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Tel: 08034351298
Email: ihemtony@yahoo.com

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DETAILS OF THE CONTRIBUTORS:

Prof. Osy Ezechukwunyere Nwebo: LLD, Ph.D, MSC, LLM, BL, LLB (Hons.) Professor of Public Law and International Constitutionalism, Faculty of Law, Imo State University, Owerri, Nigeria.

Prof Obiaraeri, N.O., LL. B (Hons), B.L. (Hons), LL.M, Ph.D (Law), FHRI, FCAI, KJW, is of the Faculty of Law, Imo State University, Owerri, Nigeria. He was a former Dean, Faculty of Law, Imo State University, Owerri, Nigeria and former Fellow and Visiting Scholar, Human Rights Institute, Columbia University, New York, New York, USA. He is Nigerian Association of Law Teachers (NALT) Taslim Elias Awardee, 2017. Phone: +23480355244442; E-mail: profnoobiaraeri@imsu.edu.ng.

Prof. Chima Josephat Ubanyionwu, Professor of Law, Department of International Law & Jurisprudence, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus, Chairman, Nigerian Bar Association, Aguata Branch (2018 – 2020), Phone: 08036660646, Email: barcjuba@yahoo.com.

Okoro, Jude Tobechukwu, LL.B; BL; LL.M and Ph. D (ABD), is a Lecturer in the Department of Public Law, Faculty of Law, Federal University, Oye-Ekiti, Ekiti State; GSM Number: +234 8064758398; E-mail Address: jude.okoro@fuoye.edu.ng

Emma Osuji Esq (KSM) Ph.D Lecturer in Department of Public Law, Faculty of Law Imo State University Owerri.

Aaron OLOGE, Lecturer, Department of Commercial and Property Law, Faculty of Law, Delta State University, Oleh Campus; E-mail: aologe@delsu.edu.ng; Phone Number: +2348067158259

Obiaraeri, Chinyere A., Ph.D; Senior Counsel, OBIARAERI, OBIARAERI, OBIARAERI & CO., 5 Ekwema Crescent, Owerri, Imo State, Nigeria.

Uju Obuka, Ph.D., LL.M, BL, LL.B, Senior Lecturer in Law, Faculty of Law, University of Nigeria Nsukka. uju.obuka@unn.edu.ng. Contact: 08033280467.

Eno-Obong Bassey Akpan is currently a doctoral candidate of the Faculty of Law, University of Uyo. She is Notary Public for Nigeria, human rights lawyer and gender activist. E-mail: enoakpan@hotmail.com. Tel: +234 8023377543.

Damilola S Adesanya, Lecturer, Department of Commercial and Property Law, Bola Ajibola College of Law, Crescent University, Abeokuta, Ogun State, Nigeria.

Saliu O Jimoh, Lecturer, Department of Jurisprudence and International Law, Bola Ajibola College of Law, Crescent University, Abeokuta, Ogun State, Nigeria.

Chukwuebuka Ibeh is an Associate at Gracean Solicitors, Lagos State, and also as a Member of the Legal Department at Chimons Gas Ltd, Lagos. He holds a Bachelors Degree from Imo State University, and can be contacted on ibehchukwuebukanic@gmail.com

Chinwe Patricia Iloka, LL.B, B.L, LL.M, Ph.D, Senior Lecturer, Department of Private and Public Law, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University Igbariam Anambra State Nigeria Mobile: +2348035696281, Email: cp.iloka@coou.edu.ng and chypat4@gmail.com

Awodezi Henry, Faculty of Law, University of Delta, Agbor, Delta State, Nigeria, Email: h.awodezi@unidel.edu.ng Tel: 08062977801, ORCID ID: 0000-0002-1179-3371.

Patricia Izuka Tom, Directorate of General Studies, Delta State University of Science and Technology, Ozoro, Delta State, Nigeria, Email: tompatriciaizuka@gmail.com Tel: 08037181518

Osuji Obiageli Francisca, B.A, (Theatre Arts), B.L, LLB, LLM), Lecturer, University of Benin, Edo State, Nigeria. francisca.osuji@uniben.edu, +2347038168840

Prof. Okorie, Chimezie Kingsley, Ph.D, SAN, Dean, Faculty of Law, Imo State University.

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CONSTITUTIONALISATION OF THE ROLE OF TRADITIONAL RULERS IN NIGERIA: AN APPRAISAL

Prof. Osy Ezechukwunyere Nwebo*

Abstract

It cannot be overemphasised that traditional rulers are primarily the custodians of the traditions and cultures of their people. They also, play significant role in the settlement of disputes and promotion of national development through effective mobilization of the people in their domain to embark on various development programs for their common good. However, the Constitution of the Federal Republic of Nigeria 1999 (the Constitution) has no provision for the role of traditional rulers. Recently, the traditional rulers feel that the non-inclusion of their position and role in the Constitution diminishes their political significance as partners in progress with the Government. Therefore, the traditional rulers have been clamouring for their position and role to be clearly defined in the Constitution. The protagonists of the constitutionalisation of the role of the traditional rulers at various levels of Government contend that the idea is necessary in order to entrench the position of the traditional rulers as partners with government in the democratisation process. The idea has generated a serious debate as to whether indeed the position of and role of traditional rulers in Nigeria should be such matters that should be included in the Constitution, considering the modern democratic governance system which the country has adopted and is struggling to consolidate. The question is, whether a specific provision defining the constitutional role for the traditional rulers is not inconsistent with the idea of modern constitutional democracy especially, under a federal constitution. The article adopted the doctrinal methodology in analyzing the above question and argued that the *status quo* which maintains their traditional and apolitical position will rather sustain rather than undermine or diminish their significance. On the other hand, it will be inconsistent with the principles of modern democracy to establish another organ or institution of government with its new challenges but without special value addition to the democratic governance process at the federal level. Thus, relying on the customary law theory, the article concluded that the role of the traditional rulers being traditional in nature and in a country of diverse traditions and customs should be confined to their various domains under the various State laws. It is therefore recommended, that the informal albeit important peace building role of traditional rulers at the National level can be sustained without making it a constitutional matter with its necessary challenges.

Keywords: Constitution; Constitutionalisation; Democracy; Traditional Ruler

Introduction

Traditional rulership institution in Nigeria has a pre-colonial existence and remains part of the present day polity with diverse roles and influences. There are differences also in the role of traditional rulers in the various traditional societies in Nigeria during the pre-colonial era, the colonial era and the post-colonial era especially. Apart from the differences in their roles during the different epochs, there are also variations in terms of the form and extent of the powers and influences they have in their various domains. These variations are the necessary consequence of the plural character of the country in terms of culture and religion. Today, the development of the modern democratic governance system in Nigeria has in no small measure diminished their political authority without undermining their contribution as partners in progress with the Government.

For some time now, the traditional rulers have been expressing concern that their position in the present democratic system is not defined in the Constitution of the Federal Republic of Nigeria

* Prof. Osy Ezechukwunyere Nwebo: LLD, Ph.D, MSC, LLM, BL, LLB (Hons.) Professor of Public Law and International Constitutionalism, Faculty of Law, Imo State University, Owerri, Nigeria.

1999(as amended)¹ and that there is need for them to be assigned constitutional recognition and role. This has generated debate as to whether indeed they should be recognized and given a defined role to play constitutionally in the light of the democratic governance system which the country has since adopted and is seeking to consolidate. The question is, whether assigning a constitutional role for the traditional rulers is not inconsistent with modern constitutional democratic process and therefore, an antithesis of the idea of traditional or natural rulership. Put differently, to what extent can the traditional rulership system be integrated into the modern constitutional democratic politics which has been adopted under the Presidential Constitution of the Federal Republic of Nigeria?

The protagonists of the constitutionalization of the role of the traditional rulers at various levels of Government contend that the idea is necessary in order to entrench the position of the traditional rulers as partners with government in the democratization process. The protagonists predicate their argument on the view that the *status quo* which did not give the traditional rulers constitutional recognition or specific role undermines or diminishes their significance. On the other hand, the opponents of this view argue that it will be inconsistent with the principles of modern democratic system of government to establish another organ or institution of government in the Constitution with its new challenges, but without value addition to the consolidation of democracy. The point is that the role of the traditional rulers being traditional and customary varies from place to place and from community to community. This is even more so in a country of diverse traditions, customs and religion which should be confined to their various domains under the various State laws as it is being practiced presently. In other words, that the *status quo* which maintains their apolitical position will rather sustain than undermine or diminish their significance.

The article appraises the above issues and argues that the traditional institution is not one of the three main organs of government in a constitutional democracy and the emergence is not predicated on a democratic leadership selection process. Furthermore, their position does not fall within the federal governance architecture in a federal system of government which allows each level of government to retain its peculiar cultural or social identities. Therefore, their role should remain traditional, apolitical and confined to their ethnic social milieu in order not to complicate the federal system of government which Nigeria has adopted.

In order to drive home the above point, the article adopts the doctrinal methodology and examines the previous literatures on traditional rulership in Nigeria. It briefly examines the traditional rulership system in the various geopolitical zones and ethnic societies in the pre-colonial period, during colonial times and after independence. These were juxtaposed with the realities of modern constitutional democracy especially, under a federal constitution which Nigeria has adopted. The article concludes that the agitation for constitutional role for unelected traditional rulers whose role are essentially cultural and in some cases religious and whose impact is limited to their various ethnic domain is an anti-thesis of the Nigerian federal arrangement.

In dealing with the issues arising from the debate, the article is outlined in sections as follows: section 1 is this introduction; section 2 deals with brief explanation of the key concepts; section 3 examines the nature of traditional rulership in Nigeria in the pre-colonial era, colonial era and post-colonial era; section 4 analyses the reconcilability or otherwise of traditional rulership with the modern constitutional democratic system of government; section 5 is the concluding remarks on the issues analysed with recommendations.

¹ Hereinafter referred to as “the Constitution”.

Explanation of Key Concepts

Constitution

The concept of constitution has no precise connotation and as such can be variously explained.² A country's constitution, especially a written one is an indispensable factor in establishing the fundamental principles and the framework for the exercise of governmental powers and the rights of the citizens and their limitations. It establishes the various organs of government and the limits of their powers as well as the necessary democratic institutions to enforce observance of the rule of law. Thus, a constitution prescribes how government is constituted and lays the necessary foundation for constitutionalism and democracy to flourish. The relationship between constitution and democracy lies in the objective of ensuring that the rule of law guides the democratic process. It also provides limitation to the powers of both the government and the governed to ensure the promotion of democratic governance.

Constitutionalisation

Constitutionalisation is the act or the process of establishing a constitution over a state or organization such that its powers are subjected to the discipline of the constitutional procedures and norms contained in the constitution. The constitutionalisation process may take the form of the designing a new constitution or incorporating something (a new provision) into an existing constitution.³ In this article, the concept of constitutionalisation is taken to mean the later that is, the incorporation of the position and role of the traditional ruler as part of the provisions of the Constitution of the Federal Republic of Nigeria 1999.

Democracy

Democracy has become generally accepted as the best form of government and that "real democracy" will offer a ready solution to all the political, social and developmental problems. Because it has no fixed creed and because of its propaganda value all kinds of governance systems proclaim themselves democratic. Thus, it has been taken for granted that democracy is a universally accepted way of life but without a universally accepted definition. Accordingly, the concept has been variously defined and explained depending on one's context, circumstance or ideological inclination. In any event, democracy is presented as a form of government in which the power to govern is derived from the people either by direct referendum (direct democracy) or by means of elected representatives of the people (representative democracy).⁴

However, it has been popularly accepted that democracy as a concept can best be defined as "government of the people by the people and for the people".⁵ From the above definition, it is apparent that the epicenter of democracy is "the people", to whom sovereignty belongs and from whom government should derive all its powers and authority to govern. This implies that, the participation of the people in the democratic process is imperative, if they have to determine their political destiny by themselves. Thus, the hallmark of a true democracy is rule by the consent of the people, which must be determined by their affirmative votes in a free, fair and credible election in accordance with the constitution of a country, which in itself, must have been a product of a democratic process. Hence, democratic governance can only flourish in a governance system in which the leadership selection process is predicated on a democratic constitution.

² See OE Nwebo *Critical Constitutional Issues in Nigeria*, Owerri: Versatile Publishers (2011) 9.

³ <https://www.collinsdictionary.com/us/dictionary/english/constitutionalize> (accessed 10 July 2023); <https://academic.oup.com/book/11994/chapter-abstract/161241913?redirectedFrom=fulltext> (accessed 10 July 2023).

⁴ See OE Nwebo *Political Parties and Promotion of Constitutionalism and Democratic Governance in Nigeria: The Challenge of Internal Democracy* Owerri: Imo State University Press (1921) 17.

⁵ A. Lincoln, in his famous speech called *the Gettysburg Address a "monumental act"* (19 November 1863). available at: <<http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>>, accessed 5 May 2017.

Traditional Ruler

The question as to who traditional rulers are and their status in the Nigerian context have remained controversial. There is no precise or generally laid down definition of who is a traditional ruler. This is understandable, considering the reality of the Nigerian diversities in terms of the cultures and traditions of the various ethnic societies, the position or status of the traditional rulers and the role they play. Thus, there are more than 250 different ethno-cultural groups in Nigeria with their own systems of traditional rulership known by their different classifications, levels of authority, titles or stools, powers and influence. Some of the traditional rulers are known as Oba, Sarki, Alarm, Etsu, Attah, Eze, Sultan, Shehu, Emir, Obong, Obi, Tor or Olu and so on. The above differences make it difficult to define the phrase traditional ruler in clear and precise terms.

However, in general terms, a “traditional ruler” may be defined as the traditional head of an ethnic unit or clan who is for the time being the holder of the highest traditional authority within the ethnic unit or clan and whose title is recognised as the traditional ruler title by the Government of the State.⁶ The concept has also been defined as a person who by virtue of his ancestry occupies the throne or stool of an area, has been appointed to it in accordance with the customs and traditions of the area and whose throne has been in existence before the advent of the British in Nigeria.⁷

The obvious problem with the second definition is that a time frame was placed on when a traditional ruler can be so called. This implies that when the position of any ruler did not exist before the advent of colonialism, it was a mere creation. For these later rulers, some authors exclusively reserved the title "Chief" whereas the first group was referred to as traditional or natural ruler. In this article, traditional ruler is taken to include the natural rulers that existed before the advent of colonialism as well as the rulers appointed by the colonial administration or the succeeding Nigerian governments.⁸

Examination of Traditional Rulership in Nigeria

In this article, the various indigenous political governance structures in Nigeria are grouped into two main categories: those with centralised authority and those without centralised authority to highlight the complex situation of the traditional rulership systems in Nigeria. Thus, prior to the establishment of the British administration in what now constitutes Nigeria (which is a creature of the colonial masters) and even thereafter, there was no one governance, administrative or judicial system running throughout the country. The political, administrative and judicial structures were as complex as the country was diverse. Thus, in some jurisdictions, traditional rulers were monarchs or paramount authorities or natural rulers in their kingdoms or ethnic communities. As monarchs, they enjoyed a combination of political, administrative, judicial and spiritual leadership as well as being the custodians of all customs and traditions of their people. In short, to all intents and purposes they enjoyed the title of a king, though the title king in colonial times was exclusively reserved for the British monarch. In some cases they were regarded as the "father" of all citizens

⁶ <https://www.lawinsider.com/dictionary/traditional-ruler>

⁷ SJS Cookey et al *Traditional Rulers in Nigeria* (2010), Safari Books Ltd., Ibadan, 3. This was the definition adopted by the National Conference of traditional rulers in Kaduna in 1983.

⁸ In Nigeria, the systems of the traditional institutions differ as there are differences in terms of cultures and traditions and in terms of the various State Laws. For instance, under the “Imo State of Nigeria Traditional Rulers and Autonomous Communities Law No. 3 of 1999”, provisions were made for traditional rulers and allied matters. In that law, the concept of traditional ruler and “Eze” are used to mean the same. Thus, it provides that: “Eze” means a traditional or other head of an autonomous community who has been identified, selected, appointed and installed by his people according to their own tradition and usages, and presented to the Government for recognition. It made no difference between an existing Eze and a new one. However, an Eze to be properly so called must be recognized by Government. The same applies to many other States of the Federation in accordance with their State Laws.

of his community and sometimes referred to as “royal fathers”. In some other ethnic communities, the traditional rulers did not enjoy kingship powers in its plenitude and in some cases they did not even exist. Instead, there was different leadership or administrative structures under which certain ethnic nationalities were governed.

Thus, there are significant differences in the indigenous governance and leadership structures. Accordingly, the states which now constitute Nigeria could be broadly grouped into “centrally-organized” and “non-centrally organised states”. Dr. Elias in his book referred to these as “Chiefly” and “Chiefless” societies. In the centrally-organized States the Chief, Oba or Emir was always at the apex of the pyramid of the administrative and judicial authority. In other words, in the centrally-organized States, there was always a hierarchical administrative and judicial set-up with the Chief or the Oba or Emir at the apex of authority and the village head at the base of the pyramid.

Typical examples of centrally organized indigenous societies existed in the Hausa/Fulani (forming greater part of the Northern States), the Yoruba Kingdom (now constituting the Western States) and the Bini kingdom (now constituting part of Edo State. In the above societies, the chief, Oba or Emir as the case may be, was the administrative and judicial head, having final economic; and legal control over all the land within his jurisdiction.

The traditional rulers in the centrally organized societies are for the most part chosen through a combination of birth and the input of kingmakers, usually ethnically heterogeneous empires or a group of aristocratic families. These kingdoms have usually a clearly defined territorial foundation and are ethnically strongly homogeneous. Some of the centralized kingdoms are the result of conquest and expansion. Typical examples are the Sokoto Caliphate and the Kanem-Borno empires. The Sokoto Caliphate, under Usman Dan Fodio's leadership, conquered much of Northern Nigeria and established a highly developed and centralised Islamic political structure to rule the region. The Caliph in Sokoto established thirty emirates with numerous sub-emirates to govern the region. Some of the chiefly political formations are commonly found among the Yorubas in the south west of Nigeria, commonly described as a confederacy of kingdoms. They are also found in the Middle Belt (e.g. Aku of the Jukun), the South-East (e.g. Obi of Onitsha), and the South-South (e.g. Oba of Benin) representing traditional African monarchies in the pre-colonial times.

It is important to mention that in most of these centrally organised communities, there is another hierarchy of subordinate chiefs who are appointed by the traditional rulers themselves to assist in the day to day discharge of their duties. These categories of chiefs are in this article not qualified to be referred to as traditional ruler. Thus, there could be a delegation of power to some inferior chiefs and headmen in judicial and administrative matters. Disputes were usually settled by the village head and appeals usually lay to the chief or Oba or Emir, as the case may be. Criminal cases invariably went to the Chief either through the village-head or straight to the chief.

It must be noted, that there is a type of the centralised form of political organisation or Chieftom composed of a recognised traditional rulers, appointed by the government, who wields authority over an area/district assigned to him. These chiefs did not emerge through ancestry but rather a creation of Indirect Rule and found particularly in the Middle Belt. In these chieftoms, succession was by rotation among the ruling houses.

The prominent groups among the category of the non-centrally organized societies, that is, societies without centrally organised administrative and judicial set-up were the Igbo (now forming most part of the present South Eastern States and some part of Middle Belt especially the

Tiv and parts of the South-South especially, Delta and Rivers States. Their political systems are characterized by non-existence of hereditary rulers and officers. Sometimes, these societies are described as acephalous systems or segmented or "stateless societies". These societies are typified by the absence of an outstanding leader or central authority in that political power is diffused and exercised by heads of different segments or lineages of a political community over their subjects. The people were organized in units of clans, villages and kindreds or families. The Council of Elders performed Judicial and administrative functions in the various units.

Contrary to the eurocentric understanding of the Igbo traditional society which portrays it as acephalous or stateless, without a central or coordinating political authority. (Green, 1964:8) on the other hand, a more nuanced study of the Igbo traditional society shows that the Igbos had an indigenous political governance system that was decentralized and segmented (Uchendu 1965; Ejiofor, 1982, stride and Ifekaa, 1971) and which ensured effective decision, execution and adjudication processes. Thus, the Igbo political system for the most part, can be rightly described as democratic, publican or Segmentary, involving debate and representation followed by a final decision that is communicated to the sub-units for execution. This system has more or less survived the modern democratic system and indeed compatible with modern democratic governance system, in that it is essentially consultative, representative and participatory and adaptable.⁹ This is as against the position in centralized governance systems where the traditional rulers as monarchs exercised ultimate administrative and judicial authority.

From the foregoing, it could be seen clearly that long before the arrival of the British people and the establishment of their system of government and administration of justice, each of the territories which together now constitute Nigeria had their own governance systems, law making and Administration of Justice that worked very effectively for the natives. It is therefore not surprising that the colonial administration recognized it and wisely utilized the existing system to complement the governance of the various territories.

Thus, under the colonial era, the British administration effectively utilized the existing traditional rulership system to administer the local communities. The system was institutionalized as the policy of indirect rule by which local governance was left in the hands of the traditional chiefs who were empowered to collect taxes and dispense law and order under the guidance of the British officials. The British administration appointed traditional chiefs in those indigenous societies without centralized political set up to assist them in governing the locals. Indirect rule was very successful in the North and partially successful in the West where there were existing central authorities. However, the system was not successful in the non-centralised indigenous authority like the Igbos where indirect system experienced resistance.

In any case, it is apposite to point out that the basic difference between the indigenous administrative and judicial systems and that of the British governance system majorly lies in the absence of Separation of Powers in the indigenous societies. Both the Council of Elders in the non-centrally-organized States and the Chiefs, Obas or Emirs in Centrally organized combined both administrative, legislative and judicial powers and functions.

Analysis of the Role of Traditional Rulers in a Constitutional Democracy

Functions of Traditional Rulers

It cannot be overstressed, that the life of the Nigerian people is deeply rooted in their cultural

⁹ This conclusion is without prejudice to the minor exception found among the Igbos of Onitsha and Agbor who have kings. For instance, the Obi of Onitsha ruled his people with his Ndi Ichie (Red cap Chiefs).

values and tradition. In this regard, the role of traditional rulers in Nigeria as the custodians of the culture and tradition of their people cannot be overemphasized. Thus, in a number of situations, the traditional rulers have been recognised generally as men of great wisdom and knowledge who could advance the process of socio-economic development. Some have brought their initiatives to bear and acted pro-actively and sometimes when consulted to ensure that development plans in their domains were influenced by their input especially, at the local government level. In this way, their wealth of experience has been brought to bear on the formulation, execution and monitoring of development plans to the benefit of the people.

Prominent among the functions of the traditional rulers are the following:

Maintenance of Law and Order-Traditional rulers usually assist the government in maintenance of law and order in their communities as well as promoting peaceful co-existence of people of different religious, ethnic and social backgrounds;

Judicial Functions-The traditional rulers perform judicial functions by engaging in the settlement of disputes among members of their communities in accordance with their customs and traditions especially in disputes involving land matters and inheritance. They also play leadership role in the settlement of inter community disputes;

Peace Building-In periods of national crisis in Nigeria or inter-state crisis, traditional rulers on their initiative or on the request of government usually intervene to broker peace and stabilize the system, thereby promoting national unity and the corporate existence of the country;

Mobilisation of the People to Support Government Programmes-The people generally have more trust in their traditional rulers than government. This enables them to maintain a working relationship between the government and the people especially in communicating and supporting development programmes especially, in the areas of sanitation, health, agriculture political education and so on;

Community Development-The traditional rulers mobilise their people to engage in community development projects such schools, dispensaries, water and electricity in collaboration with the town union or community associations;

Adviser to Government-the traditional rulers in some states advise government at various levels on issues relating to customs and traditions of the people and law and order.¹⁰

Challenges of the System of Traditional Rulership

The roles and functions of traditional rulers as summarized above no doubt show that the traditional rulers are very relevant as veritable partners with government in the achievement of good governance in Nigeria. However, the traditional rulership institution is not without its own challenges. The challenges include but not limited to the following:

There is no uniform process of the emergence or selection of traditional rulers in Nigeria. Most of them emerged through inheritance or appointment without the participation of the subjects except

¹⁰ Various States in the Nigerian Federation have their own Chieftaincy or Autonomous Communities Laws and made provisions for the organization and roles of their traditional institution. For instance, under the Traditional Rulers and Autonomous Communities Law No. 3 of Imo State, the State and Local Government Councils of Ndi Eze (traditional rulers) are established and assigned specific functions for the Councils and the Ezes (recognized traditional rulers respectively).

a select few kingmakers, contrary to the modern democratic process of leadership selection which is by means of general election. Thus, in most cases the selection processes are inconsistent with the modern Western democratic pattern which we have adopted; There are no uniform process of administration of the various ethnic groups or communities due to the differences in cultures and religions and the role played by the traditional rulers. Furthermore, the territorial jurisdictions of the traditional rulers differ in terms of size and the extent of their authorities over their subjects; In some geographical zones or States in Nigeria the number of traditional rulers are few ruling over large population while in some others the number is humongous ruling over few inhabitants. In fact, there is proliferation of traditional rulers in some states especially the south Eastern States to a scandalous proportion, leading to perennial conflicts, instability and infighting amongst traditional rulers for supremacy even amongst the members of a community seeking for new autonomous status; There is disparity on the mode of payment of traditional rulers. Some are paid salaries, allowances or stipends by the States or Local Governments or their communities as the case may be. Some argue that it should be the responsibility of the government, while others argue that it should be that of their communities. There is also disparity in terms of the sufficiency of the amount they are paid, with all the implications on the loyalty of the traditional rulers; The apolitical position of the Nigerian traditional rulers raises some problems. However, it is a known fact that most of the traditional rulers tend to be on the side of the government or party in power, even at the risk of being occasionally opposed by the majority of the people in their domain. It is also a known fact that some of them have been deposed on account of the political leaning of the traditional rulers;

Though generally the traditional rulers are respected as men of honour and integrity some of them are perceived as corrupt and as pursuing their selfish interests at the expense of the welfare of their people and as betraying the peoples' confidence by being more concerned with pleasing even bad government in power than with pursuing the interests of their people. Some-times, some of them have also been implicated in the commission of heinous crimes.

It cannot be denied that the role of traditional rulers differ in content according to the differences in the class or status, their jurisdictional coverage and ethnic value systems having regard to the plural character of the Nigerian state. Nevertheless, the continued existence of traditional rulers in the present democratic dispensation cannot be dispensed with. The question remains as to whether their role justifies making their position a matter for the constitution. Thus, the demand for a place in the Constitution needs to be juxtaposed with the above challenges and what the Nigerian contemporary democratic system requires, such that ultimately the country will have a realistic constitutional framework for the consolidation of democracy.

Traditional Rulership and the Democratic Governance in Nigeria

In retrospect, before Nigeria gained independence in 1960, the traditional rulers were part of the political process in one form or the other. The nationalists/political elites carried them along in the formation of political parties and the struggle for independence. However, the contention by a cross-section of nationalists and the emergent political parties was that the institution of traditional rulership was in direct conflict with democratic ideals as the system was gathering considerable momentum. After independence, the political elites continued to try to reduce the influence of traditional rulers in local decision-making. However, under the 1960 and 1963 constitutions roles were created for the traditional rulers. At the federal legislature some special class among them were members of the Senate.¹¹ The legislatures of the regions were composed of the Houses of

¹¹ See for example Section 34(ii) of the Constitution of the Federal Republic of Nigeria 1963 which made provision for the *ex-officio* membership of Senate for the Oba of Lagos and a Chief selected in such manner as may be prescribed by Parliament.

Assembly and the House of Chiefs.¹² Recall that this was under a parliamentary system of government in which there was fusion of legislative and executive powers. Thus, the traditional rulers enjoyed these competences and powers during the Nigeria's First Republic (1963-1966).

From 1960 to 1966, when the military seized power, the democratisation effort in Eastern and Western Regions had a significant adverse effect on influence of traditional rulers in local decision-making. In most parts of the Northern Region, however, the Emirs were still in control of their Councils as the democratisation effort appeared to be neutralised by their overwhelming influence. It is instructive to note that upon the assumption of political power by the military in January 1966 the role, influence and participation of traditional rulers in the governance of the country began to take a new shape. At both the federal and State levels they virtually had no significant role to play other than to merely support the military in power. At the local government level the traditional rulers played limited roles which has been aptly described in the following terms:

In the Northern States between 1966 and 1972 Customary/Native Courts were taken over by state governments, and Prisons and Police were taken over by the Federal Government. The nomenclature of Native Authority was dropped and the existing Native Authorities balkanised into independent local government units, but the Emirs were still influential in the decision-making process at the local level. New provisions were introduced for election of two-thirds of the membership of the Local Government Councils. In Western states (including the Mid-west), before 1966, the role of traditional rulers in local government had been essentially ceremonial. The situation was the same in parts of the Eastern States where traditional rulership still existed.¹³

The above was generally the position of the traditional institution until the introduction of the 1976 Local Government Reform which insulated them from politics and formally assigned advisory roles to them under the local government system which was an appendage of the state governments. This was not without strong opposition from the traditional rulers in the Northern part of the country, where traditional rulers where there is more or less dynastic traditional institutions, the traditional rulers continued to play a significant role in the decision making process at the local level. Thus, it appears that the problem of traditional rulers is more of a Northern problem where the existence of dual authority structure, the traditional and the secular is very pronounced.¹⁴ Against this background, the 1979 Constitution, did not even mention or provide any role for the traditional institution even in the local government as their role was merely advisory/ceremonial. The debate over the agitation of the traditional rulers for constitutional recognition of their role in local government probably led to the attempt under the ill-fated 1989 Constitution to spell out the functions of a Traditional Council at local government level. As was the case in the 1979 Constitution the 1999 Constitution did not mention or specify any role for the traditional authorities.

¹² For instance, Section 4 of the Constitution of Northern Nigerian Law, 1963 states that there shall be a Legislature for the Region, which shall consist of the Governor, a House of Chiefs and a House of Assembly. See also Section 4 of the constitution of eastern Nigeria and Western Nigerian Law 1963 respectively, which states that there shall be a Legislature for the Region, which shall consist of the Governor, a House of Chiefs and a House Assembly. Similar provision was made under the Constitution of Mid-Western Nigeria Act 1964.

¹³ Daniel Adetoritse Tonwe and Osa Osemwota "Traditional Rulers and Local Government in Nigeria: a Pathway to Resolving the Challenge" <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiOrtr35N-CAxWWVUEAHZsGBXQ4ChAWegQIBxAB&url=https%3A%2F%2Fpress.lib.uts.edu.au%2Fjournals%2Findex.php%2Fcgjlg%2Farticle%2Fview%2F3728%2F3869&AOvVaw1flqfuvPbLz3rOvfqEuvLd&opi=89978449> usg=

¹⁴ As above.

The Constitution merely guaranteed the existence of local government system “under a democratically elected local government councils”, under a law of the state which shall ensure its existence and provide for the establishment, structure, composition, finance and functions.¹⁵ The contemporary position of the traditional institution in Nigeria is that the political arrangement did not assign any constitutional role to them. However, they are assigned nominal advisory roles in states and local government affairs under the various state laws, which are not fully respected. Hence, the debate over the agitation for constitutional recognition and assignment of role for the traditional rulers continues to reverberate thereby calling to question the need to resolve the conundrum of the retention of traditionalism and modernism *pari passu*.

The foregoing clearly indicates that in the pre-colonial era, traditional rulership systems effectively served the people as they were practiced in the various ethnic societies and groups in Nigeria before colonialism. The traditional rulership system also substantially served the administrative interest of the colonial administration during the colonial era as they played a significant and active role in the governance of local communities. However, controversy arises when juxtaposing their relevance under the present day modernizing polity with divergent opinions. In analyzing the controversy, three schools of thought have been identified.

According to Egwurube,¹⁶ there are three schools of thought in this regard with particular reference to a democratically elected local government system. One school contends that the institution of traditional rulership should be abolished, as it is an anachronism in a democratically elected local government system, guaranteed under Section 7(1) of the Constitutions. It is therefore, anomalous to have the parallel institution of traditional rulership which emerged on the basis of local customs and tradition governing with a democratically elected local government council based on competitive and participatory process. The abolitionists are therefore of the view that if the country is serious with the adoption of the democratic and participatory culture needed to quicken the pace of modernisation, then the traditional rulership system should be abolished to develop an enduring democratic culture. Though the position of the abolitionists is logical, considering the high degree of acceptance of traditional authorities particularly in the rural areas the traditional rulership cannot be easily abolished without negative effect on the democratic stabilization process. The second school of thought argues for the enhancement of the role of traditional rulers by allowing traditional rulers to participate in politics. The adoption of this strategy is bound to be clouded with a number of difficulties including the subjection of the traditional rulers to the rigors of the electoral processes thereby, undermining of their legitimacy and sacredness in the eyes of the citizenry. The third school of thought is the retentionists, which favours the retention of the traditional authorities as participatory local government actors in advisory and non-executive capacities. This option will not only ensure stability and continuity of emergent local government system based on democratic and participatory principles, but would also tap the strength of traditional authorities in the sphere of citizen mobilisation and acceptance of local government policies thereby, reducing potential acrimonies and confrontation between local government actors and traditional authorities.¹⁷

This article adopts the retentionists’ option which appears to be in line with the present federal arrangement as against the radical abolitionists’ option. The retentionist option is preferred because it integrates the traditional institution into the country's contemporary local government system as

¹⁵ See Section 7 of the Constitution.

¹⁶ Egwurube, J. (1985) Traditional Rulers and Local Government under the 1979 Nigeria Constitution. In Aborisade, O. (Ed.) Local Government and Traditional Rulers in Nigeria. Ile-Ife: Unife Press. Cited in

¹⁷ See Daniel Adetoritse Tonwe and Osa Osemwota “Traditional Rulers and Local Government in Nigeria: a Pathway to Resolving the Challenge” generally note 13 above.

may be designed under the law of each state in keeping with the local circumstance. This will enable the system benefit from their wealth of experience, privileged position and acceptance with the people to contribute to the achievement of good governance and rapid development which modern democratic governance promises.

For the protagonists of constitutionalisation, due to the relevance of traditional rulers in the governance of the people, particularly in the grassroots, they should have formal constitutional role in Nigeria's present democratic process. They argue that the very essence of participatory democracy and inclusivity connotes the integration of institutions like the traditional rulership institution into the constitution in building a sustainable and the cohesive democracy which the legitimacy of Nigeria's traditional rulers provides especially, at the grassroots. While admitting that the role of monarchs and the nobility should be integrated into governance as a key component of participatory democracy, they need not be included in the federal constitutional framework as they are not and should not be imbued with legislative, executive or judicial mandate.

Conclusion and Recommendation

In determining whether the role of traditional rulers should be Constitutionalised as being suggested, or not, account must be taken of the fact that the traditional rulership systems in Nigeria are varied in terms of types, hierarchy, roles and authorities in their communities.¹⁸ In a federation, a single policy decision may not be able to accommodate these disparities. Thus, any policy thrust must take cognizance of the fact that laws are made to conform to the generally accepted way of life of the society where it is meant to apply. The patterns of traditional rule in the Nigerian communities are diverse in terms of tradition, authority, class and influence thereby raising challenges as already indicated above. For instance, as earlier alluded to, the Hausa/Fulani traditional society is characterised by a socio-cultural and religious unity anchored on their aristocratic system of government and politics with a highly centralised form of government in which the rulers had political, cultural and religious authorities. In general terms, the Yorubas owed cultural, political and spiritual allegiance to a common ancestor, *Oduduwa*. They traced their mythical origins to *Ile-Ife*, a place they still fondly refer to as the cradle of civilisation. Though their traditional political organisation is similar to what obtains among the Housa/Fulani it is loosely centralised with semi-independent states under a monarch. In the case of the Igbo society and some other societies in some parts of the country, their traditional political organization is non-centralised and without an all-powerful monarch, with a few exceptions.

Traditional rulers have all along been recognized, respected and involved in the governance of the country, being part of the peace building process of the nation and the promotion of national development through effective mobilisation of their people for development programmes. However, taking into consideration the fact that their roles are majorly primordial-cultural, spiritual and religious, traditional rulers should remain as advisors of government in cultural matters and as representatives of people in various Commissions and Boards dealing with cultural matters and chieftaincy affairs and any Board for that matter when required. At a time when the country is tinkering with the idea of devolving power to the states and reducing the size of the existing federal institutions under a dwindling economy, it is antediluvian to seek to create a role for traditional rulers in a federal constitution, with all its challenges. If care is not taken, religious leaders and other "important" will also begin to seek constitutional recognition and role. Thus, any traditional ruler who desires an elective office or a special role in government has the constitutional right to resign his position and join the fray.

¹⁸ See generally SJS Coockey et al *Traditional Rulers in Nigeria* (2010), ch. 4, Safari Books Ltd., Ibadan.

Therefore, in a plural society like Nigerian, politics should be played within a federal constitutional framework or democratic arrangement which is conducive for the various nationalities to retain their diverse traditional systems while collaborating in areas of common interest. Accordingly, the article recommends, that in a true federal system of government, not all institutions of government should be provided for in the federal constitution particularly, institutions whose roles are local and therefore relevant to the people they serve and their role should be provided for by the law of that level of government. Thus, although the Constitution has no provision for traditional rulers, yet legally they are recognized and assigned roles at the States, local government and community levels where they hold sway. The traditional rulers as partners in progress under the various State laws which established Council of Traditional Rulers at State and local government levels with responsibilities. The statuesque should therefore be maintained to let sleeping dogs lie instead of opening the pandora's box.

CONSTITUTIONAL PREREQUISITES FOR THE COMPOSITION OF THE EXECUTIVE COUNCIL OF THE FEDERATION BY THE PRESIDENT- A CRITICAL LEGAL ANALYSIS

Prof Obiaraeri, N. O.*

Abstract

One of the many measures provided in the Nigerian constitution to ensure good governance is the requirement that the President has the exclusive responsibility to appoint qualified Ministers into the federal executive council who will advise him on national affairs. To fast-track this leadership recruitment process, a recent constitutional requirement was added requiring the President to appoint the Ministers within a given time frame although it did not state what should happen when this is breached? This paper deployed the doctrinal research method to examine the constitutional parameters for the composition of the executive council of the federation and the mandatory timeline allowed the President to compose the Federal Executive Council among other things. The paper found that there is a lacuna in the law as the constitution did not expressly prescribe any penalty should the President not submit a comprehensive list of Ministerial appointees from at least one State of the Federation and or within the approved time limit to the Senate for confirmation. Hence, it was recommended among other things that since the breach of any constitutional provision is a gross misconduct, failure, refusal or neglect by the President to comply should form a ground for removal of the President from office by the legislature because a President who is unable to obey the constitution is unfit to hold office and liable to be removed from office.

Keywords- federation, executive powers, composition, president, breach of constitution

Introduction

The three arms of government recognised and created under the Nigerian constitutional order are the legislature,¹⁹ the executive²⁰ and the judiciary.²¹ This paper seeks to interrogate the procedure for composition of the Executive Council of the Federation which is critical in the discharge the executive powers of the federation vested in the President. The Executive Council of the Federation²² otherwise interchangeably called the “Federal Executive Council”²³ is very important and indeed indispensable in the governance of the nation. The primary role of the FEC is advising the President to determine the direction of government although the President is and remains the ultimate executive decision-maker and Chairman of the FEC. In order to strengthen the curve of good governance via the exercise of the executive powers of the federation, this paper will be divided into segments to examine the irreducible constitutional conditionalities for the composition of the FEC and specifically on whom the power is vested; the minimum number of members of the FEC; qualification and disqualification criteria of ministerial nominees; procedure for

* Prof Obiaraeri, N. O., LL. B (Hons), B.L. (Hons), LL.M, Ph.D (Law), FHRI, FCAI, KJW, is of the Faculty of Law, Imo State University, Owerri, Nigeria. He was a former Dean, Faculty of Law, Imo State University, Owerri, Nigeria and former Fellow and Visiting Scholar, Human Rights Institute, Columbia University, New York, New York, USA. He is Nigerian Association of Law Teachers (NALT) Taslim Elias Awardee, 2017. Phone: +23480355244442; E-mail: profnoobiaraeri@imsu.edu.ng.

¹⁹ Section 4 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

²⁰ Section 5 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

²¹ Section 6 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

²² The Constitution of the Federal Republic of Nigeria, 1999 as amended alludes to the “Executive Council of the Federation”. See section 144(1)(a) thereof. In section 144(5), it is provided that in this section, the reference to “executive council of the Federation” is a reference to the body of Ministers of the Government of the Federation, howsoever called, established by the President and charged with such responsibilities for the functions of government as the President may direct.

²³ Hereinafter abbreviated and referred to as “the FEC”.

confirmation of ministerial nominees, and the import of the recently promulgated sixty days timeline for composition of the FEC. In addition, the paper will interrogate the question of consequences or penalty for breach or non-compliance with the mandatory provisions for the composition of the FEC. Recommendations will be made on the way forward and the conclusion will be reached highlighting that the FEC should be composed of men and women of high impact and vision to assist the President effectively exercise the enormous executive powers of his office.

Executive powers of the federation- on whom vested and how exercised

Without too much ado, the executive powers of the federation are vested on the President. It is expressly provided under *section 5(1)* of the CFRN, 1999 as amended that-

Subject to the provisions of this Constitution, the executive powers of the Federation:

(a) shall be vested in the President and may subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and

(b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws.

The foregoing constitutional provision puts it beyond argument that the President is directly vested with the executive powers of the federation which may be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation.²⁴

The office of the President of the federation is created under *section 130(1)* of the CFRN, 1999 as amended and the President shall be the Head of State, the Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation.²⁵ Despite the humungous powers of the President as outlined above, it is not the contemplation of the constitution that the President should be a sole administrator or preside over the executive arm of the government alone. Therefore, the President is required to be assisted or advised by Ministers who are members of the Executive Council of the Federation. Aside the Vice-President²⁶ who is elected alongside with the President, *section 148(1)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended requires the President to appoint Ministers and assign responsibilities to them as members of the Executive Council of the federation. How then is the President required to compose the FEC and within what timeline? Who is the authority empowered to confirm Ministerial nominees? These queries will be interrogated exhaustively and suitable answers provided in the ensuing paragraphs of this paper.

²⁴ *Section 148(1)* of the CFRN, 1999 as amended.

²⁵ *Section 130(2)* of the CFRN, 1999 as amended.

²⁶ The office of Vice-President is created in *section 141* of the CFRN, 1999 as amended. Under *section 146(1)* of the CFRN, 1999 as amended, the Vice-President shall hold the office of President if the office of President becomes vacant by reason of death or resignation, impeachment, permanent incapacity or the removal of the President from office for any other reason in accordance with *section 143* of this Constitution. In *Buhari & Anor v Obasanjo v Ors* (2005) LPELR-815(SC) (Pp. 103 paras. C-C), it was held that "'President" or "Vice-President" means the President or Vice-President of the Federal Republic of Nigeria." In *Attorney-General of the Federation & Ors v Alhaji Atiku Abubakar & Ors* (2007) LPELR-3(SC) (P. 49, paras. E-A), it was held by the Supreme Court, per Akintan, JSC, that "Unlike the Ministers, the Vice President cannot be removed by the President. The process of removal of the President or the Vice President is provided for in *section 143* of the Constitution. It is through the process of impeachment which is to be conducted by the National Assembly as set out in that section. *Section 143(10)* of the Constitution specifically ousts interference of the court from the proceedings leading to the impeachment of the holders of the two offices."

Composition of the Executive Council of the Federation, by whom and how

The composition of the FEC is a very serious exercise that is subject to subject certain irreducible and non-negotiable constitutional stipulations. These complex pre-conditions can be serially identified as follows:

The President has the sole or exclusive power to appoint Ministers

Section 147(1) of the CFRN, 1999 as amended provides that “There shall be such offices of Ministers of the Government of the Federation as may be established by the President.” This provision gives the President the latitude, liberty or exclusive right or prerogative (the word “may” is used)²⁷ to create as many offices of Ministers as he may desire or wish. Thus, no person can successfully question the constitutional power of the President to appoint any number of Ministers he desires so long as they do not fall short of the mandatory minimum number stipulated under section 147(3) of the CFRN 1999 as amended.

Qualification to be appointed a Minister and disqualifying conditions

The President can only appoint qualified persons as Ministers into the FEC. A person is qualified to be appointed as a Minister if he is qualified to be elected as a member of the House of Representatives. This draws from the provision of section 147(5) of the CFRN 1999 as amended which provides that no person shall be appointed as a Minister of the Government of the Federation unless he is qualified for election as a member of the House of Representatives. Out of abundant caution, under section 65 of the CFRN 1999 as amended a person shall be qualified for election as a member of: the House of Representatives, if he is a citizen of Nigeria and has attained the age of 25 years; has been educated up to at least School Certificate level or its equivalent; and he is a member of a political party and is sponsored by that party. Under section 66 of the CFRN 1999 as amended, it is provided thus-

- (1) No person shall be qualified for election to the Senate or the House of Representatives if:
 - (a) subject to the provisions of section 28 of this Constitution, he has voluntarily acquired the citizenship of a country other than Nigeria or, except in such cases as may be prescribed by the National Assembly, has made a declaration of allegiance to such a country;
 - (b) under any law in force in any part of Nigeria, he is adjudged to be a lunatic or otherwise declared to be of unsound mind;
 - (c) he is under a sentence of death imposed on him by any competent court of law or tribunal in Nigeria or a sentence of imprisonment or fine for an offence involving dishonesty or fraud (by whatever name called) or any other offence imposed on him by such a court or tribunal or substituted by a competent authority for any other sentence imposed on him by such a court;
 - (d) within a period of less than 10 years before the date of an election to a legislative house, he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of a contravention of the Code of Conduct;
 - (e) he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in any part of Nigeria;

²⁷ In *Taiwo v FRN* (2022) LPELR-57826(SC) (Pp. 6-10 paras. C), it was held that in a statute, when 'may' is used it is generally accepted that it is permissive but exceptions exist when 'may' could be mandatory. See the case of *Edevot v Uwegba & Ors* (1987) LPELR-1009 (SC) where the apex Court gave this explanation, it said: "Generally the word 'may' always means 'may'. It has long been settled that may is a permissive or enabling expression. In *Messy v Council of the Municipality of Yass* (1922) 22 S.R.N.S.W 494 per Cullen, CJ at pp 497, 498 it held that the use of the word 'may' prima facie conveys that the authority which has the power to do such an act has an option either to or not to do it. See also Cotton, L.I. in *Re Daker, Michell v Baker* (1800) 44 CH.D 282. But it has been conceded that the word may acquire mandatory meaning from the context in which it is used”.

- (f) he is a person employed in the public service of the Federation or of any State and has not resigned, withdrawn or retired from such employment 30 days before the date of election;
- (g) he is a member of a secret society;
- (h) he has been indicted for embezzlement or fraud by Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a Tribunal set up under the Tribunals of Inquiry Act, a Tribunals of Inquiry Law or any other law by the Federal or State Government which indictment has been accepted by the Federal or State Governments respectively; or.
- (i) he has presented a forged certificate to the Independence National Electoral Commission.

(2) Where in respect of any person who has been-

- (a) adjudged to be a lunatic;
- (b) declared to be of unsound mind;
- (c) sentenced to death or imprisonment; or
- (d) adjudged or declared bankrupt,

any appeal against the decision is pending in any court of law in accordance with any law in force in Nigeria, subsection (1) of the section shall not apply during a period beginning from the date when such appeal is lodged and ending on the date when the appeal is finally determined or, as the case may be, the appeal lapses or is abandoned, whichever is earlier.

(3) For the purposes of subsection (2) of this section "appeal" includes any application for an injunction or an order certiorari, mandamus, prohibition or habeas corpus, or any appeal from any such application.

Thus, a person is not eligible to be nominated as a Minister if he or she is caught in the web of the disqualifying criteria comprehensively enumerated above and if erroneously nominated, the person is liable to not to be confirmed as a Minister by the Senate.

Federal Character must be reflected-there must be at least one Minister from each State of the Federation

Under *section 14(3)* of the CFRN, 1999 as amended, it is expressly provided the composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies. Consequently, to reinforce the requirement of inclusion and inclusivity in the composition of the government of the federation, *section 147(3)* of the CFRN 1999 as amended enacts that

Any appointment under subsection (2) of this section by the President shall be in conformity with the provisions of *section 14(3)* of this Constitution:- Provided that in giving effect to the provisions aforesaid the President shall appoint at least one Minister from each State, who shall be an indigene of such State.²⁸

²⁸ The proviso herein is mandatory as the word "shall" is used. In a recent decision in the case of *Aliyu v Namadi & Ors* (2023) LPELR-59742(SC), the Supreme Court, per Kekere-Ekun, JSC, reiterated that "It is a correct statement of the law that generally, when the word "shall" is used in a statute, it is interpreted to be mandatory. However, whether it is used in a mandatory or directory sense depends on the context in which it is used." See also *Katto v C. B. N.* (1991) 9 NWLR (Pt.214) 126; (1991) LPELR - 1678 (SC) @ 25-26 F - D, *BPS Construction*

It is clear from the foregoing that the President shall appoint at least one Minister from each State of the federation. This means that the President can also appoint more than one Minister from any given or all the States. As there are thirty six States of the Federation, it means that the minimum membership of the Ministers in the Executive Council of the Federation shall be thirty six. Clearly, the above mandatory provision of *section 147(3)* serves to guard against marginalisation of any component State out of the 36 States created in the federation under *section 3* of the Constitution of the Federal Republic of Nigeria, 1999 as amended. Out of abundant caution, it needs to be noted that the 36 States in Nigeria expressly created in *section 3(1)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended are Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara. Only qualified Ministers can be appointed from these States. No person shall be appointed as a Minister of the Government of the Federation unless he is qualified for election as a member of the House of Representatives.²⁹

Confirmation of Ministerial Nominees by the Senate

Ministerial nominees must be confirmed by the Senate. Thus, it is provided in *section 147(2)* of the CFRN 1999 as amended that any appointment to the office of Minister of the Government of the Federation shall, if the nomination of any person to such office is confirmed by the Senate, be made by the President. When interpreted, this provision gives the Senate the power to receive a list of Ministerial nominees from the President and thereafter confirm or reject such ministerial nominees as they may wish in their absolute discretion subject however to the cumulative provisions of *sections 147(5), 65 and 66* of the Constitution of the Federal Republic of Nigeria, 1999 as amended. Only Ministerial nominees duly confirmed by the Senate can be sworn into office by the President. This provision is mandatory for compliance as the word “shall” is used.³⁰ It is an obligatory discharge of duty and must be complied with and any contravention or non-compliance is fatal.³¹

Deemed Confirmation of Ministerial nominees by the Senate

Under *section 147(6)* of the CFRN 1999 as amended, an appointment to the office of Minister shall be deemed to have been made where no return has been received from the Senate within twenty-one working days of the receipt of nomination by the Senate. This simply means that the Senate, as the sole screening authority, has a constitutional duty to expeditiously screen Ministerial nominees and make a return (whether the Ministerial nominee is cleared or not) to the President within twenty one working days of the receipt of the nomination. Failure, refusal or neglect to do the needful within the constitutional timeline will amount to deemed confirmation.

Mandatory timeline for composition of the FEC

From 29 May 1999 when there was a return to democratic rule under the Constitution of the Federal Republic of Nigeria, 1999 and up to 17 March 2023, there was no constitutional time limit within which the President must compose the FEC or submit the Ministerial nominees to the Senate for confirmation. Consequently, this right to appoint Ministers at will and without any time limit was abused as some past Presidents delayed up to six months or more after being sworn into office

& Engineering Co. Ltd v FCDA (2017) 10 NWLR (Pt. 1572) 1; and *Umeakuna v Umeakuna* (2019) 14 NWLR (Pt. 1691) 61.

²⁹ *Section 147(5)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

³⁰ This was the decision of the Supreme Court in *Buhari v Yabo* (2018) 9 NWLR (Pt. 1624) 197 followed by the in *Nwokidu v George & Anor* (2022)LPELR- 58045(CA).

³¹ See *Ideal Insurance Ltd v Ajaokuta Steel Co Ltd* (2014) 7 NWLR (Pt. 1405) 165 and *Okpe v Fan Milk PLc* (2017) 2 NWLR (Pt. 1549) 282.

before appointing Ministers of the Government of the federation. At the State level, some State Governors delayed for nearly six months, one year or even more before appointing Commissioners of the Government of a State.³² To cure the mischief, one of the last minute novel constitutional amendments by the 9th NASS and signed into law by erstwhile President Buhari on March 17, 2023 was the alteration which mandates the President and Governors to submit the names of persons nominated as Ministers or Commissioners within 60 days of taking the oath of office for confirmation by the Senate or State House of Assembly.³³ This obligatory provision is designed to ensure that the President or Governors hits the ground running with requisite members of their cabinets so soon after being sworn in. Although it does not expressly provide any penalty for its breach, but breach of constitutional provision is never treated lightly and it is treated as gross misconduct. In *section 143(11)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended, "gross misconduct" is interpreted to mean "a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly to gross misconduct." It is submitted that the requirement of nominating Ministers or Commissioners within 60 days is simple and uncomplicated and ought to be obeyed fully and completely being a constitutional provision which the President and Governors swore to uphold.

Consequences for breach of constitutional provisions on the composition of FEC by the President

The law is ensconced like the Rock of Gibraltar that the Constitution is the supreme law of the land. *Section 1(1)* of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) expressly states that the Constitution is supreme its provisions shall have a binding force on all persons and authorities throughout Nigeria. In the very recent of *NPF & Ors v Police Service Commission & Anor*,³⁴ the Supreme Court held among other things that it is both a fundamental and elementary principle of our law that the Constitution is the basic law of the land. It is the supreme law and its provisions have blinding force on all authorities, institutions and persons throughout the country. All other laws derive their force and authority from the Constitution.³⁵ Relating this to the issues under consideration, it is submitted that breach of the provisions of the constitution in the composition of the FEC by the President is "gross misconduct" that can lead to his removal from office by the National Assembly. As noted earlier, under *section 143(11)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended "gross misconduct" is interpreted to mean "a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the National Assembly to gross misconduct."

Thus, breach of constitutional provision by the President on any issue is severe. It can lead to removal of the President from office by the National Assembly. In *A-G Federation & Ors v*

³² *Section 192(1)* of the CFRN, 1999 as amended provides that "There shall be such offices of Commissioners of the Government of a State as may be established by the Governor of the State."

³³ See Fifth Alteration (No.23). the Bill which was signed into law on 17 March 2023 sought to alter the Constitution of the Federal Republic of Nigeria, 1999 to require the President and Governors to submit the names of persons nominated as Ministers or Commissioners within sixty days of taking the oath of office for confirmation by the Senate or State House of Assembly; and for related matters.

³⁴ (2023) LPELR-60782(SC) (P. 154, paras. A-F), per Jauro, JSC . See also *Madumere & Anor v Okwara & Anor* (2013) LPELR - 20752 (SC), *Marwa & Ors v Nyako & Ors* (2012) LPELR - 7837 (SC), *First Bank v T.S.A. Industries Ltd* (2010) LPELR - 1283 (SC), *Olafisoye v FRN* (2004) LPELR - 2553 (SC), *INEC v Musa* (2003) LPELR - 24927 (SC). *Kalu v Odili & Ors* (1992) LPELR-1653.

³⁵ This principle was laid firmly in *A-G Bendel State v A-G Federation & Ors* (1981) LPELR 605; *Adediran & Anor v Interland Transport Ltd* (1991) LPELR 88; *Bakare v Lagos State Civil Service Commission & Anor* (1992) LPELR 711 and *Abacha & Ors v Fawehinmi* (2000) LPELR 14.

Abubakar & Ors,³⁶ the Supreme Court clarified that the power to remove the President and Vice-President is provided for in *section 143* of the Constitution. The provision clearly gives the role of removing the two public officers to the National Assembly. The Constitution has not conferred on the court the power to declare the office of the holder of the two offices vacant for whatever reason. Succinctly stated, it is very grievous and serious for the President who swore to uphold the constitution as a condition precedent to the assumption, holding and exercise of the powers vested by the Constitution in him as the holder of the office of President, to be accused of the deliberate violation, breach, contravention or non-compliance with any provisions of the Constitution which he swore to preserve, protect and defend in the discharge of the duties and performance of the function of the office. The time fixed by the Constitution for the doing of anything can be extended.

In *Ode v Uzor & Ors*,³⁷ the Supreme Court per Okoro JSC held as follows:

This Court has held in a plethora of decided cases that when it comes to the time fixed by the Constitution for doing anything, such time cannot be extended. It is immutable, fixed like the rock of Gibraltar. It cannot be extended, elongated, expanded or stretched beyond what it states. See *Marwa & Ors v Nyako & Ors* (2012) LPELR-7837 (SC), *Eze v Umahi & Ors* (2022) LPELR-59157 (SC), *Nyako v Adamawa State House of Assembly & Ors* (2016) LPELR-41822 (SC), *Useni v Atta & Ors* (2023) LPELR-59880(SC), *Besong v Ochinke & Ors* (2022) LPELR-59622(SC).

