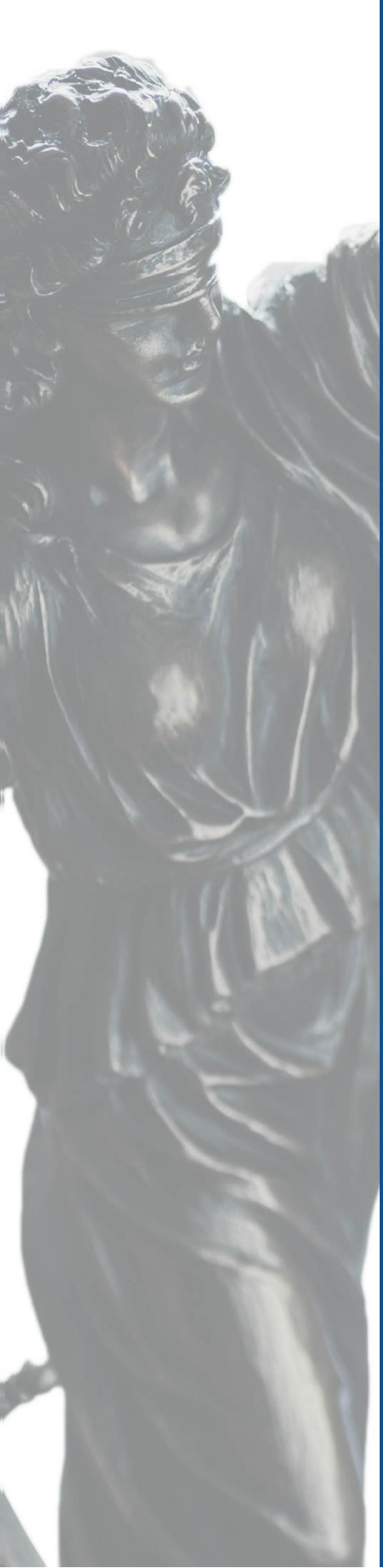

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EDITOR'S NOTE

It is my utmost pleasure to present the first edition of volume four of the UNILAG Law Review. Over the course of the last four years, the UNILAG Law Review has continued to evolve into the foremost platform for legal discussion for all stakeholders in the legal profession in Nigeria. Leading the Editorial Board is definitely not a walk in the park but as the famous saying goes, team work makes the dream work. Leveraging our teamwork and synergy, we were able to overcome our differences and piece together this material of legal scholarship.

The repertoire of articles contained in this edition ranges from international law to the role of the law in pertinent social issues as well as the vast environmental changes the world is facing. The articles are enlightening, thought-provoking and suitably portray the brilliance and diversity in the perspectives of some of the finest of legal minds you will find around. We are confident that this journal will be useful to all stakeholders of the legal profession.

It is expedient that I thank our patron - Professor Fabian Ajogwu SAN and the law Firm of Kenna Partners for their indefatigable support and commitment towards the growth of the UNILAG Law Review. I also appreciate the hard work of all members of the Editorial Board for ensuring that only the best content is brought to our readers. They worked tirelessly in reviewing manuscripts, ensuring the ethos of excellence of the UNILAG Law Review is maintained. I would also like to thank the Faculty of Law for its support and guidance through our staff adviser Professor I.O. Bolodeoku – who is dedicated to refining our editorial skills. I thank all the authors for their contribution to this volume, this journal is next to nothing without your input. The diversity and brilliance in this issue attests to the bright future of our legal profession.

Lastly, as we survive a global pandemic, it is evident we face a lot of challenges but if there is one thing that remains constant – it is learning. To this end, I implore readers to immerse themselves in this Journal, expand their world-views and mostly importantly; find practical applications for their learnings.

Olufolajimi Otitoola
Editor-in-Chief '20

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.

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TRANSNATIONAL AND INTERNATIONAL LEGAL CAREERS: CALCULATING FOR OPPORTUNITIES IN ACADEMIA, POLICY, PRACTICE AND BEYOND

Temitope Onifade*

ABSTRACT

Transnational and International Legal Career (TILC) opportunities will likely increase in the post-COVID 19 era. Being competitive for top TILC opportunities in academia, policy, practice and beyond requires some knowledge for conscious calculation. Although globalization and technology have made knowledge more accessible and could guide one's calculation, personal experiences offer a clearer pathway. Backed by personal stories, this article is a career autoethnography synthesizing and building on public lectures on TILC opportunities, including graduate and post-graduate work, delivered at the International Law Student Association workshops of University of Ibadan and Obafemi Awolowo University. The writer discusses how to navigate this career path. Bachelor of Laws (LLB) and Juris Doctorate (JD) students are the primary audience, while young lawyers (including graduate students) are the secondary audience, although non-law undergraduates and graduates could also benefit.

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1.0. GETTING ON THE SAME PAGE ON TERMINOLOGY

Let me start by clarifying my dimensions of career levels: the transnational and international. Like transnational education,[1] transnational careers may involve living in one country and working in another, often driven by globalization and technology. For instance, while living in Calgary in Canada, I worked as a research intern with Artis International based in the United States, chaired by two experienced policy researchers affiliated with the University of Oxford but also located at different countries: Dr. Richard Davis, a former Director of Prevention (terrorism) Policy at the White House who also worked as a Director at the United States Department of Homeland Security, and Dr. Scott Atran, a Research Director in Anthropology at Institut Jean Nicod-Ecole Normale Supérieure in Paris France. Information technology made my work easy, as we mostly communicated using internet applications and tools. International careers involve working across countries. You may also think of it as working in a country different from where you are born or ordinarily domiciled. Adequate evidence points us to many impressive Nigerians that are leading legal professionals around the world, including lawyers and legal academics in Australia, Canada, New Zealand, the United Kingdom, the United States, and several other countries.

Academia, policy, practice and whatever is beyond are dimensions of career types. Although academic work takes place at primary and secondary schools,[2] my focus is on post-secondary levels. At the post-secondary level, working in academia means you are employed by academic institutions such as universities and colleges or initiatives within such institutions, including as graduate students carrying out research and teaching duties, but this does not necessarily mean that you are limited to just teaching and/or conducting research. As a lecturer at Memorial University some years ago, my job description

[1] C. Adick, "Transnational Education in Schools, Universities, and Beyond: Definitions and Research Areas" (2018) 8(2) *Transnational Social Review*, p. 124.
[2] See W. Doyle, "Academic Work" (1983) 53(2) *Review of Educational Research*, p. 159.

mainly required me to teach. Now at the Commonwealth Climate and Law Initiative (CCLI) at the Smith School of Enterprise and the Environment, University of Oxford, and the Liu Institute Network for Africa (LINA) at the School of Public Policy and Global Affairs, UBC, my work has involved research, policy, and community engagement. As you can already tell, although you can do policy work as an academic, there is the option to devote more time working for governments (at the national and subnational levels), intergovernmental organizations such as the United Nations and the African Union, non-governmental organizations (NGOs) (especially think tanks), communities, and businesses (e.g. corporate social responsibility, risk management and sustainability compliance schemes). Policy work, focusing on making good decisions for public good,[3] is incredibly rewarding because you make an immediate impact on people's lives, unlike academic research which may take some time to have real world impact or legal practice which can eventually amount to simply working towards the interests of whoever can afford to pay your fees (although there is pro bono practice, which I also did at the Women's Law Clinic at the University of Ibadan). I do not have great personal examples, but I can refer you to two of my closest friends: Ayoola Odeyemi who serves as the Senior Policy Advisor in the Indigenous Advanced Education and Skills Council, Canada, and has added real value to the education of indigenous peoples in Canada, and Yemi Adeyeye who works as the Director of Young Professionals for Agricultural Development, Food and Agricultural Organization of the United Nations, has inspired young people's interest in agriculture around the world. You all know what legal practice means, including in-house practice in the corporate and financial sectors, so I would not say much about it. What I should draw your attention to are the attractive areas of legal practice that are emerging across geographical scales. Now is the time to build your expertise in those areas. My top three are climate law (especially low-carbon law), information technology law, and indigenous law — at least in North America where I have lived for some time. The actual "hot areas" may vary

[3] S. Torjman, *What is Policy* (Ottawa: The Caledon Institute of Social Policy: 2005): available at https://maytree.com/wp-content/uploads/544ENG.pdf (accessed 3 June 2020).

across jurisdictions. Some opportunities have come my way simply because I accidentally started working on renewable energy (a subset of low-carbon law) in Nigeria as a founding partner at a start-up law firm called Lex Luminaire LP, where I published my first scholarly article on environmental law,[4] and have built an expertise in the area,[5] but other emerging fields might do the same for you. As you might have noticed, I initially started with low-carbon law and then moved to low-carbon policy, suggesting there are other career routes beyond strictly staying in the legal field. For instance, my career trajectory would immediately tell you I have focused more on policy than law: I have taught Sustainable Resource Management and Environmental Science students at Memorial University, carried out projects with multidisciplinary colleagues for the Government of Newfoundland and Labrador, co-hosted public affairs shows within multidisciplinary teams on Vancouver Cooperative Radio, led a group of multidisciplinary tutors at the workshops of the Community Sustainability Global, and collaborated within multidisciplinary teams at CCLI at University of Oxford and LINA at UBC. These are jobs beyond traditional legal academic, policy, and practice routes.

Five sections follow. Section 2 ranks and advises on how to decide on TILC routes. Section 3 advises on the four key criteria to meet as a student: academic excellence, research experience, work experience and leadership experience. Section 4 advises on how to go about taking steps to achieve these criteria, including reading career literature, studying career and role models, and engaging career mentors. Section 5 advises on how much energy to put into achieving each of the criteria. Section 6 concludes.

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[4] B.R. Akinbola and T.T. Onifade, "Legal and Administrative Remedies in Environmental Law in Nigeria: Reform Proposition", (2013) 1(1) *Afe Babalola University Ado-Ekiti Law Journal*, p. 320.

[5] See, for instance, T.T. Onifade, "Renewable Energy in Nigeria: A Peep into Science, a Conclusion on Policy", (2015) 1(1) *International Journal for Innovations in Science, Business & Technology*, p. 49; T.T. Onifade, "Global Clues for Choosing Suitable Support Systems for Renewable Energy in the Power Sector", (2015) 6(1) *Renewable Energy Law and Policy Review*, p. 25; T.T. Onifade, "Hybrid Renewable Energy Support Policy in the Power Sector: The Contracts for Difference and Capacity Market Case Study", (2016) 95 *Energy Policy*, p. 390.

2.0. RANKING AND DECIDING ON TILC ROUTES

To give you a sense of the degree of preparation required for these career routes, I would like to rank them. My ranking is based on my experience working within and across the routes in the past 10 years (Post-Call to Bar in 2010), so other people may think differently. Legal practice is the easiest for obvious reasons. Without prejudice against other great things people may do, all you need to be a successful lawyer are: law degree,[6] practicing license (e.g. Body of Benchers Certificate), rich lawyering skills and a good network of clients and colleagues. Getting excellent grades might give you an edge in many ways, for instance in getting your first job and building a solid network, but there is no guarantee that you would be more successful than other lawyers with terrible grades. Ironically, having excellent grades could also be a disadvantage — I know lawyers that became outstanding because they were forced to start their private practice due to their poor grades, which closed the doors to getting positions at elite law firms — but would likely enable you to launch your career and start earning a decent salary without any delay. But to become an outstanding lawyer, your grades have little to nothing to do with it. Policy work follows in the hierarchy. Unlike legal practice, you need more than grades, lawyering skills, and a network. You should have decent research and leadership skills and values. The ability to influence others, maturity in handling situations and empathy for vulnerable people would make you go far. Keep in mind that while you can learn research and develop values, they are not easily teachable.

Moving on, by far the toughest career route is academic work, including teaching and research. Many academic jobs require you to combine both research and teaching and may ask for some additional academic leadership work (called service). Having excellent grades, strong research experience and some values is often a minimum requirement to be successful, but you need much more to be

[6] For instance, Bachelor of Laws (LLB) or Juris Doctorate (JD), and professional diplomas (e.g. Nigerian Law School qualifying exams and American bar exams) in law. While academic programmes such as LLB and JD prepare students mainly in substantive law, professional diploma programmes often train them in procedural law.

outstanding. Counter-intuitively, depending on the country, an academic job may not even attract mouth-watering remuneration when compared to legal practice and policy careers. While the pay is decent in Australia, most parts of Europe and North America, and, increasingly, some parts of Asia and the Middle East, I am not sure this is the case in most of Africa, Asia, and the Caribbean. However, what seems to be consistent across jurisdictions is that you get a lot of freedom, both intellectual (you can largely decide how to teach and what to research) and physical (when not teaching, many institutions allow you to work from home in pajamas!).

Now, how do you decide which route? Think about your values: people who tend to be driven by ideas might find academic career more rewarding because of the intellectual freedom it gives; others that want to pursue certain values, for instance pursuing public good, may find policy careers rewarding; and yet some others who want to make substantial money may take interest in some types of legal practice (e.g. traditional corporate and financial law), while others who want to fight for the vulnerable may decide to ignore optimum pay and go the way of other types of legal practice (e.g. corporate governance, human rights law, environmental law). These are just examples, so things may be different depending on what drives you and where you work. If you are ambitious and have the time, for instance where you finish your LLB or JD studies at a young age, you can try a bit of everything. Doing so takes time in terms of your training and responsibilities. The desire to take such a path might partly explain why some people have many (sometimes embarrassing) degrees or spend many years trying different things out. That is the path I have taken.

3.0. WHAT SHOULD YOU DO AS A STUDENT?

Managers (used broadly to mean any official that manages employees across academic, policy, practice, and other routes) use four main things to evaluate people across these career routes, including graduate and post-graduate opportunities such as professional or research training and awards: academic excellence, research experience, work experience and leadership experience. Exactly what would carry weight depends on many variables, including the nature

of the job, location, organization, the leadership at any point, and who you know there, among other things, but we can draw some generalizations.

We can generalize the degree of difficulty for each of these variables. While academic excellence might sound daunting to many of you at this stage of your training, you will realize in hindsight that it is the easiest. For instance, grades and awards (scholarships, fellowships, prizes, etc.) require hard work but are straight forward at your level: you master what we already know (existing knowledge), and then get rewarded for doing so. Research experience is much tougher than academic excellence because research often requires you to build on what we already know especially if you publish refereed or peer-reviewed articles. There are other easy ways to get research experience, for instance supporting more established researchers, but your goal should be to mature intellectually. Leadership is the toughest because you must be able to influence others to follow you. If you force your decisions on others, that is not leadership.

3.1. Academic Excellence

Reflecting the sense that academic success[7] means more than grades, academic excellence involves deep learning and understanding.[8] However, academic excellence is still often interpreted as having very good or excellent grades at the time of graduation. Using the 5-point grading scale, a very good grade is anything 4 point and above (higher threshold of Second Class Upper, equal to A- in North American grading systems), while an excellent grade starts from 4.5 (First Class, equal to A or A+ in North American grading systems). First class is no longer for God as it used to be many years ago. You probably have it or must have met someone that got it. Therefore, achieve it if you can. Alternatively, try to maintain a higher threshold of Second Class Upper. Although you may not get some opportunities a First Class

[7] See M. Cachia, S. Lynam, and R. Stock, "Academic Success: Is It Just about Grades?" (2018) 3(2) *Higher Education Pedagogies*, p. 434.
[8] B. Gereboff, "Taking Control: Defining Academic Excellence" (2015) *Hayidion: The Ravsak Journal*, p. 12.

would give you immediately, there will be many others, and you may even end up with some better opportunities.

Partly because many students worry and have asked me questions about their grades, let me illustrate with myself. Like many above-average students (although, as my classmates would tell you, I doubt that I qualify as a serious student during my studies at OAU), I had decent grades during the early stages of my LLB studies and was on my way to a First Class in a class of almost 300 students at OAU. At OAU, having a First Class was still rare back then (only one colleague, also my friend, was diligent enough to make it!), but that should not be anyone's excuse for missing it. Without a doubt, I had my "fault": I did not know the value of a First Class or plan for it (none of my family members even knew anything about that); took part in too many non-academic activities (especially dancing, singing, partying and politics); had laughable memory (and Nigeria's legal training system and teachers require one to ridiculously memorize, which, if moderate, would have its value, although there are teachers who take exception to blind "*la cram, la pour*"— my favourite teacher at OAU in that regard was Dr. Bode Ayorinde, Founder of Achievers University and now a member of the Nigerian House of Representatives); and was distracted by many other life issues outside school, among other things. Nonetheless, some of the skills I learnt doing other things have made my life better. Arguably more than I should have, I polished my research and leadership skills back then. So, the million-dollar question then is: has not having a First Class as an LLB student affected me? That is a likely yes: when I just graduated, I would probably have received some overly generous and prestigious scholarships right away. However, now reflecting on it, I cannot tell for sure that the negative impact is significant, having received those scholarships anyway (to be clear, I have also had First Class in other degrees, so that thwarts the full picture). Besides, grades are meaningless once you get to an advanced career stage. While grades may get you there, grades cannot keep you there—what you can do and your productivity are far more important.

In any event, more significant are other challenges that, in retrospect, appear to be much more troubling than my grades: ignorance and

"poverty" (although, my interpretation of poverty now goes beyond having financial resources). Partly because I had no computer or ready access to the internet (which was just becoming popular, so I learnt most things reading Microsoft Encarta on a laptop owned by my roommate and, later, partner at Lex Luminaire LP, Dapo Egunwale), I knew nothing about scholarships and other opportunities. Although I did internships and competitions (moot, essay, and debate), I did not apply for most things, especially awards, as an LLB student. Now looking back, I often feel I wasted my LLB grades because of my ignorance. At such, I consider ignorance to be a more fundamental problem. Also, the same goes for poverty. To be clear, I did not know or think I was poor, or think about poverty, as an LLB student (you do not know what you do not know, so I did not know I was poor because I did not really know what being poor meant), so my awareness was subsequent. My father retired before I started my LLB studies and my mother had health issues, but they still offered me everything they had, for instance food (yams were my favourite, because my mum left teaching to sell them and offered me in abundance) and tuition (fortunately, OAU was one of the cheapest at the time, so we paid just over ₦5,000, and I had some help from my siblings), but I largely thrived reading friends' books. At the height of poverty, there were times I begged people on the streets for transportation fare (just a couple of times, I swear!), and getting access to books was tough. I remember thinking of or trying to join some of my inspiring friends — Abayomi Ogayemi, Anwuli Ikem, Femi Iyiola, Lulu Onakpoya, Ogechi Oluigbo, Feyisayo Adegboye, Dunni Shodipo, Tosin Bolarinwa and Tomi Adewoye — at the pre-degree classrooms at Ipetumodu, OAU library and classrooms, or elsewhere, where I could use their books, but I was terrible at studying with others: I often slept off or wanted to talk to girls (you know, as a teenager, what can I say?). For instance, in our year 1, Abayomi Ogayemi would come to my room to get me so we could go study overnight, but I almost always slept off (and he did too!), except when talking to girls, so I eventually started hiding anytime he came. Someone I cannot forget and would be eternally grateful to is Titilayo Fadairo who eventually gave me her books, but I also borrowed other books owned by my kind-hearted friends, Abayomi Ogayemi and Adeola Owoade.

Amazingly, immediately after graduation, I got a half-tuition scholarship to pursue a master's degree in the United Kingdom. Studying or living outside Nigeria was not my thing (out of ignorance!), but, due to her good heart, my sister, Toyin Adekanmbi, submitted the application without telling me. "Wow!" was my reaction upon receiving the offer, since I did not know that some people gave free money to kids as a reward for getting good grades. However, then comes the financial problem again. Where would I get the money to pay for the remaining half of my tuition? Reluctantly, my dad and I went to meet his friend, Archbishop Ayo Ladigbolu, to see if he could help us raise some funds from the Oyo State Government; although I got other scholarships from the Oyo State Government (for law school and another master's), that admission did not pan out. Looking back, I wish I knew about Commonwealth Scholarship and a handful of other awards out there at the time.

Jumping out of my discussion is the key message I would like to pass that, while grades can make or break, having excellent or very good scores does not mean you are better or worse. Your grades often reflect the aggregate of your decisions, good or bad. Like me, you may just have more options to choose from with very good or excellent grades. I have enjoyed the freedom to try out the academic, policy and practice routes. Someone with bad grades may be confined in their career choices. Not that they cannot be an outstanding lawyer or policy official making more money or having better impact. However, it would be tough, if not impossible, to get scholarships and other awards based on academic merit. Working as an academic in a competitive setting would also almost be impossible. But then, what really matters are your values and what you want in life. What do you care about? You have time to decide on that and make suitable decisions.

Awards are another important component of academic excellence.[9] Please feel free to be an Oliver Twist: the more you get, the better.

[9] When you apply for graduate studies and awards, including scholarships and fellowships, reviewers often consider previous awards that you have received in their evaluation of your application. For instance, the most prestigious graduate awards in the world such as the Rhodes Scholarships (United Kingdom), Marshall

During my LLB studies, we had limited access to information because the internet was new to Nigeria. While we got internal awards within the university and through competitions, low internet access made learning about external awards difficult. Right now, you have too much access to information! Additionally, there were fewer award opportunities back then. Most of us only applied for things shared through our friends and networks. Again, globalization has now made it possible to easily apply for awards outside your geographical location.

How do you decide which awards to apply for? That is one of the questions I asked my first academic mentor in Canada, Prof. Gabriela Sabau at Memorial University. Her reply was to apply for everything: writing competitions, government scholarships and bursaries. These are channels to get you early awards. Also, organize seminars and share awards, albeit based on merit. Such awards would carry some weight for future opportunities.

Yet another component of academic excellence, specialized short courses outside your degree studies, would also give a positive impression and suggest that you are invested in your area of interest.[10] You have likely seen one or two around or heard about them. I did too as an LLB student. Negotiation and Conflict Management Group brought its Pre-certification and Associate Mediator courses during my LLB studies. Because I was open to new opportunities, I took the courses. Many of such courses are now available online. Some organizations (universities, intergovernmental organizations, etc.) host their online learning platforms, for instance the World Intellectual Property Organization and the World Bank, but numerous others use online hosting platforms such as Coursera and edX. Many of the short courses are free, but some may require payment. Apparently, I imagine e-courses (and other online opportunities) will increase in the post-

Scholarships (United States) and Vanier Canada Graduate Scholarships (Canada) consider previous awards to judge academic excellence.

[10] For instance, in applications for awards, the specialized courses may help a candidate establish "the relevance of the proposed academic programme to his or her scholarly and career plans." Marshall Scholarships, "Criteria: Academic Merit", available at https://www.marshallscholarship.org/apply/criteria-and-who-is-eligible/criteria-academic-merit (accessed 3 June 2020).

COVID-19 global society because we have learnt to do so much online.

Tutorial is my final component of academic excellence. Teaching others is one of the best ways to learn and test what you know, but you also get to help others, which is even more gratifying. You may already have existing platforms to teach others, but, if not, you can also create one. For instance, as the Principal Liaison Officer of the Law Students' Society at OAU, I created the Law Group Tutorial because none existed at the time. I recruited top students to teach freshmen. Numerous students enrolled and found it rewarding, and the tutors also strengthened their knowledge and ability to impart knowledge.

3.2. Research Experience

Everyone needs some research experience, but those interested in academic and policy careers might find it hard to succeed without it. Several opportunities for research experience are around you, but many students undervalue and/or misunderstand the idea of research. Truly ignorant students may think LLB research does not carry much weight, or that they do not need it because they want to practice. They would rather spend their time organizing conferences and bringing public figures. I did all of that too. However, having some research experience might give you more opportunities than interacting with big names. For instance, my research experience immediately after I left OAU got me job offers and other opportunities from Prof. Elisabeta Olarinde (Deputy Vice-Chancellor, Administration, and Provost, College of Law, Afe Babalola University) and Dr. Peter Obutte (Deputy Director-Academics, Centre for Petroleum Energy Economics and Law, and Senior Lecturer, Faculty of Law, University of Ibadan), and subsequently in Canada, for instance as a Lecturer and later the opportunity to be an Assistant Professor through Prof. Gabriela Sabau at Memorial University, and more recently as a Research Associate at Commonwealth Climate and Law Initiative at University of Oxford through Prof. Janis Sarra at UBC. Knowing big names can only get you so far, but your research skills can open doors that even such people might not be able to enter. Of course, knowing big names and excelling at research could achieve the

same thing, but just knowing big names might not. Some other students are not ignorant, meaning they are open to research, but may not know how to get the experience. So many openings await you: carrying out research for debates and moot competitions, working on entries for essay competitions, helping out with your student journal or newspaper, volunteering as a research assistant for lecturers and more senior researchers such as doctoral students (locally and transnationally), and helping with research at legal clinics, among several others. Not many LLB students get to publish quality articles, especially in refereed journals, but actively seek that opportunity because it is probably the most significant evidence of research experience you would have at your level. However, avoid mediocre work or publishing too many articles, because you will eventually dislike the quality of your current publications when you know better.

Again, let me give you some examples from my time at OAU, while acknowledging there are more significant research opportunities now, including international moot competitions that were not available during my time. I was invited to present my first research paper at a Justice Chambers' Meeting in year 1. Eventually, I also did some research as counsel and coach for moot competitions, speaker and coach for debate competitions (although I was fortunate to win a debate award, I was better at the research part, not the speaking part, because I was bad at memorizing things), and lead author for competitive essay competitions (including one on behalf of my class, which earned us the Ife Law Research Awards, and the Obasanjo Presidential Library Essay Competition). Later, I started getting some recognition as a student research leader. I coordinated research as Lead Counsel and later Coach for the Justice Amina Adamu Augie (Justice of the Supreme Court of Nigeria) Moot Competition, Chair of the Inaugural Wole Olanipekun (Senior Advocate of Nigeria) National Moot Competition, Deputy Editor-in-Chief of the 27th Volume of the "Advocate: International Journal of the Law Students' Society" (the Advocate) and research and programme consultant to Prima Strata Club for a national debate competition, among several other engagements.

3.3. Work Experience

Many of you already get work experience through internships and externships, so I would only draw your attention to some things you might want to consider. First, you might want to do internships that suit your area of interest, not just at law firms. If you want to be a trial lawyer, then a litigation law firm is the way to go. But rather than litigation, you may want to practice within companies, in which case you should intern within the industry. Some of you are already considering joining the bench, so perhaps you should intern with courts and other judicial staff, including judges, magistrates and court clerks. For those interested in policy work, then intern with government departments or politicians at any level. If your goal is to join academia, why not volunteer as a research assistant for academics, doctoral students and other researchers, and research-oriented organizations? Altogether, also remember that, inspired by globalization and with the help of technology, you can now take up opportunities abroad. For instance, you could work as an intern or a research assistant to someone in another country.

Because I had inadequate knowledge of career routes, I did a bit of trial, judicial and academic internships. I interned with the Law Firm of Wahab Shittu in Lagos as an LLB student, and then externed with the Law Firm of Funmilayo A. Quadri in Ibadan as a law school student. While working with Ms. Quadri, she was gracious enough to also allow me to proofread the Nigerian Supreme Court Quarterly Law Report, which gave me additional professional editing experience that has been useful in my career. During Law School, I also externed with the Oyo State High Court, Federal High Court Division in Ibadan, and the Court of Appeal Division in Ibadan.

3.4. Leadership Experience

Leadership is tough! You need to do better than having academic excellence, research experience and work experience. You need to think beyond yourself and inspire other people. You see why it is tough? Leadership cannot be forced. Start small by trying to lead your juniors, then work your way up to lead colleagues and organizations, for instance by becoming chair of committees or head of chambers.

Where there is no organization that would serve your cause, you could even start one: my favourite example for that is Wole Kunuji at OAU who started a few student organizations. Also, start thinking of what you can do beyond the university, for instance community projects and causes within your local governments.

Most of my leadership work at OAU were within the university, specifically in the Law Students' Society and Justice Chambers (I did other non-academic leadership work, including serving as the head of a dance group and a music group, but these were not professional), but I also had the opportunity to connect with senior scholars and professionals across Nigeria through my leadership work. For instance, while serving as the Deputy Editor-In-Chief of the Advocate, my good friend and Editor-in-Chief, Feyisayo Adegboye, and I travelled to solicit articles from faculty members at the University of Ibadan (e.g. Professor J.O. Anifalaje and Professor Yinka Omorogbe), University of Lagos (e.g. Professor Oyelowo Oyewo, Professor Ayo Atsenuwa and Professor Abiola Sanni) and Lagos State University (e.g. Prof. Olusegun Yerokun and Professor B.A. Susu), among others. Also, my team and I travelled to meet Chief Wole Olanipekun (Senior Advocate of Nigeria) who hosted us when we decided to honour him with our volume of the journal (although we eventually handed the volume over to another team because our set left for law school).

4.0. HOW DO YOU GO ABOUT WHAT YOU SHOULD DO AS A STUDENT?

You should start considering now whether you would like to focus on a route from the get-go or do a bit of everything. That decision would determine the steps to take, for instance which of academic excellence, research experience, work experience and leadership experience should take most of your time.

Because you may not know enough variables to consider to be able to think adequately, start by reading career literature. While there is

literature on transnational[11] and international[12] legal careers, including those looking at specific career levels such as those of Master of Laws (LLM) graduates,[13] there is yet to be a systematic body of literature on TILC guiding students and young lawyers especially in Africa, so you could start by reading articles (such as this one) providing some insight. Good TILC articles are written by people that have quality experience or expertise in the transnational and international space. To know whether you should spend your time reading a TILC article, read about the writer.

Also, study those I call "career models," for instance through career profiles and learn from role models. I distinguish career models and role models: like models in the fashion industry, career models are celebrities in your field, representing your picture of an ideal career personage at specific levels, while role models are people you could learn a variety of things from. Career models have lived out what you might be reading, so their trajectories mirror your aspiration, while role models exhibit aspects of a lifestyle that you would like to emulate, even if they have not lived out your aspiration. Then, talk to career mentors. Like role models but unlike career models, career mentors have relevant knowledge to guide you, even if they have not lived out their advice. Although their knowledge may come from personal experience, they might also have learnt more about your area of interest in other ways, for instance through networks and research.

Engage career literature, career and role models, and career mentors strategically. While reading career literature, it is better to compare

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[11] See, for example, D. Campbell (ed.), *Transnational Legal Practice: A Survey of Selected Countries* (Deventer: Kluwer Law and Taxation, 1982)*;* L. S. Spedding, *Transnational Legal Practice in the EEC and United States* (Transnational Publishers Inc.: 1987).

[12] See, for example, J.W. Williams (ed.), *Career Preparation and Opportunities in International law* (American Bar Association Section of International Law and Practice and International Law Institute: Washington DC, 1984); M.W. Janis, *Careers in International Law* (American Bar Association Section of international Law and Practice: Washington DC, 1993); M. Bombau (ed.), *Careers in International Law,* 5th ed. (American Bar Association Section on International Law: Chicago, 2019).

[13] C. Silver, "States Side Story: Career Paths of International LL.M. Students, or 'I Like to be in America'" (2012) 80 *Fordham Law Review*, p. 2383.

diverse contributions. That way, you can find more nuances and bring out the most helpful lessons, for instance recurring views. Also, digest the journey of career models and get role models to guide you along your pathway, whether similar or different from that of your career mentor. Make efforts to get your best career models as mentors but realize this is an ideal scenario that might not come to be. For instance, you may not be able to contact them, or they may not have the time to mentor you. Role models could fill that gap. Additionally, while learning about career models is extremely helpful, role models and career mentors are better suited to brainstorming your unique circumstances, which could then shape the advice you get to be tailor-made. For instance, if you have genuine family responsibilities, then you may want to get research, work and leadership opportunities that come with some remuneration rather than as a volunteer, so an experienced mentor or role model may be in the position to bring that consideration into perspective.

4.1. Career Literature

TILC literature is still in its infancy. For that reason, you may not have many options. Eventually, a body of literature would develop, so there will be more rigorous investigation of career trajectories and lessons. At that time, there would be more room to determine the value of TILC writings.

While at OAU, I did not have access to any TILC literature because none really existed. Even now, there are only a handful of articles, most of which use lived experience. However, there is no systematic body of work providing guidance on TILC.

4.2. Career and Role Models

Unlike career literature, career models are plentiful. Rarely, career models are close to you. For instance, you may have celebrity lecturers and professors. While at OAU, my career model was Prof. Ademola Popoola (former Dean of Law, OAU, among other notable positions). He represented what I wanted to be and partly influenced my desire not to study outside Nigeria. More often, career models are distant. For instance, just before graduating from OAU, I started

reading about notable scholars, including Prof. Taslim Olawale Elias (former Dean of Faculty of Law, University of Lagos, former Attorney-General and Chief Justice of Nigeria, and former Justice and later President of the International Court of Justice, among other notable positions), Emeritus Prof. David Adedayo Ijalaye S.A.N (former Dean, Faculty of Law, and former Deputy Vice Chancellor and Chairman of Board of Postgraduate Studies, OAU, first Emeritus Professor of Law in Nigeria, and former Attorney-General and Commissioner for Justice, Ondo State, among other notable positions), Prof. Itse Sagay S.A.N. (former Dean of Faculty of Law, OAU, among other notable positions), Prof. Okorodudu Fubara (also former Dean of Faculty of Law, OAU, and first Nigerian female Professor of Law, among other notable positions) and Prof. Akin Oyebode (former Professor, Faculty of Law, University of Lagos, and former Vice-Chancellor, University of Ado-Ekiti, among other notable positions), so they became distant career models. Combined, some of these scholars embody various aspects of what I would like to be in the future. Anyhow, also note that, as you mature in your training, your career models may change. Although mine have not changed significantly, I have added others to my list.

Reading about career models can be incredibly inspiring. As a sort of reality check or self-evaluation, you could measure your achievements against theirs along the way. For instance, you could verify what they did at undergraduate and graduate levels. However, be careful in the lessons you draw. Measure yourself against career models with serious caution. Put into perspective their achievements by trying to investigate or imagine their unique circumstances, for instance where they were at your stage, rather than giving yourself unnecessary hard time by comparing your current stage with theirs. Remember, you come from different backgrounds with distinct challenges and opportunities. For instance, up to the 1990s, it was still relatively rare for legal scholars to earn doctoral degrees,[14] but doing so in the 2000s

[14] That remains the case in most parts of the United States and some parts of Australia and Canada where academics mainly require a Juris Doctorate (JD) to teach and carry out research in a university law programme. A JD is the equivalent of a Bachelor of Laws (LLB), although they have different methods of design and delivery. In most parts of the United States, mostly foreigners earn a

onward could significantly impact your career prospects in academia, and many Nigerian law students in those decades had access to domestic scholarships on merit, which is arguably no longer the case. Also, they have had more time and/or resources to do things! As such, do not measure their achievements in their 50s to yours in your 20s.

A major challenge with regards to career models while I was at OAU was my limited access to information. I did not know much about the profiles or other details of people that had gone before me early enough. Until my final couple of years when I read about the likes of Prof. Taslim Olawale Elias, hardly do I remember reading the profile of any Nigerian leading in the transnational and international scenes, except Prof. Wole Soyinka (Emeritus Professor at OAU at the time, although he was rarely in his office), but he is not a lawyer. Although I knew Emeritus Prof. David Adedayo Ijalaye S.A.N and Prof. Okorodudu Fubara at OAU, I learnt more about their work in Nigeria during public presentations, so I did not know much about their TILC opportunities and contributions. Not knowing about people in the TILC space meant I did not know I could do more than I was doing. The Faculty of Law, the Law Student Society or other organizations could have remedied that problem by bringing eminent Nigerians in that space, but they focused more on Nigerian stars in Nigeria (which is also good, although a mix of local and TILC stars would be better). Commendably, the International Law Student Association is now filling that significant gap. The University of Ibadan and Obafemi Awolowo University chapters have invited me to interact with them, inspiring this article and an international TILC project that I coordinate.

Like career models, role models could inspire you. More importantly, they are also often readily available and approachable. I had numerous role models, many of them also good friends that were inspiring at OAU. My final year project supervisor and the Dean of Law at the time, Prof. Ademola Popoola, was an excellent role model. I remember we once travelled to Ibadan to get some book donations, and I found spending time with him enjoyable. He treated students

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doctorate in law. Called Doctor of Juridical Science (SJD or JSD), this doctorate is largely different from Doctor of Philosophy in Law (PhD) in terms of design and delivery.

equally regardless of their economic status or pedigree, so that earned him my respect. There were other faculty members I looked up to: Prof. J.O. Fabunmi and Prof. Okorodudu Fubara from a distance, and Dr. Akinwale Orifowomo, Dr. Femi Odunsi, Dr. A.O. Ogunfolu and Dr. Bode Ayorinde more closely. They either taught me or I read about their work, although my relationship with them was not a close mentor-mentee one (except for Dr. Orifowomo, who later became a good mentor). Additionally, I had several senior friends and/or role models that inspired me, so numerous that I cannot remember them all or might have forgotten the proper way to spell their names: Ola Faro, Bisi Makanjuola, Iruoma Ejie, Chuks Okoye, Olalekan Idowu (a.k.a. Lakeside), Akinkunmi Akinrinade, Yinka Salau, Ige Asemudara, Tola Bela, Ekemeke Ojuoju, Misbau Alamu Lateef, Temidayo Odulaja (a.k.a. T12), Kenny Ajetunmobi, Titi Fadairo, Ibiyemi Fashina, Funmilayo Akinosi, Bose Malomo, Francis-King Akinlotan, Tolani Adegbagbo, Agbalaya Abiodun (a.k.a Sagay), Akin Dada, Mobolaji Akintunde, Sola Kadiri, Seun Bakare, Anthony Aregbe, Joan Igezunya, Kemi Bonuola, Femi Okin, Joba Oloba, Wole Kunuji, Dayo Fagbemi, Debo Oladinni (a.k.a. Debo Labour), Tolu Omoleye, Bisayo Busari, Titi Owonikoko, Shina Balogun and Damilola Fatula. Like the academics, they were more of role models, although many of them were also friends.

4.3. Career Mentors

Often, senior students and junior lecturers are willing to guide junior students on career paths. Meanwhile, except senior lecturers and professors show deep interest in you, do not waste precious time pursuing them because they have too much on their plates. See what you could learn from the journey of such senior students and lecturers. Even better, ask if they might be interested in taking you under their wings, but be careful how you do this: offer to help them out one way or the other (e.g. ask them if you could help with anything, offer to help on small projects, promote their work), so it does not seem like you only want to keep getting without giving back.

My decisions as an LLB student were not as calculated as what I advise. Partly because of my ignorance, I was awkward with lecturers and did not discuss much of my academic issues with senior students, so I

really had no career mentor. While getting close to graduation and subsequently, I developed solid relationships with academic mentors, starting with Prof. J.O. Anifalaje (I met him while working on the Advocate and he took me under his wings, including reluctantly recommending me for a position with the Oyo State Ministry of Education while discouraging me from taking it, claiming that the job would be a waste of my talent). Eventually, Dr. Bukola Akinbola, Prof. Elisabeta Olarinde (who offered me an academic job in the classroom!), Comrade Femi Aborisade and Mr. Dare Adebayo became outstanding mentors at the University of Ibadan.

Not having a close career mentor was largely my own fault, and not because lecturers and senior students were not willing to be one. At a point, I was a professional dancer (I danced with Sola Jokotola, Jide Famuyiwa, Yinka Salau, Toba Kalejaiye, Ogayemi Abayomi, Bisola Olanipekun and many others, performing with or collaborating with dance groups such as Alpha Dancers, Shake'em Up, Law Dance Group and our OAU stars, for instance Temidayo Odulaja a.k.a. T12). I also did other "interesting" (in the Canadian parlance) things that the Nigerian culture frowned at, for instance making my hair and wearing earrings, somewhat making me a misfit in a typical Nigerian law department. I remember one of my lecturers, Dr. Taiwo Ogunleye, called me to order. He cautioned that a public figure in the Faculty of Law should not be doing those things.

4.4. Taking the Steps

You need academic excellence throughout your time as a student. As a starting point, that means you should try to get very good or excellent grades, at least a higher threshold of an Upper Second Class, but even a First Class if you can. Also, get as many awards as you can, lead tutorials and take specialized courses.

For people who are above and beyond in doing other things, for instance outstanding research and leadership work, it may be difficult to maintain a First Class and get academic awards because doing so requires conscious dedication and time. Therefore, you must decide what is more important to your future and whether you can afford the opportunity cost, for instance sacrificing an A for a B to lead a

research project or moot competition. Remember that when you sacrifice grades and academic awards, you may be earning research and leadership awards, or other benefits that you get from your research or leadership engagement. Rarely, such awards or other engagement benefits may also earn you some credit to make up for the grades you lose. Nevertheless, I strongly encourage you to maintain very good grades irrespective of whatever else you do, such that awards, specialized courses and tutorials are an addition. Try not to go below a 4 point on a 5-point grade scale, especially if interested in academic and policy career routes, and try to earn a few awards at the least, even if you do not get into specialized courses and tutorials.

After achieving academic excellence and learning how to maintain it, then comes the time for research, work, and leadership experience. Getting most of your research experience from year 2 or 3, after you have maintained strong grades and acclimatized to life as a student, would be wise. Rushing into research in year 1 like I did might not be a good idea, since you are new to the system and are untested. Subsequently, you can get research and/or work experience from year 3. If you are sure what career route you would like to take, then it is easier to decide how much research and/or work experience you would need. Leadership experience should come latest in year 4. You would already be a senior student and should have everything else covered.

5.0. HOW MUCH ENERGY SHOULD YOU PUT INTO YOUR PREPARATION?

Like I have hinted, what you prioritize should be based on what you want to do. I encourage you to achieve 100% of academic excellence, research and/or work experience, and leadership experience, if that is possible for you (what a superhuman!). If otherwise, then you could strategize to achieve specific percentages by your final year. For those interested in an academic career, aim at an overall of 50% academic excellence, 30% research experience, and 20% leadership experience. If you want a policy career, target 50% academic excellence, 20% research experience and 30% leadership experience. For those interested in legal practice, pursue 50% academic excellence, 25% research experience and 25% leadership experience. You would

notice that academic excellence is the highest with a constant value, simply because it carries more weight for subsequent opportunities immediately after graduation (the weight reduces as you advance in your career, for instance in graduate school).

These suggestions are based on my experience, so do not take them hook, line, and sinker. Try your best to be the best, but do not do beyond your best. Remember things may not work out as planned, which is just how life works. If you fail, then try again, and again. For instance, if you miss out on academic excellence, research and/or work experience, or leadership experience as an LLB student, attempt to fix that error as a Master of Laws student if you have enough motivation. Even if you did not miss out but had other circumstances, you could do something to enhance your opportunities. For instance, because I only got a master's scholarship that covered half tuition immediately after my LLB at OAU, I decided to go for a master's degree at the University of Ibadan, which eventually opened doors to full scholarships. Since then, I have only considered or accepted academic scholarships and other opportunities with adequate funding for not only me but also my parents, with some trickle to others (and, in different ways and to varying degrees, forfeited those with inadequate funding, including some from Harvard University, University of Ottawa, Columbia University and University of Oxford). Alternatively, you could also prove yourself in other non-academic ways. For instance, if you invent something significant or make a new idea work in a way we have never seen, no reasonable person will care about your academic merits. Invent or create a new or significant body of knowledge, social movement or business that becomes successful, then see if your grades would still carry much weight. Of course, your opportunities might not be broad (e.g. jumping from academia to policy), but even narrow opportunities have their worth (e.g. you can become an expert and a leader in your specific area of work, for instance in a business sector).

Nonetheless, avoid anything that would negatively affect other important things in your life, for instance your relationship with God, health, family, values, and humanity. Career only comes after these other invaluable areas of your life. Altogether, if you fail in one area,

remember you are growing. You will have many opportunities to make it right. Also, many of your achievements at this level will not make it into your future public profile. For instance, when organizations ask for my biography, I am often unable to include the things I did as an LLB student. As such, think of your current achievements mainly as stepping stones, meaning they do not have much value in and of themselves. If anyone achieves so much as an undergraduate but does not build on it, then that does not mean much. Additionally, remember that merit (e.g. brilliance, or indicators such as good grades, research productivity, leadership profile, etc.) only gets you so far. When you get to a stage, you would realize that you need people to take genuine interest in you, which often means they are ready to help. There would be people that are equally or nearly equally qualified, so decisions would be made based on other things beyond your merit. For instance, in choosing people for some of the projects I work on, when having to decide between multiple people that are equally or somewhat equally qualified, I look at their character and overall humanness (for me, character and humanness are even more important than merit). Thus, merit is only a part of the picture.

6.0. CONCLUSION

I have clarified TILC routes, and then discussed how to rank and decide on the career paths, what to do or not do, how to go about what to do and how much energy to put in. Yet, there are other important things to keep in mind, which I cannot fully cover, including your attitude to life and other people.

The first two points are general. Focusing on your attitude to life and other people, they are probably more important than academic, research, work, and leadership merits. First, understand God—or whatever name you call the solid foundation that keeps life together—is ultimate in everything. You get so much joy and mitigate trouble (depression and others) when you do. Also, there will be challenges in life, which only God can get you through. Second, consciously make efforts not only to develop yourself but also to exhibit sound character: among other things, love endlessly, be humble always (e.g. remember, many gifted people are in remote places without a chance to really explore their strengths, so opportunities make the difference;

whatever you are doing, someone is doing better; and you may think you have "arrived" but might still be far away, so do not think too much of yourself), be patient (e.g. do not use people merely to achieve success; avoid using others' success as a sole measure of yours; and remember, "…time and chance happen to them all!"), give willingly (give without thinking of getting back, except within professional relationships), and help others readily. Essentially, realize that life is not just about you but more about people around you. Even if you achieve so much, your joy will come from sharing and caring, not merely having, or owning. Moreover, with God on your side, sound character will get you where merit or qualifications cannot. Therefore, take a break from your busy life, catch your breath, self-evaluate and rethink to fix your values from time to time.

The last two points are more specific. They revolve around your strategic career steps. First, build good relationships with some lecturers and colleagues. You cannot like everyone, and not everyone will like you, so do not waste your time trying to please all. Frankly, you do not need everyone! You only need a few good people that your values align, so having two or three lecturers to write you reference letters, and a few colleagues that you can grow together, is crucial. To be clear, you are likely to achieve little without those reference letters, and your colleagues might be your future network and referees. Second, actively search for opportunities. I did not do this at all as an LLB student, largely because I was ignorant, and partly because I had limited access to information. If I knew better, I should have looked for more opportunities even as an LLB student (conferences, scholarships, volunteering opportunities, etc.). Do not waste your grades and other qualifications like I often feel I did. You deserve to be rewarded for your talent and hard work.

BYPASSING #METOO: A BLUEPRINT FOR SEXUAL HARASSMENT PROTECTIONS IN NIGERIA

Vanessa Ajagu*

ABSTRACT

Recently, more women have come out with their experiences with sexual assault, and they have exposed sexual assaulters in the process. This movement has become known as the #MeToo movement. While it started in the USA, it has quickly spread to other parts of the world. This is despite a culture making sexual assault a norm and victim-blaming.

It is against this backdrop that this article explores sexual assault, the social factors that affect how sexual assault is treated, and the legal framework in place against sexual assault. Of particular concern is sexual assault in work environments. Despite how common it is, sexual assault against women by male co-workers is severely under-reported. Even more, no domestic law provides for sexual assault in work spaces. Instead, courts are forced to rely on international laws, amongst other options. This article recommends a framework to curb sexual assault in Nigeria.

1.0. INTRODUCTION

Six rounds of sex in exchange for movie roles, "business meetings" mandated in private hotel suites and accusations of childishness when one calls out sexual misconduct. Workplace sexual harassment in Nigeria is an epidemic: a silently swept-under-the-rug epidemic.[1] After

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[1] C. Izuzu "Sexual harassment in Nollywood is an Epidemic; But Who Will Speak Up?", available at https://www.pulse.ng/entertainment/movies/sexual-

all, "what defence does a person in Nigeria have? With the legal system that takes years? … Please," said Joke Silva.[2] The actress is right: The Nigerian legal system fails victims of workplace sexual harassment. The country is in dire need of statutory and administrative protections.

However, this problem transcends Nigeria's borders. The rise of the #MeToo movement has exposed weaknesses in the implementation of sexual harassment protection laws across the globe.[3] The movement, which developed in the United States and gained most of its traction in the country, highlights the limitations of Title VII of the Civil Rights Act of 1964 (Title VII) and the Employment Opportunity Commission (EEOC) in protecting victims of workplace sexual harassment.[4] Evidently, even when protections do exist, they may not work as well as they should.[5] Thus, it is one aspect to establish legal protections and another for them to function.

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harassment-in-nollywood-is-an-epidemic-id7572149.html (accessed 3 June 2020).

[2] *Ibid.*

[3] C. Powell, "#MeToo Goes Global and Crosses Multiple Boundaries" available at https://www.cfr.org/blog/metoo-goes-global-and-crosses-multiple-boundaries (accessed 3 June 2020) (reporting that despite high rates of sexual harassment, the #MeToo campaign has been somewhat less visible in the Middle East, partly due to norms that attach stigma and shame to speaking out). Studies show that eighty-seven percent of women in Vietnam, seventy-nine percent in India, seventy-seven percent in Cambodia, and eighty-four percent in Bangladesh have experienced some form of sexual harassment; M. Senthilingam, "Sexual Harassment: How it Stands around the Globe", available at https://www.cnn.com/2017/11/25/health/sexual-harassment-violence-abuse-global-levels/index.html (accessed 3 June 2020). Nonetheless, sexual harassment allegations of prominent individuals following the #MeToo movement were mainly documented in the United Kingdom and United States; K. Fox and J. Diehm, "#MeToo's Global Movement: The Anatomy of a Viral Campaign", available at https://www.cnn.com/2017/11/09/world/metoo-hashtag-global-movement/index.html (accessed 3 June 2020).

[4] Chicago Tribune, "#MeToo: A Timeline of Events", available at http://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html (accessed 3 June 2020).

[5] R. Abelson, "Effectiveness and Consistency of E.E.O.C. are questioned", available at https://www.nytimes.com/2001/08/02/business/effectiveness-and-consistency-of-eeoc-are-questioned.html (accessed 3 June 2020); Human Rights Watch, "Corruption on Trial? The Record of Nigeria's Economic and Financial Crimes Commission", available at

Given that Nigeria has not yet established a comprehensive system for dealing with sexual harassment, the shortcomings of legal protections in the United States' extensive legal regime can guide Nigeria in designing functional statutory and governmental agency protections from the ground up.[6] Here, sexual harassment is defined as "unwelcome sexual advances, requests for sexual favours, and other verbal or physical harassment of a sexual nature,"[7] which prevent predominantly women from maximizing their potential in the workplace. Without reliable legal avenues to bring claims, victims of workplace sexual harassment in Nigeria are treading uncharted territory by speaking up against discrimination. As such, this article examines workplace sexual harassment in Nigeria and proposes a blueprint for creating an effective system to curb the problem.

In Section 2.0, this paper considers the current state of workplace sexual harassment in Nigeria. It specifically provides evidence of the gendered menace and explores the laws – or lack thereof –that address workplace sexual harassment in Nigeria. In Section 3.0, this paper looks to the United States, a country where the #MeToo movement has brought sexual harassment to the forefront of media and intellectual discourse. The United States operates as a helpful comparison because of the substantial focus placed on improving its already-developed system.

Section 3.0 analyses Title VII and the EEOC, legal safeguards against workplace sexual harassment in the United States, while delineating the flaws in the United States' system as it currently exists. Proposed reforms to remedy these flaws include extending Title VII coverage, enacting workplace gender parity provisions, adopting adequate baseline funding for the EEOC, enforcing anti-harassment compliance trainings, and investigating sexual harassment claims thoroughly.

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https://www.hrw.org/report/2011/08/25/corruption-trial/record-nigerias-economic-and-financial-crimes-commission (accessed 3 June 2020).

[6] O. Abudu, "Sexual Harassment in Nigeria: It's Everybody's Problem", available at https://guardian.ng/issue/sexual-harassment-in-nigeria-its-everybodys-problem/ (accessed 10 June 2020).

[7] EEOC, "Sexual Harassment", available at https://www.eeoc.gov/sexual-harassment (accessed 8 November 2018).

Finally, Section 4.0 builds off the values and criticisms of the United States' workplace sexual harassment protections to suggest a legal model that can be implemented in Nigeria. This model involves closing Nigeria's gender gap, enacting broad statutory protections for its informal-economy employees, and establishing a functional agency that enforces laws against workplace sexual harassment. Although the high rate of corruption and lack of accountability in Nigeria may impinge on the efficacy of said model, a sexual harassment law along with an enforcing government agency will play a significant role in advancing gender justice in Nigeria.

2.0. OVERVIEW OF WORKPLACE SEXUAL HARASSMENT IN NIGERIA

A report by World Economic Forum ranked Nigeria 122 out of 144 countries in terms of gender equality.[8] This is furthered by the fact that a 2010 Gender and Equal Opportunities Bill, which aimed to prohibit discrimination on the basis of sex was not passed by the Nigerian Senate.[9] Auspiciously, the struggle for holistic gender justice has been propelled by discourse surrounding sexual harassment safeguards in the country. The Nigerian Senate "observed the growing menace and the growing culture of sexual harassment in institutions of higher learning" and consequently passed the Sexual Harassment in Tertiary Educational Institutions (Prohibition) Bill in 2016 (SHTEIB).[10] Yet, as House Majority Leader, Representative Gbajabiamila argued, "the bill is too restrictive … What about … the work place?"[11]

[8] P. Abumere, "Nigeria Fails to Close Widening Gender Gap Even in 2017", available at https://www.pulse.ng/news/local/gender-equality-nigeria-fails-to-close-widening-gender-gap-even-in-2017/9bsd7mv (accessed 3 June 2020).

[9] N. Sambamurty, "Nigeria's Gender Equality Bill Was Rejected. Here's Why We're Still Hopeful", available at https://www.one.org/us/blog/nigerias-gender-equality-bill-was-rejected-heres-why-were-still-hopeful/ (accessed 3 June 2020).

[10] Sexual Harassment in Tertiary Educational Institutions (Prohibition) Bill (2016) (proscribing "severe punishment for lecturers and academic staff of universities, who either sexually harass or assault their male or female students").

