UNILAG LAW REVIEW

Vol. 3 No. 1
August
2019

UNILAG LAW REVIEW

VOLUME 3, NO. 1 (2019)

Published by:

The University of Lagos Law Review (UNILAG Law Review).

The UNILAG Law Review is a flagship publication of the University of Lagos, Law Students' Society. It is the foremost platform for legal discussion and scholarship for all stakeholders in the legal profession. The UNILAG Law Review is published online and in print - in two issues every year.

Cover:

Design by Omeiza

llordomeiza@gmail.com

Contact:

Ground Floor,

Faculty Building,

Faculty of Law, University of Lagos

editor@unilaglawreview.org

TABLE OF CONTENTS

EDITOR'S NOTE

I am pleased to present the first edition of volume three of the UNILAG Law Review. Every publication is a testament to the fact that the UNILAG Law Review has come to stay in the world of legal scholarship. In just three years the growth of our publication has been tremendous, with readership from various continents both for our online forum and the print edition articles. I must say that the task of leading the first set of editors has not been easy; we have met every form of obstacle imaginable and a lot of sacrifices have been made to see to the realization of this dream. I will not be giving the full version of the story if I do not also state that we have conquered all of our fears and obstacles, in one way or the other; on all fronts.

The quality of articles that featured in this edition are diverse, enlightening and thought-provoking. Various articles in this edition focused on the synergy between technology and our legal practice, environmental law, constitutional supremacy and interpretation, intellectual property, law and medicine, tax, land law and image rights in sports law. This piecemeal of information would be most useful for lawyers especially in this technological revolution as almost every technological problem need a legal solution and vice versa.

I must appreciate the hard work and commitment of all members of the Editorial Board for a job amazingly done. The world is not ready for what I know you all will do. Particularly to our staff adviser Professor I.O Bolodeoku for his constant guidance and teachings, we are most grateful. I thank all the authors for their contributions to this volume, it was indeed well put together.

Once again, I would urge every reader to furnish their mind with this material of knowledge.

Ayotunde Kayode-Dada
Editor-in-Chief '19

GUIDELINES FOR CONTRIBUTORS

The UNILAG Law Review accepts submissions from all stakeholders in the legal profession within and outside Nigeria. Authors can either submit to the print journal or the online forum of the UNILAG Law Review. All references in the work must comply with the UNILAG Legal Citation Model (LCM). This is available on the website http://www.unilaglawreview.org. Submissions should be sent in word documents to; editor@unilaglawreview.org.

For more details on how to submit and the various categories, please visit; editor@unilaglawreview.org

SUBSCRIPTION

To subscribe to the paperback edition of the UNILAG Law Review kindly send a mail to editor@unilaglawreview.org addressed to the Financial Director, UNILAG Law Review.

This edition of the UNILAG Law Review is also available online and can be accessed at: http://www.unilaglawreview.org

POLLUTERS PAY PRINCIPLE IN NIGERIA: AN APPRAISAL OF ITS EFFECTIVENESS

Bena Benafa*

ABSTRACT

The issue of pollution in Nigeria is a continuous menace to the environment which has led to loss of biodiversity and environmental degradation. This article focuses on the polluter-pays principle (PPP) which is defined as a principle which holds a polluter liable for the pollution cost. This article seeks to establish whether the PPP has been duly incorporated into the Nigerian law. There are several laws that regulate pollution in Nigeria. The National Oil Spill Detection and Response Agency (Establishment) Act, is an example of laws that seek to incorporate the PPP into the Nigerian Law (based on the recent amendment in 2018). However, irrespective of this development, the argument is that the PPP is not adequately operational in Nigeria. It is the author's view that most environmental laws seek to either compensate affected persons or punish polluters either by the payment of a fine or imposition of a term of imprisonment.

1. INTRODUCTION

The Niger-Delta region is reputed to be one of the most polluted spots on earth. In 2013 and 2014, ENI and Shell identified more than 1053 pollution cases.[1] According to Amnesty International, this appears to be the standard operating procedure in Nigeria.

There are several environmental laws. These laws mandate operators to prevent pollution by using up-to-date equipment or

* Bena Benafa, LLB, BL, LLM, ACIArb, Senior State Counsel in the Federal Ministry of Justice, bena.benafa@gmail.com,

[1] Amnesty International, "Nigeria: Hundreds of Oil Spills Continue to Blight Niger Delta", available at: https://www.amnesty.org/en/latest/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/ (accessed 29 June, 2017).

to compensate affected persons in the event of pollution. Additionally, there are laws which require operators to carry out clean-up activities of pollution. Some authors have relied on these laws to argue that the PPP applies in Nigeria. This article therefore primarily tests the validity of this opinion.

The article is divided into four parts. The first part considers briefly the definition of PPP. The second part examines the views of authors who maintain that the PPP applies under Nigerian law. The third part appraises the statutory provisions on which the authors' arguments are founded. The fourth part concludes this article. It will be argued that it is not apparent if the PPP applies in Nigeria. Uncertainty about the application of the principle arises because many of the provisions relied on by the authors, such as the one on compensation, are often contained in laws that have a different objective. For example, the compensation provision in the *Oil Pipelines Act* may be triggered even when no pollution has occurred.[2] Essentially, this shows that the primary objective behind the Act is not an endorsement of the PPP, but to simply provide some framework for compensation arising from damages in the construction and maintenance of pipelines. Secondly, some of the laws, such as *National Oil Spill Detection and Response Agency (Establishment) Act*, 2006[3] (amended in 2018), explicitly refer to the PPP but impose penalties on a polluter to clean-up oil spill failing which it will be liable upon conviction to a fine of ₦5,000,000, imprisonment or both. It will seem that the provision does not effectively endorse the PPP because the polluter may choose to pay the fine if he realises that the cost of the clean-up may outweigh the fine imposed. Essentially, this suggests that the fine may not be an adequate penalty for the clean-up and therefore renders questionable whether the Act indeed adopts the PPP.

---

[2] *Oil Pipelines Act, 1965*, Cap, 07, Laws of the Federation of Nigeria, 2004, s.11 (5).

[3] *National Oil Spill Detection and Response Agency (Establishment) Act*, 2006, No 15 [hereinafter NOSDRA Act].

However, these conclusions do not mean that there are no statutory or common law rules which hold polluters liable. The provisions examined below obviously hold polluters responsible. However, the major focus of the article is the PPP and whether it is effectively applied under Nigerian law.

1.1. Polluter Pays Principle as an Overarching Principle

The polluter-pays principle (PPP) may be defined as a principle which holds a polluter liable for pollution cost. Historically, the principle started-off as a cost allocation measure to internalise the social costs of pollution.[4] The objective for such internalisation was primarily to bring about competition in trade.[5] The principle was later refined to have both preventive and curative aspects. In its preventive aspect, it ensured that the polluter adopted pollution control measures to reduce pollution in a cost-effective way.[6] 'From the economic point of view, polluters are encouraged to reduce pollution as soon as the cost they must bear is seen to be greater than the benefits they anticipate from continuing nuisances'.[7]

The above provision meant that the PPP took the form of an *ex ante* preventive regulatory framework. In effect, the PPP expanded from its earlier focus on cost internalization to a more preventive side. Sadeleer points out that, legally speaking, the preventive function made the PPP consistent with the principles of

---

[4] *NOSDRA Act*, No. 15. See Ronald Coase, "The Problem of Social Cost" (1960) 3 *Journal of Law and Economics*, 1-44. The costs are 'externalities' not reflected in the price of the product. See Arthur Pigou, *The Economics of Welfare* (1972).

[5] Organization for Economic Co-operation and Development (OECD), *Guiding Principles Concerning International Economic Aspects of Environmental Policies, Recommendation* (C (72)128, 1972) [hereinafter OECD 1972 Principles] see also S. Gaines, 'The Polluter-Pays Principle: From Economic Equity to Environmental Ethos' (1991) 26 *Texas International Law Journal*, 463, 473.

[6] N. Sadeleer,"Environmental Principles: From Political Slogans to Legal Rules" (2002) *Oxford University Press,* 36.

[7] *Ibid*.

prevention which it sought to enhance. This brought about coherence in policy measures which was missing in the earlier PPP understanding.[8]

The PPP was further refined subsequently to include a curative *ex post* function. This was to ensure the polluter took steps to remedy pollution after they occurred. The OECD, in its 1991 Recommendation on the use of Economic Instruments in Environmental Policy,[9] made provision for the polluter to bear responsibility not just for the cost of prevention, but for pollution damage.

The European Union is one major endorser of the PPP. The PPP forms a focal point of its environmental policies. In the 1980s, the PPP received recognition under the *Single European Act of 1987* (Article 130r (2)) which states: 'action by community relating to the environment shall be based on the polluter should pay'. In 1992, the Act was amended by Article G (38) of the Treaty of the Functioning of the European Union (TFEU)[10] which further affirms the commitment of the EU to the PPP.

The result of these important legislations was to make the PPP binding on all EU institutions.[11] The principle cannot therefore be completely excluded from consideration by EU institutions.[12] This has influenced its strict application as a principle in pollution cases to hold a polluter liable, even for an accidental discharge of

[8] *Ibid.*

[9] OECD, "Recommendation on the use of Economic Instruments in Environmental Policy" (C (90)177, 1991).

[10] Now the Treaty of the Functioning of the European Union (2012) OJ326/47, Article 191.1.

[11] G Winter, "Constitutionalising Environmental Protection in the EU" (2002)2 YEL, 76; G Winter, "The Legal Nature of Environmental Principles in International, EC and German law", in R. Macroy (ed), *Principles of Environmental Law* (2004), 19-22.

[12] *Supra* note 6, at 31.

waste.[13] It has also been applied to hold an oil company liable because it failed to consider the seaworthiness of a ship used to transport its crude, even though the negligence was directly attributable to the ship owners.[14]

The underlying justification for the strict application of the PPP in the EU seems to have been aptly captured by the Advocate General of the European Court of Justice who noted that: 'by producing economic goods, the producer therefore causes waste and is therefore responsible in accordance with the PPP.'[15] This conclusion is not very conventional, as a polluter will normally be a party who directly produces waste, rather than the producer of the product producing waste. However, in arriving at that decision, it may be said that finding the producer liable only underlines the influence the PPP, as a fundamental principle under EU law. The section below will consider the position in Nigeria.

1.2. Does the PPP Effectively Apply under Nigerian Law?

Several authors maintain that the PPP applies under Nigerian law.[16] For example, Ibrahim argues that the PPP is adopted under the *Oil in Navigable Waters Act*,[17] the *Petroleum Act*[18] and the

---

[13] *Van de Walle and others* v *Texaco* [2004] ECR 1-07613. This was on the basis that excluding the polluter from liability will contravene any prohibition on abandonment, dumping and uncontrolled disposal of waste.

[14] *Commune de Mesquer* v *Total France SA and Total International Ltd.* [2008] ECR 1-04501.

[15] Case 188/07 [2008] ECR 1-04501, Opinion of AG Kokott, p. 125.

[16] C. Emole, "Nigeria: Regulation of Oil and Gas Pollution" (1998) 28 *Environmental Policy and Law*103, 105; Global Legal Group, *The International Comparative Legal Guide to Environment and Climate Change Law* 13th Ed.(2016), 150; T. Okenabirhie, "Polluter Pays Principle in the Nigerian Oil and Gas Industry: Rhetoric or Reality?"(2010) 13 CEPMLP Annual Review, 4; A. Olaniyan, "Imposing Liability for Oil Spill Clean-up in Nigeria: An Examination of the Role of the Polluter Pays Principle" (2015) 40 Journal of Law, Policy and Globalisation, 73; A. Ibrahim, "Assessment of the Legal and Institutional Framework of Environmental Degradation by Oil and Gas Companies in Nigeria", (PhD Dissertation, Ahmadu Bello University 2014), 87-90.

[17] *Oil in Navigable Waters Act*, 1968, Cap O6, LFN, 2004.

Regulations made under the Act[19] and the *NOSDRA Act*. Okenabirhie similarly argues that the PPP was adopted into Nigerian law 'more than two decades ago'. [20] She affirms that the principle was adopted in the *Oil Pipelines Act* and the *Oil in Navigable Waters Act* 1968.

According to Okenabirhie, the PPP is interpreted under Nigerian law to mean that the polluter must pay the clean-up cost and compensation to those who suffer because of damages arising from pollution.[21] In Okenabirhie's view, despite the adoption of the PPP, there has not been any record of clean-up. Okenabirhie argues that the reason why the PPP has not been effective is due to some features under Nigerian law, especially the defences available to polluters. She contends that under the *Oil Pipelines Act*, for example, polluters can escape liability where they establish that the damage was caused by a third party.[22] She contends that many companies in Nigeria often rely on this provision to claim sabotage to limit their liability.

In a similar vein, Olaniyan affirms the recognition of the PPP in Nigeria. He argues that the NOSDRA Act is a "major piece of legislation" which specifically sanctions this principle. He adds that section 6(2) (3) of the Act, discussed below, provides an example of a statutory provision which embodies the PPP, by imposing a fine on polluters who fail to take practical steps to remedy the pollution.[23]

The arguments above assume that the laws relied on endorse the PPP. In the section below, we will examine some public

---

[18] *Petroleum Act, 1969,* Cap P10, LFN, 2004.
[19] *Petroleum (Drilling and Production) Regulations* and *the Petroleum Refining Regulations*.
[20] *Supra* note 16, at 4.
[21] *Ibid*, at 4.
[22] *Ibid,* at 14.
[23] *Supra* note 16, at 78.

regulations which the authors have relied on to see if they endorse the PPP.

1.3. Statutory Provisions and Polluter's Liability

Nigerian Constitution of 1999 is the primary source of environmental policy. Section 20 of the Constitution mandates the Nigerian government to take measures to protect the environment and safeguard the water, land, and wildlife from pollution. Other regulatory measures to protect the environment are based on the Constitution.

Pursuant to this, the government has adopted several international conventions and enacted several laws. The laws, some of which have already been mentioned, are the National Environmental Standards and Regulatory Enforcement Agency (Establishment) Act, 2007; Oil in Navigable Waters Act, the Oil Pipelines Act, and the NOSDRA Act. Importantly, the Oil in Navigable Waters Act ratifies the International Convention for the Prevention of Pollution by Oil 1954. Also, the NOSDRA Act ratifies the International Convention on Oil Pollution, Preparedness, Response, and Cooperation. In the section below, we shall examine these laws to see if they endorse the PPP as claimed.

1.3.1. National Environmental Standards and Regulatory Enforcement Agency (Establishment) Act (NESREA)

The NESREA Act is the 'primary'[24] and 'major'[25] legislation in Nigeria. The Act is said to be a 'new dawn in environmental compliance and enforcement in Nigeria'.[26]It established the NESREA and vested the agency with the function of enforcing

[24] *Supra* note 16, at150.
[25] A. Ogunba, "An Appraisal of the Evolution Environmental Legislation in Nigeria" (2015- 2016) 40 Vermont Law Review, 673.
[26] M. Laden, "Review of NESREA Act and Regulations 2009-2011" (2012)8 LEDJ, 116.

environmental standards, and regulations throughout Nigeria. The agency has the power to set standards on issues regarding the protection of the environment, sustainable development of Nigeria's natural resources, as well as atmosphere protection, air quality, waste management, and control of hazardous substance.[27] However, by section 7 of the Act, the oil and gas sector does not fall within the scope of the agency's functions. This is left within the purview of the Nigerian Ministry of Petroleum Resources.

In line with its functions, the agency has published a National Policy on Environment which is based on two 'sustainable development principles'. The first is the precautionary principle which according to the agency, is geared towards setting standards against "threats of serious or irreversible damage".[28]The second is the principle of "cost-effectiveness" in preventing environmental degradation even in the absence of full scientific knowledge.[29] Importantly, the National Policy on Environment does in fact refer to the PPP as one of the tools to enforce environmental legislation. However, that this is contained in a policy document does not in fact mean the PPP operates in legal terms.

Section 27 (1) of the NESREA Act provides that it shall be a criminal offence for any person to discharge into land, air or water any hazardous substance. Additionally, section 27 (2) imposes a fine of one million Naira or imprisonment for a term not exceeding 5 years for the violation of this provision by an individual. For a body corporate, the section imposes the same fine and an additional fine of fifty thousand Naira for everyday the violation subsists. It is important to note that similar penal

[27] *National Environmental Standards and Regulatory Enforcement Agency (Establishment) Act, 2007*, Cap F 10, LFN, s. 20-28.
[28] NESREA, "A National Policy on Environment" (2009) available at http://www.nesrea.gov.ng/wp-content/uploads/2017/09/National-Policy-on-Environment.pdf (accessed 22 December, 2018).
[29] *Ibid.*

provisions are made for the violations of any regulations relating to water quality, ozone protection; air quality and atmosphere protection.

Importantly, it will seem that there are no provisions imposing any obligations on the polluter to bear the cost of the clean-up. Thus, the objective of the Act will appear to be not to make polluters pay the cost of pollution but to penalise them for causing pollution. This is therefore a penal provision rather than a provision endorsing the PPPs.

Additionally, it is questionable whether the fines payable under the Act are for remedying pollution. Difficulties may arise, for instance, where the pollution cost may exceed the fine imposed. The question is: who bears the excess cost? Will the polluter not pay the fine rather than bear responsibility for the clean-up? It is doubtful if the Agency can, in any case, impose a penalty more than what is contained in the Act.

The conclusion which may be drawn from the foregoing is that it is doubtful if the NESREA Act endorses the PPP. The penal provisions under the NESREA Act reflect the overall objective of the NESREA Act which is not for cost internalisation but for deterring pollution by penal sanctions.

1.3.2. Oil in Navigable Waters Act

The Act, as already mentioned, ratifies the International Convention for the Prevention of Pollution of the Sea by oil (1954). It is one of the laws referred to by some authors as sanctioning the PPP in Nigeria.[30]

The objective of the Act is to criminalise the discharge of oil from a Nigerian vessel into a prohibited sea area.[31] The violation

[30] C. Emole, *supra* note 16, at 105; T. Okenabirhie, *supra* note 16, at 4; A. Ibrahim, *supra* note 16, at 87-90.
[31] *Supra* note 27, s.1.

of this provision is a criminal offence attracting a fine not exceeding two thousand Naira (£4). However, there are defences available to the offender. For example, it is a defence to prove that the oil was discharged for securing the safety of the vessel or for preventing damage to any vessel. The alleged polluter may also escape liability where he is able to prove that the discharge was because of a leakage which was not due to his failure to exercise reasonable care.

Pursuant to Regulation 2 of the Act, every Nigerian ship of 80 tonnes gross tonnage or over shall be fitted with an oily-water separator in accordance with the provisions of the regulation. Furthermore, Regulation 5 provides that in loading, discharging or bunkering oil, any oil accidentally 'spilt on the deck or on the quay, pier or jetty' shall immediately be cleaned up and disposed of into large tanks or bunkers ashore.

Ibrahim argues that the above provision sanctions the PPP under Nigerian law. It is his view that a polluter, in accordance with the PPP, is responsible for the cost of fitting the oil separator. In doing this, Ibrahim argues that the polluter has [therefore] paid the cost of preventing the pollution'.[32] He further argues that under regulation 5 above, the polluter is to bear the cost of cleaning up accidentally spilt oil; therefore, the provision endorses the PPP rule that 'the polluter is liable for pollution of the environment'.[33]

It may be said that Ibrahim's arguments are reductive. In effect, his view seems to reduce any provision which imposes an obligation on a polluter as PPP. Essentially, whenever a statute or rule holds an operator responsible to perform certain acts, such a statute, by Ibrahim's argument, endorses the PPP. Applying this reasoning, even common law liability principles under which a polluter may be held liable may be said to be PPP. However, this

[32] A. Ibrahim, *supra* note 16, at 90.
[33] *Ibid*.

may not be the case. Although the Act indirectly imposes some cost on the operator, it may be said that it does not endorse the PPP for several reasons. First, the primary objective of the Act is to criminalise the discharge of oil, as noted. Regulations 2 and 5 above are only ancillary to this objective. Secondly, even if the Act endorses the PPP, then the expectation should be that there ought to be a consistent application of the PPP under the Act. However, the defences available to a polluter indicate an inconsistent approach which may suggest that the Act does not sanction the PPP.As noted, an operator may escape liability if he proves that the waste was discharged because of securing the safety of the vessel or some other cargo. This defence pays little attention to how the pollution is cleaned-up or who bears the cost. In contrast, the EU courts are likely to adopt a contrary approach. As noted earlier, the European Court of Justice (ECJ) has not shown reluctance to define waste in a broad way to accommodate accidental spill to ensure waste is properly cleaned up. This may be said to pay attention to the pollution and its clean up, unlike the situation in Nigeria where a polluter may escape liability pleading a similar defence.

1.3.3. Oil Pipelines Act: Compensation provision is not PPP

Both Okenabirhie and Ibrahim maintain that the *Oil Pipelines Act* endorses the PPP.[34] In Nigeria, the *Oil Pipelines Act* regulates the grant of licences for pipelines. Licences are granted to persons wishing to construct a pipeline network for oil transportation. The construction of the pipeline may require the demolition or construction of structures and destruction of property, hence the issue of compensation to affected persons. Compensation may also arise where already constructed pipelines are damaged or causes spill. In this light, *Section 11(5) of the Oil Pipelines Act* provides that the holder of a licence shall pay compensation to:

[34] T.Okenabirhie, *supra* note 16, at 4; A Ibrahim, *supra* note 16, at 90.

(a) any person whose land is affected by the exercise of rights conferred by the licence and

(b) any person who suffers damage because of the damage or leakage from the pipeline, provided that such damage was not because of the person's fault or the malicious act of a third party.

Okenabirhie argues that this Act adopts the PPP. This is in line with her comments mentioned earlier, that in Nigeria the PPP is interpreted to mean *inter alia* that the polluter must compensate those who suffer because of damages arising from pollution. Okenabirhie refers to the above section in support of her argument. However, she claims that the PPP is rendered ineffective because polluters often use sabotage as a defence to escape liability. As mentioned, compensation will not be payable where the polluter can establish that the leakage was caused by the person complaining or a malicious act done by a third party.

The question is: does the payment of compensation under this Act reflect an endorsement of the PPP? Admittedly, one of the tenets of the PPP is that polluters need to bear the cost of remediation, including the cost of compensation to victims of pollution. However, it will be wrong to equate the compensation provision under the above Act to the PPP. First, it may be said that the primary objective behind the Act is for the grant of licence for pipelines; and there need not be pollution for this statutory provision to arise. In other words, compensation may be payable where either it may be necessary to erect an installation on the property of another or where damage arises while erecting the pipelines, etc. Therefore, there need not be pollution for the section to be triggered. Essentially, what this means is that Okenabirhie's argument may be misconceived, because the provision may be triggered by other factors other than pollution (which is one of the conditions for the PPP). Basically, this may indicate that the objective of the Act is not to

endorse the PPP but to provide for compensation in the event of any harm whatsoever (including pollution).

1.3.4. National Oil Spill Detection and Response Agency (Establishment) Act and Penal Sanction

This Act implements the International Convention on Oil Pollution Preparedness, Response and Cooperation 1990 (OPRC). The Convention, in its preamble, endorses the PPP as soft law[35] and treats the PPP as a principle used for 'providing funds following pollution damage'.[36] Along this line, Okenabirhie's argues that in Nigeria the PPP may be interpreted to mean that the polluter must pay for any clean-up exercise.[37] The NOSDRA Act which implements the Convention is said to contain provisions which 'embody the polluter pays principle.'[38]

However, it is important to note that by section 12 of the Nigerian Constitution 1999, a convention can only take effect to the extent that it is ratified by the Nigerian government. Thus, although the convention may sanction the view that funds for pollution damage must be provided by the polluter, the implementing legislation may vary.

The NOSDRA Act establishes the National Oil Spill and Response Agency. The agency has the power to prepare for and respond to oil spillages. It is important to note that the Act does not contain any explicit provision imposing an obligation on polluters to bear the cost of oil spills. However, section 19 (1) (j) of the Act provides that 'the agency shall monitor the clean-up operations and ensure full rehabilitation of the affected areas.' Ibrahim argues that the 'wordings of the Act are very clear in the

[35] *Supra* note 6, at 23.
[36] The International Convention on Oil Pollution Preparedness, Response and Cooperation 1990 (OPRC).
[37] T. Okenabirhie, *supra* note 16, at 4.
[38] A. Olaniyan, "Will the polluter not pay the fine rather than bear responsibility for the clean-up?" *Supra* note 16, at 78.

sense that an oil spiller shall bear the cost of cleaning up an oil spill'. According to him, by this provision, the agency is to monitor and ensure that an oil spiller cleans up the spill.[39]

Importantly, section 6(2) of the Act provides that an oil spiller is bound to report an oil spill to the agency in writing not later than 24 hours after the occurrence of an oil spill. In violation of this rule, a fine of Five Hundred Thousand Naira may be imposed for each day of default in failing to report. Section 6 (3) further provides that 'the failure to clean-up the impacted site, to all practical extent, including remediation, shall attract a further fine of one million Naira.'

The section above suggests that the polluter shall remedy and clean up the site failing which it shall pay a fixed sum one million Naira. This is a criminal penalty imposed for failing to act and not for cleaning up the environment. In this regard, the question remains as to what happens when the pollution cost exceeds one million? Will the polluter not prefer to pay the penalty rather than clean up the pollution? It is therefore questionable how adequate this provision is to provide for pollution remediation in line with PPP.

The ineffectiveness of the Act may be seen in the case of the Ogoni land oil spill. Ogoni is an oil producing community in Nigeria. Due to oil production activities carried out by Shell for over 50 years, there has been a massive oil spill in the region. The United Nations Environment Programme found groundwater sources to have high levels of hydrocarbon with benzene 900 levels above standard guidelines.[40]There was also

[39] A. Ibrahim, *Supra* note 16, at 92.

[40] United Nations Environment Programme, "Environment Assessment of Ogoni land" (2011) available at http://postconflict.unep.ch/publications/OEA/04_ch04_UNEP_OEA.pdf (accessed 11 June, 2017).

massive destruction of vegetation and other public health issues in the community.[41]

The pollution was predominantly caused by Shell which operated in the community. The UNEP recommended *inter alia* that the Nigerian government set up an Environmental Restoration Fund for Ogoni land, with the initial funding for the first five years of $1billion to be contributed by the Nigerian Government. In June 2016, the President of Nigeria set in motion the $1billion clean up and restoration programme.[42] The government is to contribute 55% of the cost while Shell and other oil companies are to contribute the remainder.

We may say that the Ogoni case presents an example of the failure of the NOSDRA Act. Two conclusions may be drawn from the NOSDRA Act. The first is that it does not endorse the PPP; it is merely a public regulatory tool that has the objective of penalising pollution. This may not deter pollution because the cost of clean-up will often exceed the penalty, meaning a party may prefer to be penalised than clean up the pollution. Secondly, it is possible that it endorses the PPP. However, in this regard, this endorsement is not clear and is inadequate as seen from the Ogoni case above where public funds are to be utilised for the clean-up.

4.0 CONCLUSION

Although Nigeria has a clear policy framework recognising the PPP, it is doubtful if the PPP applies. It could be that the PPP, in principle, applies, but the question is whether it is adequate? Some authors, like Ibrahim, adopt a reductive approach. In their view, any provisions which hold a polluter responsible for some

[41] *Ibid*, at 154-201.

[42] Europa, "Nigeria Launches $1billion Ogoni land Clean-up and Restoration Programme" available at https://europa.eu/capacity4dev/unep/blog/nigeria-launches-1-billion-ogoniland-clean-and-restoration-programme (accessed 15 June, 2017).

act is PPP. However, this may not be accurate. As discussed, some of the provisions, such as the one on compensation may be triggered even without the existence of pollution. Essentially, this means that the law relied on by the authors may have other objectives.

The NOSDRA Act is another law which seems to 'endorse' the PPP, but its endorsement of the principle is not very clear therefore giving rise to doubt as to whether the principle applies in the first place. On one hand, the principle may be said not to apply as the objective of the law may be to penalise the polluter rather than to make him pay the cost. On the other hand, the principle may be said to apply, though not adequately and clearly. In any event, both conclusions suggest that there is room for improvement.

SITUATING ARTICLE 1 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS IN THE MATRIX OF STATE PARTY IMPLEMENTATION

Chimere Arinze Obodo*

ABSTRACT

Regional human rights instruments play a crucial role in protecting human rights. Their acceptance in international human rights discourse has influenced member states legislation, institutions, and non-governmental organisations. Such influence largely depends, in principle, on the obligations and mandates imposed on the state parties to such treaties. Article 1 of the African Charter on Human and Peoples' Rights mandates the state parties to the Charter to recognise the rights and freedoms enshrined in the Charter and to undertake and adopt legislative or other measures to give effect to them. However, domestic adherence to international human rights treaty obligations can create difficulties for state parties when viewed against the backdrop of state party economic resources, legal, political and cultural systems, and the credibility of national institutions. This article explores the obligations imposed by the African Charter and argues that state parties must take proactive steps to enhance implementation measures.

1.0 INTRODUCTION

The African Charter on Human and Peoples' Rights[43] of 1981 being the principal indigenous human rights instrument for the African region contains a catalogue of rights across the three categories of human rights.[44] The African Charter has been

* Chimere Arinze Obodo is a research candidate at the Robert Gordon University Aberdeen, Scotland, c.a.obodo@rgu.ac.uk.

[43] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter called The African Charter].

[44] The African Charter was adopted by the Organisation for African Unity (OAU) General Assembly on 27 June 1981 in Nairobi, Kenya and came into force on 21 October 1986 after meeting the absolute majority ratification requirement by OAU member states. See OAU Doc. CAB/LEG/67/3/Rev.5.

ratified by 54 of the 55 African Union[45] Member States and broadly speaking, such ratification success showcases the acceptance of human rights norms and ethos by African states despite their differences in legal, cultural and religious backgrounds, at least on paper.[46]

The African Charter consists of 68 articles with its first and opening Article imposing a duty on member states to accept, recognise and undertake to give effect to the rights and freedoms enshrined in the Charter. The real and visible prospect of Article 1 is that the enjoyment of the Charter rights and freedoms largely depend on the level of recognition given, and measures that are taken to give effect to them by state parties. It further suggests that state parties have the primary responsibility of implementation. However, the African Charter is self-enforcing through the African Commission on Human and Peoples' Rights[47] (African Commission) and the African Court on Human and Peoples' Rights (African Court).[48] That notwithstanding, if the

[45] The African Union [hereinafter called the AU]. It is the successor to the Organization of African Unity (OAU).

[46] As at the time of writing, all African States except Morocco have ratified the African Charter. South Sudan joined the AU in 2011 and deposited its document of ratification of the African Charter on 19th May 2016 in line with Article 65. Morocco re-joined the AU in January 2017, 33 years after withdrawing from the regional body due to the OAU recognition of Western Sahara. However, Morocco has commenced the process of ratifying the African Charter.

[47] The African Commission on Human and Peoples' Rights [hereinafter called the African Commission]. The African Commission was set up in 1987 and has the mandate to promote, interpret and protect the African Charter. It has its headquarters at Banjul, The Gambia.

[48] The African Court was established through a Protocol to the African Charter on the Establishment of the African Court in 1998. The African Court later came into force in 2004 after 15 AU states ratified the Court Protocol. Its current status is a bit hazy given its merger with the AU Court of Justice to form the African Court of Justice and Human and Peoples Rights vide an amending protocol (to the protocol merging the two courts) which also invested the merged court with a criminal jurisdiction. For a detailed discussion on the African Court, see Henry Alisigwe, *Judicialism in International: The Pivots, Prospects and Challenges* (Unpublished Ph. D Dissertation, Nnamdi Azikiwe University, Awka, 2015), 285-324; Henry

Article 56 requirement is anything to go by, the self-enforcing approach of the African Charter can be said to be secondary about individual complaints and communication.[49]

The enjoyment of the African Charter rights and freedoms is sacrosanct and aligns with the international human rights goals.[50] However, the normative and institutional approach of the African Charter has been criticised for the absence of a judicial arm of enforcement in its early years and for creating a normative foundation for a leeway for its non-compliance by state parties.[51] At the same time, however, the African Charter has recorded several successes towards the realisation of an effective human

---

Alisigwe and Chimere Obodo, "Africa, The International Criminal Court and the Future of Prosecuting International Crimes in Africa: Re-examining the Frosty Relationship" (2018) Gambia Law Review, 95.

[49] Article 56 provides that communications filed by individuals before the African Charter institutions can only be considered if they meet certain conditions such as exhausting local remedies, submitting communications within a reasonable period from the time the local remedies are exhausted or not related to cases already settled by state party institutions.

[50] Preamble to the Universal Declaration on Human Rights of 1948; Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993.

[51] Christof Heyns, "The African Human Rights System: In Need of Reform" (2001) 2 African Human Rights Journal, 155; Fatsah Onguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff Publishers, Netherlands, 2003) 791; Hastings Okoth-Ogendo, "Human and Peoples' Rights: What Point Is Africa Trying to Make?" In Ronald Cohen, Goran Hyden, and Winston Nagen, (eds.), *Human Rights and Governance in Africa*, (University Press of Florida, Gainesville- Florida, 1993) 76; Jean Boukongou, "The Appeal of the African System for Protecting Human Rights" (2006) 6 African Human Rights Law Journal, 269; Oji Umozuruike, "The African Charter on Human and Peoples' Rights" (1983) 77 African Journal of International Law, 902; Edward Kannyo, *Human rights in Africa: Problems and Prospects* (A report prepared for the International League for Human Rights. Human Rights Working Paper, 1980) 15; Nsongurua Udombana, "Can a Leopard change its Spots? The African Union Treaty and Human Rights" (2002) 17 American University International Law Review, 1177; Makau Mutua, "The African Human Rights System: A Critical Analysis", available at http://hdr.undp.org/sites/default/files/mutua.pdf (accessed 21 May, 2017); Makau Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 Virginia Journal of Int. Law, 339.

rights regime in Africa. For example, the African Charter has been praised for its unique inclusion and recognition of various categories of rights.[52]

One of the most noteworthy features applauded in the African Charter is its unique mix of the categories of rights. The African regional organisation has further been praised for developing a regional human rights standard that recognises the African values and history.[53] It is this conceptual space which gives the African Charter institutions a potentially distinctive role in human rights enforcement. However, the same Charter creates difficulties for its institutions. For instance, some specific provisions of the African Charter and its Court Protocol are restrictive to the full enjoyment of the Charter rights and freedoms.[54] Some of these features have resulted in the African human rights system being described as the least efficient, developed, most controversial, and distinctive regional human rights instrument when compared with its Inter-American and European counterpart.[55]

Meanwhile, there seem to be severe human rights violations across many African states. While violations are rife in states experiencing armed conflicts, terrorism and oppressive regimes, a

---

[52] George Mugwanya*, Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System* (Transnational Publishers, Michigan, 2003) 31; Oji Umozuruike, "The African Charter on Human and Peoples' Rights" (1983) 77 *African Journal of International Law*, 902.

[53] Josiah Cobbah, "African Values and the African Human Rights Debate: An African Perspective" (1987) 9 *Human Rights Quarterly*, 309; Frans Viljoen, "Africa's Contribution to the Development of International Human Rights and Humanitarian Law" (2001) 1 *African Human Rights Law Journal*, 18; Evelyn Ankumah, *The African Commission on Human and People's Rights: Practice and Procedure* (Martinus Nijhoff, Netherland, 1996) 11.

[54] While the requirement under Article 56 (3) and (4) has resulted to the dismissal of many individual communications, Article 34 (6) of the Court protocol denies individuals access to the African Court except where the State Party involved has made declaration allowing individuals and Non-Governmental Organisations direct access.

[55] Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals* (3rd edition, Oxford University Press, New York, 2008) 1063.

dominant issue vis-a-vis the implementation of the African Charter rights and freedoms is whether Article 1 creates an obligation that safeguards against violations. This has increased the concern on whether state parties abide with their Charter mandate and obligation and has further given rise to the question this study will answer – whether and to what extent has Article 1 been complied with by state parties?

The starting point to understand this question will be an evaluation of the efforts to bring into reality in law and practice the enshrined rights and freedoms. There is no gainsaying the fact that some of the challenges faced in the implementation of the African Charter become more ostensible when the diverse legal systems of state parties are considered. However, the African Charter provides regional human rights principle envisaged as a common standard with which the state parties' laws need to be harmonised. For instance, the wordings of Article 1 which speaks of "to adopt legislative or other measures", gives the state parties so much leeway in the implementation of the African Charter rights and freedoms.

The path to national implementation of the African Charter is outlined in Article 1.[56] The Charter provides as follows:

> The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them

It states how and to what extent the Charter requires a particular act of implementation by state parties. On the other hand, it seems to have granted some form of discretion on state parties to choose whatever type of implementation that will best fit state

[56] Article 1 provides: 'the member states of the organisation of the African Unity, Parties to the present Charter shall recognise the rights, duties, and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them'.

parties as long as it ends up guaranteeing the protection and promotion of the Charter rights and freedoms. For instance, it opens a wide range of implementation channels outside the legislative measures.