Way forward

As submission of list of ministerial nominees by the President to the Senate is predicated on a fixed constitutional timeline, in order to improve upon and fastrack this focal leadership recruitment process, the following are suggested namely-

- (a) At all material times, the President should be obliged or be compelled to obey the national constitution just like all public holders and indeed every person or authority in Nigeria. Therefore, constitution should be amended to mandate the Senate to consider failure, refusal or neglect of the President to submit a complete or comprehensive list of Ministers containing at least a nominee from each State of the federation within the stipulated timeline of sixty days from the date of inauguration as President an impeachable offence. Consequently, the National Assembly should be empowered expressly to take steps to commence procedure for removal of such erring President.
- (b) There should be a constitutional amendment to introduce a clear provision on the time limit the President shall take to fully reconstitute the FEC in the event of a cabinet dissolution. It is suggested that the constitution should be amended to require the President to reconstitute the FEC within sixty days of dissolution or to re-appoint a Minister from a State that is not represented in the FEC in the event of disengagement.
- (c) In carrying out the screening and confirmation of Ministerial nominees, the Senate should see the need to exercise that responsibility with utmost seriousness to ensure that Ministerial nominees are vigorously screened and meet the qualifying criteria and are not caught in the web of disqualifying conditions set down by the Constitution before confirmation. The procedure of “take a bow and go” often adopted by the Senate in the confirmation of Ministerial nominees should be discouraged as it does not afford the senate and indeed Nigerians the opportunity to see

³⁶ (2007) LPELR-3(SC) (Pp. 58 paras. A) per Akintan, JSC.

³⁷ (2023) LPELR-60346(SC).

ahead of time that each of the Ministerial nominee asked to take a bow and go has the requisite qualification, capacity and competence to deliver.

(d) Although under *section 147(6)* of the CFRN 1999 as amended, an appointment to the office of Minister shall be deemed to have been made where no return has been received from the Senate within twenty-one working days of the receipt of nomination by the Senate, it is suggested that the Senate should approach this responsibility with every sense of urgency and patriotism. Except where good cause is shown, in no circumstance should a Ministerial nominee assume office without rigorous screening and confirmation by the Senate. The idea of deemed confirmation is good but it is in the national interest that Ministerial nominees be duly screened and confirmed by the Senate.

Conclusion

It has been shown that the national Constitution has set down the parameters for composing the FEC with respect to membership, minimum number and time limit for its composition which should be rigidly observed or obeyed. As the Constitution is the organic law or grundnorm,³⁸ the President should feel obliged to strictly comply with the stipulated irreducible minimum conditions for composition of the FEC as already exhaustively discussed. The interregnum or period between declaration of a winner in a presidential election and the swearing in day is enough for the President to have put together his list of Ministerial nominees and submit same to the Senate for confirmation without any further waste of time. Thus, the additional 60 days allowed the President from the date of taking oath of office to submit the names of persons nominated as Ministers for confirmation by the Senate should be more than enough for the President to comply. Where the President fails, refuses or neglects to comply, this should amount to gross misconduct which the National Assembly should be empowered expressly to view strongly as a ground for removal of the President from office. The executive powers of the President to compose the FEC must not be exercised inconsistently with Constitution. Much as the President is at liberty to appoint Ministers into the FEC, he does not however have the liberty to disobey, disregard or neglect constitutional stipulations.

³⁸ See *Osho v. Phillips* (1972) 7 NSCC 172 at 178; (1972) 4 SC 259; *A-G., Abia State v A G Federation* (2002) 6 NWLR (Pt. 763) 264 at 269; *A-G Federation & Ors v Abubakar & Ors* (2007) LPELR-3(SC).

EXAMINATION OF THE LEGAL AND INSTITUTIONAL FRAMEWORK OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN NIGERIA

Prof. Chima Josephat Ubanyionwu*

Introduction

The object of this monograph is to critically examine the legal and institutional framework of ADR. We shall look at the concept of ADR and thereafter examine the legal framework of ADR. We shall conclude the article by examining the legal and institutional framework of ADR. This will go a long way in proper understanding of the role of ADR in settlement of disputes.

The concept of ADR

ADR is an acronym for Alternative Dispute Resolution. According to Wikipedia, "Alternative Dispute Resolution or External Dispute Resolution (EDR), typically denotes a wide range of dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation: a collective term for the ways that parties can settle disputes, with the help of a third party.¹ It refers to a variety of processes that help parties resolve disputes without trial.

ADR may be described as a spectrum of informal procedures for resolving disputes-ranging from negotiation, to non-binding third party intervention,² to binding third party intervention,³ outside the formal circuit of the courtroom.⁴ Although the use of ADR has faced some resistance in the past,⁵ today many lawyers in different jurisdiction across the world function as dispute resolve spending much of their professional lives helping their clients settle disputes through ADR methods. There are a number of studies⁶ that have indicated a strong settlement culture in the United States and the U.K and the reluctance of lawyers to have to go to trial.⁷ ADR processes can be tailored to diverse kinds of conflicts. Disputes, parties and transactions, some requiring expertise in the subject matter (such as scientific and policy disputes) and spawning new hybrid processes such as consensus building, which engage multiple parties in complex, multi-issue problem. More than anything else, ADR is becoming the first port of call for resolution of every type of dispute, from business disputes to labour management disputes, and to interpersonal disputes. ADR, more than anything else, seeks to address one fundamental question. What is the best way for people to deal with their conflicts, grievances and differences?

The scope of ADR

ADR is generally classified into at least four types: negotiation, mediation, collaborative law, and arbitration.

Negotiation

This is a consensual dispute resolution process whereby parties in a dispute come together to discuss directly or indirectly, the matter in dispute between them in order to agree on the form of any joint action which they might take in the resolution of the dispute: Essentially, negotiation allows

* **Prof Chima Josephat Ubanyionwu, Professor of Law, Department of International Law & Jurisprudence, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus, Chairman, Nigerian Bar Association, Aguata Branch (2018 – 2020), Phone: 08036660646, Email: barcjuba@yahoo.com.**

¹ Australian Securities and Investments Commission -Complaints resolution schemes.

² Such as mediation.

³ Such as arbitration.

⁴ Gem, H. Judging Civil Justice Cambridge University Press, 2009. p. 80.

⁵ Redfern M., The Element in the Room should pre-litigation Mediation be mandatory? leadr kon gres, Brisbane, Austrial, 2011.

⁶ See Sarat A. and Feistiner W., Divorce Lawyers and their clients, Oxford: Oxford University Press, 1995.

⁷ Barbieri; G.L., Alternative Dispute Resolution Centre Manual: Guide for practitioners on Establishing and Managing ADR Centres.

two or more parties to accomplish by agreement what no single party could, or would want to do alone.

Mediation

This is also a consensual dispute resolution process, though it involves a neutral third party called a mediator who helps the disputing parties to make decisions and reach agreements on matter of dispute between them. It is worthy of note that the mediator does not decide the case, but helps the parties communicate so they can try to settle the dispute themselves. Mediation may be particularly useful in the following areas: family members, neighbourhood, and community quarrels, business partners, divorce and custody cases, medical malpractice, auto-mobile accident cases, etc.

Collaborative Law

Collaborative law, also known as collaborative practice, divorce or, family law is a legal process enabling couples who have decided to separate or end their marriage to work with their collaborative professionals including collaboratively trained lawyers, coaches and financial professionals in order to avoid the uncertain outcome of court and to achieve a settlement that best meets the specific needs of both parties and their children without the underlying threat of litigation.⁸ It is a problem-solving process that gives divorcing parties and their lawyers a way to end a marriage and restructure families without the stress, delay and expense of litigation.

Arbitration

A dispute resolution process where a neutral person called an "arbitrator" hears arguments and evidence from each side and then decides the outcome. Arbitration is less formal than a trial and the rules of evidence are often relaxed. Arbitration could be binding or non-binding.

Legal framework of ADR

The legal framework of ADR is divided into three:

- i. Customary law Arbitration
- ii. Domestic statutory framework
- iii. International obligations under various international instruments.

Customary Law Arbitration

Customary law as stated in the case of *Oyewunmi v. Ogunesan*⁹ is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static, it controls the lives and transactions of the communities subject to it and it is the mirror of the culture of the people and imports justice to the lives of the people. "The basic aims of dispute resolution in customary law are reconciliation, peace and the assuagement of feelings that might otherwise dislocate social cohesion and solidarity. Customary law arbitration has judicial recognition.¹⁰

In *Okpuruwa v. Okpokan*¹¹ Oguntade JCA observed:

during the pre-colonial times when regular courts had not been there, Nigerians surely had a simple and cheap method of adjudicating over disputes occurring among them. The parties were usually referred to elders or a body set up for that purpose.

⁸ <https://en.m.wikipedia.org>.

⁹ (1990) 3 NWLR (Pt. 137) 182.

¹⁰ See *Onwusike v. Onwusike* (1962) ENLR 10.

¹¹ (1998) 4 NWLR (Pt. 90) 554 at 586.

Domestic Legal Framework

The advent of judicial development in dispute settlement has necessitated putting in place proper legal framework for arbitration and ADR in Nigeria, hence the Arbitration Ordinance of December 31, 1914. Today, there are Federal and States laws and rules regulating the practice of ADR, in Nigeria.

The Principal Federal Legislation is the Arbitration and Conciliation Act, 2004. This Act provides "a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of International commercial arbitration.

Moreover, the Civil Procedure Rules of the various States equally provide a veritable legal framework of ADR in that they encourage and facilitate settlement of ADR. For instance, Order 4 of the High Court of Anambra State (Civil Procedure) Rules, 2019, provides for "interface with ADR."

Order 4, Rule 8 (c)¹² Provides:

Case Evaluation shall be conducted on every substantive suit begun by Writ of Summons by the DCR (Evaluation) in the presence and with active participation of the parties and their legal practitioners to determine if the matters are to be dealt with in the High Court by litigation or is suitable to be transferred to AnMDC.

Order 4, rule 8(f)¹³ provides

that at the end of the interface with ADR, the DCR (Evaluation) shall make a report. The report should state whether any of ADR options are preferred.¹⁴

Still with reference to the domestic legal framework, there is the Nigerian investment Promotion Commission (NIPC) Act.¹⁵ This Act¹⁶ deals with investment promotion in Nigeria with specific provision for the resolution of disputes arising between an investor and any government of the Federation or any agencies of government, through arbitration.

There is yet the Multi-Door Court House (MDCH) which is a court initiated court-centered dispute resolution mechanism. As a State managed ADR process, it is usually set up to provide facilities for the resolution of (Civil) disputes within the court premises; thereby providing a range of alternative means for the disposition of those disputes, short of court trial.

International Legal Framework

This refers to legal framework of non-domestic origin or nature. For example, the United Nations Commission on International Trade Law (UNCITRAL), the New York Convention, and International Centre for Settlement of Investment Dispute (ICSID), etc. UNCITRAL was established by the United Nations General Assembly to enable United Nation to play a more active role in reducing or removing legal obstacles to the flow of International trade. The preamble to the resolution noted divergences from the laws of different States in matters relating to International trade and this constituted obstacles to the development of world trade.

¹² High Court of Anambra State (Civil Procedure) Rules, 2019.

¹³ *Ibid.*

¹⁴ See also the preamble to the High Court of Lagos State (Civil Procedure) Rules 2012 which encourages an "amicable resolution of disputes by use of Alternative Dispute Resolution (ADR) mechanism."

¹⁵ Law of the Federation of Nigeria, 2004.

¹⁶ *Ibid.*

The aim of the New York Convention is to ensure the enforcement of arbitration awards worldwide.

ADR contract clause

ADR contract clause is a clause in an agreement by which the contracting parties agree to attempt to resolve any disputes between them by the use of one or more ADR processes.¹⁷ The clause may specify, a particular

ADR Procedure, such as mediation or leave the parties to agree on one as and when a particular dispute arises.

The inclusion of ADR clause in a contract obliges the parties to resolve their dispute through ADR. In other words; ADR clause is legally enforceable. *In Cable and Wireless Plc v. IBM United Kingdom Ltd*,¹⁸ Colman J. upheld an ADR clause in a commercial contract. One of the parties sought to bypass the ADR clause by starting litigation in England; on the party's application, the court granted a stay of proceedings, thereby effectively forcing the claimant to pursue the claim through the agreed dispute resolution process.

To summarize, this segment of this monograph, it is clear that the following provide the legal framework of ADR (i) customary law (in Africa), (ii) Statutes, (iii) Common Law; (iv) International Conventions (v) International Treaties (vi) Express agreement of the parties.

Institutional Framework of ADR

Institutional Framework of ADR refers to the institutions, organizations, or bodies that drive the ADR processes. These bodies, organizations or institutions help to provide the necessary platform, and support for ADR. They encourage and facilitate the operation and utilization of ADR mechanisms. Some of these Arbitral institutions include:

(1) *The International Centre for Settlement of Investment Dispute (ICSID)*

The ICSID is an International arbitration institution established in 1966 for legal dispute resolution and conciliation between investors and States. It has its headquarters in Washington, D.C, United States. It is a member of the World Bank group. Its availability to investors and States helps to promote International investment by providing confidence in the dispute resolution process.

(2) *The International Court of Arbitration of the International Chamber of Commerce (ICC)*

The ICC International Court of Arbitration is an institution for the resolution of International Commercial disputes. It operates under the auspices of the International Chamber of Commerce. It was founded in 1923. It consists of more than 100 arbitrators from roughly 90 countries.

(3) *The London Court of International Arbitration (LCIA)*

The LCIA was founded in 1892 and is based in London, United Kingdom and provides the service of International arbitrators. It is universally recognized as one of the World's leading arbitral institutions.

(4) *The International Centre for Dispute Resolution (ICDR)*

The ICDR was established in 1996 as the International division of the American Arbitration Association (AAA). The ICDR is one of the most recognized and prominent providers of international dispute resolution services in the world.

¹⁷ Abdulsalam O. Ajetunmobi, *Alternative Dispute Resoultion and Arbitration in Nigeria, Law, Theory and Practice*, Princeton & Associates Publishing Co. Ltd, 2017, p.52.

¹⁸ (2002) 2 ALLER (Comm) 1041.

(5) *The United Nations Commission on International Trade Law (UNCITRAL)*

The UNCITRAL, established by the United Nations General Assembly plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.

(6) *Permanent Court of Arbitration (PCA)*

The PCA, established by treaty in 1899, is an inter governmental organization, providing a variety of dispute resolution services to the international community. It is located in Hague, Netherlands. Other International Arbitration institutions include the Stockholm Chamber of Commerce (SCC); the Swiss Chambers Court of Arbitration and Mediation (SCCAM); the German Institute for Arbitrations (DIS); the World Intellectual Property Organization) Arbitration and Mediation Centre (WIPO) in Geneva; the American Arbitration Association (AAA) etc. At the continental level, there is the Cairo Regional Centre for International Commercial Arbitration established by the government of the Arab Republic of Egypt in conjunction with the Asian-African Legal Consultative Committee (AALCC) in 1979. The Cairo Centre offers specialized services to settle trade and investment disputes, through arbitration. It offers advice to parties to international commercial and investment contracts, with regards to drafting these contracts, promote arbitration and other ADR techniques in the Afro-Asian region.

At the national level, there is the Lagos Regional Centre for International Commercial Arbitration established by the Nigerian Government in collaboration with the Asian-African legal Consultative Committee.

Conclusion

From the foregoing, both the legal and institutional framework of ADR have become highly developed and diversified. The result will be that investors fear are being allayed as any trade or commercial dispute that may arise will be fairly and expeditiously settled.

FINDING AN EQUILIBRIUM BETWEEN TECHNICALITIES /TECHNICAL JUSTICE AND SUBSTANTIAL JUSTICE

Okoro, Jude Tobechukwu*

Abstract

The Courts and tribunals are temples of justice and established to dispense or do justice according to the law. There are situations where extant laws establishing these courts or rules of Court prescribe a particular mode or manner for institution of an action and a departure from it would inevitably lead to a striking out or dismissal premised on lack of procedural compliance or otherwise on technical grounds. Sadly, such situations have arisen where an inadvertent departure from a prescribed mode for instituting an action have led to the termination or death by way of striking out or outright dismissal of many otherwise actions with a good cause of action and a consequential miscarriage of substantial justice. It is most glaring when the cause of action is within the jurisdiction of the court yet suffers a dismissal anchored on technicalities. This to say the least defeats the essence of fairness, equity, good conscience and natural justice and takes the judicial system back to the rigid and inflexible Common Law judicial system or era where letters of the law are slavishly followed and enforced. This work therefore recommended among others amending or expunging strict liability provisions of laws or rules of court which prescribe the mode or manner of instituting an action. This will ensure that suits inadvertently instituted in breach or violation of any prescribed mode or manner of instituting an action can be regularized and determined on the merit in the interest of justice and by extension equity.

Keywords: Court, Equity, Law, Practice and Procedure, Justice.

Introduction

The courts as established by the Constitution of the Federal Republic of Nigeria, 1999¹ are designated to dispense justice according to the law. Courts are referred to as courts of law and justice. Law and justice are two sides of the same coin and cannot be isolated from each other. The law is the wheels on which justice runs. In our legal jurisprudence and by extension practice and procedure, there is what is known and referred to as technical justice on one part and substantial justice on the other part. These are interwoven and intertwined composite parts of justice and therefore not mutually exclusive. The two are best illustrated with Olympic circles.

As stated earlier, the law is the wheel on which justice runs and the corollary is that justice must be done according to the spirit and letters of the law for if justice is not dispensed as prescribed by the law, then it is not justice. It therefore means that where the law has prescribed a way for dispensing justice, it must be followed as prescribed and any departure from same would amount to breach or violation of the law and consequently a miscarriage of justice.² It goes without saying that justice is the end product of application of the law. However, justice cannot be a slave to or hostage of the law for the law is the vehicle that drives justice to its destination or otherwise the instrument through which justice is delivered or dispensed. Therefore, in any situation where

* Okoro, Jude Tobechukwu, LL.B; BL; LL.M and Ph. D (ABD), is a Lecturer in the Department of Public Law, Faculty of Law, Federal University, Oye-Ekiti, Ekiti State; GSM Number: +234 8064758398; E-mail Address: jude.okoro@fuoye.edu.ng

¹ SS 230, 237, 249, 255, 260, 265, 270, 275, and 280.

² *Larmie v. D.P.M and Services Ltd.* [2006] All FWLR (Pt. 296) 775 at 778 where the Supreme Court defined and described miscarriage of justice as "... the decision or outcome of legal proceedings that is prejudicial or inconsistent with substantial rights of a party. ... Miscarriage of justice means a reasonable probability of more favourable outcome for the defendant. A miscarriage of justice therefore means such a departure from the rules which permeate a judicial procedure as to make that which happened not in the proper sense of the word a judicial procedure at all".

justice cannot be dispensed using the law as an instrument, then a situation of absurdity arises and one can arguably assert that the law has failed in its sacred duty to do or dispense justice.

Definition, meaning and nature of justice in law

It is logical to first but in brief espouse what “law” in the context of justice is because the concept of justice according to the law is incomplete without the law. In fact, there cannot be a comprehension of justice without the law for it is the law that prescribes what justice is in any given context. Law is defined as “a body of rules of action or conduct prescribed by controlling authority and have binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequence is a law”³. On the other hand, “Justice” is fairness, moral rightness, a scheme or system of law in which every person receives his/her or its due from the system, including all rights, both natural and legal.⁴ The Black’s Law Dictionary defines justice as protecting rights and punishing wrongs using fairness; the fair and proper and proper administration of law.⁵ Justice, in its broadest sense is the concept that individuals are to be treated in a manner that is equitable and fair.⁶ This broad definition was captured by Plato⁷ when he opined thus: “justice is keeping what is properly one’s own and doing one’s own job”.

From a microscopic view of the above definitions, it is clear that justice is not an absolute legalistic term or something that is stuck in rigidly and slavishly following the dry letters of the law void of equity and fairness. The corollary is that the idea and meaning of justice does not include laws which though legal may be unjust and consequently impose injustice, inequality or a deprivation in its application. A system where the application of laws does not fairly, equitably and accordingly give each one his/her due cannot be described as justice.

The nature of justice is that it is a rule against bias and the right to a fair hearing.⁸ By necessary implication, justice in this sense is well beyond the dry letters of the law but extends to natural justice which embodies viz- fairness, equity and good conscience. Natural justice is also known as substantial justice or fundamental justice or universal justice or fair play in action.⁹ Lord Esher M. R. in *Vionet v. Barrett* defined natural justice as the natural sense of what is right and wrong.¹⁰ It is a systematic process of rendering justice by the judicial, quasi-judicial and other administrative authorities.¹¹ The rules of natural justice embodies three cardinal principles viz: rule against bias, rule of fair hearing and rule of reasonableness and the sole purpose of this is to prevent the miscarriage of justice.¹² A judicial or an abjuratory system void of the principles of natural or

³ Henry Black, *Black’s Law Dictionary*, (6th edition, Springer, 1991) 1002

⁴ GERALD HILL, *The Peoples Law Dictionary*, available at ><https://dictionary.law.com/Default.aspx?selected=1086>< accessed 10th August, 2023.

⁵ Bryan Garner, *Black’s Law Dictionary* (9th edition, West, 2009) 942

⁶ MORRIS GINSBERG, ‘The Concept of Justice’ (1963) 144 *Journal of the Royal Institute of Philosophy*, 99.

⁷ A Greek philosopher who lived between 428/427 – 348/347 BCE and authored “The Republic” and translated by Desmond Lee, (England: Penguin Books Ltd.), 1974, cited by P C Obioha, *The Nature of Justice*, published in *Journal of Social Sciences*, 29 (2): Pp183-192, 2011, at page 3

⁸ *Newswatch Communications Ltd. v. Atta* [2006] All FWLR (Pt. 318) 580 at p. 583 where the Supreme Court on *contents of principles of fair hearing* stated: Fair hearing according to the law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end. It also envisages that the court or tribunal hearing the parties case should be fair and impartial without it showing any degree of bias against any of the parties.

⁹ M. A. Aslam, ‘Principles of Natural Justice in the Light of Administrative Law’ (2020) available at ><https://www.legalserviceindia.com/legal/article-1659-principles-of-natural-justice-in-the-light-of-administrative-law.html>< accessed 10th August, 2023.

¹⁰ [1885] 55 LJ RB 39

¹¹ Pritam Banik, *Principles of Natural Justice with Case Laws*, available at ><https://strictlylegal.in/principles-of-natural-justice-with-case-laws-and-explanation/>< accessed 10th August, 2023.

¹² *Ibid*

substantial justice will render the administration of justice impossible and unpleasant as we have seen and witnessed in recent cases¹³ decided by the Supreme Court of Nigeria. In *Cooper v. Wandsworth*,¹⁴ it was stated thus:

Even God did not pass a sentence upon Adam before he was called upon to make his defence. “Adam” says God, “where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat”.¹⁵

In view of the above, it can be deduced that administration of justice must be rooted in fairness and by extension determination of the substantive law. The Latin maxim “*fiat justitia ruat caelum*”¹⁶ captures succinctly and aptly the whole essence of justice.

Technicalities/Technical Justice

Legal technicality ordinarily means a strict adherence to the words of a statute to determine the spirit of justice. In *Benedict Orji v. Ozo Nne Illoputaife*¹⁷ the Court of Appeal, defined technicality to mean “immaterial, not affecting the substantial rights, without substance.” Justice Niki Tobi (Rtd.) offered an answer to what legal technicalities are in *Yusuf v. Adegoke*¹⁸ when he said thus:

What is technicality? In *Adedeji v. The State*¹⁹, I said at page 265: “I realize that courts of law seem to be using the word technicality out of tune or out of turn, *vis-a-vis* the larger concept of justice. In most cases, it has become a vogue that once a court is inclined to doing substantial justice by deflecting from the rules, it quickly draws a distinction between justice and technicality so much so that it has become not only a *cliche* but an enigma in our jurisprudence. In most cases when the courts invoke the substantial justice principle, they have at the back of their minds the desire to put to naught technicalities which the adverse party relies upon to drum down an otherwise meritorious case. We seem to be over-stretching the technicality concept. We should try to narrow down the already onerous and amorphous concept in our judicial process. A technicality in a matter could arise if a party is relying on abstract or inordinate legalism to becloud or drown the merits of a case. A technicality arises if a party quickly takes an immediately available opportunity, however infinitesimal it may be, to work against the merits of the opponent’s case. In other words, he holds and relies tenaciously unto the rules of court with little or no regard to the justice of the matter. As far as he is concerned, the rules must be followed to the last sentences, the last words and the last letters without much ado, and with little or no regard to the injustice that will be caused the opponent.”²⁰

Technical justice or technicalities in the dispensation of justice is akin to a judicial system rooted in Common Law. This makes justice a slave to the dry letters of the law and consequently reduces it to legalism. Idowu²¹ stated that the practice of technicalities or technical justice is rooted in the Common Law of England which is one of the cardinal sources of the Nigerian legal jurisprudence. The Common Law is well known for its rigidity and inflexibility and hence after its incorporation

¹³ See *APC v. Machina*, Suit No.: SC/CV/1689/2022; [2023] LPELR- 59953 (SC)

¹⁴ [1863] 143 ER 414

¹⁵ King James version, *Bible*, Genesis 3:11.

¹⁶ *Let justice be done though the heaven falls.*

¹⁷ [2011] LPELR-9199 (CA) 24, Para A-E.

¹⁸ [2007] LPELR – 3534 (SC).

¹⁹ [1992] 4 NWLR (Pt. 234) 248.

²⁰ *Adeleke v. Oyetola: Technicality and the Judicial Process*, reported in the Cable, July 29, 2019 <accessed on 28th August, 2023>

²¹ O I Idowu, *The Supreme Court of Nigeria and the Stains of Justice by Technicalities: Why APC v. Machina is Wrong*, (2023) 3 (1) Redeemer’s University of Nigeria Journal of Jurisprudence and International Law, 5.

into our legal system, the inherent rigid rules and technicalities became part and parcel of our judicial and legal system till present.²² The effect or consequence of technicalities is that a cause of action though within the jurisdiction of the court could still be defeated for want of form or failure to file the appropriate Writ.²³ In other words, any error in mere form is sufficient to terminate a cause of action without even a hearing and determination of the facts of the case or the substantive suit. The Supreme Court in *Akeredolu v. Abraham*²⁴ held thus:

Technicality in the administration of justice shuts out Justice. A man denied justice on any ground, much less a technical ground, grudges the administration of justice, it is therefore better to have a case heard and determined on merit than to leave the Court with a shield of 'victory' obtained on mere technicalities.

The recent case of *APC v. Machina*²⁵ is a *locus classicus* on this point.

The facts of the case in brief were that pursuant to the Independent National Electoral Commission (INEC) guidelines, the All Progressives Congress on 28th May, 2022, conducted a valid primary election in respect of the Yobe North Senatorial District wherein Bashir Sherrif Machina emerged as the undisputed winner under the statutory supervision of INEC. Ahmed Lawan²⁶ was absent and did not participate because he voluntarily withdrew his candidature to pursue nomination as a presidential candidate. Subsequently, the APC conducted another primary election on 9th June, 2022 where Lawan emerged as the candidate and in which Machina did not participate. This second primary election was in breach of Section 84 (5) of the Electoral Act as APC never cancelled the primary election that produced Machina. Also, INEC did not monitor/supervise the second primary election that produced Ahmad Lawan and was not put on notice either by the APC. However, the APC strangely forwarded Lawan's name to INEC as its duly elected candidate for the Yobe North senatorial district election. Aggrieved by the wrongful exclusion of his name, Machina approached the Federal High Court (FHC) in Damaturu, challenging the action of the APC and among other things sought an order declaring him as the APC's authentic and valid candidate for the Yobe North Senatorial district. The suit was commenced by Originating Summons²⁷ in line with the Practice Direction of the Federal High Court which specifically prescribes Originating Summons as the form of commencing pre-election matters. In the supporting affidavit accompanying the Originating Summons, allegations of criminality (fraud and forgery) were raised against the APC. The totality of the arguments canvassed by the parties was: Whether, in consideration of the provision of Section 115 (1) (d)²⁸ of the Electoral Act, 2022,

²² An example of a legal principle which reflects the rigidity of Common Law is the *locus standi* principle which still heavily applies in our judicial system.

²³ *APC v. Machina* Suit No. SC/CV/1689/2022, [2023] LPELR- 59953 (SC); In *Pinnel v. Cole* [1602] 5 Co. Rep 117a, Lord Coke recognized that the Plaintiff ought to fail in his action based on the merit of the case, yet succeeded as a result of the technical flaw in the Defendant's pleadings. At the time, Common Law was expressed in Latin as *forma non observata infertur adnullatio actus* meaning, when forms are not observed a nullity of the act is inferred.

²⁴ [2018] LPELR- 44067 (SC)

²⁵ Suit No. SC/CV/1689/2022, [2023] LPELR- 59953 (SC)

²⁶ The immediate past President of the Senate and Senator representing Yobe North Senatorial District in the National Assembly (Senate- the Upper House and otherwise known as the Red Chambers)

²⁷ This is one of the forms of commencement of a suit in a Court of Record or superior court and this form or mode is employed where a litigant or party seeks the interpretation of the law and actions and sets questions for the court to determine. It is used where the facts are not contentious and is supported by an affidavit which sets out the facts.

²⁸ The section provides thus: "A person who signs a nomination paper or result form as a candidate in more than one constituency at the same election, commits an offence and is liable on conviction to a maximum term of imprisonment for two years." This was clearly a question of interpretation for which Originating Summons was the right and proper way to raise and determine the issue.

Senator Lawan could have lawfully participated in the 2022 Presidential and Senatorial Primary Elections of the APC?

The Plaintiff successfully challenged his party, the APC, at the Federal High Court and same was upheld on appeal by the Court of Appeal.²⁹ The Defendant not satisfied with the decision of the Court Appeal appealed at the Supreme Court. Before the Supreme Court, the question as raised by the APC was whether Machina's case was properly commenced at the trial court considering that allegations of fraud and forgery were raised in the grounds of the Originating Summons and allegations of facts of fraud and forgery were adduced or averred in the affidavit in support.

In a strange twist, the Supreme Court allowed the appeal solely and on the ground that the action was wrongly instituted by way of an Originating Summons rather than by Writ of Summons since in the wisdom of the apex matter, the case was contentious in nature by virtue of the fact that there were allegations of fraud made by the Plaintiff. Consequently, the Supreme Court in a split decision of 3 against 2 dissenting judgments ruled³⁰ that the Defendant (Lawan) was the All Progressives Congress (APC) senatorial candidate for Yobe North Senatorial District instead of the Plaintiff (Machina). The two dissenting Justices held that the second primary election which produced Lawan was held in breach of the Constitution of the Federal Republic of Nigeria³¹ and the Electoral Act, 2022³² and consequently upheld the findings of the Federal high Court and the Court of Appeal as the APC never cancelled the earlier election held on 28th May, 2022 in respect of which Lawan had voluntarily withdrawn and did not participate in.

It should be noted that in the instant case, Machina followed the laid down procedure in the institution of the action. The Practice Direction of the Federal High Court specifically prescribes Originating Summons as the form of commencing pre-election matters.³³ However, because Machina had included "fraud" in his allegation as earlier stated, the apex court reasoned that he ought to have sought judicial intervention through a Writ of Summons because of the criminal nature of the allegation. While this position resonates with the law, because the Supreme Court has held in a plethora of authorities that the rules of court supersedes a practice direction; and by the rules of court, an allegation of fraud should be brought by way of Writ of Summons. However, it is also trite that the failure of a party to initiate proceedings by the appropriate mode is not fatal to his case. It is a mere procedural irregularity that can be cured by simply converting the suit to the proper mode. It is trite that equity follows the law. Equity won't look at the form but the substance of the matter. Where the Court puts form over substance then it adheres to a barren technicality. The age-long principle of law is that where an action is commenced by the wrong form, the proper thing for a court to do in such circumstances is to order the Plaintiff to bring the matter by the appropriate mode and not to dismiss the matter as the apex court did. This is the position the apex court adopted in *Udo v Registered Trustees of B.C.S.*³⁴ on *whether commencing action by wrong procedure constitutes jurisdictional issue* held thus:

Commencing an action by wrong procedure does not constitute a jurisdictional issue since the lapse, except where specifically stated in the rules of court, does not defeat the Claimant's cause of action. If the subject matter of the Plaintiff's action is within the jurisdiction of the court, the cause of action would not be abrogated simply because it has been commenced by the wrong procedure. The lapse in that

²⁹ The Federal High Court and the Court of Appeal delivered their judgment on 28th September, 2022 and 28th November, 2022, respectively.

³⁰ The judgment was delivered on 6th February, 2023.

³¹ S 285.

³² S 84 (5).

³³ S 4 (1) Federal High Court Practice Direction.

³⁴ [2015] EJSC Volume 7 155 at page 158.

regard is only an irregularity that gives the Defendant the right to insist that the Plaintiff adopts the proper procedure in approaching the court.³⁵

In my opinion, and with due respect to the apex court, I do not subscribe to the view that the suit ought to have been instituted by way of Writ of Summons because the matter before the trial court was an issue relating to the interpretation of the Electoral Act and whether APC's action in submitting the name of another candidate (Lawan)- after it had conducted a primary election earlier where Machina emerged as a candidate is valid in the eyes of the law. It was an issue that could be resolved by affidavit evidence. This is supported by the Federal High Court pre-election practice direction, 2022 by virtue of section 4 (1) which states that pre-election matters should be instituted by originating summons. Relying on the fact that rules of court supersede practice direction to dismiss a cause of action is technical and barren justice to say the least.

It is trite that the essence of law is to serve as a vehicle for delivery of justice in our courts of law. Iguh, JSC, in *Famfa Oil Ltd v. A.G. Federation*³⁶ lucidly stresses this point thus:

Accordingly, Courts of law should not be unduly tied down by technicalities, particularly where no miscarriage of justice would be occasioned. Justice can only be done in substance and not by impeding it with mere technical procedure irregularities that occasion no miscarriage of justice".³⁷

Substantial Justice

According to the Black's Law Dictionary,³⁸ substantial justice is defined as "justice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." Substantial justice is justice on objective consideration of the merits or otherwise of a case. The Supreme Court in *Udo v Registered Trustees of B.C.S.*³⁹ on duty on court to do substantial justice held thus:

The overriding duty of courts, including this court, however, is to do substantial justice between parties, a principle which entitles the appellate court to find exceptions to their primary duty of determining appeals solely on the basis of the issues raised and determined at the court below...

The spirit of substantial justice is rooted in the Latin maxim *fiat justitia ruat caelum*, which means "let justice be done though the heaven falls." "When the law becomes a science and system, it ceases to be justice."⁴⁰ This form of ideology has offended the law enthusiasts, who are of the opinion that the rules are integral parts of the law and any attempt to downplay the rules will make the law lifeless and susceptible to the whims and caprices of any judge.

The astute English legal luminary, Lord Denning, in addressing the endless and ever recurring conflict between justice and technicalities had this to say thus:

My root belief is that the proper role of the judge is to do justice, if there is any rule of law which impairs the doing of justice, then it is the province of the judge to do

³⁵ See, *Okotie-Eboh v Okotie-Eboh* [1986] 1 NWLR (Pt. 16) 264; *Ijebu-Ode Local Government v Adedeji Balogun & Co. Ltd.* [1991] 1 NWLR (Pt. 166) 136.

³⁶ [2003] LCN/ 3068 (SC); Suit No.: SC/305/2002, [2003] 18 NWLR (Pt. 852) 453.

³⁷ See also, *Consortium MC v. N.E.P.A* [1992] 6 NWLR (Pt. 246) 132 at 142; *Bello v. A.G. of Oyo State* [1989] 6 NWLR (Pt. 45) 828; *Okonjo v. Dr Odje* [1985] 10 SC 267; *Falobi v. Falobi* [1976] NMLR, 169.

³⁸ 9th edition, p. 943.

³⁹ [2015] EJSC Volume 7, 155 at page 156.

⁴⁰ Walter Savage, English poet and philosopher.

all he legitimately can to avoid the rule, even to change it, so as to do justice in the instant case before him.⁴¹

The Supreme Court in some of its judicial pronouncements had towed a similar path. In *Dapianlong v Dariye*⁴² the erstwhile Chief Justice, Walter Onnoghen J.S.C., wittingly stated:

“The reign of technical justice is over, on the throne now sits substantial justice, long may you reign, substantial justice.”

In *Salawu Ajide v Kadiri Kelani*⁴³, Oputa J.S.C. (Rtd.), on the need for truth to prevail in order to ensure justice is done poignantly cautioned that:

Justice is much more than a game of hide and seek. It is an attempt to discover the truth, on human imperfections, notwithstanding. Justice will never decree anything in favour of so slippery a customer as the present Defendant/Appellant on this note, our courts have admitted that justice and truth are on the same ticket and that in doing justice the courts and all ministers in her temple, that is lawyers and all other stakeholders, must strive at discovering the truth regardless of legal technicalities.

In *Aigbobahi v Aifuwa*⁴⁴, the Supreme Court on *Duty on Supreme Court as apex court to do substantial justice rather than technical justice* held thus:

The Supreme Court is the court of last resort in some appeals in Nigeria. The attitude of the Supreme Court has changed from doing technical justice to doing substantial justice. This attitude envisages the possibility of hearing everyone on any complaint so as to enthrone and sustain the rule of law

The Court of Appeal in *Aturu v Akinleye*⁴⁵ held that cases must be fought not by mere technicalities but by determination of the substantial issues before the court. It is the duty of courts to aim at and do substantial justice.

It is trite that the law does not command the impossible but however and sometimes, we have seen judicial decisions apparently commanding the impossible and then using the hammer of technicalities to strike out or dismiss the merits of a case. In *Labour Party v APC*⁴⁶, the Court of Appeal held that a subpoenaed witness must frontload his witness deposition at the time of the filing of a petition.⁴⁷

Okoro JCA., in *BALOGUN V. E. O. C. B (Nig.) Ltd.* said:

Good law, in my opinion must have a human face; good law should not patronize technicalities that will give rise or room to undeserved victories in litigation. Good

⁴¹ Joshua Ogwu, ‘An Inspection of the Legal Tussle between Technicalities and Substantial Justice: A Need for balance’ (2020) available at ><https://unilaglawreview.org/2020/05/15/an-inspection-of-the-legal-tussle-between-technicalities-and-substantial-justice-a-need-for-balance/>< accessed 28th August, 2023.

⁴² [2008] 8 NWLR (Part 1036) 332.

⁴³ [1985] 1 NWLR 248 at 269.

⁴⁴ [2006] All FWLR Pt. 303 202 at page 208.

⁴⁵ [2006] All FWLR Pt. 337 526 at page 528.

⁴⁶ Petition No.: CA/PEPC/03/2023 [Unreported].

⁴⁷ Under the Electoral Act, 2022, a Petitioner has 21 days to file his petition against any election result and usually at the time of filing a petition, the Election Tribunals are yet to be constituted and inaugurated. In addition, a petitioner may not know if there may be need to file an application for a subpoena and have a witness subpoenaed with his witness deposition frontloaded with the petition. The practice is to apply to the court after commencement of trial to apply for a witness to be subpoenaed as the need arises and if necessary and this usually arises only after issues have been joined and the Respondent denying any allegations of facts in the Petitioner’s or Plaintiff’s claim which can only be rebutted by calling a subpoenaed witness to testify.

law should discourage technicalities ... good law will not encourage a situation where a party in litigation will only return home with pyrrhic victory which in reality is no victory at all.⁴⁸ The court is more interested in substance than in mere form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice.⁴⁹

In affirming the above in other words, the Supreme Court in *Boniface Ebere Okezie V. Central Bank of Nigeria* held thus:

Justice does not reside in the form of the processes of the court. Where there are sufficient provisions in the Rules of the court to sustain an action, the rules of natural justice demand that parties should be heard with a view to resolving their dispute once and for all. It is in the interest of justice that parties are not shut out prematurely from being heard in accordance with the laid down procedures in the court's Rules.⁵⁰

In *Akeredolu v Abraham*⁵¹ the Supreme Court in that case had said that:

Technicality in the administration of justice shuts out Justice. A man denied justice on any ground, much less a technical ground, grudges the administration of justice, it is therefore better to have a case heard and determined on merit than to leave the Court with a shield of 'victory' obtained on mere technicalities.

The importance of substantial justice and fairness are vital such that where the letters of law⁵² will occasion injustice to any other party in a judicial litigation or adjudication, the spirit of the law should be applied notwithstanding the direct, explicit and implicit letter of the law, otherwise, the party who succeeds by invoking the letters of the law will 'leave the Court with a shield of victory obtained on mere technicalities'.⁵³

It is pertinent to state that the Constitution of the Federal Republic of Nigeria, 1999 contemplates and envisages that matters brought to the court for adjudication be heard on the merit and not to be struck out or dismissed on grounds of technicalities without being heard. The Constitution proceeds to state the function of the judiciary as to "extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any questions as to the civil rights and obligations of that person."⁵⁴

Technicalities/Technical Justice and Substantial Justice: Striking a balance or finding an equilibrium

The conflict between technicalities or technical justice and substantial justice in our judicial system is a recurring decimal and perhaps a shifting parabola that plagues the dispensation of justice. Sometimes, Attorneys and Judges are often caught up more in procedure than in achieving justice by placing emphasis and reliance on technical justice or technicalities which are largely anchored on strict adherence to the letters of the Rules of court above substantial justice. This negates the spirit of natural justice, fairness and equity particularly when there is a meritorious cause of action.

⁴⁸ [2007] 5 NWLR (Pt. 1028) 584.

⁴⁹ *Ibid.*

⁵⁰ [2020] 15 NWLR (Pt. 1747) 181.

⁵¹ [2018] LPELR- 44067 (SC).

⁵² Especially Rules of Courts.

⁵³ *Akeredolu v Abraham* [2018] LPELR- 44067 (SC).

⁵⁴ S. 6 (6) (b).

However, the point must be made that where there is a need to approach the Court to enforce a right, duty, responsibility, obligation or redress, guaranteed by the law, it is proper to look at the legal procedures and processes to see whether the provisions of the law that established the Court, the rules, regulations and practice directions of the Court has been followed. This is because it is through the proper initiation of the provisions of adjectival laws that the provisions of substantive laws are enforced. This ensures that the substantive law is interpreted and enforced with predictability, certainty and stability.

Legal justice implies the application of the law as it is. This ordinarily implies that all the laws of the land, including procedural laws and rules of courts must be adhered to by all the litigants seeking justice before the court. However, in approaching the Court, there is probability of making mistakes inadvertently which in turn may lead to defect, failure, or mistake in a legal proceeding or lawsuit. These possible mistakes are normally described as irregularities which are departures from a prescribed rule/regulation prescribed by the adjectival law that should not be punishable either with a striking out or dismissal.⁵⁵

Therefore, a distinction must be made between mere irregularities which are not and should not be fatal to a cause of action and substantial procedural irregularities which are fatal and irredeemable. The provisions of the Rules of Court are intended for the orderly conduct of cases before the Court and are therefore required to be complied with by litigants.⁵⁶ There are broadly speaking two types of irregularities in Law: substantial irregularities and non-substantial irregularities. The treatment the Court will accord a given irregularity depends on its nature and effect in law. When a non-substantial irregularity is discovered and proved to exist during a judicial procedure, if curable, the Court will grant leave to the party in error to correct the irregularity subject to the conditions specified by the trial Court so that the cause of action is not nullified.

In other words where non-compliance with the provisions of the rules is not intrinsically fatal to the proceedings the Court has the discretion under the rules to waive such non-compliance as a mere irregularity. Generally, a Court has the inherent powers and discretion to bend forward or backward and direct a departure from the provisions of its rule where the interest of justice so requires⁵⁷ to accommodate technical defects in a given proceeding.

Therefore, where a procedural irregularity can be cured without causing any injustice to the adverse party, an amendment will be granted to rectify the anomaly and restore normalcy. Such discretionary power may be granted to correct the name of a party even if doing so will have the effect of substituting a new party, provided the Court is satisfied that the mistake in question, being sought to be corrected, is honest, genuine and not one which will overreach and unduly encumber the adverse party. For example, the Court can also allow a plaintiff to amend his writ even after final judgment in the proceedings has been entered, for the purpose of substituting a party's correct name for the incorrect one.⁵⁸ The Court may enlarge the time provided by the rules for the doing of anything to which the rules apply, or may direct a departure from the provisions of the rules in

⁵⁵ Example, See Order 5 Rules (1), (2) and (3) of The High Court of Imo State (Civil Procedure); Order 2, High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2007; Order 5 of High Court of Ondo State (Civil Procedure) Rules, 2012; Rules, 2017, Order 5, Rule 1, the National Industrial Court Rules, 2007 (NIC Rules, 2007).

⁵⁶ O D Amucheazi and P U Abba, *The National Industrial Court of Nigeria: Law, Practice and Procedure*. (Wildlife Publishing House, 2013), p. 124.

⁵⁷ Order 21, Rule 2, Court of Appeal Rules, 2016; *Ogundalu v Macjob* (2006) 7 NWLR (Pt. 978) 148

⁵⁸ Hon. Justice Mossud Abdurrahman Oredola, J.C.A. in *Njoku & Ors. v Onwunelega*, [2017] LPELR-43384 (CA), Pp. 41- 42

any other way where departure is required in the interest of justice.⁵⁹ It therefore goes without saying that mere irregularity does not go to the root of the cause of action and consequently does not divest the court of its statutory and inherent jurisdiction to hear and determine the cause of action on the merit.

On the other hand, once an irregularity is found to be substantial, the process becomes incompetent because same is ineffectual in conferring jurisdiction on the Court. It is the law that an incompetent process cannot be amended.⁶⁰ The Supreme Court in *Dickson Ogunseinde Virya Farms Ltd. v Societe Generale Bank Ltd*⁶¹ reiterates that:

A litigant cannot be heard to complain about fair hearing when the applications (s) he placed before the Court were incompetent. 'That is the exception to the fair hearing principle as it only applies where the party has the right to be heard and when that right does not exist on account of a process that is incompetent or dead on arrival, then the party has no leg on which to stand to cry out about fair hearing. Substantial irregularity is any irregularity that goes to the root of the proceedings or process. For instance, the failure to commence proceedings with a valid writ of summons goes to the root of the case and any order emanating from such proceedings is liable to be set-aside as incompetent and nullity because, 'it clearly borders on the issue of jurisdiction and the competence of the Court to adjudicate on the matter'.⁶²

It is now settled law that Courts should not decide cases or resolve issues on mere legal technicalities.⁶³ Where a litigant inadvertently approaches a Court for the redress by a wrong procedure, it will amount to mere technicalities or irregularity to base a defence to such action on the fact that the action was instituted by wrong procedure.⁶⁴ At most, the adverse can only insist that the proper procedure be adopted but not to canvass for the striking out or dismissal of the suit. A person whose rights have been violated must be free to seek redress for such wrongs in the Courts.⁶⁵

An irregularity is substantial when it touches on the legality of the whole proceedings or process and in such situation the technical failure is not a mere technicality but an irregularity that is transcendent to the realm of validity. A substantial irregularity is the one which causes a proceeding to have a smell of judicial sacrilege and to allow that kind of trial which is hostile to the law to stand is in itself, denial of fair of hearing.⁶⁶ A breach of a mandatory constitutional provision is more than a mere technicality, it is fundamental. The breach vitiates the entire proceedings before the Court.⁶⁷ So also a litigant must adhere strictly to his pleading, hence a litigant who ignores his pleadings and made a different case at the hearing will not be allowed to claim that such inconsistency is a mere technicality.⁶⁸ It is the law that parties must be consistent in presenting their cases to the Court. This means that the pleadings and the oral evidence or witness deposition should tell the same story because this goes to the root of the case and the rule

⁵⁹ Order 2, Rule 31, Rules of Supreme Court of Nigeria; Order 44 Rule 4, Imo State High Court (Civil Procedure) Rules, 2017

⁶⁰ 25 Nigeria Army v Samuel [2013] 14 NWLR (Pt. 1375) 466 at 483.

⁶¹ [2018] LPELR- 43710(SC).

⁶² *Kida v Ogunmola* [2006] All FWLR (Pt. 327) 402 at 412 - 413, [2006] 13 NWLR (Pt.997) 377 at 394.

⁶³ *Egolum v Obasanjo* (1999) 7NWLR (Pt. 511) 255, 413.

⁶⁴ *General Sani Abacha & Ors v Chief Gani Fawahinmi* (2000) 6 NWLR (Pt. 660) 228.

⁶⁵ S 6 (6) (b) CFRN, 1999.

⁶⁶ *Ojasanmi v FGN*: (2018) LPELR-44331(CA).

⁶⁷ *Alhaji Nuhu v Alhaji Ogele* (2003) 18 NWLR (Pt. 852) 251.

⁶⁴ *Kode v Yussuf* (2001) 4 NWLR (Pt. 703) 392.

of pleadings. It is loud law that parties are bound by their pleadings and cannot give evidence in contradiction to their pleadings. In effect, a party cannot depart from his pleadings and give evidence of facts not duly pleaded therein, such departure is not in the eye of law a mere technicality but a substantial irregularity that goes to the root of the departing party's case since same has the potentiality to overreach and do injustice to the other party.⁶⁹

It is an irredeemable irregularity for judicial officer(s) who did not sit through a trial to deliver judgment in the case. The main function of the trial Court is to see and observe the witnesses. 'He watches their demeanour, candour or partisanship, their integrity, manner etc. He can therefore decide on their credibility and this affects a substantial part of his findings of fact'.⁷⁰ The opportunity of a Court or Tribunal to observe the demeanour of a witness is an indispensable aspect of procedural jurisprudence, which is rooted in fair hearing.⁷¹ Consequently, the Supreme Court in *Adeleke v Oyetola*⁷² held that the decision of the Electoral Tribunal was a nullity because Justice Obiora who read and pronounced the majority judgment at the Tribunal was evidently absent from the proceedings, at least, one of the days of the trial and the failure of the absent panelist to be present on that day meant that the tribunal lacked the authorities to have given any judgment in the entirety of the matter.

The Supreme Court's majority decision in *Adeleke v. Oyetola* follows the West African Court of Appeal authority in the case of *Nana Tawiah v. Kwesi Ewudzi*,⁷³ where it was discovered that at least two of the Tribunal members who gave judgment were not present throughout the proceedings, and did not hear all the evidence. Thus, the Court (WACA) came to the conclusion that the absence of the judges "vitiates the whole trial, and in my opinion this Court has no option but to declare the whole proceedings before the Tribunal and the Provincial Commissioner's Court a nullity".⁷⁴

Another instance of substantial irregularity that is incurable is when a process, for example, an election petition is not filed within the time specified⁷⁵ or the fees statutorily prescribed are not paid.⁷⁶ Generally, other forms of substantial irregularities include where a matter is filed before a Court that lacks jurisdiction to entertain the matter, non-service of relevant processes (including hearing notices) and in all these situations the procedure will amount to a nullity.⁷⁷

The question that should be pertinent in coming to a resolution of this ever recurring conflict is whether an irregularity is fundamental and impacts negatively on the merit of a case? It must be borne in mind that the whole purpose of law and rules of Court is to ensure that the affairs of the Court during the administration of justice are carried out in an orderly fashion with reasonable degree of certainty that prescribed acts have been duly complied with by the parties in the interest of justice.⁷⁸ Thus, where the law prescribes a way of carrying out an act, such is the only way to be followed, when a date is specified for the doing of an act, that date becomes sacrosanct. This is because the rules of Courts and practice direction are made to be obeyed and no favour should be

⁶⁹ *Kode v Yussuf* (Supra).

⁷⁰ *Okereke v The State* (2016) 1 SCM 99 at p. 113.

⁷¹ *Woluchem v Gudi* (2004) 3 WRN, 20.

⁷² SC/553/2019.

⁷³ 3 WACA 52.

⁷⁴ *Ibid.*

⁷⁵ Electoral Petitions must be filed within 21 of the announcement of the elections results. See section 285 (5), Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010.

⁷⁶ Paragraph 3 (4), First Schedule to the Electoral Act, 2010 (as amended).

⁷⁷ *Okafor v A. G. Anambra State* (1991) 6 6 NWLR (Pt. 200), 659.

⁷⁸ *F. S. B. Int. Bank Ltd Vs. Imano* (Nig.) Ltd [2000] 11 NWLR (Pt.679) 620 at 634.

shown for not obeying same.⁷⁹ However, it has also been judicially noted that strict and unreasonable adherence to technicality in the administration of justice shuts out justice.⁸⁰

Technicalities, substantial justice and fair hearing

The conflict between technicalities and substantial justice centrally borders on procedural correctness and substantive fairness. It is in the interest of justice that parties are not shut out prematurely from being heard in accordance with the laid down procedures in the court's Rules. The whole essence of fair hearing is to ensure that parties are heard on the merit or strength of their case and that same is determined on the merit void of technicalities. This perspective supports the concept of justice been done in the eyes of a layman who leaves the court with the impression and satisfaction that justice has been done. It is a notorious principle of law, and also an essential attribute of the administration of justice that justice must not only be done, but it must manifestly be seen to have been done.⁸¹ What this lucidly means is that it is not merely of some importance, but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.⁸²

In *Obaro v Hassan*⁸³ on test of fair hearing Per O. Ariwoola, JSC, said:

In *Alhaji (Chief) Yekini Otapo v Chief B. O. Sunmonu*,⁸⁴ on the test of fairness in the trial and appellate courts, this court per Obaseki, JSC, states as follows:... The true test of a fair hearing is the impression of a reasonable person who was present at the trial, whether from his observation justice has been done in the case...

The court furthermore, on the importance of rules of court and failure to obey held thus:

Rules of court are very vital in the process of justice administration. They are meant to be obeyed. Failure to do so can be counterproductive or negatively costly at times. A party who fails to obey court rules does so at his own peril. He can hardly be heard to complain.⁸⁵

In *Boniface Ebere Okezie v. Central Bank of Nigeria*⁸⁶ the Plaintiffs filed an action by way of Originating Summons at the Federal High Court, Lagos, under section 303 of the Companies and Allied Matters Act, seeking leave of court to challenge the actions of the CBN Governor, on behalf of Union Bank of Nigeria, by derivative action. In the Originating Summons, the Plaintiffs did not raise any questions for answer, but set out their claims in declarations, injunctive reliefs and damages. In response to the Originating Summons, the Defendants filed a notice of preliminary objection, challenging the competence of the suit and the jurisdiction of the court to hear and determine the action of the Plaintiffs. The preliminary objection was heard and upheld by the trial court on the ground that the Originating Summons did not contain questions for determination. The appeal to the Court of Appeal was dismissed as lacking in merit, whereupon the Plaintiffs further appealed to the Supreme Court. The Apex Court wasted no time in chastising the trial court and the Court of Appeal, for clinging to technicality to rob the Plaintiffs of justice. The Court held as follows:

⁷⁹ *Williams v Hope Rising Funds Society* [1982], 2 SC 145 quoted with approval in *Jimoh O. Ojugbele v Mr. Musefiu O. Lamiidi* [1999] LPELR-CCN/1/99, Ratio 2.

⁸⁰ *Akeredolu v Abraham & Ors* [2018] LPELR- 44067 (SC)

⁸¹ *Administrator & Executor of the Estate of Abacha v. Eke-Spiff & Ors* [2009] LPELR – 3152 (SC)

⁸² *R v. Sussex Justices Ex parte Mc Cathy* (1924) 1 K.B. 256 at 259

⁸³ [2015] EJSC Volume 8, 126 at page 137

⁸⁴ [1987] NWLR (Pt. 58), 587, [1987] LPELR 2822, [1987] 5 SC 228

⁸⁵ See also, *Afolabi v Adekunle* [1983] 8 SC (Reprint) 75, [1983] 14 NSCC 398 at 405 and *University of Lagos v Aigoro* [1985] 1 NWLR (Pt. 1) 143.

⁸⁶ [2020] 15 NWLR (Pt.1747) 181.

There is need to keep the focus on the substantiality of justice and so each of these forms is valid as an originating summons for the determination of any question of right or of construction under an enactment.

Justice does not reside in the form of the processes of the court.

Where there are sufficient provisions in the Rules of the court to sustain an action, the rules of natural justice demand that parties should be heard with a view to resolving their dispute once and for all. It is in the interest of justice that parties are not shut out prematurely from being heard in accordance with the laid down procedures in the court's Rules.

There was no basis for the conclusion of the two courts below that the originating summons of the appellants was bad and must be struck out for not stating questions for determination. For effect, it was certain that the two courts below went the wrong way in reaching their conclusion and a miscarriage of justice ensued in the erroneous application of the procedural law or rules, hence the necessity for the Supreme Court's intervention and to come against concurrent findings of fact of two courts.

The paramount duty of courts is to do substantial justice and not cling to technicalities that will defeat the ends of justice. It is more in the interest of justice that parties are afforded reasonable opportunity for their rights to be investigated and determined on merit rather than parties shut out prematurely from being heard on the grounds of non-substantial compliance with rules of court. It is immaterial that there are technicalities arising from statutory provisions or technicalities inherent in rules of court. So long as the law or rule has been substantially complied with and the object of the provisions of the statute or rule is not defeated, and failure to comply fully has not occasioned a miscarriage of justice, the proceedings will not be nullified.