[11] Urhobo Today, "Why Reps Dumps Omo-Agege's Sexual Harassment Bill", available at http://urhobotoday.com/?p=27901 (accessed 3 June 2020).

This Part provides an overview of workplace sexual harassment in Nigeria. Subsection 2.1 provides statistical and anecdotal evidence to illustrate the pervasive nature of sexual harassment in the country. Sub-subsection 2.1.1 identifies cultural and religious factors that permeate the discourse. Thereafter, sub-subsection 2.1.2 introduces the inadequate legal avenues for victims of sexual misconduct to seek redress. These include the National Industrial Court of Nigeria, Sharia Law: Penal Code of Northern Nigeria, Violence against Person's Act, and Nigerian Labour Act, discussed in sub-subsections 2.2.1, 2.2.2, 2.2.3, and 2.2.4 respectively. The introduction to these courts and statutes sets up a discussion in Section 3.0, which compares the legal protections available to victims of workplace sexual harassment in the United States.

2.1. State of Workplace Sexual Harassment

"She wore a short skirt," "she was out past 9:00pm," "she didn't say no." Justifications for sexual harassment are often so loud that they silence victims in Nigeria. As explained by one Nigerian senator, "the menace of sexual harassment has been there for a long time and has gone unchecked."[12] This section examines evidence of the rampant rate of workplace sexual harassment in Nigeria as well as the culture of silence that maintains the status quo.

2.1.1. Evidence of Rampant Sexual Harassment

In an interview, a female employee in Nigeria recounted how her supervisor "told her to quit the job if she was not ready to be his mistress. She pleaded but he told her that someone else had already taken the position."[13] This female employee, like many others, is often caught in a conundrum: subjecting herself to being a sexual object or seeking new employment? The former appears to be a more viable route. Research by the Civil Liberties Organization in Nigeria affirmed

[12] A.M. Jimoh, "Senate Passes Sexual Harassment Bill", available at https://guardian.ng/news/senate-passes-sexual-harassment-bill/ (accessed 3 June 2020).

[13] E. Sessou, "Sexual Harassment: Real or Imagined Problem", available at https://www.vanguardngr.com/2018/04/sexual-harassment-real-imagined-problem/ (accessed 3 June 2020).

that many women were given employment based on prerequisite sexual favours.[14] In a country where the employment rate is low,[15] poverty is the norm,[16] and patriarchy is cultural,[17] harassed women may perceive no choice at all. The reality of the economic climate in Nigeria is reflected by studies which show that victims of sexual harassment would rather avoid their abuser than report their experiences.[18]

Despite anecdotal evidence that points towards a high rate of sexual harassment in Nigeria, statistics deceptively suggest otherwise. In a survey, over sixty percent of respondents reported that they had not been harassed at work.[19] In another report, about seventy-five percent of respondents indicated that they were rarely harassed.[20] These results should not be taken at face value. Meta-analytic studies suggest that inquiring about sexual harassment experiences using legally defined objective measures yield substantially lower rates than studies involving perceptual measures.[21] It is worthy of note that the mere

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[14] S. Williams, "Nigeria, Its Women and International Law: Beyond Rhetoric", (2004) 4(2) *Human Rights Law Review*, pp. 229 and 252.

[15] I. Okosun, "Poverty Alleviation and Employment Scenario in Nigeria: A Review", (2010) 2(1) *Insight on Africa*, pp. 67 and 70.

[16] *Ibid*, at 69; N.M. Abdulraheem, R.K. Salman and A.I. Abikan, "Domestic Violence Against Women in Nigeria: A Scourge Devoid of Solution", (2014) 17(2) *Nigerian Law Journal*, pp. 78 and 79.

[17] A.M. Essien and D.P. Ukpong, "Patriarchy and Gender Inequality: The Persistence of Religious and Cultural Prejudice in Contemporary Akwa Ibom State, Nigeria", (2012) 2(4) *International Journal of Social Sciences and Human*, p. 286.

[18] Y. Noah, "Experience of Sexual Harassment at Work by Female Employees in a Nigerian Work Environment", (2008) 3(7) *International NGO Journal*, pp. 122 and 125.

[19] A.O. Tayo, "Sexual Harassment: Dealing with this Menace in the Nigerian Workplace", available at https://www.pulse.ng/gist/pop-culture/dealing-with-this-sexual-harassment-in-the-nigerian-workplace-id7592288.html (accessed 3 June 2020).

[20] *Supra* n 18, at p. 125.

[21] P. McDonald, "Workplace Sexual Harassment 30 Years on: A Review of the Literature", (2011) 14 *International Journal of Management Review*. For a theoretical explanation of why individuals who experience sexual harassment may be reluctant to report the problem, see D. Wear, J.M. Aultman, and N.J. Borges, "Retheorizing Sexual Harassment in Medical Education: Women Students' Perceptions at Five U.S. Medical Schools", (2007) 19(1) *Teaching and Learning in Medicine*, pp. 20 and 20-29 (suggesting that some younger women seek

fact that individuals do not report sexual harassment does not mean that what they experience is not sexual harassment. Indeed, sexual harassment is so rampant in Nigeria that "co-workers would make unsolicited sexual comments … and women wouldn't think it was out of place."[22] A female journalist asserted that she "never really … felt harassed even though these things happened … so regularly."[23] To many Nigerian women, coping with inappropriate comments and less-than-subtle sexual requests at work is "part of the skills women in these parts of the world develop since men will surely do these things."[24] Thus, rather than illustrating that sexual harassment is not widespread, a study that found that only about twenty-seven percent of Nigerian women ascribe sexual harassment as "very offensive,"[25] reflects an embedded culture of silence, one where speaking up is frowned upon and victims become accustomed to discriminatory treatment.

2.1.2. Culture of Silence

Socio-cultural values in Nigeria permeate the formulation and administration of laws in the country. The director of Vision Spring Initiatives, an organization dedicated to achieving gender equality in Nigeria, put it succinctly when she said that "persons who have been sexually harassed most times have silence in common … not unrelated with culture and fear of the consequences of reporting such cases."[26]

The Nigerian custom surrounding workplace sexual harassment can, at least in part, be attributed to the belief that a woman's place is in

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to distance themselves from negative connotations of feminism and political correctness).

[22] S. Busari and T. Idowu, "The #MeToo Stories You Haven't Heard: Meet the Women Speaking Out in Nigeria", available at https://edition.cnn.com/2018/03/02/africa/nigeria-rape-survivors-metoo-asequals/?utm_cid=%20cnni-com-fb-africa-link (accessed 3 June 2020).

[23] The World Staff, "Sexual Harassment at Work is a Global Problem. Now, The World is Finally Talking About It," available at https://www.pri.org/stories/2017-10-20/sexual-harassment-work-global-problem-now-world-finally-talking-about-it (accessed 3 June 2020).

[24] *Ibid.*

[25] *Supra* n 18, at 125.

[26] *Supra* n 13.

the home: her employment prospects are not a primary concern.[27] Conversely, men yield power based on their control of women within the family and workplace.[28] The effect is that the Nigerian society accommodates discriminatory acts and practices to the benefit of the man. Consequently, sexual harassment thrives as an offshoot of a patriarchal structure.[29]

Nigeria's patriarchal culture discourages women from engaging in sexual activities or conversations. While men are praised for their sexual drive, women are stigmatized for being sexually active. The stereotype that a woman's sexual urges are merely a means to a procreative end is manifest in the Nigerian custom that only men can engage in extramarital affairs, have many wives, and keep concubines.[30] A woman is labelled a disgrace if she dares such. This socio-cultural perspective on sexuality has influenced the disclosure of harassment and the punishment of harassers in Nigerian workplaces. Instead of punishing the harasser, the harassed is shamed.[31] The impact of misogynistic norms is an enabling culture, one that has victims of harassment concluding that silence is a more palatable route than reporting their experience.[32] Such traditions conflict with the concept of justice.[33]

While these misogynistic "practices defended in the name of culture … preserve patriarchy at the expense of women's rights,"[34] they work

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[27] *Supra* n 14, at p. 252.

[28] A.Y. Ige and I.A. Adeleke, "Evaluating the Role of Culture on Sexual Harassment: The Case of Nigerian Organizations", available at http://ilera2012.wharton.upenn.edu/RefereedPapers/IgeAY%20AdelekeIA%20ILERA.pdf (accessed 3 June 2020).

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] *Supra* n 18, at p. 125.

[33] F. Raday, "Culture, Religion, and Gender. Roundtable: An Exchange with Ronald Dworkin", (2003) 1 *International Journal of Constitutional Law*, pp. 663 and 666.

[34] *Ibid.* For decades, Nigerian women have been oppressed under the guise of culture. Culture has been cited as the basis for female gender mutilation, female disinheritance, and harmful widowhood practices; O. Akor "The Need for a Law against Harmful Traditional Practices", available at https://www.dailytrust.com.ng/the-need-for-a-law-against-harmful-traditional-practices.html (accessed 3 June 2020).

in tandem with religion.[35] Interpretations of Sharia law and Christian ideology are strongly grounded in Nigerian tradition as depicted by the false notion that sexual harassment is a by-product of "irresponsible" dressing and lack of modesty.[36] Yet, "cultural defence" and "religious freedom" arguments contribute to victim shaming and ultimately keeping victims silent.[37] The false impression that Nigerian culture and religious interpretations are inherently misogynistic - that is, letting go of discriminatory practices discards historical foundations - perpetuates gendered inequality.

2.2. Legal Protections against Sexual Harassment

The Nigerian constitution "prohibits torture and other inhuman or degrading treatment" against any individual.[38] Although equality is formally guaranteed in the constitution, Nigeria has conceded to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee that "additional domestic legislation is needed to implement the Convention."[39] Despite this assertion, a draft bill on the "Abolition of All Forms of Discrimination against Women in Nigeria and Other Related Matters" was not approved by the National Assembly."[40] To the contrary, legislation such as the Penal Code of Northern Nigeria, which permits wife battery for punishment[41] and the Criminal Code, which classifies sexual assault as

[35] *Infra* sub-subsection 2.2.2.
[36] *Supra* n 13.
[37] Supra n 33.
[38] Constitution of the Federal Republic of Nigeria (CFRN) (1999), s. 34(1).
[39] V.A. Dormady, "Status of the Convention on the Elimination of All Forms of Discrimination against Women", (1999) 33(2) *The International Lawyer*, pp. 637 and 639; Nigeria is a State Party to CEDAW, although it has not domesticated the treaty. This is attributed to the "myriad of harmful traditional practices in Nigeria that are obviously incongruous with certain provisions of the CEDAW articles." See "Nigeria: Why Country cannot Domesticate CEDAW", available at https://allafrica.com/stories/200809300359.html (accessed 3 June 2020).
[40] United Nations, Concluding Observations of the Committee on the Elimination of Discrimination against Women 3 (2008), available at https://www.refworld.org/pdfid/4efb2f122.pdf (accessed 3 June 2020) (internal quotation marks omitted).
[41] Penal Code of Northern Nigeria 2000, s. 55(1)(d).

a misdemeanour,[42] encourage sexual harassment and institutionalize domestic violence. This section examines the minimal and many times non-existent legal protections available to victims of workplace sexual harassment in Nigeria.

2.2.1. Minimal Protection: National Industrial Court of Nigeria

The National Industrial Court of Nigeria (NICN) has exclusive jurisdiction over employment matters.[43] The 1999 Nigerian Constitution (as amended) confers the NICN with jurisdiction over matters "relating to or connected with any dispute arising from discrimination or sexual harassment at the workplace."[44] Similarly, the NICN has the power to apply international treaties relating to employment in local cases.[45] Thus, although there is no national legislation prohibiting workplace sexual harassment, victims may seek legal remedy through the NICN using international law.

In *Ejieke Maduka* v *Microsoft Nigeria*, the court relied on international labour standards in adjudicating plaintiff's sexual harassment claims.[46] There, the court stated that plaintiff's employment termination due to her refusal of sexual advances amounted to a "breach of her fundamental human rights" under CEDAW and International Labour Organization (ILO) laws. These laws, according to the court, "are applicable to construe the fundamental rights of the applicant expressly guaranteed in the 1999 Constitution as amended."[47] Four

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[42] Criminal Code Act 1990, Cap. C38, Laws of the Federation of Nigeria, 2004, s. 360.
[43] CFRN (1999) (as amended), s. 254(c); National Industrial Court of Nigeria Act 2006, s. 7.
[44] CFRN (1999) (as amended), s. 254(c).
[45] *Ibid.*
[46] *Ejieke Maduka* v *Microsoft Nigeria* (2013) NICN/LA/492/2012, available at https://mikedugeri.wordpress.com/2017/04/01/workplace-sexual-harassment-court-judgment-in-the-case-of-ejieke-maduka-v-microsoft-nigeria-limited/ (accessed 13 June 2020) (awarding approximately $250 million in sexual harassment lawsuit).
[47] *Ibid*; Convention Concerning Discrimination in Respect of Employment and Occupation (Convention No. 111 1958), Article 1. Available at https://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/genericdocument/wcms_114189.pdf (accessed 3 June 2020). ("Discrimination

years after *Ejieke Maduka*, the NICN revised its Civil Procedure Rules to include *procedure* for bringing sexual harassment claims.[48] These rules provide that an employee with a sexual harassment claim must indicate whether the harassment was physical, verbal, non-verbal, or based on quid pro quo.[49]

2.2.2. Minimal Protection: Sharia Law and Penal Code of Northern Nigeria

The Nigerian Constitution attempts to establish a secular state, which is not bound to any religion. In practice, Sharia law, which is grounded in Islamic faith, is applicable in twelve out of the thirty-six states in the country, where Muslim populations are the majority.[50] This law, which exists in tandem with state criminal and civil law, is based on Islamic moral codes.[51] In a Sharia system, in which a rape victim must produce four witnesses to support her claim, or face being stoned to death for being "promiscuous",[52] it is no wonder that many women do not speak up when they face sexual harassment.

The implementation of Sharia law in tandem with the Penal Code of Northern Nigeria silences women living under Northern jurisdiction.[53] The Penal Code reflects a legislative compromise to harmonize

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includes … any distinction, exclusion … made on the basis of sex … which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." (internal quotation marks omitted)).

[48] Rules of Civil Procedure 2017, Order 14.

[49] *Ibid.*

[50] K. N. Roberts, "Constitutionality of Shari'a Law in Nigeria and the Higher Conviction Rate of Muslim Women under Shari'a Fornication and Adultery Laws", (2005) 14 *Southern California Review of Law and Women's Studies*, pp. 315 and 329.

[51] S. Atta, "Too Many of Nigeria's Women are Targets – Not Just the Kidnapped Girls", available at http://time.com/103531/nigeria-boko-haram-sharia-law/ (accessed 3 June 2020). While the Nigerian government has condemned stoning and beating as forms of punishment promoted by Sharia law, the adoption of Sharia law remains a state right in the country; *Ibid*.

[52] *Supra* n 50.

[53] There is overlap between the Penal Code of Northern Nigeria and Sharia law as both are grounded in Islam. However, Sharia law contains some more conservative provisions. See Human Rights Watch, "Political Shari'a?"" available at https://www.hrw.org/report/2004/09/21/political-sharia/human-rights-and-islamic-law-northern-nigeria (accessed 3 June 2020).

criminal laws governing individuals in Northern Nigeria to align with their predominantly Islamic beliefs. Amongst other sections which ban violent sexual assault,[54] the Act prohibits the "use of words, gestures or acts to insult the *modesty* of a woman."[55] While this provision technically criminalizes sexual harassment, it is contextualized through Muslim lens where women are secluded to prevent "temptations of the world."[56] The paternalistic approach of the Act focuses on women being modest rather than the human right to be free from discrimination.

2.2.3. Minimal Protection: Violence against Persons Act

The *Violence against Persons Act* prohibits violence against individuals and provides remedies for victims of violence.[57] Extending the reach of the Nigerian Criminal Code Act,[58] this statute covers rape, infliction or the threat of infliction of bodily injury, verbal abuse, and coercion. Thus, it prohibits extreme forms of sexual assault. Although the Act states that intimidation is a misdemeanour offence, it does not have an explicit sexual harassment provision.[59]

2.2.4. Absence of Protection: Nigerian Labour Act

The Nigerian Labour Act (NLA) governs employment practices in Nigeria.[60] From recruitment to relief, the Act prescribes the obligations of both employees and employers. Yet, the statute fails to address sexual harassment.[61] Consequently, there is no national

[54] Penal Code of Northern Nigeria 2000, s. 282(1).
[55] V. L.K. Essien, "The Northern Nigerian Penal Code: A Reflection of Diverse Values in Penal Legislation" (1983) 5(1) *New York Law School Journal of International and Comparative Law*, pp. 89 and 95.
[56] *Ibid.*
[57] Violence Against Persons (Prohibition) Act 2015 (Nigeria).
[58] Criminal Code Act 1990 (Nigeria) (criminalizing only extreme forms of sexual assault).
[59] Violence against Persons (Prohibition) Act 2015 (Nigeria).
[60] Labour Act 2004, Cap. L1, Laws of the Federation of Nigeria, 2004. The NLA is one of many statutes regulating employment in Nigeria. Others include the *Trade Union Amended Act*, 2005 (Nigeria), *Employees Compensation Act*, 2010 (Nigeria), *Factories Act*, 2004 (Nigeria), and *Pensions Act*, 2004 (Nigeria), none of which have provisions on sexual harassment.
[61] Labour Act 2004 (Nigeria).

statute that explicitly prohibits sexual misconduct in the workplace.[62] This legislative oversight disregards women's rights and fails to implement the CEDAW Committee's recommendation.[63]

2.3. Organizational Policies against Sexual Harassment

While some employers institute guidelines that regulate sexual harassment,[64] internal policies are often not taken seriously without national laws prohibiting such actions. A study in Nigeria showed that about ninety percent of people who were sexually harassed did not send a complaint to their office's Human Resources department.[65] Accordingly, a former executive in an oil and gas company explained that they never got a complaint directly "none of the victims would admit it as harassment but you would notice the occasional looks. Executive predators are common."[66] This silence is not surprising seeing that about thirty percent revealed that their previous reports of sexual misconduct went unresolved and about thirty-seven percent stated that they feared the loss of their jobs.[67] The culture of dirty jokes, butt grabs and intimidation has been inadequately addressed by the internal policies of business organizations.

Unlike the United States where the Harvey Weinstein scandal rocked the nation,[68] it is unlikely that a business in Nigeria would collapse as a result of sexual harassment revelations.[69] Rather, because victims of workplace sexual harassment often perceive justice as non-existent, they suffer in silence. This is exemplified by a study where participants attributed their reluctance to file sexual harassment complaints to the

[62] At least one state in Nigeria has criminalized sexual harassment. Lagos State's criminal law decrees that "any person who sexually harasses another is guilty of a felony and is liable to imprisonment for three years." Criminal Law of Lagos State 2011, s. 262.
[63] *Supra* n 39 and 40 (and accompanying text).
[64] *Supra* n 19 ("In most organizations, there are policies that deal with sexual harassment.").
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Infra* n 74 and 75 (and accompanying text).
[69] *Supra* n 23.

perception that "the authorities would not do anything".[70] For the brave women who speak up, the Nigerian police trivialize their mishap as a "private matter", rarely ever investigating the situation.[71] This is evidenced by the fact that only ten percent of rape cases in Nigeria result in convictions.[72] Consequently, the assumed learned helplessness of many victims of workplace sexual harassment is fuelled by the government's disregard of gender justice. It is paramount that Nigeria's workplace sexual harassment laws are developed and enforced on a national level.

Without national laws that prohibit hostile work environments, victims are unlikely to bring their claims. Thus, the CEDAW Committee's urge that the Nigerian government should "enact legislation prohibiting sexual harassment in the workplace, including sanctions, civil remedies and compensation for victims".[73] This paper takes CEDAW's recommendation further by examining how to best develop Nigeria's anti-sexual harassment legal system through the lens of the Unites States, a country where the #MeToo movement has triggered large scale conversations and reform surrounding workplace sexual harassment. Looking to the United States can help guide the Nigerian legislature and executive in creating a better system, one void of the shortcomings that have been highlighted by the #MeToo movement

[70] K. Johnson, "Sexual Harassment in the Workplace: A Case Study of Nigeria", (2010) 8(1) *Gender and Behaviour*, pp. 2903 and 2914.

[71] N.M. Abdulraheem, et al., *supra* n 16, at p. 79. Domestic violence is a significant problem in Nigeria with about fifty percent of Nigerian women having been battered by their husbands. About ninety-seven percent of women would not report these cases to the Nigerian police; *Ibid*, at p. 83. Some scholars have attributed this to the cultural context of family privacy in Nigeria. See This Day, "Nigeria: Reforming Our Laws a Problem, Implementation a Greater Challenge", available at https://allafrica.com/stories/201507140958.html (accessed 3 June 2020) ("There is often reluctance to investigate or prosecute domestic violence or sexual crimes because of the cultural contexts of family privacy.").

[72] United States Department of State, "Country Report on Human Rights Practices for 2011, Nigeria", available at http://www.state.gov/documents/organization/186441.pdf (accessed 5 December 2012).

[73] *Supra* n 40, at p. 6.

3.0. WORKPLACE SEXUAL HARASSMENT IN THE UNITED STATES

"Harvey Weinstein paid off sexual harassment accusers for decades".[74] This New York Times headline accusing Hollywood mogul, Harvey Weinstein, of sexual assault was more than scandalous: It inspired the #MeToo movement, perhaps the largest scale movement against sexual harassment in modern history.[75] Since then, over "219 celebrities, politicians, and CEOs have been accused of sexual misconduct" in the United States.[76] The outcry of women in the United States made evident that despite legal protections for victims of sexual harassment such as Title VII and the EEOC, many suffer from workplace sexual harassment in silence.[77] For instance, in fiscal year 2015, before the #MeToo movement began,[78] approximately one-third of charges received by the EEOC included allegations of workplace harassment.[79] Yet, about three in four victims of workplace

[74] J. Kantor and M. Twohey, "Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades", available at https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html (accessed 3 June 2020).

[75] K. Sutton, "The Media is officially in the #MeToo Movement for the Long Haul", available at https://mic.com/articles/187292/the-media-is-officially-in-the-metoo-movement-for-the-long-haul#.uW5q06h6A (accessed 3 June 2020).

[76] D. Roberts, "What so Many Men are Missing About #MeToo. Sexual Discrimination and Abuse Constitute a Crisis; Louis C.K. will be Fine", available at https://www.vox.com/2018/9/10/17826168/me-too-louis-ck-men-comeback (accessed 3 June 2020).

[77] J. Goldscheid, "Is Sexual Harassment a Civil Rights Violation? It Should Be", available at https://www.aclu.org/blog/womens-rights/sexual-harassment-civil-rights-violation-it-should-be (accessed 3 June 2020). ("The fact that #MeToo has taken off as a viral hashtag is a stark reminder that gender-based violence and harassment persist despite years of public attention and law reform.").

[78] To qualify, this Note analyses #MeToo as "beginning" in 2017, following Weinstein's sexual assault allegations and actress Alyssa Milano's #MeToo solidarity tweet. However, the movement was originally founded by civil rights activist, Tarana Burke, decades ago. See S.E. Garcia, "The Woman Who Created #MeToo Long Before Hashtags", available at https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html (accessed 3 June 2020).

[79] EEOC, Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace 6 (2016),

harassment never report the misconduct.[80] To put it succinctly, sexual harassment is a persistent problem in the global workplace, even in places like the United States, where effective, longstanding mechanisms exist.

As the president of women's advocacy group, Legal Momentum, said, "Nobody will disagree that something needs to be done about sexual harassment, but the devil is in the details."[81] Establishing an effective system that combats workplace sexual harassment is complicated. This is exemplified by the rise of the #MeToo movement in the United States, a country with seemingly robust sexual harassment protections. While creating laws and establishing an agency are steps in the right direction, there are nuanced factors worth considering. This Part examines workplace sexual harassment protections in the United States, probing into their efficacy and highlighting areas in which reforms will strengthen their legitimacy. Taken together, this analysis helps create an exemplar for an efficient legal framework in Nigeria such that the country can bypass the flaws in the United States' system.

Firstly, subsection 3.1 provides an overview of these protections as they currently exist. Specifically, sub-subsection 3.1.1 analyses Title VII, the law which prohibits discrimination on the basis of sex in workplaces and sub-subsection 3.1.2 examines the EEOC, the agency that enforces Title VII. Thereafter, subsection 3.2 delves into proposed statutory reforms to tackle the shortcomings of Title VII. These include laws that promote workplace gender equality, extend Title VII coverage, and increase EEOC funding. Finally, subsection 3.2 analyses proposed reforms to augment the EEOC's objectives. In particular, subsection 3.2 suggests that the EEOC enforces anti-harassment compliance trainings and engages in comprehensive investigations. The analysis of these legal protections provides a

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https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm (accessed June 3,2020) (approximating charges alleging harassment on the basis of sex, race, disability, age, national origin, colour, and religion).

[80] *Ibid.*

[81] C. Kelly and A. Hegarty, "#MeToo was a Culture Shock. But Changing Laws Will Take More than a Year", available at https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002/ (accessed 3 June 2020).

background to Section 4.0, which borrows from critiques of the current United States system to create a blueprint for workplace sexual harassment safeguards in Nigeria.

3.1. Current Legal Protections against Sexual Harassment

Title VII is widely regarded as the United States' most visible pronouncement of its commitment to equality. Amidst calls for racial equality, Congress enacted the statute and established the EEOC to curb workplace harassment.[82] However, its statutory and administrative reach towards discrimination on the basis of sex has often left scholars on both sides of the isle. Given minimal legislative history and concerns surrounding delegation of law-making authority, this section provides a brief overview of Title VII and the EEOC in 3.1.1 and 3.1.2 respectively. This review provides context for sexual harassment reforms, which are analysed in subsections 3.2 and 3.3.

3.1.1. Statute: Title VII

Title VII prohibits employment discrimination on the basis of "race, colour, religion, sex, or national origin."[83] The Smith Amendment, which satirically added "sex" as a proscribed basis for employment discrimination, was neither debated before the Judiciary Committee nor the Education and Labour Committee.[84] Rather, it was speedily adopted in the House under the "five-minute" rule.[85] As such, there is

[82] J.J. Donohue, "Is Title VII Efficient?" (1986), 134(6) *University of Pennsylvania Law Review*, p. 1411.
[83] Civil Rights Act 1964, 42 *U.S.C.*, s. 2000e-2.
[84] (1964) 110 *Congressional Record*, p. 2577 (statement of Rep. Smith) ("An imbalance of spinsters, shutting off the 'right' of every female to have a husband … is a grave injustice"); F.J. Vaas, "Title VII: Legislative History", (1966) 7 *Boston College Industrial and Commercial Law Review*, pp. 431 and 439.
[85] (1964) 1120 *Congressional Record*, pp. 2577 – 2584 (covering only about nine pages of House debate on discrimination on the basis of sex); Congressional Institute, 112th Congress House Floor Procedures Manual, available at https://www.conginst.org/112th-congress-house-floor-procedures-manual/xii-amendments-under-the-five-minute-rule/ (accessed 2 January 2019) (explaining that under the five-minute rule, "the author of an amendment is recognized for five minutes, followed by recognition of a Member who wishes to speak in opposition for five minutes").

little legislative history on workplace discrimination on the basis of sex under Title VII.[86]

The lack of congressional guidance on discrimination on the basis of sex proved problematic for both the EEOC and the courts.[87] Within fewer than one hundred days of enacting the law, sex discrimination cases comprised about fifteen percent of the EEOC's caseload.[88] However, with poor legislative direction, early court opinions did not construe Title VII as permitting sexual harassment claims.[89] The refusal was rooted in the notion that sexual harassment was a "personal attack, not a gender issue."[90] It was not until a 1986 case, *Meritor Savings Bank* v *Vinson* that the Supreme Court concluded that sexual harassment was prohibited under Title VII, more than twenty years after Title VII passed.[91] Despite the Supreme Court's decision, lower courts grappled with the parameters of sexual harassment under Title

[86] Vaas, *supra* n 84, at p. 441.
[87] *Ibid.*
[88] *Ibid.*
[89] *Tomkins* v *Public Servs. Elec. & Gas Co*., 422 F. Supp. 553, 556 (D.N.J. 1976) (refusing to recognize sexual harassment as discrimination under Title VII), rev'd, 568 F.2d 1044 (3rd Cir. 1977); *Corne* v *Bausch & Lomb, Inc.,* 390 F. Supp. 161, 163 - 165 (D. Ariz. 1975) (holding that a woman subjected to sexual advances failed to state a claim under Title VII), vacated, 562 F.2d 55 (9th Cir. 1977).
[90] M.R Peirce, "Sexual Harassment and Title VII: A Better Solution", (1989) 30(4) *Boston College Law Review*; N.M. Abdulraheem et al*., supra n 16*.
[91] (1986) 477 U.S. 57, 66.

VII. What constituted sexual harassment,[92] who could be sexually harassed,[93] and when did "gender" matter?[94]

While Title VII has many loopholes with regards to discrimination on the basis of sex, its vague nature has provided both the EEOC and courts with broad administrative--interpretative authority.[95]

[92] The Supreme Court in *Harris* v *Forklift Systems, Inc.*, took a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." (1993) 114 S. Ct 367, 370 371 ("Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employee's job performance, discourage employees from remaining on the job, or keep them from advancing in their care."); see also Guidelines on harassment Based on Race, Colour, Religion, Gender, National Origin, Age or Disability, 58 Fed. Reg. 51,266 (proposed 1993) (to be codified at 29 C.F.R. 1604.11) (classifying harassing behaviour into "epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts" and "written or graphic material that denigrates or shows hostility or aversion toward an individual or group … and that is placed on walls, bulletin boards, or elsewhere on the employer's premises or circulated in the workplace"); R.D. Lee Jr. and P.S. Greenlaw, "The Legal Evolution of Sexual Harassment", (1995) 55(4) *Public Administration Review*, pp. 357 and 359 (analysing harassing behaviour under the EEOC's 1993 guidelines).

[93] As of 2006, firing an employee because of their sexual orientation was considered lawful in 33 states. See J.E. Snyder and R.S. Bauch, "Sexual Orientation Discrimination in the Workplace", (2006) 20 *CBA Rec.* 44, 45; see also *Evans* v *Georgia Regional Hospital*, (2017) 850 F.3d 1248, 1255 (11th Cir. 2017) (permitting the termination of an employee because of her lesbian status). But see *Baldwin* v *Fox*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015) (holding that "sexual orientation is inherently a sex consideration" and thus falls under Title VII's protections); *Hively* v *Ivy Tech Community College* 853 F.3d 339, 345 (7th Cir. 2017) (same); *Zarda* v *Altitude Express, Inc.,* 883 F.3d 100, 112 (2nd Cir. 2017) (en banc) (same).

[94] *Carreno* v *IBEW* Local No. 226, 54 Fair Employment Practice Case (BNA) 81, 82 (D. Kan. 1990) (dismissing a Title VII harassment claim under the rationale that "the harassment suffered by the plaintiff was … because of his sexual preference" and not because of his gender).

[95] For instance, although prohibiting discrimination on the basis of sexual orientation was probably not within Congress' purview when enacting Title VII, the court can enforce a more liberal position. See, *Hively's case*, 853 F.3d at 345; *Zarda's case*, 883 F.3d at 112. With society's changing notions of sex and gender, gay rights, trans rights, and those in-between, can be safeguarded through a flexible reading of Title VII.

Furthermore, administrative codes which prohibit hostile work environments have been enacted to bridge Title VII's statutory gap.[96]

3.1.2. Agency: EEOC

The EEOC was established to combat unlawful employment discrimination.[97] While Congress expressly delegated authority to the agency to issue procedural regulations under Title VII,[98] the Supreme Court has held that the EEOC lacks the power to issue substantive ones.[99] Thus, the EEOC cannot enact new laws that are not present in Title VII.[100]

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[96] California Government Code, s. 12940 (2018) ("It is unlawful … for an employer to discriminate on the basis of … genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation."); (2018) 41 Code of Federal Regulations, s. 60-20.8 (prohibiting sexual harassment); Internal Revenue Service News Release FS- 98-11 (Apr. 1, 1998) (outlining Internal Revenue Service's policy on sexual harassment).

[97] Civil Rights Act 1964, 42 U.S.C., s. 2000e-2 (1964). The EEOC is tasked with enforcing Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. 42 U.S.C., s. 2000e-4 (2018) (consolidating enforcement authority for federal employment discrimination statutes in the EEOC).

[98] Civil Rights Act 1964, 42 U.S.C., s. 2000e-12 (2018) ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter."); see also *EEOC* v *Commercial Office Products Co.,* (1988) 486 U.S. 107, 116 (deferring to the EEOC's interpretation in a procedural regulation).

[99] *General Elec. Co.* v *Gilbert*, (1976) 429 U.S. 125, 141. The court's conclusion was controversial. The amendment to the House bill, which gave the EEOC authority to issue "procedural" regulations was introduced two days before passage and adopted without debate. See (1964) 110 Congressional Records 2575. This suggests that Congress may not have aimed to curtail the EEOC's law-making power. Nonetheless, the distinction between substantive and procedural regulation is rarely debated. "Substantive law largely affects behaviour through procedure" whereas procedural law "sets out the rules for enforcing substantive rights." P.T. Baumann et al., "Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases", (1992) 33(2) *Boston College Law Review*, pp. 211 and 216; *Byrd* v *Blue Ridge Rural Electric Cooperative Inc.,* (1958) 356 U.S. 525 (holding that whether a judge or jury decides the status of an employee is a procedural issue); 22 Code of Federal Regulations 40.24(b) (2018) (defining prostitution, a substantive law).

[100] R.H. White, "The EEOC, the Courts and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation", (1995) 51 *Utah Law Review*, pp. 51 and 93 (explaining the EEOC's law-making limitation).

Although, the EEOC may not legislate, the agency is not necessarily barred from giving meaning to Title VII. In fact, it is plausible that "Congress denied the EEOC the power to fill in statutory gaps while implicitly delegating the power to interpret statutory ambiguities."[101] Nonetheless, there is uncertainty as to whether the EEOC's interpretations of Title VII are entitled – as seen in *Chevron U.S.A., Inc.* v *Natural Resources Defence Council, Inc.* – to deference.[102] That is, whether federal courts are compelled to defer to the government agency's interpretation of the statute which it administers.[103]

The EEOC's mandate to enforce Title VII indicates that some level of statutory interpretation must occur in particular; the EEOC must determine whether conduct constitutes discrimination. Prior to filing a Title VII lawsuit alleging discrimination, employees must file charges with the EEOC.[104] Barring voluntary settlement between parties, the

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[101] *Ibid*; *Griggs* v *Duke Power Co.,* (1971) 401 U.S. 424, 424 (deferring to the EEOC's "Uniform Guidelines for Employee Selection Procedures" because the guidelines related to the *methods* of proving whether an employment test was "job-related," rather than a statutory interpretation); *Hall* v *Gus Construction Co.,* (8th Cir. 1988) 842 F.2d 1010, 1013 – 1016 (applying EEOC guidelines in finding employer liability for abusive treatment of women by male co-workers); *Yates* v *Avco Corp.,* (6th Cir. 1987) 819 F.2d 630, 634 – 635 (employing EEOC guidelines in finding that employer knew or should have known supervisor was sexually harassing women); *Henson* v *City of Dundee*, (11th Cir. 1982) 682 F.2d 897, 903 - 905 (applying EEOC guidelines in finding employer knew about hostile work environment, and was therefore liable for sexual harassment).

[102] (1984) 467 U.S. 837, 842-844 ("If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[103] *Ibid*; J A. Yavelberg, "The Revival of *Skidmore* v *Swift* Judicial Deference to Agency Interpretations after *EEOC* v *ARAMCO*" (1992) 42 *Duke Law Journal*, pp. 166 and 192 (arguing that all EEOC rulings are ineligible for Chevron deference); A.W. Blumrosen, "Society in Transition IV: Affirmation of Affirmative Action Under the Civil Rights Act of 1991", (1993) 45 *Rutgers Law Review*, pp. 903 and 910 (asserting that the EEOC's Uniform Guidelines are entitled to *Chevron* deference because other agencies participating in development of guidelines have substantive rulemaking powers); *Supra* n 100, at p. 94 ("Agency's substantive rulemaking powers supports Chevron deference even though agency lacks cease-and-desist power."). This issue of ascribing *Chevron* deference to the EEOC was raised in *Garcia*, where the Supreme Court denied certiorari. *Garcia* v *Spun Steak Co.* (1994) 114 S. Ct. 2726, 2726 (denying cert.).

[104] The legal process for filing discrimination claims differs based on the employer. See EEOC, "Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence,

EEOC investigates the claim and concludes on whether there is reasonable cause to believe a violation of Title VII occurred. If the EEOC determines that a claim lacks merit, the employee retains the right to sue in federal court.[105] On the other hand, if the EEOC finds that discrimination likely occurred, the agency seeks resolution through an informal voluntary process called conciliation. In the event that conciliation does not succeed, the EEOC has discretion to litigate the violation in federal court. Again, the employee may file a lawsuit if the EEOC does not.[106] Thus, to meet Congress' goal of administratively resolving employment disputes, the EEOC requires some interpretive power to adjudicate claims.[107]

Nonetheless, the EEOC's impact is far from abysmal. In fiscal year 2016, the agency resolved 97,443 charges and reached more than 315,000 members of the workforce.[108] Of $482 million secured for victims of workplace discrimination, $347.9 million was attained through administrative mediation, conciliation, and settlements.[109] When administrative solutions fail, the EEOC considers several factors in deciding whether to file a lawsuit. These include the strength of

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Sexual Assault, or Stalking", available at https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who (accessed 13 June 2020) (explaining that private sector employees file a "charge of discrimination" with the EEOC and federal government employees file an "EEOC complaint" with their contracting agency); EEOC, "Milestones: 1965", available at https://www.eeoc.gov/eeoc/history/35th/milestones/1965.html (accessed 8 November 2018) (asserting that Title VII requires the EEOC to defer charges to state or local Fair Employment Practices Agencies (FEPA) so that attempts to resolve disputes are first undertaken under local laws).

[105] EEOC, "What You Can Expect after a Charge is Filed", available at https://www.eeoc.gov/employers/process.cfm (accessed 8 November 2018) (explaining the process of resolving claims).

[106] *Ibid.* Filing EEOC claims and federal lawsuits based on sexual harassment are subject to time limitations.

[107] *Supra* n 100, at p. 54 ("One would suppose it is the EEOC to whom Congress, expressly or impliedly, confided the authority to interpret the laws administered by that agency.").

[108] EEOC, "What You Should Know: EEOC's Fiscal Year 2016 Highlights", available at https://www.eeoc.gov/eeoc/newsroom/wysk/2016_highlights.cfm (accessed 8 November 2018).

[109] *Id.* The strength of the agency's voluntary mediation program is evidenced by its seventy-six percent success rate. *Id.*

evidence, the particulars of the case, and perhaps most importantly, the impact of the specific litigation in combating workplace discrimination generally.[110]

The EEOC recognizes that eliminating employment patterns that discriminate against a class of individuals is critical to ensuring safe workplaces. As a result, the agency prioritizes the eradication of systemic discrimination in workplaces.[111] Within administrative contours for instance, the EEOC settled a case alleging sexual harassment and retaliation against a class of Latino farm workers for $1.05 million.[112] The agency also secured a consent decree, which provides for affirmative action goals for women applicants.[113] On the litigation end, in fiscal year 2014, twenty-five percent of the EEOC's active court docket involved challenges to systemic discrimination.[114] One of such cases involved eighty-two women who were subjected to sexual assaults, sexual solicitations, derogatory comments, groping and pornographic displays.[115] That case, which was settled for $8

[110] EEOC, "About EEOC", available at https://www.eeoc.gov/eeoc/ (accessed 8 November 2018) (mentioning the EEOC's litigation considerations).

[111] EEOC, "Systemic Discrimination", available at https://www.eeoc.gov/eeoc/systemic/index.cfm (accessed 8 November 2018) (explaining the EEOC's mandate to tackle systemic discrimination).

[112] EEOC, "Rivera Vineyards Settles EEOC Suit Alleging Sexual Harassment, Retaliation, Job Segregation", available at https://www.eeoc.gov/eeoc/newsroom/release/6-15-05.cfm (accessed 3 June 2020).

[113] *Ibid*; EEOC, "ABM Industries Settles EEOC Sexual Harassment Suit for $5.8 Million" available at https://www.eeoc.gov/newsroom/abm-industries-settles-eeoc-sexual-harassment-suit-58-million (accessed 3 June 2020) (reporting $5.8 million settlement of case where twenty-one Hispanic female janitorial workers were subjected to unwelcome touching, explicit sexual comments and requests for sex); EEOC, "Pitre Car Dealership to Pay over $2 Million to Resolve EEOC Same-Sex Sexual Harassment Suit", available at https://www.eeoc.gov/eeoc/newsroom/release/4-1-14.cfm (accessed 3 June 2020) (resolving a class claim involving severe same-sex sexual harassment and retaliation for over $2 million).

[114] EEOC, "What You Should Know: The EEOC, Conciliation, and Litigation", available at https://www.eeoc.gov/eeoc/newsroom/wysk/conciliation_litigation.cfm (accessed November 8 2018).

[115] EEOC, "International Profit Associates to pay $8 Million for Sexual Harassment of Eighty-Two Women", available at

million, as well as subsequent wins, suggest that the EEOC is at least doing something right.[116] Curbing systemic discrimination involves uprooting sexual harassment by instilling preventive measures.

Prevention is the most effective weapon against sexual harassment.[117] As the EEOC's Select Task Force on the Study of Harassment in the Workplace reported, majority of individuals who suffer from workplace harassment do not report their experiences.[118] To the contrary, victims tend to ignore their harassers, endure discriminations, or deny the weight of situations.[119] Thus, it is imperative that the EEOC enforces strong policies that deter workplace sexual harassment in the first place.

3.2. Statutory Reforms Tackling Sexual Harassment since #MeToo

Despite the EEOC's effort to implement Title VII, the #MeToo movement indicates that more comprehensive mechanisms against sexual harassment are necessary. Since the #MeToo movement began, state and federal legislatures in the United States have been pressured to hold hearings and introduce bills that address sexual harassment.[120] For instance, Maryland, Illinois, Louisiana, New Hampshire and Delaware have criminalized sexual relations between law enforcement and people in their charge.[121] Yet, few new laws substantially remove barriers to eliminating workplace sexual harassment. At the state level, a number of laws have been passed but majority are limited in scope.[122]

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https://www1.eeoc.gov//eeoc/newsroom/release/3-28-11a.cfm?renderforprint=1 (accessed 3 June 2020).

[116] *Ibid.*

[117] *Infra* n 180 and 182 (and accompanying text).

[118] EEOC, "Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace 16", available at https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm (accessed 3 June 2020) ("Examining the myriad and complex issues associated with harassment in the workplace.").

[119] *Ibid.*

[120] *Supra* n 81.

[121] *Ibid.*

[122] A USA Today study found only two state bills that passed in 2017, which address two or more recommendations from anti-sexual harassment activists. Vermont law now prohibits mandatory non-disclosure agreements for sexual

Even less assuring, Congress has not passed any laws related to sexual harassment in the workplace, not even regarding its own procedure surrounding claims against congresspersons, which lags behind EEOC standards.[123]

Senator Speier's 2014 proposal that there be mandatory sexual harassment training in Congress "was rebuffed by the Chair of the committee who wouldn't even take it up as an amendment in the committee let alone on the floor."[124] Fast-forward to the #MeToo era, a letter from 1,400 former congressional staffers urged leadership to mandate harassment training and reform the system for filing complaints.[125] Consequently, the House passed an amendment to the Congressional Accountability Act to "strengthen victims' rights, require third-party investigations and hold members personally financially liable for settlements."[126] Negotiations to rectify this bill in Senate have hit more substantial roadblocks as major provisions that deter sexual harassment have been protested.[127] Congressional action is paramount to prevent future victims of sexual harassment from remaining silent.

Federal legal reforms are imperative because a person's right to safe working environments should not be contingent on where they live.[128] Comprehensive federal workplace sexual harassment laws can best be instituted in three ways. First, Congress can pass a separate statute,

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harassment, extends sexual harassment protections to independent contractors, and allows auditing workplaces for compliance. New Delaware law now makes employers responsible for sexual harassment when the employer fails to take corrective action, prevents employers from retaliating against an employee for filing a discrimination charge, and empowers the Department of Labour to investigate violations.

[123] ACLU, "Congress: In the Age of #MeToo, Hold Yourself Accountable for Harassment and Discrimination", available at https://action.aclu.org/petition/congressional-accountability (accessed 8 November 2018) (explaining that the "current system puts the onus on the victim, does little to address the unequal power dynamics between victims and perpetrators, and often re-traumatizes survivors").

[124] *Supra* n 81.

[125] *Ibid.*

[126] *Ibid.*

[127] *Ibid.*

[128] *Infra* sub-subsection 3.2.2.

which goes in-depth into workplace sexual harassment. While this path is most efficacious, it is unlikely that 2018's partisan Congress would pass such legislation.[129] Second, Congress can provide the EEOC with the authority to make substantive rules.[130] Such agency power will allow for flexibility and real-time decisions that enhance the EEOC's capacity to enforce Title VII. Third, Congress can amend Title VII to ensure fundamental protections are available to all. This involves clarifying the parameters of sex-based discrimination and incorporating suggested reforms into legislation. Regardless of the process, as a result of the #MeToo movement, the American Civil Liberties Union, Leadership Conference on Civil and Human Rights, National Women's Law Centre, and over thirty other undersigned organizations urge lawmakers to eliminate workplace sexual harassment through numerous proposed reforms.[131]

This section focuses on those proposed reforms which may be juxtaposed in the Nigerian context. These include promoting workplace gender equality, expanding legal protections against harassment to all working people, and allocating greater resources to the EEOC.[132] Subsection 3.3 analyses each proposed reform in turn as they highlight areas in which the United States' system falls short, despite pre-existing mechanisms. This provides a background for Section 4.0, which offers a blueprint for sexual harassment protections in Nigeria.

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[129] B. Bowman, "Partisan Divide in US Congress the Worst It's Ever Been" available at, https://theglobepost.com/2018/10/01/polarization-politics-study/ (accessed 3 June 2020) ("Polarization between Democrats and Republicans in the U.S. Congress is the worst it's ever been, which makes it difficult to make any progress on social or economic policies, a new study released by Michigan State University found").

[130] *Supra* sub-subsection 3.1.2.

[131] National Women's Law Centre, "A Call for Legislative Action to Eliminate Workplace Harassment" available at https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/Workplace-Harassment-Legislative-Principles.pdf (accessed 3 June 2020).

[132] *Ibid*.

3.2.1. Workplace Gender Equality

Sexual harassment is a by-product of workplace sex segregation and inequality.[133] Thus, eliminating patterns of inequality is critical to giving marginalized individuals the power to stand against discrimination.[134] Dismantling unnecessary workplace hierarchy requires employment law reforms that restrain arbitrary authority and enable work - life balance.[135] Suggested reforms include amending the *Family and Medical Leave Act*, 1993 (FMLA) by mandating paid maternity leave,[136] passing the proposed *Paycheck Fairness Act* "requiring employers to demonstrate that wage differentials are based on factors other than sex,"[137] and enacting the proposed Schedules that allow the *Work Act* prohibit unfair and unpredictable scheduling practices that hinder the success of women in the workplace.[138] Consequently, groups like 5050by2020 advocate for increased female participation in core leadership positions in Hollywood[139] and others like #Angelsaim for gender parity in Silicon Valley.[140] Laws must be formulated to alter

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[133] V. Schultz, "Reconceptualizing Sexual Harassment, Again", (2018) 128 *Yale Law Journal*, pp. 22 and 42.

[134] *Ibid*.

[135] C. Ingraham, "The World's Richest Countries Guarantee Mothers More Than a Year of Paid Maternity Leave, the U.S. Guarantees Them Nothing", available at https://www.google.com/amp/s/www.chicagotribune.com/business/ct-biz-guaranteed-maternity-leave-20180206-story.html%3foutputType=amp (accessed 3 June 2020) ("President Bill Clinton signed the Family and Medical Leave Act, which included a provision giving eligible workers 12 weeks of *unpaid* leave to care for a new child." (emphasis added)).

[136] *Ibid*.

[137] ACLU, "Equal Pay for Equal Work: Pass the Paycheck Fairness Act", available at https://www.aclu.org/other/equal-pay-equal-work-pass-paycheck-fairness-act (accessed 26 November 2018).

[138] Schedules That Work Act, (2017) H.R. 2942, 115th Cong.

[139] "5050by2020", available at https://5050by2020.com (accessed 8 November 2018) ("What does 50/50 mean? It means reimagining leadership to reflect all of us.").

[140] #Angels, "The #ANGELS Story", available at https://www.helloangels.co/about (accessed 8 November 2018) ("Our mission is to get more women on the cap tables of successful start-ups."); Letter from M. Goodman, Dir., LGBTQ, Gender & Reprod. Justice Project, ACLU of Southern California, to A. Y. Park, Regional Attorney, EEOC L.A. District Office, available at https://perma.cc/PDE5-NVRB (accessed 13 June 2020) (demanding the EEOC to investigate television industry's sex segregation and discriminatory use of recruiting practices).

power structures and reshape the mindsets of co-workers and supervisors who ascribe women as lesser.

Because workplace upper management is overwhelmingly occupied by men and bottom ranks are disproportionately filled by women, men may learn a false sense of superiority.[141] Accordingly, the link between sexual harassment and sex segregation can be erased when there is "equal representation, opportunities, benefits and pay for all women workers" in every industry and arm of government.[142] After all, there is a reason why most cases of sexual harassment are male-harasser female-victim:[143] "There is massive male sexual entitlement … public spaces are run by men" who are enabled by social norms.[144] If women occupy equal positions of power, sexual harassment is less likely to be normative and protections are more likely to be ensured.

3.2.2. Title VII Coverage

Title VII only applies to employers with a minimum of fifteen employees.[145] "As long as an employer hires no more than fourteen

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[141] M. Puente, "Women are Rarely Accused of Sexual Harassment, and There's a Reason Why", available at https://www.usatoday.com/story/life/2017/12/18/women-rarely-accused-sexual-harassment-and-theres-reason-why/905288001/ (accessed 3 June 2020) (explaining the power imbalance that promotes sexual harassment).

[142] N.Y. Times, "Open Letter from Time's Up", available at https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html (accessed 3 June 2020).

[143] *Supra* n 141.

[144] Senthilingam, *supra* n 3. In the restaurant industry for example, female employees often tolerate sexual harassment to get tips. Activists have beckoned on Congress to require minimum wage be paid to tipped workers. See also *supra* n 131. Since the #MeToo movement, there has been an increase in EEOC filings involving sexual harassment in restaurants. See, Press Release, EEOC, "EEOC Sues Daisy Dukes & Boots Saloon for Sexual Harassment and Retaliation", available at https://www.eeoc.gov/eeoc/newsroom/release/10-2-18.cfm ("A male assistant manager of Daisy Dukes' Chesterfield, VA restaurant sexually harassed Michelle Henard and other female employees."); EEOC, "Las Trancas Restaurant to Pay $66,598 To Settle EEOC Sexual Harassment and Retaliation Lawsuit", available at https://www.eeoc.gov/eeoc/newsroom/release/8-9-18c.cfm (accessed 3 June 2020) ("A restaurant in Martinsburg, W.V., has agreed to pay $66,598 and provide other relief to settle an employment discrimination lawsuit filed by the [EEOC].").

[145] Civil Rights Act 1964, (2018) 42 U.S.C., s. 2000e. See, *Arbaugh* v *Y & H Corp*. (2006) 126 S.Ct. 1235, 1245 (holding that an employer cannot seek to dismiss

employees, it can refuse to hire women, Moslems, or disabled persons, and it will not be in violation of federal discrimination law."[146] Although an employer who is not covered by federal law may be subject to state or local anti-discrimination laws, many states have similar limitations on which employees can bring claims.[147] As such, Congress must address Title VII's coverage-based loopholes, which render reporting sexual harassment an "unthinkable risk."[148]

Expanded federal protection is especially important for those who occupy positions as independent contractors, farm workers, and domestic workers because they currently fall outside the purview of Title VII.[149] As of 2009, the United States Census Bureau reported that there are 1.5 million domestic workers in the United States. [150] These high-risk workers are predominantly immigrant women and women of

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Title VII claims *after* trial based on an assertion that they had fewer than fifteen employees).

[146] R. Carlson, "The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law", (2006) 80 *St. John's Law Review*, p. 1197.

[147] For instance, in the states of Oklahoma, South Carolina, Texas, Utah, West Virginia, Nebraska, Nevada, Mississippi, Georgia, Florida, Arkansas, and Alabama, anti-discrimination laws only cover workplaces with at least fifteen employees. See Workplace Fairness, Discrimination Claims State Laws, available at https://www.workplacefairness.org/minimum (accessed 8 November 2018) (summarizing state anti-discrimination laws).

[148] Time Staff, "700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault", available at http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/ (accessed 3 June 2020); J. Ross, "Sexual Assault Endured by Domestic Workers Overlooked in National Conversation", Wash. Post, available at https://www.washingtonpost.com/news/post-nation/wp/2017/11/29/sexual-assault-endured-by-domestic-workers-overlooked-in-national-conversation/?utm_term=.f9bda4f0bb61 (accessed 3 June 2020) ("Today black, Latina and Asian women comprise forty percent or more of the nation's nannies, maids and home health-care aides.").

[149] Ross, *ibid*. ("A home health-care aide, had been on the job just a few weeks when her client, a mentally sharp but physically fragile elderly man, grabbed her breast").

