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DIGITAL DIVIDE AS A CLOG IN THE WHEEL OF DIGITAL ECONOMY: WHAT OPTIONS FOR NIGERIA?

Ikechukwu Chime*

Abstract

The rise of the digital economy, fueled by technological innovations and digitalisation, has revolutionised every aspect of society and the economy. Unfortunately, the digital divide in Nigeria is hindering many citizens from participating in this new economy due to a lack of access to digital resources. To address this issue, this paper employs the doctrinal research methodology to provide a comprehensive overview of the digital economy. The paper evaluates the extent of the country's digital divide and identifies the factors contributing to its widening. It analyses the current legal and policy frameworks to bridge this gap. Ultimately, the paper recommends greater investment in telecommunication and electrical infrastructure, improving data availability and affordability, connection quality, and allocating more resources to digital education to encourage the development of locally relevant content and applications in languages. It concludes that bridging that divide will require targeted regulatory and policy initiatives recommended herein.

Keywords: Digital economy, digital divide, technology, digitalisation

1. Introduction

Information and Communication Technology (ICT) is the main driving force behind today's global socio-economic activities. Its influence has permeated every aspect of life, constantly evolving and changing how we communicate and carry out economic activities.[1] The increasing digitalization of economies, widespread access to the internet, and the disruptive power of technology have made access to digital services necessary for optimal engagement in today's world. Among the most common forms of technology that drive the digital economy are mobile devices, particularly telephones, when combined with the internet.

The liberalization of the telecommunication industry has unleashed improved access to telephones and internet services in Nigeria.[2] Increased access to

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[1] R Bukht and R Heeks, 'Defining, Conceptualizing and Measuring the Digital Economy' *International Organisations' Research Journal* (2017) 13 (2) 143.

[2] A study was conducted to appraise the impacts of Global System of Mobile (GSM) Communication in Nigeria from its inception in 2001 till date, and it was found that GSM and its attendant technology growth and development have played invaluable roles in placing Nigeria in its rightful position in this era of digitalisation. U Ahmed & A Musa, 'Assessment of Mobile Phone Use in Nigeria from Inception to Date' (2016) *Sch Bull* 192.

mobile devices has also led to improved use of technologies and innovations that depend on telephone services, resulting in a significant growth in the number of internet users in the country.[3] The Nigeria Communications Commission (NCC), the regulator of the Nigerian telecommunication sector, reported that about 122.5 million Nigerians had access to and were actively connected to the internet.[4] These data imply that Nigeria's teledensity rate is 91%, with a 55.4% internet penetration rate as of the beginning of 2023.[5]

Growth in teledensity and internet penetration is critical for developing the nation's digital economy. Through the National Digital Economy Policy and Strategy (NDEPS) launch, the government seeks 'to reposition the Nigerian economy to take advantage of the many opportunities that digital technologies provide.[6] Furthermore, Nigeria's digital economy has developed faster than the traditional economy, growing at an average annual rate of 9.9%/year from 1998 to 2017, compared to the 2.3% growth in the overall economy.[7] Consequently, its digital economy vision seeks to shape a nation where digital invention and entrepreneurship are used to create value and prosperity for all. It recognises the transforming impact of technology on every area of life and, thus, seeks to become a leading player in the sector. Also, given the application and pervasive impact of technology in every area of life, the nation hopes to utilise the digital economy in achieving the age-long effort to diversify the economy, hoping its development will catalyse diverse economic growth. To this end, government agencies have been modified as engines for digital transformation projects.[8]

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[3] M Gyemang and O Emeagwali, 'The Roles of Dynamic Capabilities, Innovation, Organizational Agility and Knowledge Management on Competitive Performance in Telecommunication Industry' [2020] 10 (7) *Management Science Letters* 1533.

[4] Statista, 'Total Number of Active Internet Users in Nigeria from 2017 to 2023 (in millions)' (6 Sept 2023) <https://www.statista.com/statistics/1176087/number-of-internet-users> accessed 15 Sept 2023.

[5] Ibid.

[6] Mallam KashifuInuwa, 'Digital Economy: Collaboration Amongst Stakeholders Accounts for Unprecedented Achievements – DG NITDA' <https://nitda.gov.ng/digital-economy-collaboration-amongst-stakeholders-accounts-for-unprecedented-achievements-dg-nitda/> accessed 15 Sept 2023.

[7] A Oguntoye, 'Analysts Review How Digital Platforms Have Become Integral to Nigeria's Economic Growth' <https://www.proshareng.com/news/TECH%20TRENDS/Analysts-Review-How-Digital-Platforms-Have-Become-Integral-To-Nigeria-s-Economic-Growth/54276> accessed 15 Sept 2023.

[8] In 2019, the former Ministry of Communication, the executive arm that drives government communication apparatus, was changed to Ministry of Communications and Digital Economy, ostensibly, "to improve revenue generation for Nigeria and create many digital jobs." The change was also aimed at increasing Nigeria's involvement and capturing a significant share of the multi-trillion global digital economy fund. See E Paul, 'Ministry of Communications and Digital Economy: What's in a Name Change?'

These economic benefits of the digital economy impact both the public and private sectors and drive socio-economic change. However, many Nigerians need access to this digital economy and its many benefits. 61% of Nigerians in rural communities need access to the digital economy, and in the urban region, about 40% of Nigerians are still connected.[9] Within this divide, only about 45% of women against 62% of men have access to digital technologies to foster participation in the digital economy.[10] This divide is compounded by factors like financial capacity, digital awareness and education, gender disparity, lack of adequate infrastructure, etc., and it significantly impacts the growth of the country's digital economy. The ripple effect of the digital divide in Nigeria is multidimensional.[11]

Against this background, this paper conducts an overview of the digital economy in Nigeria. Section two provides a conceptual and theoretical framework; section three assesses the nature, causes, and consequences of the digital divide in Nigeria; section four analyses the laws, policies and institutions that are in place to bridge the digital divide. The recommendations and conclusions are outlined in section five.

2. Conceptual and Theoretical Framework

2.1 Understanding Digital Economy

The meaning of digital economy has evolved since 1996, when the concept was first conceived.[12] Buhkt and Heeks provide an extensive analysis of the evolution of definitions of digital economy.[13] From Nigeria's perspective, the digital economy revolves around the utilisation of digital transformation, knowledge, and technology to deliver goods and services; an economy that thrives on the Fourth Industrial Revolution (4IR), the convergence of all sets of digital innovation that spurs social, economic development and economic output

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<https://techpoint.africa/2019/10/28/ministry-communications-digital-economy/> accessed 15 Sept 2023.

[9] A Adepetun, 'NCC Tasks Innovators on an Indigenous Solution to Bridge Nigeria's Digital Divide' <https://www.google.com/amp/s/guardian.ng/news/ncc-tasks-innovators-on-indigenous-solution-to-bridge-nigerias-digital-divide/amp> accessed 15 Sept 2023.

[10] While digital divide is troubling, digital gender divide is more troubling. Digital gender divide which focus on the extent of exclusion of women in digital transformation now occupies an integral point in gender inequality discussion the world all over. See OECD, 'Bridging the Digital Gender Divide: Include, Upskill, Innovate' (OECD, 2018) < https://www.oecd.org/digital/bridging-the-digital-gender-divide.pdf> accessed 15 Sept 2023.

[11] Robert A Manning, 'Emerging Technologies: New Challenges to Global Stability' [2020] *Atlantic Council: Showcroft Centre for Strategy and Security* 4.

[12] Tapscott Tapscott, *The Digital Economy: Promise and Peril in the Age of Networked Intelligence* (New York: McGraw-Hill Publishers 1997).

[13] Buhkt and Heeks (n 1)

created from digital technologies and innovations and the NDEPS offers a broad definition of the digital economy as any aspect of the economy that is based on or driven by technologies.[14]

The various definitions of the digital economy have been summed into three different approaches by the Organisation for Economic Cooperation and Development (OECD):[15]

1. *Bottom-up Approach*: This approach to defining the digital economy focuses on the production processes and output of industries and organisations in determining whether they constitute part of the digital economy. From this perspective, the digital economy is the sum of sectors producing digital output or heavily reliant on digital input. This narrowly defined approach will only accommodate the economic outputs of the ICT sector and e-commerce market in terms of online sales of goods and consumers' spending on digital equipment.[16] This method considers the contribution of digitalisation to economic growth. Still, its confined or narrow parameters offer an inadequate assessment since it excludes so many aspects of what can be considered part of the digital economy. From a different perspective, the emphasis on digital inputs also opens up an all-encompassing scope of activities and sectors that fall under the digital economy. For instance, the definition of G20 DETF[17] that categorises a broad range of economic activities using digitised information and knowledge as the critical factor of production, though narrow in limiting digital economy by digital input, encompasses all sectors of the economy since most of these sectors use digital inputs.
2. *Top-Down or Trend-Based Approach*: This approach aggregates the collective effect of the value created by digital transformation and its impact on the economy. Thus, its view of the digital economy will include the transformative effect of technology on individuals, society, industries, and sectors of the economy. This method evaluates fundamental trends driving digital transformation and further examines how these trends are reflected in the real economy. This approach goes

[14] FMoCDE, *National Digital Economy Policy and Strategy (2020-2030*) *NDEPS* (Abuja: FMoCDE 2020) 2.

[15] OECD, 'A Roadmap Toward a Common Framework for Measuring the Digital Economy: Report for the G20 Digital Economy Task Force' <https://www.oecd.org/sti/roadmap-toward-a-common-framework-for-measuring-the-digital-economy.pdf> accessed 15 Sept 2023.

[16] Jurica Novak and others, 'The Rise of Digital Challengers: How Digitization Can Become the Next Growth Engine for Central and Eastern Europe' <https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Europe/Central%20and%20Eastern%20Europe%20needs%20a%20new%20engine%20for%20growth/The-rise-of-Digital-Challengers.ashx> accessed 15 Sept 2023.

[17] Ibid.

beyond the conventional metrics to capture how the benefits of digital investments can transcend from one company to another, multiplying their final impact. Doing so reveals that the digital economy is much larger and more widely spread than previously thought, thus casting a new light on how to make plans for the future.[18] The IMF, however, disagrees with this view of the digital economy. While it concedes that digitalisation has penetrated many activities and almost the entire economy, it argues that it is more realistic to focus measurement efforts on a concrete range of economic activities at the core of digitalisation.[19]

3. *Flexible or Tiered Approach*: This approach to defining the digital economy classifies it into core and non-core components. Thus, the digital economy is comprised of all segments of the economy that make extensive use of digital technologies (i.e., for which existence depends on digital technologies), as opposed to sectors that make intensive use of digital technologies (i.e., only applying digital technology to enhance their productivity).[20] Bukht and Heeks also adopted this approach regarding the digital economy as the share of output derived solely or primarily from digital technologies with a business model based on digital goods or services.[21]

These definitions imply that the digital economy can be portrayed as the famed elephant described by three blind men. Each definition describes the digital economy from the author's primary area of focus or the trends that were prevalent at the time. As the world is only at the cusp of digitalisation, there exists an absence of widely accepted definitions for the emerging digital economy and several other related economic terms. Hence, many interpretations may be given to the same concept in different forums and the relevant literature and analyses. The rationale for this is the unconventionality and absence of sufficient understanding or clarity of the digital economy. It may also reflect the high pace of technological advancement. As the time required for adopting standard definitions is less often commensurate with the pace of technological change, it is essential to strike a balance between avoiding confined definitions that may inhibit progress and reaching a mutual understanding of relevant terms.[22]

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[18] Oxford Economics, 'Digital Spillover: Measuring the True Impact of the Digital Economy' (2020) <https://www.huawei.com/minisite/gci/en/digital-spillover/files/gci_digital_spillover.pdf> accessed 15 Sept 2023.

[19] IMF, 'Measuring the Digital Economy' <https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/04/03/022818-measuring-the-digital-economy> accessed 15 Sept 2023.

[20] Ibid.

[21] Bukht and Heeks (n 1).

[22] UNCTAD, *Digital Economy Report 2021: Cross-border Data Flows and Development – For Whom the Data Flow* (United Nations Publications, 2021)

In this regard, the opinion of the United Nations Commission on Trade and Development (UNCTAD) proves prescient:

> As the world is only at the early stage of digitalisation, the evolving digital economy and several other related economic terms lack widely accepted definitions. There may be many interpretations of the same term in the relevant literature and analyses, as well as in different forums. This is because of the novelty and the lack of sufficient understanding or clarity regarding this phenomenon. It may also reflect the high speed of technological progress. The time required for agreeing on standard definitions often lags behind the velocity of technological change. In this context, it is necessary to strike a balance between avoiding straitjacketing definitions, which may block progress, and reaching a common understanding of relevant concepts.[23]

2.2 Concept and Theories of Digital Divide

The term 'digital divide' was first used in the mid-late 1990s and gained popularity only afterwards.[24] It describes the divide between individuals who can access modern information and communication technology and those without access.[25] The OCED defines 'digital divide' as a "gap between individuals, households, businesses, and geographic areas at different socio-economic levels with regard both to their opportunities to access ICTs and to their use of the internet for a wide variety of activities".[26] This is to say that the digital divide transcends inequality of access to ICT between individuals; it extends to groups, which could include certain communities indicated by geographical distinctions. Digital divide is sometimes referred to as 'Digital Inequality'. Four major theories of digital divide have emerged - the Adoption-Diffusion Theory, Van Dijk's Theory, the United Theory of Acceptance and Use of Technology (UTAUT), and the Spatially Aware Technology Utilization Model (SATUM).

The Adoption-Diffusion Theory, which originated in the 1950s and '60s from studies on the adoption and diffusion of varied innovations, was popularized by an American communications theorist and sociologist, Everett Rogers, in 1962.[27] The diffusion of innovations theory is a hypothesis that outlines the

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<https://unctad.org/system/files/official-document/der2021_en.pdf> accessed 15 Sept 2023.

[23] Ibid.

[24] J Prick and A Sarkar, 'Theories of Digital Divide: Critical Comparisons' (49th Hawaii International Conference on System Sciences, USA, 2016).

[25] C Steele, 'What is the Digital Divide' (22 Feb 2019) < http://www.digitaldividecouncil.com/what-is-the-digital-divide/> accessed 15 Sept 2023.

[26] Prick and Sarkar (n 24).

[27] CFI Team 'Diffusion of Innovation: The Rate at which New Ideas and Technology Spread' (CFI Team)

methods and process through which new technological advancements are spread throughout societies and cultures from the first stage – introduction - until it is finally fully adopted.[28] It identifies openness to risks and innovation as the reason why some people may have access to information technology when others do not.[29]

Jan A Van Dijk developed Van Dijk's Theory of the digital divide.[30] It posits that inequalities of personal positions and backgrounds result in disparities in resources for the individual, which leads to inequalities of access and eventually to disparities in participation by the individual in society.[31] The core tenets of his theory are - categorical inequalities in society produce an unequal distribution of resources; unequal distribution of resources causes unequal access to digital technologies; unequal access to digital technologies also depends on the characteristics of these technologies; unequal access to digital technologies brings about unequal participation in society; unequal participation in society reinforces categorical inequalities and unequal distributions of resources.[32]

The United Theory of Acceptance and Use of Technology (UTAUT) proposes four core constructs in analysing the digital divide in any given society: performance expectancy, effort expectancy, social influence, and facilitating conditions. The UTAUT combines the four considerations to determine the extent of the digital divide/acceptance of any recently launched technology.[33] The Spatially Aware Technology Utilization Model (SATUM) accounts for the spatial effect of the digital divide. It takes into account the geographic forces, the extent of urbanization, and the levels of technology adoption. It seeks to determine how geographic proximity to regions, provinces, or communities impact levels of ICT adoption.

3. Nature, Causes, and Effects of Digital Divide in Nigeria

Differences in the developmental stage of different countries contribute to and account for various access levels of access to information and communication

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<https://corporatefinanceinstitute.com/resources/economics/diffusion-of-innovation/> accessed 15 Sept 2023.

[28] C Halton, 'Diffusion of Innovations Theory' < https://www.investopedia.com/terms/d/diffusion-of-innovations-theory.asp> accessed 15 Sept 2023.

[29] CFI Team (n 27).

[30] Jan AGM Van Dijk, 'Digital Divide: Impact of Access' in Patrick Rossler, Cynthia A Hoffler and Liesbet von Zoonen (eds) *The International Encyclopedia of Media Effects* (John Wiley & Sons, Inc Published 2017).

[31] Ibid.

[32] Ibid.

[33] D Marikyan & S Papagiannidis, 'Unified Theory of Acceptance and Use of Technology: A Review' In S Papagiannidis (ed) *TheoryHub Book* (Open NCL, United Kingdom, 2023).

technology (ICT). Hence, the extent of digital divide is wider in developing and underdeveloped countries than in their developed counterparts. The barriers to access to information and technology are both physical and social. Nigeria, like most developing countries, has a significant gap in digital divide for various reasons. Several factors are responsible for the nation's digital divide.

A considerable level of knowledge, literacy, and competence in the use and adoption of ICT tools, solutions, and techniques is vital for citizens to properly engage and benefit in the now pervasive digital economy.[34] Census projection estimates that over 33.6 million (16.8 percent) Nigerians are youths (aged between 15 and 35) and 43.69 per cent of them were aged 0 to 14 in 2019.[35] On the face of it, this constitutes a veritable asset for the country and a great prospect for the growth of the digital economy in Nigeria, since young people are generally favourable early adopters of technology. Realizing that expectation will require that the youths should have appropriate skills for inclusive and productive participation.

Firstly, Nigeria has high levels of poverty.[36] 63% of Nigerians are classified as multi-dimensionally poor; that is, they are deprived of the three-dimensional elements of well-being: money, education, and basic infrastructure.[37] Due to their deprived state, a significant portion of the population sees ICT and the Internet as luxuries and unnecessary. Secondly, the digital divide is exacerbated by spatial considerations because of the disparity in access between urban-rural areas. Since the multidimensional poverty level in rural areas is as high as 73%, compared with 42% in urban areas, the level of the divide is more significant in rural areas[38]. Furthermore, rural communities have limited levels of electricity supply, and because most ICT equipment requires electricity to function, they cannot function in these places.

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[34] AM Oyelakin, 'Increased Digital Literacy Skills as a Catalyst for Driving Nigerian Digital Economy: An Overview' [2022] (7) (1) *Malaysian Journal of Applied Science 52-57.*

[35] J Daniels, 'Why We Should Drive It Home for the Nigerian Youth' Vanguard Newspapers (Nigeria, 16 January 2022) https://www.vanguardngr.com/2022/01/why-we-should-drive-it-home-for-the-nigerian-youth/ accessed 22 April 2022.

[36] RS Dauda Poverty and Economic Growth in Nigeria: Issues and Policies, (2017) 21(1) *Journal of Poverty* 61-79.

[37] Nigerian Bureau of Statistics, 'Nigerian Multidimensional Poverty Index, 2022' <https://www.nigerianstat.gov.ng/pdfuploads/NIGERIA%20MULTIDIMENSIONAL%20POVERTY%20INDEX%20SURVEY%20RESULTS%202022.pdf> accessed 15 Sept 2023.

[38] C Mba, '61% Unconnected Rural Dwellers and Other Key Figures Nigeria Must Rewrite Towards Becoming an All-Inclusive Digital Economy' <https://www.dataphyte.com/latest-reports/economy/61-unconnected-rural-dwellers-other-key-figures-nigeria-must-rewrite-towards-becoming-an-all-inclusive-digital-economy/> accessed 15 Sept 2023.

Nigeria's low literacy rate is the third contributor to the nation's digital divide. Education is one of the tools to reduce digital gaps that exist. It exposes civilizations to information technology and the internet. Where the people are uneducated, digital disparities are wide. The Nigerian educational sector is beset with many challenges in the form of weak institutional coordination and capacity; poor funding; quality of teaching staff; and emphasis on theoretical rather than practical education.[39] Of a population of over 213 million people, an estimated 76 million adults are uneducated[40] and about 20 million children are out of school.[41] In addition, a considerable level of knowledge, literacy, and competence in using and adopting ICT tools, solutions, and techniques is vital for the proper engagement of citizens in benefiting from the now pervasive digital economy.[42] A World Bank Study identified the population's lack of digital skills as a significant barrier to the country's digital economy aspiration.[43]

Interestingly, the consequences of digital divide are far-reaching in every society. It creates a new distinction basis in society. It robs individuals, groups, and even the government of the opportunity to develop technologically, causing the groups at the end of the divide to be left behind in the wave of advancement enveloping the global village.[44] The divide has had an all-negative impact on the Nigerian population, as it deepens because of the problems of access to, distribution of, and use of information technology. People only become poorer and the nation more underdeveloped. Technology has been described as the new oil in many economies, including the Nigerian economy. A lot of business, learning, and career opportunities are online. Trading, for instance, has been made more convenient because of the internet and technology through e-commerce. The world as we know it has become digitised. If the divide is not reduced, Nigerian society will only be pushed backwards in development, and the margins between the haves and the have-nots will be strengthened.