However, the African Charter is not alone in the trend of imposing the implementation responsibility of international human rights enforcement on state parties. Article 2 (2) of the International Covenant on Civil and Political Rights (ICCPR) of 1966[57] imposes the obligation to "respect and to ensure" the enjoyment of the rights therein enshrined on its state parties through legislative or other measures as may be necessary to give effect to the rights recognised in the Covenant.[58] Hence, while the style adopted by some international instruments leaves the mode of implementation open to member states, there is no doubt that domestic legislation provides the best guarantee for human rights protection.[59]

2.0 STATE PARTY OBLIGATION TO IMPLEMENT

To understand the form in which the substantive rights of the African Charter are to be implemented, the question to be addressed first is the one in relation to the obligation of state parties. Any obligation undertaken under a treaty upon becoming a party means a duty undertaken by such state party; hence, the principle of *pacta sunt servanda*. Any excuse not to abide by the duties and obligations imposed therein amounts to a violation irrespective of the political, legal, economic and cultural

[57] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[58] See also Article 2(1) of International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1977 which is *in pari materia* with Article 2(2) of the ICCPR.
[59] Machiko Kanetake, "UN Human Rights Treaty Monitoring Bodies before Domestic Courts" (2018) 67 *International and Comparative Law Quarterly*, 201; Anja Seibert-Fort, "Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its Article 2 Para 2" (2001) 5 *Max Planck Yearbook of United Nations*, 399.

background of such state party. With an emphasis on Article 1, state parties are urged to undertake legislative and other measures to implement the Charter rights, and this can be assumed as their central obligations upon becoming a state party to the African Charter. Thus, the assumption here is that Article 1 creates an immediate obligation on member states irrespective of state parties' situation.

This assumption is further supported when compared with the wording in Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966[60] which requires state parties "to take step" to achieve the full realisation of the rights recognised in the Covenant progressively, and Article 2 (2) of the International Covenant on Civil and Political Rights (ICCPR), 1966.[61] While it has been observed that the wording of the ICCPR creates immediate and stringent obligations, the different wording style of the ICESCR creates certain obligations of immediate effect that engenders a duty "to take steps".[62] Such comparison with the African Charter seems to support the assumption that the African Charter is equated with the thinking underscored by the drafters of the ICCPR.

No doubt, the normative style and features adopted by the drafters of the African Charter is indicative of their quest for

[60] The International Covenant on Economic, Social and Cultural Rights [hereinafter called ICESCR]. Article 2 (1) provides 'every state party to the present Covenant undertakes to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view of achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

[61] The International Covenant on Civil and Political Rights [hereinafter called ICCPR]. Article 2 (2) provides 'where not already provided for by exiting legislative or other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant'.

[62] Anja Seibert-Fort, *Supra* note 59, at 399.

immediate and stringent obligations of implementation. To further ascertain this, the absence of a derogation clause in the African Charter which forecloses all state party excuses for non-implementation except as provided under Article 27 is another indication of a stringent implementation.[63] The absence of a derogation clause rules out any excuse by member states for non-implementation irrespective of the peculiar country situation. Thus, the African Commission has ruled that the position of the African Charter on the absence of derogation is sacrosanct even during an adequately declared and genuine state of emergency in a civil war.[64]

The style adopted by the African charter entails that state parties are obliged at all times and irrespective of the internal or external situations and challenges to implement all provisions of the Charter. Accordingly, in *Media Rights Agenda* v *Nigeria,*[65] this assumption was reaffirmed by the African Commission when it posited that the absence of a derogation clause in the African Charter signifies that any emergencies or special circumstances shall justify no such limitations on the rights and freedoms enshrined in the Charter.[66] Thus, it would have been questionable to analyse or confront human rights violations if the enabling human rights treaties did not create stringent state party obligations. On the other hand, however, this distinctive feature of the African Charter has been criticised as inappropriate, more especially when compared with other international human rights instruments.[67] Whereas some scholars argued that it is partly

---

[63] A derogation clause permit states to take measures derogating from obligation to apply the provisions of a treaty in time of war or other public emergencies. See generally Article 4 of ICCPR and Article 15 of ECHR.

[64] See *Commission Nationale des Driots de l'Homme et des Liberties* v *Chad*, - Communication 70/92.

[65] *Media Rights Agenda* v *Nigeria*, Communication No. 222/98.

[66] *Ibid*; see also, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions* v *Sudan* - Communication No. 279/03-296/05.

[67] Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development* (Martinus Nijhoff Publishers, Netherlands, 2003) 468-476; Awol

responsible for the weaknesses in the African human rights system,[68] some have suggested that the Commission should have corrected this omission through its interpretations in order to bring the Charter in line with international jurisprudence.[69] No doubt, it is unimaginable the confusion some African states, many of which are also parties to the ICCPR with provisions on derogation, would face in ensuring a stringent implementation of the African Charter provisions in time of war or emergencies.

The counter effect of having a derogation clause is that state parties could base their non-enforcement on scarce resources or government understanding of likely public emergency. Further, while many African countries have derogation clauses in their constitutions,[70] many others have classified social and economic rights category as Fundamental Objectives and Directive Principle of State Policy;[71] and thus unenforceable. Either way, the idea of an immediate and stringent implementation of the African Charter provisions will be affected. This approach in national constitutions disallow compatibility of national laws with the African Charter provisions; thereby, impeding the full enjoyment of the African Charter.[72] Of course, the classification of some of the Charter

---

Allo, "Derogation or Limitation? Rethinking the African Human Rights System of Derogation in Light of the European System" (2009) 2 *Ethiopian Journal of Legal Education*, 50; Laurent Sermet, "The Absence of a Derogation Clause from the African Charter on Human and Peoples' Rights: A Critical Discussion" (2007) 7 *African Human Rights Law Journal*, 142; Christof Heyns, "The African Regional Human Rights System: In Need of Reform?" (2001) 1 *African Human Rights Law Journal*, 155.

[68] Javaid Rehman, *International Human Rights Law* (2nd Edition, Pearson Education Limited, England, 2010) 312.

[69] Christof Heyns, *Supra* note 67, at 155.

[70] See for example, section 45 of the 1999 Constitution of Nigeria, Article 137 of the 2003 Constitution of Rwandan, art 27 (5) of the 1997 Constitution of Eritrea, and, section 38 of the 2005 Constitution of Swaziland, and many others.

[71] Chapter 2 of the 1999 Constitution of Nigeria and chapter 2 of the 1977 Constitution of Tanzania.

[72] Abdi Ali, "Derogation from Constitutional Rights and its Implementation under the African Charter on Human and Peoples Rights" (2013) 17 *Law, Democracy and Development*, 78.

Rights as Fundamental Objectives and Directive Principle of State Policy is a violation of the provisions of Article 1 and an obstacle to a universal international human rights approach as enshrined in Vienna Declaration and Programme of Action.[73]

Pursuant to Article 1 of the African Charter, each state party is to "undertake to adopt legislative or other measures" to give effect to the rights. In this light, the Charter incorporated what may be seen as forming part of "other measures" of implementation of the African Charter rights. For example, Article 26 of the African Charter obliges state parties as follows:

> to guarantee the independence of the courts and allow for the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed in the present Charter.

This entails that the African Charter has obligated state parties to establish National Human Rights Institutions (NHRIs) to complement the regional institutions in the promotion and protection of Charter rights and freedoms in addition to guaranteeing the independence of the national courts. Although this is not surprising because of the roles of courts in providing redress against violations, it is expected that an efficient national judicial system is vital for effective international human rights discourse.

The role of national courts and NHRIs in the promotion and protection of human rights is very crucial. In recent decades, there has been an increase in the number of NHRIs across Africa with role ranging from monitoring human rights situation, making recommendations to government and handling complaints and

[73] Article 4 of the Vienna Declaration emphasises that human rights are universal, indivisible, interrelated and interdependent.

investigations against human rights violations.[74] As at the time of writing, 44 African states have established their NHRIs including Nigeria, Tanzania and Republic of Benin.[75] The unique potential feature of the NHRIs as an avenue of ensuring the implementation of the African Charter also creates difficulties for NHRIs. For instance, the NHRIs as an entity created by state party legislation is grappled with the dilemma of independence from the government.[76] Hence, by being accountable to the government and maybe some other actors such as the NGOs, their credibility, legitimacy and effectiveness are somewhat questioned.

Therefore, state parties have an obligation to show beyond doubt that their actions are at all times in line with the intent of the Article 1 of the African Charter in promoting and protection human rights and freedoms. Likewise, there is an obligation under Article 62 on state parties to submit a report on the legislative and other measures taken to give effect to the Charter rights and freedoms every two years. However, while the wording "shall undertake to submit" seems to imply a stringent obligation on duty to report every two years, statistics on the progress made in submitting a report to the Commission indicates that the majority of African Charter member states are in default. For example, as at June 2018, only twelve countries are up to date with their reports; while eleven states are late by one reports, three countries are two reports overdue, nineteen states are three

[74] Bonolo Dinokopila and Igweta Rhoda, "The Kenya National Commission on Human Rights under the 2010 Constitutional Dispensation" (2018) 26 (2) *African Journal of International and Comparative Law*, 205; Anne Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?" (2006) 28 *Human Rights Quarterly*, 904.

[75] United Nations Development Programme, *Study on the State of National Human Rights Institutions (NHRIs) in Africa* (Blandford Consulting, Johannesburg, 2016) 17-18; Christof Heyns and Morris Killander, *Compendium of Key Human Rights Documents of the African Union* (University of Pretoria Press, Pretoria, 2016) 343.

[76] Anne Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?" (2006) 28 *Human Rights Quarterly*, 904.

reports overdue and five states have never submitted a report.[77] However, under the reporting system provided in Article 62, the Commission has urged state parties to take immediate steps to improve human rights situations and prevent violations within their states.[78] Demands as this are based on the Commission's conviction that the Charter creates an unconditional implementation for its state parties and their mandate under Article 30 to promote, protect and interpret the Charter rights and freedoms.

It is beyond dispute that domestic court jurisprudence is relevant in defining state party obligations, the condition under which these rights can be claimed, asserted and reliefs sought when violated at the national level.[79] Far from being up-to-date for the investigation of state party implementation measures under Article 1, the issues raised have the relevance for a well-established understanding of the prospects and challenges confronting the enjoyment of the African Charter rights and freedoms. In the following, the seeming relationship created under Article 1 of the African Charter with state parties towards the promotion and protection of the Charter rights and freedoms will be analysed by referring to other relevant provisions rooted in Article 1 of the African Charter.

3.0 RELATIONSHIP BETWEEN AFRICAN CHARTER AND NATIONAL LAW[80]

[77] 43rd Activity Report of the African Commission on Human and Peoples' Rights, available at http://www.achpr.org/files/activity-reports/43/43rd_activity_report_eng.pdf (accessed 11 July, 2018).

[78] For example, in its comments on DRC 11th, 12th and 13th Periodic report for 2005 to 2015, the Commission recommended immediate measures to guarantee the protection of human and peoples' rights and compliance with its Charter obligations.

[79] Sandra Liebenberg, "Basic Rights Claims: How Responsive is Reasonableness Review?" (2004) 5 (5) *Economic and Social Review*, 11.

[80] Discussions on this and similar relationships often evokes thoughts on the Monist/Dualist controversy. See further *Abacha* v *Fawehinmi* (2002) 4 SC (Part.2) P.1; Cf *Cameroun* v *Nigeria*, ICJ Reports (2002) P.303

Under the African human rights system, the Article 1 of the African Charter creates, in principle, immediate and unconditional state party obligations. In several decisions, the African Commission and the African Court have held that the implementation of the Charter rights is a critical process in any human rights system. For instance, the African Commission decision in *SERAC* v *Nigeria* emphasised that collective rights, individual rights, environmental rights, and economic and social rights are essential elements of the African Charter and must be made efficient through implementation.[81] Further, in *Civil Liberties Organisation (in respect of the Nigerian Bar Association)* v *Nigeria,* wherein the complainant challenged the ouster clause in the Legal Practitioners' Decree promulgated by the Nigerian Military Government which prevents the observation of Articles 6, 7, and 10 of the African Charter, the African Commission ruled that the term "law " in these clauses should, in fact, be understood as a reference to international law.[82]

The above jurisprudence has shown that the interpretation to the provisions of the Charter is geared towards ensuring state parties immediate and stringent obligation of implementation. In another vein, the implication of the decision in *Civil Liberties Organisation (in respect of the Nigerian Bar Association)* v *Nigeria,* as a landmark case, is that African Charter state parties can no longer substitute African Charter or international human rights law with domestic law using their understanding of claw-back clauses. This scope of interpretation by the African Commission can be argued to have saved the African Charter from a perceived battle for superiority with domestic legislation.

This article is being published about a region that has witnessed severe human rights atrocities before and after the emergence of

[81] Communication 155/96.

[82] Communication 101/93. Other cases where state governments rely on claw-back clauses include Communication 60/91 - *Constitutional Rights Project (in respect of Akamu and Others)* v *Nigeria*; Communication 87/93 - *Constitutional Rights Project (in respect of Lekwot and Others)* v *Nigeria.*

the principal regional human rights instrument. The issues raised here will stand as a suggestion to reduce the tension on the interface with the African Charter implementation and may have relevance for the future of human rights within the region. According to some scholars, newly independent African states paid little or no attention to human rights concerns as they were more committed to dismantling colonialism and safeguarding their independence prior to the adoption of the African Charter.[83] This period in African history enclosed human rights concerns to domestic issues and witnessed the rise of authoritarian governments across many African states. Without the assumption that the widespread human rights violation was due to lack of a regional human rights treaty, it is noteworthy that many African states had at this time ratified the UN human rights instruments such as the ICCPR and ICESCR and recognised the UDHR. Obviously, African countries at this time lacked any form of interest in human rights implementation.

The lack of interest in human rights is still rife in many African states. Often, African leaders explore means of evading accountability for human rights violations despite their obligations under both international laws. Therefore, domesticating the African Charter rights holds significant promise for strengthening accountability in many ways.[84] Domestication of international laws provide victims with more legal remedies beyond the limited scope of rights guaranteed domestically. Therefore, as most domesticated laws need independent judiciary and other entities entrusted with promotion and protection of human rights to strive, there is a perception that some states government's

[83] Edward Kannayo, "The OAU and Human Rights" in Yassin El-Ayouty and William Zartman (eds) *The OAU after Twenty Years* (Praeger, New York, 1984) 157.

[84] Isaac Terwase Sampson "Between Boko Haram and the Joint Task Force: Assessing the Dilemma of Counter-Terrorism and Human Rights in Northern Nigeria" (2015) 59 (1) *Journal of African Law*, 25.

actions or inactions adversely promote weak enforcement institutions to evade accountability.[85]

In practice, for the contents of treaties to be actualised, the political and economic structure of the individual state should be considered because the implementation of international treaties takes place at the national level.[86] The statutory basis is that the adoption and ratification of international treaties create duties on state parties to establish effective national institutions to monitor implementation at the domestic level. Furthermore, it further improves accountability, accessibility of international law idea, and a foundation for activism of individual, institutions and NGOs.[87] Thus, in the absence of effective and efficient national or regional implementation institutions, even the best treaty and strategies would fail.

As already indicated, it is the duty of state parties to not violate the rights enshrined in the African Charter and to take further steps to implement these rights effectively. Accordingly, the African Commission and the African Court have stressed unconditional obligation of states parties to adopt measures that will guarantee full compliance with the Charter provisions. Although this is apparent in case law jurisprudence from the African Charter institutions, state parties have continued to violate this unconditional demand for full implementation. An example is the idea of the non-justiciability of socio-economic rights in Nigeria[88] and Tanzania.[89]

---

[85] For example, in Burundi and Central African Republic.

[86] Juan Carlos Ochoa S, "Towards a Holistic Approach in International Practice, to the Design and Implementation of Initiatives to Promote the Rule of Law at the National Level" (2015) *International Journal of Law in Context*, 78.

[87] Navanethem Pillay, "Human Rights in United Nations Action: Norms Institutions and Leadership" (2009) *European Human Rights Law Review*, 1.

[88] Taiwo Olaiya, "Interrogating the Non-Justiciability of Constitutional Directive Principles and Public Policy Failure in Nigeria" (2015) 8 (3) *Journal of Politics and Law*, 23; Ajepe Shehu, "The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience" (2013) 2 *Afe Babalola University Journal of Sustainable Development Law and Policy*, 101; Jacob Dada,

The relationship between the African Charter and the national law should be created by a constitution, legislative act or judicial interpretation accorded to the international treaties by domestic courts. However, in further putting a clog in the relationship between state parties and their regional human rights obligation under the African Charter, the Nigerian Supreme Court has in *Mustapha* v *Governor of Lagos State* agreed that human rights must encompass all humans and these rights need be clearly distinguished from civil rights, political rights, economic rights and so on.[90] Thus, what a state considers as fundamental rights may vary in accordance with the state laws. Consequently, the Nigerian Supreme Court had further held that although fundamental rights are part of human rights, the trend in modern society where the rule of law operates is to protect fundamental rights for the enhancement of human dignity and liberty.[91]

The relationship between the Charter and its state parties is crucial if a stringent implementation of the Charter rights will be achieved. As already indicated, although the provision of Article 1 creates a duty on state parties to ensure the achievement of the Charter goals and objectives, Articles 56 (5), (6) and (7) are emphasises the fact that the regional system recognises national sovereignty and power to provide redress. The statutory basis is the most secure way of guaranteeing national safeguards through national institutions. Even after having exhausted local remedy, Article 57 mandates the Commission to notify state parties of all communications against them.

"Impediment to Human rights Protection in Nigeria" (2012) 18 *Annual Survey of International and Comparative Law*, 1; Rhuks Ako, et al, "Overcoming the (Non)justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Rights to a Healthy Environment in Nigeria" in Alice Diver and Jacinta Miller (ed) *Justiciability of Human Rights Law in Domestic Jurisdiction* (Springer, Cham, Switzerland, 2016) 124.

[89] Part II of the 1977 constitution of Tanzania.

[90] (1987) 2 Nigeria Weekly Law Report (Part 58) 539 at 584.

[91] According to Justice Uwaifo in the case of *Federal Republic of Nigeria* v *Ifegwu* (2003) Federal Weekly Law Report (Part 167) 703 at 758.

The view that state parties to the Charter are obliged to implement is not questionable. The concern is that there are different methods of implementation of international treaties and the various methods affects when the international treaty is statutorily adopted and ratified.[92] In practice, being a monist or dualist state eventually create a directly enforceable rights or claims in national institutions but with difference in the process of becoming a state law.

4.0 DOMESTIC PROTECTION OF THE AFRICAN CHARTER RIGHTS

As already indicated by the provisions of Articles 1 and 56, the enforcement of the African Charter rights and freedoms was primarily intended to take place at the national level. This intent shows the need for an independent judiciary and NHRIs as emphasised under Article 26. Taking these provisions into account, the implementation of the Charter may encounter problems not unconnected with the peculiarities and situations in dogging member states. For example, effective implementation of the Charter rights cannot be as guaranteed in South Sudan given the armed conflict situation when compared to a more peaceful Republic of Benin[93].

Currently, many African states constitutions have incorporated human rights provisions with recognised institutions for enforcement. For example, successive Nigerian Constitutions since Nigeria's independence in 1960 have all included human rights provisions with an overriding aim to allay the fears of the

[92] Machiko Kanetake, "UN Human Rights Treaty Monitoring Bodies before the Domestic Courts" (2018) 67 *International and Comparative Law Quarterly*, 201; Cindy Cohn, "The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant of Civil and Political Rights" (1991) 12 *Human Rights Quarterly*, 295.

[93] But the combatants in the South Sudan conflict are nevertheless bound by the norms of International Humanitarian Law.

minority tribes over being dominated by the majority tribes.[94] This select example is an indication of the complexity of the cultural and religious background of the African continent. However, the state party constitutions show that the national court entrusted with the implementation of the constitutional rights provisions of member states are clearly spelt out.[95] Equally relevant is that some of these constitutions emphasised on the court with apparent jurisdiction to handle human rights cases. This is not unusual as the judiciary has often been vested with the responsibilities for the dispensation of justice, interpretation of legislation and are the custodian of constitutional values.[96] For instance, section 46 of the Nigerian constitution states that any person who alleges that any of the provisions of Chapter IV has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.[97] This provision entails that a person can seek redress in a High Court for past, present and future infringement.

---

[94] Anthony Nwafor, "Enforcing Fundamental Rights in Nigerian Courts: Prospects and Challenges" (2009) African Journal of Legal Studies, 1. However, in relation to Nigeria, the 1979 Constitution subsequently introduced the Fundamental Objectives and Directive Principles of State Policy in addition to the fundamental rights, and this style was followed by the still-birthed 1989 Constitution and the current 1999 Constitution of Nigeria. Furthermore, it is worth mentioning that the 1979 constitution was nullified and replaced by a military decree after the 1983 military coup led by the then General Mohammad Buhari in 1983 and the military continued to govern the country until 1999 when General Abdulsalami Abubakar handed over to a Civilian Government.

[95] Take, for instance, section 46 of the 1999 Nigerian constitution, Article 30 of the 1977 Tanzania constitution and Article 114 of the 1990 Constitution of Benin.

[96] Benedict Nchalla, "Tanzania Experience with Constitutionalism, Constitution-Making and Constitutional Reforms" in Morris Mbondeyi and Tom Ojienda (ed) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspective from Sub-Sahara Africa* (Pretorian University Press, Pretoria, 2013) 35.

[97] This was emphasised in *Gov. Bornu State* v *Gadangari* where the Nigerian High Court confirmed that a person might invoke the Fundamental Rights (Enforcement Procedure) Rules in the following three instances; where provisions of Chapter IV 'has being contravened', 'is being contravened' or 'it's likely to be contravened' - (2016) 1 Nigeria Weekly Law Report (Part 1493) 396.

Traditionally, what the constitutional powers granted to the courts on human rights entail is that an individual can challenge any act of government or legislation if such is likely to or violates his basic rights. For instance, in *Judge i/c High Court, Arusha and Attorney General* v *NIN Munuo Ng'uni*, the Court of Appeal of Tanzania held that the court has power and discretion in appropriate cases to allow the relevant organ to correct the defect impugned in the violation of the basic rights of citizens.[98] Although this decision was given against the backdrop that the Tanzanian Constitution requires the court to give state authority the opportunity to rectify its action and inactions, the ruling further suggests that such constitutional provision is only at the discretion of the court and only in appropriate cases. Such decisions against state party constitutional obstacles to human rights implementation and enjoyment amplifies the role of the judiciary in human rights implementation. Far from being unique to the African Charter ideology, the court in Tanzania, just as in some other countries have shown that a person may challenge the customary law, legislation executive orders and policies on the grounds of its contradiction with constitutional safeguards and regional treaty provisions and the courts are expected to overturn such laws, orders or policies.

On the other hand, arguably in reference to the findings by the regional institutions, state parties have exhibited strong discomfort in implementing findings against them. For example, following the African Commission's finding that Botswana has violated human rights in *Good* v *Botswana*,[99] Botswana expressly notified the Commission that it would not be subject to its decision. On a large scale, the government of Tanzania has shown great reluctance in enforcing national and regional courts' decisions bothering on the African Charter rights and freedoms. For example, two times the High Court has decided against the

[98] Court of Appeal of Tanzania at Arusha, High Court No. 45 of 1998 (unreported).
[99] Commission 313/05.

state in the cases instituted by *Rev Christopher Mtikila* about independent candidatures in general elections; yet, Tanzania has failed to implement these decisions.[100]

Some African leaders continue to show lack of interest in human rights issues and to ensure the implementation of their human rights constitutional provisions. That notwithstanding, it is important that the constitutional provisions clearly the rights and the procedure for the independence of the courts and other institutions entrusted with human rights adjudication. These must be clear and precise in the constitutions in order to prevent a conflict of interest or influence over these issues. For example, on meaning, nature and sources of fundamental rights in Nigeria, it has been held by the Supreme Court that fundamental rights mean rights included in Chapter IV of the 1999 constitution and consists of any of the rights stipulated in the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act of 1983.[101] It would also assist in the formidable task of interpretation and implementation by these bodies.

Whatever interpretation accorded to African Charter provisions by the state party courts is vital for the legitimacy of the Charter rights in such state party. However, there is no explicit obligation to confer on the Charter the status of national law; instead, there is a duty under Article 1 to make the Charter directly applicable based on the member states undertaking under Article 1. Flowing from this seeming understanding on the actual and explicit implementation of the Charter rights, Umozuruike emphasised that the indivisibility and interdependence of rights was a way to guarantee their enjoyment which ordinarily would be hindered by

[100] The first judgment was delivered in 1994 in the case of *Rev. Christopher Mtikila* v *Attorney General*, (1993) (Civil Case No. 5), (unreported), and secondly in 2006. Also, decision on the same case by the African Court has not been complied with at the time of writing.

[101] See *El-Rufia* v *Senate of the National Assembly* (2016) 1 Nigeria Weekly Law Report (Part 1464) 506.

poverty and the scarce finances of states.[102] Again, this experience rejects the arguments supporting the use of claw-back clauses by member states to avoid the implementation of the Charter rights.[103] Perhaps, allowing domestic law take precedence over international law defeats the purpose of codifying certain rights through international binding treaties. Hence, such has the unsavoury effect of ruling out international supervision of domestic law in respect of treaty rights which defies the entire essence of the international human rights system.[104]

5.0 OTHER MEASURES OF IMPLEMENTATION OF THE AFRICAN CHARTER

The drafters of the African Charter had to provide a leeway for other measures of implementation to ensure stringent implementation of the Charter rights and freedoms. This necessitates state parties that it is not enough to have the Charter rights enshrined in national laws; rather, state parties are expected to adopt effective means of guaranteeing its implementation. It may entail redress by competent and independent national institutions as enhanced by Article 26 or other innovative ways that a state party may deem fit to use so far that it ensures the protection and promotion of these rights.

---

[102] Oji Umozuruike, "The Present State of Human Rights in Africa" (1986) 1 *Calabar Law Journal* 62.

[103] For examples of the claw-back clauses, see Articles 6-12 of the African Charter. Further, it has been argued that the phrases 'the law' confer upon the states the right to exclude the enjoyment of these rights. See Javaid Rehman, *International Human Rights Law* (Pearson Education Limited, England, 2nd Edition, 2010) 312. Further, the African Commission in its bid to save the Charter from itself ruled that the phrase 'the law' in the Charter should be understood as a reference to international law. See *Jawara* v *The Gambia*, (2000) AHRLR 107, para 5; Communication 101/93; *Civil Liberties Organisation in re the Nigeria Bar Association* v *Nigeria*; *Amnesty International* v *Zambia* (2000) AHRLR 325, para 41.

[104] Evelyn Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedure* (Martinus Nijhoff, Netherland, 1996) 176.

State parties have to work out what best can be termed other measures of implementation. It has been found that Article 26 attaches much importance to the national institutions. The recognition and establishments of NHRIs by state parties are prime examples. In all, the reason for the emphasis on the institutions under Article 26 shows the importance attributed to domestic implementation by the African Charter.

It is essential that the leeway accorded member states in the implementation choices of the Charter rights is broad given the regional human rights history. Based on this, the Commission will not only ask or insist on legislative measures with regards to the implementation of the Charter rights and freedoms. This situation is heightened because all branches of government are charged with the implementation of the Charter; thus, the Commission needs to charge member states to indicate in their reports what judicial, administrative and other measures were adopted for the promotion and protection of human rights. Generally, administrative enforcement is vital in complementing judicial measures of implementation. For example, the measures adopted by security agencies to ensure the protection of lives and property or policies adopted to guarantee the independence of the judiciary.

It is unfortunate that requesting for legislative measures alone to ascertain the extent of implementation of the African Charter will not be comprehensive without emphasising on the request for other possible measures adopted. However, given the fact that Article 26 has focused on the national courts and NHRIs, there is essential need for their independence to be guaranteed and their voices heard at the regional level. According to the Office of the United Nations High Commissioner for Human Rights, the National Human rights Institutions are state bodies established with a constitutional and/or legislative mandate to protect and

promote human rights.[105] Although such bodies are part of state apparatus for the promotion and protection of human rights and are state funded, they often participate as relay mechanisms between state parties and international human rights mechanisms.[106]

However, it has been noted that the significance of NHRIs include submission of parallel or shadow report of state human rights activities; assistance with the protection of human rights defenders; provision of more human rights expertise at regional events; and, a linking channel between the regional and national levels.[107] Even with a varying mandate of the NHRIs from state to state, in order to be binding against AU member state, such state must first be a party to the African Charter.[108]

6.0 CONCLUSION

This study has analysed the purport and obligation of Article 1 of the African Charter. Though the wording of Article 1on the implementation of the African Charter is precise, the term "other measures" seems to be somewhat vague and open-ended. Nonetheless, the implementation envisaged in Article 1 is unconditional and immediate for member states. The drafters may not have intended otherwise, and for this reason, Article 26 and 56 were not intended to put the unconditionality of implementation into question. Accordingly, this has been

[105] Office of the United Nations High Commissioner for Human Rights, *National Human rights Institutions: History Principles, Roles and Responsibilities* (2010) Professional Training Series No. 4, Revision 1, 13.

[106] Bonolo Dinokopila and Igweta Rhoda, "The Kenya National Commission on Human Rights under the 2010 Constitutional Dispensation" (2018) 26 (2) *African Journal of International and Comparative Law*, 205; Morten Kjaerum, National Human Rights Institutions Implementing Human Rights (Martinus Nijhoff, Netherlands, 2003) 6; Mario Gomez, 'Sri Lanka's new Human Rights Commission' (1998) 20 *Human Rights Quarterly*, 281.

[107] Frans Viljoen, "Exploring the Theory and Practice of the Relationship between International Human Rights Law and Domestic Actors" (2009) 22 *Leiden Journal of International Law*, 177.

[108] *Femi Falana* v *African Union* – App. No. 001/2011.

showcased in various decisions of the African Commission and African Court.

On the other hand, the wording of Article 1 to allow for other measures of implementation in addition to legislative measures allows for the development of the Charter's implementation architecture. It indicates that the drafters of the African Charter did not hope to have a static treaty; instead, a system that will guarantee steady realisation. While the Commission has always considered member states obligation towards the Charter to be immediate and unconditional, there has been a remarkable development in establishing NHRIs. However, the Charter rights and freedoms and such implementation institutions are often limited by the constitutions or other enabling national laws.

Although there is a need for a legislative measure to transform the Charter into domestic law, other measures are required to have a full realisation of the implementation of these rights. For example, the role of the judicial and quasi-judicial arm of government in interpreting and providing redress to victims. In practice, constant efforts are needed to fulfil the implementation of the Charter rights through institutional and procedural safeguards, education, monitoring mechanisms and law enforcement. Therefore, member states assume a huge responsibility to ensure effective implementation and to prevent violations while at the same time providing redress to individuals. Generally, all arms of government are saddled with a key role in the implementation of the Charter rights.

ANALYSIS OF TRADEMARK POLICING & THE DECISION IN SUPERMAC (HOLDINGS) LTD V MCDONALD'S INTERNATIONAL PROPERTY COMPANY, LTD

Ibrahim Muhammed*

ABSTRACT

In a world of multiple choices, where products are multifarious in the market, consumers are saturated with more options than ever before. Thus, identity and branding have become important tools not only for the savvy but also quintessential for the survival of businesses. The law in recognising such importance has long recognised trademark and the tort of passing off. However, the official ownership and registration of a trademark is not an Excalibur that can solve the Gordian knot that is brand identity. For trademarks must be policed and enforced by a registered owner else it will deemed that there is a waiver of right. This paper seeks to highlight the importance of and the issues surrounding trademark policing and when same can lead to trademark bullying. Furthermore, there shall be a cursory explanation of the means of policing a trademark in Nigeria before an analysis of the judgement in Supermac (Holdings) Ltd v McDonalds International Property Company by the European Union Intellectual Property Office. Finally, this paper shall round up with a few recommendations to steps that registered trademark owners can undertake.

1.0 INTRODUCTION

Our words might be our bond, but our identity is the source of the bond for as stated by Lisa Gansky:

> Your brand is your public identity, what you're trusted for. And for your brand to endure, it has to be tested,

> redefined, managed, and expanded as markets evolve. Brands either learn or disappear.[109]

Concern about brand identity is a prominent justification for the provision of trademark law. Thus, for a lot of companies and individuals, the utilisation of trademark is a way of safeguarding important business assets such as goodwill and reputation that has been acquired over the years through hard work, sweat and labour. Furthermore, mergers and acquisition transactions have been known to fail or be successful on the basis of whether or not the party has its mark duly registered or not.

Therefore, it is ownership of a registered trademark gives the right for enforcement when others infringe on the mark in the same market. Additionally, *Section 5(1) of the Trademark Act, 1967* specifically permits for the exclusive right of a proprietor to use the trademark with regards to the goods it was registered under. *Section 5(2)* states:

> without prejudice to the generality of the right to use a trademark, the marks shall be deemed to be infringed by any person who not being the proprietor of the trademark, uses a mark identical to it or so nearly resembling it as it is likely to deceive or cause confusion in cause of trade in relation to any goods in respect of which it was registered.

Also in *Ferodo Ltd.* v *Ibeto Ind. Ltd*[110] Mustapher, JSC, stated:

> Following the provisions of *Section 5(2) of the Trademark Act*, an infringement of a registered trade mark cannot be maintained unless the court finds that the defendant is engaged in the use of a mark identical

---

* Ibrahim Muhammed is an Associate at Kenna Partners, imuhammed@kennapartners.com.

[109] Lisa Gansky, available at https://www.brainyquote.com/quotes/lisa_gansky_655885 (accessed 7 February, 2019).

[110] (2004) 5 NWLR (Pt.866) 317.

> with the registered trade mark or uses a mark so nearly resembling the registered trade mark, as to be likely to deceive or cause confusion **in the course of trade**; or uses in relation to any goods in respect of which it is registered, or uses in such a manner as to render the use of the mark to be taken as importing a reference to the goods which the plaintiff's trade mark is connected.

The right of enforcement if not utilised can lead to a weakening of the mark, charge of non-use and ultimately a loss of the registered trademark. Thus, the need for Trademark Policing.

2.0 WHEN DOES TRADEMARK POLICING BECOME BULLYING?

The need to police one's mark to prevent it from being generalised and losing its distinctiveness can sometimes lead to the owner of the mark being tagged a 'trademark bully'.[111] The term "trademark bully" is used on large companies that tend to be aggressive in the enforcement of their trademark through threats of litigation. Usually this is directed against smaller businesses and the alleged claims of infringement is often minor or trivial.[112] This act of "bullying" can have a dire economic consequence for the smaller business organisation and the society at large as it leads to the inhibition of competition and the fostering of monopolism. A prime example of trademark bullying is seen in the case of *Charbucks* v *Starbucks*,[113] where Jim Clark, the operator of a small coffee shop named Black Bear Micro-Brewery in New Hampshire was involved in a 16 years dispute

[111] Irina D. Manta, "Bearing Down on Trademark Bullies" (2012) 22 *Fordham Intell. Prop., Media & Ent. L.J.,* 853, 869; Jeremy N. Sheff, "Fear and Loathing in Trademark Enforcement" (2012) 22 *Fordham Intell. Prop. Media & Ent. L.J.,* 873, 873-875.

[112] Jessica M. Kiser, "To Bully or Not to Bully: Understanding the Role of Uncertainty in Trademark Enforcement Decisions" (2014) 37 *Colum. J.L. & Arts*, 211.

[113] *Starbucks Corp.* v *Wolfe's Borough Coffee, Inc.*, 2005 WL 3527126 (S.D.N.Y. Dec. 23, 2005) (No. 01 Civ. 5981), vacated, 477 F.3d 765 (2d Cir. 2007).

with the giant coffee retail outlet Starbucks. In 1996 some of the customers of Jim Clark requested stronger blends of coffee and he promptly responded by improvising a brew so strong and dark that he termed it "Charbucks" in reference to of the dark and charred roasted beans involved in the making of the coffee.[114] However in 1997, he was contacted by Starbucks who felt "Charbucks" was infringing and diluting their own super mark "Starbucks".[115] Unfortunately a long and drawn out litigation occurred despite the attempts of Clark to settle the issue out of court.[116]

Trademark bullying exists as a result of the onus of enforcement and policing placed on a registered owner as no registered owner of a trademark will appreciate being perceived as acquiescing to the use and weakening of a trademark that may be the lifeblood of his/her brand. However, it is important to note that just as the victim of trademark bully would face the economic impact in its financials, it is notable that the bully itself will face direct and indirect cost as a result of the enforcement. Direct costs include the cost of hiring the services of 3rd parties or individuals to watch for infringements of the registered mark, these 3rd parties would be responsible for routinely searching databases such as the trademark registers, domain name registers, business name registration databases, and other sources that may relate to the registered mark.[117] Further direct cost include legal fees for sending cease and desist letters and litigation expenses. Indirect

---

[114] Ibid, at 212.

[115] *Starbucks Corp.* v *Wolfe's Borough Coffee, Inc.*, 2005 WL 3527126 (S.D.N.Y. Dec. 23, 2005) (No. 01 Civ. 5981), vacated, 477 F.3d 765 (2d Cir. 2007), available at http://www.blackbearcoffee.com/resources/102 (accessed 14 February, 2019); "Starbucks Litigation—What It's All About?" available at http://blackbearcoffee.com/resources/99 (accessed 14 February, 2019).

[116] "Letter from Jim Clark, to John Rawls, Attorney to Starbucks Corp.", available at http://www.blackbearcoffee.com/Starbucks/Faxes&Letters/6-5-01ResponseToRawls.htm (accessed 5 June, 2001).