[150] A.J. Hiller and L.E. Saxtein, "Falling Through the Cracks: The Plight of Domestic Workers and Their Continued Search for Legislative Protection", (2009) 27 *Hofstra Labour and Employment Law Journal*, p. 233 (discussing the loopholes in Title VII, which adversely impact domestic workers); see also *supra* n 131 (calling for Congress to extend federal protection to individuals who are not considered "employees," such as independent contractors and unpaid interns).

colour facing intersectional disadvantages imposed by race and national origin.[151] Considering that these workers are usually the only employee in their workplace, their employers are often exempt from Title VII protections.[152] While #TimesUp, a legal defence fund with about $13 million in donations, helps protect less privileged women from sexual misconduct and retaliation, reformers argue that Congress should cover *all* workers under Title VII, so that every person who suffers sexual harassment is availed core federal protections against workplace harassment.[153]

During Senate debate on Title VII, Senator Cotton warned that if the statute was applied to all employers and the EEOC had to investigate every complaint, it would require a "small army" for enforcement.[154] Yet, reformers argue that it is injudicious to turn a blind eye to harassment simply because its resolution may be costly.[155] Rather, it is imperative to reach a practical solution that manages resources effectively. Establishing full Title VII coverage and administrative

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[151] E. Lewis, "Who Is at Highest Risk of Sexual Harassment?", available at, https://www.aclu.org/blog/womens-rights/womens-rights-workplace/who-highest-risk-sexual-harassment (accessed 3 June 2020) ("Women who work in low-wage positions also often face intersectional disadvantages"); see also Ross, *supra* n 148 ("In passing some of the nation's core labour laws … lawmakers intentionally excluded occupations in which most of the nation's black, Latino and Asian workers were employed such as domestic work and farm labour.").

[152] S. Bapat, "Domestic Workers Face Rampant Harassment on the Job, with Little Protection", available at https://www.salon.com/2017/11/30/domestic-workers-face-rampant-harassment-on-the-job-with-little-protection_partner/ (accessed 13 June 2020) ("These workers are isolated … They are alone with their perpetrators, and they're trying to keep their job"); Ross, *supra* n 148.

[153] C. Buckley, "Powerful Hollywood Women Unveil Anti-Harassment Action Plan", available at https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html?rref=collection%2Fbyline%2Fcara-buckley&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection&_r=0 (accessed 3 June 2020) (explaining #TimesUp's legal defence fund aimed to help less privileged protect themselves from sexual misconduct).

[154] (1964) 110 Congressional Record S13086 (statement of Sen. Cotton).

[155] P. Jenoff, "As Equal as Others: Rethinking Access to Discrimination Law", (2012) 81(1) *University of Cincinnati Law Review*, pp. 85 and 99 ("Even accepting the argument that complying with employment discrimination laws and defending cases that arise under them is costly, there are still compelling arguments against the minimum employees requirement as presently codified.").

efficiency can be achieved using varied routes. First, the EEOC can be restructured similar to the National Labour Relations Board (NLRB), which adopted self-tailored jurisdictional limits to manage its administrative resources.[156] Second, Title VII's small business exemption can be tailored to particular businesses and evolved according to the demands on the EEOC's resources.[157] Third, Congress can adopt a Title VII coverage exemption that allows any employee bring sexual harassment claims.[158] Finally, Congress can implement federal laws similar to those in New York, California, and Oregon, known as Domestic Worker Bill of Rights.[159] Regardless of how Congress decides to extend protection, increased EEOC funding is paramount for all individuals in all workplaces to be safeguarded against harassment and discrimination.[160]

3.2.3. EEOC Funding

According to a US News Report, the average wait time to resolve private complaints at the EEOC is about 295 days.[161] "The main reason that the EEOC's charge process is so problematic is that it has been subject to utterly unrealistic expectations," owing to its inadequate

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[156] *Supra* n 146, at p. 1268 (explaining that the NLRB's earliest use of the single employer doctrine "was to reach firms that might be exempt from the Board's jurisdiction unless they were combined with affiliated firms into a single employer").

[157] *Ibid.* ("The EEOC's regulations are sufficiently vague to permit the EEOC a fair amount of latitude for applying the doctrine according to the demands on agency resources").

[158] A similar "exemption" is present for racial discrimination. Under the Civil Rights Act 1866, there is no threshold on how many employees a business must hire in order to incur liability based on racial discrimination. 42 U.S.C. § 1981 (2018).

[159] Ross, *supra* n 148. These state laws, Domestic Worker Bill of Rights, allow domestic workers file sexual harassment claims regardless of Title VII coverage. Importantly, many of these laws apply to employers who only employ one worker.

[160] *Infra* n 162 (and accompanying text).

[161] J. Calfas, "A $16 Million Win for #MeToo and Time's Up Was Slipped into Trump's Budget", available at http://time.com/money/5221146/metoo-eeoc-funding-increase/; (accessed 3 June 2020). See also Associated Press, "At the EEOC, harassment cases can languish for years", available at https://wtop.com/national/2018/04/at-the-eeoc-harassment-cases-can-languish-for-years/ (accessed 3 June 2020) (averaging 543 days for federal employee complaints to be handled by the EEOC).

funding.[162] Until the EEOC is fully funded beyond a "symbolic level," the agency will continue to have too many complaints and too little resources to thoroughly handle them in a timely manner.[163]

In response to criticisms surrounding the EEOC's expertise and capacity to enforce sexual harassment laws, Congress granted a $16 million increase in the EEOC's budget for the 2018 fiscal year.[164] While one cannot conclude on the adequacy of the 2018 budget, funding is already furthering the EEOC's reach. This is evidenced by the agency's fifty percent increase in lawsuits challenging sexual harassment in fiscal year 2018 compared to fiscal year 2017.[165] What is certain is the need for sufficient baseline funding subject to contextual increase. Adequate baseline funding ensures that the EEOC can litigate a higher volume of cases and reach more industries, which are ripe with systemic discrimination.[166] To enforce Title VII's mandate, the EEOC must have resources to train, investigate and litigate, such that employers are aware that sexual harassment will be not be tolerated.

Statutory reforms bridge legal gaps that enable sexual harassment. However, it is crucial that the EEOC is able to leverage these laws to enforce preventative measures and tackle discriminative practices when they arise.

3.3. Administrative Reforms Tackling Sexual Harassment Since #MeToo

Formal legislation is futile without proper implementation. While Title VII has loopholes, the #MeToo movement highlights the EEOC's unsatisfactory enforcement of existing anti-sexual harassment provisions. In the wake of the movement, traffic on EEOC's website

[162] *Supra* n 5.
[163] *Ibid.*
[164] Calfas, *supra* n 161 (explaining that prior to increase, the EEOC faced staff cuts and hiring freezes).
[165] EEOC, "EEOC Releases Preliminary FY 2018 Sexual Harassment Data'" available at https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm (accessed 3 June 2020).
[166] EEOC, "EEOC Sues Beavers' Inc. / Arby's For Sexual Harassment of Teen Workers available at https://www.eeoc.gov/eeoc/newsroom/release/3-30-18.cfm (accessed 3 June 2020) (explaining lawsuit against a team leader trainee who repeatedly pressured young female employees to have sex with him).

has doubled, which suggests that individuals are curious to understand the agency's role in preventing and punishing sexual harassment.[167] Given the need for administrative effectiveness in enforcing Title VII, this section examines challenges to the EEOC and limitations to achieving its objectives. In particular, sub-subsection 3.3.1 suggests that the EEOC should enforce anti-harassment compliance trainings and sub-subsection 3.3.2 urges that the agency conduct comprehensive investigations. This analysis, together with the proposals for statutory reform in subsection 3.2, aids in formulating a framework for an agency that effectively tackles workplace sexual harassment in Nigeria.

3.3.1. Anti-Harassment Compliance Trainings

Many workers are familiar with dreary trainings: They have gathered in a room, watched a formal PowerPoint presentation, which explains why sexual harassment is "bad," and ticked boxes that confirm that they attended the compliance seminar. According to the Bureau of Labour Statistics, ninety-eight percent of companies have sexual harassment policies and seventy percent of employers mandate sexual harassment trainings.[168] Too often, these policies and trainings are used as shields by employers who seek to deflect liability.[169] In *Faragher* v *City of Boca Raton* and *Burlington Industries, Inc.* and *Burlington Indus. Inc.* v *Ellerth*, the Supreme Court determined that a company can avoid liability in a sexual harassment case if it showed that it had trained

[167] S.J. Pearlman and D.J. Moss, "Proskauer Delivers #MeToo Webinar with EEOC Commissioner Feldblum", available at https://www.lawandtheworkplace.com/2018/09/proskauer-delivers-metoo-webinar-with-eeoc-commissioner-feldblum (accessed 3 June 2020) ("Visits to the EEOC website related to harassment issues have more than doubled with the expansion of the #MeToo movement.").

[168] S.K. Johnson, J.F. Kirk, and K. Keplinger, "Why We Fail to Report Sexual Harassment", available at https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment / (accessed 3 June 2020).

[169] *Supra* n 131. Poor employer incentive to actually prevent harassment is further evidenced by the fact that not many employers signed onto the EEOC's "It's on Us campaign," which sought to provide workplaces with tools to prevent sexual harassment; Equality Now, "United States: End Sexual Harassment in the Workplace!", available at https://www.equalitynow.org/united_states_end_sexual_harassment_in_the_workplace?locale=en (accessed 8 November 2018).

employees on its anti-harassment policies.[170] Consequently, rather than addressing unacceptable behaviour, many employers engage in symbolic compliance with the law.

These "formal trainings" are problematic because they fail to uproot the problem: preventing harassment and discrimination. The New York State legislature recognized these shortcomings and drafted an anti-sexual harassment training scheme, one of the most comprehensive in the United States. Starting October 2018, every employer in New York must adopt a model sexual harassment training program, which includes specific goals and means to achieve those goals.[171] Similarly, the states of California, Connecticut, and Maine mandate such trainings for employers who meet a certain employee-count threshold.[172]

While the EEOC cannot mandate compliance trainings due to the agency's procedural-substantive law-making limitation,[173] they can adopt the administrative stance that employers must meet a certain "effective training" threshold in order to avert sexual harassment liability.[174] Blueprints for these trainings should be provided by the EEOC.

The EEOC is in the process of releasing updated enforcement guidelines on sexual harassment for employers.[175] These guidelines should incorporate "effective training" thresholds. An effective anti-sexual harassment training program is one that is properly tailored and

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[170] *Burlington Industries Inc.* v *Ellerth* (1998) 118 S. Ct. 2257; *Faragher* v *City of Boca Raton* (1998) 118 S. Ct. 2275.

[171] EEOC, "Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace", available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf (accessed 3 June 2020) (EEOC, Report of Co-Chairs). New York state law requires that anti-sexual harassment trainings: (i) be interactive; (ii) explain sexual harassment; (iii) provide examples of sexual harassment; (iv) provide information concerning remedies available to victims of sexual harassment; (v) provide information concerning complaint adjudication; and (vi) address responsibilities for supervisors.

[172] *Ibid.*

[173] *Supra* sub-subsection 3.1.2.

[174] *Supra* n 171 (explaining that the EEOC sometimes seeks compliance training clauses in settlement agreements).

[175] Calfas, *supra* n 161.

continuous. Similar to the state of New York, the EEOC should implore employers to conduct annual and interactive trainings using audio-visuals aids and simulations.[176] Such trainings should confront conduct, which although might be legal, are unacceptable and might trigger future discrimination.[177] This involves incorporating elements of unconscious bias training and promoting an active bystander approach.[178] Importantly, individuals in a supervisory capacity should receive more rigorous and holistic coaching that emphasizes accountability and compels cultural transformation.[179]

The EEOC can incite a culture shift on sexual harassment through outreach and educational services. The agency should have effective resources that employers can easily adapt to their specific business needs. Currently, the EEOC hires representatives who are available to provide free trainings to employers on a limited basis.[180] However, these trainings do not assist employers in educating *against* harassment prevention per se. Rather; they provide general information about the EEOC, their mandates, enforceable laws, and charge-complaint processes. Although these impart useful knowledge, they do not uproot the problem. While the EEOC's Training Institute offers fee-based trainings, which address prevention, these are unlikely to be utilized by small mom-and-pop businesses.[181] Consequently, the EEOC should offer free comprehensive training resources that businesses can self-employ. Until there is a federal law, which requires compulsory and effective trainings, the EEOC should operate within its power to both provide effective training resources and incentivize employers to utilize them.

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[176]New York State, "Model Sexual Harassment Prevention Training", available at https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentDRAFTModelTraining.pdf (accessed 3 June 2020).
[177] *Supra* n 171, at p. 44.
[178] *Ibid*, at pp. 11 and 14.
[179] *Supra* n 177.
[180] EEOC, "Outreach, Education & Technical Assistance", available at https://www.eeoc.gov/eeoc/outreach/index.cfm (accessed 28 November 2018).
[181] *Ibid.*

3.3.2. Comprehensive Investigations

About half of the EEOC's investigations on sexual harassment claims yield "no reasonable cause."[182] That is, the agency does not find grounds for employer liability. This might account for why the percentage of employers who agree to mediate EEOC charges before investigations begin is considerably lower than the percentage of charging parties who agree to mediate:[183] Perhaps many employers simply do not think they will be found liable.

Employers are not ignorant in taking their chances. In seventy percent of cases closed in 2017, EEOC investigators determined that there was insufficient evidence to find that discrimination occurred.[184] This is not surprising seeing that the EEOC has limited resources and personnel to execute thorough evaluations of every claim.[185] As such, the agency prioritizes cases it believes are "strong" and often closes some without a full investigation. While this is a strategic decision, dismissing complaints without a fair process where all parties are heard can discourage workers from pursuing their claims. One way to ameliorate such budgetary concern is to promote confidential and/or anonymous reporting of harassment findings by laymen.[186] Budget aside, the EEOC should adopt an approach where they first and foremost, believe survivors.[187]

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[182] EEOC, "Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2018", available at https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (accessed 8 November 2018).

[183] EEOC, "Enforcement", available at https://www.eeoc.gov/enforcement (accessed 8 November 2018).

[184] Associated Press, *supra* n 161.

[185] As of the writing of this Paper, the EEOC had 549 investigators handling the thousands of claims it receives; *Ibid*.

[186] *Supra* n 131 ("Require employers to provide multiple internal reporting mechanisms, including options for confidential and/or anonymous reporting.").

[187] M. Quinn, "As Sexual Harassment Reforms Stall in Congress, Statehouses Take the Lead", available at http://www.governing.com/topics/politics/gov-sexual-assault-harassment-statehouse-congress-kavanaugh-ford.html (accessed 13 June 2020) ("First and foremost, you have to believe survivors" … you have to have an environment where people feel safe coming forward").

Evidently, "it's easy to say there's no reasonable cause if you don't do an investigation."[188] This was highlighted by the Supreme Court nomination hearings of Brett Kavanaugh, during which many called for a full FBI investigation into Dr. Blasey Ford's sexual harassment allegations against him.[189] Believing survivors is imperative. That is not to say that the EEOC should rush to judgment against those accused of sexual misconduct. Rather, due process involving transparent and thorough investigations is required. It must find the balance between construing women as though they lack agency and dismantling power disparities that leave marginalized groups vulnerable.[190]

In the event that a full investigation accurately yields "no reasonable cause," claimants should be adequately protected against retaliation. Although federal law prohibits retaliation against those challenging harassment, studies have found that seventy-five percent of those who reported harassment experienced some form of pay cut, career impairment, or reputation damage.[191] Thus, the EEOC should more effectively investigate actions, and the threat of actions, which instil fear and tend to keep individuals from stepping forward.

When individuals raise claims with "reasonable cause," the EEOC should ensure that liable parties are proportionately penalized. In 2016, there was only a forty-four percent success rate for conciliation of charges after the agency found reasonable grounds for discrimination.[192] It is no shock why employers may not take the administrative process seriously: The EEOC litigates less than eight percent of the cases where it believes discrimination occurred and conciliation proved unsuccessful.[193] These numbers indicate that a

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[188] Associated Press, *supra* n 161.
[189] L.M. Lapidus, "A Full Investigation is Needed into the Sexual Assault Allegations against Brett Kavanaugh", available at https://www.aclu.org/blog/womens-rights/violence-against-women/full-investigation-needed-sexual-assault-allegations (accessed 3 June 2020) ("It is critical that a confirmation vote be delayed until a thorough and transparent investigation can be conducted").
[190] *Supra* n 77.
[191] Equality Now, *supra* n 169.
[192] *Supra* n 108.
[193] *Supra* n 114 ("When deciding whether to file a lawsuit, the EEOC considers several factors, including the seriousness of the violation, the type of legal issues

good number of employers escape repercussions for harassment. Given the current climate surrounding sexual harassment, the EEOC should employ a divide-and-conquer approach. The agency should strengthen collaborative efforts with state and local FEPAs, non-profits like the ACLU, and private law firms committed to pro bono.

Consequently, it is necessary that the EEOC performs more effective educational outreach that changes mindsets and dispels the culture of silence. When claims of sexual harassment arise, the EEOC should ensure that investigations are thorough and do not negatively impact the complainant.

Despite the United States' shortcomings, the state of sexual harassment laws in Nigeria is even direr. Evidence of rampant workplace sexual harassment, a culture of silence surrounding the discourse, and a lack of adequate legal protections to remedy the problem suggests that the Nigerian legislature can borrow from the strengths in the United States' system and imbibe reforms that bypass the United States' flaws. As Section 3.0 highlights, there is much to be done in strengthening sexual harassment protections in the United States. Title VII's minimal legislative history on discrimination on the basis of sex and the EEOC's substantive law-making restrictions have proven to be obstacles in the movement against sexual harassment. Consequently, statutory reforms which address gender parity, Title VII coverage, and EEOC funding are necessary. Notwithstanding loopholes in the law, the EEOC can more competently prevent sexual harassment by enforcing anti-harassment compliance trainings and conducting comprehensive investigations. These reforms can help in establishing a more efficient system in the United States as well as instituting an effective one at the outset in Nigeria, which adequately prevents, deters, and punishes sexual harassment.

4.0. IMPLEMENTING UNITED STATES' SAFEGUARD IN NIGERIA

in the case, the wider impact the lawsuit could have on the agency's efforts to combat workplace discrimination, and the resources available to litigate the case effectively.").

Comprehensive sexual harassment protections in Nigeria are necessary. This Part proposes a two-pronged system in Nigeria: a statute and an effective agency to administer the law. In particular, this Part imports the United States' sexual harassment safeguards – along with their proposed reforms discussed in Section 3.0 – into the Nigerian context. Subsection 4.1 modifies the United States' system to propose a culturally ideal statutory and administrative structure that addresses sexual harassment in Nigeria. While the goal is to bypass the shortcomings of the United States' system, subsection 4.2 takes cognizance of the high rate of corruption and administrative mismanagement in Nigeria, and possible limitations to enforcing sexual harassment protections in the country.

4.1. Proposed Legal Protections against Sexual Harassment

As discussed in subsection 2.2, there is no national law in Nigeria which addresses workplace sexual harassment. While the NICN has ruled against sexual harassment using international law and has procedures for bringing sexual harassment claims,[194] there needs to be nationally entrenched sexual harassment laws. Not only will creating a national law educate individuals about their rights but statutory safeguards also inspire legitimacy, highlighting that the Nigerian government does not tolerate sexual harassment. The goal is not to eradicate core ethnic traditions but to incite a societal shift, which creates room for progressive culture while guaranteeing fundamental women's rights. This section proposes a culturally sensitive statute and agency, which address sexual harassment in Nigerian workplaces.

The analysis of United States' system in Section 3.0 shows that Nigeria requires a comprehensive statutory system that prevents workplace sexual harassment and encourages victims to bring claims without adverse repercussion.[195] On the federal level, statutorily addressing workplace sexual harassment in Nigeria can be done in one of two

[194] Rules of Civil Procedure 2017, Order 14 (Nigeria).
[195] Sub-subsection 3.1.2 (explaining the limitations to Title VII's vague prohibition of discrimination on the basis of sex).

ways: The Nigerian parliament can amend the Nigerian Labour Act to include a provision against sexual harassment or it can pass an independent statute that bars sexual harassment across contexts. Given the tabled concerns surrounding the SHTEIB bill, it is too narrow and should extend beyond higher institutions to include workplaces, the latter route is more practical.[196] Moreover, an independent statute enables more in-depth provisions, bypassing statutory problems present in Title VII.[197]

Regardless of which route is taken, workplace sexual harassment laws in Nigeria must provide maximum coverage. With over sixty percent of Nigeria's economy fuelled by the informal economy – "economic activities undertaken by individuals and organizations, which are not subject to full government regulations"[198] – it is even more pertinent that the country's workplace sexual harassment law has a broader reach than Title VII.[199] Any and every Nigerian employee should be able to bring a sexual harassment claim.

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[196] *Supra* n 12 (explaining that aiming to combat sexual harassment in tertiary institutions, the Nigerian Senate passed the Sexual Harassment in Tertiary Education Institution Bill (SHTEIB), which provides for a five-year imprisonment or N5 million fine [approximately $13,800] as punishment for sexually harassing students).

[197] *Supra* n 90 (and accompanying text) (explaining that the single word "sex" has too little legislative history and provides poor guidance to the courts on how to resolve sexual harassment cases). Broadly defining statutory terms like "sex" might be difficult given the Nigerian Law Reform Commission's mandate to reform laws in consonance with prevailing societal norms. See This Day, *supra* n 71. Consequently, it is crucial to incorporate a public relations campaign along with the legal strategy: issue reports, push news headlines, and place prominent individuals at the forefront of the sexual harassment discourse.

[198] Proshare, "Informal Economy and Poverty Reduction in Nigeria", available at https://www.proshareng.com/news/NIGERIA%20ECONOMY/Informal-Economy-and-Poverty-Reduction-in-Nigeria/41237 (accessed 3 June 2020) ("The informal economy … include(s) photography, catering, hairdressing, motorcycle services, tailoring, fashion designing, carpentry, painting, etc."); "Nigeria's Informal Economy Accounts for sixty-five percent of GDP IMF", available at https://www.businessamlive.com/nigerias-informal-economy-accounts-65-gdp-imf/ (accessed 3 June 2020) (providing a statistical analysis of Nigeria's informal economy).

[199] Similar to state legislation in the United States, at least one Nigerian state has made plans to protect domestic workers. Ross, *supra* n 148; G. Salau, "Concerns Mount as Lagos Plans to Regulate Domestic Workers, Guards", available at

To enforce the sexual harassment law, the Nigerian parliament should create an independent agency – one that works hand-in-hand with the NICN or is an offshoot of NICN.[200] Firstly, the agency should be granted *substantive* rule-making power in order to efficiently resolve employment disputes.[201] Secondly, the agency should have the power to hold trials and litigate systemic discrimination.[202] These legal procedures, ideally the outcome of comprehensive investigations, should be granted a high degree of judicial deference.[203] This ensures that civil and criminal penalties are enforceable. Thirdly, the agency should be allocated sufficient funding subject to supply-demand increase. As exemplified by the EEOC, this would certify that the agency has adequate resources to achieve its goals.[204] Finally, the agency should be charged with conducting mandatory and effective anti-harassment compliance trainings to employers.[205] These administrative provisions enable statutory protections.

A detailed statute and well-established agency are germane to minimizing workplace sexual harassment in Nigeria. Given the general ineffectiveness of Nigerian administrative bodies,[206] the success of a sexual harassment agency can strengthen other agencies.

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https://guardian.ng/sunday-magazine/concerns-mount-as-lagos-plans-to-regulate-domestic-workers-guards/ (accessed 3 June 2020) (explaining Lagos states' plan to regulate domestic workers).

[200] CFRN (1999) (as amended), s. 254(c) (conferring NICN with jurisdiction over employment matters).

[201] White, *supra* n 100, at p. 96 (and accompanying text).

[202] BBC News, "Nigeria's EFCC 'Failing to Tackle Corrupt Politicians'", available at https://www.bbc.com/news/world-africa-14671687 (accessed 13 June 2020) ("Nigeria's courts were sometimes "an obstacle to accountability", with most of the EFCC's big cases stalled for years without the trials commencing." [internal quotation marks added]).

[203] Yavelberg, *supra* n 103, at p. 192 (and accompanying text).

[204] *Supra* sub-subsection 3.2.3.

[205] *Supra* sub-subsection 3.3.1.

[206] *Supra* n 202 (explaining the EFCC's ineffectiveness); O. Lanre and A. Kingimi, "At Least Four Killed in Boko Haram Attack on Nigerian City", available at https://www.reuters.com/article/us-nigeria-security/at-least-four-killed-in-boko-haram-attack-on-nigerian-city-idUSKBN1HX373 (accessed 3 June 2020) (noting the failure of Nigeria's National Emergency Management Agency to suppress Boko Haram militants); A. Maja-Pearce, "Nigeria's Power Problem", available at https://www.nytimes.com/2014/08/08/opinion/adewale-maja-pearce-nigerias-

4.2. Limitations to Proposed Protections against Sexual Harassment

Although an independent sexual harassment agency in Nigeria highlights that sexual harassment is not tolerated, social structures in Nigeria may limit its effectiveness. A 2009 audit found that virtually all administrative bodies in Nigeria mismanage government funds.[207] Because statutes and administrative agencies do not exist in a vacuum, the high rate of corruption and general lack of government accountability in Nigeria pose a threat to the effectiveness of proposed sexual harassment protections.[208]

Corruption is so endemic in Nigeria that agents of the Economic and Financial Crimes Commission (EFCC) have told politicians that if bribed, "they would destroy documentation [needed] to launch an alleged investigation into mismanagement of public funds."[209] The high level of corruption in the country means that even though the proposed sexual harassment agency is allocated sufficient funds, their grant might be syphoned.[210] Consider for instance, an incident at the Nigerian Joint Admissions and Matriculations Board, where an employee alleged that a snake ate $100,000.[211] Such far-fetched stories are common. Nigerian agencies constantly evade accountability so

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power-problem.html (accessed 3 June 2020) (narrating the inability of former government-owned National Electric Power Authority to provide constant power supply); N. Eweka, "The Nigerian Police Force is Pitiful, Incompetent, Ineffective, Inefficient and Corrupt", available at https://dailytimes.ng/nigerian-police-force-pitiful-incompetent-ineffective-inefficient-corrupt/ (accessed 3 June 2020) ("The Nigerian Police Force is the worst in the world according to the World Internal Security and Police Index.").

[207] E.S.I. Ejere, "Promoting Accountability in Public Sector Management in Today's Democratic Nigeria", (2013) *Tourism and Management Studies*, p. 953.

[208] *Infra* n 209 and 212.

[209] BBC News, "Nigeria Anti-Fraud EFCC Agents Jailed for Taking Bribes", available at https://www.bbc.com/news/world-africa-19843161 (accessed 3 June 2020) ("Two anti-corruption agents in Nigeria have been given five-year prison terms for accepting bribes.").

[210] *Supra* n 207 ("Due to the poor culture of accountability, corruption has become a way of life in Nigeria; to the extent that it is trite to say that officials are not only corrupt, but corruption is official.").

[211] BBC News, "Nigerian Snake Ate Millions of Naira, Clerk Says", available at https://www.bbc.com/news/world-africa-43030827 (accessed 3 June 2020).

much so that the Human Rights Watch asserted that "proven criminality is no bar to the highest echelons of politics in Nigeria."[212]

As of 2011, the EFCC had prosecuted thirty politicians, convicting four and incarcerating none.[213] The EFCC's lack of accountability and its selectivity in investigations and prosecutions is somewhat attributed to its political reigns: It is used as a presidential weapon against political opponents.[214] "A situation where opportunistic and selective application of laws is the order of the day does not augur well for the vitality of rule of law."[215] Rather, it facilitates corruption and impedes on fundamental human rights. Consequently, ensuring that the proposed sexual harassment agency is politically independent is pertinent to its legitimacy and effectiveness.[216]

Drafting a progressive sexual harassment statute in Nigeria is necessary. But even more crucial is guaranteeing that said statute is properly implemented. Preventing and punishing sexual harassment requires accountability and integrity from public officials. The Nigerian government must set the stage for a sexual harassment agency that is free from political influence, staffed based on meritocracy, and subject to checks and balances.

5.0. CONCLUSION

Since the #MeToo movement began in the United States, discourse surrounding sexual harassment has been brought to the forefront of

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[212] *Supra* n 202 ("When a ruling party chief … emerged from prison … after serving a … sentence following a landmark EFCC prosecution, he was treated to a rapturous welcome by members of Nigeria's political elite…" [internal quotation omitted]).
[213] *Ibid.*
[214] Proshare "The Economic and Financial Crimes Commission's (EFCC's) Critical Role in Growing the Economy", available at https://www.proshareng.com/news/Nigeria%20Economy/The-Economic-and-Financial-Crimes-Commission's--Efcc's--Critical-Role-in-Growing-the-Economy-/14392 (accessed 3 June 2020).
[215] *Supra* n 207, at p. 957.
[216] J. Ibietan, "Corruption and Public Accountability in the Nigerian Public Sector: Interrogating the Omission", (2013) 5(15) *European Journal of Business and Management*, pp. 41 and 47 (explaining that Nigeria's administrative agency officials should be selected based on meritocracy and should be compelled to undergo public service trainings).

political campaigns, board meetings, and even judicial hearings. Today, most people would agree that sexual harassment is foul. The challenge is doing something to tackle it. This is complicated by a lack of consensus around defining what constitutes sexual harassment and assessing how the problem should be ameliorated. In the United States, these questions have been tackled with a wide range of proposed reforms, which include remodelling Title VII and the EEOC. However, in a country like Nigeria where victims of sexual harassment rarely consider their experiences as sexual harassment, the problem becomes convoluted.

Sexual harassment is normalized in Nigeria, at least in part due to the lack of statutory and administrative protections in the country. To remedy the harm, it is imperative that the Nigerian parliament pass workplace sexual harassment protection laws promptly. Learning from the United States' context, a comprehensive statute that clearly prohibits sexual harassment is necessary in Nigeria. The vagueness of Title VII and its loopholes stalled progress in the fight against sex discrimination, a predicament that Nigeria does not necessarily have to experience. Rather, Nigeria's forward-thinking law must provide maximum coverage and exist alongside affirmative action policies.

While workplace gender equality minimizes Nigeria's culture of silence, victims of sexual harassment will only speak if they are guaranteed that their claims will be effectively resolved without repercussion. An effective administrative agency must be established to handle sexual harassment claims in Nigeria. Unlike the United States' EEOC, the Nigerian agency should have clear authority to issue substantive rules. With proper adjudicatory power, political independence, and adequate funding to issue comprehensive investigations, victims of workplace sexual harassment have a high chance of achieving redress.

Yes, there is no clear-cut solution preventing harassment or ensuring that victims speak about their experiences. This article is cognizant of its seemingly utopic proposal: Given that Nigeria lacks workplace sexual harassment protections, "corruption is extolled as national

culture,"[217] and patriarchy is deeply-ingrained in the country,[218] bypassing the #MeToo movement altogether requires a tremendous societal shift. National campaigns, awareness movements, and social media conversations are necessary. Yet, these are not mutually exclusive from this article's proposed legal strategy. Instituting comprehensive sexual harassment protections in Nigeria bolsters social awareness and deters sexual harassers.

Functional sexual harassment protections in Nigeria have the power to incite change across other administrative agencies in the country. From the EFCC to the police force, proposals in this paper can be adapted to hold Nigerian officials accountable. Similarly, this paper's blueprint can be modified to support countries like Mali, Russia, and Indonesia,[219] in designing functional statutory and governmental agency protections.

Sexual harassment protections are germane to gender justice. The time is up for requesting sex in exchange for movie roles, mandating "business meetings" in private hotel suites, and accusing victims of childishness when they call out sexual misconduct. Nigeria's culture of silence must no longer be celebrated.

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[217] C. Ojukwu and J.O. Shopeju, "Elite Corruption and the Culture of Primitive Accumulation in 21st Century Nigeria", (2010) 1(2) *International Journal of Peace and Development Studies*, p. 15.

[218] The Nigerian parliament must manage legal pluralism to ensure the enforcement of sexual harassment laws in Northern Nigeria. While the proposed law can mandate enforcement regardless of contrary laws, legal pluralism is part of a larger problem that requires a broad solution in order to safeguard gender justice. See sub-subsection 2.2.2.

[219] World Policy Centre, "Is Sexual Harassment Explicitly Prohibited in the Workplace?", https://www.worldpolicycenter.org/policies/is-sexual-harassment-explicitly-prohibited-in-the-workplace (accessed 2 January 2018) (listing countries without workplace sexual harassment prohibitions); UCLA Fielding, "Nearly 235 Million Women Worldwide Lack Legal Protections from Sexual Harassment at Work", available at https://ph.ucla.edu/news/press-release/2017/oct/nearly-235-million-women-worldwide-lack-legal-protections-sexual (accessed 3 June 2020) ("More than one-third of the world's countries (68) do not have any workplace-specific prohibitions of sexual harassment in place.").

UNEARTHING THE PRINCIPLES OF DELIBERATIVE DEMOCRACY WITHIN THE FRAMEWORK OF THE EXTANT 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

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ABSTRACT

Recently, political theorists have intensified their call for the entrenchment of deliberative democracy as the style of governance. Its proponents have argued that deliberative democracy's emphasis on citizen-led process of decision making, rather than its outcome, makes it the ideal form of democracy. While no country has successfully entrenched this form of democracy, Canada, the United States and Australia have applied its principles to address some issues of governance successfully. Its appeal has drawn the attention of communist nations like China and supranational organizations like the European Union. Relying on the public reasoning principle, power checking principle, and entrenchment principle, the author inquired into the parameters within which deliberative democracy as an ideology could thrive within the framework of the existing 1999 Constitution. After that, the author reflected on those principles, conclusively identified hindrances to its application, and recommended some practical solutions.

1.0. INTRODUCTION

After hostilities of the Nigerian civil war ceased in 1970, politicians, civil rights groups, and representatives of ethnic minorities in Nigeria came together to deliberate on the steps to tow to avoid a recurrence.[1] Some have argued, and this author agrees, that the war was an aftermath of fear of dominance of the ethnic minorities by the

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[1] For a detailed analysis of the events that led to the Nigerian civil war and its aftermath, see E.E. Osaghae et al. (eds), *The Nigerian Civil War and its Aftermath* (John Archers Publishers for Programme on Ethnic and Federal Studies: Ibadan, 2002).

larger ethnic groups in Nigeria.[2] The ethnic minorities in Nigeria were particularly apprehensive that they would have no input in the political, economic, social, cultural, educational and legal decisions.[3] This apprehension resulted in agitation for the adoption of a new constitutional order and governance model.

By 1979, Nigeria adopted the federal-presidential system of government modelled after that of the United States and enacted the 1979 Constitution - which *inter alia* ought to make the government more responsive and responsible to the clamouring of Nigerians. That constitutional governance model remains in force. However, its existence had done little to address the fears of those ethnic minorities or rectify the dissonance between the Nigerian government and the Nigerian people. This dissonance, expressed as dearth of deliberation among the levels and arms of the Nigerian government, as well as between the Nigerian government and the Nigerian people, requires urgent redress.

Deliberation within this context refers to the engagement and exchange of ideas between the respective arms and levels of government, as well as between the government in its entirety and the citizens, minimal as it might be, in the decision-making process. Nigeria's constitutional democracy is a continued struggle between procedural and constitutional democratic theories. The former underscores popular sovereignty and majority rule, and merely permits individual rights necessary to ensure the impartiality and integrity of the democratic process. In contrast, the latter gives pre-eminence to institutions, practices, and rights that protect the minority against majoritarian excess, by imposing restrictions on

[2] O. Awofeso, "Secessionist Movements and the National Question in Nigeria: A Revisit to the Quest for Political Restructuring" (2017) 2(7) *Journal of Social Science and Humanities Research,* available at https://www.ijrdo.org/index.php/sshr/article/view/773 (accessed 5 September 2019).

[3] M.R. Rindap and I. Mari, "Ethnic Minorities and the Nigerian State" (2014) 3(3) *International Journal for Arts and Humanities*, p. 89; A.A. Ahmad, "The Position of Minority Identity in Nigeria and Its Effect on Governmental Policies" (2015) 5(4) *International Journal of Research in Social Sciences,* p. 89.

popular decision-making.[4] It is within this struggle that the author identified three distinct deliberation principles. The principles are – public reasoning principle, power checking principle and entrenchment principle.

In this article, the author analysed these principles to reveal the extent of their optimization. After that, the author identified factors that constrain their optimization. These constraints are a result of Nigerian's deep distrust for and in their government, corruption, abuse of power, illiteracy, ethnic and religious intolerance, terrorism, nepotism, poverty and the abuse of fundamental rights and civil liberties. Finally, the author recommends solutions that have the potential to ease those constraints.

1.1. Deliberation Principles in the 1999 Constitution of Nigeria

A detailed analysis of the 1999 Constitution would reveal several deliberation principles. This revelation is not unusual. The 1999 Constitution is the expression of Nigeria's source of power, and this includes its scope and limits.[5] The Constitution further prescribes the duties of the Nigerian government[6] and identifies the rights of Nigerians.[7] Furthermore, both the Nigerian government and Nigerians are obligated to comply with and uphold the Constitution's provisions. This symbiotic relationship between the government and the citizens is imperative in a constitutional democracy and it is within the scope of this relationship that the author identified the following deliberation principles.

[4] J.J. Worley, "Deliberative Constitutionalism" (2009) 2(5) *Brigham Young University Law Review*, pp. 431 – 432.
[5] Constitution of the Federal Republic of Nigeria (CFRN) (1999) (as amended), Cap. C23, Laws of the Federation of Nigeria, 2004, s. 1(1).
[6] *Ibid*, at Ch. 5, 6, and 7.
[7] *Ibid*, at Ch. 4.

1.1.1. Public Reasoning Principle

The origin of the public reasoning principle is traceable to Immanuel Kant. The renowned philosopher had mainly argued that self-legislation is imperative to stifle the emergence of an autocratic government.[8] Kant generally reasoned that self-legislation is the only avenue through which the people can simultaneously be free and governed. According to him, "only the united will of the people" can make legitimate laws.[9] While self-legislation does not mean that the people themselves must make all laws, it envisages that the government has a duty to justify laws made and ensure their implementation in a manner that is acceptable to the citizens. In instances of disagreements, the government must clarify said laws to enhance the norms generally accepted by the citizens. In doing this, it reassures the citizens that the exercise of governmental power is strictly to their benefit.

Predicated on the preceding, the 1999 Constitution provides that "sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its power and authority."[10] By acknowledging that power belongs to the people, the Constitution mandates the government to ensure that the exercise of said power primarily focuses on catering to the welfare and security of the people.[11] However, if sovereignty truly belongs to the people, why is governmental power in Nigeria commonly exercised in a manner that is most adverse to the rights of and unaccommodating of the will of Nigerians?

Popular sovereignty does not connote that power resides with the people; rather, it implies that political office holders attain office through the choice of the people.[12] By this, the people had delegated governance to said elected officials, because the people as a group

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[8] I. Kant and M.J. Gregor, "*Practical Philosophy*", 9th print ed., (Cambridge University Press: Cambridge, 1996), p. 457.
[9] *Ibid*.
[10] CFRN (1999) (as amended), s. 14(2)(a).
[11] *Ibid*, at s. 14(2)(b).
[12] P.H. Russel, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3rd ed. (University of Toronto Press: Toronto, 2004), p. 7.

neither have the necessary intellect nor will power to govern.[13] This averment reminisces of Plato's condescension when he broadly argued that wisdom and virtue – qualities that are required for a political community to thrive – are unevenly distributed in the community.[14]

However, the citizens could reclaim their status as the source of the power of the State during elections. The citizens could exceed the act of merely voting against elected officials who had inadequately justified policies formulated and implemented in the previous election cycle. In addition to voting at elections, the citizens could identify, compile, and explain their perceived failings of said policies, both in its formulation and implementation. The process of identifying, gathering and interpreting said "failed" formulated and implemented policies would require detailed deliberations amongst the citizens. These deliberations could create an avenue to unravel the specifics of and propose necessary improvements to those "failed" policies. In turn, these improvements could then be presented as a white paper to a new government, voted into power by the people, based on a mutual promise to adopt and implement the improvements proposed in that white paper. This way, sovereignty could be returned to the people.

The public reasoning principle also ensures that the State pursues the common good of all. The drafters of the 1979 and extant 1999 Constitution of the Federal Republic of Nigeria were confident that the common good of Nigerians could be adequately addressed if the Nigerian government religiously pursues the objectives contained in Chapter II of the Constitution. Those objectives, known as the Fundamental Objectives and Directive Principles of State Policy (the policy), contain the aspirations of the government and the

[13] J.D. Maistre and R.A. Lebrun, *Against Rousseau*, *On the State of Nature and On the Sovereignty of the People* (McGill-Queen's University Press: Quebec, 1996), p. 45.

[14] S. Chambers, "The Philosophic Origins of Deliberative Ideals" in Andre Bächtiger, John S. Dryzek, Jane Mansbridge, and Mark Warren (eds.), *The Oxford Handbook of Deliberative Democracy* (|Oxford University Press: Oxford, 2018), p. 54.

expectations of the citizens.[15] This policy embodies the collective will of Nigerians. Thus, the extents to which these objectives have been pursued and attained are additional avenues for deliberations. This measurement could be by criticism and comment on government policies or civil arguments amongst the citizens and the government on the extent to which the government had achieved the objectives contained in the policy.

Furthermore, the Constitution guarantees the freedom of all Nigerians to participate in the governance of Nigeria.[16] To ensure that the minorities remain heard, the Constitution created the Federal Character Principle, which principle mandates that as much as practicable, appointments into public offices in Nigeria should reflect the ethnic diversity of the Nigerian State.[17] Some have argued, with some measure of validity, that this principle entrenches mediocrity in public service in the name of national unity and integration.[18] By

[15] E. Alemika, "Fundamental Objectives and Directive Principles of State Policy within the Framework of Liberal Economy", in *Nigeria: Issues in the 1999 Constitution* (NIALS: Lagos, 2000), p. 235.

[16] CFRN (1999) (as amended), s. 14(2)(c).

[17] *Ibid,* at s. 14(3) and 14(4); S. 318 of the Constitution defines the federal character principle thus: "*Federal Character Principle refers to the distinctive desire of the people of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation as expressed in section 14(3) and (4) of this constitution*".

[18] This argument has generated a body of literature of its own. See E.E. Osaghae, "Federal Society and Federal Character: The Politics of Plural Accommodation in Nigerian Politics since Independence" in U. Eleazu (ed.), *Nigeria: The First 25 Years* (Infodata Limited: Lagos, 1985); A.A. Ayoade, "The Federal Character Principle and the Search for National Integration" in K. Amuwo, A. Agbaje, R. Suberu, and G. Herault (eds.), *Federalism and Political Restructuring in Nigeria* (Spectrum Books Limited: Ibadan, 1998); D. Abubakar, "The Federal Character Principle, Consociationalism and Democratic Stability in Nigeria" in K. Amuwo, A. Agbaje, R. Suberu, and G. Herault (eds.), *Federalism and Political Restructuring in Nigeria* (Spectrum Books Limited: Ibadan, 1998); T.P. Aondoakaa, and G. Orluchukwu, "Federal Character Principles in Nigerian Constitution and Its Applicabilities: Issues and Challenges" (2015) 20(12) *IOSR Journal of Humanities and Social Sciences,* p. 51; T. Onimisi et al., "Federal Character Principles: A Conceptual Analysis" (2018) 6(2) *International Journal of Social Science and Humanities Research*, p. 172. However, the analysis of the appropriateness or otherwise of the federal character principle is outside the scope of this research. Nevertheless, this author notes that arguments against the federal character principle is mostly a veiled attempt to subjugate the ethnic minorities and

ensuring the representation of all ethnicities in Nigeria, the respective ethnic groups could identify issues affecting and pertinent to them by both their representatives in the National Assembly, as well by those appointed into public offices by the executive arm of government in compliance with the federal character principle. This federal character principle also ensures the representation of those that would have been unrepresented in the administration of Nigeria.

It is undisputed that the public reasoning principle is comprehensive. Despite its potential, this deliberation principle remains under-utilized. If appropriately harnessed, this principle could accommodate conversations on issues like provisions of public infrastructure, quality education, acculturation, religious liberties, freedom of association and speech, as well as security and welfare of Nigerians and Nigeria.

Optimizing this principle nevertheless remains a tall order, hindered by a myriad of factors. The concept of divide and rule[19] adopted by the colonial masters remains rife and continues to be employed by the political elite[20] to their benefit and the detriment of Nigeria and Nigerians. The consequence of this divide and rule approach is the mounting dissonance between the government and the governed. However, the constitutional guarantee that power is derived from and exercised in trust for the people, if adequately harnessed could pressurize the government to justify its exercise of governmental power to the governed, and this could re-animate the public reasoning principle as contained in the 1999 Constitution.

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dissuade real conversations and deliberations on issues relevant to them within the framework of the Nigerian State.

[19] For a comprehensive understanding of this policy, and how it negatively impacted governance in former British Colonies, including Nigeria, see A.J. Christopher, "Divide and Rule: The Impress of British Separation Policies" (1988) 20(3) *Area*, p. 233; F.S. Bethke, "The Consequences of Divide-and-Rule Politics in Africa South of the Sahara" (2012) 18(3) *Peace Economics, Peace Science and Public Policy*, pp. 1 – 13.

[20] H. Canci and O.A. Odukoya, "Ethnic and Religious Crises in Nigeria: A Specific Analysis upon Identities (1999 - 2013)" available at https://www.accord.org.za/ajcr-issues/ethnic-religious-crises-nigeria/ (accessed 15 December 2019); T. Edoh, "The Upsurge of Ethno-Religious Sentiments and the Future of Democracy in Nigeria." (2001) 1(2) *Nigerian Journal of Political and Administrative Studies*, p. 79.

1.1.2. Limitation Principle[21]

This principle emphasizes the importance of limiting the powers of government to ensure that deliberation thrives. It does this by stipulating the scope of governmental powers and ensuring that said powers are subject to regular checks to eschew its abuse. The limitation principle operates vertically (amongst the levels of government in federalist states) and horizontally (amongst the arms of government). According to Ojo:

> A complete separation of powers is neither practicable nor desirable for effective government. What the doctrine can be taken to mean is the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another.[22]

Since the overlap of the exercise of governmental power is intricately necessary for the efficiency of government, restraint must be exercised to ensure that said overlap does not silently brew over-harmonisation, which in turn, could reduce or perhaps eliminate checks on the exercise of power between the levels and arms of government.

The horizontal check of powers is usually exercised in moderation because the constitutional duties of the respective arms differ. As such, these arms of government employ distinct tools to perform their constitutional responsibilities. While the legislature generally employs a combination of normative, empirical and pragmatic reasoning when enacting legal norms, the executive is constrained to practical discourse. At the same time, the judiciary merely applies said enacted and other existing norms to ensure the coherence of the legal system.[23]

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[21] CFRN (1999) (as amended), Ch. 2, s. 13.
[22] A. Ojo, "Separation of Powers in a Presidential System of Government" (1981) *University of Lagos Public Law Journal*, p. 105.
[23] J. Habermas and W. Rehg, "Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy" in T. McCarthy (ed.), *Studies in contemporary German social thought* (MIT Press: Massachusetts, 2001), p. 192.

Of the three arms, only the legislature, otherwise known as the deliberative body, has the leisure to deliberate on issues. Despite this unique feature, the legislature is constitutionally restricted in its duties to check the excesses of the executive alone, and the exercise of such power is mostly within the parameters of legislative procedures and norms. Concerning the judiciary, the power-checking duties of the legislature become constrained. Once the legislature confirms the nomination of members of the judiciary, it mostly becomes *functus officio* on the regulation of and inquiry into the acts of the judiciary.

On their part, the judiciary neither has the luxury of deliberating with the public nor other arms of government, except when it delivers judgment on issues and disputes that have come to the court. Furthermore, the judiciary does not have the liberty to comment on or provide advice to the other arms or levels of government in Nigeria.[24] Instead, the judiciary sits above the fray, like a demi-god waiting to pronounce judgment on all before it.

Since deliberative democracy requires a "reasoning[-]giving process which is open and accessible to all citizens, binding in the short term, but dynamic and open to change as a result of future dialogue,"[25] that reasoning-giving process is best provided by the executive, who must remain pragmatic in its deliberation with the other arms and the citizens. Its constitutional role of implementing policies that affect the daily lives of its citizens and the general well-being of the country limits the timeframe it has to deliberate on issues and simultaneously underscores the importance of such deliberations. Depending on the prevailing circumstances, such deliberations could be exhaustive or limited, but they ought to be dynamic so that they could cater to the

[24] *Ikuforiji* v *Federal Republic of Nigeria* (2018) LPELR-43884 (SC). In this case, the Supreme Court reiterated the long-established principle of law in Nigeria that Nigerian courts do not engage in or adjudicate on academic issues. In contrast, the Supreme Court of some countries like Canada have the inherent powers to advise the government on issues that have not amounted to a dispute. See Section 53(1) and (2) of the Supreme Court of Canada Act. R.S.C., 1985, c. S-26.

[25] D. Gittings, "Separation of Powers and Deliberative Democracy" in R. Levy, H. Kong, G. Orr and J. King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism*, 1st ed. (Cambridge University Press: Cambridge, 2018) p. 117.

changing necessities of governance. The preceding, if properly optimized, could be an adequate check on the exercise of the power of the executive, because it demands that the executive continually and simultaneously justify its acts to both the other arms of government and the citizens.

The vertical separation of power operates similarly. While the horizontal separation of power eschews the emergency of autocracy, the vertical separation of power ensures that the voice of all, especially the minorities, is not drowned. It does this by certifying that certain legislative items are within the exclusive purview of the federating states.[26] This way, Sager's "moral progress" germinates, permitting the respective federating units to invent ideas, propagate them and ensure its consolidation without unravelling the social fabric of the country.[27]

The limitation principle is essential for deliberative democracy to thrive within the framework of the Nigerian Constitution. Its applicability, however, had not been without constraint. Although the 1999 Constitution describes the powers of government, it leaves the

[26] See the Second Schedule to the Constitution of the Federal Republic of Nigeria (1999) (As Amended). The Schedule has two parts. The first part, titled "Exclusive Legislative List" contains items that are within the exclusive legislative competence of the federal government. The other list, titled "Concurrent Legislative List" contains additional items that are with the concurrent legislative competence of both the federal government and that of the federating units. If both the federal government and any of the federating units legislate on an item on the Concurrent Legislative List, any conflict that might arise from the respective legislations must be resolved in favour of the legislation passed by the federal government. This principle is known as covering the Field. See Nigerian case of *Saraki* v *Federal Republic of Nigeria* (2016) LPELR-40013 (SC) for an analysis of the Nigerian Supreme Court's analysis of the meaning of covering the field.

[27] L.G. Sager, "Cool Federalism and the Life-Cycle of Moral Progress" (2005) 46(4) *Williams and Mary Law Review*, p. 1385. Sager in this article had argued that the respective legislative competence of the different levels of government reflects the moral compass of the society that allows such society to evolve within the confines of certain legal principles guarded by the federal government. This way, the federating units could act as a testing ground for the pursuit of specific policies, whose policies might affect the social fabric of the society if they were pursued in the first instance by the federal government. By acting as a testing ground, the extent of the success and the rationale for the failings of said policies could be identified. This identification would serve as a rich source of information from which the federal government could draw on if it ever desires to implement similar policies at the federal level.

task for checking the excesses of government with the government.[28] These power checking gaps are an unsettling problem[29].

Similarly, the executive's total control of all instruments of State sanction is unsuitable for a developing, federal and quasi-democratic country like Nigeria where the government, especially the executive arm, views the law, including the Constitution, as literature it can cherry-pick from and completely disregard with little consequence. This exclusive control of State power is premised on the executive's total control of all instruments of State sanction and has negatively impacted and continues to impact democratic governance in Nigeria.[30] This limitation extends to all constitutional democracies, with weak institutions and "strongmen" occupying the position of power.[31]

The fact that the citizens have limited constitutional and statutory avenues to challenge the excesses of government save for the institution of an action in court, further compounded the potential of deliberation within Nigeria's constitutional order. Even when litigants institute actions in court, such litigants must scale the hurdle of *locus standi* and accurately show that they are not meddlesome interlopers.

Furthermore, the Nigerian government hardly considers the clamouring of Nigerians when it formulates and implements policies.

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[28] CFRN (1999) (as amended), Chapters 4, 5, and 6.

[29] Furthermore, there is a pre-eminence of party loyalty in Nigeria, which means that if most members of the legislature are from the same party as the head of the executive arm, then there is little prospect for the effective exercise of oversight functions. Gradually, party loyalty is upending time-honoured constitutional principles with impunity in countries that practice the presidential system of government.

[30] W. Idada and S.O. Uhunmwuangho, "Problems of Democratic Governance in Nigeria: The Way Forward" (2012) 3(1) *Journal of Sociology and Social Anthropology,* p. 49.

[31] Countries like Syria, Egypt, Zimbabwe, Venezuela, Russia, China, Iraq, Iran, Afghanistan, Pakistan, and North Korea have strong men at the helm of affairs. The weak institutions in their respective countries are incapable of checking the impulses of these strongmen. Thus, they become the uncommanded commander whose wishes and wills become policies and are therefore mostly enacted as law. The pre-eminence of strongmen and weak institutions has been identified as one of the primary reasons why nations fail. See D. Acemoglu, J.A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, 1st ed. (Crown Publishers: New York, 2012).

Additionally, the power of recall[32] is restricted to the legislature and does little to neither check the excesses of the executive nor challenge the conduct of the judiciary. Records also exist, showing that the legislature's check on the powers of the executive is akin to power struggles between the respective arms rather than an actualization of what the Constitution mandates.[33]

The quasi-independence of the Nigerian judiciary makes a mockery of its attempts to check the excesses of the other arms, especially that of the executive.[34]Although the Nigerian judiciary may deliver judgment on issues presented to it, the enforcement of said judgment, especially if said decision is against the executive or any of the agencies of the executive, depends mostly on the willingness and co-operation of the executive.

All, however, is not lost. By having the scope and limit of the powers of government delineated, it becomes easier to identify excesses in the exercise of governmental power. This identification process permits the citizens to point those identified excesses to the arm constitutionally mandated to check the erring arm of government. Deliberation does not mean unilateral decision making; it means engaging the issue, bringing the ills into the light and having it rectified in a mutually beneficial manner. This deliberative framework remains an unfolding art, which requires daily exercise and careful, but cautious moderation. If carefully moderated, the limitation principle is prime for the continued germination of the deliberation within Nigeria's constitutional framework.

[32] CFRN (1999) (as amended), s. 69 and 110.
[33] J.Y. Fashagba, M.A. Ola-Rotimi, and C. Nwankwor, *The Nigerian National Assembly*, 1st ed. (Springer International Publishing: 2019), p. 15.
[34] I. Abdullahi, "Independence of the Judiciary in Nigeria: A Myth or Reality?" (2014) 2(3) *International Journal for Public Administration and Management Research,* p. 55.