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[39] AM Oyelakin, 'Increased Digital Literacy Skills as a Catalyst for Driving Nigerian Digital Economy: An Overview' [2022] (7) (1) *Malaysian Journal of Applied Science* 52-57.

[40] Tribune Online, '76 million Nigerian Adults are Illiterates- FG' (Nigerian Tribune, 7 September 2021).

[41] M Alabi, 'Updated: Nigeria Now has 20 million Out-of-School Children' *Premium Times* (1 September 2021).

[42] *Ibid*, n 39.

[43] Lixi Marc Jean Yves and others, 'Nigeria Digital Economy Report' (Washington, DC) World Bank Group <http://documents.worldbank.org/curated/en/387871574812599817/Nigeria-Digital-Economy-Diagnostic-Report> accessed 15 Sept 2023.

[44] C Steele, 'The Impacts of Digital Divide' (Digital Divide Council, 20 September 2018) <http://www.digitaldividecouncil.com/digital-divide-the-pros-and-cons/> accessed 15 Sept 2023.

4. Legal and Policy Frameworks for Bridging the Digital Divide in Nigeria

The efforts to build a thriving digital economy in Nigeria have led to the adoption of various legal and policy frameworks. These frameworks include several policies and initiatives aimed at expanding access to affordable, reliable, and internet connectivity. These frameworks include;

4.1 National Broadband Plan

In 2013, the Nigerian government developed a National Broadband Plan (NBP) that seeks to provide broadband access to all Nigerians.[45] The Plan outlines strategies to increase broadband penetration in underserved areas, improve digital infrastructure, and promote digital literacy. Since the Plan was introduced, there has been a significant increase in broadband penetration in Nigeria, with the number of active broadband subscriptions growing from 3.4 million in 2013 to over 153 million in 2021.[46] The NBP has also facilitated the deployment of broadband infrastructure in underserved areas through initiatives such as the Backbone Transmission Infrastructure Project and the Rural Broadband Initiative.[47] However, despite these achievements, there is still a significant digital divide in Nigeria, particularly in rural areas where internet access remains limited.[48] Additionally, low levels of digital literacy continue to limit the potential impact of increased broadband access in areas where broadband service has been extended to.[49] Therefore, while the NBP has been effective to some extent in bridging the digital divide in Nigeria, more work needs to be done to ensure that all Nigerians have equal access to digital technologies and can fully participate in the digital economy.

4.2 Nigerian Communications Act

The Nigerian Communications Act (NCA) established the Nigerian Communications Commission (NCC) and regulates the telecommunications

[45] Federal Ministry of Communications and Digital Economy 'National Broadband Plan' <https://www.ncc.gov.ng/technical-regulation/national-broadband-plan 2013-2018> accessed 15 Sept 2023.

[46] Nigerian Communications Commission 'Active Broadband Subscriptions' <https://www.ncc.gov.ng/stakeholder/media-public/media-reports/active-broadband-subscriptions> accessed 15 Sept 2023.

[47] Galaxy Backbone 'Backbone Transmission Infrastructure Project' <https://www.galaxybackbone.com.ng/btisp/> accessed 15 Sept 2023; Nigerian Communications Commission 'Rural Broadband Initiative' <https://www.ncc.gov.ng/digitalinclusion/ruralbroadband-initiative> accessed 15 Sept 2023.

[48] International Telecommunication Union 'Digital Access Index 2021' <https://www.itu.int/en/ITUD/Statistics/Documents/facts/IDA2021/IDA2021-w5.pdf> accessed 15 Sept 2023.

[49] Digital Sense Africa 'Digital Literacy in Nigeria: Bridging the Divide' <https://www.digitalsenseafrica.com.ng/2019/07/26/digital-literacy-in-nigeria-bridging-the-divide/> accessed 15 Sept 2023.

industry in Nigeria.[50] The Act provides a framework for the development of the telecommunications sector, including measures to promote fair competition, ensure access to telecommunications services, and protect consumer rights. The NCA has been instrumental in bridging the digital divide in Nigeria, particularly in terms of increasing access to telecommunication services across the country.

Through the NCC, the Act has facilitated the expansion of telecommunication infrastructure across Nigeria, including in rural and underserved areas.[51] Additionally, the Act has helped to promote healthy competition in the telecommunications sector, which has led to more affordable and accessible telecommunication services.[52] However, while the Act has effectively increased access to telecommunication services, it has been criticised for not promoting digital literacy and technology adoption among Nigerians.[53] Therefore, while the Nigerian Communications Act has played a critical role in bridging the digital divide in Nigeria, there is still room for improvement to ensure that all Nigerians can fully participate in the digital economy.

4.3 Universal Service Provision Fund

The Universal Service Provision Fund (USPF) was established in 2006 to provide funding for deploying ICT infrastructure in underserved and unserved areas of Nigeria. The Nigerian Communications Commission manages the fund, financed through a 1% levy on the revenue of telecommunications service providers. The fund aims to promote universal access to telecommunications services in underserved and unserved areas of Nigeria. The USPF has been instrumental in bridging the digital divide in Nigeria by providing funding for the deployment of telecommunication infrastructure in underserved areas, including rural communities and regions affected by conflict.[54]

Through its various initiatives, such as the Rural Broadband Initiative and the School Knowledge Centre program, the USPF has helped increase access to broadband internet and digital services for many previously underserved Nigerians.[55] However, despite these achievements, there are still significant challenges in bridging the digital divide in Nigeria, including limited access to

[50] Nigerian Communications Act 2003**.**

[51] Ibid.

[52] Ventures Africa 'Nigerian Communications Act: Driving Growth and Innovation in the Nigerian Telecoms Industry' <https://venturesafrica.com/nigerian-communications-act-driving-growth-and-innovation-in-the-nigerian-telecoms-industry/> accessed 15 Sept 2023.

[53] Ibid.

[54] TechNext 'Universal Service Provision Fund: Ensuring Universal Access to Telecommunications Services'
<https://technext.ng/2019/09/24/universal-service-provision-fund-ensuring-universal-access-to-telecommunications-services/> accessed 15 Sept 2023.

[55] Universal Service Provision Fund 'Rural Broadband Initiative' <https://www.uspf.gov.ng/rural-broadbandinitiative-rbi/> accessed 15 Sept 2023.

electricity and low levels of digital literacy.[56] Therefore, while the USPF has made significant progress in promoting universal access to telecommunications services in Nigeria, there is still more work to do to ensure that all Nigerians have equal access to digital technologies and can fully participate in the digital economy.

4.4 National Identity Management Commission Act

The National Identity Management Commission (NIMC) Act was established in 2007 to create and manage a national identity database and issue National Identity Numbers (NIN) to citizens and legal residents in Nigeria.[57] The Act provides a legal framework for managing national identity data. Its goal is to provide a unique identity to every Nigerian and facilitate public and private services, including financial services, education, healthcare, and voting. However, the effectiveness of the NIMC Act in achieving this goal still needs to be improved. This framework needs the adequate infrastructure to facilitate its application. In addition, poor funding and corruption have hindered the successful implementation of the NIMC Act.[58] Moreover, the low level of awareness and education about the importance of obtaining NIN among the population and the difficulty in accessing registration centres have further slowed down the process. As a result, many Nigerians, especially those living in rural areas and low-income communities, still need access to digital services and are excluded from the benefits of the digital economy.

4.5 Nigeria ICT Policy

The Nigeria ICT Policy (2012) provides a framework for developing the ICT sector in Nigeria. The policy aims to promote universal access to ICT services, promote digital literacy and skills development, and support innovation and entrepreneurship in the ICT sector. The policy also seeks to address the gender digital divide by encouraging the participation of women in the ICT sector. Nigeria's ICT policy was first introduced in 2001 to address the digital divide in the country by increasing access to and adoption of ICT. Since then, the government has implemented various initiatives, such as the National Broadband Plan (2013-2018) and the establishment of the Nigerian Communications Commission (NCC) to regulate the ICT sector.

However, the effectiveness of these policies in bridging the digital divide in Nigeria has been a subject of debate. While the government's efforts have increased internet penetration and mobile phone usage, the digital divide

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[56] Universal Service Provision Fund 'School Knowledge Centre' <https://www.uspf.gov.ng/school-knowledge-centre-skc/> accessed 15 Sept 2023.

[57] National Identity Management Commission Act 2007.

[58] B Abubakar and M Kaura, 'Examining the Implementation of the National Identity Management Act in Nigeria'

International Journal of Innovative Science and Research Technology (2020) 5 (4) 136-147.

persists, particularly in rural areas where access to infrastructure and electricity remains a challenge.[59] The government must also prioritize ICT infrastructure development to create a healthy environment for private sector participation to achieve more significant results.[60] Overall, while the Nigerian ICT policy has made some progress in closing the digital gap, there is still a need for more concerted efforts to achieve significant and sustainable results.

5. Recommendations and Conclusion

5.1 Recommendations

Further steps are needed to urgently address the digital divide and its impacts on the digital economy in Nigeria. The first step in this regard is addressing inadequate telecommunication and electrical infrastructure. The goal of full broadband penetration will be achieved through a multi-prong approach, including the Infrastructure Company (InfraCo) Project, a public-private partnership (PPP) under the Open Access Model. Part of the goal of the InfraCo is the resolution of 'Right-of-Way' (RoW) charges in the states, provision of incentives to encourage the increase of investment in broadband rollout, and enacting legislation to classify core digital infrastructure as Critical National Infrastructure. Although the country has improved significantly in its data availability and affordability, connection quality issues remain regarding reliability, quality, and speed of service.

Furthermore, there is a need to strengthen public trust in the use of digital technologies and participation in the digital economy by tackling the issue of cyber security, standards, frameworks, and guidelines that will make citizens more comfortable adopting and utilising digital technologies. In addition, the nation needs to allocate more resources to digital education, focusing on providing comprehensive training and resources to empower citizens to fully utilise the internet and its resources for economic and social advancement. Integrate digital literacy and skills into the national education curriculum at all levels, support training and capacity building among public sector employees and citizens, improve the delivery of government services, and lower the access barrier to digital tools.

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[59] A Fadairo and A Ogunleye, Bridging the digital divide in Nigeria: An analysis of ICT infrastructure development'
[2020] *Telematics and Informatics* 101.

[60] M Osunade and C Ayo, 'An analysis of the impact of ICT policies on bridging the digital divide in Nigeria' *International Journal of Interactive Mobile Technologies* (2017) 11 (6) 122-132.

Digitalization has opened up several forms of content creation in the form of videos, blogs, internet forums, social networking sites, etc. Digital content creation has become a source of revenue, employment, and social welfare enhancement. Regulatory reforms and appropriate mechanisms are required to incentivise local digital content creation funding. Also, this should encourage the development of locally relevant content and applications in languages easily understood by the local community. Promoting these local language-based platforms to increase internet adoption and digital participation among diverse linguistic groups across Nigeria.

5.2 Conclusion

Nigeria has the fundamentals to become a significant player in the digital economy as one of the countries with the largest youth populations in the world and Africa's biggest economy. The opportunities and prospects offered to the country by the digital economy can only be achieved by putting in place essential elements that will enable the citizens to have access to quality digital services. With the growth of the digital economy, the inability to access information and communication technology and the internet places people at a disadvantage, leading to the classification of people based on their level of access and the divide in their digital access. The digital divide constitutes a clog on the wheels of Nigeria's digital economy development. Admittedly, efforts have been undertaken towards its abridgement, but greater efforts are needed. Therefore, the government must identify the areas that need greater focus for active participation in the global digital economy. The areas recommended in this paper are fundamental for bridging that divide by developing and deploying targeted regulatory and policy initiatives to promote these specific areas.

INCLUSION OF INDIVIDUALS AS SUBJECTS OF INTERNATIONAL LAW

Adrian Osuagwu[*] Sylvester Anya[**] & Obinne Obiefuna[***]

Abstract

The classical notion of international law as a body of laws or rules that regulate the relations of States inter se is no longer sustainable. This paper is an attempt to appraise the inclusion of individuals as subjects of international law. It uses the doctrinal methodology. It makes the claim that the activities of individuals attract international judicial notice and produce certain consequences. Individuals now have rights and obligations under international law. As incumbents of rights under international law, individuals have some procedural capacity to protect these rights. Again as rights are corollary of duties, individuals could be held accountable before international courts when they are in default as regards their international obligations. Thus, officials of the State can no longer find shelter in the rubric of State capacity or official capacity to occasion gross violations of human rights and fundamental freedoms.

Keywords: Human rights and fundamental freedom, individuals, international crimes, objects, obligations, subjects of international law

1. Introduction

Traditionally, international law was seen as a body of rules that regulates the relations of States *inter se*. As international law was only concerned with the activities of States, it therefore means that only States had rights and obligations under that legal order.[1] Thus, international law assumed a state-centric position as other entities such as individuals were regarded as mere objects under that system of law. This special status accorded to individuals under international law meant that individuals had some obligations under international law and were subjected to the regulation of international law but had no rights directly flowing from that system of law.[2]

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[1] Heath Pickering, 'Why do States mostly Obey International Law' (4 February 2014), <https://www.e-ir.info/2014/02/04/why-do-states-mostly-obey-international-law/> accessed 13 May 2023.

[2] C Giorgetti, 'Rethinking the Individual in International Law' [2018] 22(4) *Lewis and Clerk Review* 1095.

This notion of international law which is state–centered has been jettisoned for being too restrictive in so far as individuals were almost absent in the international legal order. A more holistic view of international laws is that which sees international law as a system of law or rules that regulates the activities of States and other entities such as international organisations, non-state actors and individuals in as far as their operations and activities are of concern to the international community. [3]

Again, the advent of international human rights has set aside this statist view of international law. This branch of law not only offers individuals some substantive rights but also offers them some procedural capacities to prosecute these rights. Now, the International Criminal Court (ICC) imposes certain obligations on individuals with the implication that individuals could be held accountable on the international arena upon default with regard to these obligations. The necessary implication of the above fact is that individuals are now subjects of international law and not mere objects.[4]

This paper is a modest attempt at appraising the inclusion of individuals as subjects of international law. It makes the claim that the era when states were seen as the only subjects of international law is over. This is more so as the activities of individuals attract international judicial notice. The paper finds that, the inclusion of individuals as subjects of the international law has the implication that individuals now enjoy certain rights and fundamental freedoms under international law. As rights are correlative of obligations, it follows that individuals have come to assume certain obligations under international law. An obvious consequence of this is the procedural capacity to prosecute those rights before international courts and the possibility of being held accountable before international courts and tribunals. This is indicative of individuals being recognized as subjects of international law.

2. Conceptual Analysis on the Meaning of Subjects of International Law

The concept of legal personality is recognized in most legal systems.[5] It refers to any entity whether human or not, individual or group of persons, real or imaginary. What is relevant is a determination whether such an entity is capable of bearing rights in accordance with the rules of a certain legal system.[6] An entity with this capability is regarded as having a legal personality in law. The element of obligation is implicit in what constitutes a legal person under the

[3] JG Starke, *Introduction to International Law* (10th edn, New Delhi: Aditya Books 1994) 3.

[4] George Manner, 'The Object Theory of the Individual in International Law' (July 1952) 46(3) *The American Journal of International Law* 428-449

[5] Mortimer NS Sellers, 'International Legal Personality' (2005), <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2144&context=all_fac> accessed 10 May 2023.

[6] JM Elegidio, *Jurisprudence* (Spectrum Law Publishing 2000) 227.

law, for right is a correlative of obligation and one cannot assume a right in a given legal system without a corresponding obligation. In other words, a legal person is an entity capable of bearing rights and obligations in a given legal system; it is an entity recognized by law as competent to be a party to a legal relationship.[7]

In international law, legal personality signifies an entity that has standing as a member of the comity of nations, possessing certain rights and obligations as a subject of international law.[8] Subjects of international law otherwise known as international persons are entities endowed with international legal personality, which is the capacity to bear rights and obligations under international low.[9] International persons are 'any entity capable of possessing rights and duties and endowed with the capacity to take certain types of action on the international plane'.[10] An entity which possesses international personality is regarded as an international person or a subject, as distinct from a mere object, of international law.[11]

There are four possible definitions for 'subject of international law': i) it possesses legal and protected interests under international law; ii) is an incumbent of rights and obligations under international law; iii) is capable of bringing an action under international law; and iv) is an entity with rights and obligations under international law and is capable of concluding agreements with states and international organizations.[12]

The only subject of international law which possesses all these capacities is the State. However, this does not mean that States are the only subjects of international law. All entities may not have the same capacity. Capacity in law implies personality but always it is capacity to do certain acts. This means that personality is another way of saying that an entity is endowed by international law with legal capacity.[13] Entity A may have capacity to do acts 1 and 2, but not act 3; while entity B may perform acts 2 and 3 but not act 1, and entity C may perform all the above mentioned acts.[14] In *The Reparation for Injuries Suffered*

[7] GW Paton and DP Derham (eds), *A Textbook of Jurisprudence* (Clarendon Press 1972) 391.

[8] RL Bledsoe and BA Boczek, *The International Law Dictionary* (Oxford: Cl10 Press Ltd 1987) 39.

[9] B Cheng, 'Subjects of International Law' in M Bedjaoui (ed), *International Law: Achievements and Prospects*, (MartinusNijhoff Publishers 1991) 23.

[10] T Hillier, *Source Book on Public International Law* (Cavendish Publishing Ltd 1998) 175.

[11] Hillier (n 10).

[12] Starke (n 3) 58.

[13] DJ Harris, *Cases and Materials on Public International Law* (6th edn, Sweet and Maxell 2004) 98.

[14] Harris (n 13).

in the Service of the United Nations (Advisory Opinion) (*the Reparation case*),[15] the International Court of Justice (ICJ) observed that in any legal system, the subjects of law are not necessarily the same in terms of their character or the scope of their rights, and their nature depends on the demands of the community. The demands of international existence have shaped the evolution of international law throughout its history, and instances of non-state institutions acting on the international level have already been seen as a result of the gradual expansion of state collective action. In June 1945, an international organization whose goals and values are outlined in the United Nations Charter was established as a result of this development.[16] However, international personality is essential to achieving these goals. That case gave recognition to the fact that international law has space for other international legal persons otherwise known as subjects of international law that may have rights and obligations at variance with those of States.[17] Hence, the ICJ in *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons by a State in Armed Conflict*,[18] recognized the United Nations, an international organisation, as a subject of international law.[19] Again, in *Prosecutor* v *Simic*,[20] the court held that it is widely accepted that the International Committee of the Red Cross (ICRC), though a private (non-governmental) organisation under Swiss law has an international legal personality.

The significance of an entity being acknowledged as a subject of international law is that without international personality, it has no existence in international law. Thus, its actions will not receive recognition in international law, it lacks the capacity to initiate proceedings against any other subject of international law, and it cannot be held accountable under international law.[21] Besides these legal considerations, the acceptance of an entity as a subject of international law attracts political recognition from other subjects of international law.[22]

Traditional or classical international law regarded states as the only subjects of international law. This conception flows from the classic view of international law which sees international law as 'the body of customary law and conventional values which are considered binding by civilized States in their

[15] ICJ Rep. 1949, 174.

[16] United Nations, 'Maintain International Peace and Security', <https://www.un.org/en/our-work/maintain-international-peace-and-security> accessed 9 May 2023.

[17] Giorgetti (n 2).

[18] ICJ Rep. 1996, 226.

[19] R Portman, *Legal Personality in International Law* (Cambridge University Press 2010) 109.

[20] IT 95 – 9. Pt, Decision of 27 July 1999.

[21] A Kaczorowiska, *Public International Law* (4th edn, Routledge, 2010) 182.

[22] Kaczorowska (n 21).

intercourse with each other'.[23] For Oppenheim therefore, the only entity capable of being a subject of international law is the State, for according to him, the law of nations or international law is law between States only and exclusively.[24]

Attempts have been made to grasp at the meaning of a State. For Appodorai, 'When, a body of people is clearly organised as a unit for purposes of government, then it is said to be politically organised and may be called a body politic or state – a society politically organized.'[25] A State is therefore a political system of an association of human persons or a body of people who are politically organised.[26] This understanding of a State as a society politically organised underlines the main difference between a State and a society. Thus, the term society refers to all human associations irrespective of whether they are organised or not. A State must be politically organised. In other words, organisation for law is an essential ingredient for a State to exist.[27] Further, a State is part of the society. The society is thus wider than the State as the former is indicative of various social relationships which cannot be expressed via the State.[28] As far as modern conditions require, all the essential attributes or elements of a State are well settled. [29] Schwarzenbeger and Brown maintain that any entity that wishes to be considered a State must satisfy a minimum of three conditions namely: i) the entity must possess a stable government which is not dependent on any outsider country;[30] ii) the government must rule supreme within a territory which has more or less settled frontier[31] (*supremapotestas*); and iii) the government must exercise control over a certain number of people.[32] These conditions could be summarized as follows: A State must have the following qualifications, namely: a government that is independent, a territory and an identifiable population.

