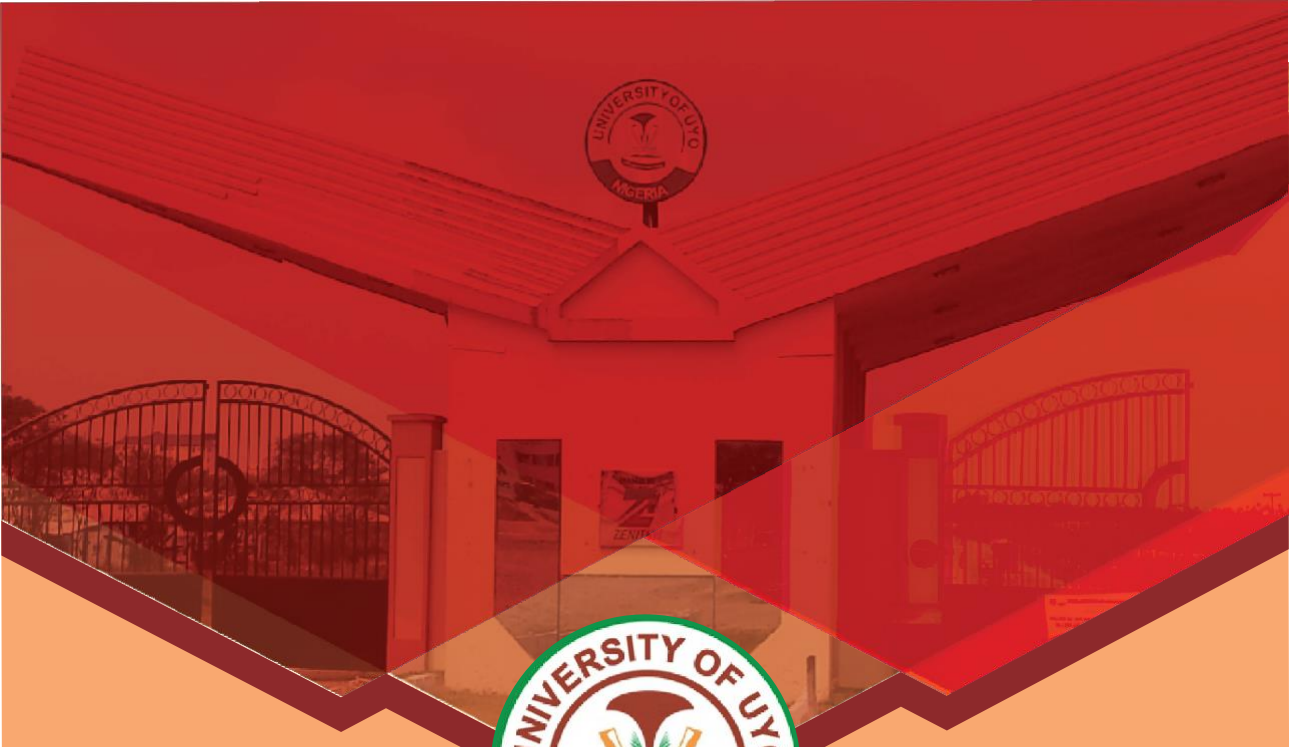

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Articles

The Right to Work and the Changing Narratives on Refugee Protection

*Christy Hwyere-Yashim**

Abstract
This article espouses the right to work in the context of refugee protection. It interrogates policies and practices regulating Refugees' access to the labour market, and found, *inter alia*, that refugee problem is a global issue with permeates all the continents of the globe. It is demonstrated that refugee problem is not anchored on dearth of protective norms, but on the reluctance of States to assume full responsibility for refugee protection in line with normative prescriptions. This reflects in the increasing number of restrictive practices that undermine the full enjoyment of the right to work by Refugees. This is further exacerbated by restrictive interpretation of Refugee definition, circumscribed access to Refugee status determination procedure, overwhelming arrivals of Asylum Seekers, colossal impact of mass influx of Asylum Seekers in countries of asylum, and increasing instances of Protracted Refugee Situation. The article concludes with a number of recommendations for ameliorating Refugee problem through the entrenchment of the right to work.

1. Introduction

Refugee protection is tied to grant of Refugee status. This utopian postulation does not necessarily mean that once Refugee status is granted the quality of protection provided by States of asylum and received by intended beneficiaries is effective and at par with the standards prescribed by global and regional instruments on Refugee protection. In most cases, certain realities in States of asylum make that the actualisation of effective refugee protection unrealistic. Regardless of this, Refugee status remains a temporary status that lasts for as long as the risk of persecution remains.[1] It also attracts array of rights designed

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[1] *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920, 954.

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for the attainment of conditions considered necessarily for ameliorating debilitating situations of Refugees whose experiences of forcible displacement have exposed them to all manners of risks. Rights intrinsically linked with Refugee status are predicated on denial or unavailability of domestic protection in States of origin. Amongst the array of rights associated with Refugee status, the right to work stands out and remains the most important economic right for Refugees. This is anchored on the fact that safeguarding the right to work allows Refugees to engage in income-generating activities to support themselves and their families. This is necessary to curb dependence on humanitarian assistance and in facilitating attainment of self-reliance in States of asylum. Mankind is pre-eminently a social species with instinct for meaningful association.[2] This also holds for Refugees, and explains the innate push by Refugees to engage in work once situations in States of asylum permit.

In a way, guaranteeing the right to work for Refugees enhances the prospect of attainment of any of the cognisable durable Refugee solutions of Local Integration, Voluntary Repatriation, and Resettlement. Local Integration is a complex process with considerable legal, economic, social and cultural demands for both the beneficiaries and the countries of asylum. Sometimes, Local Integration allows Refugees to gain the nationality which enhances the prospects to work in countries of asylum. In Africa, the option of Local Integration is undermined by the shift from "open-door" policy to "closed-door" policy owing to prolonged presence of Refugees which places undue strain on already fragile economies of host countries in Africa. This is apparent, and the reality on ground confirms that the transition from "open-door" policy to "closed-door" policy continues to resonate on national asylum policies and practices of African States. This clearly underscores the transient disposition of African States on the notion of Refugee protection.

In a way, the re-emergence of xenophobia is a direct outcome of this policy shift. Already, Nigeria had previously contended with the challenge of xenophobia during the era of "Ghana-must-go" policy introduced the government of Shehu Shagari to increase its popularity in the 1983 elections.[3] In addition, countries such as South Africa and Zimbabwe have witnessed attacks on as well as shut down of businesses owned and run

[2] *Minister of Home Affairs v Watchenuka* (2004) 1 All SA 21 (SCA), para. 27.

[3] Ebenezer O Oni and Samuel K Okunade, 'The Context of Xenophobia in Africa: Nigeria and South Africa in Comparison' in O Akinola (ed), *The Political Economy of Xenophobia in Africa: Advances in African Economic, Social and Political Development* (Springer International Publishing AG 2018) 37-51.

by foreigners on account of increasing xenophobic attacks. These xenophobic attacks have attendant consequences on globalisation, inter-state diplomatic relations, and Pan-Africanism which were the linchpins of Africa's struggle against colonialism, apartheid and slavery. This undermines cross-border interactions which is an inevitable prerequisite for globalisation. Xenophobia is inspired by a sense of ethno-centrism reflecting in the belief of superiority of one's nation or nationality over others. The ultimate outcome is the fuelled feeling hatred, dislike, prejudice or rejection of foreigners. It seems the appointment of United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance is designed to avoid such outcome.

Voluntary Repatriation entails the return of Refugees to the country of origin on the basis of free and informed choice. Currently, the United Nations High Commissioner for Refugees facilitates Voluntary Repatriation in Africa and across many regions of the globe. This is done with restriction on return to volatile areas that places Returnees at risk. This makes it expedient for Voluntary Repatriation to be carried out in safety and dignity requiring the involvement of the country of origin in the reintegration process, and in assisting those that make the brave decision to rebuild their lives in the country of origin. This enjoys normative support with the introduction of the notion of "safety" to the principles on Voluntary Repatriation. As is stands, the law is that "the country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation."[4] In practice, the United Nations High Commissioner for Refugees promote and facilitate Voluntary Repatriation through "go-and-see" visits for Refugees, promoting housing and property restitution, provision of assistance to Returnees, engaging in peace and reconciliation activities, and so on. Importantly, article 5 of the 1969 Refugee Convention stipulates that "the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will." This clearly makes the element of voluntariness a cardinal guiding principle on Voluntary Reparation in Africa.

Resettlement involves movement of Refugees from the country of asylum to another country that has agreed to admit such Refugees. This option is frequently used to protect Refugees whose life, liberty, safety,

[4] Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, art 5(2).

health or human rights are at risk in the country where refuge is sought. The vulnerabilities necessitating Resettlement must be cogent and compelling requiring immediate intervention. The precondition for Resettlement is for the potential beneficiaries to have undergone the Refugee Status Determination process and accordingly registered as Refugees in the initial country of asylum. The invocation of this option shifts the burden on Refugee protection to the new country that has agreed to admit the refugees. Even at this, there is no obligation on States to accept Refugees through resettlement. In as much as the the United Nations High Commissioner for Refugees is involved in Resettlement, the final decision concerning the resettlement of Refugees lies with the third country which enjoys wide latitude on how Refugees are resettle. This points to the fact that Resettlement is not a right that automatically inures in favour of anyone granted Refugee status. In the context of the options of Voluntary Repatriation and Resettlement, safeguarding the right to work remains expedient for improving the conditions of Refugees. This is without prejudice to the fact that it also repositions Refugees for a life free from idleness and despair which breed crime and criminality.

Refugeehood or the grant of Refugee status does not automatically guarantee effectiveness of Refugee protection. Protection gaps may arise from contingencies that are detached and outside the contemplation of applicable normative prescriptions. This aptly captures the situation in Africa which is the only region of the developing world to have adopted a legally binding Refugee instrument.[5] This is without prejudice to the fact that a number of African States have also ratified and, in some cases, domesticated global regimes on Refugee protection.[6] As it stands, normative prescriptions on Refugee protection, such as the Geneva Convention Relating to the Status of Refugees 1951,[7] the New York Protocol Relating to the Status of Refugees 1967,[8] and the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969,[9] are all open for adoption by African States. In spite the guarantees afforded by these normative frameworks, there is considerable debate on the extent to which available Refugee protection

[5] Marina Sharpe, 'Organization of African Unity and African Union Engagement With Refugee Protection: 1963–2011' [2013](21)(1) *African Journal of International and Comparative Law*, 51.

[6] See Nigerian National Commission for Refugees (Establishment, Etc.) Act 2004, Tanzanian Refugees Act 1998, Moroccan Immigration Law 2003, Kenyan Refugees Act 2006 and South Sudan Refugee Act 2012.

[7] Hereinafter referred to as the 1951 Refugee Convention.

[8] Hereinafter referred to as the 1967 Refugee Protocol.

[9] Hereinafter referred to as the 1969 Refugee Convention.

factually supports the right to work. It is common for the law to theoretically support a position, while the reality of the law is diametrically opposed to such position. To the extent that the reality of the law reflects in the manner in which the law is put to practice, widening gap in the theory and practice of law must be frontally addressed by African States since it has become clear that the Refugee problem in Africa is not one relating to paucity of norms. Albeit theoretically, African Refugees benefit from the most progressive protection regimes in the globe.

Refugee protection entails the totality of measures designed to ensure that forcibly displaced persons in need of protection are recognised and granted Refugee status with attendant protective rights. A salient threat to Refugee protection reflects in the expanding causation of forced displacement which features significantly in the debate on the extent to climate change can be treated as a causation of forced displacement. Literally, climate change denotes long-term change in the statistical distribution of climatic condition or weather patterns of a place after a given period of time. Under the United Nation Framework Convention on Climate Change 1992, climate change is construed as "a change which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."[10] Apparently, climate change encompasses environmental alterations occasioned by natural variability alongside human activities closely linked to global warming. Today, the issue of climate change permeated global political discourse.[11]

The earth and its inhabitants are facing environmental crisis of an unprecedented scale.[12] For climes prone to environmental degradation, global warming, extreme weather conditions and other climate-induced ecological and environmental challenges, migration, in the nature of forced displacement, remains a viable climate adaptation and mitigation strategy. This culminates in the evolution of expressions such as "Climate Refugees" and "Environmental Refugees" which are colloquially used to denote those that cross international frontiers to work and escape the adverse impact of climate change. Owing to the peculiar nature of such movement, there are questions on the proprietary of admitting the so-

[10] United Nations Framework on Convention on Climate Change 1992, art 1(2).
[11] Carlarne Cinnemon, 'Delinking International Environmental Law and Climate Change' [2014](4)(1) *Michigan Journal of Environmental and Administrative Law*, 2.
[12] Prue Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change* (Routledge 1998) 1.

called "Climate Refugee" or "Environmental Refugee" with the ambit of the Refugee definitions in the Geneva Convention Relating to the Status of Refugees 1951,[13] the New York Protocol Relating to the Status of Refugees 1967,[14] and the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969. In other words, the intersect of Refugee protection and climate change reflects in the exigencies for bridging the protection gap which exists in situations where persons seeking Refugee protection do not fall squarely within the ambit of persons with respect to whom countries of asylum owe responsibility for Refugee protection under extant legal regime.

2. Meaning of Refugee

Refugee definition is fundamental to efficient refugee protection.[15] This is so because Refugee definition determines those qualified for Refugee protected. Generally, a Refugee is a forcibly person displaced that has crossed the borders of a State with a view of seeking safety and protection in another State. The forcibly displacement is necessary for the activation of Refugee protection. This requirement must be accompanied by the failure of domestic protection as well as the presence of the beneficiary of Refugee protection within the territory of a foreign State. These elements are underscored by article 1A(2) of the 1951 Refugees Convention which defines a Refugee as any person who as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In this context, the interrelated concepts of "fear" and "persecution" stand out. Fear arises from persecution, and persecution is a major catalyst for fear.

For fear to suffice for the purpose of Refugee protection, it must be well-founded. Well-founded fear is consummated once the linkage between persecution and verifiable human actions or inactions is established. This renders the fear of persecution *simpliciter* insufficient

[13] The 1951 Refugee Convention was adopted on 28th July 1951 and it entered into force on 22nd April 1954.
[14] The 1967 Refugee Protocol was adopted on 31st January 1967 and it entered into force on 4th October 1967.
[15] Okoli Chinwe K and Halima Doma Kutigi, 'Refugee Protection and the Impact on Host Country' [2012](4)(2) *Journal of Public Law & Constitutional Practice*, 78.

for activation of Refugee protection. As such, the fear of persecution must be predicated on one or more of the five recognised grounds of race, religion, nationality, membership of a particular social group or political opinion. In addition to these grounds, other novel grounds have been incorporated by other regime on Refugee protection. For instance, additional grounds of "external aggression," "occupation," "foreign domination" or "events seriously disturbing public order" have been added under the 1968 Refugee Convention to ensure broader protection for Refugees in Africa.

Furthermore, fear is considered well-founded once the persecuted individual does not enjoy the protection of the country of origin.[16] The evidence of the lack of protection on either internal or external level may create a presumption as to the likelihood of persecution as well as the well-foundedness of fear.[17] By providing the option for contracting States to further limit the definition to those fleeing due to "events occurring in Europe before 1 January 1951" or "events occurring in Europe or elsewhere before 1st January 1951,"[18] the Refugee definition in the 1951 Refugee Convention is overly narrow. This contributed in so small measure in the denial of protection to those that are deserving. This also created problem when it comes to the application of the Refugee definition in the 1951 Refugee Convention to Refugees in the third world.[19] The occasioned geographic and timeline restrictions was addressed by the 1967 Refugee Protocol which obliges States Parties to implement article 1A(2) of the 1951 Refugee Convention without the chronological (events occurring prior to 1951) or geographic (events occurring in Europe) restriction, save for situation where the geographic limitation is explicitly preserved by a State Party to the 1967 Refugee Protocol. Accordingly, article 1(2) of the 1967 Refugee Protocol stipulates that the term "Refugee" shall apply to:

> any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself the protection of that country; or who, not having a nationality and being outside the country of his former habitual

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[16] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 92.
[17] ibid.
[18] 1951 Refugee Convention, article 1B(1).
[19] RC Chhangani and Praueen Kumar Chhangani 'Refugee Definition and The Law in Nigeria' [2011](53)(1) *Journal of the Indian Law Institute*, 35.

> residence is unable or, owing to such fear, is unwilling to return to it.

Like the Refugee definition in the 1951 Refugee Convention, the one offered by the 1967 Refugee Protocol also adopts the individualized persecution-based approach as criteria for Refugee status determination. However, by way of improvement over the 1951 Refugee Convention, 1967 Refugee Protocol eliminates the geographic and timeline restrictions.[20] Even at this, the 1967 Refugee Protocol still provided weak protection for African Refugees fleeing due to armed conflicts or as a result of internal disturbances that arose from the processes of decolonization, democratization and the creation of new States.[21] This is illustrated by the fact that the 1967 Refugee Protocol does not prescribe for the utilisation of the *prima facie* Status determination which is most appropriate for cases of sudden and large-scale influx Refugees that characterised most Refugee movements in Africa. To address this gap, the 1969 Refugee Convention restates the Refugee definition enshrined in the international refugee regimes, but also added a more objectively based consideration reflecting the social and political realities of contemporary refugee movements within the continent of Africa thus:

> the term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[22]

This clearly broadens the definition of Refugee. The accommodation of events such as "external aggression," "occupation," "foreign domination" and "events seriously disturbing public order" in this regional definition is predicated on the historical background of African States that had at one time or the other witnessed external aggression, occupation or foreign domination, and violent struggle for self-determination and national development in the wake of the colonial era.[23] These elements, which cannot be targeted at individuals, underscore the extensive scope of the Refugee definition, which incidentally is the most celebrated feature of

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[20] James C Hathaway, *The Rights of Refugees Under the International Law* (Cambridge University Press 2005) 111.
[21] Chhangani and Chhangani (n 19) 41.
[22] 1969 Refugee Convention, art 1(2).
[23] Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' [1991](3) *International Journal of Refugee Law*, 186.

the 1969 Refugee Convention.[24] However, the need to review this expanded Refugee definition has been raised against the backdrop of the fact that the components of the expanded definition or specific revolutionary situations of "external aggression", "occupation" and "foreign domination" are irrelevant today.[25]

At any rate, the African Refugee is a person who is compelled to take flight, and is not required to satisfy the subjective psychological factor of fear.[26] This implies that persecution is only but one of diverse ways the normal bond between the citizen and the State can be severed. The phrase "events seriously disturbing public order" encompasses non-violent phenomena such as earthquakes, hurricanes, drought and famine. It also evokes questions on the extent to which the obligation of a government can be extended beyond the precinct of human actions and capabilities to the control of natural forces as well as the extent to which such natural forces can be exacerbated by social policies and institutional responsibilities. The obligation of government extends no further than the realm of human capabilities and capacities. Even though governments across the globe have assumed remedial responsibility for natural disasters through dedicated institutions of the State, the legitimacy of the State rests exclusively on its control of human actions rather than control of natural forces and occurrences.

In Nigeria, the domestic Refugee definition virtually repeats the definition in the 1969 Refugee Convention, and that, it includes both the subjective criteria of well-founded fear of persecution without the geographical and temporal limitations and the objective criteria of compelling circumstances, such as external aggression, occupation, foreign domination or events seriously disturbing public order prevailing in the country of origin.[27] Accordingly, section 20(1) National Commission for Refugees Act 1989[28] declares that a person shall be considered a Refugee if he falls within the definition provided by article 1 of the 1951 United Nations Convention; article 1 of the 1967 Protocol Relating to the Status of Refugee and article 1 of the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.

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[24] Marina Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' [2012](58)(1) *McGill Law Journal*, 111.
[25] George Okoth-Obbo, 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugees Problems in Africa' [2001](20)(1) *Refugee Law Quarterly*, 115-116.
[26] Nicholas Sitaropoulos, *Judicial Interpretation of Refugee Status* (Baden-Baden, 1999) 67.
[27] Chhangani and Chhangani (n 19) 48.
[28] Cap. N21 Laws of the Federation of Nigeria, 2004.

Thus, the Nigerian Refugee is a victim of a wide variety of man-made conditions, including civil wars, armed conflicts as well as conditions such as famine and natural catastrophes which do not permit humans to reside safely in their countries of origin.[29]

Apparently, a person becomes a Refugee on satisfying the elements of the prevailing Refugee definition in the jurisdiction where Refugee protection is sought. This is owing to the fact that the term "Refugee" invokes several meanings depending on the context of usage. It represents a person that has been granted Refugee status, and this is premised on the fulfilment of the criteria contained in a given Refugee definition.[30] In other words, the various Refugee definitions articulated vary slightly. However, the key elements in these Refugee definitions is that Refugee must have cross international border and remained beyond the protective reach of the State of nationality or State of habitual residence as in the case of stateless Asylum-Seeker. Although international borders are often down-played by African States in a manner that allows for free migratory movement between neighbouring States, the fact remains that only forcibly displaced persons who qualify as Refugees are worthy of Refugee protection. These Refugees are often caught up by a legal space characterised, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and on the other hand, by competing humanitarian principles derived from general international law.[31] Once a person is recognized as Refugee, the status carries a number of benefits in the nature of array of rights that include the right to work.

3. Right to Work in the Context of Refugee Protection

The right to work is of particular importance for Refugees.[32] Guaranteeing this right reduces Refugees' dependence on assistance and lessen the burden on the country of asylum. It also boosts confidence and dignity by giving Refugees better control over their lives and future. It also constitutes a long-term sustainable solution as Refugees who are actively supporting themselves are better positioned to explore any of the durable Refugee solutions of Voluntary Repatriation, Resettlement or

[29] Obinna Mbanugo, 'The State of Refugees and Internally Displaced Persons in Nigeria: A Legal Review' [2012](3) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 101.
[30] E Ibu Otor, 'The Legal Framework for the Protection of Refugees' in Dakas CJ Dakas, Akkaren Samuel Shaakaa and Alphonsus O Alubo (eds), *Beyond Shenanigans: Jos Book of Readings on Critical Legal Issues* (Innovative Communications 2015) 582.
[31] Goodwin-Gill and McAdam (n 16) 1.
[32] Otor (n 30) 603.

Local Integration. Until a suitable durable Refugee solution is found, it is important to encourage self-reliance among Refugees. Incidentally, guaranteeing the right to work is a major route for attainment of the desired self-reliance for Refugees. Self-reliance entails the social and economic ability of an individual, a household or community to meet essential needs in a sustainable and dignified manner.

Aside the fact that strengthening the right to work is a major route to self-reliance, it also positions Refugees to support themselves as well as their dependants especially if there are no prospects of improvement of the situation in the countries of origin. The inherent trauma experienced by Refugee can be exacerbated by idleness and dependence on humanitarian support for survival.[33] Lack of language skills, unfamiliarity with new surroundings, coupled with fear and concern about events in the States of origin can create added burden.[34] As such, guaranteeing the right to work strengthens livelihoods of Refugees, reduces vulnerability, and also removes Refugees from idleness and despair. This is necessary especially in situation where there is no prospect for attainment of any of the durable Refugee solution. While national or international assistance programmes might provide interim relief, continued reliance on such assistance can become a problem particularly in Protracted Refugee Situation or in situation of overwhelming arrivals of Asylum Seekers.

In most developing countries, Refugees are either denied the right to work or accorded the right to work in extremely limited manner.[35] Sometimes, States set prohibitive fees to secure the registration needed to lawfully approach employers. Majority of Refugees are hosted by low and middle-income countries where the informal sector plays a more significant role in the economy. The engagement of Refugees in the informal sector may be due to lack of requisite skills and qualification needed to fit in the formal sector of the economy. The informal sector is more susceptible to exploitation. In the less developed world, the right to engage in agricultural activities is usually the most pressing concern.[36] Unfortunately, there are sometimes blunt refusals to allow Refugees to farm.[37] Exclusion from agriculture may also be the more subtle result of the Refugees' assignment to an area in which there is no available land,

[33] Hathaway (n 20) 719.
[34] Mbanugo (n 29) 97.
[35] Hathaway (n 20) 730.
[36] ibid 720.
[37] ibid.

or where cultural norms prevent Refugees from farming.[38] Common reason often advanced by these States is that allowing Refugees to work will drive down wages for their own citizens thereby creating tensions between the Refugees and their hosts.[39] In addition, this may be designed to prevent Refugees from competing with citizens for limited employment opportunities.

The right to work embraces array of rights or entitlements at work. It entails the opportunity to gain living by work which one freely chooses or accepts.[40] To freely chose or accept suggests availability or array of options from which one can make a choice. Article 1(1) of the Employment Policy Convention 1964 (No. 122) imposes the obligation on States to declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment. To this end, such policy must be aimed at ensuring that there is work for all who are available for and seeking work.[41] In as much as this is designed to enable States progressively overcoming the challenges of unemployment and underemployment, this obligation should not be misconstrued as absolute and unconditional right to obtain employment for everyone available and willing to work. This is more so that the policy is expected to take due account of the stage and level of economic development and the mutual relationships between employment objectives and other economic and social objectives of State, and must as well be pursued by methods appropriate to national conditions and practices.[42]

It follows that the opportunity to gain living by work which one freely chooses or accepts implies the right not to be unfairly deprived of available employment opportunities. This culminates in the idea of non-discrimination. As such, the right to work can also be construe to mean non-discrimination in relation to all aspects of work.[43] This can also be extended to the right of Refugees to work that is devoid of elements of discrimination.[44] With this clarification, it becomes convenient to extend the ambit of the right to work to the entitlement to same employment opportunities in the nature of same criteria for selection in matters of

[38] ibid.
[39] ibid 730-731.
[40] International Covenant on Economic, Social and Cultural Rights 1966, art 6(1).
[41] Employment Policy Convention 1964 (No. 122), art 1(2)(a).
[42] Employment Policy Convention 1964 (No. 122), art 1(3).
[43] Pir Ali Kaya and Isin Ulas Ertugrul Yilmazer, 'The Right to Work as a Fundamental Human Right' [2019](15)(14) *European Scientific Journal*, 157.
[44] Refugee Convention 1967, art 24.

employment;[45] the right to equal remuneration and benefits for work of equal value without distinction of any kind; the right to equal treatment in respect of work of equal value, as well as the right to equality of treatment in the evaluation and opportunity to be promoted to appropriate higher level subject to no considerations other than those of seniority and competence.[46] This clearly imposes obligation on States to eradicate circumstances that have the effect of impairing the exercise of the right to work on discriminatory grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[47] Already, workplace practices amounting to sexism and denigration of women have attracted global condemnation.[48]

The right to work is not limited to having a job. It also entails the enjoyment of work with just and favourable conditions.[49] The expression "just and favourable conditions of work" is broad, all-encompassing, and, therefore, extendable to cover works with fair wages, appropriate health conditions, occupational safety, rest, leisure, reasonable limitation of working hours and periodic holidays with pay as well as remuneration for public holidays, and social security in cases of retirement, unemployment, sickness and other incapacity. The right to work also embraces the right to form trade unions and join the trade union of choice for protection of economic and social interests.[50] Aside this being subjective to the rules of the trade union in question, no restriction is expected to be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.[51] These workplace guarantees are inspired by the notion of freedom of association which also formed the fulcrum of the right of trade unions to establish national federations or confederations of trade unions; the right of establish national federations or confederations of trade unions to form or join international trade-union organizations;[52] and the right to strike provided that same is exercised in conformity with the laws.[53]

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[45] Convention on the Elimination of All Forms of Discrimination Against Women 1979, art 11(1)(a).
[46] ibid, art 11(1)(d).
[47] International Covenant on Economic, Social and Cultural Rights 1966, art 2(2).
[48] Convention on the Elimination of All Forms of Discrimination Against Women 1979, art 11 and 14(2)(e).
[49] International Covenant on Economic, Social and Cultural Rights 1966, art 7.
[50] ibid, art 8(1)(a); International Covenant on Civil and Political Rights, art 22; Kaya and Yilmazer (n 43) 157.
[51] International Covenant on Economic, Social and Cultural Rights 1966, art 8(1)(a).
[52] ibid, art 8(1)(b).
[53] ibid, art 8(1)(d).

The workplace is an extension of human society. This being the case, the workplace is defined by the dominant ideas, values and ideologies that permeate human society. This proposition reflects in the growing utility of human rights precepts in the interrogation of workplace ideals. Human rights are not only universal, but comprises of inviolable and inalienable rights that inure in favour of humans for the enjoyment of life with dignity. The protection of human rights is accepted as one of the fundamental bases for the existence of governments in democratic climes. Incidentally, the right to work has emerged as the foundation for the realization of a number of human rights, including those of Refugees. It is currently accepted that human rights violation is a causation of forced displacement. This has led to utilization of international, regional and domestic human rights instruments to extend protection to victims of human rights violations. This idea falls within the spectrum of the concept of complementary protection. Considering the growing recognition of this concept as part and parcel of the gamut of extant regime on Refugee protection, human rights instruments can also be invoked in support of the right to work for Refugees. In this case, no dichotomy can be drawn between Refugees and foreign workers, on the one hand, and citizens of the State of asylum, on the other hand. This is premised on the fact that the notion of non-discrimination in the context of human rights protection does not recognise any divide between workers on the basis of nationality and other social status.

From human rights prism, everyone enjoys equality before the law and equal protection of the law.[54] Under article 23(1) of the Universal Declaration of Human Rights 1948, everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Furthermore, everyone, without any discrimination, is entitled to the right to equal pay for equal work.[55] Remuneration is expected to be just and favourable, and must be of such magnitude to ensure that everyone can cater for himself and his family in a dignified manner.[56] In the same vein, article 6(1) of the International Covenant on Economic, Social and Cultural Rights 1966 recognizes the right to work. This is the first specific right recognised by this instrument. In this context, the right to work includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.[57]

[54] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2004, s 3; International Covenant on Civil and Political Rights 1966, art 26.
[55] Universal Declaration of Human Rights 1948, art 23(2).
[56] ibid, art 23(3).
[57] International Covenant on Economic, Social and Cultural Rights 1966, art 6(1).

Article 11(1) of the Convention on the Elimination of All Forms of Discrimination Against Women 1979 places obligation on States to take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights. This instrument treats the right to work as an inalienable right of all human beings.[58] Article 15 of the African Charter on Human and Peoples' Rights 1981 entitles every individual to the right to work under equitable and satisfactory conditions, and to equal pay for equal work. This provision has been replicated under section 15 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2004.

In South Africa, judicial intervention has ensured that even persons awaiting Refugee status verification are entitled to work.[59] As this intervention, African States are progressively pursuing policies that allow for the enjoyment of right to work by Refugees through the promotion of economic and social interaction between Refugees and host communities. Under section 27(f) of the South African Refugees Act No. 130 of 1998, refugees are entitled to seek employment. To seek employment does not necessarily create obligation to be granted the employment sought for. As such, the manner in which the right to work is couched under this provision remains inchoate. However, it can be argued that the right embraces obligation on States to grant employment, in that, every right attracts a corresponding duty. Perhaps, this right is deliberately couched in this manner in order to give some measure of latitude to the South African government to allow for the exercise of the right to work by Refugees in proportion to the availability of job at every material time.

While section 9 of the Cameroonian Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees expressly allows refugees to seek employment in Cameroon, policies of government of Cameroon on foreign nationals severely limit their rights to work.[60] Section 27(2) of Law No. 92-007 of 14th August 1992 on the Labour Code stipulates that "a contract of employment concerning a worker of foreign nationality must be endorsed by the Minister in charge of Labour previously to commencement thereof." This provision apparently renders the rights of

[58] Convention on the Elimination of All Forms of Discrimination against Women 1979, art 11(1)(a).
[59] *Minister of Home Affairs v Watchenuka* (2004) 1 All SA 21 (SCA).
[60] Emmanuel Eloundou Mbua, 'Law No. 2005/006 of 27 July 2005 Relating to the Status of Refugees in Cameroon: An Additional Hurdle or a Major Step Forward to Refugee Protection?' [2015](38) *Journal of Law, Policy and Globalization*, 72.

foreign nationality to employment as a matter of discretion of the Minister in charge of labour. As a result of this provision and the accompanying discrimination, many refugees do not apply for positions because they know they will be unsuccessful.[61]

Under section 33(f) of South Sudan Refugee Law 2012, every recognized Refugee and every member of his or her family is entitled to seek employment in South Sudan. In respect of wage-earning employment, section 16(4) of the Kenyan Refugee Act 2006 allows Refugees and members of their families to be subject to the same restrictions as are imposed on persons who are not citizens of Kenya. Section 32(1) of the Tanzanian Refugees Act 1998 provides for grant of work permit to qualified Refugees. This work permit may be revoked for any good course.[62] Any Refugee who works or engages himself in any activity without work permit commits an offence punishable with imprisonment or fine or both.[63] Within West Africa sub-region, the governments of ECOWAS states have agreed to allow Refugees from within that region to work while in receipt of protection.[64] Aside the fact that Refugees' presence creates employment opportunities to the local citizens who are employed to work in Refugee Camps with voluntary agencies, non-governmental organisations and humanitarian agencies such as international Red Cross and Red Crescent,[65] some of the Refugees are professionals in various areas such as law, medicine, engineers and even professors, which the host community can benefit from.[66] The growing importance of the right to work reflects in the fact that most of the agreements concluded by the International Refugee Organisation for the resettlement and the selection of Refugee workers provide that they shall enjoy the same labour conditions as national workers.[67]

To facilitate access to labour markets for refugees, Member States of the International Labour Organization in 2016 adopted a comprehensive set of Guiding Principles on the Access of refugees and other forcibly displaced persons to the labour market. This seeks to inspire Member States of the International Labour Organization to, inter alia, formulate national policies, and national action plans to ensure the protection of refugees and other forcibly displaced persons in the labour

[61] ibid 73.
[62] Tanzanian Refugees Act 1998, s 32(2).
[63] ibid, s 32(4).
[64] Hathaway (n 20) 732.
[65] Okoli and Kutigi (n 15) 86-87.
[66] ibid 86.
[67] Otor (n 30) 604.

market. This includes the provision of decent work opportunities for all. This intervention is without prejudice to Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205) which was adopted to, inter alia, provide the legal and technical framework and specialized knowledge to respond to labour market challenges that host communities may face concerning refugee and forcibly displaced persons' access to the labour market.

Under the ambit of Refugee protection, the right to work can assume the nature of Wage-earning employment, Self-employment, and Practice of liberal profession. In any of these instances, the right to work is limited to ensuring equality of treatment with non-nationals.[68] In addition, the right to work is open to Refugees whose presence in the country of asylum is lawful.[69] It is unclear what constitutes lawful presence of a Refugee in a State of asylum. Hathaway identifies three situations in which the lawful presence of a Refugee in a State of asylum can be established, viz., where a person who is admitted to a State party's territory for a fixed period of time, even if that is for only a few hours; where a person whose status has not yet been regularised, but who has applied for Refugee status; and where a person whose claim for Refugee status the host State has opted not to assess, for example, because no mechanism is available or because of a mass influx of people.[70]

Apparently, the lawful presence of a Refugee may arise from the pendency of formal application for Refugee status or from formal grant of Refugee status. It may also entail the intermediate stage between physical presence on the territory of the State of asylum and the grant of authorized stay. In any case, the right to work in the context of Refugee protection is strengthened by the principles of non-refoulement,[71] non-penalisation for illegal entry into or stay in the country of asylum,[72] and the institutionalisation of the notion of asylum.[73] Article II(1) of the 1969 Refugee Convention imposes obligation on African States to "strengthens the institution of asylum" by using their best endeavours consistent with their respective legislations to receive Refugees and to secure the settlement of those Refugees.[74] Aside the fact that the principle of non-refoulement which remains a pillar of Refugee protection admits of no

[68] 1951 Refugee Convention, art 17(1) and (3).
[69] Hathaway (n 20) 730.
[70] ibid 174-175; 183-185.
[71] Refugee Convention 1951, art 33.
[72] ibid, art 31.
[73] 1969 Refugee Convention, Art II(1)-(6).
[74] ibid, art II(1).

exception under the 1969 Refugee Convention, a major incentive for accepting Asylum Seekers in Africa is inspired by the principle of burden-sharing.[75] To this end, article II(4) 1969 Refugee Convention provides that "where a member State finds difficulty in continuing to grant asylum to Refugees, such Member State may appeal directly to other Member States and through the OAU and such Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum."

4. Wage-earning Employment

Wage-earning employment can be construed in the broadest sense to include all kinds of works which cannot properly be described as self-employment or practice of liberal profession. This genre of work creates contractual relationship between employer and employee the performance of which is predicated on periodic payment of remuneration by the employer to the employee. Wage-earning employment is common in jurisdictions where opportunities for work abound. It is also common is formal sector where wage payable is regimented and cannot fall short of the minimum wage. Article 17 of the 1967 Refugee Convention deals with wage-earning employment by providing as follows:

> 1. The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.
> 2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:
> (a) He has completed three years' residence in the country,
> (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse,
> (c) He has one or more children possessing the nationality of the country of residence.
> 3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to

[75] ibid, art II(3).

> programmes of labour recruitment or under immigration scheme.

The obligation imposed on State Parties to give ''sympathetic consideration'' to Refugees, pursuant to article 17(3) of the 1967 Refugee Convention, appears intended to augment the disadvantaged status of Refugees vis-à-vis the status of nationals. In this context, ''sympathetic consideration'' involves open-ended measures evolved out of exigency and adopted by State Parties to give effect to the obligation imposed by these normative prescriptions. While the provision of article 17 of the 1951 Refugee Convention is undermined by the high number of reservations, the obligations imposed by the provision bind all State Parties regardless of the level of economic development.[76]

5. Self-Employment

Self-employment embraces all forms of independent economic activities and established businesses which are not governed by formal relationship between employer and employee. This includes wide range of entrepreneurial activities covering all sectors of the economy. Self-employment is common in the informal sector, and as such, creates jobs and increase labour force participation in entrepreneurial activities. Since Refugees have the potential to create businesses and jobs, self-employment allows for creation and operation of businesses directly manned by Refugees. This reduces the exposure and susceptibility of Refugees to dangerous and hazardous works. Article 18 of the 1951 Refugee Convention deals with the right to Self-employment by providing as follow:

> The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

To give effect to the obligation imposed by the above normative prescription, States are encouraged to foster conditions in which access to opportunities for self-employment are effective. This may include allocation of land for farming, settlement in secure and fertile areas, proximity to transport links and to markets, ability to register and formalize a business, and access to training programmes and micro-credit

[76] Hathaway (n 20) 741.

opportunities.[77] Soft loan with favourable terms may also be made available to Refugees to enable them set up desirable businesses in countries of asylum.

6. Practice of Liberal Profession

The expression "liberal profession" refers to professional engagements requiring diplomas and other forms of certification as qualification for practice. This genre of work is organized and carried on independently and devoid of the incidence of employer-employee relationship. Practitioners of liberal profession include teachers, technicians, lawyers, doctors, nurses, architects, and engineers. Article 19 deals with the practice of liberal profession by providing thus:

> 1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that state, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.
> 2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relation they are responsible.

Host communities experiencing shortage of professionals are more disposed to allowing Refugees practice liberal profession. The right to freedom of movement is important for the enjoyment of the right to work. Under the regime on Refugee protection, Refugees are on the same pedestal with foreign workers. Invariably, a States can prevent Refugees from working if foreigners are not allowed to work. While this allows for the restrictions on the right to work for foreigners to be applicable to Refugees, this admits of two exceptions. The first exception, which relates to wage-earning employment, is that any restrictions placed on non-nationals shall not be imposed on Refugees if they have completed three years' residence in the country; or if they are married to a national of the country; or if they have a child who is a national of the country.[78] The second exception, which relates to Refugees that are self-employed or practising liberal profession, arises from the obligation imposed on States

[77] Alice Edwards, 'Article 19 1951 Convention', in Andreas Zimmermann, Jonas Dörschner and Felix Machts (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol-A Commentary* (Oxford University Press 2011) 980.
[78] Refugee Convention 1951, art 17(2)(a)-(c).

to accord "treatment as favourable as possible."[79] The right to work is not a principle with only a philosophical value, but a right with legal obligations.[80] As such, the right to work remains exercisable by Refugees not only in accordance with the normative prescriptions of extant regime on refugee protection, but also in consonance with extraneous normative prescriptions of applicable laws and regulations in the State of asylum.

7. Emerging Issues of Concerns

In relation to the right to work in the context of Refugee protection, there are a number of emerging issues of concerns. First is the increasing rate of unemployment which remains a threat for the working age population of the labour force. Unemployment is the direct opposite of employment. It is a colloquial term for joblessness which entails situation whereby people who are physically fit, capable, qualified and ready to work are without jobs.[81] As a manifestation of underdevelopment, unemployment also contributes to political instability in the sense that the unemployed consider the State as an oppressor with nothing to offer.[82] Sequel to the outbreak of COVID-19, the workplace had witnessed automation of the workplace reflecting in reliance on new technologies and digital labour platforms which heightened the rate of unemployment.[83]

In Nigeria, unemployment rate has been on the rise since the economic crisis in 2014. At the moment, it has been projected that the unemployment rate in 2023 will increased from 37.7 percent to 40.6 percent.[84] The unemployment rate is a labour market performance indicator that is determined using employment-to-population ratio. The increasing rate of unemployment may not necessarily arise from job loss which is one of several causes of unemployment. Rather, it could mean that the rise in unemployment is underscored by increase in the number of people searching for jobs or those previously outside the labour force

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[79] ibid, art 18 and 19(1).
[80] Kaya and Yilmazer (n 43) 157.
[81] Olawunmi Omitogun and Adedayo Emmanuel Longe, 'Unemployment and Economic Growth in Nigeria in the 21st Century: VAR Approach' [2017](13)(5) *Acta Universitatis Danubius* 155.
[82] Charles Udegbunam, *Graduate Unemployment in Nigeria: A Critical Analysis of the Genesis, Structure and Impact on Development of Abuja* (Abuja Express Services Consultants 2006) 123.
[83] Ogbole Ogancha O and Oreoluwa Omotayo Oduniyi 'Workers' Protection in the Covid-19 Era in Nigeria' [2020](4)(2) *Obafemi Awolowo University Law Journal* , 299.
[84] Ayodeji Adegboyega and Mary Izuaka, 'Nigeria's unemployment rate projected to hit 40.6% – KPMG' Premium Times, April 5, 2023 <https://www.premiumtimesng.com/business/business-news/591879-nigerias-unemployment-rate-projected-to-hit-40-6-kpmg.html> accessed 29th April 2023.

have decided to join the labour force and are now in active search of jobs. Incidentally, Refugees too have had to contend with the consequence of shrinking workspace owing to the rising rate of unemployment. This has not augured well for the right to work in the context of Refugee protection. This is more so that most Refugee movements in Africa are characterised by mass influx of Asylum Seekers.

Another emerging issue of concerns is the challenge posed by encampment of Refugees. While it appears that the use of Refugee camps allows for effective and efficient management of Refugees, experience has shown that it undermines the right of free movement which is cardinal to actualisation of the right to work in the context of Refugee protection. Article 26 of the 1951 Refugee Convention entitles Refugees to the right of freedom movement. In most cases, Refugee Camps are cited in remote and isolated locations with little prospects for gainful employment. In situations where workplace policies support the right to work in Refugee Camps, employment opportunities are limited with exploitative terms and conditions. This is more so that Refugee Camps arguably share a lot of similarities with Correctional Centres where social stability is sustained through some sorts of coercion. This is true for the Dadaab Refugee Camp located in one of the most deprived regions of Kenya. The Kenyan government has invoked national security concerns as justification for its encampment policies that violate a number of rights including the right to work and the right to freedom of movement.

Finally, the participation of Refugee children in work is another emerging issue of concerns. It is trite that children fall under the spectrum of vulnerable groups. Unfortunately, the peculiarity of children is not addressed by extant regime on Refugee protection. In 1988, UNHCR issued the first edition of its Guidelines on Refugee Children, confirming its policy not only to intervene with governments to ensure that the safety and liberty of Refugee children are defended, but also to assume direct responsibility in many situations for protecting the safety and liberty of Refugee children.[85] This has gained further support by the global drive to abolish child labour and to progressively raise the minimum age for admission to work for children to a level consistent with their physical and mental development. This directly pitches extant regime on Refugee protection against other regime designed to safeguard the rights of children. For instance, the Convention on the Rights of the Child 1989 generally sets out civil, political, economic, social and cultural rights of every child regardless of race, religion or abilities. This

[85] Goodwin and McAdam (n 16) 477.

instrument which applies to child Refugees and Asylum-Seekers makes the best interest of the child as the primary consideration in all action concerning a child.[86] It further obligate State to take appropriate measures to ensure that a child who is seeking Refugee status or who is considered a Refugee, whether unaccompanied or accompanied, is accorded appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the instrument and in other international human rights or humanitarian instruments.[87] In relation to the right to work, article 32(1) of Convention on the Rights of the Child 1989 provides as follows:

> States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

On 19 April 1991, Nigeria ratified the Children Rights Convention 1989. This clearly makes the highlighted provisions obligatory in Nigeria. More so, the highlighted provisions have, in a way, been replicated in the African Charter on the Rights and Welfare of the Child 1990 as well as the Child Rights Act 2003.[88] Furthermore, international labour standards make provision for the minimum age for employment. No one under that the minimum age can be admitted to employment or work in any occupation in the strict sense.[89] Accordingly, States enjoy discretion in fixing the minimum age which shall not be less than the age of completion of compulsory schooling and, in any case, same shall not be less than 15 years.[90] Notwithstanding, a State whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, may initially specify a minimum age of 14 years.[91] This provisions apply to employment or work that does not in any way jeopardise the health, safety or morals of young persons. In relation to employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons, the minimum

[86] Convention on the Rights of the Child 1989, art 3.
[87] ibid, art 22(1).
[88] African Charter on the Rights and Welfare of the Child 1990, art 23; Child Rights Act 2003, ss 1 and 28.
[89] ILO Convention Concerning Minimum Age for Employment 1973 (No. 138), art 2(1).
[90] ibid, art 2(3).
[91] ibid, art 2(4).

age for admission shall not be less than 18 years.[92] However, national laws or regulations may permit the employment or work of persons 13 to 15 years of age on light work which is not likely to be harmful to their health or development; and not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received.[93]

By and large, the restrictions imposed by the ILO Convention Concerning Minimum Age for Employment 1973 (No. 138) apply to employment or work in mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.[94] Considering that this instrument was ratified by Nigeria on 2nd October 2002, the unanswered question remains whether the restrictions imposed hold for engagement of child Refugees and Asylum Seekers whose rights, obligations and incidences are circumscribed by extant Refugee instruments.

8. Conclusion

It has been shown the extent to which the right to work is guaranteed by extant regime on Refugee protection. With the right to work, Refugees can make significant contributions to the countries of asylum. The recognition of the right to work indicates that the presence of Refugees in host countries have positive impact.[95] This has the propensity to change the perception of Refugees from been seen as "burdens" to "contributors." By nature, the right to work is an interrelation of availability, accessibility and quality of employment opportunities. In as much as extant regime on Refugee protection guaranteed the right to work, the broader notion on Refugee protection in Africa reflects more of rhetoric than reality. This is demonstrated by the array of challenges associated with the implementation of the right to work in the context of Refugee protection. Accordingly, it suggested that States should prioritised job creation in order to progressive undo the rising rate of unemployment. Again, the encampment of Refugees should be as brief as possible, and the extant regime on Refugee protection should be altered though appropriate

[92] ibid, art 3(1).
[93] ibid, art 7(1).
[94] ibid, art 5(3).
[95] Okoli and Kutigi (n 15) 86.

amendments that would address peculiarity of children and other vulnerable groups. Existing restrictions on the right to work should also be relaxed, and Refugees should be accorded the right to work under favourable terms and conditions.

Above these, African states should address the root causes of displacements through the practice of politics of inclusion, popular participation, responsible and accountable governance; an Africa-wide migration data collection should be evolved to promote standard indicators and procedures and research, and policy management; states hosting Refugee should ensure the character of refugee camps and settlements accords with existing international standards and international humanitarian; the AU must consider the need for a more specialized body similar to the UNHCR to supervise the application of the 1969 Convention; States which have not ratify the global and regional refugee conventions should do so, and also enact the necessary pieces of legislation and regulations so as to give effect to these conventions.

