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EDITOR'S NOTE

It is with immense pleasure that I present to you the First edition of Volume Seven of the UNILAG Law Review. Leading the editorial board over the past year has been an enriching experience, and I am proud of what we have achieved despite the challenges we faced. Upholding the tradition of excellence in legal scholarship has been a true privilege, and I extend my heartfelt commendation to the editorial team for their exceptional dedication and hard work.

This achievement would not have been possible without the exceptional knowledge and expertise shared by our authors, both locally and internationally, including students and legal professionals. I am deeply grateful for your contributions, as it is your work that gives this journal its vitality and significance.

This edition features a diverse array of articles that tackle some of the most pressing issues of our time. The contributions within these pages provide fresh insights and critical analysis on a wide range of legal topics, from constitutional law and digital markets to environmental rights, online dispute resolution, and the evolving challenges posed by emerging technologies. Whether exploring socioeconomic rights, the intricacies of corporate transactions, or the impact of reforms in the criminal justice system, this volume aims to enrich the discourse and deepen our understanding of the law.

I extend my heartfelt gratitude to our patron, **Professor Fabian Ajogwu SAN**, and the law firm of **Kenna Partners** for their steadfast support. Special thanks are also due to our staff adviser, **Dr. Edefe Ojomo**, whose mentorship has been invaluable, and to the Editorial Board for their tireless efforts to ensure this volume meets the highest academic standards.

To our readers, I hope this volume serves to inspire, enlighten, and provoke thoughtful engagement with the legal issues that shape our world.

Thank you for your continued support. Here is to the continued advancement of legal scholarship.

Ayotunde Abiodun,
Deputy Editor-in-Chief '24.

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TOWARDS A FEDERAL CONSTITUTIONAL FRAMEWORK: A CRITICAL ANALYSIS OF INTER-GOVERNMENTAL ALLOCATION OF CONSTITUTIONAL POWERS IN NIGERIA

Wole Kunuji*

ABSTRACT

Constitutional allocation of powers among levels of government is a problematic issue in many federal States. In Nigeria, where many ethnic groups are regionally concentrated, the problem of power allocation is often a huge source of conflict considering its real and perceived implications for ethnic survival and dignity. This article examines the history and nature of inter-governmental allocation of powers in successive pre- and post-independence Constitutions of Nigeria, with particular focus on the extant 1999 Constitution. The article argues that the centralised power-distribution architecture entrenched in the 1999 Constitution is a colonial cum military legacy that is completely incompatible with the federal idea and unsuitable for a multi-ethnic State like Nigeria. The article proposes a counter-hegemonic federal constitutional framework for Nigeria that recognises the country's diversity without undermining its unity.

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1.0 INTRODUCTION

For decades, debates about Nigeria's constitutional architecture have revolved around the subject of power allocation among the country's levels of Government.[1] It is not difficult to imagine why this is the case. Inter-governmental allocation of powers is notoriously controversial in many federations.[2] Classical and contemporary history shows that many federal States are often enmeshed in the difficult contentions associated with power struggles between central and regional governments. Indeed, some scholars have argued that the power allocation controversy is the dominant problem of federalism.[3]

In Nigeria, power allocation problems are particularly difficult and contentious because of the country's ethnic diversity and the long history of acrimonious struggle for ascendancy among the ethnic groups, most of which are territorially concentrated. It is for this reason that the tensions and controversies over the division of powers set out in the extant 1999 Constitution of Nigeria[4] can only be adequately understood against the background of the country's socio-political history. This article aims to critically discuss that history with a view to highlighting the very flawed nature of the country's federalism. The main argument of the article is that given Nigeria's glaring diversity,

[1] See generally the discussions in A.A. Ikein (ed), *Oil, Democracy, and The Promise of True Federalism in Nigeria,* (University Press of America, 2008), pp.1-484; See also T.Y. Danjuma, "Revenue Sharing in Nigerian Federalism" in J. Isawa Elaigwu, P.C.Logams and H.S. Galadiman, *Federalism and Nation Building in Nigeria: The Challenges of the 21st Century,* (National Council on Intergovernmental Relations: Abuja, 1994), pp.87-115; A.G Adedeji, *Nigerian Federal Finance- Its Development, Problems and Prospects* (Hutchinson Educational Ltd, 1969), pp.1-265.

[2] R. Watts, *Comparing Federal Systems,* (McMillan-Queen's University Press, 2008), p.96; See also G. Anderson, *Fiscal Federalism: A Comparative Introduction,* (Oxford University Press, 2010) p.v.

[3] See A.H. Birch, *Federalism, Finance and Social Legislation,* (Oxford University Press, 1957), p. xi; See also K.C. Wheare, *Federal Government*, (Oxford University Press, 1963), p.93.

[4] The Constitution of the Federal Republic of Nigeria, 1999 (as amended 2011).

the highly centralised division of powers entrenched in the 1999 constitution is grossly untenable. Indeed, this power allocation structure represents the very antithesis of the federal idea. And except this structure is urgently revised to reflect and accommodate the country's diversity, the Nigerian State, as we currently know it, may completely unravel in the nearest future.

The article starts with a historical analysis of Nigeria's constitutional evolution, highlighting the country's precolonial make-up as a collection of distinct, separate, and independent empires, kingdoms, city-states and communities with different cultures, languages, orientations and peculiarities. The discussion highlights how these stark differences were ignored in the compulsive and arbitrary colonial amalgamation of these distinct entities to form the Nigerian state in 1914. As shown in the article, the seeds of the current centralised State structure in Nigeria were sown during the colonial and immediate post-colonial era, as the colonial authorities and their military successors unilaterally authored successive constitutions and incrementally strengthened the central government's control over powers and fiscal resources.

As we shall see in the article, unilateralism and centralisation have, for decades, been employed as instruments of governance in Nigeria despite the country's character as an agglomeration of different ethnic nations separated by language, culture, economic needs, and political orientation.[5] Today, Nigeria is, without doubt, a caricature of a federation, a crude distortion of the federal idea.

[5] Nigeria's ethnic groups "are diverse in their origins and speak different languages. In many respects, their cultural patterns, political, institutional, social standards, and customary usages differ very widely." See O.Awolowo, *Thoughts on the Nigerian Constitution*, (Oxford University Press: Ibadan, 1966), p.162.

What follows is not intended to be an exhaustive analysis of federal constitutionalism in Nigeria. No single article can accomplish that. This article highlights and discusses the aspects of the nation's history and constitutional experience that are relevant for a proper understanding of the challenges militating against federal constitutional advancement in Nigeria. It may well be that these challenges are not peculiar to the Nigerian federal system. However, in Nigeria, they have become huge death traps impeding the country's march towards genuine federal Statehood. The major proposition advanced in this article therefore is that the way to address the existing crisis of Statehood in Nigeria is to abrogate the extant constitutional arrangement and replace it with a counter-hegemonic federal constitutional framework that recognises the country's diversity without undermining its unity.

1.1 Pre-Colonial Era- Era of Kingdoms, Empires and City-States

Nigeria, as we know it today, with its physical boundaries and landmarks, is essentially a colonial creation.[6] There was nothing like 'Nigeria' prior to the arrival of Europeans on the shores of West Africa in the late 14th century. What we had, scattered all over the territory now called Nigeria, were well established independent empires, kingdoms, city-states, townships, and villages, most of which had already attained some level of political and cultural sophistication by the time the first set of Europeans arrived.[7]

[6] O.I. Odumosu, *The Nigerian Constitution: History and Development,* (Sweet & Maxwell, London: London, 1963), p.5.

[7] See the pronouncement of the Supreme Court of Nigeria on this point in *AG of the Federation v. AG of Abia State and 35 Ors* [2002] vol. 16 WRN 1-132 at p.68. According to the Court, "until the advent of the British colonial rule in what is now known as the Federal Republic of Nigeria (Nigeria for short), there existed at various times sovereign states known as emirates, kingdoms, and empires made up of groups in Nigeria. Each was independent of the other with its mode of government indigenous to it. At one time or another, these sovereign states were either making

In his well-researched monograph on pre and post-colonial history of Africa, eminent historian, Professor Banji Akintoye, revealed that several politically independent African empires and kingdoms had, in fact, been in existence long before the advent of colonialism.[8] For instance, the 'Kanem-Bornu' and 'Old Oyo-empires' had, for centuries, existed in what is now known as Northern and Southern Nigeria respectively.[9] Apart from these, old kingdoms such as the 'Sokoto Caliphate,' was already well established in what is now North-Western Nigeria before colonialism took root in Nigeria.[10] There were also the numerous city-states of the Niger-Delta, comparable e in size, population and social organisation to the ancient Greek city states. The pre-colonial histories of these empires, kingdoms, and city-states, according to Akintoye, were characterised by different, distinct, and significantly developed social, political, and economic traditions.[11]

Akintoye's account of Nigeria's history tallies with those of several other first rate African scholars and students of African History. For instance, Professor Akinjogbin's vivid portraiture of the Old Oyo Empire and the other kingdoms which together constituted the pre-colonial Yoruba country, shows that these were organised assemblages of peoples, each with an efficient traditional system of government

wars with each other or making alliances on equal terms. The position existed throughout the land now known as Nigeria." See also O.I Odumosu, *supra*, note 6; B.O Nwabueze, *Constitutional Law of the Nigerian Republic*, (Butterworths: London, 1964), p.91.

[8] Akintoye writes that the old Ghana, Mali, Songhai, Mandinka, and Tukolor empires predated the advent of colonialism. See S.A. Akintoye, *Emergent African States- Topics in Twentieth Century African History,* (London Group Ltd: London, 1976), p.3.

[9] Ibid *at p.* 3.

[10] Ibid.

[11] Ibid *at p.* 15

peculiar to it.[12] Similar descriptions have been used by other African and Asian scholars to emphasise the social, cultural and political organisation of many African societies prior to colonial adventurism on the continent.[13]

The accounts of these African and Asian scholars have been buttressed and given credence by western historians and researchers who travelled extensively in Africa in the nineteenth and early twentieth century and who have since documented their observations and findings on Africa's history. Two of such scholars, Margery Perham and Michael Crowder, are particularly noted for their vivid portraiture of the ancient landmarks and peoples of the continent. For instance, Perham wrote about the "political and cultural sophistication" of Northern Nigeria's "ancient Hausa states, with their walled red cities, crowded mosques, literate mullahs, large markets, numerous crafts in metal and leather, far-ranging traders, and skilled production of a wide variety of crops."[14] Drawing on the writings of 18th century European explorers of Africa,[15] Perham adds that the Hausa states were famous for "their organised trade and wide

[12] I.A. Akinjogbin, "The Oyo Empire in the 18th Century" (1966) 3(3) *Journal of the Historical Society of Nigeria,* 451.

[13] For instance, see Professor Akin Mabogunje's detailed description of the peoples, tribes, kingdoms, and empires of pre-colonial West Africa in A.Mabogunje, "The Land and Peoples of West Africa" in J.F.Ajayi & M. Crowder eds., *History of West Africa*, vol 1., (Longman Group Limited: London 1976), pp 15-29; See also Nehemia Levtzion, "The Early States of the Western Sudan to 1500" in J.F Ade Ajayi & Michael Crowder eds., *Ibid*, pp 114-149. Other accounts of pre-colonial societies in Africa are fully set out in. F Ade Ajayi & Michael Crowder (ed), *History of West Africa*, ed 1., (Longman Group Limited: London, 1976), pp.1-601.

[14] M. Perham, *Lugard, The Years of Authority,* (Collins Clear-Type Press: London and Glasgow, 1960), pp 33-34.

[15] They include the Scottish explorers, Walter Oudney and Hugh Clapperton; Cornish explorer, Richard Lander; English explorer, Dixon Denham and German Explorer, Heinrich Barth. Perham specifically cited 'D. Denham, H. Clapperton and W. Oudney, *Travels and Discoveries in North and Central Africa in 1822, 1823, and 1824* (1831), vol. iv. See M. Perham, *ibid.*

contacts, their custom of supplying housing, food, and escort to travelers, and their capacity to breed individuals of high character and intelligence."[16]

Perham's views are echoed in Michael Crowder's 1962 classic, *The Story of Nigeria*. According to Crowder, who spent several years teaching African history in Nigerian Universities, pre-colonial Nigeria had:

> a number of great kingdoms that had evolved complex systems of government independent of contact with Europe. Within its frontiers were the great kingdom of Kanem-Borno, with a known history of more than a thousand years; the Sokoto Caliphate which for nearly a hundred years before its conquest by Britain had ruled most of the savannah of northern Nigeria; the kingdoms of Ife and Benin, whose art had become recognised as amongst the most accomplished in the world; the Yoruba empire of Oyo, which had once been the most powerful of the states of the Guinea coast; and the city-states of the Niger Delta, which had grown partly in response to European demands for slaves and later palm-oil; the largely politically decentralised Igbo-speaking peoples of the south-east, who had produced the famous Igbo-Ukwu bronzes and terracottas; and the small tribes of the Plateau, some of whom are descendants of the people who created the famous Nok terracottas.[17]

It is thus clear, from the foregoing accounts of African and western historians, who have done extensive and detailed research on African history, that discernible political and social organisation on the continent did not start with the arrival of Europeans. Social, cultural, and political sophistication of the peoples of Africa, in fact, predated the continent's contact with Europe.

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[16] Ibid, p.33.

[17] M. Crowder, *The Story of Nigeria,* (Faber and Faber: London, 1978), p.11; See similar comments in T. Buttner, "The Economic and Social Character of Pre-Colonial States in Tropical Africa" (1970) 5(2) *Journal of the Historical Society of Nigeria,* 275-289. According to Butner, prior to the advent of colonialism, "many peoples of Tropical Africa (varying in locality) attained a relatively high standard of development which, by every measure, compared favourably with that of other peoples….In the course of several thousand years of its history, Tropical Africa knew important state formations with a high level of cultural attainment which overcame the Neolithic phase as early as the first millennium of our era and which exercised an impact on and determined the subsequent social development of the peoples of Africa."

The foregoing survey of historical accounts of pre-colonial Africa is necessary to dispel the notion created by some writers and scholars who, in a bid to justify colonialism and its attendant centralisation and monopoly of power in Africa, have argued that Africa was devoid of any form of history prior to European arrival on the continent. Indeed, desperate attempts were made by these scholars to brand pre-colonial Africa as an enclave of barbarians and primitive beings who were incapable of rational and civilised existence.[18] That was perhaps what Joseph Conrad sought to do with his very controversial book, "*Heart of Darkness*" which portrayed pre-colonial Africa as "pre-historic" and "unearthly."[19]

Conrad was not alone in this undisguised racist approach to African history. Georg Hegel in his book, "*Philosophy of History,*" described Africa as "unhistorical." Africa, according to Hegel, "is no historical part of the world; it has no movement or development to exhibit. Historical movements in it...belong to the Asiatic or European world."[20] But it was the Oxford Historian, Hugh Trevor-Roper who delivered the *coup de grace*. In a series of television lectures, he delivered in the early 1960s, Trevor-Roper argued that "perhaps in the future, there will be some African history to teach. But at present there is none, or very little: there is only the history of Europeans in Africa. The rest is largely darkness…. And darkness is not a subject for history."[21]

[18] Thea Buttner refers to this as the "colonial-historical mentality and approach." See T. Buttner, Ibid.
[19] J. Conrad, *Heart of Darkness and Other Tales*, *revised edition* (Oxford University Press, 2008), pp 138-139. Professor Chinua Achebe has done a fitting riposte to Conrad in his satirical essay "An Image of Africa: Racism in Conrad's Heart of Darkness" available at http://kirbyk.net/hod/image.of.africa.html (accessed 24 September 2024).
[20] G.W. F. Hegel, *The Philosophy of History*, (Dover Publications Inc: New York, 1956), p.99.
[21] C.L. Innes, *The Cambridge Introduction to Postcolonial Literatures in English,* (Cambridge University Press, 2007), p.7.

We now know that Conrad, Hegel, and Trevor-Roper were advertently or inadvertently mistaken in their understanding of Africa and its history. Evidence compiled by serious researchers and travellers confirm to us that not only were many pre-colonial African societies well organised and politically astute, they, in fact, had their own forms of civilisation.[22]

What remains to be said is that the erroneous or deliberate perception of pre-colonial Africa as an enclave of barbarians and savages who were incapable of rational thought and political organisation must have contributed to the administrative approach adopted by the colonialists in Africa from the early part of the nineteenth century to the early part of the twentieth century.[23] As we shall see in the next section, in their bid to provide 'civilised' administration to the 'savages' and 'barbarians,' the colonialists forcefully lumped together many dissimilar ethnic nationalities, many of which already had a history of mutual warfare and antagonism, and imposed on them a single centralised government. This set the foundation for centralised governance, as well as separatist agitations, inter-ethnic rivalry, suspicion and hatred, all of which remain the hall mark of political and social life in Nigeria today.

[22] Professor Akintoye writes that "the view that pre-colonial Africa had no culture, and no history is false. The European officials, scholars and missionaries who popularised this image of Africa were ignoring the evidence of rich African cultures- in political, economic and social organisations, in art, music and manners- which were all over Africa for them to see."; See Akintoye, supra, note at p.15.

[23] According to Professor Kenneth Dike, an eminent Nigerian Historian, it is possible that "in the colonial era African History was deliberately slanted and distorted to justify the European presence on the continent…the assumed lack of African history so widely advertised in the literature…. was to prove that the African has no history and therefore subhuman. Everything was done to use history to bolster imperialism." See K.O. Dike, "African History Twenty-Five Years Ago and Today" (1980) 10(3) *Journal of the Historical Society of Nigeria,* 14-15.

1.2 Colonial Era: Lugard's Amalgamation and the Seeds of Centralisation

A lot have been written already on the historic 'scramble' for the African continent by the European powers, a process which began in Berlin in 1884/1885 and went on over a period of ten years.[24] The 'scramble' culminated in a series of 'take-overs' which, according to Keltie, enabled the "most civilised powers of Europe" to parcel out amongst themselves "the bulk of one barbarous continent."[25]

Details of the partitioning process have been recorded elsewhere.[26] What is important for the purposes of this article is the effect this nineteenth century partitioning of the African continent has had on the peoples and traditional societies of Africa. Nothing highlights the tragic consequences of the partitioning than the words of an official of the then British Government who, in recounting how the Nigeria-Cameroon border was drawn, stated that:

> in those days, we just took a blue pencil and a ruler, and we put it down at Calabar, and drew a line to Yola….I recollect thinking when I was sitting having an audience with the Emir [of Yola] , surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.[27]

[24] The most authoritative and detailed of these is perhaps John Scott Keltie's "*The Partition of Africa*" which was first published in 1895; See J.S. Keltie, *The Partition of Africa,* (Cambridge University Press, 1895). See especially pp. 207-281; See also Sir C. Lucas, *The Partition and Colonization of Africa,* (Clarendon Press: Oxford, 1922); J.D. Hargreaves, "Towards a History of the Partition of Africa' (1960) 1(1) *Journal of African History* pp 97-109; D. De Leon, "The Conference at Berlin on the West African Question", (1886) 1(1) *Political Science Quarterly,* 103-139; M. Crowder, *supra*, note 17 at p.150.

[25] J. S. Keltie, *supra*, note 24 at p.1.

[26] *Ibid at* pp 207-281.

[27] This British Official was quoted in J.C. Anene, *The International Boundaries of Nigeria, 1885-1960: The Framework of an Emergent African Nation,* (Harlow: Longmans, 1970), p.3; See also C.J. Dakas, "The Role of International Law in the Colonization of Africa: A Review in Light of Recent Calls for Re-Colonization" (1999) 7(1) *Africa Yearbook of International Law,* 106.

Earlier in 1890, Lord Salisbury, former British Prime Minister, had, after an Anglo-French convention convened for the purpose of sharing indigenous African territories among the two super powers, declared that:

> we have been engaged in drawing lines upon maps where no man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.[28]

It was this arbitrary restructuring of the African continent, done without the consent of the societies and peoples whose lives were to be directly affected by the restructuring, that laid the foundation for the culture of unilateralism and the centralisation of state power that appear to have become the hall mark of governance across Africa in general and Nigeria in particular. The partitioning that officially commenced at the Berlin conference of 1884/1885 and was consolidated over the next ten years marked the beginning of several acts of colonial 'appropriations and 'take-overs' that gradually but assuredly robbed many hitherto independent African communities of their autonomy and identity. In the process, strikingly different ethnicities hitherto separated by language, culture, religion, social orientation, and politics were cobbled together under new political arrangements that were bound to generate inter-ethnic strife. Nobel Laureate, Professor Wole Soyinka put it succinctly when he said:

> ….at the Berlin Conference, the colonial powers…. met to divvy up their *interests* into states, lumping various peoples and tribes together in some places, or slicing them apart in others like some…tailor who paid no attention to the fabric, color, or pattern of the quilt he was patching together.[29]

[28] Lord Salisbury was quoted in J.C Anene, *ibid;* See also C.J. Dakas, *ibid at* p. 106.
[29] C.J. Dakas, *ibid at p.* 105.

In the case of Nigeria, this lumping together, facilitated by colonial conquests, continued well into the 1890s and early 1900s and culminated in the (in)famous amalgamation of the Northern and Southern territories of Nigeria in 1914. Both territories had been separately administered by Britain before 1914.[30]

The 1914 amalgamation of Northern and Southern Nigeria is noteworthy for two major reasons. First, like the partitioning of Africa itself, the scheme of amalgamation was designed and implemented solely by the colonial authorities through Sir Frederick Lugard, the colonial Governor of Nigeria. The plan, scheme, and mode of amalgamation were entirely the work of Lugard.[31] No attempt whatsoever was made to consult or gain the consent of the peoples and territories that formed the object of this amalgamation. The amalgamation was unilaterally conceived, unilaterally designed, and forcefully imposed on the 'natives.' Indeed, "Nigeria," the new name given to the amalgamated territories was coined by Miss Flora Shaw, a Briton who later became the wife of Sir Lugard, the colonial Governor of Nigeria.[32] The unilateral manner in which the amalgamation scheme was conceived and implemented essentially set the tone for the colonial policy of centralisation that followed in later years.

The 1914 amalgamation is also remarkable for cobbling together more than 250 large ethnicities, each of which had its own distinct identity, economic orientation, political

[30] For more on the series of colonial conquests and unilateral appropriation of territory that preceded the 1914 amalgamation, see O.I Odumosu, supra, note 6 at pp.5-10; See also A.G. Adebayo, *Embattled Federalism- History of Revenue Allocation in Nigeria, 1946-1990,* (Peter Lang Publishing Inc: New York, 1993), pp 13-14.
[31] F.D Lugard, *Nigeria: Report on Amalgamation of Northern and Southern Nigeria, and Administration, 1912-1919*, (London: H.M.S.O, 1919), p.1-8; See also M. Perham, supra, note 14 at p.411.
[32] M. Perham, *ibid* at p. 11.

traditions, and religious culture. The arbitrariness of the amalgamation, done without any regard for history, ethnicity, and culture, set the stage for the ethnic rivalry, strife, and bigotry which have characterised inter-ethnic relations in Nigeria ever since. In a bid to ensure their individual survival, regain their autonomy, and preserve their identities and dignities, Nigeria's many ethnic groups have remained locked in a spirited but acrimonious struggle for power and ascendancy.

The foregoing account of Nigeria's pre-colonial history up till and including the 1914 amalgamation of the northern and southern territories of what is today called Nigeria, has now established two important facts. First, pre-colonial Nigeria was not an enclave of unsophisticated, socially unorganised, and politically naive barbarians, as some scholars and writers would have us believe. Indeed, as we saw above, the many ethnic nations that were scattered all over the territory now called Nigeria were distinct and independent entities that had attained varying levels of political sophistication prior to the advent of colonialism. The "barbarous pre-colonial continent" narrative is a deception that was mainly employed to justify colonialism and the centralisation of state power it engendered across Africa, a problem that has persisted till date.

A second fact established by the discussion thus far is that, like the unilateral partitioning of the African continent by the superpowers in the 19th century, the 1914 amalgamation of the northern and southern territories of the land space now called Nigeria, was unilaterally conceived and implemented by the colonial authorities without any consultation with the peoples of the amalgamated territories. Their opinions were neither sought nor considered important. Such was the unilateralist and centralist nature of the amalgamation.

As we shall see below, this policy of unilateralism and centralism despite the diversity of Nigeria, was to continue throughout the colonial era. Sadly, it has also persisted in the post-colonial era despite the so called "federal" status of the country. The unilateral method used in formulating and adopting successive Nigerian constitutions as well as the centralist division of powers and fiscal resources in these constitutions lend credence to this assertion. In the next few paragraphs, I will briefly examine each of these constitutions and the nature of power and fiscal allocation set out in them.

1.3 Constitutional Developments 1914-1960

If the amalgamation of the Northern and Southern territories to form Nigeria was arbitrarily and unilaterally done, the system of government established by the 1914 colonial constitution further entrenched unilateralism and centralism as instruments of governance. Under that constitution, the Colonial Governor of Nigeria was invested with sweeping powers to exercise executive and legislative powers throughout the length and breadth of the new country, subject only to the authority of the British Crown.[33] Government Departments such as the "Railways, Military, Audit, Treasury, Posts and Telegraphs, Judicial, Legal and Survey" as well as Customs were directly under the control of the colonial Governor.[34] The budgets for these Departments and the revenues derived from them were centrally administered by the Governor. [35] The Governor was assisted in his duties by a retinue of colonial officers whose roles were

[33] See B.O Nwabueze, *A Constitutional History of Nigeria,* (London: C.Hurst & Company, 1982), pp 35-39; See also, O.I. Odumosu, *supra*, note 6 at pp. 12-14.
[34] Sir U.Udoma, *History and the Law of the Constitution of Nigeria,* (Malthouse Press Limited: Lagos, 1994), p.48.
[35] A.G. Adedeji, *supra,* note 30 at p.15; A. Adedeji, *Nigerian Federal Finance- Its Development, Problems and Prospects,* (Hutchinson Educational Ltd, 1969), p.29.

merely advisory as the Governor retained the right to act unilaterally if the occasion demanded it. Such was the magnitude of the Governor's power over the entire colony under the 1914 constitutional arrangement.