[117] Jessica M. Kiser, To Bully or Not to Bully: Understanding the Role of Uncertainty in Trademark Enforcement Decisions, 37 COLUM. J.L. & ARTS (2014) at pg. 22.

cost can come in the shape of bad publicity as a result of the general public disagreeing with the need for enforcement and this can lead to product boycotting and drop in sales. An example being the disdain shown towards Nutella for the sending of a cease and desist letter in 2013 to a fan who from 2007 had been organising a "world Nutella day."[118] These clashes between the registered owners and fans over brand related activities can, if not well managed, lead to destruction of the essence of obtaining the trademark right in the first instance, that is goodwill and lead to a chilling effect on creativity and genuine usage.

In the realm of copyright some copyright owners have found ways to cohabit in a symbiotic way with fans whilst still maintaining their exclusive rights. For example, Blizzard Entertainment, the creator of popular online multiplayer role-playing games such as World of Warcraft, actively solicits fans to create artwork for its official Fan Art by granting license to use its copyrighted materials.[119] Moreover, Blizzard occasionally offers their customers the ability to download free "Fansite Kit" that gives copyright protected imagery and information to consumers who can then utilise the images and the information on their own websites that are dedicated to the Blizzard brand. The terms for these "Fansite Kit" are "non-exclusive, non-transferable and no assignable license to use and display" the provided content "for home, non-commercial and personal use only."[120]

---

[118] Trevor Little, "Fans Go Nuts before Cease and Desist Letter U-Turn", WORLD TRADEMARK REV. (May 22, 2013), available at http://www.worldtrademarkreview.com/blog/detail.aspx?g=043BC5F9-CA03-4BDE-B9A7-A9CF6E3A4603 (accessed 26 February, 2019).

[119] *Fan Art Program Terms & Conditions*, BLIZZARD ENTM'T, available at http://us.blizzard.com/en-us/community/fanart/rules.html (accessed 27 February, 2019).

[120] Jessica M. Kiser, "Brandright", 70 (2017) *Ark. L. Rev.* 489, available at: http://scholarworks.uark.edu/alr/vol70/iss3/1. See *Legal FAQ*, BLIZZARD ENTM'T, available at http://us.blizzard.com/en_us/company/about/legal-faq.html [https://perma.cc/D44G-2Z2E].

These forms of nonexclusive licences could be granted to avoid conflict in the use of trademarks by trademark owners to third parties who genuinely are not with the ambition of usurping the goodwill of the mark.

3.0 POLICING OF A REGISTERED TRADEMARK IN NIGERIA

In Nigeria, a duly registered trademark proprietor has exclusive rights of use, as conferred by the *Trademark Act, 1965*,[121] to use the mark and to sue for infringement for acts of unlawful use. Therefore, the issue of enforcement is left for the proprietor. The following are steps that may be initiated for policing of such a registered mark.

3.1 Consistent and Frequent Monitoring

Firstly, a proprietor of a registered trademark is to maintain the practice of constant and frequent monitoring of the marketplace for infringement of his/her mark. The duration for the checking and monitoring is to depend on variables such as nature of the goods and resources but it is advisable for it to remain constant and as frequent as possible to allow early detection. Thus, it has been said that early detection is the best offence when defending a registered mark.[122] Furthermore, it is important to note that under the *Trademark Act 1965*, there can only be an infringement if an identical or closely resembling mark is used on identical or closely resembling goods. The only exception to this is where the mark is a well-known or famous trademark and it will have to be via the discretion of the Registrar.[123]

---

[121] *Trademark Act, 1965,* Cap. T13 Laws of the Federation of Nigeria (LFN), 2004.

[122] Alana M. Fuierer and David P. Miranda, "The Importance of a Comprehensive Trademark Enforcement Program: The Changing Tides of Trademark Infringement" (2016) 34(1) *Inside Spring/Summer*, 19.

[123] Davidson Oturu, "Understanding Trademarks and How It Differs from Trade Secrets and Patents in Nigeria", available at

Therefore, the use of a similar or closely similar mark on dissimilar goods will therefore not constitute an infringement and as such it is important to know the limit of the protection afforded to the sender.

Also, it is important to note that failure to maintain a consistent and frequent policing of ones registered trademark may result in the weakening of a mark. Moreover, it is even more important to police infringement in light of the ease of online infringement on social media and on the internet. However, it is also noted that it is unfeasible to expect registered owners of marks to be aware of every single act of infringement and to police such. In the United States case of *Engineered Mech. Servs.* v. *Applied Mech Tech.*,[124] the U.S. District Court for the Middle District of Louisiana stated:

> The owner of a mark is not required to constantly monitor every nook and cranny of the entire nation and to fire both barrels of his shotgun instantly upon spotting a possible infringer. Lawyers and lawsuits come high and a financial decision must be made in every case as to whether the gain of prosecution is worth the candle

Thus, there is to be a prioritizing when it comes to a determination of the acts of infringement that would be acted upon.

3.2 Letter of Application to Registrar for Cancellation and Notice of Opposition

In the circumstances that there is double registration or attempted registration of a mark that is identical to that already registered by a trademark owner. The owner may send a formal application to the Registrar challenging the registration or file an

---

http://www.mondaq.com/Nigeria/x/692406/Trade+Secrets/Understanding+Trademarks+And+How+It+Differs+From+Trade+Secrets+And+Patents+In+Nigeria (accessed 27 February, 2019).

[124] 591 F. Supp. 962 (M.D. La. 1984).

opposition against the registration. The option of the formal application is preferable as there is no need to wait for it to be advertised in the Trademarks Journal. Furthermore, the process for filing an opposition requires there to be submission of further documents by both parties, these documents include the notice of opposition itself, counter-statement and statutory declarations, before the Registrar determines the issue at hearing. [125]

3.3 Cease and Desist Letter

Upon the discovery of an infringement it is common practice for there to be sent a cease and desist letter. The purpose being to notify the party of his/her act of infringement and for them to stop all actions that result in infringement. This is important because it not only puts the party on notice of the ownership of the registered trademark but it also can serve as evidence in a judicial proceeding for the enforcement of the mark.[126]

As there can only be an infringement if an identical or closely resembling mark is used on identical or closely resembling goods, it is important to know the limit of the protection afforded to avoid the sending of a cease and desist letter to a non-infringing party.

Furthermore, the sender of a cease and desist letter must be cautious when sending cease and desist letters as it is not uncommon for a defendant to publicise such a letter and thereby bring the suit into the public sphere via the internet and cause the writer of the letter to be embroiled in negative publicity that may

---

[125] Bolanle Olowu, "Nigeria: Protecting and Enforcing Trademarks and Copyrights", available at http://www.nigerianlawguru.com/articles/intellectual%20property%20law/PROTECTING%20AND%20ENFORCING%20TRADEMARKS%20AND%20COPY%20RIGHTS.pdf (accessed 26 February, 2019).

[126] "Trademark Infringement and Enforcement of Trademark Rights in Nigeria", available at https://Resolutionlawng.Com/Trademark-Infringement-And-Enforcement-Of-Trademark-Rights-In-Nigeria/, (accessed 14 February, 2019).

have a serious and adverse consequence for the company as was the case in Lagunitas Brewing Company suit (discussed below).

3.4 Negotiation

After receipt of a letter of reply from the alleged infringer of a registered trademark, there may be a meeting of parties to negotiate and iron out a deal. This is advisable to save the time and expenses involved in the litigation that would ensue in a trail and also if there was genuine lack of bad faith in the use of the identical mark.

3.5 Filing of action

As held by the Supreme Court of Nigeria in *Dyktrade Ltd.* v *Omnia Nig Ltd*:[127]

> Trade Mark when registered will entitle the proprietor to sue or institute an action for any infringement of the trade mark. Registration entitles the proprietor to the exclusive use of the trade mark and also the right to sue for passing off the goods of the proprietor

Thus, when there is discovery of an act of infringement, the registered owner of a trademark may sue the alleged infringer.

In the case of *Ferodo Ltd.* v *Ibeto Ind. Ltd*[128] Nikki Tobi, JSC, stated:

> By the combined effect of *Sections 136 and 137 of the Evidence Act*, the burden is on the appellants to prove that the trade mark of the respondent is an infringement of theirs and that the act of the respondent amounted to a passing-off. [129]

When a suit has been filled for the protection of a registered trademark, the applicant has the onus to prove an infringement

[127] (2000) 12 NWLR (PT.680).
[128] (2004) 5 NWLR (Pt.866) 317.
[129] *Ibid*, at pg. 56, Para. G-A.

and must prove that the unauthorised use of the mark is one that will likely cause confusion in the minds of the consumers.

Furthermore, since it is not all acts of infringement that is expected to be prosecuted, it is trite that wise discretion should be exercised in deciding whether or not to file an action else the "proprietor" may find itself on the wrong end of the sword. For example, in January 12, 2015 Lagunitas Brewing Company (Lagunitas) brought a suit against Sierra Nevada Brewing Company (Sierra Navada)[130] over the use of the trademark of an "IPA", which is an acronym for the most popular style of beer. The suit was short in duration as it was withdrawn after two days as Lagunitas was publicly criticised via social media and led to the loss of the trademark in the "court of public opinion."[131]

Thus, before filling for enforcement of a registered mark, the proprietor is to consider meaningfully not only how to discharge to burden of proof of use but other non-legal considerations such as the media and cost of enforcement.

3.6 Disclaimer and Public Notice

Another ancillary avenue for the protection of a trademark is through the act of issuing disclaimers and publication of public notices. This serves to alert members of the general public and customers of the potential similarities so as to forestall the transfer of the goodwill onto the infringing item.

3.7 Available Remedies

In a suit for infringement of trademark the remedies available to the applicant varies depending on the circumstances of the suit. However, in most cases the court will award an injunction to stop

[130] *Lagunitas Brewing Company* v *Sierra Nevada Brewing Co.* (N.D. Cal. 3:15-cv-00153).

[131] LagunitasT (@lagunitasT), Twitter (Jan. 13, 2015, 8:15pm), available at https://twitter.com/lagunitasT/status/555216638643933184, accessed on (8 February, 2019).

further infringement. Furthermore, in some cases, you can also obtain monetary damages if loss of income can be proved or if the infringer acted in bad faith by knowingly or intentionally copying your trademark. Also, the court may require that the trademark infringer gives up its profits and well as pay the claimant's attorneys' fees.[132]

3.8 Defences

A party that has received a ceased and desist letter and using the mark bona fide can attack the validity of the mark if it is unregistered. For example, the party may be able to show that a mark in dispute is purely descriptive and has not acquired any secondary meaning if it is not registered. Other grounds of defending an allegation of infringement is that that the mark has become generic. In an infringement suit, the party may also be able to show that there is no likelihood of confusion between the marks as to cause customers to mistake them for one another. Furthermore, a defendant may also have reliance on freedom of expression as a means of defending a trademark infringement if the mark is not used for commercial purpose.[133]

4.0 SUPERMAC (HOLDINGS) LTD V. MCDONALD'S INTERNATIONAL PROPERTY COMPANY, LTD[134]

4.1 Background

The suit was necessitated from Macdonald's successful objection to the trademark of Supermac in Europe and outside of Ireland where Supermac is based. Macdonald had objected to the registration of "Supermac's" on the basis of it bearing similarity to its own trademark of "Big Mac". Macdonald's had claimed that the Supermac registration sought to "take unfair advantage of the

[132] https://www.justia.com/intellectual-property/trademarks/enforcement/.
[133] "Trademark Enforcement" https://www.justia.com/intellectual-property/trademarks/enforcement/.
[134] CANCELLATION No 14 788 C (REVOCATION).

distinctive character and repute of trademarks previously won by McDonald's"[135] and would confuse customers. Furthermore, McDonald's had trademarked the "SnackBox," a product that is synonymous with Supermac's but not affiliated with any of Macdonald's own products.[136] Furthermore, the registration in question was not limited only to the world famous Big Mac burger but covered a wide range of goods that includes meat sandwiches, preserved and cooked fruits and vegetables. Also covered are a range of services, including the operation of a restaurant, the construction and planning and franchising for restaurants and other facilities engaged in providing food and drink prepared for consumption and for drive through facilities.[137]

In April 2017, *Supermac* applied to the European Union Intellectual Property Office (EUIPO) for revocation of MacDonald's BIG MAC mark trademark, [138] it argued that between the years of 2012-2017 MacDonald's had not put the registered trademarks to use and therefore there was a lack of genuine use between the stated periods. In defence McDonald asserted that the mark "Big Mac" was used and "commonly known" by millions that it sold its products under the Big Mac name and that it was used in European Union member states as evidenced by its advertising and packaging.

4.2 The Decision

The EUIPO, which is based in Alicante, Spain, found that Macdonald's had failed to show conclusive evidence that the

[135] Connor Heneghan, "Supermac's accuse McDonald's of 'trademark bullying' as ongoing dispute continues", available at https://www.joe.ie/news/supermacs-mcdonalds-584822 (accessed 7 February, 2019).
[136] *Ibid*.
[137] Olivia Mullooly and Colm Maguire, "I'm Revokin' It – EUIPO Revokes BIG MAC EU Trade Mark", http://www.mondaq.com/ireland/x/776714/Trademark/Im+Revokin+It+EUIPO+revokes+BIG+MAC+EU+trade+mark (accessed 7 February, 2019).
[138] *Supermac's (Holdings) Ltd* v *McDonald's International Property Company Limited*, CANCELLATION No 14 788 C (REVOCATION).

registered trademark, Big Mack (which it trademarked in 1996) was genuinely used in the European Union as a burger or restaurant name. This caused the revocation of the Big Mack (No. trademark (No. 62638) in its entirety and this was to be effected from the date of the application of revocation.

The Big Mac trade mark was registered in three different classes, of which McDonalds was required to prove use of all three. By failing to sufficiently evidence such use, the whole trade mark was in fact cancelled. This landmark case highlights not only the importance of registering a Company's trademark, but making sure that the mark is registered them under the most appropriate classes.[139]

4.3 Rationale of the Decision

The rational of the decision lies in the lack of proof of genuine use of the registered mark by Macdonald's and this was as a result of the lack of evidence.

According to *Article 58(1)(a) European Union Trade Mark Regulation* (EUTMR), which states:

> the rights of the proprietor of the European Union trade mark will be revoked on application to the Office, if, within a continuous period of five years, the trade mark has not been put to genuine use in the Union for the goods or services for which it is registered, and there are no proper reasons for non-use.

Thus, the onus was on Macdonald's to prove continues use of the registered mark for it is established procedure and law that in revocation proceedings grounded on allegations of non-use, the

[139] Christopher Buck, "Supermac's bites back at McDonald's over trade mark dispute", available at https://www.franklins-sols.co.uk/site/blog/intellectual-property-blog/super-mac-bites-back-at-mcdonalds-over-trade-mark-dispute (accessed 21 February, 2019).

burden of proof lies with the proprietor. The reason for placing the onus on the proprietor is as a result of the fact that the applicant cannot be expected to prove a negative fact, namely that the mark has not been used during a continuous period of five years. Likewise, the propitiator is in a stronger position to prove the use of the mark.

Therefore, Macdonald's defence came primarily through the submission of 3 (three) affidavits by its company representatives from Germany, the United Kingdom and France, advert materials; printouts from other websites (including Wikipedia) and through its own brochures. All of this evidence showed that Macdonald's sold over 1.4 billion Big Macs over the period in contention.

However, the EUIPO came to the conclusion that the evidence submitted "do not give any data for the real commercial presence of the EUTM for any of the relevant goods or services." This resulted in the failure of a nexus between the submitted evidence and the sales numbers. A combined reading of *Article 19(1) and 10(3) of EUTMR* regarding the place, time, extent and nature of the evidence states:

> **Time** – for the mark to be used during the "Relevant period", it must be clear as to the duration in which the trademark was in use
>
> **Place** –just like the requirement of time it has to be clear from the evidence where the trademark has been used in relation to the goods or services during the "Relevant period."
>
> **Nature** – the mark has to be used in accordance with its function, in the course of trade and in relation to the goods and services
>
> **Extent** – this takes into account all other surrounding circumstances including the nature of the goods and

services, the characteristics of the market concerned, the territorial extent of use, commercial volume, duration, and frequency to determine use.

4.4 Evidentiary Issues

The evidence of Big Mac's entry into Wikipedia was held to be insufficient of proof as the webpage being user dependent could have been edited by any user. This is trite as it is common knowledge that even the website does not take responsibility for content.

Macdonald's provided proof of the presence of the Big Mac mark on its website. However, the EUIPO believed that it did not prove genuine use as it too was not linked to sales. It is suggested that the evidence of the use of the mark on the website of Macdonald's could have been strengthened by additional evidence of customer visitation of the website and proof of orders of the products that the mark was utilised for.

- Affidavits: On the issue of the Affidavits, the EUIPO did acknowledge that it was relevant and admit able but did mention that the probative value was less than affidavits by independent evidence as it was made by the company's employees who can be said to have an interest in the suit.
- Packaging and Branding: On the evidence of packaging was without proof of its circulation and therefore failed to show who was aware of the use of the mark and how it led to any sales.

Also, there was no proof of the use of the mark as the name of a restaurant or any place of food and drinks.

Therefore, the EUIPO was highly critical of the submitted evidence, concluded that the submitted evidence before it had failed to show proof of use of the mark at a particular place, time

and its extent or nature of the use to satisfy proof of Big Macs being sold to customers to create genuine use.

4.5 The Implication of the ruling

Supermac's founder and MD Pat Mcdonagh had pronounced the decision as "a victory for all small businesses. It prevents bigger companies from hoarding trademarks with no intention of using them."[140]

Macdonald's plans to appeal the decision of the EUIPO and the ruling does not stop the company from selling its "famous" Big Macs but if the decision is upheld, the consequence would be that Supermac will be able to expand across the European Union and trademark owners will be placed at a greater onus to prove genuine use of the marks even for famous marks. The decision will provide grounds for the reduction in the incidence of trademark hoarding and bullying for by implication the decision, that trademark owners either us or lose their registration.

Furthermore, the decision emphasises the need to provide objective data and records to prove mark identity and its accrued goodwill else there would be insufficient data to aid in ruling that there has been genuine use. This is a result of the fact that the Court needs to draw form the evidence the presumption of genuine use and objective evidence serves this purpose than a company's subjective evidence. Thus, it is suggested that instead of using company representatives Macdonald's should have utilised a firm of Chartered Trademark Attorneys to present some of its evidence.[141] Moreover, the wide spectrum of the rights that the trademark Big Mac was utilised and applied for created a higher

[140] Anca Alexe, "McDonald's loses Big Mac trademark across EU after legal battle with Irish fast food chain", available at http://business-review.eu/business/mcdonalds-loses-big-mac-trademark-across-eu-after-legal-battle-with-irish-fast-food-chain-194805 (accessed 27 February, 2019).

[141] Daniel Bailey, "How McDonald's Lost Its Big Mac Trade Mark", http://www.mondaq.com/uk/x/775290/Trademark/How+Mcdonalds+Lost+Its+Big+Mac+Trade+Mark?type=popular (accessed 7 February, 2019).

standard for the satisfaction of the onus of genuine use. For the more use, a registered trademark has the more evidence is required to prove genuine use of it during a particular period. Had the trademark being applied and granted only for limited use such as sandwiches and closely related food items, Macdonald's might have been able to satisfy the standard of proof that was needed to protect its trademark.

Conclusively, it is expected that Macdonald's could win the appeal due to the worldwide recognition of its Big Mac as a brand. To be successful at the Board of Appeal more direct evidence of sales to customers and of brand recognition is required to be furnished by its representatives for the onus of genuine use to be satisfied and this new evidence will have to be justified as the Board of Appeal being an appellate body will only admit new evidence if there are "valid reasons" as to why they were not produced and tendered at the lower tribunal.

5.0 RECOMMENDATION

The importance of trademark cannot be under or over emphasises. However, owners should be cognisant of the fact that ownership does not entail that the rights cannot be eroded by allegations of non-use and owners need to be aware of symbiotic relationship with their purchasers. Thus it is recommended that:

a. To combat allegation of non-use registered trademark owners should prepare and update catalogue of real evidence to showcasing the use of trademark.
b. Trademark owners should continually utilise registered marks for the purpose identified to avoid non-use claim.
c. Trademark policing should be balanced to avoid negative press and avoidance of identification as a trademark bully.
d. Registered trademark owners can grant nonexclusive licenses for limited purposes to fans and third parties. This will in the long run provide a symbiotic relationship with

the registered mark as the third parties genuinely are not with the ambition of usurping the goodwill of the mark.

6.0 CONCLUSION

Trademarks have proven to be effective and empowering means of protecting not only the identity of a brand but also the goodwill that has been acquired overtime. They are pivotal to the promotion of trade and economic development and in Nigeria, they can serve to be means by which indigenous industries are galvanised. However, with great power comes great responsibility and as such registered trademark owners cannot rely on the provisions of the law alone and must maintain a state of constant vigilance by policing their mark and being reasonable and cautious of the means for policing the mark, so as not to be accused of over policing and bullying.

GOVERNOR'S CONSENT: SHOULD THE COURT OR THE LAW BE BLAMED? (AN APPRAISAL OF THE CASE OF SAVANNAH BANK V. AJILO (1989) NWLR (PT 97) 305)

Nina Bot-Timothy*

ABSTRACT

The Land Use Act[142] (LUA), since its promulgation in 1978 has been the subject of legal debates and calls for amendment. The decision of the court in Savannah Bank v. *Ajilo[143] was indeed one of the earliest cases that brought to light the true import of the provisions of the LUA. The intention of the author is to explore the significance of the vexatious requirement of governor's consent and the damning consequences of non-compliance with the requirements of the LUA. This article also examines the effects of the pronouncement of the court on domestic and commercial land-related activities in Nigeria.*

1.0 LAND HOLDING SYSTEM BEFORE 1978

Before the *Land Use Act*[144] came into existence in 1978, two land systems were dominant in Nigeria, owing to the historical divide of the nation in two parts; Northern and Southern Nigeria. In the North, a tenurial system existed which in effect left the ownership and management of land vested in the local authorities and state governments. The system of issue of certificate of occupancy was already in existence under the *Land Tenure Law*.[145] In the South on the other hand, there were various systems of ownership and control of land including customary ownership and freehold interests. Under the Public Lands Acquisition Ordinances and Laws, (*Public Lands Acquisition Act Of 1917, Public Lands Acquisition*

* Nina Bot-Timothy is currently a student at the Nigerian Law School Abuja, and a graduate from the University of Lagos, ninabottimothy@gmail.com.
[142] *Land Use Act* (LUA) 1978 Cap L5, Laws of the Federation of Nigeria, 2004.
[143] (1989) NWLR (pt 97) 305.
[144] *Supra*, note 1.
[145] Cap. 59 Laws of Northern Nigeria, 1963.

Decree[146]) land could be compulsorily acquired from individuals or communities to be used for public purposes. The various state land laws were essentially *in pari materia* with the ordinances. People held land with freehold interest - that is absolute ownership, with unrestricted freedom to alienate at will. The laws also provided for registration of title deeds for record purpose.

2.0 FACTS

The Respondents/Plaintiffs (Ammel O. Ajilo and Ammels Photo Industries Ltd) executed a deed of mortgage between himself and the 1st defendant (Savannah Bank). However, the respondent did not get Governor's consent as required under *Section 22 of the LUA* which provides thus:

> It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained

Following the default of the respondent to pay the required loan sum and accruing interest after the due date, the 1st Appellant hired the second Appellant an auctioneer, to exercise its right of sale by public auction.

The Respondent then instituted a case at the High Court of Lagos State praying the court to grant amongst other things, a perpetual injunction against the plaintiffs (appellants) from selling the mortgaged property, and a declaration that the mortgage agreement in itself was null and void for not having Governor's consent.

The trial Court granted the plaintiffs' prayers, stating that the mortgage was void ab initio. The Court of Appeal affirmed the

[146] Decree No. 33 of 1976.

reasoning of the trial court, and dismissed the appeal. The appellants (defendants in the trial court) further appealed to the Supreme Court.

2.1 Arguments of Parties

The crux of the Appellants' argument was that since the provisions of *Section 22 of the LUA* stated that "It shall not be lawful for the holder of a statutory right of occupancy *granted by the Governor…"*, then it stood to reason that the holder of a deemed grant of a right of occupancy was not subject to the provisions of the law. The Appellants contended that such requirement specifically pertained to statutory right of occupancy granted by the Military Governor and not to land vested in the holder of a deemed statutory right of occupancy.

To buttress their points, both sides made reference to different rules of interpretation of statutes. The Appellants contended that the proper way of interpreting the provision was to follow the words specifically mentioned in the Act, and by explicitly mentioning the holders of the statutory right of occupancy granted by the Governor, it has excluded the statutory right of occupancy deemed to be granted by the governor. This is a strict application of the literal rule of interpretation which states that words are given their plain and ordinary interpretation to convey their ordinary meaning. The appellants went further to argue that since the Act has clearly distinguished between a right of occupancy expressly granted by the Governor and one which had been deemed as granted in *Sections 34 and 36 of the LUA*, then it is logical to presume that the exclusion of deemed grant under *Section 22* was intentionally done to eliminate deemed grants from the purview of lands requiring Governor's consent.

On the other hand, the Respondents argued that for proper interpretation of the LUA, the entire Act had to be read as a whole to understand the *mischief* which the law intended to correct. As mentioned earlier, before the enactment of the LUA,

Northern and Southern Nigeria were governed by separate land legislations, including the *Land Tenure Law*[147] in the North, and generally, customary and private freehold ownership in the South. The intent of the Federal parliament in creating the LUA, was to harmonize the Nation into one unit, with a single law governing ownership and alienation of land in the state.

They argued that the broad interpretation is that *Section 22* applies both to holder of certificate of occupancy actually granted by the Military Governor and deemed holders of certificates by virtue of *Section 34(2) of the LUA*. The narrower interpretation of *Section 22* limits its application to holders of statutory right of occupancy actually granted whereas the broad interpretation extends its application to the holders of deemed statutory right of occupancy.[148]

2.2 Decision of the Supreme Court

The court in making its decision looked at the provisions of *Section 34(1) & (2) of the LUA*. In its ratio, the use of the words "as if" equated a deemed grant with actual grant.

> The only difference between both grants is in origin. This means that while a deemed grant under the LUA is by operation of law, an actual grant is a grant made by the exercise of the powers of the Governor pursuant to the provisions of the LUA, but the Act was intended to apply to both deemed and actual grants. Therefore, both grants were to be subject to the provisions of *Section 22 of the LUA* and as such the mortgage transaction entered between the parties was void.

On the Appellants' argument that *Section 22 of the LUA* did not apply to deemed grantees, the court per Obaseki JSC specifically stated thus:

---

[147] *Land Tenure Law*, Cap. 59 LNN 1963.

[148] The Respondents made reference to S*ections 1, 2, 34(2), 36(4), 40, 5(1)(a) and 41 of the LUA*.

> A statute should not be given a construction that will defeat its purpose. To exclude a holder of a deemed grant of statutory right of occupancy, the interpretation would defeat the purpose of the Act particularly the provision of *Section 22*.

3.0 ANALYSIS OF THE CASE

3.1 I broke the law, you pay for it

The court's ruling that the maxim "e*x turpi causa non oritur actio*" was undesirable to apply in the case due to the nature of the provisions of the LUA is one of the vexatious subjects of discussion on this case. The maxim interpreted means "from a dishonourable cause an action does not arise", and has been used by English courts to dismiss actions which arise from illegal dealings. Some of these cases include *Williams* v. *Everett*[149] popularly known as the *Highwayman* case where a robber sued his accomplice for not producing his share of the loot as agreed; *Holman* v. *Johnson*[150] where the court per Lord Mansfield stated that "no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".

This article will not dwell on an in-depth analysis of the maxim itself, but seeks to explore possible reasons why the court did not apply it to the facts of this case. The most likely reason being that the LUA itself is an Act; a written law made by the National Assembly of the Federation. It is not a principle of common law which can be subject to change via different interpretations of the principle by different judges. That is in fact how common law and equity evolve over time. It is much more complicated to modify a written law by the legislature without stepping on its foot, so to speak. This maxim is applied mostly in the areas of torts law and contract law, which are largely governed by common law and equity. While the court refused to substantiate its non-application

[149] (1725) 104 ER 725.
[150] (1775) 98 All ER 1120.

of the maxim, it is this author's view that since the LUA was validly enacted, an act prohibited, and a penalty set in the event of its contravention, the Court was bound to follow the law as equity follows the law.

Furthermore, a court is bound by the pleadings of the parties. It cannot give beyond what the parties have asked for; it may give less, but never more. This was affirmed in the case of *Epenyong v. Nyong*.[151]

The appellants asked the Court to determine if the provisions of the law bound deemed grantees in the same manner as actual grantees, and it answered in the positive.

3.2 Constitutional backing

The LUA is deemed to have been enacted by the National Assembly. But if that wasn't enough to portray the serious intent of the transitional Military government for the legislation to stay, it was given further constitutional backing by the *1999 Constitution of Nigeria (as amended)*.[152] *Section 315 (5)* lists some enactments which will not be invalidated by any provisions of the constitution and then goes further to state thus;

> and the provisions of those enactments shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of *Section 9 (2) of this Constitution*.

Section 9 (2) provides that

> An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in

[151] (1975) 2 SC 71.
[152] C23 LFN 2004.

> either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

Herein lies the problem. There has been clamour for amendment of the LUA for a long time, and even more so after the decision of the court in this case, but the difficulty in amending the Act has made any attempts futile. A Bill was set before the National Assembly in 2009[153] but was met with hostility and did not pass. It should be noted that the proposal must be supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States. The process of obtaining Governor's consent alone is a very lucrative venture for the state, let alone other land related matters that are a source of revenue for states simply by the processes set out in the LUA for land acquisition, alienation and exploration. The possibility of two-third of the state houses in Nigeria supporting a bill that could significantly decrease their revenue source is slim to none.

3.3 Effects of the ruling on commercial activities in Nigeria

The existence of the LUA has critically impacted commercial activities in Nigeria, which may be contrary to the intention of its makers. The issue of governor's consent being a necessity for alienation of land interests is a deterrent to businesses and even private individuals acquiring land in the country. Prospective buyers must budget for the purchase price, stamp duties, professional fees for all professionals employed and other miscellaneous expenses. In addition, the time it takes for this consent to be given may be another issue entirely, depending on which state the consent is being sought from.

[153] National Assembly Bill Tracker www.nassnig.org/document/bills (accessed 4 May, 2019).

This case is an image of how possible it is for things to go wrong without obtaining the consent of the Governor, and how catastrophic it could be on the party moving consideration. The court expressed its dissatisfaction with the LUA itself, and attributed the fault to inelegant drafting.

Ideally, the transferor of the right according to section 22 LUA ought to be the one who seeks the consent of the governor, but in the event of his failure to do so, the transferee suffers the consequences, while the party at fault gets to eat his cake and have it, by enjoying the benefits of the contractual agreement and still keeping his land.

Of course, lending institutions are now wiser, and have made it their duty to obtain Governor's consent themselves.

Another way of circumventing the provisions of the law is to make the delivery of the deed by escrow, that is, dependent on the condition of first obtaining the consent before the parties are deemed to be bound by the deed. This was the deciding and distinguishing factor in *Awojugbagbe Light Industries Limited v. P. N. Chinukwe & Anor*.[154]

4.0 CONCLUSION

This case has gained notoriety as a true depiction of how the law can be inimical to the achievement of justice on certain occasions. It is rather unfortunate that the ruling of the court is still applicable today. The *Land Use Act*[155] is in dire need of amendment to resolve many issues that have arisen in its decades of existence; there is hardly anything that the court can do in terms of judicial activism in its rulings without going beyond the boundaries set by the Constitution and rule of law. It is hoped that in the nearest future, the Act would be amended to correct such unnecessary

[154] (1995) 4 SCNJ, 162.
[155] *Supra*, note 1.

hardships that may arise and have already arisen due to its application to land transactions in Nigeria.

IMAGE RIGHTS: THE IMPORTANCE OF IMAGE RIGHTS IN EMPLOYMENT CONTRACTS

Eribake Ayomide Oloruntoba*

ABSTRACT

Image rights have become an important aspect for footballers and football clubs commercially. The need to have image rights as a recognised clause in football contracts cannot be over emphasised. Although it can be seen as an economic aspect of football, it is also legal, as the image rights of players can also be infringed on, with individuals looking to take advantage of the images of the players without the players benefitting from it. This article seeks to discuss the importance of the image right clause in football contracts signed by players.

1.0 INTRODUCTION

Image rights have become important to the commercial aspect of football. The money spinning nature of football and the level of fame most footballers have has made brands eager to have them as their ambassadors, and also have them advertise their products – an economic master-class. Clubs have traditionally paid its players solely for playing football. This relationship is however evolving, as commercial drivers push football into the entertainment and brand space, clubs are looking for a variety of ways to 'monetise and grow their revenue base.[156] As such, clubs are entering into a multitude of commercial partnerships where brands want to be associated with clubs and their high-profile players. Most Premier League clubs have in excess of 70 commercial partners, all seeking the right to use the image of high-profile players in their advertising. This shows the

* Eribake Ayomide Oloruntoba is 400 level student, Faculty of Law, University of Lagos, eribakeoloruntoba@yahoo.ca

[156] Daniel Geey "Image Rights in UK Football Explained" available at https://danielgeey.com/image-rights-in-uk-football-explained/ (accessed on 24 January, 2019).

importance of image rights, not only to the clubs and players, but the brands as well – one of the few reasons is the money spinning nature of football as a sport.

2.0 FOOTBALL EMPLOYMENT CONTRACTS

According to the Dispute Resolution Chamber[157] (this is one of the arbitration bodies in FIFA which rules on football disputes between clubs and players – usually based on contractual matters or employment disputes) for jurisprudence for an employment contract to be considered valid and binding, it must at least contain the names of the parties, the object, the duration of the employment relationship, the salary and the signatures of the parties concerned – also called the *essentialia negotii.*[158]

In a DRC Decision of 1 March 2012, the Chamber highlighted that, in order for an employment contract to be considered as valid and binding, apart from the signatures of both the employer and the employee, it should also contain the *"essentialia negotii"* of an employment contract, such as the parties to the contract and their role, the duration of their employment relationship as well as the remuneration.[159] Consequently, the Chamber concluded in this case, that as from 1 January 2011, the contract was no longer binding due to the absence of the claimant's salary.

Also, in another DRC Decision of 28 March 2012, the DRC concluded that all essential elements were included in the relevant agreement: the parties, the duration, and the signatures of both parties as well as the agreed obligations of the parties, particularly the remuneration.[160] Therefore, the DRC concluded that the

[157] Article 5(2) of the FIFA Statutes: "FIFA shall provide the necessary institutional means to resolve any dispute that may arise between or among member associations, confederations, clubs, officials and players." [Hereinafter called the DRC].
[158] F. de Weger, "The Jurisprudence of the FIFA Dispute Resolution Chamber", *ASSER International Sports Law Series*, DOI 10.1007/978-94-6265-126-5_6, 133.
[159] DRC 1 March 2012, no. 3121034.
[160] DRC 28 March 2012, no. 3121533.

private agreement clearly represented the basis of an employment relationship and also contained all the essential elements of an employment contract. The Chamber therefore decided that the private agreement concluded by the parties, was to be considered as a valid and a legally binding employment agreement that created obligations for the parties.

2.1 Form

In line with the DRC Jurisprudence, all employment contracts must be in writing. Also, Article 2(2) of the FIFA Regulations on the Status and Transfer of Players (RSTP) states that "a professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs".

This is a prerequisite to determine the status of the player. The DRC emphasizes that the requirement is the existence of a written contract which is duly registered in the respective federation.[161] Also, relevant Court of Arbitration for Sports (CAS) jurisprudence show, in principle, that an agreement between 2 parties does not have to follow any specific form and may in fact, simply result from a verbal agreement on the understanding that the parties opting to conclude non-written agreements may obviously face increased challenges in terms of proof.[162]In a DRC decision of 22 July 2004, the DRC noted that the last written employment contract between the player and the club expired on 20 November 2003 and that it was only extended until 20 December 2003, when the club ended its participation in the final phase of the second tournament.[163] Moreover, it was noted that

[161] DRC 4 February 2005, no. 25820. See also CAS 2013/A/3207 *Tout Puissant Mazembe* v *Alain*
Kaluyituka Dioko & Al Ahli SC, award of 31 March 2014.
[162] See CAS 2013/A/3091 *FC Nantes* v *FIFA & Al Nasr Sports Club*, award of 2 July 2013, CAS 2013/A/3092 *Ismaël Bangoura* v *Al Nasr Sports Club & FIFA*, award of 3 June 2013, CAS 2013/A/3093 *Al Nasr Sports Club* v *Ismaël Bangoura & FC Nantes*, award of 2 July 2013.
[163] DRC 22 July 2004, no. 7472A.

the club acknowledged the lack of a written employment contract between the parties for the 2004 season, despite claiming the existence of an oral agreement binding the player to it for such a period. In this respect, the Chamber emphasized that "every player designated as a non-amateur by his national association must have a written employment contract with the club employing him". Consequently, the Chamber finally concluded in this matter that the football player stopped being contractually bound to the club on 20 December 2003 and was thus a free agent.

