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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

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[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.

[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.

THE EPIDEMIC OF TORTURE AND THE MENDACITY OF THE NIGERIAN TORTURE ACT, 2017

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Abstract

The prevalence of torture, cruel, and other inhuman and degrading treatment on crime suspects in Nigeria and around the globe is alarming and gradually returning humanity to a barbaric state. It is an affront to the dignity of the human person, truncating several international and domestic laws against torture. Nigeria ratified and domesticated the United Nations Treaty against Torture in 2001. Recently, the Nigerian government enacted the Anti-Torture Act 2017, prohibiting torture as a means of extracting information from suspects. It is petrifying that notwithstanding international and domestic laws against torture, the Nigerian government, its security operatives, and other security outfits are brazenly basking in the ugly culture of perpetrating various acts of torture on citizens. This article aims to showcase the government and its security agents as central and major actors in the effective prohibition and prevention of torture in Nigeria. The objective is to bring to the limelight the futility of international conventions on torture and the Act 2017 without implementation and government cooperation. The research adopts doctrinal designs using an analytical approach. This article opines that there is a need for government and security agents' collaboration in the effort to curb the reign of torture in Nigeria. Our finding is that without a committed resolve by government and security actors to stop the use of torture as a crime-solving tool in Nigeria, the Anti Torture Act 2017 will remain a façade and there may be no end to torture and violation of the rights of suspects in Nigeria.

Key Words: The United Nations Treaty against Torture, Implementation, Government and Security Agents

1. Introduction

United Nations Convention against Torture and other cruel, inhuman or degrading treatment 1984[1] aims at preventing torture on persons among other things. It requires that States take effective measures to prevent torture in any territory within their jurisdiction. The treaty equally forbids States from transporting persons to any country where there is a reason to believe that they

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[1] The 'Torture Convention' was adopted by the United Nations General Assembly on 10 December 1984 in Resolution 39/46, but the Convention entered into force on 26 June 1987 after ratification by 20 States.

will be tortured.[2] For some time now, there has been a widespread culture of torture across the globe and Nigeria is not an exception. Human rights, especially those of suspects, detainees and prisoners are often trampled upon by government, law enforcement agents and other security outfits. Instances abound where persons placed under investigation or held in custody of security agents or by persons in authority are subjected to physical harm, torture, threat or intimidation and acts that impair their free will. Many of the interrogators and law enforcement agents adopt torture mechanism as a 'necessary' tool for extracting information from suspects contrary to existing laws.[3] They often view torture, cruel and degrading treatments as a punishment or as a way to gain life-saving information in spite of the provision of the Evidence Act.[4] Aside its psychological effect on its victims and the society at large, torture is prohibited by various international Conventions[5] as a form of punishment so that its perpetrators are liable to criminal sanctions.

Interestingly, Nigeria is a party to the United Nations (UN) Convention against Torture and other cruel, inhuman or degrading treatment 1984. Additionally, the Nigerian government in 2017 enacted the Anti Torture Act, prohibiting acts of torture of any kind. It is rather worrisome that between 2017 and the present time 2024, the prevalence of torture in the country by government and its security operatives is unimaginable. This article is in five parts. Part I introduced the article and gave the meaning and judicial interpretation of torture. Part II examined domestic and international legislations on torture. Part III discussed the epidemic of torture in Nigeria and the mendacity of the Anti-Torture Act 2017. Part IV discussed the Causes of Torture in Nigeria. Part V is on recommendation and conclusion.

2. The Legal Meaning and Judicial Interpretation of Torture

Torture has been defined as the infliction of intense pain on the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure.[6] Under International Humanitarian Law (IHL) and International Human Rights

[2] Nigeria ratified and domesticated the United Nations Convention against Torture in 2001. See International Rehabilitation Council for Torture, https://irct.org Nigeria, accessed 25 March 2023.

[3] The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment; the Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration); Administration of Criminal Justice Act 2015; the Nigerian Torture Act 2017 etc.

[4] See also s 29 of the Evidence Act 2011.

[5] Under the Rome Statute of the International Criminal Court 1998, torture is an international crime under article 7(1) (f). it is a crimes against humanity as well as a war crime.

[6] B A Garner, *Black's Law Dictionary*, (9th edn West Group St Paul Minn, 1999) 1498.

Law (IHRL), torture comprises: any act by which severe pain or suffering, whether physical or mental, is inflicted on a person; the act must be intentionally inflicted; and the act must be instrumental for such purposes as obtaining from the individual or a third person information or a confession, or punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or intimidating him/her or a third person, or coercing him/her or a third person, or for any reason based on discrimination of any kind[7]. Inhuman, cruel treatment on the other hand is the infliction of severe physical or mental pain or suffering, which goes beyond mere degradation or humiliation.[8] What actually distinguishes torture from other forms of ill-treatment is the outrages upon personal dignity. These are acts that humiliate, degrade or otherwise violate the dignity of the person to such a degree as to be generally recognized as an outrage upon personal dignity. Unlike torture, there is no requirement that these acts be inflicted for a specific purpose.

Article 1.1 of the United Nations Convention against Torture 1984 defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.

It is deemed that the terms 'inherent in or incidental to lawful sanctions' refer to sanctions authorized by international law. The International Criminal Tribunal for Rwanda in a landmark judgment in *Prosecutor v Jean-Paul Akayesu*[9] defined torture thus:

> The word 'torture', as set forth in Article 3(f) of its Statute, in accordance with the definition of torture set forth in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or

[7] Ibid.
[8] Ibid.
[9] Case No. ICTR-96-4-T, Judgment (2 September 1998). Akayesu was involved in several episodes of torture in violation of Art. 4 of the Statute.

> with the consent or acquiescence of a public official or other person acting in an official capacity.

According to the Tribunal**,** acts of torture could also be addressed under the crime of genocide, which makes punishable the causing of serious bodily or mental harm to members of a national, ethnic, racial or religious group. In *Attorney Gen. of Isreal v Eichmann*,[10] Israeli courts held that serious bodily or mental harm could be caused by the enslavement, starvation, deportation and persecution and by detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture. Thus, any intentional infliction of unlawful pain on a suspect amounting to violation of his right and degradation of his person amounts to torture and it is prohibited by law.

Under the Rome Statute 1998, the crime of torture is a crime against humanity according to Article 7 (1) (f) of the Statute. Thus, Article 7(2) (e) defines 'Torture' as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

In Nigeria, the Constitution of the Federal Republic of Nigeria 1999(Fourth Alteration) did not define torture but it provides *inter alia*:

> Every individual is entitled to respect for the dignity of his person and accordingly (a) No person shall be subjected to torture, cruel, inhuman and degrading treatment, (b) no person shall be held in slavery or servitude; and (c) no person shall be required to perform forced or compulsory labour.[11]

The Administration of Criminal Justice Act (ACJA) 2015[12] also provides for humane treatment of arrested suspects. It states among other things that 'A suspect shall 1(a) be accorded humane treatment, having regard to his right to the dignity of his person; and (b) not be subjected to any form of torture, cruel, inhuman or degrading treatment'. Thus, the ACJA strikes a balance between the duties of law enforcement agents in carrying out their function of arrest and protection of the rights of the arrested suspect in their custody.

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[10] (1961) Isr DC 45, at 3; Crim App, Attorney Gen. of Isr. v Eichmann, (1962) Isr SC 16, at 2033).

[11] Constitution of the Federal Republic of Nigeria 1999(Fourth Alteration) s 34 (1) (a), (b) & (c).

[12] The Administration of Criminal Act 2015 (ACJA) was enacted to ensure that system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy administration of justice, protection of the society from crime and protection of the rights and interests of suspects, the defendant and the victim. See also *Federal Republic of Nigeria v Honourable Farouk M Lawan* (2018)LPELR-43973(CA).

Furthermore, in 2017 the Nigerian government enacted the Anti-Torture Act prohibiting torture. Section 2 (1) of that Act, defines torture and provides thus:

> Torture is deemed committed when an act by which pain and suffering, whether physical or mental, is intentionally inflicted on a person to – (a) obtain information or confession from him or a third person; (b) punish him for an act he or a third person has committed or suspected of having committed; or (c) intimidate or coerce him or a third person for any reason based on discrimination of any kind. When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity provided that it does not include pain or -suffering in compliance with lawful sanctions.

Section 2 (2) of The Anti-Torture Act 2017 listed out acts that constitute Torture as follows:

(a) Physical torture, such as -

(i) systematic beatings, head-hangings, punching, kicking, striking with rifle butts and jumping, on the stomach,
(ii) food deprivation or forcible feeding ·with spoiled food, animal or human excreta or other food not normally eaten,
(iii) electric shocks,
(iv) cigarette· burning, burning by electrically heated rods, hot oil, acid, by the rubbing of pepper or other chemical substances on mucous membranes, or acids or spices directly on the wounds,
(v) the submersion of the head in water or water polluted with excrement, urine, vomit or blood,
(vi) being tied or forced to ·assume fixed and stressful bodily positions,
(vii) rape and sexual abuse, including the insertion of foreign bodies into the sex organs or rectum or ·electrical torture of the genitals,
(viii) other forms of sexual abuse,
(ix) mutilation,
(x) dental torture or the forced extraction of the teeth,
(xi) harmful exposure to the elements such as sunlight and extreme cold,
(xii) the use of plastic bags and other materials placed over the head to the point of asphyxiation,
(xiii) the use of psychoactive drugs to change the perception, memory; alertness or will of a person, such as administration of drugs to induce confession or reduce mental competency, or the use of drugs to induce pain or certain symptoms of disease, or

(b) Mental or psychological torture, such as- (i) Blindfolding,

Under section 3 of the Act, no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture. It prohibits secret detention facilities, solitary confinement, incommunicado detentions where torture may be carried out. Section 3 categorically states that evidence obtained from torture is inadmissible in any court except for use against a person accused of torture. This is in line with section 29 of the Evidence Act 2011 which does not in any proceeding in court admit in evidence any confessional statement obtained by oppression of the person who made it. The prosecution must ensure that the statement which he intends to tender in evidence was not extracted from the defendant by any means of oppression[13]. In sub section (5) of the section 29, the Act clearly stated that 'oppression' includes torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture.

If evidence obtained through torture is not admissible in any court, why then do law enforcement agents freely trade in torture? In all the definitions above, one statement has been remarkably consistent that 'Torture' does not include pain or -suffering in compliance with lawful sanctions. The question then is what is a 'lawful sanction'? According to the Concise Oxford Dictionary,[14] the word 'lawful' means conforming to, permitted by, or recognised by law or rules. For the English Thesaurus[15] what is lawful is constitutional, legal, and legalised. 'Sanction' on the other hand is a threatened penalty for disobeying a law or rule.[16] From the analysed definitions of 'lawful' and 'sanction', it is therefore right to say that 'lawful sanction' is a constitutional and legally recognised threatened penalty for disobeying a law or rule. Legally speaking, it is the statute which established and defined a crime that states the sanction for perpetrators of such crimes. The lawful sanction for any crime is the penalty legally permitted and recognised by the law that defined that crime and not the one invented by any law enforcement agent, security outfits or individual. It does not include any punishment meted out through jungle justice or outside the ambit of the law.

Statutorily, section 34 of the Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration) provides that every individual is entitled to respect for the dignity of his person and accordingly (a) No person shall be subjected to torture, cruel, inhuman and degrading treatment. However, the constitution does not explicitly state that the freedom from torture, cruel and inhuman treatment is absolute. The constitutional provision does not seem strong and elegant enough

[13] S 29 (2)(a) and (5).

[14] C Soanes, and A Stevenson , *Concise Oxford Dictionary* , 11th edn (Oxford University Press 2007) 807.

[15] Geddes and Grosset, *English Thesaurus* (Scotland: David Dale House New Lanark ML II 9D 2006) 145

[16] C Soanes, and A Stevenson, *supra* 1272.

to address the reckless acts of torture by security operatives. Perhaps that has been the reason for the continuous reliance on the use of torture and degrading treatment by security actors as an operative tool. Prior to the Anti-Torture Act 2017, there was no law in Nigeria with the sole objective to prohibit and punish torture and other forms of cruel, inhuman and degrading treatment. Thus, the Anti-Torture Act is a welcome development if it is diligently enforced.

3. Torture and International Treaties on Torture

Torture and other forms of degrading treatment are grave breaches of the Geneva Conventions 1949 and their additional Protocols. It is a war crime in both international and non-international armed conflicts and a serious violation of international humanitarian law. In fact, from The Hague Regulations to the Rome Statute, torture is prohibited. The Hague Regulations, in its effort to protect the interest of detainees, state that prisoners of war are in the power of the hostile government, but not of the individuals or corps who capture them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property.[17]

The prohibitions on torture is enshrined in international and regional human rights instruments, such as the Universal Declaration of Human Rights 1948,[18] the International Covenant on Civil and Political Rights 1966,[19] the United Nations Convention against Torture 1984, and the United Nations Convention on the Rights of the Child 1989,[20] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950,[21] American Convention on Human Rights 1969,[22] African Charter on Human and Peoples' Rights 1981,[23] the Inter-American Convention to Prevent and Punish Torture 1985, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987; the Arab Charter on Human Rights 2004,[24] and the Human Rights Declaration by the Association of Southeast Asian Nations 2012[25] etc.

The Universal Declaration of Human Rights 1948 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[26] The four Geneva Conventions of 1949 and their Additional Protocols I and II of

[17] Art 4
[18] Art 5.
[19] Art 7.
[20] Art 37(a).
[21] Art 3.
[22] Art 5.2.
[23] Art 5.
[24] Art 8.
[25] Art 14.
[26] Art 5.

1977 extensively provide against torture. According to article 12 of the First Geneva Conventions of 1949, members of the armed forces and other persons mentioned in the following Article who are wounded or sick, shall be respected and protected in all circumstances. They shall be treated humanely and cared for by the party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created. Only urgent medical reasons will authorize priority in the order of treatment to be administered.

The Second Geneva Convention 1949 on the Wounded, Sick and Shipwrecked almost repeated Article 12 of the First Geneva Convention and provided *inter alia* that members of the armed forces and other persons mentioned in the Article, who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances.[27] The Third Geneva Convention 1949 in Articles 13, 17 and 87 respectively made very serious provisions on humane treatment of prisoners, including questioning of prisoners, all to protect the rights and interest of prisoners of war.

Article 13 of the Third Geneva Convention 1949 in its wisdom states that prisoners of war must at all time be humanely treated. It prohibits any unlawful act or omission by the detaining power that would cause death or seriously endanger their health while in custody and such will be regarded as a serious breach of the present Convention. It particularly prohibits the subjection of any prisoner of way to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. They must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.

In Article 17, the Convention reiterated specifically that no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Those who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind, and those who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service.

Article 17 is quite inspiring and protective. Without ambiguity it says that prisoners of war, who, owing to their physical or mental condition, are

[27] Art 12

unable to state their identity, shall be handed over to the medical service. It is instructive that the article did not say that such prisoners of war should be regarded as invalid and therefore exterminated but the article rather made a befitting alternative provision that will take care of their health first. This serves as a lesson for all security actors and law enforcement agents. It emphasises the sacredness of life and the need to respect the rights of suspects at all material time.

Furthermore, Article 87 of the Third Geneva Convention protects prisoners of war from being sentenced by the military authorities and courts of the detaining power to any penalties except those provided for in respect of members of the armed forces of the said power who have committed the same acts. Collective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden. The detaining power is prohibited from depriving any of them of his rank, or prevent any from wearing his badges.

Also, in Article 27, the Fourth Geneva Convention prohibited torture of any kind and extensively provided for the rights of 'protected' persons. Hence, they are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. In article 32, it prohibited corporal punishment, torture, and prohibited the high contracting parties from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. The two Additional Protocols to the four Geneva Conventions of 1977[28] also condemned torture and inhuman treatment.

Interestingly, the UN Code of Conduct for Law Enforcement Officers 1979[29], in a tone of finality prohibited torture and provided that no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor invoke superior orders or exceptional circumstances such as state of war, a threat of war, a threat to national security, internal instability or any public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment[30]. This is in line with article 3 of the Anti-Torture Act 2017. Even at international level, the force is not taken for granted. Hence, the international community

[28] Additional Protocol I of 1977 Arts 75(2)(a)(ii); Additional Protocol II of 1977 Arts 4(2)(a).
[29] It was adopted by the General Assembly resolution 34/169 of 17 December 1979.
[30] Art 5

under the umbrella of the UN produced a code of conduct for the force and specifically prohibited them from hiding under 'superior orders' or exceptional circumstances to inflict torture on protected persons. Similarly, in international criminal law, the defence of superior order is a conditional defence, only available in war times and there must be superior-subordinate relationship.[31] In *Prosecutor v Einsatzgruppen*,[32] the military tribunal held *inter alia* that:

> the obedience of a soldier is not the obedience of automation. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery… And what the superior officer may not militarily demand of his subordinate, the subordinate is not required to do. Even if the order refers to a military subject it must be one which the superior is authorised under the circumstances to give. The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes with malice of his own, he may not plead superior orders in mitigation of his offence. If the nature of the ordered act is manifestly beyond the scope of the superior's authority, the subordinate may not plead ignorance of the criminality of the order.

In Nigeria, superior order is only a defence where the order comes from a competent authority, whose order the other is bound by law to obey, and which order is not manifestly unlawful.[33] Most Nigerian law enforcement agents rely on 'superior order' to inflict torture on suspects and even to indulge in extrajudicial killing of suspects forgetting that any order that command the killing of another or infliction of torture outside the due process of law is manifestly unlawful and therefore should not be obeyed.

The United Nations Security Council in adopting the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) 1993 also listed 'torture or inhuman treatment, including biological experiments' as a grave breach of the Geneva Conventions.[34] A year later, the Security Council included torture as a crime against humanity in the modified definition found in the Statute of the

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[31] Art 33 of the ICC Statute. And (a) the person was under a legal obligation to obey orders of the government or the superior in question, (b) the person did not know that the order was unlawful, (c) and the order was not manifestly unlawful. See also *R v Smith* (1900) 17 Supreme Ct. (Cape of Good Hope) 561 per Solomon J.

[32] See K Kittichaisaree, *International Criminal Law* (U S A: Oxford University Press, 2001) 26.

[33] The Criminal Code S 32 (2). *State v Nwaoga* (1972) 1 All NLR (Pt 1) 149.

[34] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* 47 and Art 5 U N Doc S/25704 (May 3, 199347 and Art 5, UN Doc S/25704.

International Criminal Tribunal for Rwanda (ICTR) 1994.[35] Progressively, in 1998 the Rome Statute of the International Criminal Court (ICC) included torture and other inhuman treatment to be war crimes in both international and non-international armed conflicts and specifically categorized torture as a crime against humanity [36]. The Statute came into force in 2002.

The central characteristic of torture is that it is an intrinsic part of official behavior and the practice is wrongly perceived as a powerful institutional expression of state power, craft, and social control. The official use of torture functionally shows that the state uses these powers as critical components of security to intimidate or sometimes even eliminate its enemies, or suspected enemies. It is submitted that when torture becomes a routine practice in governance, the state does not represent the moral order of the community, but instead becomes the repository of authorised violence and impermissible coercion. This of course does not give credit to any government. In such situations, power is often achieved through brute forces which unusually claim lives and always end in blood shed. Winston would say that when power is maintained by practices of torture and ill treatment, the claim to state legitimacy is illusory, or weakened if not impossible.[37] It is trite that any functional government with well-trained law enforcement agents in their areas of specialty knows very well when to apply skill and expertise to elicit relevant information from suspects and the general public without using violence or resort to torture. Torture is the exception rather than the rule.

4. The Prevalence of Torture in Nigeria

According to the Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration), every individual is entitled to respect for the dignity of his person, and no person shall be subjected to torture or to inhuman or degrading treatment. [38] Though the constitutional provision against torture is not comprehensive, obviously, the section does not contemplate that torture should be used as a tool for solving crime issues in Nigerian. Thus, the Anti-Torture Act 2017 in the effort to fill existing legislative gaps and protect the rights of suspects and victims of torture, strongly and explicitly criminalised acts of torture, cruel, inhuman and degrading treatment. [39]

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[35] William A Schabas, *The Crime of Torture and the International Criminal Tribunals*, 37 Case W Res J Int'l L (2006) 349. Available at https://scholarlycommons.law.case.edu/jil/vol37/iss2/11 accessed 22 February 2023.

[36] Art 8(2)(a)(ii) and 8(2)(c)(i) and (ii); (Art 7(1)(f) and (k).

[37] Winston P Nagan and Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*,14 Harvard Human Rights Journal 87 (2001), *available at* http://scholarship.law.ufl.edu/facultypub/615 accessed 22 April 2024.

[38] Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration) S 34(1) (a).

[39] See S 3 of the Act.

Notwithstanding that Nigeria is signatory to the United Nations Treaty against Torture, Nigeria's security forces have continued to violate the human rights and fundamental freedom proclaimed in the declaration, including the 1999 Constitutional provision against torture and the Anti-Torture Act 2017 with impunity. It is most painful that Nigeria's security forces allow bandits, culprits and criminals to move around the streets of Nigeria unfettered, while they arbitrarily arrest, detain, wrongly accuse and torture innocent citizens to death.

Before the advent of the Anti-Torture Act 2017, on 5 July 2011, the family of one Mr. Nwakamma of Umuocho village in Osisioma Ngwa Local Government Area, cried that policemen tortured their father to death for an offence he did not commit.[40] The police, acting on the instruction of Assistant Commissioner of Police, arrested Nwakamma and his three sons and the wife for alleged kidnap of one Adaugo, who was later released by the kidnappers at a ransom. After conducting an identification parade of these suspects before Adaugo. Adaugo clearly exonerated the suspects and told the police that those who kidnapped her were Ugochukwu and Nnanyereugo. The police would not listen because they were thirsty of blood. The officer in charge of anti- robbery invited the old man, asked another police officer to bring cutlass and rope and told the children to come and bid their father farewell and see how their father would die. Just as was said, not long after that comment, the children heard their father crying like a child until he could no longer speak. The police later invited the youngest son to come and see his father. He went in and saw Mr Nwakamma naked on the ground at the brink of death with faeces scattered all over his body. He called his two other brothers to come and help him wash their father at the command of the police. While they were washing him, they saw several deep cuts all over his body but he managed to tell them that from what the police did to him, he might not survive, thereafter he looked into space and died. Imagine such brutality and the agony of the family watching their father die in such a gruesome manner for an offence he did not commit. Nigeria Police celebrate torture of suspects as if they are celebrating life even when it is uncalled for. Through this means they have sent so many to untimely death without qualms of conscience. Few suspects who survive the torture remain vegetable for life.[41]

A year before the coming into force of the Anti-Torture Act 2017, Saheed Eyitayo, aged 34, was tortured to death by Nigeria's secret police known as SSS on 4 April 2016. Painfully, the security operatives paid a paltry sum of N15 million compensation to the victim's family to keep them. The victim's friend

[40] C Onuoha, ' Inhuman Policemen Tortured Our Dad to Death for Offence he did not Commit' (*Daily Sun*,
Tuesday 5 July 2011) 16.

[41] F Asogwah and others, *Climate of Impunity; A Report on the use of Torture by the Nigeria Police* (Lagos: Civil
Liberty Organisation 2005) 38-57.

Jamiu was accused of cloning the phone number of ex-Lagos State Governor, Akinwunmi Ambode. Since they could not get the original suspect, they arrested the deceased and tortured him to death with bruises all over his body[42]. Nigerian law enforcement agents have devised various methods of inflicting torture on citizens including tying of arms and legs tightly behind the body, suspension by hands and legs from the ceiling or a pole, repeated and severe beatings with metal or wooden objects.

In the northern part of Nigeria such act of torture is called 'tabay'.[43] In the South East, the Okuzu SARS Headquarters then, was just a torture house of all sorts and in the West, the Lagos Kirikiri Prison is a nightmare and others. The challenge is that the masses are beginning to embrace this rascality and cruelty, and if nothing is done timeously, the rest will become history in the near feature. Instances abound where mobs had lynched suspects alleged to have stolen either perfume in a cosmetic shop or cell phone in phone shops.[44] Yet, the penalty for stealing is not death penalty. Section 390 of the Criminal Code[45] prescribes three years imprisonment for the offence of stealing if no higher punishment is provided. The Supreme Court in *Agala v Egwere*,[46] has held that generally, by section 6(1) and (5) of both the Constitution of the Federal Republic of Nigeria, 1979 and 1999 respectively, it is in the court and not to non-judicial bodies that judicial powers of the Federal Republic of Nigeria is vested.

From the year 2000 in Anambra State to about 2009, the activities of members of the Anambra State Vigilante Services known as the scorpion squad/the Bakaassi boys cannot be easily forgotten. They were formerly brought in, by former governor Mbadinuju and also used by former governor Chris Ngige. In Anambra then, it could be described as the axis of death, a point of no return of sorts. The Bakassi boys carried out their barbaric, cruel and brutal acts and killed indiscriminately[47].

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[42] Adejumo Kabir: 'Reign of Impunity: Nigeria's Security Forces Torturing Suspects to Death' <https:// https://humanglemedia.com/reign-of-impunity-1-nigerias-security-forces-tortu /org/en> accessed 22/4/24.

[43] Yuexin Li, 'Torture In Nigeria: Life In The Hellfire' https//theowp.org, accessed 20 October 2023. According to the investigations of BBC Africa Eye, dozens of images and videos work as clear evidence to show the illegal torture in Nigeria.

[44] The Guardian Newspaper of Saturday 19 March 2020 reported how a man who stole phone was lynched in Jos, Plateau State.

[45] The Criminal Code Schedule to the Criminal Code Act Cap C38 *Laws of the Federation of Nigeria (LFN) 2004*, applicable to Southern Nigeria, (to be herein referred to as the C C)

[46] All FWLR (Pt 532) 1609.

[47] The boys paraded Awka and environs with axes and pump action guns. See www.nairaland.com/nigeria/topic.314. Retrieved 20 February 2023.

On 20 September 2016,[48] an alleged notorious armed robber who was alleged to have held some communities in Imo State to ransom with his activities met his gruesome end when he was nabbed by an angry mob who lynched him. He sustained various degrees of injury from the angry mob and could not be saved by the police who rushed him to a hospital in Owerri, the state capital, where he was confirmed dead.

Despite various complaints by the citizens and human rights activist, government seemed reluctant to do anything towards stopping or cautioning the police or military in their indiscriminate use of torture. From history, it could be argued that government is sometimes behind these acts of torture and killings. For instance, in 1999, in Odi Bayelsa State, soldiers on a reprisal attack, tortured and killed over 250 people. Similar event had allegedly happened in Zakibam Benue State, before the Odi incident in retaliation for the killing of 19 soldiers.[49] Then the Niger-Delta Joint Task Force (JTF) expedition was launched in full force in an effort to arrest the action of the Movement for the Emancipation of the Niger Delta (MEND). In 2013, it was the Baga incident in Bornu State. The outcome of these incidents is better not imagined, shocking yet without apologies even over the Odi massacre.[50] For the Zakibiam incident government blamed the governor who requested for military action to arrest the situation then.[51] Later, it was the Jos-Plateau torture and massacre, then the python dance in the South-East[52] to torture and exterminate members of the Indigenous People of Biafra (IPOB) who are agitating for self determination and recently, the Lekki toll gate incident.

Amnesty International has raised alarm on the use of torture in the fight against insurgency by the Nigerian armed forces. In one of their February 2014 reports on cases of torture in Nigeria, Amnesty International's lamented on how the police and the military routinely use torture and other forms of ill-treatment as means of extracting information from suspects thereby breaking the spirit of these suspects or detainees. The body decried the admissibility and use in court of such information or "confessions" extracted from detainees through torture as evidence against the detainee. Amnesty International warned that the torture the Nigerian armed forces were exerting on detained to extract confessional

[48] www.pulse.ng/gist-/end-of the-road-deadly-killed-by-mob-in-imo/bwempbe, accessed 22 March 2023.

[49] I Isiguzo, 'The Police and Extrajudicial Killings: Police as your F(r)iend' (*Sunday Vanguard* 9 August 2009) 10.

[50] I Isiguzo, (note 50) 10.

[51] R Ejemba, 'Zakibiam Invasion-blame Akume not me' (*Daily sun* Tuesday 18 January 2011) 11.

[52] This was a torture without comparison where human beings were forced to defecate and eat their faeses and swallow it with dirty water from the gutter and all sorts of similar inhuman acts.

statements from them and the admissibility of such evidence by the court is contrary to national and international law.[53] The executive summary of Amnesty International report posits that Nigerian military forces have among other things committed countless acts of torture against innocent citizens to the detriment of individual suspects and national psyche. Hundreds have become victims of enforced disappearance, and thousands have died in military and police detention[54] as a result of starvation, torture and denial of medical assistance.

However, in 2017, Nigerian government feigned capacity to handle torture and so, the Anti-Torture Act 2017 was enacted[55]. Nonetheless, it appears the Anti-Torture Act is more like a mirage because in spite of the Act, torture is still escalating in Nigeria, yet no police or army officer has been charged under the Anti-Torture Act. The Nigerian authorities have failed to prosecute a single officer from the notorious Special Anti-Robbery Squad (SARS), despite strong evidence that its members have continued to use torture and other ill-treatment to inflict, punish and extract information from suspects. The perpetrators of the python dance, the Benue killings, Lekki shoot-out etc seem to have escaped justice notwithstanding Amnesty International's report of about 82 cases of torture, ill treatment and extra-judicial execution by SARS between January 2017 and May 2020.[56] Across the country, SARS officers turned their duty to protect Nigerians into an opportunity for extortion and stealing money, property and other valuables belonging to suspects and their families. Since 2016, Amnesty International has documented[57] about 15 cases where SARS officers arbitrarily confiscated suspects' property.

Soldiers in Operation Python Dance II, on 15 September 2017, invaded the Family house of Nnamdi Kanu, at Afaraukwu, Umuahia in search of the said Nnamdi Kanu, for reasons best known to them. According to Daily Sun Newspaper,[58] about 18 people lost their lives during the invasion[59] and the

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[53] Amnesty International, *Nigeria: Torture, cruel inhuman and degrading treatment of detainees by Nigerian security forces: Amnesty International's written statement to the 25th session of the UN Human Rights Council*, https://www.amnesty.org/download/Documents/.../afr4400120 14en.pdf, 2014. accessed on 20 March 2023.

[54] Amnesty International "Stars on their shoulders Blood on their Hands, War Crimes committed by the Nigerian Military" *Amnesty International Report* (2015) http://www.amnesty.org/download/Document/AFR4416612015 ENGLISHpdf. accessed on 20/3/2023

[55] The Anti-Torture Act 2017 was passed by the 8th National Assembly and signed into law by President Mohammadu Buhari on 29 December 2017.

[56] Osai Ojigho Nigeria, 'Horrific reign of impunity by SARS makes mockery of anti-torture law', https//www. Amnestyorg/en/latest accessed 5 May 2021.

[57] Ibid.

[58] https://www.sunnewsonline.com/breaking.soldiers-invade-nnamdi-kanu's-family-house-many-feard-killed. Retrieved on 4 March 2023 4:50pm.

trauma and shock of the experience allegedly led to the untimely death of both parents of Nnamdi Kanu.

Two years after the Anti-Torture Act 2017 had came into force, in September 2019, nearly 500 men and boys were rescued from one Kaduna school erroneously believed to be Koranic school but wherein the detainees,[60] were tortured, sexually abused, starved and prevented from leaving with chains on their legs. In Nigeria, inexperienced, poorly trained and ineptly led soldiers manifest their lack of professionalism and indiscipline by torturing and killing innocent citizens and a failure to effectively execute infantry tactics.[61] Reported cases abound of police torture and brutality notwithstanding the Anti-Torture Act 2017.

Police in Port-Harcourt, Rivers State arrested one Chima over alleged armed robbery and tortured him to death on 23 December, 2019.[62] They, broke his legs, hung him in the air and left for their normal patrol. He later died. Law enforcement agents who are supposed to enforce the Anti-Torture Act 2017 are the very ones abusing and violating the same law. Who then will bell the cat?

A Civil Defence Officer was allegedly tortured to death by police at Nyanya Police Station in Abuja on 20 March 2019. He had an encounter with a traffic warden because there was traffic gridlock on the road. The police officer started beating him and dragged the man on the ground and later took them to Nyanya Police Station where the District Police Officer (DPO) used the needle and choked the man to death.[63] The question is if citizens are manhandled in the city where the Anti Torture Act 2017 should be maximally implemented, what happens in the rural areas of Nigeria where the eyes of the law may be very far from these law enforcement agents. The fight against torture in Nigeria is a clarion call for government to take action before it becomes too late.

Similarly, on 29 September 2019, three alleged robbery suspects were severely beaten and set ablaze for allegedly robbing a young lady in the Dutse Alhaji area of the Federal Capital Territory (FCT), Abuja.[64] On the next day September 30 2019, some suspected kidnappers were burnt to death at the same Dutse areas of Abuja.[65] In May 2021, one 'school boy' employed some girls for prostitution

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[59] Ibid

[60] Yuexin Li,(note 48).

[61] Stafford Micheal. of ' U S Marine Corps' Stafford Study, 2018.

[62] BBC Pigin News: https:www.bbc.com/pidgin/tori-54493376 17/10/2021 2:26pm. accessed 22 February 2023.

[63] Pidgin news; https:www.bbc.com/pidgin/tori-54493376 17/04/2021 2:26pm. accessed 22 February 2023

[64] Adelani Adepegba, 'Mob sets three suspected 'one chance' robbers ablaze in Abuja' https://thenationalineng.net/threerobbers-lynched-inabuja. accessed 22 February 2023.

[65] Ripples Nigeria,'3 suspected kidnappers lynched in Abuja'

and to make returns for him. One of them in one occasion failed to make the required return, 'school boy' stripped her naked, and with the assistance of three of his boys, bound her hand and feet and gave her the torture of her life with several strokes of the cane on her buttocks while pouring water on her until she fainted. He videoed this insolence and the video clip went viral but up until date nothing has been heard about arresting the school boy or prosecuting him. Man's inhumanity to man.

Three years after the Anti-Torture Act 2017 had come into force; law enforcement agents still indulge in gruesome acts of torture as usual. Below are reported cases of torture involving law enforcement agents.