As the administrative and governance structure illustrated above shows, the Nigerian State established pursuant to the 1914 amalgamation of the Northern and Southern territories was essentially a unitary political entity structured to facilitate maximum colonial control over the peoples and societies of Nigeria. The new state was not designed to encourage genuine participation of the people in the governance of their country, neither was it intended to sincerely cater to their interests. In fact, like similar colonial projects elsewhere on the African continent, the creation of Nigeria by the amalgamation of different ethnic groups and nationalities was mainly aimed at furthering the trade and expansionist policies of the colonial authorities.

A new constitution introduced by Sir Hugh Clifford in 1922 did not make any significant difference in Nigeria's power allocation structure. Apart from the Constitution's provision for the inclusion of a few Nigerians in the country's centralised legislative council,[36] there is perhaps no other discernible difference between the 1914 and 1922 constitutions. As with the 1914 constitution, the 1922 constitution was authored not by the Nigerian people but by the British Parliament. Again, as with the 1914 constitution, the 1922 constitution assigned enormous unilateral powers to the colonial Governor

[36] Nigerian (Legislative Council) Order in Council, 1922, s. 4. The Legislative Council replaced the ineffective Nigerian Council which was abolished forthwith. The four elected members were three from Lagos and one from Calabar. This shows that the elected members were in actual fact representing only two of the hundreds of communities in Southern Nigeria. See B.O Nwabueze, *supra*, note 33 at p.40.

whose discretion in the exercise of these powers was largely unfettered and unquestionable.[37]

As regards the finances of the country under the 1922 constitution, budgets and revenues remained centrally administered, as before. In fact, Professor Adedeji who has done an extensive review of the fiscal system operated by Nigeria during this period argues that it was an era of 'complete fiscal centralisation.'[38] The political and fiscal system in Nigeria retained this centralised character until 1946 when, following strident criticisms of the constitution by Nigerian nationalists,[39] the colonial authorities devised a new constitution for Nigeria.[40]

Though the new constitution was an improvement on the 1922 constitution in that a few more Nigerians were elected to the Central Legislature,[41] and Regional Councils[42] were established for each of the three Regions into which Nigeria had by then been divided,[43] the nature of the Executive Council remained virtually unchanged. And the colonial Governor was still the head of the Central Legislature. The Regional Councils, consisting mostly of tribal Chiefs, were merely consultative assemblies with no real legislative power of any sort. While these Regional Councils could advise the Governor

[37] B.O Nwabueze, *ibid at* pp. 39-41.
[38] A.G. Adedeji, *supra*, note 1 at pp. 29-30.
[39] Professor Odumosu has documented an account of the nationalist activism which became fervent during this period. See O.I. Odumosu, *supra* note 6 at pp 27-39.
[40] See the Nigeria (Legislative Council) Order in Council, 1946.
[41] *Ibid*, s. 8(1).
[42] *Ibid*, s. 33(1), 34(1) and 35(1).
[43] Nigeria was divided into Northern, Eastern and Western Regions in 1939.

on any matter concerning the Regions, the Governor was not constitutionally bound to heed their counsel.[44]

Most importantly, although the annual estimates of expenditure for each Region was expected to be presented by the Governor to the Regional Councils for their advice and recommendations, the Governor was not bound by such advice or recommendation, and could, in fact, reject them.[45] Appropriation of funds for the Regions was thus discretionarily undertaken by the colonial Governor.[46]

In fact, under the 1946 constitutional arrangement, the guiding principles adopted for the allocation of centrally collated revenues to the regions were unilaterally determined by an expatriate Fiscal Commissioner, Sir Sydney Phillipson who was appointed for that purpose by the colonial Governor. Records show that, in undertaking this important task, Philipson consulted mainly with expatriate colonial officers.[47] Nigerians who would be directly affected by the revenue allocation policy were not consulted, neither was their input sought.

In short, like the practice under previous constitutions, decisions on the 1946 fiscal policy were centrally taken and arbitrarily imposed on the entire country. Not surprisingly therefore that the principles recommended by Philipson for the allocation of revenues to the regions, namely 'even progress' and 'derivation,'[48] were not

[44] See *Nigeria (Legislative Council) Order in Council* 1946, s. 51-53; B.O Nwabueze, supra, note 33 at 42-46; O.I Odumosu, *supra*, note 6 at pp.43-48.
[45] The *Nigeria (Legislative Council) Order in Council*, 1946, s. 52(1), 52(3) and 52(4).
[46] *Ibid*, s.52(8); O.I. Odumosu, *supra* note 6 at p.46.
[47] See S. Phillipson, *Administrative and Financial Procedure Under the New Constitution*: *Financial Relations between the Government of Nigeria and the Native Administrations,* (Government Printer: Lagos, 1946), pp. 1-2.
[48] *Ibid*, p. 20.

enthusiastically received by many Nigerian leaders who felt that the application of these principles would significantly undermine the socio-economic interests of their regions. This could have been avoided if the colonial government had availed itself of the views and opinions of Nigerians on the sensitive issue of revenue allocation before designing a new fiscal policy.

The limitations of the 1946 constitution, like the ones before it, did not endear it to Nigerian nationalists who mobilised and campaigned against it vigorously.[49] The two principal flaws of the constitution, from all indications, included its evident lack of legitimacy, considering its formulation, adoption, and promulgation by the British Parliament without any consultation with the peoples of Nigeria,[50] and its failure to establish a truly inclusive system of government under which Nigerians could be actively and effectively involved in the management of their own affairs.[51] These flaws, as we have seen, had, in fact, been the hallmark of Nigeria's legal order up till this time as the 1914 and 1922 constitutions, as shown above, were similarly drafted and promulgated unilaterally by the British Parliament without the input of Nigerians, and power was, in like manner, exclusively concentrated in the hands of the colonial Governor under both constitutions.

[49] A.G Adebayo, *supra* note 30, p. 22; See also O.I Odumosu, *supra* note 6, p. 71.

[50] Indeed, this point was vehemently raised by the National Congress of Nigeria and the Cameroons (NCNC), a Nigerian political party at the time. The Party decried "the unilateral way the whole proposals (for the constitution) were prepared without consulting the people and natural rulers of the country…" See M. Crowther, *supra*, note 17 at p. 225; O. Awolowo, *supra*, note 5 at pp. 5-6.

[51] O.I. Odumosu, *supra*, note 6 at pp 48-52; See also N. Azikiwe, 'A Speech delivered in the Legislative Council at Lagos on August 21, 1948, supporting a motion for increased political responsibility for Nigeria' in N. Azikiwe, *Zik- A Selection from the Speeches of Nnamdi Azikiwe,* (Cambridge University Press, 1961), pp 106-107; O.Awolowo, *The People's Republic,* (Oxford University Press, 1968), p.36.

Given the controversy that dogged the 1946 Richards constitution, it is not surprising that the colonial authorities subsequently initiated measures aimed at engendering a more liberal political arrangement. The change came with the appointment of Sir John Macpherson as colonial Governor of Nigeria in 1948 following the departure of Sir Arthur Richards. Macpherson eventually introduced a new constitution in 1951. Unlike the unilateralism that characterised the formulation of previous constitutions, the process that produced the 1951 Macpherson constitution was somewhat inclusive. Consultations were made and meetings were held with Nigerians by the colonial authorities.[52] But as with subsequent constitutions making processes up till the end of the colonial era, these consultations primarily involved the Nigerian elite which consisted of top politicians from the three largest ethnic groups in the country.[53] And, other than its consideration by the Central legislative Council and the Regional Houses of Assembly comprising top politicians, the final text of the constitution was not subjected to a referendum or any other form of popular endorsement by the Nigerian people as would be expected of a democratic constitution.

The foregoing notwithstanding, the 1951 constitution did make significant changes to the country's political configuration. For instance, in response to the demands made by leading indigenous politicians across the country for a federal system of government, the 1951 constitution established Regional Houses of Assembly with actual legislative powers over certain matters.[54] This represents a marked departure from what obtained under the 1946 constitution where the so-called Regional Councils merely acted in

[52] O.I Odumosu, *supra* note 6 at pp. 56-65.
[53] *Ibid* at, pp. 73-76.
[54] The Nigeria Constitution (Order) in Council 1951, s.91.

advisory capacity. Perhaps, the most important innovation introduced by the 1951 constitution was the predominant inclusion of elected representatives of the various parts of the country in the central and regional governments.[55] Again this was a significant improvement over the 1946 constitution under which, unelected colonial officials and native authority personnel appointed by the colonial Governor dominated both levels of government.

Despite the huge leap forward made by the 1951 Macpherson constitution, the constitution was not without its fundamental flaws. The most significant of these, apart from those already highlighted above, was the power conferred on the central government by the constitution to, if it deemed it appropriate, block or quash a regional legislation, even if such legislation had been properly passed by the regional legislature.[56] Indeed, under the 1951 constitution, a regional legislation could only be duly enacted with the express approval of the central government.[57] Thus, although it made important concessions to the Regions, the 1951 constitution still retained significant centralist streaks that made it unacceptable as a governance framework for an ethnically diverse country like Nigeria.

Agitations for greater devolution of power to the Regions soon erupted.[58] The "reactionary nature" of the 1951 Macpherson constitution and the centralist financial

[55] B.O Nwabueze, *supra* note 33 at p. 46; O.I Odumosu, *supra* note 6 at p.65.
[56] O.I. Odumosu, *supra* note 6 at p. 66; See also The Constitution (Order) in Council 1951, s. 96-97.
[57] O.I. Odumosu, *Ibid*.
[58] See for instance Dr Nnamdi Azikiwe's speech at the fourth Annual Convention of the National Council of Nigeria and the Cameroons which took place at the Lagos City Auditorium on August 17, 1952, in N. Azikiwe, *supra*, note 51 at pp 83-84. The Northern and Western Region governments also protested what they regarded as the unfairness of the financial arrangements made pursuant to the 1951 constitution. While the North wanted an increase in the block grants

arrangements established under it were roundly denounced.[59] One public figure cynically remarked that *"..if the Richards constitution was the same old poison in a different bottle, the Macpherson Constitution is the same old bottle with a different label."*[60] Such was the disenchantment with the 1951 constitution that some local politicians made a strong case for a confederal arrangement that would see the regions exercise power over practically all matters except defence, external affairs, and customs which would be overseen by a central non-political body.[61]

The colonial administration itself came to realise the need for the transfer of more powers to the regions in order to ensure that each region exercised, as much as possible, full control over its own internal affairs without interference from the central government. Sir Oliver Lyttleton, the then Secretary of State for the Colonies captured this sentiment succinctly when he said:

> recent events have shown that it is not possible for the three Regions of Nigeria to work together effectively in a federation so closely knit as that provided by the present constitution. Her Majesty's Government in the United Kingdom, while greatly regretting this, consider that the Constitution will have to be redrawn to provide for greater regional autonomy and for the removal of powers of intervention by the Centre in matters which can, without detriment to other Regions, be placed entirely within regional competence...[62]

The Secretary of State's remarks quoted above show that, by this time, it had become abundantly clear to the colonial authorities that Nigeria could no longer be

allocated to it under that arrangement, the West protested the failure of the central government to fully apply the principle of derivation in the allocation of revenues to the regions. See A.G. Adebayo, *supra* note 39 at pp. 59-62.

[59] N. Azikiwe, *supra*, note 51 at pp. 112-113.

[60] *Ibid*.

[61] O.I. Odumosu, s*upra* note 6 at pp. 91-92.

[62] House of Commons Debate, 5th series, 515, 21 May 1953, cols.2263-2264, cited in D.S. Rothchild, *Towards Unity in Africa*, (Washington Public Affairs Press, 1960), p. 159.

administered as a unitary state, given its multi-ethnic character and the perpetual struggle among the country's ethnic groups for power, resources, ascendancy and relevance.

A new constitution was introduced in 1954. This constitution, unlike the ones before it, established a truly federal arrangement characterised by significant and substantial regional autonomy. [63] For instance, under the 1954 constitution, the regional legislatures were not required to submit legislation duly passed by them to the central government for approval. A regional legislation, under the new dispensation, effectively became law upon its due passage by the relevant regional legislature.[64] In addition, under the division of powers entrenched in the constitution, matters common to the entire federation were assigned to the central government while powers for effective self-government of the regions were assigned to the regional governments. Thus, matters such as "external relations, immigration and emigration, naturalisation of aliens, defence and atomic energy, customs and foreign exchange, banking and public debt, mining, postal services, telephones and telegraphs, and central broadcasting"[65] were assigned to the central government exclusively. The constitution also specified matters over which both the central and regional governments could concurrently legislate. These included "statistics, labour, insurance, research, water, power, national parks, industrial development, and the establishment of certain

[63] O.I. Odumosu, *supra,* note 6 at pp. 95-101.
[64] D.S. Rothchild, *supra*, note 62 at p. 160.
[65] Ibid.

professional qualifications."[66] Matters not included in the exclusive and concurrent legislative lists above were reserved for the regional governments.[67]

However, although the 1954 Constitution enabled substantial transfer of powers and fiscal resources to the regional governments and significantly increased the participation of Nigerians in the governance of their own country, the central government still retained jurisdiction over the most lucrative taxes, in addition to the power to fix the rates for taxes levied throughout the country even where such taxes were constitutionally reserved for the regions.[68] In addition, the financial arrangements made pursuant to the 1954 constitution were, in fact, solely recommended by an expatriate, Sir Louis Chick, who was appointed to undertake the task by the British Secretary of State.

Like other Fiscal Commissions before it, there is no evidence to show that the Chick Commission consulted widely with Nigerians from the several ethnic groups in the course of his assignment. Not surprisingly therefore, the principle of 'derivation' recommended by Chick for the allocation of centrally collected taxes to the regions was not well received by some regional governments which felt that full application of 'derivation' as the main factor in the allocation of centrally collected tax revenues would serve to "accentuate regional disparity in wealth and resources," thus making

[66] Ibid.
[67] Ibid.
[68] A.G. Adedeji, *supra*, note 1 at p. 120.

the rich regions richer and the poor regions poorer, a condition which could foster jealousy and disunity.[69]

The above notwithstanding, it must be acknowledged that the 1954 constitution was a significant improvement on previous constitutions before it. For the first time in the history of Nigeria, the constitution established central and regional governments with autonomous powers. Each level of government could exercise discretion in the exercise of its powers, and none was regarded as subordinate to the other. Most importantly, the autonomy of the regional governments and the assignment of powers over local matters to them ensured that the government was closer to the people, and Nigerians in each region could actively participate in the governance of their affairs.

The drive for full independence from Britain led to further conferences in London in 1957, 1958, and 1960. The result of these conferences was the independence constitution of 1960 which established self-government for Nigeria and further reinforced the powers of self-government and autonomy already granted to the regions under the preceding 1954 constitution.[70]

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[69] A.G. Adedeji, *Ibid.* at p. 81; See also *ibid* at p. 118. Further reviews of the federal financial arrangements were carried out in 1957 and 1964. This review commissions were headed by Sir J. Raisman and Dr K.J Binns respectively. Like the previous fiscal commissions before them, members of these fiscal commissions were mainly expatriates. And they carried out only limited consultations, mostly with government officials. Both commissions essentially recommended the following guiding principles for the allocation of centrally collected tax revenue to the regions: "preservation of continuity in government services; the minimum responsibilities which a government has to meet by virtue of its status as a government; population as a broad indicator of need, since this determines the scale of services each government has to provide; and the balanced development of the federation." See A.G. Adedeji, *supra*, note 6 at pp.132, 244; A.G. Adebayo, *supra*, note 30 at p.125.

[70] O.I Odumosu, *supra*, note 6 at pp.111-134. It should be pointed out that a new constitution was introduced in 1963 to reflect the republican status of Nigeria. The 1963 constitution was essentially the same as the 1960 constitution in terms of the division of powers among the levels of government. The main difference was the introduction, in the 1963 constitution, of section 84 which vested the executive powers of the federation in the indigenous President of Nigeria,

What must be noted about the conferences, consultations, and discussions that preceded the promulgation of the 1954 and 1960 constitutions, is the quality of participation at the conferences. Like the process that midwifed the 1951 Macpherson constitution, participants at the 1953, 1957, 1958, and 1960 constitutional conferences were majorly drawn from the leadership of the three dominant political parties at the time.[71] And decisions taken at the conferences were not in any way submitted for review and ratification by the generality of Nigerians. Instead, the decisions were incorporated into the new constitutions and promulgated into law by the British Parliament. Essentially, the constitutions produced at the end of these conferences can be regarded as elitist. It was devised by top Nigerian politicians under the supervision of the colonial authorities. Thus, while it is true that the 1954 and 1960 constitutions ignited significant changes in the nature and character of governance in Nigeria, they were not essentially different from the 1914, 1922, 1946, and 1951 constitutions in the elitist approach adopted in their formulation. This is evidenced by the fact that only the leadership of the political class was involved in the constitution making process, and these constitutions were promulgated by the British Parliament instead of the Nigerian Government

This disregard for popular participation in constitution making was to become a recurring decimal in subsequent constitution making processes in Nigeria.

as against section 78 of the 1960 Constitution which vested the same powers in Her Majesty, the Queen of England.

[71] See for instance the list of those that took part in the 1957 constitutional conference in London in *Report by the Nigerian Constitutional Conference Held in London in May and June 1957,* (H.M.S.O: London, 1957); See also D. S.Rothschild, *supra*, note 62 at pp. 159, 165-166.

Centralisation of the constitution making process has been one of the greatest governance problems in Nigeria ever since. When a constitution making process is not inclusive, the division of powers entrenched in the ensuing constitution cannot be said to truly reflect popular interest, properly so called. And when a constitution does not represent popular interest, its democratic credential is severely attenuated.

1.4 The Military Era: Re-Centralisation of State Power

In the foregoing discussion, Nigeria moved from being a highly centralised state to being a significantly decentralised state after the official introduction of federalism in 1954. From 1960 to 1966, the regional governments wielded significant constitutional powers and were largely autonomous in the exercise of those powers.

However, the gains recorded under the 1954, 1960, and 1963 constitutions, in terms of the assignment of significant powers of self-government to the regions, were abruptly reversed on the 15th of January 1966, when in the early hours of that day, a military coup d'etat carried out by a group of young military officers effectively terminated civil democratic rule in Nigeria.[72] From then on, and for the next thirty-three years,[73] a policy of power-centralisation was ruthlessly and firmly pursued by the military. What played out during the more than three decades of military rule in Nigeria was, in fact, a rehash of the extreme centralist paradigm of the 1914-1945 colonial era.

[72] The story of the coup d'etat and the events leading to it is eloquently discussed in M. Crowder, *supra* note 17, pp. 259-269. See also B.O Nwabueze, *supra* note 33 at pp. 161-162.
[73] There was a brief return to civil rule from 1979 to 1983. However, another coup d'etat in 1983 overthrew the civilian administration and reinstated military rule until 1999.

Governance under successive military administrations was by decree, the constitution having been suspended. The existing regions of the federation were unilaterally divided into smaller states during this period by the military authorities.[74] Ostensibly, this fragmentation of the former regions into smaller regions (called states) was aimed at bringing the government closer to the people. In reality, however, it would appear that this was a ploy by the military to weaken the other centres of power in the country with a view to keeping the states perpetually subordinate to and dependent on the central government for their survival and sustenance.

The vision of the military, it appears, was to create an omnipotent and monolithic central government from which other levels of governments would take instructions and to which other levels of government would be no more than mere appendages. This became quite clear from the Unification Decree which was promulgated by the military authorities soon after seizing power in 1966. The aim of this Decree was to impose a unitary agenda on the entire country.[75] Although the Decree was ultimately withdrawn due to public resistance to it,[76] it nevertheless revealed to all Nigerians, the centralist mindset of the military.

Thus, although Nigeria continued to be called a federation during the military era, the country had, in reality, become a unitary entity with the so-called 'states of the federation,' no more than 'slavish appendages' of the central government. Such was

[74] I.A. Ayua and D.C.J. Dakas, "Federal Republic of Nigeria" in J. Kincaid and G. Alan Tarr (eds), *Constitutional Origins, Structure, and Change in Federal Countries,* (McGill-Queens University Press, 2005), p. 253.
[75] M. Crowder, *supra*, note 17 at p.269.
[76] *Ibid.*

the total and complete control exercised by the central military government over the states during this period.[77]

During this era, the allocation of governmental powers became increasingly centralised till practically all powers that had been reserved for the regional governments under the 1960 and 1963 constitutions were transferred to the central military government. The legislative and executive powers of the entire country became the exclusive preserve of the Central Military Government since the federal and regional legislatures that existed under the previous civilian era had ceased to exist under the military.[78]

In addition to the above, fiscal arrangements during the military era were, as could be expected, centralised. In fact, between 1968 and 1977, the military authorities in Nigeria unilaterally reviewed the revenue allocation system four times without setting up any advisory commission, as was done prior to the 1966 coup.[79] Fiscal policy was centrally determined and centrally dictated such that by 1997, the fiscal system had become absolutely centralised. Commenting on this point in a 1997 paper, eminent Economist, Professor Adedotun Philips stated that:

> ...The federal (central) government dominates the fiscal system. This arises from the lopsided revenue structure which ensures that an annual average of over 90 percent of overall government revenue is collected by the federal government alone, whilst it accounts for about 75 percent of total expenditure in Nigeria. A vital contributory factor is that prolonged military rulership of Nigeria has virtually

[77] See Prof. Nwabueze's discussion of the nature and character of the system of government established during the military in B.O Nwabueze, *supra*, note 33 at pp. 205-232.
[78] *Ibid*. See also W.O Alli, "The Development of Federalism in Nigeria: A Historical Perspective" in A.T. Gana and S. G. Egwu (eds), *Federalism in Africa* vol.1, (Africa World Press Inc, 2003), pp. 83-84.
[79] A.O. Philips, "Managing Fiscal Federalism: Revenue Allocation Issues" (1991) 21(4) *Publius* p.104; J. Isawa Elaigwu, "The Challenges of Federalism in Nigeria: An Overview" in J. Isawa Elaigwu (ed), *Fiscal Federalism in Nigeria- Facing the Challenges of the Future*, (Adonis & Abbey Publishers Ltd, 2008), p. 22. For a more comprehensive account of the financial arrangements during the military era, see A.G Adebayo, *supra*, note 30 at pp. 123-151.

> destroyed the constitutionally stipulated federal system and substituted a unitary, monolithic structure. Consequently, State and Local Governments are virtually insignificant in the fiscal system. Over the years, till date, budgetary administration has been characterised by....loss of autonomy by State and Local Governments in making expenditure decisions....The federal financial system has been progressively distorted over the years...Thus, upfront appropriation of revenues by the Federal Government has now become an annual practice, resulting in the retention by the Federal Government of a disproportionate share of federally-collected revenue and the undue reduction of revenues which ought to accrue to State and Local Governments.[80]

The above graphic description, by Professor Phillips, of Nigeria's fiscal system during the military era lends credence to the earlier assertion that military rule in Nigeria was, in effect, a return to and continuation of the centralism of the colonial era. Such was the centralisation of financial arrangements under the military during this era that the states of the federation were consistently dependent on the central government for more than 70 percent of their revenue, a situation similar to what obtained during the colonial era.[81]

A major problem with the fiscal arrangements designed by successive governments during the colonial and military eras was that the principles and methods devised for the horizontal allocation of centrally collected revenues among the Regional Governments, and the vertical allocation of revenue between the Regional and Central Governments were mostly crafted without any significant consultation with the Regional Governments.[82] Even when fiscal commissions were constituted by the Central Military Government to advise on financial arrangements for the federation, the fiscal commissions mostly consisted of expatriate economists or Nigerian financial experts

[80] A.O. Phillips, "Nigeria's Fiscal Policy, 1998-2010" NISER Monograph Series No 17, 1997 p. 3.
[81] A.G. Adebayo, *Embattled Federalism*, supra, note 30 at p. 147.
[82] *Ibid at*, p.170.

who often had little or no interaction with the Regions. These commissions were only accountable to the Central Government. It is therefore not surprising that the fiscal policies and revenue allocation principles recommended by these commissions were often condemned and rejected by the Regional Governments and their peoples.[83] Disregard and contempt for the culture of public consultation by the Nigerian political elite is one of the major reasons for the widespread public disenchantment with Nigeria's so called federal system today. The tendency of the Government at the centre to unilaterally take important decisions on critical governance issues without exhaustively consulting with the Regional Governments, and the various ethnic nationalities that constitute Nigeria is a major flaw of the current 'federal' arrangement.

From the foregoing, it is evidently clear that the history of Nigeria's so-called federalism is replete with unilateralism, centralism, and undemocratic practices, all of which are inconsistent with and antithetical to the idea of federalism. The autocratic and undemocratic nature of military rule in Nigeria from 1966 to the late 1990s precipitated a long and sustained struggle against dictatorship and a loud clamour for democratic rule throughout the 1980s and 1990s. Ethnic organisations, non-governmental organisations, and individual Nigerians vigorously campaigned against the absolutism of the military and its attendant erosion of democratic values.[84]

[83] *Ibid at* pp. 123-151.