The International Labour Standards on the Right to Strike: A Comparison of the Practice in Nigeria, Ghana, Tanzania and Uganda

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Abstract
This article examines the right to strike in Nigeria, Ghana, Tanzania and Uganda on a comparative basis reflecting on the legislation and jurisprudence of these countries. The article relied on the standards set up by the International Labour Organisation (ILO) as the chief regulator and repertory of International Labour Standards and best practices in labour matters. The article contends that although the various jurisdictions examined have made efforts to comply with ILO minimum threshold as far as the right to strike is concerned; they need to do more to ensure substantial or full compliance with the ILO standards. Consequently, several recommendations have been put forward concerning the right to strike in Nigeria, Ghana, Tanzania and Uganda which if implemented will bring these countries into full compliance with ILO prescriptions concerning the right to strike.

1. Introduction

Strike can be defined as a collective stoppage of work that is done to mount pressure on those who depend on the sale or use of the product of that work. The strike must involve a group of employed workers temporarily suspending their services against their employer.[1] It has also been defined as a coordinated and simultaneous withdrawal of labour by workers.[2] Strike plays the same role in labour negotiations that warfare plays in diplomatic negotiations. If the right to strike is taken away from workers, their trade unions will be lame duels. As such it is a very important element of collective bargaining.[3] The right to strike is closely

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[1] KC Knowles, *Strikes: A Study in International Conflict* (Philosophical Library 1952) 1.
[2] ET Hiller, *The Strike: A Study in Collective Action* (University of Chicago Press 1982).
[3] JG Getman and FR Marshall, 'The Continuing Assault on the Right to Strike' [2000] 79(3)(1) *Texas Law Review* 70.

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connected to the collective bargaining process. The Committee on Freedom of Association believes that strikes are part and parcel of trade union activities. The Committee proclaims the right to strike 'as one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests.[4] Without the right to strike, organized labour would be powerless to deal with management as 'collective bargaining would amount to collective begging.'[5] In most cases, the right to strike is often the only instrument left in the hands of workers to compel recalcitrant employers to recognize and bargain with their trade unions or to comply with the terms of a collective agreement or to generally make improvements regarding the terms and conditions of their employment.[6] In essence, the connection between the right to strike and collective bargaining is that the right to strike is used to enforce collective agreement. Thus, it comes into effect where the collective bargaining process has failed.

This article examines the right to strike in Nigeria, Ghana, Tanzania and Uganda on a comparative basis reflecting on the legislation and jurisprudence of these countries. The article contends that although the various jurisdictions examined have made efforts to comply with ILO minimum threshold as far as the right to strike is concerned; they need to do more to ensure substantial or full compliance with the international labour standards.

2. International Labour Standards on the Right to Strike

International Labour Standards are rules set out by the International Labour Organisation in their legal instruments to govern the treatment of workers and their employers in labour and industrial relations. There are two types of International Labour Standards which are Conventions and Recommendations. A Convention is a form of agreement between groups especially under International Law. Where the International Labour Organisation has adopted a Convention, Member States are required to ratify it. A Convention generally comes into force one year after the date of ratification. On the other hand, Recommendations do not have the binding force of law like Conventions and are not subject to

[4] ILO, *Digest of Decisions and Principles of the Freedom of Association Committee* (5th edn) para 522.

[5] AJM Jacobs, "The Law of Strikes and Lockouts" in R. Blanpain and C. Engels (eds) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (5th edn, Denver: Kluwer 1993) 15.

[6] T Novitz, *International and European Protection of the Rights to Strike* (Oxford University Press, 2003) 49.

ratification. They however, are evidence of the thinking of the international labour community on the issues addressed therein.[7] Whereas a Convention lays down the basic principles to be implemented by ratifying countries, a related Recommendation supplements the Convention by providing more detailed guidelines on how it could be applied.[8]

As much as every country has its own local labour legislations, from the origin of labour law, it has always been felt that national legislation on labour matters cannot be solidly implemented in individual countries without support from international bodies.[9] Thus, it has become a standard practice to judge the quality and scope of rights and obligations of employers and workers by a reference to international standards. This development is arguably, a direct fall-out of globalization which has opened up workplaces within national borders, to international participation as well as to scrutiny.[10] By adopting and implementing these international labour standards, member states establish a minimum standard of protection of their workers against inhumane labour practices.[11] Workers are humans and humans are the same all over the world irrespective of race or colour. It is therefore ethically and morally right to have an international standard apply to every worker despite his country of origin or domicile. Several of these standards have been set up by the International Labour Organisation to enhance the practice of the right to strike in ILO Member States.

The major international legal instrument which protects the right to strike is the International Covenant on Economic, Social and Cultural Rights 1976 (ICESCR). Article 8(1)(d) of the ICESCR provides that states should ensure that every worker be given the right to strike in his country. The International Labour Organisation does not explicitly provide for the right to strike in its numerous Conventions and Recommendations. It has however, emphasized the importance of this right in its Constitution and through the Committee on Freedom of

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[7] E.A. Oji and O.D. Amucheazi, *Employment and Labour Law in Nigeria* (Mbeyi Associates Nig. Ltd 2015) 426.
[8] S. Falana, "Strengthening Labour Administration for the Enforcement of Labour Standards in Nigeria" in F. Adewumi & S. Falana (eds), *Rights and Labour Standards in Nigeria* (Frankard Publishers 2008). 28.
[9] N. Valticos, "International Labour Law" in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations* (Kluwer Law and Taxation Publishers 1982) 2.
[10] C.K. Agomo, *Nigerian Employment and Labour Relations Law and Practice* (Concept Publications Ltd) 49.
[11] G.K. Isholo, "ILO and the International Labour Standards Setting: A Case of Nigerian Labour Act" 1 *Journal of Human Resources Management* 15.

Association and the Committee of Experts on the Applications of Conventions and Recommendations. According to the Committee on Freedom of Association, the right is impliedly protected in Article 1 of Convention No.98 which states that 'workers should use adequate protection against all acts of discrimination in employment, which could be detrimental to union freedom.'[12] It is taken that such 'adequate protection' includes the right to strike. Also, Article 3 of Convention No.87,[13] which makes provision for workers' union to 'organize their administration and activities and formulate their programmes,' has been taken to encompass the right to strike. According to the Committee on Freedom of Association and Committee of Experts on the Applications of Conventions and Recommendations, workers' trade union programmes include embarking on strikes.[14]

Two Resolutions however, emphasize this right. The first which is 'Resolution Concerning the Abolition of Anti-Trade Union Legislation in the State Members of the ILO' called for the adoption of laws to ensure the effective and unrestricted exercise of trade union rights including the right to strike by workers. The second which is 'Resolution Concerning Trade Union Rights and their Relation to Civil Liberties' calls for measures to be taken to ensure full and universal respect for trade union rights particularly the right to strike.[15]

Under the International Labour Standards, there are several conditions workers must fulfill before embarking on a strike action. However, it condemns any provision which, rather than creating reasonable conditions which are to be fulfilled before a strike can be called, makes it virtually impossible to hold a legal strike.[16] Before workers can embark on a strike action, they must have undergone conciliation, mediation and arbitration procedures before the decision to embark on strike. After taking a decision to embark on strike, they must give prior notice to the employer. The Committee on Freedom of Association has considered that the decision to call strike in the local branches of a trade union should be taken by the general assembly of the

[12] Right to Organize and Collective Bargaining Convention, 1949 (No 98).
[13] Freedom of Association and Protection of the Right to Organize Convention, 1948 (No.87).
[14] Report of the Committee of Experts on the Application of Convention and Recommendation, ILC, 43rd Session, 1959, Part 1, Report III. 114.
[15] Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association 2018 (6th edn, International Labour Office) 783.
[16] Report of the Committee of Experts on the Application of Convention and Recommendation 116.

local branches, when the reason for the strike is of a local nature. When the issue affects workers at the national level, the decision to call a strike should be taken by an absolute majority of all members of the executive committee of the trade union.[17] The decision to embark on strike must be made through a secret ballot by a specified majority and the decision of non-strikers should be respected.[18]

The International Labour Organisation provides that not every worker enjoys the right to strike. Workers in the Armed Forces and the Police and public workers exercising authority in the name of the State are barred from embarking on strike. Workers engaged in essential services can also be restricted from exercising this right in so far as a strike there could cause serious hardship to the nation. They should however, be given adequate protection to compensate for the restriction of this right.[19] The Committee on Freedom of Association defines essential services in its strict sense as 'services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.'[20] It listed the health sector, electricity services, fire-fighting services, police and armed forces, air traffic control and the provision of food to pupils in schools as essential services. It also provides that Member States should not make unnecessary provisions that will inhibit the exercise of this right. However, a prohibition of strikes can be justified in the event of an acute national emergency and for a limited period of time.

These provisions are minimum standards which Member States are encouraged to adopt and build up on to adequately protect the workers' right to strike in their various countries. The level of compliance with these international labour standards in Nigeria, Ghana, Tanzania and Uganda will be examined in the next section.

3. Right to Strike in Selected Jurisdictions

3.1 Nigeria

The right to strike in Nigeria is not a constitutional right. However, it is provided in the Trade Unions (Amendment Act) 2005, the Trade Disputes Act 2004 and the Trade Disputes Act 2004. Section 18(1) of the Trade Disputes Act 2004 provides that workers can only embark on a strike action after they have unsuccessfully undergone alternative dispute

[17] *Ibid.*
[18] *Ibid.*
[19] (n.15) 596.
[20] (n.14).

resolution process to settle a trade dispute. A contravention of this provision constitutes an offence which upon conviction makes the offender liable to a fine of ₦100 or a six-month imprisonment term. This is consistent with Recommendation No. 130 which recommends the institution and proper implementation of a suitable grievance procedure as an essential element in sound labour relations in an establishment.[21]

Furthermore, section 18(2) of the Act provides that where a dispute is settled, either by agreement or by acceptance of an award made by a tribunal, the dispute shall be deemed to have ended. Any further trade dispute involving the same matters (including a trade dispute as to the interpretation of an award made as aforesaid by which the original dispute was settled) shall be treated as a different trade dispute.[22] For such a trade dispute, workers cannot also embark on strike until all the settlement procedures have been exhausted. This cycle continues *ad infinitum.* This has been viewed by many scholars as a merry-go-round, where one can never differentiate one stage from another. It can therefore be said that this section is a total ban on the right to strike.[23] This contradicts the international labour standard which condemns any provision which, rather than creating reasonable conditions which are to be fulfilled before a strike can be called, makes it virtually impossible to hold a legal strike.[24]

No trade union can embark on a strike action unless majority of the members agree by secret ballot to embark on it. This is in line with international labour standards.[25] In situations where the company has branches across different states, it may be difficult for all the workers to assemble in one place for the purpose of voting by secret ballot. Section 31(6)(e) of the Trade Unions (Amendment Act) requires as a condition for a lawful strike that a ballot must have been conducted in accordance with the rules or Constitution of the trade union at which a simple majority of all registered members must have voted to go on strike. The requirement of a strike ballot to embark on strike has excluded the incidence of wildcat strikes. The obligation to observe a certain quorum and to take strike decision by secret ballot may be considered acceptable. However, the requirement of a decision by over half of all the workers involved in order

[21] Examination of Grievances Recommendation No 130 of 1967.
[22] Trade Disputes Act 2004, s.18(3).
[23] C.K. Agomo, 'Federal Republic of Nigeria' in Blanpain (ed.), *International Encyclopedia of Labour Law and Industrial Relations* (Kluwer Law International 2000) 270.
[24] (n.14).
[25] *Ibid.*

to declare a strike is oppressive and could hinder the possibility of carrying out a lawful strike, particularly by workers in large enterprises.[26] This is at variance with the international labour standards. The Committee on Freedom of Association has considered that the decision to call strike in the local branches of a trade union should be taken by the general assembly of the local branches, when the reason for the strike is of a local nature. When the issue affects workers at the national level, the decision to call a strike should be taken by an absolute majority of all members of the executive committee of the trade union.[27] After obtaining a strike ballot, the workers and their union are obliged to give to their employer a notice of their intention to go on strike.

This is usually called strike notice. The requirement for strike notice is contained in section 42(1) of the Trade Disputes Act which provides that a worker who ceases to perform his job without giving his employer at least fifteen days' notice of his intention to do so in circumstances involving danger to persons or property commits an offence. Section 41 of the Trade Disputes Act provides that where a worker in essential services embarks on strike without giving his employer at least fifteen days' notice of his intention to do so, such act would constitute an offence which upon conviction makes the offender liable to pay a fine of ₦100 or a six-month imprisonment term unless he proves that he was not aware that his duty is an essential service. It cannot be over-emphasized that every strike involves danger to the employer's property or business. The obligation to give prior notice to the employer before calling a strike is consistent with international labour standard.[28] The period of notice serves as a cooling-off period. It is designed to provide a period of reflection, which may enable both parties to come once again to the bargaining table and possibly reach an agreement without having recourse to a strike.[29]

The right to strike is not enjoyed by all workers in Nigeria. Certain categories of workers are exempted. In the first instance, Nigerian law prohibits workers in essential services from embarking on strike.[30] This is in line with international labour standards. However, the list of essential services in Nigeria is far and overreaching and includes services

[26] G.G. Otuturu, 'Trade Unions (Amendment) Act 2005 and the Right to Strike in Nigeria: An International Perspective' 2014] (8)(4) *Labour Law Review* 25.
[27] (n.14).
[28] (n 14).
[29] (n 26).
[30] G.S. Morris, 'The Regulation of Industrial Action in Essential Services' [1983] (12) *Industrial Law Journal* 7.

which are not in the very best essential.[31] These include workers in the Armed Forces and allied industries which produce their materials; public workers in the federal state or local government level connected with the supply of electricity, power, fuel or water; workers involved in sound broadcasting or postal, telegraphic, cable, wireless or telephonic communications; workers involved in maintaining ports, harbours, docks or aerodromes; workers involved in transportation of persons, goods or livestock by road, rail, sea, river or air; workers involved in the burial of the dead, hospitals, the treatment of the sick, the prevention of disease, or public health matters such as sanitation, road-cleaning and disposal of night soil and rubbish, and outbreak of fire; workers in the Central Bank of Nigeria, Nigeria Security Printing and Minting Company Limited, and bankers. By this definition, virtually all workers in the public sector and bankers are restricted from enjoying this right under the guise of their services being essential.

It has been observed that Nigeria has the widest definition of essential services with so many workers being denied the right to strike when their work stoppage will in no way have any adverse effect on the public. The following services which are considered essential services in Nigeria are not categorized as essential by the international labour standards. They are the production, transportation and distribution of fuel, transportation of persons, goods or livestock, teaching, banking, printing and minting of currencies. The Committee of Experts on the Applications of Conventions and Recommendations has reported that the definition of essential service is overly broad and should be amended to conform to the true notion of essential services-which are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population.[32] More specifically, the Committee on Freedom of Association has urged Nigeria to amend her legislation to comply with the appropriate scope of essential services. It requested the government to limit the scope of essential services to situations where there is a clear and imminent threat to the life, personal safety or health of the whole or part of the population.[33]

Secondly, workers in the Export Processing Zone are absolutely denied the right to form unions, bargain collectively and exercise the right

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[31] Trade Disputes (Essential Services Act) 2004 s.7 (1).
[32] ILO, CEAR, 2007, 96th Session: Individual Observation Concerning Freedom of Association and Protection of the Right to Organize Convention, 1948 (No.87) Nigeria.
[33] ILO, Committee on Freedom of Association, 343rd Report, Case No. 2432 (2006) (Nigeria), paras 1024; M.E. Ackerman, 'The Right to Strike in Essential Services in MERCOSUR Countries' [1994] (133)(3) *International Labour Review* 385.

to strike. However, the EPZ authority is given the mandate to handle their disputes rather than letting them have trade unions.[34] This is incompatible with the international labour standard which demands that no such restrictions should be placed on workers. The Freedom of Association and Protection of the Right to Organize Convention, 1948(No.87) guarantees that all workers, without distinction whatsoever, shall have the right to establish organisations of their own, organize their activities which includes the right to strike. Thirdly, the Trade Unions (Amendment Act) limits the right to strike in Nigeria to disputes of rights which is interpreted as 'any labour disputes arising from the negotiation, application, interpretation of a contract of employment or collective agreement under this Act or any other enactment or law governing matters relating to terms and conditions of employment.'[35] Workers are prohibited from embarking on strike where they have disputes with the employers over their interests. This contradicts the international labour standard which provides that the right to strike should not be limited to disputes of interests alone but that workers should be able to express their dissatisfaction as regards economic and social matters affecting their interests.[36]

Another restriction is the provision that any worker who takes part in a strike shall not be paid wages for the period of the strike. However, where it is the employer that locks out his workers, the workers shall be entitled to their wages.[37] However, despite these restrictions, there have been frequent strikes or news of strikes in Nigeria. Workers in every sector of the economy, whether public or private, essential or non-essential, have embarked on strike. This trend lends support to the view that restriction or not, 'Nigerian workers have made ample use of this freedom of strike.'[38]

3.2 : Right to Strike in Ghana

Ghana became a Member State of International Labour Organisation after she gained independence in 1957 and has ratified fifty international labour standards including the eight core conventions concerning the right to form or join a trade union, collective bargaining, equal treatment

[34] Nigerian Export Processing Zones (EPZ) Act Cap O5 LFN 2004, s. 4 (c).
[35] Trade Unions (Amendment Act) 2005, s. 31 (6) (b).
[36] O.V.C Okene & C.T. Emejuru, 'The Disputes of Rights Versus Disputes of Interests' Dichotomy in Labour Law: The Case of Nigerian Labour Law' [2015] (35)(23) *Journal of Law, Policy and Globalization* 137.
[37] Trade Disputes Act 2004, s. 43(1)(a)(b).
[38] A.A. Adeosun, 'Strikes- The Law and the Institutionalization of Labour Protest in Nigeria' [1980] (16)(1) *Indian Journal of Industrial Relations* 6.

in employment, minimum age for employment, abolition of forced labour and the elimination of worst forms of child labour.[39] The country has also passed a number of legislations to bring national laws in conformity with ratified Conventions. These include the Ghanaian Constitution and the Labour Act, which is comprehensive and provides for all the workers' rights. The right to strike is not a constitutional right in Ghana. It is however provided for in the Labour Act 2003.

Before parties embark on strike in Ghana, they are expected to have undergone the trade dispute settlement process which includes collective bargaining, mediation and voluntary arbitration.[40] This is in line with the international labour standard. Section 161 of the Labour Act provides that parties to an industrial dispute shall not resort to strike or lockout when negotiation, mediation or arbitration proceedings are in progress. This is known as the 'cooling-off period'. Any party who contravenes this provision is liable for any damage, loss or injury to the other party to the dispute. Where alternative dispute resolution fails, the party intending to take a strike action shall give a written notice of this to the other party and the National Labour Council within seven days.[41] This is in line with international labour standard. The intending strike can only be embarked on after the expiration of seven days from the date of notice, and not at any time before the expiration of the period. The dispute shall be settled by compulsory arbitration under section 164 of the Labour Act if it remains unresolved within seven days from the commencement of the strike or lockout.

Workers in essential services are restricted from embarking on strike.[42] This is in line with international labour standard. Under the Labour Act, essential services include persons working in an area where an action can lead to a total loss of life or pose a danger to public health safety and such other services as the Minister may by legislation determine. The Labour Act protects workers when they embark on lawful strikes. During any lawful strike, the employment relationship between the employer and the workers will not be affected. To this effect, an employer cannot sack a worker who embarked on a lawful strike. No civil procedure or acts of physical coercion against him or his property can be made against him.[43]

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[39]ILO http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11 accessed 20 April 2020.
[40] Sections 153-157 Labour Act 2003 Act 651.
[41] ibid, s 159.
[42] ibid, s.163.
[43] ibid, s.169.

3.3 : Right to Strike in Tanzania

The right to strike in Tanzania is governed by the Employment and Labour Relations Act 2019. The Act applies to all private and public workers in Tanzania but does not apply to workers in the Tanzania People Defence Force, the Police Force, the Prisons Service and the National Service.[44] Workers may engage in a lawful strike if the dispute is a dispute of interest and they have undergone a mediation process to settle the dispute.[45] This is in line with international labour standards. As recommended by the international labour standard, the Employment and Labour Relations Act provides that no trade union can embark on a strike action unless a ballot has been conducted and majority has voted in favour of the strike.[46] Where the decision to embark on strike has been reached, a forty-eight hours notice should be given to the employer of their intention to strike.[47] Section 80(2) of the Act however provides that this procedure may not be followed where the employer unilaterally altered the terms and conditions of employment of the workers or where the workers and employers have agreed on their preferred strike procedure in a collective agreement.

Tanzanian workers also have the right to embark on a secondary strike or sympathy strike after a fourteen days notice of the secondary strike has been given to the employer.[48] Employers and workers also have the power to, in their collective agreement, provide for some minimum services to be performed during the duration of a strike action.[49] This is a commendable provision as it is not envisaged by the International Labour Organisation. Where a trade union embarks on a lawful strike action (a strike in compliance with the provisions of this Act), the workers' employment cannot be terminated by the employer neither will they be liable for a breach of the contract of employment or for any civil or criminal proceeding.[50] The worker may however not be remunerated during the duration of the strike. Where the employer pays the worker's accommodation, food or other amenities during the strike period, he will be entitled to a refund by the worker.[51] Conversely, where the strike

[44] The Employment and Labour Relations Act [CAP. 366 R.E. 2019], s. 2 (1)..
[45] ibid, s 80(1)(a)(b).
[46] ibid, s 80(1)(d).
[47] ibid, s 80(1)(e).
[48] ibid, s 80(2)(a).
[49] ibid, s 79(1).
[50] ibid, s 83(1)(2)(3).
[51] ibid. s 83(4).

action was not lawful, the workers shall be liable to indemnify the employer for any loss resulting out of the strike.[52]

Section 76(3) of the Employment and Labour Relations Act prohibits some conducts associated with strikes. These are picketing, use of replacement labour, locking employers in the premises and preventing employers from entering the premises. The Act restricts so many workers from exercising the right to strike. They include workers engaged in essential services; workers engaged in a minimum service; workers bound by an agreement that requires the issue in dispute to be referred to arbitration; workers bound by a collective agreement or arbitration award that regulates the issue in dispute; workers bound by a wage determination that regulates the issue in dispute during the first year of that determination; a magistrate, a prosecutor or a court personnel.[53] In addition to this list, the Essential Services Committee may designate a service as essential if the interruption of the service endangers the personal safety or health of the population or any part of it.[54] This is a very large list of essential services which is contrary to international labour standards.

3.4 : Right to Strike in Uganda

The right to strike in Uganda is a constitutional right for all workers in Uganda.[55] The right to strike is also guaranteed under section 3(d) of the Trade Unions Act 2006. Section 7 of the National Labour Relations Act[56] provides that workers shall have the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Strikes are included among the concerted activities protected for workers by this section. Section 13 of the Act further provides that nothing in this Act shall be construed so as either to interfere with or impede or diminish the right to strike, or affect the limitations or qualifications on that right.

Section 30 of the Labour Disputes (Arbitration and Settlement) Act provides that every worker has the right to strike.[57] Workers may embark on strike where there is a trade dispute. However, they are required to

[52] ibid, s 84.
[53] ibid, s 76(1)(2).
[54] ibid, s 77(2).
[55] Article 40(3) of the Constitution of the Republic of Uganda Amended by the Constitution (Amendment) Act 11/2005 and the Constitution (Amendment) (No.2) Act, 21/2005.
[56] National Labour Relations Act 29 U.S.C.
[57] Labour Disputes (Arbitration and Settlement) Act 2006, s.30.

undergo some dispute resolution procedure which includes collective bargaining, conciliation or adjudication by the Industrial Court.[58] Where an award has been made by the Industrial Court on a trade dispute, it shall be unlawful to embark on a strike to vary that award. Any person who does this is liable, on conviction, to a fine not exceeding twenty-four currency points or a one-year imprisonment or both.[59] This is not in line with international labour standards and is similar to the Nigerian situation which stipulates a tedious and unending cycle of dispute resolution which aims at truncating the right of workers to strike. Section 30 of the Act provides that workers are immune from any civil liabilities arising from embarking on a lawful strike.[60]

Section 34 gives workers in essential services the right to embark on strike after giving a fourteen days' strike notice to the employer.[61] This is a welcome provision as it is better than the international labour standard that restricts workers in essential services from embarking on strike. Essential services in Uganda includes water, electricity, health, sanitary, hospital, fire, prisons, air traffic control, civil aviation, telecommunication, ambulance, central and local government police services and all transport services necessary for the operation of any of these services. This is albeit a long list. However, it does not impede the right to strike as they can see embark on strike after giving the required notice.

4. Comparison of the Right to Strike in Nigeria, Ghana, Tanzania and Uganda with the International Labour Standards

In this section, the Nigerian, Ghanaian, Tanzanian and Ugandan practice of the right to strike will be analyzed to discover their level of compliance with international labour standards on the right to strike.

a) The ILO recommends that disputing parties should engage in alternative dispute resolution mechanism whenever there is a trade dispute. Parties can only resort to strike where these procedures have failed. This standard is practiced in all the four jurisdictions. Nigerian labour legislation provides for collective bargaining, mediation, conciliation and arbitration as its pre-strike dispute resolution mechanism. Under the Ghanaian regime, collective bargaining, mediation and voluntary arbitration is

[58] ibid, s 28.
[59] ibid, s 29.
[60] (n 57).
[61] ibid.

practised. Uganda practices collective bargaining, conciliation and even adjudication. For Tanzania, only mediation is required. The Tanzanian practice of using only mediation as a pre-strike resolution mechanism is ideal. Having workers go through a myriad of processes before embarking on strike negates this standard.

b) International labour standards provide that the decision to embark on strike must be made through a secret ballot by a specified majority and the decision of non-strikers should be respected. In Nigeria and Tanzania, the standard of obtaining a secret ballot before embarking on strike is followed. It is however not practiced in Ghana and Uganda.
c) The standard of giving a strike notice to the employer before embarking on a strike action as recommended by international labour standards is practiced in the four jurisdictions. Whereas Nigeria provides for fifteen days' notice, it is seven days' notice for Ghana, two days notice' for Tanzania and fourteen days' notice in Uganda.
d) The international labour standards provide that the right to strike should cover both dispute of rights and dispute of interest. This is not practiced in Nigeria, Ghana and Uganda but practiced in Tanzania.
e) The ILO prohibits workers employed in essential services from enjoying the right to strike. In compliance to this, the four jurisdictions provide a list of essential services. Workers working in establishments that provide these services are barred from striking. Whereas Ghana has a compact list of essential services, Nigeria, Tanzania and Uganda have a bogus list which deprives so many workers from embarking on strike.

5. Concluding Remarks and Recommendations

From the above facts, it is evident that the four jurisdictions compared are complying with the standards set up by the ILO on the right to strike to a reasonable extent. However, if the standards are seen as a minimum, then much is expected from these countries. To this end, the Nigerian, Ghanaian, Tanzanian and Ugandan government are expected to draw lessons from each other in order to boost the practice of the right to strike in their respective countries. Notable lessons from each jurisdiction will be highlighted and recommended for the other jurisdictions to adopt. The recommendations are stated below;

a) As practiced in Uganda, the right to strike should be made a constitutional right in Nigeria, Ghana and Tanzania.
b) The Ugandan practice of fourteen days' strike notice is ideal. It is ample time for the employers and workers to have a re-think on settling the trade dispute and thus averting the strike action.
c) The right to strike should be extended to cover disputes of interests as envisaged by international labour standards and practiced in Tanzania.
d) Ghana has the list number of essential services. Thus more workers have the right to strike in Ghana. This should be adopted in Nigeria, Tanzania and Uganda.
e) The Tanzanian practice of choosing minimal services that can be performed during a strike action should be adopted so all workers including those in essential services can embark on strike without putting the country into chaos as a result of their withdrawal of essential services.
f) Where employers unilaterally alter the terms and conditions of employment of the workers, the workers should be allowed to strike without following the procedure for strike. This is the practice in Tanzania and it should be adopted in Nigeria, Ghana and Uganda. This will restrict employers from unilaterally and arbitrarily altering workers' contract of employment.
g) The Tanzanian practice of using only mediation as a pre-strike resolution mechanism is ideal. Having workers go through a myriad of processes before embarking on strike is against the international labour standards.
h) The Tanzanian practice whereby the right to strike covers both dispute of rights and disputes of interest is in line with international labour standards and should be adopted in Nigeria, Ghana and Uganda.
i) Finally, it is recommended that the International Labour Organisation help these four jurisdictions by actively supervising the practice of the right to strike. Where there are problems in the application of the standards, the ILO should seek to assist them through social dialogue and technical assistance. This is due to the fact that being a voluntary organisation; it has limited powers to enforce the international labour standards.[62]

[62] W Sengenberger, *Globalisation and Social Progress: The Rule and Impact of International Labour Standards* (2nd edn, Freidrich-Ebert-Stifling 2005) 7.

If these recommendations are put in place in Nigeria, Ghana, Uganda and Tanzania, the workers' right to strike in these jurisdictions will be reasonably protected.

An Examination of Socio-Economic Rights and the Judicial Process in Nigeria

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Abstract
There has been a cacophonous clamour for the judicial enforcement of socioeconomic rights in several regions of the world including Nigeria. Socio-economic rights are enforceable and/or justiciable in jurisdictions such as South Africa and India. In Nigeria, however, the fundamental Objectives and Directive Principles of State Policy contained in Chapter II of the Constitution of the Federal Republic of Nigeria 1999 (as amended), which in turn embodies detailed provisions on socio-economic rights, remains non-justiciable. Nigeria has equally ratified the African Charter on Human and People's Rights and has incorporated same into her *corpus juris* with ample provisions for socio-economic rights. The objective of this paper is to examine socio-economic rights and the judicial process in the context of advancing socio-economic rights to the status of legally enforceable human rights in Nigeria, specifically through constitutional amendment and the judiciary, by the courts taking centre stage and shedding the garb of judicial conservatism.

1. Introduction

Any discourse on the effective realisation of socio-economic rights in Nigeria, must of necessity, consider the place and role of the judicial process.[1] An assignment of a role for the judiciary in human rights implementation agenda ensures that states live out their positive obligations to fulfil socio-economic rights beyond what the political and administrative organs and/or structures are willing to concede on their

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[1] E Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria' (2007) 2 Journal of African Law 249

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own volition.[2] The concept of obligation may remain but a paper tiger, if there is no corresponding sanction in the event of failure to comply.[3] This paper submits that the judiciary as an institution and arm of government is saddled with the responsibility to address the large scale poverty, despondency and misery in Nigeria through context-responsive interpretations of relevant human rights instruments, both locally and internationally. It urges these institutions, nay, the various courts having juridictions over human rights guarantees and even quasi-judicial human rights institutions such as the African Commission on Human and Peoples' Rights to be more vociferous and volatile in advancing socio-economic rights.[4] Whether, however, these courts have the requisite skills to grapple with the complexities of resource allocations within a body polity and whether these institutions promote socio-economic rights without assuming the critical decisions that go to the heart of the political process is dependent, largely on the methodological approach for the interpretation of guaranteed rights.[5]

The political theory and constitutional principle of separation of powers, though a universally recognisable doctrine of socio-political governance, is still suffering from the malady of impracticality within the Nigerian socio-political landscape.[6] This doctrine anchors on the division of governmental powers through the scheme of allocation of authority amongst the three branches of government namely, the executive, legislature and the judiciary. The implementation, execution and formulation of laws and national development programmes is vested in the executive. The legislature is allocated the primacy responsibility of law making while the judiciary interprets the law in the course of adjudication of disputes.[7] This paper submits that the executive arm of government still wields the most influence and biggest powers amongst the three arms of government. In states that operate parliamentarianism, for instance, "ministers are members of the legislature and are thereby in

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[2] R Falk 'Affirming Universal Human Rights' (2003) 3 Human Rights & Human Welfare 77

[3] **J** Donnell, 'Human and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 The American Political Science Review 308

[4] N Haysom, 'Giving Effect to Socio-economic Rights: The Role of Judiciary' (1999) 4 ESR Rev II

[5] L Henkin, 'Rights: Here and There' (1981) 81 Columbia Law Review 1582; Y Khushalani, 'Human Rights in Asia and Africa' (1983) 4 Human Rights Law Journal 403

[6] K Kalu, 'Constitutionalism in Nigeria: A Conceptual Analysis of Ethnicity and Politics' (2004) 6 West African Review 11

[7] Sections 4, 5, and 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

a position to lead and control it," pointing to the end that the executive controls legislative initiative.[8]

The doctrine of separation of powers serves as an indirect limitation on governmental power.[9] It is an important pillar of democratic governance and the rule of law and even one that safeguards individual liberties.[10] In *Mayers v US*,[11] the Court, *per Justice Brandeis*, referring to the US Constitution of 1787 stated *viz*: "The doctrine of the separation of powers was adopted...not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident among the three departments, to save the people from autocracy."

As one of the cornerstones of government, the judiciary exercises judicial power which was defined in *Huddart Parker & Co. Ltd. v Moorhead*,[12] *per* Justice Isaacs, as "the power which the state exerts in the administration of public justice, in contradiction from the power it possesses to make laws and the power of executing them." Constitutionalism entails limitations on governmental powers and judicialism makes those limitations possible. The judiciary has "a separate procedure comprising a separate agency and personnel for an authoritative interpretation and enforcement of law."[13] One of its functions is to strike "a balance between the individuals freedom and the rights of the state to self-preservation."[14]

Judicialism is "the backbone of constitutionalism, the practical instrument whereby constitutionalism may be transformed into an active idea in government; it is our best guarantee of the rule of law and therefore of liberty."[15] Judicialism, requires judicial independence, nay, courage, which enables judges to speak truth to power, and to say "no" to whatever threatens or is likely to threaten constitutional guarantees whether from the executive or legislative arms of government.[16] Judicialism also serves as a legitimating force on governmental acts on

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[8] B Nwabueze, *Judicialism in Commonwealth Africa* (C Hurst, London, 1977) 49
[9] *Nwabueze* (n 8) 55
[10] F Strong, *Judicial Function in Constitutional Limitation of Governmental Power* (Caroline Academic Press, Durham 1997) 35
[11] 272 US 52 (1926)
[12] (1909) 8 CLR 330 383 *per* Isaacs J.
[13] B Nwabueze, *Constitutionalism in Emergent States* (C Hurst, London 1973) 18
[14] *Nwabueze* (n 8) 139
[15] *Nwabueze* (n 13) 21
[16] M Marshall, 'Speech: Wise Parents do not Hesitate to Learn from their children: Interpreting State Constitutions in an Age of Global Jurisprudence' (2004) 79 New York University Law Review 1633-1639

occasions when courts hold challenged governmental measures valid or constitutional or statutory interpretation, that is, "the determination of legislative intent in formulation of policy."[17] Second "is executive oversight, that is, "the bounding within rationality of discretion in the administration of law."[18]

2. Constitutional Interpretation

A constitution is the foundational norm of the legal system. It is a protocol of survival and continuity for any social grouping, ensuring that no one attains salvation or offers a programme of salvation, to the populace by another route. It provides a sense of citizenship, dignity and personality to all citizens and sets forth the general parameters of legislative, executive and judicial powers. A constitution embodies not only the fundamental principles of humanity, but also the fundamental rights under law. According to Nwabueze,[19] constitutional interpretation is "the most vital factor in constitutional government," but interpretation is a corollary of law-making, hence, the function of the political organs.[20] Courts engage in policymaking by interpreting vague constitutional and statutory provisions. However, they do so only in the exercise of their judicial functions and as a last resort "when impelled by the necessity of deciding ordinary adversary litigation between individual parties."[21] The rationale is to prevent an usurpation of the supreme role of the legislature[22] and arrogating to themselves the primary power to receive, review and revise all legislative acts.[23] This paper submits that this assumption, perhaps explains why the African Charter on Human and Peoples' Rights, which gives the African Commission the mandate to interpret its provisions, provides that the Commission's mandate must be exercised "at the request of a state party, an institution of the African

[17] *Strong* (n 10) 12
[18] *Strong* (n10) 14
[19] *Nwabueze* (n 8) 54
[20] M Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, Oxford 1998) 129
[21] *Hunt* (n 20) 131
[22] The interpretative function of the legislature is necessarily implied in its power to make laws. Every legislative act is an interpretative determination by the legislature that the act is within its powers under the Constitution.
[23] G Hazard, 'The Supreme Court a Legislature' (1978) 64 Cornel Law Review 1-2 where Hazard defines a 'legislature' to mean "a body whose chief function in government is to formulate general rules of law to primarily reflect the notions of utility and value held by its members."

Union or an African organization recognised by the African Union,"[24] therefore underscoring the political nature of interpretation.

3. Judicial Review

Judicial review 'is a self-imposed responsibility that is rooted in John Lock's philosophical creed. The partisan conflict, for instance, that culminated in Thomas Jefferson's election in the United States in 1800, provided the impetus for Chief Justice Thurgood Marshall to establish and institutionalise the ameliorative role of the judiciary. In *Marbury v Madison*,[25] the court *per* Marshall held that, "it is emphatically, the province and duty of the judicial department to say what the law is." Marshall justified federal courts' power to ignore enacted laws that were inconsistent with the constitution on the ground that such laws fell outside the delegation of authority by the people to the government, as expressed in the constitution.[26] Judicial review, therefore, removes issues of executive policy to the realm of adjudication.[27]

Judicial review has been criticised as an act of judicial usurpation or, at best, a bald effrontery[28] and that "given the principle of electorally accountable policymaking, all non-interpretative judicial review is illegitimate.[29] It has been argued that legislatures should legitimately resolve controversial issues, since courts are undemocratic and lacking in passive virtues.[30] In *Eakin v Raub,*[31] Justice Gibson in his dissenting judgment held that "the construction of the constitution in this particular instance belongs to the legislature which ought therefore to be taken to have superior capacity to judge of the constitutionality of its own acts." To

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[24] African Charter Article 45(3)
[25] 5 US (1 Cranch) 137 (1803)
[26] That the people have an original right to establish, for their future government, such principles as in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.
[27] L Hartz, *The Liberal Tradition in America* (Princeton University Press, Princeton 1993) 16 (Stressing that judicial review) "implies a prior recognition of the principles to be legally interpreted")
[28] *Strong* (n10) 21
[29] M Perry, *The Constitution, the Courts, and Human Rights* (Yale University Press, Haven 1982) 37; A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs Merril, Indianpolis 1962) 19 (Nothing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process is the distinguished characteristic of the system. Judicial review works counter to its characteristic.")
[30] A Bickel, 'The Passive Virtues' (1961) 75 Harvard Law Review 40
[31] 12 Seg & R (PA) 330 (1825)

Perry,[32] "if judicial review does not run counter to the principle of electorally accountable policymaking, it is at least in serious tension with it." This paper submits that judicial review is not only a feature of constitutional arrangement in Nigeria, it is also one of the most admired elements of Nigerian constitutionalism. Its overriding virtue and justification "is to guard against governmental infringement of individual liberties secured by the constitution."[33] The fruits of judicial review, quite sadly and regrettably have been as variegated as the types of regimes in which it has been institutionalised.[34] This paper submits that even those who invented the notion of judicial review have not always exercised good conscience in its application to advance the rights of minorities. Often times, those who most loudly agitate for liberty, scarcely ever grant it. *Scott v Sandford (The Dred Scott Case)*[35] was one of several examples where the power of justice review was of minimal assistance.

In the above mentioned case, the Supreme Court sanctioned the system of slavery and racism that existed until the civil war, abandoning the aspirational component of the US Declaration of Independence to the effect that all men are born equal. *Plessy v Ferguson*[36] which followed the *Dred Scott Case*, legitimised racial desegregation in schools, notwithstanding the American Bill of Rights. It took 58 years of struggle for the timorous decisions in *Scott v Sanford (Supra)* and *Plessy v Ferguson (Supra)* to pave way for the dawn of a new era as seen in *Brown v Education Board of Topeka,*[37] where the US Supreme Court recognised the legitimate rights claims of Blacks to equal educational opportunities.

4. Concerns and Justifications of Judicial Application of Socio-economic Rights

Debates on the constitutionalisation of socio-economic rights and their judicialism have continued to rage on in human rights law and

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[32] *Perry* (n 29) 9

[33] **J** Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Supreme Court* (University of California Press, Los Angeles 1980) 64

[34] G Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton University Press, Princeton 1993) 113 (Stressing, "a critical factor in any comparative assessment of the institution of judicial review will be the extent to which a consensus may be said to exist with respect to a society's defining political principles")

[35] 60 US 393 (1856)

[36] 163 US 5370 (1896) (Legitimising racial desegregation); L Ackermann, 'Constitutional Protection of Human Rights: Judicial Review' (1989) 21 Columbia Human Rights Law Review 59

[37] 348 US 886 (1954)

jurisprudence.[38] The debates remain unabated, notwithstanding the acknowledgement that human rights are interdependent and indivisible, and that some states have gone ahead not only to consitutionalise, but have made socio-economic and cultural rights justiciable.[39] Those who advocate against the constitutionalisation and judicialisation of socio-economic rights opine that the process only favours civil and political rights.[40] Davis[41] is of the view that socio-economic rights are "choice sensitive" matters that are appropriately left to political rather than judicial determination. The political organ in implementing socio-economic rights has to make a choice based on resources or policy. The judiciary is said to be ill-suited to deliberate on socio-economic rights, which unlike civil and political rights, are not "negative" but "positive" in nature.[42]

The above means that socio-economic rights are incapable of immediate realisation because their implementation requires positive action on the part of the state.[43] They are seen as being indeterminate, expensive to realise and achievable only progressively. Civil and political rights, because of their negative nature, place restraint on the state and when their violations are proved, remedies are immediately realisable.[44] The argument that socio-economic rights are not amenable to judicial enforcement, has "been widely discredited" and "adequately rebuffed."[45] This paper submits that the contention that the courts lack the skill set to determine or enforce socio-economic rights, which by their nature raise the problem of polycentricity is flawed. The term "polycetricity" as used, denotes decision that are capable of having effect on indeterminate persons or class. Matters with budgetary implications are thought to

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[38] A Oyeniyi, 'Realisation of Health Rights in Nigeria: A Case for Judicial Activism' (2014) 14 Global Journals Inc. US 4 23-24

[39] W Egbewole and T Alatise, 'Realising Socio-economic Rights in Nigeria and the Justiciability Question: Lessons from South Africa and India (2017) 8 International Journal of Politics and Good Governance 14-22

[40] S Ngwuta, 'Legal Framework for the Protection of Socio-economic Rights in Nigeria' (2011) 10 Nigerian Judicial Review 24

[41] D Davis, 'The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 South African Journal of Human Rights 475

[42] *Davis* (n 4) 510

[43] *Egbewole* and *Alatise* (n 39) 25

[44] **J** Crawford, 'Responsibility to the International Community as a Whole' (2000) 8 Indiana Journal of Global Legal Studies 303

[45] M Dennis and D Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaint Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) 93 American Journal of International Law 462

require special expertise which the courts lack. Judicial enforcement of civil and political rights equally has resource, financial, economic or budgetary implications or consequences. However, the fact that socio-economic rights have budgetary consequences, the court has held, is not enough to bar their justiciability.

In *August v Electoral Commission*,[46] the South African Constitutional Court, reacting to the charge that the vindication of socio-economic rights presents the problem of polycentricity held: "we cannot deny strong claims timeously asserted by determinate people because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate group." Daniel[47] notes that:

> In reality, degree of judicial involvement in polycentric matters must vary depending on the context of every specific case. In any event, there are polycentric elements to virtually all disputes before the courts. Certainly, civil and political rights matters are no less polycentric than socio-economic ones…One should not lose sight of the fact that several features of the judiciary make it well-suited to vindicate socio-economic rights. Unlike the legislature and executive, courts are able to provide individualised remedies to aggrieved claimants, and offer a comparatively speedy solution in the face of legislature or executive tardiness. Courts are experts at interpretation and are thus ideally suited to lend content to social rights and the standards of compliance that they impose.

This paper aligns with the submission above to the end that a court should never be reluctant to adjudicate a claim simply because other indeterminate persons who are affected or are likely to be affected are not part of the parties before the court. This may result in determinate aggrieved persons suffering unnecessarily because of the tardiness, lack of interest or ignorance of indeterminate others.

This paper further submits that the contention that the courts lack expertise in respect of socio-economic rights and/or policy matters is unfounded. This is so because, under the Nigerian 1999 Constitution for instance, a person does not need to be a university graduate in order to occupy the exalted offices of the President, Vice President, Governor, Deputy Governor, member of the Senate or House of Representatives or Minister of the Federal Government. Only the positions of Attorney General of the State and/or Federation, Justice of the Supreme Court,

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[46] (1993) 35A 1(CC)

[47] B Daniel, 'Introduction to Socio-Economic Rights in the South African Constitution' in D Brand and C Heyns (eds), *Socio-economic Rights in South Africa* (Pulp, Pretoria, 2005)

Justice of the Court of Appeal, Judge of the Federal High Court or High Court of the State, require that a prospective appointee thereto be a lawyer who has so qualified having garnered a minimum of ten (10) years post call cognate experience. It therefore goes without saying that apart from the demand of good education and experience, judges come from diverse backgrounds. In fact, some were professionals in other fields before their dalliances with law. Socio-economic terrain therefore, cannot be unfamiliar to the judiciary for the purpose of enforcing socio-economic rights.

This paper concedes, however, that in making laws, the legislature may, during public hearings, draw from the views of experts. The executive arms of government can also benefit from the contributions of specialists in formulating and implementing government policies. Instructively, the courts are not left out too. Under Section 67 of the Evidence Act 2011, the opinion of experts are relevant in judicial adjudication in Nigeria. Consequently, a court can rely on the opinion of an expert in arriving at the determination of a case. Judicial vindication of socio-economic matters represent issues of politics and ideology. Consequently, that their determination and enforcement by the judiciary "politicise" judicial task. Having regard to the foregoing, Haysom[48] posits that "socio-economic rights thus politicise justice and judicialise politics. They allow the courts, by enforcing socio-economic rights, to stray onto the political terrain, at the expense of the democratic process and political life is inevitably impoverished."

This paper submits that judicial review of civil and political rights, like socio-economic rights, sometimes raise political issues whether directly or indirectly. For instance, in Nigeria, the Supreme Court, the Court of Appeal and Election Petition Tribunals sit over electoral matters. In the process, they sometimes invalidate the election of a person and in his place, declare another person duly elected. An entire election, therefore, as indeed an electoral calendar may be voided and/or altered and *ipso facto*, a fresh election ordered. A consequence hereof, is an invalidation of electoral mandate. There is, thus, scarcely a more political issue to be imagined in the wake of judicial task over socio-economic rights, than when the courts and tribunals exercise their jurisdiction over electoral matters. The argument that the judiciary should be politically neutral and in abstinence from decision that politicise justice as well as elimination of political values and matters

[48] H Haysom, 'Constitutionalism, Majoritarian Democracy and Socio-economic Rights' (1992) 8 South African Journal on Human Rights 14-16

from adjudication is not just misplaced, it is also hardly feasible. This is in tandem with Pieterses's[49] submission viz:

> In truth, both constitutionalism and adjudication are inherently political. Courts, particularly in jurisdictions where judicial development of the common law is the norm, have always engaged in lawmaking, and society's moral/political values must necessarily intrude in this exercise. This same is true of constitutional interpretation.

5. The Role of Courts in the Justiciability Question

The emergence of the court system marked a great milestone in human journey.[50] The coming into being of the court system birthed a significant landmark in humanity's quest for justice.[51] It is axiomatic that the preponderating role of the judiciary is to administer justice, and this sacred responsibility is inextricably and inexorably linked to the courts.[52] Justice remains the master idea of the world, and the quest to realise it through the instrumentality of our courts have become an irresistible psychological force.[53] Today, the human instinct for justice now finds ready expression in the administration of law in our courts. The foundation of the courts' system is the confidence the society repose in judicial officers. Sikes,[54] quoting Warren Bunger, an erstwhile Chief Justice of the United States of America notes:

> A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society; that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have been exploited in the smallest transaction of daily life come to believe that courts cannot vindicate their legal rights from fraud and over reaching; that people come to believe the law in the large sense cannot fulfil its primary function to protecting them and their families in their home, at their work and on the public streets.