On the other hand, James Crawford identifies five exclusive and general legal attributes of States. Thus, i) in principle, States have full powers to perform, acts, conclude treaties on the international plane. This is another way of expressing the view that states are sovereign.[33] ii) In principle, States are

[23] This is Oppenheim's definition of International Law <www.legalbitesin/definition-international-law/> accesses 4 February 2022.
[24] Giorgetti (n 2) 1091.
[25] A Appdoraci, *The Substance of Politics* (11th edn, Oxford University Press 1974) 3.
[26] BA Garner (ed), *Blacks' Law Dictionary* (7th edn, West Group Publishing Co 1999) 1415.
[27] Appodorai (n 25) 13.
[28] Appodorai (n 25) 13.
[29] Starke (n 3) 95.
[30] Schwarzenbeger and brown, in Hillier (n 10) 183.
[31] Schwarzenbeger and brown, in Hillier (n 10) 183.
[32] Schwarzenbeger and brown in Hillier (n 10) 183.
[33] J Crawford, 'The Creation of States in International Law 1979' 32 in Hillier (n 10) 183.

exclusively competent as regards their internal affairs.[34] iii) In principle, States are not subject to compulsory international processes, jurisdiction or settlement; they must give their consent to such processes.[35] iv) In international law, states are equal; [36] and iv) finally, any derogation from these principles must be clearly established. [37] It is submitted that some of the elements of statehood as elaborated by Crawford are implicit in the ones enumerated by Schwarzenbeger and Brown. Thus, these two authors are in agreement that for an entity to be a State it must have sovereign powers to regulate persons and things within its domain and it must be independent.

However, the Montevideo Convention on the Rights and Duties of States 1933[38] outlines the traditional criteria for statehood. Accordingly, a State as an international person must have a permanent population, a defined territory, a government, and the capacity to enter into relations with other States. Although, the convention was only ratified by some Latin American States and the United States of America, and despite the fact that this definition does not bind other States except parties to the convention, these attributes of statehood have gained entrance into other documents which have included definitions of the State[39] and have now translated into customary international law.[40] A brief analysis of these attributes is undertaken *seriatim.*

The requirement of population indicates that States are aggregate of individuals living within a defined territory. Permanent population refers to a stable community. Hence, a State cannot exist without the element of population.[41] The qualification of permanent population does not suggest the absence of migration of people beyond territorial boundaries[42] or that the State must have a fixed number of populations.[43] What it does suggest is that there must be some population linked to the state on a more or less permanent basis and such population can be regarded in general context as those living in that State.[44] There is no limit as to the size of the population,[45] and the requirement of population is not affected because the inhabitants of a State are nomadic that is,

[34] Art 2(7) of the UN Charter 1945.
[35] Crawford (n 29).
[36] Crawford (n 29); Art. 2(1) of the UN Charter 1945.
[37] Art 2(1) of the UN Charter 1945; Crawford (n 29).
[38] Art 1.
[39] B Broms, 'States' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (MartinusNijhoff Publishers 1991) 44.
[40] M Dixon and R. McCorquodale, *Cases and Materials on International Law* (3rd edn, Blackstone Press Ltd 2000) 143.
[41] Kaczorowiska (n 17) 186.
[42] M Dixon, *International Law* (7th edn, Oxford University Press 2013) 119.
[43] Dixon (n 38).
[44] Dixon (n 38).
[45] Kaczorowska (n 17) 186.

moving in and out of the country.[46] There is also no requirement that the population must be homogenous or nationals of the State. It suffices that people live with some measure of permanence in the territory.[47]

Territory may be defined as 'a geographical area included within a particular government's jurisdiction, the portion of the earth's surface that is in a State's exclusive possession and control'.[48] In other words, territory is that portion of the earth surface that is subject to the sovereign authority of a State.[49] The territory of the State comprises the earth (land territory), portions of the sea (territorial waters and territorial seas) and air space which are subject to the authority of the State.[50] As regards territorial boundaries, there is no requirement in international law that the borders of a State must be absolutely settled. Rather, it is essential that the State is identified with a portion of the earth's surface[51] where it exercises sovereign authority to the exclusion of others. Again, the size of territory of a State is a non-issue, as there is no requirement in law as to the minimum size of a State's territory.[52] For instance, the territory of Monaco is less than 1.95km^2 and the size of the State of Vatican (Vatican City) is less than 0.5km.^{2}[53] However, the criterion of a defined territory is effective because it prevents groups of individuals who live without any defined territory from calming statehood just because they have set up a government.[54]

Government is '… the apparatus or machinery of the organisation vested with the authority to govern. It is that organ vested with political power to exercise effective and exclusive influence over a person or people within a given territory'.[55] An effective government therefore is the ability to effectively and independently exercise authority within its territory.[56] It is the capacity and ability to maintain a legal order throughout the territory of the State.[57] The existence of a government has both internal and external implications.

[46] Kaczorowska (n 17) 187.
[47] Kaczorowska (n 17).
[48] Garner (n 22) 1484.
[49] A Cassesse, *International Law* (2nd edn, Oxford University Press 2005) 82.
[50] Cassesse (n 45) 81.
[51] Hillier (n 7) 184.
[52] Kaczorowiska (n 17) 187.
[53] M Craven, 'Statehood, Self-Determination and Recognition' in MD Evans, *International Law* (4th edn, Oxford University Press 2014) 219.
[54] Broms (n 35) 44.
[55] I Mackenzie, *Politics: Key Concepts in* Philosophy (Continuum 2009) 9.
[56] N Hobach, R Lefeber and Ribbelink, *Handboek Internationaal Recht* (Den Haag: Asser Press 2007) in AZ Zaded, *International Law and the Criteria for Statehood*: *The Sustainability of the Declarative and Constitutive Theories as the Method for Assessing the Creation and Continued Existence of State* (Tilburg: Published LLM Thesis, Faculty of Law, Tilburg University) 23.
[57] D Raic, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 62-63.

Internally, the existence of a government indicates the capacity to be effective within a defined territory and exercise exclusive control over a permanent population.[58] Externally, it implies the ability to act independently on the international plane without being legally dependent on other States within the international legal system.[59] Therefore, for a State to operate on the international level, it must have a practical identity which is government.[60] The importance of effective authority is highlighted in *Island of Palmas*.[61] This case arose out of a dispute between the Netherlands and the United States of America. As a result of the Spanish–American War of 1898, Spain ceded the Philippines to the US by the treaty of Paris in 1898. In 1906, an official of the US visited the island which the US believed to be part of the territory ceded to her. He found to his greatest chagrin, a Dutch flag flying there. The two countries referred the sovereignty over the island to arbitration. The arbitrator Max Huber noted that Territorial sovereignty... includes the sole right to publicize a State's operations. This right has a corresponding obligation: the duty to uphold the rights of other States, particularly their rights to integrity and inviolability in peace and conflict, as well as the rights that each State may assert on behalf of its citizens abroad. The State cannot perform this obligation without exercising its territorial sovereignty in a way appropriate to the situation. Thus, based on continuous and peaceful display of effectivities and State authority, title to the sovereignty of the island was given to the Netherlands.[62]

The reference to capacity to enter into relations with other states implies independence. That is independence in law from the authority of a foreign State and thus, the capacity under its municipal law to enter into international relations with other States.[63] Any absence of such legal independence means that the entity in question is not an independent State. According to Shaw, 'The concern here is not with political pressure by one country over another, but rather the lack of competence to enter into legal relations. The difference is the presence or absence of legal capacity not the degree of influence that may affect decisions'.[64] Corroborating Shaw's position, Dixon opines that, there is bound to be some degree of dependence or influence in the relations among States and so the criteria of capacity to enter into relations with other States implies legal independence and not factual autonomy.[65] Hence, this fourth element is satisfied if a state is not subjugated under the sovereign authority of another State.[66]

[58] Mackenzie (n 51) 9.
[59] Mackenzie (n 51).
[60] Dixon (n 38) 120.
[61] (1928) 2 RIAA 829.
[62] Ibid.
[63] Harris (n 10) 105.
[64] MN Shaw, *International Law* (5th edn, Cambridge University Press 2005) 181.
[65] Dixon (n 38) 120.
[66] Dixon (n 38) 120.

Although it is generally accepted that a State may exert some political pressure on another State and by so doing influence the policies and conduct of that State, it may reach a point when factual dependence by one State upon another is so grave that it is really no more than a puppet State. This situation negates the element or criterion of independence.[67] Independence is first condition of statehood, thus, if a new State is no more than a satellite of the parent State, it cannot satisfy the primary condition of independence and accordingly is not entitled to recognition as a State.[68] Historically, this strict stance has eased to admit individuals as subjects of international law.

3. Historical Evolution of the Recognition of Individuals as Subjects of International Law

The point has been made that the old dogmatic view which sees States as the only subjects of international law is no longer maintainable.[69] A new trend gradually started taking place when States allowed individuals within their domain to play a limited role on the international arena. Thus, in 1928 the Permanent Court of International Justice (the PCIJ) recognised the possibility of individuals acquiring some rights and obligations through international agreements. In *Danzig Railway Officials Case*,[70] there was an agreement between Poland and Danzig as regards the conditions of employment of Danzig railway officials working on the polish rail system. The argument of Poland could be summarised as follows: Firstly, the international agreement created rights and duties between contracting parties only. Secondly, they contended that since the treaty was not incorporated into Polish law, it cannot create direct rights and obligations for individuals concerned. Lastly they claimed that any failure on the part of Poland to fulfill her international obligations arising from the agreement, she will be responsible only to the Free City of Danzig.

On the other hand, the Free City of Danzig argued that, though the agreement is international in form, it was intended by the contracting parties to constitute part of a series of provisions which created a legal relationship between the railway administration and her employees. This indicated a contract of service. They also contended that, it is the substance of the agreement and not the form that determines its legal character.[71]

After listening to the submission of both parties, the court held that the intention of the contracting parties reveals that the relations between the Polish railway

[67] Harris (n 10) 108.
[68] Lauterpatch, 'Recognition in International Law' (1948) 26–29 in Harris (n 10).
[69] Gukiina Patrick Musoke, 'Subjects of International Law and the Theories Pursuant Thereto (October 2023) https://www.researchgate.net/publication/374976938_subjects_of_international_law_and_the_theories_pursuant_thereto> accessed 12 May 2023.
[70] (1928) PCIJ Rep series B No.15.
[71] (1928) PCIJ Rep series B No.15.

administration and the Danzig officials should be governed by the agreement, the provisions of which form part of the contract of service. Accordingly, the court came to the conclusion that, there is an exception to the general rule that individuals are not subjects of international law, and this arises only where the contracting parties show a clear and unambiguous intention that they have adopted an international agreement which created rights and duties for individuals.[72]

A significant progress was made in the recognition of individuals as capable of being international persons after the Second World War (WWII). Thus, there was a concerted effort to hold accountable all individuals who were involved in crimes against international law such as war crimes, crimes against the peace and crimes against humanity. This desire to prosecute and punish individuals who were regarded as major war criminals of the European axis culminated in the establishment of two tribunals, namely; International Military Tribunal at Nuremberg and International Military Tribunal for the Far East (the IMT and IMTFE respectively).[73]

The IMT was established on the basis of the London Agreement on 8 August 1945 to prosecute the Nazi war criminals.[74] The Charter of the tribunal is annexed to the London Agreement which forms an integral part of the agreement.[75] The Charter of the IMT expressly made individuals subjects of international law. In Article 7, the Charter clearly states that crimes against the peace, war crimes and crimes against humanity[76] are crimes falling within the jurisdiction of the tribunal and which attracts individual responsibility. This article therefore is unequivocal as regards the international personality of the individual since the individual could be answerable under international law. Further, in finding the accused guilty of crimes under the Charter, the tribunal declared that '[c]rimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law to be enforced'.[77]

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[72] (1928) PCIJ Rep series B No.15.

[73] United Kingdom of Great Britain and Northern Ireland, United States of America, France, Union of Soviet Socialist Republics, 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London, on 8 August 1945 UNTS 251, <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf> accessed 13 May 2023.

[74] United Nations Treaty Series <www.un.org/en/genocide/prevention/document/atrocity-crimes/Doc.2_charter of IMT 1945.pdf> accessed 4 December 2022.

[75] Art 2 of the London Agreement.

[76] Art 6 of the Charter of Nuremberg IMT.

[77] Judgment of the Nuremberg Military Tribunal 1946 (1947) 41 AJIL 172.

The IMTFE was not established by an international treaty or agreement.[78] After the United States of America dropped the second atomic bomb at Nagasaki which resulted in the surrender of Japan, the Supreme Commander of the Allied Powers, General MacArthur was granted authority to issue all orders as regards the implementation of the terms of surrender.[79] Based on this authority, he established the IMTFE and trials began in May 1946.[80] Relying on the precedent set by the IMT, the IMFTE indicted 28 Japanese military and civilian leaders for war crimes, crimes against the peace, and crimes against humanity.[81]

The provisions of the Nuremberg Charter may now be regarded as part of international law, as the principles of the Charter and the decisions of the tribunal were affirmed by the United Nations General Assembly in 1946.[82] Further, the General Assembly of the United Nations in a resolution,[83] asked the International Law Commission to codify or rather '… formulate the principles of international law recognised in the Charter of Nuremberg Tribunal and in the Judgment of the tribunal'.[84] The task of the International Law Commission was realized in 1950, when the Commission submitted a final formulation of the principles of international law embedded in the Nuremberg Charter and in the judgments of the tribunal, to the General Assembly.[85] The principles are as follows:[86]

(i) Any person who commits an act which constitutes a crime under international law is responsible thereof and liable to punishment.
(ii) The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
(iii) The fact that a person who committed an act which constitutes a crime under international law acted as head of State or responsible government official does not relieve him from responsibility under international law.

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[78] Office of the Historian, 'The Nuremberg Trial and the Tokyo War Crimes Trials (1945−1948)', <www.history.state.gov./milestones/1945-1952/nuremberg> accessed 2 October 2021.
[79] Office of the Historian (n 70).
[80] Facing History and Ourselves, 'The Tokyo Trials' <www.facinghistory/holoccust-and-human-behaviour/chapter-10/tokyo-trials> accessed 24 June 2022); R Cryer, 'International Criminal Law' in MD Evans (ed) *International Law* (4th edn, Oxford University Press 2014) 769.
[81] Facing History and Ourselves (n 72) 84.
[82] Shaw (n 59) 235; UNGA/RES/95 (I) (1946).
[83] UNGA/RES/177 (II) (1947).
[84] International Law Commission, 'Formulation of the Nuremberg Principles', <legal.un.org/ilc/guide/7_1.shtml> accessed 16 May 2022.
[85] International Law Commission (n 76).
[86] International Law Commission (n 76).

(iv) The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him.
(v) A person charged with a crime under international law has right to a fair trial on the facts and law.
(vi) Crimes punishable under international law are crimes against peace, war crimes and crimes against humanity.
(vii) Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in principle VI is a crime under international law.[87]

These principles as distilled from the Charter of the IMT and Judgment of the Tribunal, clearly demonstrate that there is recognition in international law that individuals have acquired certain rights and obligations. Individuals responsible for violation of these obligations are answerable before international tribunals or courts. This recognition of individuals as subjects of international law has been entrenched in the Rome Statute of the International Criminal Court 1998.

4. The International Criminal Court and the Recognition of Individuals as Subjects of International Law

The resolve to create an international criminal court that will have jurisdiction over the worst crimes that have shocked the conscience of the international community has a long history. Soon after the First World War (WWI) in 1919, the victors and Germany entered into a peace treaty signed at Versailles, which provided for the punishment of the major parties responsible for war crimes.[88] However, the international community reneged on this desire in creating a permanent criminal court on the grounds that it would be time consuming to establish one by treaty. As a panacea for such inability, two *ad hoc* international criminal tribunals (the IMT and the IMTFE discussed above) were created.[89] International criminal proceedings came to a halt after the creation of these tribunals until after the end of the Cold War.[90] During the Cold War, there was lack of interest in creating an international tribunal or calling to accountability people implicated in serious breaches of international law.[91] In the almost four

[87] International Law Commission (n 76).
[88] Art 227 of Treaty of Versailles which provided for the prosecution of the German Emperor, William II of HolenZollen for a supreme offense against international morality and sanctity of treaties.
[89] 'International Criminal Court', <lawijrank.org/pages/1377/international-criminal-courts.html> accessed 8 October 2022.
[90] Cryer (n 72) 770.
[91] J Rehman, *International Law* (2nd edn, Edinburgh: Pearson 2010) 722.

decades that followed, trials of such breaches were conducted within domestic courts.[92] Instances of such trial include: the infamous Eichmann trial in Israel in 1961, Klaus Barbie in France in 1983, Paul Touvier trial in France in 1994, Finta in Canada in 1994, and Andrei Sawonuik in 1999 in the United Kingdom.[93] An attempt was also made to create an International War Crimes Tribunal in the Former East Pakistan to hold individuals responsible for genocide and crimes against humanity accountable.[94] These attempts at establishing international tribunals during this period were frustrated primarily due to Cold War politics and selfishness of the permanent members of the Security Council.[95]

However, there was a change of attitude in the early 1990s which saw the establishment of two *ad hoc* tribunals. Antonio Cassese has offered an illuminating insight into this change of attitude. For him, the end of the Cold War saw the dissipation of the animosity that had engulfed international relations for a long time.[96] Thus, this relative optimism saw a reduction of mistrust and mutual suspicion between the West and the East.[97] Further, there was an uncommon agreement among the five permanent members of the Security Council of the United Nations which enabled this organ to fulfill its functions in a more effective way.[98]

The end or breakdown of the bipolar war and heightened prospects for peace during this era saw a concerted international response as regards the humanitarian crisis in the Balkans. This paved way for the major powers to pursue a common purpose.[99] The result was the establishment of the International Criminal Tribunal for Yugoslavia[100] (ICTY) and the International Criminal Tribunal for Rwanda[101] (ICTR). The ICTY was established by the Security Council pursuant to its power under Chapter VII of the Charter of the United Nations. The ICTY was empowered to prosecute individuals responsible for gross violations of international humanitarian law committed in the territory of the former Yugoslavia from 1 January 1991 to a date to be determined by the Security Council upon restoration of peace.[102] On the other hand, the ICTR was

[92] Rehman (n 83).
[93] Rehman (n 83).
[94] Rehman (n 83).
[95] Rehman (n 83).
[96] Cassese (n 45) 454.
[97] Cassese (n 45) 454.
[98] Cassese (n 45) 455.
[99] L Barnet, 'The International Criminal Court: History and Role' <Lop.Parl.ca/sites/publicwebsite/default/en-ca/reaserachpublications/20021E> accessed 8 June 2022.
[100] Security Council pursuant to Resolution 827 (1993).
[101] Security Council pursuant to Resolution 955 (1994).
[102] Arts 2-5 of the Statue of ICTY.

established by the Security Council acting under its Chapter VII powers. The ICTR had jurisdiction to prosecute persons implicated for the crimes of genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and nationals of Rwanda implicated for genocide and other such violations committed in the territory of neighboring States from 1 January 1994 to December 1994.[103]

The most important development in the establishment of a permanent international court after the creation IMT and IMTFE is perhaps the creation of the International Criminal Court (the ICC).[104] The treaty creating the court known as the Rome Statute was adopted in 1998 in a diplomatic conference also called the United Nations Conference on Plenipotentiaries on the establishment of an ICC held from 15 June to 17 July 1998 in Rome.[105] In that conference 120 States adopted the Rome Statue.[106] This came into force on 1 July 2002.[107]

Article 1 of the Statute establishes the court as a permanent institution which shall exercise jurisdiction over individuals who are implicated for the worst crimes of international concern as stated in the Statute. The jurisdiction of the ICC is somehow limited. The court has jurisdiction over the most serious crimes which are of concern to the global community. These crimes are genocide, crimes against humanity, war crimes and the crime of aggression.[108] A combined reading of Articles 12 and 13 of the Rome Statute 1998 is to the effect that the court can only assume jurisdiction if a state becomes a party to the statute thereby accepting the jurisdiction of the court. Secondly, the alleged crime must have been committed in the territory of a State party or the accused person is a national of a State party to the Statute. Lastly, the court can also exercise jurisdiction over nationals of a State who is not yet a party to the Statute in so far as the crime was committed in the territory of a State that had ratified the Statute.[109] Further, the Security Council is empowered pursuant to Chapter VII of the Charter of the United Nations to make a referral with regard to non-State parties.[110]

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[103] SC/RES/955 (1994).