[84] A detailed account of this struggle, and the nature of the military rule that occasioned it, has been documented by Professor Kunle Amuwo. See Kunle Amuwo, "Transition as Democratic Regression" in K. Amuwo et al (ed)., *Nigeria During the Abacha Years: The Domestic and International Politics of Democratization,* (Institute Francais de Recherche en Afrique: Ibadan, 2001), pp 1-56. Also available online at http://books.openedition.org/ifra/632 (accessed 25 September 2024).

In 1999, after decades of pressure from the pro-democracy movement and other civil society organisations, the military authorities hurriedly handed over power to a civilian government. However, in the process of doing this, they also handed over, another elitist constitution that was not debated, adopted or popularly ratified by the Nigerian people. The draft of the constitution was not debated or discussed by any constituent or constitutional assembly, and there was no referendum or any other formal mechanism of popular ratification of the Constitution. In short, there was no forum for the peoples of Nigeria to exercise their constituent power. Contrary to what is contained in the Constitution's preamble, the Constitution was not made by the Nigerian people. It was made by the military and a few civilian acolytes of theirs. The constitution was hurriedly drawn up by a committee unilaterally set up by the military, and promulgated into law by a decree,[85] thus effectively making the military authorities, and not the peoples of Nigeria, the source of the constitution's authority. Since the peoples of Nigeria, drawn from the constituent units of the federation were not genuinely involved in making the 1999 constitution, the division of powers and resources set out in the constitution cannot be said to reflect the will of the Nigerian people.

Like previous constitutions before it, the 1999 constitution also entrenches an inordinate concentration of powers and fiscal resources in the central government, despite the ethnically diverse character of the Nigerian state.

[85] Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 1999.

The unilateral formulation and promulgation of the 1999 Constitution, and the centralised division of powers entrenched in it, despite the glaring diversity of the Nigerian State, is the underpinning cause of the separatist and secessionist agitations that have rocked the country in the last few decades.

2.0 QUO VADIS? - A DECENTRALISED FEDERAL CONSTITUTIONAL FRAMEWORK

To address the problem of centralisation that has plagued the Nigerian State since the colonial era, I will propose, in this article, a two-pronged approach. First, the current 1999 constitution with the centralised power-sharing arrangement set out in it must be completely abrogated. A fresh constitution-making process that is genuinely participatory, inclusive, and deliberative should be put in place. The process should be designed to include a constituent-assembly, and a ratifying referendum in order to ensure that the new Constitution indeed reflects the popular will. In short, the constitution-making process should be genuinely democratic.

The process that produced the 1996 constitution of South Africa exemplifies this approach.[86] That process, characterised by widespread popular participation and popular endorsement has been widely adjudged as the most democratic constitution-making process Africa has ever witnessed.[87] The Nigerian constitution-making process can be designed using a similar method or approach to ensure that citizens from all parts of the country, and groups representing different professional, religious, socio-

[86] C. Murray "A Constitutional Beginning: Making South Africa's Final Constitution" 2001 23(3) *University of Arkansas at Little Rock Law Review,* 816-837. For a more comprehensive account of public participation in the South African Constitution Making process, see H.Ebrahim, *The Soul of a Nation: Constitution-Making in South Africa*, (Cape Town/Oxford University Press 1998), pp. 239-250.
[87] Ibid.

cultural and political tendencies are fully involved in the process. Popular participation not only imbues the constitution-making process and the constitution itself with legitimacy, but it also helps to compel long-term fidelity to the Constitution.[88]

Second, the new Constitution should entrench a federal framework that genuinely accommodates Nigeria's diversity without compromising its unity. In essence, the Constitution should recognise the multi-ethnic character of the Nigerian State and promote a governance structure that supports autonomy for the constituent units of the federation in matters that are local or regional in nature. This sort of federal system has been practiced in Canada for several years. It is well known that Canada has one of the most decentralised federal systems in the world.[89] And, while the federal arrangement in that country has not always been perfect, it has undoubtedly helped to manage inter-regional and inter-governmental tensions in the country in the last few decades. Canada, like Nigeria, is a multi-ethnic State with pronounced diversity. The Canadian experience with decentralised federalism has demonstrated that a truly federal system characterised by significant regional or provincial autonomy in matters that are purely internal to the constituent units of the federation is often the best for a multi-ethnic State with deeply entrenched diversity. Nigeria 's federal system should be patterned along this line. The federal framework set out in the new Constitution should embrace regional autonomy without compromising the country's unity.

[88] B.O Nwabueze, *Constitutionalism in the Emergent States*, (Fairleigh Dickinson University Press, 1973), pp 25-26; J. Wallis, *Constitution Making During State Building,* (Cambridge University Press, 2014), p. 3.
[89] R.L. Watts, *supra* note 2 at pp 32-33.

In summary, the point being emphasised is that Nigeria's problematic federal system can only be rectified by a complete abrogation of the current constitutional arrangement and its replacement with a genuine counter-hegemonic federal constitutional framework, freely and inclusively adopted by the peoples of Nigeria, and characterised by a power sharing arrangement that recognises the country's diversity and multi-ethnic character without undermining its unity. Only such a federal system can contribute to the peace and stability of the country and help to stem the tide of secessionism threatening to tear the country apart.

3.0 CONCLUSION

In this article, Nigeria's constitutional experience since its compulsive creation in 1914, has been examined. In particular, we analysed the nature of the division of powers entrenched in successive constitutions of Nigeria in the last hundred years or so. The discussion revealed that constitutional distribution of powers among the levels of government in Nigeria has had a long and troubling history of centralisation. This policy of centralisation was forged in the crucible of colonialism and nurtured on the altar of military rule. In essence, the centralist nature of the division of constitutional powers in Nigeria today is a colonial *cum* military legacy that has corrupted the very soul of Nigeria's federalism. It has entrenched and fostered a problematic "federal" framework by institutionalising the hegemony and dominance of the central government.

Throughout Nigeria's checkered history, the centralist nature of power allocation in the country has led to consistent agitations for greater public participation in constitution-

making, transfer of powers to the constituent units of the federation, regional fiscal autonomy, and regional control of mineral resources. These agitations indicate that there is increasing popular disenchantment with the country's dysfunctional and illegitimate constitutional architecture.

Any attempt to address these agitations must therefore commence with a radical abrogation of the 1999 constitution along with its centralist federal philosophy, and its replacement with a decentralised federal constitutional framework that is designed by the peoples of Nigeria themselves through a widely inclusive and participatory constitution-making process.

ACHIEVING A COHERENT LEGISLATION FOR RENEWABLE ENERGY SUB-SECTOR IN NIGERIA: A MAJOR TASK FOR THE 10TH ASSEMBLY

Oliver Azi[*]

ABSTRACT

Our world is threatened by climate change and the reason for this is not farfetched—fossil fuels. It has been recommended that as against non-renewable energy that is popularly used a shift to utilising renewable energy is imperative. Nigeria has made certain strides in ensuring renewable energy is utilised. However, the 10th National Assembly needs to identify that a basic issue compromising effective results in this sector is too many laws and policies which does not spell a clear framework and pathway. Using the doctrinal research method, this work has looked at the existing legal framework for renewable energy and the policies regulating it. This work has gone further to identify the basic challenges facing the present legal framework. Hence, the work gives proposals on spheres of the renewable energy sector which, if considered, will enhance and ensure that a coherent legal framework is birthed by the 10th National Assembly.

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1.0 INTRODUCTION

Renewable energy is energy drawn from sources that are naturally replenishing. It comes from natural sources and examples of such sources are the sun and the wind.[1]. Our society is driven by different forms of energy and there is a great need to identify this energy and the laws guiding its administration. Also, since human existence is hinged primarily on laws and regulations to control animalistic instinct, so are laws used in the regulation of the renewable energy sector

Hence, the following subject matter gives a robust perspective to the topic at hand, this work will consider, the sub-theme: existing legal framework on renewable energy in Nigeria—here, the focus lies not only on the extant and extinct legal framework but similarly, the challenges of the legal framework and policies. Furthermore, this work will give an overview of the proposed legal framework for achieving coherent legislation for renewable energy in Nigeria and compare this with the legal framework of other top-performing countries and their extant legal frameworks.

2.0 CONCEPTUAL CLARIFICATION

In setting the pace for this work, there is the need to clarify the terms that will be used and how they have construed matters in the understanding of the overall work. Hence, the following reoccurring concepts will be defined:

[1] United Nations, "What is Renewable Energy," available at: <https://www.un.org/en/climatechange/what-is-renewableenergy#:~:text=Renewable%20energy%20is%20energy%20derived,that%20are%20constantly%20being%20replenished> (accessed on 24 June 2024).

2.1 Renewable Energy

Renewable energy comes from natural sources that replace themselves more quickly than they are used up. Examples of such sources that are continuously replenished are the sun and the wind. On the other hand, non-renewable fossil fuels like coal, oil, and gas require hundreds of millions of years to create. When fossil fuels are used to create energy, they emit dangerous greenhouse gases like carbon dioxide. More emissions are produced by burning fossil fuels than by producing electricity from renewable sources. The key to solving the climate catastrophe is switching from fossil fuels, which now produce the majority of emissions, to renewable energy. In most nations, renewables are now more affordable and create three times as many jobs as fossil fuels.[2]

2.2 Legislation

There is no definition of the word "*Legislation*" in the Black's Law Dictionary, however, what is defined is the word "Legislative" which means relating to law-making or the enactment of law.[3] In context, this means an already passed law or codified law enacted by the legislative arm of the government.

2.3 Coherent

According to the Merriam-Webster dictionary, the word "*Coherent*" simply means or can be substituted with "*logically*" or "*aesthetically ordered or integrated*" and this in its more simplistic term means consistent.[4] Hence, for this work, our focus will be that the current legal framework for renewable energy is haphazard and inconsistent and

[2] United Nations, "What is Renewable Energy," Ibid.
[3] Bryan Garner, 'Black's Law Dictionary.' (St. Paul, MN: Thomson Reuters, 2014).
[4] Merriam Webster Online Dictionary, available at: <https://www.merriam-webster.com/dictionary/coherent> (accessed 29 June 2024).

this creates a need for the 10th National Assembly to create a more consistent, coherent, and logical or aesthetically ordered legislation for renewable energy in Nigeria.

3.0 EXTANT LEGAL FRAMEWORK ON RENEWABLE ENERGY

A functioning and coherent legal framework is essential in guiding a country towards effectively utilising its renewable energy resources. Through established legal frameworks, the government can control the use and dispensation of these resources. Hence, these are the substantive enacted laws and policies that bother on renewable energy and its regulation in Nigeria.

3.1 The Electricity Act 2023

The importance of a power sector in any society cannot be overemphasised.[5] The Electricity Power Sector Reform Act was enacted by the National Assembly in 2005.[6] Going in tandem with the trends of developed countries in the power sector, the Electricity Power Reform (ESPRA) Act 2005 was enacted. The Act revoked the National Electric Power Authority (NEPA) and the Electricity Act (not the extant Electricity Act of 2023). The framework of the Electricity Power Sector Reform Act involves initiatives that focus on fueling the flames of sustainable and safe energy. The Nigerian Electricity Regulatory Commission has a duty to generate electricity using renewable resources

[5] Oluwaseun Viyon Ojo, "An Overview of the Legal and Regulatory Framework for Renewable Energy Projects in Nigeria: Challenges and Prospects," *Unilag Law Review* (2017) (1)(1)30.
[6] Prior to the establishment and enactment of the Electricity Power Sector Reform, there was in existence the National Electric Power Authority Act, Cap 256, LFN 2004; This act was saddled with the responsibility of developing and sustaining an efficient economical system of power supply in Nigeria. Electricity generation started in Nigeria in 1896. However, the first utility company was established in 1929. NEPA was then put in charge in the year 2000. The Nigerian Electricity Regulatory Commission (NERC) now performs as the regulatory body of the Power Reform Act. Its duties include generation, transmission and distribution of electricity in Nigeria.

such as solar, biomass and wind to make available satisfactory and fitting technical and commercial methods for the sale of electricity to Nigerian consumers.[7]

In June 2023, an Electricity bill was signed into law by President Bola Ahmed Tinubu.[8] The Electricity Act 2023 repeals the erstwhile ESPRA 2005. The substantive Electricity Act provides a better framework for the control and regulation of the power sector in Nigeria. It is concerned with areas such as the provision of a composite resource policy for transmission and utilisation of renewable energy in a bid to attract investors, distribution and supply of the rights of consumers concerning power and electricity usage. The jurisdiction of the Act cuts across the various metropolises in the region. However, unlike the ESPRA 2005, the Electricity Act allows for the generation, transmission and supply of power to be made by the other tiers of government. It does not strictly vest these powers on the Federal government alone. Currently, only Kaduna, Lagos and Edo have electricity laws and can independently operate by virtue of the provision. Other states are guided by the NERC in terms of the generation and distribution of electricity.

3.2 Energy Commission of Nigeria Act (ECA)

In 1979, the Energy Commission of Nigeria Act was promulgated. It was amended in 1988 and 1979. It is the apex government organisation empowered to carry out planning and implementation in the energy sector. The commission also introduces alternative energy resources such as nuclear energy, biomass, solar and wind. The commission is

[7] Ibid.
[8] Oluyemi Ogunseyin, 'Electricity Act 2023: Ten important things to know,' (The Guardian, 13 June 2023) <https://guardian.ng/news/electricity-act-2023-ten-important-things-to-know> (accessed 29 June 2024).

vested with the power to coordinate and give general surveillance of the progress of the different energy resources in Nigeria.[9]

The Act vests on the Technical Advisory Committee the power to carry out the following functions. These functions include but are not limited to the following: gathering and disseminating information regarding the Government's policy on energy development,[10] serving as a trouble-shooting centre for technical issues in energy development, advising state and Federal government on energy development issues, including funding for energy research and development, prepare master plans and policies for energy development exploitation, utilisation, project execution, project financing, incentives and recommendations to government and lastly liaise with all international organisations in energy matters such as International Atomic Energy Agency, World Energy Conference and other similar organisations.[11]

3.3 Climate Change Act 2021

The Climate Change bill was signed into law in November 2021 by former President Muhammadu Buhari. This act was enacted to provide Nigeria with a legal framework for climate goals which is concurrently threatened by fossils from energy. Former President Muhammadu Buhari made a commitment at the COP 26 in Glasgow to achieve net zero emissions by the year 2060.[12] The Act establishes the National Council on Climate

[9] 'Energy Commission of Nigeria' <https://www.devex.com/organizations/energy-commission-of-nigeria-ecn-150225> (accessed 29 June 2024).
[10] The Act aligns with the Government's policy on developing, controlling and disseminating renewable energy. It simultaneously protects the environment from harmful effects of fossil fuel while distributing and harnessing renewable energy.
[11] Ibid.
[12] 'Climate Change Laws of The World' *Interface* for the Climate Policy Radar Database, <https://climate-laws.org/> (accessed 24 June 2024).

Change which has the duty of implementing the country's climate action plan. Nigeria intends to achieve and sustain ownership of gas emissions (GHG) through green growth and sustainable economic growth and development.[13] The Act compels any private organisation with 50 or more employees to put procedures in place in other to achieve the annual carbon emission reduction target. A climate change officer will be appointed to keep these private entities in check by subjecting them to a fine, whenever they fail to meet the target.

4.0 POLICIES AND REGULATORY FRAMEWORK ON RENEWABLE ENERGY

Nigeria has a plethora of regulatory framework policies on renewable energy. These policies help to drive the implementation of projects that reduce energy use.

4.1. National Renewable Energy and Efficiency Policy 2015[14]

The Federal Executive Council endorsed this policy on 20 April 2015. It provides an outlook on the situation in Nigeria with goals and plans to implement renewable energy. It provides for capacity building and the utilisation of local workers and materials. The Federal Ministry of Power has the duty to regulate the activities of the Renewable Energy Efficiency Policy plan. It is the first and only tool for renewable energy development in Nigeria. The policy makes it compulsory that the Ministry of Power facilitates the development of the Integrated Resource Plan and sees to the

[13] International Labour Law Organisation, Database of National Labour, Social Security, and related Human Rights Legislation <https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=112597&p_lang=en> (accessed 25 June 2024).
[14] The NREEEP is a policy document approved by the Federal Executive Council (FEC) in 2015 and forms the overarching policy on renewable energy and energy efficiency in Nigeria.

effectiveness of the actions agreed. It is focused on geothermal, biomass, solar, wind and tidal energy power generation.[15]

4.2 National Climate Change Policy 2021-2030[16]

The National Climate Change Policy (2021-2030) is aimed at implementing the established mitigation procedures to promote issues like high-growth economic development plans and low-carbon for a sustainable environment in Nigeria. It is well established that the climate is becoming a prevalent worldwide issue. The increasing climate variability calls for rapt attention, hence the establishment of the National Climate Change Policy. This policy identifies climate change as one of the major hindrances to economic growth and development. The main objectives of the Policy are to implement mitigation measures that will promote low carbon as well as sustainable and high economic growth, strengthen national capacity to adapt to climate change, raise climate-change-related science and technology that will enable the country to better participate in international scientific and technological operations on climate change, strengthen national institutions (policy, legislative and economic) to establish a suitable and functional framework for climate change governance.[17]

[15] "African Power Platform," available at: <https://www.africanpowerplatform.org/resources/reports/west-africa/nigeria/379-national-renewable-energy-and-energy-efficiency-policy-nreeep.html? (accessed 29 June 2024).
[16] The National Climate Change Policy for Nigeria 2021-2030 assists the country in achieving its goal of meaningfully contributing of reducing greenhouse gas (GHG) emissions and reduces the socio-economic impacts of adverse effects of climatic change.
[17] "Climate Change Laws of the World" <https://climate-laws.org/document/national-policy-on-climate-change-and-climate-change-policy-response-and-strategy_95ff> (accessed 29 June 2024).

4.3 Renewable Energy Master Plan 2005[18]

The Renewable Energy Master Plan 2005 (REMP), urges the use of renewable energy and aims to offer a plan for its implementation. It conceptualises Nigeria's ambitions for renewable energy and tries to address the crucial elements in achieving them. By 2030, Nigeria's minimum power consumption is expected to exceed 315 MW, according to the REMP. The target is for renewable energy to make up more than 20% of the energy supply.[19]

4.4 Renewable Energy Policy Guidelines 2006[20]

The Federal Ministry of Power published a paper in 2006 called the Renewable Energy Policy Guidelines (REPG) that outlines policy goals for the advancement and application of renewable energy. The main difference between the REPG and the REMP is that the REPG gives the distribution and production of renewable energy a higher priority. Additionally, it lays forth a plan for the efficient management of the Renewable Electricity Trust Fund. In order to promote the involvement of more stakeholders, the REPG also offers incentives for the use of renewable energy and suggests a five-year tax exemption as an incentive for investment in renewable energy.

These legal frameworks and policies amongst many others are the substantive laws and plans that the government has put in place to tackle some of the prevailing issues

[18] The Nigeria Renewable Energy Master Plan (REMP) is a policy being implemented by Nigeria's Federal Ministry of Environment that aims to increase the contribution of renewable energy to account for 10% of Nigerian total energy consumption by 2025.
[19] Ibid.
[20] The Renewable Energy Policy Guidelines 2006 (REPG) is a document by the Federal Ministry of Power that details policy objectives for the development and utilisation of renewable energy.

concerning tidal energy, hydro energy, geothermal energy, solar, wind, and biomass energies. Nigeria has not turned a blind eye to the growing need for the utilisation of renewable energy. However, we cannot say that the country has considered all possible means of saving energy by making use of renewable energies. The International Renewable Energy Agency (IRENA) released a report on 13 January 2023 stating that Nigeria can save about 40% of natural gas and 65% of oil with the introduction of the utilisation of renewable energy. Nigeria must invest in these energy sources to meet rising demands. Through this, Nigeria gets access to modern energy services that will in turn enhance the development of the country in relation to renewable energy.

5.0 CHALLENGES FACING RENEWABLE ENERGY LEGISLATION

Even though various existing frameworks regulate the energy sector in Nigeria, this sector has been faced with numerous challenges and obstacles. These challenges may, however, be the stepping stone to better renewable energy and providing clean power in Nigeria. The existing challenges that the energy sector has faced are discussed below.

5.1 Policy and Regulatory obstacles

Although there exists a framework for regulation of the renewable energy sector, it has been argued that these frameworks do not give a clear institutional framework for renewable energy in Nigeria.[21] This is primarily premised on the fact that the existence of multiple frameworks does not guarantee efficiency. There has been a duplication of agencies and institutions. For instance, the Energy Commission of Nigeria (ECN), the Nigeria Electricity Regulatory Commission and the Ministry of Power all share similar

[21] S.O Oyedepo, "Towards Achieving Energy for Sustainable Development in Nigeria" (2014) 34 *Renewable and Sustainable Energy Review*, 255, 269.

roles in the regulation of the energy sector. The duplication of these bodies and roles makes it difficult to have a clear institutional framework for renewable energy projects in Nigeria and this has affected its growth.[22]

5.2 Finance Obstacles and High Cost

One of the setbacks that energy has faced in Nigeria is the high cost of technology that is needed.[23] As a result of how expensive renewable energy is, it becomes difficult for investors to invest. This is because they may not be able to generate profit because of the high startup capital.

Electricity from renewable energy sources is more expensive than conventional energy and so fiscal or incentive mechanisms are needed to enable them to play a meaningful role in the total energy balance.[24] By implication, the absence of consistent financing options for this type of investment puts a clog on the advancement of projects on renewable energy.

5.3 Access to Grid

Most Nigerians do not have access to electricity and by default cannot access the national grid to obtain power supply. It is shown in numbers that more than 15.3 million Nigerian households lack access to grid electricity and those who are connected lack

[22] E.I Efurumibe, "Barriers to the Development of Renewable Energy in Nigeria" (2013) 2(1) *Scholarly Journal of Biotechnology,* 11, 12.
[23] S. Amadi, "Ethics and Values in Sustainable Development," available at <www.nercng.org/index.php/nerc-documents/funct-startdown/267/> (accessed 6 June 2024).
[24] J.C. Bongaerts and G Dogbe, "Optimal Institutional Arrangements and Instruments for the Promotion of Energy and Renewable Sources." Chapters, in: Michael Faure & Joyeeta Gupta & Andries Nentjes (ed.), *Climate Change and the Kyoto Protocol*, chapter 9, pages 195-229, Edward Elgar Publishing.

consistent supply.[25] This poses a major challenge that the renewable energy sector faces. The hope that the cost of electricity from renewable energy sources will be lower than that of fossil fuel will be determined by factors such as the support mechanism provided as well as the grid connection procedure and the price of transmission.[26] The absence of provision for priority to the grid continues to remain a major barrier in Nigeria.[27]

5.4 Poor Enforcement

There exists a host of laws that regulate the energy sector in Nigeria. However, this sector has been plagued with challenges and this suggests that the implementation of these policies is not adequate. The failure to implement these laws and policies has significantly affected the development of the energy sector in Nigeria.

5.5 Inadequate information

In Nigeria, there is inadequate data on renewable energy as the statistics are either not up to date or they are inaccurate.[28] It is recommended that data and statistics should be sufficient for both renewable energy and conventional energy, which should be reviewed from time to time as there is a need for energy agencies to work with the

[25] '15.3m Nigeria Households Lack Access to Grid Electricity-Group' (Premium Times, 15 December 2012) <https://www.premiumtimesng.com/news/111301-15-3m-nigerian-households-lack-access-to-grid-electricity-group.html> (accessed 29 July 2024).
[26] G. Bellantuono, "Comparing Regulatory Decision-Making in the Energy Sector," *Comparative Law Review* (2010) 1(2).
[27] K.M Usman, A.H Iza and J.O Ojosu, "Renewable Energy Financing: Towards a Financing Mechanism for Overcoming Pre-Commercialisation Barriers of Renewable Energy Financing System in Nigeria" (2012) 3 (4) *International Journal of Scientific and Engineering Research*, 1, 3.
[28] S.U Yamusa and A.H Ansari, "Renewable Energy Development in Two Selected African Countries: An Overview and Assessment" (2013) *Renewable Energy Law and Policy Review* 151, 153.

National Bureau of Statistics to ensure accurate statistics.[29] The implementation of this would ensure that accurate statistics are obtained that would boost viability of the energy sector.

Additionally, sufficient information can increase public support for the deployment of renewable energy and the lack of sufficient information may affect the level of public support. This is where statistics become crucial in the formation of policies and enactment of legislation on renewable energy. Creating a level of public awareness on the importance of renewable energy in Nigeria would enhance its promotion and a lack of it would be a setback.[30]

6.0 PROPOSED LEGAL FRAMEWORK FOR CLIMATE IN NIGERIA

The crux of this work deals with a proposal for a legal framework. Albeit, the necessary preliminaries have been stated—the challenges facing the present framework and the present framework. This work will thus, not be completed without the necessary proposed legal framework.

6.1 Proposal and Recommendations

To achieve coherent legislation on renewable energy in Nigeria, there is a need for a pragmatic effort by the 10th National Assembly. This author proposes the following:

[29] P.K Oniemola, "Powering Nigeria through Renewable Electricity Investments: Legal Framework for Progressive Realisation" *International Association of Energy Economics*, 35 <https://www.iaee.org/en/publications/newsletterdl.aspx?id=88> (accessed 29 July 2024).
[30] Y.S Mohammed et al, "Renewable Energy Resources for Distributed Power Generation in Nigeria: A Review of the Potential" (2013) 22, *Reviews* 257, 266.