Sometime in October 2020 the prevalence of police torture was unbearable for the masses and the citizens embarked on a Nation-Wide peaceful protest. They called on Federal Government to address and put an end to SARS brutality, torture and inhuman treatment on fellow citizens. Unfortunately, the Federal government, the Lagos State government and law enforcement agents turned it into a bloodbath for protesters at Lekki toll gate. The military and police opened fire on unarmed End SARS protesters at the Lekki toll gate, killed several peaceful protesters with Nigerian flags in their hands and left many others injured. It was one of the most disheartening brutal bloody killings that have ever happened in the country.[66] The Nigerian flag was stained and socked with the blood of her innocent citizens (not foreign invaders) holding Nigerian flags in their hands and killed by Nigeria law enforcement agents whose primary duty is to protect her citizens. It has never been heard before. Immediately after the End-Sars killing, at Lekki, there was a video clip where a US soldier reprimanded Nigerian soldiers for shooting unarmed civilians. He further said that no US soldier dares to shoot at unarmed soldier let alone shooting a civilian that does not have a gun. The Nigerian Army and other law enforcement agents constitute a major potential threat to security in Nigeria.[67] They subject civilians to inhuman and degrading treatment. There have been viral video clips where Nigerian soldiers forced IPOB members to drink mud water.

Recently, about late November 2022 the Nigeria Police Force, Ebonyi State Command, allegedly tortured some students[68] who just returned from Cyprus and Norway Universities to celebrate Christmas and New Year with their

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https://www.ripploesnigeria.com/3-suspected-kidnappers-lynchede-in-abuja/ accessed 22 February 2023

[66] Daily Post Nigeria, 'End SARS: Police in Lagos Relax Security at Lekki toll Gate', https://www.daily post.ng accessed 22 March 23.

[67] Nairaland Forum, 'See-what IPOB-members did After Soldiers Forced Them To Drink Mud Water' https:// www.nairaland.com/4055516/video- Politics Accessed 7 October 2023.

[68] Nnaji Samuel Chidiebere, Obiedelu Chigozie, Ezeah Izuchukwu and their in-laws Omagba Solomon.

families and loved ones, and coerced them to confess to a crime they never committed. Police allegedly framed them to have hacked into the Facebook account and phone number of the Vice Chancellor of Alex Ekwueme University, Abakaliki, Ebonyi State and extorted the sum of N5.5million from the students by forcing them to withdraw the money from their bank accounts. One of them got the beating of his life for daring to demand for the arrest warrant and identity of the police officers.[69]

Aside statutory provisions and International Treaties against torture which Nigeria is signatory to, courts in Nigeria have variously condemned police torture, and degrading treatments on suspects, although, for Nigeria law enforcement agents, efficiency and proficiency mean subjecting suspects to torture and brutality. The Supreme Court vehemently condemned torture, cruel treatment and extrajudicial killing in *Shella v State*[70] where the appellant and five others were charged for torturing and slaughtering the deceased Umaru for allegedly making insulting remarks about Prophet Mohammed. The trial court found them guilty of the offence of culpable homicide and sentenced them to death. The Court of Appeal dismissed their appeal. The Supreme Court in dismissing the appeal held that although under Islamic law any sane adult who insults prophet Mohammed must be punished accordingly but Islamic Law has not left the killing/punishment open in the hands of private individuals. The offence alleged has to be established with evidence before a court of law. According to Ogundare JSC:

> In any case, even on the assumption (although without any proof) that the deceased had in some way done anything or uttered any word which was considered insulting to the Holy Prophet should the appellant and others with him constitute themselves into a court of law and pronounce the death sentence on another citizen? Plainly, this was jungle justice at its most primitive and callous level… I am greatly pained.[71]

The Supreme Court also condemned such act of jungle justice in the case of *Kaza v The State*[72] were the deceased was alleged to have insulted Prophet Muhammad and the appellants tortured and killed him. The trial court found the appellant and his co-accused guilty as charged and sentenced them to death by hanging. The decision of the trial court was affirmed by both the Court of Appeal, and the Supreme Court and the appeal was unanimously dismissed. It is pertinent to state that the Constitution of the Federal Republic of Nigeria 1999

[69] Sahara News Reporter, EXCLUSIVE: 'Nigerian Police Personnel Torture Students Returning From Cyprus, Norway, Forcefully Withdraw Over N5.5milion From Bank Accounts After Nine-Day Detention', https//saharareporters 7 February, 2023 Accessed 28 March 2023.

[70] [2007] 18 NWLR (Pt. 1066) 240.

[71] At 269-269.

[72] [2008] 7 NWLR (Pt 1085) 125.

(Fourth Alteration) is very clear in strictly prohibiting the Government of the Federation or of State from adopting any religion as State religion.[73] In providing for the right to freedom of thought, conscience and religion, the Constitution made it clear that

> Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.[74]

The Constitution in its section 38 already stated resoundingly re-echoed the wisdom of the Universal Declaration of Human Right 1948.[75] Flowing from the constitutional provisions above and the Universal Declaration of Human Rights 1948, it is therefore wrong to impose one's personal religious adherence on others, or for such personal or sectional opinion to be accorded legal status binding on others in a circular State as Nigerian. Such imposition infringes on the Universal Declaration of Human Right and the Constitution. It offends the right to freedom of thought, conscience and religion.

In *R v Jegede*[76], members of a night guard killed a notorious thief whom they believed was carrying stolen goods and was armed. In convicting for manslaughter, the court held that no law authorizes the killing of a person merely because he is notorious criminal. Also in *R v Aliechem*,[77] where the accused found his neighbour in his yam barn at night and believing him to be a thief, stabbed him in the stomach, the court in convicting the accused for murder held that no law authorised the killing of a person merely because he was caught stealing.

Notwithstanding the Anti–Torture Act 2017, and other statutory provisions, the Nigerian government and law enforcement agents have remained unrepentant in the use and application of torture, to extract information from both suspects and other citizens including electoral results.[78] Due to ugly experiences and the high level of corruption that is going on in the police force, the masses do not have confidence in law enforcement agents again. Most of the time, people resort to self help and jungle justice; lynching crime suspects instead of handing them over to police as required by law. Their belief is that police would collect

[73]Constitution of the Federal Republic of Nigeria 1999(Fourth Alteration) S 10
[74] Ibid s 38 (1).
[75] Art 18
[76] (1955)WNLR 33
[77] (1956)1 FSC 64
[78] The just concluded 2023 election speaks for itself especially in Rivers State and Lagos State

bribe from the relatives of the accused and release the accused from their custody. It gives wrong signal to the society and creates bad feelings among the people when they observe that somebody who was caught red handed committing a crime and sent to the police for action to be taken, has freely come back to the society to torment and terrorise them. Thus, in July 2021 an alleged homosexual was beaten to death in the South West Ondo State and nine people were burnt alive in Zamfara in the North West for insulting Prophet Muhammad.[79]

The question is, of what relevance then is the Anti-Torture Act 2017 if it cannot be enforced but continuously be abused by the very government that enacted the Act, its law enforcement agents and citizens? This is where the mendacity of the Anti-Torture Act 2017 lies.

Ordinarily, one would say that the Anti- Torture Act, 2017 is very relevant in a country like Nigeria especially at this present time when torture is prevalent in the country. According to Mac Cardie, J, in *Prager v Blastspiel Stamp and Heacock Ltd*,[80] the common law grows with the development of the nation, so that an expanding society demands an expanding common law or an expanding law. The Anti-Torture Act 2017 is typical of an expanding law for an expanding society like Nigeria. Therefore, there is no doubt that the Anti-Torture Act 2017 is very much relevant. Nonetheless, enforcement will give credence to its relevance. The provisions of the Anti-Torture Act[81], if diligently and sincerely enforced, will certainly go a long way to check the escalating rate of torture and extrajudicial killing in the country.

5. Causes of Torture in Nigeria

It is indeed ironical to enact an Anti–Torture Act 2017 while there are legislative enactments that seem to encourage torture and extrajudicial

[79] The Conversation, Exclusive: ' Nigeria set to pass a law against mob lynching. Will it make a difference?' https://theconversation.com/nigria-set-to-pass-law-against-mob-lynching-will-it-make-a-difference-8789022. Accessed on 21 April 2024.

[80] (1924) 1KB 566 at 570.

[81] Especially sections 1, 3, 4, 7 where both perpetrator and the person present watching the act are liable and superior order is no excuse for torture. For example Section 1 of the Act imposes an obligation on government to ensure that all persons, including suspects, detainees and prisoners are respected at all times and that no person under investigation or held in custody is subjected to any form of physical/mental torture. It admonishes government to adhere to domestic and international standards on absolute condemnation and prohibition of torture. Thus, complementing sections 7 and 32 of the Criminal Code.

killings. They should be reviewed to avoid the mischief of using these laws to justify acts of torture and arbitrary killing by security agents. The law allows the use of lawful force by a peace or police officer or even a private person, who is lawfully acting to suppress a riot.[67] The force must bear in mind that the aim of such allowance is to place the force a step ahead of ordinary civilians for security purpose and not for mischief.

Furthermore, the construction of section 33 (2) (b) of the Constitution is not elegant enough to protect the life of suspects to the extent of arrest and prevention of escape from custody and can give room for torture. The same inelegance extends to section 271 of the Criminal Code, which contains similar powers of forceful arrest which is more barbaric and brutal than the absurdity in section 33 (2) (b) of the Constitution.

Similarly, the Force Order, Order 237,[82] which allows police officers to shoot suspects and detainees who attempt to escape or avoid arrest whether or not they pose a threat to life, is not an elegant drafting and can give room for torture. Again, section 73 of the Criminal Code which provides that a police officer is not criminally responsible for death occurring after a proclamation has been made for dispersion of rioters seems hash. Although section 298 of the Criminal Code serves as a check since the section provides that any person authorised by law to use force is criminally responsible for any excess, according to the nature and quantity of the act which constitutes the excess. Yet, when a suspect or a detainee does not pose any danger to the arrester, there is no need applying violence except for self defence. Of course *Omoregie v the State*,[83] says that self defence has no limit where it applies.

Another possible cause is disregard for the rule of law. Where the rule of law is respected and observed, the law is supreme and authority is legitimately exercised in accordance with written, publicly disclosed and enforced method, in line with established procedure as opposed to the influence of arbitrary power.[84] There is equal subjection of all classes of

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[67] Ss 72, 73, 276 – 280 CC. It is lawful to use reasonable force to suppress a riot provided that the danger to be apprehended from the continuance of the riot warrants such force. See also C O Okonkwo, *Criminal Law in Nigeria*, 2nd edn (Ibadan: Spectrum Law Publishing 2000) 229.

[82] This order provides that the use of lethal force is only allowed when strictly unavoidable to protect life.

[83] (2008) 35 NRN 181, (2008) 18 NWLR (Pt 1119) 464.

[84] A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn London: Macmillian & Co. Ltd., 1961) 202- 205.

persons to the ordinary laws of the land administered by the ordinary courts. However, the situation in Nigeria seems more like there is absolute supremacy or predominance of the influence of arbitrary power as opposed to the regular laws, different classes of the population are subjected to different laws, administered not by the ordinary courts but by a few powerful individuals. Consequently, there is a subjugation of the rights of individuals to the whims of certain persons or bodies who attempt to take the place of the courts in the enforcement and interpretation of laws.[85]

At present, suspects can easily finance their criminal ways out of punishment provided they have the means or on the alternative makes themselves a willing tool for destruction, and criminality in the hands of some influential and powerful persons who are connected with the crime. In the 2023 general election citizens were harassed, tortured, stabbed and killed by government thugs and agents[86] and till date no one is apprehended or prosecuted for such cruelty and arbitrariness. It appears that a good number of the members of the force and law enforcement agents are masochists and so they derive pleasure in inflicting pain and torture on others which under normal circumstance are abhorrent and unpleasant to sane minds.

6. Recommendations and Conclusion

Torture is one of the most serious crimes of concern to both international and the Nigerian communities and therefore must not go unpunished. Effective prosecution of perpetrators must be ensured by taking measures at the national level which enhances international cooperation where necessary. This is "if" government is determined to put an end to torture and impunity. In the light of the above findings, it is recommended that government refrains from encouraging torture. Government is to ensure that all persons, including suspects, detainees and prisoners are respected and that no person under investigation or held in custody is subjected to any form of physical/mental torture. Government is to adhere to domestic and international standards on absolute condemnation and prohibition of torture. Otherwise, the Anti-Torture

[85] M C Onuegbulam, 'Extra judicial killings and its Challenges under the Nigerian Criminal Justice System'. (Unpublished LLM Dissertation UNEC 2013) 101

[86] Fortune Eromosele, '137 killed, 57 abducted during 2023 elections', https://www.vanguardngr.com/2023/05/137-killed-57-abducted-during-2023-elections-report, accessed 22 April 2024. Five days before the gubernatorial and State House of Assembly elections, Chukwudi Ogbonna, the Accord Party candidate for Ogba/Egbema/Ndoni L.G.A Constituency 2 in the Rivers State House of Assembly was abducted at Rumuigbo, near Port Harcourt, Rivers State. One person identified as Muhammad Abdullahi was killed while 15 other people were injured during a violent clash between supporters of PDP and APC at a gubernatorial campaign rally in Duguri, Alkaleri L.G.A Bauchi State.

Act 2017 will remain a mediocre statute if not moribund. It is the duty of every government to exercise responsibly its criminal jurisdiction over those responsible for crimes and in accordance with national laws and international treaties. The barbaric practice of beating, hanging or inflicting various types of torture on persons suspected to have access to important secrets, so as to force them to divulge same, does not show expertise in criminal investigation. It is rather a violation of the right to the dignity of the human person, an affront to justice, an abuse of the laws against torture and therefore must be checked. With experts, confessions are often more likely when interrogators adopt a respectful and friendly stance toward suspects, they build rapport, instead of torture and tension.

In conclusion, while this research acknowledges the relevance of the Anti-Torture Act 2017 and the goodwill of government in enacting the Anti-Torture Act 2017, prohibiting various acts of torture and leaving no circumstance for justification, the fact remains that prevention or eradication of acts of torture and extrajudicial killing can hardly occur outside government. In fact government can greatly hinder the effective enforcement and implementation of the Anti-Torture Act 2017 directly or indirectly by remaining complacent in implementation of sanctions in the Act. This is because though government is creating the domestic norms to check crimes of torture, the same government also determines the process of the implementation or non-implementation of these norms according to its executive will. A lot of responsibility is placed on government in the eradication of torture and enforcement of the Anti-Torture Act 2017 and other international laws against torture.

CHILD RIGHTS ACT 2003 AND THE PROTECTION OF CHILDREN AGAINST TRAFFICKING

Prof Ifeoma P Enemo*

Abstract

Human trafficking is a horrendous criminal activity with unfathomable dimensions. Whether for children or adults, it is a gross violation of human rights. It is a modern form of slavery and indeed deprives the trafficked of their human rights, particularly fundamental freedom. Every country in the world is faced with this challenge of human trafficking, though the scale may be higher in some countries than in others. All efforts at the international, regional, and national levels have not been so fruitful. Unfortunately, women and children are the most trafficked, and they suffer all forms of exploitation, including sexual exploitation, child labour, street hawking, domestic service, and street begging, among others. This article examines this global menace of child trafficking, particularly in Nigeria, and the protection accorded such children under the Nigerian Child Rights Act 2003, which is a Nigerian legislation enacted to tackle issues dealing specifically and comprehensively with child rights, such as child trafficking. The doctrinal method is adopted, and information is obtained from primary and secondary sources. The article found that despite the efforts made in Nigeria, which include the elaborate provisions in the CRA to protect the child and to tackle this teething problem, child trafficking, whether offline or online, is still very rife and constitutes a severe problem in Nigeria, just as in other parts of the globe. It also found that the CRA, which has various implementation challenges, has done little or nothing to bring about positive change in that direction. However, the article concludes that efforts must first be made to ensure that all the States in Nigeria adopt the CRA, while those that have adopted the Act should bring traffickers to book based on the provisions of the Act.

Keywords: Child, Child Rights, Child Trafficking, Child Rights Act, Protection, Traffickers

1. Introduction

Human trafficking is not new all over the world. It has become a severe problem and a global challenge. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational and Organized Crime

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Convention (TOC Trafficking Protocol)[1] defines trafficking in persons to mean 'the recruitment, transportation, transfer, harbouring or receipt of persons, employing threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.' Again, section 13[2] of the Trafficking in Persons (Prohibition) Act in Nigeria criminalizes human trafficking and related abuses. Thus, in this section, it is an offense if any person recruits, transports, transfers, harbours or receives another person employing threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, or position of vulnerability; or giving or receiving payments or benefits to achieve the consent of a person having control of another person, for the purpose of exploitation of that person.

There is international trafficking of human beings for various forms of exploitation. According to Akinpelu and others, 'Human trafficking is seen as an illegal trade in human beings for the purposes of commercial sexual exploitation or forced labour, which represents a modern-day form of slavery.'[3] They also described it as the fastest-growing criminal industry in the world and tied with the illegal arms industry as the second largest, after the drug trade.[4] A Director-General of the International Organization on Migration (IOM) noted that 'human trafficking global network rakes in between $35 billion and $40 billion annually, effectively making it the third biggest global crime after drugs and guns trafficking. It remains, however, a deadly and inhumane business that regards human beings as mere commodities.'[5] At the global level, the International Labour Organization's (ILO) estimation shows that there could be as many as 12.3 million people in forced labour, bonded labour, and commercial sexual servitude worldwide at any given time.[6]

Unfortunately, human trafficking in Nigeria seems to be the severest[7] in Sub-Saharan Africa.[8] In fact, Nigeria has been described as one of the leading

[1]Nigeria became a signatory on 13 December 13 2000.

[2] Trafficking in Persons and Prohibition Enforcement and Administration Act, Cap T23 Laws of the Federation of Nigeria (LFN) 2004 originally passed in 2003 and amended in 2005 and 2015.

[3] Ibrahim L Akinpelu, Solomon A Ojo, Olusegun S Adegoke, Rahman Opeyemi, 'The Security Implications of Child Trafficking in Nigeria: The Interventions of NAPTIP' (2021) *International Journal of Research and Innovation in Social Science*, vol V Issue XII, 216.

[4] Ibid.

[5] Ambassador William Lacy Swing, *Thisday Newspaper* 25April 2013.

[6] Trafficking in Persons (TIP) Report, 2009, 8.

[7] Rabiu Sani Shatsari, 'The Trafficking in Women and Children in Nigeria: An Analysis of the New Anti- Trafficking Legislation and its Application' (2010) *Junal Undang-Undang Dan Masyarakat* 92.

[8] Ibid.

African countries in human trafficking with cross-border and internal trafficking.[9] It is more pathetic and also common knowledge that most victims of trafficking in Nigeria are women and children: boys and girls, but more of girls, usually poor and uneducated. According to Kofi Annan, these people were denied 'the right to live in dignity, free from fear or want.'[10] Thus, the case of child trafficking, which is a subset of human trafficking, was aptly described as the most severe human rights violation involving the under-aged in the world today.[11]

This paper, therefore, analyses the global menace of child trafficking, particularly in Nigeria, and the protection accorded such children under the Nigeria Child Rights Act 2003 to determine the effect and adequacy of the Act in protecting trafficked children.

2. Who is a Child?

The United Nations Convention on the Rights of the Child (CRC) defines a child as '… any human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier.'[12] However, different laws in Nigeria answer the question, who a child is, differently, and for various purposes. This may, at times, bring contradiction when it comes to application. If one is not an adult who is expected to be able to confront and solve fundamental problems directly without the supervision of another, he/she is a child. Under customary law in Nigeria, an author notes that the informal system of social control renders the determination of childhood by age almost ineffective, and age is not generally a symbol of capacity in the customary setting.[13] In the case of *Labinjoh v Abake*,[14] it was held that a person ceases to be a child on the attainment of puberty under customary law. It seems that what mattered here was the child's physical development and not the child's psychological development.[15]

Under the Criminal Code, section 30, any male child below the age of seven is not criminally responsible for any act or omission, and a child below the age of 12 years is presumed to be incapable of having carnal knowledge.[16] The Penal Code provides that if a person above seven years old commits an offense, he

[9] AD Abiona, 'An Appraisal of the Nigerian Child's Right Against Human Trafficking' Long Essay submitted to Faculty of Law, University of Ibadan, 2015.

[10] Kofi A Annan, Secretary-General Foreword To The United Nations Convention Against Transnational Organised Crime and The Protocols Thereto (Un/Undoc, New York/Vienna. 2004) iii.

[11] Akinpelu and ors (n 1).

[12] The UN Convention on the Rights of the Child (1989)

[13] MA Ajanwachuku, 'A Legal Analysis of the Nebulous Concept of Childhood in Nigeria' (2016) 7(2) *Beijing Law Review* 122-126.

[14] (1924) 5 NLR 33.

[15] MA Ajanwachuku (n13).

[16] LFN 2010 Cap C38, s 30. This is only applicable in the Southern States of Nigeria.

will be criminally liable to trial and conviction under the code.[17] Also, section 59(2) of the Labour Act[18] provides that a person under the age of 14 years cannot be employed or allowed to work in any industrial undertaking. Unfortunately, the Nigerian Constitution describes a person of full age as a person who is 18 years and above.[19] This means that this definition will not apply to a married woman whose adulthood is determined by marriage.[20] Consequently, a 13-year-old girl, for example, who is married, is considered to be of full age.[21] Unfortunately, this lends support to child marriage, which is common in Northern Nigeria and has been condemned by many authors.[22] In *Maimuna Abdulmumini v FRN, Katsina State and the Nigerian Prison Service,*[23] the ECOWAS Community Court of Justice held that a Child's right under section 5(3) of the ACRWC, which expressly prohibits death sentence for crimes committed by children, is violated by death sentence even if she was married.

The Child Rights Act 2003,[24] the most comprehensive legislation on children's rights in Nigeria, and the African Charter on the Rights and Welfare of the Child define a child as a person below the age of 18 years. The CRA is expected to reconcile the differences regarding a child's age by various statutes. Because Nigeria is a federal state, the Child Rights Act 2003 only applies to Abuja. The 36 states in Nigeria have to domesticate the Act and enact it for its applicability. Many states seem to have adopted the CRA into their state laws, thereby bringing the application of the Act into force in those states. However, in this article, a child refers to a person below the age of 18 years, as stipulated in the CRA. It is equally so stipulated in other legislation, charters, and protocols which deal with human trafficking.[25]

3. Child Trafficking

Child trafficking is a form of human trafficking. The Trafficking in Persons Protocol defines it as the 'recruitment, transportation, transfer, harbouring and/

[17] Section 50(a) of the Penal Code, Laws of Northern Nigeria, 1963. Thus, it is only applicable in the Northern States.
[18] LFN 2010, Cap L1.
[19] Constitution of the Federal Republic of Nigeria, 1999 (1999 Constitution), s 29(1).
[20] Ibe O Ifeakandu, 'Child Trafficking and Rights Violation; Examination of Child Protection under International and Nigeria Legal Provisions' (2019) 10 (4) *Beijing Law Review* 1078-1099.
[21] 1999 Constitution, s 29 (4)(b).
[22] For example, see KO Fayokun, 'Legality of Child in Nigeria and Inhibition Against Realisation of Education Rights'. (2015) 5 *US-China Education Review* 460-470; Ifeakandu (n 20).
[23] Ruling No ECW/CCI/Jud/14/14.
[24] LFN 2010 Cap C50, s 277.
[25] For example, the ACRWC.

or receipt' of a child for the purpose of slavery, forced labour and exploitation.[26] There must be recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation. Children are trafficked and moved both within and outside Nigeria. Thus, there is internal and cross-border trafficking of children. Nigeria has been said to be a source, transit and destination country, where children are usually recruited and transported to countries in Africa, Europe, Asia and the Americas, among others.[27] It also provides a destination for children trafficked from Benin Republic, Togo, Mali and some other African Countries.[28] Children that are trafficked can be moved by an individual or a group of people.[29] At the end of it all, the children find themselves in exploitative situations, and this exploitation can take various forms, for example, dirty and dangerous work for little or no pay, with inadequate rest time, and often with some force or violence,[30] sexual assault among others. They are trafficked by: road transportation or bush path: This is very dangerous, and as an author noted, 'two years ago, they used to come to Europe by aeroplane, now they come by land, by foot, and by car, going through deserts and various countries to Morocco, through Gibraltar they arrive in Spain and then by train they get to Italy or other European countries'[31], sea: here, the traffickers use boats and canoes to cross oceans and seas. This happens under deplorable conditions where the children get little to no care. Here the traffickers take great risk travelling with the trafficked children and at times they get caught, yet they are not deterred.

In fact, the number of children trafficked each year in Nigeria cannot be estimated as accurate data in this wise remains a mirage. On 21February 2023, four women were caught in Rivers State for kidnapping and trafficking a four-year-old boy to Aba, Abia State. In the same State, another suspect was nabbed for trafficking a 15-year-old girl to Lagos for prostitution after she had earlier trafficked two 16-year-old girls.[32] Different organizations have come up with different estimates as to the number of trafficked children. ILO, for example, estimates that 20% of about 40 million people trafficked are children,[33] while

[26] UN Charter art 3(c).
[27] Ifeakandu (n 20).
[28] Ibid.
[29] ILO, UNICEF & UN.GIFT, Training Manual on Fight Trafficking in Children for Labour, Sexual and other Forms of ExploitationTextbook.
[30] Ibid.
[31] Omotere Adunola, *Child Trafficking in Nigeria: Causes, Effects and Remedies* (Ogun State: Ego Booster Books, 2011)16.
[32] Blessing Afolabi 'Children Suffer Increasing Abuse as Parents Disregard Law Enforcing Child Rights' *Punch* (5 March 2023) <https://punchng.com/children-suffer-increasing-abuse-as-parents-disregard-law-enforcing-childs-rights> accessed 15 November 2023.
[33] International Labour Organisation (ILO), *Understanding the Drivers of Rural Vulnerability*: *Employment Working Paper No 124* (2017) 7-15

the United Nations Office on Drugs and Crimes (UNODC) estimates that 30% of trafficking victims are children.[34] Though such contradictions are problematic when it comes to providing effective measures to combat it, it still points out the fact that a significant number of helpless children are still trafficked.

They are trafficked for domestic servitude, particularly the girls, wherein they suffer extreme harm as they are exposed to all forms of exploitation and violence, be it sexual, physical, or psychological abuse. Trafficking could be for agriculture, manufacturing, cleaning and other forms of forced labour.[35] According to UNICEF, several millions of Nigerian children are forced into exploitative labour, such as domestic labour, begging, farm labour and prostitution every year.[36] Ifeakandu also noted that several children are used as slaves and, in some cases, maltreated or even killed, having been branded witches.[37]

It is noteworthy that traffickers have kept pace with technology and have become adept at using the internet for their trafficking operations.[38] According to UNODC, 'Technology is not only for sexual exploitation but also to coerce victims into crime and forced labour, and to advertise the selling of kidneys harvested from victims they have trafficked.'[39] It is unfortunate that Nigeria is not just a source but also a transit and destination for trafficked children.

4. Causes of Child Trafficking

Several factors cause child trafficking. These include:

i. Poverty and homelessness: This is one of the significant causes of child trafficking. Here, the traffickers prey on vulnerable children; that is to say, they prey on children who come from dysfunctional homes, children abandoned with no parental care, or children who come from impoverished families.[40] These children cannot take care of themselves, nor do their parents have the financial means to look after them; some do not even have parents. Their difficult circumstances make them easy targets for the traffickers.

[34] Ifeakandu (n 20).
[35] UNODC, Global Report on Trafficking in Persons 2020 (United Nations publication, Sales No E20 IV 3), 11-12.
[36] UNICEF, *Child Rights Toolkit: Integrating Child Rights in Development Cooperation* cited in Ifeakandu (n 13).
[37] Ibe O Ifeakandu, 'The Denial of Sustainable Energy as a violation of Child's Rights' in Y Omoregbe and A Odor (eds) *Ending Africa's Energy Deficit and the Law: Achieving Sustainable Energy for All in Africa* (Oxford: Oxford University Press) 215-233.
[38] Ibid 15.
[39] Ibid.
[40] UNODC (n 35).

ii. Large family size: Here, parents who cannot cope with their many children fall prey to traffickers who deceive them and promise a better life for the trafficked children. The question is: wherein lies the children's rights as provided by the CRA, such as the rights to freedom, to belong and have identity, to education, and others? They are all denied them. This calls for serious efforts at the protection of the Nigerian child.

iii. Greed and Profit: Traffickers are greedy and make huge profits out of this illegal business. It is easy to trap children and their labour is very cheap whilst a lot of profit is made from the trade. As the children give labour and services, have their organs harvested, are subjected to sexual exploitation, forced marriages and used for other purposes, the traffickers take all the money and these trafficked children, if given at all, are given pittance barely enough to sustain them.

iv. Lack of access to Education and Ignorance: these trafficked children are mostly uneducated or not well educated and stand to be easily deceived. This equally applies to parents with big families who unknowingly give their children to traffickers in the hope of a better life for themselves and their children.

v. Unemployment: If the children are uneducated, employment is difficult, making them vulnerable and some even homeless. Again, this equally applies to their parents. When the parents are uneducated, they may be unemployed, which in turn leads to their inability to take care of their children. They are then forced to give the children away in hopes of a better life for the children.

vi. Gender: Girls are more trafficked than boys for the sex trade. However, boys are equally in the sex trade and are also trafficked for forced manual labor, forced criminal activities, begging, and becoming child soldiers.

v. Security Challenges in Nigeria: The security challenges in the country expose children to trafficking. Child trafficking is enormous in areas such as the Northern parts of Nigeria, e.g., Plateau State, due to severe insecurity and violent clashes. Here, lives and properties are destroyed daily, rendering most inhabitants poor, thereby exposing children to trafficking. These children are abducted by armed groups and are forced into marriages, forced labour, child soldiers, and other exploitative purposes. In the conflict area of Plateau State, e.g., Jos, it was reported that NAPTIP found the menace to be a humongous one and recorded 85 cases with 146 victims from March 2021 to date.[41] Stakeholders were reported to have complained about traffickers disguising themselves as missionaries who had come to help children from the ongoing crisis in

[41] 'Child Trafficking in Plateau Conflict Areas' <https://asknigeria.com/child-trafficking-in-plateau-conflict-areas/> accessed 20 November 2023.

the state but ended up exploiting and trafficking them.[42] Fake orphanages were found, and children were rescued.[43] The consequences of child trafficking are enormous. They could be long-term, such as depression, suicidal tendencies, low self-esteem, aggressive behaviour, self-isolation, poor health, pregnancies and abortions, and STIs, among others. Short-term consequences may include constant exhaustion, fatigue, injuries from hard labour, and insomnia.

5. Some Major International, Regional, and National instruments Useful in Combating Child Trafficking

There are international legal instruments that are relevant to the issue of trafficking. Some are either trafficking-specific or affect trafficking indirectly. However, their failure to stamp out the scourge is the most noticeable thing about them.[44]

The most important international instrument to combat trafficking is the Palermo Protocol, a supplement to the UN Convention against Transnational Organized Crime (2000). According to article 5 of the Protocol, States must criminalize trafficking, attempted trafficking, and many other intentional participation or community organizations in a trafficking scheme.[45] These cover the cases of children. Thus, the international came up with the CRC in 1989, and later, the African Charter on the Rights and Welfare of the Child (ACRWC) in 1990. These international instruments make the protection of children their priority. Section 35 of the Convention on the Rights of the Child and Section 29 of the African Charter on the Rights and Welfare of the Child compel state parties to take all necessary measures, including legislation, to prevent child sale, abduction, and trafficking.

Nigeria passed the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2015 (as amended). This Act provides a solid legal framework that should be effective in combating child trafficking for sexual purposes. Unfortunately, it has made only marginal progress in the fight against child trafficking and, indeed, human trafficking generally, especially concerning prosecution. Even though Government agencies such as the National Agency for the Prevention of Trafficking in Persons (NAPTIP) established by this Act developed several mechanisms to address the issue of trafficking in persons, the illegal business has continued unabated.

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[42] Ibid.
[43] Ibid.
[44] Rance Khooshie Lal Panjabi, 'Born Free Yet Everywhere in Chains' (2008) 37 *Denv J Int'l L & Pol'y* 1.
[45] United Nations, *International Instruments Concerning Trafficking in Persons*, OHCHR Research and Right to Development Division, Rule of Law, Equality and Non-Discrimination Branch.

6. Specific Child Rights Act Provisions Protecting the Child against Trafficking

All Nigerian children are entitled and should enjoy all the rights provided in the CRA and the relevant Child Rights Laws. Such rights include the right to protection from exploitation, the right to family life, to education, protection from sexual violence, and even the rights enjoyed by every human being.[46] Trafficking of children seriously violates these rights. Thus, the Act made elaborate provisions against trafficking and other related offenses such as sexual exploitation, child abuse, and child labour, among others.[47] The National Assembly of the Federal Republic of Nigeria enacted the Child Rights Act in 2003 to domesticate the Convention on the Rights of the Child.[48] It is the most essential and copious legislation that provides and protects the rights of every child. However, the Act is limited in application to the Federal Capital Territory due to the federalism practiced in Nigeria. The 36 States in Nigeria must ratify and domesticate the Act for its applicability in the States. So far, more than 30 States have domesticated the CRA that provides guardrails for Children in the State. The Act provides four baskets of rights for the children. The third of these baskets of rights is provided in Sections 1-52 for the protection of the child, which includes protection from child labour, child trafficking, ritual killing, sexual, physical, and emotional abuses, and neglect[49], among others. By this Act, a child's best interest shall be paramount in all actions concerning a child.

Section 11(a) and (b) of the CRA specifically provides against child trafficking as follows:

> Every child is entitled to respect for the dignity of his person, and accordingly, no child shall be subjected to torture, inhuman or degrading treatment or punishment; held in slavery or servitude. No child shall be subjected to any forced or exploitative labour; employed as a domestic help outside his home or family environment.