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[49] M Pieterse, 'Relational Socio-economic Rights' (2009) 25 South African Journal on Human Rights

[50] P Bhagwati, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and judicial Restraint' (1990) 3 JHRPLI - 15

[51] *Bhagwati* (n 50) 20

[52] O *Ogbu*, 'The Significance and Essence of the Fundamental Objectives and Directive Principles of State Policy' (2010) 5 Unizik Law Journal 276

[53] Ogbu)n 50) 283

[54] H Sikes, 'The Drowned Valleys on the Coast of Kenya' (1930) 38 The Journal of the East Africa and Ugenda Natural History Society 1-9

Stemming from the above submission by Justice Warren Bunger, is the fact that the success of the judicial process, hinges, largely, on the degree of confidence which the citizenry repose in the court system. The court system introduced a new foreboding in human historical folklore. Via the instrumentality of the courts, even human relationship now runs much more smoothly, just as the courts have also been ensuring that atrophied rules are looped off before putrefaction sets in.[55] The courts are often called upon to make constitutional or statutory declaration of the fundamental human rights of the citizens, as such, the justiciability question bordering on socio-economic rights within the Nigerian legal landscape is escapably pertinent.[56]

It is to the judicial process, nay the courts and no where else, that people look into for the protection and effective realisation of rights.[57] The importance of the courts in translating abstract rights to practical realities, therefore, cannot be overemphasised. It is the courts that give to these "airy nothing a local habitation and a name."[58] Oputa,[59] quoting Sir Jack Jacob, pungently observed viz:

> The equitable, effective and efficient administration of justice is of crucial, indeed of paramount value in the life and culture of a civilized community. It constitutes the torch-stone of the quality of justice enjoyed by its members. For the administration of justice is the life blood of the legal system of any country and at the same time, it is the life line of its citizens to secure justice. The administration of justice is therefore a major responsibility of the machinery of good government, an instrument of social justice and a tool in the age long quest for justice, which is one of the deepest, most inspiring and most abiding aspiration of the human spirit.

The deceased Cicero of the Nigerian Supreme Court, also elegantly captured the role of courts in the following words:

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[55] C Oputa, 'Legal and Judicial Activism in an Emergent Democracy: The Last Hope for the Common Man?' (11 December 2003) paper presented during a Symposium in memory of Hon. Justice Chike, Idighe at the Obafemi Awolowo University amphitheatre, Obafemi Awolowo University, Ile-Ife

[56] C Oputa, *Our Temple of Justice* (Friends' Law Publishers Ltd, Orlu 1993) 112

[57] *Oputa* (n 56) 120

[58] W Shakespeare, *A Midsummer Night's Dream (*Macmillan and Co., London 1993) last act

[59] C Oputa, 'Peace, Justice and Fairplay in a Democratic Nigeria' (31 January 2004) birthday lecture in Honour of His Grace, Most Rev. (Dr.) John O. Onaiyekan, CON., the Catholic Archdiocese of Abuja

> This presupposed and still presupposes courts to which men, when they are in doubt or anxiety or when they suppose that wrong has been done to them, may freely have recourse, in the guaranteed hope of obtaining redress. This again presupposed and still presupposes a court that is free and not tied to the apronstrings of extrinsic pressures and control from either the legislative or executive branches of government or from powerful multinationals or from any other concentration of power in society including mob pressures and hysteria. The court system further presupposes and still presupposes, courts which are not incapable (for reasons of the ignorance of the judge or his corruption, favouritism, prejudice fear or favour) of delivering a just verdict.[60]

The role of the courts in the justiciability question finds expression in the judicial application of socio-economic rights, and within the tenor, ambit and contemplation of this paper, considerations shall be given to the Indian, South African and Nigerian jurisdictions as shall be seen hereinafter.

6. Judicial Application of Socio-economic Rights in India

India, perhaps more than any other country, has through judicial review, developed the jurisprudence of directive principles and the domestication, justiciability and judicialisation of socio-economic rights. The development is gobsmacking, taking into cognizance, the fact that Article 37 of the Indian Constitution of 1950 expressly states that directive principles are non-justiciable, although they are fundamental in the governance of the country and the state has a duty to apply them in making laws. This paper submits that the judicial activism of the Indian Supreme Court has made a caricature of the conservatism of other national courts on the subject, though that acitivism was far from being achieved over night.

When a challenge of the primacy of fundamental rights over directive principles of state policy came up for the first time before the Supreme Court in 1951 in the case of *State of Madras v Champakam Dorairajan*,[61] the court unequivocally held that "the directive principles have to conform to and run subsidiary to the chapter on fundamental rights." Between 1975 and 1977, India under Indira Ghandhi was under internal emergency. The after math was the wanton violation of the rights to life, liberty and freedom of expression among others. The courts in

[60] C Okeke (ed), *Towards functional Justice: Seminar Papers of Justice Chukwudifu A. Oputa* (Gold Press Limited, Ibadan 2007) 37-38
[61] (1951) SCR 525

India, particularly the Supreme Court appeared helpless. It was unable to provide remedies to victims of the emergency rule, even as its image was gravely battered. When the state of emergency came to an end, there was political re-alignment. A popularly elected civilian government that was in place then, was weak and by 1978/1979, it was on the cusp of collapse. Significantly, that period invariably marked the advent of public interest litigation (PIL) movement in the judiciary which radically re-shaped the Indian jurisprudence on socio-economic rights for good. The period following the emergency,

> provided the right environment for the judiciary to redeem itself as a protector and enforce of the rule of law. Judges woke up to this heed and public interest litigation was the tool the judiciary shaped to achieve this end. Public interest litigation was entirely a judge-led and judge dominated movement.[62]

Public Interest Litigation was aimed at liberalising, popularising and democratising access to the justice system. Complex and sometimes confusing procedure for invoking the jurisdiction of the Supreme Court was deconstructed and simplified. The rules governing *locus standi* were equally relaxed so much so that a postcard or ordinary letter could be treated as petition to the Supreme Court for it to commence judicial determination. Judicial formalism was forced to take the backstage.[63]

The aftermath occasioned an attitude of the court towards interpreting Article 21 (the right to life and personal liberty) of the Constitution, to compass a gamut of other ancillary and integral rights which included many socio-economic rights and this resulted in a foundation, for social justice. The remedies that resulted from public interest litigation were said to be "unorthodox and unconventional and were intended to initiate affirmative action on the part of the state and its authorities,"[64] but they were hugely successful.

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[62] S Muralidhar, 'Justiciability of Economic, Social and Cultural Rights – The Indian Experience in 'Circle of Rights, Economic, Social and Cultural Right Activism: A Training Resource' International Human Rights Internship Programme and Asian Forum for Human Rights and Development 2000 436-37

[63] U Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' In **J** Kapur (eds), Supreme Court on Public Interest Litigation (Valsep, New Delhi 1998)

[64] **J** Kothari, 'Social and the Indian Constitution' (2004) 2 Law, Social Justice and Global Development Journal (LGD) <http://www.go.warior.ac.uk/elj/igd/2004_2/kpthari> accessed 2 May 2023

The radical break from the liturgy of the past came to the fore with the landmark decision in the case of *Maneka Gandhi v Union of India*.[65] In this case, after Mrs. Indira Gandhi lost power as Prime Minister of India, the passport of her daughter-in-law, Maneka Gandhi was confiscated by the new government. Maneka was setting out to travel abroad on a speaking engagement but could no longer do so on account of her passport being impounded. Maneka petitioned the Supreme Court relying on Article 32 of the Indian Constitution which entitles a person to file a petition directly to the Supreme Court if the fundamental right of that person has been infringed upon. She contended *inter alia*, that the seizure of her passport violated the principles of natural justice. The government on their part, raised a preliminary objection, arguing that the right to travel abroad was not a fundamental right, and that Article 32 of the Constitution was inapplicable and that the petition was incompetent before the Supreme Court. The contention of the government was also that the principles of natural justice were inapplicable.

The right to travel abroad was not specifically guaranteed by the constitution but the petitioner relied on Article 21 which guaranteed the right to life and personal liberty. The Supreme Court adjudged that in a wide connotation, "personal liberty" included all aspects of personal liberty, the right to travel abroad, was therefore held to have been accommodated within the purview of "personal liberty" and that it was protected under Article 21. The Supreme Court further held that no one could be deprived of the right to go abroad except by procedure established by law. Also, that to pass judicial scrutiny, an executive, quasi-judicial or legislative action would satisfy the just, fair and reasonable test.

The socio-economic rights jurisprudence of the Indian Supreme Court encompassing the right to life, the right to food, the right to work, the right to education, the right to shelter and the right to health shall also fall within the purview of this discourse. The Indian Supreme Court's stance, is namely, that directive principles which are fundamental to the governance of the country are complementary to and cannot be isolated from fundamental rights. Through creative, interpretative skill and the need to dispense social justice, the Indian Supreme Court expanded the provisions of right to life to include some concomitant social and economic rights. That way, "the court overcame the difficulty of justiciability of those economic and social rights, which were hitherto in their

[65] (1978) 1 SCC 248

manifestation as Directive Principles of State Policy, considered unenforceable."[66]

In *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*,[67] the court stated *viz*:

> The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on, such functions and activities as constitute the bare minimum expression of human self.

It could be deduced from the above quotation, that the right to life is not considered as an end in itself, but include the bare necessities of life which cannot be isolated from economic needs. Much as the Supreme Court of India has held in some cases that the right to life encompasses the basic right to food, shelter and clothing,[68] a special and specific right to food was never canvassed before the court until the case of *Kishen v Pathnayak v State of Orissa*.[69] Until then, the Supreme Court merely gave direction to the government to take macro level measures such as irrigation projects to reduce the drought in Orissa, one of the poorest states in India, where due to starvation, some people were forced to put their biological children up for sale. The court declined to recognise as urged, that a distinct right to food as an integral part of the right to life, was being infringed upon.

In 2001, there was massive outcry on the heels of the droughts and several cases of starvation to death in the same poor state of Orissa. Paradoxically, there were excess stock piles of grains in the stores of the central government which were actually wasting away. This unfortunate state of affairs captured national attention and constituted the basis for a full campaign for the right to food in India. A Non-governmental Organisation, People's Union for Civil Liberties (PUCL) in April 2001, commenced a public interest litigation at the Supreme Court vide *People's*

[66] (1951) SCR 525
[67] (1981) 2 SCR 576
[68] Chameli Singh v State of UP 1996 (2) SCC 549; *Paschim Sanity & Ors v State of West Bengal* 1996 (4) SCC 37
[69] AR 1989 SC 677

Union for Civil Liberties v Union of India & Ors.[70] This case sought for the enforcement of the right to food of the thousands of families that were starving to death in the drought affected state like Orissa, among others. The Supreme Court was disturbed by the sprawling cases of deaths through starvation and on its own enlarged the scope of the petition by the People's Union for Civil Liberties (PUCL) from the initially stated six drought affected states to include all the Indian States and Union Territories. The court held that it was the responsibility of the government to prevent hunger and starvation.[71] The court specifically recognised a right to food within Article 21 of the Constitution and had to broaden the scope of the right to include the right to be free from starvation. It held that it is the responsibility of government to provide food to the aged infant, persons with disabilities, destitute men and women who are in danger of starvation, pregnant and lactating women and destitute children.

The lesson emanating from the Indian experience is that in developing and advancing the jurisprudence on directive principles and socio-economic rights, the Supreme Court relying on those rights, enlarged and evidenced the scope of fundamental rights, particularly the right to life and personal liberty contained in Article 21. Directive principles are seen as being enforceable when they supply content to fundamental rights. The right as expanded through judicial decisions, now contains such ancillary and complementary socio-economic rights like the rights to livelihood, shelter, health, clothing, food, adequate nutrition and education. Rather than have a rigid dichotomy between directive principles and fundamental rights, the court considers them to be complementary to each other and in deserving cases, it harmonised the two, treating certain rights under the directive principles as integral parts of fundamental rights.

This paper submits that by liberalising and simplifying the public interest litigation process, the court made it possible for the poor, illiterate, disadvantaged and most vulnerable people who ordinarily would be inhibited from accessing the court, to petition the court with no difficulty. The court has also developed far reaching methods of granting remedies and making positive orders in respect of socio-economic rights against government, its agencies and even private bodies. Sometimes, the orders or directions are given in stages and the implementations are monitored through post judgment procedure which in turn has

[70] Writ Petition (Civil) No 196 of 2001, decided on 2 May 2003
[71] *Ibid*

encouraged the progressive realisation of socio-economic rights. Muralidhar[72] succinctly albeit instructively enthused: "The experience of Indian judiciary bolsters the vision of the Constitution as a dynamic and evolving document and not merely an expression of desired objectives in an open-ended time frame."

7. Judicial Application of Socio-economic Rights in South Africa

The South African Bill of Rights is generally considered as one of the most progressive in the African continent, nay the world. This is because it contains all categories of human rights that are ordinarily included in most international human rights instruments, namely, the so-called first generation rights (which consist of the traditional civil and political rights) and the rather controversial second and third generation rights (which consist of social, economic and cultural rights). For that reason, many scholars[73] view South Africa as a benchmark in terms of the constitutional protection and judicial enforcement of socio-economic rights. The constitutionalisation of socio-economic rights in South Africa, was preceded by various debates and arguments on the wisdom and desirability of entrenching socio-economic rights in the constitution.[74]

The central theme in the debates was whether the realisation of socio-economic rights is not more of political and policy for the executive and legislative arms of government than a judicial matter.[75] Several years after the consitutionalisation of the rights was achieved, the debates are

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[72] S Muralidar, 'Implementation of Court Orders in the Area of Economic, Social and Cultural Rights: An Overview of the Experience of the Indian Judiciary' First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi 1 – 3 November 2002 5

[73] W Egbewole and T Alatise, 'Realising Socio-economic Rights in Nigeria and the Justiciability Question: Lesson from South Africa and India'(2017) 8 International Journal of Politics and Good Governance 14-18; P O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 Modern Law Review 532 – 554; **J** Mubangizi, 'The Constitutional Protection of Socio-economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 African Journal of Legal Studies 1-19

[74] M Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-economic Rights' (2004) 20 South African Journal on Human Rights 383; D Davis, 'The Case Against Inclusion of Socio-economic Rights in Bill of Rights Except as Directive Principles' (1992) 8 South African Journal on Human Rights 475; A Sachs, 'Towards a Bill of Rights in Democratic South Africa' (1990) 6 South African Journal on Human Rights 1; S Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 Univ. Penn LRI, 26-42; N Haysom, 'Constitutionalism, Majoritarian Democracy and Socio-economic Right' (1992) 8 South African Journal on Human Rights 451-63; E Mureinik, 'Beyond a Chapter of Luxuries: Economic Rights in the Constitution' (1992) 8 South Africa Journal on Human Rights 464-74.

[75] *Mureinik* (n 83) 476

still on.[76] Though much of the debates x-ray the role of the South African judiciary in the vindication or enforceability of the rights. To underscore the point that the debates still rage on, Yacoob enthused "the question is therefore not whether socio-economic rights are justiciable under our constitution, but how to enforce them in a given case. The very difficult issue which must be carefully explored on a case-by-case basis."[77]

Section 7(2) of the 1996 South African Constitution enjoins the state to "respect, protect, promote and fulfil the rights in the Bill of Rights" Iles[78] argues that to "respect, protect, promote and fulfill":

> impose on the state a mixture of both positive and negative obligations. The duty to respect a right involves an immediate obligation on the state to refrain from legislative or other action, which interferes with enjoyment of the right. The duty to protect the right, requires the state to take measure to prevent the right from being interfered with by other non-state actors. Promoting and fulfilling the right requires positive action on the part of the state to take legislative and other measures to assist individuals and groups in obtaining access to the right.

This paper submits that the foregoing also repudiates the argument that socio-economic rights impose positive rather than negative obligations on the state. Michelman[79] in assessing the irony in the judicial vindication of socio-economic rights noted *viz*:

> By constitutionalising social rights, the argument often run, you force the judiciary to a helpless choice between usurpation and abdication, from which there is no escape without embarrassment or discredit. One way, it is said, lies the judicial choice to issue positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against prevailing political will. The other way lies the judicial choice debase dangerously the entire currency of rights and the rule of law by openly ceding to executive and parliamentary bodies of an unreviewable privilege.

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[76] P De Vos, 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 South African Journal on Human Rights 67, 74

[77] *Government of the Republic of South Africa v Groutboom* (2001) 1 CHR 261 at 283 paras A-B

[78] K Lles, 'Limiting Socio-economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 South African Journal on Human Rights 459

[79] F Michealman, 'The Constitution, Social Rights and Liberal Political Justification'(2003) 1 International Journal of Constitutional Law 13, 15

For the South African judiciary, there is hardly any choice other than upholding and enforcing the socio-economic rights duly guaranteed by the constitution. In the discharge of that constitutional role, the South African inherited legal culture would seem to hinder a free flow of that assignment. The South African legal culture has to a considerable extent, been influenced by Anglo-Saxon legal culture of classical liberalism and the result is unfavourabble disposition towards socio-economic rights.[80] Further to that is the conservatism of the South African judiciary; its abiding faith in legal positivism and a culture of almost total deference to the executive until 1994. Pieterse[81] opines that having regard to the fact that "a large proportion of South Africa's legal fraternity were schooled in the legal culture" above described, one can then appreciate why the judges are certain "to feel ideological discomfort with enforcing socio-economic rights and to attempt instinctively to it by deferring to the legislative and executive branches in social/political matters." This paper submits that caution seems to be the golden thread that runs through the gamut of cases decided by the South African Courts, particularly the Constitutional Court.[82]

Mubangizi[83] notes that the constitutional protection of socio-economic rights in South Africa has to be seen in the context of the debate that has often characterised the justiciability of such rights. It is important to note that the inclusion of socio-economic rights in the South African Bill of Rights was not contested. Some argued that socio-economic rights were inherently non-justiciable and not suited to judicial enforcement.[84] It was further argued that the protection of such rights ought to be a task for the legislature and executive, and that constitutionalising them would have the inevitable effect of transferring power from these two branches of government to the judiciary, which lacks the democratic legitimacy necessary to make decisions concerning

[80] Z Motala, 'Socio-economic Rights, Federalism and the Courts: Comparative Lessons for South Africa' (1995) 112 South African Journal on Human Rights 68
[81] *Pieterse* (n 83) 399
[82] Such cases include *Soobramoney v Minister of Health, Kwazulu Natal* (1992) 1 SA 765 (CC) and *Government of the Republic of South Africa v Grootboom* (2001) 1 CHR 26; 2001 (1) SA 46(CC).
[83] **J** Mubangizi, 'The Constitutional Protection of Socio-economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 African Journal of Legal Studies II
[84] **J** De Waal, I Currie and G Erasmus, *The Bill of Rights Handbook* (4th edn Juta & Co. Ltd, Kenwyn 2001) 433

allocation of social and economic resources.[85] Devenish[86] however, on his part, argues that there was no principled objection to the inclusion of socio-economic rights in a justiciable bill of rights and that the vital issue was the extent and nature of their inclusion.

The above contentions were considered in the *First Certificate Judgment*[87] in which the Constitutional Court held that although socio-economic rights are not universally accepted as fundamental rights, they "are at least to some extent justiciable; and at the very minimum can be negatively protected from invasion."[88] The Court conceded that socio-economic rights might result in courts making orders that have direct budgetary implications, but hastened to point out that the enforcement of certain civil and political rights would often also have such implications.

The other aspect of the socio-economic rights debate revolves around the fact that the protection of such rights is dependent on the availability of resources. It is further argued that it is meaningless to provide for such rights without the resource capacity to ensure their protection. It is therefore no surprise that the issue of availability of resources has been raised in all cases that have come before the Constitutional Court involving socio-economic rights. Suffice it to say that although the court initially stuttered in its decision in *Soobramoney v Minister of Health, Kwazulu Natal*,[89] it was later to redeem itself in the subsequent decisions in *Government of the Republic of South Africa v Grootboom*,[90] *Minister of Health and Others v Treatment Action Campaign Others*[91] and *Khosa v Minister of Social Development*.[92]

In all the aforementioned cases, the Constitutional Court consistently jettisoned the State's argument of resource constraints. In so doing, the court aligned with the United Nations Committee on Economic Social and Cultural Rights which on its part noted that:

> In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to

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[85] *Mubangizi* (n 92) 119
[86] G Devenish, *A Commentary on the South African Bill of Rights* (Butterworths, London 1999) 358
[87] *Exparte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* (1996) 1996 (4) SA 744 (CC)
[88] Ibid paragraph 78
[89] 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696
[90] 2001 (1) SA 46 (CC)
[91] 2002 (5) SA 703 (CC)
[92] 2004 (6) SA 505 (CC)

> use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[93]

This paper submits that in the light of the decisions of and the pronouncements by the Constitutional Court, the socio-economic rights debate in South Africa has therefore now been settled.

8. Judicial Application of Socio-economic Rights in Nigeria

The first Nigerian Constitution to make provision for Fundamental Objectives and Directive Principles of State Policy was the 1979 Constitution of Nigeria in its Chapter II. The draft Constitution that was a precursor to the 1979 Constitution was the result of a work by a Constitution Drafting Committee. When the Committee concluded its assignment in 1976, the Daily Times, a foremost newspaper in Nigeria, at the time sponsored debates and symposia on the Draft Constitution which took part in several centres all over the country from December 1976 to May 1977. The outcome of the exercise was later published.[94] Chapter II of the Draft Constitution made provision for what it described as the "Fundamental Objectives and Directive Principles of State Policy."

A bit of history behind Chapter II is found in the report of the sub-committee on National Objectives and Public Accountability of the Constitution Drafting Committee (CDC). The sub-committee as chaired by Ben Nwabueze had the first three articles which stated as follows:[95]

> Article 2: Any person may apply to a court of competent jurisdiction for a declaration whether any law or action of an organ or authority of the State or of a person performing function on behalf of the organ or authority of the state is in accordance with the Directive Principles of State Policy.
> Article 3: A declaration by the Court that a law or other action is not in accordance with the Directive Principles shall not render the law or other action in question invalid to any extent whatsoever and no other action shall lie against the state, any organ or authority of the state or any person on this ground.
> Article 4: A declaration by the court that the state or any organ thereof is not complying with the Directive Principles shall nevertheless be ground for the impeachment of the appropriate

[93] General Comment 3, The Nature of States parties obligations (Article 2 paragraph 1 of the CESCR) (5th Session, 1990)
[94] W Ofonagoro, A Ojo and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 19760-1977* (Daily Times of Nigeria, Lagos 1977)
[95] Report of the Constitutional Drafting Committee Volume II, (1976) 38

> functionaries in accordance with the provisions of the Constitution in that behalf.

The sub-committee claimed that the provisions in the Indian and Pakistani Constitutions had served as their models and that they derived assistance from the United Nations Charter and the International Convention on Economic, Social and Cultural Rights.[96] The provisions recommended by the sub-committee were far-reaching than that of the Indian and Pakistani Constitutions. They were novel and radical. Article 2 thereof clearly provides for the justiciability of Chapter 2 of the Draft Constitution on Directive Principles. Article 4 provides for sanctions, albeit the impeachment of the appropriate functionaries against whom a declaration was made for not complying with the Directive Principles. The impeachment was to be in accordance with the provision of the Constitution in that behalf. Interestingly, rather than the above recommendation of the said sub-committee being adopted as such, a watered-down version found its way into the Draft Constitution as Section 7(2) and it states *viz*:

> Section 7(2), subject to the provision of subsection[97] of this section, no court of law shall have the power to determine any issue or question as to whether any action or omission by any person or authority, or as to whether any Law or any judicial decisions is in conformity with this Chapter of the Constitution.

The chapter on directive principles in general, and Section 7(2) in particular, were the subject of intense debates by Nigerians. According to Jinadu,[98] "the provisions of the Draft Constitution in Fundamental Objectives and Directive Principles of State have elicited the most acrimonious and intellectually stimulating discussion." The Student Union of Ahmadu Bello University, Zaria contended that the non-justiciability clause was "undemocratic and open to abuse."[99] The students' body suggested that Section 7(2) should either be deleted or the whole chapter expunged from the constitution. Awolowo[100] described the

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[96] Ibid

[97] Section 7 (3) of the Draft Constitution exempts the application of section 7(2) from sections 13 and 17 which deal with Directive on Local Government System and Prohibitions of State Religion.

[98] *Jinadu* (n 106)

[99] *Ojo* (n 106) 403-41

[100] O Awolowo, 'My Thoughts' in W Ofonagoro, A Ojo and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976-1977* (Daily Times of Nigeria, Lagos 1977)

chapter as "a radical and enlightened innovation." The sage went on to argue that "the quality of the social objectives is destroyed and the provisions under Chapter II for those objectives are reduced to worthless platitudes by Section 7(2)(3) of the Draft."[101]

Ojo[102] opined that the inclusion of the directive principles in the Draft Constitution had compromised the seriousness of the constitution, thereby unwillingly inviting cynicism. He advocated that they be expunged and left to where they appropriately belong, that is, party political manifestoes. Nwabueze,[103] however, in reaction to what he called "this whole bogey about the objectives not being judicially enforceable" argued that: "a constitutional duty has an inherent sanction by the mere fact that it is commanded by the constitution. It has moral, educative and psychological force for both the rulers and the governed, which is perhaps more important than the sanction of judicial enforcement."[104]

If that is so, then this paper wonders why the sub-committee under Nwabueze recommended limited justiciability in the first place. This paper submits that in so far as the rulers and the governed know that a constitutional duty is bereft of any enforceability or justiciability, it will neither command any inherent sanction nor any moral or psychological force. The tendency will be to treat it as a mere declaration, pious wish and cosmetic emblem. The Nigerian Tribune commented that the non-justiciability clause has rendered "the entire chapter useless to both the government and the people."[105] Sani[106] considered the chapter "one of the most striking and commendable innovations," although he thought that the title was clumsy. He noted that the "chapter no doubt attempts to spell out the ideological goals of this nation but regrettably does so in a rather evasive and half-hearted manner presumably because of the morbid fear held in some elitist quarters for any declarations of social values that have Marxist semblance or socialist exhortations."[107] For

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[101] Ibid 43
[102] *Ojo* (n 106) 48
[103] B Nwabueze, 'Where Dr. Ojo Misfed' in W Ofonagoro, A Ojo and Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976-1977* (Daily Times of Nigeria, Lagos 1977) 54
[104] Ibid
[105] Nigerian Tribune 'Tribune Comment on Fundamental Objectives' in W Ofonagoro, A Ojo and Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976-1977* (Daily Times of Nigeria, Lagos 1977) 55
[106] H Sani, 'Fallacies of the Nigeiran Draft Constitution' in W Ofonagoro, A Ojo and A Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976-1977* (Daily Times of Nigeria, Lagos 1977) 59
[107] *Sani* (n 106) 61

Emovon,[108] the chapter "constitutes a bold step to planned economy and stability."

A constituent assembly whose membership was party appointed and partly elected was set up to deliberate on the Draft Constitution. It was further mandated to receive and collate public comments and debates on the Draft Constitution on 29 August 1978. The Assembly made no fundamental changes to the Draft Constitution.[109] The Supreme Military Council, the principal organ of the ruling military junta, on receipt of the Draft Constitution, arbitrarily inserted several new provisions before it took effect on 1 October 1979 as the Constitution of the Federal Republic of Nigeria. Section 6(6)(c) of the 1979 Constitution was to the effect that:

> The judicial powers vested in accordance with the foregoing provisions of this section –(c) shall not, except as otherwise provided in this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.[110]

The above provision has been retained in the present 1999 Constitution also as Section 6(6)(c). Ojiaku [111]uncharitably described the above clause as "a sermon from the pulpit to be listened to and observed or regarded as mere rhetorics according to the dictates of one's conscience." Section 4(2) of the 1999 Constitution confers on the National Assembly the power to make laws for the peace, order and good governance of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative list set out in Part I of the Second Schedule to the Constitution. Item 60(a) in the Exclusive Legislative List prescribes "the establishment and regulation of authorities for the Federation or any part thereof –(a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in the Constitution." After referring to the said item 60(a), Uwais strenuously canvassed as follows:

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[108] E Emovon, 'Fundamental Objectives and Directive Principles and Public Accountability'in W Ofonagoro, A Ojo and Jinadu (eds), *The Great Debate: Nigerian Viewpoints on the Draft Constitution, 1976-1977* (Daily Times of Nigeria, Lagos 1977) 62

[109] V Motton-Migan, *Constitution Making in Post-Independence Nigeria: A Critique* (Spectrum, Ibadan 1994) 67

[110] Section 7(2) of the Draft Constitution was replaced with this provision by the Constituent Assembly

[111] G Ojiaku, *In the Name of Justice* (African Perspective publishing, Lagos 1997) 10

> The breathtaking possibilities created by this provision have sadly been obscured and negated by non-observance. This is definitely one avenue that could be meaningfully exploited by our legislature to assure the betterment of the lives of the masses of Nigerians, whose hope for survival and development in today's Nigeria have remained bleak, and is continuously diminishing. The utilization of this power would ensure the creation of requisite bodies to oversee the needs of the weak and often overlooked and neglected society. It would also provide a unique and potent opportunity for our legislators to monitor and regulate the function of these bodies, where Executive, for reasons best known to it, fails or neglects to prioritise and implement the provisions of chapter I and by extension, the welfare of all Nigerians.[112]

This paper aligns with the submission of Uwais above. This paper submits that besides the legislature in Nigeria scarcely ever being productive as a result of being a rubber-stamp of the executive arm of government, members of the Nigerian parliament, whether at the state or national level, only sponsor Bills that advance their selfish objectives as opposed to those that will advance the welfare, interest as well as command the attention of the generality of the Nigerian populace.

The case of *Attorney-General, Ondo State v Attorney-General of the Federation and Others*[113] presented the Supreme Court of Nigeria, with the first opportunity to examine the provisions on the Fundamental Objectives and Directive Principles of State Policy in the 1999 Constitution of Nigeria as well as the attitude of the Nigerian Supreme Court thereto. The Corrupt Practices and Other Related Offences Act No. 5 of 2000 came into force on 13 June, 2000. This legislation sought to prohibit and prescribe punishment for corrupt practices and other related offences throughout the Federal Republic of Nigeria. To implement its aims, the Act established a body known as Independent Corrupt Practices Commission (ICPC).

By an originating summons filed in the Supreme Court on 16 July 2001, invoking the apex court's original jurisdiction under Section 232(1) of the 1999 Constitution, the plaintiff, the Attorney General of Ondo State sued the Attorney General of the Federation. The Chief Law Officer joined other 35 Attorneys-General of the States as parties because their fights

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[112] M Uwais, 'Fundamental Objectives and Directive Principles of State Policy: Possibilities and Prospects' in C Nweze (ed), *Justice in the Judicial Process: Essays in Honour of Honourable Justice Engene Ubaezonu* (Fourth Dimension Publishing Company, Enugu 2002) 179

[113] (2002) 9 NWLR (Pt. 772) 222

were likely to be affected by the action. He asked for certain reliefs, principally that in Nigeria. The plaintiff's main contentions summarily, were that the Act is not in respect of a matter or matters either in the Exclusive Legislative List or the Concurrent Legislative List and as such, unconstitutional. Also, that the National Assembly had no power to make laws with respect to the criminal offences contained in the Act, and that sections 26(3), 28, 29, 35 and 37 of the Act are unconstitutional, void and of no legal effect whatsoever.[114]

Section 15(5) of Chapter II of the 1999 Constitution of Nigeria on Fundamental Objectives and Directive Principles of State Policy, states that the State shall abolish all corrupt practices and abuse of power. The provision of item 67 of the Exclusive Legislative List provides that: "Any other matter with respect to which the National Assembly has power to make law in accordance with the provisions of this Constitution." Item 68 on its part provides: "Any matter incidental or supplementary to any matter mentioned elsewhere in this list." Section 4 deals with the legislative power of the National Assembly.

The Court held that reading the above provisions of the Constitution together and construed liberally and broadly, it can easily be seen that the National Assembly possesses the power both "incidental" and "implied" to enact the said Act to enable the State, which for this purpose means the Federal Republic of Nigeria, to implement the provisions of Section 15(5) of the Fundamental Objectives and Directive Principles of State Policy. Under the provisions of Section 3 of the Corrupt Practices and other Related Offences Act, the Independent Corrupt Practices Commission (ICPC) was established with the powers to implement the provisions of the Act, both penal and otherwise.

What the National Assembly did by the promulgation of the Act was geared towards the eradication of corruption and corrupt practices in Nigeria. It was also an effort aimed at promoting and enforcing the observance of the provisions of Section 15(5) of the 1999 Constitution.[115] Uwaifo JSC in his lead judgment, held that having cognizance of item 68 of the Exclusive Legislative List:[116]

> ...it is incidental or supplementary for the National Assembly to enact the law that will enable the ICPC to enforce the observance of the Fundamental Objectives and Directive Principles of State Policy. Hence the enactment of the Act contains provisions in

[114] Ibid
[115] (2002) 9 NWLR (Pt 772) 222, 312 paragraphs F-H, *per* Wali JSC
[116] Ibid 305 paragraphs E - F

> respect of both the establishment and regulation of ICPC and the authority for ICPC to enforce the observance of the provisions of Section 15 subsection 5 of the Constitution. To hold otherwise is to render the provisions of item 60(a) idle and leave the ICPC with no authority whatsoever.[117]

Uwaifo JSC furthermore, in his concurring judgment, extensively dealt with the issue of Fundamental Objectives and Directive Principles of State Policy *viz*:

> As to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy in Chapter II of our Constitution, section 6(c) says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of state organs if they acted in clear disregard to them, the nature of the consequences of which having to depend on the aspect of the infringement and in some cases the political will of those in power to redress the situation. But the Directive Principles (or some of them) can be made justiciable by legislation.

Uwaifo JSC went on to point out that not every section under Chapter II is suitable for legislative input which would result in sanctions, whether penal or compensatory for its breach.[118] He referred to the Indian case of *The State of Madras v Champakam*[119] wherein the Indian Supreme Court held that "the Directive Principles of State Policy have to conform to and run subsidiary to the Chapter on Fundamental Rights. That is the correct way in which the provisions found in parts III (Fundamental Rights) and IV (Directive Principles) have to be understood."[120] Having regard to the Indian situation as represented in *the State of Madras v Champakam(supra)*,Uwaifo JSC then said:

> Whatever was necessary was done (in India) to see that they (Directive Principles) are observed as much as practicable so as to give cognizance to the general tendency of the Directives. It is necessary therefore to say that our own situation is of peculiar significance. We do not need to seek uncertain ways of giving effect to the Directive Principles in Chapter II of our Constitution. The Constitution itself has placed the entire Chapter II under the Exclusive Legislative List. By this, it simply means that all the

[117] Section 15(5) of the Constitution Provides that the state shall abolish all corrupt practices and abuse of power.
[118] (n 125) 383 paragraph G
[119] (1951) SCR 525
[120] Ibid 531

> Directive Principles need not remain mere or pious declarations. It is for the Executive and the National Assembly working together, to give expression to anyone of them through appropriate enactment as occasion may demand. I believe that this is what has been done in respect of section 15(5) by the present Act.[121]

In the final result, the claim was only partially successful and/or sustainable because the Supreme Court struck down as being unconstitutional, Section 26(3) of the ICPC Act which placed a time limit within which to conclude the prosecution of an offence. The court meted out the same fate to section 35 for violating the constitutional provisions on personal liberty. On the whole, the ICPC Act was saved as it is a legislative enactment that gives force to Section 15 (5) of the Fundamental Objectives and Directive Principles of State Policy. This paper submits that there are some salient issues arising from the Supreme Court judgment above, particularly Uwaifo JSC's concurring judgment which ought to be herein examined. The reference to *Champakan Case* in order to capture the Indian situation, it is hereby submitted with the greatest respect, is not quite appropriate. This is so because *Champakan Case* which was decided in 1951 does not quite represent the current state of affairs in India. This paper earlier on considered several Indian cases[122] that were decided in the 1970s when the Indian judiciary initiated the jurisprudence of Public Interest Litigation (PIL).

9. Conclusion

It is the contention of this paper that it is possible and practicable for Nigerian Courts to accommodate the notion of a strong interpretative obligation which is namely to construe municipal law consistently with international law, including unincorporated conventional approaches. The liberal attitudes of the African Commission and such municipal judicial institutions like the South African Constitutional Court as well as Indian Supreme Court are inspirational catalysts especially in the light of a country like Nigeria where there are no constitutional guarantee of socio-economic rights or put differently, where these rights are relegated to the mere appellation of fundamental objectives and directive principles of state policies.

This paper submits that even when allowances have been made for judicial creativity, problems yet remain on the application of judicial

[121] *Ibid* paragraphs E-H

[122] They are as captured in VI of this paper.

remedies to socio-economic rights including questions of judicial competency and accountability. Judicial decision with large scale budgetary effects are problematic, creating tensions with democratic self-governance. Decisions about healthcare funding involve difficult decisions at the political level and functional levels – fixing the health budget and deciding what priorities should be met. Lester and O'Cinneide[123] share in this concerns to wit:

> There are limits to what can be achieved by the judicial process in implementing fundamental rights. Courts cannot provide a remedy for every injustice. Judges lack the constitutional authority as well as the expertise to make political decisions about the raising and disposition of public revenue, or as to how public programmes should be designed and executed. The judicial branch cannot arrogate to itself the roles of the legislature or executive branches without usurping their separate and distinct public powers.

The limits of the judicial process *vis-à-vis* socio-economic rights also finds credence to the end that it is not the function of a court to govern a country like Nigeria. The courts, conscious of this limitation in deploying the judicial process to advance socio-economic rights, appear to be avoiding going into detailed determination of policy and practice. It therefore could be reasonably assumed that the courts could continue to define and observe appropriate parameters of the judicial function.[124] While being sensitive to separation of power concerns, the court in the *Minister of Health v Treatment Action Campaign* [125]reiterated the standard for judicial review thus:

> Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging

[123] L Lester and C O'Cinneide, 'The Effective Protection of Socio-Economic Rights in Y Ghai and J Cottrell (eds), *Economic, Social and Cultural Rights* (Routledge, London 2004) 15

[124] A An-Naim, 'To Affirm Full Human Rights Standing of Economic, Social and Cultural Rights' in Y Ghai and J Cottrell (eds), *Economic, Social and Cultural Rights* (Routledge, London 2004) 7

[125] Tac Case (2002) 5 SA 721 (CC)

> budgets. In this way, the judicial, legislative and executive function achieve appropriate constitutional balance.[126]

In the *Soobramoney Case*, the issue was whether a public hospital had violated the South African Constitution for failing to provide renal dialysis services to a terminally ill man who suffered from diabetes, ischemic heart disease and cerebro-vascular disease. Soobramoney claimed that the hospital's refusal to treat him violated his right to health care and emergency medical treatment.[127] The South African Constitution provides that "everyone has the right to life" and that "no one maybe refused emergency medical treatment."[128] The hospital had produced evidence before the court that it prioritised treatment for non-terminal patients because dialysis was a scarce resource. The court jettisoned the claimant's "emergency" contention.[129] Relying on the *Unification Case*,[130] the court's reasoning was that the claim fell squarely under a more relevant sphere of access to healthcare facilities, also guaranteed in the Bill of Rights. It however noted that obligations imposed on the state with respect to those rights were dependent on available resources and that in the context of South Africa, an unqualified obligation "to meet the health care and other needs would not presently be capable of being fulfilled."

The court rejected the "broad construction" argument that emergency medical care included ongoing treatment of chronic illness. It was also the holding of the court that such a construction would make it "substantially more difficult for the state to meet its primary obligation under sub-section(1) and (2) to provide healthcare services to everyone within its available resources and that "it would reduce the resources available to the state for purposes of preventive healthcare and treatment of diseases." In his concurring judgment, Justice Sachs noted that rights, by their very nature, are shared and independent on available resources and that in the context of South Africa, an unqualified obligation "to meet the health care and other needs would not presently be capable of being fulfilled."[131]

The court rejected the "broad construction" argument that emergency medical care included ongoing treatment of chronic illness. It

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[126] Ibid
[127] Section 27 (3)
[128] Ibid
[129] (198) paragraph 2
[130] Ex-parte *Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744.
[131] (n 98) paragraph II

was also the holding of the court that such a construction would make it "substantially more difficult for the state to meet its primary obligation under subsection (1) and (2) to provide health care services to everyone within its available resources" and that "it would reduce the resources available to the state for purpose of preventive healthcare and treatment of diseases."[132] In his concurring judgment, Justice Sachs noted that rights, by their very nature, are shared and independent, meaning that a court is obligated to strike appropriate balances between the equally valid entitlements or expectations of a multitude of claims. Such an exercise, according to him, ought not be seen as imposing limits on those rights but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.[133]

After the *Soobramoney decision*, some scholars feared that the Constitutional Court would render the rights provisions in the South African Constitution ineffective.[134] Other scholars, however, argue that from the standpoint of judicial precedent, *Soobramoney* did not contribute much to the understanding of socio-economic rights, neither did it "lay down any guidelines that could be followed when interpreting socio-economic rights so as to illuminate and indigenise the jurisprudence on socio-economic rights."[135] This paper, however, submits that the court was simply balancing competing interests and in the process, dispelling fears about its inability to make policy choices in constitutional interpretation and its application to socio-economic rights. It is noteworthy that the court successfully blended consideration of benefits and costs and simple cost efficiency within a policy perspective with attention to its limited institutional competence to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[136] The state, the court stressed, must "manage its limited resources" in order to address the many claimants in need of access to healthcare, housing and social security as well as all aspects of the rights to human life.[137] *Soobramoney* illustrates that a constitutional court can satisfactorily navigate its way through socio-

[132] (n 98) paragraph 20

[133] (n 98) paragraph 54 arguing in relation to intervention by court on such matters that ("institutional incapacity and appropriate constitutional modesty require us to be especially cautious")

[134] E Bazelon, 'After the Revolution' (2003) 25 Legal Affairs 28; F Michelman 'The Constitution, Social Rights and Reason: A tribute to Etienne Mureinik (1998) 14 South African Journal of Human Rights 499

[135] *Ngwena* and *Cook* (n104) 135-7

[136] (n 98) paragraph 29

[137] (n 98) paragraph 31

economic rights claims without violating separation of powers and legislative competence.[138] Another self-limitation on the judicial process is the imperative of maintaining uniformity and predictability to enable litigants and advocates alike rely on the continued application of the same rules.

10. Recommendations

This paper hereby makes the following recommendations:

1. Since human rights are universal, indivisible, interdependent and interrelated, the separation of civil and political rights and economic, social and cultural rights in the Nigerian 1999 Constitution (as amended) ought to be removed through constitutional amendment. Such constitutional amendment would be with the view of bringing the provisions of Chapter II of the Constitution under Chapter IV of the same Constitution. Not only shall such an amendment accord socio-economic rights the same status, vigour, strength and vitality as civil and political rights, it shall also address the controversy about the non-justiciability of socio-economic rights in Nigeria.
2. To make socio-economic rights pragmatic and not esoteric, the courts must take up the gauntlet of adopting the ideology of a broad and progressive interpretative approach to the Constitution to the end of making Chapter II of the Nigerian 1999 Constitution justiciable. Judicial conservatism should pave way for judicial liberalism as far as the justiciability of socio-economic rights is concerned, not just because "there is nothing in law to conserve when the citizens are suffering from poverty, hunger, unemployment etc,"[139] but also because "a narrow interpretation straight-jacketed on the fear of a judge not being a legislator into the confines of words which might even be equivocal is with respect, a negation of the true essence of justice."[140]
3. The philosophical obscurantism about the nature of socio-economic rights which has accentuated the problem of justiciability of socio-economic rights by stunting the growth and pace of efforts at realising socio-economic rights can be checked through current global economic

[138] M Kende, 'The South African Constitutional Court's Embrace of Socio-economic Rights: A Comparative Perspective' (2003) 6 Chapman Law Review 137, 147.
[139] C Okeke (ed.), *Towards Functional, Justice: Seminar Papers of Justice Chukwudiju A. Oputa* (Gold Press Ltd., Ibadan 2007) 5
[140] *Per* Eso in *Fawehinmi v Akilu* (1987) 4 NWLR p. 848

realities which hint at the imperatives of pursuing a socio-economic agenda for the upliftment of the materially poor in societies.[141]

4. Minimum content rights principle should be applied to the enforcement of socio-economic rights as that would serve as a yardstick for the courts to adjudge the level of commitment and seriousness to socio-economic rights.
5. The successful enforcement of socio-economic rights does not automatically translate into a process of social transformation and as such, the judiciary should not run the risk of spreading its effectiveness and contribution too thin so as to threaten its already secured role in the enforcement of socio-economic rights.
6. The role of the judiciary should always remain effective in whatever it is conceived of as being legitimate and capable of doing. The judiciary should retain and build on its role in enforcing socio-economic rights. As long as this is achieved, it will keep the hopes of millions of vulnerable and marginalised communities and individuals in Nigeria and the world over alive.

There is an urgent need to challenge the popular belief amongst judges, jurists, lawyers and human rights crusaders that socio-economic rights are not justiciable in Nigeria. This can be achieved through adequate advocacy, sensitisation, re-orientation and capacity building among all the stakeholders involved.

[141] P O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7 Human Rights Law Review 483

Legal Measures for Combating Electoral Malpractices in Nigeria

*Uwemedimo Otung**

Abstract
This paper interrogates the role of the law in curbing electoral malpractices in Nigeria. In Nigeria, the electoral process dates back to 1923, after elective principle was introduced under the the Clifford Constitution of 1922. Ever since, electoral malpractices have manifested in many ways in Nigeria's electoral process. Electoral malpractices manifests in many ways such as multiple and under-aged registration in the voter's register, bribing of electoral officers, intimidation of voters, vote merchandising, falsification of election result, creation of illegal polling unit, snatching of ballot materials, stuffing of ballot boxes and declaration of a loser as a winner among other infractions. Electoral malpractices have produced governments with questionable legitimacy as they are not a product of popular will of the electorate. This has resulted in apathy among the electorate as perpetrators of electoral malpractices are not prosecuted. The paper recommends, among other things, transparent and competitive process in the recruitment of electoral officers to superintend elections in Nigeria.

1. Introduction

The history of electioneering in Nigeria dates back to 1923 consequent upon the introduction of elective principle under the 1922 Constitution of Sir Hugh Clifford. The principle provided for one seat for Calabar and three seats for Lagos in Legislative Council. By this pioneering initiative, politics and politicking made their debut in the Nigerian Nation. The 1922 elective principle provided for 12 months residential qualification in the two areas the principle covered. The other conditions were that eligible voters must be British protected persons or subjects and 100 pounds financial qualification. The Clifford's principle held sway till 1959 General Elections when the whole country was unified into a single electoral system. During the hegemony of the elective principle, electoral malpractices were limited to falsification of residency of a person in Calabar or Lagos.[1] Electoral malpractices in the 1959 general elections

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[1] S Edeh, *Nigerian Colonial Constitution* (Spectrum Books 2015) 82.

which ushered in Nigerian Independence was fraught with multiple registration in the roll and multiple balloting. This trend was also the posture that characterized the 1964 general election.

The 1979 and 1983 general elections which were conducted under universal adult suffrage expanded the frontiers of electoral malpractices in Nigeria. The elections were marred by voter registration infractions such as double or multiple registration, underage voting, multiple voting, voter intimidation, thuggery, falsification of result and destruction of some public infrastructure following the announcement of election results.[2] The 1993 general election which was annulled without a declaration of a winner was widely acclaimed to have represented the will of the electorate. The election was conducted under 'Option A4' ballot system which was a departure from the secret ballot system. Option A4 system required voters to queue behind posters of the candidates they desired to vote for. Although option A4 model was a radical departure from international best practice in the conduct of elections, Nigerians were satisfied that the system made the ballot to count.[3] Despite this transparency, there were prevalence of electoral malpractices in the form of underage registration, vote merchandising and falsification of results during collations.[4] The elections between 1999 and 2023 experienced electoral malpractices in a higher degree and sophistication. Bribing of electoral officers, underage and multiple registration in the voters register, intimidation of voters, vote buying including dollarization of payment system, falsification of election results, declaration of a loser as the winner, creation of illegal polling unit, snatching of ballot boxes and ballot papers and stuffing of ballot boxes among many other infractions marked the elections.[5] Electoral malpractices have therefore been a persistent and recurring feature in Nigeria's electoral process prior and after independence.