1.1.3. Entrenchment Principle

One of the characteristics of a democracy is the opportunity to "update" the Constitution to reflect the current realities that should govern the people. This "updating process" is usually done by the representatives of the people elected under universal suffrage that must have inquired from and documented those desires of the people.[35] The intrinsic role Constitutions play in a democracy underscores the higher threshold necessary for its amendment. Generally, attaining this threshold ought to be complicated. This high threshold is to ensure that the proposed amendment is genuinely reflective of the desires of the citizens. Another reason for this is to forestall arbitrary amendments of the Constitution.

Although the approximate life span of Constitutions is seventeen years,[36] necessities of governance and verisimilitudes of life sometimes mandate earlier amendments. To be deemed proper, the amended Constitution must take into consideration the desires of and involve the citizens in the process of its amendment. Such involvements should not merely be by referendum, where the citizens are beaconed to indicate acceptance or rejection of proposed amendments. Instead, it should encompass detailed, structured, informative and expressive conversations with the citizens on the rationale for the amendments as well as the amendment's collective benefit to the society.

Yaniv Roznai and Richard Albert[37] have written extensively on the proprietary and otherwise of including unamendable provisions in

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[35] J. Colón-Ríos, "Deliberative Democracy and the Doctrine of Unconstitutional Constitutional Amendments" in R. Levy, H. Kong, G. Orr and J. King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism*, 1st ed. (Cambridge University Press: Cambridge, 2018), p. 271.

[36] Z. Elkins, T. Ginsburg, and J. Melton, *The Endurance of National Constitutions* (Cambridge University Press: New York, 2009).

[37] Y. Roznai, "*Unconstitutional Constitutional Amendments: Study of the Nature and Limits of Constitutional Amendment Powers"*, (London School of Economics and Political Science, 2014) [unpublished]; Y. Roznai, "Towards a Theory of Unamendability", (2015), *New York University Public Law and Legal Theory Working Papers*, paper 515; Y. Roznai, "Unamendability and the Genetic Code of Constitution", (2015), *New York University Public Law and Legal Theory Working Papers*, paper 514; R. Albert, "Non Constitutional Amendments" (2009) 22(1) *Canadian Journal of Law & Jurisprudence*, p. 5; R. Albert, "The Difficulty of

Constitutions. The collective deducible rationale for such inclusions is to ensure the non-alteration or jettisoning of the constitutional order absent good reason. The desire to ensure certainty and render immutable underlying constitutional principles had led more countries to include unamendable provisions in their constitutions. Roznai commenting on this wrote that:

> As my research demonstrates, between 1789 and 1944, only 17% of world constitutions enacted in this period included unamendable provisions (52 out of 306), whereas between 1945 and 1988, 27% of world constitutions enacted in those years included such provisions (78 out of 286). Out of the constitutions which were enacted between 1989 and 2013 already more than half (53%) included unamendable provisions (76 out of 143). In total, out of 735 examined constitutions, 206 constitutions (28%) include or included unamendable provisions. It seems that just as having a formal constitution virtually became a symbol of modernism following the American and French revolutions, so too nowadays having an unamendable provision is becoming a universal fashion.[38]

However, the downturn of such inclusion is that it constrains deliberations on those unamendable provisions. All provisions of the Nigerian 1999 Constitution are subject to amendments.[39] The only constraint provided is the minimum threshold necessary for such amendment(s). Section 9 of the 1999 Constitution provides that:

> (2) 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

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Constitutional Amendments in Canada" (2015) 53(1) *Alberta Law Review*, available at https://www.albertalawreview.com/index.php/ALR/article/view/281 (accessed on 14 December 2019); R. Albert, "The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada." *Queens Law Journal (Forthcoming) (2016)*.

[38] Roznai (2014), *ibid*, at p. 28.

[39] CFRN (1999) (as amended). S. 9 provides that *"The National Assembly may, subject to the provisions of this section, alter any of the provisions of this Constitution".*

> 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.
>
> (3) An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third(s) of all States.

Achieving this threshold is easier said than done. Nigeria's national legislative body comprises of a 109-member Senate and a 360-member House of Representatives,[40] and these legislators are representative of the diverse ethnic groups in Nigeria, which ethnic groups have an innate distrust of and for one another. While the 1999 Constitution provides that a minimum of 73 Senators and 240 Representatives must approve the proposed amendment(s) to the Constitution,[41] that threshold is not easily attainable. Generally, members of the legislature jostle to ensure that their respective cultural, religious, social and ethnic peculiarities are accommodated and reflected in any proposed amendment(s) to the Constitution. This jostle to ensure that any proposed amendment(s) reflects the peculiarities of the diverse make-up of Nigeria becomes more pronounced when the National Assembly sends said proposed amendment(s) to the respective Houses of Assembly of the 36 federating units of Nigeria for their approval.

[40] *Ibid*, at s. 48 and 49.

[41] However, if a proposed amendment to the Constitution seeks to affect the structure of the Nigerian State or modify the provisions on the fundamental rights of the citizens, then the threshold differs. In this instance, four-fifth members of each of the Houses of the Nigerian National Assembly, as well as the Houses of Assembly of the federating units in Nigeria, must consent to the said proposed amendment(s). This means a minimum of 88 members of the Senate; 288 members of the House of Representatives and at least 29 Houses of Assembly must consent to such amendment(s).

Members of those respective Houses of Assemblies are elected to represent the interest of their respective local communities. Thus, they broadly view the proposed amendment(s) through the lens of its benefit to their local communities first, and after that to the Nigerian State. Hence, most members of the Houses of Assembly are unlikely to support any proposed amendment(s) that would not ultimately benefit their local community. As a result of this, obtaining the approval of 24 of the 36 Houses of Assembly necessary for any proposed amendment(s) to the Constitution to become law might be a tall hurdle if said proposed amendment(s) are not exhaustively deliberated on. Furthermore, if members of the respective legislative bodies do not envisage the benefit of said amendments to their constituencies, then the passage of the proposed amendment(s) might be stalled.

Although not expressly provided in the Constitution, the respective Houses of Assembly can make recommendations to the National Assembly on issues arising from and about the substance of the proposed amendments. Their recommendations, which could either be accepted or rejected, provides additional deliberation opportunities between the different levels of government. This is premised on the realization that no proposed amendment to the 1999 Constitution would succeed if said proposed amendment(s) is/are not supported by at least 24 Houses of Assembly of the federating units in Nigeria.

Admittedly, the process of amending the existing Constitution of the Federal Republic of Nigeria is an exclusive legislative process.[42] Nigerians are hardly invited to deliberate on the provisions of said proposed amendments. In their stead, the Nigerian government invites civil society groups, labour unions, and professional associations to deliberate on provisions of the proposed amendments. These bodies are perceived to be representatives of all Nigerians and are thus best positioned to embody and present the will and desire of ordinary Nigerians to the government.[43] Also, it is not unusual for members of

[42] CFRN (1999) (as amended), ss. 8 and 9.

[43] For instance, the 1st Alteration of the Nigerian Constitution in 2010 came about as a result of the pressure imposed on the government by members of the

the National Assembly and the respective Houses of Assembly to return to their constituents to explain the purpose of such amendments. The "explanation process" equally provides opportunity for deliberations between the government and Nigerians.

While this is not deliberation as conceived by deliberative constitutionalists,[44] it is nonetheless a step in a positive direction for a country that had been governed by military dictators, including former military dictators for approximately 42 years, since 1960. The entrenchment principle, directly and indirectly, aids in the deliberation process.[45] The strenuous process associated with amending the Constitution provides ample avenue for Nigerians, albeit, in a limited scope, to engage the political actors. It also forces legislators to explain to their constituents their rationale for supporting or refusing to support such proposed amendment(s) to the provisions of the Constitution. This is a noteworthy improvement to Nigeria's Constitutional and deliberative framework.

2.0. REFLECTIONS ON THE DELIBERATION MARKERS WITHIN NIGERIA'S CONSTITUTIONAL FRAMEWORK

Deliberative democracy advocates the willingness to transform erstwhile held opinions, arguments, and beliefs based on reasoning. Sunstein commenting on this stated that: "A central point of deliberation … is to shape both preferences and beliefs, and frequently to alter them".[46] Deliberative democracy does not envisage the complete eradication of one's biases. Instead, it admonishes participants in the democratic space to be willing to modify their

groups mentioned above. They not only pressured the Nigerian Government but also provided suggestions, inputs and recommendations that were useful to the legislature when the provisions of the 1999 Constitution were subsequently amended.

[44] M. Vargova, "Democratic Deficits of a Dualist Deliberative Constitutionalism: Bruce Ackerman and Jurgen Habermas" (2005) 18(3) *Ratio Juris,* p. 365.

[45] J.E. Fossum and A.J. Menendez, "The Constitution's Gift? A Deliberative Democratic Analysis of Constitution-Making in the European Union" (2005) 11(4) *European Law Journal,* p. 380.

[46] C.R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press: Oxford, 2002), p. 8.

reasoning based on logic and consensus, in the pursuit of democratic ideals.[47] It is against this background that the author inquires whether the three deliberative principles identified in the 1999 Constitution are truly deliberative. Do they, on the one hand, provide the platform within which the arms and levels of government could engage each other and, on the other, permit robust inquiries and conversations between the government and the citizens? If they do, how and to what extent? If they do not, what could be the rationale?

Between 1960 and 1999, Military Dictators ruled Nigeria for approximately 30 years. Since 1999 to date, two men who previously led Nigeria as Military Dictators have been democratically elected to rule Nigeria. One of these men is the current President of Nigeria.[48]As such, for a more substantial part of Nigeria's existence, Nigerians had been governed by military decree that is devoid of citizens' participation and unwelcoming to deliberations.

The federal-presidential system of government currently practised, and the 1999 Constitution is a military construction, conceived, vetted and approved by the military. Although the 1999 Constitution was tailored after the 1979 Constitution, which was professed as citizen-driven, the military made the final decisions regarding what should be included or excluded from both Constitutions.[49] This means that Nigerians were not genuinely the authors of either the 1979 or 1999 Constitutions since neither were the products of deliberations amongst Nigerians.[50] Rather, a 15-member committee appointed by

[47] C.R. Sunstein, *The Partial Constitution* (Harvard University Press: Cambridge, 1994), pp. 22-23.

[48] In 1999, after sixteen years of uninterrupted military dictatorship, former Military Dictator General Olusegun Obasanjo (who was the military administrator of Nigeria from 1976 – 1979) contested and won the presidential elections. He was in office until 2007. Between 2007 and 2015, Nigeria was led by civilians. However, in 2015, another former Military Dictator, General Muhamadu Buhari (who also led Nigeria as a military administrator from 1983 – 1985), contested and ran for the office of the president. He won and was re-elected in 2019. Thus, since 1999, Nigeria had been ruled by former military dictators for approximately thirteen years.

[49] B.O. Nwabueze, *A constitutional history of Nigeria* (Longman: New York, 1982).

[50] T.I. Ogowewo, "Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy" (2000) 44(2) *Journal of African*

the Nigerian Military Government under the leadership of General Abubakar Abdulsalam drafted the 1999 Constitution.[51] During that period, Nigerian had a population of about 116 million people,[52] yet the Constitution, in its preamble, commenced by stating that: - "We The People" -, thereby giving the connotation that Nigerians participated in and agreed to be bound by the contents of that Constitution.[53]

As an aberration to what a Constitution should be, its provisions, implementations, and interpretations have been lopsided.[54] The Constitution paid lip service to inclusion, while the drafters deliberately incorporated huddles to restrain the citizen's engagement with the government on its policies. The drafters accomplished this by ensuring among other things that the entirety of Chapter 2 of the Constitution is non-justiciable,[55] that the independence of the judiciary is constrained; that the citizens could not demand the government to account for its governance practices, which practices ought to be in pursuit of the objectives contained in the Fundamental Objectives and Directive Principles of State Policy.[56]

Despite Nigeria's growth under the boots of military dictators, the existing 1999 Constitution, with its many limitations, contains three distinct deliberation principles - public reasoning principle, entrenchment principle, and the limitation principle. The underlying

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Law, p. 135; J. Ihonvbere, "How to Make an Undemocratic Constitution: The Nigerian Example" (2000) 21(2) *Third World Quarterly,* p. 343.

[51] I.A. Akaayar and C.J. Dakas, "Federal Republic of Nigeria" in J. Kincaid and G.A. Tarr (eds.), *Constitutional Origins, Structures, and Change in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2005), p. 241.

[52] "Nigeria – Population", available at https://countryeconomy.com/demography/population/nigeria?year=1998, (accessed 19 October 2019).

[53] CFRN (1999) (as amended), see preamble; Ihonvbere, *supra* n 50.

[54] For an analysis of the failing of the 1999 Constitution and its effect on the Nigerian society, J.I. Elaigwu, *Nigeria: Essays in Governance and Society*, 1st ed. (Adonis & Abbey Publishers: London, 2012); J. Campbell and M.T. Page, *Nigeria: What Everyone Needs to Know* (Oxford University Press: New York, 2018).

[55] CFRN (1999) (as amended), s. 6(6)(c); Alemika, *supra* n 15.

[56] For further general understanding of the failings of the 1999 Constitution, see Ogowewo, *supra* n 50.

theme that runs through these principles is the pursuit of the collective good achievable by Nigerians for Nigeria.

These principles aid in re-emphasising that sovereignty belongs to the people; that government's primary duty is to ensure the security of and cater to the welfare of Nigerians; that the participation of Nigerians in governance of Nigeria is guaranteed; and that the exercise of governmental power must be according to law contained in a document called the Constitution. It further ensures the non-arbitrary amendment of the provisions of said Constitution. The collective good achievable also presupposes that the decision-making process would accommodate the views of all Nigerians based on rationality and impartiality, even if some of the opinions expressed are antithetical to the belief of a section of the Nigerian society.[57]

This collective good pursuit transcends mere proposition of lofty ideas that might be popular[58] or the aggregation of the conflicting, yet important choices sought to be made in the quest of a predetermined goal of democratic importance.[59] Under this collective good achievable, the rationale for adopting a stance on an issue of democratic importance must not be personally held and religious followed; instead, such reasoning must be willing to be clarified, modified, and if need be, transformed for the greater good of the society.[60]

Within the framework of the Nigerian Constitution, this collective good achievable is expressed in interactions between the arms of government on the one hand and between the government in its entirety and the citizens on the other. Most policies sought to be pursued by the government are usually backed by legislation and are

[57] O.K. Ezenyili, "Democracy and Good Governance in Nigeria" in J. Bohman and W. Rehg (Eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press: Cambridge, 1997), pp. 67 and 75.
[58] S. Freeman, "Deliberative Democracy: A Sympathetic Comment" (2000) 29(4) *Journal of Philosophy and Public Affairs,* p. 371.
[59] *Supra* n 57.
[60] T. Christiano, "The Significance of Public Deliberation" in J. Bohman and W. Rehg (Eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press: Cambridge, 1997) 243 at p. 244.

generally in furtherance to the fundamental objectives and directive principles of state policy. The executive generally draft legislation that is presented to the legislature to be deliberated on and amended as appropriate. In situations that warrant it, the judiciary is presented with the subject matter of the legislation to address the disputes that might arise on issues associated with it. Also, the government usually incorporates the input of labour unions, civil society groups, and professional bodies in the substance of the policies to be pursued or in the procedure for its implementation.

Even though the enactment of the 1999 Constitution is innately undemocratic, democratic decisions within the Nigerian State are reached mainly as a product of various deliberations, in the loose sense, amongst the arms of government on the one hand and between the government and the governed on the other. While decisions are not generally reached by consensus as proposed by deliberative democrats, the 1999 Constitution permits the accommodation to varying degrees, the contributions and input of Nigerians, albeit to a limited degree in the decision-making process.

3.0. CONSTRAINTS TO THE VIBRANCY OF THE DELIBERATION PRINCIPLES IDENTIFIED IN THE 1999 CONSTITUTION

Several factors constrain the vibrancy of the deliberation principles identified in the 1999 Constitution. Some of the constraints that are relevant to this paper are:

3.1. Poverty and Illiteracy

Deliberative democracy transcends the mere right to participate freely in the democratic process. Instead, its emphasis is on the principle of equality of participants in the democratic space. It connotes that similar opportunities must be afforded to everybody to contribute to the political discourse. It thus deemphasizes the role money and intellect play in political discourse. Similarly, this principle advocates that access to the deliberation space must not be hindered by anything

except age and mental health.[61] Strata discriminatory factors like economic positions, education, exposure, political and social connections, influence should be irrelevant. Instead, emphasis ought to be placed on ensuring that the views of all and sundry willing to participate are listened to and accommodated.[62]

Nonetheless, in Nigeria, poverty and illiteracy affect deliberation in two ways. First, prospective participants would instead pursue their proverbial daily bread than engage in any form of deliberation. Nigeria was recently crowned as the poverty capital of the world, with over 87 million people living on less than 2 US dollars daily.[63] Those primarily affected by the poverty rate are mostly illiterate. They see neither usefulness nor benefits of deliberative principles found in the Nigerian Constitution. They would instead deliberate on sports and reminisce about the good-old-days they had experienced or that their parents had told them about. They have an innate distrust for and would not discourse with the government. They believe that the government has no real interest in addressing their basic needs. As a result, they generally pledge their votes in exchange for necessities like food, clothing and petty cash.[64] They are also antagonistic to others whom they perceive to be higher than them on the social strata. Amongst their social peers, spewing accusations on the government is preferred to deliberating.

Secondly, poverty and illiteracy contribute to an inferiority complex. Thus, people who perceive themselves to be poor and illiterate believe

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[61] J. Cohen, "Democracy and Liberty" in J. Elster (ed.), *Deliberative Democracy*, Cambridge Studies in the Theory of Democracy (Cambridge University Press: New York, 1998), p. 185.

[62] *Supra* n 57.

[63] B. Adebayo, "Nigeria Overtakes India in Extreme Poverty Ranking" available at https://www.cnn.com/2018/06/26/africa/nigeria-overtakes-india-extreme-poverty-intl/index.html (accessed 30 November 2019).

[64] G. Matenga, "Cash for Votes: Political Legitimacy in Nigeria" available at https://www.opendemocracy.net/en/cash-for-votes-political-legitimacy-in-nigeria/ (accessed 20 November 2019); F. Yohanna, "Nigeria: A Democracy Where Votes are for Sale" available at http://www.yourcommonwealth.org/social-development/democracy-participation/nigeria-a-democracy-where-votes-are-for-sale/ (accessed 20 November 2019).

that they have nothing to contribute to the conversation on good governments. They recognize that they lack enough intellect and information to contribute to the discussion on entrenching good government. Most of them have not seen the Nigerian Constitution before. They also mostly lack comprehension of governance and do not understand the rights that they are ordinarily entitled. Hence, they are quick to resort to the power-of-the-fist than that of reasoning. Since daily survival is the principal goal of those Nigerians, they employ any means possible to achieve that goal.

Under this kind of atmosphere, no genuine deliberation is achievable; neither would good government be entrenched unless the government addresses the problems of poverty. More so, most of the government policies, which, if religiously pursued, could lift millions of poor Nigerians out of poverty are contained in the fundamental objectives and directive principles of state policy, which the government continues to pay lip-service.

3.2. Ethnic and Religious Intolerance

Nigeria comprises about 250 ethnic groups with different cultures, distinct temperaments, diverging world views, religious perception, beliefs, political tolerance, and intellectual exposure. Loosely stated, Nigeria is divided along ethnic and religious lines between the predominantly Muslim north and the predominantly Christian south. While the structural division was not a making of the colonialist, the seed of discord and intolerance that emanated from that structural divisions was orchestrated by the British. This orchestration was a reward bestowed on the northerners for their amenability to colonial rule and their less-agitation for independence.

In contrast, the more active southern part of Nigeria led by intellectuals like Nnamdi Azikiwe and Obafemi Awolowo, both of whom had long challenged, and were less amenable to colonial rule, were viewed with contempt by the colonialist. Hence, when the British were departing Nigeria, they ensured that they left the reins of power to the north. That singular act fanned the embers of discord between the north and the south, which discord continues to grow to

date, and is partly responsible for the several ethnoreligious conflicts that Nigeria had experienced and continue to experience.[65]

Some of those ethnoreligious conflicts that had occurred in Nigeria are the Nigerian civil war,[66] the Kafanchan-Kaduna crisis of 1980, the Kaduna Sharia riots of 2000, the Idi-Araba – Oko-Oba conflict of October 2000, and the Jos riot of 2001.[67] The unabating agitation for Biafra's independence in the south[68] and the shameful Boko Haram terrorist menace in the north[69] are a continuing reminder of and reflection upon the ethnoreligious discord that exists in Nigeria. This discord has amplified the inherent distrust between the northern and southern parts of Nigeria, as well as between Muslims and Christians. Undisputedly, no meaningful deliberation can occur under a cloud of suspicion, irrespective of what the subject-matter to be deliberated upon might be.

3.3. Distrust for and in the Government

Reeling from years of military dictatorship, most Nigerians do not trust the government to put the interest of the citizens before that of the government. Most Nigerians feel that the government exists to cater to the desire of the privileged few, to the detriment of the masses. Government policies are primarily geared towards re-entrenching the political elites to ensure their continued dominance in Nigeria's socio-economic space. Additionally, few Nigerians believe

[65] Canci and Odukoya, *supra* n 20; C. Massaro, "Nigeria Plagued by Ethnic and Religious Violence as Attacks on Christian Rise" available at https://www.foxnews.com/world/nigeria-ethnic-religious-violence-christians (accessed 26 November 2019).
[66] Osaghae et al., *supra* n 1.
[67] V.A. Isumonah, "Migration, land tenure, citizenship and communal conflicts in Africa" (2003) 9(1) *Nationalism and Ethnic Politics,* p. 1; S. Joshua, "Democracy and Violent Conflicts in Nigeria: Implications for National Development" (2013) 7(3) *Africa Research Review*, p. 324; E.E. Osaghae and R.T. Suberu, *A History of Identities, Violence, and Stability in Nigeria*. Oxford: Centre for Research on Inequality, Human Security and Ethnicity, University of Oxford; Edoh, *supra* n 20.
[68] C. Offodile, *Politics of Biafra and the Future of Nigeria* (Lulu Publishing Services: North Carolina, 2016).
[69] C.N. Ibenwa, "Terrorism and Its Management: A Case Study of Boko Haram Islamist Sect in Nigeria" (2016) 4(9) *Global Journal of Arts Humanities and Social Sciences*, p. 43.

that the government could be trusted to cater to the security and welfare of Nigerians. This cloud of distrust is unsuitable for deliberation to thrive.

Furthermore, most Nigerians provide necessities like food, clothing, shelter, electricity, water, education, access to health, and security for themselves, and had long ceased from believing in the promises made by the government to provide these necessities. Most Nigerians do not believe that the government exists for them and as a result, they eschew avenues to interact with the government. They perceive that those avenues are simply an opportunity for the government to present itself as representing the masses. This distrust had permeated all sectors of the Nigerian State, and it is primarily responsible for the unwillingness of Nigerians to engage the government on any issue. This inherent distrust of the government negatively impacts the vibrancy of the deliberative principles contained in the Nigerian Constitution.

3.4. Non-Independence of the Judiciary

An understanding of the concept of independence of the judiciary within Nigeria's deliberative constitutionalism doctrine is multifaceted. It primarily connotes that the judiciary must be independent and immune from external influence either from the other arms of government or from the populace. The converse, however, is the reality. While the judiciary is constitutionally empowered to adjudicate over all persons, entities and governmental structures in Nigeria,[70] it lacks the inherent powers to enforce its judgment and is thus, not truly independent.[71] All instruments of the State capable of ensuring compliance are under the control and direction of the executive. This is a peculiar problem and usually results in a state of hopelessness for the judiciary. When the decisions of the court are against the executive, the judiciary's state of despair becomes obvious. This status-quo had discouraged many Nigerians from approaching the court to interpret and challenge the acts of the executive. Many have

[70] CFRN (1999) (as amended), s. 6(6)(b).
[71] M.A. Ikhariale, "The Independence of the Judiciary under the Third Republican Constitution of Nigeria" (1990) 34(2) *Journal of African Law*, p. 145.

viewed the judiciary as a toothless bulldog whose potency relies mainly on the willingness of the executive to cooperate with the judiciary.

Furthermore, independence of the judiciary envisages that the citizens, including the other organs of government, must be free to comment on the decision and judicial findings of the judiciary. It is within this framework that the principles of deliberative democracy become animated. The decisions of the courts, especially the appellate courts, are analysed, criticized, cited, quoted, and re-submitted to the courts as judicial authorities to be affirmed or upturned. More effort needs to be expended by the government to ensure that the independence of the judiciary is genuinely established and jealously guarded. The power checking principles contained in the 1999 Constitution, including the willingness of the citizens to challenge the acts, actions and activities of government might become more animated when the independence of the Judiciary becomes more established.

3.5. Corruption and Nepotism

The emphasis on obtaining and keeping power in the Nigerian State aids corruption and births nepotism. Nigerians blindly pursue political and financial power because of the protection and prestige it affords. The recognition of these had emboldened political office seekers to employ all mechanisms, including violence, the threat of violence and bribery to secure their victories at elections.[72] This practice of retaining political office by all means possible has permeated all corners of the Nigerian State and continues to be entrenched, based on the benefits that accrue to those elected officials.

Since alliances and allegiances in Nigeria are secured by the promise of and the actual benefit derived from financial and political power, these alliances and allegiances have been known to shift frequently.[73] This shift results in non-coherence of ideologies, and this, in turn, affects the deliberation process. Rather than to be convinced by the

[72] See M.M. Ogbeidi, "Political Leadership and Corruption in Nigeria since 1960: A Socio-Economic Analysis" (2012) 1(2) *Journal of Nigeria Studies*, p. 1. In this article, this author analyses the effect and negative impact of corruption on Nigeria's political clime.
[73] *Ibid*, at pp. 3 – 5.

superiority of another's argument, consensus in Nigeria is primarily reached by calculating the opportunity cost in terms of personal benefits that would accrue to those persons burdened with making such choices. This act has hurt Nigeria's corruption ranking[74] and reveals a worrying trend. No genuine deliberation within any framework, including but not limited to the provisions of the Nigerian Constitution, could be achieved under a corrupt climate.

3.6. Terrorism, Militancy and General Insecurity

Nigeria is metaphorically heading toward Thomas Hobbes' state of nature, where life is solitary, poor, nasty, brutish and short.[75] The country is on a lonely path, the citizens are poor, life is nasty, the reality is brutal, and the intervals between reliefs are getting shorter. The preceding coupled with perceived neglect and negligence of the government to act responsively and responsibly in the face of continued inequality, exploitation, ethnic domination, corruption, nepotism, lawlessness, insecurity and fraud led to the rise of ethnic-based guerrilla forces and militants. These outlaws are made up of members of the exploited communities whose objectives *inter alia* are to defend their communities and natural resources from continued exploitation.

In the northern part of Nigeria, terrorism emerged as a reaction to the government's continued failure to provide necessities to the teeming youth population.[76] Their lack and illiteracy provided a fertile ground upon which the seed of hatred was sown. It also afforded Al-Shabab, members of the Islamic State and other terrorist organizations from northern Africa to infiltrate the north-west part of Nigeria and support the insurgents to wreak havoc in Nigeria. The continued unleashing of biblical hell on the Nigerian populace is mostly a cry for help and a brash demand for a fair shake of the national cake. A similar

[74] Transparency International, *2018 Anti-Corruption Index*, Annual Corruption Perception Index (Transparency International, 2018).
[75] T. Hobbes, *Leviathan: Vol. 1* (CreateSpace Independent Publishing Platform: South Carolina, 2017).
[76] *Supra* n 69.

argument is submitted as the rationale for the increased insecurity state in the country.[77]

No deliberation can genuinely take place when these menaces continue to rise, threatening the territorial integrity of Nigeria, enhancing internal insurrections and weakening Nigeria from its ability to wade off external aggressions. The deep-seated dissatisfaction of the respective ethnicities in Nigeria remains unaddressed. Until the Government embarks on a positive and honest step toward understanding, re-orienting, re-accommodating fears and agitations of these outlaws, those deliberation principles identified in the 1999 Constitution would remain under-optimized.

4.0. RECOMMENDED SOLUTIONS

The preceding problems have hindered the vibrancy of the deliberation principles earlier identified in the 1999 Constitution. Unless rectified, these problems would continue to hamper sincere deliberations on issues pertinent to the continued survival of Nigeria and Nigerians. In this section, the author proposed some recommendations that he believes could solve those identified problems.

4.1. Mandatory Accountability of the Acts, Actions and Activities of Government

One of the essential features of a democratic government is the requirement that power holders account for their exercise of government power. This provides an opportunity to ensure that both substantive and procedural acts of government comply with existing law and, by so doing, ensure that power holders remain bound by, and do not hold themselves to be above the law. Accountability connotes that the acts, actions, and activities of government must be transparent, accessible and justifiable to the citizens. It is also an avenue to certify that the policies of the government, and its

[77] E.I. Obarisiagbon, and E.O. Akintoye, "Insecurity Crisis in Nigeria: The Law Enforcement Agents a Panacea?" (2019) 7(1) *Journal of Sociology and Social Work*, available at http://jsswnet.com/vol-7-no-1-june-2019-abstract-6-jssw (accessed on 24 December 2019).

implementation, are in tandem with the promises made by the government. By this, the citizens and critics of the government are availed with the opportunity and means to highlight the failings of government and propose recommendations that could help address those identified failings.

This demands that the government renders a mandatory account to the citizens is in tandem with the reasoning principle identified in the 1999 Constitution and discussed above. This reasoning principle primarily implies that the power of the Nigerian State exercised by the Nigerian government is derived from Nigerians. Hence, its exercise ought to be beneficial to Nigerians. Since Nigerians are the constitutional donors of State power, then we ought to be entitled to a mandatory account of how the Nigerian government had exercised that power.[78]

For this, the Nigerian legislature could enact the necessary legislation(s) requiring all arms of the Nigerian government, especially the executive, to annually document and publish how it had exercised the powers that had been constitutionally donated to it by Nigerians.

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[78] In 2011, the administration of Goodluck Jonathan signed into law the Freedom of Information Act, Federal Ministry of Information and National Orientation, 28 May 2011 [Freedom of Information Act]. The aim of this Act as stated in its preamble was to "make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences of disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and; for related matter". However, this Act is inchoate. While it mandates the Nigerian government to publish an account of its acts, actions and activities. It does not prescribe the frequency of such publication, nor does it prescribe/impose sanction(s) for the failure of the Nigerian government to document and publish those records. As a result, public officials in Nigeria have exploited these lacunas to deny the request of many Nigerians. For information on the activities of the government; "Nigeria's Access to Information Law is not Working", available at https://www.icirnigeria.org/nigerias-access-to-information-law-is-not-working/ (accessed 14 November 2019); T. Ilori, "How Nigeria and Uganda are Faring in the Right to Information", available at https://cipesa.org/2018/11/how-nigeria-and-uganda-are-faring-on-the-right-to-information/ (accessed 16 December 2019). This recommendation not only imposes a duty on the government to publish and make publicly available an account of its acts, actions and activities, it also mandates its annual publication.

This way, the Nigerian government would be under a statutory duty to account for its acts, actions, and activities to all Nigerians annually.

Additionally, said legislation must prescribe criminal sanctions on the leadership of any of the ministries, departments or agencies (MDAs) of the Nigerian government that fails to document and publish an account of its acts, actions and activities annually. Also, said legislation must also prescribe the timeframe for publishing those publications. All the preceding would ensure that those MDAs of government timeously document and publish accounts of their acts, actions, and activities.

This annual publication would further avail the government with the opportunity to justify its actions to Nigerians and obtain feedback on areas of its policies that needs to be improved. This mandatory accountability of the acts of government would further help Nigerians better understand the policies pursued by the government, provide comprehensive resources that Nigerians could rely upon to deliberate with the government on its policies and provide means by which the government would better understand its policies.

By demanding that the government renders a mandatory account for its acts, actions, and activities, Nigerians would have the means to measure the extent to which the government had adhered to the constitutional provisions that prescribe that the welfare and security of Nigerians should be the primary aim of government.[79] This mandatory account could serve as a score-card to check the activities of the government and ensure that those activities comply with the rule of law.

To avoid self-bias and checkmate the propensity to produce a mendacious report, the legislature could prescribe that the report be prepared with support and input from auditors, legal practitioners, human rights groups, accountants, public policy experts, security experts, economics, financial experts and other relevant professionals. These professionals would vet and ensure that the annual report to be documented and made available to Nigerians, are a true reflection

[79] CFRN (1999) (as amended), s. 14(2)(b).

of the acts, actions, and activities of government for the year under review.

Admittedly, there are certain aspects of the government's activities that ought not to be publicized. Some of these activities could be on-going law enforcement investigations, defence and national security issues, sensitive policy papers of government, privileged information and other documents sealed on the orders of the court. Nevertheless, the process of compiling, documenting and vetting those documents detailing the acts, activities and actions of government that are not deemed privileged, coupled with the animated conversations, engagements, and arguments that said published report would generate, could rekindle Nigerians' trust for their government and consequently enhance the prospect and process of fruitful deliberations between the Nigerian government and Nigerians.

4.2. Re-orientation of Law Enforcement Agencies

Another bottleneck that stifles the vibrancy of those deliberation principles in Nigeria is the lawlessness of law enforcement agencies. Within the framework of the Nigerian State, law enforcement agencies usually uphold the rules of their appointees, rather than the rule of law. All its members swear allegiance to the Constitution and other relevant statutes, and undertake to uphold the rule of law. However, most of its members have discarded their oath and, in its place, sworn loyalty to their appointer.[80] When the rule of man replaces the rule of law, abuses arise. This is the current situation in Nigeria, where most of the law enforcement agencies have jettisoned adherence to the rule of law and are upholding the rule of their appointer. [81]

This act of upholding the rule of their appointer is based mainly on three premises. First, the notion of the rule of law is practically non-

[80] A.A. Aderinto, "Policing and the Politics of Law Enforcement in Nigeria" in D.E. Agwanwo (ed.), *A Political Economy of Policing in Nigeria* (Aboki Publishers: Makurdi, 2014), p. 59.

[81] E.C. Onyeozili, "Obstacles to Effective Policing in Nigeria" (2005) 1(1) *African Journal of Criminology and Justice Studies*, pp. 40 – 44.

existent in Nigeria.[82] The executive wields excessive power that is generally unchallenged. Because the executive controls all instruments of State power, it has become a law unto itself. Hence, it is not unusual that when the executive directs members of the law enforcement agencies to execute an act, those agencies perceive said directive to be a law that they must obey.

Secondly, most of these law enforcement agencies do not have another means of livelihood. Their sustenance is wholly based on the income they earn from their occupation as members of the law enforcement agencies. Hence, when asked by someone in a position of authority, who equally has the power to determine their appointment, to execute an act, they comply, even when they perceive that such directive might be unlawful.

Finally, a large chunk of members of law enforcement agencies in Nigeria are known as recruits. This is because they are illiterate. Therefore, most of them do not understand what the rule of law is. They have been trained to obey and not question the directives of their superiors. Acting on the impulses of these training, these recruits do not know how to refuse an illegitimate order. Accordingly, they execute the dictates of their superiors and upholds those dictates like they were the rule of law. To ensure that deliberation thrives in Nigeria, members of Nigeria's law enforcement agencies must undergo re-orientation. This proposed re-orientation should primarily focus on explaining the concept of the rule of law, fundamental rights, and civil liberties. Furthermore, this proposed re-orientation must also enlighten members of Nigeria's law enforcement agencies on the nature, scope, and limits of their statutory powers. They must also be made to understand that the executive, including the President, is bound by the rules of law. As such, any order issued by the executive that contravenes the provisions of the law ought to be discarded.

To ensure that members of these law enforcement agencies uphold the rule of law, then the law must be used to secure their employment. This means that relevant legislation must be enacted to protect

[82] E.J. Okon, "The Rule of Law in Nigeria: Myth or Reality?" (2011) 4(1) *Journal of Politics and Law,* pp. 211 – 214.

members of the law enforcement agencies that refuse to execute any unlawful directive. The respective law enforcement agencies ought to have a compliance department saddled with the responsibility of inquiring into the lawfulness of issued directives. If the issued directives are lawful, then they must be executed. If the directives are not, then said, directives could either be discarded or returned to the issuer for necessary modification. This is to ensure that the execution of those directives would be within the ambit of the law. It is only when this is done that Nigerians would be willing to deliberate on issues with the government.

4.3. Safeguarding the Independence of the Judiciary

Another constraint to the power checking principle is that the judiciary depends a lot on the executive for the performance of its duties. This overreliance is neither healthy for a vibrant democracy to thrive, nor for the principles of deliberative democracy to be entrenched. The propensity of this overreliance to destroy Nigeria's nascent democracy had been critically analysed by several authors, many of whom recommended that the appointment, remuneration, security of tenure and pension of members of the judiciary should be done independently of the executive.[83] This author agrees with their recommendations and adopts them as part of his proposed solution to the bottlenecks hindering the vibrancy of deliberative democracy in Nigeria.

In addition to their recommendations, this author also proposes that the judiciary should be empowered to enforce its judgment. While no law constrains the judiciary from enforcing its judgment in Nigeria, the fact that all instruments of State power that could be deployed to enforce the judgment of the court are under the control of the executive usually results in the judiciary having to rely on the executive for the enforcement of its judgment. While this is not a peculiarity of the Nigerian State, the overbearing influence that the executive bears

[83] R.C. Okeke and A.N. Idike, "The Judiciary and Democracy Consolidation in Nigeria under the Buhari Administration" (2017) 2(4) *Specialty Journal of Politics and Law,* pp. 24 – 32; *Supra* n 34; *Supra* n 71; A.A. Olowofoyeku, "The Beleaguered Fortress: Reflections of the Independence of Nigeria's Judiciary" (1989) 33(1) *Journal of African Law,* p. 55.

on the notion of the rule of law makes it *sui generis*. This circumstance usually results in a state of hopelessness for the judiciary, especially when the said judgment of the court is against the executive or any of its MDAs. This state of despair also limits the willingness of Nigerians to challenge the acts, activities, and actions of the Nigerian government.

To address this, this author proposes the enactment of statute, empowering the respective law enforcement agencies (particularly the Nigerian Police Force) to create a department within their organizations, whose principal responsibilities would be to give effect to the decisions of the court. While members serving within this department remain part of their respective agencies, their promotion, remuneration, and conditions of service should be outside the hierarchical framework of their principal agencies. By this, the enforcement of the judgments of the judiciary would no longer rely on the willingness of the executive. This could re-animate the trust of Nigerians in the judicial process and, by so doing, re-energize the power checking principles of deliberative democracy as contained in the provisions of the 1999 Constitution.

5.0. CONCLUSION

The potential of deliberative democracy to solve the multifarious problems associated with governance in all constitutional orders is limitless. As this article shows, there already exist deliberation principles within the framework of the existing *1999 Constitution of the Federal Republic of Nigeria*. However, many of these opportunities remain either untapped or under-utilized. While deliberative democracy will have to scale several constraints, including but not limited to, re-orientation of the law enforcement agencies and empowering the judiciary to enforce its own decisions before it could become entrenched, its capacity to address problems of governance that is citizen-focused and citizen-driven is an opportunity that we all as Nigerians must be willing to harness and maximize. Nigeria is at a tipping point, and if the citizens do not rise to deliberate and demand robust deliberations within the tiers and arms of governments on the one hand; and between the government and the citizens on the other, our beloved country might find itself consigned to the history books,

fulfilling the words of the late literary giant – Chinua Achebe – that "there was a Country."

EXIGENCY FOR COMMERCIAL COURT ESTABLISHMENT TO EASE ENFORCEMENT OF CONTRACT IN NIGERIA

Bolarinwa Levi Pius* and Dr. Adetokunbo Ogunfolu*

ABSTRACT

Corporate disputes often exist among the players in the field of business transactions occasioned by high octane scheming, near apocalyptic competitiveness and combustible mix of profiteering emotions. Many corporate organizations operating in Nigeria prefer to go abroad for quick commercial adjudication of litigations that ensue with their clients or contract partners. The Nigerian adjudicatory architecture and procedure is complex and porous allowing litigants to manipulate the wheel of justice to a long and complex route; and so, cannot accommodate the exigency of commercial dispute resolutions.

This article aims at examining the narrative of commercial disputes resolution in Nigeria, factors responsible for delay in commercial dispute resolution, and the consequences of such delay to the Nigerian economic growth. The article suggests urgent legislative piece to establish a specialized commercial court in Nigeria having both civil and criminal jurisdiction with efficient regulatory framework to enhance virile enforcement of civil and criminal contracts.

1.0. INTRODUCTION

Due to its colonial links with Britain, the Nigerian legal system is largely based on the English system. Nigerian law consists basically of Nigerian legislation, the received English law (i.e. common law, English statutes of general application in force in England as at 1 January 1900, and the doctrines of equity) customary law and judicial precedents. Like England, Nigeria also operates an adversarial system. There are three

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main methods for resolving commercial disputes: through litigation, arbitration and mediation/conciliation.

Major commercial disputes are brought before the State High Courts or the High Court of the Federal Capital Territory Abuja, which have unlimited jurisdiction to hear all matters other than those that are within the exclusive jurisdiction of the Federal High Court. The State High Courts and the High Court of the Federal Capital Territory, Abuja have jurisdiction to determine civil proceedings where the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue. Section 251(1) of the Constitution of the Federal Republic of Nigeria[1] gives the Federal High Court exclusive jurisdiction over matters of: revenue; company taxation; customs and excise; banking; aviation; securities market and shipping. Appeals lie from the High Courts (Federal, State and Federal Capital Territory) to the Court of Appeal and thereafter to the Supreme Court, which is the apex court in Nigeria.

Many State High Courts have recently amended their Civil Procedure Rules (CPR) to provide for a frontloaded case filing system, as well as the option of trying alternative dispute resolution mechanisms before actual trial commences. The Lagos State High Court has implemented a fast-track route for certain cases and other State High Courts are considering similar measures. Many of the State High Courts have created commercial divisions for the speedy resolution of commercial disputes, and particular judges may be assigned to hear specific types of commercial matters.

There are also specialized courts, which hear disputes arising in connection with the operations or administration of specific laws. For example, the Federal Inland Revenue Service (Establishment) Act [2] provides for the framework for the resolution of disputes between tax payers and the Federal Inland Revenue Service (FIRS). The Act provides that any person aggrieved by a decision of the FIRS may appeal to the Tax Appeal Tribunal within 30 days of the decision being

[1] No. 24 of 1999.
[2] No. 13 of 2007.

made. Similarly, the Investment and Securities Act[3] also creates the Investment and Securities Tribunal to hear matters relating to the operations of the capital market. The newly established National Industrial Court that has exclusive jurisdiction over labour and employment matters has also been quite busy.

The functional institution of government is supervised by utopian constitutional framework wherein all the architectures of government harmonize for service delivery. It is a truism that the wealth of a nation is the fountain of its strength and such wealth would not come except there is a pool of both local and foreign investments in Nigeria to continue growing the economy. Advanced economies of the world started by growing their institutions to attract both foreign and domestic investors in growing their economy.

It is a truism that one of the institutions strengthened to build the economy is the judiciary. Strong judicial administration of civil and commercial justice system is *sine qua non* to quick enforcement of commercial transactions and all manner of contracts so related. However, delay in the adjudication of commercial litigations caused by overloaded jurisdiction of the Federal High Court, frivolous injunctions, and lack of deep knowledge of commercial fundamentals by the judges, corruption and tedious administrative oversight over judges on commercial matters, remains albatross to ease of enforcement of contract.

The foregoing challenges led to the administrative activism of heads of High Courts in Nigeria to create special unit/division in their courts to adjudicate on commercial matters aiming at freeing the commercial matters tied down in the court dockets. However, this administrative policy to quicken adjudication of commercial litigation was short lived as the same problem of delay has persisted. This is so because the same judges, same procedures, same lawyers, same high court (only with a special building dedicated for hearing commercial litigation), as the subject matter jurisdiction of the Federal High Court still adjudicate commercial litigation. Nothing new: nothing different.

[3] Cap. 124, Laws of the Federation of Nigeria, 2007.

Also, efforts were made to redress the delay in commercial litigation through imported arbitration, conciliation and mediation methods but to no avail. Therefore, investors persist in repatriating their investments from Nigeria to advanced economies that guarantee ease of enforcement of contract. Hence, this article aims at examining all those challenges and advocates for urgent legislative piece establishing commercial court with distinct architectures and administrative pattern.

1.1. Conceptual Definition and Clarification of Terms

Clarification of some fundamental terms is necessary for critical appreciation of the subject matter. The concepts such as "exigency", "commercial court", "enforcement of contract" need foundational light. The word "exigency" denotes a state of affairs that needs urgent demand[4]. The phrase "commercial court" is a judicial institution that hear actions in the commercial list arising out of the ordinary transactions of merchants and traders; among others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages[5]. "Enforcement of contract" is the time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality and efficient in the court system[6].

From the foregoing, it is unequivocal to say that the Nigerian ease of enforcing commercial justice and contract is indexed on this universal principle. However, the scale of justice remains weak and its wheel is also slow. Worse still, commercial crimes and torts are litigated at different courts and this causes jurisdiction crisis, avoidable bureaucratic bottlenecks, and distortion in the Nigerian commercial

[4] "Exigency", available at https://www.merriam-webster.com/dictionary/exigency (accessed 19 August 2018).
[5] L.B. Curzon, *Dictionary of Law*, 5th ed. (Financial Times & Pitman Publishing: London, 1998), p. 65.
[6] "Enforcing Contract", available at https://www.doingbusiness.org/data/exploretopic/enforcing-contracts (accessed 19 August 2018).

jurisprudence. Commercial cases drag for years on the court dockets as the specialized division of commercial court created by the High Court to avert this challenge has rather worsen the case. This article is exigent in looking for acceptable solution to the Nigerian peculiar problem of ease of enforcing commercial contracts having both species of torts and crimes, which is universally adorable.

2.0. JUSTIFICATION OF THIS RESEARCH

Commercial case management system in Nigeria continues to elude the acclaimed standard of enforcing contract. Series of efforts made at ensuring that commercial litigations are adjudicated within time frame in line with the commercial customs and usages have yielded little results. Universally speaking, major advanced economies of the world have adopted alternative to dispute resolution (ADR) as the best option to resolving commercial disputes. This option has been appreciably adopted by various jurisdictions of the world. However, in the Nigerian commercial dispute resolution narrative reverse is the case. In Nigeria, administrative creation of commercial court as a division of the Federal High Court and non-adjudicatory ADR, unlike in advanced jurisdictions, has not phased out delays in enforcing commercial contract.

Arbitration has been incorporated into the nation's *corpus juris* and the courts have encouraged this option as the best. But for the adversarial imperative of the Nigerian courts' tradition, the intrigues and horse trading of the so-called parties to commercial litigations have always manipulated arbitral processes and decisions back to the regular court for the matters to start *de novo.* The arbitration is now a pawn in the hands of the scheming players and investors' money and assets are trapped down till they lose their commercial values. This is creating a huge loss of investments to the Nigerian economy caused by its peculiarity.

Hence, the objective of this article is to advocate for a statutorily backed, proactive and independent commercial court having both criminal and tort jurisdiction to redress this challenge due to the circumvention of the acclaimed arbitration window and bureaucratic frustration of High Court Division on commercial matters without

legislative imprimatur to give the court structural and functional architectures in line with international best practice.

3.0. STATEMENT OF PROBLEM

The advanced jurisdictions usually create commercial courts as divisions of the High Court with expert judges in commercial laws to enhance quick and sound dispensation of commercial justice. The same administrative convenience has been replicated in the Nigerian commercial justice system, but for the usual delay in administration of commercial litigations. The alternative dispute resolution reliefs are also cornered by tripartite conspiracy theory involving litigation judges, counsel, commercial litigants, arbitration losers and court procedures. This often results in capital flight of investments from Nigeria and poor enforcement of commercial contract. The twin problems of conspiracy theory and capital flight of investments from Nigeria are identified in this article.

4.0. LITERATURE REVIEW ON THE SUBJECT

Various authors, scholars and experts in the world have supported creation of commercial courts as divisions of the High Courts. The evidence of their workings to enhance administrative convenience is positively felt around the world. However, Nigeria is a peculiar clime with little or no result. Possibly there are few literatures that have researched into the Nigerian peculiar problems in the light of advocating for a statutorily established commercial court in line with international best practices. A commercial law expert, Professor of economics, and former Governor of the Nigerian Central Bank, Charles Soludo[7] pontificates on necessity for a constitutional imprimatur and statutorily multivariate commercial court when he said Nigeria needs "introduction of commercial courts for speedy resolution of commercial disputes …."[8] However, he did not explain

[7] C. Soludo, "The Political Economy of Restructuring the Nigerian Federation", an Inaugural lecture delivered at Ndigbo Lagos Foundation on Wednesday, 2 August 2018 in Lagos, available at https://www.premiumtimesng.com/news/top-news/278742-nigerias-constitution-does-not-guaranty-economic-prosperity-soludo.html (accessed 27 August 2018).

[8] *Ibid.*

the structural elements needed to achieve it. This article aims at explaining the structural elements and also canvassing for a legislative piece having both civil and criminal jurisdictions on commercial matters and enhancing its architectural and administrative functions.

5.0. EPISTEMOLOGY OF ENFORCING COMMERCIAL CONTRACT IN NIGERIA

Doing business includes measuring the time, cost and procedural complexity of resolving a commercial lawsuit either between domestic bodies or with mix of foreign bodies. The court hears arguments on merits and that an expert provides an opinion on the quality of the commercial issues. The time, cost and procedures are measured from the perspective of commercial litigants pursuing the standardized case through domestic jurisdictions. Effective commercial dispute resolution has many benefits. Courts are essential for entrepreneurs because they interpret the rules of the market and protect economic rights. Efficient and transparent courts encourage new business relationships because businesses know they can rely on the courts if new customer fails to pay. Speedy trials are essential for small business economies like Nigeria, which may lack the resources to stay in business while awaiting the outcome of a long court dispute.

The narrative of enforcing commercial contract in Nigeria is proverbial and paradoxical in that as the Ease of Enforcing Contract Index moved Nigeria up the rung of the ladder, little or nothing is seen to complement the proof. It is a gory state for the Nigerian administration of civil justice procedure that commercial cases running up to 20 years and more are still in the docket of the Nigerian high court. A survey, conducted by the Lagos State Ministry of Justice between 2002 and 2005, revealed that it takes an average of five years for a commercial case to journey from the stage of filing to the stage of judgment delivery at the high court. This figure is believed to be very conservative. Lagos is the Nigerian commercial nerve centre and a benchmark in measuring administration of contract enforcement. Delay in commercial dispute litigations frightens investors and investments are repatriated to clinically reformed economies that enhance ease of enforcing commercial contracts such as South Africa, Ghana and other better jurisdictions in the province of Africa.

6.0. SOME STATISTICAL NARRATIVES OF DELAY IN ENFORCING COMMERCIAL DISPUTES IN NIGERIA

On 3 March 1999, the then National Maritime Authority now Nigerian Maritime Administration and Safety Agency, gave a loan facility to the tune of $2m to East West Services Limited to purchase a motor vessel named ECOWAS Trade II, the loan was part of the Federal Government's Ship Acquisition and Ship Building Fund, an initiative to encourage indigenous vessel owners. East West Services Limited defaulted; a situation which forced NMA to file a debt recovery suit marked *National Maritime Authority* v *East West Coast Ser. Ltd*[9]. It ran for 17 years before the His Lordship Justice Ibrahim Buba who inherited the case delivered the judgment on 14 October 2016 in favour of NIMASA which succeeded the NMA. However, the judgment has become nugatory and has no commercial value as the judgment debtor; East West Services Limited was no longer in existence as at the time the judgment was delivered. The judgment reads:

> The evidence of PW1 is not challenged, contracted or denied. Exhibits P1-17 remains unchallenged. A court of law is not challenged or contradicted and that it is capable of believing. Consequently, and in the light of Exhibits P1-17, this 1999 suit has been in the trial court for 17 years, must and shall come to an end. Accordingly, judgment be and is hereby entered for the plaintiff against the defendant as per paragraphs 27(a)-(e) of the statement of claim dated 1999.

In another sad commercial case *Ibrahim I. Bello-Olupo* v *Reliance Bank Ltd*[10] which bordered on alleged unpaid bank loan and recovery of landed property title document, the defendant, Reliance Bank Limited, had become defunct, while the plaintiff's engineering company, Up-to-Date Engineering Company, with offices in Lagos, Abuja and Ilorin, had become distressed, leading to direct and indirect loss of jobs. The distress of Up-to-Date Engineering Company was not unconnected

[9] FHC/L/CS/311/99.
[10] (2018) 8 CLRN 99.

with the withholding of the title document of a landed property, which the company's alter ego, Alhaji Bello-Olupo, deposited with Reliance Bank in 2001 while seeking an Advanced Payment Bond of ₦6,252,065.06, to execute a ₦25m rural electrification contract awarded to him by the Kwara State Government in 2001. The hope that this contract would take his business to the next level had fizzled out while his inability to recover his title document, withheld by the bank, had foreclosed his chances of tendering same as a collateral to obtain other bank loans to execute other contracts.

On the other hand, Reliance Bank, which went under the weather and merger with four other banks in 2006 to become Skye Bank Plc, claimed that Bello-Olupo still owed it ₦7m as of 2003. It would have sold Bello-Olupo's landed property at Coker Village, Orile-Iganmu, Lagos, to recoup the alleged debt but for this lawsuit, which had now dragged for 12 years.

In another sad commercial matter, *Dike Geo Motors Ltd* v *Allied Signal Inc.*[11], the plaintiff, a manufacturer of an automobile brake and clutch fluid under the trade mark Allied & Device, had filed the suit on, May 29, 1995 accusing the defendant, a Nigerian company, of adulterating product or infringing on its trade mark. The case ran for 26 years after being tied down by series of frivolous injunctions and procedural scheming. Even if the Supreme Court decides to give judgment on the matter, it is of no commercial value again because the company has since fizzled out of Nigeria.