Other provisions of the Act related to child trafficking include section 27(1) which prohibits the removal of a child from the custody of his or her parents, guardian, or a person having lawful care or charge of the child. Yet, it is a well-known fact that children are trafficked with or without the consent of those family members in whose custody they are. Section 28 provides that no child shall be subjected to any forced or exploitative labour; employed as domestic

[46] See articles 1 and 4 of the Universal Declaration of Human Rights (1948).
[47] See generally sections 15, 19,21, 25, 27, 28, 30 of the CRA.
[48] D Ogunniyi, 'The Challenge of Domesticating Children's Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children' (2018) 62 (3) *Journal of African Law*447-470.
[49] Wilson O Diriwari, 'Efficacy of the Legal Frameworks for Child Protection in Nigeria' being a Thesis submitted for the Degree of Doctor of Philosophy from Brunel University London, 177.

help outside his home or family environment. Indeed, section 28 (1)(a) (b) (c) and (d) of the CRA prohibits children from doing dangerous and immoral work, but it excludes domestic service from the list. That means that children employed by family members should not perform work that will damage their physical and mental health.[50] For example, a family member engaging a child in light work of an agricultural, horticultural, or domestic nature is not deemed as the child being subjected to exploitative or hard labour. The question is, how and where do we draw the line? Well, if along the line, the child suffers any form of abuse in the process of employment in the hands of the family member, it will fall under exploitative and forced labour.[51] Any person who contravenes the provisions of this section commits an offence and is liable to 5 years imprisonment or fine of between N50,000.00 or both or, depending on the offenders. Body corporates shall be liable to a fine of N250, 000.00.[52]

Section 30 deals with the prohibition of buying, selling, hiring, or otherwise dealing in children for hawking or begging for alms or prostitution, etc, By Section 30 (2) (b) and (3), it is an offense punishable with a term of ten years imprisonment upon conviction for any person to use a child as a slave or for practices similar to slavery such as sale or trafficking of the child, debt bondage or serfdom and forced, compulsory labour.

Other related offenses, as provided by the CRA, are as provided below.

Section 25 deals with the exposure of children to the use, production, and trafficking of narcotic drugs, the punishment of which is life imprisonment.

Section 26 prohibits the use of children in other criminal activities. An offender here is liable to 14 years imprisonment.

Section 27 prohibits the abduction, removal, and transfer of children from the lawful custody or protection of their parents or guardians. This attracts between 10 and 20 years of imprisonment.

Section 29 provides for the application of the provisions relating to young persons in sections 59-63 of the Labour Act, 1971 to children.

Section 31 prohibits unlawful sexual intercourse with a child, the punishment of which is life imprisonment.

Section 32 also prohibits other forms of sexual abuse and exploitation. They are punishable by 14 years imprisonment.

Section 33 shows that other forms of exploitation prejudicial to the welfare of a child are prohibited, the punishment of which is a fine of N500,000.00 (US$3794) or five years imprisonment, or both.

[50] CRA s 28 (b).
[51] See n 46.
[52] See CRA s 28 (4) and (5).

Section 34 prohibits the recruitment of children into any of the branches of the armed forces of the Federal Republic of Nigeria (no punishment is prescribed). The fact that the provision does not prescribe any form of punishment for violating section 34 weakens the protection of children against forcible recruitment into the army. Consequently, the CRA should be amended to stipulate severe punishment provisions.

Thus, the CRA covers those circumstances very well, normally exploited by traffickers in order to carry out their wicked acts and achieve their goals. It thereby outlaws child trafficking and imposes punishments on offenders.

7. **Online Trafficking Against Children**

Children are generally very vulnerable, and their vulnerability make them easy targets for traffickers who have now resorted to the internet for their recruitment. There is therefore no gainsaying the fact that the internet has revolutionized the way such children are recruited.[53] Thus, traffickers have increasingly resorted to the social media and online platforms to recruit children for trafficking. The 'National Human Trafficking Hotline' reported the internet as the top recruitment location for all forms of trafficking.[54]The popular online platforms often used by the traffickers include, Instagram, Facebook, Snapchat, WhatsApp, Kik, among others.

Traffickers employ the following tactics to 'hunt' these children: building 'true friendship' to gain control over them, using chat rooms, online fan communities to initiate contact, creating fake profiles pretending to be someone the child knows, exploiting the vulnerable child's self-esteem, emotionally draining the child, engaging in flirty conversations leading to exchange of explicit content, employing coercion, threats and intimidation tactics, introducing children to online community where children are already involved and are exploited, and coerced into engaging in sexual activities, and accepting offline meeting for such activities[55], among others.

A very disturbing aspect of the online activities by child traffickers, is that their success partly stems from the fact that there is absence of control or monitoring by most parents and guardians, of their children's activities online, and also most have no idea that trafficking and exploitation of children go on online, while some others are illiterates and have zero knowledge about the internet. Such parents therefore fail in their 'parental responsibility' to their children as prescribed by the law. At the end, the traffickers also take advantage of this

[53] Human Trafficking Front (2020, July 14), 'The Use of the Internet to Recruit Children by Traffickers' Available <https://humantrafficking.front.org/the-use-of-the-internet-to-recruit-children-by-traffickers> accessed 10 October 2023.
[54] Polaris (2020), 'Analysis of 2020 National Human Trafficking Hotline Data (Polaris Project)' <https://polarisproject.org-statistics/2020-us-national-humantrafficking> accessed 10 October 2023.
[55] Human Trafficking Front (n 53).

failure by parents, who face obvious challenges with respect to technology and online activities, establish contact with the children and go on to recruit them without detection. Thus, responsibility to combat all forms of child trafficking, including online trafficking, fall, not only on the Federal and State governments, NGOs, etc, but also on parents and guardians. Therefore, the need for combined efforts of the government, law enforcement, judiciary, teachers, parents, health professionals and other relevant bodies, to help protect children and their rights with respect to the digital environment, cannot be over-emphasised.

8. Challenges of Implementing the Child Rights Protection Measures under the CRA

One of the challenges is the non-domestication of the Child Rights Act by some states in Nigeria. So far, 34 out of the 36 states in the country seem to have adopted the Act as a state law. This is partly due to ethnic and cultural values obtained in such places. For example, child marriage still takes place in some states and even genital mutilation is also ongoing.

Again, using the instrumentality of the law as the only way of protecting the child from trafficking is insufficient. Thus, the law is equivalent to a toothless bulldog as it has only done little to curb the menace. There is, therefore, a need for enlightenment as prevention is better than cure. This is necessary to equip the family, community, state, and international community responsible for protecting the child.

Lack of enforcement of the laws and implementation-related difficulties may not always be due to cultural and traditional factors, as some people may assert, but also in-action arising out of the lack of political will by the authorities to act.

Lack of effectiveness of the law due to its non-implementation is in itself a serious challenge since as a result, the law has little or no impact in protecting these trafficked children.

9. Recommendations

The following recommendations are made:

i. After 20 years of existence, the CRA needs an immediate and urgent review by the Legislature. The punishment sections, for example, should be reviewed and amended to suit the offenses, and some sections of the Act should be completely expunged. This will help close the gaps therein. Also, laws need to be enacted to protect children specially from online traffickers.

ii. Efforts must first be made to ensure that all the States in Nigeria fully and wholly adopt the CRA, while all those that have adopted the Act should bring traffickers to book based on the provisions of this Act. The definition of a child by the State laws, for instance, should be under that in the CRA and, therefore, not be lower than 18 years as provided in

some state laws. Some children may be saved from the hands of traffickers by a uniform provision in all States.

iii. Despite the difficulties, implementation of the laws should be focused on, while the government and other stakeholders' political will to do so should be encouraged to follow through with enforcement and implementation.

iv. The Government, through the Ministry of Women's Affairs and Social Development, can provide shelter and empowerment programs for the victims of child trafficking and improve and increase their access to other services.

v. Education for every child is essential and should be made compulsory to reduce illiteracy, which will, in turn, reduce the rate of child trafficking. With children kept busy in school, the risk of falling into the hands of evil traffickers is diminished. Again, educated parents would better understand and make better use of take-homes from sensitization and awareness-creating programs and training, thereby reducing successes recorded by traffickers.

vi. The government must make efforts to alleviate poverty to enable parents to cater to their children and completely shun traffickers. Who are more trafficked than children from poverty-stricken homes.

vii. NAPTIP, law enforcement agencies, CSOs, and other grassroots organisations should collaborate and synergize efforts for effective apprehension and prosecution of these heartless traffickers. There is a dire need to bring these traffickers to book. Their capacity must be strengthened by training and re-training.

viii. A list of apprehended traffickers should be published in newspapers and even on social media to deter others who perpetrate or plan to perpetrate the dastardly act.

ix. Massive and effective sensitization of members of the public, including law enforcement agencies, needs to be embarked upon by the government at all levels on the extent and challenges of child trafficking going on in the country, the consequences, and the rights available as provided by the CRA.

x. Careless and reckless parents should be prosecuted for failure in carrying out their parental duties as required by law. This will serve as a deterrent measure to others. Parents should empower themselves in modern technology to be able to guide their children towards a safer, more balanced and responsible use of technology in today's online/ digital world.

10. Conclusion

The CRA has responded positively to this thorny issue of child trafficking by appropriately making provisions with sanctions against child trafficking as well as other matters. This is despite the socio-cultural environment in which it

operates. However, child trafficking is still rampant in Nigeria, made worse by online activities, and is thus far from being eradicated. Therefore, its impact has not been as significant as expected. Consequently, we need to try a more holistic approach that includes a more essential and more precise understanding of the provisions of the CRA by all stakeholders and, in reality, making all child rights issues, especially trafficking, of paramount consideration, and such matters must be treated with the highest standards. Nations affected by child trafficking must, in all good sense, join hands to combat this menace. The fundamental truth is that in Nigeria, lack of awareness, no political will by the Government to implement the CRA, insincerity, corruption, lack of wholesome adoption by states, and the non-adoption of the Act by some states, among others, are all responsible for non-implementation of the relevant provisions of the CRA, thereby exposing Nigerian children to untold hardship, physically, mentally and otherwise, to trafficking.

Child trafficking should not in any way be tolerated in Nigeria, either advertently or inadvertently. Let us all rise and protect /save our children, our future leaders, and hope for tomorrow by showing zero tolerance for such a fatal and dastardly act of trafficking of Nigerian children. In that way, the efforts against child trafficking will definitely end up in eradicating the nightmare of many Nigerians.

THROUGH THE BACKDOOR, DRESSED IN BORROWED ROBES: THE USE OF POWER OF ATTORNEY FOR THE TRANSFER OF INTEREST IN LAND IN NIGERIA

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Abstract

Whether a power of attorney qualifies as an instrument for the transfer of interest in land in Nigeria, thereby necessitating the consent of the Governor before any such transfer, has become a thorny issue. Attempts to proffer an authentic answer to this question have sharply polarized scholars and stakeholders. This article is of the view that a power of attorney, by its nature, does not have the legal capacity to be used in transferring interests in land and posits that the current practice whereby documents of actual conveyance are masked as powers of attorney in order to escape the statutory requirement for governor's consent before alienation of interest in land amounts to gaining entrance into a premises through the back door, dressed in borrowed robes.

Keywords: Land, Land instrument, Power of attorney, Transfer of interest in land, Governor's consent,

1. Introduction

Ownership of property comes with a number of claims, liberties, powers and immunities with regard to the thing owned[1]. The absolute power to alienate the thing owned is one of the incidents of ownership. In fact, one of the most radical ways of demonstrating ownership over a thing is the absolute power of the owner to sell or otherwise dispose of that thing at his will and without any let or hindrance. However, with respect to land, the introduction of the Land Use Act in Nigeria brought with it the vesting of the radical title in all lands comprised in every state in the Governor of that state to hold same in trust for the people[2]. One of the most revolutionary provisions of this Act is the requirement of the consent of the governor as a condition precedent to the validity of any transfer of interest in land in Nigeria[3]. According to Abugu, in principle, there is really nothing wrong with this requirement as it is consistent with the present regime

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[1] See Reginald Akujobi Onuoha, 'Governor's Consent under Section 22 of the Land Use Act: The Position Since *Savannah Bank v Ajilo'* in IO Smith (ed), *The Land Use Act: Twenty Five Years After* (Lagos: Department of Private and Property Law, University of Lagos, 2003)199.

[2] Section 1 of the Land Use Act, 1978. (hereiafter, 'the Act').

[3] See Uwakwe Abugu, *Land Use and Reform in Nigeria-Law and Practice* (Abuja: Immaculate Prints, 2012) 109.

which vests all land in the State in the governor, mandating him to hold and administer same for the use and common benefit of all Nigerians[4]. To effectively exercise this mandate, the governor needs to be able to keep track of the movement of land from one person to the other. However, in practice the consent requirement has brought untold hardship on many Nigerians and business outfits by reason of the tortuous process and the unreasonable length of time it takes to obtain such consent. As a result, legal practitioners have resorted to devising smart schemes to circumvent the consent requirement and ensure timeous and cost-effective modes of transferring interest in land. One of such schemes devised to avoid the consent of the governor is the use of Power of Attorney as a means of transferring interest in land. But to what extent can a power attorney achieve the legal requirements for transfer of interest in land? This article argues that a power of attorney, properly so called, in its normal nature and character, is not, in itself, an instrument for the transfer of interests in land in Nigeria. It is an appointing document of agency. The article, however, notes that through the negative application of some creative drafting ingenuity, practitioners have created a hybrid document which, while substantially retaining the form of a power of attorney, is essentially a deed of conveyance in content and effect.

2. Meaning, Nature and Form of a Power of Attorney

According to *Black's Law Dictionary*[5] a power of attorney is an instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of principal. It has also been defined as a formal instrument by which a person empowers another to act on his behalf, generally, or in specific circumstances.[6] It is usually, but not always necessarily, under a seal whereby a person who is entitled to an estate in land(the donor) authorizes another(the donee) his attorney, to do in the donor's stead anything which the donor can lawfully do in respect of that land[7]. This is usually clearly spelt out in a document. It may be issued for valuable consideration and may be coupled with interest. In either case, it is usually irrevocable either absolutely or for a limited period.[8]

[4] Section 1 of the Act. It should also be noted that Governor's consent to alienation of interest in land in Nigeria anchors its philosophical basis on the concept of ownership itself while its justification dates back to the customary jurisprudence of the consent of the family head and the landlord(in the appropriate cases) before any transfer of the respective interests can be validly effected.

[5] Joseph R Nolan and others, *Black's Law Dictionary* 6th ed., (St Paul Minn., USA: West Publishing Co, 1997) 1171.

[6] Elizabeth Martin (ed.) *The Oxford Dictionary of Law* (London: Oxford University Press, 2002) .p.372.

[7] Abugu (n 3) 110.

[8] *Ude v Nwana* (1993) 1 NSCC 236 at 250; (1993) 2 NWLR(Pt 278) 638. See also Section 2(1) of the Law of Property and Transfer Edict, 1998 of Rivers State.

Generally speaking, a power of attorney is revocable if the circumstances warrant that.

Discernable from the above definitions is the fact that a power of attorney, by its nature, is an instrument that creates an agency relationship. It is, therefore, subject to all the rules and principles of agency. It is the law that all the powers of the attorney (the donee) should be clearly and unequivocally set out. It has been stated that a power of attorney must be drawn in such a way that the powers of the donee are so exhaustively listed that a fair construction of the whole instrument will reveal whether a particular authourity is provided for (or not) in the instrument either expressly or by necessary implication[9]. This is because a power of attorney is construed strictly and extrinsic evidence is not admissible to establish either what it was that an attorney should have the power to do or that it was intended that he should have additional powers. If the authority is exercised in excess and outside the reasonable scope of its power, a third party will not be able to make the donor liable[10].

Quite a number of judicial authorities abound which celebrate the principle that a donee who acts outside the ambits of the powers set out in the power of attorney does so in vain and such an act is a nullity .[11] However, where the circumstances demand, a power of attorney may be given a purposeful interpretation to include powers necessarily incidental to the ones expressly given.[12] It needs to be pointed out that a power of attorney does not generally preclude the donor from also carrying out those acts for the performance of which he has already appointed an attorney . Unless a donor is statutorily barred from acting, or the power of attorney is given for valuable consideration and declared to be irrevocable, nothing stops him from doing the act himself even though he has donated the power to do same to an attorney[13].

With respect to its form, it has been opined, and this article respectfully shares that view, that since a power of attorney is an instrument of appointment and not a product of a contractual relationship, it does not require the duality of

[9]See Sylvester O Imhanobe, *Legal Drafting and Conveyancing* (Abuja: Temple Legal Consult, 2010) 509; *Re Bryant, Powis and Bryant v Banque de People* (1893) A.C 170 at 71; *Re Dowson and Jenkin's Contract* (1904) 2 Ch 219; *Melwani v Five Star Ind. Ltd*.(2002)3 NWLR (Pt 7531) 217.

[10] *Idowu v Abayomi* (1960) SCNLR 511. See also UJ Osimiri, 'Third party Cannot Vary the Terms of Power of Attorney in Oil Spilage Compensation Claims' (1998) 1 *JCPPL*, p.54 ; Imhanobe (n 9) 509.

[11] *Ojugbele v Olasoji*(1980) FNLR 135; (1982) 1 all NLR (Pt 1) 43; (1982) 4SC31; *Amusan v Benthworth Finance Ltd* (1965-1966) 4 NSCC 309.

[12] See *Anglican Diocese of the Niger v Attorney General of Anambrra State* (1979) ANSLR 64.

[13] See *Agwaramgbo v Nakande* (2000) 9N.W.L.R (pt.672) 341 See also the classic explanation of this common law principle by Coleridge CJ in *Huth v Clarke* (1897)13 QBD 391.

execution or authentication[14]. It is a deed poll, requiring only the signature of the donor to authenticate it[15]. In practice, however, legal practitioners in Nigeria draft powers of attorney that make provision for the signatures of both parties as well as those of witnesses[16]. Some even extend the rights, duties and privileges enjoyed by the parties to their heirs, personal representatives, executors and assigns, giving the impression that these latter sets of people would inherit the rights, duties and privileges so created. It is submitted that this substantially detracts from the spirit, nature and character of a power of attorney as an agency transaction. A power of attorney is useful for many purposes and, as a general rule, it need not be by deed unless it is so required by law. However, if the authority conferred on the donee empowers him to execute a deed, then the power of attorney must itself be by deed.[17] Thus, the power of attorney to sue on behalf of the donor, to collect rent, represent the donor at a meeting or to merely sign a document need not be by deed. But in all cases where a power of attorney gives the donee the power to effect a transfer of possession, title or ownership of land on behalf of the donor, it must be by deed.

3. Registrability of a Power of Attorney

The answer to the question, whether a power of attorney is a registrable instrument depends on (a) the nature of the power ceded to the donee by the donor under the power of attorney and (b) whether it is classified as an 'instrument' under the relevant land instrument registration law applicable in the state where the land is located. Where a power of attorney gives power merely to sue and defend actions, collect rents, build a house or renovate a building, it is not a registrable instrument.[18] It is registrable where it gives power to the donee to transfer an interest or title in a piece of land to a third party. This will be the case even where the same power of attorney contains other powers that would ordinarily make same not registrable. It has been contended that every power of attorney which empowers the donee to effect a transfer of title or interest in land in Nigeria is statutorily and compulsorily registrable.[19] Section 2 of the Land Instrument Registration Act,[20] defines a registrable instrument as:

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[14] Abugu (n 3) 114.

[15] Imhaanobe (n 9) 521.

[16] Ibid. The learned author notes that an advantage of dual execution is that if the document is registered, the donee's signature therein contained can be compared with any other signature purported to have been signed by him at any time in future in transactions dealing with the same land.

[17] *Abina v Farhat* (938)13 NLR 17; *Abubakar v Waziri* (2008)14 NWLR (Pt 1105) 507.

[18] *Abu v Kuyabana* (2002) 4 NWLR (Pt758) 599

[19] Abugu (n 3) 116.

[20] See Land Instrument Registration Law, Cap 72, Laws of Eastern Nigeria, 1963 and s 2, Land Registration Law Cap 58, Laws of Northern Nigeria, 1963 which are the same as that of Lagos. These have been enacted into laws by the various states in the respective regions, retaining substantially the provisions of this section.

> A document affecting land in Nigeria whereby one party,(hereinafter called the grantor) confers transfers, limits, charges, or extinguishes in favour of another party (hereinafter called the grantee) any right or title to or interest in land in Nigeria, and includes a certificate of purchase and a power of attorney under which any instrument may be executed, but does not include a will.

Thus by the various land instrument registration laws in Nigeria only powers of attorney "under which any instrument may be executed" are registrable i.e. powers of attorney to execute deeds transferring interest or title to land and not merely powers of attorney to sign documents. Note that in Enugu State, any document which purports to confer, transfer, limit, charge or extinguish any right to or interest in land is a registrable instrument.[21] With this inclusion, Enugu State has considerably solved the puzzle created by legal practitioners who creatively craft documents which, in form, may present the appearance of powers of attorney or even ordinary purchase receipts, but which in substance, are instruments that effectively transfer interests in land. It is urged that other states should take a cue from Enugu.

This writer is in agreement with the view expressed by Abugu that perhaps, the quality of a power of attorney as a registrable instrument as securing priority and, in contest for title upon registration, in favour of the donee explains the attractions which Legal Practitioners have for it as a means of transferring land. But if a power of attorney does not meet other legal requirements for effective transfer of land, mere registration would not add any further value to the document. In fact, registration is not a magic wand that cures any defect in a registered instrument. A defective or invalid document remains defective or invalid even if it has been registered.

4. Power of Attorney as an Instrument for the Transfer of Interest in Land and the Issue of Governor's Consent

It has become a topical issue for discussion among lawyers and other stakeholders in the real property industry whether a power of attorney qualifies as an instrument for the transfer of interest in land in Nigeria, thereby necessitating the consent of the Governor before any such transfer. Attempts to proffer an authentic answer to this question have sharply polarized scholars and stakeholders, producing in their wake, two schools of thought. On the one side are those who contend that a power of attorney, given for valuable consideration or coupled with interest, has the inherent capacity to effectively transfer an interest in land. On the other side is the school peopled by scholars and stakeholders who believe that a power of attorney, by its special nature, as an appointing document of agency does not have such a capacity. The greatest support for the former point of view has its constituency in the general (if ignorant) assumption by members of the public that a power of attorney is an

[21] Section 2 Land Instrument (Preparation and Registration) Law, Cap 100, Revised Laws of Enugu State of Nigeria, 2004.

instrument of transfer of proprietary interest, which assumption originated from, and is encouraged by, legal practitioners whose drafting creativity gave birth to the use of power of attorney in transferring interests in land.

It has been earlier on stated that this practice was invented as an escape route from the mandatory requirement of governor's consent for alienation of interests in land. The proponents of this school contend that an irrevocable power of attorney has the trappings of a conveyance and should, therefore, be seen as such. Accordingly, they argue that it would amount to defrauding the system to insist that an irrevocable power of attorney is not more than an agency document subject to the general rule of *delegatus non potest delegare.* Prominent among the supporters of this view is the very learned scholar, Professor Emeka Chianu who forcefully posits that construing a document headed 'irrevocable power of attorney' as nothing but an ordinary power of attorney amounts to underrating custom and practice as a source of law, given the current common practice whereby practitioners load powers of attorney with all manner of authority, including the power of outright alienation without accounting to the donor[22]. To the adherents of this school, through common custom and usage, a power of attorney has acquired the status of a registrable instrument of proprietary transfer comparable to deeds of assignment, sale, mortgage, gift or conveyance.

This argument sounds so attractive and plausible that it even received some early judicial nods. In *Ejukorlem & Co Ltd v Chief Inspector of Mines*,[23] two companies which were given a mining lease executed a power of attorney in appellant's favour to mine minerals which had been granted the companies. Section 13 of the Minerals Ordinance prohibited the assignment of a mining lease without the Governor's written consent. The Ordinance made it a crime to mine minerals without a lawful grant from the governor. Consequently, the appellant company was charged and convicted. It appealed the conviction and the issue turned on the effect of the power of attorney. The instrument, which was declared irrevocable, empowered the company to do everything which the companies were authorized to do: take possession of the properties and work the mines, prosecute anyone, and sell all minerals and retain the proceeds without accounting to the donors. Dismissing the appeal, it was held that the power of attorney was a subterfuge to get round the Minerals Ordinance and as such void. In a very illuminating exposition of the law, Hurley Ag SPJ concluded:

> It is an attempt to get round the provisions of section 13 by giving the company what section 13 says shall not be assigned to it without the governor's consent.... The attempt fails, for what it amounts to, and what (the power of attorney) effects, is an assignment of the rights and interest in question, and the assignment is void for want of the consent

[22] Abugu (n 3) 128.
[23] *Ejukorlem & Co Ltd v Chief Inspector of Mines* (1957)NRNLR 200.

The Supreme Court of Nigeria endorsed this position later in the case of *Dickson v Solicitor-General of Benue Plateau State*[24] where the court held that the power of attorney required consent since it transferred to the donee the right to the possession of the premises in question.

As expected, the practice and judicial support for alienation of land through an irrevocable power of attorney has attracted the attention of governments which are forever in search of means to improve the revenue base of the state. Consequently, some state governments in Nigeria have, by legislative fiat, extended the requirement for the payment of consent fee applicable to all instruments of alienation of land to power of attorney affecting interest in land. It has been stated that in Rivers State, the same consent fee of 5% percent of the capital value of property or of the consideration, whichever is higher, is charged for both assignment and power of attorney coupled with consideration or interest.[25] According to Abugu, Lagos State has also specifically made a requirement that the grant of a power of attorney in respect of any dealing with any state lease must be preceded by the governor's consent while the consent fee of 12.5% of the capital value of the property is charged for irrevocable power of attorney coupled with interest or given for valuable consideration.[26]

While this article may concede that an irrevocable power of attorney given for valuable consideration or coupled with interest (especially as currently masked and crafted by Nigerian lawyers) has the capacity, as between the donor and the donee, to have the effect of a transfer of interest in land, thereby making the requirement of governor's consent and consequent payment of consent fee for such documents justifiable to avoid the institution of fraud against the state, it is humbly submitted that this practice substantially alters the original nature and true essence of a power of attorney as an appointing instrument of agency.

The institutional economic benefits accruable from according a power of attorney the character of a conveyance prevents the proponents of this view from really addressing the more vexed issue of whether a donee of an irrevocable power of attorney can effectively transfer his interest under the power of attorney to a third party by executing another power of attorney in favour of the new donee (a third party)? The same practice among legal practitioners has shown that donees have had recourse to powers of attorney to transfer their interests to the point of having as many as four successive people acquiring interests in the same property through powers of attorney. This practice flies in the face of the hallowed and time-tested principle of agency, *delegatus non potest delegare*. Judicial authorities show that at best a power of attorney can only be utilized by a donee to transfer interest in the property subject of the power by the execution of a proper lease or assignment acting for

[24] (1974) 1 ALL NLR (Pt 1) 276.
[25] Abugu (n 3) 130.
[26] Ibid.

the principal (owner) of the property and not merely by executing another power of attorney, which would amount to an agent appointing the purported purchaser as another agent of the same principal. This view has been upheld by the courts in a plethora of cases. In the case of *Ude v Nwana*,[27] the government of Eastern Nigeria granted a lease of State land to the appellant for a term of seven years; it effluxed on December31, 1971. During the term, the appellant appointed a third party an attorney over the land. In February 1973 the Rivers State Abandoned Property Authority issued the appellant a declaration releasing the property to him. Ten years later the Rivers State Government sold the property to the respondent who trespassed on the premises. The appellant sued for a declaration that he was a lessee of the premises and sought to recover damages for trespass from respondent. The Rivers State Government contended that by executing the power of attorney, the appellant was in breach of the covenant in the lease which prohibited alienation without the Government's consent. The Supreme Court rejected the contention, holding that a power of attorney does not constitute an alienation of land. Nnaemeka-Agu JSC stated:

> A power of attorney merely warrants and authorizes the donee to do certain acts in the stead of the donor and so is not an instrument which confers, transfers, limits, charges or alienates any title to the donee, rather it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third part. So even if it authorizes the donee to do any of these acts to any person including himself the mere issuance of such a power is not per se an alienation or parting with possession, so far it is categorized as a document of delegation: it is only after, by virtue of the power of attorney, the donee leases or conveys the property, the subject of the power, to any person including himself then there is an alienation. There is no evidence in this case that that stage had been reached. Until that stage is reached and as long as the donee acts within the scope of the power of attorney, he incurs no personal liability: any liability is that of the donor.

This decision was followed by the Court of Appeal in *Olorunfemi v Nigerian Education Bank Ltd.*[28]

An extension of the principle that a power of attorney whether irrevocable able or not or whether given for valuable consideration or coupled with interest or not cannot effect a transfer of the property subject of the power is the rule that a power conferred by a power of attorney is not transmissible by the death of the donee. In other words the interest of the donee secured rower of attorney is not an inheritable property by reason only of the power conferred on the dead donee. As such unless the donee exercised the option of transferring or ring the interest in the power to himself or to another person, the interest is not more than a precarious non- transmissible one that does not survive him. This principle is the natural consequence that follows the nature of a power of

[27] (1993) 1 NSCC 36; (1993) 2 NLR (Pt 278) 638.
[28] (2003) 5 NWLR (Pt 812)

attorney as mere instrument of agency. Of course, the power of an agent to act for the principal cannot survive the agent so that the same may be carried out by the donee's personal representatives, heirs, assigns, or the executors of his Will.

In *Ndukauba v Kolomo*,[29] the Eastern Nigeria government granted a 99 year term to one Ezeakunne who in turn executed a power of attorney in favour of the plaintiffs father to manage the property. The plaintiff's father erected a building on the land and remained in possession through tenants. In 1982, the Rivers State government transferred the land to tow defendant. After this suit was instituted the donee of the power died and his son continued with the suit. It was also in evidence that the donor had also died at the time of the suit The Court of Appeal held that with the demise of the don and the donee of the power, the agency determined and tl plaintiff had no locus standi to prosecute the claim. His Lordship, Ogebe JCA set out the law in the following words:

> From the reading of the document it is clear that the power of attorney only delegated the authority of the donor to appellant's father personally. It was not meant to transfer the authority from father to son. It therefore followed that when the appellant's father died on 29th of October, 1988 during the pendency of the case in the lower court the appellant had no *locus standi* to pursue the matter.

The principle that emerges from this case appears to be that while the death of the donor cannot revoke a power of attorney given for valuable consideration or coupled with interest as it relates to the act of the donee or a purchaser deriving title from him, the death of the donee effectively determines a power of attorney irrespective of its form and content. Accordingly, no personal representative or legatee in the donee's Will can step into the donee's shoes to take the interest secured by such a power of attorney beneficially, unless the donee had taken steps to vest the property in himself pursuant to the power of attorney before his death.

It is hereby reiterated that a power of attorney is not a document whereby interest in land in Nigeria can be transferred, and that the current trend among state governments whereby they enact laws specifically requiring the governor's consent for a power of attorney affecting interest in land does not cure that defect. Pats-Acholonu JCA puts it succinctly:

> It must be emphasized that a power of attorney is not an instrument that transfers or alienates any landed property. It is merely an instrument delegating powers to the donee to stand in the position of the donor and do the things he could do. It is erroneously believed in not very enlightened circles particularly amongst the generality of Nigerians that power of attorney is as good as a lease or assignment. It is not whether or not it is coupled with interest. It may

[29](2001) 2 NWLR (Pt 726) 117.

> eventually lead to execution of an instrument for the complete alienation of land after the consent of the requisite authority has been obtained.[30]

Abugu's learned view that obtaining a governor's consent for a power of attorney amounts to putting the cart before the horse and is of no legal significance is unimpeachable. The governor's consent must be predicated on an instrument which is capable of transferring interest in the land and duly executed pursuant to the power of attorney. It is submitted that all the prevailing laws on payment of consent fees for powers of attorney or that make governor's consent a condition precedent to execution of a power of attorney can only be a clever device by the relevant governments to attract revenue by exercise of its legislative authority. But whether such legislation are constitutional or legal is highly questionable. This is because the governor's power to consent is limited to instruments which are capable of transferring interest in land. Any such consent endorsed on a power of attorney in favour of a third party does not transform such a power of attorney into an instrument of alienation. And to collect consent fee to do what they have no power to do, nor power to achieve, amounts to fraud on members of the public.

Also, any document which pretends to be a power of attorney by simply assuming to be one, but whose contents and substance have the effect of a transfer of interest in land is indeed not a power of attorney. It should, therefore, be treated as a document of conveyance.

5. Conclusion

Recourse to the use of power of attorney as an instrument for the transfer of interests in land in Nigeria grew out of the attempts by stakeholders to circumvent the stress and expenditure involved in securing the consent of the governor before any alienation of interest in land. It is suggested that the procedures and the cost for obtaining the said consent be reviewed, making it less burdensome for citizens. This will discourage practitioners and other stakeholders from the unwholesome practice of dressing instruments of conveyance in the borrowed robes of powers of attorney. It will also encourage people to always opt for the proper documents for all transactions relating to land. It is also suggested that the laws on registration of instruments be amended to reflect the view that documents purporting to be powers of attorney but which in fact transfer interests in land should be denied registration as such. Furthermore, the states' land registries need some uplifting with respect to their working infrastructure and quality of personnel. Documents should be properly read and scrutinized before being accepted for registration. This article is a modest contribution to the on-going debate, among scholars and legal minds, on the use of power of attorney to transfer interests in land in Nigeria. It attempted the question as to what extent a power of attorney can effectively and legally be used to transfer interests in land in Nigeria. To do this, it analysed the meaning,

[30] Ibid 127.

nature and form of a power of attorney and came to the conclusion that a power of attorney is an appointing document of agency, governed by all the principles of agency. It also discussed the practice by governments who make laws requiring governor's consent for the validity of powers of attorney, an act which cannot be justified in law. The current practice whereby documents of actual conveyance are masked as powers of attorney in order to escape the statutory requirement for governor's consent before alienation of interest in land was also discussed. Affirming that a power of attorney, by its nature, does not have the legal capacity to be used in transferring interests in land, the article posits that practice amounts to gaining entrance into a premises through the back door, dressed in borrowed robes.

EXAMINING THE RIGHT TO HEALTH AMID THE COVID-19 PANDEMIC IN THE LIGHT OF THE FEDERAL COMPETITION AND CONSUMER PROTECTION (FCCP) ACT, 2018

Ebelechukwu Lawretta Okiche[*] and Chidera Philomena Onah[**]

Abstract

The right to 'health' which is said to be 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity' is among the fundamental rights of every human person. This right is so inclusive that it encompasses not just appropriate and affordable health care but every other determinant of health such as adequate nutrition, safe and potable water, sanitation, and health-related education and information. Recently, the world was jolted by the outbreak of a viral infection 'COVID-19' which first appeared in Wuhan, China in December 2019. Declaring the disease a pandemic as a result of the alarming rate of spread and mortality, the World Health Organisation (WHO) urged nations to take aggressive steps to contain the disease. Measures taken include lockdown, prohibition of mass gatherings, social distancing and isolation, the use of face masks, hand sanitizers, disinfectants, latex gloves, and the rest of them. All over the world including Nigeria prices of goods and services skyrocketed overnight as business undertakings, through obnoxious trade practices priced goods and services out of reach of the average consumer thereby impugning his right to health. This is contrary to the provisions of the FCCP Act. This paper interrogates the response of the Act and the body created by it to the situation to ascertain the adequacy or otherwise of both as consumer protection instruments. The methodology this paper employs is the doctrinal methodology with the comparative approach.