6.1.1 Harmonisation of Laws

There are blizzards of legislation and policies on renewable energy in Nigeria; this is a problem. Little or no focus seems to be achieved by virtue of the legislation. The problem with many laws is the problem of institutional duplication and inconsistent role clarification. For instance, the Energy Commission of Nigeria (ECN), Nigeria Electricity Regulatory Commission and the Ministry of Power, all share similar roles in the regulation of the energy sector for coherent legislation to be achieved, there is a need to reduce the laws and policies on the renewable energy sector and also the need for clear clarification of the roles of different agencies and parastatals vested with roles linked with the renewable energy sector. This way, uniform legislation is achieved that captures every segment and issue bordering on renewable energy in Nigeria.

In relation to the first proposal made, the 10th National Assembly should also consider the extant Energy Independence and Security Act of the United States which amongst everything, tried to harmonize the roles and responsibilities of government in the energy sector. This way, there is a clear landmark and template for the renewable energy sector which can be adopted in Nigeria.

6.1.2 Coherent Financial Model

The need for the law to create a coherent financing model showcasing a Public Private Partnership (PPA) for the renewable energy sector is necessary. The role of the government is predominantly hinged on the security and welfare of the people.[31] However, renewable energy projects can be expensive and burdensome to the

[31] S. 14 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

Government, hence, the need to involve the private sector. Therefore, it becomes necessary that a project financing model[32] or any model that can ensure active participation of investors in this sector is achieved. For instance, the Project Financing Model was used in projects like the Azurra Independent Power Project, Egina Oil Project and Lekki Toll Gate Project which are good examples of where Project financing deals were used in Nigeria and how they played out. This should be codified and made extant in the uniform law on renewable energy in Nigeria. Even the Paris Agreement had stipulated financing for renewable energy.

6.1.3 Commitment to 2050 Zero Net Carbon Emission Goal

In accordance with the Paris Agreement on Climate,[33] there is a need for the 10th National Assembly to also consider our 2050 Zero Net Carbon Emission goal which Nigeria is committed to. The Climate Change Act was signed in 2021 which was in tandem with the Climate Pact in Paris. However, it must be remembered that in 2005 Nigeria had a Renewable Energy Master Plan. If climate change and renewable energy are global issues, there is a need to harmonize our laws with international expectations and requirements. For Instance, just like the United Kingdom became the first country to codify laws set to achieve net zero carbon emission, so should Nigeria be pragmatic

[32] Project finance is the funding (financing) of long-term infrastructure, industrial projects, and public services using a non-recourse or limited recourse financial structure. The debt and equity used to finance the project are paid back from the cash flow generated by the project. Project financing is a loan structure that relies primarily on the project's cash flow for repayment, with the project's assets, rights, and interests held as secondary collateral. Project finance is especially attractive to the private sector because companies can fund major projects off-balance sheet (OBS).

[33] Paris Agreement to the United Nations Framework Convention on Climate Change, FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015); The Paris Agreement, often referred to as the Paris Accords or the Paris Climate Accords, is an international treaty on climate change. Adopted in 2015, the agreement covers climate change mitigation, adaptation, and finance.

in her laws in achieving the same? This cannot be done without coherent legislation for this. So, coherence here means that our laws should not only be restrictive and exhaustive at the same time but should also be in tandem with the expectations of the global community.

However, dissenting thoughts and perspectives might want to prevail. One such argument that persists is: *with every new pact or treaty signed, will Nigeria always enact a new law or policy while reneging on a previous legislative enactment*? The relevancy of such a treaty or pact will determine Nigeria's active participation. Climate Change is an issue that affects everyone and Nigeria is not exempted.

6.2 Comparison with Other Jurisdictions

To test the effectiveness of the proposed legislation, there is a need to compare it with economies that have strong renewable energy policies—two will be considered here.

6.2.1 United States of America

Certain renewable energy technologies and investments have long found a favourable market in the United States. There are several legal frameworks generally recognised in the United States and they will be discussed below. It has never been more crucial to have energy resiliency. Global priorities in the face of rising geopolitical tensions, shifting commodity prices, supply chain problems, and an increase in extreme weather events include stepping up renewable energy production, accelerating energy diversification, and enhancing energy storage[34]. In addition, several external pressures

[34] Greg Matlock and Stephanie Chesnick, "Key Attributes of the US Renewables Landscape' (EY Americas, 15 November 2022) <https://www.ey.com/en_us/insights/energy-resources/3-key-attributes-of-the-us-renewables-landscape?WT.mc_id=10821189&AA.tsrc=paidsearch&s_kwcid=AL!10073!3!648300728075!p!!g!!

are pressuring manufacturers of conventional energy sources to consider adopting cleaner, more effective operating practices.

The Energy Independence and Security Act[35] is an Act to advance the nation's energy security and independence, increase the production of green fuels, safeguard consumers, improve the efficiency of goods and infrastructure, advance the study and use of options for capturing and storing greenhouse gases, boost the federal government's energy efficiency, among other things.

The Energy Policy Act[36] is an Act to guarantee future employment through safe, economical, and dependable energy. The Federal Government must obtain at least 7.5 per cent of its electricity from renewable sources, according to the U.S. Office of Energy Efficiency & Renewable Energy.

The Inflation Reduction Act (IRA)[37] makes the single largest investment in climate and energy in American history, allowing the country to combat the global warming crisis, advance environmental justice, maintain its position as a global leader in domestic clean energy production, and put the country on track to meet the climate goals set forth by the Biden administration, including a net-zero economy by 2050. This act seeks to create loan opportunities for businesses and companies seeking to reduce fossil energy usage and create policies towards achieving sustainable renewable energy.

energy%20regulations&gad=1&gclid=Cj0KCQjwtO-kBhDIARIsAL6Lore5iv_agAeGuEBXEo8dft4dqTsn0JEgoFxqeBsDYacCZElJwLUKCwMaAj7eEALw_wcB > (accessed 30 July 2024).

[35] The Energy Independence and Security Act of 2007.

[36] Energy Policy Act of 2005.

[37] The Inflation Reduction Act (IRA) 2022.

6.2.2 The United Kingdom

The Energy Act 2013, which was passed in accordance with the Electricity Market Reform Programme (EMR), is largely responsible for implementing the regulatory framework that supports the United Kingdom's (UK) transition to clean energy. The EMR aims to transform the UK electricity system to ensure that the energy supply is reliable, affordable, and low carbon. Contracts for Difference (CfD) programs were among the key EMR delivery methods that provided long-term revenue stabilization for low-carbon power projects. In the UK, the CfD program is the main source of funding for new renewable energy projects.

The UK market for renewable energy continues to draw both local and foreign investment, with its offshore wind manufacturing sector reporting a record-breaking investment of £1 billion in 2021, the biggest yearly amount since the industry's inception in 2000. The rate of the shift to renewable energy is accelerating significantly in the United Kingdom in light of government aspirations to provide energy security and minimize the effects of climate change, as well as declining costs and increasing innovation. The government stated that it will bring clean, affordable and secure power to the people for generations to come in the Energy Security Strategy.

Also, to fulfil its obligations under the 2016 Paris Agreement to keep global warming well below 2°C, the United Kingdom became the first major economy in the world to codify in law an act to bring all greenhouse gas emissions to net zero by 2050. As of 2021, the Department for Business, electricity and Industrial Strategy (BEIS) estimated that 19% of UK greenhouse gas emissions were related to the delivery of electricity. The amount of renewable energy connected to the grid has increased dramatically over

the last ten years, from 8 GW in 2009 to approximately 50 GW as of December 2021 or a 525% increase.[38]

7.0 CONCLUSION

As rightly noted, the world's focus is on renewable energy because of the adverse effects of non-renewable energy and its impact on the environment. However, our laws seem not to be consistent and coherent as there are blizzards of laws permeating the space on energy in Nigeria. Hence, in retrospect, the nexus between the extant legal framework and the challenges facing renewable energy has been discussed in this work.

In furtherance to the aim of this research work, a proposal has been made on how coherent legislation on renewable energy can be met in Nigeria. This no doubt, will be one of the biggest tasks of the 10th National Assembly and so, our proposals have been subjected to the legislations applicable in other countries—which should be in tandem.

[38] Louise Dalton and Sabrina Polito, 'United Kingdom' *The Renewable Energy Law Review*, Fourth Edition, 203.

THE ABUSE OF DOMINANCE IN THE DIGITAL MARKET: A NIGERIAN PERSPECTIVE

Omowonuola Adekanmbi*

ABSTRACT

The digitisation of the economy has altered market dynamics, expanding competition challenges to the digital ecosystem. The Federal Competition and Consumer Protection Commission recently penalised Meta Platforms Inc. for abusing its dominant position in Nigeria. This article explores the implications of this landmark decision, focusing on the intersection of digital market practices and competition law in Nigeria. It examines the Federal Competition and Consumer Protection Act to discover how the current regulatory frameworks handle dominance in digital marketplaces. The study also highlights critical issues such as data exploitation, market entry barriers, and the bundling of services. Using the Meta case as a foundation, this article proposes reforms to improve regulatory enforcement and ensure fairness in Nigeria's digital market.

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1.0 INTRODUCTION

The world is fast becoming a global village thereby causing an increase in the trade of goods and services on the Internet. Consequently, there is a digitisation of the economy in many African States. Since there is a movement to trading on the Internet, the digitisation of the economy is increasing, and the dynamics of competition are changing, thereby extending beyond the scope of traditional markets into the digital ecosystem. In Africa and specifically, Nigeria, the competition law rules are relatively new and are constantly evolving to meet the growing demands of the economy, thus necessitating a growing need to assess the effects of competition in the digital market particularly the effect that big companies will have over emerging companies within the digital market.

Recently, the Federal Competition and Consumer Protection Commission ("FCCPC" or the "Commission"), Nigeria's foremost competition authority, imposed a US$200,000,000 (Two Hundred Million United States Dollars) fine against Meta Platforms Inc. and WhatsApp LLC (together referred to as Meta), one of the biggest providers of social networking, advertising and business insight solutions in the world and operating majorly within the digital ecosystem, for competition law infractions, including the abuse of its dominant market position by forcing unscrupulous and anti-competitive policies on its consumers.[1]

[1] 'Release In the Matter of Meta Platforms, Inc. and WhatsApp LLC' *FCCPC* 19 July 2024, available at https://fccpc.gov.ng/wp-content/uploads/2024/07/Release-In-the-Matter-of-Meta-Platforms-Inc.-and-WhatsApp-LLC.pdf (accessed 27 July 2024).

This paper will consider the concept of competition and abuse of dominance under Nigerian law; competition and abuse of dominance in the digital market; an examination of the case between the Commission and Meta as well as its implications for Nigeria's competition law; and recommendations to help improve competition in the Nigerian digital market.

2.0 COMPETITION AND ABUSE OF DOMINANCE UNDER NIGERIAN LAW

The Federal Competition and Consumer Protection Act 2018 (FCCPA or "the Act"), Nigeria's primary legislation for safeguarding consumer rights and regulating competition, contains extensive provisions aimed at fostering a fair and efficient competitive market. These provisions are designed to ensure that all citizens have access to safe products while protecting the rights of consumers across the country.

The FCCPC, in accordance with its powers under the Act, regulates all competition law-related issues in Nigeria, including but not limited to the abuse of dominance. An undertaking will be considered to be in a position of dominance if the undertaking can act without taking account of its customers, consumers, or competitors.[2] Furthermore, within a relevant market, a dominant position exists:

> Where an undertaking enjoys a position of economic strength enabling it to prevent effective competition being maintained on the relevant market and having the power to behave, to an appreciative extent, independently of its competitors, customers and ultimately consumers.[3]

[2] Section 70 (1), Federal Competition and Consumer Protection Act (FCCPA) 2018.
[3] Section 70 (2), FCCPA.

It is imperative to note that by the provision of the FCCPA, occupying a position of dominance is not in itself illegal. A violation of the law occurs only when a business holding a dominant position in a market abuses that position.[4]

2.1 When will an Undertaking be deemed to be in a Dominant Position?

As earlier mentioned, an undertaking will be considered as having a dominant position if it can act without considering three important market players, that is, its customers, the consumers or its competitors. Additionally, there are certain factors to be considered by the Commission in determining whether an undertaking holds a dominant position in the market.

These factors include; the market value of the undertaking or undertakings concerned in the relevant market; the financial power of the affected undertaking; its or their access to supplies or markets; its or their links with other undertakings; legal or factual barriers to market entry by other undertakings; actual or potential competition by undertakings established within or outside the scope of application of the FCCPA; ability to shift supply or demand to other goods or services; and the ability of the opposite market side to resort to other undertakings.[5]

Beyond the scope of the FCCPA, in determining whether an undertaking has a dominant position in the market, the FCCPC, in the exercise of its powers under the FCCPA issued the Federal Competition and Consumer Protection Commission Abuse of Dominance Regulations 2022 (the "FCCPC Dominance Regulations"), which restates the position of the FCCPA that an undertaking would be deemed to be in a dominant position where

[4] Section 72, FCCPA.
[5] Section 72(3), FCCPA.

the undertaking can act without considering its customers, consumers or competitors; or enjoys a position of economic strength in the market which enables it to prevent effective competition from being maintained.[6] It further provides that the FCCPC will assess the ability of the undertaking to unilaterally increase prices in its relevant market beyond the competitive level.[7] In addition, the FCCPC would also consider parameters which are capable of being influenced to the advantage of the dominant undertaking and to the detriment of consumers.[8] They include prices, output, innovation, variety and quality of goods or services, data (in the case of an undertaking in the digital economy) and other relevant parameters.

Furthermore, to determine that an undertaking is in a dominant position, the FCCPC will delineate the relevant market and upon doing so, the FCCPC will consider the competitive factors provided in the FCCPA to be able to access the competitive structure of the relevant market.[9] Upon delineating the relevant market, the FCCPC would consider the constraints imposed by the existing supply sources and the position on the market of actual competitors (the market position of the undertaking and its competitors including its market shares, financial power, access to supplies or markets, and link with other competitors). The Commission would also consider the constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry, and legal and factual barriers to entry) and

[6] The Abuse of Dominance Regulations (the FCCPC Dominance Regulations), 2022, Regulation 4(1) of the FCCPC Dominance Regulations.
[7] Regulation 4(2), FCCPC Dominance Regulations.
[8] Ibid.
[9] Regulation 5, FCCPC Dominance Regulations.

the constraints imposed by the bargaining strength of customers of the undertaking (countervailing buyer power).[10]

An undertaking may be deemed dominant in multi-sided markets and networks[11] and in such instances, the FCCPC would consider;[12] direct and indirect network effects,[13] the parallel use of services from different providers and the switching costs for users, economies of scale of the undertaking, arising in connection with network effects, access of the undertaking to data relevant to competition, and innovation-driven competitive pressure.

Whilst the FCCPA and the FCCPC Dominance Regulations do not specifically provide for undertakings operating within the digital ecosystem, the above provisions would be applicable in determining whether an undertaking operating within the digital ecosystem is indeed in a dominant position.

[10] Regulation 5(2), FCCPC Dominance Regulations.
[11] Although not defined by the Act or the Regulations, a multi-sided market is generally known and understood to be a market where firms need to get two or more distinct groups of customers who value each other's participation on board the same platform in order to generate economic value; Sean Silverthorne, "New Research Explores Multi-Sided Markets," 12 March 2006, available at: https://hbswk.hbs.edu/item/new-research-explores-multi-sided-markets (accessed 29 November 2024); A multi-sided network is also recognised as a service or product that connects two or more participant groups; Daniel Pereira, "Multi Sided Platform Business Models," 3 March 2023, available at: https://businessmodelanalyst.com/multisided-platform-business-model/ (accessed 29 November 2024); A good example is Ride Hailing Services, the Uber App is a multi-sided network connecting the riders to the drivers.
[12] Regulation 5(4), FCCPC Dominance Regulations.
[13] Although not defined by the Act or the Regulations, a network effect refers to a situation where the value of a product or service depends on the number of buyers, sellers, or users who leverage it. A direct network effect occurs when the value of a product or service increases simply because the number of users increase while an indirect network effect occurs when a service depends on two or more user groups (such as buyers and sellers or producers and consumers) and as more people from one group join the platform, the other group receives a greater value amount; Kate Gibson, "5 Ways to Leverage network Effects for Business Growth," 16 July 2024, available at: https://online.hbs.edu/blog/post/network-effects-business#:~:text=Network%20effects%20occur%20when%20your,the%20same%20group%20or%20side (accessed 29 November 2024).

In addition to the above provisions, the Nigerian Communications Act (NCA), the primary legislation for the regulation of the communication sector in Nigeria, contains copious provisions on the regulation of competition as it relates to the Nigerian communications market.[14] The Nigerian communications market can be considered to be within the digital ecosystem and as such its provisions are noteworthy.

The Nigerian Communications Commission issued the Nigerian Communications Act – Competition Practices Regulations 2007 (the "NCC Competition Regulations"), which provides a framework for the promotion of fair competition in the communications sector and protects the misuse of market power.[15] Its considerations for the determinant of a dominant position within the communications market are similar to that of the FCCPC Dominance Regulations, although it contains considerations that are specifically tailored to the communications industry.[16] Albeit, these considerations can be examined when considering dominance within the Nigerian digital market.

2.2 What Actions Constitute an Abuse of a Dominant Position in Nigeria?

Where an undertaking is determined to be in a position of dominance within its relevant market, such undertaking can be deemed to have abused its dominant position in the following circumstances;[17]

[14] Section 3(1), Nigerian Communications Act (NCA), 2003 Cap N97, Laws of the Federation of Nigeria 2004.
[15] Section 1, Nigerian Communications Act- Competition Practices Regulations 2007.
[16] Regulation 18(2), NCC Competition Regulations.
[17] Section 72(2), FCCPA.

2.2.1 When the Undertaking Charges an Excessive Price to the Detriment of Consumers

In deciding on whether an undertaking is guilty of excessive pricing as a means of abusing its dominant position in the market, the FCCPC will consider[18] whether the market is characterised by any high barriers to entry; whether the consumers have credible alternatives to the products or services of the dominant undertaking; whether the firms compete in a mature environment, where investment and innovation play little or no role; whether the price charged significantly exceeds the cost incurred in production;[19] the price that would have been expected to be charged by an efficient undertaking in a competitive market; and whether the price charged is unfair either in itself or when compared to competing products in the geographical market.

2.2.2 Where there is a refusal to give a Competitor Access to an Essential Facility when it is Economically Feasible to do so

In determining whether an undertaking's refusal to supply goods or services or to provide access to essential facilities is abusive, the following conditions must be satisfied;[20] where a refusal relates to a product, a service or an essential facility that is objectively necessary for an undertaking to compete effectively in a downstream market such that the input is indispensable since there are no alternative solutions which enable equally efficient competitors to counter (at least in the long-term) the negative effects of the refusal; where a refusal is likely to lead to the elimination of

[18] Regulation 9(1), FCCPC Dominance Regulations.
[19] Regulation 9(4), FCCPC Dominance Regulations.
[20] Regulation 10(2), FCCPC Dominance Regulations.

effective competition or the prevention of its emergence in the downstream market (the higher the market share and the less capacity constrained the dominant undertaking is, the more likely effective competition will be eliminated); where a refusal is likely to lead to consumer harm (this will particularly be the case if the refusal is likely to prevent innovation or limit technical development, for instance by preventing the emergence of a new product that is not a mere duplicate of the dominant undertaking's product); and where the requirement to deal will not significantly deter the dominant undertaking's incentives to invest and the refusal to deal is not otherwise objectively justified.

2.2.3 Forcing the Condition that the Buyer Purchases Separate Goods or Services Unrelated to the Object of a Contract

In this instance, the FCCPC will arrive at a decision that an infraction has occurred if the following conditions are satisfied:[21] the undertaking accused of abusing its dominant position, is dominant in the primary product market which is the product to which other products are bundled; the products are distinct products from the consumer's point of view; and the conduct or practices are likely to lead to foreclosure of competitors on the tied or bundling market.

2.2.4 Selling Goods or Services Below their Marginal or Average Cost

The FCCPC Dominance Regulations refer to this act as predatory pricing. Predatory pricing involves deliberately setting the price of a product below its appropriate cost in a bid to incur short-term losses on the sale of the product to eliminate competition.[22]

[21] Regulation 11(4), FCCPC Dominance Regulations.
[22] Regulation 12(1), FCCPC Dominance Regulations.

In assessing whether a dominant undertaking is engaged in predatory pricing, the FCCPC would consider whether losses that could have been avoided were incurred by the dominant undertaking in the face of commercially viable alternatives.[23]

Additionally, the FCCPC will consider a dominant undertaking to be engaging in predatory pricing if the undertaking sets a price below the average avoidable cost as a short-term strategy subject to market conditions.[24] The FCCPC will also take into consideration other factors such as direct evidence of a strategy aimed at excluding competitors and the likelihood for equally efficient competitors to have entered the market in the absence of the conduct in question or the period during which lower prices are sustained.

2.2.5 Requiring or Inducing a Supplier or Customer not to deal with a Competitor

The FCCPC in assessing whether a dominant undertaking is guilty of abusing its dominant position in the market will also take the following considerations into account:[25] the competitive constraints exercised by actual and potential competitors; the stability of market shares; the likelihood of new entry; and the portion of the market affected by the conduct of the undertaking and the duration of the obligation.

2.2.6 Other Factors Considered by the FCCPC

Additionally, the FCCPC will consider certain factors in ascertaining whether any of the actions of an undertaking amount to an abuse of dominant position under the FCCPA.

[23] Regulation 12(3), FCCPC Dominance Regulations.
[24] Regulation 12(4)(a), FCCPC Dominance Regulations.
[25] Regulation 13(4), FCCPC Dominance Regulations.

They include: refusing to supply scarce goods to a competitor when supplying those goods is economically feasible or buying up a scarce supply of intermediate goods or resources required by a competitor if the anti-competitive effect of the exclusionary act outweighs its technological efficiency and other pro-competitive gains; and when the activities of an undertaking unreasonably lessen competition in the market and impede the transfer or dissemination of technology.[26]

2.3 Possible Defences to an Allegation of Abuse of Dominance Under the FCCPA and the FCCPC Dominance Regulations

Where an undertaking is alleged of abusing its dominant position by engaging in any of the activities highlighted above, the undertaking would not be treated as abusing a dominant position if its conduct improves the production or distribution of goods or services or the promotion of technological or economic progress while allowing consumers a fair share of the profit; the conduct is indispensable to the attainment of the objectives above; and the undertaking does not have the possibility of eliminating competition.[27]

Consequently, an undertaking accused of abusing a dominant position can raise any of the above points in its defence.[28] However, the burden of proving this rests on the undertaking seeking to rely on these defences. Thus, the arguments and evidence presented by the undertaking must be such that would convince the FCCPC not to conclude that the alleged infraction gives rise to pro-competitive effects.[29]

[26] Section 72(4), FCCPA.
[27] Section 72(3), FCCPA
[28] Regulation 14(1), FCCPC Dominance Regulations.
[29] Regulation 14(3), FCCPC Dominance Regulations.

3.0 COMPETITION AND ABUSE OF DOMINANCE IN THE DIGITAL MARKET

The FCCPA and the FCCPC Dominance Regulations contain copious provisions regulating the abuse of dominance and while these provisions can be extended to activities within the digital ecosystem, there needs to be specific rules that bear in mind the complexities of digital markets. Unlike the traditional market where the regulation of competition is relatively easy, the regulation of competition in the digital market is a bit more complex considering that the digital market involves digital platform-based business models, network effects, and economies of scale, amongst other things.[30]

Since digital markets are often distinguished by strong multi-sided network effect and high start-up costs, amongst others, there is usually a difficulty of market entry by small digital businesses and this in turn leads to a small group of companies or individuals holding a significant market share.[31] Although it is unclear how certain conducts in the digital market can be characterised as an abuse of a dominant position or amount to monopolising the market, within the existing framework, some conducts can be deemed to constitute a breach of competition within the digital market. Some of these conducts will be discussed seriatim.

Firstly, a company would be deemed to be unduly taking advantage of its position and engaging in anti-competitive practices where a dominant company that operates in two-sided markets leverage the market power, it possesses on one side of the market

[30] Padmashree Sampath, "Competition in the Digital Age," *Medium* 9 October 2019, available at https://medium.com/berkman-klein-center/competition-in-the-digital-age-408a5c7f9f8d (accessed 20 June 2024).

[31] Baker McKenzie, "Competition in the Digital Economy: An African Perspective," available at https://www.bakermckenzie.com/en/-/media/files/insight/publications/2021/07/baker-mckenzie-competition-in-the-digital-economy.pdf (accessed 20 June 2024).

to gain an undue advantage over other companies operating within the other side of the market.[32]

Also, a large company with access to the data of other consumers on the internet can take advantage of the data it has to its undue advantage within another part of the digital market. Thus, a lot of regulators have concerns about large firms using user data to exploit the digital market and unduly taking advantage of the same.[33]

4.0 THE REGULATION OF COMPETITION IN AFRICA USING NIGERIA AS A CASE STUDY

In Africa, the digital market is dominated by global research and social media giants. More often than not, a single company usually establishes a dominant position within the digital market as the majority of digital platform users find it easier to trust and use an already familiar and established digital platform.[34] However, as technology is still evolving, the competition and regulatory frameworks in most African countries are not aligned with the unique dynamics of the digital market. This misalignment often results in insufficient regional competition, which can hinder economic growth across the continent.[35]

In Nigeria, the FCCPC is developing certain guidelines for market definitions in a bid to restore fair competition in digital markets. The guidelines being developed by the

[32] Ibid.
[33] Ibid.
[34] Claver Nigarura, "The Development of the Digital Economy: Competition Regulation in Africa," *DLA Piper Africa*, 27 April 2021, available at: https://www.dlapiperafrica.com/en/africa-wide/insights/africa-connected/issue-06/the-development-of-the-digital-economy-competition-regulation-in-africa.html (accessed 20 June 2024).
[35] Ibid.