It is sad to note that while a commercial case is journeying through the labyrinth of the congested court dockets, what the parties are disputing over or the subject matter of the lawsuit would have been destroyed before the court's judgment would eventually come. Though at the end of the day, the court would declare one of the parties in the commercial suit a winner, such a party might really have nothing to benefit from the victory – a case of justice delayed is justice denied. Since commercial transactions and enforcement of same is directly proportionate to time, any judicial forum that fails to consider

[11] FHC/L/CS/591/95.

this universal principle of timeliness in adjudicating commercial cases destroys the economy.

The World Bank Ease of Enforcing Contract is mainly premised on timing and cost of litigation of commercial disputes through the courts. Nigeria's current ranking on ease of business as 131 out 190 jurisdictions, is not good enough for an economy that is desirous of attracting investments like Nigeria. With an inefficient and unpredictable justice system, only investors, who had no better market elsewhere, would attempt to venture into the Nigerian market.

Sad still, commercial litigants out of frustration in the Nigerian civil and criminal courts, move their grievances to advanced jurisdiction for settlements. Also, the Nigerian commercial jurisprudence is distorted as it is scattered in different books, documents on different fields of law. There is no comprehensive and synchronized commercial law reports to house both criminal and civil commercial cases for easy reference and research development to build the Nigerian commercial jurisprudence[12]. This has been creating huge commercial and capital flight from Nigeria ranging from cost of employing lawyers, housing them in foreign hotels, paying litigation fees and boosting foreign courts image as having the best commercial litigation architectures.

7.0. ARBITRATION LACUNAE IN RESOLVING COMMERCIAL LITIGATION IN NIGERIA

It is obvious that disputants are now discovering that Arbitration is a more efficient, flexible and cost-efficient alternative to litigation and in the very words of Lord Langdate, M.R,

> Many cases occur, in which it is perfectly clear, that by means of a reference to arbitration, the real interests of the parties will be much better satisfied than they could be by any litigation.

[12] Kanyinsola Ajayi SAN "The Nigerian Securities Market and Regulation: Industry Challenges and Expectation from the Judiciary", a 2016 Judges Workshop delivered at the National Judicial Institute on the Nigerian Capital Market Dispute Resolution.

The resolution of commercial disputes is obviously a very crucial aspect of the operation of the national economy and of the judicial system[13]. Commercial arbitration in Nigeria is governed by the Arbitration and Conciliation Act[14]. Arbitration is simply defined in the Act as "commercial arbitration, whether or not administered by a permanent arbitral institution". On the other hand, "commercial" is defined as:

> …all relationship of a commercial nature including any trade transaction for the supply of goods and services, distribution agreement, commercial representation or agency, factoring, leasing, investment, financing, banking insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road.

From the foregoing, we can then say that commercial arbitration is the voluntary submission of disputes arising from any form of business or commercial transaction to a third party other than the courts, for a binding decision[15]. However, this article identifies the substantial challenges frustrating the finality and enforcement of commercial arbitral decisions; examines unpleasant judicial attitude in enforcement of arbitral awards, and effects of these substantial challenges on enforcement of contracts in Nigeria. This becomes a problem since parties must, however, adhere to the *lex arbitri*. The *lex arbitri* contains mandatory rules that cannot be deviated from, such as grounds for challenge of awards. Also, it contains non-mandatory rules of procedural matter such as composition of the tribunal, conduct of the proceeding and features of the award. The challenges facing arbitral award enforcement are statutory and judicial challenges:

7.1. Statutory Challenges

There are lacunae in the Arbitration and Conciliation Act which are albatross to a seamless enforcement of arbitral awards. These

[13] J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates Nigeria: Lagos, 1999).
[14] Cap. A18, Laws of the Federation of Nigeria, 2004.
[15] Arbitration and Conciliation Act (ACA), s. 32.

lacunae are fundamentally pathological as investments are being repatriated to better enforcement jurisdictions due to uncertainty in the enforcement of contract in Nigeria, being one of the basic indices used by World Bank to analyse ease of doing business in all jurisdictions of the world.

7.1.1. Uncertainty in Time Limitation for Recognition of Enforcement of Arbitral Award

Time Limitation for recognition and enforcement of arbitral awards in Nigeria is governed by statutes. Generally, Statute of Limitation is the law which sets out time within which an aggrieved person can present or file his matter for determination by the court or any other body established for that purpose.

The Limitation Act[16] has placed the time limitation period for bringing an action including arbitration to six years. The question is, when does the six years start to run? In *M.S.S Line* v *Kano Oil Millers Ltd*[17], The Supreme Court decided that:

> The period of limitation runs from the date on which the cause of arbitration occurred, that is to say, from the date when the claimants first acquired either a right of action or a right to require that arbitration takes place upon the dispute.

Respectfully, this article disagrees with this decision of the Supreme Court of Nigeria as it is incorrect and not in tandem with international standards. Arbitration agreement has two main undertakings, the first being an undertaking to submit to arbitration when the dispute occurs, and the second being an undertaking to comply with the arbitral award when made. These two undertakings constitute two distinct contracts. It follows therefore that the time limitation for reference to arbitration runs from the date of the breach giving rise to arbitration *whereas the second limitation period for enforcement starts to run from the date the defendant refused to comply with the terms of the award*. This is because the same Supreme Court had in *K.S.U.D.B* v *Fanz Construction*

[16] Cap. 522, Vol. 88, Laws of the Federation of Nigeria, 2004.
[17] (1974) NNLR 1.

Co. Ltd.,[18] stated that an award once published extinguished any right of action in respect of the substantive matter in dispute and gives rise to a new cause of action based on the agreement between the parties to perform the award implied in every arbitration agreement.

However, in the Nigerian jurisdictional space, the Supreme Court decision quoted above remains valid till date until the Court overrule itself or set aside its own judgment. The current implication of the Supreme Court judgment is that arbitral award is being frustrated by the guilty who continue to refuse honouring the arbitral judgment. However, the Nigerian courts continue to follow the Supreme Court decision whereas effluxion of time extinguishes/terminates the arbitral award mid-way at the High Court.

7.1.2. Pathological Defects in Stay of Arbitral Proceedings

It is antithetical that arbitration that is supposed to dispense issues between parties quickly is being cornered by a scheming party who goes to court to stop the arbitral proceedings. There is nowhere in the Arbitration and Conciliation Act where court is empowered to grant injunction against arbitral proceedings. It often amounts to a "rape" of justice when a court stops arbitral tribunal from performing its statutory function by granting an injunction to a party that wants to prevent the continuation of arbitral proceedings even though that party had entered into an agreement to resolve all disputes through arbitration. The Arbitration and Conciliation only provides for judicial imprimatur in the following areas: stay of court proceedings, the removal of an arbitrator for misconduct, the setting aside of arbitral award and enforcement of an award. The Act does not provide for the intervention of the court to restrain arbitration by injunction from performing its statutory duties.

A judicial auxesis captures an exemplified case of *Nigerian National Petroleum Corporation* v *Statoil (Nigeria) Ltd and Ors*[19]. The Nigerian National Petroleum Corporation and Stateoil (Nigeria) Limited and Texaco Nigeria Outer Shelf Limited had entered into a production

[18] (1990) 4 NWLR (Pt.142)1 at 37.
[19] CA/L/758/2012.

sharing contract. That contract provided that disputes would be resolved through arbitration. A dispute arose from the contract but the Nigerian National Petroleum Corporation (NNPC) sought and obtained an injunction at the Federal High Court to prevent the continuation of arbitration. It argued that the subject matter of the claims in the arbitration involved taxation, and that by law, only a tax tribunal could hear the matter. The simple doctrine of contractual *consensus ad idem* was sacrificed on the judicial altar for commercial injustice to thrive.

Although the Court of Appeal set aside the black market and protégé injunction granted by the Federal High Court, the shock of the High Court decision has created uncertainty in the "hearts" of investors. Investors now lack confidence in the Nigerian judicial system. The Court of Appeal in Nigeria held in this case that a lower court was wrong to grant an injunction to a party that wanted to filibuster the continuation of arbitration proceedings even though that party had entered into arbitration agreement to resolve all disputes by arbitration. The Federal High Court decision to grant an injunction in the first place was part of a growing trend by lower courts to stop arbitrations commenced by international oil companies against NNPC. In the cited case, the central issue has been whether section 34 of the Arbitration and Conciliation Act that states that, "*a Court shall not intervene in any matter governed by this except where so provided by this Act,* means that the only basis on which a court can intervene to prevent the commencement or continuation of arbitration must be expressly provided for in the Act".

It seems to this article that the cited provision is omnibus in spirit and letter regarding granting of application to clog arbitral proceedings. Hence, doctrine of Implied Construction or Interpretation is necessitated. However, in the cited case above, the Nigerian Judiciary took the doctrine of Implied Construction to corner and conspire against the growth of arbitration.

In the opinion of this writer, the Arbitration and Conciliation Act created a consequential lacuna by not being categorical through insertion of a clause restraining the meddlesome interloper, the High Court or any court from entertaining any application to defraud a just

party whose belief is in the arbitration clause entered into from arbitral justice. Natural justice is a fundamental constitutional matter captured in Chapter IV of the Nigerian Constitution. Any attempt to impeach or subjugate this constitutional provision is and remains a nullity. Until there is a legislative activism to establish independent Commercial Court to immolate the conspiracy and rascality, all effort to make Nigeria an attractive business hub in Africa will continue to be an illusion.

7.1.3. Use of Archaic and Complicated Procedures to Commence Enforcement Proceedings

The procedures used in the Nigerian courts to enforce arbitral award is cumbersome, archaic and complicated. It is processed by filling Originating motions or Originating summons which are in themselves not created for or suitable for arbitral proceedings under Nigerian law. This continues to burden investors who desire direct and simple enforcement procedures.

In England, the Arbitration Act[20] regulates the Arbitration matters, as well as the Supreme Court of England and Wales Country Courts Civil Procedure Rules[21] 1998, and amply makes provisions for the enforcement of arbitral awards in England. Section 66 (1) of the Arbitration Act 1996 (UK), which is in *pair materia* with section 31(3)[22] of the Act, provides that an arbitration award may, by leave of the court, be enforced in the same manner as a judgment or order of the court. Where leave is granted, judgment may be entered in terms of the award. Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make award.[23]

The procedure is to simply file an Arbitration claim form which will include a concise statement of the remedy claimed and any questions on which the claimant seeks the decision of the court and give details

[20] Chapter 23, 1996.
[21] No. 3132 (L.17) 1998.
[22] Order 26 Rule 8 Federal High Court (Civil Procedure) Rules 2009.
[23] Order 26 Rule 12(1).

of any arbitral award challenged by the claimants, identifying which parts of the award are challenged and specifying the grounds for the challenge. The rules make provisions on issues such as service outside jurisdiction; how notice may be served and on who;[24] case management hearings; and the enforcement of the arbitral awards. The application is simply made in the arbitration claim form to enforce the award in the same manner as a judgment or order of court.[25] All parties are expected to be served and the hearing will proceed notwithstanding that the defendant did not appear. The procedure in England is simple, direct and uncomplicated. There is no use of archaic procedure like motions or Originating summons like the Nigerian provisions which are in themselves not created for or suitable for arbitral proceedings under Nigerian law.

7.1.4. Unnecessary Burden of Clothing the High Court with Power to Enforce Arbitral Award

An award which cannot be enforced at the end of the day is useless. The successful party in arbitration expects the award to be performed without delay. That is a reasonable expectation. As stated earlier once award has been rendered, the arbitral tribunal usually has nothing to do with the dispute unless on exceptional grounds. The Nigerian Arbitration and Conciliation Act empower the losing party with some options:

- He may simply carry out the award voluntarily,
- He may use the award as a basis for negotiating a settlement
- He may challenge the award through application to set aside
- He may resist any attempt by the winning party to obtain recognition or enforcement of award

Where a court is asked to enforce an award, it is asked not only to recognize the legal force and effect of the award, but also to ensure that it is carried out by using such legal sanctions as are available. In Nigeria, once an award is registered in the court, it becomes

[24] In line with the ACA.
[25] S. 66(3) Arbitration Act, 1996 (UK).

enforceable as a judgment of that court. Thus Section 31 of Arbitration and Conciliation provides:

> 31. (1) an arbitral award shall be recognized as binding and subject to this section 32 of this Act, shall, upon application in writing to the court, be enforced by the court.
>
> (2) The party relying on an award or applying for its enforcement shall supply-
>
> (a) The duly authenticated original award or duly certified copy thereof;
>
> (b) The original arbitration agreement or a duly certified copy thereof.
>
> (3) An award may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.

Looking at the statutory requirements that the beneficiary of arbitral award must certify and dockets of the High Court coupled with industrial strikes, the award documents are not worth the papers they are written. The bureaucratic provision of the Act in enforcing arbitral award in the Nigeria Court is needless as the arbitral judgment may become academic by Statute of Limitation as the court may not enforce the award on time in the face of docket of case files before it as well as industrial disharmony which may suspend the court activities for a long period of time. Also, political exigencies may warrant such delay in enforcement. Hence, effluxion of time renders such arbitral award academic or useless. This is very inimical to wheel of arbitral justice. This frustration is called Arbitral Filibuster.

The compulsory provision in the Arbitration and Conciliation Act for bureaucratic submission of arbitral award to the High Court for enforcement is a disservice to the frenetic efforts exerted at the arbitration. The incessant question often asked by the stakeholders, particularly the investors, is why can the arbitration judgment not be enforced like the judgment of the High Court without any recourse to the High Court? Various advanced economies have removed this enforcement clog from their domestic statute. That is, those advanced

economies have empowered the arbitrations to enforce their judgment. Hence, investors' confidence and certainty are gained by them. The implication of this in the Nigerian adjudicatory forum is that uncertainty pervades enforcement of arbitral award until the bureaucratic High Court enforcement of arbitral award is removed.

7.1.5. Setting Aside of Arbitral Award

The finality of arbitral award has met mixed reactions among the stakeholders in arbitration. For the import of clarity, it is expedient to note that the provisions of the Arbitration and Conciliation Act on this subject empower the High Court with power to review the award of arbitration tribunal. This amounts to a double trial as it wastes time, money and businesses are grossly affected. This is so because upon the establishment of grounds to set aside the arbitral award by the aggrieved party, the beneficiary would also be asked to make his/her own submission. What a double trial!

It therefore becomes vexatious, knotty and monotonous to investors who will rather opt for exodus transfer of their businesses to viable and seamless climes for enforcement of contract. Other jurisdictions have removed the provision of judicial review of their arbitral tribunals by making the arbitral awards enforceable without recourse to judicial review of their courts. The Brazilian Arbitration law abolished the requirement for judicial ratification of arbitral awards. This law equated an arbitral award with other judicial decisions or judgment[26] and expressly provides that the arbitrator is equivalent to a judge for the purposes of the arbitration proceeding.[27]

What other advanced jurisdictions like Brazil cited above do is to provide for appeal being the only option available to aggrieved party at the Court of Appeal. The implication is that the judgment of arbitral tribunal is equivalent to that of a High Court. Until a replica provision by way of amendment to Arbitration Act, investors' confidence will continue to decline and Nigeria continues to lose wealth due to transfer of investors' capitals.

[26] In cases where the claimant is challenging the arbitral award see s. 62.4.
[27] S. 62.6.

7.2. Judicial Challenges

"Independence and Impartiality" is an alliterative pairing found in every fibre of judicial imprimatur and human rights treaty, despite, in fact, being disparate concepts with different legal histories. Judicial independence is fundamental to every democracy, both as a guarantor of the separation of powers in the state and of the rule of law. There is an unstated assumption that the role of courts in arbitration is, or should be, different from their everyday role. However, in the case of enforcement of arbitral award, the Nigerian judiciary is fraught with some challenges predicated on judicial impartiality and non-independence. These challenges are serially captured as investors continue to ponder on the uncertainty of the enforcement of arbitral awards in Nigeria:

7.2.1. Impartiality and Neutrality Challenges of Seamless and Quick Dispensation of Commercial Litigations

The results from the 2015 Queen Mary International Arbitration Survey's[28] reflect this sentiment. Respondents to the survey were asked to specify their preferred seats or adjudicatory fora/climes. The five most preferred and widely used seats are London, Paris, Hong Kong, Singapore and Geneva. When asked the reasons why they prefer certain seats to others, the three paramount factors relate to the formal legal infrastructure of the seat-namely:

- impartiality and neutrality of the local legal system
- national arbitration law; and
- track record of enforcing agreement to arbitrate and arbitral awards

It is obvious that following the foregoing survey, the Nigerian judiciary is not listed among the arbitration viable fora/jurisdictions in the

[28] Queen Mary University of London, "2015 International Arbitration Survey Improvements and Innovations in International Arbitration", retrieved from http://www.arbitration.qmul.ac.uk/docs/164761.pdf (accessed 12 April 2018).

world. Some cases to justify the challenges are captured under headings:

7.2.2. Indifference in Upholding Arbitration Agreement and Supporting Arbitral Process

The Nigerian judiciary, which includes judges, is very reluctant in supporting and upholding arbitration because it is believed to be a usurpation of judicial tradition and wrong step in rendering judges "adjudicatory roles". This is demonstrated by a number of cases narrated shortly. In the case of *Imoukhuede* v *Mekwunye & 2 Ors*,[29] a dispute arose out of a tenancy agreement between the parties, which contained an arbitration clause to the effect that disputes were to be referred to a Sole Arbitrator to be appointed by the resident of the "Chartered Institute of Arbitration (London) Nigerian Chapter". "M" issued a notice of arbitration and wrote to the Nigerian Branch of the Chartered Institute of Arbitrators (CIArb) requesting the appointment of a sole arbitrator. CIArb complied with the request. The arbitral proceedings continued, and a final award was made.

"I" challenged the award at the High Court of Lagos State on the ground, among others, that there was no valid arbitration agreement between the parties. The contention was that

There is no body/organization known as THE CHARTERED INSTITUTE OF ARBITRATION (LONDON) NIGERIAN CHAPTER and as such, there cannot be a referral for arbitration to a non-existent body.

The High Court dismissed the challenge. It found that the parties' intention was to refer their disputes to arbitration and that the intended appointing authority was the Chairman of the Chartered Institute of Arbitrators, Nigerian Branch.

However, it is so pathetic and mind boggling that the Court of Appeal reversed the sound and judicial activism of the High Court. The Appeal Court disagreed, it held:

[29] (2015) 1 CLRN 30.

> There is nothing from the processes before the lower court to support the conclusion reached by the lower court that the Chairman of the Chartered Institute of Arbitrators (United Kingdom) Nigerian Branch is the same person as the president of chartered institute of arbitrator London-Nigerian Chapter when the words used, in the agreement are clear and do not in my view admit of any ambiguity. The duty of the courts inclusive of the lower court where the language of an agreement is clear and unambiguous agreement and concurs with same….
>
> If the Parties in this Appeal really intended that any other person other than the President of the Chartered Institute of Arbitrators (London) Nigerian Chapter should be the appointing authority as canvassed by learned counsel for the 1st respondent, surely same would have been explicitly stated in Exhibit B.
>
> It follows therefore that since there is in effect no body/organization known as the Chartered Institute of Arbitration (London) Nigerian Chapter, the clause itself is unenforceable.

With due respect, their Lordships' decision does not demonstrate nor pontificate an understanding of the arbitral process – specifically, the interpretation of pathological arbitration clauses. The decision is quixotic and questionable because of a number of reasons:

First, while Nigerian law enjoins the courts to re-write a contract for the parties, where a term of a contract is open to more than one interpretation, it is appropriate to adopt the interpretation that is most consistent with business common sense[30].

Secondly, the commercial intention of the parties was to submit any dispute arising out of the tenancy agreement to binding arbitration. A mistake in the name of an appointing authority does not derogate from that intention. The clause should have been interpreted to give congruent application to this intention. In any event, Nigerian Courts

[30] *Texaco Oversea (Nig) Pet. Co Unltd* v *Rangk Ltd* (2009) All FWLR (Pt. 494) 1520.

have applied the "blue pencil" rule to invalidate only the offending portion of a contractual provision.[31]

Thirdly, Nigerian Courts recognize that arbitration clauses are to be respected and should be read, and thus construed, as liberally as possible. In *Fidelity Bank Plc* v *Jimmy Rose Co. Limited*, the same Division of the Court of Appeal (though presided over by a different panel of Justices) held:

> The position of the law is that whether or not the arbitration agreement is a document signed by the parties as envisaged by Section 1(1) (a) of the Arbitration and Conciliation Act … or discoverable from their correspondences as per Section 1(1) (b) thereof, the essential prerequisite is that it must be precise and unequivocal. The court will hold such an agreement to be unequivocal if the word used is neither permissive nor discretionary. (Emphasis added)
>
> Courts of law have inherent jurisdiction to decide disputes between parties, but where the parties by their own agreement opt for arbitration the courts will always respect such agreements and decline jurisdiction. (Emphasis added)
>
> For courts to accept and recognize an agreement as an arbitration agreement it must be precise and mandatory… The agreement will be held to be mandatory and unequivocal if it contains the mandatory word "shall" and not the permissive and discretionary "may". (Emphasis added)

I commend the rationale of the respective Courts in *Fidelity Bank* v *Frontier Oil*. The primary focus of the Courts should be to determine whether the parties have a real intention to submit their dispute to arbitration. That intention crystallizes where the reference to arbitration is mandatory.

To paraphrase the UK House of Lords (as it was then known) in *Premium Nafta Products Limited and others* v *Fili Shipping Company Limited and others* ("Fiona Trust"), where the parties make provision for an

[31] *Idika* v *Uzoukwu* (2008) 9 NWLR (Pt. 1091) 34.

arbitration clause, the interpretation of the said clause should begin with the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their contractual relationship to be decided by an arbitral tribunal.

7.2.3. Judges' Exercise of Restraint of Knowledge and Skills during Activism in Arbitral Award

The Judges are referred to as Law Lords expected to be clothed with knowledge and cognate skills to decide matters in the interest of justice and in accordance to law. However, the Nigerian Judges are not yet there with respect to arbitration flow of telepathy. There is a case that bordered on allowing third parties to intervene in arbitral proceedings:

In the case of *Statoil Nigeria Limited* v *Federal Inland Revenue Service*[32], a dispute arose between Statoil and the Nigerian National Petroleum Corporation (NNPC) as to the interpretation and performance of the Petroleum Sharing Contract (PSC) between the parties. This resulted in arbitration proceedings being instituted by Statoil. The Federal Inland Revenue Service (FIRS) subsequently commenced proceedings against all the parties to the arbitral proceedings seeking to determine whether the Arbitral Tribunal has jurisdiction to determine the subject matter of the arbitration. FIRS' position was that the dispute was based on issues of tax and the interpretation of the Petroleum Profit Tax Act[33] and was not arbitrable as it impacted upon its statutory obligations under the Federal Inland Revenue Act.

Without deciding whether the dispute before the arbitration tribunal was arbitrable, the Court of Appeal held that although FIRS was not a party to arbitration agreement, it could intervene in arbitration proceedings. It held:

> If a party to an arbitral agreement can challenge the jurisdiction of the Arbitral Tribunal, or that the arbitral agreement was ab initio, null and void, what about a person or authority such as the 1st respondent who was not a party to the agreement but complains or that if an

[32] (2014) LPELR 23144 (CA).
[33] Cap. P13, Laws of the Federation of Nigeria, 2004.

> award is eventually made one way or the other is of the view that the proceedings or subsequent award by an arbitral tribunal constitute an infringement of some provisions of the Constitution or the laws of the land or impede her constitutional and statutory functions or powers, would the person be debarred from seeking declaratory remedies or by originating summons? I do not think so. Where there is proved a wrong, there has to be a remedy.

The Court also held that the third party was not required to wait for an award and then seek to set it aside; it could bring independent proceedings to challenge the arbitration proceedings. It held:

> I am of the humble opinion that it will be in the best interest of the 1st respondent not to wait or stand by for the Arbitration Tribunal to complete the proceedings and make an award. 1st respondent has the *locus standi* to act timeously to arrest the situation by a declaratory action or originating summons in a Court of law. Where the claim succeeds, the Court may make a declaration that the arbitral agreement was void ab ignition or that the Arbitral Tribunal lacked the jurisdiction to have entertained the dispute on grounds of constitutional or statutory illegality.

In light of this decision, it appears that a non-party to an arbitration agreement can challenge an award in circumstances where the issue of jurisdiction is raised and where the powers conferred by the Constitution or by statute are contravened or need to be interpreted. This decision highlights the tension between the need for *judicial restraint* under Section 34 of the Arbitration and Conciliation Act and the inclination of the Courts to enforce their constitutional role

The challenges are so fundamental that amendments of the arbitration Act and lacunae of overloading High Court on commercial matter could hardly remove the defects captured:

8.0. LACUNAE OF OVERLOADING HIGH COURT WITH COMMERCIAL MATTERS

Nigerian commercial jurisprudence continues to suffer as slavish appendage of the overloaded jurisdiction of the Federal and State High

Courts. Being the practice in advanced climes, the Nigerian constitution has placed the commercial litigation under a division of the High Court. However, commercial cases have continued to proliferate the High Court dockets for years as captured in the foregone narrative. Due to lack of statutorily independent commercial court in Nigeria, consequences of delay in adjudication of civil and criminal commercial cases are huge and devastating to ease of enforcing contract and doing business in Nigeria. The consequences are captured:

8.1. Loss of Hard-Earned Financial Investments by Investors

Commercial transactions in Nigeria, like every other jurisdiction, are proportionate to time and space. Transactions at the floors of the Nigerian Stock Exchange where financial (service) products involving banking, insurance and securities transactions confluence, react to exigency of time. Foreign exchange trading, equity trading, buying and selling of securities in insurance, and banking are traded with consciousness of time. Future, forward contracts, options and franchise are traded proportionate to timing. Hence, fraudulent trading, insider abuse and other genre of commercial crimes that need urgent investigations and prosecution of erring company or individual on time because of the peculiarity of the market are often remitted in the docket of the Federal High Court to drag for years before they are decided.

The civil litigations involving same keep suffering the same fate. These crimes and commercial torts take months or years before they are finally resolved and the implication is that investors seeking justice are already frustrated and losses procured. This is as a result of complex civil and criminal administrative procedures, frustrations by counsel, deficient cognate knowledge and skills of judges in financial transactions, and unforeseen bureaucratic forces during litigations.

8.2. Lack of Synchronized Commercial Matters Jurisprudence in Nigeria

Jurisprudence is a philosophy or epistemology of law. It is an organic growth or development of each branch of laws with the purpose of using such telepathic experience as guiding principles, promoting knowledge in that branch of law. Unlike every advanced jurisdiction of the world, Nigerian does not have comprehensive and distinct data for decided cases on commercial matters. Nigeria only has terse securities, banking and insurance and other commercial historical narratives without corresponding or sequential law reports specially devoted as Commercial Law Reports. There are lacunae of subject matter commercial law reports to aid facts and evidence in similar/confluence cases. Most of the times, Nigerian lawyers consult foreign and advanced jurisdictions to import their decided cases to support their cases. This is promotion of neo-colonial commercial tort and crime dispensation. Even the few decided commercial cases decided by the Federal High Court are scattered among general law reports and become difficult to locate simply because they are negligible to be separately collated in a distinct law report.

8.3. Further Decline in World Bank Ease of Enforcing Contract in Nigeria

Currently, enforcing commercial contracts of various species in Nigeria is poor and creates uncertainty in the minds of investors because of jurisdiction/forum shopping controversy such as between the Investment and Securities Tribunal and the Federal High Court. It becomes sadder that the there is no statutorily created commercial court let alone of investing same with criminal jurisdiction to quickly adjudicate on all commercial matters. The World Bank Ease of Enforcing Contract continues to see Nigeria as one of the dangerous and insecure jurisdictions for commercial investors to commit their investments. This is because commercial (crime) cases take longer time in the High Court docket and that statutorily specialized court on the commercial subject matter does not exist in Nigeria. It is a business norm/axiom that investors, even countries rely on the World Bank Index to choose where to commit their portfolios. As it is, Nigeria is a doubt.

8.4. Increase in Financial Crimes and Torts

This is a direct experience anywhere when administration of criminal and civil justice is slow or subject to manipulations by the offenders/felons, and there is indulgence in civil procedural schemes and frivolous injunctions and adjournment. On daily routine in Nigerian commercial markets, crimes and torts are committed with impunity. This is because the wheel of justice is slow, uncoordinated and easily manipulated. Many times, the purpose would have been defeated before the cases were decided. This is because the appropriate court that has subject matter jurisdiction, the Federal High Court does not border about the exigency of the market and thought in the mind of investors.

8.5. Repatriation/Capital Flight of Investment Portfolios from Nigeria

This is becoming obvious as the investors who were already in the market are gradually repatriating their investments to other jurisdictions to continue their business. The release being heard at interval regarding the outflow of investments from the shore of Nigeria is alarming as investors continue to doubt the certainty of enforcing their contracts and getting justice in court against those felons who aim at defrauding them.

9.0. RECOMMENDATION

9.1. Advocacy for Statutorily Independent Commercial Court

A prompt and structured judicial architecture is a pillar and prospect of enforcing commercial contract anywhere in the world. This is necessary particularly in a developing economy like Nigeria where commercial arbitrations are circumvented, and the High Courts' dockets are overloaded with commercial cases, despite the creation of commercial litigation divisions for administrative ease of commercial cases disposal. Hence, this article advocates for a legislative piece setting up commercial court:

9.2. Epistemology of the Proposed Commercial Court

The word "epistemology" simply connotes theory of knowledge about a particular field or taxonomy of idea on interpretations, analyses or logical schema about a study. The science of epistemology is a way of investigating our human ways of knowing, with particular reference to how words obtain their various species of meanings.

9.3. Constitutional Provision for the Proposed Commercial Court

The need for reasonable commercial certainty about the content of commercial law and jurisprudence is central to the operation of the economic system Nigeria and the world. Without it the outcome of commercial transactions becomes speculative and this is a disincentive to trade. Jurisprudence of independent commercial court which is constitutionally value-chained will introduce level of certainty into aspects of the law of contract and commercial law generally. This would save commercial litigation from the scheme of Arbitration Filibuster, where commercial matter litigants leverage on arbitration weaknesses to frustrate enforcement of arbitral awards that occasion huge commercial loss.

In taking the commercial matters from the crisis of delay and enforcement of contract whereby superficial and quixotic divisions of commercial courts are attached to the exclusive jurisdiction of the traditionally over bloated High Courts, constitutional imprimatur is exigent particularly of Sections 6 (5) to include Commercial Court among the list of the superior courts and conferred on it all the rights, functions, privileges and benefits enjoyed by the Federal High Court outlined in Section 81 of the 1999 Constitution. Constitutionalism is a pillar of jurisprudence, judicial functionalism and investment activism. Speed in adjudication of commercial matters is guaranteed under a specialized constitutionally sanctioned commercial court having judges with commercial training and business *cognito.*

9.4. Appointments of the Proposed Commercial Court Judges

Appointments of the proposed Nigerian Commercial Judges should follow the same process as it stands for other superior courts in

Nigeria. For example, it should follow the Federal High Court Judges' appointments which are constitutionally provided for under Section 250 (1-5). The person for the Office of the Chief Judge of the Commercial Court is recommended from the National Judicial Council (NJC), being the regulatory body for the nation's Judiciary, to the Presidents for appointment subject to the confirmation of the National Assembly. This procedure is wisely provided for to avoid abuse of powers and stifling of the nation's Judiciary by the Executive. All other Judges of the Commercial Court are recommended by the National Judicial Council (NJC) for appointment by the President with the confirmation of the National Assembly. At the Federating Units, the same procedure is recommended.

9.5. Salaries Structure of the Commercial Court Judges

The salaries of the Commercial Court Judges are paid to the regulatory head of the Judiciary, that is, the National Judicial Council under the Chairmanship of the Chief Justice of Nigeria for onward disbursement to the Federal Judges and the same goes for the State. Judicial funds and salaries are got from the Appropriation Act and are drawn from the Consolidated Revenue Fund. The philosophy behind this is to guarantee the independence of the Judiciary from the Executive as espoused in the context of separation of powers among the three organs of Government. As it is today, the Nigerian Federal Judges are financially and functionally independent from the Executive so as to enhance impartiality, equity and natural justice in dispute resolution. This architectural financial functionality would enhance impartiality and speedy dispensation of commercial litigations.

9.6. Jurisdictional Architecture of the Proposed Commercial Court

Upon capturing the Commercial Courts in detail under the genres of courts as established and alluded to under Section 6 of the 1999 Constitution. Generally, the Commercial Court would have exclusive trial jurisdiction over any action or proceeding for declaration or injunction affecting the validity of any commercial matters. Being a specialized Court on commercial matters, the Commercial Court should, *in extenso,* be clothed with exclusive jurisdiction in civil and

criminal causes and matters arising from the operation of various commercial laws, agreements and activities.

9.7. The Statutory, Practical and Functional Architecture for Proposed Specialized Commercial Court (CC) in Nigeria

The legal infrastructure and regulatory deficit confronting efficient and quick dispensation of commercial litigations are hereby architecturally redressed. The Nigerian National Assembly needs as a matter of urgency to enact Commercial Court Act (CCA) as a follow up to the proposed amendments of the Nigerian Constitution to allow commercial court to commence operation according to its mandate. The new legislative piece should confer on the Commercial Court all the powers, functions, duties, privileges and rights being enjoyed by the Federal High Court. One of the hallmarks of independence judiciary is financial autonomy and total adherence to the principle of separation of powers as espoused by Montesquieu.

As an abstract principal, judicial independence ranks high in our constellation of democratic values-right up there with freedom of speech, the sanctity of the home, and the right to counsel. And well it should, since all other rights would be diminished, perhaps even forfeited, in the absence of judges capable of resisting the will of government or the pressure of popular sentiment. It is the independent judge, loyal only to the rule of law, who protects our constitutional liberties, who ensures fairness, and who stands guard against the excesses of those in power.

As Justice Jackson observed at the height of the Cold War and the depth of the McCarthy era:

> Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-

> law procedures than under our substantive law enforced by Soviet procedural practices[34]

In other words, freedom rests upon the application of the law at least as much as it does upon the precise content of the law. In turn, application of the law rests upon the existence of judges who are unconstrained by other forces – who are, as we say, independent. It is so much for the high-minded civics lesson. The concrete story of judicial independence is acted out more in the trenches than in the pages of the law journals or political science texts. Real-life intrusions on judicial independence come in many forms and at every level. Although these intrusions occur most often when a judge does something notably unpopular or controversial, it would be a mistake to believe that judicial independence is threatened only by demagogues or Neanderthals. Rather, the dangers may come from any number of directions, some more subtle than others.

9.8. Exigency for Legislative Proposal of Administration of Civil Justice (Procedure) Act (ACJA)

It is a common legal pontification that justice delayed is justice denied. Nigerian administration of civil justice is too slow that civil litigations drag for years before they are disposed of. Various stakeholders in the administration of justice such as litigants, defendants, their counsel and corrupt judges leverage on the weak justice system to frustrate quick disposal of commercial litigations. Nigeria has continued to decline in the rung of Enforcement of Contract Index being released by the World Bank on yearly basis. Hence, there continues to be exodus repatriation of investment portfolios into other jurisdictions with efficient enforcement of contracts.

However, this can be addressed by fixing the statutory lacunae of frivolous injunctions, judicial industrial actions, justice buying and provocative adjournment of cases. The quick passage of Administration of Civil Justice (Procedure) Act (ACJA) will fix the lacunae. Most importantly, corporate transactions and businesses must not be tied down by intrigues being played out by players in the

[34] *Shaughmessy* v *United States* **ex** *rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

court of justice to frustrate commercial litigations. The proposed Act should block all judicial administrative intrigues, and look into advanced economies to import their viable jurisprudence and replicate them in our laws. This Justice Act would immensely complement efficient and quick mandate of the Commercial Court. The result of the workings will open Nigerian business ecosystem to massive investment portfolios and the economy would grow.

10.0. CONCLUSION

This article has detailed the essence and benefits of establishing commercial court with civil and criminal jurisdictions in Nigeria. The major benefits are that investors' confidence is secured, our criminal and civil commercial jurisprudence becomes synchronized and accessible, ease of doing business in Nigeria becomes guaranteed to the investors, and Nigeria can then have comprehensive Criminal Financial Services Law Reports and Civil Financial Services Law Reports. The essence of subject matter law reports aids easy citation of decided cases to aid evidence. Also, subject matter law reports enhance academic ratiocination, analyses, debates and practical discuss to grow commercial jurisprudence in Nigeria. It is believed that following the proposals suggested commercial investment pools into the Nigerian economy will be massive.

A REVIEW OF THE NIGERIAN CORRECTIONAL SERVICE ACT 2019

Chidubem Ezeilo and Princewell Akinseye-George*

ABSTRACT

Nigerian Correctional facilities fall short of the approved standard for the rehabilitation and reformation of inmates. The Standard Minimum rules for the treatment of Prisoners as adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955[1] sets out rules that preserve the rights of prisoners. According to the Controller-General, the facility built in 1955 to shelter 800 inmates now holds about 3,113 inmates as at December 3, 2019.[2] The newly signed Nigerian Correctional Service Act may foster the desired change in the system if it takes effect in practice.

1.0. INTRODUCTION

On August 14, 2019, President Muhammadu Buhari signed the Nigerian Correctional Service Bill into law. Many circumstances necessitated and led to the signing of the bill; such as the dilapidated and congested nature of the facilities. For instance, as at August 2018, the Port Harcourt prison built in 1918 and designed to shelter 800 inmates now accommodates 5,000, while Kirikiri Maximum Prison in Lagos built to hold 956 inmates has become home to 2,600 inmates.[3] Poor feeding of inmates, lack of adequate medical care for inmates due to lack of requisite facilities and the lack of recreational and vocational training for inmates are also contributing factors.

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[1] Approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 197.

[2] O. Ramon, "PRAI Sues FG Over Electrocution of Ikoyi Inmates", available at https://punchng.com/prai-sues-fg-over-electrocution-of-ikoyi-inmates/ (accessed 15 June 2020).

[3] O. Agede and S. Agiobu-Kemmer, "Reforming Nigerian Prisons beyond Name Change", available at https://guardian.ng/saturday-magazine/cover/reforming-nigeria-prisons-beyond-name-change/ (accessed 27 December 2019).

Prior to the Nigerian Correctional Service Act 2019 (NCSA), the Nigerian Correctional Service was regulated by the Prisons Act of 1972.[4] Because the regulation on the law of prisons is an item under the Exclusive Legislative List,[5] states that desired to make changes to the administration of their correctional facilities were constitutionally barred from doing so. The main aim of the Prisons Act 1972 was to provide a body of rules for the comprehensive administration of prisons in Nigeria and the careful management of the correctional facilities created for individuals who violated the laws of the States and the Federation.

The ideal prison system seeks to deter those who would otherwise commit crimes and reduce the probability that those who serve a prison sentence will reoffend[6] after their release. The extent to which the Prisons Act of 1972 executed its projected mandate was a subject of controversy. A casual observation of the population that goes in and out of the prisons in Nigeria presupposes that there are some problems in the system. Hence, the prisons system has not been able to live up to its expected role in Nigeria[7] in terms of impacting positively on the lives and vocations of inmates. This has raised several questions which have not been addressed.

Thus, the pertinent questions are:

1. Has the wording of the NCSA 2019 improved correctional detention in Nigeria by providing for a system capable of delivering retribution, deterrence, incapacitation and rehabilitation?
2. Do the provisions of the NCSA 2019 lay the foundation for a correctional service system that meets international best practices?

[4] Prisons Act 1972, Cap. P29, Laws of the Federation of Nigeria, 2004.
[5] Item 48 of the Exclusive list as contained in the Second Schedule to the 1999 Constitution.
[6] "Corrections shall be the Primary Goal of the Correctional Service": Nigerian Correctional Service Act (NCSA) 2019, s. 10.
[7] E.E. Obioha, "Challenges and Reforms in the Nigerian Prisons System" (2011) 27(2) *Journal of Social Sciences*, pp. 95 – 109.

2.0. HAS THE WORDING OF THE NCSA 2019 IMPROVED CORRECTIONAL DETENTION IN NIGERIA BY PROVIDING FOR A SYSTEM CAPABLE OF DELIVERING RETRIBUTION, DETERRENCE, INCAPACITATION AND REHABILITATION?

The intent of the NCSA 2019 is made clear in its name as the Act sets out that the Nigerian Prison administration will now be known as the Nigerian Correctional Service as opposed to its previous name the "Nigerian Prisons Service". Additionally, section 2(1)(a) of the Act[8] sets out that its objective(s) is for the Nigerian Correctional Service to fully comply with international Human Rights standards.

The flavour of the Act and its avant-garde approach will not be surprising to contemporary Nigerian Scholars and the proponents of the Act. This is because the provisions of the Act take a considerable leap forward from the 1972 Prisons Act by making applicable nationwide significant correctional service innovations first outlined in the Administration of Criminal Justice Act 2015.

Part II of the Act makes provision for a Nigerian Non-Custodial Service system; an internationally recognised form of reformative justice defined in the Act as "an aspect of Nigerian Correctional service that serves as an alternative to going to a custodial Centre".[9] Section 37(1) of the Act[10] states that:

The Nigerian Non- Custodial Service shall be responsible for the administration of non-custodial measures including:

a. Community Service;
b. Probation;
c. Parole;
d. Restorative Justice Measures; and
e. Any other Non-Custodial Measures assigned to the Correctional Service by a Court of competent jurisdiction.

[8] NCSA 2019, s. 2(1)a.
[9] NCSA 2019, s. 46.
[10] NCSA 2019, s. 37(1).

Section 42 of the Act[11] bolsters section 37 by putting into perspective the procedure for managing community service sentences. It provides for the appointment of supervisors to monitor those sentenced to community service, the submission of reports by the appointed supervisors to the Comptroller-General and also makes provision for the conversion of sentences of eligible offenders serving punishment of imprisonment imposed on them within the last six months of the coming into force of this Act, to community service, upon formal application.

The provisions of the above section 37 and 42 align with the position of the already in force Administration of Criminal Justice Act 2015.[12] Section 460 (2) and (4) of the Administration of Criminal Justice Act 2015[13] provides thus:

> The Court may, with or without conditions, sentence the convict to perform specified service in his community or such community or place as the court may direct.
>
> (4) The Court, in exercising its power under subsection (1) or (2) of this section shall have regard to the need to:
> a. Reduce congestion in prisons;
> b. Rehabilitate prisoners by making them to undertake productive work; and
> c. Prevent convicts who commit simple offences from mixing with hardened criminals.

The inclusion of provisions which provide for the establishment of a community service program in both the Administration of Criminal Justice Act 2015 and the Nigeria Correctional Service Act 2019 makes plain the progressive intent of the Nigerian Legislation on issues pertaining to Restorative Justice. In the same vein, section 43 of the NCSA[14] departs from the conservative nature of the preceding

[11] NCSA 2019, s. 42.
[12] The Administration of Criminal Justice Act (ACA) 2015 is by default enforceable in the Federal Capital Territory only and becomes applicable in states upon ratification.
[13] ACA 2015, s. 460 (2) and (4).
[14] NCSA 2019, s. 43.

Prisons Act 1972, in providing for restorative justice measures such as victim-offender mediation. The inclusion of provisions which are designed to address the needs of crime victims while ensuring that offenders are held accountable for their offences such as victim-offender mediation had originally been recommended to the members of the United Nations by the United Nation's Office on Drugs and Crime in its 2006 Handbook.[15]

The Handbook set out three basic requirements that must be met before victim-offender mediation can be used; the offender must accept or not deny responsibility for the crime; both the victim and the offender must be willing to participate; both the victim and the offender must consider it safe to be involved in the process.[16] Comparatively, section 43 of the Act states:

(1) The Controller-General shall provide the platform for restorative Justice Measures including:
(a) Victim-Offender Mediation;
(b) Family Group Conferencing;
(c) Community mediation; and
(d) Any other Mediation activity involving victims, offender and, where applicable community representatives.

The strength of these provisions is increased by section 43(2) of the Act which provides that the correctional service measures set out in section 43 of the Act may be applied at any stage in the criminal proceedings even after imprisonment.

In its forward-looking nature, the Act in section 40 provides for the administration of a parole process to be overseen by the Comptroller-General. Of importance is subsection (c) of section 40, which sets out that, included in the administration process of parole is the rehabilitation and reformation of parolees. This is a landmark innovation in Nigeria as there is now a provision for the temporary or

[15] United Nations Office on Drugs and Crime, "Handbook on Restorative Justice Programmes", available at https://www.un.org/ruleoflaw/files/Handbook%20on%20Restorative%20Justice%20Programmes.pdf (accessed 27 December 2019).
[16] *Ibid*, at Ch. 1, S. 2.3, P. 18.

permanent release of a prisoner before the expiry of a sentence, on the promise of good behaviour. This is a much-needed development that would help control the well-known congestion challenges faced by the Nigerian Correctional Service. Although the Act does not set out provisions guiding the day to day administration of its innovative reformative justice sentencing, resort can be made to a host of guidelines and handbooks provided by the United Nations and other Common Law Nations which already have these reformative justice sentencing procedures in place.[17]

3.0. DO THE PROVISIONS OF THE NIGERIAN CORRECTIONAL SERVICE ACT 2019 LAY THE FOUNDATION FOR A CORRECTIONAL SERVICE SYSTEM THAT MEETS INTERNATIONAL BEST PRACTICES?

Section 2(1)(a) of the Act set out that the objective of the Nigerian Correctional service is to inter-alia "be in compliance with international Human Rights standards".[18] The International community, through the United Nations, has made it clear to member States of the United Nations that the humane treatment of every person is essential. Prisoners, whether they are convicted of violent crimes or not, are included in this Agenda and are entitled to basic Human Rights. Member States of the United Nations, including Nigeria, have signed and ratified international treaties, conventions, covenants and rules confirming these rights. Among the most important are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. The main thrust of all such conventions as they relate to prisons is simple; they state the following:

[17] Penal Reform International, "Making Standards Work: An International Handbook on Good Prison Practice", available at https://www.penalreform.org/resource/making-standards-work-international-handbook-good-prison-practice/ accessed (24 December 2019).
[18] NCSA 2019, s. 2(1).

> Regardless of circumstances, all human beings have fundamental human rights. They cannot be taken away without legal justification. People held in lawful detention or in prison forfeit for a time the right to liberty. If they are in unlawful detention or imprisonment, they retain all rights, including the right to liberty.[19]

In order to examine the compliance of the Act with this mandate, it is necessary to review the exact provisions of this Act that brings Nigeria closer to achieving international compliance and lays the foundation for a Correctional service free of human rights contraventions. Apart from the forms of non-custodial sentencing and sentencing review programs laid out above, the provisions of the Act which immediately come to mind are sections 12 and 14.

Section 12 (1) (c) of the Act 2019 states:

> Where an inmate sentenced to death has exhausted all legal procedures for appeal and a period of 10 years has elapsed without the execution of the sentence; the Chief Judge may commute the sentence of death to life imprisonment.[20]

This section of the Act was laid down to solve the problem of State Governors in Nigeria failing to sign the warrant of execution. Amnesty International on the issue stated that "there were no fewer than 2,285 death row inmates languishing in different prisons across the country, noting that in 2017 alone, a total of 621 persons were sentenced to death by the Courts with no governor willing to sign their death warrants.[21] Worse off is the fact that the inmates are kept in dehumanising conditions as they are "awaiting execution". An advocacy group HURILAWS (Human Rights Law Service) reported that most death row cells are seven by eight feet, shared by three to five people; the cells are dark and are with hardly any ventilation;

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[19] *Supra* n 11.
[20] NCSA 2019, s. 12(1)(c).
[21] O. Ramon, "No more justification for death sentence in Nigeria", available at https://punchng.com/no-more-justification-for-death-sentence-in-nigeria-group (accessed 20 September 2019).

Prisoners use buckets as toilets and sleep on the bare floor.[22] This ongoing maltreatment of inmates awaiting the execution of their death sentence is now mitigated by section 12(1)(c) of the Act 2019. Inmates who have been awaiting execution of their death sentence for up to 10 years and have exhausted all legal procedures for appeal can now hope that the Chief Judge of the state is disposed to commuting their sentence of death to life imprisonment. This is a welcome development; however, the requirements of "10 years" awaiting execution and exhausting all appeal procedures could still be further mitigated.

Section 12(8) of the Act deals with the problem of prison congestion,[23] which has plagued the Nigerian Correctional Service administration for decades. Most prisoners are kept in old and sometimes damaged structures. Over the past decade, there has been a steady rise in the Nigerian prison population; by July 1990, the average monthly inmate population was 54,000 while the total prison capacity was only 31,000, resulting in an overcrowding figure of 74.2 per cent.[24] To tackle this problem which previous legislations failed to tackle, section 12(8) of the Act provides that:

> The state Comptroller of Correctional Service in conjunction with the Correctional Centre Superintendent shall have the power to reject more intakes of inmates where it is apparent that the Correctional Centre in question is filled to capacity.[25]

Section 12(11) of the Act in support of section 12(8) states that a state Comptroller of correctional service shall be sanctioned if he, within one week of discovery fails to notify, inter alia, both the Chief Judge and Attorney General of the State when the custodial center approaches full capacity.

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[22] C. Okeke "HURILAWS Statement on World Day against the Death Penalty 2019", available at https://hurilaws.org/hurilaws-statement-on-world-day-against-the-death-penalty/ (accessed 25 September 2019).
[23] NCSA 2019, s. 12(8).
[24] A.R. Grace (PhD), "An Assessment of Prison Overcrowding in Nigeria: Implications for Rehabilitation, Reformation and Reintegration of Inmates" (2014) 19(3) *Journal Of Humanities And Social Science*.
[25] *Supra* n 22.

Section 14 of the Act, unlike section 12 attempts to solve existing problems in correctional service administration, provides for the reformation and rehabilitation of inmates. Section 14(1) of the Act states that "the Correctional service shall provide opportunities for education, vocational training, as well as training in modern farming techniques and animal husbandry for inmates".[26]

Similarly, Subsection (5) of section 14 states that

> The Correctional Service may recommend for issuance of certificates of good behaviour upon discharge to an inmate who had demonstrated good conduct, including those who have acquired training through formal and informal education aimed at facilitating their reintegration into society.[27]

4.0. CONCLUSION

The Correctional Service Act 2019 will protect and preserve the rights of inmates in line with international standards in ways that no Nigerian legislation has been able to. For instance, section 25 of the Act makes provision for an unforeseen case where an inmate diagnosed of a particular illness which cannot be taken care of within the center, is taken to a hospital on the instruction of the Superintendent. Whilst officials of the Nigerian Correctional Service are advised to fully comply with the basic protective measures against the novel coronavirus to ensure the safety of inmates, it is laudable that there may be no need to further make legislations to cover the subject of the prevailing pandemic as it affects the Nigerian Correctional Service owing to the detailed nature of the Correctional Service Act 2019. The need for social distancing as a measure to curb the transmission of the deadly Coronavirus as advised by the World Health Organisation makes it even more necessary for the relevant institutions in Nigeria to consciously see to the decongestion of prisons in line with the spirit of section 12 of the Correctional Service Act. The said section stipulates the measures and procedures for decongestion of prisons.

[26] NCSA 2019, s. 14(1).
[27] Supra note 25, s. 14(5).

The Act is indeed a lighthouse for bold, groundbreaking and problem-solving legislation which seek to ensure adherence to international best practices. The efforts of Victor Ndoma-Egba of the sixth assembly who first presented the bill to the senate in 2008 (11 years ago) are laudable and must not be forgotten.

ARREST OF SHIP IN NIGERIA: DIFFERENT PERSPECTIVES AND THE SCOPE OF MARITIME CLAIM

Prince Nwafuru*

ABSTRACT

The subject of ship arrest is one that often piques the interests of stakeholders in maritime industry not only because of its peculiar relevance to maritime claimants but more importantly for the reason that when a ship is arrested, a lot of interests are at play. Typically, the stakeholders whose interests may be on the line range from shipowners, carriers, operators, cargo-owners, charterers, crew members, banks amongst other interests. It is therefore expected that the subject of arrest should be viewed more broadly beyond the limited audience of lawyers and their clients. The existing literatures on the subject suggest an undue emphasis on judicial arrest without the corresponding explanation (even briefly), of the other notion of arrest in maritime lexicon. This op-ed though not attempting to foray deeply into the subject of non-judicial arrest, is however, acknowledging the different perspectives from which the concept of arrest may be viewed.

1.0. INTRODUCTION

It is safe to state that ship is the most important asset in the maritime industry, and it comes as no surprise that the subject matter of arrest often revolves around her. Presumptuous as it may sound, the term "arrest of ship" is often taken to mean the judicial arrest. Thus, unless context is offered, the tendency is to presume that all reference to arrest within maritime lexicon is judicial arrest forgetting that the phrase could also lend itself to other meanings not related to admiralty action *in rem*. Relatedly, the subject matter of admiralty action *in rem* is not limited to ship as the Admiralty Jurisdiction Act, 1991[1] (hereinafter referred to as "AJA") talks of "ship" or "property" or

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[1] Admiralty Jurisdiction Act (AJA) 1991, Cap. A5, Laws of the Federation of Nigeria, 2004, s. 5(2) and (3).

"other property…." In this essay, the writer amongst other things seeks to briefly highlight the different perspectives that the phrase "arrest of ship" is often used and also attempt to take the readers through the labyrinth of what constitute maritime claims for the purpose of *in rem* action.

2.0. THE CONCEPT OF ARREST

The author has been asked a couple of times whether a ship can only be arrested with a court order? Definitely, the answer is "No" as the maritime laws confer the power of arrest on regulatory authorities and we shall see how such power can be exercised vis-à-vis the judicial arrest. To buttress the point, the tripodal terms "detain", "forfeit" and "arrest" are often employed interchangeably in the maritime statutes in describing non-judicial arrest, and to mean the seizure of ship. More so, there is no definition of "arrest" under the AJA. Semantically, to "detain" and "arrest" are similar in meaning and effect is the confinement or keeping in custody of the subject matter.

The point being made is that the arrest of ship can be viewed from either judicial or administrative-cum-statutory perspectives. The 1952 Arrest Convention[2] defines "arrest" to mean "Any detention or restriction or removal of a ship by order of Court to secure a maritime claim but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument."[3] The Federal Agencies such as Nigerian Maritime Administration and Safety Agency (NIMASA), Nigerian Port Authority and the Nigerian Navy have statutory powers to arrest and detain ships and the grounds for such arrest may relate to the sea worthiness of the ship or involvement in maritime offences. The Merchant Shipping Act, 2007

[2] Nigeria is a party to this Convention and the AJA is mirrored after it. Nigeria is not yet a party to the 1999 Arrest Convention which is an updated version of the 1952 Arrest Convention. However, the Admiralty Jurisdiction Rules, 2011, appears to have proactively adopted some of the principles in the 1999 Arrest Convention.