It must also be noted that verbal agreements will generally not be taken into consideration by the DRC[164]. Also, if an offer is not accepted, no employment contract exists.[165]

2.2 Length

Generally, in professional football, employment contracts are concluded for a predetermined period of time.[166] According to Article 18(2) of the RSTP, 2016 edition, the minimum length of the employment contract will be from the date of its entry into force until the end of the season, while the maximum length of the contract will be five years. Contracts of any other length will only be permitted if consistent with national laws. According to Article 1(3) under A of the RSTP, 2016 edition, this provision is binding on a national level and must be included.

As mentioned before, pursuant to Article 18(2), RSTP, 2016 edition, players under the age of 18 may not sign a professional contract for a term longer than three years. Any clause referring to a longer period will not be recognised. Contrary to the professional football employment contracts between clubs and players aged 18 or older, which may be concluded for a maximum

[164] DRC 22 July 2004, no. 74165. See also DRC 24 October 2005, no. 105874(2).
[165] DRC 26 October 2006, no. 1061318.
[166] *Ibid*, at 3.

of five years, FIFA is of the opinion that minors should be protected by reducing the maximum length of professional contracts to three years. FIFA feels obliged to safeguard the interests of young players and not hinder their progress through an extensive tie to a club. Any clauses signed for a longer period in contracts will not be recognised by the football authorities. In the event that the contract is signed for longer than a term of three years, only the first three years of the contract will be considered as valid. After the end of the third year, the player will then be free to leave the club unless he explicitly or *de facto* accepts the extension.[167]

2.3 Signature

In an employment contract, both parties must sign[168]. In other words, the signatures of both the player and club are important to the validity of the contract. Although not stated in the RSTP, the DRC has pointed out that if one of the parties does not sign the employment contract, the contract is invalid. Also, in the event that one of the parties used a licensed players' agent, then the name of the agent must also be mentioned in the employment contract itself. This was explicitly stipulated in Article 22(3) of the Players' Agent Regulations, 2008 edition. In the current Article 18(1) of the RSTP, 2016 edition, it states that if an intermediary is involved in the negotiation of a contract, he shall be named in that contract. However, for sake of clarity and to avoid any misunderstanding, it is of no relevance in relation to the validity of the employment contract whether or not it is signed by the agent.

In a case before the DRC of 11 March 2005, the Chamber rejected the argument raised by the player, according to which his

[167] FIFA Commentary, explanation Article 18(2), p. 53. RSTP, 2016 edition, Article 18(2), last 2 sentences.
[168] *Ibid*, at 3.

employment contract with the club should be considered as invalid due to the fact that it was not signed by his agent.[169]

According to the DRC jurisprudence, a player's signature cannot be replaced with the signature of the player's representative. In a DRC decision, the Chamber was of the unanimous opinion that when acting as the representative of the player, the agent's attitude was not in line with due diligence. The DRC emphasized that the pre-contractual correspondence between an agent and a club cannot legally bind the player in the sense of a conclusion of a contract. In this respect, the Chamber as also eager to emphasise that the signature of an employment contract, in any case, has to be considered as a strictly personal right of the employee and therefore the signature of a players' agent cannot replace the signature of the player.[170]

The DRC has also made sure to protect minors with its decisions showing that the protection of minors is an important priority. The DRC has also inferred that an employment contract of a minor must be co-signed by his guardian. In a decision of 23 March 2006[171], the Chamber opined that the minor should be protected the best possible way.

2.4 Language

The language of the employment contract is usually written in English or the language of the country of the club. It must be noted that FIFA does not provide for any mandatory rules with regard to the language of the employment contract as a result of

[169] DRC 11 March 2005, no. 35144b.
[170] See also CAS 2007/A/1429 *Bayal Sall* v *FIFA and IK Start* and CAS 2007/A/1442 *ASSE Loire* v *FIFA and IK Start*, award of 25 June 2008. As also follows from the latter case, the stating of an incorrect date of birth does not make a contract invalid.
[171] DRC 23 March 2006, no. 36619.

which one may therefore conclude that the parties are entirely free to choose the language of the contract.[172]

In a decision of 4 February 2005, the DRC decided that in a contractual dispute between the parties involved, the FIFA regulations do not oblige the parties to sign a contract drawn up in one of the official FIFA languages.[173] The only requirements stated by the FIFA regulations are the existence of a written contract duly registered in the respective federation. In this context, on 13 August 2003, the player and the club signed an employment agreement written in Arabic. The DRC was of the opinion that this contract was legally binding between the parties because it fulfilled all the legal requirements under the national law concerned and the FIFA regulations. The player stated that at the time of signing the contract with the club in Arabic, the club had acted in bad faith by not providing him with a copy of the contract, duly translated into English, French, German or Spanish, as required by FIFA. The DRC explicitly underlined that fact and stressed that the regulations of FIFA do not oblige the parties to sign an employment contract drawn up in one of FIFA's official languages, as claimed by the player in this case.

In several decisions, such as in the decision of the Chamber of 30 November 2007, the DRC decided and confirmed that signing a contract in spite of not knowing its exact contents due to the language of the contract or due to any other reason, is to be considered as gross negligence, and the consequences thereof shall not have to be borne by the other party to the relevant contract.[174] Also, a party who signs a document of legal

[172] *Ibid*, at 150.
[173] DRC 4 February 2005, no. 25820.
[174] DRC 30 November 2007, no. 117311. See also DRC 6 May 2010, no. 510141.

importance without knowledge of its precise contents generally does so at its own risk.[175]

3.0 WHAT ARE IMAGE RIGHTS?

Image rights are the expression of a personality in public domain[176]. The provision of image rights in law enables the definition, value, commercial exploitation and protection of image rights associated with a person. Image rights can also be said to concern the various rights an individual holds in their own persona (including their name, photo and likeness, signature, personal brand, slogans or logos) etc.[177]

Image rights can also be defined as the proprietary right associated with an individual's personality.[178] It must be noted that image right can be exploited in a variety of ways such as through sponsorship, endorsement and merchandising[179]. This broad scope was recognised in the case of *Proactive Sports Management Limited* v *Wayne Rooney and others*[180] where the Court defined image right to mean:

> … the right for any commercial or promotional purpose to use the Player's name, nickname, slogan and signatures developed from time to time, image, likeness, voice, logos, get-ups, initials, team or squad

[175] See DRC decisions of 28 September 2007, no. 97460 and no. 971002; DRC 22 June 2007, no. 67675. See also CAS 2009/A/1956 *Club Toftaltróttarfelag, B68* v *R.*, award of 16 February 2010; CAS 2013/A/3375, *KSC Lokeren* v *Omer Golan & Maccabi PetachTikva FC*; CAS 2013/A/3376, *Omer Golan & Maccabi Petach Tikva FC KSC Lokeren*, award of 22 August 2014.

[176] "What are image rights?" available at ipo.guernseyregistry.com/article/103037/what-are-image-rights (accessed on 24 January, 2019).

[177] "Image rights", available at www.rocketlawyer.co.uk/article/image-rights.rl (accessed on 24 January, 2019).

[178] Al-Ameen A. (2017) "Image Right Clauses in Football Contracts: Masterstroke for Mutual Success?" Intel Prop Rights. 5: 185. DOI: 10.4172/2375 - 4516.1000185, 2.

[179] McArdle D, "You had me at no capital gains tax on disposal: Legal and Theoretical Aspects of Standalone Image Right" (2016) 36(4) *Legal Studies*, 645.

[180] EWCA (2011) Civ 144.

> number (as may be allocated to the Player from time to time), reputation, video or film portrayal, biographical information, graphical representation, electronic, animated or computer-generated representation and/or any other representation and/or right of association and/or any other right or quasi-right anywhere in the World of the Player in relation to his name, reputation, image, promotional services, and/or his performances together with the right to apply for registration of any such rights.

The concept of image right as understood today stems from the so-called "right of publicity" which was established in the US case of *Haelan Laboratories, Inc. v. Topps Chewing Gum*, Inc.[181]. This right is historically linked to right of privacy but was extended in Healan Lab to also protect against commercial misappropriation.

4.0 IMAGE RIGHTS IN FOOTBALL

The importance of image is further enhanced by the fact that technology and the media have greatly influenced our appetite for sport. These two factors invariably increase the commercial value of sportsmen and women as companies often quickly spot the opportunity to attach themselves to such popular image in order to boost their product and services. Image thus serves as an intellectual asset. In the football context, this intellectual asset was recognised by the former FIFA President, Sepp Blatter, who stated that sport is now a product and the rights protecting this product is worth millions of dollars in the football industry. In other words, the football industry has been commoditised.[182]

The idea of image rights is that the household name now has control over how their name is used and exploited

[181] Cir (1953) 202 F.2d 866 2d.
[182] Blackshaw L (2012) "Sport Marketing Agreements: Legal, Fiscal and Practical Aspects", Springer, 25-254.

commercially.[183] The need for protection of image rights cannot be over emphasised, as the players, many of whom are household names have had their images exploited by companies and individuals alike. The use of these images is usually to entice fans to purchase the products which have images of their favourite players.

Speaking on the importance of image rights, sports agent, Dave Williams[184], stated that:

> To sign a contract purely based on performance on the sports field is a little bit naïve if you're somebody who does have true value as a household name. It makes sense to license your image or copyright it to exploit its value.

It must be clear that the player has an image that has a value to sponsors, before being able to set up an image rights company for the player.[185] Once the image right is transferred to an image rights company, the company will contract with the player's club and commercial partners. It may well be that any club deal limits a player's personal deal option (this means that the club can agree with various brands or sponsors, regarding image right deals, reducing the options available to the player) or even seek to share in revenues from personal deals in return for seeking to source individual deals for players. After the establishment of the company and the transfer of the rights, if the player moves to another club, an employment contract and image rights agreement negotiation will most likely occur.

In a circular released by the FIFA Executive Committee[186], after a meeting held on 24 October 2008, where it discussed the minimum standard across the world for the employment

[183] "Image rights explained" at news.bbc.co.uk/sport1/hi/football/1808779.stm (accessed on 24 January, 2019).
[184] *Ibid*, at 13.
[185] *Supra* note 156.
[186] Circular no. 1171 on 24 November 2008.

relationship of professional football players, sent an enclosed document containing a minimum standard for discussions between member Associations and parties concerned. On image rights, it stated that:

> 6.1 The club and player have to agree how the player's image rights are exploited if applicable.
>
> 6.2 As a recommendation and principle the individual player may exploit his rights by himself (if not conflicting with club's sponsor/partners) whilst the club may exploit the Player's image rights as part of a group and/or the whole squad.

It is important to note that endorsement agreements have a lot of crucial clauses which need to be carefully considered to ensure that each party's rights are protected. The most crucial clause is "grant of right" clause. Negotiations regarding this clause could hold up or even truncate a coveted transfer. Because of the commercial gains that could be made through this avenue, players, especially the more popular ones, are often reluctant to let go of this right easily. They would demand a share of such right which could be reflected in their total pay package.[187] A contractual template was created (FAPL) to deal with the commercial aspect of the player's contract. This standard contract established the degree to which a club can use a player's reputation and image to make money. As noted by Hewison, there are limits of the right granted to clubs. He opined that while it might be acceptable for a club to use a player's image to sell photos, "putting a player's name on bottles of wine, golf clubs or ladies' knickers would probably fall outside the terms of the contract".

On the other hand, the Clubs too often try to extract the greater proceed from the exploitation of their collect image right. A typical example concerns the issue of wage structure between the footballers and their clubs. Football clubs like Arsenal and

[187] *Ibid*, at 4.

Manchester United demand a player's image right as part of their contract. However, other clubs are just happy to get a minimal share of the proceeds from commercial exploitation of the player's image rights.[188]

5.0 IMAGE RIGHTS IN NIGERIAN FOOTBALL

It must be noted that there are no laws in Nigeria regarding 'image rights' in particular. Under the Nigerian Professional Football League contract form, image rights – in this case, known as "player image" is described as 'the player's name, nickname, fame, image, signature, voice and film and photographic portrayal virtual and/or electronic representation, reputation, replica and all other characteristics of the Player including his shirt number.'[189] This definition somewhat seems encompassing of what image rights should contain. However, the effect of this clause in a Nigerian player's contract is not visible. First, most players do not have the kind of 'image' most brands seek, thereby making the clause for formality sake. Also, it must be noted that the lack of television coverage has also contributed to the reduction of the "image of local players", as their names are not well known among football supporters, and they rarely feature in commercials, like their foreign counterparts.

The clause containing the image rights of players is one that is also not protecting the players, rather it protects the club – or in a subtler way, it provides clubs the opportunity to exploit the player's image. The clause, titled "*Community public relations and marketing*"[190] states the following:

> 4.1 For the purposes of the promotional community and public relations activities of the Club and/or (at the request of the Club) of any sponsors or commercial partners of the Club and/or of the League

[188] *Ibid*.
[189] Nigeria Professional Football League (*Framework and Rules*) – Form 7, 114.
[190] *Ibid*, at 119.

and/or of any main sponsors of the League the Player shall attend at and participate in such events as may reasonably be required by the Club including but not limited to appearances and the granting of interviews and photographic opportunities as authorised by the Club. The Club shall give reasonable notice to the Player of the Club's requirements and the Player shall make himself available for these activities of the Club. No photograph of the Player taken pursuant to the provisions of this clause 4.1 shall be used by the Club or any other person to imply any brand or product endorsement by the Player.

4.2 Whilst he is providing or performing the services set out in this contract (including travelling on Club business) the Player shall:

4.2.1 Wear only such clothing as is approved by an authorised official of the Club; and

4.2.2 not display any badge mark logo trading name or message on any item of clothing without the written consent of an authorised official of the Club provided that nothing in this clause shall prevent the Player wearing and/or promoting football boots and in the case of a goalkeeper gloves of his choice.

4.3 Subject in any event to clause 4.4 and except to the extent of any commitments already entered into by the Player as at the date hereof or when on international duty in relation to the Players" national football association or FIFA he shall not (without the written consent of the Club) at any time during the term of this contract do anything to promote endorse or provide promotional marketing or advertising services or exploit the Player's Image either(a) in relation to any person in respect of such person's products brand or services which conflict or compete with any of the Club's club branded or football related products (including the Strip) or any products brand or services of the Club's main sponsors/commercial

partners or of the League's sponsors or for the League.

4.4 The Player agrees that he will not either on his own behalf or with or through any third party undertake promotional activities in a Club Context nor exploit the Player's Image in a Club Context in any manner and/or in any Media nor grant the right to do so to any third party.

4.5 Except to the extent specifically herein provided or otherwise specifically agreed with the Player nothing in this contract shall prevent the Player from undertaking promotional activities or from exploiting the Player's Image so long as:

4.5.1 the said promotional activities or exploitation do not interfere or conflict with the Player's obligations under this contract; and

4.5.2 the Player gives reasonable advance notice to the Club of any intended promotional activities or exploitation.

4.6 The Player hereby grants to the Club the right to photograph the Player both individually and as a member of a squad and to use such photographs and the Player's Image in a Club Context in connection with the promotion of the Club and its playing activities and the promotion of the League and the manufacture sale distribution licensing advertising marketing and promotion of the Club's branded and football related products (including the Strip) or services (including such products or services which are endorsed by or produced under licence from the Club) and in relation to the League's licensed products services and sponsors in such manner as the Club may reasonably think fit so long as:

4.6.1 the use of the Player's photograph and/or Player's Image either alone or with not more than two other players at the Club shall be limited to no greater

> usage than the average for all players regularly in the Club's first team;
>
> 4.6.2 the Player's photograph and/or Player's Image shall not be used to imply any brand or product endorsement by the Player; and
>
> 4.6.3 PROVIDED that all rights shall cease on termination of this contract save for the use and/or sale of any promotional materials or products as aforesaid as shall then already be manufactured or in the process of manufacture or required to satisfy any outstanding orders.
>
> 4.7 In its dealings with any person permitted by the Club to take photographs of the Player, the Club shall use reasonable endeavours to ensure that the copyright of the photographs so taken is vested in the Club and/or that no use is made of the said photographs without the Club's consent and in accordance with the provisions of this contract.

Image rights, is almost as important as a player's salary or bonus, owing to the fact that he gets paid for the use of his own image. However, it is sad to note that most footballers either don't study the contracts, or fail to contact lawyers to scrutinize their contracts, which leads to them signing or waving off their image rights. Also, the drafting of the above terms as regards the player's image right does not favour the player in a number of ways. For example, Clause 4.7 states that:

> In its dealings with any person permitted by the Club to take photographs of the Player, the Club shall use reasonable endeavours to ensure that the copyright of the photographs so taken is vested in the Club and/or that no use is made of the said photographs without the Club's consent and in accordance with the provisions of this contract.

From that clause, it is possible to note that a player cannot have the opportunity to own his image rights. Rather, the monies accrued from his image goes in the club's purse, leaving him with only his salary and bonuses.

It must be noted however that a player has the option to either amend the terms of the contract or reject the contract through his agent or representative(s).

6.0 CONCLUSION

In conclusion, the writer opines that most players – especially in Nigeria, be educated on the importance of their image rights. Also, from the DRC Jurisprudence stated above, players should be able to understand the integral part of their contracts to make them valid and admissible. Also, although, there are no laws protecting image rights, it can be protected by the law of copyright, and the player can sue for passing-off by the erring party.

RESOURCE CONTROL BY STATES IN NIGERIA: ISSUES AND CHALLENGES UNDER THE 1999 CONSTITUTION.

Gerald Nnamokwor*

ABSTRACT

It has been observed that despite the enormous mineral and human resources which Nigeria as a country possesses, being Africa's largest economy and the most populous country in Africa, Nigerians are yet dissatisfied with all the institutions of governance in Nigeria. This dissatisfaction has brought about enormous clamour for some forms of political changes in Nigeria using different terminologies such as Regionalism, Restructuring, Resource Control, Confederation etc. This as a result, has necessitated some forms of political movements such as MASSOB, IPOB, etc. geared towards self-determination as a result of some perceived marginalization. The essence of this paper is to exam how resource control by the federating states in Nigeria as a form of political restructuring in Nigeria will be able to immensely cure the political menace currently experienced in Nigeria and enhance the country's economy. In doing this, the paper will commence by looking at Nigeria's political evolution.

1.0 INTRODUCTION

The current poor state of Nigeria's economy and the high level of corruption in the system have necessitated calls from all sections of the country for some forms of political reforms to improve the country's state of economy as well as the living standard of the citizens of the country.

The essence of this paper is to examine the current federal system of government practiced in Nigeria and advocate that each federating state should take control of the mineral resources generated within the state and use it to develop the state. The work starts by looking at the evolution of Nigeria's politics.

2.0 A BRIEF HISTORY OF NIGERIA'S POLITICAL EVOLUTION

Nigeria came into existence by the amalgamation of the Northern and Southern Protectorates by the then British government led by Lord Fredrick Lugard in the year 1914 bringing together the diverse peoples and cultures of a vast land under one polity. However, as time went on, Nigerians agitated massively for a political structure of a free and independent Nigeria.

In the 1950's we saw the emergence of three regions – Northern, Western and Eastern Nigeria with elected Nigerian leaders having limited powers of self-rule. During the pre-independence debates, the leaders from the Northern and Western Nigeria agitated for a loose federation with strong regions. This prevailed at independence in 1960 and was reaffirmed in the 1963 Republican Constitution.[191]

An agreement between the parties controlling the Northern and Eastern regions produced the governing coalition at independence in 1960. In 1963, the Mid-West was carved out of the Western region as the fourth region. Each of these regions had a written constitution, emblem and official representation in London.[192] The regions were allowed to generate their own revenues needed to run their affairs and contribute to the growth of the central government.

The various leaders that headed the respective regions competed for the best for their various peoples. The Western region established the first public television service in Africa. Each of the

---

* Gerald Nnamokwor is an Associate at Kenna Partners, gnnamokwor@kennapartners.com.

[191] Nasir Ahmad El-Rufai, "What Is Restructuring and Does Nigeria Need It? - The Essence of the Restructuring Debate in Nigeria", available at http://saharareporters.com/2017/09/21/what-restructuring-and-does-nigeria-need-it-essence-restructuring-debate-nigeria-nasir-1 (accessed 12 February 2019).

[192] *Ibid.*

three regions founded their own university, built industries and modern infrastructures.

In 1966, the five majors struck in and assassinated virtually all the elected political leaders of the Northern and Western Regions. Unitarist tendency gained ground in General Aguiyi Ironsi's government, and a unification decree was enacted in May 1966, unifying the public service across the country.

Later on, a counter-coup followed which ended the unification decree. The counter-coup was followed by widespread of violence in the North, the creation of 12 states out of the four defunct regions, threats of secession and a civil war.

In order for the then government to raise money to prosecute the civil war which started in 1967, the taxation authorities of the former regions were changed to favour the Federal Government, further strengthening the centre at the detriment of the twelve states. At this period, the military ensured that the Federal Republic of Nigeria, ruled by the Federal Military Government became mainly a unitary state.

Historically, the four years of civilian democratic rule between 1979 and 1983 witnessed some resurgence and reassertion of the federal spirit.

The second coming of the military lasted until 1999. In those sixteen years, the Unitarist takeover was compelled. However, as states became many, smaller and less financially-independent, a powerful centre, which showcased itself in a Federal Government that assumed even more powers and responsibilities, took the major part of national revenue yet cannot do well.

3.0 A CRITIQUE OF THE CURRENT FEDERAL SYSTEM OPERATED IN NIGERIA UNDER THE 1999 CONSTITUTION

3.1 Definition of Federalism

Federalism is a popular concept that has been defined by many authors. Professor B.O. Nwabueze described federalism as an arrangement whereby powers of government within a country are shared between a national, country-wide government and a number of regionalized (i.e. territorially localized) governments in such a way that each exists as a government separately and independently from the others operating directly on persons and property within its territorial area, with a will of its own apparatus for the conduct of its affairs and with an authority in some matters exclusive of all the others.[193]

Professor Illochi A. Okafor & Dr. Offornze D. Amucheazi also defined federalism as a system in which governmental powers are divided between a central government on one hand and regional governments on the other, by the constitutive instrument within one political and legal order and where each of the levels of government is entitled to exercise powers in its own sphere without interference from the others.[194]

Generally speaking, federalism simply implies a system whereby political powers are shared between the central government and the federating states in a defined legal, socio-economic and political order.

For a country to claim that it practices federalism, such country must fulfil the following criteria which according to Professor K.C. Wheare[195] are the indispensable attributes of a true federalism. Such attributes, which we shall use as parameters to decide

---

[193] B.O. Nwabueze, *The Presidential Constitution of Nigeria,* (C. Hurst & Co.: London, 1982).
[194] I.A. Okafor and O.D. Amucheazi, *The Concept of True Federalism in Nigeria*; (SNAAP PRESS Ltd: Enugu).
[195] A.E. Obidimma and E.O.C. Obidimma, "Restructuring the Nigerian Federation for Proper Functioning of the Nigerian Federalism" available at https://www.iiste.org/Journals/index.php/PPAR/article/view/25794 (accessed 13 February, 2019).

whether Nigeria actually practices federal system or not, include the following:

3.1.1 Written Constitution

Simply put, a Constitution contains the basic principles and laws of a nation, state, or social group that determines the powers and duties of the government and guarantees certain rights to the people in it.

A written constitution is one of the paramount and unassailable attributes of a federal system. It spells out the quantum of powers to be exercised by each tier of the government. According to E. A. Odike, "the true mark of federalism is that it distributes legislative, judicial and executive powers between the federal and the constituent states in a written document called the constitution".[196] In line with this, Professor Wheare[197] argued and maintained that:

> …since Federal Government involves a division of functions and since the states forming the federation are anxious that they should not surrender more powers than they know, it is essential that for a federal system of government to operate, there must be a written constitution embodying the divisions of powers, and binding all governmental authorities throughout the federation. From it, all states and federal authorities derive their powers and any actions they perform contrary are invalid…

In Nigeria's first Republic, the regions had their own separate constitutions. But in 1979 and 1999, the military handed down a single constitution to the centre and the states, providing alternatively for federal and state structures within one

[196] EA O Dike, "Nigeria's Federalism: Myth or Reality" (2005) *Abakiliki Bar Journal*, 83-84.
[197] *Ibid.*

constitution and according to Ilochi A. Okafor,[198] this was a re-invocation of the constitutional form in 1951 when one constitution only was established for both the centre and the regions.

3.1.2 Each government must be Autonomous

In a federal state, it is required that each government should be autonomous, which necessarily implies its separate existence and its independence from the control of other governments.

In the case of *Attorney General of Ogun State & Ors.* v *Attorney General of the Federation & Ors.,*[199] the court held per Kayode Eso JSC that:

> …the autonomy of each government requires not just the legal and physical existence of an apparatus of government – a legislative assembly, governor, courts, ministries and departments etc. Autonomy of the state governments is the defining principle of true federalism, its foundation or bedrock.

According to Angela E. Obidimma and Emmanuel O.C. Obidimma[200]

> …in a federal state, the power sharing arrangement should not place such a preponderance of power in the hands of either the national or the regional government as to make it so powerful that it is able to bend the will of the other to its own. The sharing should be weighted as to maintain a fair balance between the national and regional governments.

It has been observed that the sharing of the legislative and executive powers under the 1999 Constitution does not reflect

[198] *Supra*, note 194.
[199] (1982) 3 NCLR 583.
[200] *Supra*, note 196.

this fundamental feature of a federal state.[201] In the 1999 Constitution, the Exclusive Legislative List contains 68 items, all of which are exclusive to the Federal Government. The first 66 items refer to specific maters. The 67th item refers to any other matter with respect to which the National Assembly has powers to make laws in accordance with the provisions of the Constitution. The 68th item relates to matters incidental and supplemental to any matter mentioned elsewhere in the list. The Concurrent Legislative List has 30 items. By the sub-divisions, the list defines the respective extent of federal and state power in respect of the matters listed therein with the aim of reducing possible conflicts, especially through the application of the doctrine of covering the field. By the sub-divisions, a concurrent matter no longer necessarily implies that both federal and state governments are competent to act over its entire field. In respect of some matters in the list, their competence is respectively restricted to some aspects only of a so-called concurrent matter making such aspects exclusive to the one or the other.

From the above, it is obvious that the Federal Government wields overwhelming powers to the detriment of the federating units. This is contrary to what a true federalism should be, according to Professor Wheare as mentioned above.

3.1.3 Financial Independence

Financial independence is one of the unassailable criteria which every system that claims to practice true federalism must meet up with. According to Professor Wheare,[202] financial subordination arguably marks an end of federalism no matter how carefully the legal forms may be preserved. It is a fundamental principle of true federalism. Wheare further canvassed

[201] *Ibid*.
[202] *Supra*, note 196.

> that both state and federal authorities in federalism must be given the power in the Constitution each to have access to and to control, its own sufficient financial resources

In expounding this, Nwabueze[203] argued and maintained that:

> Federalism requires that the national and regional governments should stand towards each other in relation of meaningful autonomy and equality resting upon a balanced division of powers and financial resources. Each must have powers and financial resources sufficient to support the structure of a functioning government able to stand on its own against the other.

It has been observed that the sharing pattern applied in Nigeria's federal system gives the Federal Government powers and resources obviously far greater than those given to the states, hence, denying the states of any meaningful autonomy in relation to the Federal Government. This can be seen under the current revenue sharing formula in Nigeria. Under the said current sharing formula, the Federal Government takes the lion's share of 52.68% from the Federation Account. The 36 states take 26.72%, while the balance of 20.60% is given to the 744 local governments in the country.[204] This has, over the years, generated controversies and remains a key factor in the clamour for true federalism, political restructuring or what we refer to as state control of resources.

3.1.4 The Regional Governments must be Equal in Powers

In a federal system, it is imperative that all the regional governments be equal. Accordingly, no regional or state government shall have more or less powers than the others, or be accorded a special position in relation to the Federal

[203] B.O. Nwabueze quoted in A. E. Obidimma and E. O.C. Obidimma. *op. cit.*
[204] "Current Revenue Sharing Formula Illegal-Reps" *Punch newspaper* 3 March, 2018 available at https://punchng.com/current-revenue-sharing-formula-illegal-reps/ (accessed 13 February, 2019).

Government otherwise the regional or state governments cannot interact among themselves and with the Federal Government as equal partners.

The concentration of overwhelming powers in a particular regional or state government would tend to produce in it an attitude of superiority over the others and thus destroy the equilibrium of the system.

Again, there should also not be marked an obvious inequality in population between the regions. In line with this, John Stuart Mill opined:

> In all federations… some (i.e. federating regions) will be more populous, rich, and more civilized than the others. The essential thing is, that there should not be any state so much more powerful (i.e. in terms of population) than the rest as to be capable of vying in strength with many of them combined. If there be such one, and only one it will insist on being master of the joint deliberations; if there be two, they will be irresistible when they agree and whenever they differ, everything will be decided by a struggle for ascendancy between the rivals.[205]

Looking at the situation of things in Nigeria, it is quite obvious that all the states in Nigeria are not equal both in population, economic powers and the influence they wield in national politics. The map shows the states in Nigeria, their population and number of local government areas therein.[206]

By a way of critical analysis, how can we justify the gap amongst the states listed above both in population, number of local governments and even in geographical area? This is totally not in

[205] J.S Mill, "Representative Government", quoted in A. E. Obidimma and E. O.C. Obidimma, *op. cit.*
[206] Available at www.population.gov.ng (accessed 13 February 2019).

the spirit of true federalism as argued above by John Stuart Mill.[207] As such we can conclusively argue that some states in Nigeria are far more powerful than most of the others and therefore, Nigeria as a country cannot rightly claim to be a true federalist state.

Having considered the above, it is obvious that Nigeria does not meet up with the relevant criteria which every country that claims to be a true federal state must meet. The writer of this paper hence argues that for Nigeria as a country to become a true federal system, certain constitutional amendments must be made.

3.2 The 1999 Constitution, Revenue Allocation and Resource Control

There have been a lot of controversies over the issues of revenue generation, allocation formula and whether the federating states should have certain level of control over the mineral resources produced in each state contrary to what the 1999 Constitution (as amended) provides.

The *1999 Constitution (as amended) in Section 153(1)(n)* established the Revenue Mobilization Allocation and Fiscal Commission. *Section 162* provides that the federation shall maintain a special account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of the Federation. Also, *Section 162(3)* provides thus;

> any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the local government councils in each state on such terms and in such manner as may be prescribed by the National Assembly.

However, the current revenue sharing formula in Nigeria gives the bulk of the Federation's revenues to the Federal

[207] *Supra*, note 205.

Government.[208] This is unlike what was obtainable under the *1960 Constitution* and the *1963 Republican Constitution*. For instance, in the 1960 Constitution that heralded Nigeria's independence, elaborate provisions were made in *Sections 130-139* for revenue allocation. Of particular importance to this paper is *Section 134* which reads:

> 134. (1) There shall be paid by the Federation to each region a sum equal to fifty per cent of-(a) the proceeds of any royalty received by the Federation in respect of minerals extracted in that region; and(b) any mining rents derived by the Federation during that year from within that region.
>
> (2) The Federation shall credit to the distributable pool account a sum equal to thirty per cent of;
>
> (a) the proceeds of any royalty received by the Federation in respect of minerals extracted in any region; and
>
> (b) any mining rent derived by the Federation from within any region.
>
> (3) For the purposes of this section the proceeds of a royalty shall be the amount remaining from the receipts of that royalty after any refunds or those receipts have been deducted therefore or allowed for.
>
> (4) Parliament may prescribe the periods in relation to which the proceeds of any royalty or mining rents shall be calculated for the purposes of this section.
>
> (5) In this section minerals include mineral oil.
>
> (6) For the purposes of this section the continental shelf of a region shall be deemed to be part of that region.

The *1963 Republican Constitution* also made elaborate provisions for payment of a certain percentage of revenue to each region in respect of different items as exercise, import, and export duties, rents and royalties.[209]. While the *1979, 1989 and 1999 Constitution* provided that all mines and minerals, including oil fields, oil mining, geological surveys and natural gas fall under the Exclusive Powers

---

[208] *Ibid*.

[209] *Constitution of the Federal Republic of Nigeria, 1963*, s.136.

of the Federal Government. Specifically, *Section 44 (3) of the 1999 Constitution* provides that:

> 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 the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

This is contrary to what is obtainable in some other federal states like the United States of America where ownership rights of mineral resources are shared among private individuals, Federal Government and the State Government. In this paper, we advocate that certain ownership rights over mineral resources in Nigeria should be given to state governments. For instance, the states could be given the right to control 70% of the mineral resources in such state and use it to carter for the affairs of the state and local government areas within the state while 30% control of the mineral resources generated in each state should be given to the Federal Government for the running of national issues such as security and some other issues that ensure national cohesion. On the other hand, the writer here acknowledges the fact that some states are more endowed than the others when it comes to natural and mineral resources. The Federal Government can still give some percentage of its own share of the mineral resources which it gets from the richer states to the poorer states. For instance, out of the 30% of the mineral resources which the Federal Government gets from all the 36 states of the Federation, it can donate for example 10% of it among the less privileged states. With this, there will be equity and fairness in the sharing of the countries resources and this will immensely and rapidly improve the diminishing economy of the country.

4.0 THE NEED TO AMEND THE NIGERIAN CONSTITUTION TO ALLOW RESOURCE CONTROL BY EACH FEDERATING STATE

Over the years, there has been an overwhelming clamour by the Nigerian citizens for the 1999 constitution to be amended so as to give control to each state over the mineral and other natural resources produced in therein.

The section of the Constitution in question is *Section 44 (3) of the 1999 Constitution*. For clarity and proper discuss, the said section of the constitution shall be herein reproduced as follows:

> 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 the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.[210]

This section of the Constitution seems to be a cog in the wheel of Nigeria's development since the coming of the Constitution and thus has generated series of arguments, clamours and agitations for the restructuring of the country.

The central argument canvassed in this part of this paper is that the constitution should be altered in such a way as to give states certain percentage of control over the mineral resources they have for the proper running of the states while contributing their quota to national development.

> In discussing this, the paper will critically consider some relevant sections of the Land Use Act.[211] To this effect we shall commence by looking at *Section 1 of the Act*. The section provides as follows: Subject to the

[210] *Constitution of the Federal Republic of Nigeria*, 1999 (as amended), s. 44 (3).
[211] *Land Use Act*, 1978 Cap. L5, Laws of the Federation of Nigeria, 2004.

> provisions of this Act, all land comprised in the territory of each state in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

By this provision, all land in Nigeria was vested in the state. According to Hon. Justice I. A. Umezulike[212]

> the Act clearly nationalized all land in Nigeria through a combination of two approaches. It vested all land in the state and abolished private ownership of it which was accomplished by making a right of occupancy the largest interest capable of existing in land in favour of a private person or body.

The Act explicitly provides that no greater interest than a right of occupancy can pass to any person or body under any existing instrument.[213] Umezulike[214] further argued that the vesting of all land in the government has the effect of conferring ownership on it. According to him, to vest corporeal land is to vest its ownership. It operates to pass the ownership. It cannot be said that ownership which was vacated in private land was in limbo or in abeyance. It must be in some person. It is submitted that the state is clearly the owner pursuant to section 1 vesting all land in it.

The implication of vesting all land in the state and the abolition of private ownership of it is that the state becomes the owner of all land in the country and all land becomes state land. To this effect, all land becomes state land in exactly the same manner as land procured by the state before the Act by private purchase under voluntary agreement or by compulsory purchase under statutory

---

[212] I.A. Umezulike, *A.B.C of Contemporary Land Law in Nigeria* (SNAAP Press Nigeria Limited: Enugu).
[213] *Land Use Act*, 1978 CAP. L5, Laws of the Federation Nigeria, 2004, s.25.
[214] *Supra*, note 212.

powers. As with state land existing before the Act, the ownership acquired by the state under the Act is a beneficial one. According to Umezulike,[215] the declaration by the Act that; "Such land shall be held in trust and administered for the use and common-benefit of all Nigerians" under section 1, in no way detracts from the beneficial character of the state's ownership. He cited the case of *Chief Bola Adewounmi* v *Ogunbowale* & *Ors*.[216] The section is not intended to confer upon every citizen of Nigeria, the benefit which a beneficiary to a trust has against a trustee under the common law. The real beneficiary is therefore the state. Therefore, the expression, "all Nigerians" as used under section 1 can only mean in law all Nigerians organized as a state.

The argument in this paper is that, if the whole land in a state is vested in that state, why would the Federal Government interfere in the mineral resources contained in such state's land? The paper strongly canvasses that since the Land Use Act has vested the whole land in a state in that state, such a state should be allowed to take charge of greater percentage of all the mineral resources produced from such state and use it for the running of the affairs of the state and for the development of such state. This practice though may have numerous challenges to attain because of the constitutional provisions conferring powers on the Federal Government of Nigeria over the mineral resources in every state, however if achieved, will certainly have numerous advantages to the development of the country. This form of political restructuring will also enhance the spirit of federalism as intended by the Constitution.

We shall now proceed to discuss the numerous advantages of altering the Constitution to allow resource control by states and the ways of overcoming the challenges that may be faced in order to alter the Constitution to allow resource control by states and state autonomy generally.

---

[215] *Ibid*.
[216] Suit No. LD/115/81 of 28/5/82, High Court of Lagos State.

A fundamental question which has always been asked is: "whether resource control by the federating states could be capable of improving the dwindling state of Nigeria's economy?"

In answering the above question, the writer of this paper shall be looking at the following which we consider as some of the numerous benefits Nigeria as a federation would gain if resource control is granted under the 1999 Constitution.