It must be borne in mind that as much as law is designed to dispense justice, there are safeguards provided by law to ensure its certainty and purity. When such safeguards are violated, then justice cannot be dispensed. This is different from "mere technicality". This is where the line is drawn and perhaps tenuous. A few examples will help. Courts have their jurisdiction spelt out in the Constitution and the statutes that create them.⁸⁷ If a litigant approaches the wrong court and a full trial is conducted where he ventilates all his grievances and he gets "justice", that justice will be short-lived as he is most likely to get a reversal of his euphoric justice on appeal. Another example is where the Defendant or someone affected by the outcome of a case is not served⁸⁸ with the originating documents of the suit, any judgment (or "justice" in our context) obtained through such process is likely to suffer a reversal on appeal by the person not served. A suit brought out of the time permitted under the limitation law for a suit to be commenced no matter how well the "justice" (again in our context) is dispensed will ultimately amount to nothing. There are so many examples of issues which may at a first look or appear technical, but which a deeper consideration will clearly show to be so fundamental to justice that they transcend the realm of mere technicalities in that they are not just simple matters of procedure, but matters which actually ensures that justice is dispensed.

The preceding paragraph is particularly true in election petitions which have been described as "*sui generis*", that is, in a special class. There are so many laws guiding the conduct of election matters. A few examples will be necessary. The constitution provides that election petitions are to

⁸⁷ Ss. 232, 239, 251, 257, 262, 267, 272, 277 and 282 of the Constitution of the Federal Republic of Nigeria.

⁸⁸ Service of court processes is what among other requirements that confers jurisdiction on the court over the parties before it.

be commenced within 21 days, anything outside this stipulation will render any petition invalid. Judgment in an election⁸⁹ petition must be delivered in writing within 180 days any judgment which falls short of this constitutional requirement will sound a death knell for the Petition⁹⁰. Therefore, if the Court holds a party to the standard required by these laws on the insistence of his adversary, the agreement of the court with such adversary will not be undue technicality, it will be obedience to the law. In marrying this scenario with the case of *Adeleke v Oyetola*⁹¹, the Supreme Court upheld the decision of the Court of Appeal that the Judge who delivered the lead judgment at the tribunal was not present when some witnesses testified before the tribunal and therefore did not listen, see, or watch the witnesses and assess their demeanour but that in his Judgment he reviewed, assessed and applied the evidence of witnesses who testified in his absence, to give Judgment in the Petition. The Supreme Court held the same position in *Shanu v Afribank (Nig.) Ltd.*⁹² and *Nyesom v Peterside*.⁹³ Indeed, as far back as the days of the West African Court of Appeal, the Court held in the case of *Nana Tawiah v Kwesi Ewudzi*⁹⁴ that thus:

It is clear that at least two of the Tribunal members who gave judgment were not present throughout the proceedings, and did not hear all the evidence. This vitiates the whole trial, and in my opinion this Court has no option but to declare the whole proceedings before the Tribunal and the Provincial Commissioner's Court a nullity.

The rationale for these decisions is Section 36 of the Constitution of the Federal Republic of Nigeria which makes copious provisions regarding fair hearing. It dictates that the composition of a panel is intrinsic to the fulfilment of the fair hearing requirements of the constitution. The right to fair hearing is a substantive right guaranteed by the constitution, obeisance to the constitutional provision guaranteeing fair hearing cannot by any stretch of ingenuity be a matter of technicality.⁹⁵

The consequence of any decision reached in contravention of the fair hearing provision of the constitution is that the decision is a nullity. In *Dingyadi V INEC*⁹⁶, the Supreme Court stated the effect of proceedings held in breach of the right to fair hearing thus:

The law is trite that the effect of breach of the right of fair hearing in any proceedings of Court as happened in the instant case rendered the proceedings including the judgment of 10th March, 2010 dismissing the appeal, a complete nullity.

Usually, the main argument of those who hold steadfast to technicalities is to rely on form to wave the age old cliché of miscarriage of justice or lack of jurisdiction which many advocates wave like a magic wand. I am of the opinion that where parties are not mistaken as to the nature of any event that occurs at trial, then it would amount to resorting to mere technicality because of form. In other words, form should not and never take precedence over substance more especially where the facts of the case are not either materially affected or affected in any way at all such as to weigh or bear on the outcome or end product.

⁸⁹ S 132 (7) and (8) of the Electoral Act, 2022.

⁹⁰ S 285 (6) CFRN, 1999, S 132 (8) Electoral Act, 2022

⁹¹ Reported in 2019.

⁹² [2002] LPELR -3036 SC.

⁹³ [2016] 7 NWLR (Pt. 1512) 452 @ 504.

⁹⁴ 3 WACA 52.

⁹⁵ S 1 (1) of the CFRN, 1999 establishes it as supreme over all persons and authorities and subsection (3) provides that anything inconsistent with it is null and void.

⁹⁶ [2010] LPELR- 40142 (SC), *Rasaki Salu v. Taiwo Egeibon* [1994] 6 S.C.N.J. 223, [1994] 6 N.W.L.R. (Pt. 348) 23 at 44.

In *EFCC v Kalu*⁹⁷, Senator Orji Kalu was charged alongside a former Commissioner of Finance of Abia State, Jones Udeogo and Slok Nigeria Limited for allegedly stealing over Seven Billion Naira from Abia State treasury. The Supreme Court quashed the judgment that convicted and sentenced the former Governor to 12 years imprisonment on the ground that trial Judge, Justice Mohammed Idris was no longer a judge of the Federal High Court as at the time he sat and delivered the judgment that convicted the defendants and as such lacked jurisdiction. According to the learned justices of the Supreme Court, Justice Idris, having been elevated to the Court of Appeal before delivering the judgment, lacked the *vires* to return to sit as High Court Judge. The apex court also held that the Fiat obtained by Justice Idris from the President of the Court of Appeal pursuant to section 396 (7) of the Administration of Criminal Justice Act (“ACJA”) was unconstitutional.

The question to be considered at this stage is: how did the return of the Judge to deliver judgment cause miscarriage of justice having been the same Judge that presided over the trial, heard and took evidence of witnesses and witnessed their demeanours? Furthermore, how could a court that sat on a trial till the end before delivery of judgment suddenly lack jurisdiction to deliver judgment after trial? It can hardly be argued by any stretch of imagination or logic that it caused or led to a miscarriage of justice or that Justice Idris lacked jurisdiction to deliver judgment even in view of the Fiat obtained pursuant to the ACJA. It was a murder of justice on the altar of technicality.

Is it all matters that border on jurisdictional issue that must be quashed or nullified, especially where it does not lead to miscarriage of justice? It is trite that where a court lacks jurisdiction, the entire proceeding no matter how well conducted is a nullity. But I believe there should be a qualification to ascertain whether such lack of jurisdiction amounts to a miscarriage of justice, which should be the ultimate consideration. The issue of jurisdiction when raised most times, is merely a ploy to frustrate a good case on a technicality

In my opinion, the coming back of Justice Mohammed Idris from the Court of Appeal to the Federal High Court to deliver judgment in a matter he had been handling before his elevation to the Court of Appeal, had caused no miscarriage of justice. If anything, it has even done justice to all parties, because a judge who began the case, listened to witnesses, admitted evidence, heard counsel’s adumbrations, also wrote and read the judgment. This is the position as envisaged by ACJA which the constitution perhaps, never envisaged. I do not think section 396 (7) ACJA is inconsistent with the Constitution. Rather, it is a welcome provision to fill up a lacuna long left uncovered by the constitution. The constitution does not expressly prohibit a judge of the High Court who had been handling a matter before being promoted to the Court of Appeal, from coming back to conclude his part-heard matters.

It was Walter Savage Landor, an UK (English) writer and poet who philosophized many years back that when law becomes a science and a system, it ceases to be justice.⁹⁸ In *Salawu Ajide v Kadiri Kelani*⁹⁹, Oputa J.S.C, on the need for truth to prevail in order to ensure justice is done poignantly cautioned that:

Justice is much more than a game of hide and seek. It is an attempt to discover the truth, on human imperfections, notwithstanding. Justice will never decree anything in favour of so slippery a customer as the present defendant/appellant” on this note, our courts have admitted that justice and truth are on the same ticket and that in

⁹⁷ FHC/ABJ/CR/J6/07

⁹⁸ <https://businessday.ng/opinion/article/of-technicality-justice-and-supreme-courts-decisions-1/> accessed on 28th August, 2023

⁹⁹ [1985] 1 NWLR 248 at 269

doing justice the courts and all ministers in her temple, that is lawyers and all other stakeholders, must strive at discovering the truth regardless of legal technicalities.

Recommendations

1. Emphasis should be placed to the effect that an action must be initiated by due process. It would be no injustice for a court to refuse entertaining a matter if it defaults in following the required process of the law. This should not be viewed as an anomaly, as the rationale behind this condition is to ensure sanity and check in legal processes. If the court is not stringent on such, gross abuse of process and illegalities will become the order of the day. Thus, if a substantive law spells out due process to be followed, the litigants should not be so negligent as to neglect the rules and argue technicalities with innocent faces in court. This was the position of the Supreme Court in *FBN v Maiwada*¹⁰⁰ where Fabiyi J.S.C., stated that no one should talk of technicality when a substantial provision of the law has been rightly invoked. This position reflects due process and rule of law.
2. Secondly, balance can only be achieved when the judiciary ensures that parties before the court get a fair hearing. In *Omoniyi v Central Board*¹⁰¹ the Court of Appeal held that the true test of fair hearing is the impression of a reasonable person who was present at the trial and whether from his observation, justice had been done in the case. The judges in applying the rule of law to the facts of the case should have in mind that the end product of law is justice. Thus, they should be affirmed in all convictions that the trial was a fair one, whether controversial or not. The parameters for a fair judgment should be in line with *section 36 of the Constitution of the Federal Republic of Nigeria, 1999*.
3. Amendment of provisions of court rules or statutes that impose strict liability compliance and by extension, amendment of similar laws which establishes the courts and governs the institution of actions and conduct of proceedings. It is to be noted that judges do not make laws, but instead interpret the laws. The controversies that have paraded the legal scene on the issue of technicalities have always lingered on the interpretation of statute. The lack of precision and clarity in legal frameworks may somewhat move the judges towards applying judicial activism in offensive ways. There should be constant legislative reviews to enable the judges or courts ascertain the minds of the legislature on any matter.
4. There should be an adoption of a practice and procedure in our judicial system wherein all objections bordering on technicalities should be merged together with the hearing of the substantive suit and to incorporate all interlocutory appeals into the main case, such that the determination of the court can be made known on both in a single judgment, rather than pursue common issues of amendment or injunction up to the Supreme Court whilst the main case is guillotined thereby, on the altar of technicality.

Conclusion

Achieving a balance between substantial justice and technicalities is the ultimate safeguard for upholding the sanctity of justice. In the administration of justice every effort must be aimed at resolving or reducing social conflict and promoting social harmony. If justice is to be invoked rightly, then the law should be its solid backbone. Law and justice are inseparable and none can exist without the other. The system of dispensing justice is in two phases- the examination of the law and the application of the law to the facts. The judges depend on law to dispense justice and justice needs good laws to prevail.

¹⁰⁰ *Supra*.

¹⁰¹ [1988] 4 NWLR PT 89 p. 448.

The judiciary must save itself from extinction and historical irrelevance; it must assert itself as the last hope of the common man, by ensuring that it digs very deep into each case presented before the court in order to give justice to those who deserve it. The incapacity of the court to do justice to the real issues before it goes back to the society itself, as litigants are then forced to embrace self-help, law enforcement agencies become dispute resolution merchants and arbitrariness sets in. We cannot continue to run a court system that delivers empty papers to the people as judgment, the contents of which do not birth any form of justice at all. A system where our learned justices are more interested in rewarding the brilliancy and creativity of lawyers in identifying loopholes and punching it, thereby sacrificing good judgment on the altar of mere technicality must be frowned at.

CYBERCRIME IN NIGERIA: ISSUES AND CHALLENGES

Emma Osuji*

Abstract

Information technology, especially the internet, has remained one of the most impressive scientific developments in the history of mankind. It has bonded personal relationships, facilitated trade and commerce across all levels, and made life easier. This welcoming benefit of internet advancement has also been identified as having its attendant problems, which include high growth rate of criminality known as cybercrime. This paper systematically investigates the challenges which inhibit the successful elimination of cybercrime in Nigeria. The paper emphasizes that weak enforcement mechanisms, a slow judicial process and the slow process of forensic analysis among others, contribute to the inadequacy of the fight against cybercrime. This paper puts forward recommendations for regulatory bodies which will bring about efficient and adequate prosecuting mechanism. This will ensure that this menace is minimized in Nigeria.

Key words: *Internet Technology, Cybercrime, Internet, Legal Framework.*

Introduction

Globally, digitalization and internet-based activities have grown, with Nigeria as no exception to the adaptation of the expansion.¹ As much as internet expansion in Nigeria has its advantages and disadvantages, the exponential rate of the usage of computers and the internet in numerous establishments has had a hugely beneficial influence,² on government, commerce, education and other spheres of activity relating to mankind. The alarming growth of the internet and its wide acceptance in society has led to an increase in security threats all over the world and in Nigeria too.

In Nigeria today, several internet-assisted crimes known as cybercrimes are committed daily in various forms, such as fraudulent electronic mails, pornography, identity theft, hacking, cyber harassment, spamming, spoofing, piracy and phishing³ among others. It must be noted that cybercrime has become a threat to various institutions and internet users either through computers or mobile technology.

Hence, the rapid growth of computer technology carries with it the evolution of various crimes on the internet,⁴ with Nigeria as no exception. Nigeria is the third most targeted country for cybercrime in Africa.⁵ Between the first and second quarters of 2021 and now, there has been more than a 32 percent jump in Malware in Trojan horse attack in Nigeria.⁶ By this, we mean that a Malware that misleads users of its true intent by disguising itself as a standard program is installed

* **Emma Osuji Esq (KSM) Ph.D Lecturer in Department of Public Law, Faculty of Law Imo State University Owerri.**

¹ Anwana, E.J., Ogundale A.T., Olannde E.S., and Idem, U.J., "The Prosecution of Cybercrime in Nigeria: Challenges and Prospects. *researchgate.net/public*. Accessed 24/5/2023.

² *Ibid.*

³ Omodunbi, B., Odiase, P.O., Olaniyan O., "Cybercrime in Nigeria: Analysis, Detection and Prevention" *researchgate.net/public*. Accessed 24/5/2023.

⁴ Okorie, C.K., and Mbachu S. C., Complexities, Issues and Challenges on Cybercrime in Nigeria (eds) Chukwumaeze, U.U. and Okorie C.K., Excellence at the Bench, Essays and Selected Judgments in Honour of Honourable Justice Bernadine Ngozi Ukoha, Administrative Judge, Owerri Judicial Division, Imo State Judiciary, 2019, 165.

⁵ The Guardian "How to Protect Yourself from Cybercrime in Nigeria" *guardian.ng/features /hc*. Accessed 24/5/2023.

⁶ *Ibid.*

to exploit security gaps unknown to the general public as well as access smart phone data before it becomes encrypted via other applications.

An application such as malware is used to perpetrate digital crime by anyone who actively seeks to exploit weaknesses in technology for illegal purposes.⁷ This exploitation of weaknesses in technology which manifests in cybercrime, has done a lot of damage to individuals, government and the global community as a whole. It has become a major cause for concern worldwide including Nigeria, hence adequate mechanisms must be put in place to ensure that offenders of the said crime are properly prosecuted.

Conceptualization of Cybercrimes

Cybercrimes are transnational in nature.⁸ Cybercrimes are crimes committed without the perpetrators being physically, present at the locus.⁹ Cybercrimes are committed in the impalpable world of computer networks.¹⁰ The Black's Law Dictionary describes cybercrime as cyber theft and defines it as the act of using an online computer service, such as one on the internet to steal someone's else property or to interfere with someone's else use and enjoyment of property.¹¹ It further cites examples of cyber theft as hacking into a bank account to wrongfully credit one's account and debit another and interfering with a copyright by wrongfully sending protected materials over the internet¹² among others.

Cybercrimes being technologically driven have continuously and ingeniously made it difficult for cybercrime investigators to find solutions to such cybercrime.¹³ Crimes committed over the internet are very different in nature when compared to the physical world,¹⁴ hence the difficulty in tracking offenders. Crimes relating to cyber space do not show any form of foot print, tangible traces or objects to track criminals down easily. They possess, huge amount of complications when it comes to investigations.¹⁵

Cybercrimes can basically be categorized into four parts, namely; against individuals, against property, against society and against organization.¹⁶ Email spoofing is the act of sending email with false sender addresses, usually as a part of phishing attack designed to steal personal information or infect the computer with malware.¹⁷ Cybercrime against individual also involves spamming which deals with the sending of multiple copies of unsolicited mails such as chain letters. Again cyber defamation is also an aspect of cybercrime against individuals, wherein someone publishes defamatory matters against a person through the email.¹⁸ Cybercrimes against individuals involve spoofing. Spoofing as it pertains to cyber security is when someone or something pretends to be something else in an attempt to gain a victims confidence, get access to systems, steal data, steal money or spread malware. Spoofing attacks come in many forms including email spoofing, GPS spoofing, extension spoofing, Facial spoofing, caller ID spoofing, website and/or URL spoofing, among others.¹⁹ Similarly, cyber stalking, which involves online

⁷ Bello, T., "Anatomy of Cybercrime in Nigeria: The Legal Chronicle" *paoers.ssm.com*. Accessed 24/5/2023.

⁸ *Ibid.*

⁹ Weffinder, "Scope of Cyber Security" *www.wefinder24.com*. Accessed 24/5/2023.

¹⁰ *Ibid.*

¹¹ Gainer, B.A., Blacks Law Dictionary, West Group, St Paul Minn 1999, 392.

¹² *Ibid.*

¹³ Weffinder, *op. cit.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Mali, P., "Classification of Cybercrime" *www.lawyersdubindia.com*. Accessed 24/5/2023.

¹⁷ <https://www.malware.com/spoofing>. Accessed 24/5/2023.

¹⁸ *Ibid.*

¹⁹ *Supra.*

harassment where a person is subjected to a plethora of online message and emails which are intimidating in nature is another aspect of cybercrime against individuals.²⁰

Another class of cybercrime is cybercrime against property.²¹ Credit card fraud, intellectual property crimes, internet time theft which deals with stealing, destroying or misusing the source code are prevalent.²² Cybercrimes can also be committed against an organization. This specie of cybercrime deals with unauthorized access to a computer network without the permission of the owner.²³ It can happen by way of deleting data or copying of confidential information. An organization's system can be contaminated for purposes of injecting a virus into it.

Cybercrime against society is another class of cybercrime that affects the society greatly.²⁴ In this instance, the cyber-criminal indulges in forgery of currency, revenue stamps, mark sheet, and also carries out cyber terrorism by using computers to intimidate or coerce people and carry out the activities of terrorism sentence could be restructured.²⁵ Web jacking as an aspect of cybercrime against society permits hackers to gain access and control over website of another, and even change the contacts of the website for fulfilling political objectives or for money. This is a three sentence paragraph and it is problematic. A paragraph is made up of at least 4 to 5 sentences; reflect this observation where necessary in this paper

It must be noted that the cyber space allow these attackers to easily carry out their activities and such intrusion can be made effortlessly with very little risk of apprehension.²⁶ The internet provides anonymity and safety for persons involved in Cyber offences. These perpetrators leave no traces of their actions and this makes it extremely difficult to trace them.²⁷

Cybercrime has spread to such proportion that a formal categorization of the crime is no longer possible.²⁸ Every single day gives birth to a new kind of cybercrime, making every single effort to stop it almost a futile exercise.²⁹ Criminals have discovered that the internet can provide new opportunities and multiple benefits for illicit businesses.³⁰ These miscreants have employed the internet as a tool for not only fraud and theft among others but also drug trafficking and criminal organization rackets that are concerned with exploitation and disruption of the society³¹ Cybercrime perpetrators are always one step ahead in the sense that they create technology or come up with techniques to perpetrate a particular crime, leaving law enforcement personnel with a puzzle to unravel the crime and bring the culprits to book.

²⁰ *Supra.*

²¹ Panda Security, "Types of Cybercrime" www.pandasecurity.com. Accessed 24/5/2023.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Sulaman, S., and Yunog, Z., "Understanding Cyber Terrorism from Motivational Perspectives" www.jstor.org. Accessed 24/5/2023.

²⁶ Chowbe, V.S., "Concept of Cyber-Crime, Nature and Scope" www.researchgate.net. Accessed 24/5/2023.

²⁷ *Ibid.*

²⁸ Admindeepak, Nature and Scope of Cybercrime" deepakmiglani.com. Accessed 25/5/2023.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

Cybercrime in Nigeria

Cybercrime in Nigeria is an emerging trend that is rapidly growing in scope and frequency.³² The revolution in information and communication technology has greatly promoted the trend and scope of cybercrime in Nigeria,³³ as the internet which is of course the greatest promoter of cybercrime.

In Nigeria, the rate at which the Nigeria cyber space is subjected to daily attacks from unscrupulous minds and criminal elements has continued to remain alarming.³⁴ Cybercrimes have taken a dangerous toll on individual businesses, institutions, government and the economy.³⁵ It has become one of the main avenues of getting rich quick.³⁶ According to Checkpoint, a global network cyber security vendor, Nigeria and Kenya recorded a massive rise in cybercrime in the first six months of 2022 with phishing and scams hitting 438 percent and 174 percent respectively.³⁷ The Economic and Financial Crimes Commission stated that in 2022, 2,800 persons were convicted of cybercrime in Nigeria.³⁸ The convicted persons, according to the commission were mostly youths. Hence, the youths have become cyber-creatures spending a significant amount of time online.³⁹ As the digital world expands, so does cybercrime in Nigeria.⁴⁰

The rising cyber-attacks in Nigeria have caused more economic, social and cultural harm than good.⁴¹ It is estimated that Nigeria loses over N500m yearly to cybercrime alone.⁴² This accounts for 0.088 percent of the country's Gross Domestic Product.⁴³ These attacks on the cyber space range from those targeting business, to individuals and bank accounts, phones and computers as well. The funny thing is that these cyber criminals do not discriminate. They can affect very poor homes as well as rich ones. People are not well informed on this issue; hence they prey on any class of people, including the very intelligent ones.

It is very clear that the escalation of cybercrime cannot be curtailed adequately by local crime prevention agencies alone, hence the effects have continued internationally.⁴⁴ Apart from the social menace cybercrime has created in our economic system, it has succeeded in throwing a large number of fraudsters into the economic system of Nigeria.⁴⁵ Fraudulent activities and practices through cybercrime have made a lot of young people emergency millionaires, even billionaires in the Nigeria economic system.⁴⁶ This is of course injurious to the economic system because such funds acquired illegally are not used productively to promote the economy.

Indeed, this may be referred to as economic sabotage resulting from cybercrime. The situation has affected Nigeria's image. The image of Nigeria in this connection has been adjudged battered both internally and externally. Provide reference Though cybercrime is a global phenomenon, individual countries suffer the effects differently depending on what laws such country has in place

³² Oni, M.J., "Cybercrime in Nigeria: "The Implication in our Economy and Social Image" www.acta-pac.org. Accessed 25/5/2023.

³³ *Ibid.*

³⁴ Omodunbi, B., Odiase, P.O., Olamyan and Esan, A., *op. cit.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ EFCC, "Over 2,800 Persons Convicted of Cybercrime in 2022" www.premiumtimes.ng.com. Accessed 25/5/2023.

³⁹ OAL, Cybercrimes and Cyber Laws in Nigeria: *All you need to know.oal.law*. Accessed 26/5/2023.

⁴⁰ *Ibid.*

⁴¹ Jaiyeola, T., "How Nigeria can curb Rising Cyberattacks" www.punch.com. Accessed 26/5/2023.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Oni, M.J., *op. cit.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

to address the situation as well as how effective their law and crime prevention agencies are able to curtail the menace.⁴⁷ Hence an appraisal of the cybercrime law of Nigeria.

An Appraisal of the Cybercrimes (Prohibition and Prevention) Act 2015

The Cybercrimes (Prohibition and Prevention) Act 2015 of Nigeria is the existing legal framework for combating cybercrime in Nigeria. It has a significant impact on cyber criminality in Nigeria. The said law has created a comprehensive legal, regulatory framework for the prevention, detection, prosecution and punishment of cyber criminals.

By way of an overview the Cybercrime Act 2015, contains 8 parts and 59 sections. *Part I*⁴⁸ covers 2 sections, which contains objectives and application.

*Part II*⁴⁹ which covers protection of critical National Information Infrastructure deals with designation of certain computer systems or networks as critical national information infrastructure and audit and inspection of critical national information infrastructure.

*Part III*⁵⁰ provides for Offences and Penalties, and deals with Offences against critical national information infrastructure, Unlawful access to computers, Registration of cybercafé, Unlawful interception of communications, Unauthorized modification of computer program or data, System interference, Misuse of devices, Computer related forgery, Computer related fraud, Identity theft and impersonation, Child pornography and related offences, Cyber stalking, Cybersquatting, Cyber terrorism, Racist and Xenophobic offences, Attempt, Conspiracy, aiding and abetting, and finally Corporate liability.⁵¹

*Part IV*⁵² which deals with duties of service providers and provide for Records retention and Protection of data, Interception of electronic communication and Failure of service provider to perform certain duties while *Part V*⁵³ which provides for Administration and enforcement contains, Coordination and enforcement, Establishment of the Advisory Council and functions and Powers of the council.

*Part VI*⁵⁴ which covers Search, Arrest and Prosecution provides for powers to Conduct Search and Arrest, Powers to conduct investigation or Search without warrant, Obstruction and refusal to release information, Prosecution of offences, Order of forfeiture of assets and order for Payment of compensation or restitution.

*Part VII*⁵⁵ which deals with Jurisdiction and International cooperation provides for Jurisdiction, Extradition, Request for mutual assistance, Evidence of pursuant to a request, form of request, Expedited preservation of Computer data and Designation of contact point. Hence *Part VIII*⁵⁶ providing for miscellaneous deals with Directive, Regulations, Interpretations and Citation.

⁴⁷ *Ibid.*

⁴⁸ *Part I sections (1) and (2) of the Cybercrime (Prohibition Prevention) Act 2015.*

⁴⁹ *Part II sections (3) and (4) ibid.*

⁵⁰ *Part III sections (5) and (36) ibid.*

⁵¹ *Ibid.*

⁵² *Part IV sections (37) and (40) ibid.*

⁵³ *Part V sections (41) and (44) ibid.*

⁵⁴ *Part VI sections (45) and (49) ibid.*

⁵⁵ *Part VII sections (50) and (56) ibid.*

⁵⁶ *Part VIII sections (57) and (59) ibid.*

However, only the parts and sections critical to this paper shall be examined. For instance, *section 7* of the Cybercrime (Prohibition and Prevention) Act 2015 provides thus:

7(1) from the commencement of this Act, all operators of a cybercafé shall register as a business concern with computer professional Registration Council in addition to a business name registration with corporate Affairs Commission. Cybercafé shall maintain a register of users through a sign-in register. The register shall be made available to law enforcement personnel whenever needed.

From the foregoing provision of *section 7 (1)* of the Act, it is mandatory for every cybercafé operator in Nigeria to register its business with Computer Professional's Registration Council and the cybercafé operators have to maintain a register of users. These conditions imposed on cybercafé operators are unnecessarily burdensome and onerous.

In addition to the provision for Registration with the Computer Professional's Registration Council, cybercafé operators must pay the fees, not minding the scale of the said cybercafé. Moreso, registration of cybercafé is not within the mandate of the Computer Professional's Registration Council whose mandate is to provide a regulated and standard driven environment for Information Technology.⁵⁷

The duty of the said Computer Professional's Registration Council is centered on Information Technology education and standards in computer. There is nothing to suggest that this organization is capable of containing this additional responsibility placed on her by the Act, hence the organization does not have the spread to deal with registration of cybercafé.

Again, *section 8* of the Act which provides for system interference is another aspect of the cybercrime Act considered to be controversial.

It provides thus:

Any person who without lawful authority, intentionally or for fraudulent purposes does an act which causes directly or indirectly the serious hindering of the functioning of computer system by imputing, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data or any other form of interference with the computer system which prevents the computer system or any part thereof, from functioning in accordance with its intended purpose, commits an offence and shall be liable on conviction to imprisonment for a term of not more than 2 years or liable to pay a fine of not than N5,000,000 or to both fine and imprisonment.

In as much as this section is intended to protect the systems from unlawful interference, misuse or, a misinterpretation of this section, notably could lead to individuals being wrongfully prosecuted, hence innocent individuals who never intended to do any act that could hinder the functioning of a computer system could be punished. This is so suggested because, a virus in a computer system could lead to system interference and a person could be accused of that. Hence it is suggested that the language of this section of the Act be amended to provide a greater clarity about what truly constitutes system interference.

Again, the concept of system interference which has been vilified by the law as a form cyber stalking, could have a chilling effect on free speech. Given the broad and vague language used in

⁵⁷ See *section 2* of the Computer Professional's Council Act 1993.

the Act, individuals who express opinion that are critical of the government or other powerful entities may be targeted and accused of system interference.

Furthermore, misuse of the offence of system interference could result to infringement of privacy right. Law enforcement agencies may use the offence as a pretext to conduct surveillance on individuals or groups, hence violation of right to privacy⁵⁸ with its significant implications on rule of law, human rights and democratic governance.

Furthermore, *section 29 (2) (b)*⁵⁹ of the Cybercrime (Prohibition and Prevention) Act 2015 is considered to be another controversial aspect of this Act. It provides thus:

Where a body corporate is convicted of an offence under this Act, the court may order that the body corporate shall therefore and without any further assurances, but for such order, be wound up and all its assets and properties forfeited to the federal government.

Indeed, this provision is heavy and high handed. One of the known principles of criminal law is that punishment should be commensurate to the offence committed.⁶⁰ In this regard the forfeiture of assets of the convicted corporate body to the Federal Government without regard to the creditors and shareholders of the said corporate body is to say the least unfair and definitely not encouraging to innocent investors, hence it is suggested that the law be amended to reflect a consideration on the side of innocent investors and creditors with a view to protecting their investment.

Another section of the Cybercrime (Prohibition and Prevention) Act 2015 which calls for examination is *section 48 (4)* which provides thus:

Any person convicted of an offence under this Act shall have his international passport cancelled. In the case of a foreigner his passport shall be withheld and only returned to him after he has served the sentence or paid the fine imposed on him.⁶¹

This would appear to be a violation of the constitutional right to freedom of movement as provided for under the 1999 Constitution of Nigeria (as amended)⁶² and as decided in the case of *Director of State Security services vs Olisa Agbakoba*.⁶³ It must be noted that the Passport (Miscellaneous Provision) Act gives the power to cancel a passport in just very few cases including where the passport has expired, where it was obtained by fraud, where a person unlawfully holds more than one passport and it is in the interest of the public to so do.⁶⁴

However, under the Cybercrime (Prohibition and Prevention) Act, 2015 any cancellation of a passport on the basis of conviction would appear to be justified as being done for public interest. Since all the offences under the Act could lead to a cancellation of a passport, the absurdity would be that a minor offence as cybersquatting would lead to cancellation of passport on conviction. Again, it is submitted that this section and provision of the Act is not commensurate with the punishment. Moreso, the person whose passport was cancelled must have been sentenced or paid fine whichever way. This amounts to double jeopardy, hence it is suggested that the law be

⁵⁸ Section 37 of the 1999 Constitution of Federal Republic of Nigeria (as amended).

⁵⁹ Section 29 (2) (b) of the Cybercrime (Prohibition and Prevention) Act 2015.

⁶⁰ Hirsch, A.V., "Commensurability and Crime Prevention: Evaluating Formal Sentencing Structure and their rational" <https://scholarlycommon.law.northwestern.edu/jck>. Accessed 30/5/2023.

⁶¹ Section 48 (4) of the Cybercrime (Prohibition and Prevention) Act 2015.

⁶² Section 41 of the 1999 Constitution of Nigeria (as amended).

⁶³ (1999) LPELR-SC 5/1995.

⁶⁴ See section 5 (1) (a) (b) (c) (d) of Passport (Miscellaneous Provision) Act LFN 2004.

amended to be able to separate the punishments to be inflicted on minor offences and serious offence as contained in the Act.

In addition to above controversies surrounding the Act, it created several offences without adequate stipulation for the enforcement of its provisions. It would serve better to mention these offences⁶⁵ Again the Act failed to confer powers on any specific law enforcement agency to enforce the provision of the Act.

Furthermore, the Act attempts to regulate the activities of banks and financial institution in Nigeria, whereas such activities of the bank are already regulated by Banks and other Financial Institution Act.⁶⁶ Such duplication, it is suggested may create challenges for the court when faced with deciding which Act is applicable in a given situation.

Issues and Challenges

Issues

Despite the criticisms against the Cybercrime (Prohibition and Prevention) Act 2015, there are other issues and challenges identified. One of the notable issues confronting the success of combating cybercrime in Nigeria is lack of coordination among various security agencies. There is absolutely no coordination and meeting point for security agencies in Nigeria, where ideas are exchanged for purposes of reinforcement of capacities and ideas on how to combat cybercrime. Unlike in the United Kingdom, where cybercrime unit has brought together law enforcement agencies and experts into a single elite unit.⁶⁷ This has succeeded in providing access to specialist capabilities in combating cybercrime in the United Kingdom, hence Nigeria should emulate the same pattern to improve their capabilities in fighting cybercrime.

Similarly, under the South African jurisdiction, agencies and organizations come under an umbrella to provide the South African police service with expertise by way of collaboration.⁶⁸ A designated point of combat is established to facilitate exchange of ideas between agencies in combating cybercrime in South Africa.⁶⁹

Furthermore the issue of jurisdiction has always been pointed at as an issue in fighting cybercrime. This is so because it is transnational in nature and transcends states and jurisdictions.⁷⁰ Where a cybercrime offender is domiciled in another country as well, it becomes a problem for the court to try such offender, as the court may be faced with jurisdictional issues, geographically. Hence extradition would readily come to mind.⁷¹ In most cases extradition is seen as an option but there must a treaty in that regarded existing among the states involvement.⁷²

Again, it is a fact that in criminal prosecution, the prosecution must prove his case beyond every reasonable doubt before a conviction can be secured. Thus, in prosecuting cybercrime offences, prosecution heavily relies on electronic evidence which is faced with the challenges of accessing

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Home Office, Review of the Computer Misuse Act 1990 of the United Kingdom, www.gov.uk. Accessed 19/8/2023.

⁶⁸ Ndaka, Y., CSIR Collaborates with South African Police Service to Strengthen Cybercrime Investigation. www.news24.com. Accessed 19/8/2023.

⁶⁹ *Ibid.*

⁷⁰ Okorie, C.K., and Mbachu, S.C., *supra*, 173.

⁷¹ *Ibid.*

⁷² <https://www.mcafee.com/enterprise/en-us/assets/reports/rp-hidden-cost-ofcybercrime.pdf>. Accessed 19/8/2023.

electronic evidence resulting from lack of cooperation from service providers.⁷³ In Nigeria, there is no synergy among service providers and security agencies, this of course poses a great challenge in prosecution of cybercrime perpetrators.

Improper handling of electronic evidence is also another issue facing cybercrime prosecution in Nigeria. Some of the investigators of cybercrime offenders lack experience in handling of electronic evidence in compliance with admissibility rule and this may lead to the rejection of vital evidence in court.⁷⁴ For instance the Evidence Act, 2011 why not engage with the current Evidence Act provides a guide on what a court should do in ascribing weight to a statement contained in a document produced by a computer.⁷⁵ The aforementioned section presupposes that the court in estimating the weight to be attached to a statement in a document produced by a computer, shall regard all the circumstances from which any inference can reasonably be drawn as to the accuracy, or otherwise of said statement.⁷⁶ Additionally, the court must give consideration as to whether or not the information reproduced from the computer was supplied or recorded contemporaneously with the existence of the facts dealt with in that information.⁷⁷ This is where experience in handling cybercrime investigation becomes expedient, because the weight that will be attached to such evidence by a court depends on how the evidence generated complies with the requirement of the evidence Act. Interestingly, the South Africa law⁷⁸ on the same issue of weight to be attached in evidence generated on cybercrime treats it same way as that of Evidence Act of Nigeria.

In addition to the above, is the unwillingness of witnesses to testify for the fear of either being killed or loose clientele banks, auto-mobile industries and insurance companies find it difficult to testify in cases of cybercrime for fear of loosing clientele among others.

Challenges

The major challenge which be-devils the adequate combat of cybercrimes is the deficiency in definition. This is so because the dynamic nature of the cybercrime related offences evolve as a result of the scope and development in computer world. Scholars argue that it is important to put in place a broad definition of the term i.e cybercrime, because of the diversity and rapid emergence of new technology in the society.⁷⁹

Mention must be made of lack of infrastructure as posing a challenge to the fight against cybercrime in Nigeria. Improper monitoring of cybercrime perpetrators as a result of lack of sophisticated and modern gadgets has hampered the fight against cyber criminality in Nigeria.⁸⁰

Furthermore, is the issue of the lack of a functional national database. An effective national database could serve as a means of tracking down the perpetrators of these heinous acts by checking into past individual records, as well trace their recent digital tracks could be rephrased.⁸¹ Hence it is suggested that a functional database be created and made functional for purposes of checkmating cybercrime perpetrators.

⁷³ Obuobisa, Y.A., Challenges faced Regarding Cybercrime and the Rule of Law in Cyber Space from the Performance of a Prosecutor in Ghana. *rm.coe.int....* Accessed 20/8/2023.

⁷⁴ *Ibid.*

⁷⁵ Section 34 (1) (b) of the Evidence Act 2011.

⁷⁶ Alaba, O.A., Electronic Evidence with Cybercrime Act 2015, Jurist Publication Series, Lokoja 2019, 84.

⁷⁷ *Ibid.*

⁷⁸ See section 15 (3) of the Electronic Communication and Transaction Act, 25 of 2002 of South Africa.

⁷⁹ Okorie, C.K., and Mbachu, S.C., *op. cit.*, 176.

⁸⁰ Makeri, Y.A., "Cyber Security Issues in Nigeria and Challenges" *www.varcsse.com*. Accessed 20/8/2023.

⁸¹ *Ibid.*

It must be noted also that lack of standard and forensic National Central Control in the Cyber System has constituted a draw back in combating cybercrime malady.⁸² There is no regulation of standards, no adequate computer security in place; all these put together frustrates the fight against cybercrime in Nigeria.

Despite the shortfalls, issues and challenges, the Act has done well in curbing the menace of cybercrime in Nigeria. For instance *section 23*⁸³ of the Act on child pornography and abuse is worth commending because the Act makes it an offence for anyone using computer system or network to engage a child in pornography or engage in sexual activities with a child who is below the age 18 years in a computer system or network.

It is suggested that this provision covers the use of the social media such as facebook, twitter, instagram as a tool for meeting minors, engaging in sexual activities with them and transmitting same through communication devices, as such devices would qualify as computer system under *section 58* of the Act.⁸⁴

Conclusion

Nigeria is increasingly relying on the internet and other information technology tools to engage in personal communication and in conduct of business activities among other several benefits.⁸⁵ As much as these developments allow for enormous gains in productivity, efficiency and communication, it has loopholes which are capable of destroying an organization; hence the Cybercrime (Prohibition and Prevention) Act 2015 is put in place at least as the first legal framework to address the problems and loopholes arising from the use of internet and information technology in Nigeria.

The Act is commendable and requires proper implementation for purposes of it achieving the desired goals in checkmating cybercrime perpetrators who rely on information technology to perpetrate various crimes against individuals, corporate bodies and government agencies.

Recommendations

One of the issues observed in relation to *section 3* and *4* of the Act is the provision for protection of National International Infrastructure. In this regard the President of the Federal Republic of Nigeria acting on the recommendation of the National Security Adviser is by order empowered to publish in the Federal Gazette and design some computer systems and networks as critical National International Infrastructure.⁸⁶ Sadly enough, there is no order published in the Federal Gazette designating any computer system or network as Critical National International Infrastructure. Hence it is recommended that such be gazatted.

Again, there should be a definite law enforcement agency assigned with the execution of the provisions of the Act. This is so because no specific agency is saddled with the role of execution of the provisions of the Act especially in terms of prosecution.

⁸² Idem, U.J., Olarinde, E.S., Anwana E., and Ogundele, T.A., The Prosecution of Cybercrimes in Nigeria: Challenges and Prospects *www.researchgate.net*. Accessed 20/8/2023.

⁸³ *Section 23* of the Cybercrime (Prohibition and Prevention) Act 2015.

⁸⁴ Onadeko, O.A., and Afolayan, A.F., "A Critical Appraisal of the Cybercrime Act, 2015 in Nigeria" *www.isrcl.com>2021/05*. Accessed 30/5/2023.

⁸⁵ Omodunbi, B., Odiase, P.O., Olanyan, O., and Esan, A., *supra*.

⁸⁶ *Section 3* and *4* of the Cybercrime (Prohibition and Prevention) Act 2015.

RE-EVALUATING LOCAL CONTENT AND WAIVER PRINCIPLES IN THE NIGERIAN CABOTAGE REGIME: A COMPREHENSIVE ANALYSIS

Aaron OLOGE*

Abstract

The principal aim of the CABOTAGE Act as deduced from the long title to the Act is the promotion and development of indigenous tonnage, invariably the entrenchment of local content policy. Other objectives of the cabotage policy such as the establishment of the Cabotage Vessel Financing Fund, as well as the restriction of foreign vessels in cabotage trade are geared towards the realisation of that core aim. Furthermore, the literal interpretation of section 3 of the Cabotage Act means no more than a total domestication of cabotage trade in the hands of the citizenry in aspects of full beneficial ownership of vessels, manning responsibilities, build procurement, as well as flag registration to be domiciled in Nigeria. However, the influence of the localisation requirement has been greatly undermined by the waiver provision. This paper examines the impact of the waiver provision on the local content policy initiative and found that it faces some inherent constraints. It therefore makes a number of recommendations and contributions to the existing calls for an amendment to consider a right of first refusal in favour of domestic shipping interests and the optimal development of the indigenous Nigerian Maritime University for the training of Nigerian seafarers.

Keywords: Cabotage waiver policy, Maritime, Local Content Laws, Nigeria.

Introduction

The practice of cabotage is both old and contemporary economic approach for justifying intervention or restriction to achieve certain results. In whatever policy framework, it is seen as an acceptable tool for achieving set economic goals, especially where competition is unfair and dominance is prevalent as in Nigeria. The practice, such as the reservation of all or part of national market opportunity for national flag ships or aircraft, is justified for political, socioeconomic, geo-cultural and security reasons.¹ This underscores protectionist ideology; clearly, coastal trade is isolated from world politics of trade liberalization and opening up markets to foreign investors. Accordingly, World Trade Organization Agreements (WTO) and its negotiations at various rounds thereof are restricted to international shipping, auxiliary services, access to and use of port facilities. Cabotage or coastal trade is not a negotiating topic and this means that countries are absolutely free to enact national laws on coastal trade and are under no obligations to member countries in that regard.²

As noted above, protectionism is the hallmark of coastal trade, and as we may see later, trade liberalization is merely economic development mechanism via the waiver system to enhance growth in the maritime subsector. Thus, a vessel other than a vessel wholly owned and manned by a Nigerian citizen, built and registered in Nigeria is prohibited from engaging in cabotage trade in Nigeria.

* Lecturer, Department of Commercial and Property Law, Faculty of Law, Delta State University, Oleh Campus; E-mail: aologe@delsu.edu.ng; Phone Number: +2348067158259

1. Ndikom O, *Nigerian Cabotage Act 2003: The Journey so Far*. Paper presented at Management of Cabotage Operations Course Organized by the Nigerian Institute of Transport Technology, Zaria (July 26th - 30th, 2010), p. 2.

2. Usoro ME, *Cabotage Policy and International Maritime Politics: The Nigerian Coastal and Inland Shipping Act 2003*; www.paulusoro.com < accessed on 12/11/2017 >

The topmost priority in cabotage regimes all over the globe has been the preservation of national interest in the defence and security of its territorial waters. A phenomenon of dearth in national tonnage detracts from the integrity of any littoral state in times of national or international emergency. Foreign owned vessels in such times will be unwilling for security and economic reasons to come to Nigerian coasts, thereby presenting devastating security implications.³ The Merchant Marine Act⁴ otherwise called the Jones Act which regulates maritime cabotage in America houses hundreds of ships and thousands of skilled sailors and restricts domestic cabotage to American flagged ships. It guarantees for American fleets wide range of privileges which have been termed by foreign companies to be unfair. The justification for the legal regime has always remained availability of large fleet of ships when the American nation requires it. This strict cabotage regime has obvious advantages in terms of national security, economy, commerce, among other things.⁵ Prior to the enactment of the Cabotage Act in 2003, there had been legal regime for regulation of coastal trade in Nigeria. The Merchant Shipping Act⁶ allowed ships owned by non- Nigerians to trade in or from Nigerian waters. The National Shipping Policy Act⁷ provides beyond coastal and inland waterways trade, regulations for deep sea shipping and international trade. Recent developments in maritime security breaches despite the existence of the Cabotage Act call to question the propriety or otherwise of the enforcement of the current policy in Nigeria.

Domestication of Cabotage Trade

The Coastal and Inland Shipping Act of 2003, also known as the Cabotage Act is an economic legislation passed by the National Assembly to equip Nigerians to own vessels and develop needed capacities in the maritime industry. In view of the above, the law restricts the use of foreign vessels in coastal trade, it promotes the development of indigenous tonnage so as to achieve capital formation in cabotage trade, it establishes a Cabotage Vessel Finance Fund, the transfer of required technology and development of maritime infrastructure, the conservation of foreign earnings and transfer of technical skills and generation of employment in the country.

The Act has a total of nine parts. Part I covers short title and interpretation sections, restriction of vessels in domestic coastal trade is provided under Part II, waiver regime in Part III, license to foreign vessel under Part IV, registration is provided in Part V, enforcement is provided under Part VI, offences under Part VII, Cabotage Vessels Finance Fund under Part VIII and miscellaneous under Part IX. In all, it contains fifty five sections.

Cabotage Trade

Cabotage in Nigeria means maritime transportation activities including the exploration, exploitation and transportation of the mineral or non-living natural resources. It also includes transportation of persons and goods whether of a commercial nature or value.⁸ According to Olarewaju,⁹ services that qualify as cabotage trade in include:

³ Talatu O. Ocheja, 'Carriage of Petroleum Products: Protection of Nigerian Shipping Companies under the Cabotage Act', In Epiphany Azinge and Osatohanmwun O. Eruaga (eds.), *Cabotage Law in Nigeria*, (Nigerian Institute of Advanced Legal Studies, 2012), p 115.

⁴ Merchant Marine Act, 1920 (P. L. 66-261)

⁵ Emma O. Omuojine, 'Nigerian Cabotage: Its Policy and Prospects', <<https://www.scribd.com/doc/24383693/Nigerian-Cabotage-It-s-Policy-Problems-Prospects>> <Accessed on 4th September, 2017>

⁶ Merchant Shipping Act, No. 27, 2007

⁷ National Shipping Policy Act, 1987

⁸ See the Cabotage Act, 2003 S. 2; Animi Awah, 'General Overview of Coastal and Inland Shipping Act', In Epiphany Azinge and Osatohanmwun O. Eruaga (eds.), *Cabotage Law in Nigeria*, (Nigerian Institute of Advanced Legal Studies, 2012), p. 60.

⁹ Olarewaju, A. Adegoke, 'Cabotage Regime in other Maritime Jurisdictions: A Comparative Study', In Epiphany Azinge and Osatohanmwun O. Eruaga (eds), *Cabotage Law in Nigeria*, (Nigerian Institute of Advanced Legal Studies, 2012), p.33.

- a. The carriage of goods and passengers originating from one coastal inland point (it could be port, terminal, jetties, pier etc.) to another point located within Nigeria.
- b. The carriage of goods and passengers by sea in relation to the exploration, exploitation, or transportation of the mineral or non-living natural resources in or under Nigerian waters.
- c. The carriage of goods and passengers on water or underwater by installations.
- d. The carriage of passengers originating from a point in Nigeria destined for Nigeria but transiting through another country then back to Nigeria for discharge.
- e. The engaging by vessel in any other marine transportation activity of a commercial nature in Nigerian waters. These include towage, pilotage, dredging, salvage, and bunkering etc.

It must be pointed out that activities such as passenger ferry services, dredging, fishing, shipbuilding, and repair have not received proper attention and development as much as carriage of petroleum product and ancillary service. Ocheja, in his work¹⁰ wherein he canvassed for protection of Nigerian shipping companies in the carriage of petroleum products, argued that section 5 which prohibits foreign vessels from engaging in the carriage of materials, petroleum products or supply services to and from oil rigs, platforms and installations whether offshore or onshore or within any ports or points in Nigerian waters does not touch on crude oil. However, it is submitted that if the Cabotage Act is rightly enforced, local shipping companies would be adequately protected.

Towage

Towage is one of the cardinal trade activity prohibited under the law. Towage is the act or service of towing ships and vessels, usually by means of a small steamer called a tug. A towage contract is an agreement whereby one party (tug owner), agrees to provide the service of towing or pushing as well as pulling of a vessel to the other (the ship owner). In practice, towage contracts requires the basic elements of offer, acceptance, consideration, intention to create legal relations etc. they are generally in standard forms; the main obligation is that of tug and tow. However, it must be noted that the practice of towage is the provision of towage service by the use of best endeavour and not the successful completion of towage to the named or assumed destination. Thus, a towage contract may be superseded and converted into salvage service.¹¹ This is because to act otherwise might lead to the doing of that which is humanly impossible, particularly in instances of radical change of circumstances. Therefore, a towage contract may be frustrated by a substantial change in circumstances. The key thing is that it must be impossible to carry out the contract not merely being difficult than was expected so as to justify the application of the common law rule of *lex non cogit ad impossibilia*. According to Awah,¹² the distinction is important because if the changed circumstances are brought about by breach of contract the contract continues in force; and ordinarily frustration discharges both parties from their obligations. Consequently, where towage contract becomes frustrated, the services rendered subsequently qualify as salvage services which under section 4 (2) of the Cabotage Act, 2003 allows foreign vessels to render such services to vessels in danger or distress within Nigerian waters.

Salvage

Salvage services are voluntary operations carried out with the intention of saving a vessel, its cargo and crew from grave danger and maritime peril or minimize damage to the environment. In international law, an obligation exists for vessels under distress to be assisted. See Art 98 of

¹⁰ Ocheja, *op cit.*, p. 110

¹¹ *Minnehaha* (1861) 15 Moo PC 133, 15 ER 444.

¹² Awah, *op cit.*, p. 66

UNCLOS.¹³ Salvage may or may not necessarily be carried out under a contract. However, it entitles a tug owner to make a claim since the commercial nature cannot be overlooked in spite of the duty under international law and copious provision under the Cabotage Act of 2003. Section 4 (2) of the Cabotage Act expressly lifts prohibition against foreign tug in respect of salvage operations. Furthermore, the law in section 8 (1) (a) lifts the necessity for requiring the determination of the Minister in respect of salvage services by foreign vessels. The essence of the restriction in section 4 (1) is clearly in recognition of the pure commercial aspect of salvage. Obviously, there are situations requiring salvage services which may not be for the purpose of saving life or rescuing vessel in maritime peril. Such situations are primarily commercial with no emergency considerations.¹⁴ Therefore, it is submitted that the waiver principle should be applicable where salvage is devoid of life saving emergency or pollution prevention emergency.

It should be noted that the scope of the restriction on foreign vessel is not total. This paper concedes to the argument of Ohio,¹⁵ because vessels classified as foreign vessels may be allowed to participate in coastal trade if they fall under any of the special exemption situations provided in the Act which includes vessels ownership¹⁶ seamen on board a vessel as well as the requirement for the vessel to be built in Nigeria on application made to the Minister. See sections 9, 10 and 11 of Cabotage Act, 2003; see also Clause 5.3 of 2007 Revised Guideline. It must be emphasised that the Minister is required to satisfy himself in the case of foreign owned vessels that there is no wholly owned Nigerian vessel suitable or available to perform the specified activity, in the case of foreign seamen that there is no qualified or available Nigerian officer for the position and finally he must satisfy himself that there is no ship building company in Nigeria that has capacity to construct the particular vessel.

In our discussion on salvage above the position of the law of a ship in maritime distress or emergency was presented as an exception to the cabotage restriction rule. In addition, a foreign vessel may be allowed in coastal trade in Nigeria in the following circumstances. To wit;

- a. Marine pollution emergency or any threatened risk with the approval of the minister or any other relevant government agency.
- b. Ocean research commissioned by the department of fisheries or a department responsible for such research.
- c. Marine scientific research with the consent of minister of foreign affairs or under the sponsorship of foreign government.¹⁷

Waiver Principle and its Applicability

The thorny issue in the cabotage practice is that the waiver regime and exemptions when considered side by side with the restrictions make the waiver regime and exemptions much more significant than the restrictions which ought to be the primary aim of the policy practice. Although, the waiver principle is internationally recognised system that is based on the principles of non-availability, reciprocity or bilateral agreement, for instance, waivers are granted in Spain under non availability Spanish/EU ships.¹⁸ In Germany it is granted to non EU ships on basis of non-

¹³ See also the Salvage Convention of 1989.

¹⁴ Usoro M, *op cit.*

¹⁵ Ohio, *op cit.*, p. 93

¹⁶ *The Araz* (No.1) NSC Vol.6 P116; *The Araz* (No2) NSC Vol.6 P149; and *The Araz* (No3) 1995, 5 NSC 389 at 402. It requires all 64 shares to inhere on a Nigerian and such interest should be indefeasible; Once indigenous capacity is developed, it could be enhanced through research and innovation to even build armoured and ballistic vessels specifically developed to suit Nigerian terrain. Available at <http://www.nimasa.ng>. <accessed on 10th December, 2017>

¹⁷ See S. 8 (1)

¹⁸ See Spain Law of State Ports and Merchant Marine 27/1992. Art. 81.

availability or if available at very unfavourable conditions as well as on basis of reciprocity.¹⁹ In Greece it is granted on basis of reciprocity,²⁰ while Finland and Sweden has bilateral agreements with Norway for waivers in respect of cabotage trade in 1997 and 1989 respectively.²¹

For the avoidance of doubt Cabotage Act provides in sections 9-11 thus:

- 9 The Minister may on the receipt of an application grant a waiver to a duly registered vessel on the requirement for a vessel under this Act to be wholly owned by Nigerian citizens where he is satisfied that there is no wholly Nigerian owned vessel that is suitable and available to provide the services or perform the activity described in the application.
- 10 The Minister may on the receipt of an application grant a waiver to a duly registered vessel on the requirement for a vessel under this Act to be wholly manned by Nigerian citizens where he is satisfied that there is no qualified Nigerian officer or crew for the position specified in the application.
- 11 (1) The Minister may on the receipt of an application grant a waiver to a duly registered vessel on the requirement for a vessel under this Act to be built in Nigeria where he is satisfied that no Nigerian shipbuilding company has the capacity to construct the particular type size of vessel specified in the application.
(2) The Minister shall immediately after the commencement of this Act compile and publish information on the type, size and characteristic of vessels and craft which are built in Nigeria.

The reality in Nigeria as encapsulated in sections 9-11 by the use of the wordings ‘no wholly Nigerian owned vessel that is suitable and available, no qualified Nigerian officer or crew, and no Nigerian ship building company for the capacity or particular type and size of vessel’ has been fraught with serious challenges. The first challenge is the suitability and availability clause under section 9, by all intent and purposes, there is general consensus that Nigeria does not have sufficient domestic capacity in both the ownership and infrastructural aspects of shipping. It is capital intensive venture and one which requires ever changing technology which only foreigners can cope with; therefore, indigenous companies may be unable to compete whenever suitability and availability is in issue.

Exploring the Need to Realize Local Content Demands

This clearly is the reality local firms have been grappling with especially in the oil industry where award of contract for carriage of petroleum and other wet cargo comes with stringent requirement for standards and capacity which the local firms cannot meet. Perhaps, the cause of action in the case of *The Incorporated Trustees of Indigenous Ship Owners of Nigeria and Ors v. The Union Grace and Ors*.²² and the case of *The Incorporated Trustees of Indigenous Ship Owners of Nigeria and Ors v. The MT Torrent and Ors*.²³ should be able to clarify the condition of local operators in Nigeria. In both cases the plaintiffs sought for similar reliefs. The plaintiffs sought for a declaration that the engagement of 1st defendant, a foreign built and crewed vessel owned by 2nd defendant, a foreigner involved in the carriage of petroleum products between Nigerian ports without license, registered or being granted ministerial waiver or approval was illegal and contrary to the Cabotage Act. The Federal High Court eventually struck out the cases for coming via wrong originating

¹⁹ See Amended German Law of Coastal Shipping. Art. 2.2 and 2.3

²⁰ See Greece Code of Public Maritime Law. Art. 1696.

²¹ See Commission for the European Communities, *Fourth Report on the Implementation of Council Regulations 3577/92* applying the principle of freedom to provide services to maritime cabotage 1999 - 2000, Brussels 24th April, 2002, cited by Ofuani A I, *op cit.*, p. 128

²² Suit No.: FHC/L/CS/990/09 Judgment delivered on 24/9/09 by Sani J.