[3] International Convention Relating to the Arrest of Sea-Going Ships 1952, Article 2.

and NIMASA Act, 2007 both confer powers on NIMASA to arrest and detain ship in furtherance of its statutory powers.[4]

The exercise of judicial and statutory powers of ship arrest by the respective institutions is capable of presenting a conflict situation and section 15 of the AJA in attempt to resolve that possible conflict provides as follows:

> (1) Where a law, other than this Act, confers on a person a power to detain a ship: -
>
> (a) If the ship is under arrest under this Act, the power to detain the ship shall not be exercised;
>
> (b) The exercise of the power to detain the ship shall not prevent the arrest of the ship under this Act.
>
> (2) If a ship that has been detained under such a power as is mentioned in subsection (1) of this section, is arrested under this Act, then, by force of this subsection, the detention shall be suspended for so long as the ship is under arrest.
>
> (3) If a ship that has been detained pursuant to a civil claim or would, but for paragraph (a) of subsection (1) of this section, be liable to be detained under such a power, is arrested and sold under this Act, then, the civil claim shall, unless the Court otherwise directs, be payable in priority to any claim against the ship other than the claim of the Admiralty Marshal for expenses.

As clear as the provisions of sub-sections (1) and (2) of section 15 of AJA may appear, it is yet to be seen how the practical application will

[4] See, for instance, s. 23(5)(b) & (j) of the NIMASA Act which gives the Agency the power, inter alia, to enter, examine, search, seize and detain any vessel within the Nigerian maritime zone. Subsection (5)(e) of the same section also gives NIMASA the right of hot pursuit which under United Nations Convention on Law of the Sea (UNCLOS) and International customary law is the right to pursue and arrest an offending ships escaping to international waters as long as there is inter alia a reasonable ground to believe that the pursued ship has violated the State's laws. See also the provisions of Cabotage Act and Regulations as well as the Merchant Shipping Act (MSA) which contain powers of arrest, detention and forfeiture of ships by Maritime security agencies.

pan out particularly considering the high-handedness of our law enforcement agencies in asserting and guarding their power of arrest and detention generally. Being an uncharted part, it will be interesting to see how it will play out in practical sense. For instance, where the Nigerian Navy arrests and detains a ship on allegation of say, oil bunkering and a claimant who has a maritime claim against the res subsequently obtains an order of arrest in respect of the same ship. Going by the literal wording of section 15(1)(b) of the AJA, NIMASA or any other Federal Agency's power to detain such a ship should not prevent the judicial arrest. It is submitted that the legislative intent is to make a court-ordered arrest in maritime claims override the arrest and detention by security or maritime agencies. Any contrary interpretation will produce an absurd result and render toothless the pre-judgment security available to maritime claimants. What is not clear, however, is whether the judicial sale of a ship in satisfaction of maritime claim can be exercised in respect of ship under detention pursuant to the foregoing section. Given the global importance attached to judicial arrest and the pre-judgment security it affords to claimants, it remains to be seen how the Court would approach this issue.

3.0. THE SUBJECT-MATTER OF *IN REM* ACTION – SHIP AND OTHER PROPERTY

The AJA used the phrase "ship or other property" in reference to the res that may be the subject of *in rem* actions.

The AJA defines "ship" to mean "a vessel of any kind used or constructed for use in navigation by water, however it is propelled or moved and includes- (a) a barge, lighter or other floating vessel, including a drilling rig; (b) a hovercraft; (c) an off-shore industry mobile unit; and (d) a vessel that has sunk or is stranded and the remains of such vessel, but does not include a vessel under construction that has not been launched." Beyond the subject of ship which is by far, the commonest res in arrest proceedings, *in rem* jurisdiction can also be exercised against other maritime property such as cargo, bunkers and freight. For instance, as it relates to freight, an *in rem* action may be brought against freight that is unpaid (destination freight) and where the freight is subject to a maritime lien. A maritime lien attaches to a

freight in cases of salvage, damage, bottomry and wages disbursements.[5] It has been argued that the maritime lien on freight is parasitic because it is dependent on there also being a maritime lien on a ship that carried the freight.[6] Thus, the fact that "ship" is not the only subject of *in rem* action is clearly suggested in the phrase "other property" used in the AJA. However, in practice, it appears maritime claimants often prefer to go after ship, as the law and procedure appear much clearer on the subject than it is in respect of other maritime properties.

4.0. SCOPE OF MARITIME CLAIMS

The admiralty jurisdiction of the Federal High Court as it relates to action *in rem*, is circumscribed within the maritime claims specified under the AJA[7]. The decision to commence an *in rem* action should be preceded with a consideration of the scrutiny of the cause of action. The reason is not far-fetched being that it is only the maritime claim that can confer jurisdiction on the Court to make an order for the arrest of ship. Unfortunately, there have been instances where claims have been disguised as maritime claims either deliberately in order to deviously obtain an arrest order or out of ignorance of the practice and laws on the subject. The need for caution cannot be over-emphasized for several reasons. First, a litigant who obtains the arrest of ship wrongly and without the underpinning maritime claim stands the risk of damages for wrongful arrest. Unlike the common law

[5] See *The Orpheus* (1871) L.R. 3 A. & E. 308.
[6] *Ibid* – Also see *The Castlegate* (1893) AC 38 (HL).
[7] Note that by virtue of s. 1 of the AJA the admiralty jurisdiction of the Federal High Court is wider than the maritime claims under s. 2. The admiralty jurisdiction also extends to application by ship owner or aircraft operator for limitation of amount of his liability under the MSA, any claim for liability incurred for oil pollution, matters arising from shipping and navigation on inland waters under Cabotage Act, any banking or letter of credit transaction involving importation or exportation of goods in ship or aircraft, any action involving NPA, NIMASA and other maritime authorities, any criminal cause or matter arising from the afore-stated admiralty matters. By s. 1(2) of the AJA, the admiralty jurisdiction of the Court in respect of carriage and delivery of goods extends from the time the goods are placed on board a ship for the purpose of shipping to the time the goods are delivered to the consignee or whoever is to receive them, whether the goods were transported on land during the process or not.

principle established in *The Evangelimos case*[8] which requires proof of bad faith or mala fide in wrongful arrest claim, the Nigerian law under the AJA is a bit more liberal as all the Defendant, who seeks damages for wrongful arrest, needs to show is that the arrest was unreasonable and without good cause. Second, due to the huge capital-intensive nature and cost associated with ship operations, arrest of ship often exposes maritime stakeholders to unwarranted costs. As noted above, a lot of interests are usually at stake in shipping business – the ship owner, the charterer, the carrier, the crew, the cargo owner, the Bank that financed the importation of the cargo, the mortgagee of the ship in question, etc. These stakeholders stand to lose when a ship is detained for longer than required due to arrest. It is the writer's suggestion that judges should scrutinize the underlying substantive claim before granting an arrest order.

Maritime claim is broadly classified into a proprietary maritime claim and a general maritime claim[9]. In comparison, proprietary maritime claims are fewer in number and relate to claims directly affecting the ship or res in question such as claims for (i) possession of a ship; (ii) title or ownership of a ship or of any share therein; (iii) mortgage of a ship or of any share therein; (iv) mortgage of a ship freight (v) relating to operation or earning of a ship; (vi) for interest in respect of the afore-stated claims.

Section 2(2)(c) of AJA extends proprietary maritime claim to a claim for the satisfaction or enforcement of a judgment given by the Court or any court (including a court of a foreign country) against a ship or other property in an admiralty proceeding *in rem*.

By section 2(3) of the AJA, a reference to a general maritime claim is a reference to

(a) a claim for damage done by a ship, whether by collision or otherwise;

(b) a claim for damage received by a ship;

[8] *The Evangelismos* (1858) 12 Moo. P.C. 352.
[9] *Messrs. Nv. Scheep & Anor* v *The MV "S.araz" & Anor* (2000) LPELR-1866(SC).

(c) a claim for loss of life or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship;

(d) subject to subsection (4) of this section, a claim, including a claim for loss of life or personal injury, arising out of an act or omission of- (i) the owner or charterer of a ship; (ii) a person in possession or control of a ship; (iii) a person for whose wrongful act or omission the owner, charterer or person in possession or control of the ship is liable;

(e) a claim for loss of or damage to goods carried by a ship;

(f) a claim out of an agreement relating to the carnage of goods or persons by a ship or to the use or hire of a ship, whether by charter-party or otherwise;

(g) a claim relating to salvage (including life salvage of cargo or wreck found on land);

(h) a claim in respect of general average;

(i) a claim in respect of pilotage of a ship;

(j) a claim in respect of towage of a ship or an aircraft when it is waterborne;

(k) a claim in respect of goods, materials or services (including stevedoring and lighterage service) supplied or to be supplied to a ship for its operation or maintenance;

(l) a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched);

(m) a claim in respect of the alteration, repair or equipping of a ship or dock charges or dues;

(n) a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of any kind, in relation to a ship;

(o) a claim arising out of bottomry;

(p) a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship;

(q) a claim for an insurance premium, or for a mutual insurance call, in relation to a ship or goods or cargoes carried by a ship;

(r) a claim by a master, or a member of the crew, of a ship for- (i) wages; or (ii) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including by operation of the law of a foreign country;

(s) a claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried in a ship, or for the restoration of a ship or any such goods after seizure;

(t) a claim for the enforcement of or a claim arising out of an arbitral award (including a foreign award within the meaning of the Arbitration and Conciliation Act made in respect of a proprietary maritime claim or a claim referred to in any of the preceding paragraphs;

(u) a claim for interest in respect of a claim referred to in (a) to (t) above.

As seen above, general maritime claims do not directly affect the ship or subject matter in question. Unlike proprietary maritime claims, general maritime claims arise out of damages done to or caused by the ship, the operation of the ship or any agreement relating to or connected with the ship or use of the ship. The common ground in both categories of maritime claim is the fact that they provide maritime claimants the right to proceed against the arrest the res in action *in rem*.

A claimant who seeks to enforce any of these claims should note the time-limit provided for the enjoyment of the right. The Supreme Court in the case of *Egworabor & Anor* v *Osanebi & Ors*[10], did state that

[10] (2019) LPELR-48802(CA).

the law on limitation of action is simply a rule of law, which prohibits the commencement of stale claims. In its operation it extinguishes the right to action but not the cause of action itself, which is rendered bare and unenforceable in a court of law. The rationale for limitation of time for the commencement of action would seem to be that due to the length of time that must have elapsed, a Defendant, on being confronted with a stale claim, may have lost or due to unavailability of materials evidence or death or unavailability of vital key witnesses, due to no fault of his, necessary for his defence which would have otherwise been available if the claims were commenced timely within the period as allowed under the relevant applicable limitation law.[11]

As noted by a commentator with specialist skills in shipping and maritime law, admiralty actions do not last forever; rather, they have prescribed limitation periods, which often vary depending on the type of claim. A limitation bar, which arises on the expiration of a limitation period, effectively negates the enforcement of a claim, no matter how meritorious. In other words, if a claim is not brought within the time prescribed by the relevant law or contract, a party with an otherwise valid claim will generally lose its right of action on that claim. In order to avoid such a scenario, claimants must take active steps to enforce their maritime claim in court once it arises (or soon afterwards).[12]

Section 18 of the AJA imposes a general limitation of 3 years from the period the cause of action arose for maritime claim and maritime lien or other charge subject however to limitation period specifically fixed by any other enactment. Thus, in determining the limitation period for

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[11] See also *Attiogbey* v *UBA Plc & Ors* (2013) LPELR-20326(CA) where it was held that a statute of limitation is designed to stop or avoid situations where a plaintiff can commence an action anytime he feels like doing so, even when human memory would have normally faded and therefore failed. Putting it in another language, by the statute of limitation, a plaintiff has not the freedom of the air to sleep or slumber and wake up at his own time to commence an action against a defendant. The different statutes of limitation which are essentially founded on the principles of equity and fair play will not avail such a sleeping or slumbering plaintiff.

[12] E. Erim, "Don't let your maritime claim expire", available at https://www.internationallawoffice.com/Newsletters/Shipping-Transport/Nigeria/Akabogu-Associates/Dont-let-your-maritime-claim-expire (Accessed 11 March 2020).

each head of claim, recourse should also be made to the Merchant Shipping Act, which has some specific provisions for certain claims such as salvage (two years), maritime lien (one year), collisions (two years) and cargo claims (one year). Unlike limitation period in general civil matters which are cast in iron, the Court can exercise discretion to extend the limitation period if sufficient reason is provided[13].

5.0. MARITIME LIEN

This specie of maritime claim deserves further comment due to its peculiarity in admiralty practice. Its uniqueness may be appreciated from the stand point that it hovers over, attaches to and remains with the vessel irrespective of who is in actual possession thereof at any given time.[14] It has also been described as a claim or privilege on a maritime res in respect of service done to it or damage caused by it[15]. Such a lien does not import or require possession of the res, for it is a claim or privilege on the res to be carried into effect by legal process. A maritime lien travels with the res into whosoever possession it may come, even though the res may have been purchased without notice of the lien, or may have been seized by the sheriff under a writ of *fieri facias* issued at the instance of execution creditors. A maritime lien is inchoate from the moment the claim or privilege attaches, and when called into effect by the legal process of a proceeding *in rem*, relates back to the period when it first attached. There can be no maritime lien on res which is not a ship or her apparel or cargo, and if a lien has attached to maritime res which is sold by the owner, there is no lien against the proceeds of sale since the lien travels with the res. A maritime lien only attaches to the particular res in respect of which the claim arises and not to any other property of the owner.[16] Section 5(4) of the AJA limits maritime lien to only four claims, viz: (1) salvage;

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[13] *Ibid*.

[14] L.C. Ilogu S.A.N "Maritime Liens and Mortgages: The International Perspective" being a paper presented at the 1997 Maritime Seminar for Judges held at Sheraton Hotel Abuja, on 28th February 1997.

[15] *Harmer* v *Bell, The Bold Buccleugh* (1852) 7 Moo PCC 267 at 284.

[16] *Halsbury's Laws of England*, Vol. 43(1) (Butterworths: London, 1997), p. 1273, para. 1901.

(2) damage done by a ship; (3) wages of the master or of a member of the crew of a ship; (4) master disbursements.

With the amendment of the Constitution of the Federal Republic of Nigeria, 1999 to vest employment related matters to the National Industrial Court (NIC), there is been a debate as to which Court now has jurisdiction over claim for wages of the master and crew members. Is it the Federal High Court or the NIC? Even the Courts have not resolved this debate as there appear to be conflicting decisions on the proper interpretation of section 254C (k) of the Constitution vis-à-vis section 5(4) of the AJA. The first decision on the point is the case of *Moe oo* v *The MV Phuc Hai Sun*[17] where the Federal High Court (coram: Tsoho J. [now CJ]) was invited to pronounce on its jurisdiction over a matter involving the payment of wages to seamen. After reviewing the relevant provisions, the court held that the fact that the claim relates to foreigners, it does not fall within the ambit of the Section 254C (k) of the 1999 Constitution and such the matter was a maritime claim. Contrast this with the decision in *Assuranceforenigen Skuld (Gjensidig)* v *MT "Clover Pride" & Ors.* [18] where the same Federal High Court (Coram Idris J [now JCA]) faced with similar situation held that it lacked jurisdiction over a claim for wages of master or crew members and ordered that the matter should be transferred to the NIC. It is hoped that the Court of Appeal and/or the Supreme Court will have the opportunity to pronounce on the subject as the law is not yet settled on the point. Given the importance of maritime lien to maritime workers whose employers most times are ship owners without any fixed assets or presence within Nigeria, it will be precarious to expect such claimants to approach the NIC to seek remedy which even when gotten may end up being an empty shell as there would not be any asset to attach within jurisdiction. It is suggested that the Court should adopt a purposive approach to the issue of maritime lien relating to the claims of ship masters and crew members. The alternative would be the amendment of the Constitution to return this aspect of maritime lien within the jurisdiction of the Federal High Court.

[17] Unreported. Suit No: FHC/L/CS/592/11.
[18] Unreported. Suit No: FHC/L/CS/1807/17.

6.0. CONCLUSION

The subject matter of ship arrest is as interesting as it is crucial to every stakeholder in the maritime industry. The ratification of the Treaty establishing the African Continental Free Trade Area ("AfCFTA")[19] by Nigeria is expected to attract further opportunities in the Nigeria maritime sector. When the AfFCTA Treaty[20] is domesticated in Nigeria and becomes fully operational, it is expected that there would be a surge in maritime activities and maritime dispute, which is inevitable. It is therefore important that lawyers who play within this space appreciate the different perspectives to ship arrest and the scope of maritime claims as the consequence of wrongful arrest occasioned by the misapplication of the maritime laws particularly in admiralty action *in rem*, cannot be over-emphasized. A case has also been made for the Court of Appeal and the Supreme Court to resolve the unsettled controversy surrounding the aspect of maritime lien relating to the claims by ship masters and crew members. Thus, rather than further shrink the scope of maritime lien to only three items under the AJA, this writer suggests for further expansion of same to reflect the developments in other maritime nations particularly the principles enshrined under the 1999 Arrest Convention.

[19] The initial signing of the Agreement establishing AfCFTA by the 44 member States should not be confused with the subsequent ratification that gave legal teeth to the Treaty. The understanding was that the proposal would come into force 30 days after ratification by 22 of the signatory States. Article 12(2)(b) of Vienna Convention on the Law of Treaties, 1969 (also known as Treaty of Treaties), is to the effect that where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.

[20] The Treaty came into effect on 30 May 2019 after Gambia became 22nd State to ratify it. Gambia ratified the Treaty on 02 April 2019.

COMPARATIVE ANALYSIS OF THE LEGAL REGIME FOR THE DISQUALIFICATION OF DIRECTORS: NIGERIA AND UK COMPARED

Prince Diarah Esq*

ABSTRACT

One of the drawbacks of the limited liability structure is that it encourages excessive risky behaviour. However, commercial risks have been considered to be the lifeblood of corporate activities,[1] and some directors have been known to take undue advantage of this owner-shielding doctrine to the detriment of the creditors who had hoped on recourse to the funds of the company for the satisfaction of the debts owed them. This behaviour calls for a proper safeguard for the creditors and the public, which would entail that those directors who have conducted themselves improperly in regards to the affairs of the ailing company shall be banned from further acting as directors. The purpose of this paper is to examine the laws as regards the disqualification of directors in Nigeria vis-à-vis the provisions of the extant United Kingdom laws.

1.0. INTRODUCTION

The disqualification of directors is essential to prevent the misuse of the company form. One of its major aims was to stop the emergence of "phoenix companies"[2] which are companies set up by the director of a very similar company which had ceased business due to extensive debts. These directors will jeopardize the undertakings of an ailing company, just to jump ship and incorporate a new corporation with similar business activity but with no liability to the creditors of the former company, which is an abuse of the limited liability structure.

While it is essentially clear that the disqualification is for the protection of the public from the hands of these directors, what may

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[1] Gower and Davies, *Principles of Modern Company Law* 8th ed. (Sweet and Maxwell, 2008).

[2] *Ibid*, at p. 246.

not be clear especially in the Nigerian reality is what may constitute effective protection for the public against these directors. Should the directors' activities as directors be barred, especially with respect to other companies? For how long should they be disqualified? Or for what period in the future will the directors continue to pose a danger to the public? Also, what type of machinery is to be put in place to ensure that these directors do not act, despite the disqualifications? And how is the public made aware of these disqualifications? To distil these issues, the extant laws of the UK and Nigeria are studied with the aim of comparing them to know which will better serve the end of good corporate governance.

This work is divided into five parts. The first part is the introduction which includes the definitions of certain terms. The second part examines the disqualification of directors in Nigeria and highlights the four forms of disqualification under Nigerian Law. The third part extensively explores disqualification under UK laws with a special focus on the UK Company Director Disqualification Act. The fourth part juxtaposes UK and Nigerian Laws as regards the disqualification of directors with the aim of discovering salient points which will best serve the main purpose for disqualification. The conclusion is the final part which includes recommendations for reforms.

1.1. Who is a Company Director?

A director is the *alter ego* of a company.[3] He is a corporate governor in charge of the affairs of a company. Directors of a company registered under the Companies and Allied Matters Act (CAMA) are persons duly appointed by the company to direct and manage the business of the company.[4]

Under section 567 of CAMA, "director" includes any person occupying the position of director by whatever name called; and includes any person in accordance with whose directions or instructions, the directors of the company are accustomed to act. By

[3] *Yalaju Amaye* v *AREC (*1990) NWLR (pt. 145) 422; (1990) 6SC 157.
[4] Companies and Allied Matters Act (CAMA) 1990, Cap. C20, Laws of the Federation of Nigeria, 2004, s. 244(1).

the same token, section 245(1) thereof states that without prejudice to the provisions of sections 244 and 250, and for the purposes of sections 253, 275 and 281 of CAMA, "director" shall include any person on whose instructions and directions the directors are accustomed to act.

1.2. Meaning of Disqualification

Generally, any person who is either (1) personally insolvent (2) an undischarged bankrupt, or (3) disqualified by a court order for implication in dishonesty or fraud punishable by imprisonment, may be disqualified from holding the office of a director.[5]

Hence, disqualification is a form of prohibition to deter the performance or continuous performance of something by reason of one's ineligibility.

2.0. DISQUALIFICATION OF DIRECTORS IN NIGERIA

While "disqualification" does not lend itself to a narrow or even exact definition, in this work, it is used in a broad sense to denote the legislated prohibition of individuals to manage corporations. Thus, in examining the disqualification of directors, four forms of disqualification in Nigeria have been identified and discussed herein: (1) Disqualification by a Regulator, (2) Disqualification by Court, (3) Disqualification on Application; and (4) Automatic Disqualification.

2.1. Disqualification by a Regulator

2.1.1 *By the Securities and Exchange Commission* (SEC)

The Investment and Securities Act 2007[6] repealed that of 1999. This Act establishes the Securities and Exchange Commission (SEC). The SEC plays a supervisory and regulatory role on the capital market.

[5] Business Dictionary, "Disqualification of Directors" available at http://www.businessdictionary.com/definition/disqualification-of-directors.html (accessed 27 August 2019).

[6] Investment and Securities Act (ISA) 2007, Cap. 124, Laws of the Federation of Nigeria, 2004.

Section 13 in Part II of the Act specifies the functions and powers of the Commission. It provides that the Commission shall be the apex regulatory organisation for the Nigeria Capital Market, having the power to exercise all the functions delineated in the Act. That section, amongst other powers outlined, provides that the Commission shall have the *power to disqualify*[7] persons considered unfit from being employed in any arm of the securities industry.[8]

The term "security industry" has been given a wider interpretation by the court in the case of *Olubunmi Oladapo Oni* v *Administrative Proceeding Committee of SEC*.[9] In that case, the appellant was disqualified from operating in the capital market and from holding a directorship position in any public company, pursuant to the power bestowed on SEC by section 13 of the ISA. The appellant contended that the power of SEC under section 13 of the ISA was limited to the disqualification of persons from capital market activities and securities business or dealing in securities and did not extend to the disqualification of a person from membership of the boards of companies; and that the power to regulate the appointment, removal and disqualification of directors or members of boards of companies had been conferred on the Corporate Affairs Commission under the relevant provisions of CAMA. In summary, he asserted that the SEC is not empowered to regulate the membership of companies. In dismissing his appeal, the court held that any corporate body whose stocks are quoted in the NSE and who issues stocks, shares and debenture, is part of the securities industry. Thus, SEC has a responsibility to protect the interest of investors in those stocks and the responsibility of SEC includes the power to check the activities of the directors of public companies. The court equally held that the provisions of CAMA do not take away from SEC the power to regulate the activities of companies and their boards Therefore, it is trite that SEC has the power to disqualify persons on the ground of unfitness.

[7] Emphasis is added.
[8] ISA, s. 13 (bb).
[9] (2014) NWLR (Part 1424) 334.

2.1.2. *By the Central Bank of Nigeria* (CBN)

The Banks and other Financial Institutions Act (BOFIA) confers on the Central Bank, all the powers and duties that are imposed by the Act.[10] Therefore, section 48 of the Act provides for the disqualification of certain individuals from the management of banks. It provides that no person shall be appointed, a director or an officer of a bank if he is of unsound mind or as a result of ill health, is incapable of carrying out his duties;[11] declared bankrupt or suspends payments or compounds with his creditors including his bankers;[12] or is convicted of any offence involving dishonesty or fraud;[13] or is guilty of serious misconduct in relation to his duties;[14] or in the case of a person possessed of professional qualification, is disqualified or suspended (otherwise than of his request) from practicing his profession in Nigeria by the order of any competent authority made in respect of him.[15]

While (a) and (b) of 48(2) act as automatic disqualification by operation of law subsection (c) and (d) of that section operate as a sort of bar; thus they are actions which entitles the Governor acting on the power conferred on him in this Act, to remove or bar the said director. Subsection (e) of that section functions equally as a disqualification; but only to the extent that such director may be reinstated after remedying the defect that so disqualifies him.
Subsection 3 of that section, precludes a person who has been a director of or directly concerned in the management of a bank which has been wound up by the Federal High Court from acting or continuing to act as a director of, or be directly concerned in the management of any other bank. However, this prohibition is mitigated by the fact that such persons may act with the express authority of the Governor.[16]

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[10] The Banks and other Financial Institutions Act (BOFIA), Cap. B3, Laws of the Federation of Nigeria, 2004, s. 1.
[11] *Ibid,* at s. 48 (2)(a).
[12] *Ibid*, at s. 48 (2)(b).
[13] *Ibid,* at s. 48 (2)(c).
[14] *Ibid*, at s. 48 (2)(d).
[15] *Ibid*, at s. 48 (2)(e).
[16] *Ibid*, at s. 48 (3).

That section equally disqualifies any person whose appointment with a bank has been terminated or who has been dismissed for reasons of fraud, dishonesty or conviction for an offence involving dishonesty or fraud. That section went ahead to point out that such person "shall"[17] not be employed by any bank in Nigeria.[18]

The CBN equally maintains a register of these persons who are disqualified under subsection 4 and thus the Act maintains that it shall not be a defence for any director, manager or officer of a bank to claim that he is not aware of the provisions of subsection (4) of this section, except he can prove that he had obtained prior clearance of such a person from the secretary of the Banker's (CBN) Committee who maintains a register of terminated, dismissed or convicted staff of banks on the ground of fraud or dishonesty.

Pursuant to this, the CBN equally issued a circular in this regard, where it outlined the need for prior CBN clearance of prospective employees of banks.[19] While this is a laudable apparatus and equally important for the disqualification regime, it seems exclusive and protective of the banking industry only, as such information may only be accessible by commercial banks who are intending to hire new staff. Therefore, it is suggested that the Commission emulates this trend. Although such information may be implied by virtue of the returns which the companies are obligated to file with the Corporate Affairs Commission (CAC), it is still important that such register be maintained by the Commission.

2.1.3. *By the Corporate Affairs Commission* (CAC)

Despite the wide powers of the Corporate Affairs Commission under CAMA, there is nowhere in the Act where the Commission is granted direct powers to disqualify an erring official or a director. At best, the

[17] Emphasis added.
[18] BOFIA, s. 48 (4).
[19] "The need for prior C.B.N clearance of prospective employees of Banks", Central Bank of Nigeria circular, 16th July 2004, available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.cbn.gov.ng/OUT/CIRCULARS/BSD/2004/BSD-03-2004.PDF&ved=2ahUKEwjK3s6jtObkAhWNbFAKHambCBQQFjAAegQIBxAC&usg=AOvVaw04spnJWZ4jNfiuS4W_gX8E (accessed 22 September 2019).

Commission is granted the power to investigate affairs of the company where the interests of the public/shareholders demands,[20] and to undertake such other activities as are necessary or expedient to give full effect to CAMA.[21] This has called for the recent outcry by stakeholders for the amendment of CAMA for a new regime, which will be in line with the practice in most company registries globally.[22]

2.2. Disqualification by the Court

There are two instances where the court may disqualify a person from acting as a Director. They are *Suo motu* (on its own) and on application.

2.2.1. *Suo Motu by the Court*:

CAMA provides for the restraint of fraudulent persons from becoming directors and thus gives the court (High Court included) power to unilaterally make an order that a person who is convicted of an offence in connection with the promotion, formation or management of a company, shall not be a director or in any way directly or indirectly concerned or take part in the management of a company for a specified period not exceeding 10 years.[23] This may raise a jurisdictional question, seeing that the Federal High Court has the sole jurisdiction to entertain matters arising from the operation of CAMA or regulating the operation of companies incorporated under CAMA.[24] However, CAMA s. 254(2) confers jurisdiction on the court where such person is convicted, as well the court which has jurisdiction to wind up companies, to make such disqualification order.

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[20] CAMA, s. 7 (1)(c).
[21] CAMA, s. 7 (1)(e).
[22] Premium Times news online, "CAC seeks legal powers to remove erring company directors", available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.premiumtimesng.com/news/top-news/136428-cac-seeks-legal-powers-to-remove-erring-company-directors.html&ved=2ahUKEwiF_5_X9azoAhVxs3EKHZrsAlcQFjAAegQIAAegQIAxAC&usg=AOvVaw24edMs8i75z3r4uSMMUJjN> (accessed 22 September 2019).
[23] CAMA, s. 254 1(a).
[24] Constitution of the Federal Republic of Nigeria (CFRN) (1999) (as amended), s. 251(1)(e).

The power of the court to disqualify on application will be discussed under a separate heading below.

2.2.2. Disqualification on Application to Court

Section 254 (b) provides that if it appears in the course of winding up that a person has been guilty of misfeasance (under section 507), whether or not he has been convicted,[25] or has been guilty, while an officer of the company, of any fraud in relation to the company or of any breach of his duty to the company, the court shall make an order that that person shall not be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of a company for a specified period not exceeding 10 years.[26] Thus this presupposes that the company must be undergoing winding up. Hence it provides that an application for the making of an order under this section by the court having jurisdiction to wind up the company may be made by the official receiver, or by the liquidator of the company or by any person who is or has been a member or creditor of the company.[27] It is settled that the appointment of a receiver does not obviate the position and duties of the directors.[28] This is because the retention of the residual powers of the director is more in accordance with corporate governance as the company may not already be liquidated.[29] Thus, the receiver can also make such application that a director be disqualified in accordance with CAMA s. 254, when it appears upon his appointment or during winding up that the directors are guilty of the offences stated in that section. The liquidator is an officer of the court and appointed by the court[30] and thus is expected

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[25] CAMA, s. 254(1)(b)(i).
[26] *Ibid*, at s. 254(1)(b)(ii).
[27] *Ibid*, at s. 254(4).
[28] *Unibiz (Nig) Ltd* v *Commercial Bank Credit Lyonnais Nig Ltd* (2001) 7NWLR (Part 713) 534; *Intercontractors Nigeria Ltd* v *N.P.F.M.B* (1988) 4 SCNJ 154.
[29] O.M. Adefi, "Streamlining The Powers and Duties of a Receiver/Manager and Liquidator in the Organization of a Company: An Antidote for Corporate Governance", available at https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.ajol.info/index.php/naujilj/article/download/82385/72540&ved=2ahUKEwjmpfbu8ebkAhXNbVAKHcGoAg4QFjAAegQIAxAB&usg=AOvVaw0rOtx2IBCrdWP5UitFyxun> (accessed 22 September2019).
[30] CAMA s. 422(1)(5).

to be beholden to the court. Upon his appointment, all powers of the director shall cease.[31] It becomes clearer in CAMA s. 508, where not only can a liquidator apply for the disqualification of a director who is guilty of any offence in relation to the company, but can also, by virtue of that section, report the said matter to the Attorney General of the Federation for investigation. It is also settled law that members and creditors[32] are stakeholders in a company. Subsection 4 of section 254 CAMA solidifies that by enduing them with the right to bring an application for the making of such order by the court.

2.3. Automatic Disqualification

Automatic Disqualification is a process that does not require any active involvement of the court or the relevant corporate regulator.[33] They are briefly outlined below:

2.3.1. Bankruptcy and Insolvency

The law which generally disqualifies an insolvent person from acting as a director is targeted at precluding these set of people who have been so spectacularly unsuccessful in the management of their finances, from taking charge of other people's money.[34] Hence, CAMA disqualifies such individual from both acting as a director of a company upon his becoming insolvent and also goes further to restrict such person from acting as a director of another company. This shall be briefly distilled in the two groups for a clear understanding.

a. Current company

The office of the director must be vacated if the director becomes bankrupt or makes any arrangement or composition with his creditors[35]. This acts as an automatic disqualification by operation of

[31] CAMA, s. 422(9).
[32] CAMA ss. 303 and 310.
[33] J.J. Plessis and J.N. Koker, *Disqualification of Company Directors: Comparative Analysis of the Law in the UK, Australia, South-Africa, the US and Germany*, (Rutledge 711 Third Avenue: New York, 2017).
[34] *Supra* n 1, at p. 252.
[35] CAMA, s. 258(1)(b).

the law. CAMA even goes ahead to impose a criminal sanction upon default.

b. Another company

If an insolvent person acts as a director of, or directly or indirectly takes part in, or is concerned in the management of any company, that person will be guilty of an offence and liable on conviction to be fined or imprisoned for between six months and two years, or both.[36]

2.3.2. Share Qualification

Ordinarily, directors are not to provide financial resources for the company in terms of share ownership, however, share ownership of the directors, where applicable, assures the company that those who provide fund and those who manage the company are both stakeholders; which will reduce wastefulness. Hence, where provided for in the Articles, a director must have them, failure of which disqualifies him automatically by operation of the law.

Section 251 (3) provides that the office of a director of a company shall be vacated if the director does not within two months from the date of his appointment, obtain his share qualification.

While this qualification is mandatory under the Act, it is only applicable when the company inserts it inside their Articles and unless and until so fixed, no shareholding qualification shall be required.[37]

Therefore, the disqualification here takes effect immediately the director fails to hold such share qualification within the timeframe allowed (two months). The second limb of s. 251 (3) provides that even after the expiration of the two months and the director ceases at any time to hold his share qualification, he shall be vacated from office.

Thus, it seems clear that once a company's Articles provides for a share qualification of a director and a director fails to hold such shares

[36] CAMA, s. 253.
[37] CAMA, s. 251(1).

within the time frame of his resumption of office or anytime thereafter, such director shall stand disqualified as a director.[38]

2.3.3. Persons of Unsound Mind

Unsoundness of mind is a ground for the vacation of the office of the director under CAMA. As such a person who has become of unsound mind by inquisition cannot necessarily govern a body corporate. Persons who are not in full control of their mental faculty cannot by implication control or be in the helm of affairs of a company.[39] Some writers have equally identified expiration of tenure fixed by regulatory authorities as an event which will automatically vacate the director(s) from office.[40]

3.0. THE POSITION UNDER UK LAW

The UK has a robust body of statutes governing the disqualification of directors, which includes the Company Directors Disqualification Act (CDDA), 1986.[41] Generally, the scope of disqualification of directors under CDDA covers both acting in one's capacity as a director and also equally extends to "directly or indirectly taking part in promotion, formation or management of a company".[42] The disqualified person is denied access to limited liability and also prohibited from acting as an insolvency practitioner.[43] There are equally three different forms of directors' disqualification under the CDDA, and they are Automatic Disqualification, Disqualification by Court Order and Disqualification Undertakings.

3.1. Automatic Disqualification

In the case of an automatic disqualification, an individual is automatically disqualified from being a company director if the conditions of the pertinent statutory provision are met. The director

[38] CAMA, s. 258 (1)(a).
[39] CAMA, s. 258 (1)(b).
[40] C.S. Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (Novena Publishers, 2010), pp. 356 – 357.
[41] Company Directors Disqualification Act (CDDA) 1986. Also, the Insolvency Act 2000.
[42] CDDA, s. 1(1) and A(1).
[43] *Ibid*, at ss. 1(1)(b) and 1A(1)(b).

is automatically disqualified from acting as the director of a company without the need for anyone to apply for a disqualification order and without the need for a court to make a disqualification order. They are discussed below:

3.1.1. Bankruptcy

The rule under bankruptcy is set to deter someone in financial difficulty from putting the undertaking of a company in jeopardy. The CDDA criminalizes it.[44] Hence, it is an automatic disqualification, not dependent on making any disqualification order by the court. There are also bankruptcy restrictions order and undertaking similar to that of directors, which put restrictions on a former bankrupt person's activities after his discharge from bankruptcy.[45] These prohibitions restricted acting in breach of a bankruptcy restriction order, however, this disqualification is not absolute as a bankrupt person may apply for leave to act in the management of a company, but not as an insolvency practitioner**.** Consequently, the bankrupt has a duty to show that he can safely be involved in the management of a company.

3.1.2. Age

Anyone under the age of 16 must not be appointed as a director of a company.[46] However, this disqualification does not affect the validity of an appointment that does not take effect until the person appointed attains the age of 16.

3.1.3. Auditors

The level of independence required for statutory auditors is such that any person cannot be both a director and an auditor at the same time. A person is not allowed to act as statutory auditor of a company if he/she is a director of the company.[47] Thus this equally acts as an automatic disqualification under the UK laws.

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[44] CDDA, s.11.
[45] Sch. 20, UK Enterprise Act, 2002.
[46] UK's Company Act (CA) 2006, s. 157(1).
[47] *Supra* n 33, at p. 49.

3.1.4. Failure to Pay under a County Court Administration Order

A person who fails to make any payment which they are required to make by virtue of an administration order under the *County Courts Act 1984* (UK) is not allowed to act as a director, liquidator, or directly or indirectly take part, or be concerned in the promotion, formation or the management of a company.[48]

3.2. Disqualification on Application

The grounds for disqualification on application can be divided into those which require that a court must disqualify a person (mandatory disqualification) and those where a court *may*[49] disqualify an individual (i.e. it has the discretion to decide whether or not to disqualify the person concerned).

3.2.1. Mandatory disqualification (on the ground of unfitness):

These are the grounds contained from sections 6 and 7 of the CDDA 1986. The court has separated this ground of unfitness into two main categories which are probity and competence. Only the Secretary of State (or the official receiver in most cases) can apply for disqualification on the grounds of unfitness and can do so if they think that "it is expedient in the public interest".[50]

a. *Probity:*

Probity simply translates to commercial morality.[51] On this ground, the court has frowned on directors who trade at the expenses of the creditors. This act is often perpetuated through the "Phoenix Company". In asserting his unfitness, the court looks at his responsibility in the company's insolvency. An example would be the

[48] CDDA, s. 12.
[49] Emphasis is added.
[50] CDDA, s. 7(1).
[51] *Supra* n 1, at p. 246.

general failure of the company to provide for goods and services paid for or entering into a contract at undervalue.[52]

Thus, if the directors of a financially troubled company were at the same time paying themselves salaries which were out of proportion to the company's trading success, the likelihood of disqualification order being made for unfitness increases.[53]

b. *Incompetence (Recklessness):*

This is as regards the director's recklessness with the conduct of the business of the company. The competence of the director is what is at issue here.

Thus, the delegation of the duties of directors without adequate supervision put in place to check the delegated power has been deemed a reckless act which makes a director unfit.[54]

Also, lack of experience, knowledge and understanding has disqualified a director for three years as seen in the case of *Re Rich borough furniture ltd*.[55] Hence, a director has a continuing duty to acquire and maintain sufficient knowledge and understanding of a company's business to enable them properly discharge their duties. Hence all directors should maintain a minimum level of knowledge.

This duty equally subsists on the area of the financial obligation of the company to file annual returns, keep proper accounting records. Thus, directors are to keep themselves abreast of both the financial position of the company and the company's compliance with reporting requirements of legislation affecting and relating to the company. Otherwise, he or she will not know what corrective action needs be taken, if any.[56]

Gower differentiated the standard of competence required here from the general duty of care owed by directors, by saying that to disqualify

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[52] This is synonymous to offences provided for in s. 506, CAMA; but it should however be noted that the provision of CAMA is not specifically exclusive or applicable to the Directors of the Company.
[53] *Secretary of State for Trade and Industry* v *Van Hengel* (1995) 1 B.C.L.C. 545.
[54] *Re Baring PLC (No. 5)* (2000) 1 B.C.L.C. 523, CA.
[55] (1996) 1 B.C.L.C. 507.
[56] *Re Fredart ltd* (1994) 2 B.C.L.C 340.

a director for unfitness, the court has required a "marked degree" of negligence, however, that there are no suggestions that a particular enhanced standard of care is to be applied to directors.[57] Thus a lower standard is required to deem a director in breach of his duty of care. He went further to say that if a disqualification order is given, if unfitness is found, two years disqualification is mandatory.

On the application for a disqualification order by the Secretary of State or the official receiver, the court must make a disqualification order for a minimum of two years and a maximum of 15 years if it is satisfied that the conduct of the person concerned makes them unfit to act as the director of a company.[58] The Secretary of State or the official receiver can require the liquidator, administrator or administrative receiver of a company, or the former liquidator, administrator or administrative receiver of a company to provide such information about any person's conduct as a director of the company and to produce and permit inspection of such books, papers and other documents relevant to that person's conduct as a director as may be reasonably required for determining whether to apply for a disqualification order.[59] If it appears to the "officer holder responsible under this section" (i.e. the official receiver, the liquidator, the administrator or the administrative receiver) that the conduct of a person who has in any way been a director of a company that has become insolvent while that person was a director (either taken alone or taken together with their conduct as a director of any other company or companies) makes them unfit to be concerned in the management of a company, the officeholder must report the matter to the Secretary of State.[60]

In practice, the person must then report to the Disqualification Unit as part of the Insolvency Service. The Secretary of State then considers the report, and if it appears to be in the public interest that a

[57] *Supra* n 1, at p. 249.
[58] CDDA, s. 6(4).
[59] CDDA, s. 7(4).
[60] CDDA, s. 7(3).

disqualification order is made, an application may be made by the Secretary of State or the court.[61]

It is important to note that a different way to disqualify a director on grounds of unfitness is provided in s. 8, CDDA. According to this provision, an application for a disqualification order against a person who is, or has been, a director or shadow director of a company may be made by the Secretary of State where the Secretary thinks it is expedient to apply following an inspection of the company under the provisions of the Companies Act (CA), 2006.[62] The maximum period of the disqualification order under this provision is 15 years.[63] Disqualification orders against a person can also be made against *de facto* directors.

3.2.2. Non-Mandatory Disqualification Grounds

a. Serious Offences:

The disqualification here is under the CDDA, s. 2 and it is based on a court order. It is also known as disqualification on conviction of an indictable offence and it is the second most common disqualification after unfit ground. It is important to note that this ground covers also non-directors as well as Receivers and Liquidators. Thus, concerning a serious offence, what counts is whether the person has been convicted of an offence. If there has been a conviction of an officer on indictable offence, the person[64] concerned with promotion, formation, management, liquidation or striking off of a company, receivership or management of its property, a disqualification order may be made. Usually, the convicting court makes an order to disqualify. However, when there has been no conviction, but the company is being wound up[65] and a person has been guilty of fraudulent trading or has been guilty as an officer of the company of any fraud concerning it or any

[61] CDDA, s. 7(1).
[62] CDDA, s. 8(1).
[63] CDDA, s. 8 (4).
[64] Emphasis added.
[65] Emphasis added.

breach of duty as an officer; the court having jurisdiction to wound up company may impose disqualification order.[66]

b. Disqualification in connection with civil liability for fraudulent/wrong trading

What is considered here is the action of the director immediately preceding the company's insolvency. This is distinguished from the unfitness ground where what is considered is the director's whole activity as a director that is in question. On the application of any person or its motion, a court may also make a disqualification order against a person if it makes a declaration under section 213 or 214 of the *Insolvency Act 1986* that this person is liable to make a contribution to a company's assets, based on fraudulent trading or wrongful trading.[67]

CDDA provides that the court may act on its own (whether an application is made or not).[68] There are some other orders the court may make under the Insolvency Act.[69] Thus this disqualification order can be made irrespective of the question of whether or not an application for such an order is made by any person. The maximum period of a disqualification order under this section is 15 years.

c. Failure to comply with reporting requirements:

These are usually summary offences. If an officer has been convicted of summary offence in connection with failure to file a document with or give notice of a fact to the Registrar, the convicting court may disqualify the director, if in the past five years he has had three convictions or default orders for non-compliance with the reporting requirement of the Company and Insolvency Act.

If there have been previous indictments, section 2 applies. If the director has been convicted on summary offence and the previous offences are indictments, the summary court will still disqualify, notwithstanding.

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[66] CDDA, s. 4.
[67] CDDA, s. 10(1).
[68] CDDA, s. 10.
[69] UK Insolvency Act, s. 213 – 214.

Where there has been no conviction, the Secretary of State and others stipulated in section 16, CDDA, may apply to the court to wind up the company, praying for disqualification of director on the ground of his persistent default to comply with reporting requirements of Companies and Insolvency Act.[70] The persistent default must be proven. The maximum disqualification here is five years since it is a summary offence.

3.3. Disqualification by Undertaking (Out-Of-Court Disqualification)

As an alternative to a disqualification order by a court, there is also the option to offer a disqualification undertaking.[71] The Secretary of State may accept a disqualification undertaking offered by a person the Secretary considers to be unfit per section 6(1) or section 8(1) of the CDDA, 1986, if it appears that it is expedient in the public interest that the Secretary should do so instead of applying for a disqualification order.[72] The undertaking has the same effect as a court order. The maximum period that may be specified in the disqualification undertaking is 15 years and the minimum period is two years. On the application of the person who is subject to a disqualification undertaking, the court may reduce the period for which the undertaking is to be in force or provide for it to cease to be in force.[73] The purpose of the undertaking is to increase the speed of disqualifications and to reduce the cost in clear cases. The Secretary of States is also obligated to include those disqualifications undertakings in the register of disqualified directors,[74] and indicate where leave is granted

4.0. NIGERIA AND UK LAWS JUXTAPOSED

Having examined the two jurisdictions, which are the subjects of this discourse, it becomes imperative to examine them side by side to ascertain which would better serve the public, (whom the

[70] CDDA, s. 3.
[71] CDDA, s. 1(A).
[72] CDDA, ss. 7(2A), 8(2A).
[73] CDDA, s. 8A.
[74] CDDA, s. 2A.

disqualification seems to set out to protect) and how to get about effecting this protection. In doing this, some of the relevant innovations in the UK laws will be elicited with the rationale behind this. This is aimed at suggesting what the legislature should avert their minds to, while coming up with a new law on disqualification.

4.1. The Body of Law Governing Disqualification

The UK operates a developed system of directors' disqualification. The rules are found in a separate Act and are therefore, at least in theory, easily accessible.

The CDDA has rich provisions on how directors of insolvent companies and those who have shown themselves unfit, shall be dealt with. It provides the scope of the disqualification order and several grounds for disqualification. It designated several thresholds of periods, depending on the act of the director, from 2-15 years.

A cursory look at Nigeria's present disqualification regimes, whose laws are dispersed and exists independent of one another. The Companies Act in Nigeria (CAMA) was promulgated during the Military regime in the early '90s to administer the affairs of the company and it made very few provisions regarding the disqualification or banning of Directors for their questionable characters and in areas where the court can make orders.

Other laws governing the disqualification of directors are found in statutes regulating different sectors (the ISA and BOFIA). However, these statutes only confer on their regulators power to disqualify directors from acting in their sectors.[75] The problem now becomes, when these regulators employ these sectorial laws to disqualify a director from acting, are those disqualifications effective enough to refrain a director from acting in another body corporate not related to the previous sector? The courts have to an extent intervened to give a wider interpretation. It would also seem that CAMA has

[75] Although the court in *Oni* v *APC*, *supra* n 9, at p. 334, have given a wider interpretation to the meaning of "disqualification from the securities industries", it is humbly submitted that these judicial interpretation be given a more vivid codification in the CAMA or distinct statute which shall deal specifically on disqualification of directors.

covered this area; where such disqualified persons who are banned from being directors or directly and indirectly take part in the management of a company. Thus, it is advocated that this decision be codified and most preferably, a wider statute that deals on the subject be enacted.

Thus, a body of law that administers the disqualification of directors will make for a more organised regime. It will make the laws that deal with the subject easily accessible under one law/statute; which will provide for the different infractions that would warrant for disqualification, as well as the scope. This, of course, will be without prejudice to the powers imbued on other sector's regulators to disqualify. Finally, such legislation should feature the much clamoured and needed power of the CAC to disqualify directors.

4.2. Disqualification Undertaking

Disqualification undertaking is a form of non-adjudicatory procedure which is also an innovation of the UK. Due to its cost and time efficiency, statistics have shown that the introduction of the disqualification undertaking through the Insolvency Act, 2000, in the UK significantly reduced the number of cases that are adjudicated by the courts. Now the majority of disqualifications (about 80 per cent) are made by way of disqualification undertakings.[76]

Disqualification undertakings provide some solutions to the complexity of the UK disqualification regime, which might explain significantly the disqualification of more people via undertakings than disqualification orders.

4.3. Unfitness Regime under CDDA

It is interesting to note that, whereas most jurisdictions list specific convictions, conduct and status matters as indicative of an individual's "unfitness" to manage corporations, the CDDA treats "unfitness" as an independent ground for disqualification.[77]

[76] *Supra* n 33, at p. 62.
[77] *Ibid,* at p. 23.

In the Nigerian instance, the only mention of unfitness is the provision in ISA which mentioned that SEC can disqualify persons *considered unfit*.[78] This is similar to what is obtainable in the UK, where if the court determines that the director in question is unfit to be concerned in the management of the company, the imposition of a disqualification order on that director is mandatory and the court will have no discretion to refuse the making of such an order. This is of particular interest since the most common way directors are disqualified currently is under section 6 of the CDDA, 1986, when a director's conduct "makes [them] unfit to be concerned in the management of a company".

In respect of recklessness under the unfitness ground, Gower pointed out that to disqualify a director for unfitness, a "marked degree of negligence ought to suffice.[79] CAMA merely provided for action in negligence for a Director who has failed to exercise that degree of care, diligence and skill which a reasonably prudent director would exercise in a comparable circumstance.[80] This begs the question: what will be the remedy of the company when the negligence or recklessness and incompetence of a director is such that the company has been greatly prejudiced and on the brink of insolvency?

Under the unfitness regime, where the directors conduct as a whole, in respect of an ailing company, and his conduct as a director of any other company or companies is taken into account, the court has a duty to make a disqualification order. Noteworthy is the fact that these other companies may not have fallen into insolvency and there need not be any link between it and the ailing company[81] for the director's conduct concerning them to be taken into account.

There is nothing mentioned in CAMA about disqualification on the grounds of unfitness as obtainable in the UK, where the director's whole affair is considered. CAMA merely proscribed certain acts as seen from section 502-506 as well as other sections; which to ensure

[78] Emphasis added; s. 13(bb), ISA did not mention what conducts would make a person unfit to be employed in the security industry.
[79] *Supra* n 1.
[80] CAMA, s. 282.
[81] *Supra* n 1, at p. 243.

compliance, is followed by criminal liabilities. Thus, the only section that deals on mandatory disqualification is CAMA section 254, which provides for the disqualification of fraudulent persons. Interestingly, that section of CAMA is similar to section 2 of the UK's CDDA on disqualification on conviction of an indictable offence. However, under CDDA, it is a ground for non-mandatory disqualification order by the court. Unlike in CAMA where the word used is "shall" making it a mandatory ground for disqualification.[82]

Due to the role of a director as the alter ego of a company, it is important that separate legislation, similar to CDDA, be enacted in Nigeria for the disqualification of Directors. It is noted that in the UK, only a director can be disqualified under CDDA, s. 6, which provides for disqualification on ground of unfitness. Gower has this to say:

> It should be noted that section 6 does not permit the court to disqualify any person whose conduct seems to the court to make him or her unfit to be a director. Only directors (including de facto and shadow directors) may be disqualified… once the company has become insolvent, the director is liable to have the whole of his affairs or her conduct as director of that company scrutinized for evidence of unfitness.[83]

By so doing, directors of limited liability, for fear of his disqualification from being a director of one or more companies, will exercise restraint in all his affairs. It is submitted that in the context of directors' duties, standards are used to allow room for managerial discretion and innovation, but rules are used to reinforce standards if the probability of breach is high. [84]

This is what has informed the courts in the UK to insert the periods of disqualification from 2 to 15 years. The courts impose sanctions on directors for falling below the standards required by CDDA s. 6. The

[82] CDDA, s. 2 and CAMA, s. 254.
[83] *Supra* n 1, at p. 242.
[84] A. Cahn and D. Donald, *Comparative Company Law*, (Cambridge University Press: 2010), p. 333.

sanction is then calculated according to the seriousness of the director's lapses.[85]

4.4. Introduction of Leave to Act

In the UK's CDDA, the rigours of the prohibition imposed by the Act is mitigated by the introduction of leave, here the disqualified director may be given leave to act in particular cases. The application for leave is considered in the same action for disqualification. It has been argued that the leave should not be so wide as to undermine the purpose of the order. In *Re Britannia Homes Centre Ltd*,[86] leave was refused a director with history of insolvency who wished to incorporate a new company to carry on trading in the same line of business.

The leave often relates to the other company of which the applicant is already a director, which are trading successfully and whose future success is thought to be dependent on the continuous involvement of the applicant.

A perusal of CAMA reveals no such thing as leave to act, which may be a deadlock, especially for a director who also sits in the board of another company, once disqualified under CAMA s. 254 will be unable to act in other companies whom he sits in their board.

4.5. Register of Disqualification

This is also another innovation of the UK Legislation which is worthy of emulation. The CDDA provides that the Secretary of State should create a register of orders and undertaking.[87] The registrar should also include leaves given to persons who have been disqualified to act despite the disqualification.

It seems that this Register will act as a caveat to the general public who wishes to know the status of the directors of the company they wish to deal with.

The UK Company Act 2006 in section 1189 empowers the Secretary of State to make regulation about returns which company should make

[85] *Re Grayan Building Society Ltd.* (1995) Ch. 241.
[86] (2001) 2 B.C.L.C 63.
[87] CDDA, s. 18 and Company (Disqualification Orders) Regulation 2001.

to Registrar about the appointment of Directors and Secretary. Those returns may contain statements in relation to disqualified persons and that leave has been obtained (where applicable).