[104] Cryer (n 72) 772.

[105] Human Rights Watch, 'International Criminal Court', <www.hrw.org/topic/international-justuce/international-criminal-court> accessed 11 September 2021.

[106] Human Rights Watch (n 97).

[107] International Criminal Court, 'Rome Statue of the International Criminal Court' <www.icc-cpi.int/resource-library/document/rs-eng.pdf> accessed 12 July 2022.

[108] The jurisdiction of the court over the crime of aggression was activated on 17 July 2018. *See* Barnet (n 91); International Criminal Court, 'Assembly of State Parties', <asp.icc-cpi.int/en_menus/asp/crimeofaggression/Pages/default.aspx> accessed 8 April 2022.

[109] Cassese (n 45) 457.

[110] SN Anya, 'Optimizing the Role of the International Criminal Court in Global Security' [2011-2012] 10 *The Nigeria Juridical Review* 202.

The effort to establish the international personality of individuals culminated in the establishment of the ICC. The statute creating the court recognises individual criminal responsibility in article 25.[111] Article 25(1) provides that the court shall exercise jurisdiction only over natural persons, while Article 25(2) replicates the rule or norm of individual criminal responsibility.[112] However, the crux of Article 25 is seen in paragraph (3)(a-d), thus: commissioning, ordering, instigating, aiding and abetting are regarded as modes of participating in the crimes prohibited under the Rome Statute 1998. While paragraph (3)(e and f) provides for incitement to genocide and attempt.[113] Thus, any individual who, with the requisite intention commits, orders, solicits or induces, aids or abets, attempts any of the crimes listed in the Rome Statute 1998 is criminally responsible severally and jointly where such crimes are committed in conjunction with others. Article 25 therefore lays emphasis on the criminal responsibility of individuals or natural persons as different from the responsibility of States or other juridical persons.[114]

In *Prosecutor* v *Lubanga Dyilo,*[115] the accused became the first person to be convicted by the ICC. Thus, on 14 March 2012, Mr Lubanga was convicted of committing as a co-perpetrator, war crimes comprising enlisting and conscripting children under the age of 15 years into the Patriotic Force of the Liberation of Congo. He also used them to participate actively in hostilities in the event of an armed conflict not of an international character. This is punishable under Article 8(2)(e)(vii) of the Rome Statute. Again in *Prosecutor* v *Germain Katanga,*[116] the accused was found guilty of one count of crime against humanity and four counts of war crimes committed on 24 February 2003, during attack in the village of Bogoro, in the Democratic Republic of Congo (DRC). He was sentenced to a total of 12 years in prison on 23 May 2014.

The existence of a permanent international criminal court which exercises jurisdiction over individuals accused of gross atrocities against international law is testament to the fact that individuals have come to acquire some degree of international personality. In other words, individuals are seen as subjects of

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[111] G Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', <www.legal-tool.org/doc/f50d22/pdf/> accessed 9 December 2022.

[112] Werle (n 103).

[113] Werle (n 103).

[114] AC Damgaard, 'Individual Criminal Responsibility for Core International Crimes, Selected Pertinent Issues', (Berlin Springer 2008) 73 in AS Stockman, 'Individual Criminal Responsibility in International Criminal Law: the Quest for Diminished Responsibility as a New Defense Mechanism (LLM Thesis, Ghent University 2016-2017) <lib.urgent.be/fultext/rug01/002/349/623/rugo01-002349623-2017-000LAC.pdf> accessed 2 October 2022.

[115] Trial Chamber II, Case No ICC-01/04-01/06.

[116] Trial Chamber II, Case No ICC-01/04/07.

international law. [117] This goes to show that, the creation of the ICC is a major progress in punishing individuals accused of gross violations of international law as regards human rights. [118] One obvious implication of this is that individuals have come to be recognised as having a large measure of international personality, which illustrates a change in the perception of international law, as international law is no longer seen as a body of laws that regulates only the relations of States. [119]

5. Impact of the Recognition of Individuals as Subjects of International Law

After WWII, the two tribunals set up by the allied forces had a tremendous impact on the international community with regard to human rights. There was a renewed consciousness for the promotion and protection of human rights and fundamental freedoms. The primary factor was the belief held by all the victorious powers that the Nazi aggressiveness and crimes were the result of a perverse philosophy founded on complete disdain for human dignity. The declaration of some fundamental criteria of respect for human rights at all levels was one way to stop a recurrence of these atrocities.[120] It is therefore safe to conclude that these developments especially after WWII and the judgments of the Nuremberg and Tokyo tribunals have led to the conclusion of many international instruments conferring certain obligations on the individuals at the international level.[121]

It was after WWII that the United Nations was formed. The constituent instrument of the organisation called the Charter made abundant references to human rights and fundamental freedoms.[122] The preamble to the Charter for instance, makes a strong and indeed robust commitment in human rights and fundamental freedoms, in the dignity and worth of the human persons, in the equal rights of all, nations inclusive. The Charter in Article 55 consecrates the universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, language, sex or religion.[123] Thus, one of the purposes of the United Nations, as contemplated by the founding fathers, was the promotion and protection of individual rights.

However, the first major manifesto after the Charter of the United Nations 1945 as regards the international legal promotion and protection of human rights was

[117] Dixon (n 38) 129.
[118] Dixon (n 38) 129.
[119] Dixon (n 38) 129.
[120] Cassese, 'Individuals' in Bedjaoui (n 45) 115.
[121] Robert H Jackson Centre, 'The Influence of the Nuremberg Trial on International Criminal Law', <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> accessed 12 May 2024.
[122] Arts 1, 13, 55, 56, 62, 68 of the Charter.
[123] Art 1(3) of the Charter.

the Universal Declaration of Human Rights [124] (the UDHR) 1948. It is significant that the adoption and proclamation of rights outlined in the UDHR 1948 resulted in the globalisation of human rights. As human rights became a global affair, its promotion and protection became a yardstick for measuring and censuring the behaviour of States in international fora.[125] Thus, the observance of human rights has become the condition precedent for full international legitimacy and participation in international relations.[126]

The UDHR 1948 was consummated by obligations consecrated in the form of treaties, namely: the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 Covenant on Economic, Social and Cultural Rights (ICESCR).[127] The objective of these international instruments was to give a clear legal force and more precision to the UDHR, and to actualise mechanism or procedure for monitoring the implementation of human rights therein.[128] The UDHR and these two covenants constitute the international bill of rights.

The successes recorded by the international bill of rights were followed up at the regional level by three major regional human rights instruments, namely: the European Convention on Human Rights 1950 (the European Convention), the American Convention on Human Rights 1969 (the American Convention) and the African Charter on Human and Peoples' Rights 1981 (the African Charter).[129] One common element in all these legal instruments is the promotion and protection of the rights of individuals at the regional level. In other words, these instruments have detailed provisions on substantive individual rights and fundamental freedoms. The European Convention for example, has three sections. Section 1 presents a description and definition of individual and fundamental rights enshrined in the convention.[130] The rights provided in the convention have been elaborated by a number of additional protocols.[131] The American Convention and the African Charter are similar to the European Convention, though there are notable differences. These instruments did not

[124] Dixon and McCorquodale (n 36) 190.
[125] Cassese (n 45) 375.
[126] Cassese (n 45) 375.
[127] United Nations, 'The Foundation of International Human Rights Law', <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law> accessed 12 May 2024.
[128] N Rodley, 'International Human Rights' in MD Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 788.
[129] The European Convention on Human Rights came into force in 1953, the American Convention on Human Rights came into force in 1978, the African Charter on Human and Peoples' Rights came into force in 1986.
[130] Rehman (n 83) 185.
[131] Rehman (n 83) 185.

only provide for individual rights and fundamental freedoms, they also conferred on individuals some degree of procedural capacity.[132]

In this regard, the European Convention in section II provides for the establishment of a court known as the European Court of Human Rights (the European Court).[133] The European Court is competent to receive applications from any person or group of individuals claiming to be victims of violations by one of the contracting parties as regards the rights and fundamental freedoms guaranteed in the European Convention or additional protocol thereto.[134] In *Klopcovs* v *Latvia*'[135] the applicant was born in Riga. Sometime in 2005 he was detained in the Riga central prison pending trial. From June till around August, the prison administrators in Riga controlled and stopped the applicant's correspondence addressed to private persons and institutions. The applicant complained to the prisons administrators as regards the conduct of prison administrators in Riga that is, controlling and stopping his correspondence. The ministry of justice found the actions of the Riga central prison administration and the answers given by the prisons administration as lawful. The applicant brought an action against the ministry of justice before the administrative courts. Later the prisons administration joined the proceedings.[136]

The administrative district court found the actions of the Riga central prison administration unlawful but rejected the applicant's claim for pecuniary and non-pecuniary damages. An appeal to the Administrative Regional Court saw the decision of the court of first instance quashed and remitted to the same court. The court again retained its first decisions. The applicant appealed against the judgment as regards the claim of damages but the court did not accept his appeal as it was done out of time. However, the appeals of the opposing parties were accepted. The Administrative Regional Court held that the actions of the Riga central prison administration were unlawful in so far as they failed to inform the applicant about the reason for controlling and stopping his letters. However, the court dismissed the remaining part of the applicant's claim. On further appeal, the Supreme Court on 26 October 2012 upheld the judgment of the Administrative Regional Court. The cassation complaints of the prison's administration and applicant who disagreed with the conclusions of the appellate court were dismissed.[137]

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[132] Burns H Weston, Robin A Lukes, Kelly M Hnatt, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20(4) *Vanderbilt Journal of International Law* 586-637.

[133] Arts 19-50 of the European Convention 1950.

[134] Arts 19-50 of the European Convention 1950; Art 34.

[135] (2020) ECHR 147 <www.bailli.org/recent-decisons-eu.html> accessed 7 August 2022.

[136] Ibid

[137] Ibid.

Dissatisfied with the final decision of the Senate of the Supreme Court, the applicant approach the European Court complaining that the length of time of the proceedings was inconsistent with the 'reasonable time' requirement as contained in Article 6(1) of the European Convention 1950. After listening to the arguments of both sides and the objections raised by the respondent government of Latvia, the European Court held that i) the applicant's complaint with regard to length of proceeding is admissible; ii) the Government of Latvia violated Article 6(1) of the European Convention 1950; and iii) the respondent State is to pay the applicant within three months, the sum of one thousand Euros plus tax chargeable in respect of non-pecuniary damage.[138]

Although the European Convention 1950 allows for individual applications to the European Court, such applications must be in tandem with the admissibility criteria.[139] Hence, individual applications may be declared inadmissible if local remedies remain unexhausted, the application is anonymous, the application is inconsistent with the provisions of the European Convention 1950, is manifestly ill-founded, an abuse of process and so forth.[140]

The significance of the European Court with regard to individual applications is that it provides European citizens a forum that goes beyond municipal or national court authority for determination of cases.[141] In circumstances where their human rights and fundamental freedoms as guaranteed under the European Convention 1950 are violated, individuals subject to Article 35 of the European Convention can bring individual application to the European Court.[142] At times, the competence granted by the European Convention to individuals to transcend national law, causes revision of such law in order to be consistent with rights protected under the European Convention 1950.[143] Thus, the signatory nations of the European Convention 1950 granted the European Court the legal and binding authority to determine cases that affect their nationals and other persons subject to their jurisdiction.[144]

In *X and Y* v *Bulgaria*,[145] the first applicant and VD lived together as a couple from 2009 onwards. In 2010 they had a child together, who is the second applicant. In 2012, they had another child. The first applicant brought the application on behalf of both applicants. Both applicants live in Pleven, a city in Bulgaria. When the first applicant and VD separated in 2012, she left the flat

[138] Ibid.
[139] Rehman (n 83) 221.
[140] Art 35 of European Convention 1950; Dixon (n 38) 368.
[141] BH Weinstein, 'Recent Decisions from the European Court of Human Rights', <www.asil.org/insights/volume/5/issue/6/recent-decisions-european-court-human-rights accessed 7 November 2022.
[142] Weinstein (n 127).
[143] Weinstein (n 127).
[144] Weinstein (n 127).
[145] (2020) ECHR 109.

where she lived with VD and the children and went to live with her parents in their apartment, taking the younger child with her. The first applicant contested that she was subjected to psychological, emotional and financial abuse by VD while they lived together. After their separation, VD made it difficult for her to live with the second applicant as she had limited contact with the second applicant. VD also made no effort to bring the child to the apartment where she lived as agreed, and made her to wait endlessly and in vain for hours in the city for him to bring the child.[146]

VD contended that he never objected to the two applicants spending time together but was only worried about the wellbeing of his elder child. According to him, he repeatedly invited the first applicant to return to live with him, without success. Meanwhile the first applicant filed custody proceedings against VD which was successful, but VD was to have extensive contact with the second applicant. On appeal by both parties in May 2014, the Pleven District Court upheld the lower court's judgment as regards custody. However, the contact rights of VD were limited. On further appeal, the Supreme Court of cassation dismissed an appeal by VD on two points of law and the judgment of the Pleven District Court became final.[147]

In spite of the final decisions of the courts, VD repeatedly prevented the first application from enjoying her custodial rights. All attempts by the bailiff to make VD handover the second applicant to the first applicant were unsuccessful. On a charge for criminal non-compliance, the prosecution service terminated the proceedings for lack of an offence and notified the first application on 12 April 2018. Previous attempts by VD in proceedings for a charge of custody were unsuccessful.[148]

Sequel to action of the prosecution service, the first applicant filed an application to the European Court complaining that they have been unable to live together and enjoy the contact rights as determined by the courts. This is a breach of Article 8 of the European Convention which guarantees right to private and family life, home and correspondence.[149] After listening to the objections and arguments of the parties, the court dismissed the government preliminary objection on non-exhaustion of local remedies. The court held that the government was in breach of Article 8 of the European Convention with regard to both applicants. Award of damages was also made in favour of the applicants. The claim for just satisfaction of the applicants was dismissed.

[146] (2020) ECHR 109.
[147] (2020) ECHR 109.
[148] (2020) ECHR 109.
[149] Art 8(2) of the European Convention 1950, which prohibits government inference with the exercise of the right stated in Art 8(1), unless in accordance with the conditions stipulated under subsection 2 of Art 8.

On its part, the American Convention 1969 did not only provide for substantive rights and fundamental freedoms for individual, it also provides for mechanisms for the protection of those rights. Thus, the American Convention 1969 established an Inter-American Court of Human Rights (the inter-American Court). [150] However, individuals from the States that have accepted the jurisdiction of the court have no direct access to the inter-American Court. The Inter-American Commission of Human Rights must first consider the case; thereafter, such case may be referred to the Inter-American Court either by the Commission or the State concerned.[151] In *Gelman v Uruguay*,[152] Maria Gracia Iruretagoyena de Gelman was detained in Buenos Aires, Argentina by Uruguay and Argentinian military commandos in 1976. At the time of her detention, she was pregnant. She was then transferred to a detention facility in Montevideo Uruguay, when she was delivered of a baby. Subsequently, Gelman was forcefully disappeared and her daughter was taken from her and given to a Uruguayan family under 'Operation Condor'. This is a system of arbitrary detention, torture, execution and forceful disappearance carried out by the authorities of Uruguay. In December 1986, the Uruguayan government made an amnesty law, which eliminated the possibility of investigating, trying and sanctioning military and police officers who committed human rights violation prior to May 1985.[153] The Inter-American Court found that the Uruguayan Government violated the American Convention and other relevant legal instruments as regards right to life, juridical personality, to family, personal liability, to a name and so forth. The court also awarded financial compensation to the victims and asked the government to make some reparations in the form of public acknowledgment of international responsibility of the offence and an undertaken of non-repetition.[154]

Similarly, the African human rights system offers a better procedural capacity to the individual when compared to the American system. In this regard, the African Court of Human and People's Rights (the African Court) was established in 1998.[155] The jurisdiction of the African Court is stated in Article 3,[156] which is the interpretation and application of the African Charter 1981, the protocol establishing the African Court and any other relevant human rights instruments ratified by the State Parties to the African Charter 1981. Among the entities who have access to the African Court are individuals subject to the

[150] Chapter VIII of the American Convention 1969.
[151] Rodley (n 118) 815.
[152] *Merits and Reparations*, Judgment Int-Am. Ct. H.R series C No 221 (24 February 2011) <iachr.lls.edu/cases/gelman-v-uruguay> accessed 8 October 2022.
[153] *Merits and Reparations* (n 152).
[154] *Merits and Reparations* (n 152).
[155] Protocol to the African Charter, which came into force in 25 January 2004; *see* African Charter, 'Welcome to the Africa Charter', <www.africa-court.org/en/> accessed 8 February 2022.
[156] Protocol to the African Charter.

approval or consent of their States. In the absence of this procedure, it has been the practice of the African Commission on Human and Peoples' Rights (the African Commission) to accept communications from individuals. Thus, for the African Commission, the term 'other communications' in Article 55(1) of the African Charter 1981 is elastic enough to accommodate individual communications.

Thus, in *Purohit and Moore* v *The Gambia,*[157] a communication was filed before the African Commission by two mental health advocates named Ms H. Purohit and Mr P Moore on behalf of mental patients at a psychiatric department in the Gambia and existing as well as future mental patients detained under the Mental Health Acts of the Republic of the Gambia. The complaint was that the provisions of the Lunatic Detention Act of the Gambia and the way in which mental patients were treated violated various provisions of the African Charter 1981, especially the right to health. The complainants also alleged that the Act did not provide safeguards for patients who were suspected of insanity during their diagnosis, certification and detention or any remedy for erroneous detention. It was alleged that there was not in existence any provision for an independent examination, management and living conditions within the unit itself. The Commission found that the Gambia had violated an array of rights guaranteed in the African Charter and made a pronouncement that States are under an obligation pursuant to Article 16 of the Charter to take positive steps and judiciously apply their available resources in ensuring that the right to health is fully realised in all its aspects without discrimination.

Further, the African Court delivered its first judgment in *African Commission on Human and Peoples' Rights* v *Libya.*[158] In that case, the African Commission approach the court on behalf of Saif Gadhafi, a Libyan national detained in a secret location. He had no access to his family, friends and lawyer. There was no charge filed against him. The African Commission alleged that the victim's life was in danger and his physical integrity and health were exposed to risk and irreparable harm, thus a violation of his rights as guaranteed under Articles 6 and 7 of the African Charter 1981, which relate to the right of every individual to liberty and security of his person, as well as the right to have one's cause heard. This was due to the fact that the detained was deprived his fundamental rights, as he was continuously kept in secret detention since 19 November 2011, without the possibility of getting himself assisted by a lawyer of his choice. Among other prayers, the applicant requested the Court to rule that Libya has violated Mr Gadhafi's rights protected under Articles 6 and 7 of the African Charter. In her ruling the Court agreed with the African Commission that the measures taken by the Libyan authorities amounted to a violation of Mr

[157] Communication No 241/2001 (2003); AHRLR 96 (ACHPR 2003).
[158] App. No 002/2013, Judgment (3 June 2016).

Gadhafi's rights as guaranteed under Articles 6 and 7 of the African Charter 1981.

The mechanism put in place by the Protocol to the African Charter with regard to the procedural capacity of the individual to access the African court has however been overtaken by the establishment of the African Court of Justice and Human Rights.[159] The Protocol on the Statute creating the African Court of Justice and Human Rights was adopted by the African Union in 2008. By virtue of the Protocol, the African Court of Human and Peoples' Rights and the Court of Justice of the African Union have been substituted and merged into a single court called the African Court of Justice and Human Rights[160] (the African court). Entities entitled to have direct access to the African Court include a staff of the African Union on appeal in a dispute, but subject to the terms and conditions stipulated in the staff rules and regulations of the African Union and individuals.[161] This is an improvement on the provisions of the Protocol to the African Charter with regard to access to the court. Under the present arrangement, individuals have direct access to the African Court and are not subjected to the limitations stated under the African Charter 1981 whereby individuals were allowed to have access to court subject to the approval and consent of their states.[162]

In summary, the acknowledgement that individuals have rights and fundamental freedoms as guaranteed under these notable regional cum international instruments, and the fact that they have procedural capacity to prosecute these rights in international courts is indicative of the fact that individuals have some degree of international personality. This translates to the fact that they are subjects of international law. However, this is not to say that they are equal to States which are regarded as primary subjects of that legal system.