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[2] F Okoye, *The Prosecution of Electoral Offenders in Nigeria: Challenges and Possibilities* (Friedrich-Ebert-sifting 2013) 3-9.
[3] O Bamisaye and O Awofeso, *Democracy and Democratic Practice in Nigeria: Issues, Challenges and Prospects* (MacGrace Publishers 2011)108.
[4] D Uduma and E Emerole, 'The Effect of Electoral Malpractices on the Sustenance of Democracy in Nigeria' (2015) 5, *International Journal of Advance Legal Studies and Governance*.
[5] B Sule, 'The 2019 Presidential Election in Nigeria; An Analysis of the Voting Pattern, Issues and Impact' (2019) 5(2) *Malaysian Journal of Society and Space* 129-140.

2. Nature of Electoral Malpractices

Electoral malpractice generally refers to an instance where acceptable norms and principles that confer credibility on elections are desecrated and in their stead, falsehood, manipulation and cheating by any means are deployed to sway the outcome of elections. Electoral malpractices are illegalities committed by government officials responsible for the conduct of elections, political parties, groups or individuals with sinister intention to influence an election in favour of a candidate.[6]

Electoral malpractices are a recurrent decimal in the annals of history of elections in Nigeria save that the degree varied and continues to vary from one election to another. Before independence in 1960, Nigeria which existed as the amalgamation of two protectorates (North and South) since 1914 witnessed many elections. The September, 1923 election in Calabar and Lagos following the introduction of Clifford Constitution of 1922 was the first one. In the election, the only seat for Calabar was won by Improvement League while the three seats for Lagos in the legislative council were won by the Nigeria National Democratic Party (NNDP). The second and third elections in 1928 and 1933 were won by the NNDP both in Calabar and Lagos. Subsequent elections were held between 1938 and 1943 under the Clifford's elective principle until 1946 election which was conducted under the indirect system based on Sir Arthur Richard's Constitution. The 1959 general election was held across 312 single member constituencies nationwide. The 1964 election may be said to be one where outright malpractice began.[7]

The Northern Peoples Congress (NPC), being the party controlling the central government influenced the arbitrary abductions, arrest, detention and intimidation of opponents. Evidence of these illegalities was submitted to the President by United Progressive Grand Alliance (UPGA) demanding for the postponement of the elections but the government refused. Despite the boycott of the elections by UPGA, the NNDP without the participation of opposition political parties claimed victory in the West and forcefully retained power amidst crisis.[8] The September, 1978 election was not different from the 1964 election as it was characterised by ethnic colouration of the political parties, regional politicking and unhealthy political parties' rivalry. The 1983 election result indicated

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[6] E Ezeani, 'Electoral Malpractices in Nigeria' in G Onu and A Monoh (eds), *Election and Democratic consolidation in Nigeria* (1st edn Spectrum Publishers 2016) 415.
[7] B Powel, *Elections as Instruments of Democracy.* (Yale University Press 2000) 78.
[8] A Gboyega and Y Aliyu, *Nigeria Since Independence*: (Heineman Educational Books (Nig) Ltd 1989) 211.

that the National Party of Nigeria (NPN) had transformed itself into a super power as other political parties alleged that the process was massively rigged to give the NPN a second term in power.[9] Electoral malpractices constitute a variety of all illegal and unethical acts perpetrated to give electoral advantage to a candidate or a political party. They therefore relate to all manner of actions and conducts carried out by non-state and state actors in the electoral process.

3. Forms of Electoral Malpractices in Nigeria

Electoral malpractices constitute one of the most serious problems confronting democracy in Nigeria. A detailed study of electoral malpractices in Nigeria reveals its intensity, pervasiveness and various forms.[10] Electoral malpractices pertaining to infringement of Electoral law include quasi-military organisations, voting by unregistered persons, registrations of under-aged persons as voters, voting by under-aged persons, impersonation in polling stations, misconduct in respect of ballot papers and ballot boxes among others. Generally, malpractices under this model are those malfeasance which have been cognizable under the Electoral Act and enshrined as Electoral Offences.

Another form of electoral malpractice is the one relating to improper and unethical infringements. This includes possession of voters cards of other voters, assaulting election officials, collecting money to issue voters cards to the owners, bribery, arrest of opposition members, multiple voting, forgery of election results, creation of illegal polling stations, forcing voters to cast their ballot outside their conscience and all other acts done to give advantage to a candidate over other contestants.[11] Where an unethical act has been criminalized under the Electoral Act or any other Statute, the Act transmute to the first brand herein.

The third form of electoral malpractice relates to those wrong doings or improper conduct by the electoral umpire. The elements of this brand of electoral malpractices include such electoral malpractices by the Independent National Electoral Commission (INEC) officials as unlawful possession of ballot papers and boxes, illegal possession of voters cards, stealing of ballot boxes keys, stuffing of ballot boxes, falsification of results, forgery of result sheets, tampering with ballot boxes, unauthorised declaration or release of election results and any other act perpetrated by an electoral official for the purpose of giving advantage to

[9] ibid 213.
[10] E Ezeani, 'Electoral Malpractice in Nigeria: A case Study of 2003 General Elections' (2005) *Nigerian Journal of Sciences* 45
[11] JO Odeh, This Madness Called Election 2003 (Snaap Press Limited 2003)15.

a given candidate or pecuniary gains. The three forms of electoral malpractices reared their heads in all elections that have been held in Nigeria.[12]

4. Causes of Electoral Malpractices

A number of factors have been identified to be responsible for electoral malpractices in Nigeria and prominent among them is endemic poverty. It has been said that more than half of the people that engage in electoral malpractices find it difficult to comfortably eat what they like, dress well or live in a house they like. Virtually all the basic needs of life are difficult for them to attain because of their poor economic condition. As a result, they become ready-made instruments that can be used for any horrible assignment whether illegal in order to eke a living. Sometimes, poverty-ridden persons want to impress politicians by doing any unsavory act to show that they are ardent supporters and believers in the electoral contenders.

As at 2019, about 68.7 per cent of Nigerian graduates were unemployed while over 50 per cent live under average economic wellbeing. In 2022, the National Bureau of Statistics stated that 67.3 per cent of Nigerians were multi-dimensionally poor. It follows that more than half of the population of the nation is vulnerable to commit any electoral malpractice to eke a living. Thus, it is not unlikely for such poverty-ridden and unemployed Nigerians to quickly embrace the dangerous option of rigging election in exchange for survival.[13] Inadequate planning is also responsible for electoral malpractices and this is the case when political parties or candidates do not sufficiently prepare for elections. Electoral malpractices may also manifest when there is no sufficient readiness in terms of a political party sale of manifestoes. It can also be in the form of inadequate or late allocation of funds for campaigns or to the Independent National Electoral Commission. Consequently, candidates of political parties manipulate electoral process to be ahead of others without addressing the areas of deficiency. In respect of the INEC receiving election funds late, officials of the electoral umpire become susceptible to corrupt advances to gain advantage in their electoral pursuit. A great number of members of

[12] O Nnoli, 'The 1987 Local Government Elections in the Eastern Zone of Nigeria: Plateau, Benue, Anambra, Imo, Rivers, Cross River and Akwa Ibom State' in I Jinadu, E Ada and T Edoh (eds), *The 1987 – 1988 Local Government Elections in Nigeria*, Vol 1 case studies (National Electoral Commission Lagos: 1999)50.

[13] O Medea, 'Poverty and Nigeria Youth: Implication for the Country's Development (2019) 24(4) *Journal of Canadian Social Sciences* 34-54.

political parties engage in campaigns or attend party rallies for pecuniary gains and such uncommitted members can go extra miles when their expectations are not satisfied. What they do in such circumstance is to engage in rigging of any form to compensate for the funds earlier collected.[14] It is further contended that when a candidate is imposed on the electorate, electoral malpractices become inevitable. Candidates and their political parties desire to win elections even when they know that they are not embraced by the electorate.

It is also believed that electoral malpractices are facilitated by the absence of or poor political education as civic education is a necessary precursor to reduce electoral manipulation. When this is not sufficiently done, the consequent is bound to be in the negative. It is expedient to regularly keep political gladiators, political parties and the citizenry informed of the tenets of elections to engender free, fair and transparent electoral process. Electoral malpractices manifest in the absence of confident in the electoral system,[15] greed, abuse of political power, alienation, marginalization, exclusion and political economy of oil.[16] Penury and unemployment are also causal agents of electoral malpractices.[17] Other causal factors of electoral malpractices include ineffectiveness of security, culture of impunity, weak institutions and penalties, poor governance and proliferation of small arms and light ammunition.[18] Some other causes of electoral misconduct are expressed in partisanship of traditional rulers who are supposed to be the custodians of cultural heritage of the people, zero-sum politics, poor handling of election petitions, lack of faith in the judiciary, ideological bankruptcy in political parties, zero-tenure practice of some African leaders and the humongous emoluments paid to political office holders[19]

5. Effect of Electoral Malpractices in Nigeria's Democracy

Electoral malpractices are impediment to democratization process. Nigeria having had a bitter experience of massive electoral corruption since 1979, there are a myriad of ways the nation has been impacted by the problems created by the conduct of elections devoid of transparency.

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[14] ibid.

[15] M Aliyu, O Wakili and B Olukayode, 'Electoral Malpractice as A Challenge to Sustainable Development in Nigeria' (2020) 8(1) *Global Journal of Political Science and Administration* 15-25.

[16] O Igbuzor, 'Electoral Violence in Nigeria' (2009), papers accessed 22 February 2023.

[17] A Maslow, 'Theory of Human Motivation' (1954) 50 *Psychological Review* 338 - 339.

[18] J Galtunq, 'Violence, and Peace' (2011) *6 Journal of Peace Research* 167 -192.

[19] T Ugiagbe, 'Electoral violence in Nigeria: implications for security, peace and development' (6 September 2010) accessed 24 February 2023.

Electoral malpractices have adverse effect on democracy as they negate the essential purpose of elections as a basis for governance. A government which by electoral malpractices sustains itself in power against the wishes of the majority of the electorate is bereft of legitimacy.[20].

Electoral malpractices undermine a cardinal principle of democracy that the welfare of the citizenry is the primary objective of government. Election is the people's most effective weapon of making a government responsible and accountable. It is through election that the people are able to remove a bad government and install one that will promote their wellbeing. Knowledge of this fact makes every democratic government to be accountable. If a government sustains itself in power through electoral malpractice, performance becomes irrelevant in assessing the suitability of the government in another election. An administration can neglect the people's welfare, loot the nation's treasury and still manipulate itself back to power through electoral malpractices.[21]

Contest for elective positions is perceived as an investment. The effect is that the expenditure must be recouped once the contenders win elections and assume power. There is therefore a tendency for heightened looting of public treasury. It follows that dividends of democracy can never be delivered to the citizenry because money meant for public projects is diverted into private tills.[22] Other effects of electoral fraud are expressed in political protests, the debasement of political parties as a vehicle for peaceful transfer of power,[23] chaos, violence and anarchy.[24] There can also be arson, looting, displacement of families, turmoil among the people.[25]

6. Regulatory Framework for Combating Electoral Malpractices

It has been said that the Constitution of the Federal Republic of Nigeria 1999 as amended, the Electoral Act 2022 and Independent National Electoral Commission Regulations and Guidelines for the Conduct of

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[20] Nnoli (n 12) 67.
[21] Eziani (n 10) 45 – 47.
[22] **J** Ilo, 'Political Finance Regulation in Nigeria: the Legal Framework' in N Obiorah (ed), *Political Finance And Democracy in Nigeria: Prospects and Strategies for Reforms Centre for Law and Social Action Lagos* (Spectrum Books 2004) 84.
[23] T Aluaigba, 'The Irony of Democracy: the Nigerian experience 'in SF Kamilu (ed), *Democracy in Nigeria's Fourth Republic: Myths, Realities, Challenges And Prospects* (Trimph Publishing Company 2012) 103.
[24] E Obadare,'Democratic Transition and Political Violence in Nigeria' (2019) 16 *Journal of African Development 199 – 219.*
[25] O Ejigbile, 'Threat that Electoral Malpractices pose on the Innocents' (Paper Delivered at the Independent National Electoral Commission (INEC) Stakeholders Forum, Lagos, March 2nd – 4th 2015) 9.

Elections 2022 are the legal framework for curbing electoral irregularities in Nigeria.[26] Other than the three instruments, there are some statutes that though they are not solely electoral enactments, may be invoked to punish electoral offenders. A person may be prosecuted and convicted for electoral malpractices under Corrupt Practices and Other Related Offences Act 2004, Criminal Code Act 2020, Economic and Financial Crimes Commission (Establishment) Act 2004, Money Laundering (Prevention and Prohibition) Act 2022, Penal Code Act 2004 or under a State Independent Electoral Commission Law.

There are also subsidiary legislation which constitute the legal framework for curbing electoral malpractices in Nigeria. One is The Federal High Court (Pre-Election) Practice Directions 2022. Others are The Independent Electoral Commission Regulations and Guidelines for the Conduct of Elections 2022 and The National Judicial Council Policy Directions on Political and Election-Related Cases 2022. Nigeria is a member of United Nations as well as African Union and is bound to abide by their constitutive instruments and subservient Charter or Protocol. The African Union adopted African Charter on Democracy, Elections and Governance 2007. The objective is to promote electoral democracy and integrity. The United Nations had earlier adopted Universal Declaration of Human Rights in 1948. Judicial decisions on electoral matters by Courts and particularly those of the Court of Appeal and Supreme Court also constitute the legal framework for curbing electoral malpractices. Case law on electoral malpractices is on the same pedestal with legislative enactments and subsidiary legislations on the subject matter. Some of the laws are discussed herein.

6.1 Universal Declaration of Human Rights 1948

The Universal Declaration of Human Rights was made to be a non-justiciable international legal instrument intended as a compass for the promotion and protection of human rights among member – states of the United Nations. The non-justiciability of the instrument led to the making of Geneva International Convention on Civil and Political Rights and International Convention on Social, Economic and Cultural Rights.[27] These international instruments were made to have the force of law and captured the various subject matters which were recognized by Universal Declaration of Human Rights. However, Article 21 of the Declaration relating to the holding of free, fair and transparent elections is not reflected in any of the Conventions. It appears that matters pertaining to

[26] Okoye (n 2)11.
[27] ibid.

the raising of national leaderships have been left as exclusive preserve of individual state signatories to the Conventions.

6.2 African Charter on Democracy, Elections and Governance 2007

The lacuna that was consciously created under the Universal Declaration of Human Rights, International Convention on Civil and Political Rights and International Convention on Social, Economic and Cultural Rights was filled by the African Charter on Democracy, Elections and Governance. The Charter made copious provisions relating to the raising of representative government through the conduct of free, fair, transparent and credible elections.[28] Under the Nigerian jurisprudence, international legal instrument when ratified by the nation must be domesticated into the Nigerian legal system.[29] The Charter has not received the force of law having not been enacted by way of domestication. The Charter therefore does not operate as a law and there is a need for the National Assembly to domesticate the charter so that Nigeria can take the benefits accruable under the Charter.

6.3 Constitution of the Federal Republic of Nigeria 1999

Formal Constitutions were introduced in Nigeria from 1914 when Sir Lugard (later Lord Lugard) proclaimed the first colonial Constitution. Various imperial Constitutions operated thenceforth till 1960 when the Independent Constitution occupied the Nigerian constitutional space. The Republican Constitution of 1963 which consumed the hegemony of the British Monarch as the Head of State of Nigeria held sway till 1966 when the Military trespassed into the political arena.[30] The 1979 Constitution was proclaimed after thorough Constitutional preparations. A Constitutional Drafting Committee headed by Chief F.R.A William prepared the Draft document and same was reviewed by a Constituent Assembly chaired by Justice Udo Udoma. The Constitution guided the Second Republic until 1983 when another Military coup decimated the democratic administration.[31] Though the 1989 Constitution made debut, it had no opportunity to be tested of its provisions.[32]

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[28] African Union: African Charter on Democracy, Elections and Governance (2007) art 5, 17-22.
[29] U Umuzurike, *Introduction to International Law* (Spectrum Books 1999)17.
[30] I Udofa*, Nigerian Constitutional Law: A Comparative Approach* (Esquire Publishers, 2018) 83.
[31] ibid.
[32] ibid.

The Constitution of the Federal Republic of Nigeria, 1999 being the fundamental law of the land sets parameters and regulates the conducts of election in the polity.

Some of the salient parameters include:

(i) Section 78 which enshrines that the registration of voters and the conduct of the elections shall be subject to the direction and supervision of the Independent National Electoral Commission. This provision is also applicable to a House of Assembly as provided under Section 118 of the Constitution. [33]

(ii) Section 131 which provides for qualifications to the Office of the President as follows:
   (a) he is a citizen of Nigeria by birth;
   (b) he has attained the age of forty years;
   (c) he is a member of political party and is sponsored by that political party, and
   (d) he has been educated up to at least school certificate level or its equivalent.

The above provisions also apply to Governor of a State except that a Candidate to the Office of Governor must attain the age of 35 years as provided under Section 177 of the Constitution.[34]

(iii) Section 134(2) which enshrines that a candidate for an election to the office of President shall be deemed to have been duly elected where, there being more than two candidates for the election-
   (a) he has the highest number of votes cast at the election; and
   (b) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja. [35]

(iv) Section 153 which establishes INEC and insulates it from political interference.[36]

(v) Section 285(6) which provides that election petitions shall be heard and determined within 180 days from the date the action was filed.[37]

The Constitution has made significant provisions which are capable of ordering the electoral process aright. The challenge of the Nigerian nation in this regard lies in sincere and honest enforcement of the constitutional enshrinements. Section 134 of the grundnorm was recently applied and interpreted by the Court of Appeal sitting as

[33] (CFRN 1999) Cap C23 Laws of the Federation of Nigeria 2004.
[34] ibid.
[35] ibid.
[36] ibid.
[37] ibid.

Presidential Election Petition Court (PEPC). The Noble Court interpreted the Section wherein it held that the Federal Capital Territory (FCT) Abuja does not occupy a special status under Nigerian jurisprudence. It held further that it is not mandatory for a presidential candidate to muster 25 percent of the votes cast in the FCT before he could be declared winner of the election.[38] With respect, it is difficult to reason with their lordships that the FCT as presently structured in the Nigerian federation is like a State and does not have a special status. Nigerian States are governed by Governors[39] while the FCT is administered by the President[40] through a Minister.[41] Also, the legislative power of a State is vested in the House of Assembly[42] while the National Assembly legislates for the FCT.[43] From the aforesaid, it is undoubtedly clear that the FCT occupies a special status in the Nigerian federation. In interpreting Section 134(2) of the Constitution, the learned justices erred in law when they held that it is not mandatory for presidential candidate to record 25 percent of the votes cast in the FCT. The use of the expression "he has not less than one-quarter of the votes cast at the election in at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja" presupposes the interpretation of the morpheme 'and' in the provision. The morpheme is a conjunction which pits together 'two thirds of the States and FCT, Abuja'.

Mathematically 'and' is synonymous with 'plus' or 'in addition to'. The appropriate canon of interpretation therefore is the application of the literal principle in order to bring out the semantic import of the word 'and'. The adoption of the 'intendment' canon of constitutional interpretation by the PEPC was an escapist approach to interpret a clear and unambiguous provision. It is without contention that scoring 25 percent of votes cast in not less than 24 States and FCT underlies legal declaration of a winner. Unfortunately, the Supreme Court aligned with the position of the PEPC and was tongue-larged by legal practitioner and scholars for murdering justice.[44]

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[38] CA/PEPC/5/2023 *Obi v Tinubu.*
[39] CFRN s 176 (1).
[40] ibid, s 299 (a).
[41] ibid, s 302.
[42] ibid, s 4(6).
[43] ibid, s 4(2), 299 (a).
[44] News Agency of Nigeria, 'PEPC Judgment – Peter Obi Heads to Supreme Court' (7 September. 2023), available at <www. Premiumtimes.com> accessed 23 September 2023.

6.4 Electoral Act 2022

The various colonial Constitutions from 1922 carried electoral provisions which regulated the conduct of elections under their operational milieu. The 1960, 1963 and 1979 Constitutions empowered the federal legislature to make laws for the good governance of the Country and this included the enactment of Electoral Act. Elections into the legislature and executive were regulated by the Electoral Acts which were made under the Constitutions. The 1992 National Assembly and State Houses of Assembly elections were regulated by Military Decrees in lieu of Electoral Act[45].

One of the elements of transition to Civil Rule Programme of Abdulsalami Abubakar led military government was the promulgation of Electoral Decree.[46] The Decree by the Nigerian jurisprudence is an existing law and therefore an act of the National Assembly.[47] The Electoral Decree which regulated the conduct of 1999 general elections was amended in 2001, 2006 and later in 2010. The present Electoral Act is an amended version of Electoral Act 2010.[48] The Electoral Act was passed in January 2022 by the National Assembly. The Act which was assented into law on February 25, 2022 by President Muhammadu Buhari repealed the Electoral Act No. 6 of 2010 as amended. The Act, *inter alia*, regulates political party primaries, the conduct of Federal, State and Area Councils of the Federal Capital Territory elections.[49]

The Electoral Act makes innovations which are intended to deepen electoral consolidation, transparency and attain electoral democracy. Some of the novel provisions of the act include the following:

(i) In "Section 3(3), election funds due to INEC for the conduct of general elections must be released not later than a year before the elections.[50]

(ii) Section 28 requires INEC to issue a notice of election, not later than 360 days before the day of an election, stating the date and place at which nomination papers are to be delivered.

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[45] A Auwal 'Political Parties and Electoral Misconduct in Nigeria' in H Muhamed (eds), *The Patterns and Dynamics of Party Politics in Nigeria's Fourth Republics, Kano* (Hallmark Publishing, Nigeria 2008) 130.
[46] Electoral Decree No. 36 1999.
[47] CFRN s 315(4)(b).
[48] Electoral Act 2022.
[49] E Solomon, 'Nigeria's Electoral Act 2022: of Electoral Politics, Litigations and Matters Arising' (2022) 3(2) *Carnelian Journal of Law and Politics* 166.
[50] ibid.

(iii) Section 29(1) requires a Political Party to conduct valid primaries and submit list of candidates, not later than 180 days before the date of an election.

(iv) Section 29(5) permits any aspirant who participated in a primary election of a political party and has reasonable grounds to believe that the Affidavit submitted by a candidate of his political party contains false information in respect of requirements of the Constitution to contest the election, to institute a suit at the Federal High Court for a declaration that the information contained in the Affidavit is false.

(v) Section 33 prohibits a Political Party from substituting a candidate whose name has been submitted to INEC except in cases of withdrawal or death of the candidate. Where any of the two events occurs, the Political Party is required to conduct a fresh primary election not later than 14 days of the occurrence of the event to produce and submit a fresh flag bearer for the election.

(vi) Under Section 84(3), a political party is authorized to conduct a fresh primary election within 14 days of the death of its candidate to substitute the candidate who died after the commencement of polls and before the announcement of the final result and declaration of a winner.

(vii) Section 47(2)&(3) empowers INEC to employ the use of smart card reader and other technological devices in the conduct of elections.

(viii) Section 50(2) authorises INEC to determine the procedure for voting and transmission of results during elections.[51]

The Electoral Act is an enactment which details rules for the conduct of elections and all persons, political parties and INEC are expected to comply with the provision.[52] It has been stated that the minimum standard of compliance is substantial compliance and a party complaining of non-compliance with the Electoral Act must show how that failure affected him in the negative.[53] Courts have been applying the provisions in cases presented before them. Recently, the Court of Appeal which sat as Presidential Election Petition Court had cause to apply Section 50(2) of the Act. The Court held that INEC was at liberty to choose the manner of transmitting election results. The Court therefore held that INEC was not under any legal obligation to transmit presidential election results electronically to its collation system. With respect, the learned Justices

[51] ibid.
[52] *Wike v Peterside* (2016) All FWLR 1573 (SC).
[53] ibid.

were in grave error of law when they failed to recognize the INEC regulation which empowers the Commission to transmit results electronically.[54] It is therefore incomprehensible that the Court of Appeal applied the provision as if the said INEC Regulation is not embedded in their breast. Although the Act requires some amendments to engender electoral democracy and integrity, it suffers inefficient and insincere application of its provisions.

6.5 Federal High Court (Pre-Election) Practice Directions 2022

The repealed Electoral Act 2010 did not slate a particular judicial arm for ventilation of pre-election grievances arising from the conduct of primary elections. Prospective pre-election litigants instituted such cases at the Federal High Court, High Court of the Federal Capital Territory or State High Court. In 2017, the National Assembly further amended the 1999 Constitution wherein it vested jurisdiction to hear and determine pre-election disputes on the Federal High Court.[55] The amendment also provided the constituent element of pre-election disputes which could ground a pre-election action.[56] The Chief Judge of the Federal High Court in the exercise of the powers vested in him issued Federal High Court (Pre-election) Practice Directions 2022 to regulate the procedure for instituting pre-election matters in the Court.[57] The Practice Directions which came into effect on June 28, 2022 was signed by the Honourable Chief Judge of the Federal High Court, Hon. Justice John Terhemba Tsoho. The objectives of the Practice Directions include the following:

(a) to provide for fair, impartial and expeditious determination of pre-election cases,
(b) to ensure that in all election matters, the parties focus on matters which are genuinely in issue,
(c) to minimize the time spent in dealing with interlocutory matters.
(d) to ensure that the possibility of settlement is explored before the parties proceed to hearing, and
(e) to minimize undue adjournments and delays in the conduct of actions.[58]

The Practice Directions stipulate the nature of litigants who could institute or defend pre-election matters in the Federal High Court. A Party challenging the conduct or outcome of a Primary Election is

[54] INEC Regulations and Guidelines for the Conduct of Elections 2022, r 38(1).
[55] CFRN 1999 s 285 (9,10).
[56] ibid, s 285 (14).
[57] ibid s 254.
[58] Federal High Court (Pre-Election) Practice Directions 2022, r 1(1).

required to join the person who emerged winner of the said election or whose name was forwarded by his Political Party to the Independent National Electoral Commission as a Respondent in the suit [59] Under the Directions, every pre-election matter is commenced by an Originating Summons as specified in Forms 3, 4 and 5 of Appendix 6 to the Federal High Court (Civil Procedure) Rules 2019, with such variations as circumstances may require. The Originating Summons must be accompanied *inter alia* by an Affidavit of non-multiplicity of action on the subject matter.

All pre-election suits where the cause of action arose in a Judicial Division and the relief seeks a Declaration or to compel or restrain a person within that Judicial Division, with no consequence outside it must be filed and heard in that Judicial Division. However, if the reliefs sought, potential consequential orders or declarations extend beyond the Judicial Division, the suit can only be filed at the Federal High Court Headquarters, Abuja and assigned by the Chief Judge.[60]

The Practice Directions further make provisions for service of processes on Parties. The relevant provisions are enshrined as follows:

(a) A Party cannot serve a notice of an application on another Party on the date scheduled for hearing.
(b) To ensure speedy dispensation of justice, electronic mail and other electronic means can be employed by the Court in order to inform counsel of urgent Court and case events. Such notification must be given at least forty-eight hours before the scheduled Court date.
(c) Parties are expected to furnish the Court Registrar with functional telephone numbers and e-mail addresses of themselves and their Counsel.
(d) An application for substituted service can be made by a Party in accordance with the provisions of the Federal High Court (Civil Procedure) Rules.[61]

Where a matter is scheduled for hearing and either of the Parties is absent the court can *suo motu* or upon oral application by the Counsel for the Party present, order that the address of the Party absent be deemed adopted if it is satisfied that the Parties had notice of the proceedings. The Court and parties are required to prevent unnecessary delays and accordingly grants a maximum of two adjournments to a party. Nonetheless, an application for adjournment cannot be

[59] ibid, r 3.
[60] ibid, r 4.
[61] ibid, r 5.

entertained on a day fixed for Judgement. Where a party seeks to change his Counsel during the pendency of a matter, a maximum of only two adjournments can be granted for him to do so. In hearing a pre-election matter, the Court is empowered to schedule the time and date of hearing as is convenient for the parties. To achieve expeditious dispensation of justice Ruling on Preliminary Objections and other interlocutory issues touching on the jurisdiction of the Court can only be delivered at the stage of final judgement.

The Directions apply notwithstanding the provisions of the Federal High Court (Civil Procedure) Rules, 2019. The Directions empower the Chief Judge of the Federal High Court to direct that matters be transferred to the appropriate Division or any other Division of the Court as may be reasonably practicable considering the given circumstances. Finally, the Directions apply to every pre-election matter filed pursuant to the provisions of the Constitution and the Electoral Act.[62] By the provisions of the Practice Directions, the Federal High Court (Civil Procedure) Rules operates alongside with the Practice Directions where the Directions do not cover an issue raised in a pre-election proceeding.[63] The law is that Rules of Court must be followed and obeyed by both litigants and the Court.[64] Since the Federal High Court (Civil Procedure) Rules and Federal High Court (Pre-Election) Practice Directions are subsidiary legislation, the Rules of the Federal High Court (Pre-Election) Practice Directions are mandatory on pre-election litigants and the Court. The Federal High Court Civil Procedure Rules treats non-compliance with the Rules as mere irregularity which may be waived by the Court.[65] By the doctrine of *stare decisis* in our jurisprudence, the Federal High Court is bound by decisions of the Court of Appeal and Supreme Court. Therefore, treating non-compliance with the Rules as a mere irregularity cannot stand when the authority in *NNPC v. Alabi* which is a Supreme Court decision is invoked by a litigant.[66]

6.6 Independent National Electoral Commission Regulations and Guidelines for the Conduct of Elections 2022

The Constitution empowers Independent National Electoral Commission to make Rules and Procedures for the conduct of its affairs.[67] The Electoral Act further authorises the Commission to regulate the conduct

[62] ibid, r 2.
[63] ibid.
[64] *Nigerian National Petroleum Corporation v Alabi* [2002]6 NWLR (pt 1849) 95 (S.C).
[65] Federal High Court (Pre-Election) Practice Directions 2022 ord 3 r 8.
[66] ibid.
[67] CFRN s 160(1).

of elections.[68] The Commission revised its Regulations and Guidelines 2019 to have its 2022 edition for the conduct of elections.[69] By the combined effects of Sections 160 (1) of the Constitution and 149 of the Electoral Act 2022, the INEC Regulations and Guidelines for the Conduct of Elections 2022 is a subsidiary legislation. The Commission pursuant to the powers vested in it issued the Regulation and Guidelines as its additional compass. The Regulations cover general, off-cycle, bye, re-run and supplementary elections. The Regulations supersede all other regulations and guidelines on the conduct of elections issued by the Commission. They remain in force until replaced by new Regulations and Guidelines or updated by way of revisions or supplementary Regulations and Guidelines supported by Decision Extracts of the Commission or an official gazette.[70]

The Regulations is compartmentalized into three parts. Part I which has 12 clauses provides for elections and arrangement for their conduct. Part II which comprises 21 clauses provides for voting procedure at elections. Part III which contains 63 clauses provides for collation of Election Results and making of Returns. The novel and significant provisions in the legislation is Regulation 38(1) which empowers Presiding Officers in elections to electronically transmit or transfer the result of the Polling Unit direct to the collation system. Sub-regulation (2) of the Regulation empowers the Commission to use an electronic device, Bimodal Verification and Accreditation System to upload a scanned copy of Form EC8A to the INEC Result Viewing Portal (IReV). For purposes of clarity, Form EC8A is INEC Result Sheet.

Stating the status of INEC Regulations, the Supreme Court held that INEC Regulations and Guidelines for the conduct of Elections 2014 is a subservient Legislation to Electoral Act 2010 as amended and cannot be elevated above the Act[71]. The 2014 INEC Regulations and Guidelines was revised in 2018 and further revised in 2022. It presupposes that reference to 2014 INEC Regulations and Guidelines is a reference to the 2022 Regulations and Guidelines. Thus, the 2022 INEC Regulations and Guidelines cannot make a provision that is not grounded in Electoral Act as such provision would be a nullity *ab initio*.

[68] Electoral Act 2022 s 149.
[69] INEC Regulations and Guidelines for the Conduct of Elections 2022.
[70] ibid (Preamble).
[71] *Wike* (n 52).

6.7 National Judicial Council Policy Directions on Political and Election-Related Cases 2022

The Federal High Court has a single jurisdiction in Nigeria as the various judicial divisions are for administrative convenience[72]. It is clear that the jurisdictions of High Court of a State and High Court of the Federal Capital Territory are restricted to the territorial ambit of the State and of the Federal Capital Territory. Litigants of political and election related cases relied on the single jurisdiction of the Federal High Court covering the whole of Nigeria and embarked on forum-shopping in filing their cases. It was a common feature for a case on the same subject matter to be filed in more than one judicial division of the Court by the same parties. More worrisome was that the same political and election related cases particularly pre-election dispute were filed both at Federal High Court and High Court of the Federal Capital Territory by the same parties on the same subject matter. The scenario worsened when cases on the same subject matter and the same parties were filed both at a High Court of a State and High Court of the Federal Capital Territory. This posture resulted in the delivery of conflicting Judgements and Rulings by Courts of concurrent jurisdiction. There was therefore a need to cure the mischief that resulted from multiplicity of action on the same subject matter by the same parties before Court of concurrent jurisdiction.

The National Judicial Council of Nigeria (NJC) is vested with power to deal with all matters relating to broad issues of policy and administration.[73] The Council at it 98th meeting held on the 11th day of May 2022 made some policy directions to cure the mischief shown above. The Policy Directions enshrines the objectives and guiding principles of the Directions to include the prevention of multiplicity of litigations at different Courts of coordinate jurisdiction across the nation, resulting in conflicting orders on the same issues and facts.[74] The Policy Directions also sought to arrest forum shopping by irresponsible legal practitioners, thereby frustrating free flow of judicial administration and endanger democratic practice.[75]

The Policy Directions state that all suits to which they apply must be filed and entertained at the High Court of the Federal Capital Territory where the relief sought, potential consequential orders(s) or declaration(s) which may restrain or compel persons are beyond the

[72] Federal High Court Act Cap F12 LFN 2004 s 1(1).
[73] CFRN, Third Schedule, item 21 (1).
[74] National Judicial Council Policy Direction on Political and Election Related Cases, r 1.
[75] ibid.

territorial jurisdiction of a State.[76] However, if such a suit is within the exclusive jurisdiction of the Federal High Court, it is to be filed at the headquarters of the Court at Abuja and assigned by the Chief Judge.[77] Any such suits where the cause of action arose in a State and the relief seeks a declaration or to compel or restrain a person, within the territory of a State with no consequence outside the State can be filed and determined in that State.[78] The Policy Directions further mandated all Heads of Court to assign cases or constitute panels with intent to frustrate incidences of conflicting decisions. When a matter has been decided, the Directions restrained Court of coordinate jurisdiction from assigning or entertaining suits on the same subject and parties. A party who is dissatisfied with the Judgment can appeal to the appropriate higher Court.[79]The Policy Directions which took effect from May 11 2022 charged Heads of Courts to exercise their rule-making and administrative powers to give effect to them. The Policy Directions was signed by the Chief Justice of Nigeria and Chairman, National Judicial Council of Nigeria, Hon. Dr. Justice I.T Muhammad.

The Policy Directions are commendable as they were thought will achieve their aims. It appears the mischief that propelled the issuance of the Directions is still rife. The Labour Party leadership crises led to conflicting judgements from Federal High Court, Benin[80] which is covered by Court of Appeal, Benin Judicial Division and from Court of Appeal, Owerri Judicial Division.[81] Why was an action initiated by the same parties on the same subject matter at the Federal High Court, Owerri and appealed to Court of Appeal, Owerri also filed at Federal High Court Benin? The Court of Appeal, Owerri affirmed the decision of the Federal High Court Owerri that Mr. Lamidi Apapa is the National Chairman of Labour Party while the Federal High Court, Benin vested the Chairmanship of the Party on Mr. Julius Abure. It is therefore expedient for the NJC to review the Directions in the light of this circumstance.

7. Caselaw on Electoral Malpractices

A corpus of Judicial Pronouncement has been made by the Court on pre-election and election cases. The principles of law developed in such cases

[76] ibid, r 2
[77] ibid.
[78] ibid.
[79] ibid.
[80] D Odufowokan, 'Court Affirms Abure as LP Chairman, Restrains Apapa's Faction' *The Nation* (Lagos, 27 May 2023) 6.
[81] O Temitope, 'Appeal Court Affirms Apapa as Labour Party Chairman' *Daily Trust* (Lagos, 24 August 2023) 4.

have been used to determine subsequent matters which are in *pari materia* with such earlier decided cases except the Court finds it imperative to take a detour. An appraisal of some major principles of election law developed from 1979 to date will suffice for a sound comprehension of caselaw on electoral jurisprudence.

(a) Election petition matters are *sue generis*.[82]

(b) An election petition must state clearly the facts and the ground or grounds on which the petition is based.[83]

(c) An election petition must specify the parties interested in the election petition and must join all necessary parties in the case.[84]

(d) An election petition must state the person returned as the winner of the election.[85]

(e) Where issues are joined that results of the election produced by the petitioner were forged, the burden of proving the alleged falsehood is squarely on the respondent.[86]

(f) Evidence of witness in prove of any allegation in an election petition not sourced and tied to any polling unit are worthless evidence.[87]

(g) When a party decides to rely on documents to prove his case there must be a link between the document and the specific areas of the petition.[88]

(h) Consequences of failing to call the maker of a document tendered as exhibit in an election petition.[89]

(i) Judgment/ruling by an election tribunal delivered by a panel whose member was not part of the hearing is void.[90]

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[82] *Ehuwa v O.S.I.W.* (2006) 11-12 SC, 102 (SC), *Hassan v Aliyu* (2010) 7-12, 21 (SC); *Emmanuel v Umana (No. 1)* (2016) 2 SC, 90 (SC).

[83] *PDP v Saror 8 Ors* (2011) 3 SC, 38 (SC), *Oshiomole v Airhiavbere* [2013]7 NWLR (Pt 1353) 376 (SC).

[84] *Buhari . Yusuf* [2003]14 NWLR (Pt. 840) 1 (SC), *Omoboriowo v Ajasin* (1984)1 SCNLR 108(SC), *Ubom v Anaka* (1999) LCN 551 (CA).

[85] *Action Congress v Jang* [2009]4 NWLR (Pt 1132) 475(CA), *Abubakar v Yar'Adua* [2008]4 NWLR (Pt 1078) 465 (SC), *Aliyu v All Progressives Congress* [2023]6 NWLR 151 (SC).

[86] *Amechi v INEC* [2008]5 NWLR (Pt. 1080) 227(SC), *Audu v Wada* [2008] All FWLR (Pt. 405) 1651 (SC), *A.P.C. v PDP* [2015] 15 NWLR (Pt. 1481) 1 (SC).

[87] *Buhari . Obasanjo* [2005]13 NWLR (Pt. 941) 131(SC), *Awolowo v Shagari* (1979) 6-9 SC 51 (SC), *Ucha v Elechi* [2012]13 NWLR (Pt. 1317) 359(SC).

[88] *ANPP v INEC* [2010]13 NWLR (Pt. 1212) 549 (SC), *Ucha v Elechi* [2012]13 NWLR (Pt. 1317) 359 (SC), *Osagie v Peoples Democratic Party* [2023]5 NWLR (Pt. 1877) 355 (SC).

[89] *Aregbesola v Oyinlola* [2011]9 NWLR (Pt. 1253) 458 (SC), *Omisore v Aregbesola* [2015] NWLR (Pt. 1482) 322 (SC).

[90] ibid.

8. Challenges of the Legal Measures for Curbing Electoral Malpractices

Every human activity, phenomena, enactment or institution whether corporate or an individual that engages in interaction within the social hemisphere is bound to be confronted with hitches that seek to inhibit a flowing course of the establishment, a person or legal construct. The regulatory framework calculated at diminishing the operational efficacy of electoral malpractices is caught up with a myriad of problems which have tended to reduce the efficient and effective application of the legal framework. The challenges span from non justiciability of Universal Declaration of Human Rights, non-domestication of African Charter on Democracy, Election and Governance, executive rascalism, political influence and corruption to selfish interest of state leaders. These hindrances are discussed seriatim.

8.1 Executive Rascality

It is the obligation of the ruling machinery and in fact every citizen of the country to respect and obey the law whether it is statute law, subsidiary legislation or Judicial pronouncements. This obligation particularly on the executive branch of government is encapsulated in the Oaths of Office and Allegiance to the Constitution. Upon assumption of office, the President deposes to an Oath to observe, protect and defend the Constitution of the Federal Republic of Nigeria[91]. Contrary to this solemn deposition, state leaders exhibit very high propensity for disrespect to Rule of Law by not observing some constitutional and statutory provisions. The rascal attitude has been very glaring in the refusal of the Executive to obey Court Judgements and Rulings. The habit has also been stretched to the appointment of persons with questionable character as Resident Electoral Commissioners. Thus, the Constitution and Electoral Act have fallen prey to the whims and capricious machinations of the executive arm of government.

8.2 Political Influence

It was stated earlier in this paper that electoral malpractices are a recurrent decimal on the electoral engineering process of Nigeria in all elections from 1923. There have been manifest cases of electoral fraud, falsification of results, thuggery, willful destruction of property during elections, creation of illegal polling units, unlawful return of candidates in elections, snatching of election materials and many other electoral wrong doings. It has become a norm that perpetrators of electoral misconduct get away with it without being prosecuted and convicted. The

[91] CFRN 1999, Seventh Schedule.

State apparatus is usually quick to observe the commission of electoral infractions without a commensurate action to confront the monster. This laxity has been attributed to a seeming relationship between perpetrators of electoral malpractices and political elites. No doubt, prosecution of electoral offenders has been at the lowest ebb inspite of the quantum of destruction of public property and the height of mayhem unleashed on the polity during elections. The copious provisions of offences under the Electoral Act appear to be for academic research purposes as they do not enjoy the aura of enforcement. The relevant provisions of the Criminal Code, Money Laundering (Prevention and Prohibition) and Penal Code Acts have not been invoked by Nigeria Police Force, Economic and Financial Crimes Commission or Independent Corrupt Practices and other Related Offences Commission. Political Influence has been extensively utilized by the ruling party to perpetuate itself in power. To that extent, the ruling party employs all manner of subterfuges and machinations to win election at all cost.

9. Corruption

Electoral process is driven by institutions established under the Constitution and of other statutory enactments. There have been allegations of corruption made against members of the Executive and Legislative branches in their pursuit to either capture or retain the essence of power. The Nigerian State has acknowledged the operational influence and negative impact of corruption on the nation. This informed the will of the polity to establish EFCC and ICPC with intent to frontally confront the vice. Electoral corruption manifest in the use of money to compromise all relevant state actors in the electoral environment to secure victory at the poll. There have been instances where electoral officials and security operatives have been compromised by political parties and contestant to obtain electoral favour. The Nigerian society felt that such unethical practice would receive the wrath of the Court as the last hope of the oppressed.

However, corruption appears to have crept into the judiciary and fortunately, the National Judicial Council has been exercising disciplinary control over judicial officers. It has been thought that corruption was prevalent among Benchers in the lower echelon of judicial hierarchy. Recent happenstances point to the prevalence of corruption in the superior Court of record. On May 8 2023, Senator Adamu Bulkachuwa on the floor of plenary session of the Senate in his valedictory speech said that he encroached on the independence and freedom of his wife to help many of his colleagues in the Chamber. He stated that his wife Justice

Zainah Adamu Bulkachuwa who was President of the Court of Appeal was of great assistance to many Senators who obtained judicial victory in their electoral litigations.[92] The doctrine of *stare decisis* evolves mostly from the lips of the Court of Appeal and Supreme Court of Nigeria. Electoral litigations arising from Legislative Houses election terminate at the Court of Appeal. This presupposes that principles of law developed in cases before the Court constitute caselaw in respect of legislatives Houses election. As it were, the Court of Appeal being the final appellate Court in that regard has built a dangerous caselaw tainted with strands of injustice. It is therefore clear that justice has been sacrificed at the altar of corruption orchestrated by spousal influence.

10. Selfish Interest of State Leaders

Governance being driven by human beings conceptualizes the exhibition of patriotism in the discharge of varying responsibilities. Issuing Executive Orders, Regulations and the formulation of enactments require the injection of national interest into the envisaged activity. Since the attainment of meaningful livelihood in Nigeria is predicated on holding political office or benefiting from government largesse through political patronage by way of contracts, political leaders tie their economic fortunes and sustenance to continued occupation of government office in perpetuity. These objectives can only be achieved by political office holders throwing public interest to the wind so that their personal desire of wealth amassment could be attained. The Electoral Act as a legislation made by legislators and majorly intended to regulate the conduct of elections is of utmost importance to them. It is the legislators and their likes who have the financial wherewithal to contest elections and therefore infuse into the Act provisions which further their interest. The Nigerian National Assembly was hesitant to provide for the adoption of technology in the Electoral Act for conduct of elections. It took public outcry before the National Assembly could introduce the use of card reader machine or any other electronic device in the Electoral Act 2022. Even at that, the Assembly preferred manual collation and transmission of election result to electronic transmission which is international best practice in democracies worth the salt.

The Independent National Electoral Commission filled the gap when it provided in its Regulations and Guidelines for the Conduct of Elections 2022 that election result would be transmitted electronically to

[92] B Ajibade 'Bulkachuwa's Statement Confirms Corruption in Judiciary" *The Punch* (Lagos, 16 June 2023) 1.

its collation system.[93] The fear of the legislators may well be that adopting electronic transmission of election result in the Electoral Act would rob them of the power of manipulations to remain in office so long as they can manoeuver. The cry of Nigerians for electronic voting has also failed to appeal to the ears of legislators. Their argument has been that broadband internet penetration in Nigeria is not strong enough to support electronic polling. The successful utilization of electronic voting by Nigerian Bar Association for about a decade has not persuaded the National Assembly that electronic voting is attainable. State leaders in the executive arm also device all subterfuges in their political arsenal to further their electoral victory. In addition, prospective political recruits into leadership evolve all ways and means to gain access to power and the cycle for promoting personal interest yields further.

9. Conclusion

Elections in Nigeria have been characterised by species of electoral irregularities perpetrated by some members of the electorate and criminally minded persons so as to attain political power at all cost. Attempts have been made to confront the monster with intent to reduce its grip on the nation and engender electoral transparency and democracy. The legislative politburo of the nation has utilized the instrumentality of legislation to sanitise and fine tune the electoral process. This manifests in the various amendments of electoral Act, the latest being Electoral Act 2022. The initiative navigated through the adoption of option A4, secret balloting, technology as well as certain administrative and fiscal regulations aimed at engendering electoral democracy and integrity. The perpetration of electoral malfeasance has led to the production of government with questionable legitimacy and the assassination of faith of the citizenry in the electoral engineering process of the polity. A concomitant implication of electoral fraud has also resulted in zero tenure practice of many African leaders who manipulate the state apparatus and instruments of coercion to retain power in perpetuity. The output of Government bereft of the steam of legitimacy is widespread misgovernance and the attendant practice of kleptocracy by state leaders. The wind of military coups blowing across West Africa is directly proportional to poor governance by the bourgeois elites in leadership.[94]

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[93] INEC Regulations and Guidelines for the Conduct of Elections 2022 r 38.

[94] I Oyedeyi, 'Only Good Governance can Rescue Democracy in West Africa' *Nigerian Tribune* (Lagos, 20 September 2023)

Since political leadership of the country determines the well-being and development trajectory of both the citizenry and the polity, people pay adequate attention to the political recruitment process. Given the level of enlightenment the Nigerian populace has attained, governance has attracted a critical evaluation and statesmen must come to that reality. This understanding has led to the making of certain regulations and guidelines to aid aggrieved persons over electoral conduct to ventilate their grouse before appropriate dispute resolution machinery. While the nation is grappling with the effect of electoral fraud, there has been advocacy for a radical departure from manual to electronic balloting. Experiences in developed electoral democracies have shown that zero electoral malpractices cannot be attained as misconduct is an intrinsic element of society.[95]

In the search for the attainment of electoral integrity and transparency, this paper advocates that applications for the post of the Chairman, Members and Resident Electoral Commissioners of INEC be made through an open advertisement, screening and competitive interview of candidates by the National Institute for Legislative and Democratic Studies. The institute should forward names of recommended applicants to the President who would in turn seek the approval of the Senate. It is also recommended that INEC should ensure real-time publication and electronic transmission of election results, the establishment of Electoral Offences Commission for the prosecution of electoral offenders, the extinction of human contact during elections by the adoption of electronic voting, provision for live telecast of election proceedings as well as the amendment of the Constitution and Electoral Act 2022 to reflect the recommendations made herein.