There are no such registers in Nigeria which one could easily refer to in other to know whether a director has been disqualified. This is not unconcerned with the fact that there is no law such as the UK's CDDA which governs this area of corporate existence and endeavour holistically in Nigeria.

4.6. Disqualification Order and Foreign Law

There seems to be a lacuna in the CDDA, where directors disqualified under a law of a jurisdiction outside the UK (which may be similar to disqualification under CDDA) may conveniently act as director in a company incorporated under UK domestic laws; and yet not be in breach of CDDA.

However, part 40 of the UK's Company Act of 2006, empowers the Secretary of State to apply the equivalent of a domestic rule (in the UK) to a person who under the foreign jurisdiction law is by reason of misconduct or unfitness, disqualified from acting in relation to the affairs of a company incorporated in that jurisdiction.

Such person may be prohibited either automatically (as a result of the foreign disqualification), by court order in UK or undertaking given by him to the Secretary of State,[88] from acting in relation to a company incorporated based on UK domestic legislation.

This provision may prove to be important in the Nigeria situation, especially where there seems to be no equivalent provision for where a director who has been disqualified outside Nigeria may try to act as one in Nigeria.

5.0. CONCLUSION

The legal regime of disqualification of directors seems to be the sufficient remedy to the abuse of the Limited liability structure by directors. The UK legislation seemed encompassing and robust. The UK system is not without its shortfalls as the system is very

[88] UK Company Act 2006, ss. 1183 – 1184.

complicated, regarding not only who has standing to apply for a disqualification order, but also the specific grounds on which an application can be brought to court. The distinction between discretionary disqualification and mandatory disqualification makes the system even more complex.[89]

It has even been argued that the protective benefit to creditors of the disqualification programme may in broad economic terms, be offset by a tendency to inhibit responsible risk-taking, to stigmatise and increase the fear of failure and also to harm promotion of an entrepreneurial society.[90] However, the innovations brought to bear in the UK disqualification regime as examined above (especially the "leave to act" and "disqualification undertaking") provides some solution to these complexities.

Thus, it is advised that Nigeria emulates the UK laws in this respect. A separate law which deals on this area of corporate existence is most desirable. The director's role as an alter ego of a company bestows him with responsibilities of immense proportions, hence the standard of care required of him should be high, one of which a marked degree of negligence will be met with a disqualification sanction. This can only be possible if such laws as CDDA are made available. This will in turn become an effective and crucial tool in the enforcement of director's standard of competence, as it will seek to disqualify a director for his contribution to the company's insolvency by reason of his recklessness.

A look at the Nigerian framework reveals nothing like leave of a disqualified director to act. However, BOFIA mentioned something similar to leave in s. 48(3) where it says that a director of a wound-up bank can only act with the express authority of the Governor. This innovation needs a wider and clearer representation in our laws. A distinct law on disqualification of directors should thus incorporate leave for the director to act in other companies where the director

[89] *Supra* n 33, at p. 68.
[90] Andrew Hicks, "Director Disqualification: can it deliver?", (2001) (2001) *Journal of Business Law*, pp. 433 – 460. Available at https://exeter.rl.talis.com/items/284B01B6-F5B4-843A-646D-9F233D39A7A8.html (accessed 7 June 2020).

acts. Since dual directorship is not prohibited under our laws, [91] a disqualified director who sits in a board or management of another company would have no remedy, and this will cause a deadlock in this other company, maybe even resulting to risks of cataclysmic proportions. However, it is advised that the leave be incorporated with adequate checks so as not to defeat the purpose of disqualification.

A new disqualification statute should emulate what is done in the banking sector where the Secretary of the Banker's (CBN) Committee maintains a register of terminated, dismissed and convicted staffs of banks on grounds of fraud and dishonesty. It is suggested that this laudable apparatus be adopted for an efficient disqualification regime**.** This will definitely be in line with best practices as seen in the UK with the Register of disqualified directors. This will serve as an effective caveat to the public as well as efficient safeguard.

Finally, there should be provisions in either our laws, or the ideal Disqualification law, for disqualification of a disqualified director of a foreign company incorporated abroad, who may want to take advantage of our laws to operate a phoenix company; as obtainable in the CDDA.

[91] CAMA, s. 281.

CLIMATE CHANGE IN NIGERIA: CAUSES, EFFECTS AND LEGAL FRAMEWORK

Lawal Badru*

ABSTRACT

That the effects of climate change are absolutely injurious and have over the years caused disasters deeply affecting human lives and property is an established fact which needs no proof. The immediate causes of climate change are traceable to some natural occurrences and basically anthropogenic acts. In recent times, there have been concerted efforts – through publication of works, holding of symposia etc. – to enlighten the public on the far-reaching consequences of climate change, its causes as well as a drive to provide a corpus of laws to specifically deal with this all-important topic. As part of the effort to contribute to the existing literature in this regard, this paper examines the causes, effects and legal framework of climate change in Nigeria.

1.0. INTRODUCTION

Climate change is a global problem which directly affects human life and also destroys property. It is the resultant effect of pollution of the atmosphere. When there is excessive emission of Green-House-Gases (GHG) into the atmosphere, it becomes polluted. Greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperature and subsurface ocean temperature to rise.[1] Anthropogenic acts such as burning of fossils fuels, deforestation, gas-flaring amongst others, are some of the major causes of climate change in Nigeria.

The causes of climate change have also been attributed to some natural factors such as continental drifts, volcanoes, ocean currents,

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[1] O.A. Fagbohun, *Law and climate change in Nigeria* (Being paper presented at the 2010 Edition of the Faculty of Law, University of Ilorin Law workshop on the 13th of May, 2010).

the earth's tilt, comets and meteorites.[2] The corollary of the above are the effects of climate change which include changes in rainfall patterns, change in wind patterns, increase in temperature *et al.,* which would inevitably result to natural disasters such as flood, drought, desertification amongst others.

The manifestation of these baleful effects of climate change in Nigeria makes it expedient on the part of the government to enforce laws to regulate the acts of individual citizens and industries which induce climate change.

The important question however is: Is there any law or enactment in Nigeria as a country which seeks to regulate the causative acts of climate change? The objective of this paper is to analyse the legal framework of climate change in Nigeria and if any, the causes of climate change and its effects.

2.0. DEFINITION OF TERMS

The Climate Change Convention, that is, the United Nations Framework Convention on Climate Change (UNFCCC), has defined climate change as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."

The Nigerian Climate Reports 490 has described climate change as any long-term change in the statistics of weather over durations ranging from decades to millions of years. It can be manifested in changes to averages extremes, or other statistical measures, and may occur in a specific region or the earth as a whole. Climate change refers to a change in climate that is attributable directly or indirectly to human activities, that alters the atmospheric composition of the earth which leads to global warming. Climate change has the potential of affecting all natural and human systems and may be a threat to human development and survival socially, politically and economically.[3]

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[2] Y.O. Ali "Legal Profession And Climate Change in Nigeria" available at https://yusufali.net/articles/LEGAL_PROFESSION_AND_CLIMATE_CHANGE_IN_NIGERIA.pdf, (accessed 7 June 2020).

[3] *Ibid.*

It has been argued on several occasions that, Global warming and Climate change are coequal and indistinguishable. This is actually not correct as global warming can be described as one of the major after-effects of climate change.

According to Fagbohun, global warming is an overall warming of the planet, based on average temperature over the entire surface, while climate change is a change in regional climate characteristics including temperature, humidity, rainfall, wind and severe weather events[4].

Climate change betides as a result of pollution of the atmosphere through excessive emission of green-house-gases. According to the National Oceanic and Atmospheric Administration (NOAA), of Europe, there are seven indicators that would be expected to increase in a warming world as a result of climate change, they are: tropospheric temperature, humidity, temperature over oceans, sea surface temperatures, sea level, ocean heat content, temperature over land; and three indicators would be expected to decrease, they are: glaciers, snow cover and sea ices.[5]

3.0. CAUSES

In reality, the causes of climate change in Nigeria are largely Anthropogenic (man-made) in nature. Human causes have been influenced by the industrial revolution of the 19th century, which saw the large-scale use of fossil fuels for industrial activities. Natural resources are being used extensively for construction, industries, transport and consumption.[6] Human factors have contributed to climate change and presently, the scientific consensus on climate change is that human activity is very likely the cause for rapid increase in global average temperature over the past several decades.[7]

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[4] *Ibid.*
[5] M.B. Anzaki, "Climate Change: The Legal Framework", available at http://www.thelawyerschronicle.com/climate-change-the-legal-framework/ (accessed 2 September 2019).
[6] *Supra* n 2, at p. 1.
[7] *Ibid.*

However, reference has been made to some specific natural factors which also cause climate change. Thus, both the natural causes and human causes of climate change shall be examined respectively.

3.1. Natural Causes

3.1.1. Volcanic Eruptions

The main effect volcanoes have on the climate is short-term cooling. Volcanic eruptions pump out clouds of dust and ash, which blocks out some sunlight. The ash particles being heavy, they fall to the ground within three months[8]. Volcanoes affect the climate through the gases, and dust particles thrown into the atmosphere during eruptions. The effect of the volcanic gases and dust may warm or cool the earth's surface, depending on how sunlight interacts with the volcanic materials.[9]

3.1.2. Ocean Currents

The oceans are a major component of the climate system. Ocean currents are located at the ocean surface and in deep water below 300 meters (984 feet). They can move water horizontally and vertically and occur on both local and global scales.[10] Ocean currents carry heat around the Earth. The direction of these currents can shift so that different areas become warmer and cooler. Oceans store a large amount of heat, so that small changes in ocean currents can have a large effect on coastal and global climate.[11]

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[8] NOAA Earth System Research Laboratory, "Teacher Background: Natural climate change" available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjY3Kqvz_DpAhWI2BQKHVKiBlEQFjAAegQIAxAB&url=https%3A%2F%2Fwww.esrl.noaa.gov%2Fgmd%2Feducation%2Finfo_activities%2Fpdfs%2FTBI_natural_climate_change.pdf&usg=AOvVaw0Uy4U7TvDnjA9Y-dH5Olil, (accessed 23 February 2020).

[9] British Geological Survey, "Discovering Geology" available at https://www.bgs.ac.uk/discoveringGeology/home.html (accessed 23 February 2020).

[10] *Supra* n 8.

[11] *Supra* n 9.

3.1.3. Meteorite Impacts

Meteorite Impacts have contributed to climate change by releasing some powerful materials into the atmosphere. These materials insulate the earth from solar radiation and cause global temperature to fall; the effects can last for a few years. After the materials released (such as dust and aerosols) fall back to earth, the greenhouse gases (Carbon-di-oxide, water, methane etc.), caused by the interaction of the impact remain in the atmosphere and can cause global temperature to increase; the effects can last decades.[12]

3.1.4. Solar Variations

The sun is the source of energy for the earth's climate system. Although the sun's energy output appears constant from an everyday point of view, small changes over an extended period of time can lead to climate changes.[13] It is reasonable to assume that changes in the sun's energy output would cause the climate to change, since the sun is the fundamental source of energy that drives our climate system.[14]

Other natural causes are: (v) Continental Drift (vi) The Earth Tilt and (vii) Comets.

3.2. Anthropogenic (Man-Made) Causes

The main cause of climate change in Nigeria has been attributed to high concentration of greenhouse gases (GHGs) in her atmospheres. The excessive emission of these GHGs causes the atmosphere to be in a polluted state.

Basically, the greenhouse gases which contribute to the surfacing of climate change are the following:

3.2.1. Carbon-di-oxide (CO_2)

Carbon dioxide is a component of the atmosphere which is released through natural processes such as respiration and volcanic eruptions and through human activities such as deforestation, land use changes, and burning of fossil fuels. The concentration of carbon dioxide in the

[12] *Ibid.*
[13] *Supra* n 8.
[14] *Ibid.*

atmosphere has increased through human activities and industrial works.

3.2.2. Methane

This is a hydrocarbon gas produced through both natural sources and human activities including the decomposition of works in landfills, agriculture, ruminant digestion and manure management associated with domestic livestock.

3.2.3. Nitrous Oxide

Nitrous Oxide is a powerful greenhouse gas which is produced through soil cultivation practices, especially the use of commercial and organic fertilizers, fossil fuels combustion, nitric acid production and biomass burning.

3.2.4. Chlorofluorocarbon (CFCs)

They are gases of industrial origin used in a number of applications, but now largely regulated in production and release to the atmosphere by international agreement for their ability to contribute to destruction of the ozone layer.[15]

However, of all the greenhouse gases listed above, carbon dioxide (CO_2) has been identified as the gas which singularly contributes the most to climate change.[16]

The immediate question which then comes to mind is: what are the elements of carbon dioxide? With particular respect to Nigeria, the sources of carbon dioxide (CO_2) are (i) The burning of Fossil fuels; (ii) Deforestation and (iii) Gas Flaring

3.3. Burning of Fossil fuels

The components of fossil fuels are oil, coal and natural gas. The actual combusting of these components causes excessive carbon dioxide to flow into the atmosphere, thus, causing pollution of the atmosphere which inevitably results into climate change.

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[15] *Supra* n 9.

[16] S.G. Ogbodo, "Climate Change and Natural Disasters: Issues and perspectives" (2013) 1(3) *Olabisi Onabanjo University Journal of Public Law: Environmental Law and Practice*.

3.4. Gas Flaring

Gas in this content relates to the associated gas in oil production process. This associated gas could be harnessed to the benefit of the country when employed for domestic use and export. Unfortunately, in Nigeria, associated gas is extravagantly flared into the atmosphere, channelling ways for climate change to surface.

Nigeria has been reported to be flaring an estimated 2.5 million cubic feet of gas each day which amounts to almost 40% of the total gas consumption in Africa.[17] Additionally, Nigeria is responsible for one-sixth of the entire gas flared in the world as it pumps over 400million tons of carbon dioxide into Nigeria's environment.[18] With all these statistics, Nigeria has been held as the country which flares gas the most in the world. It is however hoped, that the provisions of the very recent enactment, *The Flare Gas (Prevention of Waste and Pollution) Regulations 2018*, would be strictly adhered to in order to protect the environment through reduction of the environmental and social impact caused by the flaring of Natural gas.

3.5. Deforestation

This is a process of clearing of forests, by cutting down or burning all the trees grown in such forest. Nigeria also leads the world in deforestation as the thick forests have been wantonly cleared for logging, timber export, wood fuel, agriculture etc.[19] It has been reported that between 2000 and 2005, the country cleared 55.7% of forests.[20]

Sadly, these trees which are cut down serve as a major absorbent of carbon-dioxide ($C0_2$) through the process of photosynthesis. Thus, by the reckless removal of trees for economic and domestic utilization,

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[17] "Is the Clean Development Mechanism An option in Nigeria's Quest to Eliminate Gas Flaring?", available at http://www.trp-ng.com/pdf-files/Is%20clean%20development%20mechanism%20an%20option%20in%20Nigeria.pdf (accessed 8 June 2020), p. 2.

[18] A. Sampson, "Gas Flaring: Nigeria Govt Under Pressure", available at https://www.scoop.co.nz/stories/WO0812/S00359/gas-flaring-nigerian-govt-under-pressure.htm (accessed 8 June 2020).

[19] *Supra* n 16, at p. 5.

[20] *Supra* n 17, at p. 5.

the atmosphere is substantially deprived of the instruments which should protect it against carbon-dioxide ($C0_2$) effects. A major effect of deforestation is desertification. This leads us to the next discussion which is the effects of climate change in Nigeria.

4.0. EFFECTS

When climate change surfaces, there is a sudden change in rainfall patterns, wind patterns, and also increase in temperature amongst others which result inevitably to natural disasters like flood, drought, desertification etc. For the purpose of this paper, the effects of climate change would be sub-divided into primary and secondary effects, and same shall be discussed *seriatim*.

4.1. Primary Effects

The primary effects consist of the major effects of climate change on the environment, which thereafter, form the basis of the secondary effects. The primary effects are:

4.1.1. Flood

Climate change effectuates irregularity in rainfall patterns. Thus, causing rain to fall in an unusual manner, this sometimes may be excessive. Excessive rainfalls result in flooding, which brutally destroys lives and property of the citizens.

In 2002, more than 16 states were flooded in Nigeria, resulting in many deaths as well as displacement of over 2 million people.[21] The rise of sea levels beyond its carrying capacity, due to climate change, may lead to overflow of the sea waters which is capable of causing flood also.

4.1.2. Drought

When irregularity in rainfall occurs, rain ceases to fall for an unusual long period of time. The effects of this when taken with the after effects of the increasing average temperature of the earth due to climate change will result in drought. Drought is a period of dryness that causes damage to crops and prevents successful growth of plants.

4.1.3. Desertification

[21] *Supra* n 16, at p. 5.

This is the process by which an area becomes a desert. It is substantially caused by the combined effect of deforestation and the unusually over-heated climate. It occurs majorly in the northern parts of Nigeria. Reports have it that, 35% of previously cultivable land in 11 northern states of Nigeria has been overrun by desertification.[22] This has deeply affected agricultural practices negatively in Nigeria.

4.1.4. Bad Health Condition

Climate change affects human health directly or indirectly. According to the World Health Organization, "climate change is expected to cause approximately 250,000 additional deaths per year" between 2030 and 2050. As global temperature rises, so do the number of fatalities and illnesses from heat stress, heat stroke and cardiovascular and kidney disease.[23] Omoruyi and Onafalujo explained that, one of the direct consequences of climate change in Nigeria includes cerebra-spinal meningitis, cardiovascular respiratory disorder of elderly people, skin cancer, high blood pressure, malaria, cholera and child and maternal health issues.[24]

4.2. Secondary Effects

4.2.1. Crisis between Nigeria Regions

Due to the problem of rainfall variability, leading to drought, there have been clashes between herdsmen and farmers, which is a serious and prevailing social problem in Nigeria. Herdsmen in the core north, now push down south more frequently, in order to feed their cattle in farmer's cultivation. This has mutated over time in the destruction of investments and effort. The herdsmen have also been responsible for attacks on outspoken farmers, a situation for which hundreds of lives have been brutally lost in Benue, Taraba, Nasarawa, Ogun and

[22] *Supra* n 17.
[23] M. Denchak, "Global Climate Change: What You Need to know" https://www.nrdc.org/stories/global-climate-change-what-you-need-know (accessed 8 June 2020).
[24] I.F. Monday, "Investigating Effects of climate change on Health Risks in Nigeria", available at https://www.intechopen.com/online-first/investigating-effects-of-climate-change-on-health-risks-in-nigeria (accessed 2 February 2020).

several other states according to statistics corroborated by the National Emergency Management Agency (NEMA).[25]

4.2.2. Diminishing Agricultural Productivity

Due to the irregularities in weather conditions, farmers now find it hard to predict the perfect season for planting. Farmers now plant in the midst of great uncertainties, thus resulting in untold losses as their investment waste away from lack of rainfall at the right time. Consequently, this results in decline in productivity and the income of Nigerian farmers.[26] With respect to desertification, the agricultural and economic consequences of the loss of such significant portion of cultivable land are incalculable.

4.2.3. Loss of Lives and Properties

Many lives and properties of citizens have been destroyed due to the primary effects of climate change such as flooding, drought and desertification. Although already stated above, it is expedient to note that, in 2012, more than 16 states were flooded in Nigeria, resulting in many deaths and displacement of over 2 million people.[27] Farmlands suffer massive destruction also due to the effects of drought in significant portion of cultivable lands.

4.2.4. Dirty Air

Air pollution and climate change are inextricably linked, with one exacerbating the other. When the earth's temperature rises, not only does our air get dirty, but there are also more allergenic air pollutants released into the environment causing dangerous air-bone diseases.

5.0. LEGAL FRAMEWORK

It is now a cliché that the Nigerian constitution which is the "grundnorm" of all other laws in the country lacks any enforceable

[25] M. Olufemi, "Climate change and its effects on present-day Nigeria", available at https://tribuneonlineng.com/climate-change-effects-present-day-nigeria/ (accessed 2 February 2020).
[26] *Ibid.*
[27] *Supra* n 17.

provision for the protection of the Nigerian environment. It is expedient to note that the Constitution has it enshrined in its provision that "the state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria".[28] However, the above being accommodated under Chapter 2 of the Constitution is non-justiciable by virtue of Section 6(6) (c) of the 1999 Constitution.

Apparently, the absence of an enforceable provision which protects the environment makes the absence of any enforceable provision with respect to atmospheric protection understandable. Fortunately, as a member of the United Nations (UN), Nigeria has ratified and has thus became a party to a number of International Laws, conventions, agreements, treaties and protocols. Some of these international conventions and agreements are of much relation to the Environment generally, and to climate change in particular.

However, even with the president's assent to these international treaties which makes them ratified by the country, they do not automatically become an applicable law in Nigeria, until domesticated by the National Assembly as provided in Section 12 of the 1999 Constitution (as amended).

Thus, for the purpose of this discussion, the legal frameworks regulating climate change both internationally and locally would be examined *seriatim.*

5.1. International Legal Framework

5.1.1. The Intergovernmental Panel on Climate Change (IPCC)

This is a scientific intergovernmental body, and an organ of the United Nation, tasked with evaluating the risk of climate change caused by human activity. The panel was established in 1998 by the World Meteorological Organization and the United Nations Environmental Programme.

[28] The Constitution of the Federal Republic of Nigeria (CFRN) (1999) (as amended), s. 20.

According to IPCC, the extent of climate change effects on individual regions will vary overtime and with the ability of different societal and environmental systems to mitigate or adapt to change.[29]

5.1.2. The United Nations Framework Convention on Climate Change (UNFCCC)

The first report of IPCC in 1990 was what led to the adoption of the UNFCCC at the United Nation Conference on environment and development, Rio de Janeiro in 1992. It was ratified by 50 countries and came into force in March, 1994.[30]

The UNFCCC is the most recognized international agreement on climate change. It was based on the concept of "common but differentiated responsibility" recognizing the need for global actions and the differing levels of obligations placed upon industrialized and developing countries.

By virtue of Article 2 of the Convention, the main objective of the Convention was to stabilise greenhouse gas emissions at a level that would not interfere with the climate system or food production, but which would still allow sustainable economic development. Sequel to the above, the Convention also provided that, objectives are to be met within a time frame that would allow ecosystems to adapt to any changes.

The Convention provided also that there be intergenerational equity; common but differentiated responsibility; the right to sustainable development and the need to cooperate within a supportive and open international economic system.[31]

The Convention divides countries into two main groups namely;

i. Industrialised countries (41 countries) comprising of Organization for Economic Cooperation and Development (OECD) countries and economies in transition.

[29] *Supra* n 5.
[30] *Supra* n 1.
[31] *Ibid.*

ii. Developing countries (145 countries).[32]

By way of general commitments, countries (based on common but differentiated responsibilities) were to compile inventories of GHGs emissions caused by human activities; compile inventories of activities which remove GHGs from the atmosphere (sinks); develop regional programmes to mitigate climate change; develop and transfer technologies, practices and processes to control GHGs in all relevant industrial sectors (including energy, transport, agriculture, forestry, and waste management); promote mechanisms to remove GHGs from the atmosphere; take climate change considerations into account in formulating and implementing social, economic and environmental policies; and promote research, education and public awareness.[33]

The UNFCCC established a conference of parties (COP), a law-making body that meets annually and is charged with devising ways to implement UNFCCC goals.

The foremost conference of parties took place in Kyoto, Tokyo. Kyoto protocol and subsequent COP which held shall be discussed below:

I. **The Kyoto Protocol**:

The Kyoto protocol (KP) was negotiated and came into force in 2005. It sets binding emissions limitations on developed countries that have signed it. It was intended that the limitations must be met between 2008 and 2012.

The protocol aimed to reduce emissions to above 30% below what would have occurred under a business atmosphere.[34] An advantage of the protocol is that it provides for flexibility by allowing each country to make its own decisions on how to reduce emissions.

II. **The Bali Action Plan (Bali Road Map)**:

The parties to the UNFCCC met in Bali (Indonesia), to review implementation of the convention in 2007. It noted that climate change

[32] *Ibid.*
[33] *Ibid.*
[34] *Supra* n 5.

is unequivocal and recognised the need for cuts in global emissions. There was also the agreement that the role of forests as carbon sinks should be specifically recognised and deforestation in developing countries should be avoided.[35]

III. **Copenhagen Climate Change Summit 2009:**

In December 2009, parties to UNFCCC met in Copenhagen, Denmark, for the 15th Conference of the Parties (COP15). A framework for international climate change mitigation as a successor to the Kyoto protocol after 2012 was to be agreed upon there.

The document recognised that climate change is one of the greatest challenges of the present and that action should be taken to keep any temperature increases to below 2^0c. The Kyoto protocol succession was endorsed by the Copenhagen accord.[36]

IV. **Paris Climate Agreement 2015**:

This agreement happens to be the most recent conference of parties in implementation of the UNFCCC, which held in Paris (France) in 2015. At this conference, nearly every nation on earth committed to actions aimed at shifting away from fossil fuels and towards cleaner, smarter energy options in order to limit global temperature rise to 2^0c – or 1.5^0c if possible.[37]

It is noteworthy however that, the above international convention and agreements such as the UNFCCC, the Kyoto protocol etc. have been ratified by Nigeria, but are yet to be domesticated, thus having no application to the country. It is hoped that, the government would do the needful as regards this as soon as possible.

5.2. Legal Framework in Nigeria

In spite of the fact that, the Nigerian Constitution lacks any enforceable provision with respect to environmental protection, some legislations which enable the protection of the Nigerian environment

[35] *Supra* n 1.
[36] *Ibid.*
[37] *Supra* n 23.

have been made available courtesy of the development of Environmental Law in Nigeria.

Thus, legislations of close relation to climate change shall be discussed below:

5.2.1. The National Environment Standard and Regulations Enforcement Agency (NESREA) Act

The NESREA Act became operational in 2007. It replaced the defunct Federal Environmental Protection Agency (FEPA) Act[38] and has since become the leading environmental protection legislation in Nigeria.

By virtue of section 7(a) of the Act, the agency amongst others is mandated to "enforce compliance with Laws, guidelines and standards on Environmental matters". In furtherance, the agency is also empowered to:

> Enforce compliance with the provisions of International agreements, protocols, conventions, and treaties on the environment, including climate change, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wildlife, pollution, sanitation and such other environmental agreements as may from time to time come to force.[39]

The above provisions validate the enforcement of the aforementioned International Convention on climate change i.e. The UNFCCC in Nigeria. However, for NESREA to enforce compliance of such relevant treaty, its domestication into the Nigerian laws must have been made by the Legislative arm of government both at the Federal and State level.

The Agency is additionally mandated to "enforce compliance with guidelines and legislation on sustainable management of the ecosystem, biodiversity conservation and the development of Nigeria's natural resources."[40]

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[38] Cap. F10, Laws of the Federation of Nigeria, 2004.
[39] NESREA Act, s. 7(c).
[40] NESREA Act, s. 7(e).

5.2.2. The Environmental Impact Assessment (EIA) Act[41]

The EIA Act is of relevance also to the regulation of climate change in Nigeria. It is currently administered by the NESREA. Although, by virtue of section 5 (1*)* of the Act, certain projects have been excluded from the requirement of an environment assessment, the Act generally is designed to ensure that Environmental Impact Assessment (EIA) is conducted with respect to any project which is likely to cause significant effect on the Nigerian environment.

5.2.3. The National Oil Spill Detection and Response Agency (NOSDRA) Act[42]

Of relevance to climate change is the NOSDRA Act also. The major objectives of the Agency are to co-ordinate and implement the National Oil spill contingency plan for Nigeria.[43] In so doing, the Agency shall "establish a viable national operational organisation that ensures a safe, timely, effective and appropriate response to major or disastrous oil pollution".[44] By virtue of section 5(c) of the Act, the Agency is further charged with the responsibility of establishing the mechanism to monitor, assist and direct the response with a view to saving lives, protecting threatened environment, and cleaning up impacted sites.[45]

5.2.4. The Flare Gas (Prevention of waste and pollution) Regulations 2018

As discussed above, gas flaring is a major cause of climate change in Nigeria. Thus, the remarkable step taken by the government in enacting a legislation which directly regulates the flaring of gas into the Nigerian environment is a significant leap. This regulation was made by President Muhammadu Buhari, in his capacity as Minister of Petroleum Resources in pursuance to the powers conferred upon him by section

[41] Cap. E12, Laws of the Federation of Nigeria, 2004.
[42] The National Oil Spill Detection and Response Agency (NOSDRA) (Establishment) Act, 2006.
[43] NOSDRA Act, s. 5.
[44] NOSDRA Act, s. 5(a).
[45] *Supra* n 16.

9 of the *Petroleum Act* and section 5 of the *Associated Gas Re-injection Act*. The objectives of the regulation by virtue of section 1 are: the reduction of the environmental and social impact caused by the flaring of natural gas; the protection of the environment; the prevention of waste of natural resources; and the creation of social and economic benefits from gas flare capture.[46]

In furtherance of the objectives of this regulation, the regulation by virtue of section 12 provides that: "no producer shall flare gas from any facility operated by such producer except pursuant to a certificate issued by the minister further to the provisions of the Associated Gas Re-Injection Act.[47] It provided also that "no permit holder shall engage in Routine Flaring or venting of natural gas from any facility operated by such permit holder."[48] Additionally, "no producer shall engage in Routine Flaring or vent natural gas from any green field project."[49]

It is believed that, the strict compliance with these regulations will effectuate the reduction of gas flaring in Nigeria which shall mitigate the concentration of GHGs in the atmosphere.

6.0. RECOMMENDATION AND CONCLUSION

Research has it that, there is a climate change Bill before both Houses of the National Assembly that shall address salient issues connected with climate change and will provide an institutional and legal framework for climate change governance in the country.[50] It is said also that the Bill will provide appropriate policies and institutional structures to combat ecological and environmental problems in Nigeria when passed into law.[51] It is hereby suggested that this Bill be passed into law as soon as possible, as this would also help to enforce compliance of international agreements on climate change.

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[46] Flare Gas (prevention of waste and pollution) Regulations 2018, s. 1(a),(b)(c).
[47] Flare Gas (prevention of waste and pollution) Regulations 2018, s. 12(1).
[48] Flare Gas (prevention of waste and pollution) Regulations 2018, s. 12(2).
[49] Flare Gas (prevention of waste and pollution) Regulations 2018, s. 12(3).
[50] *Supra* n 2.
[51] G.F. Bert, Senate committee chairman on environment and ecology at round table organized on 16 March 2010.

As proposed by the UNFCCC, the injurious effects of climate change in Nigeria can only be curtailed through the process of mitigation and adaptation. By mitigation, the UNFCCC encourages parties to avoid the unmanageable, while by adaptation encourages parties to manage the unavoidable.[52]

One of the major reasons for adaptation is because climate change cannot totally be avoided as it is impracticable to put an end to all its causes in Nigeria. While mitigation primarily involves reduction in the concentration of GHGs either by reducing their sources or increasing their sinks, adaptation involves acting to minimise the effects of climate change. Mitigation policy helps reduce future increases in climate change while adaptation policy deals with the unavoidable impacts of climate change.[53]

Thus, it is humbly advised that, mitigation and adaptation strategies be implemented in order to enhance protection of citizens from the dangerous effects of climate change to a satisfactory extent in Nigeria.

[52] *Supra* n 5.
[53] *Supra* n 1.

SEX WORK IN NIGERIA; REGULATION, NOT CRIMINALIZATION

Shadare Oluwasemilore Enoch*

ABSTRACT

It is pertinent to note that there is essentially no difference between prostitution and sex work. This would be expatiated upon in the course of this paper. Sex Work in Nigeria is illegal in all Northern States that practice the Islamic Penal Code. In the Southern part of Nigeria, the activities of pimps, underage prostitution and the ownership of brothels are penalized under Sections 223 to 225 of the Nigerian Criminal Code. This Article examines the history and prevalence of Sex Work in Nigeria, its causes, its effects, both positive and negative. It further seeks to examine the disposition of several jurisdictions towards Sex Work and Constitutional provisions protecting sex workers with regards to their freedom of choice, freedom from discrimination, among others. In entirety, this paper attempts an appraisal of the need to decriminalize and subsequently regulate sex work in Nigeria and not criminalize or victimize sex workers.

1.0. INTRODUCTION

In the words of Alessandra Torre, "I hate Society's notion that there is something wrong with a woman who loves Sex." As stated in the abstract, there is essentially no difference between Prostitution and Sex Work.[1] However, the terms "Prostitute" and "Sex Worker" are used in different ways. Sex Work is the term sex workers want their occupation to be described as. It emphasizes that what they do is an occupation. It also brings up the presumption that people are not necessarily defined by their jobs. Prostitution, on the other hand, is seen by sex workers as offensive and demeaning. They believe that the term robs them of their personhood. Just to be safe and to sound less

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[1] C. LeRoq, "What is the difference between sex workers and prostitutes", available at https://www.quora.com/What-is-the-difference-between-sex-workers-and-prostitutes, (accessed 8 February 2020).

offensive, it is more appropriate to use the term 'sex worker'. Above everything, it is the most precise and neutral description.

Sex Work can be defined as the provision of sexual services for money or goods. Sex Work as a practice has over the years been identified as such in the history of mankind. As a matter of fact, it is seen as one of the oldest professions in the world, if not the oldest.[2] Sex workers may be male, female or transgendered and the boundaries of sex work are somewhat vague, ranging from erotic and lascivious displays without physical contact with the client to high risk unprotected sexual intercourse with clients.[3] The Abuja Federal High Court, presided over by Justice Binta Nyako, sometime in December 2019, declared that officials of a security task force contravened the law when they broke into apartments in the suburbs of Abuja around 11p.m in February 2017, to arrest women accused of being prostitutes.[4] This is certainly a milestone in the regulation of sex work.

Sex Work is a matter of choice and apart from the spread of Sexually Transmitted Diseases (STDs), there is no threat that sex work poses to the society. *Section 39(1) of the 1999 Constitution* provides for freedom of expression. Every citizen of Nigeria has the right to express himself or herself in so far as such expression is not a hindrance to other citizens' or does not pose any form of threat to other citizens. Sex Workers should not be victimized or assaulted. Globally, sex workers have a 45% to 75% chance of experiencing sexual violence at some point in their careers and a 32% to 55% chance of experiencing sexual violence in a given year.[5] In 2012, it was estimated that there were between 40 and 42 million prostitutes in

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[2] F. Wickman, "Is Prostitution Really the World's Oldest Profession", available at https://slate.com/news-and-politics/2012/03/rush-limbaugh-calls-sandra-fluke-a-prostitute-is-prostitution-really-the-worlds-oldest-profession.html, (accessed 8 February 2020).

[3] C. Harcourt and B. Donovan, "The many faces of Sex Work" (2005) 81(3) *Sex Transm Infect.*

[4] C. Ukpong, "Nigerian court rules against arrest of sex workers", available at https://www.premiumtimesng.com/news/more-news/369034-nigerian-court-rules-against-arrest-of-sex-workers.html (accessed 3 February 2020).

[5] K. Koster, "17 facts about Sexual Violence and Sex work", available at https://www.huffpost.com/entry/16-facts-about-sexual-ass_b_8711720, (accessed 8 February 2020).

the world.[6] This statistic shows the economic benefit that can be gained from the activities of sex workers. New South Wales, Australia, decriminalized sex work in 1995; New Zealand legalized prostitution in 2003 alongside several other jurisdictions which would be discussed in the course of this paper.

With the constant spate of arresting, detaining and victimization of sex workers all over the country, it is not farfetched to assume that Sex Work is an offence in Nigeria. Nevertheless, no particular part of the Constitution prohibits Prostitution in Nigeria. It is however pertinent to note that the Criminal Code criminalizes "procuring and other related offences" which although may have an affinity with prostitution, are not one and the same. However, the *Penal Code Act of FCT, 1990,* provides against prostitution. It defines prostitutes as "vagabonds". This paper proposes the regulation of sex work. It is also pertinent to note that Sex work includes but not limited to activities of direct physical contact between buyers and sellers as well as indirect sexual stimulation. Furthermore, sex work only refers to voluntary sexual transactions, thus the term does not refer to human trafficking and other forceful or non-consensual sexual relations such as child prostitution or underage sex. The transaction must take place between consenting adults who are of the required legal age and mental capacity to provide consent and must be void of any form of coercion. A brief history of prostitution in Nigeria would be attempted next.

2.0. A CONCISE HISTORY OF SEX-WORK IN NIGERIA.

As debatable as the issue of the legality or otherwise of Sex work is, an Assistant Commissioner of Police, Mr. Abayomi Shogunle, has said that prostitution is a crime under the law.[7] However, He did not give

[6] G. Lubin, "There are 42 million prostitutes in the world, and here's where they live", available at https://www.businessinsider.com/there-are-42-million-prostitutes-in-the-world-and-heres-where-they-live-2012-1?IR=T, (accessed 8 February 2020).

[7] N. Adebowale, "Arrest of women in Abuja: What Nigerian law says about Prostitution", available at https://www.premiumtimesng.com/news/headlines/329180-arrest-of-women-in-

his reasons for this assertion. He also said that prostitution is a sin under the two main religions practiced by residents of the Federal Capital Territory. An attempt to trace the history of Sex Work in Nigeria would thus be made.

Humans have exchanged money and goods for sex for thousands of years and indeed, it seems that any society that begins to develop material wealth soon begins to develop some form of Sex Work. The Holy Bible in fact depicts many Israelites as having large numbers of concubines, who could be regarded as either prostitutes or as wives of lesser status. King Solomon had about 300 of them, according to 1 Kings 11:3. Beginning in the early 1900s, the rising economic importance of Lagos as a seaport and capital city changed the economic and political landscape of the city. These demographic and commercial changes expanded to the commoditization of sex and by the year 1910, commercial sex services had become prevalent in Lagos.[8] In the year 1916, the colonial government enacted a law prohibiting solicitation by women but the law did not define prostitution. The Law was implemented by the government's discretion and commercial sex work was tolerated as long as it did not cause public nuisance. In 1932, popular musician, Tijani Omoyele, released an album titled "Asewo/Omo Jaguda", which is translated in English as "Prostitutes are criminals". During the late 1930s, sex workers became popularly called "Ashewo" (people who change money into lower denominations). As a matter of fact, during the period before the World War II, commercial sex workers solicited clients in brothels, cinemas and hotel bars.[9] By the onset of the World War II, British officials became apprehensive of any link between high venereal disease rates in West African Frontier Force soldiers and promiscuous sexual affairs with prostitutes.[10] During this period, forced prostitution of teenagers was increasing. In the year 1942, an institution was built to rehabilitate child prostitutes in Lagos and a year

abuja-what-nigerian-law-says-about-prostitution.html (accessed 29 January 2020).

[8] A. Saheed, "Of gender, race and class" (2012) 33(3) *Frontiers: A journal of women studies,* pp. 71 – 92.

[9] *Ibid*.

[10] *Supra* n 7.

later, *The Children and Young Persons Ordinance* was passed, prohibiting child prostitution.[11] By 1946, a set of laws was enacted that clearly defined prostitution and reiterated its prohibition.

After Nigeria gained independence in 1960, brothels and areas notorious for prostitution that had been prohibited in the middle 1940s began to reappear.[12] Towards the early *1980s,* street prostitution became a common sight at Allen Avenue, Ikeja in Lagos and also in some areas of Oshodi, in Lagos. The 1980s also contributed to the beginning of call-ups or part time prostitution by young adults and graduates.

In the 21st Century, commercial sex work continues to thrive in Nigeria. According to statistics given by the *United Nations Interregional Crime and Justice Research Institute,* about 8,000 to 10,000 women of Nigerian descent practiced prostitution in Italy between 2000 and 2009.[13] A new and different form of Sex Work known as "corporate sex work" and which is mostly limited to financial institutions began to gain prominence in the 2000s. In 2004, a bankers' union threatened to go on strike due to allegations that some female staff sleep with men for accounts. In as much as most financial institutions do not coerce women to engage in sexual activities in order to meet financial targets, it is nevertheless implied that many of them are not against it.

3.0. FORMS OF SEX WORK

For the sake of further information, some forms of Sex Work would be identified.

3.1. Street Sex Work

Street Sex Work is a form of prostitution in which a sex worker solicits customers from a public place, usually on a street, while waiting

[11] A. Saheed, "When Sex threatened the State: Illicit Sexuality, Nationalism and Politics in Colonial Nigeria", (University of Illinois Press: 2014).
[12] *Ibid*, at p. 10.
[13] O. Aluko-Daniels, "At the margins of consent: Sex Trafficking from Nigeria to Italy", available at https://link.springer.com/chapter/10.1057/9781137391353_5, (accessed 10 February 2020).

at street corners or walking along a street.[14] They also solicit for customers from public places such as parks, beaches, clubs, restaurants etc., and they are often dressed in a provocative and seductive manner. The sexual act may be performed in the client's vehicle or in a secluded street location, or at the sex worker's apartment or in a hotel room.

3.2. Brothel Sex Work

This type of Sex Work is the type whereby there's an establishment called a 'brothel' wherein the prostitutes sometimes reside and are supervised by a person usually referred to as a "madam" with sufficient social contact and influence to make the institution profitable.[15] In this situation, one or more males are usually on the premises to deal with unruly or homosexual clients. Brothels vary, and are mostly confined to certain areas of a city which can be regarded as outskirts which is just beyond the watch of municipal authority. This type of sex work is prevalent in majority of Nigerian cities. Brothel sex work is preferred in areas where sex work is decriminalized or where brothels are "tolerated".

3.3. Escort Sex Work

Escort commercial Sex Work is a form of Sex Work where the agency provides clients with an "escort" for a fee, the "escort" being the sex worker and with sexual intercourse being a "private" matter between the escort and the client. It is the most covert form of sex work.[16] This type of sex work is relatively expensive because of low client turnover.[17]

3.4. Higher Institutions Transactional Sex

Whether or not this type of sexual relation can be aptly categorized as Sex Work is yet to be seen. However, it would not be farfetched

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[14] A.A. Bagudo and M.A. Yusuf, "Addressing prevalence of Prostitution in Nigeria through non-formal education provisions" (2019) 7(2) *European Journal of Education and Development Psychology*, pp. 1 – 10.
[15] *Ibid*, at p. 3.
[16] H.L. Surratt, "What are the different types of Prostitution", available at https://prostitution.procon.org/view.answers.php?questionID=000096, (accessed 13 February 2020).
[17] *Ibid.*

to describe it as a form of sex work as it comes under the general definition of Sex work, only that it may not always be consensual or consent may be obtained out of misrepresentation or duress. This type of sex work has obviously been thriving for donkey years but it just came to the fore recently. It is a situation where female and male students of higher institutions make themselves available for sexual relations in exchange for marks, favours or monetary privileges from their lecturers and fellow students.

Other forms of sex work which are prevalent include private sex work, transport sex work (where sex workers board vehicles to transact with the crew or passengers), among a host of others. Also involved, are beer girls who are usually employed to sell and promote goods in bars and pubs. These ones, sometimes, engage in commercial sex with customers as a means of supplementing their income.

4.0. IDEOLOGIES, STANDPOINTS AND JUSTIFICATIONS FOR SEX WORK

4.1. The Abolitionist group and the Sex Workers Rights Group

These are two conflicting ideologies of Sex Work. The Abolitionist group are in support of the criminalization of Sex Work, while the Sex Workers Rights groups are in support of the decriminalization of Sex Work. It is of utmost importance to also note that there is a difference between decriminalization and legalization of sex work. Decriminalization refers to the removal of all and criminal and administrative prohibitions and penalties on sex work, including laws targeting clients, patrons and brothel owners. Legalization on the other hand refers to a legislative regime characterized by significant regulations.

In the opinions of Raymond J. G.[18] and Hayes-Smith, the abolition of Sex Work is hinged on the explanation that the term glorifies

[18] J.G. Raymond, "Ten reasons for not legalizing prostitution and a legal response to the demand for prostitution" (2008) 2 *Journal of Trauma Practice*, pp. 315 – 322.

prostitution, a profession which contravenes and is against the moral dictates and structures of the society and also challenges the institution of marriage. Raymond further argued that sex work reduces a woman's self-worth and also objectifies her, by portraying her as an object that can be bought with money. Radical abolitionists on the other hand, postulate that Nigeria should walk in the foot-steps of Sudan by attaching a death penalty on Sex Work. Worthy of note is the fact that the abolitionist perspective is in line with the provision of the United Nations 1949 Convention that prostitution and the accompanying evil of the trafficking for the purpose of prostitution are incompatible with the dignity of the human person and therefore, endangers the welfare of the individual, the family and the community.

Although, Nigeria has adopted a hybrid prohibitionist-decriminalization scheme with regards to Sex Work,[19] sex workers' rights groups continue to clamour for the absolute decriminalization and have argued for the regulation of commercial sex work because it is a legitimate occupation, just like any other occupation and the decision to enter into the industry is a function of individual freewill and by implication, it is wrong to criminalize individuals' freewill. Hence, the prohibition and criminalization of sex work is an infringement on the rights of consenting adults to personal liberty and association and also their freedom of contract. The rationale for this is that women should have the freedom to make decisions about their body and any attempt to infringe on this freedom amounts to subjugation of women and approval of existing patriarchal order.

This writer is of the view of the decriminalization of sex work, then regulation of same; the main thrust of this paper. The criminalization of Sex Work would compromise the health of sex workers by driving sex work underground.[20] It is worthy of note that criminalization of sex work includes everything from criminalizing the sale and purchase of sexual services, to blanket prohibitions on the management of sex work. By implication, criminalization of sex work would make it harder

[19] Criminal Code Act 1990, Cap. C38, Laws of the Federation of Nigeria, 2004.
[20] Open Society Foundations, "Understanding Sex Work in an Open Society", available at https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society (accessed 27 February 2020).

for sex workers to negotiate terms with clients, work together with other sex workers for safety and carry condoms without the apprehension that such would be used against them as an evidence of prostitution.[21] As stated earlier, decriminalization and regulation of sex work would serve to uphold the freedom of choice of sex workers. Seymour J. Mandelbaum, a Professor Emeritus of City and Regional Planning at the University of Pennsylvania is of the opinion that lax regulation and over-criminalization of Sex Work can invariably lead to stigmatization and victimization of sex workers, increase in sexual violence, spread of diseases and other negative effects for the society.[22] Sex Workers rights groups believe that a regulated commercial sex industry will reduce the proliferation of brothels, underage sex workers and create employment for a young, vibrant, voluntary and healthy class of women that will contribute to national development through the payment of tax. The United States of America's State of Nevada, Netherlands and Germany are among jurisdictions which legalize and regulate Sex Work.

4.2. Economic Standpoint

It is pertinent to note at this point that the Commercial Sex Industry is a very large industry which has the potential of providing economic benefits to a society. There are currently about 10,000 people working as lap-dancers in Britain and over 72,800 Sex Workers.[23]And almost all Brits are involved in Sex Work, either as a worker or a consumer. Furthermore, over half of Brits watch pornography, over a quarter has visited a strip club, and more than one in ten British men have solicited the services of a Sex Worker.[24] Through the services of sex workers, there is cash flow between both social strata and this consequently helps to mitigate inflation. This is because sex workers provide a service which is extremely high in demand. As a matter of fact, the

[21] *Ibid*.
[22] P. Udeh, U. Uduka and S. Mbah, "Socio-economic effect of Commercial Sex Work in Abuja Suburb: A survey of selected brothels in Mararaba, Nigeria" 7(1) *Sociology and Criminology-Open Access Journal*.
[23] Economy Team, "How should economists think about sex work?", available at https://www.ecnmy.org/engage/economists-think-sex-work/, (accessed 22 February, 2020).
[24] *Ibid*.

World Health Organization (WHO) pushes that all countries should work towards the decriminalization of Sex Work.[25]

The Office for National Statistics (ONS), which collects national statistics, estimated that sex work alone put £5.3 billion into the U.K economy in the year *2009*. In the same year, pornography put £1 billion, while strip clubs put £300 million.[26] That is a whole lot of money. The English Premier League, which is watched by nearly 5 billion people around the world, puts just £3.36 billion into the U.K economy each year. These statistics are just a few out of the many overwhelming statistics of sex work. Furthermore, chats with sex workers in the UK reveal that they earn an average of £2,000 a week, three and a half times more than the British average of £569.[27]

The decriminalization of sex work would help to maximize sex workers' legal protection and their ability to exercise other key rights, including their right to justice and health care. Legal recognition and protection of sex workers and their occupation maximizes their protection, dignity and equality.[28] An estimate provided by the Urban Institute says that Atlanta's sex trade/industry was worth a whopping $290 million in 2007 alone. Miami's sex economy was worth $235 million and Washington D. C.'s $103 million.[29] The survey by the same Institute, found that pimps can make between $5,000 per week (which is the average in Kansas City) to $32,833 per week (in Atlanta.)[30]

4.3. Arguments against Sex Work

The first and perhaps the most remote argument against sex work is morality. As stated earlier, sex work is simply two adults exchanging sex for cash or its equivalent. This definition is important because sex

[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*
[28] Human Rights Watch, "Why Sex Work should be decriminalized", available at https://www.hrw.org/news/2019/08/07/why-sex-work-should-be-decriminalized, (accessed 27 February 2020).
[29] C. Kolodny, "9 things you didn't know about American Prostitution", available at https://www.huffpost.com/entry/sex-trade-study_n_4951891, (accessed 27 February 2020).
[30] *Ibid.*

work is often fused with trafficking, sexual abuse of children and rape and as a matter of fact, it is these conflations that drive the scrutiny and negative attention and opinions the sex industry often faces. Saudi Arabia is an example of a jurisdiction that has relaxed their moralistic stance on Sex Work.

This writer is of the view that morality has no place in any discussion on Sex Work. It however has a way of creeping in – often times through the religious orders who are proposing the further criminalization of the trade.

Some schools of thought are of the view that condoning sex work is the most demeaning and degrading thing the State can do to women. Furthermore, they believe that there can be no dignity in a relationship where sex is exchanged for money.[31] They are also of the opinion that Sex Work is too exploitative by its very nature to count as something consenting adults should be allowed to do. But the evidence mustered for this tends to depend on a pre-existing moral bias against making Sex Work legal.

Another argument against Sex Work is that it is an exploitative profession that makes sex workers unhappy.[32] A large minority of Brits and two-thirds of young Brits think that sex work is a form of exploitation to women and should be a criminal offence, although men, trans and non-binary people all do sex work, about 88% of sex workers are female[33] The proponents of this argument further believe that Sex Work significantly reduces the quality of life of people by exposing them to things like violence, crime and drugs. It is not untrue that sex workers are in an industry that can make them vulnerable to crime and exploitation and it is based on this that the proponents of this argument stand.

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[31] C. Herlinger, "The worldwide debate about sex work: Morality meets reality", available at https://www.globalsistersreport.org/news/trafficking/worldwide-debate-about-sex-work-morality-meets-reality-48216, (accessed 28 February 2020).
[32] *Supra* n 23.
[33] *Ibid.*

Fourthly and perhaps one of the biggest criticisms levelled against sex work is that it is fundamentally sexist. Some people point to the fact that the vast majority of sex workers are women and majority of clients are men to prove that Sex Work only exists because of a patriarchal view that sex should be about prioritizing the sexual desires of men and ignoring women. Others think that supporting prostitution encourages sexual violence by making some men believe that they have the right to obtain sexual gratification from just any woman.

Sex Work is also sometimes seen as a form of capitalist exploitation. Molly Smith, who wrote a book on sex workers rights, is of the view that prostitution is a symptom of capitalism.[34] Her point is that if we lived in a world where money had no value, then there would be no motive or reason for people to go into sex work.

4.4. Justifications for Decriminalization of Sex Work

As stated earlier, decriminalization of Sex Work would serve as a means of upholding Human Rights and dignity. A cornerstone of contemporary human rights is that all people are born free and equal in dignity and rights. There are several reasons why adults engage in Sex Work, whether it is their main source of livelihood, an ephemeral means of survival or an avenue to supplement their income. Whatever the reasons may be, sex workers should be treated with the degree of dignity and respect that you should be accorded to any human.

Secondly, Sex Work is not inherently violent; it is the criminalization of sex work that places sex workers at great risk. However, this point can be disputed on the basis that jurisdictions where Sex Work is not criminalized still experience levels of victimization and violence against sex workers. However, decriminalization still reduces this considerably.[35] The fear of arrest or abuse by law enforcement agents

[34] J. Mac and M. Smith, "Sex is Not the Problem with Sex Work", available at http://bostonreview.net/gender-sexuality/juno-mac-molly-smith-sex-not-problem-sex-work (accessed 7 June 2020).

[35] B. McCarthy, C. Benoit, M. Jansson, and K. Kolar, "Regulating Sex Work: Heterogeneity in Legal Strategies, available at https://www.annualreviews.org/doi/full/10.1146/annurev-lawsocsci-102811-173915 (accessed 7 June 2020).

poses a significant threat to the activities of sex workers. These factors, coupled with actual or perceived impunity for perpetrators of violence against sex workers places sex workers at heightened risk.[36] In jurisdictions that have decriminalized Sex Work such as New Zealand, sex workers have an increased ability to screen clients, work in safe areas with better access to security services and refer to law enforcement agencies in cases of violence.[37]

In Jurisdictions where Sex Work is criminalized, law enforcement agents, e.g. the Police, wield power over sex workers. Police threaten sex workers with arrest, jail terms, public humiliation and extortion. In Central and Eastern Europe, a high proportion of sex workers have reported suffering sexual assault by the Police, as high as 90% in Kyrgyzstan.[38] In Cambodia, a country located in South-east Asia, nearly half of all freelance sex workers have been beaten and nearly half have been raped by the Police and nearly three of every four brothel-based sex workers have been beaten and more than half have been raped by the Police.[39]

In all these instances, police abuse and victimize sex workers with so much impunity, partly because sex workers fear arrest or further abuse for reporting these crimes.

Another justification for the decriminalization of sex work is that decriminalization improves access to health services. It would serve as an avenue through which outreach workers can visit brothels and

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[36] Open Society Foundations, "10 reasons to decriminalize Sex Work", available at https://www.opensocietyfoundations.org/uploads/cc072baf-14b2-48f8-8c5f-30d7e9a6ec14/10-reasons-decriminalize-sex-work-20150410_0.pdf, (accessed 27 February 2020).