Keywords: Right to Health, Covid-19, Consumer Protection, Competition, FCCPA

1. Introduction

The most basic of all human rights is the right to life. This is so because without life, other rights accruing to the consumer, including those set out in Part XV of the Federal Competition and Consumer Protection Act (FCCPA) 2018 become meaningless. However, for life to be meaningful, it must be healthy. As a result of this, governments all over the world Nigeria inclusive have always intervened in the area of 'health' *a sine quanon* for life. Health, which is said to be 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity,'[1] has since been recognised as a fundamental human right.[2] This right is not just confined to the right to healthcare but includes other

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[1] The 1946 Constitution of World Health Organisation, The Preamble <https://www.who.int/about/who-we-are/constitution> accessed 20 October, 2020.
[2] Ibid.

factors which enable an individual to live a healthy life such as food, potable water, housing, a healthy environment, and safe working condition.[3] To this end, one of the major consumer protection efforts in jurisdictions all over the world is government regulation of products and services to make sure that the consumer is not short-changed in any way and that if he is, he would get redress.

The Nigerian Government has put in place quite a lot of legal[4] and institutional frameworks to ensure adequate protection of the Nigerian consumer from the adverse effects of unsafe food, counterfeit and fake drugs, shoddy services, and access to quality health care when the need arises. One of such laws, the Federal Competition and Consumer Protection Act (FCCPA) 2018[5], together with the institutions it creates is our major concern in this paper. The FCCPA, which is in two prongs, seeks the development and promotion of fair, efficient, and competitive markets in its competition aspect while the consumer protection aspect aims to facilitate access to safe products and services and secure the rights of all consumers in Nigeria. The Corona Virus (COVID-19) outbreak which put the world into a state of panic seems to be the first baptism of fire for the Act which came into force barely one year before COVID-19 was declared a pandemic.[6]

A search for relevant literature reveals no work which bears directly on our topic. However, Ikusika's work[7] on FCCPA and price gouging amid the pandemic is related to our study. The author decries the unconscionable increase in prices of goods critical to the health, safety, and survival of consumers in the current pandemic by undertakings in contravention of the provisions of FCCPA and calls on the Commission to take more decisive steps to live up to its

[3] The Universal Declaration of Human Rights, art.25 < https://www.un.org/en/universal-declaration-human-rights> accessed 20 October, 2020.

[4] Some of the laws are the Federal Competition and Consumer Protection Act (FCCPA) 2018 the Standards Organization of Nigeria Act 1971, (2015); the Weights and Measures Act, 1974, (Cap W3); the Food and Drugs Act 1974, (Cap F32); the National Agency for Food and drug Administration and Control Act 1993, (Cap N1); the Trade Malpractices (Miscellaneous Offences) Act 1993, (CapT10); the Food, Drug and Related Products (Registration etc.) Act 1993 (Cap F33); the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions, Act 1999 (Cap C34) and the Nigerian Communications Act 2003, (Cap N33).

[5]The Act was signed on 30/1/2019 by President Muhammadu Buhari.

[6]"WHO Director-General's opening remarks at the media briefing on COVID-19-11 2020,<"https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19-- > accessed 20 October, 2020.

[7]Bamidele Ikusika, "Examining the Federal Competition and Consumer Protection Act as A Response to Price Gouging Amidst The Covid-19 Pandemic in Nigeria" <https://thenigerialawyer.com/examining-the-federal-competition-and-consumer-protection-act-as-a-response-to-price-gouging-amidst-the-covid-19-pandemic-in-nigeria-by-bamidele-ikusika/> accessed 21 October, 2020.

statutory responsibility. Our work goes beyond this since our scope of study is broader. The work takes a holistic look at the consumer's right to health to ascertain the extent to which the FCCPA has safeguarded this right during the COVID-19 pandemic. Recommendations are made thereafter.

2. Conceptualising the Right to Health

One of the most important daily concerns of an average human being is his health and that of his loved ones. It is considered so essential and valuable that people are always willing to do anything for a healthy life. The saying that "health is wealth" simply translates to the fact that only a healthy person could work to make money or go to school or take up any responsibility for that matter. Given its indispensability to the right to life, it is not surprising that United Nations made it a fundamental human right. "The right to the enjoyment of the highest attainable standard of physical and mental health," usually shortened to "the right to health," was first articulated in the 1946 Constitution of the World Health Organisation (WHO).[8] The Preamble to the Constitution first defines health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'; and then says that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.'[9] According to the Universal Declaration of Human Rights (UDHR), the Right to health is that:

> (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
>
> (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.[10]

Other international and regional instruments also define the right in the same vein. [11] However, it is the International Covenant on Economic, Social and Cultural Rights, which through its Committee on Economic, Social and Cultural Rights, the body responsible for monitoring compliance gave a breakdown of what the right entails.[12] This has succinctly been summarised as follows;

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[8] WHO (n 1).
[9] Ibid.
[10] Note 3.
[11] International Covenant on Economic, Social and Cultural Rights, art.12.
[12] Committee on Economic, Social and Cultural Rights, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights," General Comment No 14 (2000) <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEov

The right to health is an inclusive right**.** We frequently associate the right to health with access to health care and the building of hospitals. This is correct, but the right to health extends further. It includes a wide range of factors that can help us lead a healthy life. The Committee on Economic, Social and Cultural Rights, the body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights, calls these the 'underlying determinants of health'. They include: safe drinking water and adequate sanitation; safe food; adequate nutrition and housing; healthy working and environmental conditions; health-related education and information; and gender equality.

The right to health contains freedoms and entitlements. The freedoms include the right to be free from non consensual medical treatment, such as medical experiments and research or forced sterilization, and to be free from torture and other cruel, inhuman or degrading treatment or punishment. On the other hand, the entitlements include the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health; the right to prevention, treatment and control of diseases; access to essential medicines; maternal, child and reproductive health. Other are equal and timely access to basic health services; the provision of health-related education and information; and participation of the population in health-related decision making at the national and community levels.

Right to health entails that health services, goods and facilities must be provided to all without any discrimination. Non-discrimination is a key principle in human rights and is crucial to the enjoyment of the right to the highest attainable standard of health. All services, goods and facilities must be available, accessible, acceptable and of good quality. Functioning public health and health-care facilities, goods and services must be available in sufficient quantity within a State. They must be accessible physically (in safe reach for all sections of the population, including children, adolescents, older persons, persons with disabilities and other vulnerable groups) as well as financially and on the basis of non-discrimination. Accessibility also implies the right to seek, receive and impart health-related information in an accessible format (for all, including persons with disabilities), but does not impair the right to have personal health data treated confidentially.The facilities, goods and services should also respect medical ethics, and be gender-sensitive and culturally appropriate. In other words, they should be medically and culturally acceptable. Finally, they must be scientifically and medically appropriate and of good quality. This requires, in particular, trained health professionals, scientifically

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approved and unexpired drugs and hospital equipment, adequate sanitation and safe drinking water.[13]

A careful perusal of the above shows that these determinants of health are critical requirements for the health, safety, and survival of the consumer at every point in time, especially in this pandemic.

3. The Corona Virus (COVID-19) Pandemic

In December 2019, an infectious disease caused by a new coronavirus was first identified in Wuhan, China. The viruses are known to cause severe respiratory infections. Fast forward to March 2020, up to 750,890 persons spread across more than 150 countries had been infected by the disease with a mortality rate of more than 36,000 people.[14] The world panicked. Taking cognisance of the rate at which the disease spread from country to country, the World Health Organisation quickly characterised it as a pandemic.[15] This brought about a halt to life as we knew it. In the bid to curb the spread of the virus, countries implemented nationwide lockdowns and economies suffered. In addition, measures such as the prohibition of mass gatherings, social distancing, and isolation became the order of the day to reduce the spread of the virus. Frequent washing of hands with soap, use of hand sanitiser, disinfectants, face masks, latex gloves, etc became the new normal. As is to be expected, prices of everything skyrocketed as a result of not just increased demand but also because of decrease or non-production and difficulties in distribution because of the lockdown.

In Nigeria, things went haywire as hoarding and price gouging took centre stage. Foodstuff, basic health amenities, and toiletries such as soap, face masks, hand sanitisers, disinfectants, latex gloves, and the rest of them became extremely expensive and scarce. Face masks, for instance, went from being as low as three pieces for N50 to N500 a piece; a paint bucket of *garri* went from N300 to N800; while a bag of sachet water went from N80 to up to N200. When word came out that chloroquine phosphate could be a possible cure for the illness, the drug became extremely expensive as people began purchasing it and self-medicating. Rumors of people washing and selling used and discarded facemasks arose; face masks that were designed to be used just once were reused multiple times because it was scarce and expensive. In all these, one sees

[13] WHO Factsheet No.31 The Right to Health <.https://www.refworld.org/docid/48625a742.html> accessed 20 October, 2020.
[14] Coronavirus disease 2019 (COVID-19)Situation Report –71 <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200331-sitrep-71-covid-19.pdf> accessed 20 October, 2020.
[15] WHO Director-General's opening remarks at the media briefing on COVID-19-11 2020 <http://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 20 October, 2020.

that the consumer is in a very precarious situation as undertakings started taking advantage of his vulnerability contrary to the provisions of the FCCPA.

4. The Federal Competition and Consumer Protection (FCCP) Act, 2018

After almost a decade of going back and forth, the Federal Government finally signed the Federal Competition and Consumer Protection Bill 2018 on January 30, 2019, with its scope covering all undertakings and all commercial activities within or having an effect within Nigeria.[16] The purpose of the Act is to:

(a) promote and maintain competitive markets in the Nigerian economy;
(b) promote economic efficiency;
(c) protect and promote the interests and welfare of consumers by providing consumers with wider variety of quality products at competitive prices;
(d) prohibit restrictive or unfair business practices which prevent, restrict or distort competition or constitute an abuse of a dominant position of market power in Nigeria; and
(e) contribute to the sustainable development of the Nigerian economy.[17]

To enable it achieve its purpose, the Act establishes two institutions - the Federal Competition and Consumer Protection Commission (the Commission)[18] and the Competition and Consumer Protection Tribunal (the Tribunal).[19] The Commission is a body corporate that may sue and be sued, is responsible for the administration and enforcement of not only the provisions of the Act but any other enactment concerning competition and protection of consumers.[20] To this end, the Commission is given very wide powers and authority [21] some of them which directly relate to this study are the power to:

(a) initiate broad based policies and review economic activities in Nigeria to identify anti-competitive, anti-consumer protection, and restrictive practices which may adversely affect the economic interest of consumers and make rules and regulations under this Act and any other enactment with regards to competitions and protection of consumers;
(b) advise the Federal Government generally on national policies and matters pertaining to all goods and services and on the determination of national norms and standards relating to competition and consumer protection;
(c) eliminate anti-competitive agreements, misleading unfair, deceptive or unconscionable marketing, trading, and business practices;
(d) resolve disputes or complaints, issue directives, and apply sanctions where necessary;
(e) give and receive advice from other regulatory authorities or agencies within the relevant industry or sector on consumer protection and competition matters ;

[16]FCCPA, s 2 (1).
[17] Ibid, s 1.
[18] Ibid, s 3.
[19] Ibid, s 39.
[20] Ibid, s 17 (a).
[21] Ibid, Part111, ss 17and18.

(f) create public awareness: through seminars, workshops, studies and make available information with regard to the exercise of its powers and performance of its functions to the public;
(g) protect and promote consumer interests;
(h) regulate and seek ways and means of removing or eliminating from the market, hazardous goods and services, including emission, untested, controversial, emerging or new technologies, products or devices whatsoever; and cause offenders to replace such goods or services with safer and more appropriate alternatives;
(i) collaborate with consumer protection groups and associations for consumer protection purposes;
(j) ensure that consumers' interests receive due consideration at appropriate fora and provide redresses to obnoxious practices or the unscrupulous exploitation of consumers by companies, firms, trade associations or individuals.[22]

The Tribunal is empowered to adjudicate over conducts prohibited by the. Act.[23] It has the power to hear appeals and review any decision made by the Commission or any sector-specific regulatory authority in respect of competition and consumer protection matters after an initial review has been conducted by the Commission. Consequently, the Tribunal shall make a ruling necessary or incidental to such review and can impose an administrative penalty in accordance with a prohibited practice under the Act.[24] If a party is displeased with the ruling of the Tribunal, appeal lies to the Nigerian Court of Appeal.[25]

One of the most important innovations of the new Act[26], is the enumeration of rights inherently granted to the consumer who it defines to include any person "who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production or manufacture of any other goods or articles for sale: or' to who a service is rendered."[27] The rights[28], which align with those,

[22] Ibid, ss17 (b), (c), (g), (h), (i), (j), (l), (m), (r), (s)
[23] Ibid, s.47
[24]Ibid s.51 provides that administrative penalty shall not exceed 10 percent of an undertakings turnover in the preceding year. Section 52 FCCPA also provides that the Tribunal can also order an undertaking to sell its assets where it determines that it is the most appropriate remedy or when the undertaking is a repeat offender.
[25] Ibid s 55
[26] This is one of the downsides of the defunct Consumer Protection Council Act. See F. O. Ukwueze & E. L.Okiche (2020):"Product liability in Nigeria: a paradigm shift from fault-based to strict liability regime, *Commonwealth Law Bulletin*, DOI: 10.1080/03050718.2020.1788403.
[27]Ibid, s.167
[28]They are, the rights to satisfaction of basic needs; safety; information; choice; to be heard; redress; consumer education; and healthy and sustainable environment. See Consumer International, 'Consumer Rights'

granted to the consumer under the United Nations Guidelines on Consumer Protection (UNGCP)[29] and the Model Law for Consumer Protection in Africa (MLCPA)[30] are rights to:

Information in plain and understandable language which include trade description and price disclosure;[31]

b. Select suppliers, cancel advance reservation, booking or order, choose and examine goods; return unsatisfactory goods;[32]

c. Fair dealings;[33]

d. Quality and safe products and services;[34] and

e. Redress, including damages, refund and replacement of defective goods.[35]

In the same vein, the Act imposes general obligations to manufacturers, importers, distributors, suppliers of goods, and service providers.[36] In addition, it creates specific offences.[37]

It is an offence for an undertaking defined as "any person involved in the production of, or the trade in, goods, or the provision of services" [38] to [39]conspire, combine, agree or arrange with another undertaking to prevent, limit or reduce unduly, the manufacture or production of any goods or services or to unreasonably enhance the price of any goods or services." Also, an undertaking shall not require a consumer to pay a price for any goods or services higher than the displayed price for those goods or services, or if more than one price is concurrently displayed higher than the lower or lowest of the prices so displayed. It is equally an offence for an undertaking to:

(a) offer to supply, supply, or enter into an agreement to supply, any goods or services at a price that is manifestly unfair, unreasonable, or unjust, or on terms that are unfair unreasonable, or unjust;

<http://www.consumersinternational.org/who-we-are/consumer-rights> accessed 20 October 2020.

[29]Art 5.The Guidelines were first adopted by the General Assembly in resolution 39/ 248 of 16 April 1985, later expanded by the Economic and Social Council in resolution 1999/7 of 26 July 1999, and revised and adopted by the General Assembly in resolution 70/186 of 22 December 2015

[30]Model Law for Consumer Protection in Africa (Zimbabwe 1996) art 3.

[31] FCCPA, ss. 114-117

[32] Ibid, ss 119-122

[33] Ibid, ss 123-129

[34] Ibid, ss130-131

[35] Ibid, ss132 and 136

[36] Ibid, Part XVI

[37] Ibid, Part XIV

[38] Ibid, s167

[39] Ibid, s108 (1) (b).

(b) market any goods or services, or negotiate: enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable, or unjust ; or

(c) require a consumer or other person to whom any goods or services are supplied at the direction of the consumer, to waive any rights, assume any obligation: or waive any liability of the undertaking, on terms that are unfair, unreasonable or unjust: or impose any term as a condition of entering into a transaction.

The penalty for the contravention of any right of the consumer under the Act by a natural person is imprisonment for a term not exceeding five years, or to payment of fine not exceeding N1 0,000,000.00 or to both: for a body corporate, a fine of not less than N100, 000,000.00 or 10% of its turnover in the preceding business year whichever is higher: and each director of the body corporate is liable to be proceeded against and dealt with as an individual. [40] From the foregoing, it could be clearly seen that the Act provides an adequate legal and institutional framework for the protection of the Nigerian consumer.

5. FCCPA, Consumer Protection and COVID 19 Pandemic

No sooner had the World Health Organisation announced the use of essential health products (face masks, hand sanitizers, disinfectants, latex gloves, etc) necessary for containing the spread of the virus than price gouging, hoarding, and other unconscionable practices began all over the world. Immediately and surprisingly too, the Federal Competition and Consumer Protection Commission intervened. The intervention was through a circular issued on 1 March 2020 by its Chief Executive Officer, Irukera cautioning against arbitrary, unreasonable, unconscionable, excessive, and irrational pricing of critical hygiene products (price gouging). Referring to Sections 17(h) (s), 18 (1) (c), 108 (1) (b) (c) and (d), 115 (3) and 124(1) of the Federal Competition and Consumer Protection Commission Act (FCCPA), he stated:

> This unusual and inordinate practice of unreasonably increasing the price of these products in an indiscriminate manner, on account of the national public health concern (Coronavirus) violates both moral codes and extant law. Abusing citizens' sensitivity, apprehension, anxiety, and vulnerability, especially during emergencies that could adversely affect national security is a violation of the law, specifically, Section 17 (s) of the Federal Competition and Consumer Protection Act (FCCPA) which prohibits obnoxious trade practices, or the unscrupulous exploitation of consumers.[41]

[40] Ibid, s155

[41] B Iruekera, 'Price Gouging, Unreasonable and Arbitrary Increases in Prices of Protective and Hygiene Products on Account of COVID-19 (Corona-virus) Concerns' <http://fccpc.gov.ng/news-events/releases/2020/03/01/price-gouging-unreasonable-and-arbitrary-increases-in-prices-of-protective-and-hygiene-products-on-account-of-covid-19-corona-virus-concerns/> accessed 26 October, 2020.

Encouraging consumers to be vigilant, and report arbitrary prices in consumer goods and unreasonable trade practices to the Commission through telephone numbers and email addresses he supplied, he further warned that 'any person who engages in the act of conspiracy, combination, agreement, or arrangement to unduly limit or manipulate supply, to unreasonably enhance price or otherwise restrain competition is liable for a criminal offense.' He equally enjoined consumers to 'proceed in abundance of caution and follow all respiratory and hand-washing hygiene practices that have been published by NCDC, W.H.O, LASG, FCCPC and other official and authoritative sources…'[42]

As prices continue to rise astronomically, the Commission on 13 March issued another alert urging suppliers, retailers, online shopping platforms and individuals who buy to resell to desist from charging unreasonable or inflated prices. It warned that violators will be criminally prosecuted.[43] Consumers were admonished against panic buying especially with regards to the purchases of Chloroquine, which according to the Commission, "raise questions of fairness both by suppliers/retailers, and consumers who are insistent on purchasing all available inventory, even when personal needs are inconsistent with that available inventory."[44] In addition, it urged 'consumers to avoid large gatherings, including markets/stores to make needless or non-essential purchases, and to practice the strongest discipline in staying at home and enforcing social distancing measures.'[45]

Again on 28 March 2020 the Commission issued another release stating that it is prioritising COVID-19 related complaints/issues, particularly its surveillance to 'prevent unconscionable, unjust, unreasonable, exploitative, predatory or unscrupulous conduct by businesses, whether manufacturer,/importer, distributor, or retailer such as price gouging, and supply manipulation of critical hygiene products, medications, and other vital medical devices/supplies.'[46] It counseled businesses 'to operate within the law, or risk consequences which may include prosecution' reinterring that it was receiving information including pictures through its dedicated platform that would aid investigation where and when the need arises.'[47]

Knowing that insisting on strict adherence to certain provisions of the Act during the pandemic might work hardship on both the consumer and

[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] B Iruekera, 'Update: Limited Operations and prioritization during Covid-19 Emergency and Response' <http://fccpc.gov.ng/news-events/releases/2020/03/28/limited-operations-and-prioritization-during-covid-19-emergency-and-response> accessed 26 October, 2020.
[47] Ibid.

undertakings, the Commission on 28 April quickly published what it termed **'**Guidance Regarding FCCPC's (Commission) Merger Notification Process/ Interpretation of the Law on Other Competition Issues under the Federal Competition and Consumer Protection Act (FCCPA); During COVID-19 Pandemic.'[48] The Guideline relaxes certain rules concerning authorisations for cooperation among businesses and certain consumer rights under Part XV of the Act during the COVID-19 pandemic.[49] For instance, it says that cooperation, coordination, or joint efforts to ensure the supply and distribution of scarce products and services that attend to the health, safety, and subsistence needs of consumers 'provided they are limited in scope and duration necessary to address concerns arising from the current crisis and does not go further or last longer than necessary, will not receive legal sanction from the FCCPC.'[50] Regarding consumer rights, the time for the return of defective goods shall subsist 'so long as the consumer shall ensure that the goods are not used and remain in pristine condition.'[51]

However, it is important to note that it was not just released; the Commission surely walked its talk during this pandemic. As a result of the warning to sellers engaged in price gouging and arbitrary increases in prices of protective and hygiene products issued by FCCPC, JUMIA Nigeria, an online shop, delisted 390 products belonging to 168 sellers of hand sanitizers and face masks from its platform.[52] Jumia even went out of its way to source for sellers who would sell at cheap prices and in addition forgo its commission as a result of the Commission's effort.[53] Also, the Commission took four supermarkets in Abuja and their proprietors to court for an alleged arbitrary hike in prices of sanitizers, hand-wash liquids, disinfectants, and other anti-bacterial hygiene products contrary to Section 125 (1) (a), punishable under section 155 of the Act.[54] Furthermore, in furtherance of its surveillance operations, the Commission paid

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[48] FCCPC 2020 Guideline <http://fccpc.gov.ng/uploads/FCCPC%202020%20Guidelines%20on%20Competition%20and%20Consumer%20Protection.pdf> visited 27/10/20

[49] Pursuant to FCCPA, ss. 17 (b), 163 (1), (2) (a) and (e)

[50] FCCPC 2020 Guideline, para 1.5

[51] Ibid, para3.3

[52] FCCPC 'Jumia Delists 390 Products on Account of FCCPC Warning over Hike in Prices of Protective and Hygiene Products, Assures Commission of Cooperation' <http://fccpc.gov.ng/news-events/releases/2020/03/13/jumia-delists-390-products-on-account-of-fccpc-warning-over-hike-in-prices-of-protective-and-hygiene> accessed 22 October, 2020.

[53] Ibid.

[54] Bassey Udo, 'Coronavirus: Nigerian govt sues H-Medix, Faxx Stores, others over hike in prices of sanitizers' <https://www.premiumtimesng.com/news/top-news/384844-coronavirus-nigerian-govt-sues-h-medix-faxx-stores-others-over-hike-in-prices-of-sanitizers.html,> accessed 27 October, 2020.

unscheduled visits to several companies.[55] It sealed off some of the companies that it visited, including the FarEast Mercantile Company and Apples and Pears Ltd where it uncovered large quantities of expired products.[56]

For being so proactive, the Federal Government, through the Federal Ministry of Industry, Trade and Investment (FMITI) gave the Commission an award tagged "Extra Mile Award."[57]The certificate says the Extra Mile Award was for outstanding performance as a member of the Federal Ministry of Industry, Trade and Investment Committee on Sustainable Production/Delivery of Essential Commodities during the COVID-19 pandemic."[58]In a related development, a no less important body than the United Nations Conference on Trade and Development (UNCTAD) commended FCCPC for the proactive and effective actions it took against price gouging and other anti-consumer activities during the ongoing global Coronavirus pandemic.[59] The world body praised FCCPC's leadership role as demonstrated by its 'early successive warnings against unfair practices and anti-market behaviour and also for its robust determination to enforce the law against any breaches.'[60]

6. Comparative Analyses with other Jurisdictions

6.1 Europe

Since the mid-20th century, the European Union (EU) has had an advanced system of competition practice which is based on the provisions of Articles 101[61] and 102[62] of the Treaty of the Functioning of the European Union (TFEU).[63] Articles 101 prohibits the prevention, restriction, or distortion of

[55]The FCCPA, s 18(1)

[56]Sealing of Apples and Pears Business Location for Expired/Expiring Inventories and Unsafe Food Product Handling <http://fccpc.gov.ng/news-events/events/in-furtherance-of-an-open-investigation-on-reasonable-suspicion-of-illegal-activities-s-dot-18-1-fccpa-fccpc-sealed-med-contour-in-an-abundance-of-caution-and-consumer-safety-pending-further-inquiry/> accessed 27 October, 2020.

[57] COVID-19 Response: FCCPC Receives FG Award> http://fccpc.gov.ng/news-events/releases/2020/08/19/covid-19-response-fccpc-receives-fg-award/, accessed 27 October, 2020.

[58]Ibid.

[59] UNCTAD Hails Nigeria on Consumer Protection during Pandemic <http://fccpc.gov.ng/newsevents/releases/2020/05/14/unctad-hails-nigeria-on-consumer-protection-during-pandemic/>, accessed 20 October, 2020.

[60]Ibid.

[61]Treaty on the Functioning of the European Union (TFEU), art. 101 <https://www.lawteacher.net/acts/article-101-tfeu.php> accessed 27 October, 2020.

[62] Ibid, art. 102.

[63] For details see, EL Okiche and AB Okiche, (2020) 'The Balance between Equity and Efficiency; Reflections on the Goals of the New Nigerian Competition Law' *Commonwealth Law Bulletin* DOI: 10.1080/03050718.2020.1756881

competition within the internal market; while 102 is against the imposing of unfair purchase or selling prices or other unfair trading conditions; limiting production, markets, or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.[64] Although not delineable from other union objectives, maintaining the European single market has long been one main objective of EU competition law.[65] As a result of this, the EU came up with uniform measures for its members which are enforceable by the European Competition Network (ECN), the network representing the European Commission and EU national competition authorities. Space will not permit us to enumerate all of them [66]but the gravamen of the release is that the ECN 'will not hesitate to take action against companies taking advantage of the crisis to form cartels or abuse their dominant position.'[67] This is, however, without prejudice to the measures taken by individual member nations of the EU.

6.2 The United Kingdom

From the time COVID-19 was adjudged a pandemic, the UK competition regulator, the Competition and Markets Authority (CMA) took measures to ensure the availability of essential goods and services and also provide guidance on the application of competition law to co-operation activities during the crisis.[68] The CMA first issued a statement urging traders to behave responsibly and warned them against taking advantage of the Coronavirus outbreak to exploit the consumer.[69] Subsequently, it keeps on releasing statements that address different aspects of consumer concerns.[70] For instance, the statement of 19 March 2020 is on 'temporary relaxation of competition law for groceries and supermarkets allowing them to work together to ensure supplies were

[64] Ibid.
[65] Albertina Albors-Llorens, 'Competition Policy and the Shaping of the Single Market' in Barnard C and Scott J (eds), *The Law of the Single European Market* (Hart Publishing, 2002)
[66] For details see COVID-19: Competition Law Implications of the Coronavirus Crisis, <https://ca.practicallaw.thomsonreuters.com/w-024-8054?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 27 October, 2020.
[67]Ibid.
[68] CMA warns against exploitative sales and pricing practices during Coronavirus outbreak <https://uk.practicallaw.thomsonreuters.com/w-024-3369?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29> accessed 27 October, 2020.
[69] Ibid.
[70] Ibid.

maintained during the crisis.'[71] Sequel to this, several emergency amendments were made to the Competition Act to contain the pandemic. Such amendments include temporarily suspending the application of Chapter 1 of the Act in relation to agreements between 'dairy produce suppliers which relate to collecting and sharing information and certain coordination, with the purpose of maximising the processing, transport and storage efficiency and the storage capacity of dairy produce, and preventing or maximising the need for the disposal of milk resulting from the crisis.'[72]

On 20 March 2020, a COVID-19 task force was created by the CMA to tackle the negative impacts of the pandemic.[73] The task force is to 'scrutinise market developments to identify harmful sales practices; warn firms suspected of exploiting the circumstances and people's vulnerability, and take enforcement action if there is evidence firms may have breached competition or consumer law and if they failed to respond to warnings.'[74] The taskforce which is a very active watchdog notes that the majority of the complaints it receives concern unfair pricing and refund and that it had written to over 250 traders regarding these complaints. [75]The latest update from the task force shows that two major holiday firms had formally and firmly committed to addressing the majority of cancellation and refund complaints.[76] The CMA also notes that the volume of price gouging complaints continues to decline.[77]

The most significant aspect of the CMA's response to the COVID-19 crisis is the synergy between the body and other sector specific regulators. The Department for Business, Energy and Industrial Strategy (BEIS) announced on 19 March 2020 an agreement with the energy industry to support vulnerable people with pre-payment meters, suspend disconnections and support energy customers in financial distress.[78] To this end, the Office of Gas and Electricity

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[71] COVID-19: temporary relaxation of competition law to allow supermarkets to work together and CMA statement on approach to essential business cooperation <https://uk.practicallaw.thomsonreuters.com/w-024-5629?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29> accessed 27 October, 2020.

[72] The Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020

[73] CMA launches COVID 19 taskforce <https://uk.practicallaw.thomsonreuters.com/w-0245685?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29> accessed 27 October, 2020.

[74] Ibid.

[75]Ibid.

[76]Ibid.

[77]Ibid.

[78]Legal update, COVID-19: measures agreed with energy industry to support vulnerable people <https://www.gov.uk/government/news/government-agrees-measures-with-

Markets (Ofgem) published an update stating that its priorities are to ensure reliable and secure supplies of gas and electricity and the protection of vulnerable consumers.[79]

Water Services Regulation Authority (Ofwat) , the body responsible for the regulation of privatised water and sewerage equally announced its package of initiatives for combating the crisis. These include minimising disruption in the water markets to support vulnerable consumers; allowing premises temporarily closed to be marked as vacant for settlement; making adjustments for the late payment of bills and considering urgent changes to prevent disconnection for non-payment by consumers.[80] In the area of financial services, the Financial Conduct Authority (FCA) and Payment Systems Regulator (PSR) are keyed into the whole project. Both issued a joint statement supporting the CMA and pledging to 'provide essential services, while not tolerating exploitative conduct that harms consumers.'[81] The telecommunications industry was not left out. It committed to 'working with customers on bills, removing data allowance caps, offering new mobile and landline packages at low prices, and ensuring vulnerable and self-isolating customers get alternative communications if repairs cannot be carried out.'[82]

6.3 The United States

The United States does not have a federal legislation on hoarding (even though various states have) but the Defense Production Act of 1950[83] empowers the President to designate materials as 'scarce materials or materials the supply of which would be threatened by such accumulation' to prevent the hoarding of the

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energy-industry-to-support-vulnerable-people-through-covid-19> accessed 20 October 2020.

[79] Legal update, COVID-19: Ofgem update on industry response and guidance <https://content.next.westlaw.com/Document/Ie77421c1703b11ea80afece799150095/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true,> accessed 20 October 2020.

[80] see Legal update, COVID-19: <Ofwat letter on water industry response <https://uk.practicallaw.thomsonreuters.com/w-024-5611?transitionType=Default&contextData=(sc.Default)&firstPage=true,> and Legal update, COVID-19, Ofwat joint letter with MOSL on impact on the business retail market < https://uk.practicallaw.thomsonreuters.com/w-029-4278?transitionType=Default&contextData=(sc.Default,) > all accessed 20 October 2020.

[81]Legal update, COVID-19: FCA and PSR statement on approach to competition law enforcement <https://uk.practicallaw.thomsonreuters.com,/w-024-6973?transitionType=Default&contextData=(sc.Default > accessed 20 October 2020.

[82] Legal update, COVID-19: measures agreed with telecoms companies to support vulnerable <consumershttps://ca.practicallaw.thomsonreuters.com/w-024-7395?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 20 October 2020.

[83]50 U.S.C. § 4512,

materials 'for the purpose of resale at prices in excess of prevailing market prices.'[84] Pursuant to this, the President issued an executive order 'preventing the hoarding of health and medical resources necessary to respond to the spread of COVID-19 within the United States.'[85] It is instructive to note that within two months of the order, the Federal government charged a lot of people to court for conspiracy to violate the Defense Production Act by price gouging. [86]Based on this, the Antitrust Division of the Department of Justice (DOJ) and the Bureau of Competition of the Federal Trade Commission (FTC) came out with ways firms, including competitors, could engage in pro-competitive collaboration without violating the antitrust laws.[87]

The DOJ created the "Covid-19 Hoarding and Price Gouging Task Force 'to address COVID-19-related market manipulation, hoarding, and price gouging.'[88] The task force was also to 'investigate and prosecute those who acquire vital medical supplies in excess of what they would reasonably use or for the purpose of charging exorbitant prices to the healthcare workers and hospitals who need them.' [89] Like in the UK, there is serious synergy between the FTC and all the sector specific agencies in the areas of health and safety**;** travel, immigration, and transportation; money and taxes; education; scams and fraud; benefits and grants; housing and communications leading to an all-round protection of the consumer. The result is that as of 21 September, 2020 the FTC has received over 200,000 Coronavirus-related consumer complaints.[90]

In addition to the above, most states in the US have legislation against price gouging and this has made for more grass-root coverage and protection for the consumer. The Tennessee Law 'prohibits any person from charging a price that is grossly in excess of the price generally charged for the same or similar goods or services in the usual course of business.' [91] The items covered are Consumer

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[84] Ibid

[85] <https://www.federalregister.gov/documents/2020/03/26/2020-06478/preventing-hoarding-of-health-and-medical-resources-to-respond-to-the-spread-of-covid-19#print> accessed 20 October, 2020.

[86] < https://www.kslaw.com/pages/covid-19-survey-of-federal-and-state-price-gouging-laws#California> accessed 20 October, 2020.

[87] Antitrust Division's Business Review Process< https://www.justice.gov/atr/business-reviews> and the Federal Trade Commission's Advisory Opinion Process <https://www.ftc.gov/tips-advice/competition-guidance/competition-advisory-opinions> all accessed 20 October, 2020.

[88] Ibid.

[89]Ibid.

[90] Consumer complaints about COVID-19 fraud pass 200,000 <https://uspirg.org/news/usp/consumer-complaints-about-covid-19-fraud-pass-200000> accessed 23 March, 2021.