1. There will be a resort to other mineral and agricultural resources which will lessen over reliance in oil and gas as the major source of revenue in Nigeria and enhance industrialization.

Research has proven that every state in Nigeria has some mineral and agricultural resources that they produce which have been ignored because of oil and gas. The table below shows a list of the mineral and agricultural resources and the states that produce them as well as their industrial uses.

Mineral Resources

S/NO.	Mineral Resources	States	Industrial Uses
1.	Bitumen	Lagos, Edo, Ondo, Ogun.	1. Used in road construction 2. Used for bituminous waterproofing products including the production of roofing felt and for sealing flat roofs
2.	Coal	Ondo, Enugu, Benue, Kogi,	1. Used in electricity generation 2. Steel production 3. Cement manufacturing, etc.

		Gombe, Sokoto.	
3.	Oil and Gas	Akwa Ibom, Abia, Bayelsa, Edo, Delta, Rivers, Ondo Imo.	1. Industrial uses-for operating machines 2. Residential uses- for cooking 3. Commercial use- for sales 4. Vehicles- fuel
4.	Gold	Edo, Ebonyi, Kaduna, Ijesha, Oyo.	1. Used in electronic production 2. Used in computer production 3. Used in dentistry. 4. Used in aerospace. 5. Used in awards and Status Symbols. Etc.
5.	Iron Ore	Benue, Anambara, Kogi, Kwara, Delta, Plateau, Bauchi, Nasarawa.	1. Used in steel making for auto mobiles, ships, 2. Beams for buildings, paper clips, furniture, tool etc. 3. Also used in blast furnaces to make pig iron.
6.	Lead and Zinc	Ebonyi, Benue, Ogoja, Kano.	Zink- used in roofs, gutters, down pipes, bodies of cars, batteries, fertilizers etc. Lead- used for car batteries, pigments, ammunition, cable sheathing etc.

7.	Salt	Akwaibom, Abia, Ebonyi, Cross Rivers.	1. For cooking 2. For boiling water 3. Poaching eggs 4. Crisping salads etc.
8.	Tin	Bauchi, Jos.	Used to coat metals to prevent corrosion such as in tin cans, which are made of tin-coated steel etc.

Agricultural Resources.

S/No	Agricultural Resources.	States
1.	Cocoa	Edo, Anambara, Imo, Kwara, Ondo, Ogun, Osun, Oyo.
2.	Coffee	Kwara, Bauchi, Ogun.
3.	Cotton	Katsina, Katsina, Sokoto, Kano, Niger.
4.	Groundnut	Ebonyi, Katsina, Sokoto, Kano, Niger.
5.	Kola nut	Ogun, Oyo, Osun, Kwara.
6.	Oil Palm	Akwaibom, Imo.
7.	Plantain	Ogun, Oyo, Osun.
8.	Rubber	Delta, Cross-River, Ogun, Edo.
9.	Timber	Edo, Ogun, Delta.

The point canvassed here is that if Nigeria is restructured in such a way that each state is allowed to become independent to the extent that it can generate its own resources and develop itself, it would boost the nation's economy because there will be competition amongst the states and regions and there will be some kind of innovations leading to the manufacturing of some products which are being currently imported into the country and this can enhance the strength of the nation's currency in the international market.

1. It will increase employment rate in Nigeria.

Nigeria produces over 500,000 graduates annually. These graduates come out of school without any job to start life with. Most of them still depend on their parents who saw them through school to still carter for their needs even after their school education. This is because most people depend on government to create jobs for them while government on the other hand depends majorly on money realized from the sale of oil and gas which cannot be enough to run the country. This is one of the major causes of unemployment in Nigeria. However, if each state is allowed to generate and develop their own mineral and other natural resources, the various state governments who do not have oil will start thinking of other things to do such as attracting foreign investors and even start developing the old companies in their various states which have been abandoned because of oil and gas and this will surely create more jobs for Nigerian youths.

2. It will reduce the level of corruption in Nigerian Political system and enhance accountability to the citizens.

It has been observed that most Nigerians who contest elections do that mainly with the intention of going there to share the nation's wealth and syphon public funds to the detriment of the Nigerian citizens. Most of them do not have any genuine intention

of developing the country. If Nigeria is restructured in such a way that everyone remains in their state and work hard to develop it, the craze for national politics will reduce and the people of that state will be able to hold their leaders accountable for every mess in the state's political system. However, if Nigeria persists on operating the kind of federal system she is currently operating, the level of accountability will be very low because from what has been witnessed in Nigeria, people tend to support any national leader that is from their state irrespective of whatever the person does. This cripples accountability to the people and promotes corruption which in turn retards the nation's growth in all ramifications.

5.0 THE CHALLENGES OF AMENDING THE 1999 CONSTITUTION AND THE SOLUTIONS THEREOF

To achieve the above may face certain constitutional challenges because the 1999 Constitution itself already provided in section 9(2) that in order for the National Assembly to alter any section of the Constitution, such proposal must be supported by the votes of at least two third majority of the members of each House of the National Assembly and supported by a resolution of at least two third of the House of Assembly of the 36 states. For the sake of clarity, it will be apt to reproduce the provisions of the section. Section 9 (2) of the 1999 Constitution:

> An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the House of Assembly of not less than two-thirds of all the States.

This section of the Constitution seems to be the greatest challenge the proposition for resource control by states will face

because even if the National Assembly votes in support of altering the Constitution to allow the proposition, some states who have the fear that without money from oil and gas they may not be able to stand on their own will certainly not vote in support of altering the Constitution to allow resource control by states.

However, it is important to note certain facts. Firstly, that before the discovery of oil in Nigeria, we survived through agriculture and some other mineral resources. Secondly, some of the states that are less privileged will still be given some percentage from the revenue realized from the mineral resources of the so-called rich states.

The essence of this paper is to advocate for massive sensitization of both the law makers and Nigerian citizens at large on the need to alter the Constitution to allow the states to have certain control over the natural and mineral resources within their states. As elucidated earlier above, it will improve our economy tremendously.

6.0 CONCLUSION

Having carefully examined the nature of the purported federal system of government currently operated in Nigeria, it is obvious that Nigeria as a country falls short of the relevant criteria that qualify a country as a federal system.

First, autonomy which according to Professor K.C. Wheare is an indispensable attribute of any federal system of government is clearly lacking in Nigeria's purported federalism. The Federal Government of Nigeria obviously dominates the federating states in all ramifications. For instance, as seen above, under the Exclusive Legislative List which only the Federal Government has powers to legislate on, there are over 68 matters which the Federal Government alone makes laws on. Apart from that, there is no financial autonomy of the federating states. The bulk of what is being generated in each state goes to the Federal Government

who in turn decides what it gives to each state. We have witnessed situations where the Federal Government for some reasons best known to it had to withhold monthly allocations of some states in Nigeria.[217] Such cannot be obtainable in a properly constituted federal system. Apart from these, the Federal Government of Nigeria under the 1999 Constitution arrogated to itself all the mineral resources in all the states of the federation thereby making the states completely dependent on the Federal Government. This goes against the spirit of true federalism as properly elucidated above and that is the rationale behind this paper. It has aptly been argued that for there to be true federalism in Nigeria, states should be granted some level of autonomy which can only come from giving the States higher percentage of control than they currently have over the mineral resources produced in each state. The writer acknowledges the fact that 13% of the revenues generated from the mineral resources in each state is given back to such state under Section 162 (2) of the 1999 Constitution. However, the paper argues that this is not sufficient and recommends 70% for each state as seen above for the development of such state. The writer therefore, advocates the alteration of the 1999 Constitution by the Nigerian National Assembly to allow resource control by the federating states of Nigeria. As a result, the writer recommends the following:

1. There should be a massive sensitization for the alteration of the 1999 Constitution to allow for higher percentage of state control over mineral resources within each state.
2. States should take 70% of the revenues generated from mineral resources in such state while 20% should go to the Federal Government. The remaining 10% should be given to the less privileged states, which is states that do not

[217] The President Obasanjo's led Government in 2004 withheld Council Funds meant for local Governments in Lagos State in 2004 after which the Supreme Court ordered the release of the fund after several law suits in that regard. See Guardian News Paper, 11 December 2004, 3.

have much mineral and agricultural resources, to survive with.

3. Apart from oil and gas, there should be a resort to other mineral resources that we have in Nigeria as enunciated above.

ASSISTED REPRODUCTIVE TECHNOLOGY: THE ETHICAL AND LEGAL CONCERNS ARISING FROM THE USE OF IN VITRO FERTILISATION

Rachel Ogidan*

ABSTRACT

Arthur Clarke, in comparing technology to magic, stated that any sufficiently advanced technology is indistinguishable from magic.[218] *Technology, like magic, has eased virtually into every sphere of life, including reproduction. Reproductive technology refers to treatments and procedures aimed at achieving pregnancy, including fertility drugs, artificial insemination, in vitro fertilisation, gamete intra-fallopian transfer (GIFT), zygote intra-fallopian transfer (ZIFT), and intra-cytoplasmic sperm injection (ICSI) among others. While the use of technology is commendable in resolving infertility issues, the mere fact that certain procedures are technologically possible does not make them ethically appropriate, and a plethora of moral, ethical and legal concerns are often raised. Concomitant with the great advantages and advances of the technique, limitations must be imposed. This essay evaluates the use of technology in human reproduction, as well as the core ethical and legal concerns arising particularly from the use of in vitro fertilisation.*

1.0. ASSISTED REPRODUCTIVE TECHNOLOGY

Up until the early 20th century, families which could not produce children through the natural means of conception suffered a great deal. While attempts had been made by various surgeons in the 19th century to produce a child through assisted reproductive technology, the many attempts neither gained recognition nor acceptance up until 25 July, 1978 when the world's first test tube baby was born. Baby Louise Joy Brown was born weighing 5

[218] "Arthur Clarke's Laws", available at https://sites.uci.edu/chpleaders/2010/11/29/arthur-clarkes-laws/ (accessed 1 November, 2018).

pounds, 12 ounces[219] to John and Lesley Brown in Oldham, England.

Lesley Brown was reported to have said she prayed "Dear God, I wouldn't moan about being kept awake at night and washing dirty diapers if you'd let me have a child." The tone of this prayer in addition to the willingness of the Browns to go ahead with the procedure, despite having little or no idea of what it entailed, reflects the desire to bear a child, borne out of the despair and desperation suffered by parents, particularly mothers, unable to conceive. Infertility has over the years caused havoc in many homes as procreation remains the social and cultural basis of many unions. This, amongst other reasons, has contributed to the importance of assisted reproductive technologies.

Assisted Reproductive Technologies (subsequently called ART) are medical procedures designed to help infertile people have children. They are used to treat infertility in persons unable to conceive naturally. While in vitro fertilisation is the most common and successful type, it is not the only available form of ART. The other procedures include artificial insemination, Zygote Intra-Fallopian Transfer (ZIFT), Gamete Intra Fallopian Transfer (GIFT) and surrogacy. Today, ART is an alternative pursued by couples facing infertility, particularly in developed countries.

1.1. Artificial Insemination

Artificial insemination is the oldest form of assisted reproductive technology. It dates back to 1784 when Italian physiologist Lazzaro Spallanzani developed a technique for artificial insemination in dogs.[220] Within the same century, John Hunter,

---

[219] "In Vitro Fertilisation (IVF)", available at https://www.myvmc.com/treatments/in-vitro-fertilisation-ivf/ (accessed 18 November, 2018).

[220] W. Ombelet and J. Van Robays "Artificial Insemination History: Hurdles and Milestones", available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4498171/ (accessed 7 March, 2019).

Scottish-born surgeon and founder of pathological anatomy in England, impregnated a woman using the same procedure. Similarly, in 1884, American physician, William Pancoast, performed the same procedure resulting in pregnancy and eventual birth, albeit without the consent of the mother who was under anaesthesia.[221] This act raises ethical concerns discussed in the latter part of this essay.

Artificial insemination (AI) is the fertility procedure involving the introduction of sperm into the female's cervix or cavity for the purpose of achieving a pregnancy through in vivo fertilisation,[222] which is the fertilisation of an egg inside the body of the woman. This procedure is recommended in the following instances:

1. Presence of medical conditions in men such as erectile dysfunction which prevents couples with healthy sperm and eggs from engaging in coitus;
2. Presence of medical conditions in women which precludes the cervix from producing the mucus required to help the sperm travel to the womb;
3. Existence of Endometriosis—a condition in which the lining of the uterus, which is normally shed during menstruation, grows outside the uterine cavity. It is estimated to affect 1 in ten women of reproductive age;
4. Allergic reactions by women to certain protein in sperm or semen;
5. Inability to produce enough sperm for successful fertilisation, or immobility of the sperm which prevents them from moving to the egg effectively.[223]

In addition to the following, artificial insemination is now used by men and women in same- sex partnerships who would like to

[221] *Ibid*.
[222] Available at https://en.m.wikipedia.org/wiki/Artificial_Insemination (accessed 18 October, 2018).
[223] Mike Paddock, "What to Know about Artificial Insemination", available at https://www.medicalnewstoday.com/articles/217986.php (accessed 18 October, 2018).

reproduce children of their own. This has been met with more objections than favourable reception.

The risks associated with artificial insemination are minimal, and while it is less effective than in vitro fertilisation, the minimal risk associated with the procedure makes it appealing in addition to its nominal cost in comparison to other procedures such as in vitro fertilisation.

1.2. In Vitro Fertilisation

This procedure is patronised by couples unable to achieve coital pregnancy. It is the most popular and effective form of assisted reproductive technology.[224] At a time where assisted reproductive technology procedures were treated with cynicism, the use of IVF in producing a baby in 1978 was warmly accepted as a medical milestone. The technique was developed by British researcher, Robert Edwards and Patrick Steptoe, a British gynaecologist.[225]

In the simplest terms, in vitro fertilisation (subsequently called IVF) is fertilisation outside of the body. It is a medical procedure involving the extraction of matured eggs from a woman, retrieving a sperm sample from a man, and then merging the egg and sperm sample outside the body, usually in a laboratory dish. The embryo produced is subsequently inserted into the uterus of the same woman or another woman who is called a gestational carrier for normal gestation.

While IVF is described as the most effective form of assisted reproductive technology, it is not generally undertaken till an exhaustive evaluation of infertility has been made. This is because it is expensive, time consuming and has complex series of procedures with more risks than other assisted reproductive

[224] Centres for Disease Control and Prevention, "Infertility FAQs", available at https://www.cdc.gov/reproductivehealth/infertility/index.htm (accessed 24 October, 2018).
[225] T. Zhu, "In Vitro Fertilization", *The Embryo Project Encyclopaedia*, available at https://embryo.asu.edu/pages/vitro-fertilization (accessed 7 March, 2018).

technology procedures. One noteworthy risk is multiple births i.e. a pregnancy with more than one foetus which carries a higher risk of early labour and low birth weight in the child. The procedure is recommended for similar reasons as provided above for artificial insemination.

2.0. ETHICAL AND LEGAL CONSIDERATIONS

Assisted reproductive technology has been a source of moral, ethical, and religious controversy since its inception. The legal and ethical controversies are somewhat intertwined. Religiously, assisted reproductive technology, particularly in vitro fertilisation, has been rejected on four premises: destruction of human embryos not used in implantation which would amount to waste; the question of playing God in the creation of humans; possibility of in vitro fertilisation by a donor other than the husband thus removing reproduction from the marital context as ordained by God; and the severing of an essential connection between the conjugal act and procreation.[226] Morally, unresolved issues lie as to the freezing of eggs, sperms, or embryos for future pregnancies. Many of the moral and religious controversies have overtime become resolved or suppressed. However, with the evolution of assisted reproductive technology, ethical and legal concerns are equally evolving.

The mere fact that in vitro fertilisation is technologically possible does not make it entirely ethical. While the result of IVF is rewarding for the parents and medical practitioners, the ethical concerns cannot be swept under the carpet. These concerns were expressed by Dr Patrick Steptoe and Dr Robert Edwards, the pioneers of the in vitro fertilisation technique. Their primary concern is the question of what happens to excess fertilised human embryos not needed for the purpose of achieving pregnancy. They aver that implanting all fertilised embryos in the

[226] Available at https://www.britannica.com/science/in-vitro-fertilzation (accessed 28 October, 2018).

host mother might be unsafe, thus raising another question of whose safety must be given primacy.[227]

Debates on IVF and other assisted reproductive technology procedures are often clouded by diverse ethical value systems and deep prejudices. [228]

Ethically, concerns revolve around the following areas: commodification objection; absence of definition of initiation of life; and foetal reduction.

2.1. Commodification Objection

The commodification objection arises in virtually every controversy pertaining to the use of in vitro fertilisation. It has been argued that the control over fecundity may result in a change in perception of children by the parents, a situation where they are now considered as a possession instead of a gift. IVF turns children into commodities, particularly in jurisdictions where the sale of embryos is permissible. The sale of embryos or gametes strengthens commodification, objection and other ethical concerns. In the use of the procedure, often, the genetic parent otherwise known as the donor may be different from the gestational parent. Ethically, such donors are required to participate voluntarily, free from any coercion or financial reward. The concept of commodification, "buying or selling" of human gametes or a fertilised embryo, is inherently immoral. Nonetheless, oocyte donors are paid. A move that is frowned upon, some have expressed concerns that financial compensation may lead to exploitation, as women may proceed with the

[227] Hon Mr Justice M.D. Kirby, "Bioethics of IVF- The State of the Debate" (1984) 1 *Journal of Medical Ethics,* 45-48.
[228] A. Banerjee, "An Insight into Ethical Issues Related to In Vitro Fertilization" (2006) 6 *The Internet Journal of Health,* available at www.ispub.com/IJH/6/1/4581(accessed 31 October, 2018).

donation against their own best interest given inherent medical risks involved.[229]

Legally, the question further arises as to what extent the anonymity of the donor should be preserved. These questions and concerns remain unresolved and will certainly remain an issue of debate in the field of Assisted Reproductive Technology.

2.2. Fertilisation or Implantation: When Does Life Begin?

At what point does life begin? Does life begin at fertilisation? Does life begin upon implantation? Does life begin at birth?

The first three questions are particularly important in the use of IVF. IVF cycles often result in couples transferring several embryos and cryopreserving other embryos produced by the cycles, presumptively for the purpose of future pregnancy. However, in many instances, these surpluses are never used by the genetic parents.[230] This raises another fundamental question: What happens to the excess embryos? The question remains one of ethical, moral and even religious concern. The treatment of excess embryos puts a question mark on the sanctity of life. If the second question raised above is answered in the positive, then in vitro fertilisation is merely experimentation upon a human being, and due process and regulation required for the same should be complied with. In the same light, the discarding of excess embryo is ethically unsettling and inherently immoral as it would amount to a waste of human life. However, where the second question is answered in the negative and the third in the positive, the discarding of excess embryo would not constitute a waste of human life as they would be mere laboratory artefacts. The writer

[229] A.D. Levine, "The Oversight and Practice of Oocyte Donation in the United States, United Kingdom and Canada" (2011) 23 *HEC Forum,* 15-30.

[230] Paul R Brezina and Yulian Zhao, "The Ethical, Legal, and Social Issues Impacted by Modern Assisted Technologies", available at https://www.hindawi.com/journals/ogi/2012/686253/#B39 (accessed 1 November, 2018).

submits that life begins from conception or fertilisation, and should be respected in the use of IVF. The European Group on Ethics and New Technologies' argument that the creation of embryos for research purpose alone raises serious concerns since it represents a further step in the instrumentalisation of human life supports this position.[231] While this argument pertains primarily to embryos created for the purpose of research, the arguments proffered by the group might indeed be a reflection that life begins upon fertilisation.

The use of excess embryo for research purposes remains one of four possible fates of the excess embryos. Excess embryos are often thawed or discarded; donated to research; frozen or stored indefinitely; or donated to other couples for implantation.[232] If life indeed begins at conception, whether the embryos are discarded, donated to research, indefinitely stored or even sold, the treatment of excess embryos questions the sanctity and value of life.

2.3. Foetal Reduction

One of the downsides of using assisted reproductive technology procedures, particularly IVF, is the high probability of multiple pregnancies which can in turn become a challenge for the mother and babies. Multiple births carry a higher risk of low birth weight in the child and early labour which could result in lifelong health challenges for the child such as cerebral palsy, mental retardation, and vision and hearing loss.[233] It also increases the likelihood of a miscarriage or a still birth. To reduce the chances of the above listed, gestational parents are forced to make a tough decision to increase the chance of getting a living healthy baby. Foetal

[231] Kristina Hug, "Motivation to Donate or Not Donate Surplus Embryos for Stem-Cell Research: Literature Review" (2008) 89 *Fertility and Sterility.*

[232] M.S Paul, R. Berger, E. Blyth, and L. Frith, "Relinquishing Frozen Embryos for Conception by Infertile Couples" (2010) 28 *Families, Systems and Health,* 258-273.

[233] "What Is Multifetal Reduction?" available at https://www.webmd.com/infertility-and-reproduction/fertility-multifetal-reduction (accessed 1 November, 2018).

reduction is necessary to protect a live birth and mitigate the risks associated with existing multi foetal pregnancies; the procedure lowers the number of foetuses to improve chances of a healthy pregnancy. The procedure is carried out during the first trimester while the foetuses are still in separate fluid-filled pouches. A needle containing a special drug is injected into a pouch or pouches; the drug stops the foetus's heart. While this procedure is safe and necessary to preserve the health of the mother, it is nonetheless a fairly efficient method of abortion.[234] Despite being an acceptable and approved method of improving maternal and foetal outcome in high order multiple pregnancies, there remain many unresolved medical and ethical dilemmas surrounding the procedure. The arguments that have emerged in the abortion debate are similarly deployed in favour or against foetal reduction.[235] If life begins at fertilisation, the foetal reduction would constitute a wilful termination of human life. This, like other ethical concerns, remains unresolved; however, many states in a bid to address this have stringent regulations limiting the number of embryos that can be transferred during an IVF procedure. In the United Kingdom for instance, regulations are in place limiting the transfer of only two embryos per IVF cycle, thus resulting in a nearly 10% decrease in multi foetal pregnancies.[236]

3.0. THE LEGAL QUANDARY

Legally, a plethora of concerns similarly exist, and these legal disputes like the ethical concerns remain unresolved. Some of them include:

a) The legal definition of a parent, particularly where the gestational and genetic parents are different resulting from the use of ART;

---

[234] *Supra* note 228.

[235] Maxwell J. Smith, "Ethical Considerations for the Reduction of Multifetal Pregnancies" available at http://www.royalcollege.ca/rcsite/documents/bioethics/ethical-considerations-for-reduction-multifetal-pregnancies-e.pdf (accessed 1 November, 2018).

[236] *Ibid.*

b) Custody of frozen embryos upon legal separation of genetic parents;

3.1. Battle of Parenthood: Gestational or Genetic Parents

Common law and various legislations are struggling to keep up with the constant evolving nature of assisted reproductive technology as well as the many possibilities arising from the use of the same, particularly where a child can be born with no biological relationship with its gestational parent through the use of in vitro fertilisation. Similarly, situations exist where children are borne by the same gestational mother and still bear no biological ties; conversely, children can be borne of two separate gestational mothers and yet be full genetic siblings.

The possibilities are endless, and concomitant with the endless possibilities are the endless legal issues. The law can in fact be described as being in a quandary; courts in various jurisdictions are faced with interesting family disputes arising from the use of these procedures. The most popular of these disputes is the need to clearly define who the legally recognised parent of the child is, predominantly, where the gestational and genetic parents are separate entities.

In 1999, Justice Diane S. Lebedeff of the State Supreme Court in Manhattan was faced with such dilemma in the popular case of *Perry Rogers* v. *Fasano*[237] where she had to preside over a matter stemming from an embryo mix-up at a fertility clinic. The case revolved around the custody of an 8-month-old boy, Akiel. The embryo with the genetic material of the plaintiff and her husband, Robert Rogers, had been accidentally implanted in the uterus of the defendant. This mistake which amounts to a case of gross medical negligence was discovered and both parties were informed approximately one month after the implantation of the

[237] *Perry Rogers* v *Fasano*, available at https://caselaw.findlaw.com/ny-supreme-court-appellate-division/1366796.html (accessed 7 March, 2019).

embryos. Immediate actions could however not be taken as the defendant, Donna Fasano, had simultaneously been implanted with an embryo with the genetic material of the Fasanos. Months after, the defendant gave birth to two children, one child was white, being the biological child of the Fasanos; the other child was black and was later proven to be the biological child of the plaintiff. The genetic parents, the Rogers, were legally recognised as the child's parents and custody of Akiel was subsequently granted to the plaintiffs.[238] It was further added that in compliance with the statute of New York domestic relations, the defendant had no visitation rights. This interesting case has been cited in many cases with similar facts and receives little criticism. However, it is harder for the court to follow this principle where the surrogate is also the genetic parent. This occurs in cases of traditional surrogacy. Since most jurisdictions recognise the genetic parent as the legal parent, the court is left in a quandary when a genetic parent is also the gestational parent. This is illustrated in the case of *Re Baby M* where the legal parentage was in question. The Sterns who were seeking custody of Baby M had entered into a contract, which was later held to be unenforceable, with Ms Mary Beth Whitehead. Through artificial insemination, Mr Stern's sperm was inserted into Ms Mary Beth Whitehead, thus making her a traditional surrogate. The terms of the contract required Ms Whitehead to relinquish parental rights of the child in favour of Mrs Stern. However, at birth, she refused to comply with the terms of the contract and sought to keep the child which resulted in the eventual kidnapping of Baby M.

The court held that the contract was invalid on the ground of public policy and went on to add that Ms Whitehead was the child's legal mother; however, the dilemma of who obtained custody of the child remained unresolved. Custody of the child was subsequently awarded to the genetic father, Mr Stern using the "best interest of the child" approach.

[238] Available at https://nytimes.com/1999/07/17/nyregion/biological-parents-win-in-implant-case.hml (accessed 7 March, 2019).

The court stated public policy as the rationale for her decision. It held that the contract valued the father's parental rights above the mother's parental rights and parents ought to have equal rights. In addition to this, the court averred that the surrogate got very little legal and psychological counselling thus leaving her open to exploitation which remains an ethical and moral concern. Conclusively, they added that the payment made to the surrogate compromised her judgment and might have also amounted to exploitation. This case is particularly interesting and relevant in highlighting the many legal and social issues that could arise from the use of assisted reproductive technology.

Conversely, in the recent *RE G (Children)* case,[239] the court held a different position. The genetic mother of the twins in question was not legally recognised as a parent in accordance with the statutes relevant to fertilisation and embryology. In this case, the genetic mother and gestational mother used to be partners in a homosexual relationship. The respondent (gestational mother) unable to conceive using her own eggs sought voluntary donations from her partner (appellant). The appellant donated her eggs, which were in turn fertilised using the sperm from an anonymous donor. The embryos were subsequently implanted in the respondent which produced the twins whose legal parentage was in question. The embryos remained and one was implanted in the appellant producing a daughter, D. Genetically, the appellant is the mother of all three children, who are biologically full siblings with the same father.[240] The Court however ruled in favour of the respondent, holding that in law, the appellant is only D's mother, and is not recognised as the mother of the twins by virtue of *Section 27(1) of the Human Fertilisation and Embryology Act, 1990*.[241]

---

[239] [2014] ECWA.

[240] R. English "Gestational Parents, Non-Genetic Mothers, Siblings with Different Mothers: Family Law in Quandary", available at https://ukhumanrightsblog.com/2014/03/30/gestational-parents-non-genetic-mothers-siblings-with-different-mothers-familiy-law-in-quandary/amp/ (accessed 2 January 2019).

[241] *Supra* note 237 per Black L J, para 5.

The court is frequently faced with a surplus of family law issues as the examples discussed above, borne out of the use of various assisted reproductive technology procedures, and while the various laws are constantly amended to deal with these challenges, it appears as though science would always be a step ahead, primarily in the determination of legal parentage. The battle of parenthood might indeed be insurmountable.

3.2. Control of Embryos in a Divorce

Modern technology alongside the use of IVF has created a world where a child can be conceived, yet not born into the world until several years later. The high cost and risks involved in the use of in vitro fertilisation often results in couples producing more than one embryo. However, on account of the risk multiple births bear and individual choices of the parents, typically, only one embryo is implanted. Embryos not implanted are subsequently frozen, and while frozen technology has advanced appreciably, thus reducing the ethical concerns surrounding the freezing of embryos, it has caused an increase in legal disputes relating to parental rights. Particularly, the question of what happens where the parents are separated after the conception of the embryo but before its birth. The recent judgment by the Ontario Supreme Court of Justice in *S.H* v. *D.H*[242] is relevant in establishing that embryos are property.[243] In addition to this, the court must also decide whether such embryos should be destroyed or preserved for future use by any of the parents who ought to have equal parental rights to the embryo.

There are no hard and fast rules that apply; nevertheless, if the court for equitable reasons allows the preservation of the embryo for use by one of the parents, it raises further questions which call for clarification. One question is whether or not the parent wanting to destroy the embryos is under any obligation upon the preservation and eventual use of the embryos, mainly financial

[242] S.H. v D.H., [2018] ONSC 4506.
[243] In the same light, the court in *McQueen* v *Gadberry infra* note 244 described embryos as a "special-quality marital property".

obligations including child support. This question among others would result in excess litigations and unending appeals.

Findley v. *Lee*[244] proves instructive on this subject; the San Francisco case, held in late 2015, revolved around the fate of embryos created using the plaintiff's sperm and the defendant's retrieved ova. After the separation, the defendant who had been diagnosed with cancer sought sole ownership of the embryos claiming it was the only means of producing a genetic child. The plaintiff refused this vehemently; he averred that allowing the preservation and use of the embryos would impose moral and financial obligations on him. The court in allowing this argument ruled in favour of the genetic father, and the embryos created could not be used. In arriving at this decision, the court relied on the consent form signed at the fertility clinic where both parties agreed that the embryos created be destroyed if they got divorced. This case and many others may have imbedded in the courts' reasoning the solution to the embryo custody cases.

The solution to these legal disputes might be the drafting and signing of solidly written enforceable contracts, and while this may appear illogical and uncomfortable at the time the embryos are being created, it is important to consider the possibility of severed future relationships and its impact on the embryos created. The drafting of a contract might seem tedious, and sentiments may hinder couples from doing so; in any case, fertility clinic forms should be treated as binding and enforceable contracts, and in the absence of other legal documents, the court may consider them in establishing the parties' intent at the time of contracting.[245] This is illustrated in *McQueen* v. *Gadberry*[246] where the consent form provided at the fertility clinic stated explicitly that in event of divorce, all frozen genetic material would belong to the wife. The court relied on this form as evidence of the parties' intentions at the time of making the contract, thus making it enforceable

[244] *Stephen E. Findley* v *Mimi C Lee*, (FDI-13-780539).
[245] *Ibid.*
[246] 507 S.W.3d 127 (2016).

despite the defendant's constitutional right not to be forced to have children against his will.

This interpretation of agreements memorialising the parties' wishes is one of the approaches the courts may consider in resolving disputes surrounding the disposition of embryos. Where there is no agreement memorialising such wishes, the court weighs the interests of parties.[247] This is clearly demonstrated in *Davis* v. *Davis*[248] where the divorced couple disputed over the custody of their frozen embryos with no contract or consent form completed during the IVF process. The man wished to discard the embryos while the woman sought to donate the embryos. In resolving this dispute, the court applied the "balancing interests approach"[249] and found the man's interest in preventing the birth of the embryos outweighed the woman's interest in donating the embryos.

Like the battle of parenthood, the law remains in a quandary when the question of control of embryos arises in the event of divorce. Developed states are making attempts to resolve these disputes through statutes which would direct the courts. An example is the Arizona Parental Right to Embryo Bill (SB 1393) proposed in January 2018. This Bill requires courts to award in vitro fertilisation embryos to the spouse that intends to allow the embryos to develop to birth, and in cases where both spouses want the embryos to develop to birth, the court would resolve the dispute in a manner that provides the best chance for the embryos to develop to birth.[250] While the Bill seems like a step in the right direction in providing clarity and reducing the dilemma faced by the courts, it is criticised for belittling the freedom to contract as it would overrule contracts signed by the parties. A

[247] A. El-Zein, "Embry-Uh-Oh: An Alternative Approach to Frozen Embryo Disputes", (2017), 3 *Missouri Law Review*, 16.
[248] 842 S.W. 2d.
[249] This approach was similarly used in *Reber* v *Reiss* where the woman's interest in using the embryo in producing what was likely her only chance at genetic parenthood overweighed the man's interest in not procreating.
[250] https://rewire.news/legislative-tracker/law/Arizona-parental-right-embryo-bills-sb-1393/ (accessed 11 January, 2018).

lawmaker, Senator Steve Farley, averred that the Bill would unnecessarily insert state government into not just a personal relationship but matters already settled by contract. He added that the legislature should not come between a woman, her doctor, her faith and family.[251]

The legal disputes surrounding the use of in vitro fertilisation remain unresolved despite attempts by lawmakers and members of the judiciary to lay stringent principles to regulate the same. The seemingly insuperable challenges if left unresolved might dissuade parties from considering IVF or other ART procedures.

4.0. CONCLUSION

Parties exploring the use of IVF and other ART procedures are often not exposed to the numerous underlying unresolved ethical and legal issues, which are inextricably linked.

While the techniques are beneficial to couples who may otherwise remain childless, the ethical concerns raised above cannot be completely ignored. In the same light, it is precarious to pay no attention to the legal disputes which have up to this moment proven to be insurmountable. These issues have questioned the purpose of ART, making it appear counterproductive for causing chaos in an attempt to resolve a medical problem. Assisted Reproductive Technology is a double edged sword, one that must be handled with extreme caution in the form of stringent regulations, and while a consensus cannot be achieved, it is important that the sanctity of life is protected.

[251] "New bill addresses fate of couples' embryos in case of divorce", available at https://azdailysun.com/news/local/new-bill-addresses-fate-of-couples-embryos-in-case-of/article_9073473c-fcaf-5278-b99e-fd6a75d3247b.amp.html (accessed 11 January, 2018).

INTERNET DATA IN NIGERIA: MAXIMISING THE DIGITAL ECONOMY FOR DEVELOPMENT

Adaobi Oni-Egboma*

ABSTRACT

In a fast-paced world, the ease of access to information has become popular and fundamental. Many individuals see internet data as more than a mere necessity but "life". Informational data is currently generated at a faster rate than it has ever been with most countries now boasting of a number of 4G networks. As dissemination increases, 4G and potentially 5G is fundamentally altering the institutional landscape by driving changes in innovation and ushering in high contenders into various sectors of the digital economy. However, despite the beauty afforded by internet data, many African telecom operators continuously struggle to find a balance between affordable pricing for internet data and service profitability. The Nigerian internet data service provision landscape suffers from fundamental issues ranging from data usage, high cost of internet data to poor quality of internet data services. This paper examines the evolution of Nigerian data service provision with a key focus on the telecommunications industry and how existing and new entrants need to ensure efficient provision of data services to prospective and existing customer.

1.0 INTRODUCTION

As already recognised, an increasing number of the world's population have adopted mobile cellular network as their primary means of accessing the internet and invariably, this has resulted in a daily increase in demand for mobile network services. As it stands, the telecoms industry is regarded as one of the fastest growing in the world and the largest on the African continent with an estimated value of around ₦9.7 trillion.[252] In Nigeria, the

* Adaobi Oni-Egboma is an Associate at Kenna Partners.

[252] Ilamosi Ekenimoh, Overpriced: 'Why Nigerians pay so much for data' (Stears, 11 April, 2019), available at

mobile infiltration rate has steadily increased over the last 10 years to 103.91% with a total active subscriber base of 145.5 million.[253] Based on these statistics, it evident that considerable focus particularly with regards to mobile data has become necessary to keep pace with the demands of a fast-paced and rapidly evolving world.[254] Consequently, in assessing the current issues with affordability and accessibility to internet services significant recourse must be given to current operating models within the telecoms industry in the country.

Ostensibly, consumer-driven data consumption has been fuelled by the rapid increase in mobile and broadband services. In Nigeria, the number of internet users increased to more than 111.6 million in December 2018 according to the Nigerian Communications Commission (NCC). [255] This figure is projected to grow to 187.8 million internet users by 2023 if current internet data consumption levels remain steady.[256] Currently, data trends demonstrate a strong growth outlook for the Nigerian smartphone market with a forecast increase of more than 140 million by 2025.[257] Not only is rapid population increase bound to play a role, business trends also point to an increasing influence of SAAS (Software As A Service) applications like Instagram, Twitter, Facebook, Uber, Bolt, Apple Music which have made the everyday

---

https://www.stearsng.com/article/overpriced-why-nigerians-pay-so-much-for-data, (accessed 11 May, 2019).

[253] B.M. Kuboye, "Evolution of Broadband Network Performance in Nigeria" (2017) 10 Int. J. Communications, Network and System Sciences, 199-207.

[254] *Ibid*.

[255] 'Nigeria's internet users hit 111.6m in December 2018 – NCC' *Premium Times* (Nigeria, 5 April 2019) https://www.premiumtimesng.com/news/more-news/306996-nigerias-internet-users-hit-111-6m-in-december-ncc.html (accessed 8 May, 2019).

[256] Statista, "Number of Internet Users in Nigeria from 2017 to 2023", available at https://www.statista.com/statistics/183849/internet-users-nigeria/ (accessed 8 May, 2019).