6. Conclusion

The changing environment of the international community has warranted the inclusion of certain entities such as individuals as having some degree of international personality. In classical international law, states were seen as the only subjects of international law. Though individuals have few obligations arising from customary international law, they were seen as objects of that legal system benefiting from its protection.[163] However, in contemporary international law individuals are now recognised as having international legal

[159] Rehman (n 82) 231−232.
[160] Rehman (n 82) 231−232.
[161] Arts 29 and 30 of the Statute annexed to the Protocol.
[162] Protocol to the African Charter, Arts 5(3) and 34(6).
[163] Protocol to the African Charter, Arts 5(3) and 34(6).

personality[164] hence subjects of international law. Individuals possess some rights and obligations derived either from customary international law or from treaty law. They also have some procedural capacity to prosecute these rights before international courts. Again, as entities recognised as subjects of international law, individuals can be answerable before international courts for violations of international criminal law. Thus, the inclusion of individuals as subjects of international law has contributed to the progressive development of that system of law as State authorities can no longer hide under the rubric of official capacity to perpetrate gross atrocities of human rights violations. However, this is not to say that the status of individuals under international law is comparable to that of the State.

[164] Cassese (n 45) 150.

REGULATION OF MERGER OF ASSOCIATIONS IN NIGERIA

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Abstract

A notable provision in the Companies and Allied Matters Act (CAMA) 2020 is the merger of associations. Section 849 provides that 'Two or more associations with similar aims and objects may merge under terms and conditions as the Commission may prescribe by regulation.' This novel provision sets the wheels in motion for the merger of associations under the Nigerian law. Curiously, the procedure for merger of associations pursuant to section 849 appears not to cut the mustard, as it is particularly silent on certain key issues such as the content of the scheme of merger, treatment of liabilities, and rights of dissenting members; these issues being features of mergers of companies. The paper examines the procedure for merger of associations under the CAMA 2020, comparing same with the procedures for similar mergers in the UK and South Africa respectively. The paper, among other things, recommends that the procedure for merger of associations in Nigeria be modified to address the essential elements which it omitted so as to promote due diligence and best practices, ensure fairness of the scheme of merger, and hold trustees liable for their actions.

Keywords: Merger of associations, CAMA 2020, Nigeria, **scheme of merger**

1. Introduction

Nigeria has a population of over 200 million people, and is ranked the most populated country in Africa.[1] Out of this figure, over 130 million are multidimensionally poor due mainly to a lack of access to health, education, good living standards, employment and security,[2] occasioned largely by misgovernance and bad leadership. In response to this dysfunction,

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[1] Dennis Kamprad '9 Best Charities Impacting Nigeria'<https://impactful.ninja/best-charities-for-nigeria/> accessed 1 March 2023.

[2] See Sami Tunji , 'Nigeria's poverty exceeds World Bank projection, five states lead' <https://punchng.com/nigerias-poverty-exceeds-world-bank-projection-five-states-lead/> accessed 1 March 2023.

organizations with charitable purposes are stepping in to fill the gap by providing essential services and social protection for the citizens.'[3] In carrying out their activities, these organizations/charities depend largely on contributions from their members as well as on voluntary donations from individuals, companies, development agencies and governments, both local and foreign. With the growing economic recession and mounting public expenditures, available resources for funding the objects of charities are getting lean. It is, therefore, imperative that the available resources are used in the best possible way, and options for sustainability of charities explored. Merger of associations presents as a veritable way of sustaining and strengthening charities. For instance, mergers will enable charities with similar objects to enjoy the benefit of economies of scale, save administrative costs by eliminating duplicity, and use of integrated system,[4] etc. Generally, mergers are driven by the synergy effect.[5] The synergy motive is informed by the resource-based theory of the firm, where complementary resource profiles of two merging entities, such as physical resources, intangible resources, financial and human resources are integrated in ways that make the emerging entity stronger, bigger and more productive.[6] In the simplest terms, synergy effect is reflected in the total output of the combined efforts being greater than the total of individual efforts added together. Thus, synergy can equally motivate charities to merge.

The option of mergers was unavailable to charities operated as incorporated trustees in Nigeria until 2020, when CAMA for the first time introduced mergers of associations under Part F. Unfortunately, both CAMA and its regulations left unanswered a number of questions bordering on the procedure for effecting such mergers. For instance, the procedure is silent on the treatment of liabilities during mergers. The issues of tax obligations and rights of dissenting members and creditors are also unsettled. Without these issues clearly addressed, merger options may remain unattractive to associations in their quest to synergize efforts for optimal operations and maximum impact in Nigeria.

2. Classification and Legal Status of Associations

Pursuant to Regulation 27 of the Companies Regulations 2021, associations regulated under the CAMA are classified as religious, educational, literary, scientific, social, developmental, cultural, sporting or charitable. Thus,

[3] Dennis Kamprad, (n 2).

[4] See 'Should non-profits merge?' https://businessday.ng/opinion/article/should-non-profits-merge/ accessed 2 March 2023.

[5] Edith Ogonnaya Nwosu, 'Gridlock and Goodluck in Quasi-Corporate Marriages in Nigeria' (University of Nigeria Senate Ceremonial Committee, 2021) 15.

[6] See generally Michael A Hitt, 'Creating Value Through Mergers and Acquisitions: Challenges and Opportunities' (2012) 7 <https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1123&context=mgmt_fac> accessed 8 February 2023.

classification of associations in Nigeria is based primarily on the interests and objects they promote.[7] Accordingly, religious associations are made up of members who share similar religious inclinations. Similarly, educational, scientific, social and cultural associations comprise those with similar interests. Section 823 of CAMA 2020 provides thus:

> Where two or more trustees are appointed by any community of persons bound together by custom, religion, kinship or nationality or by anybody or association of persons established for any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose, they may, if so authorised by the community, body or association (in this Act referred to as "the association") apply to the Commission in the manner provided for registration under this Act as a corporate body.[8]

Similarly, section 26 of CAMA 2020 provides that:

> Where a company is to be formed for the promotion of commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to the members of the company distributed among the members but shall be transferred to some other company limited by guarantee having objects similar to the objects of the company or applied to some charitable object and such other company or association shall be determined by the members prior to dissolution of the company.

Generally, associations in Nigeria can be formed either under Part B of CAMA or Part F of CAMA, depending on the objects or interests sought to be promoted. When associations are formed under Part B of CAMA, they can be referred to as companies with legal personality separate from the members. The company so formed can carry on business transactions but the profits are not shared among the members. This is primarily why they are referred to as not-for-profit companies or organisations. The notion here is not that they do not make profits, but that the profits arising from their activities are channelled to the objects which they promote.[9] Where the association is registered under Part F, only the trustees of the association, and not the association itself, acquire legal personality.

Accordingly, to operate any association in Nigeria, there are at least two options available to the members. One is to register the association as a company limited by guarantee, in which case the members are required to guarantee some funds for the purpose of discharging liabilities in the event of winding up of the

[7] See s 824 particularly, which provides that the Commission shall determine the classification of associations to be registered in accordance with the aims and objects of the association.
[8] See s 823 (1) CAMA.
[9] See s 26 CAMA.

company.[10] Apart from this feature and status as not-for-profit, associations registered and operated under this form are generally subject to the same regulations as companies limited by shares, including regulations on winding up and mergers. The stringent registration requirements and strict regulation of associations registered under this category therefore altogether make this route less attractive.

Where the members of an association or community do not intend to carry on business at all as their object, but desire to promote a charitable purpose as their object, they can nominate two or more of their members to be registered as incorporated trustees. Under this category, the members do not have to guarantee any sum, and the association does not enjoy separate corporate personality like companies limited by guarantee. Only the trustees of the association enjoy legal personality.[11]

It is worth mentioning that in some cases, what determines which of Part B or F an association is registered is not the resolution of the members but the interest sought to be promoted. Religious organisations and community-based associations compulsorily come under Part F. Some other interests like scientific, educational, social, and cultural or charity can come under either. It will, however, be noted that with respect to education, members who intend to promote educational activities by running schools must register as companies limited by shares, and this is primarily to bring them under the tax net.[12]

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[10] See generally s 26 CAMA.

[11] According to s 830 CAMA, From the date of registration, the trustees shall become a body corporate by the name described in the certificate, and shall have—
(a) perpetual succession;
(b) a common seal if they so wish;
(c) power to sue and be sued in its corporate name as such trustees; and
(d) subject to s 836 of this Part, power to hold and acquire, and transfer, assign or dispose of any property, or interests therein belonging to, or held for the benefit of such association, in such manner and subject to such restrictions and provisions as the trustees might without incorporation, hold or acquire, transfer, assign or otherwise dispose of the same for the purposes of such community, body or association of persons.
(2) The certificate of incorporation shall vest in the body corporate all property and interests of whatever nature or tenure belonging to or held by any person in trust for such community, body or association of persons.
(3) A certificate of incorporation when granted shall be prima facie evidence that all the preliminary requisitions herein contained and required in respect of such incorporation have been complied with, and the date of incorporation mentioned in such certificate shall be deemed to be the date on which incorporation has taken place.

[12] *Best Children International Schools Ltd v FIRS* ([(2018) CA/A/393/2016], where the Federal Inland Revenue Service (FIRS) argued that an educational institution which is registered as a company limited by shares is liable to pay tax and thus assessed the defendant in that case on income tax, notwithstanding that the nature of its business comprised wholly academic activities. Agreeing with the FIRS, the Court of Appeal

The concern here is limited to associations regulated under Part F of CAMA, reason, as stated above; being that merger of Part B associations is treated similarly as companies limited by shares.

3. Legal Framework and Regulation of Associations in Nigeria

Associations in Nigeria are regulated by various statutes, the foundation of which is the Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution) as amended. Pursuant to section 40 of the 1999 Constitution, every person is entitled to assemble freely and associate with other persons, and in particular may form or belong to any association for the protection of his interests. This freedom of association is the bedrock of other laws regulating associations.

Companies and Allied Matters Act is another principal law that regulates associations in Nigeria. By section 823 CAMA, members whose interests cut across religion, education, literature, science, society, development, culture, sport or charity may apply to the Corporate Affairs Commission (CAC) to be registered. Until registered, it appears that such associations are free to carry out their activities provided that such activities are lawful and within the bounds of the law. The unregistered associations, however, will not enjoy corporate trappings such as the ability to sue and be sued in their corporate names, own property and operate corporate accounts. In effect, the unregistered association is not recognized as persons in law. Individual members of the associations may, however, sue to enforce their rights when violated. Once the association applies to the Corporate Affairs Commission (CAC) to be registered, and is registered according to the requirements of the law, it comes under the regulatory oversight of the Commission, and must ensure legal and regulatory compliance. The association is mandated to apply its income and property solely towards the promotion of the objects of the body as set forth in its constitution, and no portion from it shall be paid or transferred directly or indirectly, by way of dividend, bonus, or otherwise by way of profit to any of the members of the association.[13] A person who knowingly contravenes this

held that what qualified a company to tax exemption under the relevant provision of the law is the corporate form of the corporation and not its business object(s). This decision is now obsolete with the enactment of the Finance Act 2021, s 7 of which amended s 23 (1) (c) of CITA by deleting educational activities from the list of companies whose profits are tax exempts.

[13] See s 838(1) CAMA. By s 838(2), however, of reasonable and proper remuneration to an officer or servant of the body in return for any service actually rendered to the body or association: Provided that— (a) with the exception of ex-officio members of the governing council, no member of a council or governing body shall be appointed to any salaried office of the body or any office of the body paid by fees ; and (b) no remuneration or other benefit in money or money's worth shall be given by the body to any member of such council or governing body, except repayment of out-of-pocket

provision is liable to refund such income or property so misapplied to the association.[14] Where the trustees of the association take part in the violation of this provision, they may be suspended and interim management appointed by the Commission.[15]

Another aspect of regulatory compliance which is often neglected, and which attracts penal sanction is the filing of annual returns. By virtue of section 848, incorporated trustees are expected to file annual returns between June 30 and December 31 each year. Where there is default in filing annual returns, the association is liable to pay fine as may be prescribed by the Commission.[16] Similarly, section 845(1) mandates trustees of an association to submit to the Commission a bi-annual statement of affairs of the association, as the Commission shall specify in its regulations. If the trustees fail to comply with subsection (1), each trustee shall be liable to a penalty for every day during which the default continues in such amount as the Commission shall specify in its regulations.[17]

Operation of associations in Nigeria may also implicate taxation obligation. Generally, associations registered under Part F are not subject to income tax. By section 23(1)(c) of the Companies Income Tax Act as amended, the profits of any company[18] engaged in ecclesiastical, or charitable[19] activities of a public character in so far as such profits are not derived from a trade or business carried on by such company, are tax exempt. The implication is that the income of those associations is not subject to tax. However, where the association engages in any business or trade outside of its object, the profits derived therefrom will be subject to tax.[20] This proviso was tested in the case of *Rev. Shodipe & Ors v Federal Board of Inland Revenue*[21], where the Court held that where a charitable institution carries on a profit-making business, profits made from such business are taxable.

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expenses, reasonable rent for premises demised or let to the body or reasonable fee for services rendered.

[14] See s 838(3) CAMA.

[15] See s 839 CAMA. This provision has however been a subject of scathing criticism. For instance, Abdullahi who argued that the aspect of vesting power on the Registrar-General of the Commission to suspend trustees of incorporated trustees and appoint interim managers is one of such troubling area of the law which is subject to abuse. AY Abdullahi 'The Legal Framework for Regulating Not-For-Profit Organizations in Nigeria' 2021 8(2) *NAUJCPL* 84.

[16] Annual Returns for Incorporated Trustees is N5,000 each year and penalty for failing to pay Annual Returns within the specified period is N5,000.

[17] See s 845(2) CAMA.

[18] Emphasis supplied.

[19] As amended by s 7 of the Finance Act 2021.

[20] For example, where a religious body runs a school or operates a printing press, the profit generated from the school or printing press will be subject to tax.

[21] [1974] FRCR 35.

4. Procedure for Effecting Merger of Associations in Nigeria

The procedure for merger of associations is captured under Reg. 35 of the Companies Regulations 2021, made pursuant to section 849 of CAMA.[22] By virtue of that regulation, the mandatory requirements for effecting a merger of associations are:

(i) The merging associations must have similar aims and objectives

The first condition for a merger of associations is that the merging entities must have similar aims and objectives. This suggests that an association with religious objects cannot merge with one that has sporting objects. Similarly, one with scientific objects cannot merge with one that has cultural objects. Their aims and objectives must be similar for a merger to be initiated. This provision is important because where two or more associations with dissimilar objects merge; it would amount to unlawful transfer since the entities are bound by law to transfer their property in the event of winding up or dissolution to associations having similar objects.[23]

(ii) 75% of the members of each of the associations must approve of the merger

This requirement presupposes that there should be a meeting of the members of each of the associations where the requisite majority's approval is obtained, or in the alternative a written consent of three-fourths of the members is secured. Since the law is silent on the issue of meetings contrary to the procedure for mergers of companies, it is suggested that the meetings of the merging associations should be held simultaneously on the same day so as to avoid a situation where the outcome of the meeting of one has an overriding influence on the other.

Since the resolution is not by unanimous consent of all the members, the issue of the fate of dissenting members is necessarily implicated. Some members who do not approve of the merger proposal, and who have a stake in the association should have a right of redress in one way or the other. They should normally be able to approach the Court to seek either a cancellation of the resolution approving the merger or have the scheme of merger reviewed. Voluntary associations usually make for free entry and free exit. Thus, a member cannot be forced or pressured into a relationship with others under a merger activity nor will an unwilling member hold the association to ransom by frustrating the merger. It is for this reason that merger provisions for companies normally

[22] The s provides that two or more associations with similar aims and objects may merge under terms and conditions as the Commission may prescribe by regulation.

[23] See s 850 of CAMA. However, it should be noted that where it is impracticable to find an association with similar objects to transfer all its assets, what remains of its assets can be transferred to a body with some charitable object. See s 850(5) CAMA.

provide for rights of dissenting members.[24] Whereas it is necessary to provide for rights of dissentients, one is not advocating a pecuniary relief because the interests of members of an association are not measured in units of money as obtained in companies limited by shares. Therefore, a member is not lawfully entitled to a refund of the aggregate of his/her contributions in the event of exiting the association.

Despite the omission by CAMA to specifically provide for the rights of dissenting members in a merger of associations, it is trite to opine that where the merger is between associations with dissimilar objectives, a dissenting member can seek an injunction to prohibit the merger transaction as being unlawful. Also, where there is default in complying with regulations governing meetings such as notice, quorum and right to vote, a dissenting member may seek legal redress. Where a member who was entitled to notice of a meeting in which the merger was approved, was not given notice and so could not attend the meeting to vote, the failure to give notice of meeting may be a ground for seeking redress.

(iii) Publication of application for merger to be made in two national daily newspapers for 28 days

The application for merger must be published in the daily newspapers circulating within the area where the associations are situate, and one of the newspapers must be a national newspaper.[25] It will be noted that what is to be published is application for the merger. This suggests that once the merger is approved by the members as required under the law, an application will be made by the merging entities to the CAC. The publication is to last for 28 days. This is to notify the general public and stakeholders, and may evoke legitimate reactions bordering on matters of public interest.

(iv) Display of notice of the proposed merger conspicuously at the headquarters and branches of each of the associations for at least 28 days:

The display of notices must be made at both the headquarters and branches (if any) of each of the associations, and may be made either before or after the publication of the application in the dailies.[26] The purpose of this requirement may be to bring into the web of protection persons other than members who are interested in the merger. Such persons as creditors and litigants constitute interested parties who may need this additional notice.

[24] See s 713 of CAMA 2020, which requires a dissenting member's shares to be purchased by the company on the terms on which under the scheme or contract the shares of the approving shareholders were transferred to it, or on such other terms as may be agreed on as the Court hearing the application of either the transferee company or the shareholder deems fit.

[25] See Regulation 35.

[26] See Reg 35(5).

In any case, Reg. 35(5) requires that the contents of the publication and notices must contain a call for objection to the application for merger. The objection if any is to be forwarded to the Registrar-General of the CAC not later than 28 days after the last publication or notice, whichever is later. It seems that dissenting members of each of the associations may take advantage of this protective measure to object to the application since the requirement does not restrict the persons who are to make the objections.

(v) Scheme of merger to be sanctioned by the Federal High Court

The last stage is the sanctioning of the scheme of merger by the Federal High Court. It should be noted that it is the scheme that is taken to the Court for sanctioning, and not the application itself.[27] Thus, where the Court is not satisfied with the scheme of merger, it may refuse to sanction it, and the merger may not be implemented. However, CAMA does not provide for the things the Court should consider before sanctioning the scheme. It is hoped that the law does not intend for the Court to act as a rubber stamp by making an order sanctioning the scheme once it is presented. The Court naturally would consider regularity of the procedure and compliance with statutory provisions. Also, it is not clear who should make the application to the court - one of the merging associations or the surviving association?

5. Treatment of Liabilities under Merger of Associations

It is obvious from the procedure for effecting merger of associations highlighted above, that CAMA omitted the treatment of liabilities of the trustees to third parties. Debra Morris emphasizes that "[m]ergers involve the risk of potential trustee liability. Charities considering merger, therefore, need to know what the potential liabilities are and which charity will be responsible for particular liabilities".[28] Accordingly, under the repealed section 122 of the Investment and Securities Act 2007, which regulated mergers and acquisitions in Nigeria until 2019,[29] the court while sanctioning the merger was required to make some facilitating orders which must include an order for the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company.[30] Consistent with the tenor of this provision, it was held in *Paul Mbu v Stanbic IBTC Bank Plc* that as part of the

[27] See Reg 35(6).

[28] Debra Morris, 'Legal Issues in Charity Mergers' <https://www.liverpool.ac.uk/media/livacuk/law/2-research/clpu/report01.pdf> accessed 22 February 2023.

[29] It is important to note that ISA didn't contemplate mergers of associations.

[30] Curiously, this provision was omitted in the Federal Competition and Consumer Protection Act 2019, which is the principal legislation regulating mergers of business associations in Nigeria. However, it is retained in s 711(3) CAMA 2020 which governs scheme of arrangements, compromise or 'merger of companies' under a part designated for internal reorganisation.

incidences of merger, the resulting company acquires both the assets and liabilities of those merging companies, whose past dealings remain intact. In *Ecobank v FRN*,[31] the court, however, provided a limit to this rule by holding that the principle does not extend to (vicarious) criminal liability. According to the court, even though a company may under certain circumstances be liable for crime committed by its agents or officers but a company resulting from a merger deal cannot in law be vicariously liable for the crimes committed by its predecessor company even despite the acquisition.