[91] Tenn. Code Ann. § 47-18-5103 **(a) (1)** <https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=a3e2091f-222c-4313-9fb4-6de01f5c0baa&pdistocdocslideraccess> accessed 23 March, 2021.

food items; Repair or Construction services; Emergency supplies; Medical supplies; Building materials; Gasoline; Transportation, Freight, and Storage services; or Housing.[92] So when news got out that a Tennessee man cleaned out stores of sanitisers and wipes in an attempt to profit off the public's panic over the pandemic by attempting to sell each of the 17,000 bottles of hand sanitiser he purchased at dollar stores for as much as $70 each, the Attorney General's Office stepped in. [93]The AG's Office sent him a cease-and-desist letter and opened an investigation, stating that it would not tolerate price gouging in this time of exceptional need. As a result, the man donated all the said supplies to a church for the church to distribute to people in need across Tennessee.

California's law[94] prohibits selling or offering to sell the covered items or services 'for a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to a date set in the proclamation or declaration of emergency.' [95] The covered items are consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels." The fallout of this is the case of *Fraser et al v. Cal Maine Foods et al*[96]where in a class action, several consumers who purchased eggs sued over two dozen defendants for price gouging. According to the plaintiffs, the defendants, who are producers, wholesalers, and retailers of eggs, seek "to unfairly profit from the increased consumer demand for eggs in the midst of the ongoing crisis."[97]

6.4 South Africa

Back home in Africa, the South African government has equally been very proactive in the handling of the COVID-19 crisis. Directly the government declared the pandemic a national disaster, the Minister of Trade, Industry, and Competition issued block exemptions (the first country in Africa to do so) in respect of four critical sectors of the economy to strengthen the country's fight against COVID-19.[98] Block exemption entails exempting the sectors from the provisions of the Competition Act in respect of restrictive horizontal and

[92] Ibid.
[93] https://www.tennessean.com/story/opinion/2020/04/20/coronavirus-amazon-fighting-price-gouging/5168526002/,
[94] Cal Penal Code s 396.
[95] Ibid (b).
[96]Case No. 3:20-cv-02733, in U.S. District Court for the Northern District of California. <https://www.law360.com/articles/1265960 > accessed 21 October, 2020.
[97] Ibid.
[98]L Naidu and S Nxumalo, South Africa: Competition Law Exemptions and Regulations applicable during COVID-19https://globalcompliancenews.com/south-africa-competition-law-covid19-24032020 > accessed 22 October, 2020.

vertical practices[99] not only to enable them to combine and coordinate infrastructure and resources for the benefit of consumers but also to fight price gouging during the crisis. The four sectors concerned are healthcare, consumer and customer protection, banking and retail property (clothing, footwear, and home textile retailers; personal care services (i.e. hairdressers, health and beauty salons, and restaurants).[100]

Following these measures, the Competition Commission has been vigorously enforcing allegations of price gouging and other unfair trade practices. For instance, it has engaged with retailers and other stakeholders who have agreed to notify it of "unusual increases of prices" by suppliers. [101]To this end, more than 900 complaints were received by the Commission as of 14 May 2020, and majority investigated. Out of these, the Commission swiftly obtained more than twenty consent agreements[102] with the firms concerned while three referrals are pending before the Competition Tribunal.[103] In the case of Centrum Pharmacy, for example, the Commission was able to get the Pharmacy to immediately desist from excessive pricing of face masks; reduce its mark-up on face masks, and donate essential goods to the value of ZAR 25 410 to two local old age homes.[104] All the other consent agreements follow the same pattern.[105]

Regarding individual consumers, National Consumer Commission (NCC), the Competition Commission (CompCom), National Credit Regulator (NCR) and the Government Communication and Information System (GCIS) all collaborate to make sure the consumer is adequately protected. The Ministry of Trade, Industry and Competition set up easy to follow complaint procedure. It was reported that as a result of this, four months into the pandemic, about 1700 cases

[99] The South African Competition Act, ss 4 and 5, <http://www.compcom.co.za/wpcontent/uploads/2017/11/pocket-act-august-20141.pd> accessed 23 March, 2021.

[100] Ibid.

[101]Ibid.

[102]Excessive Pricing COVID-19 <https://ccle.sun.ac.za/excessive-pricing-covid-19> accessed 26 October, 2020.

[103]T Dini, COVID-19 Excessive Pricing – The Cases Pursued by the Competition Commission, South Africa<https://www.bowmanslaw.com/insights/competition/covid-19-excessive-pricing-the-cases-pursued-by-the-competition-commission-s> accessed 20 March 2021.

[104] Ibid.

[105] Ibid.

of alleged price gouging were received.[106] It is instructive to note that items covered by the synergy of the regulators were not just face masks and the like but include such consumer problems as the inability to pay loans during this pandemic, pyramid schemes, debt counseling, etc.[107]

6.5 India

Like in every other nation, the pandemic caused shortage in supplies of food and other essential consumer goods as a result of the lockdown in India**.** The sudden increase in demand for certain medical and healthcare products such as ventilators, face masks and the like indicated for containing the virus further compounded the situation, thereby affecting the morale of health workers.[108] Unlike in some other climes, the Competition Commission of India (CCI) responsible for regulating anti-competitive practices did not pass any interim regulation to deal with COVID-19; it rather issued an advisory in April to guide the businesses.[109] First, it made it clear 'that efficiency gains and benefits to consumers' are among its top priorities. CCI equally recognised that there may be a need for businesses to coordinate some activities by way of sharing data on stock levels, timings of operation, sharing of distribution network, and infrastructure, transport logistics, production, etc., to make sure that supply and distribution of healthcare and medical products and other related services are not hindered.[110]

To achieve this, the CCI relaxed most of its procedures by allowing things like electronic filing of antitrust cases, notifications, and deferment of non-urgent cases, Pre-Filing Consultation (PFC) for combinations through video conference. [111] It also created a helpline for stakeholders to reach the Commission effortlessly during the pandemic in addition to the CCI's website always uploading information to and from the relevant stakeholders. CCI also

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[106]Trade, Industry and Competition on resolving issues of consumer protection during Coronavirus COVID-19 pandemic<https://www.gov.za/speeches/trade-industry-and-competition-resolving-issues-consumer-protection-during-coronavirus > accessed 20 March, 2021.

[107] Ibid.

[108] N Sharma and others 'Personal Protective Equipment: Challenges and Strategies to Combat COVID-19 in India: A Narrative Review', <https://journals.sagepub.com/doi/full/10.1177/0972063420935540> accessed 23 October, 2020.

[109] Regulating competition in times of Covid-19 <https://www.financialexpress.com/opinion/regulating-competition-in-times-of-covid-19/2105885/> accessed 20 March, 2021.

[110] Ibid.

[111] Ibid.

put in place a mechanism for conducting virtual proceedings thus enabling it to interface with sector-specific regulators and other stakeholders.[112]

Being a member of BRICS, CCI is a party to the 'Statement of the BRICS Competition Authorities on Covid-19.'[113] The Agreement aims for members to join efforts to combat the negative economic consequences of Covid-19, by sharing experiences, information, and practices on the competition during and after the pandemic for the benefit of the society and their economies. All the above inform the response of India to the pandemic.

7. Recommendations and Conclusion

This paper examines the functions of FCCPC, powers, and its role in the promotion and protection of the right to health. The only thing that is constant is change, and this sort of change should be accepted wholeheartedly as it has caused a lot of good. The COVID-19 pandemic served as an unexpected mode of test-running the Act with regards to right to health and the way price gouging negatively affects the said right. From the foregoing, one can see one of the ways the Nigerian government actively attempts to protect the fundamental human rights of the citizens. It can be seen that the FCCPC lived up to its billing to a large extent, even to the point of winning an award from a world body. However, there is still room for improvement and in this regard, we make the following recommendations;

The FCCPC should learn to collaborate and synergise with sector specific regulators such as the Nigerian Communications Commission, the Standards Organization of Nigeria and the National Agency for Food and Drug Administration Commission so that every aspect of consumer goods and services would be covered. The case of the UK is very instructive.

The presence of the Commission was only felt in Abuja and Lagos. The need for the Commission to urgently widen its sphere of coverage cannot be overemphasized as most of the consumers who need to be protected are in the rural areas.

Closely related to the above is the importance of public awareness campaigns in churches, village and town hall meetings, schools, etc to enlighten consumers on the rights given to them by law.

It is also recommended that the Commission should rely more on Alternative Dispute Resolution (ADR) in dealing with issues instead of going to court. We say this because the cases instituted by FCCPC against four supermarkets are still pending while its South Africa counterpart resolved a similar issue within

[112] Ibid.

[113] 'Statement of the BRICS Competition Authorities on Covid-19 https://www.cci.gov.in/sites/default/files/event%20document/brics.pdf > accessed 20 March, 2021.

one month. Through dialogue, the Commission was able to get South Africa Centrum Pharmacy to desist from excessive pricing of face masks; reduce its mark-up on face masks, and donate essential goods to the value of ZAR 25 410 to two local old age homes.

Conclusively, we think that FCCPC made commendable efforts towards safeguarding the consumer's right to health amid the COVID-19 pandemic but that the services of the Commission would get a lot better if the above recommendations are followed.

COMPARATIVE ADVERTISING AND TRADEMARK INFRINGEMENT IN NIGERIA

Nneka Chioma Ezedum*

Abstract

Comparative advertising is a business strategy and is legalized in some jurisdictions provided it complies with honest business practices and unfair competition laws. However in Nigeria, the Trademarks Act clearly authorises only the trademark owner to the use of his mark, the Act distinguishes between registration in Parts A and B and declares it an infringement of marks registered in Part A to be used in comparative advertising. Considering the role of advertising in economic development and growth of businesses, the right of the consumer to make informed decisions based on availability and access to information, therefore a strict interpretation of the provision of Trademarks Act that relates to comparative advertising will be both restrictive and a hindrance. This article is a critical analysis of the extant laws on comparative advertising and trademark infringement in Nigeria. It reviews the position of the law on comparative advertising under the Nigerian Trademarks Act and questions whether the extant provision of the law is too rigid in that regard. In view of other statutory provisions that access fairness and honest commercial practices, it is recommended that comparative advertising would be better accessed on those standards and not strictly declared an infringement as provided under the Act. It concludes that there is a need to review the Act to permit comparative advertising and allow fair and honest competition practices for the benefit of every party. This will also align the Act to international best practices that has been adopted in other jurisdictions.

Keywords: Trademarks, Comparative Advertising, Consumers Right, Unfair Competition, Fair Commercial Practices, Honest Competition.

1. Introduction

A trademark is a word, phrase, logo, or any other indicator that identifies the source of a particular product.[1] Trademarks indicate where goods come from and advertise the goods or services of the producer on which they are affixed. A reputable mark becomes a significant means of advertisement.[2] Comparative

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[1] J Boyle and J Jenkins, *Intellectual Property: Law & The Information Society- Cases & Materials*(5thedn Centre for the Study of the Public Domain, 2021) 99.

[2] A Omirin, 'The Rising Threat of Trademark Infringement in Nigeria: Ensuring Protection for Everyone' (2017) <https://www.google.com/amp/s/businessday.ng/amp/news/legal-business/article> accessed 4 January 2023

advertisement is a new technique in which advertisers make superlative statements about the utility of their products in comparison with another brand's product, to gain commercially.[3] It involves either direct or indirect comparisons to distinguish a product's offering while pointing out the shortcomings of another specific product[4]Comparative advertising could be subtle or direct, the aim is to show the advantage one product has over another. Comparative advertising therefore entails a direct or indirect reference to the name, attributes or other feature of the goods or services of a competitor in the process of advertising one's own goods or services.[5]

In the bid to showcase ones brand to the public, comparison of different brands arise. What if a particular product is indeed of a higher quality than others, can the trade make owner out rightly state so? Would towing that route amount to unfair practices and unfair competition? Are their comparative advisement practices that could be fair and honest with no intention to discredit the commercial practices of a registered trademark? This article argues that it is prejudicial to consider comparative advertising an infringement as strictly provided under the Act[6] as this undermines international best practices. Considering there are other statutory enactments that access fairness and honest commercial transactions, it is recommended that comparative advertising would be better assessed on those standards and not strictly declared an infringement as provided under the Trademarks Act.

Apart from section one which is the introduction, this paper contains eight more sections. Sections two, three and four discuss trademarks rights, protection and infringement of trademarks in Nigeria, in that order. Section five defines comparative advertising while the sixth section analyses comparative advertising and the constitutional rights of freedom of speech and expression in Nigeria. Achieving fair comparative advertising is the focus of section seven and in section eight the paper deals with the international standard for comparative advertising and unfair competition. Finally, section nine is the conclusion wherein recommendations were made with respect to the issues raised in the paper.

[3] S Gokhale 'An Analysis of the Infringement of a Trademark by Comparative Advertising' (2021) <https://www.google.com/amp/s/blog.ipleaders.in> accessed 4 January 2023.

[4] Inforgraphic 'Comparative Advertising' <https://infographicworld.com/marketing-glossary/comparative-advertising> accessed 23 April 2023

[5] AO Oyewunmi, *Nigerian Law of Intellectual Property* (1st edn, Lagos: University of Lagos Press and Bookshop Ltd, 2015) 267

[6] Trademarks Act, Cap T13 Laws of the Federation of Nigeria (LFN) 2004, s 5(2)(b),

2. Trademarks: Rights and Uses

The Trademarks Act provides that:

> A trademark is a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as a registered user to the mark.[7]

Trademark is a mark of identity, just like personal names. It is an identification mark which a brand uses to distinguish its products from another brand. Trademarks aid consumers in identifying good and the source of those goods. Trademarks form the goodwill of a brand because the reputation of that brand is dependent on the identification of the trademark.

To be registerable under the Act, the mark proposed to be used must be distinctive.[8] The Act further provides that the rights conferred on registration of a trademark are the exclusive right to the use of the trademark in relation to those goods.[9] The right to use the mark entitles the trademark owner with the right to affix the mark on goods, containers, packages, to introduce the goods to the market and the right to use the mark in advertising. The right to exclusive use gives the trademark owner the right to exclude others from using the mark, hence the right to object to the use of the mark in ways that could confuse or mislead consumers.

The importance of trademarks cannot be over rated or over emphasised. Trademarks enhance visibility and enable consumers maximize time. This visibility means that consumers have information about products faster and reduce the time that would be have been wasted in sourcing or searching for products. Trademarks also help to differentiate products and help consumers realize that similarity in products does not amount to equal quality or productivity.

3. Trademarks Protection

Marks deserve protection so that they may operate as indicators of the trade source from which goods and services come, or are in some other way connected.[10] Trademarks represent the mark of quality or otherwise associated with goods and services. Protecting the trademark ensures that the brand will maintain and possibly improve its standard based on the trust relationship established with respect to its trademark. The registered proprietor can use the R

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[7] Ibid, s 67(1).

[8] Trademarks Act, s 9. The Act provides that the following can be registered as trademarks: the name of company, signature, invented words, words unrelated to the product, other distinctive marks.

[9] Ibid, s 5.

[10] W Cornish and D Llewelyn, *Intellectual Property: Patent, Copyright, Trade Marks and Allied Rights* (5th edn, Sweet and Maxwell 2003) 587.

symbol and it adds a great reputation to the goods or service. In simple it gives branded recognition to your products.[11]

Trademarks serve as origin identification function and consequently shields consumers from the possibility of confusion regarding the origin of goods and services [12] .Good brands present quality. . Marks were necessary so that customers who were satisfied with a producer's product could continue to patronize the producer[13]. Trademark protection serves a dual purpose.

> First to secure to him who has been instrumental in bringing into market a superior article of merchandise, the fruit of his industry and skill; second to protect the community from imposition, and furnish some guaranty that an article purchased as the manufacture of one who has appropriated to his own use a certain name, symbol or device as a trademark is genuine.[14]

Trademarks also serve as as a guarantee of quality to consumers, Consumers can be protected, through trademark, from buying goods of lesser quality than their expectation or experience based on repeated usage or interaction with the trademarked goods and services.

4. Statutory Provision for Trademark Infringement in Nigeria

Registration of trademarks in Nigeria is a prerequisite to instituting legal proceedings for infringement of trademarks[15]. The issuance of a certificate is prima facie evidence of a valid registration which entitles the trademark owner with the right to an infringement action.[16] According to the Trademarks Act, infringement of trademark occurs when an unauthorized use of the mark is made in the course of trade or business. The right to the use of trademark shall be deemed to be infringed by one who is unauthorized 'uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered'.[17]

It therefore amounts to infringement under the Act to use identical or closely resembling marks on same goods as that of a registered mark which is likely to cause confusion in the market place or deceive consumers. For trademark

[11] Arivazhagan LE Intelligensia, '7 Advantages of Trademark Registration' <https://www.leintelligensiaipr.com/7-advantages -of-trademark-registration> accessed 6 May 2023

[12] Omirin (n 2).

[13] M Mckenna, 'The Normative Foundations of Trademark Law' <https:www.law.berkeley.edu/files/Mckenna2.doc> accessed 6 May 2023.

[14] Ibid.

[15] Trade Marks Act, s 3. This section provides that 'No person shall be entitled to institute any proceedings to prevent, or to recover damages for infringement of an unregistered trade mark…'

[16] Ibid, s 49.

[17] Ibid, s 5 (2).

infringement to occur, the registered mark has to be used on goods in the same course of trade as the registered mark. The infringement could be identical marks or closely resembling marks. In *Virgin Enterprises Ltd v Rich Day Beverages,*[18] the plaintiffs in that case registered 'virgin' as aerated waters and non-alcoholic drinks while the defendants sought for registration of 'VIRGIN TABLE WATER'. Although the two were in different cases, the court held that a non-observant consumer would see the two as same. This means that the proposed mark would likely cause confusion in the mind of an unwary consumer who would think that the registered mark is from the same source as the proposed mark.

Though identical marks are different from similar marks, there is also restriction on the use of confusingly similar mark. When issues of similarity arise, the degree of similarity between the two marks and the perspective of the average customer would be considered in aiding the court to arrive at a decision. The court considers whether a consumer who is faced with a choice between the two marks would likely mistake one for the other.

5. The Concept of Comparative Advertising

Comparative advertising is another form of infringement according to the Act.[19] State the relevant provision of the Act. Thus, the use of a trademark registered in Part A of the register by a rival business in its advertising constitutes trademark infringement under Section 5(2)(b) of the Act, regardless of the content of the advertising.[20] Comparative advertising is a marketing technique in which a company either directly or indirectly compares its product against one or more competing products, which aims to show that the company's product is superior to its competitors in terms of quality, price, or some other important attribute.[21] With respect to comparative advertising, the Act provides thus:

> In a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular or other advertisement issued to the public, as importing a reference to some person having the right either as proprietor or as registered user to use the trademark or to goods with which such a person as aforesaid is connected in the course of trade.[22]

While considering infringement of trademarks with respect to comparative advertising, there is a need to compare the distinction between infringement of Part A and Part B registration. The Act makes a clear distinction in that regard. The Act deems it to be a form of infringement for a rival company or competitor

[18](2009) LCN/3273 (CA).
[19] Ibid s 5(2)(b).
[20] Oyewunmi (n 5) 284.
[21] 'Comparative Advertising Definition, Methods and Examples' <https://study.com/academy/lesson/comparative-advertising-definition-example-o> accessed 5 May 2023.
[22] Trade Marks Act, s 5 (2) (b).

to use a registered mark in its advertisement or make reference to it in its advertisement. By virtue of this provision, the use of a trademark registered in Part A by another in its advertising constitutes trademark infringement under section 5(2)(b) of the Act, regardless of the context of the advertising[23]. With respect to goods registered in Part B, there is no mention of infringement as a result of use in advertisement[24]. It will be right to conclude that marks registered in Part B may be used for comparative advertising provided the use is not confusing or misleading.

Trademarks and advertising convey useful information to consumers who are capable of making intelligent decisions based on available, if imperfect, product information, as well as on prior experience with the product.[25] Advertising is a marketing strategy used by businesses to promote their goods and services. Advertising is used to inform the public or their target audience about a new product or service, draw attention to additional features of a product or service, acquire recognition and goodwill In the marketplace and promote their brand.[26] Advertising is any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence their choice, opinion or behaviour.[27]

Comparative advertising is a common marketing technique used by companies to compare their product to a competitor's, It emphasis how our company's products and services are better than similar ones available on the market.[28] 'Anything his can do, mine can do better!' This adage sums up the essence of comparative advertising.[29] It is the practice of promoting one's own product

[23]Oyewunmi(n 5) 284.
[24] Trade Marks Act, s 6(2).
[25] K Idris, *Intellectual Property A Power Tool for Economic Growth* (World Intellectual Organisation (WIPO) Publication N 888 ISBN 92-805-1113-0, 153.
[26]Adarmymin, 'The importance of Advertising for a Company ' cited in Bisola Scott, 'General Principles and Requirements for Advertising in Nigeria' (2020) <https://www.mondaq.com/nigeria/advertising-marketing-branding> accessed 13 January 2023.
[27] A Laoye-Balogun, 'Brand Stumping- Legal Positions on Comparative Advertising' <https://www.linkedin.com/pulse/brand-stumping-legal-positions-comparative-abimbola-laoye-balogun> accessed 13 January 2023.
[28] What is Comparative Advertising? Definition and Example, https://www.indeed.com/career-advice-development/comparative-advertising Accessed 5 May 2023.
[29] S Suleman, 'Comparative Advertising, Disparagement and Trademark Infringement: An Interface' (2012) 7 (2) VJLA18<https://papers.ssrn.com/sol3/papers.cfm?abstract_id> accessed 13 January 2023.

with reference to its rivals and the alleged lack of quality in their goods.[30] According to Suleman:

> Humans have this tendency of constantly comparing themselves with their peers. In the process of comparing one might be tempted to believe that he/she is as good as the other or he/she is the best or at least better than the rest. In fact there is nothing wrong as such in believing that one is the best for it very human to do so, but it is one thing to say "I am the best" and another to say "I am the best. He is not good".[31]

It is a known fact that advertisement, whether exaggerated, falsified or factual is a marketing strategy aimed at convincing consumers to focus on the targeted brand, and this works most of the time. The business world is competitive and advertising is used to raise awareness about a business or product, create a relationship, a brand and position a company, product or service against the competition so that it has an advantage. It enables firms to promote the attributes of their products and services and thereby, to compete better with each other[32]. However advertising that is not regulated would result to competitors not adopting fair practices, being dishonest and in the clamour to overtake each other would adopt unscrupulous standards. Therefore, regulation is important as it ensures businesses maintain good advertising standards which are also of great advantage to consumers. It also fosters fairness and responsibility towards competitors and avoids harm to society. Understanding and adhering to these regulations is essential for businesses to operate ethically and legally. As recognised in some jurisdictions, if a registered trademark is used in comparative advertising, it will continue to be an infringement if the use is not 'in accordance with honest practices in industrial or commercial matters' and also takes unfair advantage of or is detrimental to the reputation of the mark[33]

The next step is comparing one brand against another by highlighting the advantages the band in focus has over others or suggesting that the brand is superior or is of higher quality than another. When it refers to the product by name, it is known as comparative brand advertisement, though it may not contain identical trademark but just an overt reference is enough.[34] Comparative advertising identifies the competitor for the purpose of claiming superiority

[30] P Torremans and J Holyoak, *Intellectual Property Law* (2nd edn London, Butterworths 1998) 382.
[31] Suleman (n 29)
[32] Mary Azcuenage, 'The Role of Advertising and Advertising Regulation in the Free Market' https://www.ftc.gov/news-events/news/speeches/role-advertising-advertising-regulation-free-market Accessed 9 May 2023
[33] Torremans and Holyoak (n 30) 383.
[34] P Gangwar, 'Comparative Advertising and Infringement of Trademark' (2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract> accessed 7 January 2023

enhancing perceptions of the sponsoring and usually lesser-known brand.[35] The comparison could also be done by a perceived lower brand aiming to be rated equally with a higher brand in the market place.

In direct comparative advertisements, commercials will specify a competing brand by name and allege that brand or product being promoted is in some way superior.[36] For instance, commercials alleging that Pepsi is of better quality than Coke or that Toyota cars run faster and are more fuel efficient than Mercedes cars. However, when it is indirect it makes a subtle but general comparison without naming the competing brand but insinuates that one brand is superior to other products in the same field, example a Dove (cream) advert stating that Dove treats your skin with care while others are harsh to your skin. Comparative advertising could also be viewed from the perspective of an attack on a particular brand, where by the qualities of the competing brand is highlighted and shown as being detrimental, unhealthy or dangerous depending on the competing product.

Comparative advertising is a persuasive advertising strategy meant to communicate verbally and visually the competitive advantage of superior brands in the marketplace.[37] When the aim is to inform the public objectively and truthfully of brands, it creates transparency and aids consumers in making rational and objective choices. However when its purpose is to high light the statement 'Mine is best, his is no good' then that would amount to discrediting or tarnishing a brand's goodwill.[38]

Another angle to view comparative advertisement is when new products being launched in the market place compare their products with that of known products. The new products do this in a bid to gain relevance by taking advantage of the goodwill and reputation of already existing brands.

Advantages of comparative advertising include that it has the tendency of pushing brands to improve their products to enable them stay ahead of competitors. While the disadvantage is that consumers may be duped by unscrupulous advertisers who either fail to present fair and truthful comparisons or overload customers with false information[39]

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[35] K Williams and R Page, Jr, 'Comparative Advertising as a Competitive Tool' (2013) 7(4) *Journal of Marketing Development and Competitiveness*, 47-62.

[36] Forest Time, 'Comparative and Competitive Advertising' <https://smallbusiness.chron.com/comparative-competitive-advertising-37539.htm> accessed 5 May 2023.

[37] MT More, 'Campaigns Enter Phase 1 of Ad War' *US* Today (27 October 1999), 16A cited in Williams and Page (n 35).

[38] Suleman (n 29)

[39] Laoye-Balogun (n 27).

6. Comparative Advertising and Constitutional Rights

There are rights to be considered in analysing the provision of the Trademarks Act with respect to comparative advertising. The first is the right of the trademark owner. This was put in perspective by some legislation in Nigeria. The Nigerian Code of Advertising Practice, Sales Promotion and Other Rights/Restrictions on Practice (The Advertising Code) 2012 provides that all advertisements in Nigeria or directed at the Nigerian Market shall be legal, decent, honest, truthful, respectful, and mindful of Nigeria's culture, constitutional tenets and relevant lawful enactments.[40] The Advertising Code further provides that the content of an advertisement including, statements and pictures used must not breach any Nigeria copyright or international copyright laws or intellectual property rights.[41] This means that the consent of a property right owner ought to be sought before that work is used in an advert. This is aimed at protecting the right of a trademark owner and to protect a mark from infringement. However with respect to comparative advertising Article 20 of The Advertising Code states thus:

> (a) Advertisements for products and services shall not unfairly discredit, disparage, or attack other products, services, advertisements or companies, or exaggerate the nature or importance of comparative differences.
>
> (b) Advertisements for products and services shall not imitate the slogans or illustrations of another advertiser in such a manner as to mislead the consumers.

It can be inferred from this provision that the Advertising Code is not strict on comparative advertising provided the advertisement does not unfairly discredit, disparage, attack a competitor or mislead consumers.

Also, the 1999 constitution guarantees the right of every Nigerian to freedom of speech and expression. Section 39(1) provides that very person shall be entitled to freedom of expression, including 'the freedom to hold opinions and to receive and impact ideas and information without interference' There are however limitations to these rights as they are not absolute. There could arise libel, slander and even infringement of trademark when a registered mark is used in an offensive way in advertising a competitor's brand. A false comment about a product that harms its producer is known as product disparagement, also known as commercial defamation, trade libel or slander of products.[42]

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[40] The Nigerian Code of Advertising Practice, Sales Promotion and Other Rights/ Restrictions on Practice (The Advertising Code) Para 0.6, Preamble to the Code, B1730 5th edn, SI No 64, 1725-1775 (2012).

[41] Advertising Code, art 10.

[42] Tanvi Trivedi, 'Law of Comparative Advertising under Trademark Law: *Is Everything Fair inn AD and WAR?*' (2022) 7(10) *International Journal of Novel Research and Development (IJNRD)* <http://www.ijnrd.org/papers/ijnrd2210037.pdf> accessed 23 June 2023.

Libel refers to a written or oral defamatory statement or representation that conveys an unjustly unfavourable impression whereas slander refers to a false spoken statement that is made to cause people to have a bad opinion of someone,[43] are both limitations to the right to freedom of speech and expression. Libel and Slander are simply two different types of defamation; defamation is the overarching tort, libel and slander arte just two different ways of committing that tort.[44] Equally, the right to freedom of speech and expression do not encourage a third party/ competitor using a registered trademark in ways that would amount to an infringement of ones right. There are limitations to this freedom as the constitution states that this freedom is restricted where there is speech that incites violence, or hate, defames another person or slanderous statements.[45] The right to freedom of speech and expression end where the rights of others begin. 'Your right to swing your fist ends where my nose begins', In other words, people are free to act as they wish as long as their actions do not cause harm to others.[46]

7. Achieving Fair Comparative Advertising

The most important job of advertising is to get attention which is nothing but awareness creation. Advertising needs to capture the attention of people and make them aware of the products or their features in the market.[47] Putting into consideration the advantages and gain in comparative advertising, how can comparative advertising be utilized so that it does not amount to infringement of trademarks. Though the Trademarks Act states that it is an infringement to use a registered mark in comparative advertising[48] but it can be argued that are there ways that comparative advertising could be done such that it would not result to Trademarks infringement?

When the facts stated in the comparative advertisement are true, verifiable and not intended to mislead the public it should not be termed as an infringement of a trademark. The advert should be fair and not discredit the competitors' products. The advert can compare one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

[43] The Difference between 'Slander' and 'Libel' <https://www.merriam-webster.com> accessed 10 May 2023.

[44] Defamation, Libel, Slander and Defences Lecture <https://www.lawteacher.net/lectures/tort-law/defamation/> accessed 10 May 2023.

[45] Susan Oyeniyi-Isreal, 'Freedom of Speech: What it means vs How we Misuse it' <https://insight.ng/freedom-of-speech-nigeria/> accessed 10 May 2023.

[46] Harm Principle-Ethics Unwrappeed <https://ethicsunwrapped.utexas.edu> accessed 10 May 2023.

[47] Hitesh Bhasin, '11 Objectives of Advertising - What are Advertising Objectives?' <https://www.marketing91.com/objectives-of-advertising> accessed 5 May 2023

[48] As captured under Sec 5(2) of the Trademarks Act.

but should not discredit or denigrate the competitor or its trade mark.[49] It could be fair to say that one's brand is the best in that field but to state that a competitor's product is bad would be unjust, could result to slander and unfair disparagement. The question whether registered marks can be used in comparative advertising in any way to avoid an infringement suit, could then be answered in the positive. It will continue to be an infringement if the use is not 'in accordance with honest practices in industrial or commercial matters' and also takes unfair advantage of or is detrimental to the reputation of the mark.[50] This is a pointer to the fact that comparative advertising ought to be fair, in accordance with honest business practices and not be detrimental to a competitors mark. In the case of *Siemens AV v VIPA Gesellschaft fur Visuallisierung and ProzaBautomatisierungmbH,*[51]the court held that VIPA did take unfair advantage of Siemens' reputation when it held that the purpose of comparative advertising is also to stimulate completion between suppliers of goods and services to the consumers' advantage. VIPA used numbers that were almost identical to Siemens' and in their catalogue, VIPA added this 'please check the order number of the memory modules you require the handbook for your module or call us. The order numbers correspond to those of Siemens' programmable modules' in that case the court also stated that 'an advertiser cannot be regarded as taking unfair advantage of the reputation of the distinguishing marks of his competitor if effective competition on the relevant market is conditional upon a reference to those marks'.

8. International Standard for Comparative Advertising and Unfair Competition

In India, although comparative advertising is not defined in any India legislation, the Indian Trademarks Act of 1999 states that unauthorized use of a mark constitutes infringement and creates exceptions therein. Section 29(8) of the Act provides that it amounts to infringement for an advertiser to use the competitor's trademark to make comparison, however section 30(1) of the Act creates an exception to trademark infringement with respect to comparative advertising. The Act states that using another trader's trademark is not an infringement when it is in accordance with honest practices and is neither taking unfair advantage of a compared trademark nor it is detrimental to the distinctive character or reputation of the compared mark[52]. In *Colgate Palmolive Company and Anor v Hindustan Unilever Ltd,*[53]the defendants showed the defendants product to be superior to the plaintiff's Colgate Strong Teeth on the basis of

[49] Oliver Fairhurst 'Comparative Advertising: What it is and How to Manage Risk' <https://www.lewissilkin.com/en/insights/comparative-advertising-what-it-is-and-how-to-manage-risk> accessed 5 May 2023.
[50] Torremans and Holyoak (n 30) 383.
[51] Case C-59/05 European Courts Reports 2006, 1-02147.
[52] Gokhale (n 3).
[53] 2014 (57) PTC 47 (DEL)

scientific study. The court held the advert to be misleading and inaccurate and the defendant was retrained from publishing the advertisement. In the European Union (EU), the Misleading and Comparative Advertising Directive[54]includes the definition of comparative advertising in article 2 to be 'advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor'. Under it, both direct and implicit comparisons are permitted in advertising only if:

i. It is for goods and services meeting the same needs or purposes
ii. It objectively compares one or more material, relevant, verifiable and representative features, which may include price
iii. It is not misleading, confusing as to source, discrediting or denigrating and
iv. It does not take unfair advantage of the reputation of a mark, name or designation of origin.

The Directive includes within its ambit, comparative advertising and states that any advertising which either explicitly or impliedly referred to another's product must abide by some rules. The rules as outlined above states that the advert must not be misleading, the advert should not create confusion, should not take unfair advantage of the competitor's trademark and should not present its goods or services as replicas of the other product and it does not discredit or degenerate it. The primary objective is to permit honest comparative advertising, there being nothing inherently wrong with informing the public of the relative merits of goods or services by reference to registered marks.[55]

The legislation in countries like United States of America broadly support comparative advertising and considers that truthful comparisons are valid consumer information and beneficial to competition.[56] In the United States of America, the Federal Trade Commission (FTC) permits disparaging advertising as long as they are truthful and not deceptive. Thus advertisements that attack, discredit or otherwise criticize another product are permissible if they are truthful and not expressly or impliedly deceptive.[57]

The above analyses show that India, United States and the European Union have acknowledged the importance of comparative advertising. The laws of these countries aim to protect the consumer from getting confused by deceptively similar products and also protect the competitor by preventing his product from

[54] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006, which amended Directive 97/55/EC which had amended Directive 84/450/EC concerning Misleading Advertisement.
[55] Cornish and Llewelyn (n 10) 717.
[56] WIPO IP and Business: IP in Advertising <https://www.wipo.int/wipo_magazine/en/2005/02/article_0005.html> accessed 19 January 2023
[57] AR Patil and AA Patil 'International Legal Framework on Comparative Advertising in European Union, United States and India - A Contemplative Comparative Study' <https://clap.nis.ac.in/wp-content/uploads/2021/02> accessed 19 January 2023.

getting adversely affected by disparaging comparative advertising.[58] The onus is on the party who contends that his mark has been used for comparison to show that the advertisement was not done in accordance with honest commercial practices.