[257] Statista, "Number of Smartphone users in Nigeria from 2014 to 2025" https://www.statista.com/statistics/467187/forecast-of-smartphone-users-in-nigeria/ (accessed 8 May, 2019).

individual more reliant on internet data.[258] Accordingly, there is no debate that in the next few years, data will become not only indispensable but also a fundamental necessity for survival in an increasingly globalised world.

The impact of e-commerce on the rate of internet acceleration cannot also be overlooked, with companies such as amazon and PayPal illustrating daily the importance of internet access for day to day transactions. Nigeria's e-commerce market value is estimated to increase to an outstanding N15.4 trillion over the next 10 years.[259] Nonetheless, it is apparent that the huge success of mobile phones in data connection has put the telecommunications industry at the forefront of this emerging digitalized economy.

2.0 IMPORTANCE OF INTERNET DATA TO THE DIGITAL ECONOMY

The digital economy also referred to as the "Internet Economy", "New Economy" or "Web Economy" is essentially the economic activity that results from billions of everyday online connections among people, businesses, devices, data, and processes.[260] The backbone of this digital economy is hyper connectivity which means the growing interconnectedness of people, organisations, and machines that results from the Internet, mobile technology and the internet of things (IOT). This economy is gradually taking shape and undermining conventional notions about how businesses are structured; how firms interact; and how consumers obtain services, information and goods. The digital economy consists of various components, key among which include the government; policy and regulation; internet, electricity

[258] *Supra* note 252.
[259] *Ibid*.
[260] Deloitte, "What is the Digital Economy: Unicorns, Transformation and the Internet of Things", https://www2.deloitte.com/mt/en/pages/technology/articles/mt-what-is-digital-economy.html (accessed 19 July, 2019).

infrastructure; telecommunication industry; digital service providers; e-business and e-commerce industry; research and development and emerging technologies. The internet undoubtedly will be at the core of the promotion of businesses and innovation within thus economy. Access to information and effective communication will daily illustrate the immense opportunities afforded by an increasingly interconnected world. Accordingly, it is undisputed that the internet is a fundamental player has been crowned as the central component of this novel economy.

However, in analysing internet data across the country, as earlier stated, it appears that most Nigerians struggle with three fundamental problems, assessing the rate at which internet data is used up, the quality of the data provided and the cost of internet data. Putting this into perspective, the country was recently ranked 75th out of 77 nations on the quality of 4G networks.[261] The reason for which has been attributed to the fact that 4G/LTE is relatively new to the country and the present infrastructure is inadequate to optimize the benefit it affords. Although there has been an increase in the 4G network services particularly by companies such as Airtel and newer entrants such as MTN, it is arguable that infrastructural barriers need to be tackled in order to ensure efficient data service provision. In relation to broadband penetration it is estimate that the country is currently at 33% and the NCC estimates 70% penetration by 2024 at the current rate.[262]

On the continent, the cost of internet data might generally be an issue that has infrastructural deficits and lack of regulation at the

[261] "Nigeria ranks 75th out of 77 nations on the quality of 4G networks", (Nation Daily Newspaper, March 4, 2019), available at https://nationaldailyng.com/nigeria-ranks-75th-out-of-77-nations-on-quality-of-4g-networks/ (accessed 14 May, 2019).

[262] "NCC: Nigeria to Hit 70% Broadband Penetration by 2024" (THISDAY, 21 March, 2019) https://www.thisdaylive.com/index.php/2019/03/21/ncc-nigeria-to-hit-70-broadband-penetration-by-2024-2/ (accessed 14 May, 2019).

core of the problem. For instance, 1GB in Nigeria at $2.78, $2.33 in Rwanda and $3.63 in Ghana this is in comparison to $0.26 in India and $0.51 in Ukraine.[263] In analysing the cost of Nigerian data although significant strides have been made, the Affordable 4 All Initiative which is a union of institutes from diverse sectors all over the world working to cut down broadband prices and increase access to affordable internet has called on countries to endorse the sale of 1 GB at not more than 2% of an individual's monthly income, what is also referred to as "1 for 2".[264] In particular, they put forward the argument that a significant proportion of the world population still find internet services expensive. Bringing this home to Nigeria by relying on the current minimum wage in country and the present standard of living it is arguable that the average Nigerian should be entitled to spend no more than ₦1000 for unlimited data for a month. Apparently, many telecoms companies have viewed internet services as a means of recouping costs that have been lost to platforms such as Skype, FaceTime and WhatsApp. As many users nowadays utilise mobile data for text and calls which has slowly eradicated the need for traditional calls and text using mobile networks. Accordingly, the quest for less expensive data has become a major priority for the majority of Nigerians while for those who can afford it quality and accountability for internet data used is major problem which needs to be rectified.

Speed test global index statistics in 2018 ranked Nigeria as 108th in the World on Mobile internet speed at a download speed of 10.04 Mbps and upload speed of 9.35 megabytes per second.[265]

---

[263] *Supra* note 252.

[264] Tobiloba Fadoju, "Without Proper Implementation, Nigeria's Endorsement of Affordable Internet Initiative is Insignificant" (Tech point Africa, 15 February, 2017) https://techpoint.africa/2017/02/15/implement-affordable-internet-nigeria/ (accessed 14 May, 2019).

[265] Juliet Umeh, "Universal Access: Nigerians Access Internet at Great Cost", (Vanguard, 20 June, 2018), available at https://www.vanguardngr.com/2018/06/universal-access-nigerians-access-internet-great-cost/ (accessed 14 May, 2019).

This is relatively low when compared to other countries across the continent such as Morocco (72nd), Egypt (85th), Kenya (87th) and Cote d'Ivoire (105th)[266]. An analysis of these figures will show that the government needs to offer higher incentives for increased investments into the telecoms industry predominantly in rural areas which are often neglected. Such areas which particularly have restricted access to banks could benefit from Africa's thriving fin-tech and mobile payment markets. More importantly, digital players such as taxi apps and e-commerce merchants have become increasingly reliant on the need of good quality data for business survival.

3.0 THE LEGAL AND REGULATORY FRAMEWORK

The *Nigerian Communications Act* (NCA),[267] while making mention of the establishment of a regulatory framework for all aspects of communication in Nigeria,[268] does not make specific mention of data or the internet. This may be attributable to the age and concern of the Act. The NCA was passed in 2003, with the main aim of privatising the industry and providing effective voice communication lines. The NCA however enables the Nigerian Communications Commission (NCC) to make relevant guidelines and regulations to supplement the Act,[269] which is the basis of the regulations created by the NCC on the subject matter.

Established in 2003 through the NCA, the NCC is the primary regulator of the Nigerian telecommunication industry and its powers and roles derive from the Act. The functions of the NCC are detailed under *Section 4 of the NCA* and they include facilitating entry into the communications industry, protecting consumer interests against unfair practices, licencing, protecting competition in the industry and encouraging infrastructure sharing, creating and monitoring industry standards, and making and enforcing

[266] *Ibid*.
[267] *Nigerian Communications Act*, No. 19, 2003.
[268] NCA, Section 1(b).
[269] NCA, Section 4(1)(i).

regulations. *Section 104 of the NCA* states that all service providers shall, in respect of their specific services meet such minimum standards of quality of service as the Commission may from time to time specify and publish; deal reasonably with consumers; and adequately address consumer complaints. *Section 106(3) of the NCA* further states that a consumer code prepared by a consumer forum, shall include model procedures for reasonably meeting consumer requirements; the handling of customer complaints and disputes including an inexpensive arbitration process other than a court, and procedures for the compensation of customers in case of a breach of a consumer code.

In the 16 years of its existence, the NCC has established itself as a leading communications regulator in Africa, with an extensive body of work spanning different aspects of the industry and steering it to successes. In line with its power to create guidelines, the NCC has issued several key guidelines relevant to the industry, including the Guidelines on Spectrum Trading, 2018, Guidelines on SIM Replacement, Guidelines on Advertisement and Promotions, Guidelines for Dispute Resolution, and Guidelines for Provision of Internet Services.[270] On licencing to telecoms in particular, the NCC is charged with the roles of issuing licences and imposing conditions on the issue, consulting with licensees on the impact of regulations on their operations, inspecting licensees' books of accounts, and determining new services eligible for licencing.

The Commission also makes determinations as to compliance with laws and regulations by telecommunication service providers. This is an offshoot of its role of monitoring and ensuring compliance in the industry. It has the exclusive jurisdiction in

[270] NCC, "Regulatory Functions", https://www.ncc.gov.ng/9-licensing-regulation/regulatory-functions, (accessed 13 May, 2019).

determining and ensuring compliance with competition laws as they relate to the telecommunications industry.[271]

Since the rise of the provision of internet services as a mainstay of the industry, the NCC has created and implemented measures to improve the quality of internet services and customer satisfaction.[272] It has created programmes aimed at promoting consumer welfare and fined service providers for failing to meet Key Performance Indicators, and has made clear its position to use necessary sanctions to facilitate performance.[273] In acting on its role to protect consumer welfare, the NCC created a Consumer Portal which addresses complaints about service providers and consumer complaints. The Commission has also enacted Consumer Protection Guidelines. Despite this, there is still pervasive outcry against internet services and rates in Nigeria. Thus, it does not seem like the NCC is optimally fulfilling its role on consumer welfare when it comes to internet service providers and their quality and rates of service to consumers.

The primary document from the NCC in relation to internet data is the Guidelines for the Provision of Internet Services. However, this mainly addresses licencing, with allusion to the NCC Code of Consumer Practice that all internet service providers must comply with. The Guidelines fail to adequately provide an avenue for proper regulation of internet data provision by telecommunication industries particularly regarding the quality and quantity of data provided.

Nonetheless, the Code of Consumer Practice is part of the consumer protection system of the NCC and serves as the legal basis for possible action by the NCC and consumers, as well as standards that service providers are held to and requirements

[271] Section 90 of NCA.
[272] The Punch, "The impact of NCC's regulation on ICT development", available at https://punchng.com/the-impact-of-nccs-regulation-on-ict-development/, (accessed 13 May, 2019).
[273] *Ibid*.

they must comply with. There must be an important means of ensuring that a significant proportion of the consumer base is able to hold service providers to a higher level of accountability particularly with how data is utilised. There is no decision or determination concerning data usage and data rates as given by service providers listed by the NCC.[274]

The NCC also provides for the Quality of Service Regulations, 2012 which is primarily geared towards monitoring the services provided by Licensees. In particular, it details KPIs and threshold targets by which end users can assess the service provided. Some of these KPI factors include fault repair time, poor service connection, and loss of data service provision time amongst others. A Consumer Affairs Bureau was also established and charged with ensuring, through adequate information publication the protection of the rights, privileges and interests of telecommunications consumers and stakeholders. The Bureau is also required to collaborate with Consumer advocacy groups, facilitate direct interaction between telecoms service providers and telecoms service consumers, creating avenues of redress for dissatisfied consumers, and the development of effective policies and strategies that promote telecoms service delivery and improve consumer satisfaction. It also oversees the NCC Consumer Web Portal which provides consumers with the opportunity to air grievances particularly in relation to internet service provision. These include fluctuating service, renewal of service, internet speed/bandwidth, disconnection of internet service and low connectivity. After analysing where your complaint is classified, there is an online complaint submission form where the consumer can input their name, the date they first contacted their service provider and the outcome. However, it appears that the unpopularity of the service is two-fold, on the one hand many consumers could argue that they are unaware that such services still operate and on the other hand others might

[274] NCC, "Determinations", available at https://www.ncc.gov.ng/licensing-regulatory/legal/determinations, (accessed 13 May, 2019).

doubt the efficiency of the reporting system. The tables below provide a more detailed guide of how the complaint process is handled.

Internet Service	F1	Fluctuating service
	F2	Renewal of service
	F3	Internet speed/Bandwidth
	F4	Disconnection of internet service
	F5	Low connectivity
	F50	Others (please specify)

Steps	
1	Contact your Service Providers via the Call Centre, Help Line, E-mail, Facebook, Twitter, SMS or Walk into your service provider's contact or friendship centre or shop, lodge your complaints and collect your complaint ticket identity number (Ticket ID)
2.	Wait for the resolution time given to you by your Service Provider to elapse

3.	If your complaint is unresolved or you are dissatisfied with the resolution.
4	Call 0800 Call NCC (0800 2255 622), Use our online Complaint Form or send an EMAIL to: consumerportal@ncc.gov.ng with your ticket ID to lodge your complaint(s)
5	NCC Contact Centre will forward your concern(s) to your Service Provider for resolution

4.0 CHALLENGES AFFECTING INTERNET DATA IN NIGERIA

The current challenges plaguing internet service provision in Nigeria include following:

I. Lack of proper Accountability Measures;
II. NCC complaint framework is not properly developed and advertised;
III. Expenses in running telecoms filter down to prices primarily due to the poor infrastructural environment prevalent within the country;
IV. High Operational costs such as unreliable power supply has led to more money being expended on diesel and generators, also issues of vandalism constantly reinforce the need for fibre optic cables. Telecoms tower

maintenance have increased from $80 million to about $104 million[275];

V. Lack of policy framework geared strategically towards broadband infrastructure development.

The government needs to progress beyond licenses to eliminating these barriers which are key impediments to smooth network operations. Nevertheless, tech entrepreneurs such as Kendall Ananyi the owner of *Tizeti*, are changing the status quo and have shown that affordable internet service provision is indeed possible. Not only is the company able to provide affordable internet at less than ₦10,000 for a month, the internet data is unlimited with no cap on the activities that can be carried out. The goal of the company is to connect over 10 million people over the next five years.

5.0 BENEFIT OF IMPROVED REGULATION

There is an increasing recognition of the relationship between online access and economic growth.[276] Taking into consideration that Nigeria is now the poverty capital of the world and with more than half of the population living on less than a $1.90 per day,[277] it is arguable that government need to offer more incentives to reduce the price of data whilst still making it profitable to telecoms. Although ISPs can argue that the price of internet services particularly mobile data services is relatively cheap in comparison with other countries, the standard of living within the country evidently makes internet data a luxury rather than a necessity for many individuals. Thus, the issue of reducing data will need to address critically not only how much the data

[275] *Supra* note 252.
[276] Ken Nwogbo, "Nigerians swim in unreliable expensive broadband internet" (The Guardian, 26 October, 2018) https://guardian.ng/business-services/communications/nigerians-swim-in-unreliable-expensive-broadband-internet/ (accessed 14 May, 2018).
[277] *Supra* note 252.

costs but also how much the data will cost relative to monthly income.

The importance of Nigeria paying adequate attention to reforming the current state framework is premised on the fact that any country with an inadequate data service provision network is more likely to be left out of the fourth industrial revolution. Recently, the Lagos Chamber of Commerce and Industry (LCCI) stated that the fourth industrial revolution has the 'digital economy as its fulcrum'.[278] The United Nations has even gone as far as hinting that internet access may soon be considered a basic human right.[279] Greater access to mobile data in particular will no doubt improve the quality of many businesses especially through marketing and advertising which in turn will have positive impact on the economy. The expectation of this new revolution will be an inevitable disruption in every industry which will reshape how individuals work, relate, communicate and learn, essentially reinventing institutions.[280] With the advent of 5G technology slowly gaining pace, Nigeria must fix inherent problems in its telecoms sector to make internet not only affordable but accessible.

6.0 RECOMMENDATIONS

The country can learn significantly from steps taken in other countries. For instance, in South Africa, the Independent Communications Authority of South Africa (ICASA) has announced new data usage regulations which will allow users receive notifications on their data usage and transfer data to other

[278] Lucas Ajanaku, "LCCI: take advantage of fourth industrial revolution" (NATION, 14 May, 2019) https://thenationonlineng.net/lcci-take-advantage-of-fourth-industrial-revolution/ (accessed 14 May, 2019).
[279] *Supra* note 252.
[280] EY Global, "Four things to know about the Fourth Industrial Revolution", available at https://www.ey.com/en_gl/digital/four-things-to-know-about-the-fourth-industrial-revolution (accessed 14 May, 2019).

users on the same efficiently.[281] This will increase transparency and ensure that there are more detailed accountability measures rather than the speculative assumptions most Nigerians have in relation to mobile data provision by telecoms.

More importantly, there needs to be an increased focus on the role of the telecommunications industry in particular the NCA and the role of the NCC. Regarding the former, an amendment is required to bring the legislation in line with the growing essentialities of the internet. Regarding the latter, the government needs to do a better job of ensuring that the NCC promote avenues such as the NCC Consumer Web Portal which serves as an effective and efficient platform for airing grievances and increasing accountability on the part of service providers. This can be achieved through increased publicity on the reporting functions available with the NCC Consumer Web Portal. This has to be done simultaneously with the establishment of new policy frameworks geared towards curing infrastructural deficits in the country particularly those that significantly trickle down to telecom prices such as high diesel and generator costs.

Lastly, the government needs to ensure that funding is given to start-up companies interested in data provision services such as *Tizeti* is fundamental as such companies have the vision to reduce the gap in accessibility to internet services.

7.0 CONCLUSION

There is no disputing the fact that the telecommunications industry in recent times has made commendable strides to keep up with the demand for faster and robust data services within the country. However, an assessment of current data service provision prevalent within the Nigerian economy illustrates that

[281] Neo Sesinye, "Icasa rolls out new regulations for data bundles" (IT NEWS AFRICA, 26 April, 2018), available at https://www.itnewsafrica.com/2018/04/icasa-rolls-out-new-regulations-for-data-bundles/ (accessed 14 May, 2019).

there is still room for improvement. The government and service providers must work together to facilitate an effective operation of data services across various parts of the country which will be driven by an increased focus on amending the existing framework and introducing new policies that actively deal with the infrastructural deficits affecting the industry. Overall an improvement in the overall framework will ensure that the country is well prepared to reap the benefits of a digitalised economy and be an active participant of this increasingly globalised world.

ALTERNATIVES TO ENSURING VOLUNTARY TAX COMPLIANCE AND AN INCREASE IN TAX REVENUE: AN EXAMINATION OF THE REWARDS BASED APPROACH, WITH A SPECIAL FOCUS ON THE LOTTERY SYSTEM

Funmilola Aliu*

ABSTRACT

In many countries, tax compliance mechanisms are fundamentally based on either or both of the following approaches: the deterrence approach, which aims to punish non-compliant taxpayers with audits, fines or criminal punishment; and the civic duty approach, which aims at appealing to a citizen's sense of moral obligation towards the State. Both approaches are effective but only to an extent, as many countries are still characterised by low tax compliance. However, a number of countries have begun to operate an entirely new and different approach towards ensuring tax compliance, and this is known as the "rewards based approach," which seeks to reward those who pay the right taxes at the right time. This paper seeks to examine the effectiveness of the approach in other countries, especially the Value Added Tax (VAT) lottery, and the practicality or otherwise of such an approach in Nigeria.

1.0 INTRODUCTION

It is often said that nobody pays taxes with a smile. However, this may largely be true with reference to the peculiarity of the Nigerian economy. In many civilised nations where higher income taxes are imposed on its citizens, these citizens do not complain rather, they are effortlessly tax compliant, some of them even wishing to pay higher taxes if they could. Now you may be asking yourself, while thinking of the corruption and ineptitude characterized with the Nigerian government, why would anyone want to give up so much of their hard-earned money to the government? The answer is quite simple. Citizens are more likely

to pay their taxes if they see that the government is actually utilising these taxes appropriately.

Using Sweden as a case study, it is one of the most heavily taxed countries in the world with its top marginal income tax rate at 61.85%,[282] and its standard VAT rate at 25% with reduced rates of 12% and 6% for food, accommodation rental, books, newspapers and other goods and services.[283] One can only imagine the outrage and inevitable high rate of tax evasion, if Nigerians were taxed at anything above 30% on their income, and 25% on VAT. It is normal to think that nobody in their right minds would pay such high tax but in reality, the Swedish are happy with the rate of taxes in their country. Unlike many other countries where paying tax is seen as something negative, many Swedes tolerate and even welcome high taxes, with a growing number willing to accept even higher taxes in return for a largely fair and well-functioning society, with decent public services and a universal safety net.[284] Sweden's total public spending is among the highest in the world, with a total expenditure of 27.1% of its total Gross Domestic Product (GDP) dedicated to its citizens' welfare, as at 2016.[285] Undoubtedly, it can be seen that the reason behind the popularity

---

* Funmilola Aliu is a 500 level student of the Faculty of Law, University of Lagos. She is currently an Executive Editor of the UNILAG Law Review, aliufunmilola@yahoo.com.

[282] "Sweden Personal Income Tax Rate," available at https://tradingeconomics.com/sweden/personal-income-tax-rate (accessed 18 December, 2018).

[283] "VAT in Sweden" available at https://www.avalara.com/vatlive/en/vat-rates/european-vat-rates.html (accessed 18 December, 2018).

[284] D. Wiles, "Why Swedes Are Okay with Paying Taxes" available at https://sweden.se/society/why-swedes-are-okay-with-paying-taxes/ (accessed 18 December, 2018).

[285] Thomas C. Frohlich, Michael B. Sauter and Evan Comen, "Countries with the Most Generous Welfare Programs," available at https://finance.yahoo.com/news/countries-most-generous-welfare-programs-110004319.html (accessed 18 December, 2018).

of the Swedish tax system is the presence of a well-functioning welfare scheme.[286]

However, in Nigeria, the reverse is unfortunately the case. Nigerians are well known for their mass apathy towards paying taxes, but then, a number of factors can be said to be responsible. Nigeria is virtually one of the most corrupt countries in the world, ranking 144 of the least corrupt nations out of 180 countries, according to the 2018 Corruption Perceptions Index reported by Transparency International.[287] Nigeria has also overtaken India to be the poverty capital of the world.[288] With the revenue the Nigerian government generates from oil and non-oil sources, one would expect that its citizens are, at least, well catered for, but the sad reality is that majority of Nigerians are living less than below the appropriate standard of living. In view of all these, it is not difficult to see the reason behind the high reluctance to tax compliance.

Simply put, Nigerians do not see the point of paying taxes, mainly because the taxes are not properly accounted for and utilised. If the government accounts for what taxpayers pay, then it would be a step in the right direction in ensuring voluntary tax compliance. The undesirable and passive attitude of the citizens will significantly reduce because they can now see how their money is being utilised. Generally, citizens are more willing to pay if they feel the government delivers valuable public goods and

---

[286] Old age spending is equivalent to 10% of the country's GDP, while health spending comes to 6.6% of GDP. Sweden also spends a disproportionately high 4.3% of its GDP on the disabled, the second highest share of any OECD nation and more than double the OECD average of 2.1% of GDP. On the whole, in part due to higher spending on families as well as the disabled, about 32% of social spending goes directly to poor, working-age residents, much higher than the 23.1% OECD average.

[287] "Corruption Perception Index 2018" available at https://www.transparency.org/cpi2018 (accessed 7 February, 2019).

[288] "Nigeria overtakes India as world's poverty capital" *Vanguard,* June 25 2018. Also available online at https://www.vanguardngr.com/2018/06/nigeria-overtakes-india-as-worlds-poverty-capital-report/ (accessed 18 December, 2018).

services in return, that is, if they trust the government not to waste their money.[289] Research from a recent survey has shown that citizens who perceive government institutions as efficient and fair are more likely to favour higher taxes in a sample of 29 European countries.[290]

2.0 INCREASING TAX COMPLIANCE THROUGH POSITIVE REWARDS

Nobody enjoys paying taxes, at least, not in Nigeria anyway. Tax payments are compulsory and unrequited; people are legally obliged to make them but cannot expect any specific benefit in return like a piece of public property, or a preferential treatment in a public hospital. Why do people comply? Why should we be forced to give up a part of our hard-earned money to a government that does not account for the way such money is being spent?

One prominent answer is that people pay taxes because the government forces them to; the entire machinery of taxation operates under a deterrence approach that threatens non-compliant tax payers with audits, fines, and criminal punishment. An alternative answer holds that people pay taxes because society obliges them to thereby appealing to our conscience and sense of responsibility as well-meaning citizens. According to this civic duty approach, it is the feeling of public responsibility that moves people towards tax compliance. However, despite these widely adopted approaches, the tax system in our country continues to suffer from a seriously low level of tax compliance. The problem with the deterrence approach for example, is that it is costly for the government and stressful for taxpayers. The government has to waste time, effort and personnel in hunting down tax evaders.

---

[289] Brockmann, H., Genschel, P., &Seelkopf, L. "Happy taxation: Increasing tax compliance through positive rewards?" (2016) 36 *Journal of Public Policy, Cambridge University Press,* 6.

[290] For example, France, Germany, Sweden, Portugal, and Denmark are some of the most heavily taxed countries in the world.

Pressed by high expenditure requirements and high political obstacles to tax increases, some governments have recently experimented with mitigating some of these losses through a new "rewards approach" to tax compliance. This approach aims at reducing tax evasion and increasing voluntary tax compliance by providing incentives for individual tax compliance. The most prominent example of this trend is the spread of receipt-based VAT lotteries.[291] Rewards could be more effective than punishments for eliminating undesired behaviour or for motivating desired behaviour. Many psychological experiments have shown that positive inducements have a significant and positive impact on compliance. For the purpose of this article, rewards will be classified into two: intangible or immaterial; and tangible or material.

2.1 Intangible/Immaterial Rewards

Some countries have employed the use of intangible rewards appealing to a taxpayer's sense of ownership and feeling of contribution, where he or she is allowed to apportion a percentage of the tax he or she is paying for certain specific purposes. This is based on the assumption that citizens are more likely to pay taxes willingly if they know what they are paying for.

2.1.1 Japan

Japan recently introduced what is called 'hometown tax scheme' under which city residents can allocate a proportion of their income tax payments to a rural town of their choice. This system allows taxpayers who live in urban areas to contribute to rural areas in return for a credit from income tax and residence tax.[292] Reportedly, the scheme is very popular with taxpayers however; it is characterised with certain problems. Since taxpayers can choose whichever local area they wish to donate to, they are

[291] As practised in Taiwan, China, Slovakia and so on.
[292] "Hometown tax" available at https://en.wikipedia.org/wiki/Hometown_tax (accessed 19 December, 2018).

often fond of donating to localities, which offer very expensive gifts. Initially, the tax was intended as a step to alleviate the gap in tax revenue between big cities and rural areas but subsequently, it became an avenue for unfair competition amongst the local areas. What boosted the amount of the donations given, were the "gifts" returned to the donors by the municipalities that received the donations, over which there was no regulation in the program.[293] Local competition intensified among municipalities to offer extravagant gifts so as to attract donations, and the donations in return have tended to concentrate on the municipalities that offer expensive gifts, ranging from brand-name beef and seafood to bottles of imported wine, electronics products and coupons for a resort hotel in Hawaii.[294] The government attempted to resolve this problem through certain regulatory measures such as placing a limit on what could be offered as gifts to the donors, punishment on the localities that engaged further in the act by excluding them from the program, and discouraging the donor taxpayers by making donations to such localities non-deductible from their income and residence tax. However, despite all these measures, a number of localities persisted in offering expensive gifts to donors to the detriment of the communities who followed the government's guidelines. The city of Izumisano, Osaka Prefecture, collected the largest amount of donations (¥13.5 billion) in 2017. It was offering brand-name fruit, seafood and beverages made in other prefectures, as well as points that could be used to fly on low-cost carriers, as gifts in return for donations.[295] Such unfair competition goes against the very purpose of the tax in the first place.

---

[293] "Reviewing the 'hometown tax donation' system" *The Japan Times*, 17 September 2018. Also available at https://www.japantimes.co.jp/opinion/2018/09/17/editorials/reviewing-hometown-tax-donation-system/#.XBpD81xKjIU (accessed 19 December, 2018).

[294] *Ibid*.

[295] "Government eyeing rework of hometown tax donation system to curb use of gifts" *The Japan Times,* 5 September 2018. Also available at https://www.japantimes.co.jp/news/2018/12/07/business/abuse-norm-japans-

This hometown tax could be very useful in Nigeria, considering the fact that majority of Nigerians live in slums that are almost inhabitable, and rural areas characterized by underdevelopment and limited access to economic opportunities. This tax, if properly regulated, can greatly contribute to the standard of living in rural areas, thereby reducing rural-urban migration, and overpopulation in certain cities in Nigeria, such as Lagos. If the State government wishes to introduce this hometown tax, it is therefore suggested that proper regulatory and enforcement measures be put in place to ensure that Nigerians do not abuse the tax.

2.1.2. Spain

Spain, for instance, allows individual taxpayers to allocate 0.7%of their income tax liability either to the Catholic Church or to charitable organizations or to the State.[296]

Similarly, like the hometown tax discussed above, if adopted, tax compliance may likely increase when Nigerians are given the opportunity to allocate a certain part of their income to various organizations they may wish to benefit, for example, charitable houses, schools and many more. It all stems from the idea that taxpayers would be more willing to give up their income if they know exactly how it will be utilised.

2.2 Material/Tangible Rewards

Material rewards usually come in the guise of lotteries. Individuals who engage in certain taxable activities would be able to participate in a state or national lottery, where they stand a

---

hometown-tax-donation-system/#.XBkSa1xKjIU (accessed 19 December, 2018).

[296] Additional provision eighteen of the General State Budget for 2007, Act 42/2006, of 28 December, developing the provisions of Article II of the Agreement with the Holy See, has indefinitely established that, from 1 January 2007, the State will assign 0.7% of the full Personal Income Tax contributions corresponding to taxpayers who declare their wishes in this respect to the maintenance of the Catholic Church.

chance of winning a stated prize at certain specific times.[297] For instance, Taiwan operates a receipt-based tax lottery to increase sales tax compliance since the 1950s.[298] China also introduced a VAT-lottery in the 1990s. More recently and some European countries followed suit including: Malta; Slovakia; Portugal; and Romania. Local authorities in Peru and Indonesia raffle off bicycles, cars, and TV-sets to incentivize payments of property taxes and motor vehicle taxes. While the most operated lottery system to generate revenue is the VAT lottery, there is little to no empirical or statistical information for lotteries, which are directed towards income tax. This does not mean however that a lottery system a country chooses to operate must exclude the income tax.[299] The system of VAT Lotteries in certain countries will be discussed below.[300]

2.2.1 Taiwan

Taiwan was the very first country in the modern history that introduced a sales tax lottery. The Taiwanese government was searching for new policies that could increase the tax revenue during the first half of 20th century. One of the proposed ideas was to create a VAT lottery.[301] Therefore, customers that ask for sales receipts after purchases they make in shops or restaurants have the opportunity to participate in the state-run lottery and

[297] The lottery drawing in Taiwan falls on the 25th of every odd-numbered month, i.e., January, March, May, July, September and November. In Taiwan however, the lottery drawing is done monthly. So for example, there will be a drawing in December for receipts issued from November 1st to 30th.

[298] See below for more discussion.

[299] If the lottery system was based on income tax in Nigeria, perhaps what would serve as entries for employees would be their Withholding Credit Notes, although this may have to be registered for it to be a valid entry. This lottery system would indeed encourage employees to actively seek their Withholding Credit Notes from their employers, thereby reducing the likelihood of undetected tax evasion.

[300] Or sales tax lotteries, depending on the laws of the country in question.

[301] Veronika Horvathov, "The VAT lottery as a charitable lottery" (2015) Bachelor Thesis, Institute of Economic Studies, Faculty of Social Sciences, Charles University in Prague, 4.

win cash prizes. The lottery was launched in 1951 and the first published results were incredible. The amount of money collected by the tax office during the first year when the lottery was in operation increased by 76% (when compared to the previous year).[302] The Finance Ministry collected NT$51 million (US$1.6 million) that year, representing a 75% increase from the NT$29 million (US$900,000) collected in 1950.[303]

2.2.2 Other Countries

The Slovakian lottery differs from that of the Taiwanese significantly. The main difference is that customers in Slovakia have to register sales receipts for the lottery. Hence, not all sales receipts that are owned are capable of winning automatically.[304] This registration can be done in different ways. Participants can register their sales receipts via the internet or via text message but a service fee is charged for the latter option. Alternatively, they could register at the branch offices of the tax lottery offices within their localities.[305] The lottery system is equally practised in China,[306] Malta,[307] Poland,[308] and even Portugal where, since 2014, its citizens are able to participate in the lottery to win a luxury

---

[302] *Ibid.*

[303] "Odds of a jackpot hit just got better" *Straits Times*, 6 August 2010.

[304] *Supra* note 301 at p. 8.

[305] *Ibid.*

[306] This lottery has been analysed narrowly by a Chinese researcher Junmin Wan. According to his research, this lottery has been a successful experiment, because the total input to output ratio was approximately 1:30 (30 million Yuan was the total prize amount paid off to the participants of the lottery and increase in the tax revenue was equal to 900 million during the first half of 2002). The total operating tax revenue was significantly higher (by 17.1%) in the experimental areas.

[307] Malta has been operating the VAT lottery for more than 10 years. Every sales receipt can be converted into a lottery ticket. The participants must write their full name, ID card number and telephone number on the back side of every receipt that is supposed to be registered for the lottery and send them to the Department of Public Lotto in Valetta.

[308] Poland is encouraging shoppers to take part in a new "national receipt lottery" to try to boost the country's VAT revenues. Among the prizes up for grabs in the new lottery are cars, laptops and tablet computers, according to the finance ministry.

car. Sales receipts that are used to participate in the lottery must include the purchaser's unique personal tax identification number (which can be issued for every purchaser by the tax office). Greece is to become the latest country to launch a monthly lottery based on VAT compliant receipts in an order to reduce VAT fraud. From the end of October, every VAT receipt will be stamped with a unique number which will be automatically entered into a cash-prize draw organised by the government. Each month, 1,000 winners will win €1,000 each – which will be exempted from income tax.[309]

2.3 Problems of the VAT Lottery System as a Tax Compliance Mechanism in Light of the Nigerian Economy

The VAT lottery system seems very promising and practical but it is also accompanied by its peculiar problems. Should the Federal Government seek to adopt this system in generating revenue from VAT,[310] what are the pressing issues to be considered?

Firstly, in reality, there are cheap and expensive items which imply that values of different purchases differ. Different sales receipts have different face values. This means that every purchase contributes to the total amount of the public good with a different amount of money. So the question is, would a taxpayer's probability of winning be affected by this? In Malta and Portugal, the taxpayer's probability of winning is dependent of the value of the purchase. However, in Slovakia and Georgia, every purchase stands an equal chance of winning regardless of the value.[311] In the

[309] Richard Asquith, "Greece VAT receipt lottery to fight fraud" available at https://www.avalara.com/vatlive/en/vat-news/greece-launches-vat-receipt-lottery-to-fight-fraud.html (accessed 19 December, 2018).

[310] Alternatively, the State Governments could contribute to their Internally Generated Revenue (IGR) with this system through the collection of sales tax, or consumption tax as in the case of Lagos State.

[311] J. Fooken, T. Hemmelgarn, B. Herrmann, "Improving VAT Compliance - Random Awards for Tax Compliance" (2014) Working Paper no. 51, *Taxation Papers, Taxation and Customs Union, European Commission*. ISSN 1725-7565 (PDF), ISSN 1725-7557 (Printed).

latter countries, it does not matter whether one buys small chocolate for a few cents or a big new expensive television for a few thousands. Both sales receipts have the same probability of being chosen and win. Therefore, customers might be motivated more to register the sales receipt when the chocolate is bought since the prize that could be won would most likely be of higher than the value of VAT paid. On the other hand, considering the Nigerian economy, it is likely that for those who pay a higher amount as VAT, there may be the tendency of unfairness if the lottery winner is a person who paid ₦2,000 as VAT as opposed to the former, who might have spent up to ₦100,000 as VAT.[312] It is therefore suggested that there could be different prizes for different values of purchases, depending on the lottery system the government decides to operate. For example, receipt from supermarkets or restaurants may be eligible for a different prize from the receipts obtained from purchasing luxury items, for example, very expensive cars or antique items. Alternatively, rather than base the prizes on the categorization of the items purchased, the government could focus on the value contributed by the taxpayer. For example, taxpayers who have contributed less than ₦100,000 as VAT may be eligible for a prize different from those who contributed more than ₦100,000. Also, the number of winners chosen from the two categories of people may differ. Thus, the government may choose to pick six winners from the category of taxpayers who pay very high VAT, and four from the category of those who do not pay as high.

Another issue that may arise is the multiplicity of entries from numerous sales receipts a taxpayer may choose to acquire. For example, when going to a grocery store, some customers may decide to pay for the whole shopping while others may want to

[312] And for every tax system to flourish, taxpayers need to have faith that such system encourages fairness and equity. According to Adam Smith in his famous work, "An Inquiry into the Nature and Causes of Wealth of Nations" a good tax system must possess the quality of equity, amongst other essential characteristics.

pay for every item separately so as to acquire multiple receipts for different items. The arising issues may not constitute much of a problem seeing as customers are entitled to buy items in the manner they please, as long as they are actually paying for it. If there is no cost to enter the lottery, that is, when the sales receipt is automatically a lottery ticket, as practised in Taiwan, taxpayers are even more motivated to obtain separate receipts so as to increase their chances of winning. However, where registration is required, along with a fee for such registration, as practised in Slovakia, taxpayers are less likely to obtain several receipts when they can buy all their items as a whole and pay for the registration just once. It all depends on the system a country chooses to adopt.