[95] *M Laxmikanth, Indian Polity (McGraw Hill, New Delhi 2017) 42.*

Appraising the Power of the Supreme Court to Review its Judgment and the Impact on Democracy

*O. E. Enwere**

Abstract
The article appraises the power of review of the Supreme Court on its own judgment in Nigeria despite the fact that the Court is one of finality once it delivers its judgment. The Supreme Court has the powers to review its judgment based on accidental slip or omission, clerical error or to vary a judgment or order to give effect to its purpose or intention that occasioned miscarriage of justice. It however cautions that this power of review should be rarely exercised unless there exists a clear case of gross miscarriage of justice based on strong compelling facts. In examining the said power of the Supreme Court, this article shall be restricted to electoral matters which is the fulcrum of the work. It is the position of this article that the Supreme Court cannot review its decisions or sit on appeal over same, however, this article posits that in exceptional circumstances, the Supreme Court can wield its inherent jurisdiction to reverse its judgment.

> My simple answer is that it is not part of the jurisdiction or duties of this Court to go on looking for imaginary conflicts. We are final not because we are infallible; rather we are infallible because we are final.[1]

1. Introduction

For every democratic federation the supremacy of the constitution and independence of judiciary are very fundamental. The Supreme Court being the biggest watchdog of the judicial and constitutional processes is the most important institution in safe-guarding Nigeria's democracy and ensuring the supremacy of the rule of law. Therefore undermining the

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[1] The above notable and profound pronouncement forms part of the ipsissimaverba of My Lord, the Hon. Justice Chukwudifu Akunne Oputa, Justice of the Supreme Court of Nigeria, of blessed and remarkable memory when he delivered the leading judgment (to which Obaseki, Nnamani, Karibi-Whyte and Agbaje, JJSC all agreed) on Friday 19 May 1989.

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finality of the Supreme Court is to jettison the sole purpose of rule of law and constitutionality. This article shall at this part examine whether the supreme court of Nigeria is allowed by her rules of practice, actual practice and the law to overrule or upturn her judgment in the light of decided cases.

2. Theoretical and Conceptual Framework

2.1 Realist Theory

The prophecies of what the courts will do, in fact and nothing more pretentious are what I mean by law. This is the view of American realists represented by Holmes. According to Holmes, ask the fundamental question, what constitute law? You will find some text writers telling you that it is something different from what is decided by the courts of England but he is of the mind that the prophecies of what the courts will do are what I mean by the law. However, Elegido[2] submitted that to assert that law is mostly what judges say it is to involve oneself in a position which cannot be defended against critical attack as judges are people who hold certain offices defined by the same law. This paper adopts the realist theory because it interrogates the power of the apex court which is a policy court to review its judgments.

2.2 Justice

Justice, in its broadcast context, includes both the attainment of that which is just and philosophical discussion of that which is just. The concept of justice is based on numerous fields and many differing viewpoints and perspectives including the concepts of moral correctness based on ethics, rationality, law, religion, equity and fairness. The word justice is derived from the Latin word *Justitia* the concept which includes lawfulness, rightfulness. The oxford dictionary of Current English[3] defines justice as 'Justness, fairness authority exercised in the maintenance of right, judicial proceedings, brought to justice, court of justice, magistrate, judge, do justice, to treat fairly, appreciate properly, do oneself justice, performs at one's own best with justice reasonably.'

The concept of justice embraces a lot of virtues and is seen as the foundation of human existence. Justice whatever its precise meaning may be itself a moral value that is, one of the means of purpose which man lets himself in order to attain the good life. Justice is therefore a moral virtue

[2] Elegido JM, ,*Jurisprudence* (Spectrum Law Publishers, 1994) 97

[3] Della T. Ed., *The Oxford Dictionary of Current English*, New Revised Edition, United Kingdom, Oxford University Press, 1998

and is a principle of natural law[4]. In the view of Hume[5] 'Human nature cannot by any means subsist within the association of individuals and that association never could have taken place where no regard was paid to the laws and equity and justice.'[6]

Justice Oputa described justice as that 'Which oils the wheels of the social machine removing the rust of excesses and arbitrariness and balancing rights with duties and powers with safeguards to that neither right nor powers shall be exceeded or abused.'[7] This is further supported by the description that justice is the ligament which hold civilized beings and civilized nations together. Saint Augustine of Hippo said of justice: remove justice and what are kingdoms but gangs of criminals on a large scale.[8]

For Oputa,[9] it is justice that expresses the inward and other word flow of the personality of man, his twofold moral movement of rights and duties. The oxford English Dictionary defines the "Just" person as one who typically "does what is morally right" and is disposed to "giving everyone his or due."[10] For plato, Justice is a virtue establishing national order, with each part performing its appropriate role and not interfering with the proper functioning of other parts.[11] Aristotle says justice consists in what is lawful and fair with fairness involving equitable distributions and correction of what is inequitable.[12]

2.3 Democracy

Democracy is the rule by the people through free and fair elections and other forms of participation. It has to do with popular sovereignty which is the idea that the People are the ultimate authority and the source of the authority of government.[13] The political equality of all citizens is an essential principle of democracy. In a democracy, the just powers of government are based upon the consent of the governed. Free elections

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[4]Freeman, M. D. A., *Introduction to Jurisprudence.* 7th Ed. London, Sweet and Maxwell 2001
[5]Hume, D., *Treatise in Human Nature,* France, Penguin Classics, 1739, 40,
[6]Cloyd, D., *The Idea of Law,* England, Penguin Book, 1964
[7]Oputa, C. A., *Human Rights in the Political and Legal Culture of Nigeria.* Idigbe Memorial Lectures. Lagos, Nigeria Law Publications Ltd, 1989.
[8]*Ibid*
[9]*Ibid*
[10]Della T. Ed. *The Oxford Dictionary of Current English*, New Revised Edition, Oxford University Press 1998
[11]'Encyclopedia of Philosophy', available at www.lep-utm.ed, accessed on 9/1/2020
[12]*Ibid*
[13] 'The Concepts and Fundamental Principles of Democracy', https://www.civiced.org/pdfs/book accessed on 26/10/2023

and other forms of civic participation are essential to democracy. If the People are to rule, they must have practical means of determining who shall exercise political power on their behalf. If they are to rule, the People must also monitor and influence officials' behavior while in office. Elections are at the heart of the practical means for the people to assert their sovereignty.

3. Power of the Supreme Court to Review its Judgment

Section 235 of the 1999 constitution provides: "Without prejudice to the powers of the president or of a governor of a state with respect to prerogative of mercy, no appeal shall lie to any other body or person from any determination from Supreme Court." A literal interpretation of *Section* 235 of the Constitution of the Federal Republic of Nigeria clearly shows that the Supreme Court cannot sit on appeal over its decision neither can the Supreme Court review its decisions or judgments as they are final.

Furthermore, *Order* 8, *Rule* 16 of the Supreme Court Rules states: the Court shall review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the Court decided nor shall the operative and substantive part of it be varied and a different form substituted. By this provision of the Supreme Court Rules, the Supreme Court can only review its decisions or judgments just to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention.

Consequently, the Supreme Court dismissed the application for the review of the judgment of the same court in respect of the case of *Peoples Democratic Party (PDP) & 2 Others v. Degi-Eremienyo & 3 Ors,*[14] concerning Bayelsa state. The Application was filed by the All Progressives Congress (APC) and its candidates for the office of governor and deputy governor in the state and awarded a punitive costs against the applicant's lawyers. The court used the opportunity to sound a warning that it was not ready to tolerate abuse of court processes and desecration of its hallowed chambers. The Supreme Court is of the view that applications of this nature to the Supreme Court are aimed at desecrating the sanctity of this court; violating the well-known principle

[14] (2021) 9 NWLR (Pt. 1781) 274

that decisions of the court are final; and destroying the esteem, with which this court is held. According to Augie Adamu JSC who delivered the lead judgment:

> The decision of this court in appeal No.SC. 1/2020 is final for all ages; it is final in the real sense of the word, final; and no force on earth can get this court to shift its decision regarding the Bayelsa pre-election appeal No.SC.1/2020. To do otherwise is to open a floodgate of litigation on appeals that have already been settled by this court. There is no even guarantee that if these two applications are granted, the other side will not come with a fresh application to review the ruling on the ground that this court did not consider certain aspects of the arguments in its ruling. There would be no end in sight.[15]

In *Akin-Olugbade & Ors v. Onigbongbo Community &Ors*[16] the Supreme Court was of a firm view that no application can be entertained by the Supreme Court to review any fact or law in its previous Judgment. Therefore, any power given to the Court to entertain such application would have been tantamount to considering the application as an appeal. When such a procedure was allowed, it would have violated the provisions of Section 120 of the 1963 Constitution. It will therefore, be safe and correct to say that the principle of finality of the Supreme Court's Judgment has been a time-honored one. And Nigeria's Legal System considers it as sacrosanct. In Akinbade Vs. Onigbongbo[17] (Supra) the Supreme Court had this to say:

> … for, if were we are to accept the submission of counsel for the applicants about the law or the facts in the Judgment being attacked, there would be no finality about any Judgment of this Court and every dis-affected litigant could bring further appeals as it were ad infinitum. That is the situation that must not be permitted.

Again, the Supreme Court's finality rule was further enshrined in the 1979 Constitution vide Section 215 thereof. It provided that the Supreme Court had no power to allow any appeal to anybody or authority against the decision of the Supreme Court. This general rule has added a significant point when it was held that appellate jurisdiction is entirely statutory. Thus, in the absence of any provision of statute allowing a party

[15] Onyekwere, J., 'Applications for Review of Supreme Court Judgments: Pushing Mother Luck Too Far?', *Guardian Newspaper*, 1 March, 2020
[16] (1974) 6 S.C. 1
[17] *Supra*

to a suit or case to seek as a matter of course for review of the Supreme Court's decision, it could be rightly concluded that such a review is illegal and has no basis in law except in deserving circumstances. Furthermore, in *Adigun & Ors. Vs. A.G. Oyo State &Ors*[18] the Supreme Court held as follows: it is well settled that appellate jurisdiction is entirely statutory… and there is no constitutional provision enabling appeal from our decisions, accordingly ANY (emphasis mine) question of reopening the decision of this Court for further consideration does not arise.[19] It further states thus: the Judgment having been delivered in this Court, it is functus officio except for certain purposes not concerned with the substance of the Judgment."[20]

There is no gainsaying that the law has long been settled that generally the decisions of the Supreme Court in Civil matters or suit are absolutely final except set aside by a subsequent legislation. In *Adigun & Ors v. Governor of Osun State & Ors*[21] alluded to this settled law in the following words. The Justices that man the Court are of course fallible but their Judgments are, as the constitution intends, infallible. Therefore any ingenious attempt by counsel to set aside or circumvent the decision of the Supreme Court will be met with stiff resistance.

It is important to point out here that the rule prohibiting reversal of the decision of the Supreme Court is applicable only to the extent that the application for the reversal or varying seeks to alter the law or facts as they affect the rights of a party or parties in the same Judgment. In other words, where the application is sought to vary the substantive part of the Judgment, the law prohibits granting any prayer vide such application. There are however, certain exceptions to the foregoing rules and principles. The exceptions to the general rule of Supreme Courts finality are not in the nature of substantive aspects of the Judgment *strict senso*, but only that there are instances in which the Court is entitled to review its own previous Judgment. Where there are clerical mistakes in Judgments or Orders or errors arising from any accidental slip or omission the Court may correct the mistake at any time. This is what Courts have for long described as "Slip Rule". Lord Halbury in *Preston Banking Co. Vs. Williams Allsup & Sons*[22] held as follows: If by mistake

[18] No.2) (1987) LPELR-40648 (SC)
[19]Onoja, R., *Supreme Court and the Legality of Judgment Review in Nigeria*. Lagos : Sunshine Publishing House, 2000, 69
[20] *Ibid*.
[21] (1995) LPELR-178 (SC) Per Uwais JSC (as he then was)
[22] (1895 1 Ch.D)

or otherwise an order has been drawn up which does not express the intention of the Court, the Court must always have jurisdiction to correct it. But this is an application to the Vice Chancellor in effect to re-hear an Order which he intended to make but which it is said he ought not to have made. Even when an order has been obtained by fraud it has been held that the Court has no jurisdiction to hear it. If such jurisdiction existed, it would be most mischievous.[23]

Another instance is where, though the review of the Judgment affects operative and substantive parts thereof, the Supreme Court is entitled to review its judgment but only *suomotu*. In the case of *Varty v. British South Africa Coy*[24] and in *RE: Baber*,[25] the Court of Appeal in England reversed its own Judgment in each of the above mentioned cases after review. In these cases the court of England acted *Suo Motu* not at the instance of any party. The rationale here is that if parties are allowed to bring applications to the court for review of its Judgment or orders bothering on substance, then there would open a flood gate of applications upon applications. Thus there would be no end to litigation.[26]

It is however expedient to note that the Supreme Court can reverse itself with respect to operative and substantive parts of its decision relating to facts and law at the instance of a party only in a situation where it is called upon to reverse or change its position on any point of law held in an earlier Judgment but not in a suit being considered. In other words, when during hearing of appeal at the Supreme Court a party argues that the court was wrong in any earlier decision on a point and invites it to depart from its earlier position, then the Supreme Court could change the law and apply a new principle in the instant case. It therefore, follows that the effect of change in the position of the law from earlier case to future ones does not affect the parties in the earlier case. Rather, it is only the subsequent litigants that would be affected by the departure.

In addition where legislation is passed to change a principle of law, right of persons or duties given to them by a previous Judgment, the Supreme Court or any other Court follows the law as it is newly provided by the legislation. It therefore means that the finality of the Supreme Court decision is subject to any legislation that may be passed by the

[23] Daniel, O., 'The Powers that Be',*Daily Post Nigeria*, 21 January, 2021, 1.
[24] (1965) 1 ch.508
[25] (1886) 17 QBD 259
[26] (Okolo, 2014).

parliament. In *Prince Yahaya Adigun & Ors Vs. The Attorney General of Oyo &Ors (No. 2)*,[27] the Supreme Court held as follows:

> The decision of the Supreme Court is final in the sense of real finality in so far as the particular case before that court is concerned. It is final forever except there is legislation to the contrary, and it has to be legislation ad hominem. The Supreme Court and it is only the Supreme Court, may depart from the principles laid down in their decision in the case in future but that does not alter the rights, privileges or detriments to the parties concerned arising from the original case.[28]

Evidently therefore, in the case of legislation being an exception to the finality of the Supreme Court's decision, it is worthy of noting that such legislation would not be capable of changing the position of the Supreme Court if it is made for a clear purpose of targeting an individual.

However, decided cases reveal that in exceptional circumstances, the Supreme Court has wielded its inherent jurisdiction to reverse its judgment. For instance, in the case of *Oriker Jev &Ors. v. Iyortom & Ors.*[29], which interestingly is an electoral matter, the Supreme Court had in an earlier judgment ordered that the Independent National Electoral Commission (INEC) should conduct a run-off election in the case. Subsequently, the Court discovered that it made the said order based on a wrong interpretation of *Section* 133(2) in conjunction with *Section* 141 of the Electoral Act[30]

On a post-judgment application by one of the parties, the Court set aside the earlier order. It instead ordered Independent National Electoral Commission (INEC) to issue the Applicant a certificate of return.

Although, The Court in its decision in *Jev v. Iyortom* restated the fact that there is no constitutional provision for the Supreme Court to review its judgment as *section* 235 of the Constitution gives a stamp of finality to any decision of the Supreme Court. That there is, however, as the Supreme Court has decided in other instances, an inherent power to set aside its judgment in appropriate or deserving cases but that such inherent jurisdiction cannot be converted into an appellate jurisdiction as though the matter before it is another appeal intended to afford the losing litigants yet another opportunity to restate or re-argue their appeal.

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[27] (1987) LPELR-40648 (SC)

[28] Solomon. U., 'Developments in Nigerian Constitutional Law', [2016], *International Journal of Constitutional Law*, (Vol. 12. No.1), 9

[29] [2015] NWLR (Pt. 1483) 484

[30] 2010 (As Amended).

Similarly, in the case of *Olorunfemi v. Asho*[31] which is an unreported case and a ruling, the Supreme Court is said to have in its unreported ruling delivered on the 18th day of March, 1999 set aside its judgment delivered on the 8th day of January, 1999 on the ground that it failed to consider the respondent's cross-appeal before allowing the appellant's appeal. It ordered that the appeal be heard de novo by another panel of justices of the Court. It is therefore evidently clear that where the ground exists, Supreme Courts of basically all jurisdictions will not shyaway from setting aside their judgments or orders and substituting them with others. The ultimate end is justice, not the prestige of the court.[32]

Sequel to the above, it is the considered view of this work that upon review of relevant sections of the Constitution of Federal Republic of Nigeria 1999 as amended, rules of supreme court, that no specific provision exists which gives the Supreme Court power to set aside its judgment or decision. The Court retains such power under its inherent powers. It is not given by the 1999 Constitution. It is inherent in it. It is however, recognized under section 6(6) of the said Constitution which affirms that it cannot be taken away.

4. Impact of Supreme Court's Review of its Judgments on Democracy

It is necessary and pertinent to emphasize in this article that the Supreme Court of Nigeria is the highest court in Nigeria and its decisions are binding on every person and authorities breathing the air in Nigeria. Under our principle of *stare decisis*, or judicial precedence, the decisions of the Supreme Court of Nigeria are followed and obeyed by all subordinate courts in Nigeria. Therefore, the pronouncements of the Supreme Court are not only meant for the benefit of the litigants who approach that court, but are also meant for the benefit of all Nigerians including the unborn generations whose rights may be likely affected by the reasoning and logic of the Apex Court. The peculiar position of the Supreme Court as the highest court of the land with nationwide territorial jurisdiction places its decisions in a position to influence the policy of the entire nation as well as the democratic process in Nigeria.

The principle of *stare decisis*, that is, the legal principle of determining points in litigation according to precedent, has impacted much of the law everywhere in the world, but nowhere has it had as much

[31] (2000) 2 NWLR (Pt . 643) 143

[32] Nike, P., 'GTBank-Innoson Dispute: Supreme Court Reverses Prior Ruling, Readmits Bank's Appeal', Punch Newspaper, 16 January, 2022.

impact as in English law and practice which Nigeria inherited. *Stare decisis* is an age long feature of most common law countries including Nigeria. The practice of judicial precedent shows that it serves the case of justice and makes predictability of the outcome of the system positive. Judicial precedent is a basic principle of the administration n of justice in Nigeria. It is based on the fact that the principle of law on which the Court bases its decision on issues before it must be followed by Courts in order of hierarchy. Judicial precedent is a process whereby judges follow previously decided cases where the facts are of sufficient similarity. Judicial precedent means that like cases should be decided alike.[33] Judicial precedent entails that a Court must follow earlier judicial decision when the same points arose again in Litigation.[34] The doctrine of judicial precedent is well rooted in Nigeria Jurisprudence. It is a well settled principle of judicial policy to be strictly adhered to by all lower courts. In the case of *Dalhatu v. Tumaka*,[35] The Supreme Court stated as follows:

> This Court is the highest and final Court of Appeal in Nigeria. Its decisions bind every court, authority or persons in Nigeria. By the doctrine of *stare decisis*, the courts below are bound to follow the decision of Supreme Court. The doctrine is a sine qua non for certainly to the practice/application of law. A refusal, therefore by a judge of the Court below to be bound and I dare say such a judicial officer is a misfit in the judiciary.

It is not in doubt that the decisions of the Supreme Court in *Ihedioha v. Uzodinma's* case not to review its decision accords with the letter and spirit of the wordings of the Constitution of the Federal Republic of Nigeria, 1999 as amended. It also deepened the operation of the rule of law and upheld the sanctity of the judiciary and particularly the Supreme Court. This trend has been re-established in the very recent cases from the Bayelsa and Zamfara gubernatorial electoral matters. For if the Supreme had reversed itself in the case of Imo, the flood gate would be unimaginable. More decided case both criminal, civil and election cases would have surfaced, rendering the Supreme Court functions lack any form of finality. Also it will be tantamount to institutional breach of *Section* 235 of the constitution by the main body meant to protect it, thereby allowing people in government to use the breach to achieve their

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[33] Akande, J. A., *Miscellaneous of Law and Gender Relations*, Lagos, MIJ publications Ltd, 1999, 1
[34] Enwere, O. E., 'Doctrine of Stare Decisis And Its Relevancy in the Administration of Justice in Nigeria', [2019], *Journal of Jurisprudence, International and Public Law*, (Vol. 2, No. 1) 187
[35] (2003) 15 NWLR (Pt. 843) 310 at 323

parochial interests. This can be seen in the attempts made on the reversals of Zamfara, Bayelsa and other states lost by the party in power at the federal level. Maintaining the sanctity of Constitution is very important in preserving democracy, rule of law, judicial precedent and societal justice. This is expressed by the former American president Thomas Jefferson, where he presented the objective of a constitution in a society as thus; "the two enemies of the people, are the criminals and the government. So let us chain the second with the constitution so it does not become the institutionalized version of the first." To this effect, asking the Supreme Court to reverse its decision is opening the avenue freeing people in government from the chain of the constitution.

However, looking at the fact that the doctrine of *stare decisis* is one of the inevitable principles of the Nigerian Legal system as well as the harshness and injustice associated with the Imo State case, the argument that where no specific provision exists which gives the Supreme Court power to set aside its obviously bad judgment in *Uzodinma & Anor. v. Ihedioha & 2 Ors* is necessarily flawed. This is because on the authority of *Jev v. Oyortom*, the Supreme Court can actually review its decision. One of the successful reviews was in the case of *Bar Oriker Jev & Ors. v. Iyortom & Ors*.[36] Interestingly it was an electoral matter too. The Supreme Court had in an earlier judgment in the matter ordered that INEC conduct run-off election. During the review, the court discovered that it made the said order based on a wrong interpretation of *Section* 133(2) in conjunction with *Section* 141 of the Electoral Act 2010 (as amended). On a post-judgment application by one of the parties, the Court set aside the earlier order. It instead ordered the Independent National Electoral Commission (INEC) to issue the applicant a certificate of return.

Moreover, the case of *Uzodinma & Anor. v. Ihedioha & 2 Ors*[37] constitutes a bad precedent for the democratic and electoral jurisprudence in Nigeria and ought to reviewed, changed or revisited. This is because the Supreme Court's acceptance of results from 388 polling stations without certification by the required public organizations was in violation of the Evidence Act 2011's provisions of *sections* 89 (e) and (f) and 90 (c). Thirdly, neither INEC, the document's creator, nor the police department from whom the records came were able to certify the results from the contested 388 voting units. Thirdly, accepting the evidence of a police officer who did not create or have any knowledge of the document

[36] [2015] NWLR (Pt. 1483) 484
[37] *Supra*

contradicts Evidence Act 2011 particularly sections 37, 38, and 126 thereof. Fourthly, the Supreme Court's acceptance of the results from the 388 polling units without any proof from polling agents or INEC officials defies past legal practice. The court had to miraculously manufacture votes more than the number of the people who had originally voted in the election and allocated all the votes to your opponent. All of us in Nigeria should be very careful and be warned here because the honest truth is that whether we are APC, PDP, APGA, AA, Accord, etc., or apolitical, we all are involved in this dangerous rat race.

Perhaps many of us have not thought deeply about the futuristic implications of this disappointing and embarrassing judgment on Imo State's 2019 governorship election. One could be the beneficiary of this very supreme injustice today, but conceivably it could turn to hurt the same celebrator tomorrow since Supreme Court decisions are references as ultimate yardsticks of every judgment. Consequently, if we all do not in unison come out of our political affiliations to condemn this evil and seek paradigm of change, and if this brouhaha is supported and affirmed under any guise to stand, it would eventually metamorphose into a monster that would consume all of us that included the judges that took this decision. And it will be the beginning of the total destruction of whatever justice still left in Nigeria. The erroneous mantra of "Supreme Court decision is final," and that "there must be a stop to litigation" holds no water here until supreme judges begin to take supreme decisions. It is our considered view still that the Supreme Court judges are humans, and considering the enormous volume of cases they had to treat and the voluminous paper works they do, they can make mistakes. All Things being equal, that decision on Imo State was an oversight that will be justly addressed by this review.

The Supreme Court retains power to review its decision under its inherent powers as held in *Jev v. Iyortom.*[38] It is not given by the 1999 Constitution. It is inherent in it. It is, however recognized under section 6(6) of the said Constitution which affirms that it cannot be taken away. It is pertinent to emphasize that the courts, both in Nigeria and other jurisdictions, take the integrity of the judiciary very seriously. Where there is some controversy surrounding the integrity of the Supreme Court necessitating a Supreme Court to look again at its earlier decision, it is somehow imperative that a different panel should be set up to review such earlier decision. According to Chief Robert Clarke (SAN), there are few

[38] *Supra*

occasions where the Supreme Court has been asked to review its decision in Nigeria and in those few occasions, only a couple of them were successful. There have been about four instances, and he participated unsuccessfully in two of them.

"All over the world, where the common law is being practiced, the apex court allows people to review their judgment. In Nigeria also, the Nigerian Supreme Court allows people to come and review judgment. But not to challenge a judgment as if you are appealing against it, because if they make the mistake to allow anybody to always come to the court to challenge their decisions, they would open a floodgate, where everybody will want to take advantage. And that is why in Nigeria today, I don't think there are more than three cases that have gone to the Supreme Court for review. I am lucky I have done two of those cases in the history of the three that has returned to them. I am doing one presently. The apex court says we can come when it makes a mistake, acknowledging that they are not saints. They are mortals like us, but they gave conditions.[39]

With respect to the decision of the Supreme Court in the Bayelsa case, because of anomalies in his running mate's names on his certificates, the Supreme Court stopped Lyon from being inaugurated in as Governor of Bayelsa State for 24 hours on February 13, 2020, and ordered PDP's Douye Diri to be sworn in. With due respect to the learned justices of the Supreme Court, it is our submission that the decision of the Supreme Court is unjust and harsh. It is our considered view that it is unfair, unjust and unreasonable for the Supreme Court to disqualify both the Governor-elect and his running mate from being sworn due to the sin of the running mate not even the Governor-elect. The Supreme Court would have taken a cue from what happened in 1979 in Imo State where Samuel Onunaka Mbakwe emerged winner in the gubernatorial primary election under the platform of NPP. This was the position taken by the courts in *Nwakanma Okoro v. Sam Mbakwe* in 1979. Unfortunately, Mbakwes running mate or deputy known as Bernard Amalaha was found disqualified after the election. Mbakwe was allowed to choose another Deputy. He chose Prince Isaac Uzoigwe, in place of Dr Bernard Amalaha. His election was not voided.[40] The Supreme Court should not have voided Lyon's election but should have allow him pick another running mate.

According to Alozie, by voiding Lyon's election, the Apex Court has taken away the right of the people of Bayelsa State to choose their leader.

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[39] Onyekwere, J., *Op.cit*.,

[40] '1979 Imo State Gubernatorial Election', www.en.m.wikipedia.org, accessed on 16/1/2022.

He posits that the decision of the Supreme Court in voiding Lyon's election violates the sanctity of ballot box. It is the inviolable right of the people to choose their leaders. The Supreme Court seems to have taken away that right.[41] A deputy Governor or vice president has always been known to be a spare tyre. The election in question is Governorship election and not Deputy Governorship election. Consequently, after the election, where it is found that the Deputy Governor is not qualified, the Governor ought to be allowed to choose another deputy."

5. Recommendations

5.1 Stiffer Penalties for Culpable Judicial Officers

Nigeria's political process is characteristically marred with corruption and corruptive tendencies. This is because the syndromes of money politics', Big man politics', and the politicisation of the judiciary 'appear to be the major determining factor of the system of electoral justice in Nigeria and elsewhere on the Africa continent. The predictable election adjudicatory processes outcomes in Nigeria often respond to very narrow but powerful interests. Within the context of prevailing dominant money politics in Nigeria, the judiciary has become targeted markets' for political investors while electoral justice becomes auctionable and sellable to the highest bidder. Therefore, there is convergence between political corruption and judicial corruption. The manifest effect of this syndrome is to always see a wide gap between the evidence of electoral frauds and the attendant court verdicts. Instances of proven cases of corruption and financial inducement against judges sitting on election petition cases have continued to pervade the polity, thus questioning the role of the judiciary as an important institution of democratic sustenance.

5.2 Appropriate Sanctions for Court-Removed Public Office Holders

Any meaningful reform in Nigeria's electoral system must cut across three important stakeholders; namely, the election management body, the judiciary and the political class. Injecting reforms that are capable of reducing stress in Nigeria's electoral process and the judicial process of resolving ensuing disputes without proper measures that will curtail the antics of the politicians may not likely produce the desired outcomes. It is in this regard that this study recommends sanctions for political office holders who are removed by the courts for electoral fraud and

[41] Onanuga, A., 'Supreme Court decision on Bayelsa violates sanctity of ballot box', *Nations Newspaper*, 17 February, 2020, 18

manipulations. Political office holders found guilty of manipulating the electoral process to secure political power occupy such political offices as interlopers and usurpers, hence must be severely sanctioned to first caution politicians to abide by guidelines and seek political power within the ambit of the law and second to reduce the thirst 'and hunger' for political offices which are incredibly attractive in Nigeria.

Towards future general elections in Nigeria, both the electoral laws and the constitution should be reformed to include two clauses relating to political office holders found guilty of electoral fraud. The first clause should make court-removed political office holders to compulsorily refund all monies and financial benefits in the form of salaries and allowances received while illegally occupying such offices and the second clause should categorically ban court-removed political office holders from being recognised as having occupied such offices before.[42]

5.3 Departing from Bad Precedents in Future Cases

The apex court can overrule itself on a principle of law or to refuse to follow its earlier decision if it comes to the opinion that it is bad law. That cannot happen in the same case but a subsequent matter on the same subject matter. Thus, it is the recommendation of this paper that the Supreme Court should be courageous enough to depart from or refuse to follow the bad precedents it has set in such cases like the *Uzodinma v. Ihedioha's* in subsequent or future cases. Consequently, as a result of the far-reaching effect of the decisions of the Supreme Court, the Justices of the Apex Court should always ensure that they give effect to the enthronement of substantial justice at all times by departing from such cases decided by them which by their nature constitutes bad precedents and does not enthrone substantial justice. This is because the Supreme Court being the Apex Court in the land is clothed with jurisdiction to determine cases which are of general public interest and capable of shaping the policy of the country and the democratic process.

[42] Oluwole, E. O., 'The Politicization of Election Litigation in Nigeria's Fourth Republic', www. ukzn.ac.za.com, accessed on 16/1/2022.

The Role of Lawyers as Deponents to Affidavit in Garnishee Proceedings and the Scope of Section 83(1) of the Sherrif and Civil Process Act

Grace-Dallong Opadotun and Godfree Matthew***

Abstract
The Sherriff and Civil Process Act, ought to be a law that simplifies enforcement of judgments delivered by a competent courts. However, some of its provisions appear to complicate enforcement of judgements. One of such provisions is section 83(1) of the Sherriff and Civil Processes Act, which states to the effect that a lawyer must personally depose to an affidavit accompanying Motion Ex parte for enforcement of judgements. This raises the question as to whether failure to comply with that requirement, affects the enforcement of such judgement. Equally, does that section mandating a lawyer of the Applicant to depose to an affidavit in Motion Ex Parte accords with Nigerian laws? It is the response to these questions that gives birth to this article. Thus, the aim of this article is to show that literal and strict application of this section will deny successful parties access to justice. Similarly, the role of lawyers in deposing to affidavits on behalf of their clients, conflicts with the Rules of Professional Ethics. In this article, the writers used doctrinal sources such as statutes, case laws, books, and journals. This work hopes to inspire policy formulation and legislative reform.

1. Introduction

This work is compartmentalized into three sections. The first part deals with the theoretical frameworks associated with the subject-matter of this article. After that it examines the brief introductory exposition on section 83(1) of the Sherriff and Civil Process Act,[1] (hereinafter referred to as SACPA). The second part examines how section 83(1) conflicts with some major premises of Nigerian law. The third part examines the effects of the

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1 Cap S6 LFN, 2004

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said section of the Act. The fourth part examines the way forward on how to address the challenges posed by the provision of section 83(1) of SACPA.

2. Theoretical and Conceptual Framework

The interesting theoretical concepts that are engaged in this article include affidavit, deponents, garnishee, judgements, judgement debtors, judgement creditors, lawyer, and rules of professional ethics. This follows the fact that these concepts are deployed in discussing the subject matter of this paper. Thus, these concepts are briefly examined at the subsequent part of this paper.

2.1 Affidavit

This is a written or printed declaration of statements of fact that is voluntarily made, and confirmed by the maker, before a person authorised by law to administer such oath.[2] It is a written statement deposed to by a person stating the existence of certain facts which he believes to be true as a results of his personal experiences or information relayed to him by a third party. It also refers to sets of information stated by a person buttressing the existence of facts to support a legal argument in order to convince the court to grant a relief. It is from these perspectives that one notices the use of affidavit evidence to accompany a motion for the grant of reliefs by the court.

Affidavits could be classified into contentious and non-contentious affidavits.[3] Contentious affidavits are used in cases where parties are in disagreement with each other. It is an affidavit where parties seek to contradict the sets of facts deposed by each other. It is from this angle that contentious affidavits give birth to affidavits in support of motions, counter-affidavits and further affidavits.[4] On the other hand, contentious affidavit deals squarely with facts that are not contested by any person. It merely states what happened so as to get the approval of authorities to validate certain state of affairs. It is from this perspective that one may refer to affidavits of loss of documents, depositions for travelling, depositions vouching for one's integrity and character as well as affidavits in support of *Motion Ex parte*. One peculiar feature of contentious

2 G Bryant , "Black's Law Dictionary 4th Edn. Pdf ", (West Publishing CO.,1968) 80.
3 M Godfree , "Examining The Scope of Contentious Affidavits in Interlocutory Applications under Nigeria's Adjectival Laws", June 25,2020, The NigerianLawyer, @https://thenigerianlawyer.com/examining-the-scope-> accessed 23 September 2023>.
4 ibid.

affidavit is that it does not require service on any person before it could be approved.

2.2 Deponent

This refers to a person who willingly makes and swears on a written statement accompanied by oath. A deponent is someone who states in writing or by speaking as a witness in a court of law that something is true.[5] It is also defined, by *Black's Law Dictionary*, as one who deposes to the truth of certain facts; one who gives under oath testimony which is reduced to writing; one who makes oath to a written statement.[6] The above definition by *Black's Law Dictionary* refers, to a deponent of an oath in three categories. The first category envisages a situation where a person states his knowledge of certain facts via swearing to an oath viva voce. This is the common way of deposing to a fact when giving evidence in court rooms. Here parties either affirm or swear by repeating the words recited by court clerks. The second category refers to a situation where a person's statement or evidence is put down into writing and he is asked to sign as a deponent. This is common in frontloading procedures where statements of witnesses are converted into Witnesses' Statements on Oath by Counsel. This practice is commonly done by illiterate persons at the direction of the Court's Registrar or their Counsel. The third category is where the party testifying has personally made an oath on a statement that was already written. Here all he needs to do is to swear or affirm the statement he as written.

2.3 Garnishee Proceedings

This is a judicial proceeding in which a creditor asks the court to order a third party, who has custody of money belonging to the judgement debtor, who is indebted to the creditor, to turnover to the creditor the debtor's property in the possession of a third party.[7] This means that garnishee proceedings is a process where a successful party that gets judgement by a court of law can acquire the property of his opponent in the custody of a third party. It is one of the ways of enforcing monetary judgements.[8]

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5 Canbridge Dictionary, "Deponent|English meaning-Cambridge Dictionary"@https://dictionary.cambridge.org> <accessed on September 24, 2023>

6 G Bryant, Loc Cit, 525.

7 Michaelmas Chambers , "Garnishee Proceedings: Its Meanings and Procedures" June 19, 2020@https://www.michaelmaschambers.com>...<accessed on 23 September 2023>

8 O Adeyemi , "An Analysis of the Case of Central Bank v Interstellar Communications Ltd & 3Ors (2018) 7NWLR (Pt. 1618) 294"AAAChambers@https://www.aaachambers.com> accessed 24 September 2023>

It is a legal process that arms a judgement creditor to recover the fruit of his victory on from monies belonging to the judgement debtor in the custody of a third party. The main feature of garnishee proceedings is that it must be strictly between the Judgement Creditor and the Garnishee, the Judgement Creditor is a stranger.[9] However, in order to succeed in garnishee proceedings, the Judgment Creditor must ensure that:

(a) The judgement specified the amount of the money sought to be garnished;
(b) There is no pending motion for stay of execution yet to be determined;
(c) The Judgement Creditor must provide the specific details of the Garnishee such as Bank, Account number, etc.; and
(d) The Judgment Creditor must serve the Order Nisi on the Judgement Debtor as provided in section 83(2). [10]

2.4 Lawyer

A lawyer is defined as, "a person learned in law: as an attorney, counsel, or solicitor."[11] It also refers to any person who, for the fee or reward, prosecutes or defends causes in courts of records or other judicial tribunals.[12] These definitions firstly view a lawyer as a professional who is learned in law in the capacity of an attorney, counsel or solicitor. They further qualify lawyers as persons who renders their services on the condition that a person seeking their services must pay for it. As such, a lawyer is a trained professional who represents a client in court for an agreed remuneration. He is also known as advocate because he speaks for the interest of his client. Before a lawyer protects the interest of his client, there must be a lawyer-client relationship. This means that the client must have retained the legal services of a lawyer through an agreement. However, there are instances that a lawyer-client relationship does not need retainership. This is mostly in cases involving *pro bono* services, or where the lawyer is engaged by a third party to represent the client (as in the case of Legal Aid Council and Civil Liberty Organisations who pay lawyers to represent certain classes of persons in the society). In whatever capacity the service of a lawyer is engaged, he owes the state, the

9 UBA PLC v Ekanem (2010) 6 NWLR (Pt. 1190).
10 O Adeyemi. Loc.Cit
11 The Law Dictionary, "Lawyer Definition & Meaning"@https://thelawdictionary.org> accessed on
September 2023>.
12 ibid.

profession and the client to discharge his duty with diligence and professionalism.

2.5 Rules of Professional Ethics

This refers to rules that govern the conducts of professionals in discharging their duties. It governs them to exercise their duties within the bounds of the law. Rules of professional ethic are meant to ensure that professionals behave well in the course of discharging their duties. It also seeks to ensure that professionals have not abuse their roles or misuse it against the public. It is for this reason that professional bodies established disciplinary measures to tackle any acts unbecoming of professionals.[13]

The legal profession in Nigeria is governed by the Rules of Professional Conducts, 2007 (2022 as Amended). The essence of the Rules is that a lawyer should uphold and observe the rule of law, promote and foster the course of justice, maintain a high standard of professional conduct, and shall not engaged in any conduct that is unbecoming of a lawyer.[14] This law regulates the duties of a lawyer to the state where he is expected to prosecute diligently, and not to persecute. The lawyer's duty to the legal profession is to uphold and promote the rule of law and to serve as minister in the temple of justice. He is to avoid anything that will bring him into conflict with the ethics of legal profession. To his clients, a lawyer is expected to be diligent and be accountable to them.

3. Local Content Provision under the Sherriff and Civil Processes Act

3.1 An Exposition of the Scope of Section 83(1) of the Act

The SACPA was enacted to ensure that enforcement of judgments of courts and services of court process are done by the appropriate authorities. These appropriate authorities are designated persons specified by the law which include the Sheriffs and the Bailiffs. This position can be deduced from the preamble of the SACPA which state as follows, "An Act to make provision for the appointment and duties of Sheriff, the enforcement of Judgments and Orders, and the services and execution of civil processes throughout Nigeria."

Flowing from above, the provisions of section 83(1) of the SACPA came into being to ensure that enforcements of judgments are done in accordance with the law. The said section 83(1) is captured under the

13 Rule 1 of The Rules of Professional Conduct, 2007 (2022 as Amended).

14 Rule 17 of TheRules of Professional Conduct, 2007 (2022 as Amended) enjoined lawyers to avoid anything that will lead them into conflicts with their professional responsibility.

statutory headings of "attachments of debts by Garnishee Order." The specific wordings of sections 83 (1) of the SACPA are reproduced as follows:

> The court may, upon the ex parte application of any person who is entitled to the benefit of a judgement for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgement and upon an affidavit by the applicant or his legal practitioner that judgement has been recovered and that it is still and unsatisfied and to what amount, and that any other person is indebted to such debtor and is within the State, order that debts owing from such third person, hereinafter called the garnishee.

By the above provisions, the law states that a judgement creditor who wants to reap the fruit of his judgement must apply via a *Motion Ex parte.* In that *Motion Exparte*, the applicant must accompany the said motion with an affidavit. The affidavit must disclose that the debtor is credit worthy to satisfy the judgement awarded against him. It must also state whether or not the judgement debtor has satisfied the judgement awarded against him. However, the main gravamen of this section is with respect to the one of the deponents of the affidavit accompanying the said *Motion Ex parte*. The two persons to depose to the affidavit as provided in section 83(1) of SACPA are the Applicant (Judgement Creditor) and his lawyer. The reference to these persons is on the alternative which means that the affidavit could be deposed by either the Applicant or his lawyer.

Thus, the question is, must a lawyer deposed to such affidavit or can he delegate it to his clerk? Is it professionally right for a lawyer to depose to an affidavit in such circumstances? Can failure by the lawyer to depose to such affidavit invalidate the said *Ex Parte Application*? Put in another way, can the deposition of a lawyer required by law, be alternated with that of his clerk or litigation secretary? What is the principle governing deposition of affidavit by a lawyer vis-à-vis the requirements of the Evidence Act,[15] and the Rule of Professional Conduct?[16] The responses to these questions are addressed in the subsequent part of this article.

15 Cap E14 LFN, 2004.
16 2007(2022 As Amended).

3.2 How Sections 83(1) of SACPA Conflicts with Some Legal Principles on Proprietary of a Lawyer Deposing to an Affidavit in Garnishee Proceedings

Going by the contents of section 83(1) with regards to deposition of affidavit by lawyer, it is glaring that abiding by the wordings of that section will conflict with some laws of Nigeria. Some of these laws and principles that will be in conflict when in compared with section 83 (1) of SACPA include, Evidence Act, Rules of Professional Conducts, waiver of rights, substantive justice, and the permissive nature of sections 83(1) of SACPA.

(i) Conflicts with Evidence Act

The Evidence Act is the principal legislation that governs admissibility of evidence in court of law.[17] The laws and procedures relating to evidence are exclusively governed by the Evidence Act. As such, when it comes to matters relating to deposition in an affidavit, it is the Evidence Act that applies. The procedures and rules outline for deposing to affidavit are spelt out from sections 107 to 118 of the Evidence Act. Of particular interest to this article is the provisions of section 115 (3) and (4) of the Evidence Act which provides to the effect that where a person is deposing to facts outside his knowledge, he shall set forth the source of his information, the circumstances, place, time and date.

The position of the Evidence Act as an exclusive legislation governing affidavit evidence has been judicially recognised in the case of *Kalio v Benjamin*.[18] In this case, there was an objection not to admit a document because it was not registered under Land Registration Instrument Law. The Supreme Court held that the principle of admissibility of evidence is governed by the Evidence Act, and not the Land Instruments Registration Law. As such it is the law of evidence that governs anything relating to evidence. Thus, in the case of *Kalio v Benjamin,*[19] the Supreme Court held that "Evidence Act is a specific legislation that governs matters relating to Evidence."[20]

The above decision of the Supreme Court in the case of *Kalio v Benjamin*, is further amplified by the decision in the case of *Anagbado v Farouk.*[21] Here, the Supreme Court held as follows:

17 See thecommencement paragraph of the Evidence Act, Cap E14 LFN, 2004.
18 (2018) 15 NWLR PT.1648 (SC).
19 Supra.
20 ibid 6-38 paras-A-D.
21 (2019) 1 NWLR (Pt. 1653) (SC) 292 Paras-A-G.

> The law (Cap.85 of Kaduna State (Section 15 thereof), in so far as it purports to render inadmissible any material and relevant piece of evidence that is admissible in evidence under the Evidence Act, 2011, is to the extent inconsistent with the Evidence Act, enacted by the National Assembly pursuant to the powers vested in it by section 4 (2) of the Constitution and item 23 of the Exclusive Legislative list set out in Part I of the Second Schedule to the Constitution. Evidence is in Item 23 in the Exclusive Legislative List. I am of the firm view that, in view of section 4(5) read with section 4(2) of the Constitution and Item 23 of the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution, in the event of section 15 of the law, Cap.58 of Kaduna State being in conflict or inconsistent with any provisions of the Evidence Act, the provisions of the Evidence Act shall prevail.

From the above expositions of judicial authorities, it is clear that the Evidence Act is a specific legislation that governs matters relating to evidence, including affidavit. Therefore, the requirement of the Sherriff and Civil Processes Act cannot be deployed to dictate how and who can depose to an affidavit. Doing so will conflict with the Evidence Act which is a specific legislation.

(ii) Against the Rule of Professional Ethics

Also, allowing a lawyer to depose an affidavit on behalf of his client violates professional conducts of lawyers. The law outrightly prohibits lawyers to depose to an affidavit. This is because doing so contradicts the provisions of Rules of Professional Conducts. This position is supported by the dictum of the Supreme Court in *Ekpeto v Wanogho,*[22] where it was held Per Kalgo, JSC, that:

> It is an undesirable practice for a counsel to swear on affidavit in support of motion filed on behalf of his client. Where a Counsel does so it means he is giving evidence in case in which he is appearing.

The above view of the apex court is further reiterated in the case of *Bala v Dikko.*[23] In this case the court was occasioned to hold, per Mohammed JSC, as follows: "… It [is] quite unethical and contrary to the Rules of Professional Conduct in Legal Profession for …counsel to have filed the

22 (2004) 18 NWLR (PT.905)(SC) @P.413,Paras-B-D.
23 (2013) 4 NWLR (Pt. 1343) (SC) 60 Paras G-H.

motion and at the same time posed as a vital witness in the affidavit in support of the case of his client."

Adding a recent voice on this matter, the Supreme Court further discountenanced an affidavit signed by a counsel in the case of *Akinlade & 1 Or v INEC & 2 Ors.*[24] Here, the Supreme Court held that deposing to such affidavits contravenes the provisions of Rule 20 (4) of Rules of Professional Conduct, 2007 which forbids a lawyer from being a witness to his client. Thus, the Apex Court, per Eko, JSC held that:

> The point is so basic and fundamental that the total disregard or lack of it by a lawyer cannot be condoned. Any conduct that is a direct affront or infringement of the express Rules of Professional Conduct can only be regarded as conduct unbecoming…The Appellants' Counter-Affidavit being so brazenly offensive was accordingly discountenanced.[25]

Flowing from the above arguments, it clear that interpreting the provisions of section 83(1) of the Sheriff and Civil Processes Act, to the effect that a lawyer to the Applicant must be a deponent to an affidavit in a garnishee proceedings, will further promote unlawful acts by the lawyer. Therefore, the proper thing to do is for the lawyer to relay the information to a third party in compliance with section 115 (3) and (4) of the Evidence Act. Where such is done it will suffice. As such, the Clerk or Litigation Secretary of the Lawyer, can validly deposed to an affidavit contemplated by section 83(1) when the facts are relayed to him by a particular persons, in a particular place, at a specific time and date; it will suffice.[26]

(iii) Waiver of Rights

The concept of waiver of rights could be another reason why the provisions of section 83(1) of the SACPA, that a lawyer must solely deposed to an affidavit without delegating it, does not appear correct in law. This is because of two reasons. The first reason is that by rule of affidavit evidence, a deponent can delegate it to a third party to depose on his behalf, provided he particularises the circumstances under which such facts are made.[27] The second reason is that the right of an Applicant or his Lawyer to depose to an affidavit in support of *Motion Ex parte* within the context of section 83(1) of the SACPA is a right accrued to the

24 (2020) 17 NWLR (Pt. 1639 (SC) 537 Paras-B-A.
25 ibid.
26 Evidence Act, 2011 s 115.
27 ibid.

Applicant. It is his personal right and he is the beneficiary of such rights. And since it is his private rights, he can elect that a third party (such as a clerk or another person) to depose on his behalf. This is because it is his private right and may be waived. This position agrees with decision of Supreme Court in the case of *Ananuebunwa v AGF*,[28] where it was held that:

> Waiver must be in respect of a private right and for benefit of a particular person in contradistinction to a public right which one person cannot waive because it is intended for public good. A statutory provision for the benefit of a person can be waived because it confers a private right or protects a private interest.