On the other hand, unfair competition is simply dishonest practices. It is 'any act of competition contrary to honest practices in industrial or commercial matter'.[59] Article 10bis (3)[60] outlines the following acts that are prohibited:

1. All acts of such nature as to create confusion, by any means, with the establishment, the goods, or the industrial or commercial activities, of a competitor;
2. False allegation in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities of a competitor; and
3. Indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of the goods.

Unfair competition laws apply fair rules by ensuring that all parties abide by honest commercial practices, ensures transparency and correctness in advertisement and protects consumers from fraud. The following have been recognized generally as acts of unfair competition: causing confusion, misleading, discrediting competitors, disclosure of secret information, freeriding, comparative advertising. Unfair competition with respect to comparative advertising does not allow advertising that generates confusion or denigration.

9. Conclusion

In comparative advertising, the main argument in favour of this practice is that in an open market, consumers should have all the available information and that comparative advertising facilitates this.[61] Therefore creating an avenue for comparative advertising and protection from unfair practices is possible in Nigeria. As can be seen in this study, it works in other jurisdictions and can be accommodated in the Nigerian judicial system.

The argument against it is that the advertiser will be selective in the way in which the products or services are compared in order to portray his own goods and/or services in the best possible light,[62] and in the process infringe the rights

[58] Ibid.
[59] Article 10bis(2) of the Paris Convention.
[60] Ibid.
[61] T Hart, L Fazzani and S Clark, *Intellectual Property Law (*4th edn, Palgrave Macmillian Law Masters 2006) 128.
[62] Ibid.

of a registered owner. This can be limited by applying the rules or guidelines established as applicable in other jurisdictions. This ensures that though comparative advertising is permitted but usage will be in strict compliance with honest commercial practices. If a mark is used to identify a brand as belonging to the owner of the mark, then should it amount to infringement to use a competitor's mark to emphasis the difference between the two products or services? The emphasis is that comparative advertising should be in accordance with honest practices in industrial or commercial matters and should not be unfair or destroy the reputation of the mark. Therefore, as long as the use of the mark is honest, there is nothing wrong in telling the public of the relative merits of competing services and using trademarks to identify these competing services.[63]

There are several ways to ensure that the system is beneficial to all the parties. With respect to a brand owner, registration of the brands trademark gives the brand owner the requisite right to sue for infringement. The trademark owner should ensure consistency in its trademark usage. The trademark should be used in its proper format and this helps the consumers to easily recall the trademark such that even when there is comparison the mark will not lose it distinctiveness or uniqueness.

It is therefore recommended that the Nigerian Trademarks Act should be amended to allow comparative advertising that comply with the rules of honest trade and fair commercial practices.

[63] Torremans and Holyoak (n 30) 383.

REEXAMINING THE EFFECT OF PRINCIPLES OF JUDICIAL NON-INTERFERENCE AND *KOMPETENZ-KOMPETENZ* ON THE JURISDICTION OF COURTS IN NIGERIA

Nnaemeka Nweze*

Abstract

Even though the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award (Convention) does not provide a universal standard on the authority of the arbitral tribunal to determine its jurisdiction otherwise known as kompetenz-kompetenz, the Convention nevertheless does not permit national courts to review arbitral jurisdictional determination. Using the Nigerian Arbitration and Conciliation Act 2004 (ACA) and the new Arbitration and Mediation Act 2023 (AMA) as a starting point, this article investigates the effect of the principle of judicial non-interference within the context of the principle of kompetenz-kompetenz under the antecedent and the new legislation. From a doctrinal point of view, it discusses how the jurisdiction of the court in Nigeria can be ousted by specific provisions in a statute and thus rationalizes the combined effect of principles of judicial non-interference and kompetenz-kompetenz under the Nigerian statute(s) unlike in other national arbitration law. The article specifically finds that the effect of these principles is to oust the jurisdiction of the court from reviewing the arbitral jurisdictional ruling and this has a basis under the Convention, the arbitration legislation, and decisional laws in Nigeria. This serves practical ends. It fills the gap in scholarship and also provides doctrinal leadership that is regrettably lacking in case law in Nigeria. It also creates awareness of the efficiency and finality effect of arbitration seated in Nigeria. This as a matter of course is the reason why international businessmen prefer arbitration to litigation.

Keywords: Jurisdiction, Judicial Non-interference, *Kompetenz-kompetenz*, National Court, Ouster clause.

1. Introduction

The fundamental feature that distinguishes arbitration from litigation is procedure. Businessmen who engage in cross-border commercial transactions usually are aware that recourse to the settlement of their commercial dispute using arbitration promises results that are confidential, neutral, flexible, efficient,

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and final. With these objectives in mind, businessmen operating at the international level prefer arbitration to litigation because they are skeptical about bias and the various appellate channels which many national courts are not free from. Consequently, international commercial arbitration has taken centre stage as a more viable alternative to litigation and the practice has received the backing of modern arbitration legislation and international conventions, notably the New York Convention. At the heart of these legal instruments is the desire to reduce at the barest minimum, if not to eliminate completely the intervention of the court in a subject matter of an ongoing arbitration except where the intervention is necessary. This has been achieved in national arbitration laws through the provisions of basic principles of judicial non-interference and *kompetenz-kompetenz*. The principle of judicial non-interference complements the principle of *kompetenz-kompetenz* which simply means the authority of arbitral tribunal to determine its jurisdiction. *Kompetenz-kompetenz* in its basic nature has a universal form only differing in scope or limit across many jurisdictions. As a matter of fact, almost all arbitration laws do not give finality effect to arbitral jurisdictional determinations except the Nigerian legislation. While the provisions of section 12 of the old arbitration legislation did not permit the Nigerian court to second guess arbitral jurisdictional ruling during and after the arbitral process, the AMA under section 14 (5) gives finality effect to jurisdictional finding if the arbitral tribunal pre-empts the jurisdictional challenge pending before the court. This is clearly indicative of the ouster of the court's jurisdiction on that particular subject matter.

However, there is dearth of judicial opinions and scholarly contributions on the question as to whether arbitral jurisdictional rulings oust the jurisdiction of the Nigerian court from reviewing the arbitral authority. This is surprising taking into consideration the doctrinal implication of this topic.

This paper addresses the ouster of the jurisdiction of the court over specific subject matter of international commercial arbitration and its legal bases in the New York Convention, the Nigerian arbitration legislation, and decisional laws in Nigeria. Following the introduction, part 2 discusses the underlying objective of choice of (procedural) law in international commercial arbitration. The choice of applicable law simply determines the extent of judicial intervention in arbitral proceedings. Part 3 briefly examines the meaning of the principle of judicial non-interference under the New York Convention and extensively under the ACA and relatively under the AMA. It examines this principle by and large in conjunction with the principle of *kompetenz-kompetenz* and somewhat with the principle of stay of judicial proceeding. These principles could oust or curtail the jurisdiction of the court depending on the stage of the arbitration. This part further examines the scope of the principle of judicial non-interference. It rationalizes from case law point of view that the combination of principles of judicial non-interference and *kompetenz-kompetenz* under the ACA operate as ouster clause provision and

consequently criticizes contrary scholarly opinions as unwarranted and indeed regrettable. Part 4 concludes the paper.

2. Objective of Procedural Choice of Law in International Commercial Arbitration

One of the primary objectives of most international commercial arbitrations is the parties' freedom to agree upon the law of a particular country to govern the conduct of their arbitration proceeding.[1] This freedom is recognized in the New York Convention[2] and arbitration laws of many countries. It is also contained in the rules of most arbitration institutions. The objective of choice of law that governs arbitration proceedings is a demonstration of the fundamental equality of the parties. The aim is to achieve a neutral and unprejudiced means of international dispute resolution 'in which neither side has an inside track of the court.'[3] Inextricably tied to this objective is the parties desire to determine at the outset the extent of judicial involvement, especially in matters of an ongoing arbitration and approved by foremost international arbitration instruments and national arbitration laws. Inherent in this objective is the desire of businessmen to achieve arbitral procedure that is efficient, less technical, and above all one that may limit or remove entirely arbitrators' findings from judicial second-guessing. In Nigeria, this objective is facilitated by the combination of principles of judicial

[1] The law chosen by the parties to govern the arbitration also known as the *lex arbitri* determines the extent a national court under whose law the proceedings is being conducted may intervene in arbitration. In the absence of parties' agreement on law to govern their arbitration proceedings, the most closely connected law, generally the law of the seat of arbitration regulates the conduct of the arbitral proceedings.

[2] See Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) art V (1) (d) (allowing the refusal to recognize and enforce an arbitral award where arbitral procedure was not in accordance with the agreement of the parties or if the procedure was not in accordance with the law of the place where the arbitration took place). From the point of view of the New York Convention, the significance of parties' choice of procedural law is that it recognizes in clear terms the role of party autonomy so that the applicable procedural law may be different from the law of the seat arbitration if it is so chosen by the parties. The provision of New York Convention art V (1) (d) is a markedly different from the provision of the Geneva Convention on Arbitration Clauses art 2 which provides that 'The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.' See <https://www.newyorkconvention.org/11165/web/files/document/1/6/16019.pdf>accessed 12 March 2023. This provision may correctly suggest stifling of party autonomy on choice of procedural law thereby indicating strict compliance with law of the seat of arbitration. See Gary B Born, International Commercial Arbitration (2d ed 2009) 1253-1254.

[3] William Park, 'Duty and Discretion in International Arbitration' [1999] (805) (93) *American Journal of International Law* 24.

non-interference and *kompetenz-kompetenz* which the antecedent[4] and the new legislation[5] provide.

3. Principle of Judicial Non-Interference under Nigerian Law

Arbitration laws and the New York Convention recognize the principle of judicial non-interference either directly or indirectly.[6] For instance, the Nigerian AMA section 64 (cognate section of Model Law article 5) expressly provides that 'a court shall not intervene in any matter governed by this Act except where it is provided in this Act.'[7] On the other hand, the New York Convention Article II (3) indirectly provides that:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed

The Convention obligates contracting States not to entertain interlocutory appeals concerning a subject matter of an ongoing arbitration, especially in situations where the arbitral tribunal has delivered a ruling to the effect that it has jurisdiction to determine the dispute (positive *Kompetenz-kompetenz*). According to a scholar:[8]

> Nothing in the New York Convention expressly provides that national courts shall not entertain interlocutory applications concerning the conduct of international arbitrations. Nonetheless, Article II (3) of the Convention provides that national courts shall "refer the parties to arbitration" after ascertaining the existence of a valid arbitration agreement without making provision for any further judicial role in the arbitration proceedings. At the same time that neither Article II (3) nor any other part of the Convention provides for judicial involvement in establishing, monitoring, or overseeing the procedures used in the arbitration. Article V of the Convention defines the role of national court with exclusive reference to recognition and enforcement of arbitral awards.

Irrespective of their treaty obligation under the Convention, national courts in so far as the determination of arbitral authority is concerned have by way of legislation deviated from the mandatory principle of judicial non-interference which Article II (3) of the Convention establishes albeit indirectly.[9] For instance,

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[4] ACA s 34 and s 12.
[5] AMA s 64 and s 14.
[6] Gary Born, 'The Principle of Judicial Non-Interference in International Arbitral Proceedings' [2009] (30) *U Pa J Int'l L* 1025.
[7] ACA s 34.
[8] Ibid 1027.
[9] This may be rationalized on the ground that the New York Convention does not provide a universal principle of *kompetenz-kompetenz* thus allowing States under the Convention

English Arbitration Act (EAA) section 1 (c) provides that 'in matters governed by this Part the court should not intervene except as provided by this Part.' In the light of the foregoing, the Nigerian Court of Appeal in the case of *Statoil (Nig) Ltd v NNPC*[10] has drawn a sharp distinction between the meaning of the word 'should' in EAA section 1 (c) on the one hand and the word "shall" in ACA section 34 on the other hand. According to the court,[11]

> The disparity in the wording of section 34 of the Arbitration Act and section 1 (1) of the English Act was adumbrated by the appellants to show that the use of "shall" and not "should" is further evidence that the legislature's intention behind section 34 of the Arbitration Act is to (unlike the English Act strictly) RESTRICT COURTS'INTERVENTION in ARBITRAL PROCEEDINGS.

The purport of the above quote is that once arbitration has begun, the Nigerian ACA does not allow judicial second-guessing of arbitral authority or interlocutory court review of arbitral jurisdictional decisions. Thus, the stage of arbitration governed by the ACA determined whether or not the arbitration agreement limits or ousts the jurisdiction of the court in Nigeria. However, courts and commentators are of the opinion that an arbitration agreement does not oust the jurisdiction of the court in Nigeria irrespective of whether arbitration has commenced or not. Those views as subsection (ii) of this article will show are unwarranted and regrettable because they fail to distinguish the extent and limit of the principle of judicial non-interference in arbitration seated in Nigeria. For example, the principle of judicial non-interference only curtails but does not oust the jurisdiction of the court in entertaining arbitral jurisdictional questions[12] when the prospect of arbitration is still remote. On the other hand, the principle ousts the jurisdiction of Nigerian courts in second-guessing arbitral jurisdictional decisions when arbitration has started particularly under the previous legislation. [13] The only circumstances where judicial assistance might be necessary in aid of arbitration that has already begun include during the appointment of arbitrators,[14] where court orders the attendance of witness to

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to develop their various versions of determining the authority of arbitral tribunal to determine its competence to decide a dispute.

[10] [2013] 14 NWLR (Pt 1373).

[11] Ibid 30.

[12] After delivery of award, the prevailing party may seek judicial assistance for the recognition and enforcement of the award or the losing party may seek court's assistance for setting aside the award or its non-recognition and enforcement. See S 52 of ACA. For a comprehensive list of when judicial support in aid of international or domestic arbitration is necessary, see Ezike Edwin Obimma, 'The Validity of Section 34 of the Nigerian Arbitration and Conciliation Act' [2000- 2001] (8) *The Nigerian Juridical Review* 140-142.

[13] According to the UNCITRAL Arbitration Rules art 3 (3) (ACA First Schedule), arbitration is deemed to have commenced when the claimant serves on the respondent a notice of arbitration.

[14] AMA s 7 (4). ACA s 7 (4).

appear before the tribunal[15] and when award is delivered[16] etc. In sum, the extent and limit of the principle of judicial non-interference in the determination of arbitral authority will be examined within the context of when arbitration has not commenced when arbitration has commenced, and when the final award is delivered.

a. Principle of Judicial Non-Interference before Commencement of Arbitration

A party who agrees to arbitrate a commercial dispute usually the respondent may breach the agreement by commencing judicial action even before he is served with notice of arbitration. In that situation, most national legislation permits their courts to refer the unwilling party to arbitration on a mandatory basis if a request for stay of proceeding is made by the willing party in arbitration usually the claimant. This is in recognition of States' obligation pursuant to New York Convention Article II (3) which the section 5 of AMA implements.[17] The role of Nigerian court in referring parties to arbitration upon application for stay of proceedings is restricted to ascertaining whether or not the arbitration agreement is "null and void", "inoperative" and "incapable of being performed".[18] That is to say that Nigerian court should only conduct a rather superficial examination of whether the arbitration agreement is enforceable or not. In practice however, Nigerian court under the old regime determined the enforceability of arbitration agreement by means of lawsuit whereby it carries out a detail investigation of question regarding the validity of the arbitration agreement or scope of subject matter falling under the agreement.[19] Even though the trend is very likely to

[15] AMA s 43. ACA s 23.

[16] AMA s 55. ACA s 52.

[17] AMA s 5 reconciles the difference the between the old section 4 and 5 of the ACA. There are two different provisions for stay of proceedings under the ACA which are s 4 and 5 respectively. While s 4 is mandatory on court to refer parties to arbitration, section 5 is a discretionary obligation on court to refer parties to arbitration. It is outside the remit of this paper to discuss the difference between the two sections or the rationale underlying two seemingly identical provisions in the same Act. This is because much ink has flown into the discussion. See Nduke Ikeyi, 'Enforcing Arbitration Agreements in Nigeria: The Constitutional Question' [2009] (2) *Nigerian Journal of Public Law*. But suffice to say that section 4 reflects Nigerian treaty obligation under the New York Convention Article II (3), hence applicable in international commercial arbitration. On the other hand, section 5 is applicable in domestic arbitration but the provision does not in a matter of domestic arbitration preclude an interested party from bringing his application for stay of proceedings under section 4.

[18] Though these words are conspicuously missing in the provision of s 4 of ACA, they are nevertheless implied terms pursuant to the New York Convention art II (3).

[19] See *Neural Proprietary Ltd v UNIC Inds Plc* [2016] 5 NWLR (Pt 1505) 376-377 (CA); *Res Pal Gazi Const Co v FCDA* (2001) 10 NWLR (Pt 722) 599; *Owners of MV Lupex v Nigerian Overseas Chattering and Shipping Company* (*MV Lupex)*, [2003]15 NWLR (Pt 844) 469; *Onward Ent. Ltd v MV "Matrix"* (*Onward case*) [2010] 2 NWLR (Pt 1179]

continue under the new Act, it does not in any way suggest that the court can entertain the merit of the dispute. To this end, the provisions on stay of proceeding under the Nigerian law curtail the jurisdiction of the court before the commencement of arbitration contrary to a scholarly view[20] which says that the mandatory order of stay under section 4 of ACA had the effect of ousting the jurisdiction of the court.

b. Principle of Judicial Non-interference after Commencement of Arbitration

Immediately the claimant serves on the respondent a notice of arbitration, arbitration is said to have commenced. Because arbitration for good reason is designed to serve as an alternative to litigation, national arbitration laws have designed the principle of *kompetenz-kompetenz* in order to enable experts (arbitrators) chosen by the parties to determine jurisdiction that is conferred on them by the arbitration agreement. When the arbitral tribunal delivers a ruling that the parties' agreement to arbitrate is valid or in existence and that it also covers the dispute (scope) which the parties had agreed to arbitrate upon, the tribunal is said to have made a positive jurisdictional decision. This simply means that the tribunal has jurisdiction to determine the substantive dispute. Nevertheless, almost every national law[21] does not preclude its national court from reviewing arbitral jurisdictional decisions not minding the delay this might cause in certain international commercial transactions such oil and gas industry

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540 (CA); *Nissan (Nig) Ltd v Yaganathan* [2010] 4NWLR (Pt 1183) 143 (CA); *LSWC V Sakamori Const. (Nig) Ltd* [2011] 12 NWLR (Pt 1262) 581 (CA); *Conoil v Vitol SA* [2018] 9 NWLR (Pt 1625) 23.

[20] See Ikeyi (n 18) 293.

[21] See French Nouveau Code de Procedure Civile (NCPC) art 1458 that postpone judicial review of jurisdictional decision until final award is delivered. This is unlike America where judicial scrutiny of arbitral power is permissible at the inception of the arbitral process. This is pursuant to Federal Arbitration Act (FAA) s 3 & 4. See English Arbitration Act 1996 s 30 and 67; Switzerland's Federal Code on Private International Law (CPIL) 1987, art 186(3) & 190(3); German Code of Civil Procedure (ZPO) s 1040(3); Austrian Arbitration Act 2013 s 592 (3); Costa Rican International Arbitration Law No 8937, art 16(3); Japanese Arbitration Law 2003 art 23(5); New Zealand Arbitration Act 1996 s 16 (3); Spanish Arbitration Act 2003, United Arab Emirate Federal Law No 6 of 2018 s III art (19) 2; Mauritius International Arbitration Act, 2008 s 20 (7); Russian Federation Law on International Commercial Arbitration art 16(3); Kenyan Arbitration Act 1995, s 17(6); Egyptian Law on Arbitration 1994, art 22 (3); Danish Arbitration Act 2005 s 16(3); Dutch Code of Civil Procedure- Netherland art 1052(4); Indian Arbitration and Conciliation Act (1996), s 16(6); Swedish Arbitration Act 1999, s 2. In China, the power to determine the validity of arbitration agreement pursuant to art 20 (of Arbitration Law of the People's Republic of China) lies with the arbitration commission or the people's court instead of the arbitral tribunal. William Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' Boston Univ Sch of Law P L & Legal Theory Paper Series 9 (2007).

where 'liquidity is important, deadlines are short, and licenses are fragile'.[22] The AMA to a certain degree is different from other national arbitration laws. This is to the extent that it permits interlocutory challenge on arbitral jurisdictional findings but creates the opportunity for the arbitral tribunal to pre-empt the jurisdictional challenge by merging the jurisdictional findings (interim award) with the final award even as the matter is pending before the court. Such jurisdictional findings most importantly carry a final and binding effect on the parties. The implication in the light of the foregoing is that businessmen and businesswomen who challenged the arbitral authority would be foreclosed from challenging the arbitral award in setting aside proceedings on the ground of lack of existence of the arbitration agreement[23] or that the agreement was beyond the scope of the dispute submitted to the arbitral tribunal.[24]

However, the Nigerian ACA was markedly different from other arbitration laws including the AMA. It had no provision for judicial scrutiny of jurisdictional decisions on an interlocutory basis and those decisions were meant to carry a res judicata effect Section 12 of ACA stated in full that:

1) An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.
2) For purpose of subsection (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral that the contract is null and void shall not entail ipso jure the [in]validity of the arbitration clause.
3) In any arbitral proceedings a plea that the arbitral tribunal-
    a. does not have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such plea by reason that he has appointed or participated in the appointment of an arbitrator,
    b. is exceeding the scope of its authority may be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings, and the arbitral tribunal may, in either case, admit a later plea if it considers that the delay was justified.
4) The arbitral tribunal may rule on any plea referred to it under subsection (3) of this section either as a preliminary question or in award on the merits; and such ruling shall be final and binding.

[22] Philip Chong & Blake Primrose, 'Summary Judgment in International Arbitrations Seated in England' [2017] (33) (1) *Arbitration International* 63.
[23] AMA s 55 (3) (a) (ii).
[24] AMA s 55 (3) (a) (v).

The combined effect of the principle of judicial non-interference under section 34 of ACA and the principle of *kompetenz-kompetenz* just cited above indicates that where there is no permission for judicial intervention over a subject matter or issue concerning the determination of arbitral authority, Nigerian court therefore is ousted of jurisdiction on that particular subject matter. Generally, the underlying reason parties choose to arbitrate instead of litigate is to enable the arbitral tribunal to assume exclusive jurisdiction in determining the parties dispute in a final and binding manner. Irrespective of the fact that only the ACA gave the arbitral tribunal the exclusive jurisdiction to determine its own jurisdiction and which determination shall not be subject to judicial second-guessing,[25] there is however no judicial authority in Nigeria that has treated the authority of arbitral tribunal seated in Nigeria as exclusive. Instead of engaging in prima facie review, case law shows that judges in Nigeria delve into a comprehensive examination of the existence or validity of arbitration agreements even when arbitration has commenced including those seated in a foreign country. Regarding arbitration seated in a foreign jurisdiction, national courts should defer to the parties' choice of law, and a fortiori declines jurisdiction on the basis of the principle of judicial non-interference. Thus, the principle of judicial non-interference strongly complements parties' choice of law as it is the court of the seat of arbitration that has the authority to entertain questions regarding the validity or existence of the arbitration agreement. Beyond the foregoing, one judicial authority in Nigeria, the case of *Shell Petroleum Development Company of Nigeria Limited v Crester Integrated Natural Resources Limited (SPDCN)*[26] has held that the principle of judicial non-interference and the Act itself does not apply in international commercial arbitration.[27]

[25] See text to n 22. Identifying that virtually all arbitration law permits their national courts to review arbitral authority.

[26] [2016] 9 NWLR Pt1517.

[27] The decision in *SPDCN* does not represent the law in Nigeria as it is inconsistent with the rule of *stare decisis.* The principle is paramount in the jurisprudence of common law jurisdictions like Nigeria because it guarantees certainty and predictability to law and demands that judges of subordinate courts are bound to follow decisions of higher courts and Supreme Court where facts are similar.[27] See *NIWA v SPDCN Ltd* [2020] 16 NWLR (Pt 1749) 165,166. Nigerian court over the years has been consistent in enforcing arbitration agreement especially those with foreign seat. See *Res Pal Gazi Const Co v FCDA* (2001) 10 NWLR (Pt 722) 599; *Onward Ent. Ltd v MV "Matrix"* (*Onward case*) [2010] 2 NWLR (Pt 1179] 540 (CA); *Nissan (Nig) Ltd v Yaganathan* [2010] 4 NWLR (Pt 1183) 143 (CA); *LSWC V Sakamori Const. (Nig) Ltd* [2011] 12 NWLR (Pt 1262) 581

In *SPDCN*, the applicant sought an order of injunction restraining the respondent themselves, their management, agent, representative, or solicitors from continuing or proceeding with International Court of Arbitration (ICC) No 21012/TO between the applicant and the respondent. The arbitration was commenced vide a notice of arbitration dated 20 April 2015 and served by the respondent solicitor Messrs Clifford Chance LLP of 10 Upper Bank Street Wharf London E145JJ United Kingdom. The respondent filed a preliminary objection challenging the jurisdiction of the court to entertain the matter or to grant an injunction in restraint of arbitration proceedings pursuant to section 34 of the ACA. In its brief of argument, the respondent further submitted that since the gravamen of the application for anti-arbitration borders on the alleged illegality of the arbitration agreement, that a 'court of law can only have jurisdiction after the issue of jurisdiction has been raised before the tribunal and the tribunal has determined it' [28] pursuant to section 12 of ACA (*kompetenz-kompetenz*). The court unanimously held among other things that the principle of judicial non-interference under section 34 and by virtue of section 58 applies only in domestic arbitration and not in international commercial arbitration.

In its opinion, the court acknowledged that section 34 of ACA is a mandatory provision that prohibits a court from intervening in arbitral proceedings except as the Act may otherwise provide. Responding to the respondent's argument, the court observed that 'section 34 is only applicable to matters governed by the Act so that if it is found in any proceeding that the particular facts and circumstances do not come within the purview of the Act, the provision of section 34 cannot apply with full force.'[29] Therefore, the court took the position that ACA does not apply in international commercial arbitration by virtue of section 58 which says that the 'Act shall apply throughout the federation.' What the court is simply saying in effect is that principles of judicial non-interference under

(CA); *Neural Proprietary Ltd v UNIC Ins Plc* [2016] 5 NWLR (Pt 1505) 376-377 (CA); *Conoil v Vitol SA* [2018] 9 NWLR (Pt 1625) 23.

[28] *SPDCN* ibid 330. Although the respondent counsel erroneously made the argument on *Kompetenz-kompetenz* pursuant to s 12 of ACA, it should have argued instead that the court ought to decline jurisdiction in order to enable the arbitral tribunal seated in London or the English court determine issues of validity or existence of the arbitration agreement. When national court declines jurisdiction in that manner, it is said to have exercised its power of negative *kompetenz-kompetenz*.

[29] Ibid 306.

the ACA apply only in domestic arbitration and not in international commercial arbitration[30] that is seated abroad.

The outcome of the opinion is partly well founded from point of view of the pragmatic principle that regulate arbitration under the section 34 of ACA: it precludes court from intervening in subject matter of arbitral proceeding except as the Act may otherwise provide. The doctrinal underpinning of the opinion is however clearly questionable. The court's parochial interpretation of section 58 of ACA as a basis for limiting the scope of ACA and particularly the principles of judicial non-interference and *kompetenz-kompetenz* to domestic arbitration only does not just contradict prior decisional laws and the practice of arbitration in Nigeria but it also does not correlate with Nigerian enviable status in world trade and investment rating[31] considering that investors are often wary of systems that do not enforce contracts.[32] Further, the court's interpretation of section 58 is inconsistent with the framework for arbitration and

[30] International commercial arbitration could be non-domestic or foreign in nature. It is non-domestic where parties are resident or are doing business in the same jurisdiction but have chosen a foreign seat/law as a procedural framework for the conduct of their arbitration. International commercial arbitration is foreign where parties who are from different nationalities and are also doing their business or are resident in different countries agree to submit their commercial dispute to arbitration. Parties can enter into non-domestic or foreign arbitration agreement by means of telephone, telegram, telex, electronic mail and other modern means of communication (submission agreement) or through a clause in their contractual document (arbitration clause).

[31] Nigeria is one of the richest countries in sub Saharan Africa with numerous mineral deposits apart from oil and gas and with an estimated population of over two hundred and nine million people as at 3 April 2021. See https://www.worldometers.info/world-population/nigeria-population/ Nigeria is also a destination hub for investment in Africa and continues to remain one of Africa largest economy with foreign direct investment to the tune of $2.6 billion in the year 2020 despite the global corona virus pandemic. See https://guardian.ng/business-services/nigeria-attracts-2-6bn-fdi-in-2020-amid-global-downturn/.These are good indices of a viable legal system that enforces contracts. The Nigerian judiciary is relentless in ensuring that this trajectory continues to improve by strengthening the legal frame work for dispute resolution through Rules of Court which purpose is to ensure that commercial agreements are honoured thereby promoting justice between disputing parties. See *Gbenga v APC* [2020] 14 NWLR (pt 1744) 257, 258 (SC). For instance, on 26 May 2017, the Chief Justice of Nigeria, Walter Onnoghen vide a "circular" directed all Heads of Court to issue Practice Directions to ensure that parties' abide by the terms of their arbitration agreement and for court not to entertain action instituted in breach of this agreement with a substantial against a party who brings such actions. See <https://punchng.com/judges-must-enforce-arbitration-clause-cjn/> accessed 16 January 2023.

[32] See TE Carbonneau, 'The Exercise of Contract Freedom in the Making of Arbitration Agreements' [2003] (36) *VJTL* 1195.

enforcement of the arbitration agreement that the ACA established.[33] In addition, the opinion violates party autonomy in choice of law because the court in *SPDCN* should have exercised its power of negative *kompetenz-kompetenz* in order to enable the arbitral tribunal or English court to determine question of the validity of the arbitration agreement in accordance with the English law.[34]

However, assuming the *SPDCN* arbitration was seated in Nigeria, the mere service on the respondent of the notice of arbitration ought to have precluded the court from determining jurisdictional questions or even second-guessing jurisdictional decision made by the tribunal on an interlocutory basis or after the final award is made. This is indicative of ouster of court's jurisdiction and there is generally a plethora of decisional laws that underpin ouster of court's jurisdiction in Nigeria.

Before a national court can exercise judicial power on any matter, it must have subject matter jurisdiction which must be conferred on it statutorily. This is because the judicial power of the court otherwise known as "inherent power"[35] of

[33] It is safe to say that section 58 can only be regarded as mere piece of inelegant draftsmanship to the extent that it does not provide for exceptions clause similar to Model Law article 1 (2) or for purporting to limit the scope of ACA to domestic arbitration. In fact, it is incongruous to think that the framers of section 58 or indeed the entire ACA intended to exclude arbitration agreement with foreign seat from recognition and enforcement especially by mean of principles of judicial non-interference and *kompetenz-kompetenz*. The ACA was demarcated into four parts. Part I made provisions for domestic and international commercial arbitration. Under that Part, the principles of judicial non-interference and *kompetenz-kompetenz* were mandatory provisions under sections 34 and 12 and both were applicable to domestic and international commercial arbitration. Part II of the Act was on conciliation. Part III made provisions for additional provisions relating to international commercial arbitration. Under part III, section 53 allowed parties (as it happened in SPDCN) the freedom to reject the applicability of the Nigerian law (procedural law or *lex arbitri*) in favour of a preferred foreign seat (law) or any international arbitration rule as may be agreed by the parties. In fact, this provision most importantly further shows the irrelevance of section 58. Part IV of the Act was on miscellaneous. The Act had two schedules. The first schedule dealt on UNCITRAL Arbitration Rules while the second schedule by virtue of section 12 of the Constitution of Federal Republic of Nigeria[33] implemented Nigeria's treaty obligation under the New York Convention.

[34] If a national court does not enforce parties' choice of law in a situation where it grants anti-arbitration injunction over arbitration seated abroad, that court would be seen to be colluding with a recalcitrant respondent to breach the agreement to arbitrate. See Cindy G Buys, 'The Arbitrators' Duty to Respect the Parties Choice of Law in Commercial Arbitration' [2005] (79 (1) *St John's Law Review* 63.

[35] On the status of inherent jurisdiction *vis a vis* statutory jurisdiction of court, the Nigerian Supreme Court per Augie JSC in *Customary Court of Appeal Edo State v*

the court is different from the statutory power of the court. According to the Nigerian Supreme Court in *Okwuosa v Gomwalk*[36]

> Power and jurisdiction are not the same. Whereas jurisdiction is the right the court has in law to hear and determine the dispute between the parties, power on the other hand, is the authority it has to take decisions and make binding orders with respect to matters before it. It is for this reason that in the Constitution, section 6 deals with the judicial powers of courts generally while the enabling and establishment provisions of the Constitution, dealing with each court clearly set out the jurisdiction of each court.

Again, the power of the court in Nigeria to grant an injunction is a mere codification of the court's inherent power or inherent jurisdiction as it is sometimes called. This power however is in abeyance if there is no complementary or corresponding subject matter jurisdiction.[37] As a matter of fact, States may "oust" or "strip" the national court of its subject matter jurisdiction by specific and unambiguous words in a statute.[38] When that happens, the legislature for instance may vest that subject matter jurisdiction on the arbitral tribunal exclusively and with complementary judicial support necessary for efficient arbitral process. Where the authority of the arbitral tribunal is exclusive and the arbitral findings are not subject to judicial interrogations as section 12 of ACA unambiguously stated , such as a matter of course is indicative of the ouster of jurisdiction of the court. Conversely, where an arbitral tribunal makes a jurisdictional decisions pursuant to section 14 (5) and (7) of the AMA, the decision has a preclusive effect on the parties and the jurisdiction of the Nigerian court assuming the jurisdictional challenge is yet to be determined by the court.