Flowing from the second issue above, another matter relating to multiplicity of entries for the lottery, which may pose a problem, is the administrative ease of the whole process from the perspective of the taxpayer.[313] If every sales receipt is an automatic entry for the lottery, then a taxpayer may find herself or himself in a situation of having numerous receipts over the weeks from several transactions they might have made. Then finally, when the winners are announced, such taxpayer would have to start searching through the countless receipts one may have to see if they are part of the winners. This can be extremely frustrating especially where things do not go as planned. In such situation, the registration method seems to be the more reasonable method, where a taxpayer's personal details are registered for every sales receipt he presents, so that he or she may be notified in case of an eventual win.[314]

[313] Administrative convenience is also another essential canon of taxation as posited by Adam Smith, and this has a huge impact on voluntary tax compliance as taxpayers are more likely to pay when the method of payment is convenient.
[314] Winners in Slovakia receive an e-mail or a text message when they possess a winning ticket, but only if they register their sales receipts on the web page or via text message. If they register their receipts in one of the offices of TIPOS, they have to compare all registration codes to the winning ones manually.

Finally, another pressing issue, which ought to be discussed when considering this rewards based approach, is the fact that the taxes being paid do not go directly to the government. There exists a middle subject between the taxpayers and the government, and that is the business enterprises and companies, whose duty it is to collect these indirect taxes from the taxpayers and remit it to the government.[315] In the case of indirect taxes, tax agents are to collect and remit the taxes to the relevant tax authority. Failure to do this is penalised under various tax laws,[316] but the presence of penalties does not stop the rampant practice of failing to remit these taxes to the tax authorities. There is still a lot of tax evasion by tax agents, either individually or in collusion with some of the taxpayers. As a result, the contribution to the tax revenue of the government becomes significantly reduced. The lottery system does not solve this problem of tax evasion directly, but it seeks to motivate these tax agents to pay the whole amount of taxes indirectly. This is because taxpayers would not want to risk forfeiting their chances of winning the lottery and are more likely to demand their receipt(s) after every purchase. When these receipts are not demanded, there is an opportunity for the tax agents to cheat since such purchases would not be recorded.[317] However, when the taxpayers demand their receipts, probability of being caught for tax evasion would be higher.[318] Hence, the lottery provides consumers with an incentive to ask for the receipt and keep it, which in turn makes it easier for tax authorities to control VAT compliance.[319]

---

[315] They are tax agents for the purpose of paying indirect taxes such as VAT and withholding tax.

[316] *Section 74 of the Personal Income Tax Act*; *Section 82 of the Companies Income Tax Act*; *Section 19 of the Value Added Tax Act.*

[317] *Supra* note 13, at 37.

[318] We can see here that the aim of the lottery is to motivate the customers to ask for the sales receipts after all purchases that are made. This demand for sales receipts creates a bigger pressure on sellers to record more transactions thereby reducing the risk of evasion.

[319] *Supra* note 23, at 12.

It is important to note that it is not conclusive that this system of VAT lottery would definitely work in Nigeria. It may however be worth a try in a few of our States. Take Georgia for example, and their failed attempt of the VAT lottery. The success or otherwise of the lottery depends largely on how the lottery is operated. Tax lotteries are most effective in countries where tax evasion is rampant and gambling is culturally ingrained. Therefore, there may be hope for Nigeria's tax revenue with this unusual form of tax compliance mechanism, considering the fact that Nigeria's gambling industry is expanding at an incredibly fast rate. In 2014, the News Agency of Nigeria estimated that Nigerians spent ₦1.8 billion each day on sports betting, while some industry heads suggest this figure is closer to ₦5 billion.[320] Meanwhile, a 2016 PwC report projected that the industry would grow at an annual rate of 16% each year to $147 million (₦45 billion) in 2019.[321] While the numbers are disputed, the trend is clear; the same PwC report predicts that Nigeria's sports betting industry will outgrow those of Kenya and South Africa, Africa's largest betting environment.[322] There is little doubt that the lottery system of revenue generation would thrive, seeing the active involvement of Nigerians in anything that has to do with gambling. As at 2016, the leading sports betting company, Bet9ja raked in an average monthly turnover of $10m, while NairaBet made an average turnover of $3m-$5m, a 20-30% margin on profit.[323]

3.0 CONCLUSION

[320] "Nigerians spend ₦1.8bn on sports betting daily – investigation." *Vanguard Newspaper,* 1 August 2014. Also available online at https://www.vanguardngr.com/2014/08/nigerians-spend-n1-8bn-sports-betting-daily-investigation/ (accessed 21 December 2018).

[321] PWC, "The Nigeria Gaming Industry" available at https://www.pwc.com/ng/en/publications/the-nigeria-gaming-industry.html (accessed 21 December, 2018).

[322] Aisha Salaudeen, "Nigeria's booming football betting industry" available at https://www.stearsng.com/article/nigerias-booming-football-betting-industry (accessed 21 December, 2018).

[323] Raheem Adebayo, "Economics of $2 billion Sports Betting Industry in Nigeria", available at https://nairametrics.com/economics-of-sports-betting/ (accessed 21 December, 2018).

State governments in Nigeria are no doubt, confronted with series of challenges ranging from human capital development to infrastructural development. To tackle these challenges, adequate funding is necessary, but the allocation they receive from the Federal Government is not enough to manage their expenses. It is in a bid to complement this effort that the state governments resorted to internally generated revenue sources. It is not a secret that most state governments in Nigeria are heavily reliant on federal allocation for continued sustenance, generating little percentage of their revenue internally. Therefore, there is the need for these state governments to develop practical strategies and tactics for generating revenue internally with an increased collection of taxes ranging from sales tax to income tax and so on. Thus, there is need for the federal, state and local governments to generate adequate revenue from internal sources has become a matter of urgency and importance. The Federal Government also, considering the numerous Nigerian companies in the country, continues to suffer a ridiculously low contribution from the taxation sector due to mass tax evasion. Therefore, there is a need to consider alternatives to revenue generation, and mechanisms to increase tax compliance, as has been put forward by this paper.

However, it should be reiterated, that no matter how effectively well planned a tax system is, or how popular a tax law is, or how smooth its administration is, if the taxes are not properly accounted for and utilised by the government, and if such government is characterized by a shameless lack of transparency such that taxpayers do not even see the results of the taxes, then such country will continue to be plagued by incessant tax evasion and a dangerously low level of tax compliance. These problems must be solved by tracing the root cause first, most of which are bad governance, corruption, incompetence and political instability, to mention a few. Only when these problems are tackled, can we achieve near perfect voluntary tax compliance.

SEXUAL HARASSMENT AND WOMEN'S RIGHT TO WORK

Oluwatoyin Olajide*

ABSTRACT

This Article explores sexual harassment as a serious issue that negatively influences women in the workplace to the point that it affects their right to work. It constructs sexual harassment as violence against women and a form of gender based violence that should be given more consideration as a social phenomenon rather than strictly an employment issue. It explores the perspectives which have been used to explain sexual harassment, especially as an offshoot of the sex role socialization that is characteristic of women's lives. It proceeds to explain how sexual harassment has been defined and targeted under international law and how it is situated in the right to work debate. The economic, psychological and organisational effects of sexual harassment are discussed and the possibility of a synergy of international, regional and national legal tools are proposed to effectively tackle sexual harassment.

1.0. SEXUAL HARASSMENT: DEFINITIONS AND PERSPECTIVES

Sexual harassment are unwelcome sexual advances or requests for sexual favours coming either verbally or physically, but ultimately of a sexual nature.[324] It is also the unwanted imposition of sexual requirements, which usually occurs in the context of a relationship where there is disequilibrium of power.[325] The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) General Recommendation 19 defines sexual harassment as;

---

*

[324] Pamela Anderson, US Equal Employment Opportunity Commission.

[325] C MacKinnon, "Sexual Harassment of Working Women: A Case of Sex Discrimination" in L. LeMoncheck and J. Sterba, *Sexual Harassment: Issues and Answers*(2001)Oxford, Oxford University Press, 42

Unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment[326]

The basic facts about sexual harassment are that the harasser may be a man or a woman and the victim does not have to be a member of the opposite sex. The harasser can be the victim's superior, co-worker or non-employee and the victim of sexual harassment is not limited to the person harassed but anyone affected by the offensive conduct. Sexual harassment may occur without economic injury to the victim and lastly, the harasser's conduct must be unwelcomed.[327]

Although some definitions do not suggest that it is only women that are victims of sexual harassment, statistics show that women are affected disproportionately. Statistics indicate that between 40 and 50 percent of women in European Union countries experience unwanted sexual advances, physical contact and other forms of sexual harassment at work. Across Asia, 30- 40 percent of women suffer workplace sexual harassment and in Nairobi, 20 percent of women have been sexually harassed at work or in school.[328] Despite these numbers, sexual harassment cases of women have faced and still face hindrances when legal action is sought.[329]

Sexual harassment has been explained within the context of power. Power derived from one social sphere is used to derive

[326] CEDAW General Recommendation No. 19, Article 11
[327] Equal Employment Opportunity Commission, 2009.
[328] Fast Facts: Statistics on Violence against Women and Girls, United Nations Entity for Gender Equality and the Empowerment of Women (2011).
[329] C. MacKinnon, *Sexual Harassment of Working Women: A case of Sex Discrimination* (Yale University Press, Yale, 1979), 2-3.

benefits in another and because sexual harassment results from social factors, it occurs often.[330] The society has been described as a social system organized according to the principle of male rule, which also shapes democracy and capitalism and characterizes patriarchy.[331] This angle of analysis must have influenced the description of sexual harassment by Connolly and Greenwald that sexual harassment is usually initiated by someone with power against someone with lesser power and that the element of coercion involved also asserts superior power.[332]

Sexual harassment often manifests in form of demand for sex in exchange for something else; in the context of an office environment, the victim is usually expected to cooperate in order to get promoted or to keep her job.[333] It therefore asserts a woman's sex role over her work skills.[334] Furthermore, telling sexually suggestive jokes or initiating innuendos can easily be characterized as harassment. In the case of dirty joke telling, a single occurrence may be exempted from the categorization but physical touch can in a single instance be sufficient enough to be harassment.[335] Perhaps the most potent drawback in defining sexual harassment is that it is volatile; certain behaviours might be uncomfortable to some persons while same might not be considered as harassment for others.[336]

Still in relation to power, sexual harassment has been asserted to thrive on male superiority in culture as well as high positions at work and there are usually penalties for refusal such as poor work evaluation, lack of cooperation from male co-workers, demotions

---

[330] *Ibid,* at 3.
[331] Lin Farley, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (McGraw Hill, 1978), 29
[332] L. LeMoncheck and J. Sterba, *Sexual Harassment: Issues and Answers* (Oxford University Press, Oxford, 2001) p. 32.
[333] Blakely A, 1993-94. 20 Barrister Magazine p.28
[334] *Supra* note 328, at 30.
[335] *Supra* note 333, at 28.
[336] *Ibid*.

and sometimes termination of employment.[337] Beyond that, companies sometimes tend to hire female candidates that are considered to be sexually attractive lacking in skills and refusals of sexual proposition leads to non-hire.[338] This suggests that sexual harassment materializes at clearly defined thresholds.[339]A very important contribution to perspectives on sexual harassment is its relation to sex discrimination.

2.0. SEXUAL HARASSMENT AS DISCRIMINATION BASED ON SEX

To further understand sexual harassment, two models have been used to explain it. The difference approach and the inequality approach. The difference approach recognizes that both sexes are biologically and socially distinct from one another but condemns such distinctions that are inaccurate. The inequality approach explains further by maintaining the difference between the sexes and also asserting that they are socially unequal. Therefore, practices that maintain subordination of women to men are equally prohibited. The inequality approach is particularly useful because it sees women's situations as a structural problem of enforced inferiority that needs to be radically altered.[340]

The approach to understanding sexual harassment as discrimination is based on the institutionalization of control over women disproportionately in every sphere of the society.[341] Men have maintained control over resources women can acquire as well as their chances of advancement in education therefore; women employed are vulnerable to violation in form of sexual abuse in the workplace.[342]

---

[337] *Supra* note 332, at 30.
[338] *Ibid*, at 30-31.
[339] *Supra* note 325, at 43.
[340] *Supra* note 329, at 5.
[341] *Supra* note 332, at 42.
[342] *Ibid*.

The inequality model leads us to the phenomenon of gender-based violence. It has been argued that the political nature of oppression that women suffer disproportionately excludes violence against women from states human rights agenda[343] and this oppression is the concept of identifying group related justice.[344] Gender based violence is therefore a form of discrimination that inhibits women's ability to enjoy their fundamental rights and freedoms like men do.[345] The role of custom and tradition is negative in this context because it helps to maintain cultural attitudes that reinforce the subordination of women as against men as well as practices that maintain this control.[346] Violence against women is therefore a social justice issue and a wider social problem.[347] Practices which reinforce the inequality of women to men, are sex-based discrimination just as gender based violence. Sexual harassment has also been considered as part of a continuum of violence against women since its recognition.[348] Explaining sexual harassment in this context therefore posits that women are sexually harassed by men because they are women, their role in the workplace is not separated from the social meaning of female sexuality.[349]

From the traditional perspective, it is historically known that women have exchanged sexual services for material survival; phenomenon like prostitution; marriage and sexual harassment

[343] C. Bunch, "Transforming Human Rights from Feminist Perspective" in Julie Peters & Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (1995), 14.
[344] I. M. Young, *Justice and the politics of Difference*, (Princeton: Princeton University Press, 1999), 195.
[345] CEDAW General Recommendation No 19, 1992.
[346] *Ibid*.
[347] Edwards A, "Violence against Women as Sex Discrimination, Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies" (2008) 18 *Texas Journal of Women and the Law*, 53.
[348] M. Stockdale and J. Nadler, "Situating Harassment in the Broader Context of Interpersonal Violence: Research, Theory and Policy Implications" (2012) 6 *Social Issues and Policy Review*, 149.
[349] *Supra* note 325, at 43.

institutionalize this arrangement[350]. These forces affect all women differently depending on class. The exclusion of qualified women from profitable occupations is explained by the fear that they would be exposed to sexual predators at work.[351] Working women and poor ones do not have the luxury of choosing to stay at home or work, they therefore hold on to their jobs and endure lower wages compared to their male counterparts and lack of job security; these women perpetually remain at the mercy of their employers sexually and economically.[352] As Millet[353] explains, a female is continually obliged to seek survival or advancement through the approval of males as those that wield power and this is sometimes done with exchange of sexual favours. If the dynamic of oppression and expression of inferior sex is allowed to persist, there can be no guarantee against sexual harassment as this means that a woman will still be required to grant sexual favours in order to get hired, paid and promoted. She will not be employed based on merit but sexual performance and ultimately, her material gain would depend largely on this, making equality an illusion.[354]

Sex roles of men and women also influence the inequality model. Men are seen to have the dominance and aggressiveness that is characterized as masculine; women's sex role defines the feminine ideal as passive and submissive to male initiative.[355] Man's position of power does not only assure his superiority over woman, it assures that his standards become generalized as human standards that govern behaviours of men and women. Discussions of

[350] *Ibid*, at 44.
[351] M. Bularzik, *Sexual Harassment at the Workplace: Historical Notes* (New England Free Press: England, 1978), 23-43.
[352] W. Sanger, *A History of Prostitution* (Medical Pub. Co.: New York, 1985), 96.
[353] K. Millett, *Sexual Politics* (Rupert Hart-Davis: United Kingdom, 1969), 54.
[354] *Supra* note 325, at 45.
[355] *Ibid*, at 46.

women takes the pattern of what they are to men, real, ideal and in terms of value, what they are for themselves is not discussed.[356]

Women are therefore conditioned to think of themselves as subordinates of men who define their masculine role by dominating women.[357] The rigid roles that sex has been deployed to, gives no provision for allocation of social and economic resources. Sexual harassment is only therefore a reflection of the social meaning of sex difference not a distortion of it. It is differentiation in treatment due to the social realities of sex. Furthermore, sexual harassment can be said to affirm male sexual identity as defined socially because it is a result of the social stereotyping of all women as sex objects.[358]

Another perspective to the inequality approach closely linked to the sex role that has been maintained is that women are subjected to behaviour in sexual harassment that are exclusively defined and targeted towards the characteristics that define their sexuality. An attack upon sexuality is an attack upon womanhood therefore deprivation in employment through women's sexuality is a deprivation because such a person is a woman.[359]

3.0. NON DISCRIMINATION, EQUALITY AND WOMEN'S WORK

Article 11 of CEDAW requires parties to eliminate discrimination in employment to ensure that women have the right to work as well as the right to access training and employment opportunities as men and the right to receive equal pay for equal work.[360]

---

[356] Simmel G, "Georg Simmel's Neglected Contributions to the Sociology of Women" (1977) 2 *Journal of Women in Culture and Society*, 872-873.
[357] J. Snodgrass, *For Men against Sexism: A Book for Reading* (Times Change press: California, 1977).
[358] *Supra* note 325, at 47.
[359] *Ibid*, at 47-48.
[360] A Human Rights Approach to Equality for Women in the Workplace, *Human Rights Law Resource Centre Ltd* (2009), 11.

Law traditionally treated women as different and subordinate to men. Thus, the removal of former legal barriers to women's participation in paid employment because the law characterized women as dependants and not contributors to the resources of the society.[361] The changes in law however projects that sexual equality requires men and women to be treated the same despite the existence of the sexual division of labour where women take primary responsibility for childbearing.[362] Consequently, these two approaches do not correct the inequality caused by the sexual division of labour. Accordingly, law and social policy has constantly reinforced the subordination of women in the workforce by refusing to recognize the value of women's work to the men who benefit from it or the society at large.[363]

There was continuous debate about whether the position of women will improve if they are treated like men or if policies that took into account the difference between men and women would be the tool for improvement.[364]

Of all the models of equality it appears that formal equality has helped in increasing the number of women in paid employment.[365] This seems to be the crux of the problem because the focus should be on equality of opportunity and equality of results.[366] For example, the gender gap in the unemployment rate is an indication of the gender inequality in the labour market.[367] Another perspective to equality is the difference in access to labour markets, which is directly affected by the economic empowerment of women. Therefore, eliminating underlying

---

[361] Neave M, "From Difference to Sameness - Law and Women's Work" (1992) 18, *Melbourne University Law Review,* 770.
[362] *Ibid*.
[363] *Supra* note 361.
[364] Bacchi C.L, *Same Difference: Feminism and Sexual Difference* (Allen & Unwin, 1990), p.156.
[365] *Supra* note 332, at 12.
[366] Graycer and Morgan, "Thinking about Equality" (2004) 27 *University of New South Wales Law Journal*, p. 834.
[367] Global Employment Trends for Women, International Labour Office, Geneva: International Labour Organisation (2009), 9.

causes (equality of opportunity) of this inequality such as education and training for women would correct this anomaly, equality of results.[368]

Even so, increased number of women in paid work has not resulted in the eradication of economic disadvantage.[369] As has been previously noted, this is because of the conditions that make women different in that child rearing and domestic labour is socially assigned to women.[370] Sexual division of labour still prevails to a large extent, perpetrating women's economic disadvantage even with the increase in workforce participation of women because the traditional segregation of women's role remains maintained.[371] The struggle to balance paid work with domestic work left women with no choice but to take up poorly paid part time work with few promotional prospects.[372] There is also gender inequality in sectorial employment, only a small proportion of women work in industry, a large proportion in agriculture and even more women in the services sector.[373] Women also make up a large percentage of those in vulnerable employment; the move from vulnerable employment to waged and salaried work can contribute to economic independence and co-determination in resource distribution in the family.[374] This shows that access to labour markets is not the same as providing access to decent jobs for women, while women continue to increase in vulnerable employment; the reverse is the case for men.[375]

---

[368] *Ibid*, at 10.
[369] *Supra* note 361, at 768.
[370] *Ibid*.
[371] *Supra* note 324, at 1.
[372] S. Rhonda and R. Broomhill, *Short-changed: Women and Economic Policies*, (Allen & Unwin: Sydney, 1989), 37
[373] *Supra* note 44, at 10.
[374] *Ibid*, at 10-11.
[375]Assessing Vulnerable Employment: The Role of Status and Sector Indicators in Pakistan, Namibia and Brazil. Employment Working Paper No 13 (Geneva, ILO, 2008) p.13.

Furthermore, in developing regions of the world, remaining outside the labour market remains an obligation for most women and not a choice.[376] This is not to suggest that these women do nothing at home, most are heavily engaged in household and family care responsibilities which continue to be classified as non-economic activity, and these women are segmented as being outside the labour force.[377] The implication of this is described by Hartmann that 'job segregation is the primary mechanism that maintains superiority of men over women because it enforces lower wages for women in the labour market.'[378] The entrance of women into waged labour has been handicapped by patriarchy from the beginning and sexual harassment is just another method that developed to control female labour.[379] Equality in employment is affected and impaired when women are subjected to gender specific violence like sexual harassment in the workplace.[380]

4.0. SEXUAL HARASSMENT AND THE RIGHT TO WORK

The right to work is protected explicitly under two international human rights instruments.[381] It is also embedded in regional human rights instrument where some protect women exclusively.[382] The first reference to work was the concept of 'labour' found in preamble to the ILO Constitution.[383] The second trend in the component of labour was directed in the context of individual and

---

[376] *Supra* note 348, at 10.
[377] *Ibid*.
[378] *Supra* note 332, at 32.
[379] *Ibid*, at 36
[380] *Supra* note 345, para 18.
[381] *International Covenant on Economic Social and Cultural Rights*(ICESCR) 1976, Article 6(1), Article 7(a1, b and c); CEDAW, Article 11;
[382] *European Social Charter* (ESC) 1961 Art. 1,2,3,4 and 5; *African Charter on Human and People's Rights* (ACHPR) 1981 Art. 15; *Protocol to the African Charter on the Rights of Women in Africa,* 2003 Art 13(c); *Additional protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights* 1988 Art. 6 and 7.
[383] *Constitution of the International Labour Organization* (ILO), 1919.

personal freedom and dignity, this paved the way for the acceptance of the link between labour and human dignity which metamorphosed into a human right.[384]

The right to work is essential for realizing other human rights and it forms an inseparable and inherent part of human dignity.[385] The right to work should not be misinterpreted as an absolute right and unconditional right to obtain employment, it only means that individuals have the right to choose to work and the right not to be unfairly deprived of employment.[386] It therefore means work that individuals have chosen to do must be decent and must respect the fundamental rights of the human person as well as rights of workers in terms of conditions of work, safety and remuneration.[387] There must also be respect for the physical and mental integrity of the worker in carrying out the duties that accrue to him or her.[388]

The right to work is made up of provisions that entail freedoms and modern rights approaches and an obligation-oriented perspective of legal obligations and political commitments.[389] Work related rights are divided into categories; employment related rights, employment derivative rights, equality of treatment and non-discrimination right and instrumental rights.[390] The principle of non-discrimination and equal treatment in work is particularly very important as it is the foundation for the proper enjoyment of this right. This has given rise to the pursuance of public policies for positive discrimination to protect vulnerable

[384] *Declaration concerning the Aims and Purposes of the International Labour Organisation*, 1994, Art 1a and 2a
[385] *ICESCR* GC 18 on the Right to Work, 2005 Para 2.
[386] *Ibid*, Para 6.
[387] *Ibid*, Para 7.
[388] *Ibid*.
[389] K. Drzewicki, "The Right to Work and Rights in Work" in A. Eide et al (eds), *Economic Social and Cultural Rights* (2001), 225.
[390] *Ibid* at 226.

groups such as women.[391] The content of the right to work is affected by sexual harassment because sexual harassment contributes significantly to women's unemployment as against the obligation of the state to eradicate conditions that significantly reduce the opportunities for the employment and advancement of women.[392] Women stay away from certain jobs because of fear that they will be harassed.[393] Sexual harassment contributes also to women's unemployment because it sometimes leads to arbitrary dismissal, when victims do or do not consent to the demands of the harasser.[394] Sexual harassment contributes to depressed female earnings as against the conditions to ensure that there is equal pay for equal work.[395] Furthermore, sexual harassment promotes unhealthy employment practices that are detrimental to women at work such as job segregation and sexual practices which intimately degrade and objectify women.[396] It promotes an unhealthy work environment and brings to bare issues of safety and security at work contrary to Article 7(b) of ICESCR.

Discrimination according to CEDAW[397] is "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, social,

---

[391] K. Drzewicki, "The European Social Charter and Polish Legislation and Practice" in K, Drzewicki et al (ed) *Social Rights as Human Rights: A European Challenge* (1994), 211-242.
[392] Susan B., "On the Job Sexual Harassment – Sexual Harassment as Discrimination: Developments in Employer's Liability" (1981) 4 *Hamline Law Review* 520; *Supra* note 62, para 13.
[393] J. Cleveland et al, *Women and Men in Organisations: Sex and Gender Issues at Work*, (Lawrence Erlbaum Ass. Pub: New Jersey, 2000), 158.
[394] *Supra* note 329, at 63.
[395] *Supra* note 332, at 72-74; ICESCR Art. 6(1), Art. 7(a) (b) and(c); CEDAW Art. 11.
[396] *Supra* note 329, at 7.
[397] CEDAW, 1979.

cultural, civil or any other field."[398] The ILO Discrimination (Employment and Occupation) Convention defines discrimination as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.[399]

Discrimination in the context of the right to work is any inability or unwillingness to provide equal opportunity and where unequal protection in relation to employment amounts to violation of a state's core obligation concerning this right.[400] The state is obligated to protect persons from public and private conduct and any action or inaction of the state concerning patriarchal constraints on women's opportunities and working condition amounts to discrimination.[401]

The need for a comprehensive system of protection to combat gender discrimination and to ensure equal treatment between men and women in relation to their right to work cannot be over-emphasized.[402] Occurrences and conditions such as Sexual Harassment that create a hostile work environment for women are not only a violation of human and trade union rights, but are discriminatory and a form a gender based violence.[403] This is particularly so because it may be a condition for obtaining a job, receiving a promotion or a continuing condition of the work environment and most sexual harassment is carried out by men

[398] CEDAW Article 1.
[399] ILO Convention 111 Art. 1.1.
[400] R. Siegel, "The Right to Work: Core Minimum Obligations" in A. Chapman and S. Russell (eds) *Core Obligations: Building a Framework for Economic Social and Cultural Rights*, (Intersentia: Oxford, 2001), 37
[401] K. Yvonne Working Paper on Art. 2(2) and Art. 3 of the ICESCR. 9 HRQ 250 (1987), 261.
[402] *Supra* note 385, para 13.
[403] International Trade Union Confederation, "Stopping Sexual Harassment at Work: A Trade Union Guide", International Trade Union Confederation Guide (2008), 3.

against women.[404]Furthermore, the coercion and exploitation of women economically and sexually that sexual harassment involves is also a very integral aspect of violence against women.[405] Sexual harassment remains one of the most significant problems in women's employment[406] and it is important that a proper understanding of its nature in the workplace is examined in depth.

5.0. NATURE OF SEXUAL HARASSMENT IN THE WORKPLACE

The discovery of sexual harassment was counter intuitive because women were believed to benefit from sexual behaviour at work, they were believed to gain unfair advantage and privileges from seductive behaviour.[407] It has however been established that the harmful effects it has on a significant number of working women cannot be overlooked.[408] Research on sexual harassment in the workplace attempted to answer two questions, the definition of sexual harassment and its frequency of occurrence in the workplace.[409] There were surveys taken from various populations and people were asked to tell if some acts constituted sexual harassment.[410] The second was experimental studies carried out on students, employee or managers asking them to determine whether particular situations depicted instances of sexual harassment and the second was how subjects interpreted scenarios to label them sexual harassment.[411]

---

[404] Susan B, *Supra* note 392, at 517; "Stopping Sexual Harassment at Work", International Trade Union Confederation Guide, (2008), 4.
[405] C. Backhouse and L Cohen, *Sexual Harassment of Women on the Job: How to Avoid the Working Woman's Nightmare* (Prentice-Hall Inc.: New Jersey, 1981), 35-36.
[406] Susan B., *Supra* note 392, at 520.
[407] Gutek Barbara, 'Understanding Sexual Harassment at Work' in Lemon check L and Sterna J, *Sexual Harassment: Issues and Answers* (Oxford University Press: Oxford, 2001), 50.
[408] *Ibid*, at 50.
[409] *Supra* note 407, at 51.
[410] *Ibid*.
[411] *Ibid*.

The survey taken showed that 81 percent of people considered sexual activity as a requirement of workplace sexual harassment.[412] 59 percent of men and 84 percent of women asserted that sexual touching at work is sexual harassment.[413] Also, 22 percent of men and 33 percent of women considered that sexual comments at work are meant to be complimentary to sexual harassment.[414] Perhaps the most important thing that the experimental study was able to show is that the characteristics of the incident and the people involved greatly influenced the sexual harassment label.[415] The first factor affecting the definition of sexual harassment is the characteristic of the behaviour, that is more persistent and intrusive behaviours are more likely to be considered sexual harassment.[416] Explicitly sexual behaviours accompanied with threats are more likely to be perceived as harassment and touching is also more likely to be labelled as harassment than comments looks or gestures.[417] The second determinant affecting the definition of sexual harassment is the relationship between the actors.[418] The situation is labelled as serious harassment when the initiator is a supervisor rather than a subordinate and when the initiator is a man and the victim is female.[419] The third factor is the characteristics of the observer as it has been proved that men and people in authority are less likely than others to consider some behaviours sexual harassment.[420] Similarly, a man's behaviour is more likely to be considered sexual harassment if it is negative because such negativity reflects

---

[412] Barbara Gutek, "Sexuality in the Workplace", (1980) 1 *Journal of Basic and Applied Social Psychology*, 255.
[413] Barbara Gutek, "Sex and the Workplace: Impact of Sexual Behaviour and Harassment on Women, Men and Organisations", (1985) 1 *Jossey Bass Business and Management Series*, 39.
[414] *Ibid*, at 43.
[415] *Supra* note 407, at 52.
[416] *Ibid*.
[417] *Ibid*.
[418] *Ibid*.
[419] *Ibid*.
[420] *Ibid*.

hostility and insensitivity to the targeted woman or victim.[421] Women's greater experience with sexual harassment helps to explain the sex difference in defining sexual harassment[422] and in a similar vein, men see less sexual harassment because they are mostly the offenders and women see more because they are the victims in sexual harassment encounters.[423]

6.0. TYPES OF SEXUAL HARASSMENT

The experiences of sexual harassment of women can be divided into two forms, quid pro quo, which has to do with exchange of employment or benefits of it, and hostile environment, where sexual harassment is considered as a persistent condition of work.[424] These two models have also been developed and proposed to attract different legal actions.[425]

6.1. Quid Pro Quo

In this situation of sexual harassment, the woman must comply sexually or forfeit an employment opportunity.[426] Quid pro quo is applicable exclusively to sexual harassment because it involves the conditioning of employment, or the emoluments of employments based on sexual favours.[427] There are more subtle forms of quid pro quo sexual harassment and this might be hinting that an employee would be treated better on the job if she provides sexual favours to the boss.[428]According to Mackinnon, this type of situation is strongly noticeable in horizontal segregation where

---

[421] J. Pyror, "Sexual Harassment Proclivities in Men", (1987) 13 *Sex Roles,* 273; J. Pyror and J. Day, "Interpretation of Sexual Harassment: Attributional Analysis", (1988) 18 *Sex Roles*, 405.
[422] Alison Konrad and Barbara Gutek, "Impact of Work Experiences on Attitudes Towards Sexual Harassment", (1986) 31 *Admin Sci. Quarterly*, 422-438.
[423] *Supra* note 407, at 53.
[424] *Supra* note 329, at 32.
[425] Frank Ravitch, "Contextualizing Gender Harassment: Providing an Analytical Framework for an Emerging Concept in Discrimination Law", (1995) *Detroit Mercy Law Review*, 853.
[426] *Supra* note 329, at 32.
[427] *Supra* note 425, at 871.
[428] *Supra* note 393, at 223.

women are employed in feminized jobs and men are in charge of their hire or fire.[429] Following refusal from the victim, the harasser often retaliates through the use of his power over the victim's job or career.[430] To file a legal claim under this situation, the victim must demonstrate that he/she is a member of a protected class, that he/she was subjected to sexual harassment in the form of sexual advances or request for sexual favours, that the harassment was based on sex and that submission to the unwelcome advances was a condition for receipt of job benefits or refusal would result in detrimental effects on the job.[431]

6.2. Hostile Work Environment

In this case, sexual harassment makes the work environment unbearable.[432] The existence of sexual harassment does keep employment or its benefits at stake.[433] Areas where sexual jokes, teasing, pornographic materials and sexual stimuli are commonplace constitute a hostile work environment.[434] In *Meritor Savings Bank* v. *Vinson*[435], it was established that a sexually hostile work environment exists when an employee is subjected to unwelcome conduct which is pervasive enough to alter the conditions of employment and create a hostile working environment because of his or her sex.[436] The severity and frequency of conduct alleged under this situation and how it unreasonably interferes with the victim's performance is considered.[437] In *Burns* v. *McGregor Electronic Industries*, the court found that the victim had posed for nude pictures which meant that she found the work environment hostile and abusive.[438]

---

[429] *Supra* note 329, at 32.
[430] *Ibid,* at 35.
[431] *Supra* note 425, at 871.
[432] *Supra* note 329, at 40.
[433] *Supra* note 393, at 223.
[434] *Ibid*.
[435] [1986] 447, U.S Supreme Court.
[436] *Ibid.*
[437] *Supra* note 425, at 867.
[438] [1992] US Court of Appeals, Eight Circuit

7.0. EFFECTS OF SEXUAL HARASSMENT

There has been a conception that there is no easy way to determine the cost of sexual harassment.[439] One of the reasons is because the harm induced by a particular type of sexual harassment varies across targets because targets are differently sensitive to different forms of sexual harassment.[440] Less sensitive targets may be perpetuating sexual harassment by putting up a tolerant attitude.[441] The argument that women go along by being tolerant is a male enforced reality; it is indeed true that women feel too intimidated to reject advances firmly.[442] There is however reason to reinforce the fact that women do not like to be sexually harassed at work due to some negative impacts it has on them because it unfairly handicaps and disadvantages victims and makes it impossible for them to perform their jobs[443]

7.1. Psychological Effects of Sexual Harassment

A manifestation of sexual harassment on the mental health of women is that they feel responsible for the conduct.[444] It particularly causes severe self-esteem issues as victims feel demeaned by the conduct; emotions of fear, depression, anxiety, humiliation, alienation and vulnerability are commonplace.[445] Sexual harassment has also been found to cause Post Traumatic Stress Disorder (PTSD) and depression and women found to be suffering from these were found to have reported sexual harassment experiences more than other women who have

---

[439] *Supra* note 393, at 233.
[440] *Ibid*.
[441] M. Stockdale and A. Vaux, "What Sexual Harassment Experiences Lead Respondents to acknowledge being Sexually Harassed? A Secondary Analysis of a University Survey" (1993) 43 *Journal of Vocational Behaviour*, 221-234.
[442] *Supra* note 329, at 48.
[443] Supra note 329, at 47; Herbert Camille, "The Economic Implications of Sexual Harassment for Women", (1994) 3 *Kan. Journal of Law and Public Policy*, 45
[444] *Supra* note 329, at 47.
[445] *Supra* note 329, at 27; *supra* note 393, at 234.

not.[446] Perhaps the possibility of this is heightened because women are faced with unemployment and the painful realization that harassment might occur elsewhere; they try to endure, but this can be psychologically damaging.[447] These psychological effects significantly hinder the enjoyment of women's right to work.[448] The provision recognises, in this context, that women have the right to the highest attainable standard of physical and mental health.[449]

Sexual harassment also has adverse effects on the victim's interpersonal relationships as it sometimes damages their relationships with other men.[450] Harassment also constrains the potential for forming friendships or work alliances with male workers.[451]

7.2. Economic Implications of Sexual Harassment

Numerous studies have shown evidence of the tangible effects of sexual harassment on women.[452]Statistics reveal that up to 10 percent of women have quit their jobs because of sexual harassment as they fear becoming victims of retaliation if they complain about it.[453] Fear about the impact of complaint is justified as superiors don't take complaints serious and a woman that does complain is tagged as loose.[454] Victims also experience low productivity, less job satisfaction, reduced confidence, motivation and commitment to their jobs; therefore their job performance is completely shattered by sexual harassment.[455] The economic effects of sexual harassment are most obvious and quantifiable

[446] *Supra* note 393, at 234.
[447] *Supra* note 329, at 52.
[448] ICSECR, 1966, Art. 12.
[449] *Ibid*.
[450] *Supra* note 407, at 56.
[451] *Ibid*.
[452] Hebert Camille, 1994 p. 46.
[453] Gutek, 2001, 56.
[454] Mackinnon, 1979, 49.
[455] Gutek, 2001, 56; Mackinnon, 1979, 51.

when a woman is forced to quit her job.[456] Women who quit their jobs to avoid being continuously subjected to sexual harassment suffer immediate economic effects of unemployment and loss of economic advantage such as job security and benefits.[457]

Another dimension to the economic effects of sexual harassment comes from the organisational costs.[458] Absenteeism, medical costs, turnover and productivity loss all negatively impact the organisation.[459] Furthermore, a disproportionate number of women employed in traditional male occupations are harassed; this brings the loss of talented productive women in these occupations.[460] The cost of losing a substantial number of talented individuals because of sexual harassment could indeed be shocking.[461] Another shortcoming of sexual harassment on organisations is that men may fear being accused of sexual harassment and this may cause them to avoid direct contact with female employees and protégés causing women a denial of professional networks important in building a career[462]