²³ Suit No.: FHC/L/CS/1011/09 Judgment delivered on 14/10/09 by Sani J.

process of originating summons instead of writ of summons. This is a clear case of allowing technicalities to stand in the way of substantial justice and erosion from the promotion of indigenous participation in cabotage trade which is the thrust of cabotage regime in Nigeria.

On the issue of availability of qualified officers and crewmen, it can be argued that since the advent and operation of Nigerian Seafarers Development Programme²⁴ by NIMASA one thousand, forty five of seafarers have been trained both locally and internationally and with the planned take off of the Nigerian Maritime University Okerenkoko, the number is expected to be on the increase. However, a lot of those trained have not been engaged as a result of failure in enforcement. In addition, there appears to be active connivance between the foreigners and Nigerian regulators in the issuance of waiver for vessels and expatriates. Nonetheless, a major twist is the allegation that seafarers in Nigerian institutions are not well trained, consequently, ship owners are wary to entrust their vessels worth millions of dollars in incapable hands.²⁵ However, with sea time training Nigerian seafarers will be more competent.

Ship building and repair remains one area where investments should be encouraged and grant of waiver made. It is common knowledge that Nigeria²⁶ lacks the necessary capacity for ship building thereby attracting new investments. The concern here is the content and quality of the memorandum of understanding entered in order to develop this area. The objectives of any such memorandum of understanding such as ABG Indian shipyard²⁷ should be able to achieve the following in order to prevent losing an average of N26 Billion annually to foreign dry docking companies:²⁸

Firstly, it should be able to achieve an accelerated industrialization of maritime infrastructure in line with the local content cabotage policy. Secondly, it should pursue the promotion of a private sector-led economy. Thirdly, it should focus on attracting investment generation of both local and foreign direct investors to the country. Fourthly, it should have a provision of employment opportunities for Nigerian seafarers, and lastly, strengthening international cooperation.

In pursuance of the aforementioned objectives, an investor should be engaged for developing ship building and maintenance complex project with a consideration for the creation of Special Purpose Vehicles (SPV) for the purpose of realizing the objectives of the projects. This should be followed by an evaluation of proposed project and determination of same by a comprehensive feasibility

²⁴ NIMASA NSDP, <http://nimasa.gov.ng/press-center/post/nsdp-seatime-training-programme-on-course-dg-nimasa-maritime-capacity-development-on-course-experts>. <accessed on 15/12/2017>. It must be noted that NIMASA on 19th December, 2017 gave automatic employment to 20 beneficiaries of Nigerian Seafarers Development Programme cadets that passed out with distinction. It has also sponsored 150 cadets to Arab Academy of Science, Technology and Marine Transportation in Alexandria, Egypt and 89 to South Tyneside College, United Kingdom for on-board sea time training. Available at <http://www.nimasa.gov.ng/press-center/post/nimasa-offers-automatic-employment-to-20-cadets-with-distinction-commences-first-phase-of-sea-time-training-hails-amaechis-commitment-to-maritime-growth> <accessed on 20/12/2017>

²⁵ Tunji Brown, 'Nigerian shipowners are going through difficult times' ships & ports April 4, 2016, <http://shipsandports.com.ng/nigerian-ship-owners-are-going-through-difficult-times-tunji-brown/> <accessed on 30/11/2017>

²⁶ Nigerdock has a 25,000DWT graving dock, a 3,500DWT floating dock, multiple purpose workshops. See www.nigerdock.com accessed on 15/12/2017.

²⁷ Ship building and repair companies from India and South Africa have indicated partnership interest in Nigeria. Pp. 82 - 84.

²⁸ It has been revealed that 80% of vessels operating in Nigerian waters carry out both minor and major dock repair works elsewhere. Awah A, *op cit.*, p 83.

study, cash flow analysis and final stake holders meeting to determine the actual liabilities and other cost implications of the project(s).

The determination of exact recoupment of investment period after proper evaluation; which may be between 25 - 30 years should also form part of the investor's preoccupation. The project to be executed with the funds sourced through Treasury Bills/Public and Foreign Direct Investment (FDI) should be covered under agreement and supported by Public Private Partnership (PPP) Build Own Operate and Transfer (BOOT) and other related Joint Venture Agreements (JVA). Respective parties should undertake to source and secure the requisite funding required for the planning, construction, development, completion, commissioning and operation of the projects in accordance with the terms and conditions as may be agreed upon.

However, respective parties may have areas of cooperation. In furtherance of the objectives of any given MOU, the parties should spell out areas they agree to cooperate for instance. The investor should construct the project for the purpose of reducing the state's dependence on foreign vessels and serve as a complement to existing facilities as well as the development of localisation drive and to also create market for African region and in international markets. An investor is usually granted the right to review existing feasibility study to determine whether the development, construction and operation of the project is viable. If the development of such facilities proves to be feasible, the investor through the SPV be granted the exclusive right (either by a lease hold for 25 - 30 years or free and unencumbered clear title) to the property or any agreeable arrangement to manage the engineering, procurement, fabrication, construction, refurbishing, installation, commissioning, management and operation of the complex and for the operation of the facilities.

The investor should have full rights to autonomously operate as a strict business concern in accordance with acceptable international standard, including the ability to set prices and charges for installation of utilities, services, products, and such other consideration as customary with the industry in which the project operates. The investor should include a minority membership from public and other local partnership who should be involved in the procurement, commissioning and decision making process. The financial institutions and the investor will take engineering and construction decisions based on industrial standard principles only, and no other basis.

The ownership structures should be determined in a meeting with all the stakeholders and should be shown in ratio. Representation of the parties on the board of the SPV should be in the same proportion as the shareholding of the parties thereto. However, the MOU should be governed, construed and enforced in accordance with the laws of Nigeria, and relevant International Convention in the settlement of disputes. In the event of any dispute arising from the breach of or any question of any of the terms of the MOU, the parties should in the first instance negotiate in good faith to settle the matter amicably and if the parties are unable to settle the matter within three months of the occurrence of dispute, the matter should be submitted to arbitration panel with each party appointing one arbitrator, and a third arbitrator appointed jointly by the consultants. The Arbitral Proceeding should be held in accordance with the Arbitration and Conciliation Act, or any successor.

It should be noted that the provisions in sections 12 – 21 of the Cabotage Act represents the true extent of inclusion of Nigerians in the participation of the domestic maritime trade under the Cabotage Act. Section 12 determines that in the granting of waiver, the minister shall in the first instance consider a joint venture with Nigerians holding an equity participation of 60% free from any trust or obligation whatsoever in favour of non-Nigerians.

Challenges of Localisation Policy

It is submitted that while joint venture a panacea to the participation of indigenous shipping firms, it does not ipso facto guarantee or favour indigenous participation in view of the fact that 60% equity shareholding is not just a meagre 15% cabotage vessel finance contribution (as envisaged by the law) which in reality is ordinarily herculean for local operators, how then does the Nigerian businessman effectively source for his participation when one considers that the capital in dollar equivalent cannot effectively be obtained from financial institutions in Nigeria and when one considers the difficulty in servicing loans amidst scarcity and irregularity of job opportunities?²⁹

Ohio³⁰ rightly said, foreigners can safely frustrate the restriction provision by focusing on registration based on suitability of their vessels by virtue of section 12 (b) provided it has an office in Nigeria, it complies with the demands of relevant authorities, has all required valid certifications in line with international standards, and obeys all safety and pollution regulations. Therefore, section 12 (a) and (b) are ambiguous and of no meaningful help to indigenous operators because any vessel registered in Nigeria is either a vessel which is a Nigerian vessel or a foreign vessel. Foreigners can frustrate the restriction provision by refusing to partner with Nigerians under joint venture agreement and rather focus on satisfying the requirements which are demanded for their own registration under the Act.

Section 13 determines that the grant of waiver at any time shall not be more than one year. In the same vein section 17 determines that a license under the Act shall not exceed one year. These provisions are for all intent and purposes purely revenue generation save in their requirements of valid certificates and documents. Section 14 also provides that:

- (1) The Minister shall immediately after the commencement of this Act, establish and publish the criteria and guidelines for the issuance of waivers under this Act.
- (2) The waiver system provided for under this Act may be reviewed after five (5) years from the commencement of this Act by the National Assembly.

The 2007 Guidelines makes provisions for the issuance of waivers, these Guidelines also provides for the criteria and guidelines for the issuance of licence.³¹ However, it submitted that the operation of the regime now merits review since the prohibition regime is unlikely to neither assure local transport capability nor inhibit excessive foreign influence in domestic transport services due to the flexibility that has been attached to the restriction. Consequently, it is argued that the abuse of the waiver system may continue unabated, in the absence of review by the legislature.

The combined provisions in sections 15 and 16 are to effect that grant of licence to foreign vessels must adhere to terms and conditions stipulated. Foreign vessels must also adhere strictly to anti-pollution and safety regulations. The Minister under section 18 also wields the power to suspend or cancel or vary the terms and conditions of a licence in the following instances:

- (a) the owner or master of the licensed vessel is convicted of an offence under this or any other Act of the National Assembly relating to navigation or shipping;

²⁹ *The Araz* (No.1) NSC Vol.6 P116; *The Araz* (No2) NSC Vol.6 P149; and *The Araz* (No3) 1995, 5 NSC 389 at 402. It requires all 64 shares to inhere on a Nigerian and such interest should be indefeasible; Once indigenous capacity is developed, it could be enhanced through research and innovation to even build armoured and ballistic vessels specifically developed to suit Nigerian terrain. Available at <http://www.nimasa.ng>. <accessed on 10th December, 2017>

³⁰ Omiunu Ohio, 'Restrictions of Vessels for Domestic Trade under the Nigerian Cabotage Act: Extent and Scope.' In Epiphany Azinge and Osatohamwen O. Eruaga (eds.), *Cabotage Law in Nigeria*, (Nigerian Institute of Advanced Legal Studies, 2012), p. 99

³¹ S. 20, Cabotage Act, 2003. See also Clause 4.5 of the Revised Guidelines 2007.

- (b) there has been a contravention of or failure to comply with any term or condition to which the licence is subject to; or
- (c) it is expedient to cancel, suspend or vary the licence or permit for reasons of national or public interest.

Section 19 provides that where in the determination of the Minister it is deemed expedient to grant a licence in conformity with the Act, a tariff shall be imposed. The tariffs are subject to annual review by the Minister. The figures may be reviewed to introduce punitive and deterrent parameters as may be found necessary. See also Clause 9 of 2007 Implementation Guidelines. Finally, section 21 further prohibits foreign owned and crewed vessels from participating in domestic coastal trade without licence and due authorisation.

The Way Out

The current situation of indigenous ship owners has led many to canvass for review of the waiver system and to replace it with right of first refusal which is expected to give indigenous companies considerable advantage when bidding processes are undertaken. Stakeholders have also recently considered the adoption of Cost Insurance and Freight (CIF) instead of Free On Board (FOB) which will enable and boost indigenous ship owners to lift crude in Nigeria instead of foreigners.³² The National Shipping Policy Act formulated national insurance policy under section 14 (3) restricting export and import on C and F Terms and FOB respectively to government or public sector contracts alone to which Nigerians or a Nigerian registered companies while all private sector contract are excluded from benefit of the policy. The intervention by stakeholders would avert grave challenge hitherto posed to indigenous companies to compete with foreign companies who are by far better placed in the market. Shell Nigeria in her 2016 report published in 2017 announced it awarded 94% of their total number of contracts to Nigerian in 2016. However, the report conceded that the targets can prove challenging in a technical industry in which skills and capacity usually take time to acquire.³³

Flowing from above, it is argued that implementation of cabotage regime depends on strong political will in order to realise primary intention of the lawmakers which is to restrict foreign participation. The grant of waivers must not scuttle local content development and participation, it must go beyond mere revenue generation as being decried by some stakeholders, and adopt international principles of reciprocity. It is also suggested that rather than train seafarers abroad our maritime institutions can hire experts to help develop Nigeria's capacity and avoid loss of huge foreign exchange. Moneke³⁴ also suggested that where the Minister has decided that a waiver be granted, the waivers should be granted, first to wholly owned Nigerian vessels, secondly, to bareboat chartered vessel, joint venture owned vessel, and foreign vessel that have complied with the provisions of the Act. He stressed that the priority suggested was by implication the general intendment of the Act even though not expressly provided. He also maintained that the revised guideline, as opposed to its predecessor does not provide the procedure and requirements for renewal of licenses as it has done in the case of waivers. This he submitted that the process of renewal of license would be similar to the procedure for the initial application, and perhaps less complicated. Therefore, it is submitted that the Cabotage law needs a complete overhaul amending the Cabotage Act in order to achieve true Cabotage policy which will address the waiver system, and provide clear and adequate guidance as to application and renewal procedure for registration, licensing and exemption requirement of the Act.

³² Solomon Epele, 'Crude Lifting: Indigenous Ship Owners' Rising Hope' <http://www.dailytrust.com.ng/crude-lifting-indigenous-ship-owners-rising-hope.html> <accessed on 18/01/2018>

³³ Shell Nigeria, Briefing Notes, 2017 Edition Pp. 9, 29

³⁴ *Op cit.*

Conclusion

The practice of cabotage is both old and contemporary economic approach for justifying intervention or restriction to achieve certain results. In whatever policy framework, it is seen as an acceptable tool for achieving set economic goals, especially where competition is unfair and dominance is prevalent as in Nigeria. The practice, such as the reservation of all or part of national market opportunity for national flag ships or aircraft, is justified for political, socioeconomic, geo-cultural and security reasons. This underscores protectionist ideology; trade liberalization is merely economic development mechanism via the waiver system to enhance growth in the maritime sub sector. Thus, a vessel other than a vessel wholly owned and manned by a Nigerian citizen, built and registered in Nigeria is prohibited from engaging in cabotage trade in Nigeria.

Is Nigeria ready to take a leap progress and advance its cabotage potential? A reconsideration of its legal regime and bringing to bear a more favourable disposition clearly reflected on a rejig of extant laws is more than a necessity. From above, the relevance of the waiver principle is at variance with current economic conditions. It has robbed the local content requirements of its well-intended influence. It is consequently submitted that the Cabotage Act should be reviewed and the waiver requirement replaced with right of first refusal in order to sustain and preserve local content policy. In addition, the Nigerian Maritime University should have an increased funding to enable it operate with global standard in the training of seafarers in Nigeria.

RIGHT TO VOTE AND BE VOTED OF INTERNALLY DISPLACED PERSONS IN NIGERIA- A LEGAL REALITY OR MYTH?

Obiaraeri, Chinyere A.*

Abstract

The right to vote and be voted for is one of the many rights denied an IDP in Nigeria contrary to guarantees in international, regional and national laws. As displacement can be caused involuntarily by natural or human-made factors, this portends that every other person is vulnerable and potentially liable to be internally displaced, hence the need to safeguard the right to political participation of any eligible IDP. Using the doctrinal research method, relevant international, regional and national laws analysed, and this paper establishes that any denial of the right to political participation is a breach of a fundamental right. Accordingly, recommendations on how to safeguard the right of an IDP to vote and be voted were made including introduction of electronic voting which will obviate the need for the physical presence of the voter from the polling unit in any election cycle until when the IDP is fully rehabilitated and reintegrated.

Keywords- Right to vote, Right to be voted, Internal displacement, Internally displaced person, Political participation.

Introduction

This paper focuses specifically on the right to vote and be voted for of internally displaced persons¹ and how to make this right, out of the many specific needs of an IDP, functional and realisable. IDPs have become a category of concern based on indicators of need and vulnerability because everyone is a potential victim of internal displacement. During periods of internal displacement, many eligible voters who are internally displaced are deprived of the right to vote and be voted for. To address this major challenge, the paper will adopt the doctrinal research method to firstly examine the meaning of internally displaced person which is often mistaken to mean refugee, the general protection of the right to vote and be voted for including eligibility to vote under Nigerian laws and the negative impact of internal displacement on the constitutionally guaranteed right of the IDP to vote and be voted for. In the end, far reaching recommendations will be made to ensure that the right of political participation and especially the right to vote and be voted of IDPs is realised and does not remain illusory during displacement as is presently the case.

Meaning of “internally displaced person”

According to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa,² “internal displacement” means the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state borders. Therefore, an IDP is someone who is forced to flee his or her home but who remains within his or her country’s borders. An IDP is someone who has been forced to flee their home but never cross an international border. These individuals seek safety anywhere they can find it- in nearby towns, schools, settlements, internal camps, even forests and fields. Unlike refugees, IDPs are not protected by international law or eligible to receive many types of aid because they are

* **Ph.D; Senior Counsel, OBIARAERI, OBIARAERI, OBIARAERI & CO., 5 Ekwema Crescent, Owerri, Imo State, Nigeria.**

¹ Hereinafter abbreviated and referred to as “IDPs”.

² African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa otherwise called Kampala Convention. Adopted by the Special Summit of the African Union Kampala, Uganda 23rd October 2009. Entered into Force 6th December 2012. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa is hereinafter referred to as “African Union Convention on IDPs in Africa”.

legally under the protection of their own government.³ Put differently, according to the Guiding Principles on Internal Displacement, 1998, internally displaced persons are

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.⁴

IDPs are often referred to as refugees, although they do not fall within the legal definitions of a refugee as a person who has fled their own country because they are at risk of serious human rights violations there.⁵ On the other hand, *Article I(k)* of the African Union Convention on IDPs in Africa defines IDPs as

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

The key elements of these descriptive definitions are: (a) the involuntary character of the movement, and (b) the fact that such movement takes place within national borders.

It must be accentuated that IDPs include both citizens as well as other habitual residents of the country in which they are displaced, which may include, for example, stateless persons. According to the Internal Displacement Monitoring Centre,⁶ internally displaced people include, but are not limited to:

- (i) Families caught between warring parties and having to flee their homes under relentless bombardments or the threat of armed attacks, whose own governments may be responsible for displacing them;
- (ii) Residents of poor neighbourhoods rendered unsafe and uninhabitable, at least temporarily, by the impacts of weather-related, geophysical or technological hazards
- (iii) Indigenous communities forced from their ancestral lands to make way for the construction of dams and other infrastructure projects;
- (iv) Families pushed to leave their homes by constant harassment by local criminal gangs including secessionists and separatist groups;
- (v) Rural communities whose livelihoods are decimated by drought leaving them unable to feed their families and forced to seek external help elsewhere;
- (vi) Communities from coastal, mountainous or arid areas whose land and livelihoods are irrevocably lost because of gradual environmental degradation linked to the impacts of climate change.

IDPs are citizens “in flight and fright” but they are entitled to enjoy pretty much the same rights and freedoms under international and national laws as do other people in their country. Therefore,

³ UNHCR, “Who is an Internally Displaced Person?” <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/#:~:text=An%20internally%20displaced%20person%2C%20or,camps%2C%20even%20forests%20and%20fields.> Accessed 15/6/23.

⁴ ICRC, “Guiding Principles on Internal Displacement, 1998”, <https://www.icrc.org/en/doc/resources/documents/article/other/57jpgl.htm>. Accessed 16/6/23.

⁵ Amnesty International, “REFUGEES, ASYLUM-SEEKERS AND MIGRANTS”, <https://www.amnesty.ie/definitions-exactly-refugee-asylum-seeker-migrant/>. Accessed 16/6/23.

⁶ Internal Displacement Monitoring Centre, “Internal Displacement”, <https://www.internal-displacement.org/internal-displacement>. Accessed 26/10/23.

they are supposed to be insulated from some of the typical needs and protection risks that arise in internal displacement which include family separation, loss of documentation, freedom of movement in and out of camps, loss of property, and further exposure to the risk of secondary or onward displacement.

Right to vote and be voted for as an offshoot of right to political participation

According to the Office of the High Commissioner for Human Rights,⁷

Political and public participation rights play a crucial role in the promotion of democratic governance, the rule of law, social inclusion and economic development, as well as in the advancement of all human rights. The right to participate in political and public life is important in empowering individuals and groups, and is essential to eliminate marginalization and discrimination. Participation rights are inseparably linked to other human rights such as the rights to peaceful assembly and association, freedom of opinion and expression and the rights to education and to information.⁸

The right to political participation is guaranteed at international, regional and national levels. The right to political participation is far from being an orphan in the family of human rights. It is guaranteed in all comprehensive human rights instrument.⁹ This is a legal right meaning that it is a right cognisable in law. It means a right recognised by law and capable of being enforced by the plaintiff. It is a right of a party recognised and protected by a rule of law, the violation of which would be a legal wrong done to the interest of the plaintiff, even though no action is taken.¹⁰ It is expressly provided in *section 40* of the Constitution of the Federal Republic of Nigeria, 1999 as amended that

Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests: Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition.

In related terms, the right to vote and be voted for is guaranteed in Nigeria subject to the qualifying and disqualifying criteria for the various elective offices at the federal or State executives and legislatures under the Constitution. At the Local Government level, under *section 7(4)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended it is provided that

The Government of a State shall ensure that every person who is entitled to vote or be voted for at an election to House of Assembly shall have the right to vote or be voted for at an election to a Local Government Council.

The right to be registered to vote in an election into the legislative house is guaranteed in *section 77(2)* to the effect that

⁷ Hereinafter abbreviated and referred to as "OHCHR".

⁸ OHCHR, "OHCHR and equal participation in political and public affairs", <https://www.ohchr.org/en/equal-participation>. Accessed 10/6/23.

⁹ For instance, see *article 13* of the African Charter on Human and Peoples Rights, 1981, *article 21* of the Universal Declaration of Human Rights, 1948; *article 25* of the International Covenant on Civil and Political Rights, 1966. See also B Olutola, "Right to political participation under the 1999 Constitution: A fundamental or inconsequential omission?", https://www.researchgate.net/publication/358501476_RIGHT_TO_POLITICAL_PARTICIPATION_UNDER_THE_1999_CONSTITUTION_A_FUNDAMENTAL_OR_INCONSEQUENTIA_L_OMISSION. Accessed 10/6/23.

¹⁰ A-G of Lagos State v A-G of Federation (2004) LPELR-10(SC) (Pp. 97-98 paras. G) per Tobi, JSC.

The right of every citizen of Nigeria, who has attained the age of eighteen years residing in Nigeria at the time of the registration of voters for purposes of election to a legislative house, shall be entitled to be registered as a voter for that election.

Generally, the right to be registered is guaranteed in *section 12* of the Electoral Act, 2022 as follows:

- (1) A person shall be qualified to be registered as a voter if such a person-
 - (a) is a citizen of Nigeria ;
 - (b) has attained the age of 18 years ;
 - (c) is ordinarily resident, works in, originates from the Local Government, Area Council or Ward covered by the registration centre;
 - (d) presents himself to the registration officers of the Commission for registration as a voter; and
 - (e) is not subject to any legal incapacity to vote under any law, rule or regulations in force in Nigeria.¹¹

From the foregoing, by a combined reading of the relevant constitutional provisions and particularly *section 40* of the Constitution of the Federal Republic of Nigeria, 1999 as amended and *section 12* of the Electoral Act, 2022, it is axiomatic that a Nigerian citizen who meets the eligibility criteria is guaranteed the right to vote and be voted for. Right to vote and be voted is a constitutional and legal right. In *A-G of Lagos State v A-G of Federation*,¹² the Supreme Court per Tobi, JSC, held that a legal right is a right cognisable in law. It means a right recognised by law and capable of being enforced by the plaintiff. It is a right of a party recognised and protected by a rule of law, the violation of which would be a legal wrong done to the interest of the plaintiff, even though no action is taken. The determination of the existence of a legal right is not whether the action will succeed at the trial but whether the action donates such a right by reference to the enabling law in respect of the commencement of the action.

Furthermore, *Principle 22(1)* of the Guiding Principles of Internal Displacement, 1998 provides that internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:

- (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression;
- (b) The right to seek freely opportunities for employment and to participate in economic activities;
- (c) The right to associate freely and participate equally in community affairs;
- (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right; and
- (e) The right to communicate in a language they understand.

Under *article IX(2)(1)* of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, a key obligation of States parties relating to protection and assistance during internal displacement is

¹¹ *Section 12(2)* of the Electoral Act, 2022 provides that a person shall not register in more than one registration centre or register more than once in the same registration centre while under *subsection (3)*, a person who contravenes *subsection (2)* commits an offence and is liable on conviction to a fine not more than N100,000 or imprisonment for a term not more than one year or both.

¹² (2004) LPELR-10(SC) (Pp. 97-98 paras. G).

Take necessary measures to ensure that internally displaced persons who are citizens in their country of nationality can enjoy their civic and political rights, particularly public participation, the right to vote and to be elected to public office.

Whether the legal right to vote and be voted is available to an internally displaced person or whether it is a cosmetic right, a mirage or illusory will be interrogated in the ensuing paragraphs of this paper.

Internal displacement as an obstacle to right to vote and be voted

Many obstacles to equal political and public participation exist. These barriers may include direct and indirect discrimination on grounds such as race, colour, descent, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth, disability, nationality or other status. Even when there is no formal discrimination in connection with political or public participation, inequalities in access to other human rights may impede the effective exercise of political participation rights.¹³ However, this paper is centered specifically on how internal displacement including constructive internal displacement constitutes an obstacle to right to political participation in Nigeria and how this could be mitigated. For the records, many Nigerians have been internally displaced and consequently denied of the right to vote and be voted for. United Nations High Commissioner for Refugees¹⁴ Reports indicate that in Nigeria, Boko Haram and other non-state armed groups as well as clashes between herders and farmers have pushed some 3.0 million Nigerians (as of November 2021) out of their homes, especially in parts of North-East Nigeria and the country's Middle Belt, but increasingly also in North-West Nigeria.¹⁵ According to the Displacement Report from Round 43 of Displacement Tracking Matrix which is an assessments carried out by the International Organisation for Migration, a total of 2,375,661 IDPs were identified in 483,367 households.¹⁶ This number is as unsettling as it is growing daily by increased cases of internal displacement with obvious implication for the right to political participation of eligible IDPS.

The European Union Election Observation Final Report was emphatic that data on registration and voting by internally displaced persons was not published and that without a detailed operational framework for inclusion, regional commitments and constitutional guarantees of citizens' equality cannot be achieved.¹⁷ Among registered voters, internally displaced women often lacked PVCs, disproportionately impacting their right to vote according to civil society. European Union observers further noted evidence of weak strategic engagement on IDP related actions from INEC to state level, varied degrees of preparedness and planning, and inconsistent procedures for polling units, voter awareness, and IDP voting from various states, including Benue, Niger and Borno. A lack of planning was evidenced in reports of non-distribution of PVCs to large numbers of IDPs, notably in Benue state. The 2023 cash crisis and lack of access to transportation also impacted participation, while Election Day incidents of violence and intimidation hampered voting at IDP polling units in Edo, Benin City.¹⁸

There is no gainsaying that every eligible Nigerian including IDPs is constitutionally entitled to be registered, vote and be voted for. It has been stated earlier that *section 12* of the Electoral Act,

¹³ OHCHR, "OHCHR and equal participation in political and public affairs", <https://www.ohchr.org/en/equal-participation>. Accessed 10/6/23.

¹⁴ Hereinafter abbreviated and referred to as "UNHCR".

¹⁵ UNHCR Nigeria, "Internally Displaced People", <https://www.unhcr.org/ng/idps>. Accessed 16/6/23.

¹⁶ International Organisation for Migration, "Nigeria — Displacement Report 43 (February 2023)", <https://dtm.iom.int/reports/nigeria-displacement-report-43-february-2023>. Accessed 18/6/23.

¹⁷ European Union Election Observation Mission NIGERIA 2023 Final Report, page 9.

¹⁸ European Union Election Observation Mission NIGERIA 2023 Final Report page 40.

2022 provides the criteria for registration of voters for all eligible Nigerians without exception. The said *section 12* of the Electoral Act, 2022 does not however make any specific provision for registering IDPs although *section 10* of the Electoral Act, 2022 mulls the idea of continuous registration under which an IDP who meets up the registration criteria set out therein may be registered. There is also provision for transfer of registered voters under *section 13* of the Electoral Act, 2022 to the effect that

- (1) A person who before the election is resident in a constituency other than the one in which he or she was registered may apply to the Resident Electoral Commissioner of the State where he or she is currently resident for his or her name to be entered on the Transferred Voters List for the constituency.
- (2) An application under subsection (1) shall be accompanied by a copy of the applicant's voters' card and shall be made not later than 90 days before the date of an election in the constituency where the applicant is resident.
- (3) The Resident Electoral Commissioner to whom an application is made under this section shall cause the applicant's name to be entered in the Transferred Voters' List if he or she is satisfied that the applicant is resident in a polling area in the constituency and is registered in another constituency.
- (4) Whenever an electoral officer on the direction of the Resident Electoral Commissioner enters the name of any person on the Transferred Voters' List for his or her constituency, he or she shall-
 - (a) assign that person to a polling station or a polling area in his or her constituency and indicate in the list the polling area or polling station to which that person is assigned;
 - (b) issue the person with a new voters' card and retrieve his or her previous voter's card; and
 - (c) send a copy of the entry to the electoral officer of the constituency where the person whose name has been so entered was originally registered and upon receipt of this entry, that electoral officer shall delete the name from the voters' list.

As forward looking as the forgoing provisions of *section 13* of the Electoral Act, 2022 is, it does not however assuage or address the fact of denial of voting opportunity to the IDP. What the above provision offers is an opportunity for a registered voter to voluntarily transfer his or her voting unit to a brand new voting area and this shall be made not later than 90 days before the date of an election in the constituency where the applicant is resident. Internal displacement has no timetable or calendar as it can happen any time in which case internal displacement can happen after the 90 days transfer window allowed under the law. Besides, an IDP is entitled to vote in the area of his residence as of right and by choice and not to be forced by the fact of internal displacement to transfer to a new voting area or be denied the right to vote completely. There is therefore a compelling need to provide durable legal solutions to the right of the IDP to vote and be voted for.

Recommendations

To guarantee the right to vote and be voted for of IDPS, it is recommended among other things that-

- (a) the nascent Electoral Act, 2022 should be amended to guarantee specific provisions for (i) the protection of the registration of IDPs and (ii) giving practical effect to the voting rights of IDPs. Registration of IDPs as voters should form an exception to the provisions of *section 13* of the Electoral Act, 2022 placing a timeline of 90 days before application for transfer of voters to a new voting area.

- (b) Electronic Voting procedures already contemplated under the Electoral Act, 2022 should be fully activated to give impetus to virtual votes. IDPs will be able to vote if all voters are enabled to vote from anywhere without the necessity for physical presence in the polling units.
- (c) Unjustified breach of the voting right or right to be voted of IDPs should raise justiciable grounds for invalidating an election on grounds of unlawful exclusion of eligible voters. The only obligation of INEC towards a vulnerable person is that found in *section 54(2)* of the Electoral Act, 2022 to the effect that
The Commission shall take reasonable steps to ensure that persons with disabilities, special needs and vulnerable persons are assisted at the polling place by the provision of suitable means of communication, such as Braille, large embossed print, electronic devices.

Although *section 152* of the Electoral Act, 2022 interprets “vulnerable persons” to mean a woman, child or person living under extreme poverty, person with disability, the sick and the elderly, refugee, internally displaced person, migrant, person in detention or ethnic and religious minority groups, the provision in *section 54* above does not address the denial of voting right of IDPs.

- (d) The right of IDPs to vote and be voted for deserves to be expressly recognised without more. By necessary analogy, the right of prisoners to be registered voters was recognised in the case of *Emenuwe & Ors v INEC & Anor.*¹⁹ In that case, it was held among other things as follows:

There is no doubt that where there is a right in law, there must also be remedy provided by the law, *Ubi Jus Ubi Remedium*. ..., the right to register and vote are rights vested on the Appellants and those they represent by the Constitution. It cannot be subjected to any limitation by way of statutory limitation of the Electoral Act. *Section 12 (1) (e)* of the Electoral Act talks about a legal incapacity to vote under any law or regulation in force in Nigeria. Unless the Respondents can show that apart from being in prison custody, the Appellants suffer any legal incapacity for example being of unsound mind etc, the Respondents are obliged by law to make every effort to actualize the constitutional rights of the Appellants to vote. Thus the duty to ensure access to registration centres therefore is both statutory and constitutional as it creates a legitimate expectation that no substantial part of potential voters shall be denied access to the centres for registration. It seems to me that there is a misunderstanding of the position of the learned trial judge by the learned counsel. The opinion of his Lordship was clear to the effect that the discretion must rest on the executive bodies involved as Respondents in this litigation to actualize and give effect to the rights of the prisoners. His Lordship stated clearly on page 125 of the record thus: Again the right to vote is a choice, not a duty which can be exercised at the instance of the citizen, at his own volition. Therefore, there is no presumption of the exercise of such a right until it is asserted. In the case of a citizen who is not in prison, his right is asserted only when he presents himself at the registration center to register and/or a polling unit to vote. On the other hand, a prison inmate asserts his right to register or to vote and when he signifies to the prison authority of his desire either to register or to vote and where the prisoner asserts the right to register or to vote, the prison authority has the duty to ensure that the prisoner exercises his right to register or to vote accordingly.

¹⁹ O (2018) LPELR-46104(CA) (Pp. 37-40 paras. D), per Ogunwumiju, J.C.A, (as he then was).

Thus what the prison authority can do is either to take the prisoner out to register or to vote as the case may be or liaise with the electoral body to make special arrangement for the registration of such a prison inmate. Once the prison office notifies the electoral body of the prisoner's assertion of his right to vote, it becomes a statutory duty on the Electoral body to take necessary steps to ensure the prisoner has been registered or has voted. Failure to take such necessary steps would amount to illegal violation of the prisoner's voting right." ... I cannot see any impediment to the grant of prayers 8 which is an order of mandatory injunction directing the 1st Respondent to update and include in the National Register of voters, names of Nigerian citizens in the custody of the 2nd Respondent.²⁰

- (e) The suggestion by the EU Observer Mission is apposite and bears repeating to the effect that the right to vote of internally displaced voters should be enhanced by issuing a clear timely operational framework evidenced by detailed information on key voter data, specified temporary special measures, polling unit locations, security arrangements, targeted voter education planning and the early publication of post-election evaluations is not only timely but apposite.²¹

Conclusion

Internal displacement constitutes a clear obstacle to the inalienable and fundamental right to vote and be voted for of IDPs which said right is sacrosanct and inviolable by reason of international, regional commitments and constitutional guarantees. Whether under the Nigerian Constitution or various international instruments and the Guiding Principles on Internal Displacement, government has an obligation to guarantee an IDP the right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right. It is believed that making specific provisions in the Electoral Act, 2022 for the voting rights of IDPs and the introduction of electronic voting will bring an end the denial of the right to participation of IDPs in Nigeria.

²⁰ In *Thomas & Ors v Olufosoye* (1986) LPELR-3237(SC) (Pp. 40-41 paras. F), Oputa, JSC, (as he then was) held that "it is only a legal wrong or *injuria* that can ground an action at law."

²¹ European Union Election Observation Mission, NIGERIA 2023 Final Report, 43.

REGULATION OF ELECTRONIC CONTRACTS IN NIGERIA AND SOUTH AFRICA: A COMPARATIVE ANALYSIS

Uju Obuka*

Abstract

This paper appraises the legal regime for electronic contracts in Nigeria and South Africa. The paper finds that South Africa has one of the best legal frameworks for electronic transactions in the world and that contrary to the position in South Africa, there is no specific legislation on electronic contracts presently in Nigeria, instead the courts in Nigeria have continued to adopt liberal interpretation to the existing contract and commercial laws to accommodate electronic transactions in Nigeria. The paper contends that the successes recorded in electronic transactions in South Africa are attributable to a well-articulated legal regime and Nigeria should adopt the position in South Africa. The paper employs doctrinal methodology with analytical and comparative approaches. The necessity of establishing the accuracy of the findings on the inevitability of enacting a comprehensive law on electronic transactions like that of South Africa is the justification for using the method. The paper concludes by making a case for the outright enactment of the Electronic Transactions Bill into law.

Keywords: Electronic contract, Nigeria, South Africa, Electronic Communications and Transactions Act, Electronic Transactions Bill

Introduction

Hitherto, the law revolved around physical objects. Tangible goods are bought and sold, and information and content are distributed on paper. There is typically something tangible delivered from seller to buyer. Likewise, the medium of commerce is a tangible object i.e. a paper.¹ Activities that, before the computer age, took place only in the physical spheres like land, air, and sea are now taking place over cyberspace and are governed by laws made to handle the peculiar nature of those spaces.² Today, those realities have been fundamentally altered. The internet and computers have virtually taken over most of the functions being undertaken in actual reality. The emergence of the internet over the last couple of years as an important tool for the conduct of business and other social functions has created a yearning gap in our legal system necessitating that laws be put in place to cater to electronic-related activities, or that the existing laws be amended or adapted to conform with advancements in modern technology.

Many advanced countries of the world have long enacted their respective cyber laws following the United Nations Convention on International Trade Law (UNCITRAL) Model Law on E-commerce which was enacted to serve as a guide to nations to come up with legislation that will give legal recognition to online transactions.³ For instance, South Africa enacted the Electronic Communications and Transactions Act (ECTA) in 2002. The ECTA⁴ has been adjudged one of the best in the world as far as electronic transactions are concerned. Apart from providing for the legal recognition of online contracts, admissibility of electronic documents, data protection, protection of consumers of online goods and services as well as the provision of mechanisms for checking cybercrimes, it is the first legislation to provide for the exact moment an electronic

* Uju Obuka, Ph.D., LL.M, BL, LL.B, Senior Lecturer in Law, Faculty of Law, University of Nigeria Nsukka. uju.obuka@unn.edu.ng. Contact: 08033280467.

¹ T Smedinghoff, 'Online Law: What's New and Different' in T J Smedinghoff (ed), *Online Law: The SPA'S Legal Guide to Doing Business on the Interne* (Addison – Wesley Developers Press 1996), 3.

² Banwo & Ighodalo, 'Milestone in Electronic Commerce: How the Cybercrimes Act 2015 Impacts Businesses' <<https://www.banwo-ighadalo.com>> accessed 16 June 2023

³ See UNCITRAL Model Law on Electronic Commerce 1996 with additional art.5bis adopted in 1998 General Assembly Resolution 51/162 of 16 December 1996 <[https:// www.uncitral.org](https://www.uncitral.org)> accessed 20 June 2023.

⁴ 25 of 2002.

contract would be deemed to have come into existence. The same cannot be said about Nigeria which has not done anything serious since 2015 when the Nigeria Electronic Transactions Bill was curled from the ECTA of South Africa. This invariably has accounted for the uncertain legal environment concerning online transactions in Nigeria. It is in this context that this paper advocates the enactment of electronic transactions law as obtainable in South Africa to accord legal recognition to electronic contracts in Nigeria. The paper is divided into four parts. Part one is the general introduction and it gives the background to the paper. Part two deals with the legal regime for electronic contracts in Nigeria. Part three focuses on the legislative framework for electronic contracts in South Africa and lessons for Nigeria. Part four is the concluding part and makes a case for the adoption of the position in South Africa to boost electronic contracts in Nigeria.

Legal Regime for Electronic Contracts in Nigeria

There is no specific law yet for the regulation of electronic contracts presently in Nigeria but, significant efforts have been made at legislating for electronic transactions in Nigeria. Aside from that, the extant contract laws have been adapted for use in electronic contracts. This subhead is dedicated to showing the lacuna in the present legislation that has necessitated the enactment of comprehensive legislation to govern electronic contracts in the country.

The Old Era

In Nigeria, a contract is regulated by the contract law of the different states.⁵ The said laws provide for the rights, obligations, and liabilities of parties to the contract. Equally, the laws provide that a contract may be entered into in writing, orally, or by conduct. Section 6 of the Enugu State Contract Law for instance provides:

Subject to this part of the law and any other written law from time to time in force in the state, there shall be no legal requirements as regards form for a valid contract, and so a contract may be made orally, or in writing without seal or by deed.⁶

Although the above-mentioned section says that there shall be no legal requirements as regards the form for a valid contract, it went ahead to stipulate the forms a contract may take. It may be made orally, in writing without seal, or by deed. A critical appraisal of the modes of entering into contracts stipulated by the above provision will reveal that only the traditional means of contracting are envisaged, and the parties to the contract must transact in the presence of each other. Writing in the context used in the laws connotes inscriptions on tangible substances, and the conduct of the parties can be deduced from the previous course of dealings between the parties. Thus one can say with reasonable certainty that the framers of the extant laws on contract had paper-based contracts in mind when they fashioned the laws. It would not be surprising to conclude so because computers and related devices were not in existence at the time the laws were enacted. Nowadays, computers and related devices have overtaken most of the functions being performed by human beings with the result that computers and related devices are now employed in the formation of contracts. This state of affairs implies that the status of contracts entered into using these technological advances is not certain as far as the existing contract laws are concerned in Nigeria.

Even admitting those contracts into proceedings was fraught with a lot of challenges, ranging from determining whether those pieces of evidence qualify as documentary evidence, and if they do, whether they should be classified as primary or secondary evidence. Most computer-generated evidence was denied admissibility on account of the uncertainty of their status under our law. This problem was heightened by the fact that the definition of documents under the old Evidence Act did not incorporate electronic impulses or data messages.

⁵ See for example, Law Reform (Contracts) Law Cap L 81 Laws of Lagos State 2015, Contract Law Cap 26, Revised Laws of Enugu State 2004, and Contract Law Cap 32 Laws of Anambra State 1991.

⁶ Contract Law Cap 26, Laws of Enugu State 2004.

Section 2 of the Act defined document as:

Books, maps, plans, drawing, photograph, and also includes any matter expressed or inscribed upon any substance by means of letters, figures, or marks or by more than one of these means intended to be used or which may be used for the purpose of recording that matter.⁷

A careful analysis of the above section will reveal that no amount of stretching or interpretation will bring in computers and related devices within the purview of this definition. This therefore accounted for why most courts were reluctant to admit computer-generated evidence under the old Evidence Act. This reluctance on the part of the court and the lack of specific legislation on electronic transactions created an unpredictable legal landscape for electronic contracts in Nigeria, which invariably reduced the volume of electronic transactions in the country. The frustration encountered in handling new technological advances in Nigeria led to the formulation of a law that will promote the use of information technology in Nigeria.

National Information Technology Development Agency Act 2007

The earliest recognition of the necessity to regulate electronic transactions in Nigeria started with the enactment of the National Information Technology Development Agency Act.⁸ The major objective of the Act is the establishment of the National Information Technology Development Agency to plan, develop, and promote the use of information technology in Nigeria. A careful analysis of the responsibilities of the agency will reveal that the agency was set up to promote and encourage the use of information technology in Nigeria, and to play an advisory and supervisory role as far as information technology is concerned. The Act falls short of providing for the regulation of electronic contracts and other related transactions. This shortcoming necessitated the need to enact laws that would regulate electronic transactions in Nigeria.

Electronic Transactions Bill of 2015

The enactment of the National Information Technology Development Agency Act ushered in a new phase in the enactment of legislation to regulate electronic transactions in the country. However, most of these efforts are in the stages of draft bills pending before the National Assembly.⁹ The most significant of these Bills and relevant to the regulation of electronic contracts is the Electronic Transactions Bill of 2015. The Bill was passed by the National Assembly on 3 June 2015, and it has not been assented to as at the time of writing this article. The Bill provides for the validity of contracts, matters of evidence, data protection, consumer protection, electronic signatures, and payment systems, amongst other issues. Highlighting the advantages of the Bill, Aniaka had this to say

The Bill is remarkable in that, it is an attempt to deepen the benefits derivable from electronic transactions and address, as much as possible, certain legitimate concerns about electronic transactions in Nigeria, such as non-disclosure of full information on products and services, deceptive advertisement, improper description of products, delivery of defective products, poor informal dispute settlement procedures, double payments and poor customer service.¹⁰

⁷ Evidence Act Cap E14, LFN 2004 s 2.

⁸ (NITDA) Act No 60 2007.

⁹ These Bills include; Electronic Transactions Bill of 2015, National Internal Security Bill of 2009, Security Communications Interception and Monitoring Bill of 2009, Critical Infrastructure Protection Bill of 2009, Computer Security & Protection Bill of 2009, Electronic Commerce (Provision of Legal Recognition) Bill of 2008, Electronic Fraud (Prohibition) Bill of 2008, Nigerian Antitrust (Enforcement, Miscellaneous Provisions etc.) Bill of 2008, Cyber Security and Data Protection Agency (Establishment) Bill of 2008.

¹⁰ See O Aniaka, 'Analyzing the Adequacy of Electronic Transactions Bill 2015 in Facilitating E-commerce in Nigeria' <<https://www.ssrn.com>> accessed 16 June 2023.

Analysis of the Bill

The Bill provides that no information shall be denied legal effect, validity, or enforcement solely on the ground that it is in electronic form.¹¹ However, the effectiveness of such information is not affected by the location where the information was created or used or by the place of business of its creator.¹² Again the Bill provides that electronically generated documents are admissible if the document met the reliability test. Furthermore, the Bill provides that the use of electronic material is not mandatory. Thus, consent is required to use electronic material.¹³

Again the Bill provides that electronic information is an original document and satisfies the requirement of writing if the following criteria are met:

- (i) That information must be accessible to be usable for subsequent reference;
- (ii) The information is capable of being retained by the person to whom it is given;
- (iii) Where a form is prescribed, the information in electronic form is organized in the same or substantially the same form.¹⁴

However, the integrity of the information provided in such electronic form is maintained only if, the information remains complete and unaltered save for any endorsement thereon or changes that arise in the normal course of communication, storage, or display. The combined effects of s. 4 (1) (3) and s.6 of the Bill is that the requirements of writing, signature, and prescribed form are deemed to be complied with when done electronically and, electronic records or data messages qualify as original documents.

Section 11 of the Bill provides for the validity of electronic signatures. It provides that:

- (a) Where the signature of a person is required, that requirement is met in relation to an electronic communication, if any method is used to identify the person and to indicate the person's approval of the information communicated;
- (b) Having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated; and
- (c) The person to whom the signature is required to be given, consents to that requirement being met by way of the use of the method mentioned in paragraph (a).

To ensure the authenticity and integrity of electronic signatures, section 13 provides for electronic signature/certification services to be provided by a Certification Authority in accordance with the provisions of the accreditation granted under the electronic signature administration. Thus only a certified electronic signature will be admitted as a genuine signature.

Section 17 combined with s 35 (1) provides for the protection of personal data. Thus, personal data shall only be processed if, at least one of the following conditions is met:

- The data owner has given his consent to the processing;
- The processing is necessary for the performance of a contract to which the data owner is a party, or for the taking of steps at the request of the data owner, with a view to entering into a contract;
- The processing is necessary for compliance with any legal obligation to which the data holder is subject, other than an obligation imposed by contract;
- The processing is necessary in order to protect the vital interests of the owner;

¹¹ Electronic Transaction Bill s 3.

¹² S 10.

¹³ S 14.

¹⁴ S 4 (1) & (3) 6.

The processing is necessary in the interests of the public and good governance.

By s 17 (5) & (7) personal data processed for whatever purpose will not be kept longer than is necessary and, shall not be transferred to a foreign country unless the foreign country has an adequate level of protection for the rights and freedom of data owners concerning the processing of personal data. S 35 (1) mandates service providers or vendors to ensure the confidentiality of all personal information collected from the consumer, except where the consent of the consumer is obtained or where the law demands disclosure.

Section 26 provides for the validity of electronic contracts. It provides that:

- (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and acceptance may be expressed by means of a document as defined in this Act.
- (2) Where a document is used in the formation of a contract, the contract shall not be denied validity or enforceability on the ground that an electronic document was used for that purpose.
- (3) A contract may be formed by the interaction of electronic agents, provided that the interaction results in the agents engaging in operations that confirm or indicate the existence of a contract.

Section 33 provides for the protection of consumers of goods and services. By Sub-section (1) providers of services or vendors shall provide a consumer with sufficient and relevant information to enable informed decisions on the part of that consumer. Section 35 (2) mandates service providers or vendors to make their privacy policy public and easily accessible to the consumer before the commencement of the contract, and whenever personal information is either requested or collected. Equally, Section 36 mandates service providers or vendors to prominently display a return address and, clearly provide a simple procedure by which a consumer can notify the sender that he does not wish to receive unsolicited electronic message.

Shortcomings of the Bill

The above-mentioned objectives and provisions are laudable and will boost electronic contracts if enacted into law. However, the Bill is not without shortcomings. The shortcomings relate to the following:

- (i) The Exact Time a Contract comes into Existence

The Bill provides for the formation of contracts using electronic communication, and that such contracts are valid and enforceable if the conditions stipulated in the Bill are met.¹⁵ However, the Bill does not provide for the exact time a contract can be said to have come into existence, and whether the display of goods on online platforms amounts to an offer or an invitation to treat. The Bill also does not state when an email offer will be deemed to have been made. Issues bordering on legal principles of offer and acceptance have been the subject of several judicial pronouncements, and clarity is desired concerning how they apply in online transactions.¹⁶

- (ii) Non-Delivery of Goods and Services

Another shortcoming of the Bill is the issue of non-delivery of goods and services which have been paid for. One of the major highlights of the Bill is the provision requiring the vendors of goods and providers of services to disclose information about themselves, the goods, and the details of the transaction. However, there is no corresponding provision addressing the issue of

¹⁵ Ss 26-29.

¹⁶ Aniaka (n 10).

non-delivery of goods that have been paid for. This is a major flaw because it gives room for obvious evasion of liability on the part of the online merchant.¹⁷

(iii) No Guarantee of the Safety of Electronic Payment System

While the Bill makes provision for payments to be made by electronic means, it does not provide a guarantee as to the safety or security of making payment by such means. However, as noted above, the Cybercrimes Act deals with matters relating to cyber security and should be read together with the Bill, when passed into law.¹⁸

(iv) Enforcement and Conflict of Laws

Conflict of laws is the main issue with contracting with parties from different countries. The Bill provides for the time an electronic communication is deemed to be sent when it is deemed to be received, and from where it is deemed to be sent and received. The Bill is however silent on what happens where the only address provided is an email address, and which law will apply to the transaction? Which court has jurisdiction to entertain any dispute that may arise between the parties? This uncertainty in the law needs urgent attention and amendment because a law needs to be definite in its provisions.

(v) Specialized Courts and Tribunals

Electronic Transactions Bill failed to recognize that electronic transactions are intricate areas that require specialized practitioners and tribunals to handle the complex issues that are bound to erupt in the relationship between the parties and provide for special courts or tribunals that will entertain disputes whenever they arise in electronic transactions. The Bill also did not provide for specialized training for the personnel that will Mann these courts and tribunals. This is a serious issue that needs to be tackled. It is submitted that if these shortcomings are tackled, the Bill when enacted into law will be an all-encompassing legal instrument for the regulation of electronic transactions in Nigeria.

Cybercrimes (Prohibition, Prevention, etc.) Act 2015

The Cybercrimes (Prohibition, Prevention, etc.) Act is the first of its kind in Nigeria, as this was the first time legislation was provided strictly for cybercrimes. A precursor of the Act; the Telecommunications and Postal Offences Act,¹⁹ applies mainly to telecommunications and postal offences even though it provides punishment for any person who engages in computer fraud or does anything relating to fake payments, whether or not the payment is credited to the account of an operator or the account of a subscriber. Judging from the objectives of the Telecommunications and Postal Offences Act, it is not strictly for the regulation of cybercrimes.

Equally, the Advance Fee Fraud and Other Fraud Related Offences Act²⁰ prescribes punishment for any person who engages in fraudulent activity but is not strictly for cybercrimes. The increase in online activities in Nigeria with the attendant criminal activities on the internet necessitated an urgent need to formulate rules that will deal decisively with cybercrimes. The Cybercrimes Act was therefore enacted in 2015. The main purpose of the Act is to provide an effective, unified, and comprehensive legal, regulatory, and institutional framework for the prohibition, prevention, detection, prosecution, and punishment of cybercrimes in Nigeria. The Act also ensures the protection of critical national information infrastructure and promotes cyber security and the

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Telecommunications and Postal Offences Act 1995 but repealed in 2004 and 2016 respectively.

²⁰ 2006.

protection of computer systems and networks, electronic communications, data and computer programs, intellectual property, and privacy rights.

i. Highlights of the Cybercrimes (Prohibition, Prevention, etc.) Act

The Act vests the power of apportioning and designation of certain computer systems and networks as critical national information infrastructure on the President of the Federal Republic of Nigeria, as well as the power of prescribing minimum standards for the handling of critical national information infrastructure, if recommended by the National Security Adviser to the President.²¹ The president may delegate the exercise of these powers to the office of the National Security Adviser.²² It is a criminal offence to access a computer that houses critical information infrastructure that is vital to national security. Such an act will render the person who commits the act liable to imprisonment for not more than 5 years or to an option of a fine of five million naira or both imprisonment and fine.²³

It is also a criminal offence to have unlawful access to a computer with the intent to defraud other people.²⁴ A term of imprisonment of between 3-5 years and a fine ranging from seven to ten million awaits anybody who commits an offence under these sections. Equally, the Act finally criminalizes cybersquatting in Nigeria's cyberspace and this is a welcome development in the corporate world which suffers economic losses from the menace. Anybody found guilty of this offence will be liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not more than five million or to both imprisonment and fine. Also, the Act criminalizes the negligent handling of personal data of citizens by service providers in Nigeria.²⁵ The Act provides individual and corporate penalties for contravention of the relevant provisions of the Act.

Furthermore, the Act provides for the regularity and binding effect of electronic signatures in respect of purchases of goods and other transactions.²⁶ However, the Act removes from its ambit the application of electronic signature to the following:

- (a) creation and execution of Wills, Codicils, and or other testamentary documents;
- (b) death certificate;
- (c) birth certificate;
- (d) matters of family law such as marriage, divorce, adoption, and other related issues;
- (e) issuance of court orders, notices, and official court documents such as affidavits, pleadings, motions, and other related judicial documents and instruments;
- (f) any cancellation or termination of utility services;
- (g) any instrument required to accompany any transportation of dangerous materials either solid or liquid in nature; and
- (h) any document ordering withdrawal of drugs, chemicals, and any other material either on the ground that such items are fake, dangerous to the people or the environment, or expired, by any authority empowered to issue orders for withdrawal of such items.²⁷

Offences that were not originally designated as crimes under any known law in Nigeria were created by the Act and, individual and corporate liabilities and penalties such as committal of the directors of affected companies to various terms of imprisonment, as well as imposition of heavy

²¹ Cybercrimes (Prohibition, Prevention etc.) s 3.

²² S 4.

²³ S 6.

²⁴ Ss 13-15.

²⁵ Ss 25, 29 and 34.

²⁶ S 17 (1).

²⁷ S 17 (2).

finances on affected organizations were also created.²⁸ Business entities are mandated to report incidents amounting to cyber threats to the National Computer Emergency Response Team (CERT) Coordination Centre.²⁹ Service providers are to collaborate with law enforcement agents (including by providing access to data stored) concerning electronic transactions.³⁰ Institutions for the enhancement of cyber security are established.³¹ Financial institutions are mandated to ascertain and secure the identities of customers who are provided with 'Access Devices' for computer transactions, and the duty of posting and authorizing access in a single employee is prohibited.³² Sections 19, 20, and 37 impose a heavy burden on financial institutions to ensure that electronic banking and payments are secure. According to a learned author:

Sections 19, 20, and 37 make financial institutions in Nigeria culpable. The culpability of financial institutions in Sections 19, 20, and 37 of the Act is a welcome development given the incessant ripping of innocent Nigerians of their hard-earned monies through spurious charges in the name of rendering 'seamless services' to them. The Act proactively superintends over the docility of the Nigerian Apex bank, the Central Bank of Nigeria in helping to sanitize its jurisdiction. Also, this section is a sword for any litigant in Nigeria whose identity has been stolen due to the negligence of any financial institution especially during the era of proliferation of private data like the Bank Verification Exercise.³³

The Act makes provision for the payment of compensation and restitution to victims of cybercrimes. This is a landmark achievement because most criminal legislation only provides for the punishment of the offender without a corresponding restitution to the victims.³⁴

The Federal High Court is vested with the jurisdiction to try all cybercrimes and provision is made for trans-border cooperation on investigation, prosecution, and enforcement of court judgments in respect of cybercrimes.³⁵ In the course of adjudication of disputes, the Federal High Court is not to entertain any stay of proceedings on any criminal matter concerning the Act. Thus, the Act recognizes the global nature of cybercrimes by designating the Federal High Court as the only court with exclusive jurisdiction to try cybercrimes. To forestall unnecessary delays in the adjudication of disputes, the Act prohibits the grant of a stay of proceedings in any cyber-related matter before the court. The Act mandates the office of the National Security Adviser to designate and maintain a contact point that will provide immediate assistance for international cooperation under the Act. The idea behind this initiative is to maintain a contact point where Nigeria can share important information on cyber security with other foreign countries.³⁶

²⁸ Ss 5-36, 46 and 58. The following were designated as cybercrimes under the Act: unlawful access to a computer system for fraudulent purposes, trafficking of passwords or similar information without lawful authority, interfering with computer systems which hinders the functioning of the computer system, intercepting electronic messages, emails and electronic money transfers, willful misdirection of electronic messages, theft of Automated Teller Machines and Point of Sales Terminals, phishing, spamming and spreading of computer viruses, computer related forgery and fraud and the unauthorized modification of data held in any computer system or network, the use of computer systems for child pornography, cyber stalking, identity theft and impersonation, racism, cybersquatting and electronic card related fraud.

²⁹ S 21.