FCCPC include a section on Zero Price and Digital Platforms.[36] In defining the digital market, the guidelines provide for certain considerations. These include understanding the roles of various players: users act as producers, platforms serve as distributors, and advertisers function as consumers. They also recognise platforms as multi-sided markets influenced by network effects. Additionally, digital markets are defined using adapted versions of the SSNIP (Small but Significant Non-transitory Increase in Prices) test, such as SSNIQ: Small but Significant Non-transitory Change in Quality, and SSNIC: Small but Significant Non-transitory Change in Cost. It should be noted that cost here does not necessarily refer to monetary cost.[37]

4.1 The Role of African Heads of Competition Dialogue in Addressing Challenges in Emerging Digital Markets

As a result of the competitive challenges being posed in the digital market, the competition supervisory bodies from Kenya, South Africa, Nigeria, Mauritius, and Egypt signed a memorandum of understanding (MOU) to work together under the Africa Heads of Competition Dialogue (AHCD) to address emerging digital markets challenges.[38] These countries have a relatively large digital services sector, and it is anticipated that the MOU will foster growth in the digital market while enhancing the management of competitive practices within the sector.

[36] Babatunde Irukera, "Competition Law, Policy and Regulation in the Digital Era," *UNCTAD* 8 July 2021, available at: https://unctad.org/system/files/non-official-document/ccpb_IGECOMP2021_Nigeria_Irukera_en.pdf (accessed on 27 July 2024).
[37] Babatunde Irukera, Ibid.
[38] Vincent Owino, "African Competition Watchdogs Plan to Check Digital Markets," *The East African* 18 February 2022, available at https://www.theeastafrican.co.ke/tea/business-tech/african-competition-watchdogs-plan-to-check-digital-markets-3721772 (accessed 20 June 2024).

The effect of this MOU is that these regulators would have the opportunity to assess their respective digital markets, including an evaluation of global, continental and regional markets, as well as, share information necessary for building capacity to deal with the attending challenges arising from competitive practices in the digital market.[39] In signing this MOU, there is a commitment to collectively conduct an analysis and research of the obstacles to the emergence and expansion of African digital platforms to enhance competition and inclusion in the African digital market.[40]

Additionally, the regulators have stated that there are considerations of expanding the AHCD and as such the AHCD is open to admitting regulators of other African countries to improve the regulation of competition in the African digital market.

4.2 An Examination of the Case between the Commission and Meta as well as its Implications for Nigerian Competition Law

In 2021, the FCCPC set up an investigative panel to look into alleged violations of the FCCPA and the Nigerian Data Protection Regulation by Meta. The FCCPC contended that WhatsApp's updated Privacy Policy and business practices were contrary to the provisions of the FCCPA as the policy was imposed on Nigerian users without providing them with the opportunity to voluntarily accept or decline the policy. Amongst all the other issues considered by the FCCPC, this article would be specifically considering the issue of whether Meta is dominant under the FCCPA and whether its practices constituted an abuse of dominance.

[39] Ibid.
[40] Ibid.

On the issue of whether Meta was in a position of dominance within the meaning of the law, the FCCPC considered the provision of section 70 of the FCCPA alongside a number of other factors, including Meta's technological links; Meta's market share compared to other market participants; the key features of the WhatsApp with respect to the homogeneity and substitutability of its service; the amount of data points collected by WhatsApp when compared to its competitors within the market; constraints posed to other competitors for expansion with respect to lock-in effects; and user's switching cost.

Having considered the following facts as well as data provided following an independent market survey, the FCCPC concluded that Meta was in a dominant position within the Constant-Based Instant Messaging Service market in Nigeria especially as WhatsApp is currently used by 65% of Nigerian users.[41]

In a bid to determine whether Meta was abusing its dominant position in the relevant market, the FCCPC considered the provisions of Sections 71(c), 72(2)(a), and 72(2)(d)(iii) of the FCCPA, which have already been discussed above. The FCCPC held that failing to give its customers a choice to opt out of or control the sharing of their data under its updated policy was illegal and an abuse of its dominant position, as customers experienced disruptive and intrusive notifications limiting the quality and functionality of WhatsApp that forced them into accepting Meta's updated policy.

[41] Muktar Oladunmade, "FCCPC probe found WhatsApp threatened to delete user accounts, collected excessive data" *TechCabal* 22 July 2024, available at https://techcabal.com/2024/07/22/fccpc-probe-found-whatsapp-threatened-to-delete-user-accounts-collected-excessive-data/ (accessed 27 July 2024).

Furthermore, the FCCPC found that by collecting unnecessary data from its users, Meta was exploiting its dominant position by forcing WhatsApp's users to consent to sharing their personal data with a product in a different market, despite not having any interest in that product or market. This position is also reinforced by the fact that Meta's competitors like Telegram are unable to replicate the request for unnecessary information because their users have the discretion to leave.

Additionally, it was also found that by making it impossible for its users to withhold consent to share their data with third parties like Facebook, Meta violated the provision of the FCCPA prohibiting an undertaking from compelling its consumers to enter into an agreement with a third party as a condition for offering a service. By requesting that its users consent to share its data before being able to use WhatsApp, Meta was attempting to tie the Facebook market with the WhatsApp market. Without demonstrating that bundling those services respected users' right to choose or resulted in their economic benefits, Meta abused its position of dominance. The FCCPC held that by this conduct, Meta sought to maintain its dominance by forcing users to consent to be subjects of marketing and profiling in the Facebook market.

This bundling, without demonstrating that it provided greater economic benefits or respected users' right to choose, was deemed an abuse of dominance. The FCCPC concluded that this conduct aimed to maintain Meta's dominance by compelling users to accept marketing and profiling practices within the Facebook market.

Meta required users to consent to data sharing as a condition for using WhatsApp, effectively attempting to tie the Facebook and WhatsApp markets. This bundling,

without demonstrating that it provided greater economic benefits or respected users' right to choose, was deemed an abuse of dominance. The FCCPC concluded that this conduct aimed to maintain Meta's dominance by compelling users to accept marketing and profiling practices within the Facebook market.

Having considered the above and a number of other factors which have not been discussed in detail, the FCCPC found that Meta abused its dominance by failing to protect and honour its customers' rights to fair dealing by using undue pressure and unfair tactics in its business practice of combining and transferring its users' data for commercial purposes without obtaining expressed and freely granted consent of its customers, contrary to the provision of Section 72 of the FCCPA.

Following its investigations and findings, the FCCPC on 19 July 2024, released a notice imposing a US$220,000,000 (Two Hundred and Twenty Million United States Dollars) fine on Meta as well as other recommendations including the reinstatement of the rights of Nigerian users to determine and control the use, processing, sharing or transfer of their data.[42]

This decision of the FCCPC is laudable as it brought about a practical application of the provisions of the FCCPA, as well as, the FCCPC Dominance Regulations. Also, for the first time since the enactment of the Act, there was a yardstick for the proper application of tests like the Small but Significant Non-Transitory Increase in Price (SSNIP), amongst others. It would also dissuade undertakings like Meta operating within

[42] FCCPC Release, "In the Matter of Meta Platforms, Inc. and WhatsApp LLC," available at: https://fccpc.gov.ng/wp-content/uploads/2024/07/Release-In-the-Matter-of-Meta-Platforms-Inc.-and-WhatsApp-LLC.pdf (accessed 27 July 2024).

the digital ecosystem from abusing their position of dominance and taking advantage of their customers as there is now a precedence showing the enforcement of the provisions of the FCCPC Dominance Regulations by the FCCPC.

Although this decision and the imposition of the fine should act as a deterrence to other companies, the enforcement of the fine imposed by the FCCPC might be difficult given the provision of Section 74(1) of the FCCPA, which provides that an undertaking that fails to cease an abusive practice after receiving an order of the FCCPC commits an offence and is liable upon conviction to a fine not exceeding 10% of its turnover in the preceding business year or a higher percentage prescribed by the court. A reading of this provision suggests that to be able to impose a fine, a court must have convicted the undertaking, in this instance, Meta, and then subsequently imposed the fine and not the FCCPC imposing the fine itself. Thus, Meta may appeal the fine imposed on it by the FCCPC. Additionally, an important question that should be asked is whether the FCCPC considered Meta's general turnover or local turnover in determining the amount of fine that was imposed on Meta.

5.0 RECOMMENDATIONS AND CONCLUSION

The Nigerian digital market is emerging and constantly developing, hence, there is a need for the development of a policy framework that fosters its growth while also establishing safeguards to prevent exploitation by dominant players within the market.

Such a framework should prioritise addressing entry barriers that hinder fair competition, particularly those related to data access and usage. Entry barriers not only stifle innovation and competition but also enable dominant companies like Meta

to engage in practices that infringe on users' rights. By reducing these barriers, the market would foster a more equitable environment, preventing future infractions and encouraging sustainable development within the sector.

A comprehensive approach to policymaking in the digital market will support its growth while safeguarding the interests of users and smaller players, ensuring the Nigerian digital economy remains inclusive and competitive.

EXEMPTION OF DIVIDENDS DISTRIBUTED FROM RETAINED EARNINGS AND TAX-EXEMPT INCOME FROM EXCESS DIVIDEND TAX: RECENT DECISIONS OF THE TAX APPEAL TRIBUNAL AND REGULATORY CLARIFICATIONS OF THE FEDERAL INLAND REVENUE SERVICE (FIRS)

Ikemefuna Chibuike & Precious Emeka-Egonu*

ABSTRACT

This article delves into the complexities of dividend taxation in Nigeria, focusing on the impact of recent legislative amendments and administrative interpretations. Specifically, it examines the historical application of Excess Dividend Tax (EDT) and the subsequent changes introduced by the Finance Act 2019. The article critically analyses the Federal Inland Revenue Service's interpretation of these amendments as outlined in the FIRS Information Circular 2020/04. By comparing the legislative intent with the FIRS's administrative stance, the article highlights potential inconsistencies and the resulting uncertainty for taxpayers. It further explores the implications of recent Tax Appeal Tribunal decisions, which have introduced new interpretations of the law. The article concludes by providing recommendations for taxpayers and policymakers to navigate this evolving landscape and ensure compliance with the evolving tax laws.

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1.0 INTRODUCTION

Dividends are a proportion of the distributed profits of a company which may be a fixed annual percentage, as in the case of preference shares, or a variable percentage according to the fortunes or other circumstances of the company, as in the case of equity shares.[1] By law, dividends are payable to shareholders only out of the distributable profits of a company.[2] Therefore, where a company makes a profit in an accounting year for which tax has been paid, the company may elect to declare and distribute profits to its shareholders as dividends.

A company earning profit in an accounting year may resolve to retain its profits in its retained earnings account depending on the needs of its business. This retained sum may then be reinvested in the business of the company or distributed in another year as dividends to shareholders. Because dividends can only be distributed out of the profits of a company, many companies distribute dividends out of their retained earnings in a year in which the company generated no profit. In other cases, companies pay dividends out of their retained earnings in addition to dividends payable out of a company's profits for the current year where the profit of the current year is insufficient to cater to the declared dividends.

The Companies Income Tax Act (CITA)[3] has rules governing the taxation of dividends paid out of retained earnings. Specifically, prior to the amendment of section 19 of the CITA, where a company pays dividends in any year and such dividends exceed the

[1] Section 868, Companies and Allied Matters Act (CAMA) 2020 Cap. A18, Laws of the Federation of Nigeria, 2004.
[2] Section 426 (5), CAMA 2020.
[3] The Companies Income Tax Act (CITA), 1977 Cap C 21, Laws of the Federation of Nigeria, 2004.

company's taxable profits for the same year or the company has no taxable profits in the year that it declared the dividends, the dividends to be distributed will be subject to tax as though it is the actual profits of the company for the relevant year of assessment. This is known as Excess Dividend Tax (EDT). This effectively created a situation of double taxation of dividends distributed from retained earnings of a company given that such income which has been taxed in the previous year is further subjected to EDT. This effect, it appears, is contrary to the intent of section 19 of CITA. The policy and legal thrust of section 19 of the CITA was to institute an anti-avoidance mechanism, preventing situations where a company claims to have made no profit to avoid tax but declares dividends. To remedy the unintended consequences of section 19 of the CITA, the Finance Act 2019 amended section 19 of the CITA and exempted, amongst others, dividends paid out of retained earnings which have already been subject to companies' income tax, dividends paid out of tax-exempt income, dividend paid out of franked investment income, and distributions made by a real estate investment company to its shareholders from rental income and dividend income received on behalf of those shareholders.[4]

Despite the legislative effort to address the implication of Section 19 of the CITA, the Federal Inland Revenue Service (FIRS) while intending to clarify the amendment introduced by the FA 2019 issued information circular no: 2020/04 - "Clarification on Sundry Provisions of the Finance Act 2019 as it Relates to the Companies Income Tax Act"[5] (the "FIRS Circular") giving a divergent interpretation. In the FIRS Circular, the

[4] Section 7, Finance Act 2019.
[5] Federal Inland Revenue Service, "Clarification on Sundry Provisions of the Finance Act 2019 as it Relates to the Companies Income Tax Act" available at https://old.firs.gov.ng/wp-

FIRS stated that "in determining whether a dividend has been paid out of retained earnings for the purposes of section 19(1) exemption, profits of the current year disclosed in the financial statements shall be considered first." Thus, where a company pays dividends out of its retained earnings, the FIRS will levy tax on that income if the company did not pay the dividends first, out of the profits of the current year before taking from the retained earnings.

In view of the provisions of the Finance Act 2019 vis-a-vis the FIRS Circular, it is doubtful whether the FIRS Circular is legal. On its part, the Tax Appeal Tribunal (TAT) has delivered decisions since the introduction of the amendment of Section 19, one of which appears to be a departure from previous decisions and the historical interpretation of Section 19 of the CITA. This article analyses the pre and post-amendment implications of the Excess Dividend Tax, decisions of the TAT, and why the FIRS Circular may not represent the accurate position of the law.

2.0 EXCESS DIVIDEND TAX PRE-FINANCE ACT 2019 AND FINANCE ACT 2019

2.1 Pre-Finance Act 2019

The CITA regulates the taxation of profits of companies except companies engaged in petroleum operations. The corporate tax rate under the CITA is 30 percent. However, by the provisions of section 19 of the CITA, where a company pays dividends from retained earnings or tax-exempt income in a year that it had no taxable profits or the taxable profits are less than the dividends to be distributed, the company paying the dividends will be charged to tax as if the dividend is the total profits of the company

content/uploads/2021/06/CLARIFICATION-ON-SUNDRY-PROVISIONS-OF-THE-FINANCE.pdf (assessed 30 June 2024).

for the relevant year of assessment. This effectively created a situation of double taxation of the same income at the rate of 60 percent in the relevant year of assessment.

The above effect of Section 19 of the CITA before its amendment by the Finance Act 2019 was unintended especially because companies have various reasons for retaining profits and there are valid circumstances that could lead to a company distributing dividends out of retained earnings in a year that no taxable profit was generated. There are also other valid reasons that may give rise to a company not having taxable profits. For example, a company may have been granted pioneer status and exempted from payment of companies' income tax. Typically, companies upon expiration of their pioneer status, record zero taxable profits due to their claim of tax reliefs arising from deferred interest expense, tax loss relief, investment allowance, and claim of capital allowance on qualifying capital expenditure. However, the interpretation of Section 19 of the CITA does not spare even income exempted from tax as the courts and Tax Appeal Tribunal (TAT) have held time and again that where dividends are declared from exempted income and such dividends exceed the taxable profits of the company or the company has no taxable profits, the Excess Dividend Tax will apply.

Section 19 of the CITA is one of the most contentious provisions of the CITA, however, each presentation of the section for interpretation by the courts gave rise to the same unintended consequence of double taxation. The TAT and courts alike have upheld the assessment of companies to Excess Dividend Tax, where dividend is paid out of retained earnings, notwithstanding that the retained earnings had been subjected to tax in prior years or are exempt from tax. In *Actis Africa (Nigeria) Limited* v *Federal Inland Revenue*

Service,[6] following the decision of the company to declare dividends in 2014, an interim dividend of ₦49,095,020.00 was declared and paid from the company's retained earnings for 2013 as it made no profit in 2014.

Sequel to a tax audit of the company by the FIRS, additional tax assessments were issued to the company on the basis that the company did not comply with section 19 of the CITA. The company argued that it had paid tax on its profit in 2013 and it made no profit in 2014, hence, its payment of dividends from its retained earnings had already been subjected to tax. The company argued that if it was subjected to Excess Dividend Tax, it would amount to double taxation. On the other hand, the FIRS contended that the company had not complied with the provisions of section 19 of the CITA and was therefore liable to pay additional income tax. In its decision, the Tax Appeal Tribunal held that the company did not comply with the provision of section 19 of the CITA. This is similar to the holding of the Federal High Court in *Oando* v *FIRS*.[7]

Similarly, in *EcoBank Nigeria Limited (EcoBank)* v *Federal Inland Revenue Service*,[8] the FIRS issued an additional assessment on EcoBank on the basis that it declared losses for its 2009 to 2016 Years of Assessment. The FIRS further stated that within the period EcoBank declared losses, it distributed dividends to its shareholders amounting to ₦5,545,000,000.00. Consequently, the FIRS assessed EcoBank to additional income tax based on section 19 of CITA.

[6] Appeal No: TAT/LZ/EDT/014/2017.
[7] [2009] 1 TLRN 61.
[8] Appeal No: TAT/LZ/CIT/024/2018.

Upon appeal to the Tax Appeal Tribunal, EcoBank contended that a significant portion of the income distributed as dividends were profits earned from short government securities such as treasury bills and bonds, which are income exempt from tax under CITA and the Companies Income Tax (Exemption Order of Bonds and Short-term Government Securities) Order 2011. The other component of the dividends was paid out of the bank's trading profit which the bank treated as undisputed tax liability and paid the tax due from trading profit.

The FIRS, however, contended that the application of section 19 of CITA does not take into account the Companies Income Tax (Exemption Order of Bonds and Short-term Government Securities) Order 2011 and cannot be impeded by it. The FIRS further contended that in applying section 19 of the CITA it is not required to consider the source of the dividend income.

In its judgement, the Tribunal agreed with the FIRS and held as follows:

> It must be stated that companies that invest in bonds will by virtue of the tax exemptions become liable to pay excess dividend tax on their profits. A liability to pay tax arises when a company that seeks to pay dividends has either no taxable profits or has a distributable profit that is higher than the taxable profits. If the tax exemption granted by the order creates an excess dividend situation, the company should be liable to pay excess dividend tax on the same income that otherwise would have been exempted from tax. A liability to pay excess dividend tax arises where a company that seeks to pay dividends has no taxable profit as in the instant case but has distributable profit that is higher than the taxable profit.

2.1 Finance Act 2019 Amendment

To cure the defect of double taxation occasioned by section 19 of the CITA, section 7 of the Finance Act 2019 amended section 19 of the CITA, by introducing a new

subsection (2) which exempts certain distributions from the application of section 19 of CITA. The amendment is reproduced below:

> The provisions of subsection (I) shall not apply to—
>
> (a) dividends paid out of the retained earnings of a company, provided that the dividends are paid out of profits that have been subjected to tax under this Act, the Petroleum Profits Tax Act, or the Capital Gains Tax Act;
>
> (b) dividends paid out of profits that are exempted from income tax by any provision of this Act, the Industrial Development (Income Tax Relief) Act, the Petroleum Profits Tax Act, or the Capital Gains Tax Act or any other legislation.
>
> (c) profits or income of a company that are regarded as franked investment income and under this Act; and
>
> (d) distributions made by a real estate investment company to its shareholders from rental income and dividend income received on behalf of those shareholders,
>
> Whether such dividends are paid out of profits of the year in which the dividend is declared or out of profits of previous reporting periods.

By virtue of section 19 (2)(a) and (b) above, dividends paid out of the retained earnings of a company which has been previously subjected to tax as well as dividends paid out of tax-exempt profits will not be subjected to Excess Dividend Tax. The provision of the Finance Act 2019 was clear and unambiguous in exempting the listed distributions from the application of section 19(1) without any conditions. It was believed that the Finance Act 2019 laid to rest the issue of Excess Dividend Tax in Nigeria.

3.0 RECENT DECISIONS OF THE TAX APPEAL TRIBUNAL SINCE FINANCE ACT 2019

3.1 *Dangote Industries Limited* v *FIRS*[9]

The FIRS audited Dangote Industries Limited (DIL) and raised additional companies' income tax, Withholding tax, education tax, and VAT assessments for the years 2013-

[9] Appeal No: TAT/LZ/CIT/011/2019.

2015. DIL objected to the assessments and challenged same at the Tribunal on the basis that the dividends distributed consisted of tax-exempt income under the pioneer status regime of the Industrial Development (Income Tax Relief) Act (IDITRA) 2004 and franked investment income which had been taxed in previous years.

DIL argued that since its dividends were paid out of franked investment income, any further attempt by the FIRS to tax it again would amount to double taxation. It maintained that assuming without conceding that Section 19 of CITA applied to its case, the pioneer profits and franked investment income of the company are already protected from taxation by the combined effect of the IDITRA which exempts pioneer profits from tax and Section 18 of CITA. DIL further stated that Section 19 of CITA seeks to ensure that the government has a fair share of tax, where shareholders are entitled to dividends in a reasonable proportion and that it was in no way enacted to perpetrate double taxation on the profits of a company. Therefore, the section neither exposes it to Excess Dividend Tax if all sources of income are considered nor will it apply in any way to its retained earnings from which it declared dividends.

In delivering its decision, the Tribunal held that section 19 of the CITA is an anti-avoidance provision in the tax statute which seeks to limit the opportunities of taxpayers to engage in tax avoidance schemes and the source of the profit out of which the dividend is paid is not relevant as long as the dividend exceeds the taxable profit of the company and that it will only amount to double taxation if the same income is taxed more than once in the hand of a single/or the same taxpayer.

The Tribunal, however, stated by sections 80(1) and (3) of the CITA, that franked investment income cannot be further subjected to tax. In addition, section 14 of IDITRA

exempts returns of profit from pioneer companies while section 16 of the IDITRA exempts the profit of pioneer companies from income tax. Thus, the dividends should not be subjected to Excess Dividend Tax if DIL can substantiate its claims.

While the Tribunal held that Excess Dividend Tax does not apply to DIL, the Tribunal did not rely on the amendments introduced by the Finance Act 2019. The Tribunal could not have relied on the Finance Act 2019 given that the dividends in question were distributed before the enactment of the Finance Act 2019, as such the Finance Act 2019 will not apply. The Tribunal, however, departed from the precedent set by previous decisions reached on the issue prior to FA 2019. Although not relied upon by the Tribunal, the decision aligns with the changes introduced by the Finance Act 2019. While the decision is laudable, it blurs the certainty of taxpayers and calls to question whether the decision can stand a challenge in appellate courts.

3.1 *FBN Insurance* v *FIRS*[10]

The FIRS imposed Excess Dividend Tax on the dividends distributed by FBN Insurance (FBNI) on the basis that the dividends exceeded the company's taxable profits. FBNI however objected to the assessment stating that the dividends were paid out of tax-exempt income.

The Tribunal in its decision upheld FIRS' additional assessments on the basis that section 19 does not take into account the source of income from which the dividends were paid. The Tribunal averred its mind to the amendments introduced by the Finance Act 2019. However, it held that the Finance Act 2019 was not in force at the time FBNI

[10] Appeal No: TAT/LZ/CIT/030/2022.

distributed the dividends on which the Excess Dividend Tax was applied. The above appears to represent the view of the courts and the Tribunal on the treatment of dividends paid out of retained earnings prior to the enactment of the Finance Act 2019.

4.0 RETROSPECTIVE APPLICATION OF SECTION 19(1) CITA (AS AMENDED BY THE FINANCE ACT 2019) TO PRE-FINANCE ACT RETAINED EARNINGS AND EXEMPT INCOME

An important issue that agitates the mind and has attracted inquiry is whether retained earnings from periods before the enactment of the Finance Act 2019 will fall within the scope of section 19(2) of the CITA and whether companies can distribute dividends from such retained earnings without setting off the Excess Dividend Tax provisions.

The proviso to section 19(2) of the CITA expressly provides that the exception to the Excess Dividends Tax remains even if the dividends are paid out of profits of that year in which the dividend is declared or out of profits of previous reporting periods. The wording of the subsection is clear enough and supports a retrospective application to retained earnings carried forward from the pre–Finance Act periods.

Our courts have held in a line of cases that although the legislature is empowered to make retrospective laws, such retrospective intention must be expressly stated in the law. This is in line with the findings of our courts including the Supreme Court.[11] There

[11] *SPDC* v *Anaro & Ors* [2015] LPELR-24750 (SC); Toyin v *People's Democratic Party (PDP)* [2019] 9 NWLR (Part 1676) pp 50 - 64, paras. G-H; *Adesanya* v. *Adewole* [2006] 14 NWLR (Part 1000) p. 242; *Osakwe* v *Federal College of Education (Tech) Asaba* [2002] 7 NWLR (Part 765) pp 222 - 238, paras. B-C; and *Njokanma* v *Mowete* [2001] 6 NWLR (Part 709) p. 315.

is a clear and manifest intention in the proviso to section 19 that the exceptions to its application should apply retrospectively.

In view of the foregoing, the exceptions to section 19(1) of the CITA will have a retrospective effect, thus permitting taxpayers to distribute dividends from retained earnings that were carried forward into the Finance Act era.