By the above authority, it means that private rights of citizens like the deposing to an affidavit must not necessarily be complied with. Rather, he can elect to delegate another person to do it on his behalf. The above decision is apt to section 83(1) of the SACPA, because it specifically made reference to indispensability of a private rights or interest that are conferred by statute. By this it means that even where private rights are accrued to one by statutes, he can elect to do away with it. And by this the court will be liberal in interpreting such sections.

(iv) Substantive Justice

The current trend of legal practice in Nigeria is the need to promote substantial justice of a given case. Relying on technicalities is frowned at by the court. This position is reflected in the verdict of the Court of Appeal in the case of *Balogun v E.O.C.B (Nig) Ltd*,[29] where the court held opined Per Okoro **J** that "the court is mere interested in the substance rather than in mere form. Justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice." Therefore, it will be technical to insist that the deponent of an affidavit in support of *Motion Ex parte*, must be the applicant or his lawyer, and no other person. As such where an affidavit is deposed to by a third party not necessarily the counsel or applicant within the province of section 83 (1) of the SACPA, the court will be interested in whether the third party who deposed to such affidavit complied with the provisions of the Evidence Act in doing so. It is by adverting to this line of legal reasoning that the court will arrive at the substantial justice of this case.

28 (2022) LPELR-557750 (SC) 544 Para F.
29 (2007) 5 NWLR (Pt 1028) 588, 600 Paras E-F.

(v) The Permissive Nature of Section 83(1) of the SACPA

A provision is permissive when relying or abiding to its provision is not mandatory. In order words, it is interpreted in a more liberal manner to ensure that justice of a case is met. A permissive section is characterised by the reflections of such words like, 'may', 'or' and 'should'. Each of these words in it ordinary meaning implies probability, alternative, options and suggestions. The combined effects of having such words in a provision of a law should be able to guide the judge that such section needs liberal interpretation in the permissive sense. Thus, going by the provision of section 83(1) of the SACPA, it could be deduced that the reflections of words like, 'may' and 'or', should be enough indication that such section will not void an affidavit accompanying a *Motion Ex parte* because it was not personally deposed to by an applicant or his lawyer.

4. Impediments on Strict Reliance on Section 83(1) SACPA

Where the courts is to interpret section 83(1) of the SACPA in its strict sense to say that an affidavit contemplated within that provisions must be deposed to by the applicant or his lawyer, it will have adverse effects on the administration of justice. Some of the likely effects of strict interpretation of section 83(1) of SACPA include undue reliance on technical justice, obstruction of substantive justice, prejudicial to unforeseen circumstances, promoting professional misconducts and inter-statutory conflicts. These positions will be examined at the subsequent part of this work.

4.1 Undue Reliance on Technicality

It will amount to undue reliance on technicality to insist that an affidavit accompanying *Motion Ex parte* for garnishee must only be deposed to by an applicant or his lawyer and where a third party deposed to such an affidavit, it shall be voided. This runs contrary to the substantive rules of justice governing affidavits where it is stated that an affidavit can be deposed to by a third party provided certain conditions are met.[30] Thus, where a third party deposed to an affidavit after information has been relayed to him and the circumstances under which it was made are stated, it would be highly technical for the court or a party to hold and insist that such affidavit is incompetent because it was not deposed to by the

30 These conditions spelt out in section 115(3) of The Evidence Act, includes stating the circumstances ,time, places and dates when such information is relayed to the third party deposing to an affidavit.

Applicant or the lawyer, being the specific persons mentioned in section 83(1) of SACPA.

4.2 Obstruction of Substantive Justice

Where a court will rely on the strict interpretation of section 83(1) to the effect that an affidavit must be deposed to by a lawyer or an applicant, and consequently, refused such garnishee application, such act may amount to obstruction of substantial justice. This is because at garnishee stage judgement has been delivered, the status of the parties as winners and losers have been determined by the court. The winner is supposed to enjoy the fruit of his victory. Thus, where his application is simply refused because of affidavit not being deposed to by him or his lawyer personally, it would amount to refusing him access to reap the fruit of his victory, given to him by the court.

4.3 Prejudicial to Unforeseen Circumstances

A good law should be able to contemplate certain unforeseen circumstances in its application as well as interpretation. Thus, where a law is so strict and rigid over certain principles, it will rarely meet the justice of a situation it seeks to address. Allying this proposition with the provision of section 83(1) of the SACPA, it is apposite to state that this section does not contemplate the likelihood of certain unforeseen circumstances in its application. For example, what about corporate entities? Who deposed to it in official capacity? Must it be one person or in his absence there is another. Again, stretching this interrogation to sick persons, one is prompted to further ask, what happens in a situation where both the Applicants and his lawyers or one of them falls ill, would affidavit deposed to by a third party void that application? Equally what happens when the applicants and lawyers within the contemplation of section 83(1) are outside Nigeria? Can a deposition by a third party on their instructions (with particulars of circumstances under which such instructions were given) be nullified? These are some of the circumstances that section 83(1) of SACPA does not contemplate.

4.4 Promoting Professional Misconducts

Relying on section 83(1) of the SACPA, to the effect that a lawyer must deposed to an affidavit accompanying Ex Parte motion , will put the lawyer at loggerhead with his professional ethics. This is because the same lawyer that is deposing to the said affidavit contemplated in section 83(1) could be the same lawyer that would move for such ex parte application. Where such situation arises, such a lawyer is said to act in

conflict of interest against his professional ethics. That is why the courts strictly prohibit a lawyer to depose to an affidavit on behalf of his client.[31]

4.5 Inter-statutory Conflicts

The provisions of section 83(1) of the SACPA conflicts two major statutes in Nigerian jurisprudence. The first statute it conflicts with is the Evidence Act. By stating who can deposed to an affidavit without creating an exception to the rules contemplated by the Evidence Act, section 83 (1) of the SACPA conflicts with the Evidence Act. Since the Evidence Act is the principal Act that governs matters relating to evidence, the SACPA should be subject to the former.

The second statute that section 83 (1) of SACPA conflicts with is the Legal Practitioners Act,[32] and the Rules of Professional Conducts. These laws govern legal practice in Nigeria and thereby enjoin lawyers to practice their profession in such a way to avoid conflicts of interest. These conflicts of interest include not deposing to an affidavit in support of a client's case.[33]

5. Conclusion

This work starts by appraising the conceptual and theoretical framework associated with the subject matter of this discourse. After that analysis of the provisions of section 83(1) of the SACPA was done. The work further examines how reliance on the provisions of section 83(1) of SACPA conflicts with the rules of professional ethics for lawyers, conflicts with the law on evidence as well as the jurisprudence of substantive justice.

The work further examines some of the challenges that relying on the strict interpretation of section of 84(1) of SCAPA will cause. Thus, in order to address these challenges examined in the main body of this articles, these writers suggested some proactive measures. These include liberal interpretation of section 83(1) of SACPA, adoption of the maxim of *genaralibus specialibus non dere gante*, and the need to amend the SACPA.

31 Bala v Dikko (Supra).
32 Cap L111 LFN 2004.
33 Akinlade & 1 Or v INEC & 2 Ors (Supra).

Banker-Customer Relationship under Electronic Banking: Liability and Remedies for Data Breach in Nigeria

*Ogechi Bernice Ohwomeregwa**

Abstract
This paper is set to examine the nature of banker-customer relationship under electronic banking so as to discover who becomes liable in any occasion of data breach. In order to address this research problem as well as achieve its purpose or objective, doctrinal research method is employed. The discovered that the traditional banker-customer relationship has not been affected by electronic banking; the only effect of electronic banking on this relationship is on the nature and form of contract created under it. It is also observed that banks operating in Nigeria have the attitude of shifting liability to their customers using electronic banking agreements. Based on this observation, it is recommended that there is a need for courts to uphold the traditional banker-customer relationship between banks and customers. It is also recommended that exclusion or exemption clauses cannot avail banks owing to the fact that failure to protect their customers' vital information is a breach of a fundamental condition of the contract existing between them.

1. Introduction

The use of electronic means in service delivery in Nigerian banks has enjoyed a wide acceptance among bankers and customers. One of the reasons necessitating the shift towards electronic banking in Nigeria is as a result of the emergence of the global economy which requires accessibility of funds from other parts of the world. Use of electronic facilities in banking operations and service delivery enable banks operating in Nigeria the opportunity of transferring, receiving and trading in different foreign currencies without having to physically carry the cash or coin.[1] In order to flow with global developments and improve

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[1] IC Onodugo 'Overview of Electronic Banking in Nigeria' (2015) 2(7) *International Journal of Multidisciplinary Research and Development* 334-342.

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on service quality, banks operating in Nigeria have keyed into electronic banking operations, using technological infrastructures and communication networks to achieve a more efficient electronic service delivery, customer satisfaction and profit maximization.[2] Traditionally, the relationship between banker and customer is predicated on contract similar to that of a creditor and a debtor in that when a bank customer pays in money into his account, he occupies the position of a creditor while the bank occupies the position of a debtor and vice-versa. This contractual relationship between bankers and customers has been magnified under electronic banking to include other forms of contractual relationships different from pure debtor/creditor relationship. The banker customer relationship also creates some rights and liabilities, the violation of which puts the guilty party in a disadvantaged state of liability towards the other party.

2. Origin and Adoption of Electronic Banking in Nigeria

Electronic Banking has been defined as 'a means whereby banking business is transacted using automated processes and electronic devices such as personal computers, telephones, facsimiles, internet, card payments and other electronic channels.'[3] It has also been defined to mean

> any transfer of funds which is initiated by a person by way of instruction, authorization, or order to a bank to debit or credit an account maintained with that bank through electronic means and includes point of sales transfer, automated teller machine transactions, direct deposits or withdrawal of funds, transfer initiated by telephone, internet and card payment.[4]

The advent of electronic banking in Nigeria can be traced to the 1986 Structural Adjustment Programme (SAP), which introduced reform in the country's foreign exchange system, trade policies and business generally, emphasising a need for reliance on market forces and private sector in dealing with the fundamental problems of the country's dwindling economy.[5]

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[2] E Ezeoha 'Regulating Internet Banking in Nigeria: Problems and Challenges - Part 1' <http://www.arraydev.com/commerce/jibc/> accessed 13 July 2021.

[3] CBN Technical Committee Report on E-Banking, 2003.

[4] Section 58, Cybercrime (Prohibition, Prevention, Etc) Act 2015.

[5] FO Olubisi, 'History and Evolution of Banking in Nigeria' <www.researchgate.net> accessed on 12 July 2021.

As a result of this reform, many commercial banks were licensed bringing the number of banks from 40 in 1945 to 125 in 1991.[6] This rise in the number of banks led to a fierce competition among banks on ways and means of maintaining good customer base and of profit maximization by delivering better quality services to customers.[7] One of the means adopted towards better and efficient service delivery is the introduction of the Automated Teller Machine (ATM), a form of electronic banking by the then Societe Generale Bank in 1990 and First Bank in 1991.[8] Other forms of delivering quality and convenient banking services in Nigeria such as Electronic Fund Transfer, Point of Sale, Short Message Service alerts, among others, were subsequently introduced into the banking sector to pave way for easy service access and delivery in banks.

From its inception to the time in perspective, use of electronic system of banking has proved beneficial in Nigeria. The identified benefits of electronic banking which makes for its wide acceptance includes improved service delivery, minimized running cost, ease of accessing international and global financial services which makes for wide financial inclusion. Electronic banking also helps in development of new service delivery packages and products, ease of information dissemination to customers, job creation among Nigerian citizens as well as contributing towards national economic planning.

3. The Concept of Bank and Bank Customer

According to the Bill of Exchange Act, a bank includes 'a body of persons whether incorporated or not who carry on the business of banking'.[9] This definition which includes non-incorporated bodies has been faulted in Nigeria by the Bank and Other Financial Institutions Act (BOFIA). The BOFIA provides that 'no person shall carry on any banking business in Nigeria except it is a body duly incorporated and hold a valid banking license issued under this Act'.[10] Going by this provision, no corporation can carry on banking business in Nigeria unless it is registered under the BOFIA. Thus, banks registered and recognized under other laws such as

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[6] KI Igweike, *Law of Banking and Negotiable Instruments* (Rev edn, Africana First Publishers Limited 2008) 7.

[7] V, Monica 'History of E-Banking in Nigeria' <https://www.infoguidenigeria.com> accessed 13 July, 2021.

[8] 1D Adewuyi 'Electronic Banking in Nigeria: Challenges of the Regulatory Authorities and the Way Forward' [2011] 2(1) *International Journal of Economic Development, Research and Investment;* 150-156.

[9] BEA, s 2 CAP 35 LFN 1990.

[10] BOFIA 2020 s2(1)

the Central Bank of Nigeria (CBN) established under the CBN Act, Federal Mortgage Bank and Savings banks would be deemed not banks under the BOFIA.[11] It has however been stated in the case of *Woods v. Martins Bank Limited*[12] that banks can only be defined based on the circumstances of every case, considering the nature of the business in issue.

Looking at the above definitions, it is clear that the key phrase in all the above definitions of bank/banker appears to be 'banking business'; that is for an entity to qualify for a bank, it must be in the operation of carrying on banking business.[13] The concept of 'bank customer' or when and how a person who transacts with a bank qualifies for a customer of the bank is that which has also been subjected to different definitions or descriptions.[14] In Nigeria, there is no specific statutory provision as to who a bank customer is. The Money Laundering (Prohibition) Act[15] which provides that banks and other financial institutions should always verify the identity and address of a customer before entering into any business with the customer did not define or describe who a customer is.[16] Owing to this lacuna, the question of who a bank customer is has always been approached through judicial interpretations.[17]

Under electronic banking system, the concept of 'bank'/'banker' has taken a new form different from the usual brick wall as it used to be; a person or entity can transact with and become a bank customer without visiting the bank or having any physical transaction towards account opening. These days, application for account opening can be done online in the comfort of the applicant's home with the aid of electronic infrastructures and network connectivity.[18] The concept of bank customers has equally changed with the wake of electronic banking especially in the present era characterized with ATM machines and debit cards that can be used on other banks different from the issuing bank.[19]

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[11] See the case of *Woods v. Martins Bank Limited* (1959) 1Q.B, 55.
[12] (1959) 1Q.B, 55.
[13] See Lord Diplock's dictum in the case of *United Dominion Trust Limited v. Kirkwood* [1966] 2QBD, 431
[14] (n7) 69.
[15] MLA CAP, M, LFN, 2004.
[16] Igweike, (n15)70.
[17] *Ibid.* See the case of *Great Western Railway Company v. London and County Banking Company* [1901] A.C, 414 at 416. See also the case of *New Nigerian Bank v Odiase* [1993] 8NWLR (Pt. 8) 235 at 243-244.
[18] Electronic Banking with Zenith Bank Plc. <www.zenithbank.co> accessed 23 June, 2021.
[19] See the case of *Kume Bridget Ashiemar v. Guaranteed Trust Bank & United Bank of Africa.* Unreported Suit No: MHC/198/2014.

4. Banker-Customer Relationship under Electronic Banking System

The advent of electronic banking opens up enormous opportunities for banks and customers in terms of new services. Some scholars have argued that electronic system of banking has affected or altered the traditional relationship between bankers and customers.[20] On the contrary, it has been argued that what is affected by electronic banking is just the extent of transactions and services delivered by the bank to her customers and not the nature of the relationship between bankers and their customers.[21] That is to say, electronic banking only affected the mode of arriving at the contract but not the contract or the contractual relationship itself. Generally, the legal relationship existing between banks and her customers is contractual based on Creditor/Debtor relationship.[22] However, with the advancement of banking relations and types of services, there has been a shift from this contractual relations purely based on creditor-debtor relationship. Over the years, it has been observed that bankers obligation to their customers is elastic and does not cover only receipt of money and repaying same when demanded for.[23] Thus, where a bank undertakes to pay a third party on the order and instruction of a customer, the relationship of a principal and agent is created.[24]

Electronic banking has opened opportunities to numerous services that can be delivered by banks.[25] These new form of services is believed to have created other forms of relationships different from the traditional debtor-creditor relationship between banks and bank customers. Among these new form of contact created in electronic banking era is that of principal and agent.[26] In modern banking transaction, a customer may authorize his banker to pay certain amount of money to a third party as bills for goods purchased by the customer as well as to receive money in some circumstances on behalf of the customer who stand in the position

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[20] T.T, Kuvya and S, Aayushi 'Banker-Customer Relationship in the Era of Internet Banking' <www.peacclaims.com>accessed 14 March, 2021.

[21] E,Ighoroje and O, Oshiobuogie 'An Evaluation of Banker Customer Relationship in Nigeria Money Deposit Banks' [2015] 4(5) *Global Journal of Interdisciplinary Social Science;* 1-8.

[22] See the case of *Joachinson v Swiss Bank Corporation* [1921] 3 KB, 110 at 127. See also the case of *Yusuf v Corporative Bank Ltd* [1982] 1 ALL ER, 266.

[23] See the case of *Official Receiver and Liquidator v Moore* [1959] LLR, 46.

[24] See the case of *Joachinson v Swiss Bank Corporation*

[25] Ighoroje (n22).

[26] S, Ross 'The Economic Theory of Agency; Principal's Problems' [1982] *American Economic Review;* 134-136.

of a principal and the banker, agent.[27] Also when banks take up the role of stock brokers, executors or administrators of an estate as well as receiving dividends for customers, they discharge the function of agents for their principal or customers.[28]

Another form of relationship that arises between bankers and customers through electronic banking is that of trustee/beneficiary. This kind of relationship is created when some money, goods or property is kept in the custody of a bank for the benefit of a beneficiary. For instance, First Bank Plc. offers a fixed deposit savings package to parents for their kids' and wards' future education.[29] Banker-customer relationship under electronic banking can take the form of mortgagee/mortgagor where a customer pledges some valuable property to obtain loan from the bank; Bailee/Bailor, where a bank accepts a valuable from her customer for safe keeping pending when the customer needs it; guarantor/guarantee when a bank guarantees a trusted and credit worthy customer before a third party usually to obtain favour from that third party.[30]In spite of these superadded relationships, it is pertinent to note that the original relationship between a bank and her customer–contract is not altered. What is affected is the form, procedure or resultant effect of this contact. Before a bank enters into principal/agent, bailor/bailee, guarantor/guarantee, or trustee/beneficiary relationship, there must be a contract existing or envisaged.[31] The only difference is that this contract is no longer hinged solely on creditor- debtor relationship.

From the nature and extent of services and transactions delivered by banks especially in electronic banking system, a new form of relationship, fiduciary relationship can also be inferred.[32] This is a form of relationship where the party in a better position is expected to act in good faith towards the party in a weaker position and the party in a weaker position can bring an action based on fiduciary to challenge the act of the stronger party when they fail to act in good faith as required.[33]

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[27] S, Balaji. 'Banker and Customer Relationship' <www.relationship/banker_customer.> accessed 2 March, 2021.
[28] *Ibid.*
[29] 'Children Education Trust –FBN Quest Trustees' <https://fbnquest.com> accessed 12 July 2021.
[30] *Ibid.*
[31] Ighoroje, (n 26)
[32] P, Isabel 'The Evolution of Banking: A Flexible Fiduciary Duties Approach Will Help Better Protect Mobile Banking Consumers' [2015] 1(1) *Journal of Law, Technology and Policy*; 211-245.
[33] See the case of *U.B.N Plc. Chinaemeze* [2014] 9 NWLR (Pt. 1411) 166.

5. Rights and Duties of Bankers and Bank Customers in Electronic Banking System in Nigeria

Arising from the relationship between bankers and bank customers are certain rights, duties and obligations to customers by bankers and customers to their bankers. The existence of customers' rights place bankers not only under obligations not to infringe on the rights, but also duties to keep and protect the rights.[34] Bank customers' rights place the following duties on bankers. The following are some of the banks' duties to customers:

5.1 Duty to Honour Cheques Drawn on the Banker: A cheque can be defined as an unconditional order in writing drawn by one person upon another who must be a banker, signed by the drawer, requiring the banker to pay on demand or at sight or presentation, a sum of money to or on order of a specific person.[35] Fundamental to the traditional banker-customer relationship of debtor-creditor is the duty on the bank to honour cheques issued by customers provided there is sufficient fund in the account on which the cheque is drawn.[36] With the advent of electronic banking, cheque is no longer restricted to paper documents. The meaning of cheques has been magnified to include payment request through recognized electronic means and outlets such as ATM channels, POS and other electronic payment channels.[37] In the case of *Moses Jwan v. Ecobank Plc & Anor,*[38]the Court of Appeal held that 'the ATM card issued by a bank is akin to a cheque; must be honoured on request once there is enough fund in the customer's account and failure to do that means that the bank is in breach of duty to honour cheques owed to the customer.'

Interpreting a cheque to include ATM cards and failure to pay or dispense cash based on request using ATM card however, may impose some hardship to bank customers in pursuit of claims of this nature. For example, where an ATM card issued by one bank is used on the ATM machine owned by another bank, a question that may agitate one's curiosity is which of the banks should be held liable in the event of failure

[34] *Ibid.*
[35] L. Chorley and J.M Holden Law of Banking (1974 6th edn) 44
[36] See the case of *NDIC v Okem Enterprises Ltd* [2009] 10 NWLR, (pt. 880) 107.
[37] O.Olukole *Nigerian Electronic Banking Law* (Nonesuchhouse: Ibadan, 2009) p.50.
[38] [2021] 10 NWLR (Pt. 1785)449 at 485 (CA).See alo the case of *Agbanelo v. U.B.N Ltd* [2000] 7 NWLR (Pt. 666) 534 and *Diamond Bank Plc. v. Partnership Investment Company Ltd* [2009] 18 NWLR (Pt. 1172) 67.

to dispense cash, the ATM card issuing bank or the ATM machine owned bank?[39]

5.2 Duty to Receive Customer's Money and Deposits: the right of a bank customer to have his money received and collected by his banker places on the banker, an obligation not to reject any money, deposits or other banking instruments legally delivered to it by the customer or a third party for the benefit of the customer.[40] In electronic banking system, a simple SMS to customers' phone numbers or email addresses by the bank suffices to notify the customer of this.

5.3 Duty on the Banker to Act in Due Care and Diligence in Handling Customer's Affairs: Based on the contractual relationship between banks and customer, bankers especially in electronic banking system undertake several duties in service delivery to her customers.[41] It behooves on the bank to act diligently in discharging these duties to avoid liability.

D. *Duty of Secrecy in Affairs Concerning Customers' Accounts*: the right of a bank customer to secrecy on affairs concerning his account which correlates a duty on the bank not to disclose customers' affair is a long recognized right and imposes on the bankers the duty not to bring transactions and other particulars of their relationship with customers to the public;[42] such as disclosing vital and important information concerning customers account to third parties.[43]

However, there are instances where a banker will be at liberty to disclose customer's confidential information and in such circumstances a banker will not be held liable for such disclosure. These are instances such as:

i. Where the duty to disclose is imposed by law[44]
ii. Where duty to disclose is for the protection of public interest.[45]
iii. Where disclosure is in the interest of the bank.

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[39] See the case of *Kume Bridget Ashiemar v. Gtb & UBA* (Unreported) Suit No. MHC/198/2014, p. 9 delivered on 24th May, 2018 where the claimant was faced with the task of that an ATM card issued to her by the first defendant which she used on second defendant's ATM machine failed to dispense cash on the several occasions she used the card on the second defendant's machine. The case was however decided on the claimant's failure to discharge the required burden of proof.

[40]Igweike, (n17)

[41]See the case of *Diamond Bank Plc. v. Partnership Investment Company Ltd* [2009] 18 NWLR (Pt. 1172) 67.

[42] W. A Adebayo and Filani A.O 'Unauthorised Withdrawal of Money from Customers Account in Nigeria: The Legal Implication for the Banker /Customer Relationship' [2021] 9(1) *Global Journal of Politics and Law Research;* 1-20.

[43]See the case of *Walsh v National Irish Bank Limited Walsh v National Irish Bank Limited.*

[44]See section 2(1), (2 and)(3) of the Money Lundering Act.

[45]*Bankers Trust Co. v Shapira* [1980] 1WRN, 1274

iv. Where the bank has the customer's interest, express or implied to so disclose.

5.4 Duty to Act in Good Faith: this duty flows from the fiduciary relationship usually created by banker-customer relationship in electronic banking transactions. In a fiduciary relationship, a party that is in breach of a fundamental term cannot be heard to plead reliance on an exemption or limitation clause.[46]

6. Data Insecurity and Right of Customers to Data Protection in Nigerian Banking Sector

Technology, no doubt, has improved the nature and types of banking services and transactions in Nigeria.[47] Technological advancement has, however, been negatively impacted by data insecurity and attacks on banking facilities as well as customers' data. Data insecurity could be defined as any form of insecurity or risk affecting the use of electronic data and transmission, technological tools and the internet.[48]The wake of cyber attacks which affects the Information Technology Systems and infrastructure used in the banking sector has become a major source of worry to banks operating in Nigeria.[49] Data insecurity in the banking sector takes the form of permanent loss of data, and malicious attacks such as hacking into personal or company accounts among others. In recent times, there are news of different incidence of cyber attacks on Nigerian banks. Some among these is the attack on Unity Bank Plc. and Access Bank Plc. in August and September, 2020 respectively.[50] In 2019, the Central Bank of Nigeria reported that 6.5 Trillion Naira worth of bank transactions was stolen by hackers who hacked into the official websites of various banks in Nigeria.[51]

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[46] See the case of *Guarantee Trust Bank v. Monturayo Motolupe Aleogena* (2019) LCN/12777 (CA).

[47]O, Chukwuemeka 'Cyber Insecurity in Nigerian Banking System and the Need for Urgent Action' <www.7to5posts.com> accessed 1 August, 2021.

[48]V.C, Ugwuja, P.A, Ekunwe, and A, Henri-Ukoha, 'Cyber Risks in Electronic Banking: Exposures and Cybersecurity Preparedness of Women Agro-Entrepreneurs in South South Region of Nigeria' [2019] *Paper* Presented at the 6th African Conference of Agricultural Economists, Abuja, Nigeria, 23-26, 2019; p. 4.

[49]'Rising Cyber Fraud in Nigeria and Banks' Losses' <www.businessday.ng> accessed 2 August, 2021.

[50]O, Victoria Critical Data Security Issues in the Nigerian Banking Sector' [2020] *African Academic Network on Internet Policy;* <www.aanoip.org> accessed on 22nd January, 2021.

[51]H, Ogunwale 'The Impact of Cybercrime on Nigeria's Commercial Banking System' <www.researchgate.net> accessed 14 June, 2020.

The banking sector in Nigeria handles large volume of personal and financial data of bank customers during financial transactions making disclosure of certain information about customers inevitable.[52] Perpetrators of data theft and breach utilize different forms and sophisticated weapons and means in launching attacks on banks and banking facilities, making it possible to easily break in and penetrate secured banking systems.[53] They succeed in perpetrating several attacks unnoticed due to the anonymous nature of the internet where any person can access the internet from any part of the world unnoticed. Owing to the nature of the cyberspace, attacks can be originated from any computer in the world and passed through other computers in the same geographical location or across multiple national and international boundaries. For instance, in the case of *Abolade Bode v. First Bank of Nigeria Plc. & Mastercard West Africa Limited,*[54] it was discovered that the unauthorized withdrawal from the claimant/customer's First Bank account in Nigeria was made in London by one Mr. Manuel Caser of No. 22 Greengate Street London while the last two withdrawals was for purchase of Wizz Air Tickets in Budapest showing the passengers' names as Gamote Lordam and Alina Claudia Duma, respectively.

It has been reported that it takes banks an average of 197 days to become aware of data breaches and invasion; and an average of 69 days to contain it.[55] Owing to the rising risk associated with data theft and breaches in the banking sector, it has become imperative for banks to focus and invest on data security especially looking at the importance of data to bankers in the modern electronic banking system and the high attacks on data by cyber attackers who utilize the loophole of absence of stronger data security measures in Nigerian banks.[56]

7. Liability for Data Insecurity in Electronic Banking System in Nigeria

Generally, liability arises where a party's action or inaction leads to damages suffered by another. In the banking industry, the relationship existing between bankers and customers is contractual, requiring each party to discharge its contractual duty to the other. The adoption of electronic banking system in Nigeria places a duty on bankers especially

[52](n50)
[53](n49).
[54] (Unreported) Suit No: FHC/L/CS/405/13, delivered on 10th April, 2019, p.22.
[55] Victoria (n51).
[56]Cybercrime and the Banking Sector: Top Threats and Secure Banking of the Future'<http://www.information-age.com/cyber-crime-banking-sector-123464602> accessed 12 June, 2021.

in the area of protection of vital information and data usually supplied by bankers at the point of account opening for electronic banking services and subscription. It has been opined that greater duty is imposed on the bank, the custodian of the data and the gateman of the treasury.[57] It has also been held that a new innovation by bank to make for easy access and operation requires a specialized service and duty by the banks, and failure to provide the means of accessing this specialized service or negligence towards its provision and protection will amount to violation of customers' rights which in turn makes the bank liable.[58]

The applicable laws to cases of data protection and customers' inherent rights in Nigerian banking sector today are a handful of legislations on general banking, cybercrime prevention and data protection. The problem associated with applying these laws stems from the fact that the laws on general banking are not intended to be applied towards data protection as they predate the era of electronic banking and use of personal data in the banking sector. Others made for cybercrime control and data protection did not capture banking operations copiously. This has posed problems to law enforcement agents who usually are faced with the task of shuttling from one law to another in order to sway the court towards doing justice when a breach of customers' data occur.

A relevant law in Nigeria which has some provisions on personal data protection is the Cybercrime (Protection, Prohibition, Etc) Act, 2015. Under the Cybercrime Act, the duty of putting all counter-fraud measures in place by banks and financial institutions so as to safeguard their customers' sensitive information; is reposed on banks.[59] The Act nevertheless has been criticized for failing to give a working definition of the meaning, extent and standard of 'counter fraud measures.' Another area where the Act has been criticized is on the area of its placing the burden of proof on the affected customer where failure or negligence to put counter fraud measures in place is alleged.[60]

Looking at this and other shortcomings in the Act and lack of other legislative framework in this regard, some writers have opined that it will serve a better purpose falling back to the traditional fiduciary relationship between bankers and customers in matters of data protection in electronic banking system. It has equally argued that it would make

[57]Adebayo (n43)

[58] *Agbanelo v. UBN* [2000] 7 NWLR (Pt. 666) 534.

[59] Section 19(3), Cybercrime Act, 2015.

[60]U.J. Orji. 'Protecting Consumers from Cybercrime in the Banking and Financial Sector: An Analysis of the Legal Response in Nigeria' <www.tilburylawreview.com> accessed 12 November, 2020. See also section 19(3) Cybercrime (Prevention, Prohibition, Etc) Act, 2015.

for a better protection of bank customers data if reliance is placed on the general legal provisions governing data protection in Nigeria such as the provisions of the National Information Technology Development Agency Act (NITDA) among others.[61] However, it is pertinent to point out at this juncture that despite the protection seemingly provided for in these laws towards data protection by data controllers including banks, bank customers find it difficult to enforce their rights owing to the fact that they are usually gagged into tight corners by bankers in Nigeria using different forms of exclusion, exemption and limitation conditions and terms to limit, exclude and or exempt themselves and their employees from liability.

8. Legal Effect of Exclusion Clauses on Banker / Customer Relationship in Nigeria

Exclusion clauses are clauses or conditions in a contract that has the capacity of totally limiting, excluding or partly transferring certain liabilities in whole or in part from one party in most cases, the seller to another party usually the weaker party, the buyer or the acquirer.[62] Under the electronic system of banking, banks usually introduce certain limitation clauses to reduce the extent or nature of liabilities it suffers from customers. In Nigeria banking sector, a typical form of limitation clauses is stipulated in Electronic Banking Agreements/Documents. Electronic Banking Agreements are agreements between banks and customers or consumers of electronic banking services evidencing the right and liabilities of both parties. In a standard contract relationships such as the banker-customer relationship, there is always a contract agreement specifying the terms and conditions of operation of the contract.[63] In Nigeria, the banks that offer electronic banking services usually capture these terms and conditions in the 'Electronic Banking Agreements' kept by the banks, purported to have been mutually reached between the bank and their customers. For the purpose of this research, the 'Zenith Bank Electronic Banking Agreement'[64] will serve as a working tool. For instance, paragraph 7 of the Zenith Bank Electronic Banking Agreement provides as follows:

> Under no circumstances will the bank be liable for any damages, including without limitation direct or indirect, special, incidental

[61] *Ibid.*
[62] K, Marharaj. 'Limits on the Operation of Exclusion Clauses' (2012) 49(3) Alberta Law Review, 635-654.
[63] Orji (n 60).
[64] <http://www.zenithbank.com> accessed on 20 May, 2021.

> or consequential damages, losses or expenses arising in connection with this service or use thereof or inability to use by any party, or in connection with any failure of performance, error, omission, interruption, defect, delay in operation, transmission, computer virus or line or system failure, even if the bank or its representatives thereof are advised of the possibility of such damages, losses or hyperlink to other internet resources are at the customers risk thereof are advised of the possibility of such damages, losses or hyperlink to other internet resources are at the customers risk.[65]

Also in paragraph 14, the agreement provides that:

> Customer agree that the bank will not be liable for any liability, whether direct, indirect, incidental, special, consequential or exemplary damages, including but not limited to damages for loss of profits, goodwill, use or other intangible losses, even if we have been advised of the possibility of such damages, resulting from (i) The use or the inability to use the service, (ii) The cost of getting substitute goods and service resulting from any products, data, information or services purchased or obtained or messages received or transactions entered into through or from the service; (iii) Unauthorised access to or alteration of transmission of data; (iv) Statements or conduct of anyone on the service; or (v) Any other matter relating to the service.

It is trite and in tandem with the law of contract that parties to a contract are at liberty to include soothing conditions and terms to their contract and once such terms and conditions are stated and agreed upon, courts are duty bound to give effect to it and to reflect the intention of the contracting parties provided that there are no vitiating circumstances. Usually, exclusion or limitation clauses are used in standard form contracts. A standard form contract is a contract between two parties where the terms and conditions of the contract are set by one of the parties and the other party has little or no ability to negotiate a more favourable terms and conditions.[66] Standard form contracts are often used by establishments such as airlines, transport companies, hotels and banks.[67]Apart from limiting or almost eradicating or exonerating

[65]Paragraph 7, Zenith Bank Electronic Banking Agreement, <https://www.znithbank.com> accessed on 20 May, 2021.

[66]G. Gluck 'Standard Form Contracts: The Contract Theory Reconsidered' [1979] 28(1) *The International and Comparative Law Quarterly,* 72-90.

[67]F. Okeke, 'Exclusion Clauses: When He Who Pays the Piper Does Not Dictate the Tune' <www.mondac.com> accessed on 25 December, 2022. See the case of *Anyah v. Imo Concorde Hotels* [1992]4NWLR (Pt.234) 210.

themselves and their employees of every liability arising from data insecurity in electronic banking, Nigerian banks hardly avail customers of this electronic banking agreement documents so as to enable them have a full grip of what they are in for and make an informed choice as to whether or not to go on with the electronic banking contract.[68]

Be that as it may, it is a general principle of equity that an exemption clause cannot avail a party who is guilty of a fundamental breach.[69] To this end, a customer who suffers data breach or data insecurity in any form as a result of failure of her bank to install requisite security towards protection of data and deposits may not be denied the needed respite as a result of exclusion clause in the electronic banking agreement. In other words, should a Zenith bank customer suffer breach arising from failure of the bank to provide the needed security measures to their facility, the bank may likely not escape liability on the strength of the exclusion clauses in the electronic banking agreement owing to the fact that data protection and provision of counter fraud measures may be construed as a fundamental term in a banker-customer relationship in an electronic banking transaction.[70] To this end, a banker may not be heard relying on exemption, exclusion or limitation clause in matters bordering on customer's personal data protection despite there being no clear legislation n this regard in Nigeria today.

9. Remedies for Data Insecurity Arising From Electronic Banking Operations in Nigeria

From the foregoing, it can be deduced that there are rights and duties of banks and bank customers in banking activities, transactions and service delivery. One peculiar nature of right is that it can be enforced by the party possessing the right against the party on whom the duty not to violate the right is reposed. Generally, a banker's liability under electronic banking can arise under contract based on the traditional banker-customer relationship; tort of negligence arising from breach of the duty of care based on the fiduciary relationship between bankers and customers; as well as action for enforcement of fundamental rights for violation of right to privacy arising from breach of duty to protect personal data which can be pursued under the fundamental right to privacy provided for under section 37 of the 1999 Constitution. Thus, an aggrieved customer can maintain action for breach of fiduciary duty of care,

[68] *Ibid.*
[69] Maharaj (n 63).
[70] Cybercrime (Prevention, Prohibition, Etc) Act, 2015, s 19 (3); *Guarantee Trust Bank v Monturayo Motolupe Aleogena* [2019] LCN/12777(CA).

negligence in tort, general damages for breach of contract as well as an enforcement of right to privacy. However, Nigerian courts are not yet settled on the nature of data protection right, whether or not it is a fundamental right to be enforced under Fundamental Right Enforcement Rules.[71]

10. Conclusion

Rights of bank customers attract correlative duties on their bankers not only to safeguard these rights but also to ensure that they are not violated by third parties. One of the rights of bank customers is the right to secrecy concerning bank customers' accounts and affairs relating to their bank transactions. In the wake of electronic banking system, bank customers' data are collected, stored and controlled electronically using electronic infrastructures and internet network for ease and efficiency of banking transactions.

The global nature of the internet enables easy access to different information including bank customers' information stored in bankers' database from any part of the globe. In some instances, this information is accessed by third parties for criminal purposes. The usual question is how can these customers' information in the banks database be secured from third parties interference and whose duty is it to secure this important data? The answer to this poser is obviously the banks that are in control of their database where this information is stored. However, the present day realities in Nigerian electronic banking system has shown that banks usually keep and maintain electronic banking agreements in which they shield themselves of all liabilities arising from third party intrusion and violation of bank customer's rights including right to secrecy of affairs on their account.

11. Recommendations

The relationship between bankers and bank customers in electronic banking being that of contract, it is recommended that any liability arising from this contract shall be treated accordingly. To this end, any violation of a fundamental term in the contract such as violation of the customers' right to secrecy and confidentiality shall be interpreted to make the bank liable irrespective of any exclusion or exemption clause provided that the aggrieved customer did not connive or condone the

[71] *Incorporated Trustees of Digital Right Lawyers Initiative & Ors. v. National Identity Management Commission* [2021] LPELR 55623(CA) and *Emerging Markets Telecommunication Service Limited v Eneye* [Ureported] Suit No. FHC/ABJ/CS/717/2013.

violation. This essay suggests that in order to properly secure bank customers' rights in Nigerian electronic banking system, there is a need for a concrete and comprehensive legislative framework where rights and liabilities of electronic banking customers as well as penalties for non-performance of which will be clearly spelt out.

The 'Consumer' within Nigerian Law: A Case of Moving from Frying Pan to Fire?

Etefia E. Ekanem and Sunday U. Otu***

Abstract
This paper examines who the consumer is in Nigerian law. The attempt is to discover whether the scope of who the consumer is in the Act advances consumerism or otherwise. To achieve the objective of this paper, sections of legislation, subsidiary legislation, both Nigerian and foreign, and judicial authorities on the subject matter are analysed. It would appear that the definition of the term "consumer" prior to 2018 when the Federal Competition and Consumer Protection Act was enacted was more inclusive. This is because until then, the definition in section 32 of the now repealed Consumer Protection Council Act was more comprehensive and embraced more parties in the chain of distribution down to the ultimate user or consumer, and seemed to give consideration to tort-base and statutory remedies unlike the position of the FCCPA. This paper therefore posits that the FCCPA is designed to curb unfair trade practices, and to ensure that businesses operate transparently and ethically. To discover the status of the consumer in Nigeria, a comparative approach of analysis of statutory and case laws across jurisdictions is adopted. In doing this, the focus is to answer the question, "Is the FCCPA the consumer's Eldorado or an instrument of his crucifixion?"

1. Introduction

The phraseology "from frying pan to fire" implies that someone or something is moving from one difficult or challenging situation to an even more problematic one.[1] In the context of this paper, has the "consumer" within the Nigerian law, fared better or worse by the enactment of the FCCPA? The expression suggests concern about whether the transitions or changes to consumer regulations, institutions, cases or circumstances

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[1] Olusegun Adeniyi, *From frying Pan to Fire: How African Migrants Risk Everything in their Futile Search for a Better Life in Europe* (Ibadan: Bookcraft 2019)

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have potentially led to more difficulties or challenges for consumers or not. Hence, an exploration of the concept within the context of Nigerian consumer protection laws designed to safeguard consumer rights and interests,[2] and their impact on the protection of the Nigerian consumer.

The paper therefore evaluates the areas where the consumer's protection has been enhanced and areas where the position of the consumer is perceived to have nosedived. To achieve the objective of this paper, it is divided into eight sections, each dealing with a definite area of concern. After a careful consideration of thesis of this paper, the paper is concluded by recommending ways through which enhance protection of the Nigerian consumer ca be achieved:

2. Who is the Consumer?

Etymologically, the term "consumer" emanates from the Latin word *consumer* which can be literally translated to mean consume. This implies that in its ordinary sense, "consumer" refers to a person that consumes or feeds on living organisms and inanimate things in the chain of production. To this end, the word consumer has been defined from multifarious perspectives.

2.1 Statutory Law Perception

The principal legislation on Consumer Protection in Nigeria, the FCCPA, in section 167(1) defined the "Consumer" to:

> includes any person- (a) who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production or manufacture of any other goods or article for sale; or (b) to whom a service is rendered.

This definition is hinged on privity of contract, that is, it introduced a contract-based regime into the Nigerian architecture for the protection of the consumer. This appears to have worsened the position of the consumer, by adopting a pre-1992 definition.[3] Section 32 of the now repealed Consumer Council Protection Act (CPCA), 1992, defined the consumer to mean an individual who purchases, uses, maintains or disposes of product or services. The definition of the consumer under the

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[2] These include the Constitution of the Federal Republic of Nigeria 1999; Federal Competition and Consumer Protection Act 2018; Hire Purchase Act 1965; Sale of Gods Act 1893; Nigeria Communications Act 2003; Nigeria Data Protection Act 2023; United Nations Guidelines for Consumer Protection 1999; and the Model Law on Consumer Protection in Africa

[3] Eni Eja Alobo, *Modern Nigerian Law of Contract* (2nd edn, Lagos: Princeton & Associates Publishing Co Ltd 2016) 29-31

CPCA is more preferable and comprehensive to that proffered under the FCCPA as the former encompasses the contract and tort base regimes of consumer protection. The definition proffered by the repealed CPCA was criticised by Ajai[4] as being too broad. He contended that the use of the terms "maintains" and "disposes" in the repealed CPCA to refer to a consumer was too wide, and maintained that only a manufacturer as opposed to a consumer can be said to validly discard or get rid of goods. It appears difficult to be persuaded by the contention of the learned author, as nothing could be found in the repealed CPCA to suggest that the owner of the goods must be necessarily different from the person who disposes or maintains the product. Hence, even where the person who maintains or disposes of the goods is not the owner, the legal principle enunciated in *Donoghue v Stevenson,*[5] that has whittled down the doctrine of *privity* of contract can still come to the aid of a consumer who seeks legal redress for perceive wrong. Also, by the departure from the former position of the law via the by-stander rule discussed in *Stennet v Hancock and Peters,*[6] a passerby injured by a lorry negligently repaired successfully maintained an action against the repairer even where parties had no existing contractual relationship. The by-standing rule and neighbourliness doctrine are exceptions to the privity rule.

Furthermore, it is suggested that a maintenance engineer is a consumer afforded legal protection for the purposes of our discussion so long as he is hurt by a defect in the machine, he is effecting maintenance. In addition, the repealed Act made mention of "users" which therefore implies that a consumer need not be the buyer thereby granting the advantage of covering persons such as users, borrowers, gratuitous donees within the area of risk and bringing them within the umbrella of consumers by avoiding the privity of contract requirement. For instance, under section 19 of Law No. 90/031 of August 10, 1990 applicable in Cameroon that regulates commercial activities a consumer is defined as: "… any person who uses goods to satisfy his own needs and those of his dependent; such a person shall not resell or possess the good or use them in his occupation." This definition finds support in the United Kingdom Fair Trading Act, only that the latter legislation expands the scope to include the trading consumer.[7]

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[4] Oluwole Ajai 'Caveat Venditor: Consumer Protection Decree No. 66 of 1992 Arrives in the Nigerian Market Place' [1992-1993] (23)(26) *NCLR*

[5] (1932) AC 562

[6] (1939) ALL ER 578

[7] Section 137 (2) Fair Trading Act 1973 applicable in the United Kingdom

The United Nations Guidelines on Consumer Protection broadly under Guidelines 3 defines consumers as for the purpose of these guidelines; the term "consumer" generally refers to a "natural person, regardless of nationality, acting primarily for personal, family or household purposes, while recognising that Member States may adopt different definitions to address specific domestic needs." One wonders if the contract-based approach of the FCCPA does the consumer any good.

2.2 Case Law and the Consumer

Lewis, J. summarising the duty owed by the manufacturer to the consumer without giving an express definition to the term consumer in the case of *Daniels & Daniels v White & Sons Ltd and Tarbard*[8] held as follows:

> I have to remember that the duty owed to the consumer, or the ultimate purchaser, by the manufacturer, is not to ensure that his goods are perfect. All he has to do is to take reasonable care to see no injury is done to the consumer or ultimate purchaser. In other words, his duty is to take reasonable care to see that there exists no defect is likely to cause such injury.

It can be cleaned from the above that the consumer should be seen to include anyone who ultimately consumes a product or services. This seems to be the rationale behind the neighbourliness principle handed down by Lord Atkin in the case of *Donoghue v Stevenson.*[9] Aniagolu, JSC in the juridical authority of *Nigerian Bottling Company Ltd v Constance Obi Ngonadi*[10] capturing the picture of the Nigerian consumer succinctly adumbrated thus:

> But nothing appears to be elementary in this country where it is often the unhappy lot of Consumers to be inflicted with shoddy and unmerchantable goods by pretentious manufacturers, entrepreneurs, shoddy middlemen and unprincipled retailers whose avowed interest seem only, and always to maximise their profit leaving honesty a discounted and shattered commodity.

In the European case of *Overy v Paypal (Europe) Ltd,*[11] it was held that the definition of a consumer under the provisions of Unfair Terms in Consumer Contracts Regulations 1999 excludes a person whose main purpose of entering into a contract is to use the services for his own private consumption and for business purposes. Thus, except where the

[8] [1938] 4 All ER 258
[9] [1932] AC 562
[10] [1985] 1 NWLR (Pt.4) 739
[11] [2012] EWHC 2659 (QB)

business or trade purposes are considered by the court as insignificant or negligible the individual will not be entitled to protection as a consumer if he acts for business purposes as portrayed by the facts of the instant case.

In the case of *Bowe v SMC Elec. Prods*[12]*.,* the United States of America's court define a consumer in an elaborate term covering statutory, tort, contract and strict liability regimes as:

> Individuals who purchase, use, maintain and dispose of products and services. Consumer is a member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which the state and federal consumer protection laws are enacted.