³⁰ Ss 38-40.

³¹ Ss 42 and 44.

³² Ss 19, 20 and 37.

³³ T Ilori 'The Nigerian Cybercrimes Act 2015: Is It Uhuru Yet?' <<https://www.lawyard.ng>> accessed 13 June 2023.

³⁴ S 49.

³⁵ Ss 50-52.

³⁶ S 56.

It is clear from the above provisions that the core achievements of the Act are the recognition of electronic signatures as valid and binding, and the provision for the establishment of a Cybercrime and Cyber Advisory Council. The Council is given wide powers to create an enabling environment and provide recommendations on the issues relating to the prevention and combating of cybercrimes, and the promotion of cyber security. Equally, the Act confers exclusive jurisdiction on the Federal High Court to try cyber-related offences. Cybercriminals can now be prosecuted for cybercrimes in the Federal High Court. The Act also provides for trans-border cooperation on investigation, prosecution, and enforcement of court judgments in respect of cybercrimes. Thus, there is now a collaborative effort to fight cybercrime between our country and other countries. Commenting on this development, Banwo and Ighodalo had this to say:

The lack of a specialized statutory regime governing cyber-related contractual agreements in the past had limited not only the volume of commercial deals concluded electronically but also the number of cases instituted for seeking redress in cases of breaches... Disputes shall now be given speedy trial without room for interlocutory applications for stay of proceedings. Again, the Cybercrimes Act provides for cross-jurisdictional cooperation. This will ensure that investigation of allegations of offences shall enjoy mutual assistance from foreign countries while accused persons, against whom prima facie cases are established, and convicted persons in respect of trans-border transactions; shall be liable to extradition. In effect, there will be a better guarantee of the sanctity of commercial contracts.³⁷

Speaking on the achievements of the Cybercrimes Act, another writer posits that:

The Nigerian Cybercrimes Act has been able to show with ample evidence its readiness to restore confidence in Nigerian cyberspace. The punitive nature of the Act has helped to show a low tolerance of cybercrime activities by the government. The Act may be said to have achieved a fair result in this regard. Also, the Act has been able to show its dedication to sanitization of the ICT sector in Nigeria to help boost its prospects in e-commerce... Most importantly, with new provisions proscribing nefarious cyber-activities to ensure cyber-security in Nigeria, it shows to an extent Nigeria's readiness for digitization in the global cyber-society where technological innovations are fast becoming the best means of achieving positive might.³⁸

There is hope that the new legal regime will boost the confidence of individuals, firms, and companies to transact more businesses and render services online, without the fear of falling victim to identity theft, plagiarism, or copyright violation.³⁹ The establishment of institutions that are going to work together to enhance cyber security in the country should further boost confidence and ultimately increase the volume of e-commerce. The institution of the Cybercrimes Advisory Council, which is the policy think-tank for coordinating all research and policy issues relating to the prevention and combating of cybercrimes and the promotion of cyber security in Nigeria should equally be geared towards the enhancement of electronic transactions in Nigeria.⁴⁰

Regulation of Electronic Contracts in South Africa

In the online environment, the Electronic Communications and Transactions Act (ECTA)⁴¹ is the major legislation that regulates electronic transactions in South Africa. The law came into being

³⁷ Banwo & Ighodalo (n 2).

³⁸ Ilori (n 33).

³⁹ Banwo & Ighodalo (n 2).

⁴⁰ *Ibid.*

⁴¹ 25 of 2002.

after many years of legal uncertainty. Up till the enactment of the Electronic Communications and Transactions Act (ECTA), no law in South Africa comprehensively provided for electronic transactions. That notwithstanding, the courts were willing and gave legal recognition to electronic communications before the enactment of the ECTA. This is seen in *Council for Scientific and Industrial Research v Fijen*,⁴² wherein the court stated that an E-mail sent to a superior indicating one's intent to resign constituted a valid letter of resignation in the context of a written and signed document. Similarly in *Balzan v O'Hara and Others*,⁴³ Coleman J. held that a telegram could constitute written and signed authority within the meaning of written and signed, as contemplated in the Land Alienation Act.⁴⁴

Even the Interpretation Act made allusions to the fact that electronic impulses satisfy the requirement of signed writing when it states that:

In every law, expression relating to writing shall, unless the contrary intention appears, be construed as including references to typewriting, lithography, photography, and all other modes of representing or reproducing words in visible form.⁴⁵

Both the UNCITRAL Model Law on E-Commerce⁴⁶ and the UNCITRAL Model Law on Electronic Signatures⁴⁷ were influential in the drafting and formed the basis for the ECTA. The ECTA is one of the many sources of law that impact electronic communications and transactions and, must not be read in isolation of relevant statutory and common law. It applies to any form of communication by e-mail, the internet, SMS, etc., except for possibly voice communications between two people.⁴⁸ The ECTA however excludes four different instances where an electronic writing or signature would not be valid.⁴⁹ The four excluded acts are; concluding an agreement for the alienation (disposal) of immovable property as provided for in the Alienation of Land Act,⁵⁰ concluding an agreement for a long-term of immovable property above 20 years as provided for in the Alienation of Land Act,⁵¹ the execution of a bill of exchange as defined in the Bills of Exchange Act,⁵² and the execution, retention and presentation of a will or codicil as defined in the Wills Act.⁵³

Apart from the ECTA, other legislation may apply to electronic contracts. They include the Interception and Monitoring Act,⁵⁴ Regulation of Interception of Communications and Provisions of Communication Related Act (RICPCRA),⁵⁵ the National Credit Act⁵⁶ (which has now repealed the old Credit Agreements Act, Act 75 of 1980).

⁴² (1995) ZASCA 143 (1996) (2) SA 1 (SCA), quoted in S Snail, 'Electronic Contracts in South Africa: A Comparative Analysis' [2008] (2) *Journal of Information, Law & Technology (JILT)* <<https://www.warwick.ac.uk>>accessed 17 June 2023.

⁴³ 1964 (3) SA (T) 1.

⁴⁴ LAA 68 of 1957.

⁴⁵ Interpretation Act 33 of 1957.

⁴⁶ UNCITRAL Model Law on Electronic (n 3).

⁴⁷ See UNCITRAL Model Law on Electronic Signature 2001 adopted in 2001 General Assembly Resolution 56/80 of 5 July 2001 <<https://www.uncitral.org>> accessed 20 June 2023.

⁴⁸ See Michalsons, 'Guide to the ECT Act in South Africa' <<https://www.michalsons.com>>assessed 18 July 2023.

⁴⁹ ECTA s 4 (3) (4).

⁵⁰ Alienation of Land Act 68 of 1981.

⁵¹ *Ibid.*

⁵² Bills of Exchange Act 7 of 1953.

⁵³ Wills Act 34 of 1964.

⁵⁴ Interception and Monitoring Act 127 of 1992.

⁵⁵ RICPCRA 70 of 2002.

⁵⁶ National Credit Act 34 of 2005.

The ECTA has now entrenched the position that digitally negotiated and electronically signed contracts are fully valid and enforceable under South African law.⁵⁷ The ECTA Act provides for the legal recognition of data messages and the requirements of writing, signature, and contract formation. Section 12 of the ECTA recognizes data as the functional equivalent of writing or evidence in writing. It provides:

A requirement under law that a document or information be in writing is met if, the document or information is:

- (a) in the form of a data message; and
- (b) accessible in a manner usable for subsequent reference.⁵⁸

This section follows Article 6 of the UNICITRAL Model Law on E-Commerce as well as Article 9 (1) & (2) of the United Nations Convention on the use of Electronic Communications in International Contracts,⁵⁹ by guaranteeing data messages the same legal validity equal to messages written on paper. Article 6 of the UNICITRAL Model Law on E-Commerce provides that:

Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.⁶⁰

Article 9(1) & (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts similarly provide that:

- (1) Nothing in this convention requires communication or a contract to be made or evidenced in any particular form;
- (2) Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication, if the information contained therein is accessible so as to be usable for subsequent reference.⁶¹

Section 11(1) of the ECTA recognizes electronic data messages as a valid method of entering into electronic contracts and cannot be invalid due to their immaterial nature. The said section provides:

- (1) Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message;
- (2) Information is not without legal force and effect merely on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect, but is merely referred to in such data message.⁶²

Section 11(1) of the ECTA follows Articles 4 and 11 of the UNCITRAL Model Law on Electronic Commerce, as well as Article 8 (1) of the United Nations Convention on the Use of Electronic Communications in International Contracts. Article 4(1) and (2) read together with Article 11(1) provides:

As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided ... the provisions of may be varied by agreement ... it does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II.' and 'In the context of contract formation, unless otherwise agreed by the parties, an offer and the

⁵⁷ Snail (n 121).

⁵⁸ Sec.12 ECTA.

⁵⁹ United Nations Convention on the use of Electronic Communications in International Contracts 2005 adopted in 2005 by General Assembly Resolution A/60/21 <[https:// www.uncitral.org](https://www.uncitral.org)> accessed 20 June 2023.

⁶⁰ UNCITRAL Model Law on E-Commerce 1996 art 6.

⁶¹ UNCECIC Art 9 (1) (2).

⁶² ECTA s 11(1).

acceptance of an offer may be expressed using data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.⁶³

Article 8(1) of the United Nations Convention on the Use of Electronic Communications in International Contracts⁶⁴ provides that a communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

Section 4 (2) (a) & (b) of the ECTA makes it optional for any person who wants to use electronic communications for entering into a contract. It provides that:

This Act must not be construed as requiring any person to generate, communicate, produce, process, send, receive, record, retain, store, or display any information, document, or signature by or in electronic form, or prohibiting a person from establishing requirements in respect of how that person will accept data messages.⁶⁵

This provision is on all fours with Article 8 (2) of the United Nations Convention on the Use of Electronic Communications in International Contracts, which indicates that the use of electronic data messages is not mandatory but, may be done by choice or tacit consent based on the conduct of the contracting parties.

On the issue of the validity of electronic signatures in South Africa, Section 13 of the ECTA provides that a signature that was created using an electronic data message is valid. It similarly follows Article 7 (1), (2), and (3) of the UNICITRAL Model Law on E-Commerce as well as Article 9 (3) of the United Nations Convention on the Use of Electronic Communications in International Contracts, which ensure that data messages can satisfy the signature requirement. According to section 13 of the ECTA:

1. Where the signature of a person is required by law, that requirement in relation to a data message is met, if only an advanced electronic signature is used;
2. Subject to subsection (1) an electronic data message is not without legal force and effect merely on the grounds that it is in electronic form
3. Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if:
 - (i) a method is used to identify the person and indicate the person's approval of the information contained; and
 - (ii) having regard to all relevant circumstances at the time the method was used; the method was as reliable as was appropriate for the purposes for which the information was communicated.⁶⁶

This section particularly follows Article 9(3) of the United Nations Convention on the Use of Electronic Communications in International Contracts, which ensures that data messages can satisfy the signature requirement. It provides:

Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

- (a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and

⁶³ Art 4 (1) and 11(1) Model Law on E-commerce.

⁶⁴ UNCECIC Art 8(1).

⁶⁵ ECTA s 4 (2) (a) (b).

⁶⁶ ECTA s 13.

- (b) The method used is either:
 - (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.⁶⁷

As for the time of conclusion of the electronic contract, section 22 (2) of the ECTA provides that contracts concluded using data messages are concluded at the time, and the place where the acceptance of the offer was received by the offeror. In other words, the ECT Act adopted the reception theory for electronic contract formation. This specifically marks the ECTA out from other countries' legislation, in the sense that the ECTA is the only legislation that makes specific provisions for the time an electronic contract is concluded. According to Pistorius,⁶⁸ the ECT Act provides clear rules for the time and place that the dispatch and receipt of data messages become effective. The ECT Act makes specific provisions for the time an electronic contract is concluded. This salient feature of the ECT Act is in stark contrast to the uncertain legal position obtained in other jurisdictions.⁶⁹

The ECTA is therefore an all-encompassing legislation, and that makes it unique, unlike most electronic transaction legislation. Apart from the fact that it contains provisions providing for the recognition of data messages as a means of entering into contracts, and guarantees functional equivalence between paper-based and technology transactions, it equally provides for the protection of consumers and private data as well as cybercrimes. For instance, section 43⁷⁰ provides that suppliers of goods or services must provide consumers with a minimum set of information, including the price of the product or service, the name, contact details, a brief description of the business, and the right to withdraw from an electronic transaction before its completion. Consumers are also entitled, under certain circumstances, to a 'cooling off' period within which they may cancel certain types of transactions concluded electronically without incurring any penalty.⁷¹ Consumers also have the right not to be bound to unsolicited communications (spam) offering goods or services, and the sender of the unsolicited communication must at the request of the consumer, provide the identifying particulars of the source from which it obtained the consumer's personal information.⁷² A person who continues to send unsolicited communications to a consumer after having been advised that the unsolicited communications are not welcome, commits an offence.

The ECT Act also seeks to place the responsibility on businesses trading online to make use of sufficiently secure payment systems. If a payment system is breached as a result of the system not being sufficiently secure, the supplier must reimburse the consumer for any loss suffered.⁷³ Equally, the Act establishes a voluntary regime for the protection of personal information. Collectors of personal information (data collectors) may subscribe to a set of universally accepted data protection principles.⁷⁴

⁶⁷ UNCECIC Art 9 (3).

⁶⁸ T Pistorius, 'Formation of Internet Contracts: Contractual and Security Issues' [1999] (11) *SA Mercantile Law Journal*, 281-286.

⁶⁹ *Ibid.*

⁷⁰ ECTA.

⁷¹ ECTA s 44.

⁷² *Ibid* s 45.

⁷³ S 43 (5) (6).

⁷⁴ S 50.

Lessons for Nigeria

There can be no doubt that the stage for electronic contracts is set in Nigeria. This is made manifest in the number of efforts made at legislating for electronic contracts in the country and, the volume of internet contracts presently undertaken by her citizens. As captured by Kazeem:

There have been several legislative strides made since the early days of internet commerce and in Europe and America, there has been an almost frenzied approach to removal of legal bottlenecks against this recognition and enforcement of E-contracts. In Nigeria, while the pace may not be as frenetic, it is gathering steam.⁷⁵

It is unarguable that, not much has been done in Nigeria regarding the regulation of electronic contracts when compared to South Africa. South Africa enacted legislation that tackles all electronic transactions without narrowing it to electronic contracts. Most importantly it made a definitive pronouncement on when an electronic contract will be deemed to have come into existence. Although Nigeria curled the Electronic Transactions Bill from the South African ECTA, no serious effort is being made to pass the Bill into law. What we have in Nigeria so far is the stretching of existing laws to new and flexible technology which is not likely to give electronic contracts the desired legal status and protection. If our neighbours can do it, then Nigeria can equally follow their footprints and enact comprehensive legislation that will cater for electronic contracts. To this end, our preoccupation should be on enacting legislation that is both functionally equivalent and technologically neutral. It is a heartwarming development that our Electronic Transactions Bill is a replica of the Electronic Communications Transaction Act of South Africa.⁷⁶ The said Act has been adjudged one of the best in the world as far as electronic transactions are concerned. Apart from providing for the legal recognition of online contracts, admissibility of electronic documents, data protection, protection of consumers of online goods and services as well as the provision of mechanisms for checking cybercrimes, it is the first legislation to provide for the exact moment an electronic contract would be deemed to have come into existence.

It is urged that the shortcomings identified in the Electronic Transactions Bill should be addressed and the Bill amended to reflect those changes. Once this has been done, the president should without further delay assent to the Bill. With a good legal landscape for electronic contracts and other electronic transactions, Nigeria will be seen by the international community as a good place to do business and even, as a choice of law and jurisdiction for electronic contracts.

Conclusion

The above discourse has demonstrated that Nigeria is lagging in terms of enjoying the benefits of technological advancements. It is clear that if Nigeria wants to enjoy all the benefits attendant with electronic transactions, she needs to up her game and enact comprehensive legislation that will regulate electronic contracts like that of South Africa which has been adjudged one of the best in the world. The uncertainty surrounding cyberspace in Nigeria would not have been there if there had been comprehensive legislation in place to cater to electronic activities. The Electronic Transactions Bill is long overdue for passage into law. Nigeria should pride herself in place of the committee of nations with vibrant legislation to cater to the ever-evolving cyber technology. A law that will stand the test of time is a necessity for Nigeria.

⁷⁵ MA Kazeem, 'Electronic Contract Formation and the Nigerian Initiatives' <<https://www.academia.edu> accessed 18 June 2023.

⁷⁶ ECTA 25 of 2002.

CAN LAW DRIVE THE ECONOMY?: TACKLING NIGERIA'S POVERTY USING A HUMAN RIGHT'S-BASED APPROACH

Eno-Obong Bassey Akpan*

Abstract

Poverty remains high on the international development agenda. Over the years, world Conferences and Summits have paid attention to the increasing levels of poverty of billions of the world's population. In spite of the progress made, the work to end extreme poverty is far from over, and many challenges remain. While poverty is seen as a denial of human rights, it is also agreed that the inadequate or non-fulfilment of human rights causes poverty. For many Nigerians, poverty is a major obstacle to the realisation of fundamental rights. Unfortunately, law, without more, is incapable of driving the economy if it does not have human rights content to ensure adequate promotion and protection of human rights and the rights to socio-economic needs. This Paper discusses law and the interrelationship between law and the economy. It adopts a human rights-based approach to poverty reduction in Nigeria and argues that poverty constitutes an infringement of citizen's human rights. The paper concludes that poverty cannot be eradicated without the fulfilment of basic human rights, including the right to health, education, work, amongst others.

Keywords: Poverty, Human Rights, Law, Economy, Nigeria

Introduction

The World Bank Group's mission, 'Our Dream is a World Free of Poverty', is carved in stone at the Washington headquarters. This mission underpins all of their analytical and operational work in more than 145 client countries, and is bolstered by goals of ending extreme poverty within a generation and promoting shared prosperity in a sustainable manner across the globe. The World Bank Group is a unique global partnership that works in every major area of development. It provides a wide array of financial products and technical assistance, and helps countries share and apply innovative knowledge and solutions to the challenges they face.¹

The past decades have witnessed marked progress on reducing poverty across the globe. Attainment of the first Millennium Development Goal target aimed at cutting the 1990 poverty rate in half by 2015, five years ahead of schedule in 2010. Despite the progress made in reducing poverty, the number of people living in extreme poverty globally remains unacceptably high. And given global growth forecasts, poverty reduction may not be fast enough to reach the target of ending extreme poverty by 2030.² Like many developing third world countries, Nigeria's poverty index is alarmingly high. In late June 2018, the World Poverty Clock data reported that 'Nigeria now has more people living in extreme poverty than any other country in the world. In fact, the percentage of Nigerians living in extreme poverty may increase by 2030.'³

However, because of the link between the concepts of poverty and human rights, it is not only difficult to separate one concept from another, it is even more tasking to solve the issues separately from one another. Poverty and the denial of human rights are problems that are interdependent. In

* **Eno-Obong Bassey Akpan is currently a doctoral candidate of the Faculty of Law, University of Uyo. She is Notary Public for Nigeria, human rights lawyer and gender activist. E-mail: enoakpan@hotmail.com. Tel: +234 8023377543.**

¹ 'Poverty' The World Bank <<https://www.worldbank.org/en/topic/poverty/overview>> accessed 07 August 2023.

² *Ibid.*

³ World Poverty Clock <<https://worldpoverty.io/blog/index.php?r=12>> accessed 30 July 2023.

other words, where there is poverty, there are human rights violations and vice-versa.⁴ The past years have been economically tumultuous and challenging, with plenty of blame pointed at the governments for not doing the right thing in various areas of policy.⁵ Regrettably, the attitude of the Nigerian government is directly linked with the current poverty indices in the country. As enunciated by the US Department of State Diplomacy in Action, poverty and human rights violations are rampant in Nigeria due to pervasive corruption and impunity among those who exercise public and judicial powers.⁶

Nigeria needs deliberate policy interventions to eradicate the monster of poverty. It must put in place clear regulations capable of addressing those factors within the system that continue to promote poverty. Because law and the economy intertwine, the pervasive influence of law on the economy of a nation cannot be overemphasised. Law is capable of driving the economy as new laws can effectively reduce poverty and foster economic growth in Nigeria. When laws which have a direct bearing on the economy and economic growth are enacted, they are capable of driving the economy, boosting economic growth and reducing poverty to the barest minimum. Therefore, a stable institutional set-up, backed by the legal sector, is the key facilitator of economic development in a given society.⁷

Conceptual Analysis of Major Terms

Poverty

The concept of poverty is a critical one in contemporary social discussions and difficult to define and analyse. Literature in the social sciences is replete with attempts by economists and other social scientists to conceptualise the phenomenon. Poverty is a vicious circle which keeps the poor in a state of destitution and disillusionment. The state of poverty entails more than just a lack of income and productive resources to ensure sustainable livelihoods. It is about not having enough to meet basic needs. Manifestations of poverty include hunger and malnutrition, limited access to education, health and other basic services, social discrimination and exclusion, as well as the lack of participation in decision-making.⁸

According to the United Nations, overall poverty can take various forms including, ‘lack of income and productive resources to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments and social discrimination and exclusion. It is also characterised by lack of participation in decision-making and in civil, social and cultural life. It occurs in all countries: as mass poverty in many developing countries, pockets of poverty amid wealth in developed countries, loss of livelihoods as a result of economic recession, sudden poverty as a result of disaster or conflict, the poverty of low-wage workers, and

⁴ S. Warren, ‘The Interrelationship between Poverty and Human Rights’ *The Borgen Project* <<https://borgenproject.org/poverty-and-human-rights/>> accessed 30 July 2023.

⁵ ‘Regulation and the Economy’, *The Relationship and How to Improve it’ Policy Statement by the Committee for Economic Development of the Conference Board (CED)* < <https://www.ced.org/reports/regulation-and-the-economy>> accessed 30 July 2023.

⁶ Department of State Diplomacy in Action (2009). Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, Human Rights Reports: Nigeria <<http://www.state.gov/g/drl/rls/hrrtp/2009/af/135970>> accessed 30 July 2023.

⁷ B. Anand, ‘The Role of Law in the Growth of an Economy, With a Special Focus on Developing Economies’ (2018) *Edge International* < <https://www.edge.ai/2018/11/the-role-of-the-law-in-the-growth-of-an-economy-with-a-special-focus-on-developing-economies/>> accessed 01 August 2023.

⁸ ‘Ending Poverty; United Nations <<https://www.un.org/en/sections/issues-depth/poverty/>> accessed 31 July 2023.

the utter destitution of people who fall outside family support systems, social institutions and safety nets.⁹

The World Bank describes poverty as hunger, lack of shelter, not having access to school and lack of medical care,¹⁰ while the World Health Organization reveals that poverty creates ill-health because it forces people to live in dirty environments. In a poverty-stricken country, the poor suffer from ill-health.¹¹ The International Covenant on Economic, Social and Cultural Rights (ICESCR) defines poverty in the light of the International Bill of Rights and categorises poverty as a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security, and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights. This definition of poverty is also recognised by the European Union, the World Bank and the United Nations Development Programme, and is regarded as the most comprehensive and rights-sensitive definition of poverty to date.¹²

There are other definitions postulated by different authors. For instance, Williams argues that attributes of poverty may be classified into structural, economic, social, cultural and political deprivations.¹³ The structural dimensions appear more permanent and manifest a vicious circle, reflecting limited productive resources, lack of skills for gainful employment, location disadvantages and inadequate income to obtain the basic necessities of life. Basically, poverty has been conceptualised into lack of access to basic needs and lack of or impaired access to productive resources.¹⁴ Anyebe compartmentalises the condition of poverty as being essentially economic or consumption-oriented.¹⁵ Thus, the poor are conceived as those individuals or households in a particular society incapable of purchasing some basic goods and services such as food, clothing, shelter, good drinking water, healthcare, access to productive resources including education, working skill and tools, political and civil rights to participate in decision-making concerning socio-economic conditions.¹⁶ While these attributes have often been found to exist with poverty, their inclusion in the definition of poverty would tend to obscure the relation between them and the inability to provide for one's basic needs. Whatever definition is adopted, authorities and laypersons alike commonly assume that the effects of poverty are harmful to both individuals and society¹⁷ and therefore, in conceptualising poverty, low income or low consumption is its symptom.¹⁸

Human Rights

The first documentary use of the phrase 'human rights' is found in the United Nations (UN) Charter, which was adopted in San Francisco on June 25, 1945, immediately after the Second World War. The acceptance and adoption of the Universal Declaration of Human Rights (UDHR)

⁹ UN The Copenhagen Declaration and Programme of Action: World Summit for Social Development 6-12 March 1995 (United Nations Department of Publications 1995).

¹⁰ Y. Kazeem, 'Nigeria has Become the Poverty Capital of the World' (2018) <<https://qz.com/africa/1313380/nigerias-has-the-highest-rate-of-extreme-poverty-globally/>> accessed 01 August 2023.

¹¹ *WHO Health and Development* (Geneva, Switzerland: World Health Organization 2017).

¹² K. Kulindwa and H. Lein, 'Water and Poverty: The Inextricable Link' in D. Hemson et al (eds) *Poverty and Water: Explorations of the Reciprocal Relationship* (Zed Books London 2008) 1.

¹³ A. Williams, 'An Evaluation of Government Policies on Poverty Eradication: A Case Study of NAPEP in Ogbadibo LGA of Benue State' (2016) 6, *Arabian Journal of Business Management Review*.

¹⁴ *ibid.*

¹⁵ A. Anyebe, *Reading in Development and Communication* (S. Salam Press Zaria 2001).

¹⁶ *ibid.*

¹⁷ 'Poverty' *Encyclopaedia Britannica* <<https://www.britannica.com/topic/poverty>> Accessed 31 July 2023.

¹⁸ Williams (n14).

in 1948 set a common universal standard on human rights.¹⁹ For the purpose of international relations, ‘human rights’ means the rights contained in the 1948 UDHR,²⁰ which are ‘inherent in our nature and are benefits to which people are entitled by virtue of being human.’ Essentially, human rights ‘belong to all human beings, at all times, irrespective of sex, race, colour, religion, or language.’²¹ These rights belong to an individual or group of individuals simply as a consequence of inherent human vulnerability, or because they are requisite to the possibility of a just society.²²

There is now a near-universal consensus that all individuals are entitled to certain basic rights, including certain civil liberties and political rights, the most fundamental of which is the right to life and physical safety. Human rights therefore represent an articulation of the need for justice, tolerance, mutual respect, and human dignity in all of our activity.²³ Speaking of rights allows every person to express the idea that ‘all individuals are part of the scope of morality and justice.’²⁴

The UDHR document represents the modern international human rights framework created by governments, for governments.²⁵ The UDHR was followed by an International Bill of Rights which culminated in the adoption of the ‘twin covenants’, the International Covenant on Civil and Political Rights 1966 (ICCPR), and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). These covenants came to cure the deficiency of the UDHR, which signified a mere expression that did not have the nature of a legally binding covenant, and therefore had no machinery for enforcement.²⁶ The UN thereafter adopted many legally binding international human rights Treaties, Conventions, Agreements, Charters, Protocols, etcetera, including the six core International Conventions.²⁷ These documents are used as a framework for discussing and applying the human rights of every person, including right to work, right to a standard of living adequate for the individual, including food, clothing, housing, medical care, right to education, among others. These instruments outline principles and rights which become legal obligations on those States that have accepted to be bound by them. Additionally, the human rights framework also establishes legal and other mechanisms to hold governments accountable for human rights violations.²⁸

However, it is necessary to emphasise that the global human rights regime relies on national implementation of internationally recognised human rights.²⁹ For instance, in Nigeria, the rights of all citizens are protected by a legal framework made up of the Constitution of the Federal Republic of Nigeria 1999 (as amended),³⁰ other national laws, international and regional

¹⁹ *The U.N. Guiding Principles on Business and Human Rights: Analysis and Implementation*, (2012) A Report from The Kenan Institute For Ethics at Duke University.

²⁰ Adopted and proclaimed by the General Assembly Resolution 217 A (111) of 10 December 1948.

²¹ S. Anaya, *Indigenous Peoples in International Law* (2nd Edition, Oxford UP, Oxford 2004).

²² S. Kaur, ‘Historical Development of Human Rights’, (2014) 6 (4), *Journal of Social Science Research*, p. 996.

²³ H. Kennedy, ‘Conflict Resolution and Human Rights: Contradictory or Complementary?’ (2001), *INCORE*.

²⁴ *ibid*.

²⁵ *ibid* (n18).

²⁶ E. Udu, ‘The Imperatives of Economic, Social and Cultural Rights in the Development of Nascent Democracies: An Inter-Jurisdictional View’ (2014) *NAUJILJ*, 32.

²⁷ They are: International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (CESCR); International Convention on the Elimination of all Forms of Racial Discrimination (CERD); Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT); and the Convention on the Rights of the Child (CRC).

²⁸ J. Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 (2) *Human Rights Quarterly*, 282.

²⁹ *ibid*.

³⁰ In accordance with the provisions of Section 1 (1) of the Constitution is supreme (the *fons et origio*) and shall have a binding force on the authorities and persons throughout the Federal Republic of Nigeria - N Abdurraheem,

Conventions or Treaties. On the international scene, Nigeria has since ratified the six core international Conventions and other Regional Conventions such as the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child.³¹ Also, in line with the resolution of the UN General Assembly - which enjoins all member States to establish national human rights institutions for the promotion and protection of human rights - the National Human Rights Commission of Nigeria was established in 1995 to help promote and protect human rights in Nigeria.³²

Law

The definition of law has always been fraught with a lot of complexities. Humphrey argues that some scholars view the definition not from the perspective of attempting to give it a name but rather from the perspective of ascertaining the purpose of law in any given setting.³³ But law in its simple term refers to 'a body of rules of conduct, of binding legal force and effect, prescribed, recognised and enforced by a controlling authority such as the government.' According to the Merriam-Webster dictionary, law is defined as 'a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognised as binding or enforced by a controlling authority: the whole body of such customs, practices, or rules.'³⁴

Law is also 'a system of rules that a society or government develops in order to deal with crime, business agreements, and social relationships.'³⁵ These rules are created and enforced by man through environmental or social government institutions to regulate the behaviour of individuals in the society. Laws are made by persons who are given the authority to do so either directly or indirectly by the society.

The definition of law has also been extended to include, 'the body of principles recognised and applied by the state in the administration of justice.'³⁶ In other words, it consists of the rules recognised and acted upon by the court of justice. The purpose for which law is promulgated includes the need to maintain law and order within a society, to maintain the status-quo in society, to enable individuals to have the maximum freedom and the maximum satisfaction of the needs of the people.³⁷

In Nigeria, there exist different types of law; state enforced laws made by a single or collective legislature through initiation of a Bill or Laws, or those established by judges through precedent.³⁸ Under Section 4 (2) of the Constitution of the Federal Republic of Nigeria (as amended), 'The National Assembly shall have power to make laws for the peace, order and good

'Rights of Women in Pre & Post Colonial Era in Nigeria: Challenges for Today'. (2010) 3(2), *Journal of Public Law*.

³¹ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

³² The Commission was established by the National Human Rights Commission (NHRC) Act, 1995, as amended by the NHRC Act, 2010. The Commission has been charged with the responsibility of examining 'any existing legislation, administrative provisions and proposed bills or bye-laws for the purpose of ascertaining whether such enactments or proposed bills or bye-laws are consistent with human rights norms - art 6 (k).

³³ J. Humphrey, 'Definitions and Nature of Laws' (1945) *Modern Law Review*, 194.

³⁴ *Merriam-Webster Dictionary* <<https://www.merriam-webster.com/dictionary/law>> accessed 01 August 2023.

³⁵ *Collins English Dictionary* <<https://www.collinsdictionary.com/dictionary/english/law>> accessed 01 August 2023.

³⁶ U. Farooq 'What is Law – Definition, Purpose and Sense of Law' (2011) <<http://www.studylecturenotes.com/social-sciences/law/123-what-is-law>> accessed 01 August 2023.

³⁷ *ibid.*

³⁸ Sheriff, 'Types of Law in Nigeria and their Purpose' <<https://naijaquest.com/types-of-law-in-nigeria/>> accessed 01 August 2023.

government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution.’ Furthermore, Section 58 (1) of the Constitution expressly provides that the law-making powers of the National Assembly can be exercised by Bills passed by National Assembly and assented to by the President. At the State level, the House of Assembly of a State has power to make laws for peace, order and good government of the State or any part thereof with respect to matters with which it has power to make laws under the Nigerian Constitution. A Local Government Council also has power to make bye-laws for a Local Government Area, in respect of the functions assigned to it by the Nigerian Constitution, or any other law.³⁹

Law is a social science which grows and develops with the growth and development of society.⁴⁰ Therefore, new developments in the society would create new problems that would require new laws to deal with those problems. Law regulates the behaviours of a community, country, group, etcetera. In other words, it is the legislative pronouncements of the rules which should guide one’s action in society. In conclusion, law is a rule of action to which the conduct of mankind must conform. The ultimate purpose of law is to guide human conduct.⁴¹

Economy

According to the Cambridge Dictionary, economy is ‘the system of trade and industry by which the wealth of a country is made and used.’⁴² It refers to a system of making money and producing and distributing goods and service within a country or region.⁴³ The Collins English Dictionary defines a country’s economy as ‘the wealth it gets from the business and industry.’⁴⁴ The Business Dictionary further defines economy as ‘an entire network of producers, distributors, and consumers of goods and services in a local, regional, or national community.’⁴⁵

The word ‘economy’ is also used to refer to the state of a country or region in terms of the production and consumption of goods and services and the supply of money. Other definitions are suggestive of ‘economy’ being ‘a careful, thrifty management of resources, such as money, materials, or labour; the system or range of economic activity in a country, region, or community; or a system of producing, distributing and consuming wealth.’⁴⁶

The Interrelation between Law and the Economy

The interplay of law and economic growth has always been an intriguing subject for legal researchers and those associated with the legal sector. Law and economy interrelate and affect each other remotely and otherwise. There are proper purposes to which law can be deployed in a nation’s economic life.⁴⁷ Law and regulation are best understood as tools to promote economic efficiency.⁴⁸ They form the infrastructure upon which the economy is built, therefore, good laws

³⁹ M. Gidado, ‘Constitutional Role of the Legislature Viewed from a Nigerian Prism’ Paper Presented at a Seminar for Legislative Aides to the Senate President at Nicon Luxury Hotel, Abuja 20th - 21st May, 2012.

⁴⁰ J. Nadler, ‘Hart Fuller and the Connection Between Law and Justice’ (2008) 27 (1) *Law and Philosophy*.

⁴¹ *ibid.*

⁴² Cambridge Dictionary (Cambridge University Press 2019).

⁴³ *ibid.*

⁴⁴ ‘Definition of Economy’ *Collins English Dictionary* <<https://www.collinsdictionary.com/dictionary/english/economy>> accessed 02 August 2023.

⁴⁵ ‘Economy’ *Business Dictionary* <<http://www.businessdictionary.com/definition/economy.html>> accessed 01 August 2023.

⁴⁶ ‘Economy’ <<https://www.yourdictionary.com/economy>> accessed 01 August 2023.

⁴⁷ ‘Law in the Economy’ *London School of Economics LL4CM* <http://www.lse.ac.uk/resources/calendar/courseGuides/LL/2019_LL4CM.htm> accessed 01 August 2023.

⁴⁸ ‘What is Law & Economics?’ *European Master in Law & Economics* <<https://emle.org/what-is-law-economics/>> accessed 01 August 2023.

and regulations play a vital role in a nation's economy and help determine the boundaries of operations; interest rates and tax rates regulate both the consumer markets as well as corporate sectors. Laws also act as barriers to protect consumer interest, exploitation and national interest.⁴⁹

Laws are indispensable to the proper functioning of economies and societies. With an increase in the number of opportunities available for growth, especially in developing economies, businesses look to explore the latest dynamics and trends that have a positive impact on them.⁵⁰ Laws and indeed regulatory frameworks are necessary in making businesses sustainable. They create the 'rules of the game' for citizens, business, government and civil society. 'Regulations also underpin markets, protect the rights and safety of citizens and ensure the delivery of public goods and services.'⁵¹ Good laws are 'capable of generating different short-term and long-term effects on the economy which would ultimately boost the economy and allow people to pay less in taxes and benefit more from government programmes.'⁵²

For the economy to grow, law and regulation must be administered with zero to minimal corruption. There are existing data suggestive of the fact that least corrupt nations have the best economic growth rates. Law is a major way in which governments everywhere influence market economies. The scope of government regulations is vast and reaches all sectors of the economy and all aspects of our daily lives.⁵³ Without a legal framework establishing and enforcing economic growth, our free enterprise system cannot exist.⁵⁴ Invariably, market economies need clear rules to function efficiently. Because the effects of regulation on economic activity are difficult to measure, they are too often neglected in the debates over economic policy.

One way the institution of law can be used to encourage efficient transactions is to help avoid situations that lead to market failure which exacerbate poverty and plunge the poor into a terrible state of hopelessness. Law can be used as a tool to ensure that monopoly situations are illegalised.⁵⁵ Unfortunately, in Nigeria, the absence of extant laws or the non-implementation of existing laws have been largely responsible for the huge poverty figures in the country. Where there are existing laws, many of them are not directed towards addressing poverty neither are they implemented sufficiently to lift millions out of poverty.

Human Rights-Based Approach to Poverty

Poverty reduction and human rights are two mutually reinforcing approaches to the same project.⁵⁶ Using a rights-based approach, poverty can be viewed as a violation of the rights of the poor. This link between poverty and human rights has been promoted by the United Nations (UN) through the High Commissioner for Human Rights whose mandate was to formulate eighteen Guidelines for the integration of human rights into poverty reduction strategies. These Guidelines acknowledge that a human rights-based approach to poverty reduction ensures that policies and institutions attempting to reduce poverty are based on the norms and values of international human

⁴⁹ *ibid.*

⁵⁰ Anand (n8).

⁵¹ Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest (OECD Publishing, 2011).

⁵² S. Dudley and J. Brito, 'What is Regulation?' in *Regulation: A Primer* (2nd ed. Mercatus Center at George Mason University 2012).

⁵³ 'Regulation and the Economy', The Relationship and How to Improve it' *Policy Statement by the Committee for Economic Development of the Conference Board (CED)* < <https://www.ced.org/reports/regulation-and-the-economy>> accessed 03 August 2023.

⁵⁴ Dudley and Brito (n53).

⁵⁵ B. Butler, 'Law and Economics' < <https://www.iep.utm.edu/law-econ/>> accessed 01 August 2023.

⁵⁶ UNHCHR Human Rights and Poverty Reduction: A Conceptual Framework 3.

rights. This rights approach links poverty reduction to human rights and obligations of State Parties.⁵⁷

The Guidelines can be divided into three Sections: Section one sets out the basic principles that need to be considered when formulating poverty reduction strategies in terms of a human rights-based approach. Section two identifies and sets out the main elements that ought to be included in strategies aimed at fulfilling each human right relevant to poverty reduction. Section three explains how the human rights approach can lead to monitoring and accountability as aspects of poverty reduction strategies.⁵⁸ There is no doubt that these Guidelines address complex issues which are of utmost importance for the relationship between poverty and human rights.⁵⁹

A human rights approach to poverty links poverty reduction to questions of obligation, rather than welfare or charity. It compels us to look behind national averages and identify the most vulnerable people and design strategies to help them. The rights approach is grounded in the United Nations Charter, the Universal Declaration of Human Rights (UDHR), and binding provisions of human rights treaties.⁶⁰ Specifically, the International Bill of Rights (International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) contain provisions that are directly relevant to the reduction of poverty. Economic rights were first given prominence in Articles 22, 23, 25 and 26 of the UDHR to the effect that everyone has a right to work, a right to standard of living adequate for himself or his family, including food, clothing, housing and medical care and necessary social services and right to education. Like the UDHR, Articles 6 to 13 of the ICESCR list the various rights which are to be recognised and protected by States parties. Article 6 of the Covenant states that ‘The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.’ The realisation and enjoyment of socio-economic rights is crucial to overcoming the challenges of abject poverty. Anti-poverty policies will be more effective, sustainable and meaningful to the poor if they are based on international human rights standards.

In addition to the International Bill of Rights, there are other international documents that are relevant to poverty and are seen as synonymous with aspects of poverty. Similar provisions are contained in the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD), the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the United Nations Convention on the Rights of the Child (CRC) and the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.⁶¹ Today, poverty reduction has moved beyond the argument of whether the poor have needs, to the fact that they also do have rights and entitlements that give rise to legal obligations on the part of the State or government. Poverty reduction then becomes more than charity, more than a moral obligation; it becomes a legal obligation on the part of the government.⁶²

The human rights-based approach to poverty - which defines poverty as the inadequate fulfilment (or non-fulfilment) of a person’s human right to basic capabilities - is an approach which interprets

⁵⁷ Z. Strauss and D. Horsten ‘A Human Rights-Based Approach to Poverty Reduction: The Role of the Right of Access to Medicine as an Element of the Right of Access to Health Care’ (2013) 16 (3), *Potchefstroomse*.

⁵⁸ UNHCHR *Human Rights Approach to Poverty Reduction Strategies* guidelines 16-18.

⁵⁹ *Strauss and Horsten* (n58).

⁶⁰ OHCHR *Human Rights and Poverty Reduction A Conceptual Framework* (United Nations New York and Geneva 2004) iii.

⁶¹ *Strauss and Horsten* (n58).

⁶² *ibid.*

poverty, very broadly, as the absence of the capabilities needed to live a dignified life. As such, poverty constitutes an infringement on human rights of the poor and will not be eradicated without the fulfilment of human rights, including the right to the basic necessities and comforts of life such as food, shelter, health, education, work, and others.⁶³ When viewed as a social problem, and in the context of practical policy-making, the concept of poverty acquires a specific connotation that ties it closely with lack of command over economic resources.⁶⁴

It should be understood that by viewing poverty as the denial of human rights, the focus moves away from poverty reduction as an issue exclusive to economic development towards the rights and obligations entrenched within the formal legal system.⁶⁵ Thus, in the context of human rights, poverty is no longer seen as a social problem but rather as an infringement of human rights where people are deprived of the fulfilment of their basic human rights. Therefore, if a person experiences inadequate or non-fulfilment of the right of access to basic needs of health, education, work, etcetera, such a person will be classified as poor and experiencing a low level of well-being. In so far as these inadequacies have led to a lack of command over the necessary economic resources, it is an infringement of the right of such person.

Poverty Eradicating Approaches

According to World Bank estimates in 2012, 896 million people were living on less than \$1.90 per day, with most of the poor concentrated in the developing countries, including Nigeria where 86.9 million people lived in extreme poverty, representing nearly 50 percent of its estimated 180 million population, therefore leaving Nigeria's record with the highest rate of extreme poverty globally.⁶⁶ In 2015, 736 million people lived on less than \$1.90 a day, down from 1.85 billion in 1990. Today, more than 780 million people in the world live below the international poverty line, while more than 11 percent of the world population is living in extreme poverty and struggling to fulfil the most basic needs like health, education, and access to clean water and sanitation. As at June 2018, Nigeria still has the largest extreme poverty population.⁶⁷

Unfortunately, the burden of poverty weighs proportionally more against women than men. For every 100 men aged 35 to 34 years who are living in poverty, there are 122 women within the same age group, while more than 160 million children are at risk of continuing to live in extreme poverty by 2030.⁶⁸ For the first time, UN Women and the World Bank have analysed household survey data for 89 countries by sex, age, household composition and other relevant variables to better understand the profile of the poor. The findings aim to improve policy interventions to eradicate global poverty and meet the Sustainable Development Goals.⁶⁹ Research also shows that households with children are among the poorest, and that single parents with children, and predominantly single mothers with children, face a far higher risk of poverty.⁷⁰ 'Poverty makes women vulnerable to a range of health problems, some, but not all, are associated with reproductive health conditions which may be associated with poor women's work, increase vulnerability to a

⁶³ UNHCHR *Human Rights Approach to Poverty Reduction Strategies* para 113.

⁶⁴ A. Sen, *Inequality Re-examined* (Cambridge, Harvard University Press 1992) 107.

⁶⁵ P. Spicker, D. Gordon and S. Leguizamon, *Poverty: An International Glossary* (Zed Publishers 2007).

⁶⁶ Y. Kazeem, 'Nigeria has Become the Poverty Capital of the World' (2018) <<https://qz.com/africa/1313380/nigerias-has-the-highest-rate-of-extreme-poverty-globally/>> accessed 03 August 2023.

⁶⁷ *ibid.*

⁶⁸ *ibid* (n9).

⁶⁹ 'UN Women and the World Bank Unveil New Data Analysis on Women and Poverty' *UN Women* <<https://www.unwomen.org/en/news/stories/2017/11/news-un-women-and-the-world-bank-unveil-new-data-analysis-on-women-and-poverty>> accessed 01 August 2023.

⁷⁰ *ibid.*

range of health problems, as does poor nutrition.⁷¹ These poverty facts and figures assist in revealing the poverty dynamics in today's world.

While poverty rates have declined in all regions, progress has been uneven. Two regions, East Asia and Pacific (with 47 million extreme poor) and Europe and Central Asia (with 7 million) have reduced extreme poverty to below 3 percent, thereby achieving the 2030 sustainable development target to end poverty in all its forms everywhere. Regrettably, more than half of the extreme poor live in Sub-Saharan Africa.⁷² In fact, the number of poor in the region increased by 9 million, with 413 million people living on less than US\$1.90 (the internationally agreed poverty line) a day in 2015, more than all the other regions combined. If the trend continues, by 2030, nearly 9 out of 10 extreme poor people will be in Sub-Saharan Africa.⁷³ In reality, majority of the global poor live in rural areas. Quite often, these people are illiterate, under-aged below the age of 18 years, and employed in the agricultural sector. Although the work to end extreme poverty is far from over, it seems likely that with the right attitude and favourable laws in place, poverty can be eradicated within the shortest possible time. For instance, access to good schools, health care, electricity, safe water, and other critical services must become accessible to the poor and uneducated.⁷⁴

On the average, the effects of poverty on a nation - especially those in the developing category - and on the poor are damning and debilitating especially on the health and general well-being of women and children. The greatest burden of health risks is borne by the disadvantaged in societies, especially women and children, who are often poor owing to unemployment or underemployment, and have very little formal education and low occupations.⁷⁵ The effects of poverty on the health amounts to a denial of the right to life and a clear violation of the constitutional provision as enshrined in Chapter 4 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Ending poverty in Nigeria will require a concerted effort aimed at harnessing the demographic dividends through investment in health, education and livelihoods - especially for young people. As already outlined, at the root of poverty lies the deprivation of people's access to basic necessities such as food, shelter, healthcare and education. Solving these issues generally lifts populations out of extreme poverty. Concerned stakeholders and policy-makers can assist in ending poverty by adopting three major strategies which include; investment in girls' education, investment in health and well-being, and expanding economic opportunities and embracing technology.⁷⁶

Nigeria is currently home to over 10 million out-of-school children, around half of whom are girls.⁷⁷ The poorest parts of Nigeria had the worst education indicators (school attendance and years of schooling). Quite unfortunately, the statistics tallies with Nigeria's world record of harbouring the highest number of people living in extreme poverty. This picture is best presented by the 2018 Global Multidimensional Poverty Index (MPI) of the Oxford Poverty and Human

⁷¹ K. Batthyany and S. Correa, 'Health, Gender and Poverty in Latin America' Background Paper prepared for the Women and Gender Equity Knowledge Network at the WHO Commission on Social Determinants of Health (2007) <https://www.who.int/social_determinants/resources/health_gender_poverty_latam_wgkn_2007.pdf?ua=1> accessed 04 August 2023.

⁷² *ibid* (n2).

⁷³ *ibid*.

⁷⁴ *ibid*.

⁷⁵ A. Shah, 'Structural Adjustment - A Major Cause of Poverty' (2015) 24 *Global Issues*.

⁷⁶ 'Three Things Nigeria Must do to End Extreme Poverty' World Economic Forum < <https://www.weforum.org/agenda/2019/03/90-million-nigerians-live-in-extreme-poverty-here-are-3-ways-to-bring-them-out/>> accessed 01 August 2023.

⁷⁷ *ibid*.

Development Initiative.⁷⁸ Investment in education has both economic returns and intergenerational impact. For Nigeria to improve on this front, it must increase its investment in education. Also, Nigerian government must invest in the citizens' health and well-being through targeted increased investment in healthcare. 'The right to health care access is therefore crucial to the pursuit of effective equal opportunities in a free and inclusive society. All citizens should have access to the necessary resources for an acceptable physical and psychological performance.'⁷⁹ This right must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions in order to achieve the highest attainable standard of health.

One of the major ways to eradicate poverty in Nigeria is for the government to work towards relieving their long overdue debts. The debt burden on Nigeria and other poor countries has invited attention in recent years. Currently, of the 52 poorest countries of the world, 37 are in Africa with a total debt profile rising to a total of 376 billion. These countries pay the same amount in debt service as they spend on health and education combined. It has been estimated that if funds were diverted back into health and education from debt payment, lives of about 7 million children a year could be saved.⁸⁰

Another way to end poverty in Nigeria is by improving the country's economic productivity and increasing business opportunities for its citizens. There is an urgent need to improve the agricultural sector in order to create job opportunities for Nigerian citizens. As the backbone of the developing countries, agriculture accounts for between 30 to 60 percent of the total GDP and employs about 70 percent of the total workers.⁸¹ Also, the government must invest in human capital potential and create jobs for women and the teeming young population. It is also important that financial access and diverse opportunities be made available to the various groups in rural communities while microfinance facilities should be improved to help reduce poverty not just in Nigeria but around the world.⁸² In addition, focus must be shifted to developing new skills through robust and well-funded technical and vocational education and training programmes for those millions of Nigerians outside the formal school systems. These are the key ways the government can help to spur growth.

Driving the Economy through Laws

Laws and regulations are indispensable to the proper function of economies and societies and do create the 'rules of the game' for citizens, businesses, government and civil society. They underpin markets, protect the rights and safety of citizens and ensure the delivery of public goods and services.⁸³ Existing laws therefore determine how easily a business can be started and closed and the efficiency with which contracts are enforced. They are examples of the 'nuts' and 'bolts' that are rarely visible but play a critical role because their malfunctioning can thwart an economy's progress and render the more visible policy instruments, such as good fiscal and monetary policies, less effective.⁸⁴

⁷⁸ *ibid.*

⁷⁹ R. Nunes, S. Nunes and G. Rego, 'Health Care as a Universal Right' (2017) 25 (1), *Springer Open Choice*, 1.

⁸⁰ C. Ngoma and S. Mayimbo 'The Negative Impact of Poverty on the Health of Women and Children' (2017) 7, *Ann Med Health Sci Res*.

⁸¹ 'The Role of Agriculture in the Development of Least-Developed Countries and their Integration into the World Economy' *Food and Agricultural Organisation* (Rome 2002) <<http://www.fao.org/3/a-y3997e.pdf>> accessed 03 August 2023.

⁸² 'What are Ways Economic Growth can be Achieved' *Investopedia* <<https://www.investopedia.com/ask/answers/032415/what-are-some-ways-economic-growth-can-be-achieved.asp>> accessed 03 August 2023.

⁸³ *Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest* (OECD Publishing, 2011).

⁸⁴ 'Doing Business 2015' *World Bank* <<http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB15-Full-Report.pdf>> accessed 04 August 2023.

Market economies need clear rules to function efficiently. Without a legal framework establishing and enforcing the ‘rules of the game’, free enterprise system would not exist. Regulations impact positively or negatively on the economy and are capable of attracting or driving investors depending on how protective they are.⁸⁵ The coming into effect of the Federal Competition and Consumer Protection Act (FCCPA) 2019, which is currently the principal legislation on consumer protection in Nigeria, is a welcome development in Nigeria’s competition and consumer protection framework. The existence of a comprehensive legal regime for the regulation of competition is extremely important to the growth of any advanced economy.⁸⁶

The FCCP Act was signed into law by Muhammadu Buhari on 30 January 2019 to promote economic efficiency, maintain competitiveness in the Nigerian market, protect and promote the interest and welfare of consumers. It applies to all businesses and all commercial activities within Nigeria and extends to any establishment in which the Federal, State or Local Government engages in for commercial purposes.⁸⁷ The Act prohibits restrictive or unfair business practices which prevent, restrict or distort competition or constitute an abuse of a dominant position of market power in Nigeria, etcetera.⁸⁸ It also stipulates offences and stiff penalties against competition such as price-fixing, conspiracy, bid-rigging, obstruction of investigation or inquiry, offences against records, giving of false or misleading information, etcetera. These are the innovations that will not only attract investors but will help grow the Nigerian economy and eradicate poverty in the long-term.

Conclusion and Recommendations

The fight against poverty and the promotion of human rights lies at the very heart of the United Nations mandate.⁸⁹ One of the goals set by the United Nations General Assembly in 2000, to be achieved by 2015, included the elimination of extreme poverty and hunger as well as gross inequality of income within countries.⁹⁰ For many years, world Conferences and Summits have paid attention to the increasing levels of global poverty amongst billions of the world’s population and have sought ways to eliminate it.

Poverty is seen as a violation of the human rights of poor people who are vulnerable to various human rights abuses. For many Nigerians, poverty is a major obstacle to the realisation of fundamental rights.⁹¹ Corruption and bribery, which have massively contributed to the elimination or erosion of the middle class, has brought upon Nigerians extreme poverty and lack in a struggling economy. Alarming, Nigeria’s poverty statistics places her as the country with the highest number of poor people on earth.

⁸⁵ S Dudley and J Brito, ‘What is Regulation?’ in *Regulation: A Primer* (2nd ed. Mercatus Center at George Mason University 2012).

⁸⁶ Y. Okojie and I. Bolu, ‘A Review of the Federal Competition and Consumer Protection Bill 2016’ <<http://www.spajibade.com/resources/wp-content/uploads/2018/06/A-REVIEW-OF-THE-FEDERAL-COMPETITION-AND-CONSUMER-PROTECTION-BILL-2016-Okojie-Bolu.pdf>> accessed 04 August 2023.

⁸⁷ O. Ojekunle, ‘Everything You Need to Know about the Federal Competition and Consumer Protection Act’ *Business Insider* <<https://www.pulse.ng/bi/politics/everything-you-need-to-know-about-the-federal-competition-and-consumer-protection-act/wlk0211>> accessed 04 August 2023.

⁸⁸ Under Section 70 of the Act, ‘an undertaking is considered to be in a dominant position if it is able to act without taking account of the reaction of its customers, consumers or competitors.’

⁸⁹ Department of State Diplomacy in Action (2009). Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, Human Rights Reports: Nigeria <<http://www.state.gov/g/drl/rls/hrrtp/2009/af/135970>> accessed 04 August 2023.

⁹⁰ *Ngoma and Mayimbo* (n81).

⁹¹ D. Desmond, C. Coetzee and F. Matthews, ‘Poverty, Human Rights and Access to Equity: Reflections from Nigeria’ (2014) 1 (2) *International Journal of Law and Legal Studies*.

Although the causes of poverty are complex, the place of law and regulation in boosting a county's economy cannot be downplayed. Because law and the economy are intertwined, the government must embark on a deliberate enactment of laws and regulations to ginger economic growth. However, it must be noted that law alone, without more, cannot drive the economy except there is a political will on the part of government to move the economy forward. Whatever laws are put in place to drive the economy must have human rights content to ensure adequate promotion and protection of human rights and the rights to socio-economic needs. Poverty reduction strategies could take the form of improved access to education and health care, debt cancellation, enhancement of economic opportunities by removing import barriers to enable a large percentage of the poor sell their products more easily.⁹²

It is recommended that deliberate policy interventions to fight global poverty must pay special attention to the specific barriers that women face in the economy.⁹³ Social protection systems should be designed from a gender perspective, taking into cognizance the need to address female poverty. This structure should consider the multiple forms of discrimination against women and girls when designing and implementing such programmes. The Nigerian government must make a conscious effort at eliminating negative gender impacts of discriminatory laws and practices.⁹⁴

⁹² Department of State Diplomacy in Action (2009). Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, Human Rights Reports: Nigeria <<http://www.state.gov/g/drl/rls/hrrtp/2009/af/135970>> accessed 04 August 2023.

⁹³ *ibid* (n70).

⁹⁴ *ibid*.

THE EFFECT OF THE FREEDOM OF INFORMATION ACT ON THE FIGHT AGAINST CORRUPTION IN NIGERIA

Damilola S Adesanya*
and Salisu O Jimoh**

Abstract

The Freedom of Information Act (FOIA)¹ was enacted to ensure transparency and accountability in government. The Act does this by making provisions for citizens to have the warrant to request information from public officials. This paper finds that the effective enforcement of the FOIA will give room for government officials to be more accountable to the members of the public. It recognizes that while there are other means to hold public officials accountable to the people, the FOIA seems like the easiest to utilize. The paper further identifies the challenges that may be associated with the Freedom of Information Act such as the Nigerian culture of secrecy, bureaucracy and lack of adequate record keeping among others. The authors suggest that the FOIA can have a positive impact on the fight against corruption in Nigeria if certain amendments are made to the Act and if the provisions of the Act are enforced strictly. This paper recommends that there should be more awareness for the FOIA among members of the public and not just journalists or civil societies. Further to this, the FOIA should be amended to give room for administrative sanctions to be meted out on officials who fail to comply with the provisions of the Act and also to allow extension of time for reply to request for information by an individual where the circumstance warrants it.