It is important to note that the retrospective application only applies when a company distributes retained earnings from pre-Finance Act periods after the enactment of the Finance Act. Thus, where a company distributed dividends in 2018 from retained earnings that have already suffered tax, which dividends exceed its total profits in 2018 and were assessed to Excess Dividend Tax by the FIRS in 2020, the tribunal and courts will likely hold that EDT was rightly applied. This was the reasoning of the Tribunal in the case of *First Bank Nigeria Insurance Limited (FBNI)* v *FIRS.*[12] However, where the company distributes retained earnings from 2018 in 2020, it will be exempt from Excess Dividend Tax.

5.0 FIRS' LAST-IN-FIRST-OUT PRINCIPLE: LEGALITY OR OTHERWISE

In a bid to provide clarification on the amendments made by the Finance Act 2019 to the new Excess Dividend Tax provision in section 19(2) of the CITA, the FIRS issued information circular no. 2020/04 - Clarification on Sundry Provisions of the Finance Act 2019 as it relates to the Companies Income Tax Act.

The Circular introduced the Last-In-First-Out Principle (LIFO Principle) in para. 3.1. The LIFO principle is a method of valuation where it is assumed that a business entity sold

[12] Appeal No: TAT/LZ/CIT/030/2022.

the most recent/current inventory first. On the other hand, the first-in-first-out (FIFO) principle is a valuation method that assumes that a business entity sells the oldest/inventory first.[13] Paragraph 3.1 of the Circular provides that:

> In determining whether a dividend has been paid out of retained earnings for the purposes of section 19(1) of CITA, profits of the current year disclosed in the financial statements shall be considered first.

In addition to the above, the Circular also stated that where the profits reported for an accounting period are sufficient to cover the dividend declared for that year, such dividend will not be treated as having been paid from retained earnings, even if so, and will be subject to tax under section 19(1) of the CITA. This reinforces the LIFO approach adopted by the FIRS in its interpretation of section 19(2) of CITA.

The implication of the foregoing is that if a company makes a profit in the same year, it declares dividends, the profits of that year will be considered first in determining whether or not the dividends were paid out of retained earnings. In other words, dividends should first be paid out of the profit of the current year before retained earnings of prior years can be utilised for the payment of dividends, otherwise, it will not be considered as being paid out of the retained earnings and will suffer Excess Dividend Tax.

The position of the FIRS is a clear departure from the clear and unambiguous provision of the Finance Act 2019. It is evident that the amendment by the Finance Act 2019, expressly exempts dividends paid from retained earnings on which tax has already been

[13] Tim Smith, "Last In, First Out (LIFO): The Inventory Cost Method Explained," *Investopedia* 4 June 2024, available at https://www.investopedia.com/terms/l/lifo.asp (assessed 30 June 2024).

paid from the application of section 19 of the CITA, and gives no condition or qualifier to the exemption.

In *Attorney General of the Federation* v *Attorney G*eneral of *Abia State,*[14] the Supreme Court stated that:

> It is a fundamental and cardinal principle of interpretation of statutes that where in its ordinary meaning a provision is clear and unambiguous, effect should be given to it without resorting to external aid.

Similarly, the Court of Appeal stated in *Stanbic IBTC Holdings* v *FRCN,*[15] that where the language of a statute is plain, clear and unambiguous, the task of interpretation hardly arises because there is nothing to interpret or construe. In such a case, the court is duty-bound to give the words used in the provisions their ordinary, plain, natural, and grammatical meanings. Therefore, the attempt by the FIRS to import a LIFO principle in interpreting a clear provision is an aberration.

Besides, if the legislature had intended that the exemption of dividends paid from retained earnings under section 19(2)(a) of the CITA be made, by applying the LIFO principle as described by the FIRS, they would have expressly stated this in the Finance Act 2019 amendment. In *Oni* v *Gov. Ekiti State*,[16] the Supreme Court held that:

> One of the maxims of statutory interpretation is *expressio unius est exclusio*, which means the express mention of one thing excludes others, that is, although there is no express exclusion, exclusion is implied. **An implied exclusion argument lies whenever there is reason to believe that if the legislature meant to include a particular thing within the ambit of a statute, it would have referred to that thing and because of the expectation, its failure to mention that thing becomes ground for inferring that it was deliberately excluded.** In other words, the express mention of one thing in any statutory provision automatically excludes any

[14] [2002] 6 NWLR (Part 764) 542 SC.
[15] [2020] 5 NWLR (Part 1716) 110 CA.
[16] [2019] 5 NWLR (Part 1664) 1 SC.

> other, which otherwise, would have applied by implication with regard to the same issue.

Further, the introduction of the LIFO principle by the FIRS amounts to an amendment of the provision of section 19 of CITA, a task which the FIRS cannot undertake. In *Koninklijke Luchtvaart Maatschappij N.V. (KLM) Airlines* v *Kumzhi*,[17] the court held that where there is a gap in a legislation, the remedy is to amend the legislation by a subsequent legislation. The competent legislative authority vested with the powers to amend the CITA is the National Assembly, not the FIRS and the manner is by legislation as done with the various Finance Acts and not by a circular as attempted by the FIRS. The implication of this is that the action of the FIRS in amending section 19(2) of the CITA by introducing the LIFO principle and the use of a Circular in doing so is without a legal basis.

Finally, it is without doubt that FIRS circulars are the opinion of the tax authority and as such subject to the provisions of tax laws. In *Global International Drilling Corporation* v *FIRS*,[18] the court held that the FIRS information circulars are merely explanatory notes and cannot by any stretch of imagination supersede or override the provisions of a tax statute. Thus, where a circular provision is inconsistent with the law, the provision of the law supersedes it. Therefore, the authors are of the opinion that the aspect of the Circular which introduced the LIFO principle, being inconsistent with the provision of section 19 (2) of CITA, contradicts the law and is thus inapplicable.

[17] [2004] 8 NWLR (Part 875) 231 CA.
[18] [2013] 12 TLRN 1.

5.0 CONCLUSION

It would appear that the controversy surrounding the application of Excess Dividend Tax under section 19 of the CITA prior to the Finance Act 2019 is yet to be conclusively decided at the level of the Tax Appeal Tribunal. We note, however, that the decision of the FHC in *Oando* v *FIRS*[19] remains the applicable decision prior to the Finance Act 2019.

While we are yet to see an express challenge of the FIRS Circular in court, it is clear that there is no legal basis for the introduction of the LIFO principle. As is evident in the Finance Act 2019 amendment, section 19(2)(a) expressly excludes dividends paid out of retained earnings from Excess Dividend Tax under section 19(1) without more, hence questioning the LIFO principle introduced by the FIRS. Nonetheless, it is believed that a challenge of the Circular in court will reinforce the position of the law as stated in the Finance Act 2019.

[19] [2009] 1 TLRN 61.

UNRAVELLING NIGERIA'S COMPETITION LAW: AN IN-DEPTH ANALYSIS

Christiana Ufomba*

ABSTRACT

Competition law in Nigeria has undergone a transformative journey, akin to contemporary economies, striving to harmonise the promotion of market competition while thwarting anti-competitive practices. This article presents a comprehensive analysis of this evolving legal landscape, its multifaceted dimensions, challenges, and implications. At the heart of this discourse lies the fundamental tenets of competition law, encompassing the proscription of anti-competitive agreements, the curbing of abusive dominant positions, and the nuances of merger control. The article further delves into the pivotal role of competition authorities, elucidating their enforcement strategies in countering issues such as restrictive practices and the abuse of dominant market positions. In essence, this article furnishes valuable insights for policymakers, legal practitioners, and students, shedding light on Nigeria's unwavering commitment to nurturing robust competition as a catalyst for sustained economic growth.

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1.0 INTRODUCTION

In a rapidly evolving global economy, the significance of fostering healthy competition cannot be overstated. As markets expand and businesses thrive for success, ensuring a level playing field becomes imperative to drive innovation, consumer welfare, and economic growth. In Nigeria, competition law serves as the guardian of this equilibrium, striving to curb anti-competitive practices and promote fair competition.

As one of Africa's leading markets, Nigeria plays host to a multitude of industries ranging from telecommunications to manufacturing and agriculture. In such a dynamic landscape, the role of competition law takes on even greater importance to prevent monopolistic tendencies and protect consumers from exploitation.

Historically, Nigeria's competition landscape was governed by common law principles and much later, by the Investment and Securities Act 2007 and various sector-specific regulations. However, recognising the necessity of a unified and robust framework to address emerging competition challenges, the Nigerian government introduced the Federal Competition and Consumer Protection Act (FCCPA) in 2019. This landmark legislation marked a significant milestone in Nigeria's competition law landscape, ushering in a new era for the competition law landscape in Nigeria.

This article delves into the fundamental tenets of competition law in Nigeria, exploring the key provisions of Nigerian laws and the regulatory authorities charged with their enforcement. The article also sheds light on notable cases and enforcement actions that have shaped the country's competition law landscape, along with their implications for businesses operating in the Nigerian market.

By exploring the multifaceted dimensions of competition law in Nigeria, the article aims to provide a comprehensive understanding of the legal framework that governs business conduct and protects the market.

2.0 TENETS OF AGREEMENTS AND CONTRACTS

As a general rule, parties to a contract retain the commercial freedom to determine their terms and once they reach a lawful mutual understanding, those terms become binding and enforceable by the court. The principle of contractual autonomy underscores this fundamental aspect of contract law, as reaffirmed by the Supreme Court of Nigeria in the case of *Nika Fishing Co Limited* v *Lavina Corporation*.[1]

While contractual autonomy allows parties to freely negotiate and determine their terms, there are exceptions. One of these exceptions pertains to restrictive agreements. A restrictive agreement typically involves terms that impose limitations or restrictions on one or more parties, often in the interest of protecting a legitimate business or competitive interest. These agreements might include non-compete clauses, non-disclosure agreements, or non-solicitation agreements.

The reason for the distinct treatment of restrictive agreements lies in the potential for these agreements to impact competition, trade, and individual freedoms. Restrictive agreements can have far-reaching consequences, affecting market dynamics, consumer choice, and individual livelihoods. Therefore, to strike a balance between protecting contractual freedom and safeguarding broader societal interests, legal systems often subject restrictive agreements to closer scrutiny.

[1] [2008] 16 NWLR (Part.1114) 509.

Under Nigerian law, restrictive agreements are carefully examined to ensure that they do not unduly restrict competition, stifle innovation, or harm consumers. Authorities may assess whether such agreements are reasonable in scope, duration, and geographic. For example, in *Nissan (Nig) Ltd* v *Yoganathan,*[2] the Supreme Court held that a restraint in a contract merely to prevent competition will not be enforced by the courts. The FCCPA also provides that any agreement that has the actual or likely effect of preventing, restricting or distorting competition in the market is void.[3] This includes price fixing, dividing markets, collusive tendering, market/customer allocation, limiting production and distribution of goods and services, etc.

To further reiterate its stance against restrictive agreements, the Federal Competition and Consumer Protection Commission (FCCPC) which is the body responsible for enforcing the FCCPA, issued the Restrictive Agreements and Trade Practices Regulations 2022 (the "Regulations"**)** which provides guidance on the substantive and procedural requirements for implementing the provisions on restrictive agreements in the FCCPA.

From the provisions of the FCCPA and the Regulations, the FCCPC may authorise a restrictive agreement where it is satisfied that the agreement:

a. enhances the production or distribution of goods and services, or advances technical and economic progress, all while ensuring consumers receive a reasonable portion of the resulting benefits; and

[2] [2010] 4 NWLR (Part. 1183) 135.
[3] Section 59(1), FCCPA 2018.

b. imposes only necessary restrictions on the restricted entity to achieve the goal of improving the production or distribution of goods and services or promoting technical and economic progress.[4]

3.0 ABUSE OF DOMINANT POSITION

In the Nigerian law context, an entity is considered to be in a dominant position if it is able to act without taking into account the reaction of its customers, consumers or competitors or where an undertaking enjoys a position of economic strength such that the position enables the party to prevent competition in the relevant market.[5] The FCCPA recognises instances of abuse of dominant position by both buyers and sellers. An entity will be said to be abusing its dominant position where it:

a. charges consumers excessively high prices to their detriment;
b. refuses to grant a competitor access to an essential facility when it is economically feasible to do so;
c. commits exclusionary acts, except for acts listed below if the anti-competitive impact of those acts outweighs their technological efficiency and other pro-competitive benefits;
d. engages in any of the exclusionary acts below, unless the involved firm can demonstrate technological efficiency and other gains that promote competition and outweigh the anti-competitive effect of the act.[6]

[4] Section 12(2) (a-d), Restrictive Agreements and Trade Practices Regulations 2022.
[5] Section 70(2), FCCPA and Section 4 (1), Abuse of Dominance Regulations.
[6] Section 73(2), FCCPA.

The exclusionary acts contemplated in (c) and (d) above include: (a) pressuring or persuading a supplier or customer not to engage in business with a competitor; (b) declining to provide a competitor with access to scarce goods, even when it is economically viable to do so; (c) selling goods or services with the condition that the buyer must purchase additional, unrelated goods or services that are not connected to the primary purpose of the contract, or compelling the buyer to accept conditions unrelated to the contract's primary objective; (d) selling goods or services at prices below their marginal or average cost; or (f) acquiring a limited supply of intermediate goods or resources essential to a competitor's operations.[7]

To assess market dominance under the FCCPA, factors like market share, financial power, links with other entities, market entry barriers, and actual and potential competition are considered.[8] To provide further guidance on this subject, the FCCPC has also issued the Abuse of Dominance Regulation 2022 which provides guidance on the regulatory review process for assessing whether an entity has abused its dominant position or whether collectively dominant entities have abused their dominant position and determining the applicable exception.

4.0 LANDSCAPE OF ENFORCEMENT

The enforcement of competition law in Nigeria is multi-pronged with the FCCPC, the Securities and Exchange Commission and sectoral regulators all actively taking part in enforcing competition laws in Nigeria. Under the FCCPA, the consequences for contravention of competition legislation include being liable for:

[7] Ibid.
[8] Ibid.

a. fines of up to ₦50,000,000 and imprisonment where an entity fails to cease competitive practices after receiving an order from the FCCPC to that effect;[9]
b. an order by the FCCPC to cease its anti-competitive practices;[10]
c. an order by the Competition and Consumer Protection Tribunal for an individual/entity to sell any portion or all of its shares, interests or assets, in cases where the action cannot be adequately remedied or where it is a repeat offence;[11]
d. personal liability on the part of the directors of the entity who participated in the anti-competitive behaviour; and[12]
e. a revocation of a merger where the merger approval was based on incorrect information furnished by a merging party or the merger approval was obtained deceitfully among others.[13]

The FCCPC also carries out investigations and market inquiries into anti-competitive practices alone and with other regulators. For example, as will be discussed below, the FCCPC is one of the regulators that make up the Joint Regulatory and Enforcement Task Force (JRETF) set up to investigate rights violations in the digital-lending industry. The FCCPC has also issued the FCCPC Administrative Penalties Regulation to provide a regulatory framework for the administration and imposition of administrative penalties

[9] Section 74(1), FCCPA.
[10] Section 73(1)(b), FCCPA.
[11] Section 52(1), FCCPA.
[12] Section 69(2), FCCPA.
[13] Section 99(1), FCCPA.

under the FCCPA. The fines under the regulation range from ₦500,000 (five hundred thousand naira) to ₦12,500,000 (twelve million and five hundred thousand naira) .[14]

5.0 MERGERS

5.1. Mergers Under Nigerian Law

A merger is considered to take place when one or more entities acquire or establish control, either directly or indirectly, over all or a portion of another entity's operations using any of the following methods:

a. acquiring or leasing shares, interests, or assets of the target entity;
b. an amalgamation or other combination with the target entity; or
c. a joint venture.[15]

Control will be deemed present if the acquiring entity:

a. beneficially owns more than one-half of the issued share capital or assets of the target;
b. is entitled to cast a majority of the votes that may be cast at a general meeting of the target or has the ability to control the voting of a majority of those votes;
c. is a holding company and the target is a subsidiary of that company as contemplated under the extant company law; or
d. has the ability to materially influence the policy of the target in a manner comparable to a person who in ordinary practice can exercise an element of control referred to in paragraphs (a)-(c).[16]

[14] Schedule 1, FCCPC Administrative Penalties Regulations 2020.
[15] Section 92(1) (a & b), FCCPA.
[16] Section 92(2), FCCPA.

It is noteworthy that a merger will only be subject to regulatory approval if the merger is large, that is, the threshold for merger control filing in Nigeria is met, which is a combined annual turnover of the acquirer and the target in, into or from Nigeria, of ₦1,000 000,000 (one billion naira) or above; or an annual turnover of the target in, into or from Nigeria, of ₦500,000,000 (five hundred million naira) or above.[17]

Thus, where a merger transaction results in a change of control and also meets the merger threshold, the entities involved are required to seek the approval of the FCCPC prior to implementing the change of control. It is noteworthy that the FCCPC may require notification even where a merger does not meet the thresholds above where in the FCCPC's opinion, the merger may substantially prevent or lessen competition in the Nigerian market.[18]

5.2 Foreign Mergers

It is important to highlight that the scope of merger review extends beyond mergers involving only Nigerian entities. The FCCPA regime has introduced a process for reviewing foreign-to-foreign mergers, which was not the case previously. Therefore, a transaction may now be subject to mandatory notification in Nigeria even if the target company does not have a physical presence in the country, provided that the transaction has a local connection. A foreign merger is considered to have a "local component/nexus" if it includes aspects such as having a subsidiary in Nigeria, manufacturing goods and services sold in Nigeria, or if either or both of the merging

[17] The Federal Competition and Consumer Protection Act, 2018 - Notice of Threshold for Merger Notification, Pursuant to Section 93(4), para 1.
[18] Section 95(3), FCCPA.

parties (the acquirer or the target) have met the turnover threshold mentioned above in previous financial periods.[19]

5.3 Estimated Merger Review Timeline

For small mergers notified upon instruction by the FCCPC, the typical time frame for approving straightforward transactions is approximately 20 business days, counted from the moment all merger notification requirements are satisfied.[20] However, for more intricate transactions, this approval process generally extends to about 40 business days from the date when all notification requirements are met.[21]

For large mergers, the average processing time for uncomplicated transactions is roughly 60 business days,[22] while complex transactions tend to require approximately 120 business days from the point at which all merger notification requirements are fulfilled.[23]

It is important to mention that there is an option to accelerate the review of applications by paying an additional fee. This expedited process reduces the approval timeline by 40%. This fast-track procedure applies to several types of transactions, including:

a. Transactions involving parties that do not have any existing or potential overlapping business relationships.

[19] Section 22, Federal Competition and Consumer Protection Act Merger Review Regulations 2020 and para. 2.12 of the Merger Review Guidelines of the Federal Competition and Consumer Protection Commission.
[20] Section 95(6), FCCPA.
[21] Ibid.
[22] Section 97(1), FCCPA.
[23] Section 97(1)(a), FCCPA.

b. Mergers involving foreign entities whose subsidiaries in Nigeria primarily function as manufacturers or assemblers, and at least 95% of their products are exported.
c. Mergers between foreign companies, especially those with a global presence but limited operations in Nigeria.
d. Joint ventures specifically established for the construction and development of residential and/or commercial real estate projects.[24]

5.4 The Regulation of Mergers in Nigeria

Mergers and corporate restructuring in general were administered by the Securities and Exchange Commission (SEC) under the Investment and Securities Act of 2007.[25] However, this is now primarily administered by the FCCPC save for mergers involving public companies and capital market operators which is still primarily regulated by the SEC. The FCCPC also runs a concurrent mergers regime with sectoral regulators like the Nigeria Electricity Regulatory Commission (NERC), the regulator of the power sector, the Nigerian Communications Commission (NCC) for telecommunications, the Central Bank of Nigeria (CBN) for the financial sector, Nigeria Civil Aviation Authority (NCAA) for aviation, and Nigeria Midstream and Downstream Petroleum Regulatory Authority (NMDPRA) for the oil and gas sector, etc.

By virtue of these overlapping merger review regimes, there is a potential for jurisdictional conflict between the FCCPC and sectoral regulators in the regulation of mergers in Nigeria. For example, a merger may be subject to the jurisdiction of both the FCCPC and a sectoral regulator. In such cases, it is not clear which authority has

[24] Para. 2.12, Merger Review Guidelines.
[25] Cap 29, Laws of the Federation of Nigeria.

primary jurisdiction over the merger. Furthermore, it is worth noting that the FCCPC and sector-specific regulatory bodies can have varying criteria that trigger the need for a merger review. To illustrate, under the NCC Competition Practices Regulation, specific types of transactions prompt the NCC to conduct a merger review, including:

a. Transactions that involve the acquisition of more than 10% of the shares of a Licensee.
b. Any other transaction resulting in a change in control of the Licensee.
c. Transactions that lead to the direct or indirect transfer or acquisition of an individual license previously granted by the Commission under the Act.
d. Situations in which the NCC, based on the preliminary information provided by a Licensee in its initial transaction notification, determines that the transaction could potentially result in a significant reduction in competition or the emergence of a dominant entity in one or more communication markets.[26]

This NCC regulatory framework significantly differs from the merger review triggers set forth by the FCCPC. Consequently, companies operating in the telecommunications sector find themselves grappling with the challenge of determining which specific merger review regime governs their transactions. The FCCPA attempts to address this issue by providing that the FCCPC and sectoral regulators should enter into agreements on how they will exercise their concurrent jurisdiction.[27] However, the sectoral regulators are yet to enter into such agreements with the FCCPC. In the absence of an

[26] Section 27, NCC Competition Practices Regulation 2007.
[27] Sections 104-106, FCCPA.

agreement, the FCCPC and sectoral regulators may need to resolve any jurisdictional conflict on a case-by-case basis. This can be time-consuming and costly for businesses.

To avoid jurisdictional conflicts, it is important for businesses to carefully consider the jurisdiction of the FCCPC and sectoral regulators when planning a merger. Businesses should also consult with the relevant authorities to determine which authority has primary jurisdiction over the merger.

6.0 STATE AND MARKET REGULATION

The Nigerian government places great importance on competition as a catalyst for economic growth and development. To achieve this, it employs a regulatory framework through various agencies to oversee and control markets, preventing unfair practices. This approach extends to the review of mergers and encompasses both the broader competition regulatory landscape. The FCCPC and sector-specific regulators each play significant roles. In succeeding paragraphs, this article delves into specific sectors and how these sectoral regulators have worked to promote fair competition within their respective industries.

6.1 The FCCPC

One of the primary objectives of the Federal Competition and Consumer Protection Act (FCCPA) is to foster and sustain competitive markets within Nigeria, as outlined in Section 1(a) of the FCCPA. To achieve this goal, the FCCPC is granted authority to investigate and prosecute instances of anti-competitive behaviour, including practices such as price-fixing, cartel formation, and the misuse of dominant market positions.

The FCCPC has actively exercised this authority in the past, conducting investigations and market inquiries in various domains, including the following:

6.1.1 Abuse of Dominance by WhatsApp LLC and Meta Inc.

On 19 July 2024, the FCCPC fined Meta Platforms $220 million after investigations revealed that data-sharing on its social platforms violated local consumer, data protection, and privacy laws. The FCCPC found that Meta appropriated the data of Nigerian users without their consent, abused its market dominance by imposing exploitative privacy policies, and subjected Nigerians to discriminatory and disparate treatment compared to other jurisdictions with similar regulations.[28]

6.1.2 Examination of Potential Competition Violations and Consumer Rights Infringements by Dominant PayTV Service Providers

Notably, the FCCPC in 2022 issued a directive to MultiChoice, a prominent broadcasting and PayTV company, to introduce a price lock initiative (enabling subscribers to maintain a consistent subscription fee for one year) and establish toll-free customer service lines for its customers. Subsequently, a fine of ₦25,000,000 (Twenty-Five Thousand Naira) was imposed on MultiChoice for non-compliance with the FCCPC's directive.[29]

[28] FCCPC, "In the matter of investigation into Possible Violations of the Rights of Nigerian Consumers in the Provision of Contact-Based Instant Messaging Service in Nigeria and Enquiries into Obnoxious, Exploitative, and Unscrupulous Business Practices by WhatsApp LLC and Meta Platforms, Inc. under the Federal Competition And Consumer Protection Act, 2018," available at: https://fccpc.gov.ng/wp-content/uploads/2024/07/Release-In-the-Matter-of-Meta-Platforms-Inc.-and-WhatsApp-LLC.pdf (accessed 25 July 2024).

[29] "FCCPC Orders Multi-Choice to Introduce Price Lock," *Punch* 21 March 2022, available at: https://punchng.com/fccpc-orders-multichoice-to-introduce-price-lock/ (accessed 20 July 2024).