2.3 Scholars' Views

O'Grady[13] defines a consumer as the final end-user of all goods and services produced in the economy. To Harvey and Parry[14] the term Consumer includes anyone who consumes goods and services at the end of the chain of production. *The Black's Law Dictionary*[15] pungently defines a consumer as a person who buys goods or services for personal, family or household use with no intention of resale, a natural person who uses products for personal rather business purposes. Similarly, Nigerian scholars in the field of Consumer Protection Law like Ekanem,[16] Monye,[17]

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[12] [1996] 945 F. Supp. 1482, 1485 (D. Colo)

[13] James O'Grady, 'Consumer Remedies' [1982] (60)(4) *Canadian Bar Review* 549

[14] Brian W. Harvey and Deborah L. Parry, *The Law of Consumer Protection and Fair Trading* (5thedn, London: Butterworths Laws 1996)

[15] Bryan A. Garner, *Black's Law Dictionary* (9thedn, Minnesota: St Paul MN West Publishing 2009) 104

[16] Etefia E. Ekanem, *Law of Consumer Protection and Hospitality Services in Nigeria* (Jamet Publishers, 2019); Etefia E. Ekanem and E. A. Thomas, "Consumer Protection and Carrier's Liability for Flight Cancelation and Delays in Nigeria" *African Journal of Law and Human Rights*, vol. 2 June (2018) pp. 152 – 162; Etefia E. Ekanem, and M. Eseyin, "Who Protects the Consumer: Self or the State?" (2013) vol. 1 *Imo State University Journal of Private and Property Law*, pp. 83-114; Etefia E. Ekanem, "Criminal Law: What Remedy for the Consumer of Hospitality Services?" (2013) vol. 11 *Judicial Review*, pp. 1-18, available at http://www.unn.edu.ng/publications/files/Article%201.pdf; Etefia E. Ekanem, "After Two Decades of the Consumer Protection Council Act: The Wilderness' Journey of Consumer Protection in Nigeria" (2014) vol. 8 *University of Uyo Law Journal*, pp. 117-140; and Etefia E. Ekanem and E. R. Eniunam, "In the Woods in Search of who the Consumer is Within the Precinct of Nigerian Law?" (July 2015) vol. 10 No. 2 *University of Jos Law Journal, pp.* 109-127

[17]Felicia N. Monye, *Law of Consumer Protection: Civil Liability* (Vol. 2, 2ndedn, Ibadan: Kraft Books Ltd 2021) 225

Kanyip,[18] Badaiki,[19] and Akomolede and Oladele,[20] extend the definition of a consumer to go beyond a purchaser to include individuals involved in contractual relationships as well as the ultimate users who come in contact with goods and services in any way whatsoever. They see the consumer in an encompassing broad sense to cover individual users of goods and or services in general, although Kanyip[21] excludes corporate entities. Similarly, Schiffman and Kanut[22] in their definition made a distinction between organisational consumer from personal consumer. The former is espoused to mean, private organisations who procure goods and services to help them attain the organizational aims and objectives. While the latter was explained to mean, an individual who buy goods and utilizes services for his own use or that of his household.

On the other hand, Badaiki[23] defines a consumer as a person natural or corporate to whom goods, services, and credit facilities are supplied or likely to be supplied, otherwise than in the course of business and for ultimate use in the course of a business carried on by the supplier. For Schiffman and Kanut[24] consumer can be defined by classifying him into two kinds; one the personal consumer and two the organisational consumer. According to them, the personal consumer is the individual who buys goods and services for his own use, for the use of his household or for just one member of the household or even as a gift from a friend. While the organisational consumer encompasses private business, Government agencies, and institutions, all of which must buy products, equipment and services in order to run the organisation whether or not for profit.

To answer the question who is a consumer? Enyia and Abang opined that, a consumer is a citizen whose protection is regarded as one of his fundamental rights and that the nature of a particular transaction is another determinant factor that can be used to describe a consumer. In

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[18] Benedict B. Kanyip, *Consumer Protection in Nigeria: Law, Theory and Policy* (Rekon Books Ltd., 2005) 2

[19] A. D. Badaiki, 'Towards an International Legal Regime of Consumer Protection for Developing Countries: Nigeria as a Case Study' [1993] (6) (4) *Justice Journal* 43-61

[20] Ifedayo Timothy Akomolede and Olajide Oladele, 'Consumer Protection in a Deregulated Economy: The Nigerian Experience' [2006] (3) *Research Journal of International Studies* 16

[21] Kanyi, op cit.

[22] LG Schiffman and LL Kanut, *Consumer Behaviour* (Eagle Wood Chiffs, Prentice-Hall Inc 1978) 4-8

[23] A. D. Badaiki, "Towards an International Legal Regime of Consumer Protection for Developing Countries: Nigeria as a Case Study" [1993] (6) (4) *Justice Journal* 43-61

[24] L. G. Schiffman and L. L. Kanut, *Consumer Behaviour* (Englewood Cliffs: Prentice Hall Inc. 1978) 4-5

this regard, certain tests were enunciated for the identification of a consumer.[25] First, to qualify as a consumer according to the author, reference must be made to individual or other protected persons who are not contracting in their capacity as business entities. Second, the supplier must contract in business capacity and thirdly, the goods supplied must be intended for private and not commercial use.[26] Placing reliance on section 32 of the repealed CPCA,[27] the authors posited that the definition of a "consumer" as an individual who purchases, uses, maintains or disposes of products or services is apt and appears to accommodate anyone in the chain of consumption, whether or not he is the direct purchaser or producer of the products or service[28].

2.4 Jurisprudential Analysis

A critical analysis of the foregoing juridical, statutory and scholarly authorities reveals that the word consumer within the purview of Consumer Protection Law can be understood in two broad senses: One, a consumer refers to any person who purchases, uses, maintains or disposes of tangible goods, products or articles like cars, food, clothes, cosmetics, beverages, equipment that enjoys legal protection in which he is inured with the legal right to seek for redress against the person who caused the injury or damage. Here the consumer is also known as the buyer, owner, hirer, and user. Two, a consumer can also be regarded as a person who patronises services such as banking, transportation, hospitality, professional or technical that enjoys legal protection in which he is inured with the legal right to seek redress against the person who caused the injury or damage. Here the consumer is called by various names *inter alia*, a customer in the banking sector; clients in the legal profession; patients in the medical profession; informant in the information sector; guests in the hospitality sector; a passenger in the transportation sector; insured in the insurance industry; subscriber in the telecom sector.

The above definition of consumer finds solace in the celebrated case of *Donoghue v Stevenson;*[29] *Nigerian Bottling Company Ltd v*

[25]J. O. Enyia and T. A. Abang, ''In search for a Consumer Protection Antidote in Nigeria: A Case for the Amendment of the CPC Act, 1992' [2018] (10)(3)*IJCR* 66733-66742

[26] David Ought and John Lowry, *Textbook on Consumer Law* (2[nd]edn, New York: Oxford Higher Education 2007)

[27]Sections 165 and 167 of the Federal Competition and Consumer Protection Act, 2018 has repealed the Consumer Protection Council Act, Cap. C25, LFN, 2004

[28] Felicia N. Monye, *Law of Consumer Protection: Statutory Liability* (Vol. 1, 2nd edn, Lagos: Kraft Books Ltd 2021) 36-38.

[29] [1932] AC 562

Ngonadi,[30]and *Jeph Njikonye v MTN Nigeria Ltd.*[31] wherein the tort base regime and contract base regime for providing legal redress to consumers as well as the express provisions of section 167(1) of the Federal Competition and Consumer Protection Act 2018.Taking into consideration concepts like foolproof in the line of cases dealing with manufactured products in which extraneous materials have been found inside a bottle of Guinness[32].Thus, with such hurdles as the ones aforementioned, claimants who feel aggrieved by defective products and services may be discouraged from pursuing a legitimate cause of action in a court of law. Happily, the provisions of section 146 of the Federal Competition and Consumer Protection Act, 2018 has placed the onus of proof on the person making the undertaking thereby removing the hitherto constraints existing under the repealed CPC Act that made the rules of liability put in place then a herculean task for consumers to surmount. It is hoped that when the provisions of the FCCP Act, 2018 are tested in judicial proceedings, our courts will by judicial activism muster courage to overrule the Guinness line of reasoning and decisions while growing consumer protection law.

3. Areas of Concern to the Consumer in the Act

3.1 The Definition of the Consumer

FCCPA 2018 has taken the consumer from frying pan to Fire in the following areas. One, is in the definition of the consumer. This restrictive scope of definition ascribed to the consumer limits the concept to one who contracts in goods and services[33]. It tends to exclude tort base remedies, in favour of contract, on its face value except the statutory rights and duties therein provided, which threatens further development and application of the *Donoghue v Stevenson*[34] principle. Just like the Nigerian statutory law definition, the Thailand Law introduces the doctrine of privity of contract into its definition. Thus, the term consumer is defined in the Thailand Consumer Protection Act 1998 thus:

> "Consumer" means buyers or persons receiving services from persons engaging in business and includes persons who are offered or are persuaded by person engaging in business to

[30] [1985] 1 NWLR (Pt.4) 739
[31] [2008] 9 NWLR (Pt.1092) 229
[32]*Boardman v Guinness (Nig.) Ltd* (1980) NCLR 109; *Ebelamu v Guinness* (1983) 1 FNLR 42; *Osemobor v Niger Biscuits Company Ltd*. (1973) NCLR 382; *Okonkwo v Guinness* (1980) 1 PLR 583
[33]EtefiaEkwere Ekanem, *Law of Consumer Protection and Hospitality Services in Nigeria* (Uyo: Jemat Publishers 2019) 6-8
[34](1932) AC 562 at 599

> purchase goods or to accept services and includes the legitimate user or the legitimate acceptor of services from the business sector even though he is, not a payer of a remuneration commission therefore.

The above problem has been addressed by the Indonesian Law on Consumer Protection 1999 in laying emphasis on the end-user as distinct from a contractual party, although same is also protected when it provides in its definition of consumer as anybody using goods and/or services which are available in the community both for his own purpose, for the purpose of his family and other people as well as other living creatures and which are not to be traded. The European Community Council Directives defines a consumer in the following words: Consumer means a natural person, who is in a transaction covered by this Directive, is acting for purposes which can be regarded as lying outside his trade or profession.[35]

3.2 Pre-Action Notice, Condition Precedent and Promotion of Technicalities

The requirements of condition precedent and pre-action notices by NCC Act[36] and other legislation before a consumer can institute an action in court appears to have taken the consumer from frying pan to fire of having his matter struck out or dismissed based on technical justice. The Bureaucratic bottleneck by first having recourse to administrative procedure before having recourse to court does not seem to advance consumerism as the decision of the court in *Barr. Mike Nkwocha v MTN Nigeria Communications Ltd*[37] gives credence to this.

3.3 Jurisdictional Conundrum between the Tribunal and Regular Courts

Jurisdictional conundrum seems to have been created by the establishment of the Competition and Consumer Protection Tribunal by the FCCPA. This is on the principle of *expressio unis ex exclusioalterius.*[38] There are plethora of legislation through which a consumer can explore in seeking redress for an injury arising from defective product, service or misleading information by manufacturers, service providers, suppliers or

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[35] Felicia N. Monye, *Law of Consumer Protection: Civil Liability* (Vol. 2, 2ndedn, Ibadan: KraftBooks Ltd 2021) 39. See also section 3(1) of the Unfair Terms in Consumer Contracts Regulation Act 1999 defines a consumer to mean: any natural person who in contracts covered by these Regulations, is acting for a purpose which is outside his trade, business or profession.

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[37]Appeal No. CA/A/2007/O5 Judgement delivered on Wednesday 23 January, 2008 (unreported)per Mary Ukaego Peter Odili, JCA (as she then was) now JSC who read the lead judgment.

[38]*Sea Transport Services Nig. Ltd v Owners of The MT "Harmburg Star"* (2023) LPELR-60616 (CA)

advertisers. Primarily, the Constitution of the Federal Republic of Nigeria, 1999 being the grundnorm has provided for the hierarchy of courts together with their jurisdictions including issues of appeals and the creation, constitution and composition of the courts at all levels.[39] Thus, in the judicial authority of *Odutola v NITEL,*[40] the issue in contention was which was the court with the requisite jurisdiction to hear the plaintiff's suit as between the Federal High Court and the High Court of Ogun State. It is to be parenthetically noted that, the issue of jurisdiction is both constitutional and fundamental to the success of a matter in court.[41] Also, the decision of the court in *Njikonye v MTN Nigeria Telecommunications Ltd*.[42]explains jurisdictional conundrum.

The Court of Appeal after a careful review of many cases held that, the High Court of Ogun State is vested with the requisite jurisdiction to hear the matter. This conclusion was arrived at, on the basis that, it is not enough for the appellant to be praying for declaration and injunction for his matter to qualify as one to be decided by the Federal High Court. For a matter to go the Federal High Court, the acts complained of, and which one is seeking a declaration and injunction must be in connection with the executive or administrative actions or decisions of the respondent and agency of the Federal Government. The learned Justice[43] went on to ask certain questions; "can the act of debiting the appellant's bill, tossing the appellant's telephone line; making available a breakdown of the appellant's call schedule, be described as acts made in a management capacity? Do they flow from an executive action or decision by the respondent? The answer is an emphatic no!" The Court stressed that, debiting a customer's telephone bill; tossing a customer's telephone line for non-payment of telephone bill; and making available a breakdown of a customer's call schedule are acts made in the respondent's "usual field". Accordingly they fall into the class of the usual functions, day-to-day, nitty-gritty work of the telecommunications business which may be technical but certainly not administrative nor executive acts.

The conflict between the jurisdiction of the Federal High Court and State High Court is yet to be laid to rest. Thus, on the contrary, the Court of Appeal in *MTN Nigeria Communication Ltd v Suntan Ventures Ltd*.[44]

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[39] Sections 6 and 230-292 of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended)
[40] [2006] All FWLR (Pt.335) 73
[41] *Madukolu v NKemdilim* (1962) 2 All NLR 581
[42] [2008] 9 NWLR (Pt.1092) 229
[43] Per Amina Adamu Augie, JCA who presided and Read Lead Judgment in *Odutola v NITEL Ltd* at p.91
[44] (2009) LPELR-CA/L/350/2009

relied on the provisions of section 251(1)(s) of the Constitution of the Federal Republic of Nigeria, 1999 and sections 91, 92 and 138 of the Nigerian Communications Act, 2003[45] to hold that, it is the Federal High Court that has exclusive jurisdiction over all matters, suits and cases however arising out of or pursuant to or consequent upon the NCC Act or subsidiary legislation. The court went on to rule that it is crystal clear that the matter of the plaintiff, when married with the provisions of the Constitution and that of the Nigerian Communications Act, 2003, the Federal High Court, to the exclusion of the State High Court, has the requisite jurisdiction to hear telecommunication matters.

Also, agitating ones minds is the jurisdiction conferred on the high court by the provisions of the FCCPCA. This has become pertinent as the definition of the court and judge given by section 167 of the Act refers to Court of Appeal. Even the conundrum in respect to the jurisdictional conflict between the Federal High Court and the High Courts of the States and the Federal Capital Territory is still a raging tempest confronting consumers seeking judicial remedies for the injuries suffered. It is important to note, that in matters of simple contracts between subscribers and a telecommunications outfits; the Court with the competent jurisdiction is the High Court of the State or the High Court of the FCT, Abuja and not the Federal High Court of Nigeria as was decided by the Court of Appeal in the case *of Jeph C Njikonye Esq v MTN (Nig) Communication Ltd.*[46]

The Court of Appeal Abuja Division placing reliance on the provisions of section 257(1) of the Constitution of the Federal Republic of Nigeria, 1999 held that jurisdiction is vested on the High Court of the Federal Capital Territory, Abuja to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue subject to the provisions of section 251 and other provisions of the 1999 Constitution. It is recommended that the NCC Act, 2003 be amended to clarify the jurisdictions of the Federal and States High Courts in regards to telecommunication actions, parties and reliefs. For now, it is our humble opinion that, where the NCC is a party the court with the proper forum is the Federal High Court but where it is subscriber-service provider relationship, which is a simple contract, then, the High Courts of the FCT and the States should be the proper venue to institute such matters. Consumers who intend to enforce their rights may be faced with the

[45] Cap. N97, LFN, 2004
[46] [2008] 9 NWLR (Pt. 1092) 339

challenge of conflict of laws as to which court has jurisdiction as well as the applicable law of the forum. This is because the definition court in the FCCPA refers to the Court of Appeal. Thus, which judicial body has jurisdiction as between the Courts and the Tribunal in presiding over consumer matters[47].

3.4 Fair Hearing in Consumer Complaints against Regulatory Institutions

The consumer appears to have been moved from frying pan to fire when issues of fair hearing are brought to bear. Thus, where a consumer has complaints or grievances against the Central Bank of Nigeria, Federal Competition and Consumer Protection Commission and other regulatory agencies, subjecting the consumer to have recourse mandatorily under sections 87 and 88 of the Communications Act 2003[48] seems to negate the principle of *audi alteram partem* and *nemo judex in causa sua.* More so, it seems an unnecessary stumbling block to justice and clog in the will of progress for consumers to enforce their rights guaranteed under the law. This is in view of the fact that none of the regulatory agencies can act impartially or give a decision against another as required under section 36 of the 1999 Constitution. Consumers therefore should enjoy unfettered access to justice by having the right to court under section 6(6) of the Nigerian Constitution. Thus, in *Sifax (Nig) Ltd v Phoenix Capital Ltd & Anor*[49] the Apex Court held to the effect that the twin pillars of natural justice and fair hearing are: *Audi alteram partem*-you must hear both sides; and *Nemo judex in causa sua*- you must not be a judge in your own cause. Hence, section 88(3)of the Nigerian Communications Commission Act, which provides to the effect that one shall not apply to the Court for a judicial review unless that person has first exhausted all other remedies provided under this Act does not seem to be in the interest of the consumer.

4. Areas Where the Lot of the Consumer has been bettered off

4.1 Data and Privacy Protection

The Nigeria Data Protection Act, 2023 seems to be an important step in protecting personal data in Nigeria. As a result of the implementation of its provisions, there seems to be less need to rely on section 37 of the

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[47] Michael P. Okom, *Basic Principles of Conflict of Laws* (Port Harcourt: Wisdom Printing & Graphic Co 2005)

[48]Cap N97 Laws of the Federation of Nigeria 2004; Etefia E. Ekanem, 'Institutional Framework for Consumer Protection in Nigeria: An Analysis' [2011] (2)(1)*International Journal of Advanced Legal Studies and Governance*33-48

[49](2023) LPELR-59979(SC) 16 paras A-B*per* Helen MoronkejiOgunwumiju, JSC

Constitution of Nigeria, to create data protection in legal processes. Despite worries over the Commission's independence due to the Minister of Communications and Digital Economy's significant influence over the Governing Council's operations and leadership, the Act's formation of an independent Commission seems intended to improve data protection procedures. The Act seems to have contributed significantly to the sector's growth, but not without its drawbacks. The exclusion of "competent authorities" from the application of the Act may be seen as a noteworthy flaw that can lead to abuse. There is also the failure of the Act to provide for deadlines for responding to requests for exercising data subjects' rights and notifying those who may be impacted by data breaches. In the overall, despite the seemingly inadequacies of the Nigeria Data Protection Act, 2023, it has significantly contributed to the development of the information and technology sector by paving the way for improved personal data protection in the nation's digital space,[50] even though the provisions of Act are yet to be tested in court. However, the provisions of sections 50, 51, 53 and 59 of the Act seems to protect the digital rights of subscribers, data subjects and consumers and vest them with the right to enforce same in the court of law.

4.2 Specific Rights and Privileges for the Consumer Statutorily Guaranteed

The remedies to which a consumer protection or advocacy group can pursue on behalf of aggrieved consumer(s), or subscriber pursuant to section 152 are *inter alia:*

(a) Filing a complaint with the Federal Competition and Consumer Protection Commission[51]
(b) Filing a complaint before the Consumer Protection Tribunal for redress/compensation.
(c) Instituting an action before a court of competent jurisdiction for any of the civil reliefs.[52]
(d) Appealing against the decisions of either the Commission or Tribunal to Court of Appeal
(e) Filing application for judicial review of administrative or judicial action in court.

The foregoing does not preclude the consumer from seeking to enforce his right directly by himself or take necessary steps in resolving disputes with undertaking in respect of goods or services supplied to him.

[50]Iheanyi Nwankwo, 'Nigeria's Data Privacy First Responders' *Wordpress* (4 April 2018)
[51] FCCPA 2018 s 148(1)
[52] FCCPA 2018 s 149(2)(3)

One can do this by approaching the regulator[53] of the particular sector, industry or profession, or by filing a complaint directly with the Commission[54] or by approaching a court of competent jurisdiction[55] to seek for redress. In other words, the remedy could be administrative, judicial, contractual,[56] civil or criminal in nature. Nevertheless, consumers should make conscientious effort in exhausting the procedure for complaints to the service providers, regulatory agencies or the Commission before resorting to action in court. Any of the alternative disputes resolution remedies would equally serves the purpose. Therefore, recourse to litigation should be a matter of last resort due to the problems inherent in the court systems, such as high cost of litigation and technicalities which usually delay court proceedings.

4.3 Right of Cancellation of Reservation

One of the effects of exclusion clauses and limiting terms is that they impede the right of the consumer who has suffered damages, injury or loss in a contractual relationship from recovering damages. This means the consumer may have a right, but he cannot have remedy because his rights have been curtailed, restricted or denied by exculpatory terms. Happily, the courts are arising to the occasion through the application of the provisions of the Federal Competition and Consumer Protection Act 2018. Thus, in the case of *Patrick C. Chukwuma v Peace Mass Transport Company Ltd*[57] where Hon. Justice C.O. Ajah declared the no refund policy as illegal, null and void in light of the provisions of Sections 120, 104, 129 (1) (a) and (b) (iii) of the Federal Competition and Consumer Protection Act, 2018. The Plaintiff, Patrick C. Chukwuma instituted this suit after the Defendant refused to refund his bus fare despite failing to convey him to his destination. The incident that led to the suit occurred on the February 10, 2021, when the Plaintiff purchased a ticket from the Obollor-Afor branch of Peace Mass Transit Limited to convey him to Enugu. Following a two hours delay occasioned by the absence of passengers, the Plaintiff returned to the ticketing office and asked for a refund of the N500 he paid as the transport fare.[58] However, staff of the Defendant refused to refund the money, insisting that their company policy was that money paid for transport non-refundable and citing the

[53] FCCPA 2018 Ss 147 and 146(1)(b)
[54] FCCPA 2018 s 146(1)
[55] FCCPA 2018 s 146(2)
[56] FCCPA 2018 Ss 146(1)(a), 142(1) and 143
[57] Unreported Suit No: E/514/2021 judgment delivered 22 April 2022
[58] Samgena, D. Galega, 'Strict Liability For Defective Products in Cameroon?: Some Illuminating Lessons From Abroad' [2004] (48) *Journal of African Law* 247-253

statement written on their ticket to that effect as conclusive proof of their position.

When the Plaintiff tried to explain to the defendant's staff that their policy was unlawful, as the law mandates them to refund fares for services not rendered, they retorted in a rude manner, prompting the learned counsel to leave their park and seek alternative means of travelling to Enugu. A letter written by the lawyer to the Peace Mass Group of companies demanding an apology and refund was neglected, prompting the lawyer's law firm to institute the action. In the action, the Plaintiff asked the court to determine a sole question which was "whether the Defendant's policy of "no refund of money after payment" is in violation of section 120 of the FCCPCA 2018 especially when the contractual obligation to convey the Plaintiff to his preferred location was terminated". The Plaintiff, represented by his lawyers, led by Tochukwu Odo, among other grounds, argued that the FCCPCA 2018 is the primary law on questions of consumer transactions in Nigeria and that by virtue of section 120 of the law, the consumer has a right to cancel any advance booking, reservation or order for any goods or services subject only to the deduction of a reasonable charge by the service provider.[59]

The Defendant through their counsel, Titus Odo raised technical arguments on the jurisdiction of the court and mode of commencement of the suit, which Hon. Justice C. O. Ajah of the Enugu High Court of Justice in his judgment, promptly dismissed the objections of the Defendant and upheld the arguments of the Plaintiff. The Court, after a thorough analysis of the provisions of the FCCPA 2018 *vis-a-vis* the conduct of the parties in the case, held to the effect that the policy of no refund of money after payment was illegal, null and void in light of the provisions of Sections 120, 104, 129(1)(a) and (b) (iii) of the Act. The court thereafter made a declaration that the refusal of the Defendant to refund the Plaintiff the money paid as transport fare from Obollor-Afor to Enugu on February 10, 2021 was unlawful. The court further ordered the Defendant to pay the sum of N500,000 as damages to the Plaintiff.[60]

5. Comparative Analysis with Other Jurisdictions

The study observed that while the United Kingdom model established a specific institutional framework via the creation of the Office of Fair

[59]Benedict B. Kanyip, *Consumer Protection Laws in Nigeria* (Being a PhD Thesis of the Faculty of Law, Ahmadu Bello University, Zaria, 1997) 328

[60]Felicia N. Monye, *The Consumer and Consumer Protection in Nigeria: Struggles, Burdens and Hopes* (59th Inaugural Lecture of the University of Nigeria delivered on 26 May 2011) 8

Trading which was later abolished and replaced with the Financial Conduct Authority, which is saddled with the responsibility to enforce the provisions Consumer Credit Act and other credit laws under the English system, Nigerian legislation on the other hand, did not make provisions specifically establishing an agency of government by way of institutional regime for the enforcement of consumer credit laws and the enhancement of the protection of consumer involved in credit transactions. This lack of institutional framework for the regulation of consumer credit transactions creates gap and makes the Nigeria legal regime inadequate in the protection of credit consumers. Whereas the presence of an institutional framework under the English model affords enhanced protection to the consumer involved in credit transactions in that country.

The provisions of the extant legislation in the United States of America such as Consumer Credit Protection Act 1968, Fair Credit Reporting Act, Truth in Lending Act and Electronic Fund Transfer Act, Equal Credit Opportunity Act and Fair Debt Collection Practices Act are lagging in the Nigerian consumer credit legal regime. In fact, the Electronic Transaction Bill is still a mirage till today and the issue of financial literacy and the education of the consumer on the nitty-gritty on credit matters is still being treated with levity.

The South African National Credit Act 2005 provides for an institutional framework known as the National Credit Regulator (NCR) separate from the institutional and regulatory framework. Despite the realisation of the importance of credit to the Nigerian economy, the Nigerian credit environment cannot be said to have made any meaningful headway in developing the credit industry to bring it at par with the standard obtainable in other developing economies of the world. The Nigerian credit environment is to ensure that unlike the current situation whereby the Central Bank Nigeria and the Federal Competition and Consumer Protection Commission are the major regulators of the various legislative instruments regulating credit transactions in Nigeria. A lesson is learnt by borrowing a leaf from South Africa and revisit the situation by establishing a separate institution with supervisory role in the regulation of consumer credit transactions to ensure effective implementation.[61] This is because the effective enforcement of consumer protection laws, credit laws and regulations depend largely on the regulatory and supervisory agencies existing within the legal system. The

[61]Etefia Ekwere Ekanem, 'After Two Decades of the Consumer Protection Council Act: The Wilderness' Journey of Consumer Protection in Nigeria' [2014] (8) *University of Uyo Law Journal,* 117at 140.

effective use or otherwise of this institutional framework to a large extent determines the level of consumerism in Nigeria. Thus, monitoring compliance with financial consumer protection regulations is an essential element of effective implementation of the legislation and while south Africa has recorded success, Nigeria is still lagging behind and characterise by archaic laws and absence of the political will to do the needful[62].

6. Recommendations

6.1 Consumer Education, Campaigns and Enlightenment

Consumerism primarily refers to the movement aimed at lobbying government and relevant institutions to make policies for the regulation of products and services as well as ensuring compliance by the service providers, advertisers and manufacturers with best practices in favour of the consumer. It may also mean, the pressure from consumer organisations or advocacy groups to influence institutional, statutory, regulatory or professional changes for the wellbeing of the consumers. This can be achieved via self-regulation, consumer information, educational services, hence, section 151(1)(a) FCCPA 2018 allows consumer protection groups to carry out education activities, advice, and publications to the consumers with or without collaboration with the Federal Competition and Consumer Protection Commission, campaigns[63] permits consumer advocacy groups to engage in research, market monitoring, surveillance and reporting in the course of promoting consumer protection and consumers' rights. The Act gives approval to the role of consumer groups to promote consumers' rights and interests and these objectives can be achieved via workshop, symposia or seminars.[64] The concept of consumer protection dates back to biblical times where in Deuteronomy 22: 8, it is provided that: "when you build a new house, be sure to put a railing around the edge of the roof, then you will not be responsible if someone falls off and is killed." The need to safeguard the well-being of consumers has led to the enactment of special codes, rules, and procedures.

Ralph Nadar goes down in history as the pioneer of modern consumer protection advocacy in its institutionalised and globalised form when in 1965, he revealed in his publication "Unsafe at Any Speed: the

[62]F. O. Ukwueze, 'Legal Remedies for Consumers of Telecommunications Services in Nigeria' [2011 - 2012] (10)*The Nigerian Juridical Review* 132
[63]FCCPA 2018 s 151(1)(b)
[64] section 151(1)(c) FCCPA. See also section 151(1)(d) and (e) on legal representation by groups.

Designed-In Dangers of the American Automobile" the deadly flaws in automobiles. This move gave birth to myriads of legislation for the protection of consumers, buyers, and users in the United States of America. In several jurisdictions at regional, provincial, national and international levels activities of consumer advocates and groups geared at achieving the goal of consumer protection have received legal recognition in section 151 of the FCCPA.

At the international level, the United Nations General assembly in 1985 adopted Guidelines on Consumer Protection as contained in resolution 39/248 of April 9, 1985. The rights contained in the Guidelines include the right to safety, to choose, to be heard, to be informed, the right to a healthy environment, the right to redress, the right to consumer education and the right not to be exploited.[65] Unfortunately, these rights are merely guidelines and do not have the force of law. Consumerism as a movement has become a world phenomenon that defines the standards for the world community to adopt in ensuring promotion of consumer protection as provided in section 151(1)(f) of the FCCPA that enjoins consumer advocacy groups to participate in conferences and affiliate themselves with national and international associations concern with consumer protection matters. In Nigeria by the express provisions of section 151(2) of the FCCPA the Federal Competition and Consumer Protection Commission may on certain terms and conditions accredit consumer protection/advocacy groups that undertake to protect or represent consumer interests either generally or collectively in the country. Furthermore, this thesis as research work is an effort of consumerism understood in terms of advocacy in that it is as an aspect of contribution towards the ongoing efforts at consumer protection. To this extent, the status of the consumer in Nigeria is advanced.

6.2 Compensation to the Consumer

In the *locus classicus* of *Donoghue v Stevenson,*[66] Lord Atkin succinctly and brilliantly articulated thus:

> The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who,

[65]Olumide K. Obayemi, 'Competition in the Nigerian Telecommunications Industry' [2014] (5) *Beijing Law Review* 283-297 <http://www.scirp.org/journal/blr>Accessed 29 November 2022

[66] (1932) AC 562

> then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Following this line of reasoning, the courts in Nigeria have applied the principle aforesaid in the case of *Osemobor v Niger Biscuits Co. Ltd,*[67] where the defendant company was held liable for failure to exercise reasonable care in the production of biscuit. In the instant case, the presence of a decayed tooth was found in a biscuit manufactured by the defendant company. Thus, it can be seen that applying the neighbourhood principle, every manufacturer, advertiser, seller or distributor must ensure that he observes reasonable care so that his message or information contained in his advertisement does not mislead the consumer thereby occasioning injury or damage to him. The real problem seems to be that going by the definition of "consumer" in the FCCPA, the ultimate user of the chattel or services, who could be an infant, a foetus, spouse, *etcetera*, may not find protection as a consumer by reason of the privity of contract principle introduced by the Act.

6.3 Inter-Agency Cooperation

The provision of section 151(1) of FCCA 2018 that encourages collaboration between the Commission and other agencies and consumer protection groups or forum is a welcome development. This accords with section 5 of the Standards Organization Act, 2015that states viz:

> Subject to the provisions of section 4 of this Act and any other law in that regards, the Organisation shall- (a) organize test and do everything necessary to ensure compliance with standards designated and approved by Council; (b) undertake investigation as necessary into quality of facilities, systems, services, materials and products whether imported or manufactured in Nigeria; (c) evaluate quality assurance activities including certification of systems, products and laboratories throughout Nigeria.

A cursory perusal of the foregoing section 5 of the Standards Organization of Nigeria Act 2015 and section 5 of NAFDAC Act, 2004 seems to reveal duplication of functions of the regulation of laboratories, products, instruments, materials, and services in Nigeria by the two administrative

[67][1973] NCLR 382

agencies of government.[68] This, certainly, cannot be a plus to the consumer.

7. Findings and Contribution to Knowledge

The paper reveals that there was a time Nigeria did not have a dedicated legal or institutional regime for the protection of the consumer, except perhaps, whatever could be gleaned from common law. The now repealed Consumer Council Protection Act 1992 was enacted as a means of providing the much canvassed institutional and legal architecture for protecting the consumer and regulation of consumer matters in the country. Furthermore, the work unravels that due to the seemingly inadequacies associated with the CPC Act 1992, there was a lot of public outcry and criticisms that forced the government to enact the FCCPA in 2018 as a replacement after about 26 years of the existence of the CPC Act 1992. More so, the FCCPA 2018 was x-rayed and found wanting, inadequate in some vital issues bothering on consumer protection. Chief among these is the restrictive definition of the consumer in the guise of introducing the privity of contract principle to the definition of consumer. In the same vein, the essay finds out that while there are areas where the FCCPA has significantly developed and improved on the subject of consumer protection, there are areas the consumer seems to have been moved from "frying pan to fire" and therefore calls for necessary legal, policy and reforms to improve the status of the consumer.

Flowing from the aforesaid, this study has contributed to knowledge by projecting the plight of the consumer despite the extant laws on the subject. The essay has equally contributed to knowledge by pointing out areas of the law that need improvement by way of enactment, amendments or overhauling. In this regard, the paper stimulates further research in this aspect of the law. Pinpointing the weaknesses of the extant institutional framework for better protection to all categories of consumers is another way the essay contributes to knowledge. More so, this work by proposing reforms of the law on consumer protection by holding undertaking, manufacturers or service providers accountable for liability for defective, substandard or adulterated product or poor-quality service contribute to knowledge in consumer protection law in Nigeria. In addition, the study contributes to knowledge by promoting consumer education, rights and privileges for Nigerian to attain international best

[68]Aaron O Twerski, 'Liability For Direct Advertising of Drugs To Consumers: An Idea Whose Time Has Not Come' [2005] (33) *Hofstra Law Review* 1149

practices in consumer protection matters,[69] and extender the frontiers in answering the question, "who is a consumer" in Nigeria.

8. Conclusion

The FCCPA aims to promote fair competition in the Nigerian market and protect the rights of consumers. The implementation and impact of the FCCPA are ongoing, and its effectiveness in enhancing the status of Nigerian consumers can be evaluated based on several factors. The Act seeks to protect the rights of consumers, such as the rights to quality goods and services, to be informed, and to seek redress for unfair trade practices. The FCCPA aims to prevent anti-competitive practices in the Nigerian market, fostering fair competition amongst businesses; this is intended to prevent monopolistic behaviour that may potentially expose consumers to harm. While the FCCPA holds the potential to enhance the status of Nigerian consumers by promoting fair competition and providing mechanisms for redress, it actual impact, it appears, would be better assessed over time as its provisions are implemented and its effectiveness monitored. Collaborative efforts amongst regulatory bodies, businesses, and consumer advocacy groups are essential for realising the intended benefits of the Act and for enhanced protection for the consumer in Nigeria. As potent as the FCCPCA may be, one major setback appears to be the restrictive definition of who is the consumer in the Act.

[69]Etefia E. Ekanem and Akebong Samuel Essien, 'A Critique of the Federal Competition and Consumer Protection Act 2018' [2019] (1) (2) *IJOCLLEP*17

Human Right to Health: Changing the Narrative in Nigeria

Amanim Akpabio and Eno-Obong Akpan***

Abstract
The right to health care access is a basic and universal right. It has been recognised and articulated in many international and regional instruments. Nigeria, like many other States, has demonstrated a commitment to protect this right by ratifying those Conventions, Treaties and Agreements that guarantee the right to health. Unfortunately, Nigerian citizens do not have access to health care as there are currently no workable health care systems in place. The government has been accused of being non-responsive to this commitment as health care system remains weak as evidenced by lack of coordination, fragmentation of services, dearth of resources, inadequate and decaying infrastructure, and very deplorable quality of care. This Paper contends that the absence of a functional health care service for citizens is not only unacceptable but it is a major barrier to development. The Paper concludes that changing the narrative on the right to health will entail deliberate action on the part of government to show sincerity on its international obligation.

1.0 Introduction

From time immemorial, issues relating to food, education, shelter, work and health in particular have plagued mankind.[1] As human beings, our health and the health of those we care about is a matter of daily concern. Irrespective of our age, gender, socio-economic, ethnic background or religious affiliation, we consider our health to be our most basic asset. Everyone dreads to be ill or to have to care for a sick relative. This is particularly true because ill health can keep its victims from going to work or school, from attending to family responsibilities or from participating fully in the activities of their community.

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[1] E Udu, 'The Imperatives of Economic, Social and Cultural Rights in the Development of Nascent Democracies: An Inter-Jurisdictional View' (2014) *NAUJILJ,* 27.

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The right to health is therefore a fundamental part of our human rights and of our understanding of living a life of dignity.[2]

The right to the enjoyment of the highest attainable standard of physical and mental health is not new. At the internationally level, it was first articulated in the preamble of the 1946 Constitution of the World Health Organization (WHO), where health is defined as 'a state of complete, physical, mental and social well-being and not merely the absence of disease or infirmity.' This Constitution also recognised that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.' Today, almost 70 years after these words were adopted in the Constitution of the World Health Organization, they are more powerful and relevant than ever.[3]

Other international human rights treaties have recognised the right to health as an important right in the rights hierarchy. Because the right to health is relevant to all States, States have committed themselves to protecting this right through international declarations, domestic legislation and policies. Like other States, Nigeria has ratified the various conventions, treaties and agreements that guarantee the right to health. Unfortunately, there are key policy issues impacting upon the realisation of the right to health in Nigeria, and respective governments have been accused of being non-responsive to the deficiencies and continued rot of the health system.[4]

This Paper discusses the right to health and examines the applicable laws in ensuring the full realisation of this right in Nigeria. It also considers the influence of the International Covenant on Economic, Social and Cultural Rights on the protection of human rights in Nigeria vis-à-vis the domestic legal system. The Paper identifies the difficulties involved in the full implementation of this right and recommends a constitutional amendment to Chapter 11 of the Constitution of the Federal Republic of Nigeria 1999 to give full effect to the right to health, especially as it affects women and children.

2.0 Protection of Human Rights - Legal Framework

Human rights, as a tool of dignity and equality, are those rights which are inherent in our nature and are benefits to which people are entitled by virtue of being human. They are rights belonging to all human beings at all times irrespective of sex, race, colour, religion, or language.

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[2] 'The Right to Health', *World Health Organization, Office of the United Nations High Commissioner for Human Rights*, Fact Sheet No. 31 <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf> accessed 13 June 2023.

[3] 'Health is a Fundamental Human Right' (2017), World Health Organisation Media Centre Statement by Dr Tedros Adhanom Ghebreyesus, WHO Director-General 10 December 2017 <https://www.who.int/mediacentre/ news/statements/fundamental-human-right/en/> accessed 30 May 2023.

[4] O Nnamuchi, 'The Right to Health in Nigeria' (2007) *Centre for Health, Bioethics and 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.[5] The Charter was later ratified by a majority of its signatories in October of the same year.[6]

The acceptance and adoption of the Universal Human Rights Declaration 1948 (UDHR)[7] by the UN General Assembly set a common universal standard on human rights. UDHR remains a milestone document in the history of human rights which sought to protect all forms of human rights irrespective of race, colour, sex, etcetera.[8] The Declaration was inspired by the need to protect the fundamental human rights and inherent dignity of all members of the human family. The UDHR document therefore represents the modern international human rights framework created by governments, for governments.[9] It goes further than traditional categories of human rights contained in various constitutional laws of the 18th, 19th and beginning of the 20th centuries.

The UDHR Declaration deals not only with civil and political rights but also with economic, social and cultural rights and states that 'all human beings are born free and equal in dignity and right'[10] The UDHR was intended to be followed by an International Bill of Rights which could be legally binding on the covenanting parties. This 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 was a mere expression that did not have the nature of a legally binding covenant and therefore had no machinery for enforcement.[11]

Subsequently, the United Nations has adopted many legally binding international human rights Treaties, Conventions, Agreements, Charters, Protocols, etcetera, including the identified six core International Conventions.[12] These documents are used as a framework for discussing and

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[5] 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.

[6] Udu (n3), 32.

[7] Adopted and proclaimed by the General Assembly Resolution 217 A (111) of 10th December 1948.

[8] E Akpan, *Human Rights Protection for Overworked Women and the Girl-Child Living in Traditional Rural Gambian Society* (Bencke og Syede Copenhagen Denmark 2002) 17.

[9] *ibid* (n7).

[10] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 1.

[11] Udu (n3), 32.

[12] 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).

applying the human rights of every person including right of access to health care. Through these instruments, the principles and rights they outline become legal obligations on those States who have chosen to be bound by them. The framework also establishes legal and other mechanisms to hold governments accountable for human rights violations.[13]

The global human rights regime relies on national implementation of internationally recognised human rights.[14] In Nigeria for instance, the rights of all citizens are protected by a legal framework, including national laws and international and regional Conventions or Treaties. Nigeria, has since ratified the six core international Conventions and other Regional Conventions such as the African Charter on Human and Peoples' Rights.[15] The establishment of the National Human Rights Commission of Nigeria was borne out of a need to promote and protect human rights in Nigeria. The Commission was established by the National Human Rights Commission (NHRC) Act, 1995, as amended by the NHRC Act, 2010, in line with the resolution of the United Nations General Assembly which enjoins all member States to establish national human rights institutions for the promotion and protection of human rights.[16] 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.'[17]

In Nigeria, fundamental rights are guaranteed under Chapter IV of the Nigerian Constitution. Sections 33-44 list out the different kinds of rights that every citizen should rightfully enjoy devoid of all forms of discrimination.[18]

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[13] J Donnelly, 'The Relative Universality of Human Rights' (2007) 29 (2) Human Rights Quarterly, 282.

[14] *ibid*.

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

[16] See specifically Section 6 (a) which deals with all matters relating to the promotion and protection of human rights guaranteed by the Constitution of the Federal Republic of Nigeria, the United Nations Charter and the Universal Declaration of Human Rights, the International Convention on Civil and political Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the International Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights, and other international and regional instruments on human rights to which Nigeria is a party. The Commission therefore serves as an extra-judicial mechanism for the enhancement of the enjoyment of human rights. Its establishment is aimed at creating an enabling environment for the promotion, protection and enforcement of human rights. It also provides avenues for public enlightenment, research and dialogue in order to raise awareness on human rights issues (National Human Rights Commission homepage <http://www.nigeriarights.gov.ng> accessed 10 June 2023.

[17] National Human Rights Commission (Amendment) Act (2010) art 6 (k).

[18] Section 33 deals with the right to life; Section 34 makes it unlawful for anyone to subject another to torture or to inhuman or degrading treatment; Section 35 guarantees personal liberty; Section 36 guarantees fair hearing within a reasonable time by a court or other

Additionally, the right to health is guaranteed under Section 17 (3) of Chapter 11 of the Constitution (otherwise known as 'Fundamental Objectives and Directive Principles of State Policy'). The State is to direct its policy towards ensuring that 'there are adequate medical and health facilities for all persons.'

tribunal established by law and constituted in such manner as to secure its independence and impartiality; Section 37 protects the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications; Section 38 guarantees every citizen the right and freedom to change his religion or belief; Section 39 guarantees the right of freedom to hold opinions and to receive and impart ideas and information without interference; Section 40 guarantees the freedom to form or belong to any political party, trade union or any other association for the protection of his interests; Section 41 guarantees every citizen of Nigeria the freedom to move freely throughout Nigeria and to reside in any part thereof; Section 42 prohibits discrimination of a citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion; Section 43 gives every Nigerian a right to acquire and own immovable property anywhere in Nigeria;. Section 44 prohibits the compulsory acquisition of moveable property or any interest in an immovable property except with prompt payment of compensation thereof.

3.0 Legal Framework for the Right to Health

As noted earlier, the legal framework for protection of right to health dates back to the UHDR in 1948 and subsequently to 1966 when the ICESCR came into force at the international level.[19] The right to health was given prominence in Article 25 of the 1948 Universal Declaration of Human Rights (UDHR) to the effect that health is part of the right to an adequate standard of living.[20] In spite of the delay to give legal backing to the Declaration, the 'twin covenants' were unanimously adopted by the UN General Assembly. Both Covenants have been widely ratified by many States, including a vast majority of African States.[21]

For the purpose of this Paper, the most important Article of the ICESCR is Article 12 which establishes 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. The Article lists some of the steps to be taken by States parties such as: the reduction of stillbirths and infant mortality; ensuring the healthy development of children; improving environmental and industrial hygiene; the prevention, treatment and control of diseases; and access to medical care for all.[22] Article 12 (2(b)) requires State parties to improve 'all aspects of environmental and industrial hygiene'. It also embraces adequate housing and safe and hygienic working conditions, and an adequate supply of food and proper nutrition.

The Committee on Economic, Social and Cultural Rights has, in its General Comment 14, extensively elaborated on what the right to health encompasses and States parties' obligations under Article 12. What follows is a brief overview of what the Committee has established in relation to the right to health. The Committee emphasises that the right to health 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. The Committee also underscores that the right to health is an inclusive right which places an obligation on States parties to provide timely and appropriate health care, and to also address the underlying determinants of health, such as access to safe and potable water and adequate sanitation, adequate supply of

[19] A Akwara, A Soyibo and M Agba, 'Laws and Children's Rights Protection: The Nexus For a Sustainable Development in Nigeria' (2010) 6 (2) Canada Social Science, 26-33 at 27.

[20] Article 25 states that; '(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.'

[21] 'The Right to Health', World Health Organization, Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 31 <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf> accessed 13 June 2023

[22] Icelandic Human Rights Centre website <http://www.humanrights.is/en/human-rights-educationproject/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-health/right-to-a-healthyenvironment> accessed 15 June 2023.

safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.[23] Furthermore, the Committee's General Comment 14 emphasises that the right to health is closely related to, and dependent upon, the realisation of other human rights contained both in the ICESCR and other human rights instruments such as the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, privacy, access to information, as well as to the prohibition against torture and the freedoms of association, assembly and movement.[24]

Besides the ICESCR, another main instrument defining and protecting the right to health is the Constitution of World Health Organization which defines health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.' The right to health is also specifically enshrined in other international human rights instruments, such as is found under Article 5 (e (iv)) of the International Convention on the Elimination of All Forms of Racial Discrimination, Articles 11(1(f)) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women, Article 24 of the Convention on the Rights of the Child, Articles 28, 43(1(e)), 45(1(c)) and 70) of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[25]

Some Conventions of the International Labour Organisation also contain provisions on the health of workers. Specifically, the Geneva Conventions and Additional Protocols prescribe rules for conduct of warfare, including health-related obligations. Furthermore, there are also some non-binding international instruments (or 'soft laws') which address health issues, for example, the 1993 Vienna Declaration and Programme of Action, the Programme of Action of the 1993 UN International Conference on Population and Development and the 1995 Beijing Declaration and Platform for Action (UN Fourth World Conference on Women).[26]

Also, regional organisations, on their part, drafted regional instruments on human rights. In Europe, there is European Convention for Human Rights, while in America the applicable instrument is American Convention on Human Rights. It is worthy of note to mention that economic, social and cultural rights were comprehensively contained in European Social Charter (for Europe) and the Additional Protocol to the American Convention dealing

[23] General Comment 14, *The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4, 11 August 2000 <www.unhchr.ch/tbs/doc.nsf/(Symbol)40d009901358b0e2c1256915005090be?Opendocument> accessed 16 June 2023.

[24] 'Health and Human Rights. International Covenant on Economic, Social and Cultural Rights' World Health Organization, Regional Office for Eastern Mediterranean <http://www.who.int/hhr/Economic_social_cultural. pdf,> accessed 15 June 2023.

[25] *ibid.*

[26] *Nnamuchi* (n6).

with economic, social and cultural rights.[27] In Africa, the ICESCR has been incorporated into regional laws such as the African Charter on Human and Peoples' Rights, as well as the domestic laws of many countries in the form of constitutional rights and national or local legislation as the case may be.[28] Under the regional human rights system, the African Charter on Human and People's Rights deals comprehensively with economic, social and cultural rights. Article 24 of the African Charter on Human and Peoples' Rights states that 'all peoples shall have the right to a general satisfactory environment favourable to their development.'[29] The right to enjoy the best attainable state of physical and mental health is clearly enunciated in Article 16 (1)[30] of the African Charter on Human and Peoples' Rights while the right to a satisfactory environment favourable to development is guaranteed by Article 16 (3)).