Keywords: Accountability, Corruption, Freedom of Information Act, Transparency

Introduction

The advent of information technology in Nigeria has added a brighter coloration to the struggle to arrest corruption particularly in the public sector as it has almost become an integral part of the system. The virus of corruption has so much mixed with Nigeria's economy that it has become almost impossible to identify the host from the parasite. This is so as, particularly in the public sector, where the host appears not to see or deliberately ignores the harms that come with the intimacy it shares with the dreaded virus. It is therefore only a man armed with the right information that can decipher and expose the effects of corruption in Nigeria as a country. Availability and free flow of information play a major role in demanding for transparency and accountability from the governing class whose activities and schedule are usually not available for public scrutiny.

Section 39 of the Constitution² makes provision for the right to freedom of expression. This Section copiously provides that everyone shall be free to express themselves, form and hold opinions, discuss opinions, accept or reject opinions and impart ideas amongst each other.³ The ability of Nigerian citizens to freely discuss, accept or criticise modus operandi of governance is derived from this right. Also, the liberty to seek access to information, however it is kept also stems from this undeniable right. Therefore, an individual who discusses politics constructively is exercising his or her right to express himself or herself freely as provided in the constitution.⁴ To

* Lecturer, Department of Commercial and Property Law, Bola Ajibola College of Law, Crescent University, Abeokuta, Ogun State, Nigeria.

** Lecturer, Department of Jurisprudence and International Law, Bola Ajibola College of Law, Crescent University, Abeokuta, Ogun State, Nigeria.

¹ The Freedom of Information Act 2011.

² Constitution of the Federal Republic of Nigeria 1999 (The Constitution).

³ *Ibid.*

⁴ *Ibid.*

further ensure access to information for critical analysis of governance and for the people to have and make an informed opinion, the Freedom of Information Act (FOIA) was enacted by National Assembly in 2011. This law was enacted to ensure transparency and accountability in governance, by permitting the grant of access to information held by officials occupying public offices and to guarantee press freedom.

In order to do justice to the work, the paper discusses the history of the FOIA, reviews the FOIA extensively, explores the effectiveness of this law in achieving the aim of its enactment and suggests possible amendments to be made to the Act to ensure that it is actively utilized by the people for the purpose of its enactment.

It has been argued that the FOIA appears to only exist in theory and has not gainfully impacted free access to information. As a result, this paper seeks to answer the following questions: is the FOIA a law sufficient enough to curb corrupt practices among public officials in Nigeria? Are there unnecessary or inadequate provisions in the Act? Are there challenges to the adequate enforcement of the FOIA? Can the identified challenges to the enforcement of the provisions of the Act be addressed through the amendment of the Act? This paper is divided into three sections. The first part will discuss the conceptual framework of the key words. The second part will contain the history and review of the FOIA. Lastly, the third section will discuss the impact of the FOIA on the fight against corruption in Nigeria and provide necessary recommendations to help boost the impact of the FOIA on the fight against corruption. This paper will undertake a doctrinal approach to give a proper analysis of the topic.

Conceptual Clarification

Corruption

Corruption is synonymous with all forms of indiscipline and abuse of status and positions.⁵ The Black's Law Dictionary defines corruption as "The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the right of others."⁶ This definition is detailed and captures the possibility of public officials to use their office to amass wealth or other benefits for themselves fraudulently, immorally or illegally.⁷ Going by this definition anyone who partakes in such is engaging in corruption. However, this may or not be punishable depending on the state of the law of the affected society.⁸ Furthermore, corruption has been defined as a form of "dishonest or illegal behaviour especially by powerful people (such as government officials or police officers).⁹ This definition suggests that in most instances, for a person to be corrupt he/she must be in a position that puts him or her in charge of others and such a person is expected to be accountable to those people.¹⁰ Corruption in Nigeria has become so rampant that it is becoming difficult to make a sentence about Nigeria and not include corruption. It has become a major ache of the Nigerian society and this is why almost every politician vying for a political post in Nigeria uses fight

⁵ Yeaoboa-Assiamah E, 'Corruption Here, Corruption there, Corruption Everywhere, a Framework for Understanding and Addressing Public Sector Corruption in Developing African Countries' [2014] 4(3) Journal of Public Administration and Governance.

⁶ Brian A. Garner (ed), Black's Law dictionary 11th edition (St Paul MN Thomson Reuters 2014).

⁷ Olukanyinsola Ajayi & Simisola Osasanmi, 'Nigeria on the Frail of Spectre- Destabilization of Development and Transitional Economies' [1998] 1(4)Journal of Money Laundering Control.

⁸ *Ibid.*

⁹ Merriam Webster Dictionary, 'Corruption' <<https://www.merriam-webster.com/dictionary/corruption>> accessed 9 July 2023.

¹⁰ Ajayi and Osasanmi, (n7).

against corruption as a major campaign strategy.¹¹ The need to fight corruption has become necessary and several measures are being put in place to curb this societal menace by every government, yet, it keeps spreading as if no measure is being put in place to curtail it. It is now a case of the more intervention made, the more the spread of its virus as philosophically opined by Aristotle many centuries ago.¹²

The Freedom of Information

Freedom of Information is the right of the members of the public in any society to freely access and give information ordinarily held by government officials and state institutions.¹³ Free flow of information is one of the rights enjoyed by every citizen of Nigeria and it has both constitutional and international coloration and protection.¹⁴ It is considered a fundamental right of a special class. This is because it enjoys not only local or regional recognitions, but it is also recognised under customary international Law as well.¹⁵ The citizens of all states and members of the public in general have the constitutional right to enjoy this right.¹⁶ This will ensure transparency, probity and accountability in both the public and private sectors of the economy.

The country stands to benefit from its enforcement immensely,¹⁷ particularly in the age and time when the war against corruption is almost lost.¹⁸ The freedom of information is an extension of the right to freedom of expression as contained in Universal Declaration of Human Rights and the Constitution of the Federal Republic of Nigeria. This is because freedom of expression also includes the freedom to seek, receive and impart information and ideas through any media, regardless of frontiers and personality involved.¹⁹

Theoretical Framework

For an effective discussion of the work, three essential theories have been carefully selected to create the foundational bases for the research work. These theories are; the Civil Society Theory, Libertarian Theory and the Deterrence Theory of Punishment.

The Civil Society Theory is one of the most relevant and instructive theories when examining the contributions of civil society organisations to the evolution and development of a society. Little wonder in 1993, three groups: Media Rights Agenda, Civil Liberties Organization and the Nigerian Union of Journalists campaigned openly and vigorously for the enactment of FOI law that will ensure freedom of the press and unhindered access to information.²⁰ One of the major proponents

¹¹ Yemi Akinseye- George and Victor O. Ayeni, 'Independence of Anti-Corruption Bodies in Nigeria: Myth or Reality?' in Yusuf Ali (ed), *Anatomy of Corruption in Nigeria*, (Intec Printers Ltd, 2016) 237.

¹² Aristotle, "the more you know, the more you don't know" available at <<https://www.quora.com/Aristotle-said-the-more-you-know-the-more-you-dont-know-do-you-agree>> accessed 8 August 2023.

¹³ Lexology, 'An Overview of the Freedom of Information Act (An appraisal from a Lawyer's Perspective)' (19 August 2016) <https://www.lexology.com/library/detail.aspx?g=2f3432be-c8ff-4ff1-b396-3cd25682_fdee> accessed 9 August 2023.

¹⁴ CFRN 1999 s39(1).

¹⁵ Universal Declaration of Human Right 1948 217 (III) A Article 19.

¹⁶ Ojo, O. 'Combating Corruption through the FOI Act'. (Paper presented at a Media/Civil Society Roundtable on Nigeria's anti-corruption situation held at Lagos 2015).

¹⁷ Ifeoma Oluwasemilore, 'A Critical Analysis of Nigeria's Freedom of Information Act' [2018] 9 (2) *The Gravitass Review of Business and Property Law*, 11.

¹⁸ Oludayo Tade, 'Why Buhari's Government is losing the Anti-Corruption War' *The Conversation*, (Lagos, 7 March 2021) Available at <https://theconversation.com/cdn.ampproject.org/v/s/theconversation.com/amp/why-buhari-government-is-losing-the-anti-corruption-war-155488?amp_gsa> accessed 2 May 2023.

¹⁹ *Ibid.*

²⁰ Omotayo F O, 'The Nigerian Freedom of Information Law: Progress, Implementation, Challenges and Prospects' [2015] *Library Philosophy and Practice* (e journal), 1219.

of the theory is John Keane.²¹ He opined that various civil society groups should exist in a community to ensure effective participation in governance.²² He was of the opinion that the people through the various civil societies which will be autonomous and independent, can ensure transparency and accountability in governance and as a result prevent corrupt practices among public officials. Going by the proposal of this theory, the various civil societies in Nigeria will be able to improve people's participation in governance through the utilisation of the FOIA. They can furnish Nigerians with information gotten and help them have more informed political opinion.

It has been established that the civil societies identified in the theory above will require information for them to act effectively. They can apply for any information they need directly or act on the information released by pressmen through the news media. For pressmen to release adequate information they have to be able to gain access to this information and their publications should not be restricted. It is to this end that the John Locke and John Stuart Mill's Libertarian theory of the press becomes relevant to this paper. Some of the basic propositions of this theory are that:

1. publications should not be censored.
2. the protection for publication of facts should be extended to journalist who has published an error unknowingly.
3. attacks on government or government officials should not be treated like attacks on individuals and should not be punishable.
4. journalist should not encounter any legal restriction when collecting information for publication.

The deterrence theory of punishment is one of the most persuasive tactics to normative ethics in the historical evolution of philosophy. The proponents which includes Jeremy Bentham (1748-1832) proposes that morally justifiable action is the very one that generated the most good and that the fear of punishment will go a long way to curb commission of crime.²³ That is, people would scarcely commit crime because they do not want to be punished. They believe that the gravity of the punishment determines how scared people are of committing the crime.²⁴ To agree with this statement is to assume that people think before they commit a crime, that people look at the law before deciding whether to commit the crime or not. While this may be so for some people, there are also people who commit crime because it is incidental to their unlawful goals and whether or not there is punishment for their actions, they will still go ahead with the crime to achieve the goals. It is difficult to assume that the FOIA which barely has adequate and realistic punishment for defaulters would prevent the commission of offences. It is questionable whether the fact that someone can seek access to ones' records would stop a person from committing a crime. Also, putting into consideration the fact that such official can always find a reason to hide the information being sought, one cannot be certain that the FOIA can do a lot in the fight against corruption in Nigeria.

The Nigerian Freedom of Information Act 2011

The Freedom of Information Act was enacted by the National Assembly in 2011. It is the principal law on transmission of information within public institutions in Nigeria. The Act which has 32 sections, was enacted to protect and control access to public records and to ensure the protection of personal privacy. Furthermore, the Act seeks to guide public officers on disclosure of

²¹ Christinna Puga, 'Civil Society Theory: Keane' <https://link.springer.com/referenceworkentry/10.1007/978-0-387-93996-4_521> accessed 9 July 2023.

²² Keane John, *Civil Society and the state: New European Perspectives* (London University of Westminster Press 1998).

²³ *Ibid.*

²⁴ Hsin-wen Lee 'Taking Deterrence Seriously: The Wide-Scope Deterrence Theory of Punishment' [2017] 36(1) *Criminal Justice Ethics*, 2.

information and proffers necessary guidelines and protection for public officers regarding disclosure of official information at his disposal.

History of the Nigerian Freedom of Information Act

Traditionally, Nigerians irrespective of tribe have not been raised to appreciate openness or question their leaders about their leadership style. In the Yoruba land, the title of the King is 'Kabiesi' meaning 'unquestionable'.²⁵ In a typical Yoruba parlance, it was indeed a taboo and a serious aberration to question the decision of the king and sometimes these decisions were made with the help of the chiefs who carried out public administration on behalf of the king. It meant that the people could not question those holding public offices.²⁶ Often times, Public Officers in the traditional system in the bid to avoid public outcry, assumed that the best thing to do was to manage the information at the disposal of the members of the community. In like manner, in the Hausa land, the commands of the Emir were final and anyone who dared to question them was considered a rude subject. It is even worst when it has to do with religious issues²⁷

Considering this traditional background of Nigerians that the British colonial masters met, seeking press freedom during the colonial era did not sit well with the colonial masters. The British colonial government found the tone and content of Nigerian newspapers uncomfortable; they perceived them as criticism and anti-government publications and discussions.²⁸ As a result, they promulgated the Obnoxious Newspaper Ordinance of 1903 and Seditious Offences Ordinance of 1909²⁹ to curtail the free flow and dissemination of information by way of publication. At independence, the Nigerian Independence Constitution made provision for freedom of expression, the press still did not have access to information under the control of public servants. Journalists could not fight for long for the enactment of a law ensuring press freedom and free access to information due to the military takeover of government in 1966. The military rule continued till 1993.

In 1993, three groups: Media Rights Agenda, Civil Liberties Organization and the Nigerian Union of Journalists campaigned openly for the enactment of FOI law.³⁰ The Media Rights Agenda came up with a draft bill in 1994 and named it Draft Access to Public Records and Official Information Act. This draft was later revised to FOI bill. The bill remained unaccented to until 2011 when President Goodluck Jonathan gave presidential ascent to the bill and it became the FOI Act 2011. This Act has been the law governing public access to information in Nigeria till date. It was developed and recommended to the National Assembly by the coalition of over 180 Civil Society Organizations. To strengthen the right of the citizens and improve access to information held by the public officers and to aid the fight against corruption in the public sector that has become

²⁵ PH Oladumiye, Adiji Bolajoko and Esther Bolajoko. 'Monarchical Activities of the Yoruba kings of South Western Nigeria: A Culturer Heritage in Printmaking Visual Documentary' [2014] 3 (9) Journal of Arts and Humanities, 1.

²⁶ *Ibid.*

²⁷ John Campbell, 'Traditional Rulers Hold Power in Nigeria' *Council on Foreign Relations* (London, 18 April 2018) available at < <https://www.cfr.org/blog/traditional-rulers-hold-real-power-nigeria>> accessed 2 August 2023.

²⁸ Jacob U Agba, Eric Ugor Ogri and Kwita Ojong Adomi, 'The Nigerian Freedom of Information (FOI) Act and the Right to Know: Bridging the Gapp between Principle and Practice' [2018] 73 *New Media and Mass Communication*, 2.

²⁹ Ayuba A Aminu, Yahaya Y Malgwi, Bulama Kagu and Ibrahim Danjuma, 'The Nigeria Freedom of Information Act 2011 and It's Implication For Records and Office Security Management' [2011] 79 available at <<https://www.semanticscholar.org/paper/Nigeria-Freedom-of-Information-Act-2011-and-it%27s-AminuMalgwi/8c8e764f6d7c47a9b435c1b829a98ab1dbed00c4>> accessed 8 July 2023.

³⁰ Omotayo (n19).

institutionalized.³¹ It also aims at probity and to encourage transparent documentation of information and data management in the public sector so that the citizens know who to hold responsible for any unjustified blemish in the discharge and performance of his public duties and responsibilities.³²

Review of the Freedom of Information Act

Section 1 of FOIA provides that anyone has a right to access any information that is in possession of a public official and such person does not need to demonstrate any special interest in the information sought for. Such person who has the right to an information can apply for it and if denied access, he also by virtue of the Act has the right to institute a court proceeding to compel such public institution or official to make the information available for his use. This opening section of the Act is very relevant and it appears to be the most important section of the Act put together. It is consistent with the provision of the Constitution of Nigeria which provides for freedom of expression. This section of the Act will help Nigerians to be informed and have access to information that will encourage transparency in governance with a polity that is well informed politically. One likely challenge with the full implementation of this section is that the culture of secrecy has been embedded in the Nigeria public service and among the citizens of Nigeria.³³ Even if records are adequately kept, the citizens may never care to apply because the whole idea of public scrutiny is alien to our public service and the people.³⁴

The Act in Section 2 mandates all public institutions to keep and record all information regarding its activities, operations and business and also ensure proper organisation and keeping of information in their custody. It is believed that this provision will encourage public institutions to take record keeping and proper documentation and filing seriously. Furthermore, Section 2 (3) provides that public institutions should publish the records kept in line with subsection 1 and makes them readily available to the public. Some of this information include: list of employees, description and responsibilities of the institution, expenditure of the institution's funds amongst others.

To avoid a reproduction of old information just to meet with the provisions of the Act, and to ensure constant update as at when necessary, sub-section 5 of the same section provides that the information should be reviewed periodically and as soon as a change is made to it. While this section is relevant and cardinal, the adequacy of its provisions can be questioned as there are no administrative sanctions for individuals who fail to comply with this section.³⁵ Also, there is a conservative system of storing public records by most institutions in Nigeria. Most records are kept in hardcopies which make them difficult to access especially when they are old documents. It may take the individual in charge hours or days to obtain some documents and make them available. If the guidelines³⁶ can make provision for public officers to not only keep records but to ensure that the documents are kept in electronic copies, it will become easier for members of the public to access information as at when needed as time is equivalent to money in some instances.

³¹ Ifeoma Oluwasemilore, (n9).

³² Omotayo (n19).

³³ Ezegwu Daniel T, Nwokeocha Ifeanyi M and Ejem Agwu A, 'Freedom of Information Act in Nigeria: Exploring the Gulf Between Enactment and Operability' [2013] 4 (2) International Journal of Social Science and Humanities p 119.

³⁴ Kikelomo Lamidi, 'Background of the Freedom of Information Request in Nigeria' *The Human Rights Law Service* (14 April 2019) <<https://hurilaws.org/background-of-the-freedom-of-information-request-in-nigeria/>> accessed 29 July 2023.

³⁵ Omotayo (n20).

³⁶ Ngozi J Udombana, 'Addressing the Implementation Challenges of Institutional Obligations and Reporting Requirement Under the Nigerian Freedom of Information Act 2011' [2019] 10 (5) Beijing Law Review.

Section 3 of the FOIA recognises a different class of public records. This class is the one that may not be available in print but can only be printed in public offices. Upon application by anyone for this class of information, the Act mandates that it should be printed and made available to the applicant. This provision is an attempt by the Act to recognise information that has been gotten through electronic submission. This is a very good provision that gives room for technological development as electronic registrations are becoming more popular these days. The Act in 3(2) recognises the possible challenge that may be faced by illiterates and disabled persons and provides that they can make applications through a third party (a third party can help them make application). The applicant can make oral application. However, this oral application should be put into writing by the official the application was made to.

Subject to the provision of sections 6, 7 and 8, the public institution should make the requested information available to the applicant within Seven (7) days of receiving the application. If the institution thinks that the application should be denied, it shall notify the applicant of its decisions and reason for the decisions. That the Act makes provision for a timeframe is commendable and a welcome development in legislative drafts of this class. This will help to curb the usual administrative delays that Nigerians experience when dealing with public institutions. Although, it is questionable whether in reality, officials in public institutions work with this timeframe as it seems unrealistic considering the bureaucracy involved in relating with public offices in Nigeria.³⁷

One of the questions that may come up from this provision is whether seven (7) days as provided for under the sections 6, 7 and 8 of the Act is a reasonable timeline to search for a document, read a document and even have an opinion or make a decision to release a document that has been applied for? The answer to this question is subject to the circumstance of each case. In some instances, the document being requested for may have a large volume. In another way, the person to whom the request has been made may be new in office and as such may not be the author of the document or familiar with the work in the document and may not have seen the document before; therefore, he may require more time to read the document and form an opinion on whether to release the document or not. The person may even need approval from a higher authority to access or release the information.³⁸

The FOIA provides that an official can refuse an application but must give a reason for the decision. This can be likened in some circumstances to a statement of defence³⁹ which one needs ample time to prepare. The National Industrial Court has the shortest time frame within which a statement of defence must be filed and that is fourteen (14) days. For some courts parties even have up to 42 days⁴⁰ to file a statement of defence. So, in the case of a reply to an application brought under the FOIA, there should be a more detailed provision accommodating these exceptional circumstances as mentioned here.

Furthermore, this provision of approaching court in case of refusal seems to have altered the impression of journalists and other people who request for document or information under the Act. Since the law says seven days, they cannot imagine going to court to get an order after their request has been refused. Hence, once they are denied access to the requested information, they tend to forget about the document rather than explore other options and ensure that they have exhausted

³⁷ *Ibid.*

³⁸ Philip Teniola David, Sanyaolu Oluwaseyi and Emmanuel O Sijuade, '10 Years of Freedom of Information Act in Nigeria: The Journey so Far, Prospects and Challenges Among Media Practitioners' [2021] 9(8) International Journal of Social Relevance and Concern 156.

³⁹ Especially since this reply may be subject to the court's scrutiny if application is made to the court after refusal.

⁴⁰ See High Court of Lagos State (Civil Procedure) Rules 2019 Order 17 Rule 1.

all possible means to access the information. The Act was passed to encourage transparency, if this is the goal, no time should be too long to wait for the information by the end users.

Section 5 of the Act makes provision for transfer of application to access information from one public institution to another one which it considers has greater interest in the area of request. Greater interest being that the information was originally produced in or for the institution or the information was first received by the institution. This provision is brilliant but will only be effective if the various officers of the public institutions work together and are properly sensitised on this.

Section 7 of the Act provides that the applicant who applies for the release of a document or information can challenge the refusal of access to information and the court can review the application. Where the applicant establishes a case of wrongful denial, the defaulting officer or institution has committed an offence or institution has committed an offence and upon conviction will be liable to a fine of five hundred thousand naira (N500,000). Section 20 provides that this should be done within 30 days of receipt of notice of refusal. Section 21 provides that such matter shall be heard and determined summarily. Section 25 provides that if the court finds that the denial of access was inappropriate, it can order that the information should be disclosed by the public institution. This section leaves a huge decision of appropriateness or not of releasing information to the discretion of the Court. Even if the institution has a valid reason for refusing to grant access to an information, the court can decide that it should be released. Furthermore, the people may refuse to approach the court after a refusal because of the problems associated with litigation in Nigeria such as undue delay, high cost of litigation⁴¹ and uncertainty of their decisions, not leaving out conflicting orders and judgments. These problems have made people weary of litigation. Media organisations that are already dealing with shortage of funds to even carry out their day-to-day functions may find litigation too expensive and then refuse to approach the court after a refusal.⁴² Of equal importance is the Section 10 of the Act which makes it an offence to wilfully destroy, attempt to doctor or alter public records. Anyone found guilty of any of these will be liable to a year imprisonment. This section should also provide administrative sanctions for officials found guilty of the condemned act.

The Act from sections 11 to 19 provides instances and circumstances where information sought via this Act may be refused or denied no matter how important it is by the party seeking the information. Section 11 of the Act provides that a public institution may deny access to information if it finds that disclosure of the information may be injurious to international affair and defence of the Federal Republic of Nigeria. Moreover, access to such information will be denied if the interest of the public in disclosing the information outweighs the possible injury the disclosure may cause. Section 12 makes provision for public institutions to deny an application for information that the institution has gathered for administrative proceedings or for law enforcement purposes if access to such information would interfere with enforcement or deprive a person of fair hearing.

Section 14 provides that public institutions must deny access to information that contain people's personal information. However, if public interest in disclosure of the information outweighs the privacy of the individual being protected, access can be granted to the information. Section 15 forbids an institution from granting access to information relating to a trade secret. The only exception to this prohibition being if the disclosure would be in public interest, relates to public health, public safety or environmental protection. Section 16 recognises denial of access to

⁴¹ Babafemi Odunsi, Medical Negligence and kits Litigation in Nigeria' Beijing Law Review, Vol 14 No 2 june 2023.

⁴² Agba and others (n18) 25.

information that is subject to legal practitioner-client privilege, health worker-patient privilege, journalism confidentiality privilege and other relevant professional privileges. The sections reviewed in this paragraph ensure that even though the Act was enacted to ensure freedom of information, the rights of individuals to privacy as provided in the Constitution⁴³ is not breached, professional confidence is not tampered with and information that may cause danger to the public is not released under the guise of the Act. Section 13 mandates every government or public institution to provide appropriate training for its officials on the right of the public, to public records. This section is very important and adequate measures should be taken by public offices to ensure that their officials undergo these trainings and also sensitise people around them on the provisions of the FOIA.⁴⁴

Sections 17 and 19 of the Act are very relevant to the educational sector as these sections recognise the confidentiality that academic research requires. Section 17 allows public institution to deny access to an information which contains course or research material prepared by faculty members. Furthermore, section 19 permits denial of access to information relating to test questions, scoring keys and other examination data used to administer or interview. Sections 22 to 25 of the Act makes provisions for guidelines be followed by the court when reviewing cases involving refused application. While the court must have access to all necessary information regarding the case, they must ensure that effort is made to keep the information from leakage. With these sections, the Act recognises the duty and powers of the judiciary and ensures that the Act does not prevent the judiciary from doing justice.

Through section 29, the Act makes it compulsory through its provisions for every public institution to submit a yearly report to the office of the Attorney General of the Federation on or before the first day of February every year. This report must detail the extent of the compliance to the Act by the public institution. The provision is enacted to ensure accountability by officers handling sensitive information and to serve as a check in case of abuse of their responsibility under the Act. However, due to the very high numbers of such institutions in Nigeria and higher numbers of officials that keeps information, it may be very difficult to monitor compliance, this is coupled with the retinue of constitutional, statutory and administrative functions involving the office of the Attorney General of the Federation. The Office of Ombudsman should have been more preferable for this, but the Office exists more on statute than in reality in Nigeria.

Section 30 is the definition Section of this Act. Some of the salient definitions in the Act are the definitions of court, public institution and public record. Court in the Act refers to either the State High Court (SHC) or the Federal High Court (FHC). This means that both the SHC and the FHC have jurisdiction on matters arising from the Act. Public institution is any legislative, judicial or executive body of the government or private bodies which provide public services, performs public functions or utilises public funds. Public Records are electronic or paper documents under control of the public or private bodies which in themselves relate to public interest.

The Impact of the Freedom of Information Act on the Fight against Corruption

Freedom of Information Act was enacted in Nigeria at a time it was most needed. Corruption has eaten deep into the fabrics of the nation's public service and of course, even private institutions. The endemic and suppressing nature of corruption in Nigeria has raised it to the status of a national problem which like scarcity of food requires state of emergency declaration as made by Bola

⁴³ The Constitution (n2) Section 37.

⁴⁴ Ijeoma Okereke, 'How State Officials Violate Nigeria's Freedom of Information Act' *Premium Times* [Lagos, April 2020] <<https://www.premiumtimesng.com/news/headlines/386053-how-state-officials-violate-nigerias-freedom-of-information-act.html?tztc=1>> accessed 20 July 2023.

Tinubu the President of Federal Republic of Nigeria in year 2023.⁴⁵ In the fight against this monstrous misbehavior, there is every need for freedom of information to prevail. The anti-graft war can only succeed in an environment where public records are within the reach of members of the general public. FOIA is a step in the right direction in this regard. Its provisions have provided a good backup and reinforcement to the struggle to entrench the principles of responsibility, accountability, and transparency in public governance and administration. This paper argues that the Act has recorded relative popularity among members of the general public. However, how well it is being utilized to facilitate the anti-graft war is the next course for concern, as the paper recognises that it has not been effectively utilized due to several intervening variables.

Some of such are:

With both national and international agencies pointing continuously at corruption as the major obstacle to socio-economic development, there is a dire need to tame the monster now. This is where the Act becomes important, as it is one of the greatest assets in the hands of whistle blowers who have the zeal to expose corrupt acts. It now behooves on journalists and members of the civil society to key into the opportunities and avenues provided by the Act to root out corruption in the country. Until this is done, the FOIA remains an Act in the statutes book with little or no impact on the Nigerian society.

Increased citizens' demand for accountability will naturally instil fear in public office holders and therefore check their excesses. Nigerians must take advantage of the FOIA to commence the journey towards cleansing of the land. Corruption is pervasive in our society and exists at every level of the society. FOIA is one of the surest ways of holding public institutions accountable

Although, it has been argued that whether the FOIA is passed or not, corruption can still be tamed as investigative agencies have access to any record that they need for investigating allegations of corrupt practices by public officials.⁴⁶ However, the issue with this argument is that the expense of conducting such investigation outweighs the cost of applying through the FOIA. Also, Custodians of public documents are ordinarily meant to be accountable to the people. It becomes questionable whether the people should always go through investigative agencies to have access to information that should ordinarily be made available to them without asking. It is also not cost effective to always go through the investigative agencies to gain access to every public document where the members of the public suspects corrupt practices.

Worthy of note is the fact that public officials despite knowing that investigative agencies can have access to public records, still go ahead with these corrupt acts. The Auditor Generals of the States or Federation has power to call for any record whether because an audit has been commissioned or routinely and randomly yet white colour offences are still being committed. The question then is whether request from random people has the capacity to stop public officials from committing official offences? Although the people cannot by themselves hold the public officials accountable, information gotten through applications brought under the FOIA can be used to make report to relevant authorities that can hold public officials accountable. The people can also through public outcry gain enough attention from relevant authorities that will then make conscious effort to curb the corrupt acts that has led to the public outcry.

⁴⁵ Mary Izuaka, 'Tinubu declares state of Emergency on food insecurity as prices rise' *Premium Times* (Lagos, 13 July 2023) <<https://www.premiumtimesng.com/agriculture/agric-news/609678-updatewd-tinubu-declares-state-of-emergency-on-food-insecurity-as-prices-rise>> accessed 10 August 2023.

⁴⁶ Udombana (n37).

The major challenge to the great impact that the FOIA would have had on the fight against corruption in Nigeria is that the FOIA makes it almost impossible to compel public officials to disclose any information. The exceptions are cumbersome and this makes it very easy for public officials to refuse to grant an application.⁴⁷ If there is an intent not to release the documents, there are enough justifications in the Act to this effect. One may conclude that it appears that the FOIA gave with one hand and took back with the other hand.

There is also the view that the FOIA should make provisions that will enable people to apply for information with private institutions. The assumed reason for this is that public institutions use private institutions to perpetuate corruption. While the assumption may be correct, asking that a law should force privately owned organisation or business entity to be accountable to people they do not owe any such duty will amount to an abuse of power. Private organisations and business entities are already under the control of Corporate Affairs Commission (CAC) and governed by the Companies and Allied Matters Act 2020 (CAMA) and they are expected to file returns at the Corporate Affairs Commission and also hold Annual General Meetings.⁴⁸ Any member of the public could approach the Commission for the available information kept with the Commission and make do with it. Therefore, it can be stated that Private institutions are already under enough scrutiny and should not have any business with the FOIA. The FOIA is a law responsible for transparency in governance.

Furthermore, it is not very plausible that the FOIA could be invoked against a State-owned business or agencies. This so as 'Information' is not stated in the Exclusive Legislative List as provided under the Constitution.⁴⁹ Little wonder the State Assemblies are encouraged to domesticate the law to allow it enforceability within individual State of the Federation. The FOIA would contribute immensely to the fight against corruption in Nigeria. As it is, if adequately implemented, it would, through ensuring transparency, guarantee accountability of government officials to the people and also help to further reduce corrupt practices in public institutions.

Conclusion

The FOIA which was enacted in 2011 encourages transparency and accountability of public officials. Without mincing words, the act is embedded with practical provisions of law and adequate policies of governance. These would provide the public particularly NGOs and journalists with the much-needed tools, data and enabling environment to generate information for analyzing, accessing, appraising or scrutinising the account, record or activities of public officials. It will also help to educate and inform the public about the activities of the government or any of its sectors in a manner that will ensure accountability and transparency in governance. This will in no measure make the members of the public more equipped with veritable information about how they are being governed; thereby giving room for constructive criticism or condemnation of erring public officer with a view to expose his/her excesses. Furthermore, this will make them who? serve the public better and give room for increase in priceless service to humanity in the country.

There is no doubt that transparency is a great disincentive against corruption and other unethical practices. It is an effective and cost-efficient measure for the fight against corruption in Nigeria. A strengthened FOI regime will enhance citizens' demand for accountability and prevent and check the spread of corruption in Nigeria. Perhaps it may be the missing link that made corruption a

⁴⁷ Preye Kuro Inokoba, 'Freedom of Information Act and Democratic Consolidation in Nigeria: Prospects and Challenges' [2014] 3 (12), 2260.

⁴⁸ Companies and Allied Matters Act 2020 s237.

⁴⁹ CFRN 1999 Part 1 Second Schedule.

veritable vocation in Nigeria. Therefore, the provisions of the FOIA should be strictly enforced for the law to achieve its full potential.

Recommendations

1. Creation of more awareness for the Act:⁵⁰ Important journalism stakeholders such as tertiary institutions, the Nigerian Union of Journalists (NUJ), Newspaper Proprietors Association of Nigeria (NPAN) and Civil Society Organisations (CSO) should ensure there is more awareness for the FOIA and help the people have a good understanding of its provisions.⁵¹ They should also have Legal practitioners take them through the legal aspects of the Act; this will help the people to use the Act more and impact our society.
2. There should be a monitoring team to ensure compliance with the Act:⁵² the Ministry of Information develop a team whose role would be to receive reports on every application brought under the FOIA and ensure the application is treated properly (be it a decision to approve or a decision to refuse) and within time.
3. Electronic Copies of Documents should be kept: To foster adequate record-keeping, there should be a provision in the FOIA ensuring that public officials keep scanned copies of all documents. This will make it easier to produce these documents when there is request for them.
4. Impose Administrative sanctions:⁵³ While some acts under the FOIA have been made criminal and punishable by the courts, there are some acts that have not been prescribed as offences. Hence, people who perpetuate these acts would go unpunished. To ensure proper compliance with the provisions of the FOIA there should be administrative sanctions such as suspension without pay and termination of appointment for officials who fail to comply with the provisions of the Act.
5. Exceptions on number of days for application: As noted above, the days within which a reply must be provided to an application brought under the FOIA is seven days. This provision should come with some provisos that will accommodate some special circumstances⁵⁴ that make it humanly impossible to provide a reply within the stipulated time.
6. Government should put up policies that would help to build an informed, dynamic and patriotic civil service.

⁵⁰ Inokoba (n48).

⁵¹ Asogwa Fidelis Ndidiamaka, Ibe Nkechiyere Magdalene Awo and Orji-Egwu Agatha Obiageri, 'Freedom of Information Act and Journalism in Nigeria 2011-2021: A Review of a Decade of Utilisation and Practice' [2021] 6 *Melting Pot*, 45.

⁵² Udombana (n37).

⁵³ Udombana (n37).

⁵⁴ If the official is new in office and is just accessing the document in question for the first time, if the official would need approval of someone in higher authority to access the information, if the official did not author the document and if the document is voluminous amongst others.

COPYRIGHT OWNERSHIP IN PHOTOGRAPHY: UNRAVELLING NIGERIA GAME-CHANGING LEGISLATION

Chukwuebuka Ibeh*

Abstract:

Nigeria's ground breaking Copyright Act of 2022 has ushered in a new era of copyright protection, particularly in the realm of photography. This article delves into the transformative elements of the Act, shedding light on its impact on the ownership of photographic works. Notably, the Act affirms that photographers retain primary copyright ownership, irrespective of commissions or employment arrangements, reinforcing their creative rights in the digital age. The Act's implications for the copyrightability of everyday cell-phone snapshots are explored, highlighting the significance of creative input in establishing robust protection. Complexities surrounding exceptions to copyright ownership, including fair dealing, transfers, and specific entity usage, are dissected, providing clarity on the legal landscape. Duration of copyright is addressed, as well as the intricate interplay between image rights, privacy, and the art of photography. The article underscores the responsible practice of seeking consent when photographing identifiable individuals for commercial purposes, underscoring the importance of ethical considerations in the field of copyright. As the global community observes "World Photography Day" every 19th of August, these insights offer a timely reflection on the enduring importance of copyright law in fostering a vibrant atmosphere for creative expression.

Introduction:

On March 17, 2023, Nigeria promulgated a new copyright era with the enactment of the Copyright Act 2022. This new law replaces the previous Copyright Act CAP C28 LFN 2004 and brings significant changes that will affect creativity and strengthen their rights, especially in the digital domain. The Act acknowledges digital copies of works, grants the Nigerian Copyright Commission the authority to enforce compliance, recognizes audiovisual works for copyright protection, sets the tenure of moral rights, and establishes licensing regulations for photography and arts, among other provisions.¹

The primary objective of the Act is to protect authors' rights, ensuring fair rewards and recognition for their intellectual efforts, while also providing appropriate limitations and exceptions to guarantee access to creative works and achieve other objectives.² Photography is classified as an artistic work and is eligible for copyright protection.³ Overall, the Act incorporates many elements from the previous law but introduces noteworthy changes to accommodate developments in the digital era. Some of the keywords in the Article are: Copyright, Photograph, Ownership, Author, Creative, Work, Artistic, etc.

The subject matter of copyright revolves around communication and aims to control the copying of protected works by unauthorized individuals. Copyright grants the exclusive right to perform certain acts concerning the work in question. It is important to note that copyright primarily focuses on safeguarding the expression of ideas rather than the ideas themselves. In the case of *Donoghue v. Allied Newspaper Limited*,⁴ Lord Farewell emphasized that copyright does not extend to the protection of mere ideas.

* **Chukwuebuka Ibeh is an Associate at Gracean Solicitors, Lagos State, and also as a Member of the Legal Department at Chimons Gas Ltd, Lagos. He holds a Bachelors Degree from Imo State University, and can be contacted on ibehchukwuebukanic@gmail.com**

¹ An overview of the Copyright Act 2022 - Businessday NG.

² Section 1 (a & b) of the Copyright Act 2022.

³ Section 2(c) of the Act

⁴ *Donoghue v. Allied Newspaper Limited* (1937) 3 Ch. D. 503 Chancery Division in the United Kingdom

An individual may have a brilliant idea for a story, picture, or play, but copyright protection comes into play only when that idea is expressed and embodied in a tangible form, such as a book, play, or artwork. In such cases, the person who transforms the idea into a concrete medium holds the copyright, while the originator of the idea does not possess any rights to the resultant production. However, for an expression of ideas to be eligible for copyright protection, it must satisfy certain criteria. It needs to be original, meaning it should not be copied from someone else's work, or should be novel, implying that not all photographs are protected by copyright; they must meet a certain threshold of originality. Furthermore, the expression must be fixed in a definite medium of communication, whether existing at the time of creation or later developed, that enables it to be perceived directly or with the aid of a machine device.⁵

According to Will Kenton,⁶ Copyright infringement is the use or production of copyright-protected material without the permission of the copyright holder. Copyright infringement means that the rights afforded to the copyright holder, such as the exclusive use of a work for a set period of time, are being breached by a third party. Copyright is infringed by any person who without the authorisation of the owner of the copyright does or causes any person to do an act, which constitutes a violation of the exclusive rights conferred under the Act;⁷ as such Copyright is a legally actionable wrong.⁸ Anyone claiming their copyright has been infringed can seek damages, injunctions, or accounts, depending on the circumstances of the infringement.

The landmark case of *Burrow-Giles Lithographic Company v. Napoleon Sarony*,⁹ played a pivotal role in establishing photography as an artistic work deserving of copyright protection and also one of the historic court case that helped shape scope of copyright protections. In this case, photographer Napoleon Sarony filed a lawsuit against Burrow-Giles for reproducing his photograph of Oscar Wilde without permission. Burrow-Giles contended that photography did not fall under the category of "writings" in the U.S. Constitution and, hence, was not eligible for copyright protection. However, Justice Samuel Freeman Miller disagreed with this argument, asserting that photography could, indeed, be considered an original work of art. He emphasized that Sarony's creative decisions, such as posing the subject, arranging the setting, and eliciting the desired expression, showcased the artistic nature of his photograph. This ruling crucially recognized the creative process involved in photography and solidified its status as an artistic medium deserving of legal safeguards through copyright protection. The case set a precedent that paved the way for photography's recognition as a form of art under the law.

The question of copyright ownership in photographs often arises when a photographer is commissioned to capture images by a client. In Nigeria, the Copyright Act 2022 established the fundamental principle that the author of a photograph is granted initial copyright ownership, irrespective of whether the work was carried out during the course of employment or commissioned by a client¹⁰; normatively, this means that copyright is automatically granted upon the act of creation, without the need for formal registration as can be seen in patent & trademark rights. This legal analysis aims to explore the rights of photographers as original creators and copyright owners of their work, while also addressing exceptions to this rule through contractual agreements and few others.

⁵ Section 2(2) of the Copyright Act 2022

⁶ Kenton Will; Copyright Infringement: Definition, Meaning, Example and Criteria

⁷ Section 36 of the Copyright Act 2022

⁸ Section 37 of the Act

⁹ *Burrow-Giles Lithographic Company v. Napoleon Sarony*, 111 U.S. 53 (more) 4 S. Ct. 279; 28 L. Ed. 349; 1884 U.S. LEXIS 1757

¹⁰ Section 10 of the Copyright Act 2022

Copyright Ownership in Photographs:

Nigerian Copyright Act unequivocally grants the initial and inherent copyright ownership of a photograph to the person who takes the picture,¹¹ commonly referred to as the author of the work. This principle applies regardless of any financial arrangement or engagement with a client or employer. Therefore, photographers retain exclusive rights over their work, including reproduction, publication, display, and licensing. Belgore, J in *Oladipo Yemitan v. The Daily Times (Nig) Ltd & Anor.*,¹² asserted that "copyright fundamentally resides with the author, the individual responsible for the actual efforts, labor, knowledge, and skill invested in creating the work".

The definition of an "author" becomes pertinent, which in the context of a photographic work refers to the individual who took the photograph.¹³ See the case of *Banire V. NTA - Star TV Network Limited*,¹⁴ where the Appellant; Banire, sued the Respondent NTA Star TV for their unauthorised use of her image. In the instant case, the court of appeal held that copyright of photograph belongs to the photographer. The implication is that a photographer has the right to produce, reproduce and commercialize photo-images of the Photographed without his/her knowledge or consent.

In April 2017, the New York Daily News¹⁵ reported a case involving Celebrity Khloé Kardashian. She was sued for copyright infringement due to posting a paparazzi photograph of herself on her Instagram feed while visiting a Miami restaurant. The photograph had been exclusively licensed to the Daily Mail, and Khloe used it without their permission, removing their accreditation in the process.

Copyrightability of Casual Cell-phone Snapshots in Photography:

With the proliferation of cell-phones equipped with high-quality cameras, casual cell-phone photography has become ubiquitous. These snapshots capture everyday moments and often find their way onto social media platforms, but the question of their copyrightability has become a topic of discussion in the realm of photography. Photography has long been recognized as an art form deserving of full copyright protection. These creative choices include elements like posing the subject, using lighting and shade, determining the angle of the shot, selecting the camera and film, applying filters, and employing various developing techniques to produce the final result.

Undeniably, many cell-phone photographers demonstrate artistic talent and produce visually stunning images using their devices. In such cases, where significant creative decisions are made during the process of capturing the photograph, the full copyright protection traditionally afforded to professional photographers' works appears justified. In many "do you mind taking our photo" scenarios, the "photographers" do little more than click the button, without adjusting the phone's settings, and without making material contributions to any creative choices. Maybe the picture takers will tell the subject to "smile" or "squeeze in closer so I can get you all into the frame," but should that be enough to vest copyright ownership in them? (Isn't that sort of like a music producer claiming copyright protection because he shouted "play louder" during the recording process?) In any event, it is worth keeping in mind that copyright protection for many of these photos will be on the thin side.¹⁶

¹¹ *Supra*, Section 10 of the Act

¹² *Oladipo Yemitan v Daily Times (Nig) Ltd & Gbenga Odusnaya* (1980) FHCRC 180 at 190

¹³ Section 108 of the Copyright Act 2022

¹⁴ *Banire V. NTA - Star TV Network Limited* (2021) LPELR-52824(CA).

¹⁵ <https://www.nydailynews.com/entertainment/gossip/khloe-kardashian-hit-copyright-infringement-lawsuit-article-1.3107149>.

¹⁶ Advertising Law Update, available at <https://advertisinglaw.fkks.com/post/102i6or/cellphone-photo-etiquette-do-you-mind-taking-our-picture-sure-but-i-own-the> accessed 19 August, 2023.

The rise of casual cell-phone photography raises the question of whether all snapshots should have the same copyright protection as professional works of art. In situations where minimal creative input is involved, like simple point-and-click photos, the strength of copyright protection might be questioned. Factors like the level of creative input and artistic choices should be considered when evaluating the copyrightability of cell-phone snapshots, as some may showcase artistic flair while others may be more like everyday snapshots with limited copyright protection. As the world continues to witness an explosion of cell-phone photography, the copyright landscape should adapt to address these nuanced distinctions. By recognizing the varying degrees of creative input in cell-phone snapshots, copyright laws can ensure that photography's artistic integrity is preserved while providing appropriate protection for the works that genuinely merit it.

Exceptions to Copyright Ownership:

- **Transfer:**

Photographers typically retain copyright ownership of their work, but there are situations where this ownership can be transferred to the photographed/employer or client through explicit contractual agreements.¹⁷ To effect the transfer of copyright, the agreement must be in writing and clearly state the intention to transfer the copyright from the photographer/author to the photographed/client. In the absence of such agreements, the default position remains in favor of the photographer as the rightful copyright owner.

Other salient points to note here are as follows;

- **Non-Exclusive License for Non-Commercial Use:** When a person commissions such a work for their private and domestic use, they are automatically granted a non-exclusive license. This license allows them to use the commissioned work for their personal purposes, without the intention of making money or conducting any commercial activities with it. In simple terms, they have the right to enjoy and use the work themselves, but not to profit from it commercially.¹⁸

- **Control over Publication and Distribution:** Additionally, the person who commissioned the work has the right to prevent the work from being published, exhibited, broadcasted, communicated, distributed, or shared with the public. This means they have the authority to decide whether the work can be shown or distributed to others beyond their personal usage. This control allows them to maintain privacy and control over the work's accessibility to the public.¹⁹ These rights are subject to any agreements made between the person who commissioned the work and the author.

- **Work Created under a Contract for Services or Employment:**

If a person creates a work under a contract for services or during their employment by a government, ministry, department, agency, international organization, or inter-governmental organization, the copyright in that work belongs to the entity that the person is working for.²⁰

- **Fair Dealing:**

Fair dealing is a legal doctrine that allows limited use of copyrighted material without the need for permission from the copyright holder. In the Act, activities such as private use, parody, non-commercial research, criticism, and reporting of current events, are allowed without infringing on

¹⁷ Section 28(1) of the Copyright Act 2022.

¹⁸ Section 28(3) of the Act.

¹⁹ *Ibid.*

²⁰ Section 28 (2) of the Copyright Act 2022.

the photographer's rights.²¹ However, when determining whether a particular use is fair dealing, factors like the purpose, nature of the work, amount used, and its effect on the market must be considered. This exception permits limited use of copyrighted photos for specific purposes without obtaining explicit permission from the photographer or copyright holder.

- **Inclusion in Audiovisual Works or Broadcasts:**

Photographs can be used in videos or broadcasts if they are publicly displayed.²² The concept of "incidental inclusion" in copyright law comes into play here, which means that if an audiovisual work or broadcast captures an artistic work (e.g., a picture, painting or sculpture) that is located in a public place, it may be considered permissible even if the artwork itself is protected by copyright.

- **Use by Government, Public Libraries, and Certain Institutions:**

In the public interest and without generating revenue, government entities, public libraries, and specific institutions are allowed to use copyrighted works of photographers.²³ For instance, let's say a government agency, such as a national parks department, wants to create an informational brochure to raise awareness about the natural wonders and wildlife in their region. They decide to include high-quality photographs taken by various photographers to showcase the beauty of their national parks. Under this exception, the government agency is allowed to use these copyrighted photographs without obtaining explicit permission from the photographers or without having to pay licensing fees.²⁴ This exception applies because the government entity is using the photographs for a non-commercial, public interest purpose - in this case, promoting the country's natural heritage to the public.

However, it's important to note that the use should genuinely serve the public interest and not result in generating revenue for the government agency. If they were to use the photographs for a commercial purpose or to make a profit directly, the exception might not apply, and they would need to secure appropriate permissions or licenses from the photographers.

- **Limited Copying for Educational Purposes:**

When an artistic work, such as a photograph, is copied for teaching or preparation for teaching purposes, it is not considered copyright infringement.²⁵ Such copying is allowed when conducted by either the teacher or the student, as long as it is not done using a machine or method that can produce multiple copies (reprographic process).

Duration for Copyright:

The copyright duration for photography is 50 years after the work's first public availability with the author's consent, or 50 years after its creation if not made available to the public during that time.²⁶ Therefore, the ownership rights granted to the author in photography under this section are not perpetual or everlasting.

Limitations on Usage and Publication:

Despite possessing copyright ownership, photographers/authors are subject to certain limitations when using or publishing photographs. Image rights and the right to privacy are crucial considerations in this context which is provided by our laws.²⁷ The Nigerian constitution

²¹ Section 20 (1)(a-e) of the Copyright Act .

²² *Ibid.*

²³ Section 20(1)(i) and 25 of the Act.

²⁴ *Supra*, Section 20(1)(i) and 25 of the Act.

²⁵ Section 21(1) of the Act 2022.

²⁶ Section 19(1)(c) of the Act.

²⁷ Section 37 of the 1999 Constitution of Federal Republic of Nigeria (as amended).

guarantees the privacy of citizens, their homes, telephone conversations and telegraphic communication. Image rights, which pertain to the use of a person's likeness for commercial purposes without their consent, are not explicitly recognized in Nigerian copyright law. However, they may be protected under other legal principles, such as privacy laws, depending on the specific circumstances and jurisdiction.

The recently signed Nigeria Data Protection Act of 2023 clarifies that personal data also encompasses any information that can identify a data subject physically.²⁸ This includes photographs or images, allowing the Photographed/Client to rely on the Nigeria Data Protection Act for civil actions against the author in case of perceived infringement on their data/image rights.²⁹

The Photographer's Obligations:

Even though photographers hold copyright ownership, they must still adhere to the limitations imposed by image rights and privacy laws. Publishing or using photographs of individuals without their consent may result in legal repercussions, particularly if it infringes upon their right to privacy which in Nigeria is protected by the Constitution.³⁰ Therefore, it is essential for photographers to exercise due diligence and obtain proper consent when dealing with images that involve identifiable individuals for Commercial purposes.

Conclusion:

In summary, during the celebration of "World Photography Day" on August 19th each year, it is important for photographers and their clients to be aware that Nigerian copyright law generally gives initial copyright ownership of photographs to the photographer or creator. This principle may change if there are specific contractual agreements transferring copyright to the client. It's crucial to note that having copyright ownership doesn't mean unlimited use of the photos, as one must consider image rights and privacy concerns. By comprehending these legal complexities and obtaining proper consent when needed, photographers can handle copyright matters responsibly while respecting the rights of the individuals depicted in their work.

²⁸ Section 65 of the Nigeria Data Protection Act 2023.

²⁹ Section 1 of the Nigeria Data Protection Act.

³⁰ *Supra*, Section 37 of the 1999 CFRN.

THE LEGAL AND INSTITUTIONAL FRAMEWORK PROTECTING INHERITANCE RIGHTS OF WOMEN IN ANAMBRA STATE.

Chinwe Patricia Iloka*

Abstract

The inheritance right of women in Anambra State is still an unsettled issue. Women are marginalized and discriminated against and their rights to inheritance are violated on daily bases irrespective of plethora of laws protecting women's right of inheritance. The inevitability of death brings with it a plethora of challenges for the family of the deceased; foremost on the list of challenges is what to do with the property of the deceased. The law of succession and inheritance reflects Nigeria's plural legal system. Indigenous customary law developed rules of inheritance for intestacy through the traditional canon of descent, as adapted over the years to changes in the society and the rule of natural justice as applied by the courts. The aim of the study is to critically examine the legal and institutional frame work protecting inheritance rights of women in Anambra State. The research design and methodology was doctrinal approach, using analytical and descriptive research methodology. The main sources of data collection were various legal documents and materials, both from the library and internet. It was therefore observed among others that the inheritance rights of women in Anambra State are violated irrespective of the guaranteed Constitutional provisions and plethora of other laws protecting the inheritance rights of women in Nigeria. It was therefore recommended amongst others. That extant laws of Inheritance in the South Eastern States should have provisions for punishment of offenders that violate the provisions of the law and domestication of international instruments which Nigerian has ratified.

Keywords: Inheritance, Intestate, Rights, Testator, Women.

Introduction

The inheritance right of women in Anambra State is still an unsettled issue. Women are marginalized and discriminated against in issue of inheritance especially at the demise of the husband and loved ones. In Igbo land, when a person dies and leaves property, the property of that person is given to another person or people as their inheritance. Who inherits this property is decided in different ways; a person can decide before he or she dies who should inherit his property and under the English law, that is written down and signed in a document called a Will. But where there is no Will, other laws are used to decide who gets the property. In *Agbai v Okogbue*,¹ the Supreme Court held that any customary law that sanctions the breach of an aspect of the rule of law as contained in the fundamental rights provisions guaranteed to a Nigerian in the constitution is barbarous and should not be enforced by the courts, it was also stated that custom is a rule which in a particular district has, from long usage, obtained the force of law. Most Nigerian customary laws are fraught with legion of gender discriminatory practices despite the fact that the constitutional provisions are quite clear and unambiguous. For countless of years, cultural traditions and practices have ensured that men retain a material, sexual and moral dominance over women that they are simply unwilling to voluntarily relinquish.² Under some of our customary laws, a woman is more like a chattel to be sold by her parents to her husband to whom she becomes enslaved after the payment of the bride price, the dowry. Upon his death, not only has she no right to inherit from his estate but she also becomes part of the estate of her deceased husband to be

* Chinwe Patricia Iloka, LL.B, B.L, LL.M, Ph.D, Senior Lecturer, Department of Private and Public Law, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University Igbaram Anambra State Nigeria Mobile: +2348035696281, Email: cp.iloka@coou.edu.ng and chypat4@gmail.com

¹ (1991) NWLR (pt 204) 391 @ 416.

² IC Okagbue, *Igbo Customary Law and the Rights of Women in the Family*, IA Ayua, Law, Justice and the Nigerian Society: Essay in Honour of Hon. Justice Mohammed Bello (Lagos: Nigerian Institute of Advanced Legal Studies, 1995) p 202.

inherited by his heir. A cursory look at our Nigerian traditional society still shows that the rights and freedom of women with regards to inheritance is still being restricted by many practices such as force or early marriage without an ability to give consent.³ It is submitted that this customary law practices are abhorrent, extra ordinarily too harsh, belittling and reduces the dignity of the person of the women.

Thus, generally speaking, the cardinal principle of succession law among the Igbo is the concept of primogeniture, i.e., succession through the eldest male in the family known as Okpala, diokpala or diokpa.⁴ Etymologically, the word “primogeniture” is of a latin origin; it is fusion of two words: ‘primo’ and ‘genitura’ and it means first born or first birth. This rule of succession and inheritance is highly evidenced in the customary laws of succession of a number of Igbo communities, such as the Oli-ekpe practice,⁵ Igiogbe practice.⁶ Again, it is the male child of the Igbo that is reckoned with in the distribution of property for the purpose of inheritance. The belief is that the female will get married and go to her husband’s house and, as such, the property of the father cannot be entrusted to her. This is an issue that was raised in the case of *Mojekwu v Mojekwu*,⁷ where the deceased owner of some properties had two female children surviving him, but his male nephew claimed to be entitled to his estate. The nephew claimed that the iri ekpe custom allows the closest male relation of a deceased person to inherit his property where the deceased died without a male issue, brother or father. The Court of Appeal rejected the view that the case was governed by Nnewi customary law but added that, even if it were so, such customary law which discriminated against women would not be enforced as it would be repugnant to natural justice, equity and good conscience. The Supreme Court, however, overruled this decision on further appeal and upheld the iri ekpe custom of property distribution. There is, however, an exception where the daughter of a deceased agrees to remain unmarried and live in her father’s house with a view to raising male children in her father’s name. This custom, which appears peculiar to the Igbo, is known as nrachi or idigbe. It is a custom that is invoked when the deceased has left behind a substantial estate but there is no surviving male child to inherit the property and continue the lineage. Thus, it is designed to save the lineage from extinction and the daughter is, therefore, allowed to inherit the property of the estate while staying in the family house and continuing to uphold the family lineage and tradition.

Moreover, the above-stated position of Igbo customary law is now changing in line with Section 42 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which states:

- 42(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person: (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups places of origin, sex, religious or political opinions are not made subject; or ...
- (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

³ J Abaagu ‘Gender, Poverty and Environment in Africa: The Role of the Law (2006) vol 2. The International Journal of Gender and Contemporary Studies, p 16.

⁴ EI Nwogugu, ‘Family Law in Nigeria’ (3rd edn, Ibadan: HEBN Publishers 2014) 416.

⁵ A customary rule of succession prevalent among the Igbos which prohibits females from inheriting property from their parents and gives exclusive inheritance rights to the male descendants: Samuel Obi, *The Igbo Law of Property* (Butterworths, 1963), 78.

⁶ A customary rule of succession prevalent among the Binis which states that the eldest son shall be the sole heir to the dwellings of his deceased father irrespective of the deceased testamentary wishes; *Osula v Osula* (1995) 9 NWLR, Pt 419, SC 59.