Generally, apart from the combined effect of provisions of principles of judicial non-interference under section 64 of AMA and *Kompetenz-kompetenz* under

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Aguele[35] quoted affirmatively the ratio of Iguh JSC in *Gombe v PW (Nig) Ltd*[35] to the effect that:

> The inherent power of a court of record is entirely supplementary to and dependent on the statutory jurisdiction of the court in a cause. A court may have or exercise jurisdiction in respect of a cause or matter within its jurisdiction …. It has however, no inherent power or jurisdiction over a cause or matter not within its jurisdiction. An inherent power or inherent jurisdiction is not and has never been known to be distinct or separate jurisdiction. No inherent power can add to the jurisdiction of any court of record where no jurisdiction to entertain a cause had not been vested in the Constitution or statute law. Inherent power is only exercisable to enhance statutory jurisdiction in a cause or matter within the jurisdiction of the court.

[36] [2017] 9 NWLR (Pt 1570) 277 per Eko JSC at p 277 para a-c; *Akande v Alagbe* [2000] 15 NWLR (Pt 690) 358.

[37] *CCB v (Nig) Plc v Masterpiece Chemicals* [2000] 12 NWLR (Pt 682) 584.

[38] In America, Congress has the power to determine, terminate or curtail the jurisdiction of courts as article III of the American Constitution stipulates. Thus, it is important to emphasize that jurisdiction of court can be ousted or circumscribed by specific provision in a statute such as s 12 of ACA or provision in a Constitution.

section 14 (5) and (7) the Act (the equivalent of sections 34 and 12 (4) of the ACA), there are indeed judicial authorities in Nigeria that underpin the ouster of the court's jurisdiction under specific provisions in some other legislation. A good example of such legislation is section 18 (1) of Recovery of Public Funds and Property which provides that 'no action shall lie or be maintained in any court of law in respect of any matter under the edict'. In *Diamond Bank Ltd v Ugochukwu,*[39] the respondent operated two accounts referred to as 'Unachukwu Ugochukwu' with the appellant, a duly authorized and licensed commercial bank. One of the account was a current account in the name of AL-CLEMENT with two signatories namely Alfred Amobi Ugochukwu and Uzoma Onuoha. A dispute later arose between the two signatories in connection with the operation of the current account resulting in the respondent writing exhibit "D" to the appellant wherein he dropped the signature of 'Uzoma Onuoha.' Subsequently, the respondent gave cheques to some people for payment but the cheques were dishonoured and the words 'incomplete mandate' were written on them because the cheques were signed by the respondent alone. The cheques were admitted in evidence and marked exhibits 'E' 'F' 'G' and 'H'. The accounts of the respondent were later frozen on the orders of the Imo State Task Force for the Recovery of Public Funds and Property headed by a High Court Judge which was empanelled under the Recovery of Public Funds and Property (Special Provisions) Edict 1985 of Imo State. It was alleged that the respondent used the contract to defraud the Imo State Government and the appellant was ordered to transfer the funds in the account to the account of the Imo State Government. The orders were marked exhibits 'S' and 'T'. The respondent was dissatisfied with the refusal of the appellant to honour the cheques on grounds of 'incomplete mandate" and the orders of the Task Force freezing and transferring the funds in the accounts to the Imo State Government. The respondent instituted an action at the High Court and the court entered judgment in its favour and that was also affirmed at the Court of Appeal. The appellant appealed to the Supreme Court. The Supreme Court considered the provision of section 18 (1) of the Recovery of Public Funds and Property (Special Provisions) Edict, 1985 and held per Onnoghen JSC that 'in the circumstance and having regard to the facts and applicable law, I resolve the issue in favour of appellant. I find no reason to consider the other issues raised for determination as they have become irrelevant'. The court further held that 'jurisdiction may be ousted by statute, or Decree or Edit such as section 18 (1) of the Recovery of Public Funds and Property (Special Provision) Edict 1985.'[40]

[39] [2016] 9NWLR (Pt 1517) 430.

[40] Apart from "ousting" or "stripping" a court of its jurisdiction, various words or phrases have been used in case law to describe situations where court may not possess the requisite jurisdiction over a matter. See Daniel D Birk, 'The Common-Law Exceptions Clause: Congressional Control of Supreme Court Appellate Jurisdiction in Light of British Precedent' [2018] (63) (2) *Villanova Law Review* (citing reported cases states that

The effect of where the jurisdiction of the court is ousted or curtailed by statute or legislation is to render the court incompetent to entertain that matter. In *Tumsah v Federal Republic of Nigeria*,[41] the Court of Appeal per Mukhtar JCA held that:

> Where the unlimited jurisdiction of a court is curtailed by statute or the Constitution as to the subject matter or cause of action or as to the person who can bring the action, such curtailment renders the court incompetent to adjudicate over a matter which has been taken outside its power by such statute or the Constitution. In this case, in view of the clear and unambiguous provisions of the Recovery of Public Property (Special Provisions) Act, particularly sections 1 and 8 thereof, the ist respondent's reference to the wide ambit of the jurisdiction of the High Court of the FCT under section 257 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and section 330 of the administration of Criminal Justice Act does not avail the ist respondent.

Further, in *FRN v Solomon*[42] the Supreme Court per Odili JSC succinctly held that:

> For a fuller understanding it is trite that where the rules of court or any other rules whatever have curtailed an otherwise unlimited jurisdiction of a court and this can be by a specific statute or even the constitution as to the subject matter or cause of action or as to the person who can bring the action, such curtailment renders the court incompetent, stripped of its power to adjudicate over the said matter as what has happened is that such matter is outside the confines of the power of the court and that limitation has been done by statute or constitution. It follows that where a tribunal or special court is set up to adjudicate over specialized matters, the power of the regular courts created under the Constitution will be ousted in respect of such specialized matters.

From the foregoing, the dichotomy between the rhetoric and the result of the above judicial decisions is regrettable when this is analyzed within the context of the effect of principles of judicial non-interference and *kompetenz-kompetenz* on the jurisdiction of the court in Nigeria over an international commercial arbitration that had already commenced. For example, proponents of the

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'[a] court's jurisdiction could be "abolished," "abrogated," "dismembered," "dissolved," or "extinguished." A court might be "barred," or "prohibited from proceeding" in a case, or "interdicted from taking cognizance" of it. It could be "de-nuded," "deprived," "disrobed," or "stripped" of its jurisdiction, or it might be "ousted" or "outed" of it. Some courts were "enjoined" from "meddling" or "intermeddling" in particular cases, and others had their jurisdiction over cases "taken away absolutely." And this is just the beginning. Jurisdiction could be adjusted, altered, circumscribed, confined, converted, diminished, impaired, limited, prohibited, regulated, restrained, restricted, secluded, or suppressed, depending on the circumstances and the scope of withdrawal'.

[41] [2018] 17 NWLR (Pt 1648) 249, 268 para f.

[42] [2018] 7 NWLR (Pt 1618) p 223 para d-e. See also *FRN v Okey Nwosu* [2016] 17 NWLR (Pt 1541) 242; *Diamond Bank Ltd v Ugochukwu* [2016] 9 NWLR (Pt 1517) 193.

unconstitutionality of section 34 of ACA with respect to the finality effect of arbitral decisions on issues such as jurisdictional determinations under section 12 (4) and appointment of arbitrators under section 7 (4) are of the view that arbitration agreement should not restrict a citizen's right of access to court. A leading arbitration scholar[43] in Nigeria contends that:

> The lawmakers have no power to legislate a statute which extinguishes the right of fair hearing conferred on persons by the Constitution. Indeed the rule of fair hearing which is based on the twin pillars of *audi alteram partem* and *nemo judex in causa sua* is accepted by every civilized jurisdiction as a *sine qua non* to a proper and fair adjudication. Access to courts is an inviolable right guaranteed by the Constitution and any attempt by the legislature to stifle such a right by excluding the judicial review of the decisions of the arbitral tribunal will not only be anachronistic but will erode the confidence of parties in the arbitral system, for it is unreasonable to expect a party raising an objection to the jurisdiction of the tribunal to continue to participate in the arbitral process. Indeed the intention of the lawmakers of attempting to prevent the dilatory tactics of the parties under the challenge procedure is no doubt desirable but when the effect of the exclusion of judicial review of the courts is juxtaposed

[43] Muhammed Mustapha Akanbi, 'Examining the Effect of Section 34 of the Arbitration and Conciliation Act of 1988 on the Jurisdiction of Courts in Nigeria' [2009] (2) (2) *Nigerian Journal of Public Law* 305-306. See also Greg Chukwudi Nwakoby, 'The Courts and the Arbitral Process in Nigeria' [2004] (4) (1) *UNIZIK Law Journal* 20 (arguing that that the issue as to whether the arbitral tribunal should determine question pertaining to its jurisdiction depends on the stage of the proceedings at which the issue was raised. If the issue of jurisdiction is raised at the stage of arbitral proceedings when the matter is still before the arbitrators, the arbitral tribunal shall pursuant to section 12(1) of the Act determine the issue and any party who is aggrieved as to the interim or interlocutory award made by the arbitral tribunal shall apply to the court to set it aside and declare that the tribunal has no jurisdiction to determine the issue in contention. Within the context of international commercial arbitration, it is submitted that the view of the learned writer is not correct. A careful examination of section 12 (1) (3) (4) ACA show that the decision of the arbitral tribunal on interim or preliminary award is final with regards to any plea referred to it under section 12(1) (3) ACA. Maybe the learned writer bases his reasoning on the provisions of Article 16(3) of the Model law which though was adopted by the ACA section 12 (4) but was modified by ACA to exclude the right of an aggrieved person to have recourse to court on such preliminary questions and decision on jurisdiction. In domestic arbitration, a party that is dissatisfied with the arbitral award has three months' time period within which he can bring application for setting aside the award. See s 29 of ACA. This provision does not apply in setting aside of international arbitral award. For setting aside international award, see s 48 of ACA. For further similar unwarranted opinions, see also John Funsho Olorunfemi, 'The Effect of Arbitration Agreement on the Jurisdiction of the Court in Nigeria' [2009] (2)*Nigerian Journal of Public Law* 309; Ikeyi (n 15) 296,297; Obimma (n 10) 148 quoted in G Ezejiofor, 'Appointment of an Arbitrator under the Nigerian Law: The Procedure and Powers of an Appointing Authority- *Nigerian paper Mills ltd v Pithawalla Engineering, GMBH'*, [1995] (7*)* (3) *African Society of International and Comparative Law* 663-667.

> against the implications of the provisions of section 34, it becomes apparent that there is a danger of denying parties of the right to a fair hearing. A provision that shuts out an aggrieved party from the courts by making the arbitral tribunal the final forum on the question of jurisdiction is arbitrary and discriminatory. In the light of the foregoing, it is submitted that section 34 cannot be invoked to prevent a party from seeking a right of action in court when his civil rights and obligations are in danger of being violated or adversely affected to do so will infringe on the constitutional right of such a party.

Other critics disagree that the purpose of the restriction which section 34 of the ACA stipulated is to promote party autonomy and the use of arbitration as a more efficient alternative to litigation so that the judicial power of the court is not necessarily ousted but postponed because 'if there are problems along the line … then the judicial powers of the courts which were only postponed will be invoked to see that justice is done.'[44] There is no doubt that prior to the rendition of the award, 'problems along the line' specifically as it concerns the question of the finality of the arbitral jurisdictional decision designed in such a manner that precludes judicial second-guessing of the arbitral jurisdictional decisions. This is a Nigeria policy objective whose aim is to create a single forum for dispute resolution that would enable arbitrators chosen by the parties to determine disputes conclusively.[45] Further, 'in parts of the world lacking a tradition of judicial independence, the business community may prefer no judicial review at all, taking its chances with potential arbitrators misbehavior as the lesser of two evils.'[46] In sum, it is safe to say that counsel did not seize the opportunity to advice their client on the need to maximize the benefits which the ACA promised it potential users and the reason is obvious.The Nigerian courts and scholars did not understand the doctrinal underpinning of the principles of judicial non-interference and *kompetenz-kompetenz* under the ACA, hence no available literature on the subject matter as much as it could be researched. .[47] Excepting

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[44] Obimma (n 13)140-151.

[45] See *Harbour Assurance Co v Kansa General International Insurance Co* (*Harbour II*) [1993] QB 701 (CA) (holding *inter alia* that the rationale for separability doctrine (arbitration agreement) is to promote party autonomy in international commercial dispute resolution and to also have a "one stop adjudication" system). See Julian DM Lew, 'Does National Court Involvement Undermine the International Arbitration Process' [2009] (24) (3) American University International Law Review 491, 492, 509; Philip Landolt, 'The Inconvenience of Principle: Separability and *Kompetenz-kompetenz*' [2013] (30) (5) *International Arbitration* 514, 517, 525.

[46] See William W Park, *Why Courts Review Arbitral Award* Festschrift fur Karl-Heinz Bockstiegel 598. (2001) <http://www.williamwpark.com/documents/Why%20Courts%20Review%20Awards.pdf. > accessed 4 February 2023.

[47] Businessmen invariably choose arbitral seat with the knowledge of provisions of the *lex arbitri.* See Lord Mance, *Arbitration-a Law unto itself?* 30th Annual Lecture Organized by the School of International Arbitration and Freshfields Bruckhause

the risk of wasting the time of parties who may discover at the end of arbitration that they indeed never agreed to arbitrate,[48] ACA might have guaranteed legitimacy and finality of the arbitral process between actual parties compared to other 'statute[s] that allows challenge only for defects related to procedural regularity [but] may allow wiggle room for an overzealous judge to examine a dispute's legal merits under the guise of correcting arbitrator excess of authority'.[49] Relatedly, even though section 14 (6) of AMA allows an aggrieved party to seek judicial review of jurisdictional decision within 30 days after the decision was made, the Act leaves devil in the detail. There is every likelihood that the arbitral tribunal may conclude the arbitration proceeding and render a final award while the jurisdictional challenge is pending in the court. The implication is that the parties may eventually waste their time and resources in a tribunal that never had the jurisdiction to determine the dispute. This concern just as in the antecedent legislation is very likely to arise in elaborate business arrangements that could give rise to complex difficulties involving non-signatories To this end,, the AMA just like its predecessor is a law of unintended

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Deringer 16 <https://www.supremecourt.uk/docs/speech-151104.pdf> accessed 25 January 2023; Landolt (n 42) 518; Sally-Ann Underhill and M Cristina Cárdenas *Awards: Early Stage Consideration of Enforcement Issues* in J W Rowley QC, E Gaillard and GE Kaiser (eds), *The Guide to Challenging and Enforcing Arbitration Award*s 6,7 (London: Law Business Research Limited 2019).

[48] Such risk is usually inherent in complex commercial transactions that may raise complicated issues such agency, corporate piercing of the veil, successor in title etc. But in commercial transactions of a simple nature, a non-party can explore any of the following three options where the existence of arbitration agreement is in issue. First, a non-party may decide to participate in the proceedings in order to contest the substantive jurisdiction of the arbitral tribunal. Second, a non-party to arbitration may choose not to participate in the arbitration and await the award of the arbitral tribunal on jurisdiction or final award in order to challenge it in court. See George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' [2012] (37) (1) *Yale Journal of International Law* 30; Cf Kaufmann-Kohler 'How to Handle Parallel Proceedings: A Practical Approach to Issues Such as Competence-Competence and Anti-Suit Injunctions' [2008] (2) (1) *Dispute Resolution International* 111, 112. Judicial review in order to set aside such award is a remedy for vexatious proceedings. See Park (n 3) 9, 10. Third, non-party can always approach a court of competent jurisdiction to determine the existence of arbitration agreement without necessarily awaiting a ruling from the arbitral tribunal. See NYC art II (3); Model Law art 8 (1); English Arbitration Act s 9 (4). French Code of Civil Procedure 2011, art 1448 provides that the only ground upon which court can entertain a subject matter of arbitration agreement is where arbitral tribunal is yet to be constituted and if the arbitration agreement is manifestly null and void. See also Mattias Scherer and Werner Jahnel, 'Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective' [2009] (4) *International Arbitration Law Report* 73.

[49] Park (n 48) 597, 598

consequences as far the Nigerian version of *kompetenz-kompetenz* is concerned.[50] The Nigerian legislature failed to understand that, even though arbitral proceedings would go more smoothly and easily even if the tribunal pre-empts the jurisdictional challenge that is awaiting judicial review, this approach would probably end up being very counter productive and raising questions about the effectiveness of arbitration.

c. Principle of Judicial Non-Interference after Rendition of Award

Despite the foregoing, businessmen and businesswomen who are direct parties in a simple and uncomplicated commercial transaction may choose to save cost and eliminate delay in determining their rights and obligations by choosing the Nigeria AMA as their preferred seat of arbitration. Should for any reason questions relating to the existence/validity or scope of the arbitration agreement ever occur, such questions and the determination (award) thereof would legitimately be outside the remit of judicial second-guessing in a setting aside or non-recognition and enforcement proceedings assuming the tribunal renders the final award while the challenge is pending in the court. In international commercial arbitration where the Nigerian ACA was the governing law, the jurisdiction of the Nigerian court remained ousted in determining arbitral jurisdictional decisions on an interlocutory basis and even after an award is delivered. Therefore, a party who challenged the award from the point of view of the existence/validity and scope of the arbitration agreement should be foreclosed from doing so if he had raised but lost such a challenge before the tribunal. The point therefore should be made at the outset that section 29 of the ACA was inapplicable concerning setting aside international commercial arbitral awards. Section 29 of the ACA stated that:

1. A party who is aggrieved by an arbitral award may within three months –
   a) From the date of the award; or
   b) In a case falling under section 28 of this Act, from the date of the request for an additional award is disposed of by the arbitral tribunal, by way of an application for setting aside, request the to set aside the award in accordance with subsection (2) of this section.
2. The court may set aside an arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of submission to arbitration so however that if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside.
3. the court before which an application is brought under subsection (1) of this section may, at the request of a party where appropriate, suspend proceedings for such period as it may determine to afford the arbitral

[50] Nnaemeka Nweze and Festus Okechukwu Ukwueze, 'The Effects of Arbitral Jurisdictional Decision on National Courts' [2023] (16) (2) *Contemp. Asia Arb J* 198,199.

tribunal an opportunity to resume the arbitral proceedings or take such other action to eliminate the grounds for setting aside of the award.

Section 29 above applied in setting aside of domestic arbitration award. This position is supported by a contiguous provision of the Act, section 30 which stated that arbitral award may be set aside if 'an arbitrator has misconduct[ed] himself, or where the arbitral proceedings, or award, has been improperly procured'. Clearly, sections 29 and 30 both dealt with recourse against an award or setting aside the domestic award. In contrast, section 48 contained grounds for setting aside an international arbitration award, and the section clearly did not include misconduct of the arbitrator as one of the grounds nor prescribe a statutory time frame within which a party may apply to set aside an international arbitral award. Once there is a contestation of the jurisdiction of the arbitral tribunal regarding the existence/validity or scope of the arbitration agreement and whereof a decision is made by the tribunal to the effect that it has jurisdiction, a party should be barred from setting aside the award on such same grounds. This is based on the principle of estoppel per *res judicata.* However, it is safe to argue that a party who did not raise such jurisdictional challenge during arbitral proceedings should not be precluded from challenging the award in setting aside proceedings even if the tribunal addressed itself *suo motu* that it had jurisdiction over the matter. Hence, section 48 of ACA still stated that an award may be set aside if a party provides proof that the arbitration agreement was not valid or that the award contains decision(s) that are outside the scope of the parties' dispute.In sum, the arbitral landscape in Nigeria today is that when an arbitral tribunal pre-empts the Nigerian court on issues of arbitral authority, the party who brought the challenge proceedings may only seek to set aside the award on any other grounds under section 55 (3) (a) and (b) of AMA as follows:

i. that a party to the arbitration agreement was under some incapacity,
ii. That he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case, or
iii. That the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or
iv. That the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or

(b) if the court finds-

i. that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; or
ii. That the award is against public policy of Nigeria.

4. Conclusion

Legal systems have various policy objectives regarding the determination of jurisdiction of arbitral tribunals. Barring exceptional situations where judicial

support for arbitration might be necessary, Nigeria's policy objective is a donation of exclusive jurisdiction to an arbitral tribunal to determine jurisdictional questions in a final and binding manner. Even though section 14 (6) of AMA permits interlocutory challenge on jurisdictional decisions, there is every possibility owing to the overcrowded court's docket that the tribunal may conclude the arbitral process before the judicial determination of the matter. The aim of the Nigerian version of *kompetenz-kompetenz* in the light of the foregoing is to ensure efficiency in arbitration by ousting the jurisdiction of the Nigerian court from judicial scrutiny of jurisdictional decision in setting aside or recognition/proceeding. This saves time and resources for commercial parties and may contribute to increasing Nigerian chances of becoming a destination hub for international commercial arbitration. Considering the dearth of scholarship and decisional laws on the effect of principles of judicial non-interference and *kompetenz-kompetenz* on the jurisdiction of the court in Nigeria, it is safe to say that this article provides doctrinal and theoretical leadership that would assist Nigerian courts in finding a basis for a judicial hands approach on the subject matter of arbitral authority particularly in situations where the tribunal pre-empts the jurisdictional challenge pending in the court.

RIGHTS OF THE INTERNALLY DISPLACED PERSONS (IDPs) IN THE NORTHEAST NIGERIA: REVIEW OF THE LEGAL FRAMEWORK

Francis Ekene Ikebundu [*]

Abstract

Boko Haram insurgency has given Nigeria chequered history of the incidence of the Internally Displaced Persons (IDPs). The 2014 United Nations report on the population of IDPs across the globe stands at 60,000,000, of which 2,100,000 is estimated to have been displaced by the menace of the Boko Haram insurgence in Northeast Nigeria. The violent attacks and deliberate destructions of homes and properties in the Northeast Nigeria gave birth to the saga of IDPs in the country. The IDPs being persons with special status as a result of their displacements from their usual abodes, shifted attention to the peculiarity of the rights available for their circumstances apart from the generally guaranteed fundamental human rights. A number of reports had it that the same IDPs have been subjected to series of abuses in form of violations of their rights. This thus prompted this paper to investigate the rights of the IDPs from the available legal framework. The paper while adopting the doctrinal method of legal research and study, examines the adequacy or otherwise of the available legal framework for the rights of the IDPs from the international stage through the regional stage and down to what is nationally obtainable in Nigeria as a country. The paper exposes the relevant challenges and inadequacies in the legal framework amidst lack of full-fledged domesticated laws on IDPs' rights in the country. The paper found that the biggest challenge to the implementation of IDPs' right in Nigeria lies in the lack of a robust legislation to specifically cater for the IDPs. The paper thus recommends domestication and religious implementation of the relevant international and regional instruments on IDPs' rights by Nigerian government.

Keywords: Insurgency, Human Rights, Internally Displaced Persons, Northeast Nigeria, International Regional Frameworks on the Rights of Internally Displaced Persons

1. Introduction

In the recent time, the flux in the rate of crisis and violence in most countries of the world brought to the fore the issue of internal displacement which is now becoming a subject of significant concern in the international community.[51]Both international and regional stages thus have their shares of the menace. At the national level, Nigeria is not left out of the ugly situations. In the Northeast

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[51]AF Yakubu, 'Benchmarking The Rights of Internally Displaced Persons in the Fight against Boko Haram Insurgency in Nigeria' (2016) 6 *Nigerian National Human Rights Commission Journal* 21.

Nigeria, mass displacements were caused by the activities of *Boko haram* - a militant group based in North-East Nigeria, whose violent campaign has resulted in humanitarian crisis in Nigeria with an estimated of 1.9million persons displaced. Reports from Internal Displacement Monitoring Centre (IDMC) posit that 85 percent of internal displacement in Nigeria is as a result of insurgency by the militant group.[52]

The foregoing thus led to increase in the population of the Internally Displaced Persons (IDPs) in Nigeria with its attendant consequences. One of the consequences of the incidence of IDPs in Nigeria is debate surrounding their fundamental rights since they now occupy special status from other member of the populace. The incessant abuses which the IDPs face in their respective camps therefore prompted this research to examine and evaluate the legal framework of the IDPs' rights with focus on the international, regional and national levels. Though, the legal framework sought to be reviewed in this paper is a general framework that applies to all the menaces of insurgency in the northern part of the country, however, they are being reviewed with respect to the area of focus of this paper which is the Northeast. This is not to disregard the fact that other parts of Northern Nigeria are usually bedevilled with the ugly insurgency.

2. Forms of IDPs Rights Violation in Northeast Nigeria

IDPs in some part of Nigeria have their fundamental rights abused by both the state and non-state actors. They have been harassed, maltreated, starved and sexually assaulted. Records of human rights violations of IDPs in the Northeast and Nigeria at large, are still worrisome with the increasing rate of extra- judicial killings, illegal arrests, unnecessary detention and torture, rape and assault among others.[53] The results of the questionnaires circulated in the course of this research suggests that IDPs have been denied right to associations, access to education, opportunity for employment, right to own property, freedom of movement, dignity of human person, private and family life. Right to access justice has equally been denied, right to life, political parties of their choice and also, they have been disenfranchised from voting, and are exposed to extra judicial killings by security agents.[54]

The plights of IDPs have in recent years become a formidable problem of global significance and implications.[55] The IDPs in Borno, Yobe and Adamawa States, just like in any other Northeast States, are victims of violation of human rights

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[52] Internal Displacement Monitoring Commission <http://www.internal-displacement.org/sub-saharan-africa/nigeria/figures-analysisb> accessed 31 December 2021.

[53] MT Ladan *Protection of Displaced Persons under International Human Rights and Humanitarian Laws* (ABU Press,Zaria, Nigeria) 252

[54] Chap 6 of the FE Ikebundu PhD Research which summarises the findings from the questionnaire. Specifically, Chapt 6.7.0.

[55] Ibid.

both during and after displacement.[56] Most IDPs prefer to seek shelter with relatives or friends rather than staying in camps because of their tentative assurance of freedom, care and provisions which comparatively is better provided by relatives and friends than in IDPs camps.[57]

With regards to internally displaced persons, there are various forms of security challenges. However, violations received from the security agents/government officials who are meant to protect the people reign supreme. There are cases of rape and sexual harassment from security agents, inhumane and degrading treatment at the IDP camps screening centers, as well as violation on the right of movement from one place to another.[58]

The significant rights in which these IDPs enjoy are just the normal rights[59] usually enshrined in any country's constitution derived from natural rights as a result of being human, and which are entrenched in the constitution[60]. This is despite the clear constitutional provisions and several other international treaties and conventions which provide for the protection of human rights of all categories of persons without discrimination of any kind. Hence, the Displaced Persons still suffer violation of human rights by security agents in their various IDPs camps in the Northeast region of the country.[61]

The crisis in the Northeast part of Nigeria remains one of the most severe in the world, where human rights violations continue to be reported every day.[62] The Human Rights Writers Association of Nigeria (HURIWA) has described the neglect suffered by IDPs as the worst case of human rights violations.[63] Chaloka Beyani, a United Nations expert on IDPs, in a report on 29th of August, 2018, described the situation in the country as displaying the hallmarks of the highest category of crises.[64] As a result of this, the worst forms of human rights violation

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[56]Ibid.

[57]MA Olukolajo, 'Crisis Induced Internal Displacement: The Implication on Real Estate in Nigeria' *Journal of Economics and Sustainable Development*, (2015).5(4) 40.

[58] Chap 6 of the FE Ikebundu PhD Research which summarizes the findings from the questionnaire. Specifically, Chapt 6.7.0.

[59] Such as Right to life, Right to dignity of human person, Right to freedom from torture, inhumane or degrading treatment, Right to freedom from discrimination, Right to freedom of thought, conscience and religion)

[60] 'Internal Displacement In Nigeria And The Case For Human Rights Protection Of Displaced Persons' p.30

[61] See Chap 6 of FE Ikebundu PhD research. Specifically, Chapt 6.7.0.

[62] A Report by the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) in June 2018, <https://www.unv.org/our-stories/improving-livig-conditions-internally-displaced-person-adamawa-north-east-nigeria> accessed 24 December 2021.

[63] Shahara Reporters <saharareporters.com/2018/09/24/huriwa-neglect-suffered-idps-worst-case-human-rights-violations> accessed 24 December 2021.

[64]Nigeria: a huge displacement and humanitarian crisis require urgent life-saving and protection measures,

is being suffered by these people who could be referred to as victim of circumstance.[65]

Women and children remain the most susceptible to sexual and gender-based violence.[66] There are several reports on instances of rape, sexual harassment, forced marriage, child marriage, and uncontrolled birth resulting into high rate of infant and maternal mortality in the IDP camps in Nigeria.[67] Also, there is disregard for the need of children in armed conflict situations, children are been exposed to enhanced risk of abuse, forceful conscription Ibid. by the insurgents as child soldiers, suicide bombers, sex slaves and discontinuation with their education.[68] According to NEMA, there are over 750 unaccompanied and separate children.[69] For the purpose of emphasis, we shall consider some of the forms of human rights violation of IDPs in the Northeast zone of Nigeria, thus:

2.1 Sexual Exploitation Abuses in IDPs Camps in Northeast Nigeria

Government officials and other authorities have raped and sexually exploited internally displaced women and girls and the government has not been doing enough to make sure these people are protected, and the abusers are appropriately sanctioned.[70] Similarly, in another report,[71] it has been established that 84% of the total gender-based violence recorded by the Sexual Assault Referral Centre occurred in Yobe, Bornu and Adamawa States which is where the IDP camps are situated. Further research in the report showed that most sexual exploitation were carried out by security personnel and emergency management agency staff members who have been detailed to ensure the welfare of the IDPs.

In this light, the Government has a duty to see that these people are not maltreated in the hands of the security agencies, by establishing a body of inquiry that would checkmate the activities of the security operative within the camps on daily basis.

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20428&LangID=E> accessed 24 December 2021.

[65] Ibid.

[66] Ibid.

[67] IDP Protection Strategy 2015, <www.humanitarianresponse.info/en/operatioons/nigeria/document/idp-protection-strategy-2015> accessed 22 December 2021.

[68] 'Internal Displacement In Nigeria And The Case For Human Rights Protection Of Displaced Persons' p.31

[69] 'Humanitarian Need Overview' www.humanitarianresponse.info/en/operatioons/nigeria/document/idp-protection-strategy-2015 accessed 22 December 2021.

[70] This is based on the outcome of research question 3 in this research. The outcome can be found in Chapter 6 of this thesis.

[71] H Abdulhamid, 'Chilling revelations of how caregivers, security agencies rape, exploit IDPs', https://dailypost.ng/2022/11/28/chilling-revelations-of-how-caregivers-security-agencies-rape-exploit-idps/ accessed 27 December 2022.

2.2 Abuse by Movement Restrictions in the IDPs Camps in Northeast Zone of Nigeria

In Nigeria, most of the displaced persons live in IDP camps where they are either allowed to move out of the camps for a specific period or not even allowed to move out at all. For example, those living in Arabic Teachers College Village Camp said that they are only allowed to move out of the camp for just about 8 hours daily while others in some other camps said that their movement is highly restricted.[72] It is even worse when the IDPs were unable to get food at a particular point for one reason or the other; they were still disallowed from going out to fend for themselves under the guise of security reasons.

Admittedly, the restriction of movement falls under the one reasonably justiciable for the purpose of protecting the general welfare of the IDPs. However, where socio-economic circumstances of the IDP Camps suppose that they are not adequately catered for, the base instinct would be to fend for themselves and may render nugatory the restriction permitted under the law. Such restriction cannot be justified when it occasions chaos and further threat to other rights.

2.3 Inhuman/Degrading Treatments Abuses of the IDPs at the Military Screening Centres

Earlier research on violations in IDP camps reveals that the Nigeria army operated screening centers where they interrogate local people to determine how much involvement they had with militants, while some were screened in few days, others are interrogated daily for months before been released to a camp. They are being locked, naked or in rags, in these screening centers for the so-called interrogation for several months.

3. Legal and Institutional Frameworks for IDPs' Rights

The 2014 United Nations report on the population of IDPs across the globe stands at 60,000,000, of which 2,100,000 is estimated to have been displaced by the menace of the *Boko Haram* insurgence in Northeast Nigeria.[73] The outcome of the report showed significant increase in the population of IDPs, a number which could conveniently total the gross population of a country such as Italy.[74] This means that there is a surge in the number of IDPs which should concern every stakeholder. It was also observed that the number of IDPs was more than fifty-million after the World War given the fact that the world population at that period was relatively smaller compared to the current global population report. [75]

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[72]Human Rights Watch, Nigeria: Officials Abusing Displaced Women, Girls Displaced by Boko Haram and Victims Twice Over, accessed 27 December 2022

[73] C Adeogun-Phillips 'Do Internally Displaced People Have Right under the Law?' *Vanguard Law and Human Rights News* (2015).

[74] Ibid.

[75] Ibid.

This steady increase in the number of IDPs could spell doom for the future of a country if not adequately tackled since the phenomenon opens a tray of challenges for concerned states and affects the quality of its future. As it is clear beyond recondite that the law serves as a viable tool for social engineering, it becomes important to examine existing legal and institutional frameworks of IDPs' rights. This will aid in identifying and understanding the rights gap in existing framework on the subject matter. It is important to point out however that in the course of this research, frameworks include the legal materials that are ordinarily considered non-binding but from which policies and legislations draw inspirations in dealing with the rights of IDPs. As such, occasional reference to Guidelines and Policies may be made which may offend positivist sensitivities to the phrase 'legal framework'. It is thus intended by the researcher that the phrase 'legal framework' should not be taken strictly but understood to mean an aggregate of legal materials upon which the plight and rights of IDPs were enunciated irrespective of its abidingness.

4. International Legal Framework

4.1 United Nations Guiding Principles on Internally Displaced Persons

It is important to note that the UN Guiding Principle is a soft law developed by the Human Rights Commission of the United Nations. As such, it lacks compellability component of a regular law or hard law. That notwithstanding, it occupies the front burner of consideration in this research because of the particularity of its principles to IDPs as, to the mind of this researcher, no other law – soft or hard- has enunciated upon principles relevant to plight of the IDPs in general as the Guiding Principles under consideration. It collates variety of rights available to the IDPs for state parties to comply with in accordance with international best practices and principles of international law. The document covers the situation of IDPs in the event of displacement and beyond especially when it comes to returning the IDPs to their formal settlement.