The implication of the foregoing is that in the absence of any express provision requiring the transfer of liabilities as part of the scheme of merger in association mergers, the option left is for the parties to provide for such transfer in the scheme of merger to be sanctioned by the court. It is proposed in this paper that such a provision in the scheme of merger should be a *sine qua non* for obtaining the court's sanction.[32] This is imperative for the following two reasons:

i. In the absence of such provisions, only civil liabilities can be transferred to the trustees of the emerging association in view of the decision in *Ecobank.*[33] Thus, criminal liabilities where applicable will abate or be left untreated. This may invariably occasion social injustice against which most charities are promoted to fight.

ii. Under the incorporated trustees regime in Nigeria, only the trustees acquire legal personality, and not the entire association, as mentioned earlier. Where there is no clear provision on transfer of liabilities and the trustees of the target charity all retire after the merger is sanctioned, they will be deemed discharged of all liabilities upon the dissolution of any of the target charity. Where this happens, it will be legally impossible to discharge any civil or criminal liabilities of the trustees who at this point would have lost their corporate personality. Even where it is intended that there should be a shell association[34] after the merger, the shell association will be absolved of any such liability, reason being that, as stated afore, the legal personality of incorporated trustees only attaches to the trustees and not to the members or to the association as a whole.

Making transfer of liabilities a mandatory requirement for obtaining court's sanction under the scheme of merger will enable a third party to stop the merger where his/her interest is not adequately captured, or is threatened, and will minimize situations where trustees' motivation for a merger talk will be solely

[31] (2021) LPELR-52836(CA).
[32] Thus, it is pertinent that the statutory provisions be amended to provide for transfer of liabilities.
[33] Ibid.
[34] A shell charity becomes desirable where there is need to collect future legacies named for the original charity. See Debra Morris, (n 29)14.

to escape liabilities. This way, discussions on who bears the liabilities will form part of the merger negotiations and should be clearly resolved before the parties conclude the merger transaction.

6. Regulation of Merger of Associations in the UK and South Africa

6.1 Merger of Charities in the UK

Under the UK regime, merger of charities is regulated by the Charities Act 2011[35] (the UK Act). The Act defines charity as an institution established for charitable purposes only, and which falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.[36] An institution is said to have a charitable purpose if it falls within any of the descriptions assigned under section 3 of the Charities Act, that is, if it is formed for the purpose of the prevention or relief of poverty; the advancement of education; the advancement of religion; the advancement of health or the saving of lives; the advancement of citizenship or community development; the advancement of the arts, culture, heritage or science; the advancement of amateur sport; the advancement of human rights; conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity; the advancement of environmental protection or improvement, the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage or the advancement of animal welfare.[37] This description of charitable purpose under the UK Charities Act is specific and broad unlike section 823 CAMA which merely mentions 'charitable purpose' as being one of the objects[38] which an association seeking registration as an incorporated trustee may undertake.

Merger of charities is regulated by Part 16 of the UK Act. Pursuant to section 305 of the Act, 'relevant charity merger' means:

> (a) a merger of two or more charities in connection with which one of them ("the transferee") has transferred to it all the property of the other or others, each of which (a "transferor") ceases to exist, or is to cease to exist, on or after the transfer of its property to the transferee, or
>
> (b) a merger of two or more charities ("transferors") in connection with which both or all of them cease to exist, or are to cease to exist, on or after the transfer of all of their property to a new charity ("the transferee").[39]

In effect, a merger is said to occur where there is a transfer of property from one association to another (or others) in which case the transferor ceases to exist

[35] As amended by the Charities Act 2022.
[36] See s 1 of the Charities Act 2011.
[37] See s 3(1) of the Charities Act 2011.
[38] The objects are similar to the ones within the description of 'charitable purpose' in the UK Charities Act, but they are not as exhaustive as the latter.
[39] See s 305(1) of the Charities Act 2011.

once the transfer is effected, or where two or more associations transfer their property to a new association, and they cease to exist once the transfer is effected. The transfer of property is effected by way of vesting declaration.[40] The vesting declaration operates on the specified date to vest the legal title to all of the transferor's property in the transferee, without the need for any further document transferring it.[41] However, vesting declaration is invalid if it applies to any land held by the transferor as security for money subject to the trusts of the transferor (other than land held on trust for securing debentures or debenture stock; any land held by the transferor under a lease or agreement which contains any covenant (however described) against assignment of the transferor's interest without the consent of some other person, unless that consent has been obtained before the specified date, or any shares, stock, annuity or other property which is only transferable in books kept by a company or other body or in a manner directed by or under any enactment.[42]

Even though the UK Act does not expressly limit merger negotiation to associations having the same objects, as provided under the Nigerian law, it would appear that where there is a transfer of property from an association to another with dissimilar object, a breach of the law would be implicated under the UK regime.[43] Any such transfer must then be made from one association to another with the same or broadly similar objectives. According to Debra Morris,

> If one charity has broader objects than the other, it is only possible to transfer from the charity with broader objects to the charity with narrower objects (as opposed to vice versa). This is because in Charity Law there is a duty on charity trustees only to apply the assets of the charity for the purposes for which the charity was created, as set down in the objects clause in the governing documents of the charity. Therefore, to transfer the assets of a charity into another charity with wider objects would be a misapplication of funds and a breach of trust by the trustees of the transferor charity.[44]

Limiting merger of associations to entities having similar objects would in addition to fulfilling the demands of the law, serve to respect the intents and will of donors. This is because, sometimes, donors may restrict the use of their gifts to certain charitable cause. Such restrictions, if not honoured particularly after the death of the donor, may lead to a breach of trust and may implicate legal battles. In *Newcomb Case*,[45] the will of Josephine Newcomb established Sophie Newcomb College in honour of her daughter, and to elevate women's

[40] See s 306(4) of the Charities Act 2011.
[41] S 310(2) of the Charities Act 2011.
[42] S 310 (3) of the Charities Act 2011.
[43] See Debra Morris (n 29), 25.
[44] Ibid.
[45] See Doug White, 'Good Giving from the Grave, <http://www.philanthropyroundtable.org/topic/donor_intent/good_giving_from_the_grave> accessed 13 February, 2023.

education. Following Hurricane Katrina, the college found itself in financial crisis and the board of directors voted to create a new co-educational entity, Newcomb-Tulane College. The family of the deceased donor argued that the intended action violated donor intent.[46] Though the issue was eventually resolved in favour of the university by the Louisiana Supreme Court, it "nevertheless likely caused significant legal, reputational, and time costs".[47] Donor restrictions over all may then constitute one of the factors which may prevent merger of associations from happening.[48]

Section 307 requires the UK Charity Commission to be notified of any relevant charity merger at any time after the transfer of property involved in the merger has taken place, or, if more than one transfer of property is so involved, the last of those transfers has taken place. It is noteworthy that the notification pursuant to this section is required to be made only after the transfer of property has been made, implying that the approval of the Charity Commission may not usually be required for merger of charities in the UK, similar to what is obtainable in Nigeria. That notwithstanding, the notification is to be given by the charity trustees of the transferee and must specify the transfer of property involved in the merger and the date or dates on which it took place and include a statement that appropriate arrangements have been made with respect to the discharge of any liabilities of the transferor charity or charities.[49]. The notification must also include such matters as the fact that a vesting declaration has been made, the date when the declaration was made, and the date on which the vesting of title under the declaration took place.[50] This provision suggests that parties contemplating merger of associations in the UK must first agree on the discharge of liabilities of the transferor associations. For instance, "which charity will be liable to pay employees' salaries and what is the cost? What is the rent on the property that the merged charity will be using and is there any liability for arrears?"[51] To identify the potential liabilities, Morris opines that:

> [I]t is necessary to carry out what is known in the context of commercial mergers as a 'due diligence exercise'. It will be seen that the commercial process of due diligence provides a helpful starting point for merging charities but, in practice, charities have to adopt a far more flexible process.[52]

[46] See Doug White, ibid. See also The Endowment & Foundation National Practice Group 'Nonprofit Mergers & Acquisitions: 5 Points to Consider' <www.pnc.com/insights/corporate-institutional/manage-nonprofit-enterprises...> accessed 10 February 2023.

[47] The Endowment & Foundation National Practice Group, ibid.

[48] Ibid.

[49] S 307(3) of the Charities Act 2011.

[50] S 307 (4) of the Charities Act 2011.

[51] Ibid.

[52] Ibid.

6.2 Merger of Non-Profit Companies in South Africa

Non-profit companies[53] in South Africa are regulated by the South Africa's Companies Act 71 of 2008 (CA 2008) and the Non-Profit Organizations Act of 1997 (NPO Act). Under the NPO Act, non-profit organisation means a trust, company or other association of persons established for a public purpose; and the income and property of which 'are not distributable to its members or office-bearers except as reasonable compensation for services rendered.[54] Similarly, the CA 2008 defines non-profit company as a company incorporated for a public benefit or other object, and the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1 of the NOP Act. Item 1(1) of Schedule 1 of the NPO Act, on the other hand, provides that the Memorandum of Incorporation of a non-profit company must set out at least one object of the company, and each such object must be either a public benefit object; or an object relating to one or more cultural or social activities, or communal or group interests. Although the scope of activities covered under the South African law seems to be limited compared to those of Nigeria and the UK, "group interests" as used in the provision is wide enough to cover the ground, since other interests can be accommodated under group interests.

Under the CA 2008, merger between a non-profit company and a profit company is prohibited.[55] Accordingly, transfer of property from a non-profit company to a profit company is void except the transfer is for a fair value. According to Item 2 of Schedule 1,

> A non-profit company may not— (a) amalgamate or merge with, or convert to, a profit company; or (b) dispose of any part of its assets, undertaking or business to a profit company, other than for fair value, except to the extent that such a disposition of an asset occurs in the ordinary course of the activities of the non-profit company.

A merger between two or more non-profit organisations is regulated by the same provisions that govern merger of profit companies are, with, of course, necessary modifications. By Item 2(2) of Schedule 1 of the NPO,

> If a non-profit company has voting members, any proposal to— (a) dispose of all or the greater part of its assets or undertaking; or (b) amalgamate or merge with another non-profit company, must be submitted to the voting members for approval, in a manner comparable to that required of profit companies in

[53] Non-profit companies can be likened to a company limited by guarantee in Nigeria. What this means is that, in South Africa, all associations which promote interests as defined under the law are regulated as non-profit companies. In Nigeria, as already explained, some associations may be floated as companies limited by guarantee while most of them may be floated as incorporated trustees.

[54] See s 1(1) of the NPO Act.

[55] See Item 2(1) of CA 2008.

> accordance with sections 112 and 113, respectively. (3) Sections 115 and 116, read with the changes required by the context, apply with respect to the approval of a proposal contemplated in sub item (2).

While sections 112 and 113 provide for proposals to dispose of all or greater part of assets or undertaking, and proposals for amalgamation or merger respectively, sections 115 and 116 deal with required approval for transactions contemplated in Part, and the implementation of amalgamation or merger.

Pursuant to section 112, a proposal to dispose of a nonprofit company must be approved by special resolution (or 75%)[56] of its members. A notice of a members meeting to consider a resolution to approve a disposal is to be delivered within the prescribed time, and in the prescribed manner to each member of the non-profit company; and must include or be accompanied by a written summary of the precise terms of the transaction or series of transactions, to be considered at the meeting.[57]

By section 113(2), two or more companies proposing to amalgamate or merge must enter into a written agreement setting out the terms and means of effecting the amalgamation or merger. The terms must include details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies among the companies that will be formed or continue to exist when the merger agreement has been implemented.[58]

The resolution can be opposed by 15% of those entitled to vote but who did not exercise such votes in favour of the merger. Where there is such opposition to the merger, the merger will not be implemented without the approval of a court where the opposing member so seeks the court's intervention.[59] The court may, also, grant any person leave to apply to a court to seek review of the merger transaction.[60]

Once the merger has been approved by members of the merging entities as required under section 115, a notice of the merger must be sent to every creditor of the merging entities.[61] A creditor has 15 business days from the date of receipt of the notice to apply to the court for a review of the merger.[62] Where no notice was filed within the 15 business days as stipulated under section 116(1)(b), or where the court has disposed of the request where there is an application for leave to review the merger, a notice must be filed with the Commission. After the Commission has received the notice, it issues a certificate of registration to the new entity, where applicable, and then

[56] See s 64 (9) of CA 2008.
[57] See s 112(3) CA 2008.
[58] See 113(2)(f) CA 2008.
[59] S 115 (3) (b) CA 2008.
[60] S 115 (3) (b) CA 2008.
[61] S 116 (1)(a) CA 2008.
[62] S 116 (1)(a) CA 2008.

deregisters any of the merging entities that did not survive the merger. It appears the merger takes effect after notification to the Commission.[63]

When an amalgamation or merger agreement has been implemented, the property of each amalgamating or merging company becomes property of the newly amalgamated, or surviving company or companies; and each newly amalgamated, or surviving company becomes liable for all of the obligations of every amalgamated or merged company.[64]

By subjecting merger of non-profit organisations to the same regulation as commercial mergers, the South African provisions seem to have taken care of most of the concerns raised under the regime governing merger of associations in Nigeria. Issues such as treatment of liabilities, content of the scheme of merger, rights of dissenting members and creditors are within the purview of South Africa's regulatory framework.

7. Conclusion

Merger of associations or charities, as the case may be, though relatively novel, is gaining momentum globally.[65] This is largely due to the imperativeness of sustaining and expanding charities in the face of dwindling financial resources, and inability of government to provide essential services for the people. Nigeria, in its efforts to embrace international best practices, introduced merger of associations in the CAMA 2020, In spite of the importance of this innovation, it comes with certain shortfalls which are capable of undermining the very policy objectives it was meant to achieve. The provisions on merger of associations under CAMA, apart from being scanty, omit certain key elements of mergers. For instance, CAMA does not define merger of associations. This lacuna is a major omission and is capable of labelling activities such as partnership or joint ventures, often undertaken by associations, as mergers.[66] The potential challenge will be that such corporate agreements between and among associations may be subjected to regulation as mergers. The UK Charities Act of 2011 and the South Africa Companies Act of 2008 are both unequivocal and

[63] See generally s 116 (2)-(6).

[64] This is however subject to subsection (8) of 116, the requirements of s 113(1), and any provision of the merger agreement, or any other agreement. See s 116 (7).

[65] Between 1999 and 2008, for instance, there had been association mergers involving Parent Connection (1999) Child Haven (2000), Las Familias (2002), Golden Gate Community Center (2004), New Directions Institute for Infant Brain Development (2004) and Southern Arizona Center Against Sexual Assault (2008) in the US alone. See Jean Butzen, 'An Example of Strategic Mergers in the Nonprofit Sector: Arizona Children's Association' <An Example of Strategic Mergers in the Nonprofit Sector: Arizona Children's Association (ssir.org)> accessed 02 March 2023.

[66] Under s 92 of the Federal Competition and Consumer Protection Act 2019, for instance, a merger includes a joint venture. See also Edith Ogonnaya Nwosu, (n 6) 40.

elaborate on what a merger of associations means.[67] Nigeria should not only borrow a leaf in this regard, but also make elaborate provisions on the treatment of dissenting members and creditors of the merging entities. Finally, the provisions should cover transfer of liabilities of the trustees of the exiting entities, as may be necessary.

[67] It will be noted that in the UK and South Africa, associations are regulated as charities and non-profit companies respectively. Charities and non-profit companies can be likened to companies limited by guarantee in Nigeria. What this means is that, in the UK and South Africa, all associations which promote interests as defined under the respective laws are regulated as charities and non-profit companies respectively. In Nigeria, as already explained, some associations may be floated as companies limited by guarantee while most of them may be floated as incorporated trustees.

JUDICIAL REFORMS AND THE IMPERATIVE FOR TRUE FISCAL FEDERALISM IN NIGERIA

Danjuma Gwatana Shigaba[*], AA Epu[**] and PI Ukam[***]

Abstract

Fiscal federalism is all about adequate financial provisions and autonomy to component units of a Federal State. It is an arrangement whereby revenue sources and allocations are shared amongst the three tiers of Governments in such a way that each of the level exists independently with enough resources and allocations to function as a Government properly. By the combined readings of Sections 81(3), 84(1) (7), 121(3), 124(1), 162(9) of the Constitution of the Federal Republic of Nigeria 1999, show that finances meant for the judicature is controlled by the Federal Government which bears down negatively on the functions of the judicature. The aim of this paper is to examine the need for judicial reforms in Nigeria which will bear on the quality of justice delivery in the country. It seeks to examine the present constitutional provisions on fiscal matters and how it affects judicial reform in Nigeria. The article delved into the legal framework to bring to the fore the necessity to put in place true fiscal federalism to the judiciary in order to have effective judicial reforms. It adopted the doctrinal method of research, and used primary and secondary sources such as the Constitution, relevant statutes, case law, textbooks and articles in journal. Findings from the study revealed inter-alia that the Judiciary has been starved of funds thus making it unable to make the much needed impact. The implication of these findings is that without quality fiscal federalism to the judiciary in Nigeria the much clamor for reforms will continue to be a mirage. The paper recommended inter-alia that the provisions of Executive Order No 10 2020 should be inserted in the Constitution so as to protect the finances of the Federal and State Courts.

Keywords: Federalism, Judicial Reforms, Imperative, Fiscal Federalism.

1. Introduction

Nigeria is a federation as enshrined in Section 319 of the Constitution which provides as follows: *'This Constitution may be cited as the Constitution of the Federal Republic of Nigeria.'* By this provision, Nigeria operates a federal system of government. Before 1946, Nigeria's colonial government was vested in the British officials, with the Governor who was the Commander in Chief.

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According to article 4 of the Northern and Southern Protectorate Orders in Council of 1899, the Governor was:

> authorized, empowered and commanded to exercise on HM's behalf all such powers and jurisdiction as HM at any time before or after the passing of this order had or may have within the said territories and to that end to take or cause to be taken all such measures and to do or cause to be done all such matters and things therein as are lawful and as in the interest of HM's service, he may think expedient; subject to such instruction as he may from time to time receive from H.M or through a secretary of state.[1]

The road to a fully-fledged Federal Constitution started with the enactment in 1954 of the Lyttleton Constitution. By the 1954 Federal Constitution, Nigeria was divided into three component units – the Northern, Western and Eastern regions with Lagos being the Capital of the Federation. The 1954 Constitution now contained two Legislative Lists i.e. The Exclusive List and the Concurrent List. The Exclusive Legislative Lists are the items within the exclusive sphere of the Federal Parliament, while the Concurrent Legislative list has items in which both the Federal and the Regional Legislature can legislate. All other matters not captured in the Exclusive and Concurrent Legislative lists were termed residual list and are within the Legislative competence of the Regions. The 1954 Constitution for the first time addressed the issue of fiscal federalism in the allocation of revenue. The central government was given the following matter to legislate on: (i) external affairs, (ii) Questions relating to aliens, naturalization, deportation and immigration, (iii) The police (iv) Defence (v) Export and import, excise duties. Collected revenues from these items were distributed to the regions base on derivation principles. The regions had control over mining rents, personal income tax, receipt from licenses, land registration. The derivation principle was applied in the distribution of taxes collected by the Federal Government. The first Federal Constitution granted full autonomy to each region in matters of internal affairs. The judiciary was established for each region with each region having a High Court from which appeals went to the Federal Supreme Court. The public service was established for each region in addition to the Federal Service Commission.[2]

The Independence Constitution of 1960 and the 1963 Republican Constitution were not much different from the federal principles already laid down by the

[1] BO Nwabueze, *A Constitutional History of Nigeria* (London, Longman Group Ltd, 1982) 35.
[2] SG Ehindero, *The Constitutional Development of Nigeria 1849-1989* (Jos, Ehindero Nig. Ltd, 1991) 21

1954 Constitution. The 1960 Constitution had 4 Constitutions in one document: the Constitution of the Federation, the Constitution of the Western Region, the Constitution of the Northern Region and the Constitution of the Eastern Region. The regional Constitutions were Schedules to the Federal Constitution[3]. This is in consonance with the fact that since a government presupposes a Constitution by which it is organized and its powers defined, it follows that under federalism Independence government, should strictly imply separate Constitution.[4] The 1960 Constitution introduced a bicameral legislature comprising of the House of Representative and a Senate. However, the 1960 Constitution retained the Queen as Head of State, represented by the Governor – General. The Queen was conferred with powers to appoint judicial officers. The 1963 Republican Constitution came into being on 1st October 1963. The Queen ceased to be Head of State and her functions were taken over by the President. Fiscal federalism is that aspect of federalism that deals with allocation of powers for revenue acquisition usually in the Constitution.