⁷ (1997) 7 NWLR (pt 512) 283.

This provision has been held to enable an Igbo female child to inherit the property of her late father in the recent case of *Ukeje v Ukeje*,⁸ wherein the Supreme Court held that:

“No matter the circumstances of the birth of a female child, such a child is entitled to an inheritance from her late father’s estate. Consequently, the Igbo customary law which disentitles a female child from partaking in the sharing of her deceased father’s estate is in breach of Section 42(1) and (2) of the Constitution, a fundamental rights provision guaranteed to every Nigerian. The said discriminatory customary law is void as it conflicts with section 42(1) and (2) of the Constitution”.

In view of this decision, the Igbo custom which disentitles a female child to inheritance of the estate of her late father no longer represents the law. Every female child is thus entitled to a share in the property of her father whenever the latter is deceased. Similarly, the Igbo customary law hitherto forbade a widow from inheriting the estate of a man who died intestate because she is not of the same blood with the man. This was said to be in conformity with the rule of intestate succession and inheritance which states that succession goes by the blood and, since the wife is not of the same blood as the man, she cannot inherit his property. Expressing a concordant opinion, Obi observed:

“Nowhere in Southern Nigeria does the customary law give a widow the right to inherit or share in the intestate estate of her husband, even where a husband in his lifetime allots a farm, a house or some other form of landed property to his wife for her use and enjoyment, the latter does not thereby acquire inheritance rights in it.”⁹

However, this is no longer an absolute law as a woman who has at least a female child born to the husband can now inherit the estate of her intestate husband. This, again, is the new position taken by the Supreme Court in yet another recent case, *Anekwe v Nweke*,¹⁰ in which the court stated unequivocally:

“I hasten to add at this point that the custom and practices of Awka people upon which the appellants have relied for their counter-claim is hereby out rightly condemned in very strong terms. In other words, a custom of this nature in the 21st century societal setting will only tend to depict the absence of the realities of human civilization. It is punitive, uncivilized and only intended to protect the selfish perpetration of male dominance which is aimed at suppressing the right of the womenfolk in the given society. One would expect that the days of such obvious differential discrimination are over. Any culture that disinherits a daughter from her father’s estate or wife from husband’s property by reason of God instituted gender differential should be punitively and decisively dealt with. The punishment should serve as a deterrent measure and ought to be meted out against the perpetrators of the culture and custom. For a widow of a man to be thrown out of her matrimonial home, where she lived all her life with her late husband and children, by her late husband’s brothers on the ground that she had no male child, is indeed very barbaric, worrying and flesh skinning.”

The inheritance practices of intestate estate under the customary laws in Nigeria have almost as many variations as there are ethnic groups in the country and they are predominantly patrilineal that is relating to, based on, or tracing descent through the paternal line. Inheritance and succession under the native law and custom is determined primarily by the customary rules of the place of

⁸ (2014) 11 NWLR (pt 1418) 384.

⁹ SCN Obi, *Modern Family Law in Southern Nigeria* (4th edn, London: Sweet and Maxwell) African University Press, Lagos, 1966) 280.

¹⁰ (2014) 9 NWLR (pt 1412) 393, 421-422.

origin of the deceased person and not by where he resides or where the property is situated. These practices conform to the primogeniture rule which is a system of inheritance or succession by the firstborn child, specifically the eldest son¹¹ who consequently becomes the head of the family. He occupies the family house, holding same as trustee of other children, male or female. The myth surrounding the male-centeredness of the succession and inheritance law of the Igbo has, perhaps, been permanently broken through the new authorities fighting against the barbaric customs that are repugnant to natural justice, equity and good conscience. By the decision of the Supreme Court in a plethora of cases, the apex court has voided the Igbo age-long law and custom which forbids a female child from inheriting her late father's estate. The court voided this tradition and custom on the grounds that it is discriminatory and conflicts with the provisions of the constitution¹².

Legal Framework Protecting the Females Rights of Inheritance

National Laws:

The Constitution of the Federal Republic of Nigeria 1999 (As Amended):

The Constitution of the Federal Republic of Nigeria 1999, which is the grundnorm sought to eliminate discrimination in some selected provision by encouraging national integration among its citizens and prohibiting discrimination that arises on the basis of origin, sex, religion, status, and so on.¹³ To achieve gender parity, the CFRN 1999 encouraged equality of all rights, and opportunities for all citizens whether a man or a woman.¹⁴ Unfortunately, the right to equality of all rights are contained in Chapter II of the CFRN 1999, which makes them non justiciable in the Nigerian courts.

To promote parity and eliminate all forms of disparity among its citizens, the CFRN 1999 prohibited any form of discrimination suffered by any citizen on the basis of sex, origin, or religion which lead to her being segregated from others.¹⁵ To further reflect its stand with respect to women's right to property, CFRN 1999 provided that, "every citizen of Nigeria (male and female) has rights to own property individually or in association with others".¹⁶ On the basis of the above rights, the CFRN 1999 prohibits the compulsory acquisition of property whether movable or immovable in any part of Nigeria except in the manner and for the purposes prescribed by law.¹⁷ To avoid conflicting law that might undermine its provisions, the CFRN 1999 provides that any law including customary law that is inconsistent with its provision shall to the extent of the inconsistency be void.¹⁸

Marriage Act 2004

The married woman under the Act enjoys equal rights to the family assets acquired during the marriage and to be involved in their disposal during or after the marriage or upon the death of her husband.¹⁹

¹¹ RA Onuoha, 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue' *The International Journal of Not-for-Profit Law*, (2008), vol 10, Issue 2.

¹² Section 1(3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

¹³ Constitution of the Federal Republic of Nigeria 1999 as amended, Cap 23 LFN 2004, S 15(2).

¹⁴ *Ibid*, S 17(2)(a).

¹⁵ *Ibid*, S 42.

¹⁶ *Ibid*, S 43.

¹⁷ Constitution of the Federal Republic of Nigeria 1999 (as amended) S 44.

¹⁸ Constitution of the Federal Republic of Nigeria 1999 (as amended) S 1(3); *Ukeje & Anor v Ukeje* (2014) 11 NWLR (pt 1418) 384.

¹⁹ Cap M6, Laws of the Federation of Nigeria 2004.

Matrimonial Causes Act 2004

Matrimonial Causes Act, makes provisions in respect to matrimonial causes and disputes that may arise over a matrimonial home and other joint properties of the married couple.²⁰ MCA 1970 also provides that, “where a party to a marriage dies intestate as to any property while a decree of judicial separation is in operation, that property shall devolve as if that party had survived the other party to the marriage”.²¹ The court may in proceedings:

under this Act... require parties to the marriage or either of them, to make for the benefit of all or any parties to and the children of the marriage such settlement of property to which the parties are entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.²²

The court orders are usually made either on behalf of all or any of the parties to the marriage, children of the marriage in respect of whole or part of the property dealt with by ante-nuptial or post-nuptial settlements by the parties to the marriage or either of them.²³ Matrimonial Causes Act from its provisions recognize the gender equality of both parties to the marriage irrespective of the fact that judicial separation might be in existence between them.

Wills Act 1837

Wills Act 1837 and Wills (Amendment) Act 1852 which are the statutes of general application also govern statutory wills in Nigeria.²⁴ The Wills Act as enacted set out guidelines that would regulate testamentary dispositions. Wills Act was applicable to every part of Nigeria until 1959, when local legislation like the Wills laws of some of some states replaced them. Under the Wills Act, restrictions are not placed on women with regard to inheritance when it comes to testamentary disposition. Women as beneficiaries are treated equally with others. Testators under the Wills Act are free irrespective of whether or not he is subject to customary law, to dispose all real or personal estate to whomever he wishes, whether male or female and it takes effect upon his death.²⁵ The Wills Act though it recognized women’s right to an inheritance, restricted the capacity of married women to make a will unless it is a will made before the passing of the Act.²⁶ This previous position has been altered by the Married Women Property Act.²⁷

Land Use Act 1978

With the promulgation of the LUA,²⁸ all the lands in the territory of each state (except land vested in the Federal Government or its agencies) became vested solely in the Governor of a state. The urban lands are held by the Governor in trust for the citizens and he is charged with the responsibility of allocating the lands to individuals’ resident in the state, to organization for commercial, and residential purposes. With respect to rural land, similar power is granted to the local government chairman who also allocates land to those he desires for agricultural and commercial purposes. One of the objectives of the LUA settling the issues of access to land rights by all Nigerians (both male and female) on equal basis. It can be said with conviction that the LUA

²⁰ E Etomi and E Asia, ‘Family Law in Nigeria: Overview’ (2017) <http://uk.practicallaw.thomsonreuters.com> accessed 19 August 2019.

²¹ Matrimonial Causes Act 2004, Cap M7 Laws of the Federation of Nigeria 2004, S 42(2).

²² *Ibid*, S 72(1).

²³ Matrimonial Causes Act, S 72(2).

²⁴ Nglaw, ‘Making a valid will in Nigeria’ (2014)<http://nglaw.blogspot.com> accessed 22 April 2019.

²⁵ The Wills Act, S 3.

²⁶ *Ibid*, S 18.

²⁷ The Married Women Property Act 1882, S 1.

²⁸ Land Use Act 1978 Cap L5 1978 LFN 2004.

recognizes the need for gender equality with respect to accessibility of right to land. With respect to devolution of the right of an occupier upon death, the LUA states that:²⁹

in the case of customary right of occupancy, the customary law existing in the locality where the land is situated shall regulate, and in the case of statutory right of occupancy, the customary law of the deceased at the time of his death relating to distribution of property shall regulate provided the customary law does not restrict, prohibit or regulate any particular class of persons of any beneficial interest in such land or in the proceeds of sale which he may be entitled to under the rule of inheritance of any other customary law.

The LUA not only recognized the equal opportunity of both men and women to acquire rights to land, it also accorded women right to land inheritance. Unfortunately, only legally married women could benefit from the LUA, so it did not improve the ownership or inheritance rights of women married under the customary law or daughters who are not married yet. It can be said with so much accuracy that the LUA though it accorded equal treatment for all its citizen, failed to generalize its protection towards women disadvantaged by the type of marriage contracted.

Administration and Succession (Estate of Deceased Persons) Law of Anambra State 1991.

The Administration and Succession (Estate of Deceased persons) law is applicable in Anambra State, and prescribes the distribution of movable and immovable property in the State. The Administration and Succession (Estate of Deceased Persons) law is applicable to the estate of an intestate especially where the property in question is landed property situated within Anambra State or where the deceased in his lifetime had a monogamous marriage even though he was subject to customary law.³⁰ The effect of this provision of the laws is that customary law does not regulate the partition of the estate of the intestate deceased who had a statutory marriage or contracted a monogamous marriage.

Under the Administration and Succession (Estate of Deceased persons) Law, the order of priority for persons that are beneficiaries of a deceased estate are; the surviving spouse, children of the deceased or the issues of a child who predeceased the deceased...³¹ In the event that the deceased died intestate before the commencement of this law, the order of priority will be, “the husband or wife of the deceased, the personal representative of the husband if the husband died in the lifetime of the wife, next of kin...”³²

The sharing formula for the residuary estate of an intestate is said to be the value of one third for the surviving spouse whose interest shall be absolute or for life until her remarriage (whichever first occurs) in the case of a wife; the remainder together with the residue upon cesser of the wife’s interest shall be held on trust for the children equally to the value of two-thirds of the estate.³³

Married Women Property Act 1882

The Married Women Act is a Statute of general application that is applicable in Nigeria. Some states in Nigeria like Oyo, have enacted their own married women’s property laws which has similar content as the Married Women Property Act. The Married Women Property Act sought to

²⁹ *Ibid*, S 24.

³⁰ Administration and Succession (Estate of Deceased Persons) Law, Cap 4 Revised Law of Anambra State 1991, S 71(2)(c).

³¹ *Ibid*, S 96(2).

³² *Ibid*, S 96(4).

³³ Section 120(1)(b) of the Administration and Succession (Estate of Deceased Persons) Law of Anambra State.

change the previous status quo where women's property became that of their husbands upon marriage.

Through some of its provisions; a married woman now has legal capacity to acquire, hold and dispose by will any real or personal property as her separate property, and to assume ownership over any separate property that belonged to her after marriage and dispose same. Where dispute arises between the couples with respect to sharing of existing properties, the wife can make an application to any judge of the High court to resolve issues concerning title.³⁴ Apart from exercising her rights under the Married Women's Property Act regarding title to or possession of property (whether or not the marriage is dissolved), a married woman may apply to the High court in matrimonial proceedings for settlement of property acquired either before or after marriage.³⁵ The courts are guided by what it considers to be just and equitable in the case before it.

International Laws

Convention on Elimination of All Forms of Discrimination against Women (CEDAW) 1981. CEDAW³⁶ is commonly referred to as the International Bill of Rights for Women.³⁷ When it comes to international instruments that have helped to tilt the scale in favour of women, CEDAW takes the price. CEDAW defines what constitutes discrimination against women and sets out a comprehensive framework for tackling gender inequality in the society. Under CEDAW, State Parties agree to take several measures to combat discrimination against women. These measures include:³⁸

- i. Embodiment of the principle of the equality for all in their national constitutions or other appropriate legislation.
- ii. Adoption of appropriate legislative measures, including sanctions to deter discrimination against women.
- iii. To establish legal protection of the rights of women on an equal basis with men through competent national tribunals and other public institutions.
- iv. To constrain from any act or practice of discrimination against women and ensure that public authorities and institutions comply with their obligations;
- v. To take appropriate measures to eliminate discrimination against women by any person, organization or enterprise.
- vi. To adopt appropriate measures that will abolish or modify laws or customs that are discriminatory against women.
- vii. To repeal all national penal provisions which constitute discrimination against women.

CEDAW also recognizes that some of the driving force that increase discrimination against women runs deeper than the rule of law and as such requires that state parties:

... modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other

³⁴ Married Women Property Act, S 17.

³⁵ MOA. Ashiru, 'Gender Discrimination in the Property on Divorce in Nigeria' (2007) *Journal of African Law*, 318.

³⁶ Convention on the Elimination of All Forms of Discrimination Against Women 1981, 1249 UNTS 13, Can Ts 1981 No 31.

³⁷ Government Equalities Office, 'Convention on the Elimination of All Forms of Discrimination Against Women' (2011)1(1) Policy paper,1.

³⁸ Convention on the Elimination of All Forms of Discrimination Against Women, Article 2.

practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.³⁹

With respect to inheritance rights, CEDAW provides that, “States Parties should take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations so as to ensure equality of rights for both men and women.”⁴⁰

CEDAW also recognizes “the right to family benefits.”⁴¹ By this, women have equal right to both economic and social benefits including land and housing. With respect to women’s right to property, CEDAW states that “Women have a right to own and administer property without discrimination, equal treatment ought to be accorded in land and agrarian reform”.⁴² Married couples have equal ownership status with respect to the enjoyment and disposition of property.

African Charter on Human and Peoples Rights (Ratification and Enforcement) Act.

The African Charter on Human and Peoples Rights, was domesticated in Nigeria in form of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act.⁴³ Through the domestication, provisions of the Charter became enforceable in any Court of Law in Nigeria. The Act, guarantees without discrimination the right to property for women, mandates states to eliminate every discrimination against women and to protect women’s rights.⁴⁴ ACHPR Act stresses the importance of every individual to enjoy the rights and freedoms that are recognized and guaranteed in the Act without any form of discrimination on grounds of sex, color, race, ethnic group and so on.⁴⁵

To establish its stand with respect to women, the Act states that, “every individual shall have equal protection of the law and the need for the state to eliminate discrimination and protect the rights of women.”⁴⁶ ACHPR Act protects the right to property most explicitly by stating that, “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”.⁴⁷

Protocol to The African Charter on Human and Peoples Rights 2004.

The protocol to African Charter on Human and Peoples’ Right⁴⁸ came into force in 2004.⁴⁹ It seeks to liberate women from subordination to the males in the African societies through discriminatory practices that come under the guise of customary practices or cultural promotion.⁵⁰ It also addresses women’s land and property rights vigorously. The protocol enjoined all state parties to combat all forms of discrimination against women through legislations, institutional and other measures that reflect equality for all.⁵¹ To further promote equality and equal protection for all, state parties are expected to take appropriate measures such as; ensuring effective access to legal

³⁹ Convention on the Elimination of All Forms of Discrimination Against Women, Article 5.

⁴⁰ *Ibid*, Article 16.

⁴¹ *Ibid*, Article 13(a).

⁴² Convention on All Forms of Discrimination Against Women, Article 14, 15 and 16.

⁴³ African Charter on Human & Peoples’ Rights (Ratification and Enforcement) Act, Cap A9 LFN 2004.

⁴⁴ *Ibid*, S 17(3).

⁴⁵ *Ibid*, S 2.

⁴⁶ *Ibid*, S 3, S 18(3).

⁴⁷ *Ibid*, S 14.

⁴⁸ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2004.

⁴⁹ RK Segawa, ‘Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa’ (Unpublished Research Partnership, Danish Institute for Human Rights 2005) 1.

⁵⁰ R Mordi, ‘An Appraisal of Inheritance Rights of Women’ <http://www.academia.edu> accessed 11 March 2019.

⁵¹ Protocol to the African Charter on Human and Peoples Rights, Article 2(1)(a)(c) and (2).

aid for women, adequate interpretation and enforcement of gender equality rights by law enforcement organs and reform of discriminatory laws and practices so as to promote/protect women's right.⁵²

State parties to the protocol are also expected: to prohibit and condemn all forms of harmful practices that affect the human rights of women, to create public awareness through formal and informal education, take legislative measures backed by sanctions, and to provide necessary support to victims of these harmful practice and protection of women who are at risk of these practices.⁵³

When it comes to women's access to housing, the protocol recognizes women's right to equal access to housing no matter their marital status.⁵⁴ Taking into cognizance the discriminatory position of widows, the protocol provides; that a widow shall have the right to an equitable share in the inheritance of the property of her husband which entails her right to continue living in the matrimonial even though she has remarried provided she inherited it or it was given to her.

Universal Declaration of Human Rights (UDHR) 1948.

The Universal Declaration of Human Rights (UDHR), which is the most celebrated international instrument of human rights asserts that, "everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind such a race, colour, sex, birth and so on".⁵⁵

UDHR recognizes the existence of discrimination which women suffer as a result of sex, the societal stereotype of women as weaker sex and prohibit it. Some rights that are stipulated in the UDHR include: the right to equality before the law and equal protection for all,⁵⁶ the right to equality with respect to marriage (this means that husband and wife should have the same right within their marriage),⁵⁷ the right to own property (everyone has a right to equal access to property),⁵⁸ and the right to an adequate standard of living, including the right to adequate housing.⁵⁹

Declaration on the Elimination of Discrimination against Women

This is a human right proclamation issued by the United Nations General Assembly which seeks to promote equality of right for women.⁶⁰ Under this Declaration, "discrimination against women is seen as fundamentally unjust and constitutes an offence against human dignity".⁶¹ By this provision, discrimination against women is projected as an unjust act. This Declaration in its fight to eliminate discrimination against women calls for the annulment of laws and customs that discriminate against women so as to ensure that equality under the law is recognized.⁶² Customary law of inheritance that discriminates against women right to succession are criticized by the Declaration and women's equality in their inheritance rights. To add credence to the previous provisions, the Declaration also calls for "the abolition of customs and all other practices based on

⁵² *Ibid*, Article 8.

⁵³ *Ibid*, Article 5.

⁵⁴ Protocol to the African Charter on Human and Peoples Rights, Article 16.

⁵⁵ Universal Declaration of Human Rights, Article 2.

⁵⁶ *Ibid*, Article 7.

⁵⁷ *Ibid*, Article 16.

⁵⁸ *Ibid*, Article 17.

⁵⁹ *Ibid*, Article 25.

⁶⁰ M Tours, 'Declaration of Elimination of Discrimination against Women' <http://www.academia.edu> accessed 1 April 2019.

⁶¹ UN General Assembly, Declaration on the Elimination of Discrimination against Women 1967, Article 1.

⁶² *Ibid*, Article 2.

the idea of the inferiority of women”⁶³ For women’s right to property, the Declaration calls for equal right to acquire, administer, dispose of and inherit property, including property acquired during marriage.⁶⁴

Beijing Declaration and Platform for Action 1995

Beijing Declaration and Platform for Action, which was the result of the Fourth World Conference on Women in Beijing China in 1995, was the most progressive blueprint ever for advancing women’s right. The Beijing conference, called on Governments to; “Undertake legislation and administrative reforms to grant women equal rights to economic resources, including ownership and control over land and other properties. The 1995 Beijing Platform for Action flagged 12 key areas where urgent action was needed to ensure greater equality and opportunities for women and girls.⁶⁵ The platform for action also laid out concrete ways to bring about change. Among some of the 12 critical areas highlighted by the platform for action which are relevant to this dissertation are:

- i Women and poverty: There is need to eliminate poverty so as to economically empower women.
- ii Women and the economy: increasing economic opportunities for women can be achieved by giving them equal access to properties.
- iii Insufficient mechanisms for the advancement of women: need exist to integrate gender perspective in legislations, and public policies. By doing so, inequality that exist in the system will be exposed.
- iv Human rights of women: Through the implementation of human rights instrument, the inheritance rights of women will be protected and promoted.
- v The girl-child: There is need to eliminate all forms of discrimination including negative cultural practices against the girl child.

Institutional Framework:

Courts

An applicant who alleges the breach or the intended breach of fundamental rights, can apply to the court in the state where the infringement occurred for redress.⁶⁶ Constitution of the Federal Republic of Nigeria 1999⁶⁷ vests jurisdiction over fundamental rights actions on the High Courts. The Fundamental Rights (Enforcement Procedure) Rules was enacted to provide easy access to justice in cases where the fundamental rights are breached or threatened to be breached. The ‘High Courts’ also means the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory Abuja. The intention of the Constitution is to vest concurrent jurisdiction in the Federal High Court and the State High Courts in matters of enforcement of Fundamental rights under Chapter IV of the Constitution. The court in a bid to uphold the CFRN 1999 and the Fundamental Rights (Enforcement Procedure) Rules have adjudicated on a lot of cases on the inheritance rights of women.⁶⁸ The courts have also been forth coming with the enforcement of the African Charter since it has been ratified and enforced as has been demonstrated in several

⁶³ *Ibid*, Article 3.

⁶⁴ *Ibid*, Article 6(a).

⁶⁵ UN Women, ‘Beijing Platform for Action: 12 Critical Areas of Concern’ <http://www.unwomen.org> accessed 3rd April 2019.

⁶⁶ Fundamental Rights Enforcement Procedure Rule, 2009.

⁶⁷ Section 46 of the 1999 Constitution.

⁶⁸ *Obusez v Obusez* (2007) All FWLR (pt 374) 245; *Salubi v Nwariaku* (1997) NWLR 505, (pt 247) 442.

cases.⁶⁹ Nigerian courts have not relented been creative in their reliance on international conventions, the African Charter in addition with the CFRN 1999 in abrogating some of these discriminatory practices.

Ministry of Justice

Under this ministry is the Administrator General's Department who administers the estates of deceased persons who died without making a will. When any property in any estate is vacant or subject to dispute such as whether a woman can inherit it, the Administrator General steps in to handle the property in question pending settlement of the dispute. The goals of the Administrator general is to review Administration of Estate Law, training of law officer in the administration of estate and trust. Some of the duties of the Administrator general are; to stand in as a representative of an estates in court, to administer an equitable share of the assets of person(s) who die (with or without leaving a will) amongst qualified beneficiaries including women, to obtain letters of administration over estate under its management, to reseal letters of Administration where the deceased has properties located outside the state, and to manage same in the interest of the beneficiaries.

Ministry of Lands

Under this ministry, is the Probate Registry which is the place where you can obtain all the legal instruments to facilitate the legal administration and management of estates.⁷⁰ It is an effective means of dispensing justice in matters of testacy and intestacy. The activities carried out in the probate registry include: obtaining letters of administration, grant of probate and all other ancillary matters relating to the administration of Estates. Another function of the Probate Registry is the custody of Wills. After a Will has been prepared by a Testator either through himself or by his Solicitor, it must be lodged at the probate registry of the High Court of the State upon the payment of the prescribed lodgment fee. The High Court of Lagos State provides that every original Will, of which probate or administration with Will annexed is granted, shall be kept in the Probate Registry in such manner as to secure at once its due preservation and convenient inspection. A copy of every such Will and of the probate or administration shall be preserved in the Registry.

Upon receipt of an application to lodge a will, the Probate Registrar or a designated probate official will carry out a physical examination of the will to ensure that it complies with the provision of it being sealed and waxed. The envelope must also contain the name of the Solicitor that prepared the Will or the Executors named in the Will. In cases where the testator seeks personal lodgment of the Will, the lodgment fee must also be paid and official receipt shall be issued by the Probate Registrar.

Land Use and Allocation Committee.

Taking into cognizance the provisions of the Land Use Act 1978, a body (Land use and Allocation Committee) was set up in each state with the responsibility of guiding and advising the Governor on the management of land, and resettlement of those affected through revocation of rights of occupancy.⁷¹ This committee conducts the preliminary investigation over certain land so as to direct the Governor on whether it is right or not to grant a certificate of occupancy. The committee also informs the governor of the existence of certain lands that can be used for public purpose so

⁶⁹ *Sani Abacha v Chief Gani Fawehinmi* (2000) SC No 45/1997; *Odafe & Ors v Attorney General of the Federation & Ors* (2004) AHRLR 205 @ 211; *Garuba & Ors v Lagos State Attorney General* ID/599M/91 (31 October 1999).

⁷⁰ A Ayanru, 'Nigeria: The Improved Probate Registry of the High Court of Lagos State' <http://www.mondaq.com> accessed 26 May 2019.

⁷¹ Section 2(2) of the Land Use Act, Cap L5 1978 LFN 2004.

the rights of occupancy can be revoked. The Governor determines the membership of the committee and such membership are usually made of qualified individuals like estate surveyor, legal practitioner among others. A similar body also exist in the local government area with similar responsibility of guiding the local government chairman.

The multiplicity of the succession laws creates an atmosphere of confusion about the women's right to property. The tussle of power that exist within the legal pluralism concerning customary law cannot be overlooked. Based on this, it is only necessary to critically analyze the adequacy of the laws in mapping out women's rights under the statutes and the existing rights under customary law.

Women Aid Collective (WACOL)

Women Aid Collective is an organization that is independent, not politically motivated, non-governmental and not set up for profit making.⁷² WACOL is a non-profit and charitable organization which seeks to promote human rights of women, young people, accord legal assistance and favourable choice for abused women and children. To promote gender equality, WACOL through their legal aid project, handles and advocates on a lot of cases bordering on inheritance and property rights of widows.⁷³ Sometimes, during the course of their advocacy visits, WACOL takes up cases to exemplify man's inhumanity to widows through the denial of their right to property. WACOL contributed immensely in pushing the Anambra State House of Assembly to pass the Bill against levirate into law.

International Federation of Women Lawyers (FIDA)

International Federation of Women Lawyers of Nigeria is a non-profit, non-political organization constituting a voluntary association of female lawyers who have similar goals and aspiration. FIDA promotes its objectives by pushing and seeking for the promotion, protection and preservation of the rights of women.⁷⁴ To further promote its objectives, FIDA establishes international relations on a basis of equality and mutual respect for all people and offers advice to government in cases relating to women and children. One of its core goals have always been to sensitize women of their rights to property, to choose their own spouses, to not be subjected to degrading customary practices and to accord free advocacy to women who have been victims of these practices.

UN Committee on Elimination of Discrimination against Women

This is the United Nations treaty body that oversees the Convention on the Elimination of All Forms of Discrimination Against Women. The committee seeks absolute compliance of the provisions of CEDAW by member states that have signed and agreed to be bound by its provisions.⁷⁵ The practices of the committee have changed recently due to increased focus on women's right. The general recommendation of the committee⁷⁶ on matters of equality in marriage and family relations are that:

There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than the widowers and sons. In some instances, women are granted

⁷² Women Aid Collective Nigeria, 'About WACOL' <<http://wacolnigeria.org>> accessed 23 September 2019.

⁷³ RA Onuoha, 'Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the rescue' (2008)10(2). *The International Journal of Not-for-Profit Law* 1.

⁷⁴ FIDA, 'We are Experienced Female Lawyers' <http://fida.org.ng> accessed 27 August 2019.

⁷⁵ UN Committee on the Elimination of Discrimination Against Women (CEDAW), Article 17(2).

⁷⁶ Committee on the Elimination of Discrimination against Women, 'General Recommendation No 21 on Equality in Marriage and Family Relation' <http://www.ohchr.org> accessed 1 April 2019.

limited and controlled rights and receive income only from the deceased's property. Often, inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the convention and should be abolished.

The committee makes it a point of duty to ensure that its member states accord women their rights to property.

African Court

The African court on Human and Peoples' Rights is a court established by African countries to ensure the protection of human and peoples' rights. It complements and reinforces the functions of the African Commission on Human and Peoples' Rights.⁷⁷ The court was established by virtue of Article 1 of the Protocol to African Charter on Human and Peoples' Rights. The court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights, the Protocol and any other relevant human rights instrument ratified by the states concerned. Since women's right to property are guaranteed under the international instrument, the court can adjudicate on cases of violation. The court specifically has two types of jurisdictions: contentious and advisory.

Non-State Actors

Non-State Actors are crucial to the implementation of CEDAW in Nigeria. Non-State Actors is a term that incorporates many varied actors among which NGOs, religious organizations and so on. Some religious organizations like churches have been able to set up a legal and counselling unit in their churches. The legal unit has the duty of giving counselling to women who are facing one challenge or the other which is beyond their capability. In extreme cases where counselling will not be sufficient, the unit refers the matter to any NGOs that have been active in promoting the rights. Membership of the legal unit in church are usually made up of lawyers and certified counselors. When faced with matters of deprivation of a woman's property rights, the legal unit in conjunction with the church try to invite the interested parties for counselling, and where it does not work, refer the matter to any active NGO.

The NGOs that work with church legal unit must be an active one that have played an important role in women rights, such as lobbying for the passage of laws against widowhood rites, fighting disinheritance of women, female genital mutilation and early marriage.

Conclusion and Recommendations

Despite the several groundbreaking reforms that have been accomplished, the fact remains that there is still more work to guarantee women's right of inheritance. Patriarchy should be eliminated in the Private Sphere by tackling the issue of patriarchy at the home front. It has become imperative to dissuade our kids from the belief that "women are inferior" and to instill in the minds the spirit of universality of human rights. Only when this has been adequately understood and implemented, can we be able to make a lasting change. Traditional Rulers and Chiefs should be involved to curb and abolish this menace of patriarchal hegemony. The best way to protect women and girls right to inheritance is through making of will by their husbands or father. There should be consistency in judicial activism. If any customary law is repugnant to natural justice, equity and good conscience, the courts should not hesitate to abolish it. Educational and enlightenment programmes should be organized to inform women about the existence of inheritance law. There should be sensitization of the public on the inheritance rights of women and accessibility of legal aid for

⁷⁷ African Court Law Report, 'Welcome to the African Court' <http://www.african-court.org> accessed 17 August 2019.

Inheritance Matters. The current legal Aid Act⁷⁸ repealed the previous Act that was in existence in order to ensure compliance with international standard, provide legal aid and access to justice fund. By so doing, financial assistance was made available to the Legal Aid Council for indigent citizens in order to ensure that their claims are prosecuted in accordance with the CFRN 1999.⁷⁹ More specific inheritance laws should be enacted in Anambra State to protect the women. It is not enough for practices like levirate to be completely prohibited in Anambra, Enugu and Ebonyi states⁸⁰ while in other states, there is no inclination from the House of Assembly about the enactment of similar law. It has rightfully been said that, “Alone we can do so little; together we can do so much”⁸¹ It is only when all the South Eastern States come together and join forces that there can be a more lasting solution to women’s inheritance right. There is need for amendment of extant laws to include stiffer punishment for a breach of the Law. It has been rightfully said that, “nothing will deter crime but the certainty of punishment”⁸² There is urgent need for domestication of CEDAW⁸³. To enhance domestication of CEDAW, Section 12⁸⁴ need to be amended with immediate effect. There should be integration of customary law with the principles of natural justice. Judicial officers when faced with cases of discriminatory inheritance practices should be guided by the cardinal principle of justice which are; the rule against bias (*nemo iudex in causa sua*) and the rule of fair hearing (*audi alterem partem*). It is also important for judges to be objective in their decisions without influence of their background or beliefs.

It is worthy of note that several discriminatory customary laws abound and these customs that take away the inheritance rights of women in the name of tradition ought to be abolished. It is really impressive and commendable to welcome and enforce the various Supreme Court pronouncements in a number of cases, which remains a fundamental step in the protection of women’s rights in Anambra State especially the landmark decision in *Anekwe v Nweke*⁸⁵. It has brought a glimpse of hope to the female gender and it is highly commendable. There is need for massive awareness and sensitization of the public of the recent judgments of the apex court concerning the inheritance rights of women and the provisions of the constitution especially sections 42 (1) & (2) which prohibit discrimination based on sex and section 43 which guarantees the right of every Nigerian citizens to own immovable property and the constitution being the grundnorm is supreme and above all other laws in our country Nigeria.

⁷⁸ Legal Aid Council Act CAP L9 Laws of the Federation of Nigeria 2011.

⁷⁹ The 1999 Constitution of the Federal Republic of Nigeria; Cap 23 LFN 2004 as amended (CFRN 1999).

⁸⁰ Anambra State Malpractices against Widows and Widower’s (Prohibition) Law 2004; The Prohibition of Infringement of Widows and Widower’s Fundamental Rights 2004; The prohibition of Infringement of Widows and Widower’s Fundamental Rights Law 2001 No 3 Enugu State Nigeria; Abolition of Harmful Traditional Practices Against Women and Children Law 2009.

⁸¹ H Keller, ‘Unity Quotes’ <<http://www.thoughtco.com>>accessed 24 September 2019.

⁸² G Poe, ‘Punishment Quotes’ <http://brainyquote.com>>accessed 24 September 2019.

⁸³ Convention on Elimination of All Forms of Discrimination Against Women 1981

⁸⁴ The 1999 Constitution of the Federal Republic of Nigeria, S 12.

⁸⁵ SC. 129/2013;(2014) 9 NWLR (PT 1412) 393; (2014) LLJR-SC

THE COMPLEXITIES IN SUSTAINING CHILD'S RIGHTS AND WELFARE AGAINST ABUSE: THE LEGAL PERSPECTIVE

Awodezi Henry*
and Patricia Izuka Tom**

Abstract

Child's rights and welfare connote the protection and provisions of necessities for the proper upbringing of the child. The parents, guardians, teachers and even elder siblings are expected to care for the wellbeing of the child. Thus, the Constitution of the Federal Republic of Nigeria 1999 (as amended), the African Charter on Human and Peoples' Rights and the Child Rights Act made provisions for the protection of the child's rights and welfare in the Nigerian societies. Sustaining the child's rights and welfare in the society is burdened with some complexities such as domestic violence and sexual inducement. Due to children's vulnerability and inability to protect themselves from undue influence, they have often be victimized with consequential untold hardship, drug abuse and sexual abuse in the Nigerian societies. The recurrent of these ugly trends gave rise to this research. In this regard, the research adopts the doctrinal legal research methodology and examines the complexities in sustaining child's rights and welfare against abuse. The research therefore recommends a reformation in enforcement strategies and frequent enlightenment programmes on child's rights and welfare in every nook and cranny of the society. This will in effect enhance sustainability of the child's rights and welfare in Nigeria.

Keywords: Child, Right, Welfare, Sexual Abuse.

Introduction:

Generally, a child is a person who is under the age of majority. At common law, a child is a person who has not reached the age of 14 years.¹ Child's Rights Act² is one of the protective legislations enacted by the National Assembly to guarantee the rights and wellbeing of children in Nigeria. Children are defined by the Child's Rights Act to be those children under the age of 18 years.³ Parts of the mandate of the National Human Rights (Commission) are to promote, protect and enforce the rights of all children under this age as well as foreign nationals in Nigeria due to their vulnerability.⁴ The Commission takes up the rights of children from foetus when appropriate responsibility of the unborn child is neglected.⁵ The Commission admits and investigates matters bordering on inhuman and degrading treatment of a mother upon whose ripple effect hamper the survival and development rights of the child.⁶

The Constitution of the Federal Republic of Nigeria (Constitution)⁷ being the supreme law of the land with overriding provisions, provides for the protection of the rights of every citizen which includes adults, children and even the unborn child. These rights are known as the fundamental human rights which are meant to protect all citizens from governmental or private interference or encroachment such that the individual citizen can arrange his affairs according to his wishes in

* Faculty of Law, University of Delta, Agbor, Delta State, Nigeria, Email: h.awodezi@unidel.edu.ng Tel: 08062977801, ORCID ID: 0000-0002-1179-3371.

** Directorate of General Studies, Delta State University of Science and Technology, Ozoro, Delta State, Nigeria, Email: tompatriciaizuka@gmail.com Tel: 08037181518

¹ Bryan A. Garner et al, Black's Law Dictionary, 11 edn. (U.S; Thomson Reuters) 2019, p.299

² Cap. C 50 Laws of the Federation of Nigeria (LFN) 2004

³ Child Rights – National Human Rights Commission, available at ><https://www.nigeriarights.gov.ng/focus-areas/child-rights.html><, accessed 26 August 2023.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ 1999 (as amended).

order to achieve his maximum development and welfare.⁸ By virtue of nature and tenderness of age, children are vulnerable and as such can be easily forced or carried into any situation whether good or bad, hence in the absence of these rights or protection, they will be left to the mercy of the adults and the state.⁹ Thus, a child is abused if subjected to physical or mental neglect or harm.¹⁰

Pursuant to the provisions of the Constitution, legislative competence in respect of children does not come within either the exclusive or concurrent list.¹¹ Consequently, it essentially falls within the residuary legislative competence of states; hence the major legislation pertaining to children like those on infants, children and young persons, adoption and fostering has since the introduction of the federal system become the responsibility of states.¹²

Every Nigerian child is entitled to be treated with such privileges and rights of protection and care as is necessary for the well-being of the child, taking into account the rights and duties of the child's parents, legal guardians or other individuals, institutions, service agencies, organizations or bodies legally responsible for the child.¹³ Considering the vulnerability nature of children, the need to enforce and protect child's right is fundamental. Thus, it is pertinent that every person, institution, service, agency, organization and body charged with the responsibility for the care and protection of children should conform to the standards established by the appropriate authorities particularly in the areas of safety, health and welfare of a child.¹⁴

Section 4 of the Child's Rights Act 2003 makes a summary provision of the purpose of these rights and welfare which every Nigerian child is entitled to enjoy as it provides that every child has a right to survival and development. In spite of the numerous legal provisions to ensure that the child enjoys his rights and welfare towards good living, there are certain factors which often creep in to hinder the child from gaining easy access to these rights. In order to ensure that these rights are not always abused but implemented and sustained, therefore poses a serious concern of purpose and intent in this research. To achieve this purpose, this research is divided into four parts including the introduction. Part two discusses the complexities in sustaining Child's Rights and welfare. Part three examines the legal framework relating to the enforcement and sustainability of child's right and welfare while part four concludes the research and makes recommendations.

Complexities in Sustaining Child's Rights and Welfare

Under this heading, this research discusses certain factors explained as complexities under domestic violence and the pandemic of sexual inducement.

a. Domestic Violence:

Domestic violence has been explained to mean violence between members of a household or between romantic or sexual partners.¹⁵ It refers to violence between spouses or sexual partners or violence in a domestic setting relating to intentional child abuse committed by a member of the child's family.¹⁶

⁸ Osita N.O., *Human Rights Law and Practice in Nigeria: An Introduction*, (CIDJAP PRESS 1-3 Enugu-Nigeria) 1999 p.86.

⁹ Etannibi E.O.A. et al., *Civil and Human Rights Education for Nigerian Students*, LEADS- Nigeria 2001, p.35.

¹⁰ Bryan A. Garner et al, *Black's Law Dictionary*, 11 edn. (U.S; Thomson Reuters) 2019, p.299.

¹¹ Nwogugu E.I., *Family Law in Nigeria*, 3rd Edition (Ibadan-Nigeria, HEBN Publishers Plc) 2014. P.346

¹² *Ibid.*

¹³ Section 2 (2) Child's Rights Act 2003 (now Cap. C 50 Laws of the Federation of Nigeria (LFN) 2004), hereinafter referred to as Child's Rights Act.

¹⁴ Section 2 (2) Child's Rights Act.

¹⁵ Bryan A. Garner et al, *Black's Law Dictionary*, 11 edn. (U.S; Thomson Reuters) 2019, p.1881

¹⁶ *Ibid*

Domestic violence has been occurring in Nigerian communities with undesirable results. This happens in different forms such as fight; between husband and wife, children from neighborhood and siblings of a family. Sometimes, it arises in form of threat to life, undue influence, coercion, duress, sexual assault among others. During the occurrence of domestic violence, the family members are adversely affected as there will be anarchy and everyone is psychologically or emotionally distorted. More often than not, cases of domestic violence have resulted to the death or physical injury of victims.

Thus, in the words of Lammers; it was stated to the effect that non-physical degradation of one person by their partners through the conscious or unconscious gaining, regaining or maintaining of power through the repetitive overt and subtle acts and messages that control or attempt to control, which negatively affects the abused partner's emotions or self-value in the long term.¹⁷ A point to note is that most physical abuses suffered by members of the family particularly women or children, result into psychological injury and in most cases after the scars of the physical injury has disappeared, emotional injury resulting from the physical trauma sets in.¹⁸ Psychological abuse is very closely linked to all other forms of abuses since there is a cause and effect relationship between violent acts against women and all other forms of abuses and psychological abuse.¹⁹ A lot of relationships that are physically violent also involve emotional abuse which can be exhibited through isolation, humiliation, rejection and excessive jealous behaviour.²⁰ Domestic violence originates from any form of violence that could lead to psychological trauma and negative charges to a person's psychological and emotional well-being which are consequences of traumatic experiences caused by non-physical or physical forms of abuse.²¹

From the foregoing, the research posits that a child growing under the root of such home of violence cannot fully enjoy child's rights and welfare since the home is in disarray. Such rights and welfare will surely be in abeyance and could be addressed using legislation like, the Child's Rights Act²², the Constitution of the Federal Republic of Nigeria²³ and the African Charter on Human and People's Rights.²⁴ Thus, section 37 of the Constitution guarantees and protects the privacy of the child his/her home, correspondence, telephone conversations and other communications.²⁵ The exercise of these rights is however subject to the interest of defence, public safety, public order, public morality, the protection of the rights as well as the freedom of others.²⁶ The section also provides the child a right to family life in that the family is seen as the foundation and basic unit of the society, which provides a unique environment for the survival protection and development of the child.²⁷

¹⁷ Alissa Lykhina, *Women's Lived Experiences of Emotional and Psychological Abuse in Heterosexual Relationships: Behaviours, Effects, Awareness and Support* (DPhil thesis, RMIT University) 2013

¹⁸ Yinka Olomajobi, *Human Rights on Gender, Sex and the Law in Nigeria*, 2nd Edition, (Lagos: Princeton & Associates Publishing Co. Ltd) 2021. P.98

¹⁹ *Ibid*

²⁰ Emotional Abuse (Health Direct) <https://www.healthdirect.gov.au/emotional-abuse>, accessed 6 March 2018 in Yinka Olomajobi, *Human Rights on Gender, Sex and the Law in Nigeria*, 2nd Edition, (Lagos: Princeton & Associates Publishing Co. Ltd) 2021. P.98

²¹ Jessi Nesbitt, *More Than Just Bruises: Psychological Trauma in Women who have Experienced Domestic Abuse* (MED thesis, University of Lethbridge) 2003. P.4

²² Cap. C 50 (LFN) 2004

²³ 1999 (as amended)

²⁴ (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria, 1990.

²⁵ Abdulmumini Bala Ahmed, *The Law and Child's Rights in Nigeria*, (Lagos-Nigeria, Malthouse Press Ltd) 2015. P.56

²⁶ *Ibid*

²⁷ *Ibid*

The family is the first institution in the life of a child where moral and cultural values are first learnt. In this regard, the parents play a vital supervisory role in caring for the child's welfare and protection. The parents provide for the children, the basic survival and developmental needs which include health care, good nutrition, education, general protection and also instill fear and respect for cultural value as well as good discipline.²⁸

The research argues that a home that is predominant with recurrent cases of domestic violence cannot make provisions for the basic needs required for proper up-bringing of a child. A child from such home will be disadvantaged from his peer groups and where there is absence of legal intervention, such child will become a hoodlum in the society. Where this is the situation a care and supervision order would be necessary which may be executed by persons of credible character. Sequel to the provision of section 53(1) of the Child's Right Act, a court may on the application of a state government, or the appropriate authority or any authorized persons, make a Care Order or Supervision Order placing a child under 18 years of age in the care or supervision of designated person if it is satisfied that the care given or likely to be given to him is not what a parent would reasonably be expected to give to the child or he is beyond parental control.²⁹

b. The Pandemic of Sexual Inducement

Inducement refers to the act or process of enticing or persuading another person to take a certain course of action.³⁰ Sexual inducement on children especially the girl child refers to sexually manipulative activities such as inducing a child into the act of prostitution or pornography. There is sexual inducement when an adult intentionally deceive or manipulate a child into believing that having a sexual intercourse is a good act and not a prohibited act. In other words such act amounts to sexual abuse. The World Health Organization (WHO) defines child sexual abuse as the involvement of a child in sexual acts that he or she does not fully comprehend and unable to give informed consent to or for which the child is not developmentally prepared or that violates the laws or social taboos of society.³¹

Child sexual abuse is evidenced by the activity between child and adult or another child and whom by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person.³² This may include but not limited to the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of a child in prostitution or other unlawful sexual practices, graphic performances and materials.³³ The acts of sexual abuse on a child includes sexual behaviour such as touching of the breasts, buttocks and genitals, whether the victims is dressed or undressed, fellatio, cunnilingus and penetration of the vagina or anus with sexual organs or with objects as well as watching of pornographic photography.³⁴

²⁸ Jamo N.M., Civil and Human Rights under the 1999 Nigerian Constitution: Need for some Amendments. In Ladan M.T. (ed) (Zaria: Ahmadu Bello University Press) 2001. P.97

²⁹ Nwogugu E.I. Op. Cit. p.361

³⁰ Bryan A. Garner et al, Black's Law Dictionary, 11 edn. (U.S; Thomson Reuters) 2019, p.926

³¹ Onyinye Hope Chime et al., Prevalence, Pattern and Predictors of Child Sexual Abuse Among Senior Secondary School Students in Enugu Metropolis, The Malays J Med Sci. 28 (4): 123-137, 2021. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8407794/> accessed 28 August 2023.

³² World Health Organization, Report on the Consultation on Child Abuse Prevention (WHO/HSC/PVI/99.I) (Internet) Geneva, Switzerland: World Health Organization; 1999 <https://www.who.int/mip2001/files/2017/childabuse.pdf>. (Google Scholar) 01 November 2019 in Onyinye Hope Chime et al. Op. Cit., n.31

³³ *Ibid*

³⁴ Seldak A., et al., Fourth National Incidence Study (NIS-4) of Child Abuse and Neglect: Report to Congress. Washington DC: the US Department of Health and Human Services Administration for Children and Families. 2010; Ogunfonoka A.A. and Fajemilebin R.B., Impact of a School-Based Sexual Abuse Prevention Education Programme on the Knowledge and Attitude of High School Girls. The Journal of School Nursing, 2012;28

In the same vein as the Child's Right Act was enacted to curtail sexual offenses relating to child's abuse, the Sexual Offenses Act Bill 2013 passed by the Senate of the Seventh National Assembly was also introduced to make regulations dealing with matters of sexual offenses and preservation of human dignity from unlawful sexual act.³⁵ The bill has also brought some reforms in that it has created new offenses that were not part of the former prohibitory legislation; a significant change put in place by the bill is that sexual crimes are no longer gender specific where men were viewed as the main perpetrators of sexual crimes and women as victims.³⁶ The bill also introduced new offenses such as child pornography, incest, indecent exposure, deliberate transmission of HIV or other life threatening, gang rape, among others.³⁷

Legal Framework of the Protective Legislation on Child's Rights and Welfare:

The research examines herein the legal framework of the Child's Rights Act which came into force on the 31st July 2003.

a) The Child's Right Act

The rights of a child under the Child's Rights Act, is an important development with regards to the rights and welfare of a child. The legislation retains all the rights of child under the various laws and goes further to provide some additional rights to the Nigerian child.³⁸ The provisions of the Child's Rights Act recognize all the rights of children as fundamental, restores their confidence, self-esteem, improve their status and as well demand that in all matters relating to the child, his or her best interest, welfare and well-being must be the paramount consideration.³⁹ Thus, the structure of the Act has been informed by the mandate to draft a legislation which will incorporate all the rights and responsibilities of children and which will consolidate all the laws relating to children into one single piece of legislation as well as specify the duties and obligation of government, parents, guardians and other authorities or bodies in relation thereto.⁴⁰

Furthermore, the Act provides to the effect that the Nigerian courts and other bodies settling conflicts or having anything to do with the interest of the child should base their decisions on what is best for the child and that when administrative authorities intervene or in situations where regulations are made in schools, at home, in the civil society or when programmes are designed for children, or actions taken on behalf of children, their best interest must always be the paramount consideration.⁴¹ Sequel to the foregoing, part 1 of the Child's Rights Act provides to the effect that, in every action concerning a child whether undertaken by an individual, public or private body, institutions or service court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration.⁴²

The Act makes provisions to the effect that the protection of a child and necessary care for his welfare should be given serious attentions.

(6):459-468. doi:10.1177/1059840512446949. (PubMed/CrossRef/Google Scholar/) cited in Onyinye Hope Chime et al., Op. Cit. n.31

³⁵ Omoba Oladele and Opeolu Osinuga, Nigeria's Sexual Offences Bill 2013, Matters Arising, SSRN Electronic Journal, Doi:10.2139/ssm.2634134, 2015 <https://www.researchgate.net/publication/315450817-Nigeria's-Sexual-Offences-Bill-2013-Matters-Arising> accessed 28 August 2023

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ Abdulmumini Bala Ahmed, Op. Cit. p.75

³⁹ *Ibid*

⁴⁰ *Ibid*, n.76

⁴¹ *Ibid*

⁴² Section 1 Child's Rights Act

A child shall be given such protection and care as is necessary for the well-being of the child, taking into account the rights and duties of the child's parents, legal guardians, or other individuals, institutions, service agencies, organizations or bodies legally responsible for the child.⁴³ Every person, institution, service agencies, organization and body responsible for the care or protection of children shall conform with the standards established by the appropriate authorities, particularly in the areas of safety, health, welfare, number and suitability of their staff and competent supervision.⁴⁴

Other important provisions of the Act are the provisions prohibiting child's marriage. Many parents in the Nigeria societies have forced their children particularly the girl child into unwanted marriages probably for monetary gains. Most of these marriages are influenced and contracted by some wealthy individuals for their lust and selfish interest. This is a serious violation of the child's right against her consent and willingness to make a choice as she cannot do that as at the time such marriage will be contracted by her parents against her wish. The result of this practice is the multiple domestic violence and broken marriages in the societies.

The Act provides that no person under the age of 18 years is capable of contracting a valid marriage and accordingly a marriage so contracted is null and void and of no effect whatsoever.⁴⁵ The betrothal of a child is also prohibited by the Act to the effect that no parent, guardian or any other person shall betroth a child to any person and that a betrothal in contravention of subsection (1) of section 22 of the Act is null and void.⁴⁶ It follows therefore that a person who, with regards to marriage of a child or the betrothal of a child, marries a child or to whom a child is betrothed or who promotes that marriage of a child or who betroths a child, will be taken to have committed an offence and liable on conviction to a fine of five hundred thousand naira (₦500,000) or imprisonment for a term of five years or to both such fine and imprisonment.⁴⁷

The research submits that these provisions of the Act prohibiting child's betrothal and marriage appear to be very silent in the society as people witness and celebrate such marriages in different parts of Nigeria.

Furthermore, another section of the Act that remains silent is section 24 which prohibits the practice of tattoos and skin marks on a child. Skin marks are frequently put on children under the guise that they are tribal marks. According to the Act, no person shall tattoo or make a skin mark or cause any tattoo or skin mark to be made on a child and that a person who tattoos or makes a skin mark on a child commit an offence under the Act and is liable on conviction to a fine not exceeding five thousand naira or imprisonment for a term not exceeding one month or to both such fine and imprisonment.⁴⁸

Today in our Nigerian societies what we see is the ill-model of tattoos in most of the youths, all in the name of civilization. Tribal mark is another barbaric custom that refused a change as a result of which people are defaced with different marks or cuts all over their faces. This is the reality despite the provision of the Act that prohibits such practice. Similarly, another failing aspect of the law relating to the protection and preservation of the child's rights and welfare is the aspect

⁴³ Section 2 (1) Child's Rights Act

⁴⁴ Section 2 (2) Child's Rights Act

⁴⁵ Section 21 Child's Rights Act

⁴⁶ Section 22 Child's Rights Act

⁴⁷ Section 23 (a), (b), (c) & (d) Child's Rights Act

⁴⁸ Section 24 (1) & (2) Child's Rights Act

prohibiting the introduction of the child into the use of narcotic drugs and other criminal activities. Sections 25 and 26 of the Act provided thus;

No person shall expose or involve a child in the use narcotic drugs and psychotropic substances; or expose or involve a child in the production or trafficking of narcotic drugs or psychotropic substance; a person who contravenes the provisions of subsection (1) or (2) of this section commits an offence and is liable on conviction to imprisonment for life.⁴⁹

Use of children in other criminal activities;

No person shall employ, use or involve a child in any activity involving or leading to the commission of any other offence not already specified in this part of the Act. A person who contravenes the provisions of subsection (1) of the section commits an offence and is liable on conviction to imprisonment for a term of fourteen years.⁵⁰

Section 30 of the Child's Right Act prohibits the acts of buying, selling, hiring or otherwise having dealings with children for the purpose of hawking or begging from alms or prostitution. It provided to the effect that no person shall buy, sell, hire, dispose of or obtain possession of or otherwise deal in a child.⁵¹ A child shall not be used for the purpose of begging for alms, guiding beggars, prostitution, domestic or sexual labour or for any unlawful immoral purpose;⁵² or as a slave or for practices similar to slavery such as sale or trafficking of the child, debt bondage or serfdom and forced or compulsory labour;⁵³ for hawking of goods or services on main city streets, brothels or highways;⁵⁴ for any purpose that deprives the child of the opportunity to attend and remain in school as provided for under the compulsory free Universal Basic Education Act;⁵⁵ procure or offered for prostitution or for the production of pornography or for any pornographic performance;⁵⁶ and procure or offered for any activity in the production or trafficking of illegal drugs and any other activity relating to illicit drugs as specified in the National Drug Law Enforcement Agency Act.⁵⁷

The Act provides that any person who contravenes the provisions of the forgoing commits an offence and is liable on conviction to imprisonment for a term of ten years.⁵⁸ In terms of the content, the Act borrowed a leaf from the United Nation convention on the Rights of the child and the African Union Charter on the Rights and welfare of the child in respect of the guiding principles for the promotion and protection of the rights of children.⁵⁹

The Child's Right Act has comprehensive provisions covering all aspects relating to the protection, development, survival, education, welfare and a life free from disease, drug abuse, hunger et cetera of the child. But in effect, the beautiful provisions of the Act have been far from realization as there are plethora recurrent cases of domestic violence and child's rights abuses in the Society.

⁴⁹ Section 25 (1) (a) (b) & (2) Child's Rights Act

⁵⁰ Section 26 (1) & (2) Child's Rights Act

⁵¹ Section 30 (1) Child's Rights Act

⁵² Section 30 (2) (a) Child's Rights Act

⁵³ Section 30 (2) (b) Child's Rights Act

⁵⁴ Section 30 (2) (c) Child's Rights Act

⁵⁵ Section 30 (2) (d) Child's Rights Act

⁵⁶ Section 30 (2) (e) Child's Rights Act

⁵⁷ Section 30 (2) (f) Child's Rights Act

⁵⁸ Section 30 (3) Child's Rights Act

⁵⁹ Ladan M.T., An Overview of State Obligations in Respect of Children's Rights in Nigeria. A Paper presented at the National Stakeholders Forum on the passage of the Child's Rights Bill, 2003 at National Assembly Complex, Abuja, 2003. p.31 cited in Abdulmumini Bala Ahmed, Op. Cit. p.76

Conclusion and Recommendations

A child growing under the roof of a home predominant with domestic violence has a very minimal chance of getting it right in life as such child grows wild in the society and also get involved in immoral life style, drug abuse, prostitution, stealing, cultism and the like. The paper therefore concludes that the provisions of the Act are comprehensive enough to arrest this ugly trend hindering the Nigeria child from enjoying his/her right to life free from ill-treatment, hard labour, sexual abuse, drug abuse and diseases. It is commendable that the Act incorporated the provision of the constitution of the Federal Republic of Nigeria and that of the African Charter on Human and Peoples' Rights, dealing with rights, interest, welfare and well-being of a child.

However, as good as the provisions of the Act, there is no effective and efficient strategy to enforce the provisions of the Act.