Legally, a segregation of the economic effects of sexual harassment had been attempted. In the *Meritor*[463] *Case*, the employer had argued that only quid pro quo sexual harassment should be treated as sex discrimination and that Title 4 of the EEOC only targets discrimination that causes economic harm not the psychological aspects of it in the workplace.[464] The Supreme Court countered this argument by indicating that sexual harassment could constitute actionable sex discrimination even if

---

[456] *Supra* note 407, at 44.
[457] *Ibid*, at 47.
[458] Cleveland et al, 2000, 236
[459] *Ibid.*
[460] *Ibid*.
[461] C. Bolick and S. Nestleroth, *Opportunity 2000: Creative Affirmative Action Strategies for Changing Work Force* (US Government Printing Office: Washington, DC, 1988), 236.
[462] L. Barbara and K. David, *Sexual Harassment in Employment Law*. (Bureau of National Affairs, 1992), 55.
[463] *Supra* note 348.
[464] 447, U S Supreme Court, 1986 at Para 65.

not directly linked to denial of an economic quid pro quo.[465] It was also emphasized by the court that sexual harassment is involved if it creates a discriminatory work environment.[466] The court however tended to equate quid pro quo sexual harassment with economic harm and hostile environment sexual harassment with non-economic harm.[467] The erroneous believe was that quid pro quo sexual harassment causes economic harm to the victims while hostile environment sexual harassment causes only psychological harm and not economic injuries.[468] Nevertheless, it has been argued that although quid pro quo and hostile environment are theoretically distinct claims, the line between the two is not clear as they tend to occur together.[469] An employee's tangible job conditions are affected when a sexually hostile work environment results in her constructive discharge as this directly causes financial injury.[470] In *Harris* v. *Forklift Inc.*[471] the Supreme Court reiterated that hostile environment sexual harassment could have economic effect on women even if it does not lead to constructive discharge.[472] Consequently, if an employee does suffer psychological effects of an abusive work environment, her performance will be affected which can lead to discouragement on the job and ultimately a stagnant career.[473]

8.0. SILENCE NOT CONSENT

The number of women that have filtered into waged labour has increased over the years, this means that they spend considerable amount of time in the workplace. The workplace or environment can be exciting or mundane, with dissatisfaction generally tied to

[465] *Ibid*.
[466] *Ibid*, at Para 65-66.
[467] Hebert , 1994 p.44
[468] *Supra* note 464, at para. 67-68.
[469] EEOC Policy Guidance on Current Issues of Sexual Harassment (March 19, 1990), 661.
[470] *Ibid*, at 662.
[471] No 92-1168, 1993.
[472] *Ibid*, at para 370.
[473] *Supra* note 471, at para 371.

employee benefits, wages, job security and even lack of mobility.[474] For some workers the workplace is an environment of fear and emotional victimization that is not based on job related dynamic but on reactions to their gender or other characteristics.[475] Women for instance suffer conduct aimed at harassing them based on traits beyond their control.[476] Sexual harassment was and still is a common problem that was previously not commonly analyzed or protested because of lack of information and social awareness.[477] Victims of sexual harassment feel embarrassed, demeaned and intimidated by these incidents.[478] These women feel afraid, despairing and complicit. It is not an experience that is easily discussed because of the psychological strain.[479] More so, sexual harassment often comes with threats of retaliation if it is exposed. Therefore, revealing this situation risks the consequences that sanctioned the advances.[480] Women in the past also could not complain of an unnamed menace making it unspeakable and its definition socially inaccessible.[481] It has been asserted however that silence often echoes degradation and pain therefore, 'the unnamed should not be mistaken for the nonexistent.'[482] Issues such as rape, wife battery and abortion were considered 'unspeakable' and there was rarely interference but women were no doubt able to break the silence.[483]

Another reason for the silence of women about sexual harassment is that it is so perverse that it has been accepted as a normal feature in relations between men and women.[484] This

---

[474] Ravitch F, 1995, 854.
[475] *Ibid*.
[476] *Ibid*.
[477] *Supra* note 329, at 27.
[478] Nancy Seifer*, Nobody Speaks for Me! Self Portraits of American Working Class Women*, (Simon and Shuster: New York, 1976), 55.
[479] *Supra* note 329, at 27.
[480] *Ibid*.
[481] Mackinnon, 1979, 27-28
[482] *Ibid*.
[483] *Supra* note 329, at 28.
[484] H. J. Hazel, *Sexual Harassment* (Cavendish Publishing Limited: Britain, 1995), 50.

attitude was perhaps influenced by the culture which seems to define sexual harassment as typical male/female interactive behaviour.[485] Therefore, because sexual harassment is considered culturally acceptable by women, they feel undermined and embarrassed by the behaviour but they are conditioned also to believe that no harm is intended so they dismiss the actions and they fail to seek redress.[486] Another cultural undertone to silence is that perceptions differ, some women become uncomfortable by the lack of attention from men even if complementary, but flattery has been found to be a way to obtain sexual favours.[487] However, even if the intention of the harasser was not to harass the victim, it is how the victim feels that is pertinent as she suffers from the negative consequences of being sexually harassed.[488] This argument was particularly innovative because most times men see improper behaviour as part of an acceptable culturally determined role until made to realize otherwise.[489]

The consequences of silencing women's account of sexual harassment cases is not far-fetched, it has allowed such conduct by men to go on unchallenged making it seem like an acceptable mode of behaviour.[490] There are factors that contribute to silencing victims of sexual harassment.[491] The victims feel powerless in situations of sexual harassment due to their gender, position or status to the harasser and due to economic constraints.[492] Victims most times consider that they will not be believed, or even if they are, that little will be done about their complaint, in the same way, a trial in court would prove harrowing as proceedings and requirements contribute to silence

[485] *Ibid*.
[486] *Ibid*.
[487] C. Herbert, *Talking of Silence: The Sexual Harassment of Schoolgirls* (Flamer Press: London, 1989), 33; *Supra* note 72.
[488] *Supra* note 481, at 51.
[489] *Ibid*, at 51.
[490] *Supra* note 329, at 52.
[491] *Ibid*, at 53.
[492] *Ibid*.

them.[493] Furthermore, sexual harassment can affect the victim's health, producing disturbing emotions and negative psychological reactions.[494]

9.0. LEGAL TOOLS FOR PROTECTION AGAINST SEXUAL HARASSMENT IN THE WORKPLACE

International and regional tools have been developed to combat and regulate sexual harassment.[495] Most have been as a result of union action which has led to commendable programmes and other measures to eradicate sexual harassment.[496]

The ILO Discrimination Convention (Employment and Occupation) created a framework for equal, non-discriminatory treatment in the workplace but does not specifically address sex discrimination.[497] It nevertheless gives an opportunity to defend women as it deals with discrimination in employment.[498] The 2003 Code of Practice on Workplace Violence in Service Sectors offers guidance against sexual harassment.[499] The ILO also has a campaign for decent work programme which addresses sexual harassment as a health and safety issue and a violation of workers' basic rights.[500] The CEDAW offers a broad definition of discrimination with tentacles spread to every aspects of a woman's life.[501] It also defined sexual harassment and its effects on "potentialities of women"[502] The Beijing Declaration and

---

[493] *Supra* note 329, at 55.
[494] *Ibid*, at 53.
[495] Gaby Ore-Aguilar, "The regulation of Sexual Harassment in International Treaties and Documents" in L. LeMoncheck and J. Sterba, *Sexual Harassment: Issues and Answers* (Oxford University Press: Oxford, 2001), 336.
[496] Stopping Sexual Harassment at Work: A Trade Union Guide (*International Trade Union Confederation, 2008*), 6.
[497] *ILO Discrimination (Employment and Occupation) Convention*, 1960; *Supra* note 171, at 337.
[498] Burns, 2008, 6
[499] Code of practice on Workplace Violence in Services Sectors and Measures to combat this Phenomenon. International Labour Office, Geneva, 2003.
[500] *Supra* note 392, at 6.
[501] CEDAW, Art 2.
[502] *Supra* note 481, at 337.

Programme for Action in 1995 has as one of its objectives, the advancement of women's right as it relates to outlawing sexual harassment at work.[503]

The regional measures are also worthy of note. In Europe, there has been a major stride to eliminate sexual harassment.[504] The Organisation of American States has managed to create a convention that protects women from violence while suggesting legal measures as well as paving the way for just remedies.[505] In Africa, sexual harassment was addressed in the Women's Protocol and by sub-regional bodies[506]

On the national level, more than fifty countries have created laws that prohibit sexual harassment.[507] The United States for example has created sexual harassment law based on Title VII of the Civil Rights Act and victims of sexual harassment can file complaints to the Equal Employment Opportunity Commission if dissatisfied with organisational enquiry of the case.[508] In the United Kingdom, the victims of sexual harassment can file complaints with the Equality and Human Rights Commission. The Sex Discrimination Act 1975 was amended in 2008 and it requires employers to protect employees from any form of harassment encountered at work.[509] The South African Labour Law has been instrumental in

---

[503] *Supra* note 392, at 6.
[504] European Commission Recommendation of 27 Nov 1991 on the Protection of the Dignity of Women and Men at Work(92/131/EEC0); Directive 2002/73/EC on the Implementation of the Principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions. Para 9; Directive 2006/54/EC on equal opportunities and equal treatment of men and women in matters of employment and occupation; Directive 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services.
[505] *Inter- American Convention on the Prevention, Punishment and Eradication of Violence Against Women*. (Convention of Belem do Para) enforced 1995, Art 2.
[506] *Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa,* Art 12 & 13; *Southern African Development Community Protocol on Gender and Development,* Art 22; The Economic Community of West African States is in the process of developing a regional policy on sexual harassment.
[507] *Supra* note 392, at 7.
[508] *Supra* note 481, at 337.
[509] *Ibid*, at 338.

the creation of The Code of Good Practice on Sexual Harassment.[510] India and Tanzania have criminal laws addressing sexual harassment, Japan and South Africa have equality and discrimination laws targeting sexual harassment, Brazil, Belize, Philippines and Israel, Canada, Fiji and New Zealand have national human rights laws that protect against sexual harassment.[511]

9.1. Effectiveness of the International Legal Tools

The CEDAW has been very useful in Latin America because local rules of domestic procedure comes before seeking redress regionally and in other discrimination convention provisions thus, if ineffectiveness prevails, there is a more effective means of justice.[512] It is a more effective means because it can be used in a broader context as it applies within and outside the workplace while the discrimination convention applies only in the workplace.[513] CEDAW also has the power to expand protection in countries like Argentina whose law governs just public sector employees.[514] The law of employment contracts could be used by an employee in the private sector which protects the physical and psychological integrity of employees through CEDAW.[515] This would therefore be an alternative to Argentina's lack of specific legislation dealing with sexual harassment in the private sector.[516] The CEDAW Committee has also recommended that states report the status of sexual harassment under the norms of the convention and revise their laws accordingly.[517] This initiative created an avenue for states to develop legislation as well as mechanisms to penalize sexual harassment in the spheres within

[510] *Ibid*.
[511] *ILO Declaration on Fundamental Principles and Rights at Work*, adopted by the International Labour Conference 1998.
[512] *Supra* note 481, at 338.
[513] GA Resolution 34/180, UN Doc A/RES/34/180(1979), Art 1.
[514] *Supra* note 481, at 338.
[515] *Supra* note 189, Art. 81.
[516] *Supra* note 481, at 338.
[517] CEDAW Gen Rec. 19, 1992 Para 8.

CEDAW's wide reach; gender based violence was also classified as sex discrimination.[518]

The Convention of Belem do Para[519] has been successful in labelling sexual harassment as a gender based act of violence.[520] It also requires member states to adopt effective measures to prevent, penalize and eliminate violence against women which sexual harassment is an example of. It refers to its perpetuation and acquiesces by the state. It also allows persons and individuals associated with OAS member states to lodge complaints against any state that has failed to fulfil its duties.[521] The Convention of Belem Do Para is therefore the most advanced regional tool for preventing violence against women and it is also the only one that calls for the eradication of sexual harassment in public and private sphere.[522]

9.2. Effectiveness of National Sexual Harassment Laws

Title VII of the civil rights act has been recognized as one of the most important existing legal tools for attacking employment practices which discriminates based on sex.[523] Although Title VII has not always applied to sexual harassment as gender based discrimination,[524] there has been development towards the correction of this misconception.[525] The court thought recognizing sexual harassment claims would open the doors of the courtroom

[518] *Supra* note 481, at 338.
[519] *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,* 1994.
[520] *Supra* note 481, at 338.
[521] *Ibid*.
[522] *Supra* note 495, at 33; *Ibid*, Art. 2, 7 & 12.
[523] K. Wisel, "Title VII: Legal Protection against Sexual Harassment" (1977) 53, *Washington Law Review*, 123.
[524] *Barnes v. Train*, 13 Fair Employment Practice. Case 123 (DDC 1974, *Tomkins v. Public Service Electric and Gas Co.* 422 F. Supp 553 (DNJ 1976).
[525] *Meritor Saving Bank v. Vinson. US Supreme Court*, 447, U S Supreme Court, 1986.

to baseless litigation.[526] The court also felt that 'it would be tampering with nature if it attempted to regulate in this area'[527]

Courts have generally been more receptive to quid pro quo sexual harassment cases because it mostly involves some tangible or economic harm to the victim, this has not been the case for hostile environment sexual harassment cases.[528] Hostile environment cases have been more controversial because the question of whether an environment is hostile is said to be perceptive.[529] The Supreme Court outlined four tests to determine if sexual harassment occurred in hostile environment discrimination cases.[530] First, the conduct must be sexual in nature, the conduct must be unwelcome, the unwelcome conduct must be severe enough to alter the victim's condition of employment and the employer knew or should have known of the alleged conduct.[531] There was controversy with the criteria for determining whether the alleged conduct was severe according to the third test, thus the adoption of the objective reasonableness standard.[532]

10.0. THE REASONABLE WOMAN STANDARD

Courts started to apply a gender conscious approach based on the belief that the judiciary cannot eradicate discriminatory practices without considering the underrepresentation of

[526] K. Wisel, 1976, 125.
[527] Wisel, 1976, 125; see note 395, 396 and 397 on the traditional causes of sexual harassment.
[528] Perry E, Kulik C and Bourhis A, "The Reasonable Woman Standard: Effects on Sexual Harassment Court Decisions", (2004) 28 *Journal of Law and Human Behaviour*, 8.
[529] *Ibid*, at 10.
[530] Goodman Delahunty, "Pragmatic Support for the Reasonable Victim Standard in Hostile Workplace Sexual Harassment Cases", (1999) 5 *Psychology, Public Policy and Law*, 519-520.
[531] Grider, et al, "The Reasonable Woman Standard in Hostile Environment Litigation" (1992) 5 *Texas Bar Journal*, 52-55.
[532] *Supra* note 526, at 10.

women's concerns in the formation of societal norms.[533] There was argument and consideration about whether sexually harassing conduct should be measured by its impact on the reasonable woman not a reasonable person or victim.[534] The central argument was to approach sexual harassment from the perspective of the victim to determine that pervasiveness of sexual harassment could alter working conditions and create a hostile work environment.[535] The perspective of the reasonable woman was therefore adopted because it was believed that a sex blind perspective would be male-biased and systematically ignore the experiences of the victim.[536] Another reason for the justification of this perspective was because of a large body of social science research that shows that men and women perceive harassment differently.[537]

There was an attempt to regulate the use of this standard to protect employers from over sensitive employees;[538] the victim had to prove that such conduct complained about would affect a reasonable person of the same sex in the same position detrimentally.[539] The reasonable woman standard has been criticized to be antithetical to the sex blind principles of Title VII and threatens to retrench the sex based principles that Title VII was created to eliminate.[540] Critics have asserted that the reasonable woman standard will trivialize sexual harassment by defining it as a problem peculiar only to women and this may

---

[533] *Elision* v. *Brady*, 924 F.2d, 1991; Arbery A and Walter C, 'A Step Backward for Equality Principles: The 'Reasonable Woman' Standard in Title vii Hostile Work Environment Sexual Harassment Claims' (Vol 27 *Ga. L. Rev*, 1993), 505
[534]*Robinson* v. *Jacksonville Shipyards*, 1991; Alba Conte '*Legal Theories of Sexual Harassment' in Wall, Sexual Harassment: Confrontations and Decisions* (ed) (Prometheus Books: New York, 2000), 182.
[535] *Supra* note 533.
[536] *Supra* note 534, at 183.
[537] *Supra* note 526, at 11.
[538] *Supra* note 534, at 183.
[539] *Andrews* v. *City of Philadelphia*, 1990; *Austin* v. *State of Hawaii et al*, 1991.
[540] *Supra* note 533, at 508.

reduce the willingness of employers to hire female employees as it makes them vulnerable to legal action.[541]

The test has also been scrutinized in application, noting that as the community evolved, the standard of what a reasonable woman would consider as harassment will evolve.[542] In *Henson* v. *City of Dundee*[543], the court identified the elements of a hostile environment sexual harassment and based its analysis on the guidelines issued by the EEOC aimed at enforcing an employee's right to work in an environment free from discriminatory intimidation.[544] The court found that an applicant can meet the requirements to be a member of a protected group without the need for reasonableness.[545] If an applicant alleges sexual harassment, he or she still qualifies to be protected under Title VII since it protects both sexes from discrimination.[546] The court also determined that a subjective evaluation would help to elucidate if the applicant faced unwelcome harassment regardless of the reasonableness of the conduct.[547] This element applies also if the employee is an affected individual by offence taken to the conduct.[548]

The reasonable woman standard may be faulty, but it has its positive effects in organisations. The reasonable women standard is now being integrated into organisational training efforts and has helped raise awareness about sexual harassment issues.[549] Employees are taught to view social sexual behaviour from the

---

[541] Adler and Peirce, "The Legal, Ethical and Social Implications of the Reasonable Woman Standard in Sexual Harassment Case" (1993) 61 *Fordham Law Review*, 773.
[542] *Lehman* v. *Toys 'R' Us, Inc*., Supreme Court of New Jersey [1993].
[543] 682, f.2d 897 (11th circuit, 1982).
[544] *Supra* note 534, at 507.
[545] *Henson* v. *City of Dundee* no 80-5827, US Court of Appeals, Eleventh Circuit.1982 Para 903.
[546] *Ibid*, para 904.
[547] *Supra* note 534, at 508.
[548] *Ibid*.
[549] Levy A and M Paludi, *Workplace Sexual Harassment*, (Prenctice-Hall: New Jersey, 1997).

target's perspective.[550] If the reasonable woman standard influences third party decisions because of training given to supervisors and human resource managers in using this perspective, there would be more aggression in identification and reprimand of illegal sexual behaviour in the workplace.[551] The use of this standard may also help workers to recognize that unwelcome sexual behaviour is harmful.[552] Employees that have also undergone training using the reasonable woman perspective would be less likely to engage in inappropriate sexual behaviour.[553]

Research has also shown that cases heard under a reasonable woman standard would more likely be in favour of the applicant than cases not heard under this standard.[554] This could have impact on future court decisions because in an average hostile work environment case, the probability of winning is 24 percent, but when the reasonable woman precedent is being used, the plaintiff's probability of winning becomes an impressive 50 percent.[555]

The EEOC as at 2006 has resolved 11,936 charges out of 12,025 brought on sexual harassment; it has also been able to recover $48.8 million in damages from companies, which the complainants worked.[556]

11.0. SEXUAL HARASSMENT IN THE NIGERIAN WORKPLACE

In Nigeria, there is no provision in the Labour Act that prohibits Sexual Harassment. The Labour Standards Bill, which was

[550] Perry E, Kulik C and Bourhis A, "The Reasonable Woman Standard: Effects on Sexual Harassment Court Decisions" (2004) 28 *Journal of Law and Human Behaviour*, 12.
[551] *Ibid,* at 12-13.
[552] Wiener R L and L E Hurt, "How do People Evaluate Social Sexual Conduct at Work? A Psychological Model" (2000) 85 *Journal of Applied Psychology*, 75-85.
[553] *Supra* note 534, at 13.
[554] *Ibid,* at 19.
[555] *Supra* note 534, at 22.
[556] *Declaration on Fundamental Principles and Rights at Work*, 1998.

submitted to the National Assembly in 2008 though addresses sexual harassment, it has however not been passed into law yet.[557] Even though Nigeria is party to the ILO Convention 111, it has not made any efforts to implement its provisions on a federal scale as far as sexual harassment is concerned. The situation projects that employer-employee problem is a personal one; this perception is similar to the public/private distinction common in nearly all societies.[558] The Federal System of Government that operates in Nigeria has however enabled Lagos State to enforce its own criminal law, which prohibits sexual harassment.[559]

A survey conducted on female employees of both private and public organisations showed that 73 percent had been sexually harassed but the harsh economic climate perpetuates it as many women realize that jobs are not easy to come by.[560]

The CEDAW concluding observation shows that the Committee recognizes that there is prevalence of sexual harassment in the workplace as well as the lack of legislation and measures to combat it.[561] The Committee also urges that legislation should be enacted to this end, including putting in place remedies and compensation for victims.[562] The National Industrial Court of Nigeria can exercise jurisdiction over cases relating to labour, employment and health and safety of an employee including dispute arising from discrimination or sexual harassment.[563] It was given the opportunity to do so in the case of *Ejike Maduka* v.

---

[557] Wage Indicator, Decent Work Check (2019), 32.
[558] Ladebo 2003, 121; Charlseworth and Chinkin, 2000, 56.
[559] Section 262, Criminal Law of Lagos State.
[560] Yusuf N., "Experience of Sexual Harassment at Work by Female Employees in a Nigerian Work Environment" (2010) 30 *Journal of Human Ecology*, 184; Ige A. and Adeleke I., "Evaluating the Role of Culture on Sexual Harassment: The case of Nigerian Organisations" Working Paper on Work and Employment Relations 2012, 8.
[561] CEDAW Concluding Observation on Nigeria. 2008. CEDAW/C/NGA/CO/6. Para 332.
[562] *Ibid*, para 333.
[563] *National Industrial Court of Nigeria. The New Constitution(The Third Alteration Act)* 2010, section 254C-(1)-(6)

Microsoft and Ors[564]where it found that the fundamental human right to dignity and freedom from discrimination of the applicant was violated by the perpetrator. The court also held her employers liable for these violations.[565]

Prior to this judgment by the NIC, there was no case law on sexual harassment in Nigeria and the judgment not only agrees with international standards, but by finding the first and second parties complicit, it places a burden of responsibility on employers of labour.[566] Knowing that they can be found indirectly responsible for sexual harassment prompts them to put policies in place to avoid the economic cost associated with it. In this case also, the parties argued that there was in fact a policy and complaints procedure, which the applicant explored, there was however no proof that it was effectively utilized, hence, liability through their inaction. There has been recommendation that employers' Corporate Social Responsibility mandates them to create policies that eradicate practices that undermine women's dignity such as sexual harassment.[567] Although this singular act does not absolve them of guilt, it is still a step in the right direction.

12.0. CONCLUSION

To successfully combat sexual harassment, legal and non-legal means must be involved including lessons taken from the broader theme of violence against women. One of such lessons is that organisations must exercise due diligence when sexual harassment is alleged.

---

[564] Unreported Suit Number NICN/LA/492/2012, Judgement delivered on December 19, 2013.

[565] Microsoft Corporation and its subsidiary, Microsoft Nigeria and their employee Mr. Onyeje were ordered to pay the applicant compensation.

[566] Perchstone & Graeys "Workplace Sexual Harassment: Is the employer Immune from Liability?" available at www.mondaq.com (accessed 15th March 2019).

[567] B Oyesola "Using Corporate Social Responsibility to Fight Sexual Harassment in Offices", available at www.nigerianbestforum.com (accessed March 10, 2010).

The purpose of this research has been to suggest that there can indeed be a synchronization among the three major actors, which is international law, the state and the organisation. It has also aimed to suggest that there can be no stop to sexual harassment against women without judicious activism among the three actors.

The importance of the right to work cannot be overemphasized because it is an important aspect of women's rights which promotes the economic empowerment of women, as sexual harassment prevents the enjoyment of this right and it must be eradicated.

A COMMENTARY ON THE CASE OF SHELL PETROLEUM DEVELOPMENT COMPANY LIMITED V CHIEF G.B.A TIEBO VII & 4 ORS[568] AND AN ANALYSIS OF OIL POLLUTION REGULATION IN NIGERIA

Abidemi Paramole*

1.0 INTRODUCTION

On a repeated basis, there has been an overwhelming presence of oil pollution in Nigeria. As a major oil producing country, some have argued that this occurrence should not be strange to this terrain. A better and perhaps, a more appropriate way to view this, will be to state that as a major oil producing state and one which has been producing oil for many years, robust measures should have been put in place to manage oil pollution in the country. Unlike developed countries, Nigeria does not have sufficient framework in place for the promotion of sustainable practices in the oil and gas industry and by necessary extension, the extractive industry, to match the world's current demand for the promotion of the sustainable development goals. As a country self-professing itself as the 'Giant of Africa ', this is not good enough. The country is not paving the way for the promotion of sustainable development goals and the eradication of oil pollution in Africa. Perhaps, a reason for this is the major influence of corruption in the oil and gas industry and the fact that many are benefitting from these corrupt practices.

This paper is however not seeking to discuss whether oil and gas companies are engaged in corrupt practices but rather to highlight the obvious lack of efficient regulation of the extractive industry in Nigeria particularly the oil and gas sector. While it is laudable that Nigeria has enacted laws such as the National Environmental

[568] (2005) 5 CLRN.

* Abidemi is an associate at Udo Udoma & Belo-Osagie and a member of the Oil and Gas fiscal team.

Standards and Regulations Enforcement Agency (Establishment) Act, 2007, there is room for improvement. The Petroleum Industry Governance Bill, (a fraction of the principal law, the Petroleum Industry Bill) a proposed law intended to change the practice and regulation of the oil and gas industry in Nigeria has yet to receive assent from the President despite its relevance to the petroleum industry in Nigeria. This clearly does not demonstrate Nigeria's commitment to improve the petroleum industry.

Another way to ensure proper regulation of the activities of oil companies is through the judiciary. By interpreting the laws of the land, the judiciary can help shape and set precedents for how the petroleum industry should be regulated. Upon this premise, this paper seeks to provide a commentary on the case of *Shell Petroleum Development Company Limited* v *Chief G.B.A Tiebo VII & 4 Ors*[569] with a view to establishing how the lack of preparedness by the counsel representing victims in oil pollution cases frustrate the efforts of the judiciary in not only ensuring justice for the affected parties, but also the deterrence of destructive practices by some oil companies in Nigeria. The damage caused by some of these companies and the loss experienced by indigenes makes it important that diligent prosecution be made in order to secure justice for the affected communities as well as to set precedents that oil pollution will not be encouraged in Nigeria and lastly, to allow the judiciary play its crucial role in ensuring that sustainable practices are promoted.

Another issue prevalent in oil and gas pollution cases in Nigeria, is the time-consuming process victims of oil pollution have to endure in order to secure justice. Sometimes, this tedious process arises as a result of a play of ego between counsel who are representing the parties and who although should be concentrating on the substance of the case, are more interested in making a statement in the legal profession. In the Supreme

[569] *Ibid.*

Court's case of *Chief (Dr.) Pere Ajuwa & Honourable Ingo Mac-Etteli v Shell Petroleum Development Company*,[570] the Respondent had appealed at several times, the decision of the trial court to not grant an unconditional stay of execution on the sum awarded to the Appellant by the trial court. Rather than allowing the substantive appeal of the matter to take its due course after the Court of Appeal had carefully granted the unconditional stay of execution, the Appellant proceeded to contest the decision of the Court of Appeal on the issue of the grant of the stay of execution at the Supreme Court which then took four years to resolve. Commenting on the time-consuming process involved in arriving at the decision of the Supreme Court, and on the fact that the same matter was to be sent back to the Court of Appeal for determination, the Late Muhammad Saifullah Muntaka Coomassie JSC stated:

> "My lords, I shall not end this contribution without making comments on the propriety of this appeal. While I do not wish a party should waive its constitutional right of appeal, if it feels strongly dissatisfied with the decision of the lower court, it is equally the duty of counsel to ensure a speedy trial and determination of the appeal. In this case the lower court delivered its ruling on 10/5/07 and fixed the appeal for hearing on 21/6/2007 within which time to appeal would have been heard and determined. Instead, learned senior counsel had embarked on this tortuous journey of appeal on the exercise of discretionary power by the lower court. This is 2011, four (4) years after which this appeal is been heard and determined by the lower court. Now the appeal is being sent to the lower court for trial after having wasted four years without the Appellants knowing their fate to the money in issue. This act, with due respect, is not encouraging and should not repeat itself and I would not say more than this"

[570] [2011] NGSC 7.

Further to the above, and to buttress the initial point made, there is an increasing culture amongst counsel representing victims of oil pollution in Nigeria, to not pay full and proper attention to the prayers which they seek in court understanding that this can make or mar their arguments. This has led to the loss of many cases on grounds of technicalities which could easily have been avoided if the counsel had been more tactful in their approach. A particular recurring example of this is the claim for special damages specifically proving same.

Through the lens of the case of *Shell Petroleum Development Company Limited v Chief G.B.A Tiebo VII & 4 Ors*,[571] we shall examine the Supreme Court's attitude to this practice and why special damages need to be proven specifically.

2.0 FACTS/BACKGROUND

This case was decided by the Supreme Court of Nigeria. The Respondent commenced this action on 6th June 1988 suing for themselves and in a representative capacity, on behalf of their community – Peremabiri community in YELGA. The matter was first initiated in the Yenagoa Division of the High Court of Rivers State (which is in present day, Bayelsa state) (the "trial court") by the Respondent claiming the sum of ₦64,146,000 being special and general damages for the negligence of the Appellant and for permitting crude oil, which was under mining by the Appellant, to spill in to the lands, swamps, creeks, ponds, lakes and also shrines of the Respondent.

The Respondent claimed that on the 16th of January 1987, as a result of the exploration activities of the Appellant, the Appellant had caused a major oil spillage of over six hundred barrels from its flow station and its pipelines or other installation at or near the plaintiff's village called Peremabiri thereby polluting and destroying creeks, farmlands, swamps, fishing nets, raffia palms and many

[571] (2005) 5 CLRN.

other parts of the Peremabiri community. The Respondents contended that these rivers and creeks were used for drinking, irrigation and other domestic purposes and as a result of this oil spillage, had to spend a colossal amount of money purchasing water. The Respondents claimed further that as a result of the destruction, they lost a lot of revenue as they could not hire out damaged communal fishing nets to fishermen from the community and neighbouring towns and villages. It is also the claim of the Respondent that as a result of the oil pollution, they had to raise and spend exorbitant amount of money in appeasing and resettling their KURUGBO and KOROMODE juju shrines which were defiled and desecrated by the aforesaid oil spillage. The oil spillage also occasioned the Respondent incurring enormous medical expenses as the Appellant failed to fly in medical reliefs.

At the end of the trial, the trial court awarded the Respondent general damages in the sum ₦6,000,000 and ₦1,000,000 in costs.

The Appellant was dissatisfied with the decision of the trial court and in furtherance of this, appealed to the Court of Appeal, Port Harcourt Division (the "Court of Appeal"). The Court of Appeal, believing that the appeal lacked merit, also dismissed the appeal. The Appellant on further appeal, approached the Supreme Court of Nigeria (the "Supreme Court") for a final determination of the matter. The main issues deduced from the documents of both parties to the appeal to the Supreme Court can be summarised to be the following:

> (a) whether the trial court was right in conforming the award of ₦400,000.00 as special damages in respect of raffia palms which had allegedly been destroyed by the crude oil after the trial court found that there was no credible evidence to support the claim for special damages for the raffia palms and there was no appeal from this finding

(b) whether the trial court was right in upholding the sum of ₦600,000.00 as general damages for money spent in buying water for drinking and other domestic uses when there was no credible evidence supporting purchase of water anywhere

(c) whether the trial court was right in confirming the award of general damages of ₦5,000,000 for hazards, general inconveniences and miscellaneous losses and expenses after holding that fear was not a recognised head of damages in negligence

The Supreme Court noted that the Appellant did not contest the correctness of the liability in negligence as ascribed to the Appellant by the trial court in its judgment. Therefore, the Supreme Court placed its focus on the issue of awards of damages and costs which were challenged in the appeal. Ruling that at the time the case was before the trial court, it had jurisdiction to entertain same, the court proceeded to analyse the judgment of the trial court.

3.0 JUDGMENT

The Supreme Court noting that the trial judge had stated that the Respondent failed to provide enough evidence to prove special damages, pronounced that the trial judge had misunderstood the purport of the decision in the case of *Oshinjinrin* v *Elias*[572] when it awarded general damages in lieu of special damages. The court pronounced that the decision in *Oshinjinrin* v *Elias*[573] was not to lower the standard of proof required in establishing special damages but rather to state that what is required to establish special damages is qualitative and credible evidence in order to establish entitlement to special damages. In other words, it is a guide and arises from the fact that it is impossible to quantify the

[572] (1970) 1 ANLR 153 at 156.
[573] *Ibid*.

nature of evidence required in a given case to justify the entitlement to special damages. The Supreme Court stated that evidence proffered must be qualitative and credible and as such lends itself to quantification and that each case depends on its own facts and circumstance, thus, indicating that special damages is circumstantial but requires convincing evidence (however it is established) to claim it. The character of the evidence, the Supreme Court noted, must measure up to the circumstance of the occasion or the expectation of a reasonable man.

The Supreme Court found that the trial judge admitted to the fact that while the first witness of the Respondent stated that raffia palms were damaged, he did not put any value on them in units or collectively. The Supreme Court found that this was enough to support the fact that the Respondent did not establish the special damages it sought to be awarded. Furthermore, the Supreme Court noted that the Respondent did not indicate whether these palms were yielding or not and as such it is impossible to ascertain the economic value of the palms and while this does mean that they do not have actual economic value, it means that the Respondent did not put their case forward properly. The Supreme Court also noted that the trial court wrongly awarded general damages in the sum of ₦600,000 in lieu of special damages in clear misunderstanding of the *Oshinjinrin* v *Elias* case. The court relying on *Nzerive* v *Dave Eng Co Ltd*[574] noted that special damages must be strictly proved, and the court cannot make its own estimate of it. The Supreme Court noted that the trial court and the Court of Appeal were wrong for treating a claim which failed under special damages as a successful one under general damage. The Supreme Court then proceeded to set aside the cost of ₦400,000 for raffia palms and ₦600,000 for loss of drinking water respectively.

However, on the award for general damages, the Supreme Court stressed that the only time when a decision with regard to general

[574] (1994) 8 NWLR (pt. 361) 124.

damages made by a trial court can be interfered with by an appellate court is when the award is manifestly too high or too low so as to suggest that it was an erroneous assessment of the damage suffered or where the trial judge had made the award relying on a wrong principle. Furthermore, the Supreme Court analysed the argument of the Appellant but could not find that ₦5,000,000 was too much an amount to be awarded as general damages for the destruction and pollution caused as a result of oil spillage from exploration activities of the Appellant. Accordingly, the Supreme Court rejected the argument of the Appellant to tamper with the decision of the trial court by altering the general damages awarded to the Respondent. On the issue raised by the Appellant that the award of one million naira in cost is excessive and unreasonable, the Supreme Court found that this issue was not contested at the Court of Appeal and it is only allowed to entertain matters that come as appeal from the Court of Appeal and not the High Court of a State. Thus, the Supreme Court declined to give a ruling on the award of costs.

In all, the appeal partially succeeded. The awards for loss of water and damage to the raffia palms were set aside while the general damages of and award of cost were affirmed by the court

4.0 COMMENTS

The case analysed above shows how important it is to properly establish claims put forward in judicial proceedings. The importance of properly and strictly proving special damages in any case, particularly in oil pollution cases, cannot be overlooked. As was stressed in the case above, general damages are subject to the discretion and review of the court awarding it. This means that where a party claims a sum, it is possible for the court entertaining such a suit, to review the damage awarded (which is mostly lower than the amount sought from the court.) However, with special damages, the case is different. If a party claiming special damages is able to lend credible evidence to support its

assertions and claims, the court will award the specific amount sought by the party. In most cases, special damages form the primary reason for the institution of oil pollution cases. It is therefore important to specifically state how the action of an erring oil company has created loss for the victims. More emphasis should therefore be placed on establishing special damages in oil pollution cases than general damages because the determination of the special damages is somewhat within a better degree of control of the victim than in general damages.

In the case above, the Respondents were favoured to have been granted an amount higher in general damages than those set aside in special damages. Nonetheless, the Respondents could not fully secure all of the compensation it would have been entitled to because it failed to specifically prove its entitlement to special damages. More so, the matter would have taken another toll if the special damages sought was higher than the general damages awarded. This underscores the importance of ensuring that the claims sought under special damages are specifically detailed. For example, in the instant case, the decision of the Supreme Court would have been different if the Respondents had stated how much raffia palms were destroyed, or, what the economic value of these raffia palms were at the time they were destroyed, or the detailed narration of the cost involved in securing alternative water supply. A case which could have been decided within reasonable time was delayed on technical grounds which then became the subject of several appeals and which inevitably delayed justice for the aggrieved parties

Conclusively, it is recommended that litigators should as a matter of importance, adopt the use of special damages as a strategy for securing judgment in favour of victims of oil pollution and more importantly, to ensure that they specifically detail the damages suffered by these victims when praying for special damages.

UNILAG
LAW
REVIEW