6.1.3 Investigation into Anti-competitive Practices Within the Shipping and Freight Forwarding Industry, Involving Five Companies

In October 2021, the FCCPC executed a judicial search warrant and a Federal High Court order to collect information and evidence for an ongoing investigation into potential violations of the FCCPA by five companies in the shipping and freight forwarding industry. These companies, along with others not covered by the warrant or under investigation, were found to have engaged in or coordinated anti-competitive activities, both within and outside Nigeria, significantly distorting the market in Nigeria. Their actions included hindering fair competition and leading to persistently high freight rates and related costs within Nigeria.[30]

Other ways the FCCPC has exercised its authority include:

a. Examination of distribution companies for arbitrary billing and large-scale disconnection of electricity within the power sector.[31]

b. Establishment of a regulatory committee to investigate consumer rights violations in the money lending industry, with the aim of shutting down illegal money lending operations.[32]

[30] FCCPC, "FCCPC Launches Cartel and Other Anti-Competitive Conduct Investigation into Shipping and Freight Forwarding Industry," available at: https://fccpc.gov.ng/federal-competition-consumer-protection-commission-launches-cartel-and-other-anti-competitive-conduct-investigation-into-shipping-and-freight-forwarding-industry/ (accessed 22 July 2024).
[31] FCCPC, "Arbitrary Billing, Group Disconnection of Electricity Consumers Constitute Gross Consumer Abuse- FCCPC Raps DISCOs," available at: https://fccpc.gov.ng/arbitrary-billing-group-disconnection-of-electricity-consumers-constitute-gross-consumer-abuse-fccpc-raps-discos/ (accessed 26 July 2024).
[32] 'FG to shut down illegal money lenders violating consumer rights' The Cable. Available at: https://www.thecable.ng/fg-to-shut-down-illegal-money-lenders-violating-consumer-rights/ (accessed 26 July 2024).

In addition to its enforcement efforts, the FCCPC also engages in competition advocacy. This involves educating businesses and consumers about the importance of competition and the benefits it offers. The FCCPC regularly publishes guidelines and guidance notices on competition law matters. For example, the Federal Competition and Consumer Protection Commission Notice on Market Definition 2020[33], the Federal Competition and Consumer Protection Commission Leniency Rules 2022[34] and the Federal Competition and Consumer Protection Commission Merger Review Guidelines.[35] The FCCPC also collaborates with other regulatory bodies, such as the Central CBN and the SEC, to uphold competition and safeguard consumer interests. In 2021, the FCCPC joined forces with the Independent Corrupt Practices Commission (ICPC), the National Information Technology Development Agency (NITDA), the CBN, the Economic and Financial Crimes Commission (EFCC), and the National Human Rights Commission (NHRC) to create the Joint Regulatory and Enforcement Task Force (JRETF). The JRETF is dedicated to addressing and investigating violations of rights in the digital lending industry. The FCCPC has also entered into Memorandums of Understanding (MOUs) with the CBN and EFCC and is in the process of executing an MOU with NITDA.[36]

6.2 Telecommunications

Concerning the regulation of competition-related matters by the NCC, as outlined in Section 4(d) of the Nigeria Communications Act (NCA), the NCC is entrusted with the responsibility of fostering fair competition within the communications industry. It also

[33] The Federal Competition and Consumer Protection Commission's Notice on Market Definition, 2021.
[34] Federal Competition and Consumer Protection Commission Leniency Rules, 2022.
[35] Merger Review Guidelines of the Federal Competition and Consumer Protection Commission, 2020.
[36] FCCPC, "Civil Society/Consumer Protection Alliances," available at: https://fccpc.gov.ng/about-us/civil-society-consumer-protection-alliances/ (accessed 26 July 2024).

has the mandate to safeguard communications services and facilities providers from the misuse of market power or any anti-competitive and unfair practices by other service or facilities providers or equipment suppliers.

According to the provisions of the NCA, the NCC holds exclusive authority to determine, declare, oversee, supervise, and enforce compliance with competition laws and regulations that pertain to the Nigerian communications industry. Notably, the NCC has the power to decline the issuance of an individual license to an applicant who holds a controlling influence on another licensee if such issuance is deemed likely to give rise to anti-competitive concerns. Furthermore, the NCC can reject share transfers if it determines that the acquisition of ownership or control of the license could potentially lead to anti-competitive issues within the telecommunications market. The NCA also prohibits licensees from engaging in any conduct with the intention or effect of significantly reducing competition in any segment of the Nigerian communications market, unless such conduct is specifically authorised by the NCC.

In accordance with its authority under the NCA, the NCC issued the Competition Practices Regulations to provide clarity on anti-competitive behaviours. These Regulations address topics such as determining whether an undertaking possesses dominant powers, defining actions that constitute a significant reduction in competition, and outlining what constitutes an abuse of dominance. These Regulations additionally empower the NCC to review agreements aimed at, or that would have the effect of, significantly reducing competition.

The NCC has also implemented various competition-strengthening measures. For instance, in 2013, the NCC declared MTN Nigeria a dominant operator in the retail

mobile voice market segment of the telecommunications industry. As a result, the NCC directed MTN to eliminate the price differential between on-net and off-net retail voice tariffs, a concession that was later reversed when the NCC granted MTN Nigeria a 30% concession on these tariffs.[37] In November 2016, the NCC introduced a price floor for data services to promote a level playing field for all operators in the industry, thereby encouraging smaller operators and new entrants.[38] This measure was subsequently suspended by the NCC.[39]

6.3 Power/Electricity Sector

Prior to the enactment of the Electricity Act 2023, the Electric Power Sector Reform Act, No.6 2005 (EPSRA) assigned the Nigerian Electricity Regulatory Commission (NERC) the role of assessing the potential for increased competition within the Nigerian electricity supply industry and reporting on it.[40] The NERC was also responsible for considering the prevention or mitigation of market power abuses when making decisions related to license applications, terms, price setting, mergers, acquisitions, and affiliations. This responsibility was retained in the Electricity Act of 2023.[41]

In compliance with its EPSRA obligations, NERC introduced the NERC Eligible Customer Regulation in 2017, aimed at promoting competition in the electricity supply sector and

[37] "NCC and Determination of Telecoms Dominance," *The Guardian*, 28 July 2015, available at: https://guardian.ng/opinion/ncc-and-determination-of-telecoms-dominance/ (accessed 18 July 2024).
[38] "Why NCC Asked Big operators to Raise Data Tariffs," *The Cable*, 29 November 2016, available at: https://www.thecable.ng/exclusive-ncc-asked-big-operators-raise-data-tariffs/ (accessed 19 July 2024).
[39] "NCC Suspends Directive on Data Segment Price Floor," *Business Day*, 30 November 2016, available at: https://businessday.ng/exclusives/article/ncc-suspends-directive-on-data-segment-price-floor/ (accessed 20 July 2024).
[40] Electricity Power Sector Reform Act.
[41] Section 121(3), Electricity Act 2023.

enabling third-party access to transmission and distribution infrastructure for enhanced retail competition.

NERC also has a specialised division, the Market Competition and Rates Division, tasked with determining tariffs and monitoring the electricity market to prevent market power abuse. Additionally, NERC releases reports like the 2022 Market Competition Report, evaluating competition levels in the Nigerian Electricity Supply Industry and the progress toward a more competitive market.

Recently, the NERC took enforcement actions against the Abuja Electricity Distribution Company (AEDC) for violating the Supplementary Order to the Multi-Year Tariff Order (MYTO) 2024 for AEDC. This action includes a mandate for AEDC to reimburse all customers in Bands B, C, D, and E who were billed above the allowed tariff bands and to pay a fine of ₦200 million.[42]

6.4 Aviation Industry

Competition in the Aviation industry is primarily governed by the Civil Aviation Act, No 30,2022 (CAA), which replaced the Civil Aviation (Repeal and Re-Enactment) Act of 2006. The NCAA is entrusted with regulating and fostering competition, promoting fair and efficient conduct among industry operators, and preventing monopolies as authorised by the CAA.[43] These regulations are subject to the provisions of the FCCPA. The NCAA is also empowered to create and enforce regulations that ensure equitable

[42] FCCPC, "FCCPC Applauds NERC for Fines, Demands Actions to Promote Consumers". Available at: https://fccpc.gov.ng/release-fccpc-applauds-nerc-for-fines-demands-actions-to-protect-consumers/ (accessed 18 July 2024).
[43] Section 8(1)(l), Civil Aviation Act 2022.

competition in the provision of air transport services and protect the interests of aviation and related services consumers.[44]

Pursuant to the 2006 Act, the NCAA introduced the Nigeria Civil Aviation Regulations of 2015 (NCAR). The NCAR forbids aviation industry entities from engaging in any contracts, arrangements, understandings, or conspiracies that would result in a restraint of competition without prior authorisation from the NCAA. Additionally, it prohibits both restrictive practices and the abuse of dominant market positions.[45]

6.5 Banking

The Bank and Other Financial Institutions (BOFIA) Act 2020 differs from the CAA in how it handles competition matters. While the CAA makes its competition authority subject to the FCCPA, BOFIA, explicitly states that the FCCPA does not apply to transactions, acts, financial services, or undertakings conducted by banks and other financial institutions licensed by the CBN.[46] In particular, the provisions related to mergers under the FCCPA do not apply to mergers, acquisitions, or any form of business combination involving a bank, specialised bank, or financial institution. For these entities, all references to the FCCPC should be understood as references to the CBN. Additionally, the BOFIA mandates that the consent of the Governor of the CBN is required for any agreement involving the transfer of significant shareholding in a bank or other financial

[44] Section 95(7), Civil Aviation Act 2022.
[45] Para. 18.15, Nigerian Civil Aviation Regulations 2015.
[46] Section 65, BOFIA 2020.

institution.[47] "Significant shareholding" is defined as the beneficial ownership of 5% or more of the paid-up share capital of a bank or financial institution.[48]

Similarly, the CBN, in accordance with its mandate under the CBN Act, has issued the Consumer Protection Framework (CPF) to protect consumer rights and discourage anti-competitive practices in the financial services sector. The CPF requires financial institutions to collaborate with financial regulators and other stakeholders to enhance competition within the financial services industry. The CBN, as per the CPF, is also responsible for monitoring the market to discourage anti-competitive practices, including price-fixing, market allocation, abuse of dominance, and tied selling.[49]

6.6 International Collaborations

The FCCPC actively engages in international collaborations aimed at fostering cooperation, enhancing regulatory effectiveness, and combating cross-border challenges in the realm of competition and consumer protection. These collaborative efforts demonstrate Nigeria's commitment to promoting fair competition and safeguarding consumer interests on a global scale.

6.6.1 ECOWAS Regional Competition Rules

One significant avenue through which this occurs is Nigeria's membership in the Economic Community of West African States (ECOWAS). Within this regional economic bloc, ECOWAS has established a comprehensive competition regulatory framework known as the ECOWAS Regional Competition Rules. To oversee the implementation of

[47] Section 7(1)(a)(ii), BOFIA 2020.
[48] Section 131, BOFIA.
[49] Para. 2.8.1, Consumer Protection Framework of the CBN.

these rules, the ECOWAS Regional Competition Authority (ERCA) was launched on 31 May 2019. This framework and authority are critical in promoting fair competition within the ECOWAS member states.

6.6.2 Memorandum of Understanding (MOU) with the U.S. Federal Trade Commission

The FCCPC, in collaboration with the EFCC in Nigeria, has signed a significant Memorandum of Understanding (MOU) with the United States Federal Trade Commission. This MOU serves a dual purpose. Firstly, it enhances communication and cooperation to jointly address cross-border fraud, and secondly, it facilitates collaboration in consumer protection investigations. The MOU establishes a joint implementation committee dedicated to developing training programs and providing assistance for specific investigations, further strengthening the cooperation between the two countries.[50]

6.6.3 MOU with the Egyptian Competition Authority

In a bid to enhance collaboration, strengthen economies, and promote shared prosperity, the FCCPC signed an MoU with the Egyptian Competition Authority (ECA) on 31 January 2023. This agreement underscores the importance of international partnerships in advancing economic growth and regulatory effectiveness.[51]

[50] EFCC, "EFCC, FCCPC Sign MOU with U.S. Trade Commission to Combat Cross Border Fraud," available at: https://www.efcc.gov.ng/efcc/news-and-information/news-release/6194-efcc-fccpc-sign-mou-with-u-s-trade-commission-to-combat-cross-border-fraud (accessed 20 July 2024).

[51] FCCPC, "Egyptian Competition Authority (ECA) and Federal Competition and Consumer Protection Commission (FCCPC) Execute Memorandum of Understanding," available at: https://fccpc.gov.ng/egyptian-competition-authority-eca-and-federal-competition-and-consumer-protection-commission-fccpc-execute-memorandum-of

6.6.4 Membership in the International Competition Network (ICN)

The FCCPC is also a member of the International Competition Network (ICN), which provides a global platform for competition authorities to collaborate and exchange knowledge and best practices. Through its membership, the FCCPC is well-positioned to address cases involving non-resident entities engaged in anti-competitive practices, leveraging its international network to enforce competition regulations effectively.[52]

In summary, the FCCPC's international collaborations are vital to its mission of ensuring fair competition, protecting consumers, and fostering economic growth both regionally and globally. These partnerships underscore the FCCPC's dedication to addressing cross-border challenges and harmonising efforts with like-minded organisations to achieve shared goals.

7.0 CONCLUSION

In summary, while the examination of competition law in Nigeria highlights the presence of robust legislation and regulatory bodies, such as the FCCPA and sectoral agencies, as a strong foundational framework, it also reveals the potential for enhanced enforcement measures.

Despite the existing legal infrastructure, there remains room for improvement in enforcement. To optimise competition regulation, greater focus can be placed on the proactive identification of anti-competitive practices, fostering increased cooperation between the regulatory bodies, and streamlining the enforcement process.

understanding/#:~:text=Considering%20that%20both%20countries%20are,%2C%20Egypt%2C%20executed%20the%20MoU) (accessed 20 July 2024).

[52] International Competition Network, "Members," available at: https://www.internationalcompetitionnetwork.org/members/?location=africa (accessed 29 July 2024).

Additionally, the regulatory agencies can enhance their investigative and monitoring capabilities to ensure a more comprehensive oversight of market activities.

In addition, public awareness and education campaigns about the importance of competition law, both for businesses and consumers, can play a pivotal role. By promoting a culture of compliance and understanding, enforcement agencies can gain stronger public support, making it easier to detect and report violations.

In conclusion, while Nigeria's competition framework is commendable, there exists a significant opportunity for improvement in terms of enforcement. A combination of enhanced investigative capabilities, inter-agency cooperation, public awareness campaigns, and stricter penalties can collectively elevate the effectiveness of competition law enforcement in the country.

THE PRESENT AND FUTURE IMPACT OF ARTIFICIAL INTELLIGENCE ON THE NIGERIAN LEGAL SYSTEM ON DIVERSE ISSUES

Mbanasor Victoria*

ABSTRACT

Artificial Intelligence (AI) has transformed businesses, industries, and the way we do things, and laudably so. This transformation birthed by the evolution of AI continues to rapidly rope its fabrics around us, leading to several changes and conversations on the need to address the plethora of challenges surrounding the innovations and the ongoing evolving confluence between AI and industries, particularly in the legal landscape which is still leaping towards embracing the trend. In Nigeria, some of the most pertinent legal challenges related to AI are the legal status of AI, copyright ownership, Intellectual Property (IP), data protection, culpability, ethical dilemmas of bias, disciplinary agency, and market usurpation. This paper discusses the legal challenges of AI applications in the Nigerian legal system. It analytically reviews the challenges in light of its impact on legal development in Nigeria and recommends standards that may reflect a viable inculcation of AI in the system.

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1.0 INTRODUCTION

Currently, in the world, there is a growing integration of technology in businesses and organisations, and so far, individuals and organisations have had to leverage the concept of technology to drive innovation and improve efficiency across several sectors of life. The legal profession like other professions is impacted by Artificial Intelligence. The confluence between technology and the legal profession is fast asserting its relevance in the world and particularly, in the Nigerian legal system.

However, the application of Artificial intelligence is in its elementary stage in Nigeria as the forum contends with the realities of the scope of Intelligence in the world. This is seen in the fact that our judicial and general legal system is reluctant to embrace digitalisation and is still stuck on the traditional or manual mode of legal transmission, litigation, filing of and admission of evidence, and adjudication. Although the Law Pavilion is commendably at the forefront of technology in law,[1] there should be more awareness of the prospects of AI in the legal industry, which should prompt certain legal considerations bordering on the legal and ethical issues surrounding the use of AI in the legal sector.

As the evolution of AI is increasingly being leveraged in Nigeria, it embodies a clear indication that extant laws that guide the legal space should be extended and developed to aid the adequacy and appropriateness of the integration of AI to innovate

[1] M. Okoko & Co., "Legal Considerations in the Use of Artificial Intelligence" (2023), available at https://www.mondaq.com/nigeria/new-technology/1203070/legal-considerations-in-the-use-of-artificial-intelligence (accessed 15 December 2023).

the legal industry. Unfortunately, aside from some existing frameworks such as the Cybercrime Act 2015, the Nigerian Data Protection Regulation 2019, the Nigeria Data Protection Act 2023, and the Nigerian Communications Act 2003, which govern regulations on data and communications protection, there is presently no specific legislation governing or regulating the development and deployment of AI technologies in Nigeria, especially because the extant frameworks, such as the Nigerian Data Protection Regulation (NDPR) merely prescribes the rules governing personal data protection. This speaks to the issue of the non-viability of a legal framework that is essential to regulate a rather complex issue such as AI and how it may impact the legal dynamics of the Nigerian system. The complexity of AI, notwithstanding its prospects, instigates several legal questions such as the issue of whether AI has legal personality; ownership of AI and the scope of liabilities in the event of negligence or misconduct, including the issue of confidentiality, bias, usurpation of the market forces. Accordingly, this paper seeks to address these issues surrounding the integration of Artificial intelligence, with particular reference to the uniqueness of legal processes for which there are challenges impeding the use of AI in law.

2.0 OVERVIEW OF THE TREND OF ARTIFICIAL INTELLIGENCE IN THE LEGAL INDUSTRY

According to the World Intellectual Property Organisation, AI is a discipline of computer science that is aimed at developing machines and systems that can carry out tasks considered to require human intelligence, with limited or human intervention.[2] Thus

[2] WIPO Secretariat, "Revised Issues on Intellectual Property Policy and Artificial Intelligence" (2020), available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=499504 (accessed 15 December 2023).

far, there has been a convergence of the influence of Artificial intelligence in legal practice in aspects of prognostication technology where Artificial intelligence machines or tools, such as ChatGPT, Lex Machina, and Solomonic[3] can aid lawyers to predict likely outcomes of cases by analysing a wide expanse of historical judgements and reviewing court judgements and likely outcomes based on precedents; or the aspects of electronic documentation, due diligence, and performance of repetitive administrative functions.[4] For instance, an AI system known as "Luminance" was produced and deployed at the University of Cambridge to perform document analysis.[5] Incidentally, the AI tool was considered impactful as it is currently being leveraged by organisations in various countries, enhancing the entire transaction process for law firms and their clients by modelling how solicitors think to make needed relevant findings without the need to receive instructions on what to do. Similarly, in the United States, a law firm, BakerHostetler, is using a Digital Attorney called ROSS to develop a legal adviser that can be asked research questions in natural language by lawyers as they would a person. The tool then reviews the relevant law stored in its system, gathers evidence, draws inferences, and returns highly relevant, evidence-based candidate answers.[6] It also monitors the law and process and reports on new dimensions both in case decisions and other rulings of the court. Similarly, in the United Kingdom, the legal landscape seems

[3]Alex Heshmaty, "Use Of AI in Law Firms to Predict Litigation Outcomes," available at: https://www.lexisnexis.co.uk/blog/future-of-law/using-ai-to-predict-litigation-outcomes (accessed 15 December 2023).
[4] Ibid.
[5] CNBC, "An AI just Negotiated a Contract for the First Time Ever — and No Human was Involved," available at: https://www.cnbc.com/2023/11/07/ai-negotiates-legal-contract-without-humans-involved-for-first-time.html (accessed 16 December 2023).
[6] Forbes, "Law Firm BakerHostetler Hires a 'Digital Attorney' Named ROSS," available at: https://www.forbes.com/sites/amitchowdhry/2016/05/17/law-firm-bakerhostetler-hires-a-digital-attorney-named-ross/ (accessed 16 December 2023).

to have taken an interesting turn. Researchers at University College London, the University of Sheffield, and the University of Pennsylvania were reported to have applied an AI algorithm to the judicial decisions of 584 cases that went through the European Court of Human Rights and found patterns in the text. Having technically processed the records of the cases, the algorithm was able to predict the outcome of other cases with 79% accuracy.[7] In the area of medicine, Fletchers,[8] has teamed up with the University of Liverpool to create a clinical negligence 'robot lawyer' to serve as a decision support system which reviews similar previous cases on clinical negligence and provides analysis.[9] It found that rather than legal argument being predictive of case outcomes, the most reliable factors were non-legal elements: language used, topics covered, and circumstances mentioned in the case text. Nevertheless, the growing trend of AI in the legal environment also finds a place in Nigeria. For instance, the

[7] UCL News, "AI Predicts Outcomes of Human Right Trials," available at: https://www.ucl.ac.uk/news/2016/oct/ai-predicts-outcomes-human-rights-trials (accessed 16 December 2023).

[8] Fletchers is one of UK's largest medical negligence law firm/specialists. In 2016, the firm partnered with the University of Liverpool to launch an ambitious Artificial Intelligence project with the support of a government grant funded by Innovate UK. In 2023, the firm partnering with the University of Liverpool a second time, launched another project with the University of Liverpool to undertake an Artificial Intelligence project that would enhance the prior project on Structured Information Decision Support Systems (SIDSS). See Fletchers Solicitors, "Fletchers Group to push the AI boundaries further with University of Liverpool partnership," (2023), available at: https://www.fletcherssolicitors.co.uk/general/news/fletchers-group-to-push-the-ai-boundaries-further-in-the-law-signing-new-partnership-with-university-of-liverpool-computer-science-department/ (accessed 16 December 2023).

[9] Thomas Connelly, "Law Firm Teams up with Liverpool Union Bid to Create Clinical Negligence Robot Lawyer," available at: https://www.legalcheek.com/2016/12/law-firm-teams-up-with-liverpool-uni-in-bid-to-create-clinical-negligence-robot-lawyer/ (accessed 16 December 2023).

LawPavilion[10] and JudyLegal[11] have been in electronic law reporting, which has enhanced efficiency in research and case law development.

2.1 Addressing Legal Considerations in the Application of Artificial Intelligence in the Nigerian Legal Profession

As the evolution of AI is increasingly being leveraged by Nigerian lawyers or the legal profession to fast-track legal practice and heighten the efficiency and accuracy of services rendered, it embodies a clear indication that extant laws that guide the legal space should be extended and developed to aid the adequacy and appropriateness of the integration of AI to innovate legal practice. Unfortunately, aside from some existing frameworks such as the Cybercrime Act 2015, the Nigerian Data Protection Act 2023, and the Nigerian Communications Act 2003, which govern regulations on data and telecommunications protection, there is presently no specific legislation regulating the development and deployment of AI technologies in Nigeria, especially in the legal sector.

This has portended several legal questions such as the issue of whether AI has legal personality, or the issue of who owns the AI and who bears liabilities in the event of negligence or misconduct, including the issue of confidentiality, bias, usurpation of the market force. These are the most fundamental legal considerations surrounding the integration of more advanced AI in the Nigerian legal sector given predictions of robotic lawyers being used globally for adjudication. This is an overreaching innovation from AI

[10] The Law Pavilion has pioneered the legal-tech space in Nigeria for over fifteen years and it understands the dynamics of the legal industry and its technological needs.
[11] Adoni Conrad, "Judy Legal Simplifies Access to Common Law Databases," (2023), available at https://www.wearetech.africa/en/fils-uk/solutions/nigeria-judy-legal-simplifies-access-to-common-law-databases (accessed 16 December 2023).

systems that works as an accurate proxy of human intelligence. Currently, in developed countries like the United States, the United Kingdom, China, South Korea and Holland, robotic lawyers are being built to assist firms in courtroom advocacy. The pertinent question then is: Is AI or robot-lawyer a legal personality under the law?

Section 24 of the Legal Practitioners Act (LPA) 2004[12] defines a legal practitioner to mean a person entitled in accordance with the provisions of the Legal Practitioners Act to practice as a Barrister and Solicitor either generally or for the purposes of any particular office or proceedings. Similarly, section 2(1)[13] provides that a person shall be entitled to practice as barrister and solicitor "if, and only if, his name is on the roll call." In other words, the LPA is emphatic on its provision having made it a mandatory requirement. Accordingly, it can be deduced that AI robotics does not fall within the purview of a legal practitioner under the law's contemplation. Thus AI AI-driven robotics remain unfit to practice law in Nigeria neither does it qualify as a natural "person" under the Nigerian Law.

This means that the futuristic robot lawyers will not qualify to offer legal advice or serve in legal capacities whether within or outside the courtroom. The collaboration between humans and robots may be challenged in Nigeria, in view of the rules above and thereby inhibit AI application in the sector. The situation is further amplified by Rule 3 of the Rules of Professional Conduct for Legal Practitioners 2007, which is instructive to the effect that: (a) a lawyer should not aid in the unauthorised practice of the law or, (b) permit his professional services or his name to be used in aid of, or

[12] Section 24 (1) of the Legal Practitioners Act, Cap L11, Laws of the Federation of Nigeria, 2004.
[13] Legal Practitioners Act, Ibid.

to make possible, the unauthorised practice of law by any person not qualified to practise or disqualified from practice.

Another perspective is taken on the juristic personality of AI. It is trite that in light of extant judicial pronouncements in Nigeria, only juristic persons have the inherent right and/or power to sue and be sued in their names. For so long, the decision in *Shitta & Ors* v *Ligali & Sons*,[14] where the court defined a juristic person as a person or entity known by law, which can sue or be sued, has been maintained by the Nigerian courts. In other words, AI not being a legal person under the Nigerian statutes can neither sue nor be sued. This is particularly with recourse to the categories of juristic persons clothed with the right to sue and/or be sued under the Nigerian system, which includes natural persons, companies incorporated under the Companies Act, corporations aggregate and corporations sole with perpetual succession, and certain unincorporated trustees and associations.[15] Thus, from a concomitant reading of the provisions above, it is evident that AI does not have the status of a person under Nigerian law nor the juristic power to sue or be sued, as well as the authority to represent any legal interest in Nigeria. Examples may be drawn from the "Do Not Pay case,"[16] as the world's first robot lawyer was sued over allegations of fraud by appearing in a United States Courtroom without a law license to practice. This has remained a persisting issue and it is high time it received the requisite considerations to gain from the prospects of AI.