Sequel to the forgoing the research recommends the following:

- a) A serious enlightenment programme for the enforcement and protection of child's right and welfare should be organized frequently in every community both in urban and rural areas;
- b) A reformation is also recommended in the area of enforcement of the comprehensive legal provisions for the sustainability of the child's rights and welfare;
- c) The Federal, State and Local Government should beef up implementation strategies by equipping the relevant agencies to carry out their works effectively and efficiently;
- d) Government and religious groups should establish more family counselling units to quell domestic violence cases.

LEGAL AND HISTORICAL FRAMEWORKS OF ALTERNATIVE DISPUTE RESOLUTION IN NIGERIA

Prof. Chima Josephat Ubanyionwu*

Abstract

Alternative Dispute Resolution as a settlement of dispute options has come to stay in Nigeria. Litigation has been the traditional method of resolving disputes in Nigerian. As a result of many disadvantages associated with litigation, Alternative Dispute Resolution has gained grounds as alternative to the conventional court system of settlement of disputes. In this article, we are going to look at the legal and historical development of Alternative Dispute Resolution in Nigeria. Such issues like the meaning of Alternative Dispute Resolution, historical development of Alternative Dispute Resolution, history of Alternative Dispute Resolution in Nigeria, Legal framework for Alternative Dispute Resolution in Nigeria and mode of application of Alternative Dispute Resolution in Nigeria will be examined.

Introduction

Concern over cost and delays in litigation procedures together with increasing globalization have led to more flexible means of resolving disputes which provide alternatives to court-based litigation governed by the law and procedure of a particular State or country.¹ Disputes are generally an inevitable part of human interaction. They may be domestic, international, civil, commercial or economic in nature. Litigation has been the traditional method of resolving disputes, which may arise as a result of default (sometimes unintended) by a party. However, Alternatives to Litigation were developed because of attendant problems associated with litigation.

What is ADR?

The term "Alternative Dispute Resolution" (ADR), is used generally to describe the methods and procedures used in resolving disputes either as alternatives to the traditional dispute resolution mechanism of the court or in some cases supplementary to such mechanisms.²

Apart from the fact that businessmen and women now prefer private resolution of their disputes to exposure to the machinery available in the glare of the regular courts, there is the advantage that settlement through ADR avoids what can be best described as brinkmanship and acrimony, which often times arise in litigation. It reduces hostility and antagonism; but most importantly, ADR saves business relationships and encourages a continued cordiality between the parties. These are made largely possible because the procedure provides greater room for compromise than litigation.

ADR may be conveniently categorized into two groups for the purpose of this monograph namely: (1) the binding ADR and (2) the non-binding ADR. Binding ADR includes arbitration and other adjudicatory ADR methods. It can be said that the use of arbitration has been long established in Africa even though it is right to admit that it has not obtained its optimum usage within the continent and especially in Nigeria. The same applies to other binding ADR methods like Mini-trial, Expert Determination of issues and mediation-arbitration, otherwise known as Med-Arb. The non-binding ADR, *inter-alia*, includes negotiation, mediation or conciliation and neutral evaluation. These methods are mainly consensual and reconciliatory.

* Prof Chima Josephat Ubanyionwu, Professor of Law, Department of International Law & Jurisprudence, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam Campus, Chairman, Nigerian Bar Association, Aguata Branch (2018 – 2020), Phone: 08036660646, Email: barcjuba@yahoo.com.

¹ Paul Mitchard, International Arbitration and Disputes Resolution Directory, 1997, A summary of Dispute Resolution Options", p.3.

² MaCarthy Jerry, ADR, the solution," Sweet and Maxwell, London, 1982, p.6.

Historical Development of ADR

ADR is nothing new. This informal quasi-judicial system is as old as civilization. Different forms of ADR have been in existence for thousands of years.³ The Holy Bible recorded how Jesus strongly encouraged if not outrightly prohibited Christians from taking their disputes to the more book of Mathew, Jesus said, "woo to you, teachers of the law...you have neglected the more important matters of the Law-Justice, mercy and faithfulness".⁴

Likewise, Jesus also taught his followers that it is best to avoid litigation altogether by going beyond the letter of the law saying "if someone wants to sue you, and take your tunic, let him have your cloak as well."⁵ Moreover, Jesus taught that even when legal disputes cannot be avoided, every Christian should "settle matters with adversary who is taking him or her to court, even if it means reaching settlement on the way to the court house."⁶

Similarly, in his first letter to Corinthians, Apostle Paul wrote that "those who resort to taking their neighbours to court never win in the eyes of God, regardless of the verdict because, the very fact that Christians have lawsuit among one another means that both parties are defeated already."⁷ Thus, because the teachings of Jesus and various authors of the New Testament passionately urged Christians to forgive one another, stay out of court, and passionately resolve their disputes in the least formal way possible, the Christian approach to dispute resolution over the years has traditionally focused on Mediation and Negotiation rather than arbitration or litigation.⁸

In Britain, the firm Arbitration (a form of ADR) Act was passed in 1698 under William III. This was an Act for rendering the award of arbitrators more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others. In 1854, Common Law Procedure Act expressly empowered courts to remit an award for consideration by the arbitrators. Its aim was to stay (stop) an action in court if the parties had agreed to take the dispute to arbitration. Effectively, the Arbitration Act 1910 gifted a number of modern steps to be taken to agree disputes between the parties as follow; the parties shall appoint arbitrators or court may also appoint arbitrators if the parties fail to do so; decide the disputes informally, arbitrators shall make an award, or settle the dispute by mediation, compromise or any other manner; court pass a decree in terms of the award or found that the decision was made properly, and Arbitration Tribunal shall be competent to appoint expert or legal advisor to submit report to it for a specified question or appoint assessor for assisting it on technical matters.

Later in Arbitration Act 1950, there was a consolidation of the Arbitration Acts 1889 and 1934. It included the power of a court to stay actions where there was an applicable arbitration agreement. In addition, the Arbitration Act, 1975 gave effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

History of ADR in Nigeria

ADR is not new to Nigeria but deeply rooted in our culture. In fact, the ADR processes were in practice in Nigeria even prior to the Colonial era. Our traditional societies settled disputes by referring them to the elders and other respected members of the society. The pre-colonial Nigeria era was constituted by settlements, communities, families, villages, hamlets, and most especially kingdoms and empires such as the Oyo empire, the Borno empire, and the Igbo communities. These kingdoms and communities

³ MaCarthy Jerry, *Op Cit* at 39.

⁴ Mathew 23:23.

⁵ Mathew 5:40.

⁶ Mathew 5:25.

⁷ 1 Corinthians 6:7.

⁸ Peacemakers Ministries, Our Distinctive and statement of faith, available at <http://www.hispeace.com/html/org.htm> accessed on December 16, 2020.

were not without conflicts; rather their disputes and challenges were adequately settled without litigation. In most cases, the disputes were referred to elders or other bodies set up for that purpose. In *Okpuruwa v. Okpokun*,⁹ the Honourable Justice Oguntade JCA (as he then was) observed thus:

In the pre-colonial times and before the advent of the regular courts, our people had a simple and inexpensive way of adjudicating over disputes between them. They referred them to the elders or a body set up for that purpose. The practice has over the years become strongly embedded in the system that they survive today as customs.

Negotiation and Mediation have been integral parts of the traditional African decision making process. Traditionally, the elders play special roles such as managing public affairs, keeping the peace, serving as judges and looking after community welfare.¹⁰

The invasion of Nigeria by the British authority witnessed the introduction of the English type of courts for dispute settlement. The introduction of these courts notwithstanding, the existing traditional means of disputes settlement were not jettisoned but co-existed with the court adjudicative of dispute settlement. These systems are recognized by the courts provided processes. Today, cases are still settled outside the courts through the local system provided the cases are civil. The introduction of the modern ADR process in the administration of justice in Nigeria is geared towards addressing the challenges associated with court litigations. Today, there is a growing trend to formalize and popularize the use of these mechanisms as viable alternatives to litigation. There is no doubt that recourse to this mechanism in view of the economic and political conditions of the masses in this country will enhance peoples' access to justice.

Legal Framework for ADR in Nigeria

In recent times, an ever-increasing plethora of laws, Acts, Rules and Guidelines have begun to make viable provisions to aid and enhance the adoption of ADR and also stipulate clear-cut procedures to follow when ADR methods are adopted, especially in relation to disputes which arise out of commercial interactions. It is thus essential to highlight and examine some of the various innovative provisions for ADR proceedings under the various Rules of Court.

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

Section 36 of the Constitution of the Federal Republic of Nigeria 1999(as amended) guarantees a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. This is the section of our Constitution that enables Tribunals established by Law apart from the regular court to determine the civil rights of Nigerian citizens fairly and impartially.

The Arbitration and Conciliation Act

This is the principal legislation that makes provisions for arbitration in Nigerian as an ADR mechanism. This Act enacted internationally accepted provisions for the conduct and regulation of arbitration. Section 34 of the Act¹¹ provides that " a court shall not intervene in any matter governed by this Act except where so provided for in this Act"¹²

This section ousted the jurisdiction of court in arbitration matters except as the Act itself permits. This provision is vital to avoid unnecessary judicial intervention which will defeat the purpose of arbitration as an ADR Mechanism.

⁹ (1998) 4 NWLR (Pt. 90) 554 at 586.

¹⁰ Charlse Clarke, *African Practices before Colonialism*, Ibadan, Spectrum Publishers, 1999, p.17.

¹¹ Arbitration and Conciliation Act.

¹² Modeled according to Article 5 of UNCITRAL Model Law.

Section 2 of the Act¹³ provides for the enforcement of arbitration agreements. The section provides that arbitration shall be irrevocable except by agreement of parties or by leave of court or a judge. This section is in tandem with the perception in the International Business World that agreeing to arbitrate secures a minimum of rights and reduces surprises.

Section 4 of the Act¹⁴ is very crucial in ADR development in Nigeria. The Section requires a court before which an action subject to arbitration agreement is brought to stay the court's proceedings except the agreement is *null and void*. By virtue of this provision, such court shall stay its proceedings and refer the parties to arbitration tribunal where they belong by virtue of an arbitration clause in an agreement governing the transaction that gave rise to the disputes between them. Section 31 of the Act¹⁵ provides for relevant consideration by a court while staying its proceedings.

National Industrial Court of Nigeria Civil Procedure Rules 2017

The National Industrial Court of Nigeria (Civil Procedure) Rules 2017 makes provisions for an "Alternative Dispute Resolution Centre." Order 24 of the Rules¹⁶ provides thus:

- (1) The President of the Court or a Judge of the Court may refer for amicable settlement through Conciliation or Mediation any matter filed in any of the Registries of the Court to the Alternative Dispute Resolution Centre (hereinafter referred to as the Centre) established within the Court premises pursuant to Section 254 (c) (3) of the 1999 Constitution.¹⁷
- (2) The Centre shall endeavor to take all necessary steps to conclude the Mediation or Conciliation process with respect to matters referred to it within twenty-one (21) working days of the date the process commences provided that an extension often (10) working days may be granted by the President of the Court or a Judge of the Court on request if the Mediation or Conciliation process(s) is/are not completed within twenty-one (21) working days.
- (3) Upon receipt of the report of an amicable settlement of a matter from the Centre, the Court shall cause hearing notices to be issued and served on the parties and their Counsel, if any, for the adoption of the settlement agreement as the Judgment of the Court.
- (4) (1) where parties to any Mediation or Conciliation process are unable to settle their dispute amicably, the Director of the Centre shall submit a report to that effect to the President of the Court or the Judge of the Court who made the referral without the record of the Mediation or Conciliation session(s).

Federal Capital Territory High Court (Civil Procedure Rules, 2018

One radical improvement made by the 2018 Abuja Rules is the substantial provision for the procedural framework of ADR. In contrast, under Order 17 of the 2004 Abuja Rules, there was only little provision for ADR and it was discretionary and subject to the consent of the parties. However, under the new 2018 Abuja Rules, the scope of ADR is wider. Not only that, it is now the court or judge's duty bound to encourage settlement of matters *via* ADR, but there are also elaborate provisions for the procedural framework. Where a matter is suitable for ADR, the Judge shall by enrolment Order refer the case to the Abuja Multi-Door Court House (AMDC) for resolution within 21 days except otherwise ordered by the Court. Where a party refuses to submit to ADR and loses the case in court, he shall pay a penalty as may be determined by the Court. The court or judge shall, on the application of parties enroll the terms of settlement both in heading and content reached at the Abuja Multi-Door Court as consent judgment; such terms shall thereupon have the same force and effect as a judgment of the court. It should

¹³ Arbitration and Conciliation Act.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ National Industrial Court of Nigeria (Civil Procedure) Rules 2017.

¹⁷ Constitution of the Federal Republic of Nigeria 1999 (as amended).

be noted that under the 2018 rules, an application to enforce an award on an arbitration agreement or order may be made *ex-parte*, but the court hearing the application may order it to be made on notice.

High Court of Lagos State (Civil Procedure) Rules 2019

The High Court of Lagos State (Civil Procedure) Rules 2019 lays down a very comprehensive procedural structure of ADR in Lagos State. Order 28¹⁸ provides for Alternative Dispute Resolution (ADR) proceedings and states thus:

1. When pleadings are deemed closed; the case shall be referred to Lagos Multi-Door Courthouse or other appropriate ADR institutions or practitioner;
2. Upon the directive of the judge in sub-rule (2) of this rule, the claimant shall, within fourteen (14) days file his statement of claim and the defendant shall file his response within 14 days of service of the statement of claim;
3. Any judgment given under rule (3) above may be set aside upon an application made within 7 days of the judgment or such other period as may be allowed by the ADR judge.

Court of Appeal Rules, 2016

Sequel to the Court of Appeal Rules, 2016, the Court of Appeal Mediation Rules, 2018 gives a framework for conducting settlement by Mediation in the Court of Appeal. By Rule 1, Court of Appeal Mediation Centre was established to use Mediation or other ADR mechanisms to resolve disputes speedily; all appeals will be screened to determine their suitability for settlement through Mediation.

Once an appeal is filled, the Court of Appeal should within 21 days of filing, *suo motu*, or by parties' application refer the appeal to the Mediation centre for resolution.¹⁹ By Rules 5 of the Court of Appeal Mediation Rules, 2018, all appeals referred to the Mediation centre must be resolved within 3 months. This is to emphasize the objective of the centre as an avenue for speedy resolution of disputes even though the mediator can apply for extension of time.²⁰

The Mediation under the rules are confidential and parties executes confidentiality agreement to that effect. The fact that under the rules, parties are not under any obligation to settle all issues makes for flexibility and avoids suspicion.

Mode of application for Alternative Dispute Resolution

An application in any ADR proceedings under these rules shall be by motion on notice. The originating motion, as provided under this Order shall-

- (a) State in general terms the grounds of the application;
- (b) Where the motion is founded on evidence by affidavit, it shall be accompanied by a copy of the affidavit as intended to be used; and be supported by a written address.

Conclusion

Not minding the various improvement of ADR generally, there still exist a number of hindrances to its full-scale adoption by commercial disputants in Nigeria. One of such hindrances is the lack of legislation to regulate other ADR practices apart from arbitration.

With the exception of the Lagos High Court Civil Procedure Rules and the Federal Capital Territory, Abuja High Court Civil Procedure Rules which came into force in 2019 and 2018 respectively, all other major legislations on Arbitration and ADR are old. For instance, the

¹⁸ High Court of Lagos State (Civil Procedure) Rules 2019.

¹⁹ Rule 5 of the Court of Appeal Mediation Rules, 2018.

²⁰ Rule 20 of the Court of Appeal Mediation Rules, 2018.

Arbitration and Conciliation Act which is the most important legislation on Arbitration was enacted as far back as 1990 thus, such a law can hardly reflect the current trends in the society.

The issue of lack of adequate legislation to cover other forms of ADR is very worrisome. From the title of the Arbitration and Conciliation Act, it can be seen that the Act only makes relevant provisions for merely Arbitration and Conciliation amongst the plethora of ADR options which exist. There is, therefore, a need for the Parliament to create a Legislation that would encompass all relevant ADR forms.

Also, there is need for legislators to look beyond commercial disputes for our Arbitration practice in Nigeria by considering a legal framework to accommodate other forms of disputes to our arbitration system.

Finally, it has been discovered that our practice of Alternative Dispute Resolution in Nigeria lacks a vibrant awareness mechanism, which means that laypersons lack a proper understanding of how the arbitration system operates and how it is practiced. Perhaps, it is due to the fact that the 1999 Constitution (as amended) doesn't in specific terms make provisions for the adoption of Arbitration as a dispute resolution mechanism.

There is always room for further integration of Alternative Dispute Resolution in Nigeria into the formal justice system through recognition under the Nigerian Constitution or laws clarifying their relationship with the State enforcement apparatus. Such steps would increase disputants' confidence in the process and reassure them that participation in Alternative Dispute Resolution is equivalent to having their "day in Court"

ABUSE OF POWER OF EMINENT DOMAIN IN NIGERIA: A CRITIQUE

**Osuji Obiageli Francisca* and
Prof. Okorie, Chimezie Kingsley, Ph.D, SAN.****

Abstract

This aim of this article is to critically examine the contemporary trends in compulsory land acquisition (eminent domain) in Nigeria, with focus on the deficiencies within the provisions of the Land Use Act 1978, that pertain specifically to the Governor's exercise of eminent domain. This power has unfortunately become a tool susceptible to abuse in Nigeria, with some Governors employing it to revoke and acquire both private and government properties for personal interests, including favouring cronies, family members, and settling political vendettas. Despite persistent calls from diverse stakeholders for amendments to the Land Use Act, meaningful changes have yet to materialize. Utilizing a combined analytical and qualitative methodological approach, the study highlights instances of gubernatorial abuse in compulsory acquisition, exposing the need for immediate corrective measures. The article argues for urgent legislative intervention, advocating for the repeal of the Act. This article specifically proposes that the legislature takes a proactive role in addressing these challenges and emphasizes the importance of public participation in determining projects aligned with the interests of the people. By involving the public in decision-making processes, the true purpose of revocation can be ascertained, mitigating the risk of diversion for extraneous purposes and ensuring accountability. Urgent legislative reform to rectify the flaws in the current legal framework is highly recommended to restore the integrity of compulsory land acquisition, aligning it with the genuine needs and aspirations of the Nigerian people.

Keywords: Compulsory Acquisition, Land Use Act 1978, Governor's Power, Political Vendetta, Public Participation, Legislative Intervention.

Introduction

The preamble to the Land Use Act 1978¹ captures "public interest" as one of the justifications for its enactment; wherein the rights of every Nigerian to use and enjoy land and its natural resources were preserved. The Act vested all land in the territory of a State in the Executive Governor of that State,² to hold and manage such land on behalf of the people, with the enabling power of revocation or expropriation of private properties for overriding public interest.³ Unexhausted improvement jargon.

For the sake of convenience, land and property may be used interchangeably in this article. Property is perceived by a naturalist as immutable and given to man by Almighty God for sustainability and for good livelihood. The positivists on the other hand agree that law is meant to serve two purposes: to provide peace for everyone and to ensure the right to property is protected and preserved. This represents the unspoken assumption of legal positivism which challenges the natural theory that the most enlightened members of society should utilize legislation to design and build a great society. To that extent, the provisions of Act are expected to yield and build a great and better society. However, the reverse has been the case with the Act, land has not been

* **Osuji Obiageli Francisca, B.A, (Theatre Arts), B.L, LLB, LLM), Lecturer, University of Benin, Edo State, Nigeria. francisca.osuji@uniben.edu, +2347038168840**

** **Prof. C.K Okorie, SAN, Dean, Faculty of Law, Imo State University. kingsoso@yahoo.com, +2348030877008.**

¹ The Land Use Act 1978, Cap. L5 Laws of the Federation of Nigeria, 2004 (The Act).

² Section 1 of the Act.

³ Section 28 of the Act.

made available for easy acquisition, the custodian of Act – the Governor – has ended up abusing the power of eminent domain bestowed upon him.⁴

The massive powers bestowed on the custodians of land in Nigeria are being utilized somewhat fraudulently. For instance, the power of revocation under section 28 is now being used as vendetta against political opponents or for settlement of political scores; private or government properties are acquired for private use rather than utilizing them for betterment of the society. The Act is now an instrument for enriching those in authority, while the poor are being displaced with little or no adequate compensation or resettlement as provided by the Act when their properties are tampered with, thereby getting the poor poorer and the rich richer.⁵

According to Aristotle, only matters of the common good are right, as against matters for the rulers' (pursuit of self-interest and corruption) good which are wrong.⁶ But the obvious fact is that the power given to the Executive by the legislature is now being violated, as it is now being used arbitrarily without recourse to the purpose of exercise of such powers and failure to follow the procedure laid down under the Act. This article will consider this arbitrary use of power of eminent domain and suggest ways of improvement.

Due Process for Compulsory Acquisition

Compulsory acquisition of land otherwise known as eminent domain, is the power of government to acquire private rights in land for a public purpose without the willing consent of its owner. The Act is the law specifically governing the procedure for revocation of a right of occupancy in Nigeria as well as the 1999 Constitution of the Federal Republic of Nigeria (as amended). One of the fundamental requirements in revoking or acquiring private interest for a public purpose is strict adherence to laid down procedure for revocation of a right of occupancy. The procedures have to be strictly adhered to otherwise the purported revocation may be held *null* and *void*. The following procedures are laid down under the Act:

Issuance of Notice:

No doubt, the Governor of a State can revoke a right of occupancy for overriding public interest. However, such right must be exercised in strict compliance with the relevant laws not arbitrarily in show of power and authority⁷. The Act requires that the land owner be informed of the intention to revoke his property by the Governor or the President as the case may be. Where land is required for any of public purposes as established under section 28 of the Act, the Governor shall revoke such right of occupancy in the event of the issuance of a notice by or on behalf of the President if such notice declares such land to be required by the Government for public purposes.⁸ Even where the land owner has contravened any of the terms contained in the Certificate of Occupancy, the law requires that the Governor must comply with the provisions of section 28 (6) and (7) of the Act⁹. The issuance of notice alone to the land owner is not sufficient; he is interested in knowing the purpose of revocation and to what use his property will be subsequently applied and if possible, the benefit of such purpose to himself, his family, and the community at large.

⁴ *A-G Imo State v Gov. Rochas Okorochoa* Unreported, Suit No: HOW/947/2019, Hon. Justice T. N. Nzeukwu, Charles Ogugbuaja and Collins Osuji, *The Guardian*, "Court Orders Final Forfeiture of Okorochoa's Property to Imo Government" <<https://guardian.ng/news/court-orders-final-forfeiture-of-okorochoas-property-to-imo-govt/>> accessed 28 August, 2022.

⁵ *A-G Imo State v Gov. Rochas Okorochoa* Unreported (*supra*).

⁶ Maximilian Jaede, "Working Paper: The Concept of the Common Good", <<https://www.thebritishacademy.ac.uk/documents/1851/Jaede.pdf>>. Accessed on 5 February, 2021.

⁷ *Ya'u v Ministry of Land and Physical Planning Kano & Ors*, (2022) LPELR – 58781 (CA).

⁸ Section 28 (4) of the Act.

⁹ *Donli v Abdullahi & Ors*, (2022) LPELR – 58570 (CA).

Service of notice:

A revocation notice, which is not issued in line with section 28 and served in accordance with section 44 of the Act cannot be considered valid. The essence of the notice is for the holder or occupier to react or challenge the revocation if there is any need for him to do so.¹⁰ In the absence of a notice of revocation of a Right of Occupancy, it follows that any purported revocation of the right of occupancy is ineffectual.¹¹

The notice to the title holder shall be duly served by:

- (a) delivering it to the person on whom it is to be served; or
- (b) leaving it at the usual or last known place of abode of that person; or
- (c) sending it in a prepaid registered letter addressed to that person at his usual or last known place of abode; or
- (d) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at its registered or principal office or sending it in a prepaid registered letter addressed to the secretary or clerk of the company or body at that office; or
- (e) if it is not practicable after reasonable inquiry to ascertain the name or address of a holder or occupier of land on whom it should be served, by addressing it to him by the description of “holder” or ‘occupier’ of the premises (naming them) to which it relates, and by delivering it to some person on the premises or, if there is no person on the premises to whom it can be delivered, by affixing it, or a copy of it, to some conspicuous part of the premises.

Notice of acquisition must be specific and precise as to the property to be acquired; the particulars of the public purpose for which such property is acquired must be given; and the acquiring authority must give notice of intention to the owner before publishing same in the gazette. Many a time, notices are merely gazetted without more, the courts have held that publication in the Gazette alone does not constitute sufficient notice. There must be personal service of notice on the occupier of the property¹² and such revocation of a right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the Governor.¹³ Failure to serve the notice of acquisition on the holder of a right of occupancy whose property is to be revoked provides a sufficient ground for court to declare the purported acquisition *null* and *void*.

Overriding public interest:

The purpose of revocation must be for public purpose. Public purpose includes use of land by the Local Government, State Governor, Federal Government, use for mining purposes or oil pipelines or where the occupier does anything contrary to the provision of the Act, in which case revocation can come as a punishment¹⁴. Public purpose may also include for exclusive Government use or general public use; use by any of government agencies; for proper waste management; for obtaining control over land required for or in connection with development of telecommunications or provision of electricity, mining purposes, rural or urban settlement, economic and agricultural purposes, educational and other social services¹⁵. Any purported revocation or acquisition that does not fall within the listed purposes or in connection therefore is *null* and *void* although this list

¹⁰ *Minister, F.C.T & Anor v Sybron Medical Centre Ltd & Anor* (2020) LPELR – 51168.

¹¹ *Ibid.*

¹² *Goldmark Nigeria Limited and Ors, v Ibafor Company Limited* (2012) 10 NWLR (Pt. 1308) 291; *Ononuju v A. G. Anambra State* (2009) 10 NWLR (Pt. 1148) 182; *Lagos State College of Education v Edun* (2004) 6 NWLR (Pt. 870) 476.

¹³ Section 28 (6) of the Act.

¹⁴ Section 28 of the Act.

¹⁵ Section 50 of the Act.

has been held not exhaustive as the word “includes” in section 50 (1) of the Act has the tendency of widening the scope of the concepts covered by the term “public purposes” although not to narrow its meaning¹⁶.

The failure of the Act to give a definite definition of what public purpose entails has led to revocation of properties arbitrarily thereby subjecting the masses to all kinds of negative impacts associated with revocation. Be that as it may, most of the lands compulsorily acquired have not been utilized for public interest but rather diverted to serve private individuals and settlement of political scores. Revocation of property must be done in accordance with the provisions of the Act, the effect of non-compliance is invalidation of the revocation by a court of competent jurisdiction.¹⁷ This was clearly stated in *Olatunji v Military Governor of Oyo State*,¹⁸ where his Lordship expressed the view thus:

... if a property is ostensibly acquired for public purposes and it is subsequently discovered that it has directly or indirectly been diverted to serve private need, the acquisition can be vitiated. The acquiring authority cannot rob Peter to pay Paul by diverting one citizen of his interest in a property by vesting same in another.

In the above case, the State clearly failed to state the purpose for which the property was acquired. Waddington, J., in *Chief Commissioner, Eastern Province v S.N. Ononye*¹⁹ stated thus:

the notice merely states “for public purposes” and I find it difficult to understand why the particular public purpose is not stated. When the matter comes into court it has to be admitted that there is no public purpose involved at all; and the impression is liable to be conveyed, no doubt erroneously, that there was something ulterior in the failure to make the purpose public.

It is implicit by the court’s pronouncement in the cases cited above that the grounds for which a property is to be revoked or be acquired must be communicated to the holder of a right of occupancy. The holder is not entitled to speculate the grounds upon which his property is revoked. The essence is for the landowner to challenge such actions if need be.²⁰ In other jurisdictions like Ghana, where the purpose for which a particular land was revoked failed, the owner of the revoked property is given the first option to repurchase the property.²¹ But this is not the case in Nigeria, some properties have been acquired which were not utilized for a public purpose but eventually redistribute. The Act should be amended to include the option of repurchase by the displaced owner. This will enable the Governor to ensure equity and fair play in land revocations and acquisitions.

Compensation

The law is that where land is acquired compulsorily by the government for public purpose, compensation is required to be paid to the deprived owner to ensure that he is put in his former position before such deprivation.²² There should be a balance between protecting the interest of the public in creation of amenities, and protection of private or individual property rights. This is to ensure that an individual is not punished for the sake of majority, and to cushion the effect of land acquisition which includes displacement of owners from their homes and their businesses as

¹⁶ *Udoh & Ors, v Akwa Ibom State Government & Anor* (2013) LPELR – 21121 (CA).

¹⁷ *Abdulkadir & Anor v Mohammed* (2020) LPELR-52351.

¹⁸ (1995) 5 NWLR (Pt. 397) 586 at 602; (1994) LPELR – 14116.

¹⁹ (1944) 17 NLR 142.

²⁰ *Olatunji v Military Governor of Oyo State* (*supra*) 31.

²¹ Section 235 (5) Ghana Land Act 2020; Article 20 (6) of the 1992 Constitution of the Republic of Ghana.

²² Section 29 of the Act; section 44 of the 1999 Constitution (as amended).

well as other means of livelihood. Acquisition of land for public purposes²³ without adequate compensation is not only unjust but a violation of the property rights guaranteed by domestic as well as international instruments.

Resettlement:

Section 33 of the Act makes provision for an option to accept resettlement in case of revocation of right of occupancy that is in lieu of monetary compensation. This is though only applicable where revocation touched on residential building. Unfortunately, this option is rarely explored as it is subject to the discretion of the Governor or Local Government whether or not to make provision for an alternative accommodation.

Settlement of disputes regarding adequacy of compensation:

Where there is a dispute as to the amount of compensation calculated in accordance with the provisions of section 29 of the Act, such dispute shall be referred to the appropriate Land Use and Allocation Committee.²⁴ The jurisdiction of the High Court which ordinarily is a court of coordinate jurisdiction is ousted under section 47 (2) of the Act. This provision precludes an aggrieved party who is dissatisfied with the quantum and adequacy of compensation paid to him from approaching the court to air his grievances.²⁵ This notwithstanding, there are good number of cases which now firmly establish that the provisions of section 47 (2) of the Act are inconsistent with the provisions of section 272 (1) of the Constitution which confers unlimited jurisdiction on the State High Court.

Despite the procedures enumerated and discussed above, one can conclude that there is no robust legal provision on the procedure for acquisition of land under the Act. There is no provision for planning to ascertain the right land to be revoked for people's-oriented projects. Again, the Act fails to include landowner in the acquisition process, the failure which makes it possible for Government to revoke properties arbitrarily and converting same for ulterior motives. Not even at the point of valuation is the landowner involved in negotiating adequate compensation due to him. The only redress he would have had to make good his grievances is also deprived of him by the Act which ousted the jurisdiction of the Court to entertain issues bordering on the adequacy or otherwise of quantum of compensation due him²⁶ and vesting same on the Land Use Allocation Committee.²⁷

The failure of the Governor to comply with the procedure for compulsory acquisition results to negative outcomes which if challenged renders the Governor's act illegal, *null* and *void* and may lead to forfeiture of the property. But property forfeiture alone does not deter the Governors from violating the provisions of the Act, a more stringent punishment such as sanctions would be considered alongside forfeiture of the property to deter abuse of office.

Rascality of Governors

By virtue of section 1 of the Act, the Governor is entrusted with the power to manage and administer land in every State in Nigeria. The Governor under section 28 of the Act also reserves the right of compulsory acquisition of land for overriding public interest, in this case, for the benefit of all Nigerians. However, this power has been subjected to abuse by some Governors as

²³ Section 51 of the Act defines public purposes.

²⁴ Section 30 of the Act.

²⁵ *Benue State Urban Development Board & Ors v Asuakor & Anor* (2019) LPELR – 47233 (CA).

²⁶ *Ibid.*

²⁷ Section 2 and 30 of the Act respectively; *Controller General of Prisons & Ors v Elema & Anor* (2021) LPELR – 56219 (SC).

custodians of land within their States. The recent trends, as have been outlined in this article, show that some of the Governors have used the powers bestowed upon them for the benefit of themselves, their cronies and most importantly to settle political scores or as vendetta against their political opponents. These issues are going to be considered under different heads hereunder.

Reallocation of Revoked or government land to private individuals:

One of the issues that calls for contention in compulsory acquisition or revocation of property under the Act is whether the revoked property was actually utilized for the purpose for which it was acquired or revoked. This purpose ought to be for the common good of the people. Some revoked properties have been challenged in courts on ground of failure to meet the desired goal for which it was revoked, or for failure to meet the requirement of public purpose. The use for which a property must be put to therefore must be actualized before revocation is carried out.²⁸ In the United Kingdom, the procedure for compulsory acquisition requires that the acquiring authority must ensure an existence of a scheme that requires it to acquire other people's land, before it may resolve to make a Compulsory Purchase Order for that scheme.²⁹ The acquiring authority is quite distinct from approving authority and without such statement of purpose, the Minister, who is the approving authority cannot confirm the compulsory purchase order.

In Nigeria, what is witnessed in practice is a situation where the government has no plan or scheme in the first place before revocation. That is the only reason why revocation of a particular property cannot be utilized, for if there is a proper plan in the first place, then there must be proper implementation of that particular purpose. Government must have plans of project for the common benefit of the people before embarking on revocation and the purpose for such revocation must be utilized within a specific/ied period of time. This is to further prevent Governors from abusing their offices by using the massive powers bestowed on them to amass massive land for themselves and their cronies or private individuals all in the name of public purpose. Mostly in recent years more than ever before, land is being revoked by State Governors, and reallocated to themselves, their family members and election supporters.³⁰

Power of eminent domain as a tool to settle political scores or as vendetta:

Recent developments in the country have witnessed Governors in one administration, who have granted Certificates of Occupancy to both themselves and their cronies, becoming the target of the next administration. In Edo State, the Governor Oshiomole's administration witnessed a grant of Certificate of Occupancy to his Deputy Governor, Mr. Obudu, and to some private individuals which he referred to as parting gift to them during the pendency of his tenure. When Governor Obaseki took over, there was no delay in his revocation of those Certificates of Occupancy granted by Oshiomole's administration to his deputy and his other political friends.³¹

Similarly, Governor Rochas Okorocha, during his tenure as the governor of Imo State, allegedly acquired ten (10) properties belonging to the State Government to himself and his family members, while he was governor of Imo State for eight years.³² Governor Hope Uzodimma, his predecessor,

²⁸ Section 28 (2) (a) of the Act.

²⁹ Section 11(2) (b) of the Acquisition of Land Act 1981.

³⁰ Chinonso Alozie, 'Breaking: Court Orders final forfeiture of Okorocha's property'. *Vanguard Newspaper*, () <<https://www.vanguardngr.com/2021>> accessed 11 August, 2021.

³¹ Kayode Oyero, 'Why Edo revoked C-of-O of 11 properties Oshiomhole 'gave' associates' *Punch Newspapers*, (25 March 2021) <<https://punchng.com>> accessed 28 August, 2022.

³² A-G Imo State v. Gov. Rochas Okorocha Unreported, Suit No: HOW/947/2019, Hon. Justice T. N. Nzeukwu, Charles Ogugbuaja and Collins Osuji, 'Court Orders Final Forfeiture of Okorocha's Property to Imo Government' *The Guardian*, <<https://guardian.ng/news/court-orders-final-forfeiture-of-okorochas-property-to-imo-govt/>> accessed 28 August, 2022.

through the then Attorney General and Commissioner of Justice, Chief Akaolisa, filed an application in the State High Court seeking for an order of forfeiture of ten properties listed as owned by Senator Rochas Okorochoa's family.³³ Justice Fred Njemanze, sitting in Owerri High Court, on Monday 9th of August, 2021, ordered the final forfeiture of those properties allegedly owned by former Governor of Imo State, Senator Rochas Okorochoa and his family members to the State Government. According to his Lordship, there was no concrete verifiable reasons why a final and absolute forfeiture order should not be given in favour of the Imo State government. The Royal Spring Palm Estate, which was said to have been converted to a relaxation point for Okorochoa's friends and Rochas Foundation Orji among numerous others were subsequently returned to Imo State Government.³⁴

In another development in Rivers State, Nyeson Wike revoked a right of occupancy allegedly belonging to his predecessor Rotimi Amaechi, covering a hotel allegedly used in rigging election in that state.³⁵ In Benue State,³⁶ the State Governor also allegedly converted acquired land for private uses.³⁷

From the foregoing, it is obvious that the State governors use the power bestowed on them by virtue of sections 1 and 28 of the Act as vendetta, against their political opponents.³⁸ It therefore becomes a feud in which the incumbent governor of a State, seeks vengeance on his predecessor. This is a trend which has been occasioned by the massive power given to the Governor under the Act. The arbitrary use of this massive power by Governors is what the legislature has to reconsider and revisit in order to amend this unscrupulous power given to the Governor.

Incessant revocation of properties without notice:

As has been dealt extensively under procedure, the Governor of a State has the mandate to give notice to the title holder to inform him of the need for the revocation of his property. This notice must also include the purpose for which the property is desired in the first place.³⁹ This procedure is contained in section 44 of the Act. In *Adole v Gwar*,⁴⁰ the court could not find any evidence to show that the title holder was served with notice of revocation. In *Olomoda v Mustapha*,⁴¹ the appellant had given the 3rd and 4th Respondents notice of change of address as No 5 Abaji Close, Adewole Estate, P.O.Box 4749, Ilorin but despite the notice of change of address to the Respondents, notice of revocation was not served on that address but former address of the title holder. The notice was held to be a none starter.

The Governor in exercising his power of revocation must comply with the provisions of the Act, particularly with regard to giving of adequate notice of revocation to the holder of the right of occupancy. The purpose of giving such notice is to duly inform the holder of the steps being taken

³³ Chinonso Alozie, 'Breaking: Court Orders final forfeiture of Okorochoa's property'. *Vanguard Newspaper*, (9 August 2021) <<https://www.vanguardngr.com/2021>> accessed 11 August, 2021.

³⁴ *Ibid.*

³⁵ Jimitota, Rivers: Revocation of Land title as Political Weapon? <<https://www.vanguardngr.com/2017/08/rivers-revocation-land-title-political-weapon/>> accessed 02 January 2023.

³⁶ Peter Duru, *Vanguard* 'Benue Government Revokes Suswanm's Property in Makurdi', <<https://www.vanguardngr.com/2015/11/benue-govt-revokes-suswams-property-in-makurdi/>> Accessed 2 January, 2023;

³⁷ Bertram Nwannekanma, *The Guardian Newspaper* 'Experts Decry State Govts Conversion of Acquired Land for Private Uses', <<https://guardian.ng/property/experts-decry-state-govts-conversion-of-acquired-land-for-private-uses/>> accessed 2 January, 2023.

³⁸ Adeyinka Adedipe, 'Edo Demolition: Obaseki revoked his C of O, says SSG', *Punch Newspaper*, (26 march 2021) <<https://punchng.com/edo-demolition-obaseki-revoked-his-c-of-o-says-ssg/>> accessed 28 August, 2022.

³⁹ *Matthesman (Nig.) Ltd v Assea Brown Boveri Ltd (Abbeng Ltd) & Anor* (2021) LPELR -55190.

⁴⁰ (2008) LPELR S.C 302/2002.

⁴¹ *Usman Kayode Olomoda v Mr. Olaniyi Mustapha & Ors* (2019) or (2009) SC 355.

to extinguish his right of occupancy. Failure to give notice of revocation of the right of occupancy renders such purported revocation ineffectual.

Revocation on ground of a breach:

Apart from revocation of property for overriding public interest, a Governor may revoke a right of occupancy on the ground of a breach of any of the covenants contained in a Certificate of Occupancy⁴² or in any special contract made under section 8 of the Act. The question here is whether or not the Governor has a duty to follow the laid down procedure for revocation of a right where there is a breach of the covenants. The answer to this question is in the positive. Even when a breach of any of the clauses contained in the Certificate of Occupancy is a reason behind revocation of rights of occupancy, the Court has held that revocation or forfeiture of such rights is not automatic but must follow due process. In *Majomi & Ors v Hon. Minister, FCT & Ors*,⁴³ it was stated thus:

The Land Use Act requires that even where a breach capable of leading to a forfeiture of a right is committed, a notice ought to be issued signifying revocation of a right. It is essential for the purpose of the law, that the positive act of revocation be communicated to the title holder, because rights in a land do not revert back automatically, that is not how the law operates. The necessary lawful steps of revocation and communication of such, in accordance with sections 28 (6) and 44 of the Land Use Act have to be complied with before any right can be validly transferred to another person, and where that is not done, any transfer so done is null and void, and the reason for that is, ‘*nemo dat quod non habet.*’⁴⁴

On Thursday, September 21, 2023, the Federal Capital Territory⁴⁵ Secretary, Olusade Adesola released a statement wherein it was disclosed that the Minister of FCT had in exercise of the powers under sections 28 (5) (a) and (b) of the Act revoked the Certificates of Occupancy over 167 plots of land located in the various districts of the FCT, etc. The revocation was premised on non-development and/ or failure to submit building plans for approval. It is important to state that the Governor’s power to revoke any right of occupancy is not absolute, therefore, even when the Certificate holder has not complied with the terms of the grant, sections 28 and 44 of the Act must be complied with. It is expected that the Minister must have served the title holder adequate notices in compliance with section 44 of the Act and that the revocation is in line with section 28 also. The Act however did not state the duration of notice to the holder or whether he still has the opportunity to remedy the breach. Some State Governors have indulged in demolition of properties without exhausting legal options which shows abuse of powers conferred on them and most often than not this demolition is in violation of court orders.

Illegal Demolition in the face of Court Order

One may ask where the judiciary is while such mishaps are happening or while such demolition and abuse of the Act. Many cases have gone to court to stop the Governors from either demolishing or revoking properties arbitrarily or to maintain the *status quo*. But many a time, such orders have been violated or ignored. Some orders are flouted by the politicians or government. The Supreme Court in the *Military Governor of Lagos State & Ors v Chief Emeka Odumegwu Ojukwu & Anor*, noted the dangers inherent in government’s disregard for the rule of law, otherwise known as contempt of law thus:⁴⁶

⁴² Section 10 of the Act.

⁴³ (2018) LPELR -44446.

⁴⁴ *Ibid.*

⁴⁵ FCT.

⁴⁶ *The Military Governor of Lagos State & Ors v Chief Emeka Odumegwu Ojukwu & Anor* (1986) All N.L.R. 233.

If Government treat court order with levity and contempt the confidence of the citizen in the courts will be seriously eroded and the effect of that will be the beginning of anarchy in replacement of the rule of law. If anyone should be wary of orders of court it is the authorities, for they, more than anyone else, need the application of the rule of law in order to govern properly and effectively. Per Uwais, J.S.C

Contempt of court simply means willful disobedience to judgments or orders of the court. Many State Governors have been in contempt of Court due to its willful disobedience and obstruction of lawful orders of court. A court may give an order directing a person to carry out certain act or refrain from carrying out a particular act. Failure to heed or abide by the directive of or obey such court orders is a serious breach of court's jurisdiction and contemptuous.

In *Military Governor of Lagos State & Ors v Adebayo Adeyiga & Ors*,⁴⁷ a declaration that members of the Shangisha Landlords Association whose lands at Shangisha village were demolished by the Lagos State Government during the period of June 1984 to May 1985 are entitled to the first-choice preferential treatment by the Lagos State Government in doing away with the property, was flagrantly disobeyed by the Lagos State government and have not been complied with up till date. In another development, the order of the court which ordered the displaced Imo indigens whose land was grabbed by Okorocho Rochas, which order empowers the indigens to reclaim their land was met with resistance. It was reported that military personnel numbering over 25 were on site to prevent the land owners forcefully, from reclaiming their land by police officers who supposed to enforce the order of the court.⁴⁸

The *Punch Newspaper*⁴⁹ of Saturday, August 26, 2017 also reported of bulldozers which were accompanied by a horde of armed security operatives, acting on the orders of the Imo State Governor, Rochas Okorocho, which stormed Eke-Ukwu Owerri Market in Imo State, and forcefully evicted the traders, demolished their shops and destroyed wares worth millions of naira. This action was in total disregard to an Imo State High Court restraining order against the State from destroying, relocating or tampering with the market. Similarly, Okorocho had in July, 2017, demolished the Shell Camp Quarters, inhabited by serving and retired Lecturers of Alvan Ikoku Federal College of Education, despite a subsisting court order. Not only are court orders brazenly flouted by this government, there was substantial evidence that the cleared land was not used for any development purposes, but rather, reallocated to political cronies⁵⁰.

In Lagos State, a report was published where the plaintiffs, Admiralty Fleet Limited (BICS Garden), and a retired Naval officer, Admiral Festus Porbeni had in suit number FHC/L/CS/1384/21, asked the court to restrain, the Attorney-General of Lagos State, and the Lagos State Special Task Force Unit from allocating any portion of the parcel of land, building or enter into the disputed property located at B20, Wole Olateju Crescent, Lekki Phase 1 in Eti-Osa Local Government Area, pending the hearing of the substantive suit. But barely few days after the Federal High Court sitting in Lagos restrained the Attorney General and Commissioner for Justice, Lagos State from allocating any portion of the property, the State invaded the premises and

⁴⁷ (2002) SC. 112.

⁴⁸ Akachi Demolished in Owerri by The Land Owners Via Court Order: [Google.com/amp/s/universalreportersing.com/akachi-demolished-in-owerri-by-land-owners](https://www.google.com/amp/s/universalreportersing.com/akachi-demolished-in-owerri-by-land-owners). Accessed on 1 January, 2022.

⁴⁹ [Google.com/amp/s/punching.com/okorochas-illegal-demolition-of-owerri-market-PunchNewspaper](https://www.google.com/amp/s/punching.com/okorochas-illegal-demolition-of-owerri-market-PunchNewspaper). Accessed 10 March, 2022.

⁵⁰ *Ibid.*

demolished the property in violation of the court order.⁵¹ Also, in February 2021, Honourable Justice Ogunsanya of the High Court of Justice, Ikeja, ordered the parties in a suit filed by Olorunda-Oyinlola market men and women to maintain the *status quo* pending the hearing of the Motion on Notice for Interlocutory Injunction by the Claimants in the suit.⁵² Thousands of traders of Oyinlola/ Olorunda Market, Festac in Amuwo-Odofin Local Council Development Area, Lagos State, were displaced despite court's order to maintain the *status quo*.

The case of the settlers of Otodogbame cannot be left out in this discussion. Justice Onigbanjo of the High Court of Lagos State had noted that it was unconstitutional for the government to forcefully evict the settlers without providing an alternative settlement. His Lordship therefore gave an order halting further actions but the officials of the State government stormed Otodogbame and began fresh demolition of structures and shanties within the community.⁵³

In the recent past too,⁵⁴ the *Thisday Newspaper* online, published a report of a firm, Avastone Global Service Limited, whose property was allegedly illegally demolished by the then Minister of the Federal Capital Territory (FCT), Mohammed Bello, despite a valid and subsisting judgment of a court of competent jurisdiction in a Suit marked CV/2257/2020 assigned to Justice V.S. Garba of the High Court of the FCT, Gwagwalada Division, holden at Kwali. The Court had earlier, after proper consultation of the case of the Claimant, entered judgment in its favour and made the following orders: a Declaration that the demolition notice issued by the 2nd and 3rd defendants for demolition of Plot 1186 Katampe Extension, Cadastral Zone B 19, Abuja is oppressive, illegal and unconstitutional; an order of perpetual injunction restraining the defendants in this suit from demolishing the structure/buildings erected on Plot 1186 Katampe Extension, Abuja; and an Order of the Court directing the 2nd and 3rd Defendants to restore the building plan approved and withdraw the demolition notice over Plot 1186, Katampe Extension, Abuja.

But not up to one month after the delivery of this judgment was the structure demolished and vandalized in flagrant disregard and disobedience of the valid and subsisting judgment of the Court. This demolition took place despite the fact that the Respondent was properly served with the originating court processes, fully represented by a Counsel of their choice who was equally present on the Day of Judgment and fully participated in the proceedings.

It is indeed wrong and unconstitutional for government to forcefully eject Settlers who have been in occupation of a parcel of land for quite some years without giving them notice or making an alternative plan for re-settlement. The Supreme Court in *Omoijahe v Umoru*⁵⁵ clearly made it known that it is indeed justice itself that is being flouted by contempt of court, and not the individual court or the judge who is attempting to administer justice.⁵⁶ The judiciary needs no interference from the executive so as to ensure sanctity of judgment and orders of the court. Any interference from government will usually work against the administration of justice. No single individual or government is above the law, and for courts to do justice, their power to administer

⁵¹ Wale Igbintade, 'Lagos Flouts Court Order, Demolishes Rtd Admiral's Property' <<https://www.sunnewsonline.com/lagos-demolishes-property-against-court-order/>> accessed 20 February, 2022.

⁵² Bose Adelaja, <<https://www.vanguardngr.com/2022/02/festac-demolition-traders-petition-sanwo-olu-over-contempt-of-court/>> accessed on 11 March, 2022.

⁵³ Ben Ezeamalu, 'Lagos govt appeals court judgement, defends demolition of Otodogbame', <<https://www.premiumtimesng.com/>>. accessed on 11 March, 2022.

⁵⁴ Alex Enumah, 'Alleged Illegal Demolition: FCT Minister Gets Seven Days Ultimatum to pay N2bn compensation' <<https://www.thisdaylive.com/index.php/2022/01/25/alleged-illegal-demolition-fct-minister-gets-seven-days-ultimatum-to-pay-n2bn-compensation/>> accessed on 13 March, 2022.

⁵⁵ (1999) LPELR – 2645 (SC).

⁵⁶ *Adeyemi v Esther Edigin* (1990) LCN/0101 (CA).

justice without affront or interference by anyone especially those in authority must be pursued. It is a violation of the constitution and abuse of power for a government to be in flagrant disobedience of court orders which invariably will lead to loss of faith in government.⁵⁷

The incessant demolition of properties and disobedience to court orders also amount to violation of the provisions of the 1999 Constitution of the Federal Republic of Nigeria (as amended), which provides that no one may be deprived of his property; (this includes demolition of properties)⁵⁸ except as provided for under the law. Obedience to court orders or judgments is fundamental to the maintenance of social order, and as argued by a Canadian judge:

To allow court orders to be disobeyed would be to tread the road towards anarchy. If the orders of Courts can be treated with disrespect, the whole administration of justice is brought into scorn ... Loss of respect for the Courts will quickly result in the destruction of our society.⁵⁹

It has been observed that enforcement of court orders against government is hardly possible especially when it comes to orders or judgment against demolition of properties. This article advocates that government agencies in the form of Police, who indulge in carrying out illegal demolition even in the face of court orders be punished as contemnors so as to make it possible for court to purge itself. Judiciary should also be fully independent for as long as the judiciary is appointed by the government, and so long as judiciary salaries come from the State, contempt of court by the executive arm of government will never be a thing of the past.

Public Participation in Deciding People's Oriented Projects

Public participation simply means the involvement of different groups of stakeholders in a process of participation or decision-making process. Compulsory acquisition for public infrastructure project requires stakeholder's input, in fact, the people's Oriented Projects ought to begin and end with stakeholder's inputs. It therefore naturally follows that, every form of compulsory acquisition should be made open to all stakeholders and to any interested party – landowners, tenants, mortgagees, community, the general public, *et cetera* who equally participate in deciding whether or not the project is desirable. According to Brockner,⁶⁰ “the original landowner is a powerful stakeholder and therefore her participation in the compulsory purchase process needs to be reviewed, so as to minimize the dissatisfactions of the landowner and to harmonise the process,” and to ensure that the purpose which will lead to deprivation of property is such that the community approves off. Where it is impossible to achieve this due to tendency of involving large groups, the representatives may be available and involved from planning to execution of projects.

Ordinarily, compulsory acquisition is carried out for the purpose of community development. It therefore follows that the stakeholder's involvement in the process is necessary to ensure equity and purposive acquisition, as they want to be informed in detail, the purpose for compulsorily taking a private property for public use. Interactions between these parties to ensure peoples'-oriented project are very necessary and this is primarily needed at the planning stage, to getting stakeholders' stake in the compulsory acquisition project. In practice, the stakeholders for whom such development is meant for are usually sidelined or sidetracked. The forceful nature of

⁵⁷ *Military Governor Lagos State v Ojukwu* (1986) All NLR 233.

⁵⁸ *APC & Ors v Karfi & Ors* (2017) LPELR – 47024 (SC); *FCDA & Anor v KUDA Engineering & Construction Company Ltd. & Ors* (2014) LPELR -22985 (CA).

⁵⁹ *Canada Metal Company Co. Ltd v Canadian Broadcasting Corporation* [1975] 48 D.L.R. 3d 649, 669.

⁶⁰ Brockner, J. (2002), Making Sense of Procedural Fairness: How high Procedural Fairness can Reduce or Higher the Influence of Outcome Favourability, *Academy of Management Review*, 27 (1), 58 – 76, http://www.jstor.org.ezp.lib.unimelb.edu.au/stable/413469?seq=1#page_scan_tab_contents, accessed 2 November, 2023.

compulsory acquisition does not ordinarily make room for public participation more especially the one that involves the landowner, be that as it may, public participation is necessary to obviate the case of violating the purpose of acquisition and to win the trust of the government.

Once the public is involved in compulsory acquisition decision making process, ensuring that the compulsory acquisition purpose is limited to public uses and is indeed applied to public use, - the negative impact of compulsory acquisition on land owners and the community may not be so much unbearable. Where the land owner or the stakeholders are to benefit from, agree or decide on the project, subject matter of compulsory acquisition, they may not necessarily frown at the act of compulsory acquisition. A private or community land cannot be acquired to the detriment of the individual and national economy hence the need for public participation.

The above notwithstanding, one major advantage of public participation in compulsory acquisition is to fill the gap of non-participation and prevent the routine use of compulsory acquisition to take land from landowners and applying it as political vendetta and conversion to cronies instead to advancement of projects for public use.

The Act makes no provision for public participation in compulsory acquisition project not bearing in mind that the essence is for the public. There is need for legislative intervention, to include public participation in compulsory acquisition process. It therefore behooves on the legislature to amend the Act to include public involvement in ascertaining and ensuring that the property acquired is not diverted for private use or for Governor's overzealous purposes. Public inclusion in the process of compulsory acquisition will help to reveal the community's purposes and desires, and achieve the sole aim of the government which is provision of social amenities and infrastructure.

According to Brockner,⁶¹ "unfavourable outcome (acquisition of land) accompanied by non-participatory (or unfair) procedure makes the decision maker (the government) much more blameworthy and land owners feel disenchanted from development activities proposed on their land. Therefore, the process might appear fairer to stakeholders if they are involved in the decision-making process."

Conclusion

There is a lacuna in the provision of the Act for penalty or punishment to anyone who has converted people's properties or State properties to himself or used such properties otherwise than for purposes under the Act or any other law. Apart from forfeiture of such property illegally acquired,⁶² there is need for legislative intervention to include punishment for such abuse.

The conditions under which a Governor can exercise his powers of revocation are well stated in *N.U.T & Anor v Bukar*.⁶³ The dictum of the Supreme Court, *per* Kalgo JSC in *Nigeria Engineering Works Ltd v Denap Ltd & Anor*⁶⁴ is very apt at this juncture: the power to revoke any statutory right of occupancy under section 28 of the Act was granted to the Governor in his official capacity and is therefore a public right the exercise of which constitutes a public act in the public interest. It is not and cannot be a private act in the interest of the person of the Governor himself.⁶⁵ In this regard,

⁶¹ *Ibid.*

⁶² Chinonso Alozie, 'Breaking: Court Orders final forfeiture of Okorocho's property'. *Vanguard Newspaper*, <<https://www.vanguardngr.com/2021>> accessed 11 August, 2021.

⁶³ (2021) LPELR – 56149.

⁶⁴ (2001) LPELR- 2002.

⁶⁵ *Ibid.*

revocation of private property by the Governor for superfluous purposes ss not within the powers granted to the Governor under the Act and should not be entertained.

Section 1 of the Act is long overdue for amendment. A law can only be conceived as legitimate when it caters for the general will of the people as well as to their common good. The Act is no longer serving the common good of the people. The clamor for amendment of the Act is long overdue and should be given heed to, in order to move the socio-economy of the people and State, forward.

Recommendations

1. Apart from other recommendations in the body of this article, urgent consideration should be given to repealing the Land Use Act 1978 and enacting comprehensive legislation that addresses the shortcomings identified in this article to incorporate safeguards against abuse, ensuring a more transparent and accountable process of compulsory land acquisition.
2. There is need for inclusion of public participation to compulsory acquisition of land process in Nigeria. Engaging citizens in decision-making regarding people-oriented projects will contribute to the identification of genuine public needs and help prevent the diversion of acquired land for extraneous purposes.
3. This is to obviate the conversion of acquired properties to private use or as vendetta against political opponents by the Governor; and violation of other provisions of the Act. The public involvement in deciding whether or not the people are in dire need of a particular project will make the compulsory purchase process more inclusive and participatory, thereby leading to acceptance and harmony.
4. Establishing independent body to monitor and review the exercise of compulsory acquisition powers by Governors is required to prevent arbitrary actions, ensuring that land acquisition is carried out in the public interest and not for personal or political motives.