Under the 1960 Constitution, and replicated in the 1963 Constitution the following fiscal divisions of powers were enumerated: Exclusive Legislative List include: external affairs, passports and visas, defence (Naval, Military and Air Forces) currency, coinage and legal tender, exchange control, bills of exchange and promissory notes, banks and banking, customs and excise duties, including export duty, immigration and emigration, extradition and deportation, aviation, maritime shipping and navigation, posts, telegraph and telephones, railways, inter-state roads, weights and measures, patents, trademarks design, merchandise marks and copy rights, meteorology, company incorporate, insurance, taxation, statutory marriages, mines and mineral, including oil and natural gas, foreign trade. Matters in the Concurrent List are arms and ammunition, bankruptcy and insolvency, census, commercial and industrial monopolies, combines and trust control of the voluntary movement of people between territories, finger prints, identification and criminal records, higher education, individual development, labour and trade unions, legal and medical professions, prisons and other institution for the treatment of offenders, the maintaining and securing of public safety and public order, provision of essential services, registration of business names, scientific and individual research and statutes.

[3] BO Nwabueze, *Constitutional Democracy in Africa* (Vol 1, Ibadan, Spectrum books Ltd 2003) 23
[4] Ibid, 133.

The residual matters which only the regions are in charge included local governments, towns and country planning, primary and secondary education, health, land and property generally, chieftaincy and local customs, agriculture, forestry, regional roads, water supply, contract and tort[5].

The above enumerated items show the areas the central government and regional government can source their revenues for government business.

The incursion of the military into politics in Nigeria on 25th January 1966 altered fiscal federalism to the advantage of the center and to the detriment of the federating units. The military by its very nature operates a unified and hierarchical command and this had an impact on the federal system including fiscal federalism. The military cannot fathom a strict division of powers guaranteed under a Federal Constitution, so the Federal Military Government arrogated to itself power to legislate on all matters whatsoever. However the regional state governors were allowed to legislate on matters previously within the exclusive competence of a region i.e. the Residual List, and with the consent of the Federal Military Government on matters within the concurrent list.[6]

The military practice of arrogating to the Federal Military Government powers to make laws on almost all the subject matters of legislation impacted itself on the presidential constitutions of 1979 and 1999 of the Federal Republic of Nigeria. Thus 16 matters which in the 1960 and 1963 constitutions were in the concurrent legislative list are now made exclusive to the federal government. These are arms, ammunitions and explosives, bankruptcy and insolvency, census, commercial and industrial monopolies, combines and trust, drugs and poisons, finger prints, identification and criminal records, labour (i.e conditions of labour, industrial relations, trade unions and welfare of labour), prices, professional occupations as may be designated by the National Assembly, quarantine, registration of business names, regulation of tourist industry, traffic on federal trunk roads, public holidays, regulation of political parties, and service and execution in a state of the civil and criminal processes, judgments, decrees, orders of any court of law established by the legislature of a state.[7] This certainly has made the subject matters in which the federating units can get revenue become even with those of the Federal Government. However, with the Military Government, the Federal Government has more subject matters exclusive to it, the revenue sharing formula is more in favour of the Federal Government. Now

[5] Nwabueze (n 3) 139-141.
[6] Ehindero (n 2) 220.
[7] Nwabueze (n 3) 80-83.

95% of state revenue is derived from proceed of natural resources especially oil and other Federal taxable items controlled by the Federal Government. Pursuant to section 162 (1) (3) of the Constitution of the Federal Republic of Nigeria, section 1 of the Allocation of Revenue (Federation Account etc) Act, prescribes the following revenue formula:-

i. Federal Government = 48.5%
ii. State Government = 24.0%
iii. Local Government = 20%
iv. Special Funds = 7.5%

The military incursion into polities from 15th January 1966 truncated the federal principle in Nigeria and was replaced by unitary federalism because of the command structure of the military. Since then even the subsequent Constitutions of the 2nd, 3rd and 4th Republics were made up of unitary federalism. The subsequent Constitutions lacked the conditions for federalism which are:

i. The desire for political units to unionize and not unite for a common interest,
ii. The desire for the component units to preserve their independence in local matters,
iii. There is physical contiguity of "nations" that form the federation,
iv. There must be absence of marked inequalities amongst the component units and
v. The capacity on the part of the people to appreciate the meaning of a double allegiance to both the central and the component units thus able to prevent centrifugal forces to overcome the centripetal forces in the polity.[8]

From the foregoing analysis, it is cleared that under the 1960 and 1963 Constitutions of the Federal Republic Nigeria the regions had more legislative lists that they can source revenue therefrom. Thus enabling them to allocate more funds to the judiciary, thereby strengthening there reforms.

It should be noted that under the 1979 Constitution, the regions had been divided into 19 states due to military intervention in the polity as from January 1966[9]. And so under the said Constitution, the legislative list of the states were reduced

[8] A Appadorai, *The Substance of Politics* (Oxford, New York, Oxford University Press, 2004) 498-500.

[9] S Jeremiah and F Tony, 'The Impact of Military Rule on Constitutional Development in Nigeria' (2023) 3(2) *The Journal of Law and Policy* 237.

because of the fact that federal government had more items on the legislative list from where the derived their revenues.[10]

It is to be noted that the judiciary from the 1960 Constitution to the present 1999 Constitution have not been allocated directly its capital expenditure. Its capital expenditure is always determined by the executive[11]. In such scenario it can do little to judicial reforms. The judicial reforms that are being envisaged include financial independence of the judiciary,[12] situating the judiciary in accordance with federal principle, quality of appointment of judicial officers, speedy trial of causes and matters, quality of welfare of the judges, quality of infrastructure and equipment and strengthening of the appellate jurisdiction of superior courts of the state.[13]

This paper posits that without an improvement in fiscal federalism to the judicature there will be little or no reforms in the justice sector. This can be seen in the fact that there are a lot of clamour for judicial reforms for a long time, yet there has been no positive results.

This paper therefore examined the imperative for fiscal federalism in favour of the state and the judiciary so that the much needed reform needed in that sector can be realized.

2. Conceptual Framework

In this discourse, there are concepts that need defining: Federalism; Fiscal Federalism; Judicial Reform; Imperative and True.

2.1 Federalism

According to Black's Law Dictionary, federalism is the legal relationship and distribution of power between the national and regional governments within a federal system of government[14]. On the other hand according to the father of federalism, Wheare, federalism is the method of dividing powers so that the general and regional governments are each within a sphere coordinate and

[10] JO Arowosegbe, 'Techniques for Division of Legislative Powers under Federal Constitutions' <https://core.ac.uk/download/pdf/234649998.pdf> accessed 12 May, 2023

[11] AA Mustapha and others, 'The Executive, Legislature and the Judiciary: Toward Democratic Governance in Nigeria Since 1914' (2019) 6(1) *Journal of Economic Info* 43-48.

[12] Ibid.

[13] A Carl and P Ukata, *The Oxford Handbook of Nigeria Politics, the Judiciary in Nigeria Since 1999* <https://global.oup.com/academic/product/the-oxford-handbook-of-nigerian-politics-9780198804307?cc=us&lang=en&accessed> 9 December 2023.

[14] BA Garner, *Black's Law Dictionary* (9th edn St. Paul Minnesota, West Publishing & Co, 1999) 687.

independent.[15] It is in this regard that Alli defines federalism as an administrative and political system in which several states unite but keep control over their own internal affairs.[16] According to Nwabueze, federalism is an arrangement whereby governmental powers within a country are shared between a national, country-wide government and a number of regional (ie territorially localized) governments all equal in status as governments in such a way that each of the national and regional government exists separately and independently from the others and operates directly on persons and property within the territorial area of its jurisdiction, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others. Federalism is thus essentially an arrangement between governments, a constitutional device by which political powers within a country are divided among various units of governments, rather than among geographical entities comprising different people.[17] The Supreme Court in the case of *Attorney General of Abia State & 2 ors v Attorney General of the Federation of Nigeria & 35 ors*[18] *per Niki Tobi J.S.C* (as he then was) and of blessed memory defined federalism:

> as a legal and political concept, generally connotes an association of states formed for certain purposes, but the states retain a large measure of their original independence or autonomy. It is the coordinate relationship and distribution of power between the individual states and the national government which is at the centre. Federalism as a viable concept of organizing a pluralistic society such as Nigeria for governance does not encourage so much concentration of power in the centres which is the Federal Government. In federalism, the component states do not play the role of errand boys. The other extreme is also true and it is that they do not exercise sovereignty which only belongs to the Nation as a sovereign entity. States in Federalism rather exercises the middle role, if I may so, for lack of better expression of exercising legislative and fiscal autonomy as provided for in the Constitution.

From the foregoing definitions the following can be deduced as to the meaning of federalism:-

[15] KC Wheare, *Federal Government* (4th edn London: Oxford University Press, 1963) 11.
[16] WO Alli, 'The Development of Federalism in Nigeria: A Historical Perspective' in Aaron T Gana and Samuel G Egwu (eds) *Federalism in Africa; Framing the National Question* (Vol 1, Trenton, New Jersey, Africa World Press, 2003) 72.
[17] BO Nwabueze, *Constitutional Democracy in Africa* (Vol 4, Ibadan: Spectrum Books Ltd, 2004) 201.
[18] (2006) 28 NSCQR 161, 211-212.

i. It is a system of government suitable for a pluralistic society ie with numerous ethnic nationalities.
ii. It is a relationship where component unit states retain their independence, but share powers between them and the government at the centre, but the Federal Government cannot concentrate powers to itself.
iii. The components units relinquish their sovereignty for certain purpose and for the good of the whole.

2.2 Fiscal Federalism

According to Kapucu, fiscal federalism is the financial relation between units of governments in a Federal Government System. Fiscal Federalism is part of broader public finance discipline. It deals with the division of governmental functions and financial relations among levels of government.[19] *Black's Law Dictionary* defines Fiscal Federalism as relating to public finances or taxation.[20] Fiscal Federalism is the principle that guides the assignment of tax powers and expenditure responsibilities to the various tiers of government in a federation to promote healthy inter-governmental relations and synergy.[21] Fiscal Federalism is the division of responsibilities including finances among Federal, States and Local Governments to improve economic efficiency and achieve various public policy objectives.[22]

From the foregoing definitions, fiscal federalism is the monies and resources aspects of federalism ie the allocation of legislative items for purpose of revenue accruals to the centre and federating units. Fiscal federalism is an arrangement whereby revenue sources and revenue allocation are shared between national governments and a number of regional or states governments in such a way that each of the national and regional or states exists independently with enough resources and allocations to function as a government properly.

2.3 Judicial Reform

This concept has two words in it ie 'judicial' and 'reform'. The *Black's Law Dictionary* defines 'judicial' as relating to, or by the court or a judge; of or relating to a judgment.[23] 'Judicial' means – pertaining to judgment in court of

[19] K Naim, 'Public Finance' <www.britannica.com > ccessed on 25 July 2022.
[20] Garner (n16) 712.
[21] OE, Olabanji and others 'Fiscal Federation and Economic Development in Nigeria: An Auto-Regressive Distributed Lag Approach' (2020) 6(1) *Cogent Social Sciences* DOI 10.1080/23311886.2020.1789370.
[22] Congressional Research Service 'Fiscal Federalism: Theory and Practice' <https://crsreports.congress.gov > accessed 25 July 2022.
[23] Garner (n16) 922.

justice or to the administration of justice; pertaining to court of law or to judges; of or relating to a judge; inclined to make or give judgment; critical; discriminating; decreed, sanctioned, or enforced by a court; giving or seeking judgment as in a dispute or contest; determinative.[24]

'Reform' on the other hand is the improvement or amendment of what is wrong, corrupt, unsatisfactory etc.[25] 'Judicial Reform' in the circumstances is the improvement or amendment of what is wrong with the judicial proceedings, judicial function, judicial gravity, judicial mind, judicial decisions and judicial duels.[26]

In the context of this paper, fiscal federalism is important for reforming what is wrong with the judiciary.

2.4 Imperative

'Imperative' means absolutely necessary or required; unavoidable; of the nature of or expressing a command[27]. In the context of this paper, it means that for judicial reform to occur, it is absolutely necessary to put in place true fiscal federalism in Nigeria.

2.5 True

'True' as an adjective means being in accordance with the actual state or condition; conforming to reality or fact; not false, real, genuine, authentic, factual, veracious.[28] In the context of this paper, it means true fiscal federalism is an imperative to judicial reforms in Nigeria.

3. The Practice of Fiscal Federalism under the 1999 Constitution (as Amended)

The Federal Government has 68 items on the Exclusive Legislative list as its areas of Legislative powers[29]. For fiscal purposes, the Federal Government sphere of power include (i) accounts of the Government of the Federation and of offices, courts and authorities thereof, including audit of those account (ii) arms, ammunition and explosives (iii) aviation (iv) bankruptcy and insolvency (v) Banks, banking, bills of exchange and promissory notes (vi) commercial and

[24] See 'Judicial' Definition & Meaning | Dictionary.com available at: www.dictionary.com accessed 25 June 2023.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] See 2nd schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended).

industrial monopolies, combines and trust (vii) citizenships, naturalization and aliens (viii) control of capital issues (ix) copyright (x) currency, coinage and legal tender (xi) customs and excise duties (xii) designation of securities in which trust funds may be invested (xiii) Diplomatic consular and trade representation (xiv)drugs and poison (xv) Exchange Control (xvi) Export duties (xvii) external affairs (xviii) fishing and fisheries other than fishing and fisheries in rivers, lakes, waterway, ponds and other inland waters within Nigeria (xix) Immigration into and emigration from Nigeria (xx) Incorporation, regulation and winding up of bodies corporate, other than co-operative association, local government council and bodies corporate established directly by any law enacted by a House of Assembly of a state (xxi) Insurance (xxii) labour including trade union, industrial relation (xxiii) maritime shipping and navigation, (xxiv) meteorology (xxv) mine and minerals including oil fields, oil mining, geological survey and natural gas (xxvi) natural parks designated so by the Natural Assembly (xxvii) Nuclear energy (xxviii) passports and visas (xxix) patents, trademark, trade or business names, industrial designs and merchandise marks (xxx) pensions, gratuities and other like benefits payable out of the consolidated revenue fund or any other public funds of the federation (xxxi) posts, telegraphs and telephones (xxxii) prisons (xxxiii) professional occupations as may be designated by the National Assembly (xxxiv) Quarantine (xxxv) railways (xxxvi) regulation of of political parties (xxxvii) service and execution in a state of the civil and criminal processes, judgments, decrees of law outside Nigeria or any court of law outside Nigeria or court of law in Nigeria other than a court of law established by the House of Assembly of that state (xxxix) stamp duties (xxxx) taxation of incomes, profit and capital gain except as otherwise prescribed by this Constitution (xxxxi) establishment and regulations of authorities for the Federation or any part thereof – (a) to promote and enforce the observance of the fundamental objectives and directive principles contained in this constitution; (b) to identify, collect, preserve or generally look after ancient and historical monuments and records and archaeological sites and remains declared by the National Assembly to be of national significance or national importance; (c) administer museums and libraries other than museums and libraries established by the Government of a State (d) to regulate tourist traffic and (e) to prescribe minimum standards of education at all levels (xxxxii) formation, annulment and dissolution of marriages including matrimonial causes relating thereto other than marriage under Islamic law and customary law (xxxxiii) Trade and commerce between Nigeria and other countries (xxxxiv) traffic on Federal trunk roads (xxxxv) weights and measures (xxxxvi) wireless, broadcasting and television

other than ones provided by the Government of a state; allocation of wave-length for wireless, broadcasting and television transmission[30].

The concurrent legislative list has 30 items in it. However list Nos 1, 3, 4, 7, 8, 11, 13, 16, 17, 21, 23, 25, 27, 28 expressly gives the National Assembly powers to legislate on them. These include (i) making provisions of public revenue (a) between the Federation and the States (b) among the states of the federation (c)between the States and Local Government Council and (d) among the Local Government Councils in the State (ii) antiquities and monuments as may with the consent of the state in which such antiquities and monuments are located be designated by the National Assembly as National Antiquities or National Monuments (iii) the National Assembly may make laws for the Federation or any part thereof with respects to the archives and public records (iv) by law prescribe how collection of capital gains income or profit of persons other than companies, documents or transactions by ways of stamp duties are to be carried out by the Government of a state or other authority of a state (v) registration of voters and the procedures regulating election to a Local Government Council (viii) enacting laws regulating electricity, establishment of electric power stations, generation and transmission of electricity in any part of the federation, the regulation of the rights of any person or authority to dam up water in any part of the federation, regulation of any arrangement of participation of the federation with another country for the generation, transmission and distribution of electricity, establishment and promotion of a national grid system, regulation of the right of any person or authority to use, work or operate any plants, apparatus, equipment or work designed for the supply or use of electricity energy; (vi) enacting laws for the establishment of an authority with power to carry out censorship of cinematograph films and to prohibit or restrict the exhibition of such films (vii) enacting laws for the federation or any part with respect to health safety and welfare of persons employed to work in facilities, offices or other premises or in inter-state transaction and commerce including the training, supervision and qualification of such persons regulation of ownership and control business enterprises, establishment of research centres for agricultural studies, and establishment of institution and bodies for the promotion or financing of industrial, commercial or agricultural (viii) enacting laws to regulate or co-ordinate scientific and technological research (ix) enacting laws with respect to statistics in any matter which the National Assembly has power to make laws and the organization of a co-ordinate scheme of statistics for the Federation or any

[30] Ibid.

part thereof on any matter whether or not it has power to make laws with respect thereto (x) enacting laws for the Federation or any part thereof with respect to trigonometric, industrial and topographical surveys (xi) enacting laws for the Federation or any part thereof with respect to university education, technological education or such professional education, including the power to establish university, post primary technological or professional education[31].

From the foregoing, the states are only left to legislate concurrently with the Federal Government on items 2, 5, 6, 9, 10, 12, 14, 15, 18, 19, 20, 22, 24, 26, 29, 30 on the concurrent list. These are (i) any House of Assembly may make provision for grants, or loans from and the imposition of charges upon any of the public funds of that state, revenue and assets of that state for any purpose notwithstanding that it relates to a matter with respect to which the National Assembly is empowered to make laws (ii) a House of Assembly may subject to paragraph 4 hereof (powers of the National Assembly) make laws for that state or any part with respect to archives and public records (iii) may enact laws for the collection of tax, fee or rate or for the administration of the law providing for such collection by a Local Government (iv) enacting laws with respects to elections to a Local Government Council in addition but not inconsistent with any law made by the National Assembly (v) enact laws on establishment in that state of electric power stations, generation transmission and distribution of electricity to area not covered in that state, but is limited to distribution from a sub-station to the ultimate consumer, maintenance, repairs or replacement of plant or equipment for the creation or generation of electrical energy, transmission from a power station to a sub-station (vi) enact laws for industrial, commercial or agricultural development of the state (vii) A House of Assembly may enact law for the establishment of institutions for the purpose of scientific and technological research (viii) enact laws for statistics and on any matter other than that covered by the National Assembly (ix) may enact law with respect to trigonometric, industrial and topographical services (x) enact laws for the establishments of an institution for purpose of university, technological or professional education (xi) enact laws with respect to technical, vocational, post primary, primary or other forms of education including the establishment of institutions for the pursuit of such education.

From the foregoing, it is to be noted that the states can only draw revenue from 11 items. Besides that, section 4 (4) (5) of the Constitution provides as follows:

[31] Ibid.

> (4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say-
>
> (a) any matter in the concurrent legislative list set out in the first column of part II of the second schedule to this Constitution to the extent prescribed with second column opposite thereto; and
>
> (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.
>
> (5) If any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail and that other law shall to the extent of the inconsistency be void.

From the foregoing analysis, it is clear that fiscal federalism is heavily lopsided in favour of the centre ie the Federal Government. That is why the centre is so powerful with so much money that political power at the Federal Government is very attractive and the states have been cowed down, only contented with going to Abuja every month cap in hand to be handed over the crumbs that falls from the table of the all almighty Federal Government. The items the states can draw revenue from are so limited that the states have no money to conduct governmental affairs ie the provision of dividend of democracy.

It is worthy of note to say that the courts too have contributed to the impoverishment of the states on their revenue base through questionable interpretation of fiscal issues. For example in *Attorney General of Ogun State v Alhaja Ayinke Aberuagba & Ors*,[32] by an originating summons, the Respondent who were Plaintiffs at the High Court were wholesale purchasers of beer in Ogun State instituted the suit claiming against the Ogun State Government, a declaration that section 3 (1), 3 (4) (ii), 3 (7), 4, 5, 8 and 21 of the Sales Tax Law 1982 are inconsistent with the provision of the Constitution of the Federal Republic of Nigeria and accordingly void. The Supreme Court held *inter alia* as follows:

1. That State Legislatures can legislate on matter not included in the exclusive legislative list, and matters included in the concurrent list and any other matter in which the constitution empowers them to make laws thereto.
2. That since section 3 of the Ogun State Tax Law makes tax chargeable on product brought into the state, it becomes discriminatory tax law against inter-state or international trade and commerce which are within the purview of the exclusive regulating powers of the federation.