The principles under the document are to be observed by all authorities, groups and persons irrespective of their legal status and applied without any adverse distinctions.[76] The observance of the principles shall not affect the legal status of any authority, group, or persons. The Guideline places obligation on governments to ensure safeguarding of IDPs' rights under the law and as well as providing them with access to humanitarian assistance.[77] Thus, in a situation where any government fails to live up to its responsibility, the IDPs should be allowed to make demands for their entitled protection and humanitarian assistance from national authorities, and they shall not be punished for making such demand. The principles have served as good precedent over the years for developing national framework to cater for the plight of the IDPs.

[76] First Geneva Convention, 1949, art 22.

[77] Principle 2 (2)United Nations Guiding Principles on Internal Displacement

Section 1 of the UN Guiding Principles makes provision for general principles relating to internally displaced persons. For example, it provides that internally displaced persons shall enjoy fully the same rights as enjoyed by other persons under international and domestic laws, without any form of discrimination because of them being in that situation.[78] It also provides that the recognition and observance of these rights is compulsory for all authorities, groups and persons irrespective of their status under the law, and without any adverse distinction.[79] Another important provision made in this UN guiding principles is that it has specially given attention to the protection of certain categories of IDPs, these include children, unaccompanied minors, expectant mothers, persons with disabilities, and so on and the provision is to the effect that these particular set of people must be given protection and assistance as required by the peculiarity of their conditions and the specialty of their needs.[80]

The UN Guiding Principles defines IDP and provides a comprehensive statement of what protection means during internal displacement. The principles also address a range of particular needs and protection risks that typically arise in situations of internal displacement by bringing together the rights of IDPs and the responsibilities of both state and non-state actors towards them.[81] However, these principles, despite being reflective of the existing standards of international law, are mere principles which do not enjoy compulsion on the member States.[82] The argument thus is that the guiding principles are merely toothless bull dog in Nigeria as they cannot enjoy binding force without being fully domesticated. This continues to be helpless to the situation of IDPs in the North-eastern Nigeria.

4.2 United Nations Resolution 1325

This is a resolution by the United Nations' General Assembly to analyze gender-specific aspects of conflict and peace particularly in recognition of the importance of women's involvement in peace and security issues.[83] Its main objective is to provide theoretical and practical understanding of conflict, peace and security from a gender perspective so as to respond to the specific needs of women in conflict and post-conflict situations.[84] The resolution specifically addresses how women and girls are disproportionally impacted by violent

[78] Principle 1 of the United Nations Guiding Principles on Internal Displacement
[79] Principle 2 of the United Nations Guiding Principles on Internal Displacement
[80] Principle 4of the United Nations Guiding Principles on Internal Displacement
[81] W Kaelin, Annotatios, 'Guiding Principles, American Society of International Law' (2000) <http://www.asil.org/pdfs/study_32.pdf> accessed on 6 January 2022.
[82] Ibid.
[83] F Nduwimana, 'United Nations Security Council Resolution 1325 (2000) on Women, Peace and Security: Understanding the Implications, Fulfilling the Obligations' (Office of the Special Adviser on Gender Issues and Advancement of Women, Department of Economic and Social Affairs, United Nations) 7
[84] Ibid, 8.

conflict and war and recognizes the critical role that women can and already do play in peace-building efforts.[85] It also *affirms that peace and security efforts are more sustainable when women are equal partners in the prevention of violent conflict, the delivery of relief and recovery efforts and in the forging of lasting peace.* [86] *The resolution is made up of four pillars to wit; prevention, participation, protection, and relief/recovery.*

In this regard, prevention calls for improved intervention strategies to prevent violence against women, including the prosecution of perpetrators of such violence. [87] *Participation anticipates a situation of increased involvement of women at all levels of decision-making particularly in respect of management and resolution of conflicts, peace negotiations, peace operations and as security personnel.* [88] *Protection as the third pillar calls for protection of the female gender from sexual and gender-based violence that may arise in emergency and humanitarian situations such as in the IDP camps.*[89] *The fourth pillar aims to advance relief and recovery measures to address crises through a gendered lens by considering the peculiar needs of women and girls in IDP camps and settlements.*[90] *It is important to advert mind to the fact that the resolution in an international instrument which cannot be enforced to suit the course of the IPDs' plight as a matter of course except with national law tapping into it. The lack of political will and infectious environment of corruption continue to be stumbling block.*

4.3 1949 Geneva Conventions

The 1949 Geneva Convention has two (2) protocols of 1977 and 2005 respectively. That of the 2005 is very apt with respect to the discussion at hand. The reason being that the hallmark of the protocol is the protection of any person who becomes victim of armed conflict especially like that of *Boko Haram*

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[85] United States Institute of Peace (USIP), 'What is UNSCR 1325?: An Explanation of the Landmark Resolution on women, Peace and Security' <https://www.usip.org/gender_peacebuilding/aboutUNSCR1325> accessed 31December 2021.

[86] Ibid.

[87] 'UN Resolution 1325: Significant But Lacking' www.peacewomen.org/resource/un-resolution-1325-significant-lacking#:~:text=UNSCR%201325%20contains%20four%20pillars%3A%20participation%2C%20prevention%2C%20protection%2C,in%20the%20peace%20building%20and%20conflict%20resolution%20processes accessed 31 December 2021.

[88] Ibid.

[89] 'Introduction to the Four Pillars of UNSCR 1325' (2018) https://www.wilpf.org.uk/introduction-to-the-four-pillars-of-unscr-1325/ accessed 1 May, 2021.

[90] United Nations, 'UN Security Council Resolution 1325 on Women and Peace and Security (2000)' https://www.unwomen.org/en/docs/2000/10/un-security-council-resolution-1325 accessed 31 December 2021.

insurgency in Nigeria. The targets are mainly the victim of war and armed conflict such as the IDPs. The provisions of the Convention and the protocols strive to make a clear distinction between two sets of people. i.e. those who engage in armed conflict and those who are not engaged in the hostility but abjectly powerless. Thus, adequate provisions and protection are therefore given to the later as a result of their vulnerability.[91]

The Convention also caters for the challenges usually face by the victims of shipwreck, prisoners of war, and the wounded as well as the civilians.[92] The provision of the Convention has been lauded for its non-discrimination especially towards states that are not parties to it. Thus, it came to the aid of all and sundry even though the area of IDPs is not particularly mentioned in the Convention.[93] The Convention provides that all civilians, prisoners of war and others including IDPs must be treated with dignity and all their rights must be respected without any discrimination.[94] There is great abhorrence to tampering with their lives and properties.[95] They therefore must not be subjected to any form of torture and where applicable they must be given medical assistance and intensive care.[96] The parties to armed conflicts such as *Boko Haram* also have the duty to be lenient with the IDPs by protecting the wounded and the sick amongst them as well as the disabled.[97] The Convention stipulates that at any point in time, medical unit must be provided to catering for the sick, wounded, disabled and this medical unit is barred from attack from any conflicting parties.[98]

The Geneva Convention has been hugely successful over the years. However, it needs to be strengthened in terms of its existing legal framework. As an example, the law does not spell out the concept of direct participation in hostilities. This is a setback in the law because the concept is a very crucial one in that people (IDPs inclusive) lose their protection against attack when and for as long as they directly participate in armed conflict.[99]

4.4 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1981

The convention entered into force on 3rd September 1981 and has been ratified by 189 states as of 8 March 2013. Nigeria became signatory to the convention on

[91] First Geneva Convention 1949 as amended.
[92] Fourth Geneva Convention 1949 as amended.
[93] Art 2.
[94] Art 7 First Geneva Convention 1949 as amended.
[95] Art 8.
[96] Art 9.
[97] Art 10.
[98] Art 11 of the third Geneva Convention 1949 as amended
[99] ICRC, 'Are The Geneva Conventions Still Relevant?' (2015) https://intercrossblog.icrc.org/blog accessed 8December 2021.

23rd April, 1984 and ratified it on the 13th June 1985.[100] On ratification of the convention many states had entered a large number of reservations to important articles, but many were later withdrawn.[101] The Optional Protocol was adopted by the UN General Assembly on the 6th of October 1999 and entered into force on 22nd of December 2000.[102] Currently it has 80 signatories and 109 parties.[103] An Optional Protocol to (CEDAW) introduced two new enforcement mechanisms. Firstly, the consideration of individual complaints and secondly the conduct of inquire.

Article 1 of CEDAW defines discrimination against women as including that done on the basis of sex, equality and access to human rights. As the CEDAW protections cover all women or the female gender, they apply equally to internally displaced women because whenever such a woman encounters one form of discrimination or the other, it is not always clear whether the discriminatory practice is attributable to her gender or her predicament. There are various forms of discrimination that could be encountered by a woman who is internally displaced, either from other displaced persons who are not women or from the hands of security agents.

There are various other international instruments which make provision for the guaranteed rights and entitled assistance for the IDPs. These instruments anticipate a situation whereby every person would be treated equally within the ambit of the law. In essence, what these provisions seeks to address is that people (IDPs or no IDP) should all be made to enjoy equal rights before the law and any form of discrimination that may want to arise from any authority towards the IDPs, because of their state, should be frowned at by the government.

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[100] Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), new York 18th December 1979 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV8&chapter=4&lang=en accessed on 25of December 2021.

[101] States may exempt themselves from one or more of the provisions of the instrument by formally submitting a reservation; reservations incompatible with the object and purpose of CEDAW are not permitted (article 28 (2)). Art 29 gives two or more States parties the right to refer a dispute about the interpretation of CEDAW for arbitration and, if it remains unresolved, to the International Court of Justice. To date this provision has not been acted on. See General Recommendations No. 4 and No. 20 on reservations to the Convention adopted by the Committee on the Elimination of Discrimination against Women (United Nations document HRI/GEN/1/Rev.5).

[102] *Optional protocol to women's convention* https://www.un.org/womenwatch/daw/cedaw/protocol/wom1242.htmm accessed 20th November 2021

[103] *UNHCHR, 'Parties to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women'* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV8b&chapter=4&lang=en accessed 20 November 2021.

A protocol made pursuant to CEDAW obligates countries that have ratified it to eliminate discrimination and to make positive measures in the expansion of human rights.[104] This has been ratified by all but six (6) UN member nations.[105]Apart from the fact that the law has grown over time as more countries have ratified it and more NGOs participated in the reporting process, it has also been shown that the ratification of CEDAW correlates with increase in women's life expectancy, higher rate of women in elective office, increase in the ratio of girls to boys in primary and secondary schools and employment opportunities.[106] However, CEDAW does not explicitly address violence against women. This is because it was drafted in the 1970s and approved by the UN in 1979, a few years before violence against women emerged onto the global agenda as a pressing issue.[107] Thus, CEDAW as an international enabling legal instrument needs to be reviewed with a view to making it specifically address the incessant issue of violence against women especially in the nomenclature of displacement of women through insurgency.

5. Regional Legal Framework

5.1 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa

This Convention caters for the rights of IDPs within the region of Africa. It is also referred to as Kampala Convention. The Convention was adopted in 2009 as a way of providing panaceas for addressing plight of the IDPs in the region with a view to prevent further occurrence.[108] Thirty-five member states have become signatories to the Convention by May 2012 of which twelve member states had already ratified it. To enter into force, the convention must be ratified by 15 member states before it will be binding on the 53 member states of the African Union.[109]

The Kampala Convention is the first regional legal convention to secure the protection of IDPs and it is unique in its explicit provisions regarding the obligations of civil society organizations in addition to state actors. The convention provides that member states have the obligation to provide enabling environment to ensure sufficient protection and assistance of the IDPs and play

[104] United Nations General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Resolution A/RES/54/4, 1999.
[105] L Baldez,'Why Not Amend CEDAW' (28 November 2018).
[106]Ibid.
[107] Ibid. Although the law could be easily amended as the procedure for amending CEDAW is quite simple, and that's again one of the good things about CEDAW.
[108] ATHA 'Protection of Internally Displaced Persons' (Harvard Humanitarian Initiative) (humanitarian academy at Havard).
[109]Ibid.

pivotal role in collaboration with international bodies and relevant stakeholders with a view to actualizing the aim and objectives of the convention.[110]

The Convention also contains several elements which seem to be ground-breaking in advancing the international protection of IDPs. The objectives of the convention include:

(1) preventing internal displacement by addressing its root causes;

(2) establishing a legal framework applicable to all stages of displacement; and

(3) outlining the obligations and responsibilities of State and non-state actors.

Its scope is also comprehensive. It touches upon all stages of displacement, namely, prevention of displacement, protection and assistance during displacement, and endurable solutions. It also covers internal displacement caused by a wide variety of non-exhaustive factors including armed conflicts, generalised violence, violations of human rights, consequences of large development projects, and harmful practices. Some of its provisions are related to the protection and assistance of those who are hosting IDPs. Rather than listing the needs of IDPs and identifying corresponding rights, it provides, in much more detail, the obligations and responsibilities of not only States but also armed groups, other non-state actors, the AU, and international organizations.[111]

The Convention is both a human rights and humanitarian instrument. It thus provides norms applicable to both protection issues and assistance. Several of its provisions reaffirm the rights of IDPs and their protection from discriminatory practices. Its provisions dealing with early warning systems and risk reduction are relevant for creating better and effective prevention.80 As expected, a number of provisions of the Convention show its attempt to create a balance between the sovereignty of the State and the State's responsibility.[112]

The unending argument therefore is that as beautiful as the provisions of the Convention are, all the principles contained in the document are not legally binding and therefore not enforceable except by virile political will on the part of state government through domestication of the provisions in the Convention.[113]

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[110] Kampala Convention, art 5 (6).

[111] Protecting the Internally Displaced: A Manual for Law and Policymakers (Brookings Bern Project on Internal Displacement, 2008) <http://www.brookings.edu/papers/2008/1016_internal_displacement.aspx> accessed 12 January 2021.

[112] Ibid.

[113] Kampala Convention 'Protecting Internally Displaced Persons: the Value of the Kampala Convention as a Regional Example' <https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/> accessed 8 December 2021.

5.2 African Charter on Human and Peoples' Rights (ACHPR) 1981

As of 2016, 54 states in African have signed and ratified the charter as compliance in respect of human rights in African continents and Nigeria ratified it on the 22nd of July, 1983 which took effect on the 21 of October 1986.[114] One of the fundamental provisions made in the charter is the right to be free from any form of discrimination, that is to say, every human being, internally displaced persons inclusive, are to be treated without discrimination of any kind on the basis of either race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, birth or other status.[115] Looking carefully at the chapter 1 of this particular law which talks about the rights of the human being, it is evident that the charter keeps on using the phrase 'every individual'. This simply connotes that everybody, IDPs or not, should be treated equally and given equal protection before the law and the government should always ensure and encourage the observance of these rights.

It is clear that the African Charter is designed specifically to suit the African situation; however, it only emphasized on the economic, cultural and social aspect of African rights without adequately making provisions for political and civil rights. By this, it limits the operation of those rights using claw-back clauses which allow the state to restrict its treaty obligations.[116] The good and the bad news are that the Charter as enjoyed domestication in Nigeria. However, what continues to be daunting if the attitudes of government and its agencies to compliance with the domesticated provisions.

5.3 Protocol to the African Charter on Human and Peoples' Rights (Maputo Protocol)

The Protocol to the African Charter otherwise known as Maputo Protocol was adopted on 11thJuly, 2003 after the commencement of negotiation on it in 1995. The main aim of the Protocol is to change the fortune of women in Africa in terms of status and gender discrimination. The Protocol thus legislates gender equality, encourage acts directed towards eliminating of all forms of discrimination of women and girl child in Africa.

The protocol places obligation on the governments of the state parties to ensure achievement of the aims of the Protocol through legislative and institutional measures. The Protocol designed certain principles which safeguard the health and general well-being of women and girl child through prohibition of certain

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[114] African Union 'African Charter on Human and People Rights' <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800cb09f> accessed 25 December 2021.

[115] ACHPR Article 2.

[116] The African Charter on Human and People's Rights: How Effective is the Legal Instrument in Shaping a Continental Human Rights Culture in Africa? <https://www.lepetitjuriste.fr> accessed 8 December 2021.

harmful practices apart from elevating status of women to that of men in gender arena.[117]

While the Maputo Protocol is laudable for its protective provisions towards women and girl child, it however silent on the obligation of states to address the many issues of rights of women to pass on nationality as only men can pass on nationality in most countries.[118] Also, this protocol could be said to lack a wide range of acceptance as eighteen states some of which include those facing serious crises threatening their women and girls are yet to ratify the protocol. As it were, the inherent weakness in the protocol deserves timeous review for effective implementations.

5.4 African Union Constitutive Act

The African Union Constitutive Act represents a reflection of global commitment. There was a need for political efforts of all governments of the state parties of United Nations with respect to waging war against ethnic problems, prevention of genocides being a heinous crime against humanity. The foregoing was the unanimous agreement of the state parties at the World Summit of United Nations in 2005.[119] The task to undertake the work of developing the conceptual and legal framework for the international protection of IDPs was put on one Mr. Francis M. Deng, who became the Representative of the Secretary-General on IDPs in 1992. He put forward that the concept of sovereignty as responsibility be recognized as the most appropriate protection framework for people displaced inside their countries. The concept arose from work he and other scholars had done on Africa at the Brookings Institution[120] and also from work done by Refugee Policy Group ('RPG') on the protection of IDPs.[121]

The concept posits primary responsibility for the welfare and safety of IDPs with their governments. However, when governments are unable to fulfil their responsibilities, they should request and accept offers of aid from the international community. If they refuse or deliberately obstruct access and put large numbers at risk, the international community has a right and even a

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[117] Art 2 of the protocol.

[118] Pambazuka News 'The Maputo Protocol: Evaluating Women's Rights' <https://www.pambazuka.org/gender-minorities> accessed 8 December 2021.

[119] 'Responsibility to Protect' <www.globalr2p.org> accessed 11 November 2021.

[120] FM Deng, Protecting the Dispossessed (Washington DC: Brookings Institution), 1993, 14-20; and Deng and other, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington DC: Brookings Institution, 1996), 2-19, 27-33.

[121] See Cohen, 'Human Rights Protection for Internally Displaced Persons,' 16-19, which says that 'Sovereignty carries with it a responsibility on the part of governments to protect their citizens,' and discusses the human rights and humanitarian contributions to this concept; and Roberta Cohen, 'Statement to International Journalists Round Table on Human Rights and the United Nations,' United Nations, New York, 14-16 October 1991, which says that 'sovereignty implies humanitarian and human rights obligations by governments to the persons residing on their territories.'

responsibility to take a series of calibrated actions. These range from 'diplomatic demarches to political pressures, sanctions, or, as a last resort, military intervention.[122] The failure of each state to control the atrocity of genocide within their jurisdiction led to the inevitable involvement of international community with a view to sanitize the situation.[123] The constant challenges to the viability of the Act include the individual sovereignty. By the doctrine of sovereignty, each member state government continue to hold on to their sovereignty to frustrate the purpose for which the Act was passed.

6. National Legal and Policy Framework

6.1 Constitution of Federal Republic of Nigeria 1999 (as amended)

The Constitution talks about general rights of all Nigerians (IDPs inclusive). The constitution under chapter 4 guarantees certain fundamental rights which are to be enjoyed by everybody in the country. These rights include, among others: rights to life,[124] rights to dignity of human person,[125] right to personal liberty,[126] right to fair hearing,[127] right to freedom of movement[128], right to freedom of association and peaceful assembly,[129]rights to freedom from discrimination[130]and rights to privacy and family life.[131] All these rights are just the general fundamental rights that the Constitution guaranteed. It is however sad that the Constitution does not provide for specific class of rights for IDPs considering the circumstances and situation in which they have found themselves.

6.2 National Policy on Internally Displaced Persons (IDPs) in Nigeria

This policy derived inspiration from principles laid down by the United Nations on which the African Union Convention for IDPs protection is premised. The UN principles enjoyed popular acceptance by West African countries in Abuja on the 28th of April 2006. Thus, intentions to adopt its principles were manifest in the AU Summit on Refugees, Returnees and Internally Displaced Persons in Kampala (Uganda), October 2009. Consequently, Nigeria just as well as Uganda

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[122]Ibid.
[123] Cohen and Deng, Masses in Flight, 7.
[124]S 33(1) & (2) CFRN 1999 as amended. See also Article 3, UDHR, 1948, art 7 of ACHPR (Ratification and Enforcement) Act Cap. A9 Laws of Federation of Nigeria 2004.
[125] S 34 (1) (a) CFRN 1999 as amended, See Article 3 UDHR, 1948, Art 5, ACHPR 1981.
[126] S 35 CFRN 1999 as amended, Article 6 ACHPR.
[127] S 36 CFRN 1999 as amended, Article 7 ACHPR.
[128] S 41 CFRN 1999, art 12 ACHR.
[129] S 40 CFRN 1999, art 11 ACHPR.
[130] S 42 CFRN 1999 as amended, article 3 ACHPR.
[131] S 37 CFRN, See art 17 (1) ICCPR and Article 12UDHR 1948.

and Gambia formulated its own IDPs policy on the rules deriving from the Guiding Principles.[132]

The Policy outlines roles and responsibilities for the Federal, State and Local Governments, non-governmental organizations, community-based organizations, IDP host communities, civil society groups, humanitarian actors both nationally and internationally and the general public as well as educating persons about their rights and obligations before, during and after displacement.[133]

With the submission of report by the Committee, National Commission for Refugees in concert with the office of the Attorney General of the Federation came up with a draft bill and submitted the original draft IDP Policy in October 2010. Further review of the Policy was done towards integrating present realities in the country and based on the original draft of 2003 towards showing financial commitment of government in finding durable solutions to displaced persons and lasting peace and security in the displaced communities.[134]

A Technical Working Group (TWG), comprising of different stakeholders, was constituted to work on the Council's directive and revise the policy using the Convention of the AU on protection of IDPs as a template. This TWG was extensively supported by national and international technical experts, with wide stakeholder consultations. The recommendations thereafter submitted by the TWG were geared towards saving lives, preventing of large-scale displacements, wanton destruction of property, engendering national unity, promoting human and socio-economic development as well as addressing human right abuse.[135]

However, the 2012 National Policy is bedevilled with various shortcomings as it relates to IDPs' plights. Among the shortcomings perceived in the policy are its patent lack of conceptual clarification making it difficult to place the construct of IDPs under context, lack of attention on the transitional periods for integration of IDPs into the society.[136]

It is worthy of note that professionals in the legal and health professions are mostly saddled with responsibilities in the Policy. Also, Non-governmental Organizations such as Civil Society Organizations, Nigerian Red Cross Society and host communities are adequately catered for in the provisions of the policy, while professionals in the environment who constitute core environmentalists are grossly excluded. For instance, the Red Cross Society, the Institute of Peace and Conflict Resolution was included in the IDP scheme, while environmentally related institutes such as the Nigerian Institute of Town Planners, Nigerian

[132]A Akanmu, 'National Policy on Internally Displaced Persons (IDPs) in Nigeria: The Grave Exclusion' www.academia.edu/32348580 accessed 9 November 2021.
[133]Ibid.
[134]Ibid.
[135]Ibid.
[136]Ibid.

Institute of Architects, Nigerian Institute of Builders and Nigerian Society of Engineers among others were excluded. Similarly, armed group (such as police and military), government ministries, departments and agencies such as National Human Rights Commission, National Emergency Management Agency and other international organizations like United Nations High commission for Refugees had their shared responsibilities and commitments on fostering the well-being of the IDPs and IDPC in the country. Whereas, Ministries of Environment, Ministry of Works and Housing, Ministry of Transport and the likes are excluded from being a key player in the Policy.[137] This exclusion is a biggest challenge towards smooth implementation of the policy.

6.3 Violence against Persons (Prohibition) Act 2015

This is an Act which prohibits all forms of violence against persons, in private and public life and provides maximum protection and effective remedies for victims and punishment for offenders.[138] The Act is concerned about the pervasive violence against women and girls, especially sexual violence that may be perpetuated by anybody including security operatives. For example, one of the prevalent forms of violation that is suffered by IDPs is unlawful sexual activities such as rape and defilement. Thus, the Act prohibits any form of sexual intercourse with any girl/woman who does not consent to such intercourse or when the intercourse was done against her will.[139]This also extends to other unconventional sexual activities which did not constitute rape before the enactment of the act such as the use of object or other part of the body in any other opening of another person's body. This has effectively been acknowledged and criminalized under the Act.

Also, IDPs suffer violation of their right to freedom of movement, especially in the various IDP camps.It is noted that this Act as well prohibits such deprivation of a person's liberty except pursuant to an order of the court.[140]Acts such as forced isolation or separation from friends and family, exciting and participating in emotional, verbal and psychological abuse[141] as well as general violence by state actors has therefore been criminalized under the Act.[142]

It must be noted however that this Act only applies to the Federal Capital Territory and any other state in Nigeria where it has been domesticated and in force. In fact, by virtue of Section 27 of the Act, only the High Court of the Federal Capital Territory has jurisdiction to entertain and determine any matter

[137]Ibid.
[138] The Preamble to the Violence Against Persons (Prohibition) Act 2015
[139] S 1 Violence Against Persons (Prohibited) Act. Apart from this prohibition, Section 5 of the Act also prohibits a person from making another person, either by force or threat, to engage in such act.
[140] S 10 of the Violence Against Persons (Prohibition) Act.
[141] S 13 of the Violence Against Persons (Prohibition) Act.
[142] S 24 of the Violence Against Persons (Prohibited) Act.

brought under the Act. The situation in the country is that most High Courts are usually congested with cases thereby leading to little or no attention given to the case involving violation against women and girls. A special court for this purpose would have done better. Just like every other national law reviewed above, the commonest weakness of them continues to be the attitudes of government towards standardization of the laws vis-a-vis their implementations. The corruption in the land coupled with lack of real political on the part of successive governments in the country has to be checked.

7. Institutions Responsible for the Protection of the Rights of IDPs

These are the agencies or bodies which are overseeing the affairs and the protection of the rights of (and offer assistance such as relief distribution, coordination of resources towards efficiency, effective disaster prevention, *inter alia* to) Internally Displaced Persons. They are bodies established by a statute specifically for the Internally Displaced Persons.

7.1 National Emergency Management Agency (NEMA)

The Agency, NEMA was established through the National Emergency Management Agency (Establishment, etc.) Act of 1999, to manage disasters in Nigeria.[143] The establishment of NEMA ushered in a new dawn in disaster management from the hitherto narrow practice of relief distribution. The purpose for the establishment of the body is for the coordination of resources towards efficient and effective disaster prevention, preparedness, mitigation and response in Nigeria. It acts in the following areas: Coordination, Disaster Risk Reduction, search and rescue; policy and strategy; Geographic Information System, Advocacy, and education.

There are certain provisions which appear to be rights to be enjoyed by persons who have been internally displaced in Nigeria. These provisions are entrenched in the National Emergency Management Agency Act, established pursuant to the spirits of section12 of the Nigerian Constitution, with the sole agenda of managing disasters in Nigeria. The Agency is saddled with certain responsibilities for the benefit of the IDPs such as the provision of relief materials, collaborating with state and Non-state Actors for the purpose of improving the welfare of Internally Displaced Persons.[144] The weakness of the agency as provided for under the law is however that the Agency is not rights focused. Thus, no right as such obtains from the provisions of the Act especially for the welfare of Internally Displaced Persons. The only provisions which seem a bit relevant in this discourse are provided under paragraphs J and K of the said section 6 which address the violations relating to improved standard of living, as well as violations relating to medical/health rights of the IDPs.

[143] 'About NEMA' <https://nema.gov.ng> accessed 24 December 2021.
[144] S 6 National Emergency Management Agency Act; Cap N34 Laws of the Federation of Nigeria 2004.

This restricted system in approach to protection of the welfare of Internally Displaced Persons under the Act is worrisome. This is even despite the efforts of the United Nations (UN), its organs and non-governmental organizations collaborating with the government of Nigeria through the National Emergency Management Agency (NEMA) in order to mitigate the conditions of internally displaced persons and rehabilitate the victims.[145]

7.2 State Emergency Management Agency (SEMA)

The State Emergency Management Agency law is enacted by the Houses of Assembly of various state across Nigeria and it is applies for the protection and assistance of IDPs.[146] The agency is saddled with various responsibilities among which are to coordinate the activities of relevant agencies in prevention and management of disasters in the state, respond promptly to any emergency at hand within the state, provide relief materials/ financial assistance to victims of various disaster in the state, for the development of loss, prevention programs and procure necessary technology to mitigate identified emergency situation.[147] This agency is well established in each of the three selected states (Borno, Yobe and Adamawa) under the state level, whereby the Deputy Governor of each of the States is the Chairman of the body. It is however observed that most states do not realise the purpose of the laws through the bodies because of inadequate funding. The demands of the Agencies require huge financial commitments. Where there is a lack of funding, there is the possibility of sub-optimal functioning for the agencies.

7.3 North-East Development Commission (NEDC)

The North-East Development Commission (NEDC) came into being in October 2017. The mission of NEDC is to ensure redevelopment of the affected parts of Nigeria's North-East during armed conflict.[148] The NEDC is funded by the Federal Government of Nigeria as well as other local and international institutions/bodies.[149] To this end, a lot of local and international donors have swung into action with a view to actualizing the purpose for which NEDC was established. This therefore brings to fore certain challenges.

An instance of such challenges is the need to coordinate the plethora of local and international donors who had shown interest in the cause especially in the area of preventing projects and programs duplications. The need to ensure that the

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[145] 'Aims and Objectives' <https://www.scribd.com/document/331957028/aims-objectives> accessed 9 November 2021.

[146] Responsibilities 2; Lagos State Emergency Management Agency <https://lasema.lagosstate.gov.ng/responsibilities-2/> accessed 10 December 2021.

[147] Ibid.

[148] 'Nigeria Unviels Northeast Development Commission' <www.cfr.org/blog/nigeria-unviels-north-east-development-commissionn> accessed 27 November 2021.

[149] International Bilateral Donors, the African Development Bank, the World Bank, the UN, the European Union, USAID, UKAID/DFID,

various programs introduced by these players are compatible with the local content and cultural acceptance is another challenge.[150]Thus, the NEDC has a great role to play in this wise to come up with good framework for the coordination of the relevant stakeholders and ensure that their activities conform to the cultural conviction of the targeted people.[151]

7.4 National Commission for Refugees, Migrants and Internally Displaced Persons

The Commission was established by Decree 52 of 1989 known as the National Commission for Refugees etc Decree.[152] The NCFRMI Act is a product of three (3) major legal instruments[153] regulating certain aspect of Refugees problems in Africa and they together form the guide to the protection and management of asylum seekers and refugees in Nigeria. The Commission's mandate was expanded by the Federal Government to cover issues relating to Internally Displaced Persons (IDPs) and the coordination of Migration and Development in 2002[154] and 2009 under the administrations of President Olusegun Obasanjo and Goodluck Jonathan respectively.

NCFRMI's mandate is to map out national action plans for the welfare of the people affected by armed conflicts such as the IDPs, Migrants among others. All these categories of persons are referred to as Persons of Concern to the Commission. The mission is to integrate the best solutions through effective utilization of data, research and planning for the return, resettlement, rehabilitation and re-integration of all persons of concern.[155] This of course helps to address the violations that may occur from the internally displaced person's right to freedom of movement and personal liberty, as well as their right to return safely, voluntarily and with dignity, such that family members who were separated as a result of the displacement should as quick as possible be reunited and be allowed to recover their properties and possessions which they left behind or were disposed of upon displacement.[156]

It is important to note that the commission has collaborated with both national and international bodies over some years to bring succour to IDPs through various initiatives such as the construction of massive housing programmes under the IDPs Resettlement Cities Project comprising of states in Northeast Nigeria.

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[150]Ibid.
[151]Ibid.
[152]The Commission <www.ncfrmi.gov.ng/the-commission/> accessed on 9 December 2021.
[153] The 1951 United Nations Convention relating to the status of Refugees, its 1967 Protocol and the 1969 Organization of African Unity Convention.
[154] AJ Falode, 'Nation-building Initiatives of the Olusegun Obasanjo Administration in the Fourth Republic, 1999-2007' (2013) *University of Mauritius Research Journal*.
[155]Ibid.
[156] Principle 28(2) of the United Nations Principle on Internal Displacement 1998

These programmes include education facilities and agricultural schemes. This has been credited to the pro-activeness of the Commission and the support of the Federal Government. Also, skill acquisition programmes have been organised with numerous beneficiaries identified.[157]

7.5 Presidential Committee on North-East Initiative (PCNI)

This committee was established by the immediate past President Muhammadu Buhari to serve as the primary national strategy coordination and advisory body for all humanitarian interventions, transformational and developmental efforts in North-East Nigeria. The PCNI is created to oversee all remedial programs, policy implementation among others aimed at addressing the IDP crisis bordering on the IDP right to education, food security, livelihood, hygiene and shelter in Northeast since 2009.[158] Another key part of the PCNI's role as the Government of Nigeria's coordinating body for recovery efforts in Northeast is the discussion with stakeholders on the issues relating to intervention gaps in respect of violations across the various sectors.

8. Conclusion

There are numerous provisions from the international laws, regional laws and national documents which safeguard and protect IDPs' rights. It is of no doubt that the IDPs are entitled to the general fundamental human rights as provided in the chapter 4 of the 1999 constitutions (as amended) and other international treaties on human right. In the same vein, these IDPs by virtue of the circumstance in which they have found themselves, are also entitled to other peculiar rights under the laws. Therefore, it is the duty of a responsive and responsible government to make sure that the fundamental human rights of these people are kept intact without prejudice to the peculiar rights available to these IDPs under the laws.

It is however worthy of note that a number of challenges beacon as pointed above. Despite the provisions of the laws in relation to the rights of IDPs, they still suffer abuses due to lack of proper implementation of the laws in place and the utmost inadequacy of the laws to specifically cater for them. Another challenge with regards to the enforcement of the rights of IDPs is the weaknesses or lacuna in the various instruments that were discussed earlier especially the fact that some of these instruments are mere conventions and policies which does not have a binding effect. Until and unless the provisions of the international and regional legal framework are fully domesticated in Nigeria, the enforcement of the rights of IDPs will continue to suffer great set back.

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[157] Agidike Abdul Onu, NCFRMI/UNHCR and the Task of Managing Refugees in Nigeria <https://www.vanguardngr.com/2021/02/ncfrmi-unhcr-and-task-of-managing-refugees-in-nigeria/> last accessed 20 December 2022.

[158] PCNI <About PCNI pcni.gov.ng/about-pcni/> accessed on 10 December 2021

It is thus recommended that Nigerian government should rise to the occasion with a view to domesticate and implement the salient relevant provisions of the international and regional instruments with a view to give new face to implementation of the IDPs rights in Nigeria.