[37] A. Lynzi, "Screening clients in a decriminalized street-based sex industry: Insights into the experiences of New Zealand Sex Workers", (2014) *Australian and New Zealand Journal of Criminology*, pp. 1 – 16.

[38] Human Rights Watch, "Kyrgyzstan: Letter to Kenjebek Bokoyev, Chairman of Parliamentary Committee on Rule of Law, Order and Fighting Crime", available at https://www.hrw.org/news/2012/11/18/kyrgyzstan-letter-kenjebek-bokoyev-chairman-parliamentary-committee-rule-law-order (accessed 7 June 2020).

[39] Global Network of Sex work Projects, "Violence and exposure to HIV among sex workers in Phnom Penh, Cambodia", available at https://www.nswp.org/resource/violence-and-exposure-hiv-among-sex-workers-phnom-penh-cambodia, (accessed 27 February 2020).

provide health services. Decriminalization is the greatest financial support for sex worker health programs. Better financial support means greater capacity to conduct health outreach in the evenings because evenings are often the busiest times for sex workers.[40] Decriminalization has also been seen to increase condom access and rates of use by sex workers.

Decriminalization reduces the risk of HIV/AIDS and other sexually transmitted diseases/ infections. Research has proven that decriminalization of sex work could avert up to 46% of new HIV infections among female sex workers over the next decade.[41] By implication, the decriminalization of sex work would empower sex workers to insist on the use of condoms by clients and are also more likely to be able to access testing and treatment for HIV and other sexually transmitted infections.

For the purpose of this paper, the last justification is that decriminalization would enable effective responses to trafficking. Trafficking is a notorious and inhumane human rights violation which involves the coercion or deception of individuals for sexual exploitation or forced labour. Sex workers can be natural allies in the fight against trafficking and may also be well placed to refer trafficking victims to the appropriate quarters. A notable example was in India where through a sex worker run self-regulatory board, the Durbar Mahila Samanwaya Committee in Sonagachi, India was able to identify and provide support for women who had been trafficked for the purpose of sexual exploitation.[42] When absolved from the threat of criminal sanctions, sex workers can organize and collaborate with law enforcement agents.

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[40] C. Harcourt, et al, "The decriminalization of Sex work is associated with better coverage of health promotion programs for sex workers" (2010) *Australian and New Zealand Journal of Public Health.* Pp. 482 – 486.

[41] Avert, "Sex Workers, HIV and AIDS", available at https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/sex-workers (accessed 7 June 2020).

[42] S. Jana, et al, "Combating human trafficking in the sex trade: can sex workers do it better?" (2014) 36(4) *Journal of Public Health,* pp. 622 – 628.

5.0. RECOMMENDATIONS/PROPOSAL FOR REGULATION

Just like in the Netherlands where there is the *Bill for Regulation and Suppression of Abuse in the Sex Industry,* Nigeria and other jurisdictions where sex workers still face victimization and stigmatization can pass such bill into law to protect sex workers. However, in Netherlands, the Bill is still under negotiation after passing the second chamber, but it has twice been rejected by the Senate. The most recently revised version was submitted in 2014. The Bill has currently not come into force but it is believed that it will in the near future. The Bill is aimed at stricter control of some sectors in the sex industry.

Around 2016, Amnesty International released a draft proposal/policy on protecting sex workers from human rights violations and abuses. It is advised that jurisdictions take a cue from some of these provisions in addressing the issue of regulation of Sex Work.

Some major points contained in the proposal would be discussed briefly here. The proposal does not support forced and underage involvement in sex trade.[43] Amnesty International supports criminal laws against trafficking, coercion of individuals into the sex trade and soliciting sex from minors.

Furthermore, the proposal does not support decriminalization of sex work, neither is it opposed to state regulation of adult, consensual sex work. The proposal further states that it should be guaranteed that all individuals who wish to partake in sex work should be able to do so in safe conditions, void of exploitation and should also be able to stop engaging in sex work when and if they choose to.[44]

The proposal explicitly supports labour rights and fair labour relationships. In the proposal, it is stated that countries must respect and protect the rights of sex workers to just and favourable working conditions, including fair wages, safe and healthy conditions of work

[43] K. Koster, "8 things to know about Amnesty's draft proposal on Sex Work", available athttps://www.huffpost.com/entry/8-things-to-know-about-amnestys-draft-proposal-on-sex-work_b_7905776, (accessed 28 February 2020).
[44] *Ibid.*

and limit on working hours. The proposal also calls for an end to the direct criminalization of Sex Work.

Further regulations include that governments should fully decriminalize sex work and ensure that sex workers do not face discrimination in law or practice. They should also strengthen services for sex workers and ensure that they have safe working conditions and access to public benefits and social safety nets. Moreover, any regulations and controls on sex workers and their activities need to be non-discriminatory and otherwise comply with international human rights law.

6.0. CONCLUSION

For decades, moralists have argued that Sex Work downgrades and belittles the dignity of womanhood and negates the morality of the society generally. From the exposition thus made, it can be easily deduced that both men and women engage in sex work either professionally or temporarily, for economic and monetary reasons. Against this backdrop, it is not farfetched to believe that Sex Work may be against morality, but is certainly not against any form of written law. Sex work poses no danger to the State or to the person and it would be very parochial to push for the criminalization of Sex Work on the grounds of morality.

There are several reasons why people engage in Sex Work and these reasons should not be downplayed, instead they should be respected. Every individual has the freedom to contract, freedom of association and freedom of choice. This should then not be limited to the kind of job one can partake in, as far as it poses no threat to the safety and security of individuals and the State as a whole.

In view of the negative perception of Sex Work in Nigeria, this paper contends that it should not be criminalized; instead it should be decriminalized and then regulated. Therefore, law enforcement agents should cease from victimizing sex workers and recognize the rights of consenting adults to trade sexual relations as they wish as anything contrary to this position is tantamount to the denial of the fundamental human rights of, and discrimination against, women in a

patriarchy-structured Nigerian Society.[45] Little wonder Nenia Campbell said; "A woman is not a whore for wanting pleasure. If it were unnatural, we would not be born with such drives."[46]

Furthermore, Alice Bag opined; "My sexuality is not an inferior trait that needs to be chaperoned by emotionalism or morality."[47]

[45] *Supra* n 22.

[46] Goodreads, available at https://www.goodreads.com/quotes/1304491-a-woman-isn-t-a-whore-for-wanting-pleasure-if-it (accessed 7 June 2020).

[47] Goodreads, "Alice Bag > Quotes", available at https://www.goodreads.com/author/quotes/4218589.Alice_Bag (accessed 7 June 2020).

THE NIGERIAN ELECTRICITY INDUSTRY: THE JOURNEY THUS FAR AND THE FUTURE

Emmanuel B. Edet*

ABSTRACT

The need for viable supply of electricity to match the demand in a fast industrializing country such as Nigeria cannot be over emphasized. Nearly two decades since the formulation of the National Electricity Power Policy, which set in motion the process of unbundling and privatization of the Nigeria Electric Power Authority, much is left to be achieved regarding efficient generation and supply of electric power in Nigeria. Issues ranging from billing, financial distress, poor supply amongst others still plague the industry. This paper seeks to examine the legal, institutional and regulatory framework of the electric power sector with a view to understanding what has been left undone in ensuring maximal power supply in Nigeria. It analyses the state of the industry since the advent of privatization and seeks to pave a workable approach to optimizing the Electric Power industry, which would ultimately boost the Nigerian economy.

1.0. INTRODUCTION

Electricity is regarded as affording numerous advantages over various other energy carriers; enabling more efficient lighting, information and communication technologies, and more productive organization of manufacturing.[1] Electric power is a major driving force in the economic growth of any nation. Electricity has continued to positively affect economic growth as it allows for improvement in virtually the most basic of human endeavours, from food production and conservation to water purification and even medical care.[2] The

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[1] D.I. Stern, P.J. Burke, and S.B. Burns, "The Impact of the Electricity on Economic Development: A Macroeconomic Perspective" (2017) 1(1) *Energy and Economic Growth State-of-Knowledge Paper Series*, p. 3.

[2] World Economic Forum, "Why access to electricity is key to Africa", available at https://www.weforum.org/agenda/2016/05/why-access-to-electricity-is-key-for-africa/ (last accessed 10 December 2019).

overriding importance of electric power cannot by any means be overemphasized.

It was with a view to attaining the full potentials of the electric power industry and driving steady economic growth and a suitable standard of living, that the reform of the Nigerian Power Sector was initiated. At the forefront of this, was the unbundling and privatization of the then National Electric Power Authority (NEPA) in 2005;[3] this process being aimed principally at meeting all current and prospective economically justifiable demands for electricity. However, despite its predicted benefits, this step has not yielded results, as the Nigerian Electric Power Industry has continued to suffer. The commercial viability and financial liquidity of the sector has continued to be a big challenge. The industry has continued to record losses from uncollected bills,[4] energy theft and the persistent perils of the estimated billing system.[5] The generation and onward distribution of energy has not, in the least, been optimal as constraints of insufficient gas supply and inadequacy of transmission and distribution networks have been a clog in the wheel of sufficient power supply.

It is believed that steps are still being taken to build the system to perfection. Public-Private Partnership (PPP) is seen as a focal point of the privatization idea, as it seeks to encourage private sector investment and cooperation in the industry by divesting the government of a huge volume of the financial and technical burden of running the industry. However, there are still many draw-backs. Due to the government's monopoly as seen in its exclusive running of the

[3] National Electric Power Policy (2000) adopted by the Electric Power Reform Implementation Committee and approved by the National Council on Privatization.

[4] According to the National Electricity Regulatory Commission report for the 2nd quarter of 2019, available at www.nerc.gov.ng, bills for N3.09 out of every N10 worth of energy sold has remained uncollected.

[5] National Electricity Regulatory Commission Report for the 2nd quarter of 2019, available at www.nerc.gov.ng (accessed 9 December 2019).

Transmission Company of Nigeria, there has been a certain level of inefficiency[6].

An overview of the Power Sector leading to this point is apposite in perfectly understanding the institutional and regulatory framework of this gigantic Sector.

2.0. AN OVERVIEW OF THE INSTITUTIONAL FRAMEWORK OF THE POWER SECTOR IN NIGERIA

Electricity generation in Nigeria began in 1896. However, it was not until 1929 that the National Electricity Supply Company (NESCO) commenced operations with the construction of the Kurra hydroelectric power station. The Electricity Corporation of Nigeria (ECN) was established in 1951 and the first 132KV line was constructed in 1962, linking the Ijora Power Station to the Ibadan Power Station. The Niger Dams Authority (NDA) was also established in 1962 with a mandate to develop the hydropower potentials of the country.

In 1972, the National Electric Power Authority (NEPA) was formed from a merger of the ECN and the NDA. NEPA ceased to have an exclusive monopoly over electricity generation, transmission, distribution and sales, first in 1998 and then in 2005. The Authority was unbundled and all its assets were given to a newly formed holding company, the Power Holding Company of Nigeria (PHCN).[7] The unbundling of NEPA is deemed to have been the initial step in the long privatization process. The Electric Power Sector Reform (EPSR) Act of 2005 was hoped to herald a revolution in the Power Sector[8] and

[6] National Electric Power Policy (2000) adopted by the Electric Power Reform Implementation Committee and approved by the National Council on Privatization 4.3.2.

[7] PHCN was formed pursuant to Electric Power Sector Reform Act, 2005, s. 1. The Act provides that, *"The National Council on Privatization shall, not later than six (6) Months after the coming into force of this Act, take such steps as is necessary under the Companies and Allied Matters Act to incorporate a company, limited by shares, which shall be the initial holding Company for the assets and liabilities of the authority"*.

[8] V. Ifedi, "Power Reform and Electricity Generation", available at http://dawodu.com/ifedi1.htm. (accessed 3 June 2020).

push the energy sector to optimal performance, boosting investor confidence and attracting Foreign Direct Investment to the Sector.

On 30 September 2013, PHCN ceased to exist and, in its stead, the National Electricity Regulatory Commission (NERC) was formed. The NERC being an independent regulatory agency provided under the EPSR Act 2005. The agency was charged with the monitoring and regulation of the Nigerian Electricity Industry, issuance of licenses and ensuring compliance with market rules and operating guidelines.[9] The National Power Company was unbundled into eleven (11) Local Distribution Companies (DisCos), six Power Generation Companies (GenCos) and the single Transmission Company of Nigeria.[10]

The successor entities of the PHCN are discussed in detail below:

2.1. Nigerian Electricity Regulatory Commission (NERC)

The Nigerian Electricity Regulatory Commission (NERC) is the electricity regulator in Nigeria and was established to succeed the PHCN.[11] The EPSR Act[12] established the Commission with the functions of licensing operators, determining operating codes and standards, establishing customer rights and obligations, and setting out cost reflective industry tariffs.[13]

The NERC is further charged with the function of coordinating the Nigerian Power Supply structure. The Commission was inaugurated in October of 2005 with its headquarters in Abuja and Zonal Offices in each geopolitical zone for administrative convenience.

The NERC is the sole electricity licensor, as all vendors in every aspect of electricity generation, transmission and distribution must possess a valid license duly issued by the NERC in accordance with the EPSR Act.[14] The NERC is also empowered under the Act to fully enforce

[9] Electric Power Sector Reform Act (EPSRA), 2005. S. 32(2).
[10] *Supra* n 8.
[11] *Ibid.*
[12] EPSRA, s. 31.
[13] *Supra* n 9.
[14] EPSRA, s. 62(1); *Funke Adekoya S.A.N* v *VGC Management and Maintenance Co. Ltd. & Eko Electricity Distribution Company* NERC/H/061.

the requirement of licensing.[15] The Commission has however been criticized as lacking the political will to adhere to or implement strictly the provisions of the Act.[16] This is a critical issue, given the need for effective regulation in the, now free, electricity market. The need to ensure compliance with set standards and to develop best market practices cannot be overemphasised.

2.2. Transmission Company of Nigeria (TCN)

The Transmission Company of Nigeria (TCN) is a single entity independent of the DisCos and GenCos. The TCN coordinates the electricity system and has the role of electricity transport.[17] The TCN cannot buy, sell, own or have an ownership stake in power generation, distribution, marketing and sales of electricity in Nigeria.[18] The TCN is the only part of the defunct power entity that is wholly State owned and cannot be wholly private owned. The objective is to safeguard the independence of the company in the electric power market: all power generated in a station of more than 20MW must be centrally dispatched from the TCN. The TCN is the middleman between the GenCos and the DisCos.

The TCN has a monopoly over transmission of energy generated,[19] hence irrespective of how much power is generated, the DisCos can only have access to as much as is transmitted by the TCN through the grid at a given time. This is a major drawback on the journey to viability of Electricity supply. The TCN has failed to attain its full potentials as projected upon privatization, and this has not been unconnected to various challenges which have bewildered it,[20] such as vandalization of

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[15] EPSRA, s. 62(7).

[16] "Electricity Licenses and Tariffs Law and Regulations", available on www.proshareng.com/articles/Proshare%20Law/Electricity-Licenses-and-Tariffs-%C3%A2%E2%82%AC%5C%E2%80%9C-Law-and-Regulations/2266/ (accessed 10 June 2020).

[17] National Electric Power Policy (2000) adopted by the Electric Power Reform Implementation Committee and approved by the National Council on Privatization. 4.3.2 (ii).

[18] *Ibid*.

[19] *Ibid*, at ss. 65 & 66.

[20] B. Oladapo, "TCN: Understanding the Nigerian Power Sector", available at https://www.linkedin.com/pulse/tcn-understanding-Nigerian-power-sector-busayo-oladejo (accessed 11 December 2019).

transmission and distribution equipment, poor maintenance and electricity theft, amongst others. It is hoped that steps will be put in place to curb these unfortunate circumstances, hence giving the electricity middleman a fighting chance.

2.3. Generation Companies (GENCOS)

Following the post-privatization segmentation of the power sector, GenCos are charged with the responsibility of generating electricity. This is done through the transformation of hydro and gas power into electrical power. Essentially, any licensed hydro or gas electricity generating plant is essentially a GenCo, although power generators must be duly licensed by the NERC in accordance with the EPSR Act.[21]

The privatization in 2013 heralded the advent of the term, 'GENCO' although generating plants have existed in Nigeria since 1896.

There are over twenty (20) GenCos in Nigeria but the top six which generate most of the country's electricity are: Egbin Power Limited, Transcorp Power, Shiroro, Kainji/Jebba, Sapele and Geregu Generating Companies.[22] The generating sub-sector has been plagued with operational challenges like all other sub-sectors.

2.4. Electricity Distribution Companies (DISCOS)

These companies are the connections between the consumers and the grid. The average consumer of electricity sees the DisCos as the face of the entire sector. This is not out of place, as they are the only sub-sector with which the everyday consumer interacts with. The DisCos are responsible for distribution, billing and revenue collection.[23] The EPSR Act prohibits distribution of electricity without the requisite license from the NERC.[24] DisCos are all privatized to at least 60%.

There exist eleven (11) DisCos covering designated locations all over Nigeria, they are;

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[21] *Supra* n 16, s. 62(1).
[22] National Electricity Regulatory Commission Report for the 2nd quarter of 2019, available at: www.nerc.gov.ng (accessed 9 December 2019).
[23] *Supra* n 16.
[24] EPSRA, s. 62(1).

i. Abuja Distribution Company – FCT, NIGER, NASSARAWA, KOGI.
ii. Benin Distribution Company – EDO, DELTA, EKITI, ONDO
iii. Enugu Distribution Company – IMO, ANAMBRA, EBONYI, ABIA, ENUGU
iv. Eko Distribution Company – LAGOS – VICTORIA ISLAND, LEKKI, LAGOS ISLAND, APAPA, EPE, IKOYI, Etc.)
v. Port Harcourt Distribution Company – RIVERS, BAYELSA, CROSS RIVER, AKWA IBOM
vi. Ibadan Distribution Company – OYO, OGUN, OSUN, KWARA
vii. Ikeja Distribution Company – LAGOS – IKEJA, SURULERE, IKORODU, Etc.
viii. Jos Distribution Company – PLATEAU, BAUCHI, BENUE, GOMBE
ix. Kano Distribution Company – KANO, JIGAWA, KATSINA
x. Kaduna Distribution Company – KADUNA, SOKOTO, KEBBI, ZAMFARA
xi. Yola Distribution Company – ADAMAWA, BORNO, TARABA, YOBE

Just like the other sub-sectors, DisCos have experienced and continue to experience numerous challenges, including; the technical and commercial losses exacerbated by energy theft and customer apathy to payments under the widely prevailing practice of estimated billing, coupled with weak management effort at revenue collection.[25] This has led, quite predictably, to poor funding and a resultant liquidity crunch within the DisCos,[26] and in turn, to a mirage of challenges such

[25] *Supra* n 21. Only 42.92% of registered consumers of electricity are metered. 19.8% of energy released by DisCos is lost to technical inefficiencies or energy theft.
[26] B. Oladejo. "The DISCOS are knee deep in debts and cannot even access loans from bankers", available at http://sparkonline.com.ng/2017/01/no-distribution-company-in-nigeria-is-bankable-ceo-phed.html (accessed 14 December 2019).

as; insufficient power supply from the national grid, infrastructural challenges, a never reducing metering gap.

3.0. THE LEGAL REGIME IN THE POWER SECTOR

The current Electricity Power Sector regime had begun in 2000 with the constitution of the Electricity Power Implementation Committee (EPIC) which drafted the National Electric Power Policy in 2001, leading to the Electric Power Sector Reform 2005. The reform underlined restructuring and privatization of the sector, with a view to opening up the sector to other industry players for wider participation.

NEPA was created by a merger of ECN and NDA – Generation and Transmission – by the National Electric Power Authority Decree No. 4, 1972, later National Electric Power Authority Act.[27] This Act has since been eclipsed by the EPSR Act.

The Nigerian Power Sector is regulated by The Constitution, The ESPR Act and Regulations made pursuant to the Act among others.

3.1. The Constitution of the Federal Republic of Nigeria (CFRN) (1999) (As Amended)

The Constitution is the grundnorm, the primary law in Nigeria and is in the same vein the primary regulator of the electric power industry. The Constitution primarily allocates the law-making powers of the industry. The Constitution designates the Federal and State Governments with powers to make laws with regards to the electricity sector.[28] It is pursuant to the powers proffered under the Constitution that the Electric Power Sector Reform Act, 2005, was enacted.

3.2. The Electric Power Sector Reform Act 2005

The Act rolled out the Privatization process of the electric power sector. The EPSR Act is the primary legislation governing the Nigerian Electricity Supply Industry. The Act was enacted to provide the

[27] Cap. 256, Laws of the Federation of Nigeria, 1990.
[28] Part II, First Schedule to the Constitution of the Federal Republic of Nigeria (CFRN), Cap. 23, Laws of the Federation of Nigeria, 2004.

general legal framework for the formation of successor companies of NEPA, to take over assets and liabilities of the old regulatory body, while restructuring the industry.

The Act provided for the formation of a Holding Company for the assets and liabilities of NEPA,[29] which heralded the beginning of the Privatization process. It also empowered the National Council on Privatization to commence the Privatization of the Power industry.[30]

The Act establishes the Nigerian Electricity Regulatory Commission[31] and vests in it the powers to effectively regulate the Power Sector. The NERC is responsible for licensing, regulation, monitoring the electricity market, amongst other functions.[32] The Act prohibits the operation of a generation, transmission or a distribution outfit without a license,[33] empowering the NERC to enforce this requirement of licensing and punish offenders.[34] The Act also empowers the NERC to regulate tariffs and quality service; in relation to anti-competitive behaviours, including mergers and acquisitions.[35]

The Act establishes the Rural Electrification Agency[36] and the Rural Electrification fund,[37] in a bid to support, promote and provide electrification in non-urban areas. The EPSR Act provides, very importantly, for resolution of disputes within the sector. The NERC is vested with power to conduct proceedings, consultations and hearings,[38] and also the power to reconsider, rescind and vary its decision prior to issuing a final decision.[39] The Act also gives parties

[29] EPSRA, s. 1.
[30] *Ibid*, at s. 24.
[31] *Ibid*, at s. 31.
[32] *Ibid*, at s. 32(2).
[33] *Ibid*, at s. 62(1); The Act however exempts power generation facilities with capacity not exceeding 1MW or Distribution facilities with capacity not exceeding 100KW – S. 62(2).
[34] *Ibid*, at s. 62(7).
[35] *Ibid*, at s. 80, 81.
[36] *Ibid*, at s. 88(1).
[37] *Ibid*, at s. 88(11).
[38] *Ibid*, at s. 45.
[39] *Ibid*, at s. 50(2).

before proceedings of the NERC, the right to appeal or have a matter put forward for rehearing.[40]

The Act also contains penal provisions, criminalizing various acts including false declarations[41] and obstructions.[42] Furthermore, in a bit to make up for whatever it may not have been able to sufficiently cover, and also to enhance the Regulatory competence of the NERC, the Act empowers the Commission to make regulations covering various issues as the Commission considers sacrosanct.[43]

3.2.1. Application for Licenses (Generation, Transmission, System Operations, Distribution and Trading) Regulations 2010.

The regulation provides for procedures for the application and obtaining of licenses issued by NERC, and the renewal, suspension,[44] cancellation[45] and withdrawal[46] of such licenses. The regulation also outlines the procedure for appeals, in the event of grievance over actions of the Commission with regards to licensing and licenses.[47]

3.2.2. Meter Asset Provider Regulations 2018

This regulation seeks to address the severe shortfall of power in DisCos (mostly attributed to Aggregate Technical, Commercial and Collection (ATC&C) losses), as well as the public outcry about overcharging under the estimated billing system.

In all, this regulation seeks to eliminate the estimated billing system,[48] and seeks to do so through promoting independent and competitive metering services and through attracting private investors to the provision of metering services.

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[40] *Ibid*, at s. 50.
[41] *Ibid*, at s. 93.
[42] *Ibid*, at s. 94(2).
[43] *Ibid*, at s. 96.
[44] Regulation 16.
[45] Regulation 17.
[46] Regulation 18.
[47] Regulation 19.
[48] Regulation 2.

3.2.3. Regulations on National Content Development in the Power Sector 2014

The National Content Regulation with a view to increasing Nigerian participation in the Nigerian Electricity Supply Industry[49] requires qualified Nigerian operators to be given first consideration for all works and services in the industry. This is however commendable as it does not, in a bid to satisfy National content requirements, ignore competence. These regulations apply to all licenses[50] and to employment.[51]

4.0. OFFENCES RELATING TO ELECTRICITY

These practices are prevalent and usually considered by most as non-criminal. Electricity theft ranks among these acts and is in fact a criminal act involving; the use of electricity without paying, meter bypass and unlawfully connecting directly to a Distribution source. The electricity sector loses approximately ₦231 billion annually to electricity theft.[52] The EPSR Act has criminalized this practice.[53] It is an offence to knowingly and willingly steal, divert or use electricity or electric current.[54] It is also an offence punishable with up to 21 years imprisonment to illegally disconnect, tamper, meddle and interfere with electricity meters, fittings or appliances for generation, transmission, distribution, supply, calculation, conversion or sale of electricity.[55]

The EPSR Act makes it an offence to fail to or refuse to supply information, or wilfully delay or obstruct an inspector or police officer in the exercise of powers or duties conferred or imposed upon him by or under this Act.[56] A person – legal or natural – who contravenes

[49] Regulation 3.
[50] Regulation 3(ii).
[51] Regulation 10.
[52] O. G. Olaleye, "Electricity Theft and Power Quality in Nigeria", (2017) 6(6) *International Journal of Engineering Research and Technology (IJERT)*.
[53] *Supra* n 28, s. 94(3),
[54] Penal Code Act, 1960, ss. 286(3) & 287; Criminal Code, 1916, ss. 1 & 400; Miscellaneous Offences Act, 1983, ss. 1(10) & 5.
[55] Miscellaneous Offences Act, s. 1(9).
[56] S. 94(2).

any provision of the EPSR Act or any regulation made thereunder is guilty of an offence where none is stated.[57] The Act along with other enactments has adequately catered for the criminalization and prosecution of offences, many of which have resulted in huge losses and malfunctions in the sector. There however remains, as in many cases, the problem of enforcement. Efforts should be put towards detecting, preventing and prosecuting persons found culpable of these practices. This, it is believed, would send a message that the practices are unacceptable and should not in any case be condoned or overlooked.

5.0. THE JOURNEY SO FAR

Six years into Privatization, the electricity sector is still beguiled with numerous challenges. These challenges have, in no small measure, affected the efficiency and profitability of the sector. Prominent amongst these are billing, poor power generation and financial distress.

a. *Billing*

A large percentage of Nigerian Electricity consumers still operate under the problematic estimated billing system.[58] In these cases, such consumers who are not metered are made to pay amounts which are merely estimates of what may be their perceived energy consumption rate over a given period. This gives way to probabilities of over-billing and in some cases, under-billing – in which case the DisCos suffer losses. The estimated billing system gives way to fraud by employees of DisCos and is responsible for the dismal collection rates recorded. The prevalence of this practice is indicative of the huge metering gap which presents a huge task for the DisCos when it comes to measuring the consumption of their unmetered customers. The continued use of the estimated billing system is not in the best interest of the Sector as

[57] *Ibid*, at s. 94(1).
[58] "Most Nigerians Pay Estimated Bills for Power Consumption", available at https://noi-polls.com/most-nigerians-pay-estimated-bills-for-power-consumption (17 December 2019).

it would further diminish the profitability of the already financially burdened sector.

b. *Poor Power Generation*

As at June 2019, the average power generation in Nigeria was between 3711MW and 4068MW per day with the generation having peaked at 5348MW in April 2019.[59] This is nothing close to what is required to fend for the skyrocketing electricity needs of a country seeking to expand economically. Nigeria is ranked as the second worst nation in terms of electricity supply. This poor performance being blamed on the dependence of the Sector on petroleum and natural gas is cited as a major factor in the prevalent generation deficit.[60]

c. *Financial Distress*

The DisCos have been regarded as largely unbankable entities, drowning in debts and unable to secure loans from banks.[61] This is worsened by the amounts lost annually to ATC&C related issues. These issues spread all through the Sector as they cannot afford to pay off the GenCos for energy supplied or meet other outstanding obligations. This cash crunch has been attributed to various circumstances such as; inflation, fluctuating exchange rates, escalating gas prices, generation capacity, revenue shortfall and poor collection, amongst others.

It becomes clear that a lot is left to be desired in the Sector, even with the apparent hopes that with the privatization of the Sector, the best was to come. The challenges experienced may point to mistakes which

[59] *Supra* n 3.

[60] "Poor power supply in Nigeria: What is the reason", available at https://www.power-nigeria.com/en/industry-news/poor-power-supply-in-Nigeria-what-is-the-reason.html (accessed 17 December 2019). This is ironic given Nigeria's place as one of the largest producers of oil and the fact that gas is present in abundant quantities in Nigeria.

[61] B. Oladejo, "No Distribution Company in Nigeria is Bankable – CEO, PHED", available at http://sparkonline.com.ng/2017/01/no-distribution-company-in-nigeria-is-bankable-ceo-phed.html (accessed 17 December 2019). For instance, the PHED owes amounts in the excess of NGN 70 Billion.

may have been made in the process of privatizing the electric power sector.

5.1. The Shortcomings of The Privatization Process

The post privatization era seems to have failed to meet up with the optimistic expectations of laymen and industry players alike, and this may or may not be as a result of various mistakes which were made in the course of privatization. The privatization process attracted the attention of key players, as the transaction was concluded, involving amounts hovering around the region of $3 billion.

The process is said to have been flawed and worked on the basis of estimates and assumptions.[62] The privatization process was underpinned by very optimistic and unrealistic assumptions and promises by regulators, the Bureau of Privatization and policy makers. This had been attributed to the hostility of some electricity workers which prevented physical inspection of assets by bidders as part of the process initiated by the Bureau of Public Enterprise.

The administration which carried out the process was accused of selling the companies out to cronies of past administrations. This is typical in highly politicized societies as ours, where even past privatization efforts have been utilized as a means to settle political scores and reward loyalists. The disengagement of key drivers at the time may be seen as a major factor in the mistakes of the process as these persons who had conceived and properly analysed this endeavour could not see it through to the very end. Such persons include Prof. Barth Nnaji, the former Minister for Power.[63]

It should also be noted that there exists no fail-safe switch to allow the government to step in and retake ownership in the event of dismal

[62] R. Humwapwa, "Challenges and Prospects of Power Sector Privatization", available at https://punchng.com/challenges-and-prospects-of-power-sector-privatisation/amp/ (accessed 17 December 2019).
[63] O. Odion, "Privatization of the Power Sector: What Went Wrong?, By Odion Omonfoman", available at https://opinion.premiumtimesng.com/2017/05/30/privatisation-of-the-power-sector-what-went-wrong-by-odion-omonfoman (accessed 17 December 2019).

performance by DisCos without the country paying a crushing financial price for it.

Above all the mistakes and the challenges which still exist, a lot must be done to enhance prospects of profitability, as this is the only attraction to private investments which, in turn, are key to the future development of the Sector.

6.0. CONCLUSION

Irrespective of the problems that have piled against the electric power industry, it can be said, without mincing words, that the Sector is nothing short of promising and this is not in doubt. Efforts must be concerted, above all, on making the sector efficient and profitable. Only then can it realize the fullest of its potentials as was hoped at the conception of the idea of Privatization. It goes without saying as well that going back on privatization is not at all an option.

It is recommended that the estimated billing regime be completely eliminated and the prepaid billing system be properly implemented. This is the best for the consumer, the Distributor and the Generator likewise. The prepaid meter must also be technically standardized to curb, to the barest minimum, the menace of electricity theft (bypass). This way, energy supplied can be accounted for or nearly accounted for in revenue. The amendment bill criminalizing estimated billing needs to be passed into law to the extent that it deals sanctions on the distributor and the customer who insists on the largely unprofitable and almost fraudulent estimated billing system. The question of enforcement is, without mention, pivotal if any progress can be made, as it regards the billing systems and the need for change.

Also, the energy market should be further liberalized. The TCN should be unbundled and delivered into capable hands; learning from the mistakes of the previous privatization process. The monopoly of the transmission sub-sector appears to be somewhat unreliable in its current state especially when the energy needs of the nation are brought to mind. However, it is my view that the issuance of meters be a function exercised only by the DisCos.

The electric power sector remains crucial in the question of the development of the country. Notwithstanding the challenges bedevilling it six years into Privatization, the sector could move in the right direction if and only if the right decisions are made and implemented as is due.

NOT ALL POST-ELECTION DISPUTES FALL WITHIN THE EXCLUSIVE JURISDICTION OF THE ELECTIONS TRIBUNAL: A REVIEW OF THE FEDERAL HIGH COURT'S DECISION IN THE CASE OF *ROCHAS ANAYO ETHELBERT OKOROCHA* v *INDEPENDENT NATIONAL ELECTORAL COMMISSION & 7 ORS.*[1]

Onyemauche Ibezim and Ifunanya Nwodigwe[*]

ABSTRACT

Where the victory of a party in an election is rendered nugatory as a result of the exercise of administrative powers of the electoral commission, an issue arises as to the appropriate forum for judicial actions. The Electoral Act 2010 and 1999 Constitution of the Federal Republic of Nigeria are both silent on the subject. The Court had an opportunity to determine this issue in Rochas Anayo Ethelbert Okorocha v *Independent National Electoral Commission & 7 Ors and thus, had set a precedent in this regard. This paper seeks to highlight the category of post-election issues which confer jurisdiction on the regular court and an Election Petition Tribunal, using the parameter of the landmark decisions of the Court in the case in review. It espouses the propriety of the decisions therein in line with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 and judicial precedents.*

1.0. INTRODUCTION: MEANING OF JURISDICTION

Jurisdiction refers to the authority of a court to decide matters that are litigated before it, or to take cognisance of matters presented in a formal way for its decision.[2] These authorities are generally conferred on the courts by statute, constitution or the Law under which the Court is constituted.[3] The issue of jurisdiction is so fundamental that where a court has no jurisdiction, it is a futile exercise for that court to embark on the hearing of the matter because the decisions of the

[1] FHC/ABJ/CS/296/2019.

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[2] *Halsbury Laws of England*, 4th ed., vol. 10, paras. 715, p. 523.

[3] *National Bank (Nigeria) Ltd. & Anor.* v *Shoyoye & Anor* (1977) LPELR-SC.312/1975.

court made without jurisdiction, no matter how brilliant, goes to a nullity. The Supreme Court in *Okorocha* v *UBA*[4] held that;

> It is trite law that jurisdiction is the life wire of any case and is a threshold which is so fundamental that any decision reached by any Court of law no matter how superb, beautiful, or sound such case is a nullity once such trial Court or tribunal or appellate Court lacks jurisdiction to determine or adjudicate on the matter or appeal[5]

The issue of jurisdiction is so significant that it could be raised at any time in a proceeding. Once it is raised during a proceeding, the court must first determine whether it has jurisdiction or not at the earliest stage before the merits of the case or the substantial issues are considered and determined.[6] The court in determining whether it has jurisdiction must consider the nature of the claimant's claim in relation to the constitutional provisions establishing the court.[7] Furthermore, it is the plaintiff's claim as endorsed in the Writ of Summons and Statement of Claim or the Affidavit in support of its Originating Summons that the Court considers to determine whether or not it has jurisdiction to entertain the action.[8]

As stated earlier, the 1999 Constitution (as amended) creates the Court and provides for the extent of the jurisdiction of the Court.[9] The Election Petition Tribunal being a creation of the Constitution is conferred with the scope and jurisdiction of matters it can entertain.[10] The Supreme Court affirmed this position in the case of *Dankwambo* v *Abubakar & Ors*[11] where the court held thus;

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[4] (2018) LPELR-45122(SC).
[5] See also *Kurma* v *Sauwa* (2018) LPELR-SC.746/2016.
[6] Dr. J. Sokefun and N.C. Njoku, "The Court System in Nigeria: Jurisdiction and Appeals" (2016) 2 *International Journal of Business and Applied Social Science* https://ijbassnet.com/storage/app/publications/56fcacaab8e9511459399850.pdf (accessed 8 August, 2019).
[7] *TSKJ (Nig) Ltd* v *Otochem (Nig) Ltd* (2018) LPELR-44294(SC).
[8] *Alamieyeseigha* v *Igoniwari (*No. 2) (2007) 7 NWLR (Pt.1034) 524 at 573.
[9] *Supra* n 2.
[10] Constitution of the Federal Republic of Nigeria (CFRN) (1999) (as amended), s. 285(1).
[11] (2015) LPELR-25716(SC).

> The law is well settled that jurisdiction is a creation of statute or the Constitution. The jurisdiction of the Election Tribunal and the Court of Appeal in respect of election petitions is derived from the 1999 Constitution (as amended). It is therefore both statutory and constitutional.[12]

Section 285 of the 1999 Constitution (as amended), clearly specifies the extent of the jurisdiction of the National and State Houses of Assembly Election Petitions Tribunal; it provides as follows;

> (1) There shall be established for each States of the Federation and the Federal Capital Territory, one or more election tribunals to be known as the National and State Houses of Assembly Election Tribunals which shall, to the exclusion of any Court or Tribunal, have original jurisdiction to hear and determine petitions as to whether –
>
> a) Any person has been validly elected as a member of the National Assembly; or
>
> b) Any person has been validly elected as member of the Houses of Assembly of a State

Section 285(2) of the Constitution also went further to state that:

> There shall be established in each State of the Federation an Election Tribunal to be known as the Governorship Election Tribunal which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor of a State.

The Electoral Act reaffirmed the above in Section 133 (1), where it states that:

> No election or return of an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (herein referred to as an election petition) presented to the competent tribunal or court in

[12] *ANPP* v *Goni* (2012) LPELR SC.1/2012.

> accordance with the provisions of the constitution or of this Act and in which the person elected or returned is joined as a party.

From the above provisions of the 1999 Constitution (as amended) and the Electoral Act, 2010 (as amended), it can be deduced that the jurisdiction of an election petition tribunal is limited to post-election disputes.[13] This can be inferred from the wordings of the provisions of the Constitution which states that the jurisdiction of the tribunal is limited to questions "as to whether any person has been validly elected to the office…" This position seems to have received judicial stamp where the Court in *Faleke* v *INEC*[14] held that "the jurisdiction of the election petition tribunal is not at large but limited to the determination of petition relating to whether any person has been validly elected…". Thus, it is logically and legally safe to conclude that disputes relating to electioneering that arise prior to the conduct of an election, usually referred to as "pre-election issues", will not fall within the jurisdiction of the tribunal.

The foregoing formed the basis of the Court of Appeal's decision in *Mbina* v *INEC*[15] where the Court held that the issue which arises prior to the conduct of the election cannot be brought before the tribunal as such is a pre-election matter.[16] The proper forum for issues which border on pre-election matters is the High Court.[17] In *ANPP* v *Argungu & Ors*[18] where the nomination, withdrawal and substitution of candidates in the election formed the basis of the issue, the court held that such matters are not within the jurisdiction of the Election Petition tribunal. The court specifically held that "pre-election matters are to be ventilated either in the High Court of a State and Federal Capital Territory or Federal High Court".

Also, the jurisdiction of the tribunal is limited by the grounds of the petition brought before the tribunal. Section 138 (1) (a)-(d) of the

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[13] *Mbina & Anor* v *INEC & Ors.* (2017) LPELR-43248(CA).
[14] (2016) 18 NWLR (Part 1543) 61 at 132 to 133.
[15] *Supra* n 13.
[16] See also *Gwede* v *INEC* (2014) 18 NWLR (Pt. 14) 38.
[17] *Ameachi* v *INEC* (2008) 5 NWLR (Pt. 1080) 227; *Ugwu* v *Ararume* (2007) 9 NWLR (Pt.1038) 137.
[18] (2008) LPELR-CA/K/EP/NA/52/2007.

Electoral Act 2010 sets out the grounds upon which an election can be questioned before an Election Tribunal. It provides as follows:

> (1) An election may be questioned on any of the following grounds:
>
> a) That a person whose election is questioned was, at the time of the election, not qualified to contest the election.
>
> b) That the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;
>
> c) That the respondent was not duly elected by majority of the lawful votes cast at the election: or
>
> d) That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.
>
> e) That the person whose election is being questioned submitted an affidavit containing false information of a fundamental nature in support of his qualification for the election to INEC.[19]

Where the grounds of the petition fall outside those set out by the provisions of Section 138 (1) (a)-(e) of the Electoral (Amendment) Act, 2015, the tribunal shall be robbed of the jurisdiction to entertain such petition. For instance, matters that border on constitutional questions or administrative powers conferred by the Constitution are not within the scope of an Election Tribunal's jurisdiction.[20] Thus, for an election matter to fall within the exclusive jurisdiction of the Election Tribunal, the grounds upon which the petition was brought must be one of the grounds set out in Section 138 of the Electoral (Amendment) Act. The Court affirmed this position in *Zaranda* v *Tilde*,[21] where it held that an Election Tribunal lacks the jurisdiction to hear an election petition on

[19] *Electoral (Amendment) Act,* 2015. See also CFRN (1999) (4th Alteration), s. 285(9) – (14).
[20] *Supra* n 10. See also *Adams* v *Umar & Ors* (2008) LPELR-3591-CA.
[21] (2008) 10 NWLR (Pt. 1094) 184 at 212.

grounds other than those provided under Section 145 of the Electoral Act, 2006 (now section 138 of Electoral (Amendment) Act, 2015).

Another point worthy of note, as it relates to the jurisdiction of an Election Petition Tribunal, is the issue of who can bring an election petition. The Electoral Act makes provision on the appropriate parties in an Election Petition Tribunal. Section 137(1) (a) and (b) of the Act provides that an election petition may be presented by a candidate in an election and a political party which participated in the election. The petitioner in an election petition is usually the party who participated as a candidate in an election but is contesting the election of the other candidate who has been declared the winner of an election. The Electoral Act, 2010 (as amended) in Section 137 (2) implied the above assertion when it provided that "a person whose election is complained of is, in this Act, referred to as the Respondent". Thus, it can be rightly inferred that the winner of an election is not expected to complain of same or challenge another contestant who lost out by way of petition.

The above point raises the question as to whether a winner in an election can file a cross-petition. This is because the provisions of the Act clearly referred to the winner of an election as the respondent, thereby shutting out the winner from seeking any remedy in the tribunal. The clear interpretation of the Act reveals that it does not envisage a situation in which a petition is presented against the loser of the election nor where the winner in an election becomes a petitioner by way of cross-petition. However, the Court of Appeal in resolving the appeal before it in *Idris Ibrahim* v *ANPP*[22] suggested that a winner in an election may file a cross-petition under the grounds as provided by Section 138 of the Act. In the case of *Idris Ibrahim* v *ANPP*,[23] the 2nd petitioner who was disqualified by INEC before the election brought a petition after the election challenging the return of the respondent, the respondent in his counter-affidavit and preliminary objection argued that the second petitioner was not qualified to

[22] (2008) 8 NWLR (Pt. 1088) 1.
[23] *Ibid.*

participate in the election relying on Section 138 (1) (a) of the Electoral Act. The Court held that:

> Any respondent to an election petition who intends to rely on that ground must file a cross-petition. In the instant case, the appellant who sought to challenge the second petitioner's qualification ought to have filed a cross-petition.

The obiter of the Court of Appeal in the above matter resounds the fact that the petitioner may in certain circumstances be in such a position that requires him to seek a remedy. Reliance was placed on the Latin maxim *ubi jus ibi remedium* (where there is a right, there is a remedy). However, the Act is fashioned in such a manner that the petitioner is deprived of presenting a petition and the statutory petitioner is tactlessly limited by the grounds of the petition as provided by the Act.[24] The fact that petitions on post-election disputes can be presented only on the basis of one or more of the grounds stated in Section 138 of the Act cannot be overemphasized. The ground for the petition must be stated in terms clear enough as to bring it within one of the grounds listed in the Act.[25]

This obviously prevents a party, who has suffered a wrong in a post-election dispute from approaching the tribunal to seek redress on the grounds that he is the winner in an election or that his ground of petition does not fall within the grounds provided in the Electoral Act. Though the Act did not envisage that a winner of an election would file a process in a post-election dispute at the tribunal, recent happenings has shown that the winner of an election may find himself in such a situation that requires him to seek a remedy or counter the petition filed by a loser by way of cross-petition. The drafters of the Act did not consider the fact that the winner in an election may be frustrated by some administrative powers which will render such victory nugatory.

A practical example is where an election has been duly conducted and the winner was declared and accordingly returned by the returning

[24] See *Ngige & Anor* v *INEC & Ors* (2014) LPELR-25413(CA).
[25] See *Ojukwu* v *Yar'adua & Ors* (2009) 12 NWLR (PT 1154) 50.

officer in accordance with the Electoral Act. However, the acclaimed winner cannot assume office because the electoral commission has refused or failed to issue him the certificate of return. In such circumstances, the fact that the winner won the election and was declared winner becomes irrelevant as his victory has been frustrated.

Where the winner in the above illustration desires to approach the court or tribunal for a redress which is required in this regard, questions as to which court or tribunal has the requisite jurisdiction to entertain the suit would arise. The question may be whether the Election Tribunal has jurisdiction, since the issue is a post-election matter or whether the jurisdiction will be vested in the regular courts because the issue relates to the exercise of administrative powers of the commission post-election (which did not arise from the conduct of the election). The above scenario is the crux of this paper as seen in the case of *Rochas Anayo Ethelbert Okorocha* v *Independent National Electoral Commission & 7 Ors*.[26] The Federal High Court when approached had an opportunity to determine and distinguish between a post-election matter that clearly falls within the exclusive jurisdiction of the tribunal and those that can be entertained by the Federal High Court.

2.0. BRIEF FACTS OF THE CASE

The plaintiff, Rochas Okorocha contested for senatorial position representing Imo West Senatorial district in the 2019 general elections held on 23rd February in Imo State on the platform of All Progressives Congress (APC). Upon conclusion of the polls and the counting of votes at the Orlu Local Government Area of Imo State, the plaintiff got the highest number of votes cast at the election by polling a total number of 97,762 votes while his closest rival being the second defendant and candidate of the People's Democratic Party polled 68,117 votes. On 25th February, 2019 the returning officer, Innocent Ibeawuchi declared the plaintiff as the winner of the election of the Senatorial seat representing Imo West district and duly returned him as the Senator-elect. However, the returning officer subsequently informed the first defendant (INEC) that his actions were

[26] Suit No. FHC/ABJ/CS/296/2019 (unreported).

carried out under duress, the first defendant on the strength of the observations of the returning officer refused to issue the plaintiff his Certificate of Return. On 15th of March, 2019, the plaintiff filed an originating summons challenging the validity of the administrative decision of the first defendant to refuse to issue him his Certificate of Return and seeking other declaratory reliefs against the first defendant. The plaintiff in his affidavit in support of his Originating Summons alleged that on 11th March 2019, upon the publication of a comprehensive list of elected candidates by the first defendant on its website titled "2019 Senatorial Election 23February list of elected candidates who would be issued with certificates of return on 14th March, 2019", his name was omitted from the said list of elected candidates. The plaintiff also alleged that he discovered from the remarks section of the published list that the reason for the omission of his name was that his declaration was made under duress. The first to eighth to defendants in response filed Counter-Affidavits in opposition to the plaintiff's Originating Summons and alleged that the returning officer made the declaration under duress and also raised preliminary objections basically challenging the jurisdiction of the court to hear and determine the matter on the grounds that it is a post-election matter which is exclusively within the jurisdiction of the election petition tribunal.

3.0. THE DECISION OF THE COURT

3.1. On the issue of jurisdiction:

The defendants in their preliminary objections challenged the jurisdiction of the Federal High Court to determine the suit on the grounds that the matter being a post-election dispute falls within the exclusive jurisdiction of the Election Petition Tribunal in accordance with section 133(1) of the Electoral Act. In response, the plaintiff argued that the issues for the determination basically border on the exercise of the administrative powers of INEC which falls within the jurisdiction of the Federal High Court as provided by section 251(1) (r) of 1999 Constitution.

The presiding judge in determining this issue highlighted the claims sought by the petitioner to wit:

a. to interpret Sections 68(c), 71, 75(1) & (2) of Electoral Act as amended,
b. nullification of the first defendant's refusal to publish his name on its website as the winner of the election;
c. nullification of the first defendant's refusal to release his certificate of return; and
d. an order compelling the release of his certificate of return having been declared the winner of the election to the seat of senator representing Imo West Senatorial district and duly returned as the senator-elect,

In reaching its decision, the court observed that the above claims are merely challenging the administrative decision of the first defendant refusing to issue certificate of return to the plaintiff. The court further noted that none of the reliefs relates to or questions the validity of election of any person into the National Assembly to warrant the suit being filed at the National Assembly Election petition tribunal.

The court based its decision on Section 285(1) of 1999 Constitution as amended which confers limited and exclusive jurisdiction on National Assembly election petition tribunal to hear the petition as to whether any person has been validly elected as a member of the National Assembly. The court acceded to the fact that it was a post-election matter but painstakingly distinguished post-election matters which are exclusively within the jurisdiction of the election petition tribunals and those within the jurisdiction of the high court. The court noted that:

> It is not all post-election disputes that the National Assembly election petition tribunal will have jurisdiction to entertain... It is only a post-election dispute that affects questions or relates to <u>whether a</u>

> person has been validly elected as a senator in the National Assembly and that same must be challenged in any of the grounds in Section 138(1) of the Electoral Act. (Emphasis supplied)

The court lastly noted that a tribunal has no jurisdiction to determine the questions as to the validity of INEC's executive or administrative decision and why INEC refused to issue the plaintiff certificate of return. This is because the tribunal's jurisdiction is restricted by statute or by Section 285(1) (a) of 1999 Constitution as amended. The Court observed that the tribunal's jurisdiction is to determine whether or not a person was validly elected as a member of National Assembly. The court then held that the jurisdiction to determine the questions as to the validity of INEC's executive or administrative decision resides with the High Court. In reaching the above conclusion, the court cited Section 251(1) (r) of 1999 Constitution as amended which confers on the Federal High Court, the jurisdiction to determine any question as to the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.

The Court emphasized on the fact that the first defendant's refusal to issue the plaintiff with the certificate of return is not one of the grounds that the plaintiff would be required to file a petition at the tribunal. The court observed that the subject matter of the petition does not relate to the validity of the election as expressly provided by the Electoral Act. Consequently, the court further noted that:

> It is only the 2nd to 8th Defendants that participated in the senatorial election that can approach the tribunal to challenge the validity of the election and the results under any of the 4 grounds stated in Section 138 (1) of the Electoral Act 2010 and certainly not the Plaintiff and that neither the Constitution nor the Electoral Act makes provisions for the Plaintiff to seek a redress at the National Assembly Elections Petition Tribunal.

The court further stated that the plaintiff, having been declared the winner of the election, cannot, validly under the Electoral Act, approach the Election Tribunal because the plaintiff will not be expected to file a petition to question his election and return as a

senator-elect to represent Imo West Senatorial district at the National Assembly. The court also added that the plaintiff cannot seek issuance of certificate of return in the petition of another, describing such practice as "legal impossibility".

3.2. On the substantive suit:

The crux of the relief sought by the plaintiff as articulated in his originating summons is that the court should order INEC to issue the plaintiff his certificate of return having been re-elected as Senator to represent Orlu Senatorial Zone of Imo State. The first defendant in response argued that the said certificate was withheld because the result of the election in which the plaintiff emerged the winner was declared under duress. The summation of the second to eighth defendants' case was that the plaintiff has not emerged the winner in the election on the ground that the result of the election was declared by the returning officer under duress.

The court in delivering the judgment ordered that the certificate of return be issued to the petitioner having been declared the winner and issued with form EC 8E (I) and EC 8D (I). The court observed that the issuance of the forms by the returning officer is sufficient to establish the validity and finality of such election in line with the provisions of Section 68 (c) of the Act. The court further stated that the issue of duress raised by the defendant's borders on the validity of the election and that the proper forum for such issues is the election petition tribunal which has jurisdiction to determine the validity of an election and not the High Court.

4.0. COMMENTS

4.1. Not all Post Election Disputes fall within the Exclusive Jurisdiction of the Elections Petition Tribunal:

It has been established that the Election Petition Tribunal has jurisdiction to hear and determine only post-election matters. The analysis of the decision of the court in the case in review however has stretched that general proposition of law by clearly revealing that the

jurisdiction of the Election Petition Tribunal is limited to post-election matters which relates to the actual conduct of the election as regards the validity of the election or return of a candidate in an election and not necessarily all matters which arose after the election.

4.2. The Winner in an Election has a Right and a Remedy:

As stated earlier, there may be circumstances where the winner in an election may be required to approach the court to enforce his/her victory. This is no doubt a recent development in Nigerian legal system, thus there is need for the Act to be amended to reflect this new development. To address this issue, the scope of the provisions of Section 138 of the Electoral Act ought to be modified in order to enable the winner in an election to approach the tribunal when necessary or conversely, section 285 of the 1999 Constitution may be further expanded to define the category of post-election issues that the ordinary court can assume jurisdiction to adjudicate over.

Similarly, the provisions of section 137 (2) of the Electoral Act which indirectly defined a Respondent in an election petition needs to be amended. The section provides that "a person whose election is complained of is, in this Act, referred to as the respondent." Accordingly, a loser in an election cannot be a statutory respondent under the Act. Hence a petition strictly so called cannot be legally or statutorily filed against such a loser in an election because the Electoral Act does not contemplate the filing of a petition against losers in an election.[27]

A modification of the section above to a less restrictive meaning of a respondent will enable the winner in an election to approach the tribunal through petition either against INEC or any other party whose act has rendered the winner's victory nugatory

5.0. CONCLUSION

The judgment of the Court in *Rochas Anayo Ethelbert Okorocha* v *Independent National Electoral Commission & 7 Ors.*, to the effect that

[27] See the case of *Owuru* v *INEC* (1999) 10 NWLR (Pt. 622) 201.

not all post-election disputes are within the exclusive jurisdiction of the Election Petition Tribunal, has clearly revealed the lacuna in the extant laws on the subject. Though the decision is subject to an appeal, it has no doubt created a precedent for our legal system pending when the Court of Appeal is availed the opportunity to make pronouncements on it.


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