4.0 Legal Commitment to the Right to Health

As noted earlier, the concept of a right to health has been enumerated in international and regional agreements. The right to health means that everyone should have free access to the health services they need, when and where they need them. This Paper contends that food, clothing, housing, health care and social services are essential components of a standard of living adequate for health and well-being. What this translates to is that no one should get sick and die just because they are poor, or because they cannot access the health services they need. It is important to emphasise that the right to health also means that everyone should be entitled to control their own health and body, including having access to sexual and reproductive information and services, free from violence and discrimination.[31]

The absence of a functional health care service for citizens is unacceptable and is a major barrier to development. Therefore, States are enjoined to take action to ensure that all citizens enjoy an adequate standard of living. However, it does appear that defining the precise standards that must evaluate these components is somewhat difficult since States with different economic and social histories and capacities have different understandings of an 'adequate standard of living'[32] Regrettably, the world cannot be said to have achieved much despite its best effort at treaty and convention

[27] *Udu* (n3) 31.

[28] *ibid.*

[29] Icelandic Human Rights Centre website <http://www.humanrights.is/en/human-rights-educationproject/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-health/right-to-a-healthyenvironment> accessed 15 June 2023.

[30] 'Every individual shall have the right to enjoy the best attainable state of physical and mental health.'

[31] 'The Right to Means for Adequate Health' University of Minnesota Human Rights Library <http://hrlibrary.umn.edu/edumat/studyguides/righttohealth.html.> accessed 29 June 2023.

[32] *ibid.*

adoptions.[33] For many countries, especially developing countries, many of the world's citizens do not have access to health care. Currently, Nigeria has no workable health care system in place. Despite her strategic position in Africa, Nigeria is greatly underserved in the health care sphere. Health facilities - Health Centres, personnel, and medical equipment - are inadequate, especially in rural areas. While various reforms have been put forward by the Nigerian government to address the wide-ranging issues in the health care system, they are yet to be implemented at the State and Local Government levels.[34]

However, since there are no real performance measures for governments, and no mechanisms for individuals to make complaints about the breach of these rights, Rayner argues that it is far easier to respect or acknowledge a right such as the right to vote, than it is to promise that 'no child will live in poverty' or to make good the promise of a free and compulsory education for all children. Respective governments are expected to act 'to the maximum of available resources', to achieve 'progressively' the full realisation of the rights contained in the ICESCR. Unfortunately, because state parties have a discretion as to how they spend their money, many have every reason to state that they just cannot afford the required facilities.[35]

Under the Nigerian Constitution of 1999, the ICESCR rights are provided for in Chapter 11 (Sections 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24) and classified as Fundamental Objectives and Directive Principles of State Policy section. Cultural rights otherwise referred to as Policy Directive Rights are generally and mostly non-justiciable[36] as government claims it is difficult to implement due to lack of funds.[37] With respect to the applicability of these treaties within domestic framework, it is significant to note that with the exception of the African Charter on Human and Peoples' Rights, which has been incorporated into domestic legal order, no other treaty bordering on the

[33] Health is a Fundamental Human Right' (2017), World Health Organisation Media Centre, Statement by Dr Tedros Adhanom Ghebreyesus, WHO Director-General 10 December 2017 <https://www.who.int/mediacentre/ news/statements/fundamental-human-right/en/> accessed 30 May 2023.

[34] M Welcome, 'The Nigerian Health Care System: Need for Integrating Adequate Medical Intelligence and surveillance Systems' (2011) 3 (4), *J Pharm Bioallied Sci.*

[35] M Rayner, *International Covenant on Economic, Social and Cultural Rights* <http://www.universalrights.net/main/world.htm> accessed 15 June 2023.

[36] See Section 6 (6(c)) of the Constitution of the Federal Republic of Nigeria (as amended) which limits the extent to which the courts of law in Nigeria use their inherent powers to adjudicate on any matter and give sanctions where necessary to all matters between persons or between government, or authority and persons in Nigeria for the determination of any question as to civil rights and obligations of that person.

[37] O Ikpeze, 'Right to Education: Case of the Rural Poor and Globalization in Nigeria', (2008) 1(1), *Journal of Women and Minority Rights*. [40] J Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights Under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria', (2005) 2, *African Journal of Legal Studies*, p. 132.

right to health has direct application in Nigeria. Like most common law countries, Nigeria adopts a dualist approach in receiving international law; meaning that notwithstanding ratification, treaties acquire legal force only upon their enactment into law by the National Assembly. The provisions of Section 12 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) are to the effect that no treaty between the Federation and any other country shall have the force of law except the treaty has been incorporated into domestic law by the National Assembly.[40]

Although the Constitution denies legal recognition to the right to health as well as other social and economic (socio-economic) rights, the domestication of the African Charter on Human and

Peoples' Rights in 1983[38] has introduced monumental changes to the legal status of these rights in the country. In fact, it has emboldened both the Nigeria Courts and other Courts to make decisions based on the provisions of the African Charter. In *Odofe & Ors v. Attorney General of the Federation*, the Court decided on the socio-economic rights of prison inmates to medicare based on the provisions of the African Charter.[39] Also, in *Ubani v. Director of Security Service,*[43] the court held that the State has a responsibility to the entire prison inmates regardless of the offence. Although the Court admitted that provisions under the Directive Principles of State Policy are not justiciable before the Court, it nevertheless reasoned that because the Plaintiff came under Article 17 of the African Charter, the matter was justiciable in the Court as the said Article is independent of the provisions of Chapter II of the 1999 Constitution.[40] No longer may constitutional denial of legal recognition to these rights be relied upon to shield the government or its agencies from obligations regarding the right to health.[41]

5.0 Changing the Narrative on Right to Heath in Nigeria

From the plethora of international and regional treaties and conventions enumerated in preceding sections of this Paper, it is evident that the right to health care access is a basic and universal right, even if distinct communities have different rates of development and diverse availability of resources.[42] There are many and complex linkages between health and human rights. In the first instance, violations or lack of attention to human rights (such as

[38] Cited as The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. It is an Act to enable effect to be given in the Federal Republic of Nigeria to the African Charter on Human and Peoples' Rights made in Banjul on the 19th day of January, 1981 and for purposes connected therewith.

[39] O V Ikpeze, 'Non-Justiciability of Chapter 11 of the Nigerian Constitution as an Impediment to Economic Rights and Development', (2015) 5 (18), *Development Country Studies*, 50. [43] (1994) 6 NWLR 475.

[40] *Ikpeze* (n42) 53.

[41] *Nnamuchi* (n6) 3-4.

[42] R Nunes, S Nunes and G Rego, 'Health Care as a Universal Right' (2017) 25 (1), *Springer Open Choice*, 1.

inhuman and degrading treatment, abuse and violence, torture, harmful traditional practices, poor living conditions, lack of information, lack of health services) can have serious health consequences. Therefore, respecting, protecting and fulfilling human rights can reduce the vulnerability to and impact of ill health.

The health system can promote or violate human rights in the way it is designed and implemented (accessibility to service, provision of information, respect for integrity and privacy, cultural sensitivity, gender and age).[43] In Nigeria, apart from the inherent defect in the design of the health system, the constitutional limitation placed by Chapter 11 is hampering the commitment of the government to fulfill its international obligation in the health sector. The health care narrative in Nigeria has been anything but impressive and nowhere near conformity with international best practice. According to the 2009 Communique of the Nigerian National

Health Conference, health care system remains weak as evidenced by lack of coordination, fragmentation of services, dearth of resources, including drug and supplies, inadequate and decaying infrastructure, inequity in resource distribution, and access to care and very deplorable quality of care.[44] Also, a 2016 study conducted by Price Waterhouse (PwC) revealed that 90 per cent of respondents associate healthcare in Nigeria with low quality, while over 80 per cent and over 70 per cent respectively, associate it with words like `rude' and `fear'. Conversely, less than 20 per cent felt that the healthcare provided in Nigeria gave value for money, and less than 10 per cent felt that it was transparent.'[45]

No doubt, changing the narrative on the right to health will necessarily entail some deliberate action on the part of government to show sincerity on its international obligation. For instance, the government should adopt an inclusive approach to 'policy' by incorporating not only policy but also law, regulation, intervention and even practice.[46] Welcome posits that to achieve success in health care in this modern era, besides adequate management coupled with strong leadership principles, a system that is well grounded in routine surveillance and medical intelligence as the backbone of the health sector is necessary.[47]

Furthermore, Nigeria must adopt a human rights approach to health. Generally, a rightsbased approach sets the focus on basic principles of human

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[43] B Rubenson, 'Health and Human Rights' (2002) 2A, *Swedish International Development Cooperation Agency.*

[44] *Welcome* (n36).

[45] Z Hashim, 'Patient's Bill of Rights: Making Health a Human Right in Nigeria' *Premium Times*, April 14, 2019.

[46] J Cottingham, E Kismodi, A Hilber, Lincetto, M Stahlhofer and S Gruskin, 'Using Human Rights for Sexual and Reproductive Health: Improving Legal and Regulatory Frameworks' *Bulletin of the World Health Organization* <https://www.who.int/bulletin/volumes/88/7/09-063412/en/> accessed 19 June 2023.

[47] *Welcome* (n36).

rights, such as non-discrimination, participation, transparency, accountability and interdependence. It means that target-groups have to be analysed and disaggregated to discover their different needs and abilities. Gender, age, socio-economic background and other characteristics need to be considered and respected.[48] Therefore, a rights-based approach to health requires that health policy and programmes must prioritise the health needs of the population, especially vulnerable persons. The right to health must be enjoyed without discrimination on the grounds of race, age, ethnicity or any other status. Another feature of rights-based approaches is meaningful participation where national stakeholders - including non-state actors such as non-governmental organisations (NGOs) - are meaningfully involved in all phases of programming: assessment, analysis, planning, implementation, monitoring and evaluation.[49]

Finally, the Nigerian State must show commitment in promoting human rights to health and strengthening legal recognition of human rights to health and rights. This calls for a constitutional amendment of the provisions of Chapter 11 of the Constitution of Nigeria where the right to health is non-justiciable. Sufficient financial and human resources should be allocated for designing and implementing legislative and policy measures and social initiatives to ensure the realisation of rights to health and through health and to facilitate universal access to health care. [50]

6.0 Conclusion

The right to the highest attainable standard of health lies at the heart of the health and human rights movement.[51] This right implies a clear set of legal obligations on States to ensure appropriate conditions for the enjoyment of health for all people without discrimination. The right to health is therefore one of a set of internationally agreed human rights standards, and is inseparable or indivisible from other rights.[52]

Most developed societies recognise the existence of a basic right of access

[48] *Rubenson* (n47) 17-18.

[49] Human Rights and Health' (2017), *World Health Organization* <https://www.who.int/news-room/factsheets/detail/human-rights-and-health> accessed 30 June 2023.

[50] 'Leading the Realization of Human Rights To Health And Through Health' (2017) Report of the high-Level Working Group and the Health and Human Rights of Women, Children and Adolescents, *World Health Organization* <https://www.ohchr.org/Documents/Issues/Women/WRGS/Health/ReportHLWG-humanrights-health. pdf> accessed 03 June 2023.

[51] 'Health and Human Rights' *The Lancet* <https://www.thelancet.com/series/health-and-human-rights> accessed 03 June 2023.

[52] 'Human Rights and Health' (2017), *World Health Organization* <https://www.who.int/news-room/factsheets/detail/human-rights-and-health> accessed 30 June 2023.

to health care of appropriate quality, considering it a positive welfare right.[53] Delivery of medical services must answer to human rights principles. Akinbola and Chijioke emphasise that the effectiveness of rights lies in their enforceability. Rights cannot be rights properly so called if they cannot be enforced.[58] 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.[59] The government must demonstrate political will to ensure that citizens enjoy access to basic health care, especially at the primary health care level.

Furthermore, it is clear that there are so many gaps in the realisation of the right to health in Nigeria. This remains so despite Nigeria's ratification of the core human rights instruments including the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.[54] One of the greatest challenges to the realisation of the right to health comes by way of the limitation placed under Chapter 11 of the Constitution of the Federal Republic of Nigeria ousting the jurisdiction of the court to entertain matters on provision of health services. There is an urgent call for a change of narrative towards a constitutional amendment to Chapter 11 to give full effect to the right to health, especially as it affects women and children.

[53] *ibid*. [58]R Akinbola and C Chijioke, 'Environmental Right and Human Rights Enforcement in Nigeria: Visiting the Nexus and a Call for Reform', (2011) 2 (2) *Human Rights Review An International Human Rights Journal,* 208. [59] Nunes et al (n46).

[54] M Ssenyonjo, 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 (2) *Netherlands International Law Review,* 254.

Human Rights Considerations in the Exercise of Ownership of Natural Resources in Nigeria

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Abstract
One of the most important characteristics of natural resources is that they possess different kinds of important values for humans. Ownership of Natural resources is a constitutional issue under Nigerian law. The Constitution of the Federal Republic of Nigeria 1999 grants exclusive ownership of natural resources to the federal government for the common good and benefit of the citizens. The paper examines human rights issues in the exercise of ownership of natural resources in Nigeria. The doctrinal method of legal research was adopted by this paper. The paper finds that the economic advantages of natural resources are at the heart of the demand for ownership. It also finds that the right to possess natural resources rests around the exercise of ownership and that its deprivation encompasses everything that has the immediate or remote ability to cause death. The paper concludes that the rights to life, property, and ownership of natural resources are all interconnected. The paper recommends that these rights should be enforceable by the Indigenous people in the resources-bearing community to reduce restiveness over ownership of natural resources. The study also recommended that the Nigerian courts act as a legal beacon in the pursuit of fundamental human rights in Nigeria.
Keywords: Human Rights, Natural Resources, Property Rights, Indigenous people, Resource Control.

1.0 Introduction

Natural resources are raw materials derived mostly from the earth or soil.[1] Man has altered these natural deposits for his gain and purpose. Natural resources have long been recognized as important in the process of

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[1] Ikpah C, and Ibanga N H, 'Nigeria Mineral Resources: A Case for Resource Control' <http://ww.nigerdeltacongress.com.> accessed 1 November 2022.

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socioeconomic development by Scholars.[2] As a result, several theories of ownership of natural resource ownership have emerged. The ownership regime of these natural resources is governed by International conventions and customary international law, common law, and national constitutions.

Nigeria, with a geographical size of 923,768 square kilometers and a diverse variety of natural assets, is one of Africa's wealthiest countries. It also has enough energy resources to meet its present and future expansion requirements. The country possesses the world's sixth-largest crude oil reserve.[3] The Constitution of the Federal Republic of Nigeria (CFRN) 1999[4] expressly provides for the ownership of natural resources in Nigeria. Section 44(3) of the Constitution[5] provides;

> "Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils, and natural gas in, under, or upon any land in Nigeria or in, under, or upon the territorial waters and the exclusive Economic Zone for Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."

In recent years, the ownership of natural resources has been a cause of contention between the government and Indigenous peoples whose ancestral lands are located in the heart of natural resource exploitation. This agitation is based in part on a resolution passed by the United Nations General Assembly[6] which provides inter alia that:

> The rights of people and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their National Development and the well-being of the people of the state concerned

Ownership of natural resources is commonly referred to as 'resource control' in Nigeria. The calls for 'resource control' are motivated by two fundamental concerns: environmental and economic. One of the key issues is the recurring issue of inadequate attention to indigenous peoples' environmental hardship in areas where natural resources are exploited. The environmental problems resulting from natural resources development include coastal or river bank erosion, flooding, sedimentation/silt, land degradation and loss of soil fertility, air and land pollution from oil spillage,

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[2] Parimal R., Arpit S., and Shashank G., Energy Security an Indian Perspective: The Way Forward. (8th Biennial International Conference and Exposition Petroleum Geophysics), Pandit Deendayal Petroleum University, India, 2010, 137-145.

[3] Adangor Z, 'Proposals for Equitable Governance and Management of Natural Resources in Nigeria.' (2018) 7 (1) *International Law Research,* 214-216.

[4] Hereinafter referred to as CFRN, 1999 (as amended).

[5] CFRN, 1999 (as amended).

[6] United Nations General Assembly Resolution 1803, 1962.

Gas flaring, tailings dumping, and loss of aesthetic beauty of the land.[7] This concern impact on quality of life and as such an infringement on the right to life. The other concern is socio-economic such as poverty, unemployment, displacements, inadequate compensation, kidnappings, sabotage, and destruction of property among others.[8] This concern is occasioned by the deprivation of property rights as means of sustenance. The consequences of such deprivation are predicated on indigenous people's demand for a fair share of the revenue generated from the exploitation of resources in their domain. These concerns cannot be ignored, it is as a result of this that these resources have been described as a "resource curse" to the indigenous people who live in abject poverty with little or no development to show for these rich natural deposits on their land.[9] These have led to several legal challenges.[10]

Human rights appear to be ideally suited to addressing the diversity of human interests in natural resources. For example, property rights aid in the realization of other human rights such as the right to food and the right to life. In addition to the right to food, clean water, adequate shelter, and education, having a safe and sustainable environment is critical since other rights rely on it. Akinola[11] argued that it is not an exaggeration to say that environmental rights are analogous to the right to life since they are an extension of the core human rights that humanity demands and deserves. As a result, human rights are constructed with a similar goal in mind: to safeguard a very broad spectrum of vital human interests that have been judged worthy of international legal protection. As a result, human rights concerns in the exercise of natural resource ownership are only a means to a goal.

2.0 Clarification of Key Terms

2.1 Human Rights

Rights have been defined in different ways by different Authors and Jurists. Garner[12] defined rights as:

1. That which is proper under law, morality, or ethics
2. Something due to a person by just claim, legal guarantee, or moral

[7] Rev. David Ugolor, 'Strategies for Transforming Natural Resources Wealth into Wealth for the People', Proceedings of the 35th Annual Conference of the Nigerian Society of International Law (ed. Ademola O. Popoola, 2008), 164.

[8] Ibid.

[9] Burton E G, 'Reverse the Curse: Creating A Framework to Mitigate the Resource Curse and Promote Human Rights in Mineral Extraction Industries in Africa' (2014). Emory Int'l L. Rev. 28 at 425.

[10] Jonah Gbemre v. Shell Petroleum Development Corporation of Nigeria Limited (2005) AHRLR 151 (Nig HC 2005), FHC/B/CS/53/05 Federal High Court Benin Judicial Division, 14 November 2005; Fawehinmi v Abacha (1996) 9 NWLR (Pt. 475) 990.

[11] Akinola O B & Bamigboye L O, 'Expanding the frontiers of environmental rights under the 1999 constitution,' (2019) Vol. 2 *Confluence Law Journal*, 145.

[12] Garner B A, *Black's Law Dictionary*, (8th edn. West Group, 1999) 1347.

principle

3. A power, privilege, or immunity secured to a person by law
4. A legally enforceable claim that another will do or will not do a given act; a recognized or protected interest, the violation of which is wrong.
5. The interest, claim, or ownership that one has in tangible or intangible property.

Austin[13] defined a right as an ability inherent in a particular party or parties under a particular statute, acting against a party or parties (or in response to a duty belonging to a party or parties) in which it resides. He claimed that a person can be said to have a right only when another or others are bound or obliged by law to do something or forbear regarding him. It means that a right has always a corresponding duty. Holland[14] defines a legal right as the capacity residing in one man of controlling, with the assent and assistance of the state the actions of others. Holland follows the work given by Austin. Salmond[15] defines right from a different angle. He stated that a right is an interest recognized and protected by a rule of law. It is an interest that respect is a duty and disregard for is wrong.

The 1948 ratification of the Universal Declaration of Human Rights (UDHR) and the succeeding 1966 Covenants split human rights into two categories: political and civil rights on the one hand, and social, economic, and cultural rights on the other.[16] A new category of rights called the third generation of rights has emerged over time. This last group is fraught with uncertainty in terms of its precise nature and extent, particularly when it comes to enforcement.[17]

Fundamental Human rights are rights that humans have just of their humanity. They are built into the fabric of existence. This is true regardless of age, location, or social class. They are rights to which people everywhere 'naturally' feel entitled, and they protest any restriction of those rights by any person or authority, which may result in war in some instances. These rights are regarded as basic because they are seen as essential to human life, dignity, liberty, and livelihood.[18]

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[13] Aslam M A, Rights and Duties in the Light of Jurisprudence: An Overview <https://www.legalserviceindia.com/legal/article-1919-rights-and-duties-in-the-light-of-jurisprudence-an-overview.html> accessed 18 December 2022.

[14] Ibid.

[15] Ibid.

[16] Akinola, (n. 11), 148.

[17] Ibid.

[18] Chinwo C A J, *Principles and practice of Constitutional Law in Nigeria* (Life, Law, and Grace Bookhouse, Chi amazing grace Ltd Port Harcourt, 2007), 102-103.

2.2 Ownership

Garner[19] defines ownership as the bundle of rights allowing one to use, manage, and enjoy the property, including the right to convey it to others. Going by this definition, ownership is the collection of rights allowing one to use and enjoy the property. Salmond[20] talks about ownership as the relationship between a person and an object which forms the subject- matter of his ownership. This means that ownership consists in a complex of rights all of which are rights in rem being good against the entire world and not merely specific persons. Austin[21] views ownership as a right indefinite in point of the user, unrestricted in point of disposition, and unlimited in point of duration over a determinate thing. Dias[22] asserted that a person is the owner of a thing when his interest will outlast the interests of other persons in the same thing. Ownership and possession were referred to as dominium or possessio in Roman law. Dominion refers to total right over something, whereas ownership refers to actual authority over it.[23] They prioritized ownership because they believe that having absolute rights to something is more essential than having physical control over it.

Niki Tobi (JCA) in **Abraham v. Olorunfunmi**[24] described ownership as the whole or bundle of rights that the owner has over and above every other person on a thing. He recognized the breadth of the rights implied by the collection in ownership of the whole of or the rights of the owner over and above every other person on a thing. The court went on to explain that the benefits of ownership entail that the owner is not bound by the rights of others. Because the owner has an absolute right to alienate or dispose of the property, and he can exercise the right without the consent of another party because no other person has a stronger title to the property than he does.

The legal connection and entitlements to natural resources are governed by several theoretical ideas of ownership. These ideas describe the ownership rights of states and people over natural resources.

2.3 Natural Resources

Garner[25] defines Natural resources as any material from nature having potential economic value or providing for the sustenance of life, such as timber, minerals, oil, water, and wildlife. They exist independent of human actions, they are gifts of nature. In other words. Scholars frequently use the

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[19] Garner, (n. 12), 1138.

[20] Fitzgerald F J, *Salmond on Jurisprudence* (12th Edn. Universal Law Pub Co. P. Ltd. Delhi, 2013), 504 at 256 - 259.

[21] Jurisprudence and Legal Theory, <https://www.thelawlane.com/jurisprudence-and-legal-theory/> accessed 18 December 2022.

[22] Dias R W M and Hughes G B, *Jurisprudence*, (2nd edn. Butterworths, London, 1964), 339.

[23] Sneh R and Garg R, 'Ownership' (2012). Lawyers in India; Law Articles <http://www.legalserv.ceindia.com.> accessed on 18 December 2022.

[24] Abraham v. Olorunfunmi (1991) 1 NWLR (Pt. 165) 53.

[25] Garner, (n. 12), 1056.

idea of "value" to define natural resources.[26] Miller and Spoolman[27] claim that everything taken from the environment to satisfy human needs and desires is a natural resource from a human point of view.

Natural resources can be categorized in a variety of ways depending on several different factors, such as their origin and whether they are renewable or not. But resources have three primary qualities: value, scarcity, and the possibility of consumption or depletion. In Nigeria, natural resources may be divided into two categories: solid minerals and oil and gas. There are 34 different types of solid minerals found in over 450 different places across the 36 states of the Federation and the Federal Capital Territory.[28] Out of all these natural resources mentioned above, oil and gas continue to be a significant source of income for the Nigerian government and are therefore considered a significant national resource in Nigeria.

The think tank Revenue Watch Institute stated the fate of resource-rich countries hinges on how they manage their oil, gas, and minerals.[29]

3.0 Evolution of Ownership of Natural Resources in Nigeria

Natural resource exploitation is not an uncommon occurrence in pre-colonial Nigeria. Mining existed among Nigerians even before the arrival of Western civilisation and the formation of Nigeria as a nation in 1914.[30] Communities were mostly ethnic kingdoms, village groupings, and other geo-ethnic communities. Within the ethnic space, these tiny groups possessed and exercised resource-based rights to the natural resources within their borders for common subsistence and livelihood. These resources include, among other things, water resources, forest products, and wild animals. Other communities within the same ethnic group could not exert jurisdiction over their neighbors' natural resources. When other communities utilised another community's resources, they did so as a privilege rather than a right. An individual's claim to these resources is based on his/her lineal relationship to the land where such resources are found.[31]

Ajomo[32] explained that the vesting of ownership and management of natural

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[26] Miller G T and Spoolman S, *Living in the Environment: Principles, Connections, and Solutions* (17th ed. Belmont, CA: 2011), 5.

[27] Ibid.

[28] Ministry of Foreign Affairs, Nigeria - Natural Resources, <https://foreignaffairs.gov.ng/nigeria/natural-resources/> accessed 20 September 2022.

[29] Revenue Watch Institute. (2013). Resource governance index. Report. <http://www.revenuewatch.org/sites/default/files/rgi_2013_Eng.pdf > accessed 24 August 2022.

[30] Oluwagbani A, 'The Niger-Delta Development Commission and the Future of Petroleum Industry in Nigeria'. (2001) *Modern Journal of Finance and Investment Law*, 5(3), 369-370.

[31] Njoku U J, 'Colonial Political Re-engineering and the Genesis of Modern Corruption in African Public Service: The Issue of the Warrant Chiefs of South Eastern Nigeria as a Case in Point,' (2005) *Nordic Journal of African Studies* 14 (1), 99–116.

[32] Ajomo M A, "The Legal Framework of the Petroleum Industry", Paper presented at the Centre for Petroleum Environment and Development Studies workshop at the University of Lagos on

resources in the Nigerian state is historical and extends back to the colonial era. Historians and scholars including Dike,[33] Ade–Ajayi,[34] Anene,[35] Oyebola and Oyelami[36] and Onwubiko[37] have argued that European conquest and occupation of West Africa and particularly British colonial rule in Nigeria was based on two main motives. These were initially economic interest and later governance. The previously established customary resource management patterns were eroded, and many of them were structurally distorted, derailed, and disintegrative. The dysfunctional effects of these did not become apparent until several decades after the colonialists had left.

The colonial legislations were transferred to after Nigeria's independence and thus, subsist. The Constitution of the Federal Republic of Nigeria (CFRN) 1999, (as amended) confers the power to own control, and regulate petroleum and other natural resources in the Federal Government. This power is firmly provided for in Section 44(3) of the Constitution. Others are the Petroleum Act,[38] The Nigerian Minerals and Mining Act[39] and The Land Use Act.[40] Aladeitan[41] argues that it is this concept of state ownership of minerals that Nigeria inherited at independence in 1960, which thereafter became entrenched in the 1963 Republican Constitution.

Nigeria has failed to completely learn from countries such as the United States of America and others where shared ownership of natural resources is practiced. This has in turn led to the seemingly unending agitations between the federal government, states, and the indigenous people over ownership of the natural resources found in their domain. Mrabure[42] argued that State ownership has failed significantly in recent years, and management of these resources by the people will result in a shift from the status quo. He proposed that the people will have a greater feeling of participation and autonomy, putting more responsibility in their hands to ensure that the region's indigenes confront the years of neglect constructively. He concluded that more wealth should be placed in their hands since it is common knowledge that when wealth is distributed, acrimony, and friction decrease

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essentials of oil and gas law Lagos (Oct.17–18, 2001).

[33] Dike K O, *Hundred Years of British Rule in Nigeria* (Federal Ministry of Information: Lagos 1960).

[34] Ade – Ajayi J F, *Milestones in Nigerian History* (Ibadan University Press: Ibadan, 1962).

[35] Anene J C, *Essays in African History* (Onibonoje Publishers: Ibadan, 1966).

[36] Oyebola A, and Oyelami A, *A Textbook of Government for West Africa* (Educational Research Institute: Ibadan, 1967).

[37] Onwubiko K B C, *History of West Africa: 1800-Present Day* (Book Two, Africana Educational Publishers Company: Aba, 1976).

[38] Laws of the Federation of Nigeria (hereafter referred to as LFN, 2004), Cap P10.

[39] LFN, 2004, Cap N117.

[40] LFN, 2004, Cap L5.

[41] Parimal, (n. 2), 160.

[42] Mrabure K O, "Revisiting Petroleum Resources Ownership Question. A Case for Private Ownership"; a Paper Presented at the 49th Annual Nigerian Association of Law Teachers (NALT) Conference <http://www.naltng.org/wp-content/uploads/2016/06/25.pdf.> accessed 1 May 2022.

significantly.

Victoria[43] declares that Land, territories, and related resource rights are of fundamental importance to indigenous peoples since they constitute the basis of their economic livelihood and are the sources of their spiritual, cultural, and social identity. The land is the cornerstone of indigenous people's lives and cultures, as well as their ability to choose their growth and destiny. It deteriorates when they lack access to, and respect for, their lands, territories, and natural resources.

4.0 Human Rights Considerations

4.1 Property Rights as a Frontier of Ownership

Human rights postulated that human beings had some inherent rights that they were endowed with by nature.[44] These are found in international law[45] regional charter[46] and national constitutions.[47]

The right to property is provided for in Article 17 of the Universal Declaration of Human Rights (UDHR) 1948[48] and other relevant instruments.[49] In the context of natural resources, a property right is regarded as a tool of resource allocation.[50] Under international law, the ownership of natural resources varies, depending on whether such resources are located onshore or offshore. States have permanent sovereignty over onshore resources.[51]

The African human rights instrument[52] include the right to existence and self-determination;[53] the right to freely dispose of wealth and natural

[43] Victoria T C, Chairperson, United Nations Permanent Forum on Indigenous Issues. Address to the Opening of the Sixth Session of the Permanent Forum on Indigenous Issues, (14 May 2007).

[44] Atsenuwa A, 'Between Chapter 2 and Chapter 4 of the 1999 Constitution: Justifying Economic, Social and Cultural Rights in Support of Civil and Political Rights' in E Azinge and B Owasanoye (eds), *Justiciability and Constitutionalism: An Economic Analysis of Law* (NIALS Press 2010) 217–18.

[45] See Universal Declaration of Human Rights (UDHR) 1948 (Hereinafter referred to as UDHR)

[46] African Charter on Human and Peoples Rights 'Banjul Charter' 1981(Hereinafter referred to as African Charter).

[47] Constitutions of all modern democratic nations provide for human rights.

[48] Everyone has the right to own property alone as well as in association with others, and 'no one shall be arbitrarily deprived of his property.

[49] See International Convention on the Elimination of All Forms of Racial Discrimination 1965, Art 5(v); International Convention on the Elimination of All Forms of Discrimination against Women 1979, Arts 15(2) and 16(1) (h); International Labour Organization Convention No 169 1989, Arts 14 and 16 concerns Indigenous and Tribal Peoples Art 21; the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms 1995, Art 26(1).

[50] Christopher Rodgers, 'Nature's Place? Property Rights, Property Rules and Environmental Stewardship' (2009) 68 *CLJ*, 550.

[51] Anita Ronne, 'Public and Private Rights to Natural Resources and Differences in their Protection?' in Aileen McHarg and others (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010) at 64.

[52] African Charter, Arts 13(3), 14 and 21.

[53] Ibid, Article 20.

resources;[54] the right to economic, social, and cultural development with due regard to freedom and identity in the equal enjoyment of the common heritage of mankind;[55] and the right to a satisfactory environment favourable to their development.[56]

The Second World Conference to Combat Racism and Racial Discrimination[57] held in 1983 notably issued a Declaration which has been described as an official document. The preamble and the operative part of the document in paragraph 22 express the concern for the rights of indigenous people. It state:

> The right of indigenous populations to maintain their traditional economic, social, and cultural structures, to pursue their own economic, social, and cultural development, and to use and further develop their language, their special relationship to their land and its natural resources should not be taken away from them…

United Nations has also come out with resolutions on the people and the control of their natural resources.[58]

Nigeria has been active in signing and ratifying human rights treaties. The Universal Declaration of Human Rights and treaties dealing with traditional civil and political rights have undoubtedly had an impact on different Nigerian constitutions, which have consistently contained a chapter devoted to ensuring fundamental human rights inside Nigerian boundaries.[59] Section 43 of Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria. In Section 44 Subsection (1), it states that shall be acquired compulsorily in any other part of Nigeria except in the manner and for the purposes prescribed by the law.

The right to own land, freely dispose of wealth and natural resources revolves around the exercise of ownership in the interest of the people.[60] This includes the recognition of the people's legal rights to the natural resources located therein, the protection of the peoples' territorial integrity, the protection and preservation of their physical and cultural identities, including the protection of their ancestral shrines in their land, and the

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[54] Ibid, Article 21; The proviso to Article 21(4) State signatories to the current charter shall commit to eliminating all kinds of foreign exploitation, notably that practiced by international monopolies, to allow their peoples to fully benefit from the benefits gained from their national resources.

[55] Ibid, Article 22.

[56] Ibid, Article 24.

[57] Declaration of the World Conference to Combat Racism and Racial Discrimination, 1983.

[58] Adoga-Ikong J A, 'An Appraisal of the attitude of Nigerian courts in oil and gas pollution cases,' (2019) *International Journal of Law*, 5(5).

[59] CFRN, 1999 (as amended), Chapter IV.

[60] Jeremie G, The Right to freely dispose of Natural Resources: Utopia or Forgotten? Netherlands Quarterly Human Rights, 2013, vol. 32/2, 314-341, 2013 <https://repository.uel.ac.uk/download/7092c00f4d614250f9849c > accessed 25 August 2021.

provision of unrestricted access to their form and places of worship, as well as the right to free, prior, and informed consent before the start of exploitation activities.[61] It also includes the provision of adequate access to their means of livelihood including food, and an obligation on the government to take actions or measures to prevent deprivation of their normal subsistence.

4.2 Right to Life as a Frontier of Ownership

The right to life is of universal application.[62] This right is enshrined in the UDHR,[63] African Charter on Human and Peoples Rights 1981[64] and Section 33 of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended). The sanctity of the right to life cannot be tied down to a single readily specified sphere: it incorporates a vast range of other rights that rely on the presence of life to be enjoyed: it is the foundation of all other rights.

The traditional approach to the right to life views the right in a very parochial sense to cover only occasions where the government was directly involved in the arbitrary deprivation of life.[65] A major problem with the traditional approach is that it has the effect of excluding other components (such as the right to health, property, food, healthy environment, etc) contained in the bundle conveniently wrapped up as the right to life. This has the effect of restricting the enforcement of the right to the occurrence of death and thus confining the right to the realm of a broken promise, for which compensation is a just and adequate remedy only when the government directly authorised the death.

The traditional approach, as applied in Nigeria,[66] views the right to life as imposing only a negative duty on the State not to arbitrarily deprive a citizen of her life. This is in contrast to an inclusive interpretation of the right to life, which combines the conventional perspective with the imposition of a positive duty on the government to take all reasonable means to safeguard life. To avoid this parochial view, a Nigerian Court in ***Jonah Gbemre v. Shell Petroleum Development Corporation of Nigeria Limited*** [67] decided not to

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[61] In Maya Indigenous Community of the Toledo District v. Belize, Inter-American Commission on Human Rights case 12.053 Report no. 40/04 (2004), Doc. OEA/Ser.L/V/II/122 Doc. 5, rev. 1, para 117 (2004) 142, the inter-American commission relying on a similar provision in her regional instrument indicted the authorities for violation of the right of the Maya people by allowing the exploitation of timber and oil in Maya ancestral land without the people's informed consent.

[62] Constitutions of most modern democratic nations provide for the right to life.

[63] UDHR, Art 3: Right to life.

[64] African Charter, Article 4

[65] See Nasiru Bello v. AG Oyo State [1986] 5 NWLR (pt. 45) 828. Where the Supreme Court of Nigeria at the suit of the deceased family held that the respondent violated the deceased right to life and ordered compensation to his family for the execution of a convicted felon while his appeal to a higher court was pending.

[66] Section 33 of the Constitution of the Federal Republic of Nigeria (CFRN) 1999.

[67] Jonah Gbemre v Shell Petroleum Development Corporation of Nigeria Limited (2005) AHRLR

view the right to life in isolation. The court places a strong emphasis on the positive aspects of the right by reading it alongside the positive responsibilities of the State, which are frequently proclaimed non-justiciable in constitutional provisions.[68]

In its broadest sense, the right to life includes anything that has the immediate or distant potential to cause death. It includes contamination of the air, water, and anything else that negatively impacts well-being, such as a lack of proper healthcare. It encompasses the denial of the right to natural resources and their beneficial use; it encompasses the destruction of a person's means of livelihood, making it difficult for the individual to afford the requirements of life. The list is extensive; it extends far beyond compensation for unjust deprivation of life to encompass anything that jeopardises a dignified existence.[69] The right to life presupposes the existence and accessibility of certain fundamental necessities such as food, health care, housing, and education. To be sustained, the right to life requires sustenance, which must be generated by members of society, all of whom have this right to live. Thus, the right to life is related to the right to labour to gain means of sustenance to receive food and shelter...[70]

4.3 Limitations of Human Rights Treaties in Nigerian Law

Section 12 (1) of the CFRN 1999 limits the application and enforcement of human rights treaties to those that have previously been domesticated in Nigeria. This is due to Nigeria's dualist system, which states that treaties, particularly those dealing with human rights, cannot be applied domestically until they have been incorporated into national law. Section 12 (1) states that no treaty between the federation and any other nation has legal force save to the degree that it has been adopted into law by the National Assembly. Egede[71] argued that the requirement that a treaty must be enacted

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151 (Nig HC 2005), FHC/B/CS/53/05 Federal High Court Benin Judicial Division, 14 November 2005 and cited in J Nnamdi Aduba, 'The Right to Life under Nigerian Constitution: the Law, the Courts, and Reality' <http://nails-nigeria.org/library/THERIGHTTOLIFEUNDERNIGERIANCONSTITUTIONTHELAWTHE COURTSANDTHEREALITYBYJNNAMDIADUBA.pdf> accessed 28 August 2021.

[68] Such positive duties are contained in Chapter II of the CFRN, covering such components of the right to life as food, shelter, healthcare, a healthy environment, etc.

[69] See Yakye Axa Indigenous Community v. Paraguay, where the Inter-American Commission on Human Rights claimed that the government of Paraguay threatened the Yakye Axa Indigenous Community's access to food, water, and health care, as well as its survival, by failing to respect ancestral property rights, in violation of the American Convention on Human Rights articles 4 (right to life), 8 (right to a fair trial), and 21 (judicial protection). In its interpretation, the court also relied on the general comments of the Committee on Economic, Social, and Cultural Rights, the Supervisory Body of the International Convention on Economic, Social, and Cultural Rights<https://leap.unep.org/countries/py/national-case-law/yakye-axa-indigenous-community-v-paraguay> accessed 26 June 2023.

[70] Uchegbu S, 'The Concept of the Right to Life under Nigerian Constitution', in Essays in Honour of T.O. Elias, 151-152 cited in J.N. Aduba, (n 21), p. 3.

[71] Egede E, 'Bringing Human Rights Home: An Examination of the Domestication of Human

as a municipal law before it can be enforced in Nigeria appears to be merely a historical incident and a colonial relic.

In ***Fawehinmi v. Abacha***,[72] One of the crucial issues that arose, in this case, was the status of a domesticated treaty under section 12 vis-à-vis other municipal law. The Supreme Court considered Section 12 (1) of the Constitution of the Federal Republic of Nigeria (CFRN) 1979, which is similar to Section 12 (1) CFRN 1999, in respect of the African Charter on Human and Peoples Rights. The court unanimously held that section 12 of the constitution had a dualist impact. The conclusion is that no matter how advantageous an international treaty to which Nigeria has been a signatory may be, it remains unenforceable unless it is adopted into national law by the National Assembly. Egede[73] contended that the exclusion from the domestic application of Human rights which Nigeria has become a party by succession, accession, or ratification by the deliberate (or perhaps inadvertent) failure by the legislature to enact them into law appears to be unwarranted and disturbing.

4.4 The Role of Nigerian Courts in Extending the Frontiers

Flowing from the provisions of the extant laws on the ownership and control of natural resources in Nigeria is the development and emergence of case law.

In ***Jonah Gbemre v. Shell Petroleum Development Corporation of Nigeria Limited,***[74] The plaintiff sued Shell Nigeria, the Nigerian National Petroleum Corporation, and the Attorney General of the Federation, seeking a declaration that the rights to life and dignity of the human person guaranteed by sections 33(1) and 34(1) of the Constitution included the right to a clean, poison-free, pollution-free, and healthy environment. The Federal High Court ruled that the first and second respondents' actions in continuing to flare gas as part of their oil exploration and production activities in the applicant's Community violated the fundamental right to life (including a healthy environment) and human dignity guaranteed by the Constitution and the African Charter. Aside from isolated High Court cases such as ***Jonah Gbemre v. Shell Petroleum Development Corporation of Nigeria Limited***,[75] Nigerian case law has failed to recognise the progress achieved by both local and international courts in the realistic application of the right to life as it pertains to natural resources.

However, in ***Fawehinmi v. Abacha***,[76] the court also held that where justice cannot be obtained under domestic law in the domestic courts, litigants can proceed to the African Court on Human and Peoples' Rights.

Rights Treaties in Nigeria', (2007) 51 (2) Journal of African Law, 251.

[72] (1996) 9 NWLR (Pt. 475) 990.

[73] Egede, (n. 72).

[74] Supra.

[75] Supra.

[76] Supra.

In ***SERAC v Nigeria***,[77] The African Commission ruled that Nigeria breached African Charter Articles 4, 14, 16, 18, and 24 by tolerating and supporting ecologically deteriorating and polluting practices of oil firms in traditional Ogoniland through military force. Articles 4, 14, 16, 18, and 24 of the African Charter recognise the African people's rights to life, property, physical and mental health, family, and the right of women and children to be free from discrimination, as well as the right to a satisfactory environment for development.

4.5 Lessons from Other Jurisdictions

Courts in other countries have set a good example for Nigerian courts by applying the right to life granted in their respective constitutions inclusively.

a) India

The introduction of Article 48A into the Constitution (Forty Second Amendment) Act 1976 explicitly embraced environmental protection and improvement as part of State policy. Article 51A (g) made it a citizen's obligation "to protect and improve the natural environment, including forests, lakes, rivers, and wildlife, and to have compassion for all living creatures."[78]

In India, this line of thinking has resulted in the formation of new notions in which the right to life has been construed to encompass, among other things, the right to survival as a species, the right to livelihood, the right to quality of life, and the right to dignity. ***Rural Litigation and Entitlement Kendra v. State of U.P***[79] was one of the earliest cases where the Supreme Court addressed issues relating to the environment and ecological balance. The extended concept of the right to life under the Indian Constitution was additionally elaborated in ***Francis Coralie Mullin v. Union Territory of Delhi***[80] where the Supreme Court highlighted the positive obligations of the State, as part of its duty correlative to the right to life. The significance of this case resides in the court's willingness to be forceful in adopting a broad interpretation of human rights. Only via such an understanding can environmental issues be included in the broad framework of human rights.[81]

The right to livelihood (article 41), which is a guiding principle of state policy, is another extension of the right to life. This expansion can hold the government accountable for environmental acts that have threatened to displace the poor and damage their way of life. In the area of environmental rights, a strong link between the right to livelihood and the right to life has

[77] Suit No ECW/CCJ/APP/10/11, Communication No 155/96.
[78] Aedoyin-Raji J O, Abdulkadir B A, Abdulkareem A M, 'The Indigenous People and Environmental Conflicts: Reflection on Environmental Democracy for Conflict Resolution', (2021) 6 (1) *Nasarawa State University Journal of Public and International Law*, 333.
[79] (1985) INSC 220.
[80] 1981 All Indian Reports (AIR) 746.
[81] Aedoyin-Raji (n. 78).

therefore been established. The Court has been led by the affirmative responsibilities contained in articles 48A and 51A (g) in the context of the rights of indigenous people displaced by development projects and has ordered sufficient compensation and rehabilitation of the evictees. An Indian court in **Bharati v State of Kerala**[82] has justified environmental rights. Hegede and Mukherjea JJ found in this case, among other things, that "it aims at rendering the India masses free in the positive sense without truly following the Directive Principles intended by the Constitution" (India 1950). It was also held in the Indian case of ***M.C.Mehta v. Union of India***,[83] that the denial of the means of sustaining life is tantamount to a denial of the right to life.

This is in stark contrast to Nigeria, where environmental rights guaranteed by the constitution are still unenforceable in Nigerian courts.

b) Bangladesh

The Constitution of the People's Republic of Bangladesh, 1972 does not explicitly mention the right to a healthy environment, either in the guiding principles or as a basic right. Article 31 states that everyone has an innate right to be protected against activities that endanger their life, liberty, body, reputation, or property unless prohibited by law. In the case of ***Dr. M. Farooque v. Government of Bangladesh***,[84] The Bangladesh Appellate Court interpreted the right to life broadly. The petitioner filed this action, requesting that the court halt the importation of certain milk powders that had been found to contain radiation levels over the permitted limit. The petitioner claimed that the government authorities' incapacity to ship back the imported milk powder was harmful to human health and violated the fundamental right to life. The court found in favour of the petitioner.

c) United States

The right to private ownership of oil and gas was recognized by the U.S. Supreme Court as early as 1898.[85] It was decided in ***Del Monte Min. & Min. Co. v. Last Chance Min. & Mill. Co***[86] that a private owner has absolute ownership, and the government cannot interfere with it. Kuntz went on to say that owning property gives you the unique right to enjoy substances under the surface, and the state has no proprietary rights because of its sovereign status.[87]

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[82] (1973) 4 SCC 225.
[83] [1987] All Indian Reports (AIR) 1086
[84] 17 BLD (AD) 1997, vol. XVII, Page 1-33.
[85] Kuntz, Oil and Gas, A revision of Thornton, Vol 1, § 2.1 (1st ed. 1987)
[86] 171 U.S 18
[87] Kuntz, Supra, § 2.1.

5.0 Conclusion

This paper found that the right to life, property right, and the exercise of ownership over natural resources are all interconnected. Natural resources have varying degrees of importance to humanity. This is because natural resources such as air, water, and land have a life-sustaining value. Property rights have also been viewed as a component of human rights to movable and immovable property as provided by s 43 CFRN. It also found that the non-justiciability of Section 20 CFRN 1999 (as amended) under Section 6(6) (c) CFRN 1999 (as amended) is detrimental to environmental rights. These categories of human rights represent fundamental human interests that have been recognized as worthy of international legal protection. Furthermore, this paper found that Section 12 (1) of the CFRN 1999 limits the application and enforcement of human rights treaties in Nigeria, despite that these treaties have been stated in a universal human rights language.

This paper concludes that the various needs that natural resources fulfill are human rights. As the right to possess natural resources may be represented as a human rights claim, so can the right to access natural resources be viewed not just as a means of fulfilling the right to life, but also as a potential danger to human rights if denied. A human rights-based approach to environmental issues demands a high level of participation This is unquestionably one of the reasons why human rights should play a prominent part in the exercise of natural resource ownership to alleviate disparities and abuses.

The soul of law is reason, and when the rationale for any given law fails, so does the law itself. The Latin maxim *cessant ratione legis cessat ipsa lex* is commonly used to convey this. As a result, if any law fails the "reason" test, that law loses its "soul" and is likely to lead to civil disobedience. This is the case with the existing laws, notably the Federal Republic of Nigeria's Constitution. 1999 (as amended). Therefore, this paper recommended an amendment to the Constitution of the Federal Republic of Nigeria (CFRN) 1999, specifically section 44(3) which grants exclusive ownership of natural resources to the federal government because it violates Section 43 CFRN 1999 (as amended), which guarantees citizens' property rights. It is also recommended that Section 20 CFRN 1999 (as amended) be amended, as its non-justiciability under Section 6(6) (c) CFRN 1999 (as amended) is detrimental to environmental rights. Furthermore, it is also recommended that Section 12 (1) of the CFRN 1999 because it limits the application and enforcement of human rights treaties to those that have previously been domesticated in Nigeria. Finally, this paper recommended that the Nigerian courts act as a legal beacon in the promotion of these human rights in Nigeria.