[32] (1985) LPELR 3164 (SC).

3. That every state within his concurrent legislative powers can legislate for sales tax within its own state provided that it does not restrict inter-state trade.

It is clear that the above judgment did not help the fiscal matters as pertains to the states. If states cannot derive revenue from sales tax, then how can they attain internally generated revenue? The courts instead of being proactive in protecting the fiscal interest of the states, have further weakened the revenue base of the states.

4. The Judiciary and Fiscal Federalism in Nigeria

The Judicature is established by section 6 (1) of the Constitution which provides as follows: 'The judicial powers of the federation shall be vested in the courts to which this section relates, being courts established for the federation.'

The courts recognized by the constitution as superior courts of records include the Supreme Court, the Court of Appeal, the Federal High Court, National industrial Court, High Court of the Federal Capital Territory Abuja, Sharia Court of Appeal of the States, the Federal Capital Territory Customary Court, High Court of a State, the Sharia Court of Appeal of the Federal Capital Territory Abuja, the Customary Court of Appeal of states, such other courts as may be authorized by law made by the National Assembly and such other courts as may be authorized by law of a State House of Assembly to exercise jurisdiction at first instance or on appeal.

Fiscal federalism (financial matters) in favour of the judicature is embodied in the 1999 Constitution. The Constitution provides that any money that the judiciary has access to in the consolidated revenue funds of the Federation must be paid directly to the National Judicial Council, which will then distribute them to the heads of the courts established for the federation and the states in accordance with Section 6 of the Constitution.[33] Similarly, the National Assembly may prescribe compensation, salary, and allowances for the holders of the posts specified in this section;[34] however, these payments shall not surpass the sum decided upon by the fiscal commission and revenue mobilization allocation.[35] The Federation's consolidated revenue fund will be liable for the recurrent expenses of the judicial offices within the Federation, aside from the

[33] Section 81 (3) Constitution of the Federal Republic of Nigeria, 1999 (as amended)
[34] Section 81 (4) Ibid. (The offices mentioned as encapsulated in subsection 4 includes Justices of the Superior Courts of Record).
[35] Section 84 (1) Ibid.

salaries and benefits of the judicial offices specified in subsection (4) of this section.[36]

The Constitution also empowers the heads of the relevant courts to receive any money that is to the credit of the judiciary in the state's consolidated revenue fund directly[37]. While the holders of the positions specified in this section,[38] shall receive wages and other compensation as may be mandated by a House of Assembly, but not exceeding the amount as shall have been determined by the Revenue Mobilization Allocation and Fiscal Commission.[39] Finally, the constitution directs that any funds that belong to the judiciary in the Federation Account must be sent directly to the National Judicial Council in order for it to be distributed to the heads of court established for the Federation and states under section 6 of this constitution.[40]

A careful combined reading of the above provisions shows that finance meant for the Superior Courts are controlled by the Federal Government including States High Courts, Sharia Courts and Customary Courts of Appeal. It is to be noted that the amount standing to the credit of the judiciary is to be sourced from the consolidated revenue fund of the Federation and Federation account and not the states and is to be paid directly to the National Judicial Council for onward disbursement to the heads of Courts and not that it will be directly disbursed to the head of courts of the states. Again it is the recurrent expenditure of judicial officers including salaries and allowances that are to be charged upon the consolidated revenue fund of the federation not states. There is no provision for capital expenditure. By section 121 (3) of the constitution, any amount standing to the credit of the judiciary shall be paid directly to the heads of the courts in the state.

Despite the above, the judiciary has been starved of funds to execute their activities. There is prevalent poor remuneration, poor infrastructure which necessitated various court cases. Thus in *Olisa Agbakoba v Federal Government of Nigeria & 2 ors*[41], *Judiciary Staff Union of Nigeria v Government of 36 States in Nigeria,*[42] *and Olisa Agbakoba v AG Ekiti State,*[43] the trial courts held that

[36] Section 84 (7), Ibid.
[37] Section 121 (3), Ibid.
[38] Section 121 (4), Ibid, (the offices include the State Judicial Service Commission).
[39] Section 124 (1) Ibid.
[40] Section 162 (9) Ibid.
[41] FHC/Abj/CS/63/13.
[42] FHC/Abj/CS/667/13.
[43] NAD/56/2013.

monies meant for the judiciary should be credited to the National Judicial Council directly from the Consolidated Revenue Fund and Federation Account. However, the Governors were adamant in granting fiscal autonomy to the Judiciary.

In view of the sustained advocacy mounted by judicial stakeholders on the need to allow fiscal autonomy for the Judiciary, President Buhari on May 22, 2020, signed Executive Order 10 (EO10) meant to enforce the implementation of the 4th Alteration to the Constitution and provide a practical framework for the legislative and judicial arms of state governments to have financial autonomy.

The order provides as follows:

> In the exercise of the powers of the Executive President of the Federal Republic of Nigeria, President Muhammadu Buhari pursuant to Section 5 of the 1999 Constitution of the Federal Republic of Nigeria, he decides to give effect to the provision of (Fourth Alteration, No.4) Act, 2017 ACT No.7 Constitution of the Federal Republic of Nigeria 1999, by issuing the Executive Order No. 00-10 of 2020 granting the States Legislature & Judiciary financial autonomy.

The Fourth Alteration, which amended Section 121(3) of the Constitution, provides that any amount standing credit of the (a) House of Assembly of the state, and (b) Judiciary, in the Consolidated Revenue Fund of the state shall be paid directly to the said bodies respectively; in the case of the Judiciary, such amount shall be paid directly to the heads of the courts concerned. Prior this amendment, Sections 81 and 121(3) of the Constitution provided autonomy for only the judiciary. Although EO10 was hailed by many, most state governors kicked against it, arguing that it amounted to a violation of the principle federalism.

The Supreme Court, however, took the wind out of the sail of the EO10 when, in a judgment on February 11, 2022 it struck down the order. In a split decision of six-to-one, the apex court declared as unlawful and unconstitutional the EO10 on the grounds that President Buhari exceeded his constitutional powers in issuing it[44].

In the lead majority decision, Justice Musa Dattijo Muhammad said:

> This country is still a federation and the 1999 Constitution it operates is a federal one. The constitution provides a clear delineation of powers between the state and the Federal Government. The President has overstepped the limit of his

[44] Suit No SC/CV/655/2020 filed by the 36 state governments against the Federal Government.

> constitutional powers by issuing the Executive Order 10. The country is run on the basis of the rule of law.[45]

The court further held that capital project for the state three superior courts cannot be funded by the Federal Government but should continue to be funded by the State Government.

It is to be noted that only Justice Uwani Abba-Aji in her dissenting judgment agreed with President Buhari on the Executive Order 10 and added that it was in line with the provision of the constitution to enforce the separation of powers and functions. She held as follows:

> We are not unaware of the hanky panky, subterfuge played by state governors against the independence and financial autonomy of state judiciary. It is a pitiable eyesore what judicial officers and staff go through financially at the hands of state executives, who often flout constitutional and court orders to their whims and caprices. Thus the Presidential Executive order 10 is meant to facilitate the implementation of the constitutional provisions. The Executive order is to aid the states legislature and judiciary in curing the constitutional wrong of their financial autonomy which the states have always denied. This is not unconstitutional.

However, as plausible as her reasoning can be, the decision of the majority is the law. The judgment of the Supreme Court thus effectively shut out the gains in judiciary fiscal autonomy in the cases of *Agbakoba and JUSUN*.

The financial position of the courts is made worse as it cannot even retain the proceeds of filing charges it makes from litigants. In *Inuwa v Governor of Gombe State*[46] the Court of Appeal held that by virtue of section 120 (1) of the 1999 Constitution which requires all revenue or monies payable to the state should be paid into one consolidated revenue fund, the implication of this is that the judiciary has no authority over revenue generated from all fines and dues other than to pay same into the consolidated revenue fund account of the state.

From the above discourse, it is clear that true fiscal federalism is imperative if the judiciary is to function properly within its jurisdiction.

5. The Imperative for True Fiscal Federalism to Judicial Reforms

The judiciary according to common parlance is the "last hope of the common man". How true is this statement? One can imagine what will happen to the

[45] Justices Centus Nweze, Ejembi Eko, Helen Ogunwumiju, Emmanuel Agim and Adamu Jauro agreed with the lead majority judgment.
[46] (2019) LPELR 47079 CA

society without an impartial judiciary. Within the legal profession, there have been clamours for the reform of the judiciary if it should continue to dispense justice according to law without fear or favour and hold its prestige with the other arms of Government. Over the years, especially with the coming into effect of the 4th Republic, there are noticeable areas the judiciary needs judicial reform. These include independence of the judiciary especially fiscal independence, situating the judiciary according to Federal Principles, quality of appointment of judicial officers, speedy trial of causes and matters, quality welfare of the judges, quality infrastructure and equipment, strengthening the appellate jurisdiction for superior courts of the states.

5.1 Fiscal Independence of the Judiciary

It is clear that many legal commentators have been clamouring for judicial independence especially in its monetary accruals. Despite the clear provision of the constitution that amounts standing to the credit of the judiciary be paid directly to the judiciary, the state governors have refused to let go. The Executive arms of Government hold their monies so that they can dictate to the judiciary and make its independence a mirage. He who pays the piper dictates the tune thus undermining the independence of the judiciary. A reform to this will require enacting the provisions of the Executive Order 10 of 2020 into the Constitution.

It is pertinent to note that of recent, a law attempting to stipulate salaries, allowances, and fringe benefits of judicial office holders in Nigeria has passed second reading in the Senate. [47] In line with Section 58(2) of the Federal Republic of Nigeria 1999 Constitution, as amended, President Bola Tinubu sent the bill, which is an executive bill, to the two Houses of the National Assembly. In summary, the law aims to end the long-term stagnation in judicial officers' compensation by prescribing salaries, allowances, and fringe benefits. The goal of the measure is to standardize the pay scale, benefits, and other allowances for holders of judicial officers at the federal and state levels. The proposed legislative framework is expected to yield substantial improvements in the areas of the judiciary's ability, independence, and welfare. These have been long-standing and controversial topics of discussion in the public sphere. It will further secure its independence in carrying out its

[47] Vanguard, 'Bill to Prescribe Salaries, Allowances, of Judicial Officers, Pass 2nd Reading' <https://www.vanguardngr.com/2024/05/bill-to-prescribe-salaries-allowances-of-judicial-officers-pass-2nd-reading> accessed 13 May 2024.

constitutional position as adjudicator of the temple of justice, as well as bringing about swift reforms and innovation in the judiciary[48].

5.2 Situating the Judiciary According to Federal Principle

The Federal principle is that the Central Government and the Federating units share powers as enumerated in the Constitution with each being independent of the other. In our unitary federal constitution of 1999 the judiciary is also placed along the line of unitary system. In the United States where we copied our Presidential system, the states have their Appeal and Supreme Courts, why not Nigeria? In the 1st Republic in line with Federal principles, the Western Region had its own Western Region Court of Appeal. The states should have its own Court of Appeal and Supreme Court for state causes and matters rather than the said matters moving to the Federal appellate courts i.e the Federal Court of Appeal and Supreme Court. This will help in the expeditious determination of matters brought to these courts. But in a situation whereby matters move from Area and Customary courts to the federal supreme courts do not help the federal principles in any way.

5.3 Quality of Appointment of Judicial Offices

There is a clamour of appointment and removal of judges be removed from the Executive and retained within the confines of the National Judicial Council in conjunction with the State Judicial Service Commission. This is to foster quality appointment of judicial officers. In certain cases, the interference of the Executive and the head of the courts has resulted in the selection of unqualified individuals, which has contributed to the bad administration of justice.

Recently, due to accusations of abuse of power and partiality in the performance of his duties, the Civil Society Consortium on Judicial Accountability (CSCJA) demanded that Justice Olukayode Ariwoola, the Chief Justice of Nigeria (CJN), retire immediately.[49] The CJN allegedly nominated his biological offspring as judicial officers.[50]

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[48] Ibid.

[49] G Tsa, 'Alleged Abuse of Office: Lawyers Call on CJN Ariwoola to Resign' *The Sun* <sunnewsonline.com> accessed 11 May, 2024.

[50] They said the CJN appointed his daughter Oluwakemi Victoria Ariwoola as a judge of the Federal Capital Territory's (FCT) High Court and his son Olukayode Ariwoola Junior as a judge of the Federal High Court.

It is our contention that the legal system must uphold the highest ethical standards to ensure that all citizens receive fair and equitable treatment under the law. Nepotism in judicial appointments not only violates principles but also threatens to weaken the rule of law in Nigeria. It is imperative that the judiciary remains free from personal bias and favouritism to safeguard the principles of justice.

5.4 Speedy Trial of Causes and Matters

The average years a non- political or election case goes from the trial court, be it Area Courts or Customary Courts and High Courts or National Industrial Courts to the Supreme Court is not less than 15 years. The introduction of frontloading and Trial Scheduling at trial superior courts, have not helped matters. If more Judges are appointed from the Supreme Courts to the lower courts with the number of turned out cases in mind, it will go a long way in enthroning speedy trial of cases in our courts. The Supreme Court should be subdivided to judicial divisions across the six geo-political zones of the country and the Court of Appeal expanded for speedy trial of cases.

5.5 Quality Welfare to the Judges

Welfare of Judges in terms of remuneration and allowance need reforms. This calls to mind the recent decision of the National Industrial Court in Sebastain Hon vs National Assembly & ors where the Justice Obaseki Osagie ordered the upward review of judges salaries to the following:-

i. Chief Justice of Nigeria = ₦10 million monthly
ii. Justices of the Court of Appeal = ₦9 million monthly
iii. Justices of the Court of Appeal and Heads of Superior Court of Records = ₦8 million monthly
iv. Other Judges of the Superior Court of record = ₦7 million monthly

Whether rightly or wrongly, the judgment shows that reform is needed in this area of quality welfare.

5.6 Quality Infrastructure and Equipment

Our Judges still sit in dilapidated court rooms and without modern equipment to assist them in proceedings. Our Judges still write in long hand. While there is improvement in federal courts, the States Courts are still worse off, thus necessitating reform.

5.7 Strengthening the Appellate Jurisdiction of Superior Courts of the State.

The Superior Courts of the State are the High Court, Sharia Court of Appeal and the Customary Court of Appeal. For the High Court it sits on its appellate

jurisdictions in Asizzes instead of a continuous sitting. This hampers smooth dispensation of justice. For the Sharia and Customary Courts of Appeal, they only have jurisdiction if the Grounds of Appeal is on questions of facts alone, yet the justices are trained lawyers who naturally understand question of law, mixed law and fact or facts. Most grounds of appeal are certainly an intertwine of law, mixed law and fact or facts and so to limit them to questions of facts alone hampers justice delivery, thus needing reform.

But the crux of the matter is that without adequate funding, the above needed reforms cannot be achieved. This goes to the fact that unless the states have adequate taxable items in the fiscal regime of the federating units in the constitution, to enable it allocate enough funds to the state judiciary, there cannot be judicial reform. The courts too should help the country by interpreting constitutional provisions towards true fiscal federalism. It is in this regard that we commend Hon. Justice Stephen Dalyop Pam of the Federal High Court Port Harcourt when he made a landmark proactive judgment which improved the fiscal base of Rivers State in the area of VAT collection. In an originating summons filed the Rivers State Government,[51] the court held as follows:

1. That the Federal Government is only empowered to enact laws in relation to stamp duties, taxation of income, profit and capital gains only. The 1999 Constitution has specifically designated the taxes that the Federal Government is empowered to impose and collect taxes in Items 58 and 59 of Part 1 of the 2nd Schedule and this must be read to exclude other species of taxes like VAT, withholding tax, education tax and technology.
2. That the provision of Item 7 (a) and (b) of Part II, 2nd Schedule to the Constitution limited the entities to whom the National Assembly can delegate the power to collect taxes in capital gains, income taxes or profits of power, other than companies, documents or transaction by way of stamp duties to only a State Government or a State Government authority. Any delegation to any other person or entity apart from State Government authority shall be null and void.
3. In view of the Court of Appeal judgment in *Uyo Local Government v Akwa Ibom State Government & Anor* (2020, LPELR 49691 CA, where the Court of Appeal nullified the Taxes and Levies Act for being inconsistent with the provision of the 1999 Constitution, the Taxes and Levies Act is unconstitutional.

With the above judgment one can imagine the rise in monetary accruals to Rivers State and which will naturally bear down to the improvement of the Judiciary's financial allocations.

[51] *Attorney General for Rivers State v Federal Inland Revenue Service & Anor*, Suit No FHC/PH/CS/149/2020.

If federalism is an arrangement whereby government powers within a country are shared between a national government and a number of regional or states governments all equal in status, then from the analysis of fiscal federalism enshrined in the 1999 Constitution, it is very clear that fiscal functions are arbitrarily skewed in favour of the national government to the detriment of the states. And without true fiscal federalism, there is no way judicial reform can be achieved. It is therefore imperative to uphold true fiscal federalism in order to have in place judicial reform.

6. Recommendations

There must be a sitting down again by all the federating units with a view to redistributing the revenue sources and revenue allocations between the national government and the states. We do not see why fiscal functions on drugs and poisons, finger prints, identification and criminal records, incorporation of companies, insurance, labour and trade unions, shipping and navigation on the River Niger and other waterways, meteorology, mines and solid minerals, patents, trademarks, trade or business names, industrial designs and merchandise marks, poisons, public holidays, quarantine, railway, services and execution of civil and criminal processes, judgments, decrees and orders in states, stamp duties, taxation of income, profits and capital gains, tourist traffic, formation, annulment and dissolution of marriages, produce, standards of goods and commodities, registration of business names, water sources affecting more than one state, weights and measures, broadcasting and television be under the Exclusive Legislative list. These items should be in the states lists exclusively.

Residual matters should be identified and exclusively added to the states. Section 4 (4) (b) of the constitution provide that in any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution. Unfortunately there is no list called Residual List in the Constitution. However, in *AG Ogun State v Aberuagba & ors*[52], the Supreme Court held that by residual power within the context of section 4 is meant what was left after the matter in the Exclusive and Concurrent Legislative Lists and those matters which the Constitution expressly empowered the federation and the states to legislate upon had been subtracted from the totality of the inherent and unlimited powers of a sovereign legislature. That the Federation had no power to make law in residual matters. Over the years what are residual matters have been pronounced upon by the courts. Thus in *Attorney General of Lagos v Attorney*

[52] (1985) LPELR 31164 SC.

General of the Federation[53] the Supreme Court held that town and regional planning is a residual matter for the states and in the FCT it is a residual matter for the National Assembly. Similarly the public service of a state[54], the offences of armed robbery[55] power to enact commissions of inquiries[56], pool betting and casinos[57] etc have been pronounced as residual matters. A cue should be taken from the 1960 and 1963 Constitutions which specifically included matters such as Local Government, Primary and Secondary Education, Health, Lands and Properties, Chieftaincy and Local Customs, Contract and Torts as residual matters. These and more can be identified and included in the states' legislative lists.

Fiscal independence must be guaranteed to the judiciary. To that extent the provisions of Executive Order No 10 should be inserted in the constitution to protect the Federal and State Courts. This will automatically override the Supreme Court decision in *A.G Abia State & 35 ors v AG Federation.* The courts should be allowed to retain at least 50% of their internally generated revenue, so that they can channel it towards recurrent and capital expenditures bearing down on the reforms in the judiciary.

7. Conclusion

This paper examined the fact that without true fiscal federalism put in place in Nigeria, there cannot be meaningful reforms in the judiciary. The concern of stakeholders in the judicial system is for more fiscal functions to be vested in the states to increase their revenue base, and for more funds to be vested in the judiciary to enable it initiate laudable reforms in the justice sector. When the states are empowered financially, there will be positive bearing on the judiciary since Nigeria operates a constitutional democracy.

[53] (2003) LPELR 620 SC.
[54] *Cil Risk & Assets Management Ltd v Ekiti State Govt & Ors* (2002) LPELR 49566 SC.
[55] *Agosu v State* (2014) LPELR 23107 CA.
[56] *Amaechi v Governor of Rivers State & ors* (2017) LPELR.
[57] *Edet v Chagoon & Anor* (2007) LPELR 8164 CA.