[14] [1941] 16 NLR.23; See also Agbonmagbe Bank Ltd v General Manager, G.B.O Ltd & Anor [1961] All NLR 116; Fawehinmi v Nigerian Bar Association [1989] 2 NWLR 558.
[15] Inam Wilson and Tolutope Falokun, "Liability for Damage Caused by Artificial Intelligence," available at, https://www.templars-law.com/app/uploads/2021/05/LIABILITY-FOR-DAMAGE-CAUSED-BY-ARTIFICAL-INTELLIGENCE.pdf (accessed 16 December 2023).
[16] State of Chicago v DoNotPay (Unreported).

2.2 Issue of Liability or Culpability

This is closely linked to the question of legal personality and raises the problem of determining the liabilities and extent thereof of AI since it appears that it does not fall within the category of persons defined by law or contemplated as legal practitioners.[17] Some argue that AI could help create a fairer criminal judicial system, in which machines could evaluate and weigh relevant factors better than humans without bias and subjectivity.[18] However, since Robot lawyers are being developed to represent humans in courtroom advocacy and aid in other areas such as client counselling and general legal assistance, what happens where issues of negligence or misconduct are implicated in such interactions? Who bears the liability? Can the AI be held responsible where a client's interest is not well evaluated and protected leading to damages or, in cases of criminal liability, can the AI be sued? And where the plaintiff succeeds, on whom does punishment fall in view of criminal liability as well as responsibility?

In addressing these issues, some scholars have canvassed that since AI is owned by a person or firm, such firm or employer should be vicariously liable to clients for civil wrongs emanating from the interactions or output of the AI, in line with the principles of tort on negligence, vicarious liability and strict liability; or the principles of consumer protection on product liability. The arguments find grounds on the rationale that since AI software rely on information programmed in them, that is, interactions conducted via a tag cloud in which the owner can customise their devices according to their needs,

[17] Section 24 of the Legal Practitioners Act.
[18] UNESCO, "Artificial Intelligence: Examples of Ethical Dilemmas," (2023), available at: https://www.unesco.org/en/artificial-intelligence/recommendation-ethics/cases (accessed 19 December 2023).

then the operators or operational management of the program should be held liable in cases of civil liabilities.[19] This is based on the principle that organisations are or ought to be moral agents responsible for the systems developed by them.[20] An important consideration here may be centred on the principles of agency with regard to strict liability. Will a robot lawyer be personally liable for *ultra vires* acts? Is it reasonable to hold a developer or firm liable where an AI system performs unpredictably? The questions arise as AI systems are likely to interact with other systems or sensors within the Internet of Things and programmers may not be able to tell with exactitude, the response of the AI machine to the imputed instructions, hence apportioning liability becomes difficult if not impossible.[21] The problem in solving this dilemma is embedded in the difficulty in legally understanding whether an AI system is a product or a service, as strict liability tort applies to flaws in product design, manufacture, or warnings that cause personal injury or property damage to others, not services. Only negligence applies to services, such as data analysis to determine maintenance.[22]

Again, it is noteworthy that when it comes to vicarious liability, an agency relationship must be established. Also, AI tools are most vulnerable to cyber-attacks, such as hacking, and it is complex to ascertain issues of liability where a device has been interfered with illegally. Additionally, there is the begging question of the standards to

[19] Gloria Miller, "Stakeholder roles in artificial intelligence projects," (2022), Volume 3 *Journal of Project Leadership and Society*, available at: https://www.sciencedirect.com/science/article/pii/S266672152200028X (accessed 19 December 2023).
[20] Ibid.
[21] JonesDay Commentary, "Mitigating Product Liability for Artificial Negligence," available at https://www.jonesday.com/en/insights/2018/03/mitigating-product-liability-for-artificial-intell (accessed 19 December 2023).
[22] Ian Wardel, "Product Liability Applied to Automated Decisions" (2022) *Seton Hall Law,* available at https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2207&context=student_scholarship (accessed 19 December 2023).

be used in ascertaining or adjudging whether an AI manufacturer is liable for failing to mitigate directly or indirectly against the possibility of future injuries caused by specific consumer alterations.[23] Here, it is interesting to note that although Nigeria's Federal Competition and Consumer Protection Act (FCCPA) 2018 establishes the right of a consumer to receive goods that are of good quality or fit for purpose,[24] and equally imposes liability on suppliers where damage results from defective goods or service,[25] it, however, did not provide a liability regime for damages accruing from the use of AI. More so, there is no clarity on whether the use of AI technologies in the legal profession qualifies as a product or service, and although section 167 of the FCCPA 2018 defines 'product' to include goods and services, the wording does not capture with exactitude what constitutes an AI product.

It is important for the political and legal communities to be proactive and generate a liability model that recognises how new AI programs have already redefined the relationship between manufacturers, consumers, and products. Furthermore, there is the profound question of what would be the case where there are criminal implications. Who takes responsibility when an AI-driven entity commits a crime?

The Nigerian Criminal Justice system requires that to prove a crime, the person asserting such crime must prove not just the *actus reus* but the *mens* rea as well, except for the areas where strict liability applies.[26] Hence, not only must the act be proved, but also the knowledge of the understanding of the criminal nature of the act

[23] Ibid.
[24] Section 131(1)(b) of the FCCPA.
[25] Section 136(1) of the FCCPA.
[26] Section 24 of the Criminal Code Act, Cap C.38 LFN 2004.

accompanied by the intention to commit the same. This begs the question of whether the legal standard of care and duty of care can be imposed on AI by operation of law since it lacks the attribute of mental capacity and emotional intelligence to comprehend the test of reasonableness enunciated in sections 28 and 30 of the Nigerian Criminal Code. Furthermore, there is the issue of whether an AI can be a party to a crime under section 7 of the Nigerian Criminal Code, including the stipulation in section 24 – which provides that a person cannot be guilty of an offence committed independent of the exercise of his will.

However, some scholars believe that since it is the result of the programming of the inventor or command of the user that determines the action of the AI, then their intention should be imputed in the acts of the AI to hold them vicariously liable in line with the Gabriel Hallevy model.[27] Although a plausible argument, it is undermined by section 36(12) of the Constitution of the Federal Republic of Nigeria 1999, which stipulates that no person shall be guilty of an offence which at the time it was committed is not defined by any written law. Thus, AI cannot be held liable for offenses committed.

2.3 Issue of Data Privacy and Confidentiality

The adoption of AI raises concerns over data privacy. AI systems collect and process large amounts of data, which raises concerns on the use and protection of data

[27] Gabriel Hallevy is an Israeli Professor of Criminal Law who propounded certain models for understanding the question of whether the growing intelligence of AI entities subject them to legal cum social control as any other legal entity. To answer this question, he developed three models of response viz: the Perpetration-via-another Liability model, the Natural Probable Consequence Liability Model and the Direct Liability Model. See Ogu Nnoiki and Ikenga Oraegbunam, 'A Critique of Gabriel Hallevy's Models of Criminal Liability of Artificial Intelligence Entities' (2022) (4)3 *International Journal of Comparative Law and Legal Philosophy*.

collected or processed, and whether it meets data privacy standards and regulations. Section 37 of the Constitution of the Federal Republic of Nigeria 1999 guarantees the right to privacy, including the right to the protection of an individual's correspondences and personal data. Accordingly, it has been held in the celebrated case of *Incorporated Trustees of Digital Rights Lawyers Initiatives & Ors* v *NIMC*,[28] that matters of data privacy and personal data protection fall under the ambit of the right to privacy as guaranteed by the constitution. Consequently, the National Data Protection Act 2023 enumerates the rights of individuals to the protection of their personal data and further imposes an obligation on data processors and collectors to ensure that data collection is done with the consent of subjects and meets the legitimate purpose test.[29] However, it is not clear how the relevant provisions will be interpreted and enforced with respect to AI. Thus, this raises a number of legal issues such as the definition of data and what constitutes personal data.[30] Concomitantly, Rule 3.1 of the Nigeria Data Protection Regulation 2019 and Section 65 of the NDPA 2023 define personal data as:

> Any information relating to an individual, who can be identified or is identifiable, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or one or more factors specific to the physical, physiological, genetic, psychological, cultural, social or economic identity of that individual.

However, the problem that arises here is that of ascertaining whether anonymised data still qualifies as personal data.[31]

[28] [2021] LPELR-55623 (CA).
[29] Sections 24 and 25 of the Nigeria Data Protection Act 2023.
[30] Obiorah Victor, "Addressing Issues of Artificial Intelligence Under Nigerian Law: Legal Considerations and Potential Solutions for the Challenges," (Unpublished Winning Entry for the David Precious Onyebuchi Prize for Excellence in Law, Science and Tech 2.0, 2023).
[31] Ibid.

Furthermore, regarding the consent requirement under section 25 of the Nigerian Data Protection Act 2023, generative-text AI systems, such as ChatGpt, which is a free-to-use AI system, fundamentally relies on data algorithms and studies behavioural patterns to function, and this usually warrants that they gain access into the personal data of subjects without fulfilling the requirement that the consent of data subjects must be expressly obtained before such access can be clothed with the garb of lawfulness stipulated in section 24(1) of the NDPA 2023, which provides that data shall be processed in a fair, lawful and transparent manner. It also provides that Personal Data is to be collected for specified, explicit, and legitimate purposes and is not to be further processed in a way incompatible with these purposes.

Interestingly, the company behind ChatGpt - OpenAI, has disclosed that to achieve its business goals, it may share users' personal data with unspecified third parties without informing them. This was after it was disclosed that the company collects the IP addresses of users, including their browser settings, interactions with the site, etcetera.[32] This raises the question of whether practitioners and legal researchers who use these AI-generative text tools to access a subject's data can be held liable for breach of data privacy.

More so, the legal profession is known to be founded on the ethical principle of confidentiality of client information and data, amongst others. However, the integration of AI poses a threat to this hallowed principle and practice of attorney-client privilege as prescribed by the various Rules of Professional Conduct and section

[32] Marco Eggerling, "AI Data Leaks are Reaching Crisis Level: Taka Action," available at https://blog.checkpoint.com/executive-insights/ai-data-leaks-are-reaching-crisis-level-take-action/ (accessed 20 December 2023).

192 of the Nigerian Evidence Act. Since client data will be processed by complex machine learning tools and programmed by tech experts other than lawyers, this has raised the legal consideration of what happens to the duty to protect confidential information within the limits enunciated by the law imposed on legal practitioners. And who takes responsibility for this data and ensures it is processed within the ambit of confidential standards accordingly?

In addressing this issue, it may be that there is no risk of breach of confidentiality as client information is already routinely stored in the cloud.[33] However, it is recommended that there is the need for disclosure to the clients on how their data is accessed, retrieved, and stored in compliance with Rule 14(2)(b)(c) of the Rules of Professional Conduct for Legal Practitioners 2023, and extant data privacy laws and instruments in Nigeria.

2.4 Issues concerning Copyright Infringement

The adoption of AI systems in the legal profession poses a threat to the violation of Intellectual Property (IP) rights. These implications are felt in the areas of patents, copyrights, trademarks, and other secret laws. IP laws work to protect the ownership rights of subjects.[34] For instance, the copyright legal framework, such as the Copyright Act 2023 affords exclusive right of protection to owners who have exhibited sufficient effort to possess a distinct personality of a present or future tangible medium of

[33] Cloud storage employs remote servers to save data and generic information of individuals, such as files, videos or images. To maintain availability and provide redundancy, cloud providers will often spread data to multiple virtual machines in data centres located across the world. Google Cloud, "The New Way to Cloud Starts Here," available at: https://cloud.google.com/ (accessed 20 December 2023).
[34] Virandra Ahuja, "Artificial Intelligence and Copyright Challenges and Issues" (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3864922 (accessed 30 December 2023).

expression in literary works, artistic works, literary works or cinematography. However, as new AI innovations have emerged in several forms, like AI-generative texts, the question of determining the ownership of the generated texts between the AI itself, the developer, or the user becomes increasingly cumbersome. For example, OpenAI, the developer of ChatGpt has faced multiple class action lawsuits on copyright infringement from writers and data subjects.[35] Again, from the tone of the Cpoyright Act, it is also clear that the Act did not confer legal personality on AI technologies in its definition of "natural persons."

2.5 The Ethical Issue of Bias and Discrimination

AI technologies evolve around novel kinds of issues that cut across their involvement and impact on decision-making, employment and labour, social interaction, health care, rule of law, security and policing, digital divide, among others, in such a way that extant biases and prejudices are reinforced, hence increasing already existing issues on discrimination, stereotyping, and prejudice.[36] It is a settled fact that AI algorithms have the tendency to reflect human biases which may seem discriminatory, such as the bias of race, sex, ethnicity, grades, nationality, and other social constructs. The problem of selection bias in datasets used to construct AI algorithms is a furnishing instance.

It has been established that there is bias in automated facial recognition and the associated datasets, resulting in lower accuracy in recognising darker-skinned

[35] Blake Britain, "More Writers Sue OpenAI for Copyright Infringement Over AI Training," available at https://www.reuters.com/technology/more-writers-sue-openai-copyright-infringement-over-ai-training-2023-09-11/ (accessed 30 December 2023).
[36] The UNESDOC Digital Library, "Recommendations on the Ethics of Artificial Intelligence" (2021), available at: https://www.unesco.org/en/articles/recommendation-ethics-artificial-intelligence (accessed 27 December 2023).

individuals which may affect women.[37] These biases which stem from their programming and data sources therefore raise the issue of whether individuals who are victims of such bias can successfully seek redress for damages caused by AI or its owner within the purview of section 42 of the 1999 Constitution, which prohibits discrimination, and/or related relevant laws. This issue raises profound ethical concerns as AI systems are unarguably not neutral. As such, AI systems have the potential to deepen existing biases, threaten human rights more, and further compound already existing inequalities and inequities.[38]

The consequence would be the fostering of the marginalisation of minority groups in the legal industry. As succinctly underscored by Gabriel Ramasso, in no other field is the ethical compass more relevant than in artificial intelligence.[39] AI technology brings major benefits in many areas, but without the ethical checks, there is the risk of generating bias and discrimination, which only challenge our collective human rights and freedoms.[40] To address this issue, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) formulated the first global standards on AI ethics which was adopted in November 2021. This global policy known as the UNESCO Recommendation on the Ethics of Artificial Intelligence imposes an obligation on its 193 member states (of which Nigeria is one) both as actors and as authorities responsible for developing legal and regulatory frameworks throughout the entire AI system life

[37] NitheshNaik et al, "Legal and Ethical Consideration in Artificial Intelligence in Healthcare: Who Takes Responsibility?" available at: https://www.frontiersin.org/articles/10.3389/fsurg.2022.862322/full (accessed 27 December 2023).
[38] Ibid.
[39] Gabriela Ramos, "Assistant Director-General for Social and Human Sciences of UNESCO," available at https://www.unesco.org/en/artificial-intelligence/recommendation-ethics?hub=32618 (accessed 27 December 2023).
[40] Ibid.

cycle, to ensure that they provide ethical guidance to all AI actors in their jurisdiction, including the public and private sectors, by providing a basis for ethical impact assessment of AI systems.[41] This policy enjoins that since living in digital societies requires matching evolutionary practices, ethical reflections, responsible design practices, and new skills, then recourse should be given to the broader implications of AI integration. The aim is to ensure that it reflects the protection of human rights and dignity, based on the advancement of fundamental principles such as transparency and fairness.[42] Unfortunately, there is a glaring reluctance on the part of the Nigerian legal system to incorporate or adopt these recommendations as the legal category of AI systems is even still in question, making it more difficult to determine who to hold responsible when an ethical breach arises.

2.6 AI Potential to Interfere with Employability and the Labour Market

Another issue posing a challenge is the question of whether AI will usurp the human job market. This is so since most devices can function in the manner that humans do, especially now that those that can mimic human psychology and empathy have been manufactured. Regardless, it is believed that AI assistance will only help humans improve their work lives and not replace them. Gartner[43] canvasses that although the

[41] The UNESDOC Digital Library, "Recommendations on the Ethics of Artificial Intelligence" (2021), available at: https://unesdoc.unesco.org/ark:/48223/pf0000381137 (accessed 28 December 2023).
[42] The 2019 Preliminary Study on the Ethics of Artificial Intelligence by the UNESCO World Commission on the Ethics of Scientific Knowledge and Technology (COMET) (which) recommends that specific attention should be paid to the ethical implications of AI systems in the central UNESCO domains, such as education, information and communication, culture and science.
[43] Gartner Newsroom, "Gartner says Artificial Intelligence will create more jobs than it eliminates," (2017),available at:https://www.gartner.com/en/newsroom/press-releases/2017-12-13-gartner-says-by-2020-artificial-intelligence-will-create-more-jobs-than-it-eliminates#:~:text=AI%20Will%20Create%202.3%20Million,become%20a%20positive%20job%20motivator. (accessed 30 December 2023).

widespread adoption of AI in diverse sectors of life will have a significant impact on the job market, these predictions are, as a matter of fact, overly pessimistic. In his words, "AI will become a positive job motivator and even create more jobs." Similarly, other AI and Data thought leaders contend that all significant innovations in the past were associated with a transition period of temporary job loss, followed by recovery and business transformation.[44] However, despite these experts pointing out the potency of AI to create more jobs, there is nonetheless no doubt that the integration of AI in the legal profession will lead to job displacement and unemployment in the future, especially with persons who are largely unskilled or technically inclined operators whose services will be rendered obsolete by the evolution of technology that leverages law-related algorithms. The result will be fewer human legal roles overall and fewer generalist roles in particular, with new roles emerging such as legal process managers and legal technicians.[45]

3.0 CONCLUSION AND RECOMMENDATIONS

Without a doubt, the evolution of technology continues to revolutionise our commercial lifestyle, leaving a humongous trail of opportunities and innovations in its wake for the Nigerian legal system to leverage. Indeed, the future is technology and AI will continue to broaden its wings over aspects of human issues. The benefits of AI perhaps mostly outweigh its cons and thus legal frameworks should be adopted to harmonise its integration and make its use more efficacious. Thus, there is a necessity for a solid and unambiguous legal framework to address these pervading issues. Although fast-paced

[44] Ibid.
[45] Ibid.

technological developments and advancements usually pose regulatory challenges, there is a need for an appropriate confluence of technology and the legal profession and this can be done in the following ways.

On the issue of difficulty in ascertaining the status of AI, the law should be amended or enacted to accommodate the AI trend because as the historical school of thought posited, law ought to grow with the growth of the people and be strengthen with the strength of the people. Hence, the existing definition of persons under the LPA should be expanded to cover this loophole.

On the question of liability, it is fundamentally necessary for the relevant Nigerian Legal framework to be overhauled to clothe the issue of liability (especially criminality liability) with the garb that can hold the user or programmer criminally liable in the event of criminal misconduct or harm from such use. Additionally, on the ethical dilemma of bias, it is pertinent that Nigeria adjusts to the emerging and evolving global best practices, such as those in the EU Regulation and the UNESCO Recommendation.

Furthermore, it is evident that the entire issue surrounding AI revolves around the nonexistence of a legal and regulatory framework to address the concerns. Thus, legal frameworks should be established to particularly respond to the concerns emanating from the use of AI as the extant legal regime is not immediately and directly suitable to match the AI wave. This is because law-making and regulations need to be more proactive, dynamic, and responsive to technological advancements

Finally, it is advised that AI integration will be more effective in Nigeria especially in the justice sector, if there are enabling infrastructures in place for its operations. For

instance, the judiciary has been wailing about the digitisation of the justice system using AI tools, but it has been more talk than action because the government is not implementing its promises of enhancing the legal industry through technological innovation.

SEEDS OF STRIFE: UNRESOLVED LAND GRIEVANCES AND ELECTORAL VIOLENCE IN KENYA

Trevor Kamau*

ABSTRACT

During electoral seasons, citizens often engage in violence to ensure their preferred candidates gain power. Disputed electoral results are a major factor but not the only reason for Kenya's recurrent post-election violence. This paper argues that the politicisation of land issues and unresolved land grievances in developing countries, including Kenya, enable opportunistic politicians to incite violence, with elections acting as a catalyst for clashes over land grievances. The paper examines the connection between land issues and post-election violence, analysing Kenya's history since adopting multiparty democracy and the tribal clashes around elections. It argues that land grievances provide politicians with a means to incite tribal attacks, leading to ethnic evictions and violence. The paper illustrates how tribal politics and land ownership conflicts in Kenya, particularly in the Rift Valley, are manipulated by politicians to weaken opponents or cut off their support.

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1.0 INTRODUCTION

All Kenyans collectively own the territory that constitutes the Republic of Kenya.[1] Land is a very valuable resource, land delineates Kenya's borders;[2] and as such, land and politics are inseparably linked. In addition, land is necessary for human survival and growth. It is seen as an asset as well as a measure of economic success. Unfortunately, this land has not been equally held in the society. Over time, those in positions of authority have altered land ownership and holding, in ways that benefit them or their allies.

Land-related tribal conflicts are a common occurrence in Kenya. For example, land conflicts were blamed for tribal conflicts that occurred in the 1990s in the districts of Kakamega, Kisumu, Narok, and Kisii.[3] Numerous conflicts that have enveloped Kenya have been fuelled in large part by ethnicity and the way the land question has been handled in the country since colonial times.[4] Consequently, these tensions have created conflict between ethnic groups and tribal interests. In particular, violent conflicts have erupted between ethnic groups and communities dispossessed of their land during colonial times—and over competing territorial claims.[5]

Some researchers argue that politicians frequently resort to violence in closely contested elections to manipulate voter behaviour, reduce turnout, or disrupt voting patterns through the use of strategies like evictions and displacements. Moreover, they

[1] Article 61(1), Constitution of Kenya (2010).
[2] Article 5, Constitution of Kenya (2010).
[3] Telewa M., Yahya Mohamed, 'Clashes have left several dead and thousands homeless: Terror in Trans Nzoia,' The *Daily Nation* (Friday, 3 January 1992), p.13
[4] Republic of Kenya, *The Final Report of the Truth, Justice and Reconciliation Commission of Kenya*, vol. IIB, 3 May 2013 version, p. 124.
[5] Ibid at p. 296.

argue that politicians and incumbent governments may employ pre-election violence as a strategy to diminish political competition, while post-election violence might be utilised in response to citizen protests over election outcomes or as an attempt to overthrow an incumbent leader.[6]

2.0 AFRICAN PERSPECTIVE ON LAND HOLDING

It would be crucial to first comprehend the value placed on land in Kenya and throughout Africa before proceeding to analyse why and how land would serve as a mobilising tool for electoral violence. Accordingly, this part addresses the value placed on land ownership and how Kenyan and African societies have perceived it.

Prior to colonisation, the majority of communities were made up of individuals with similar heritage and cultural practices. They would live on one section of the land and leave the remainder for commercial use. [7] Pastoralist communities would let their cattle graze on the common areas while farming communities used the land for their operations without any disputes over their ownership.[8]

In addition to being viewed as a political or economic resource, land is also valued as a transgenerational asset because it is held for the benefit of future generations as well as the living. It is a medium that both within and between generations, defines and

[6] Emilie Hafner-Burton, Susan D. Hyde and Ryan S. Jablonski, 'When Do Governments Resort to Election Violence? '(January 2014) Volume 44 Issue No. 1, *British Journal of Political Science*, pp. 155, 157, available at http://dx.doi.org/10.1017/S0007123412000671 (accessed 28 January 2024).
[7] Eric Mulevu, 'A Critical Analysis of the extent to which the National Land Commission addresses the Land Question in Kenya' Unpublished LLM Thesis, University of Nairobi, Nairobi Kenya, p. 15, available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/102183/Mulevu_A%20Critical%20Analysis%20of%20the%20Extent%20to%20Which%20the%20National%20Land%20Commission%20Addresses%20the%20Land%20Question%20in%20Kenya..pdf?sequence=1 (accessed 31 December 2023).
[8] Ibid.

unites social and spiritual relationships.[9] The term "yet-to-be-born," as opposed to "unborn," is used by the Bantus to emphasise the certainty of their birth and to establish the reason behind the duty to protect their property. [10] Therefore, land belongs to a large family that includes many deceased, few living, and countless unborn members. For this reason, some have rightly argued that forcing Africans off their land is an act of great injustice and that even in cases where people leave their homes voluntarily, there is a fundamental severing of ties that cannot be repaired and frequently results in psychological issues.[11]

Certain communities also considered land to be a part of a spiritual cosmology. There are holy places in the country where people performed religious and spiritual rites, including offerings and sacrifices. According to Jomo Kenyatta, the land provided the Agikuyu with the necessities of life, enabling them to attain both spiritual and mental fulfilment.[12] Thus, through contact with the earth where the ancestors are buried, communication with the ancestral spirits is sustained.[13] To them, the earth is the 'mother of the tribe.'[14] Kenyatta further explains that the mother bears her burden for nine months while the child is in her womb, and then for a short period of suckling, but then the soil feeds the child throughout a lifetime and after death, the soil nurses

[9] Republic of Kenya and Njonjo C, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration*. (Nairobi: Kenya, 2002), p. 19.
[10] Bénézet Bujo, 'The Ethical Dimension of Community; The African model and the dialogue between North and South' (1998) *Paulines Publications Africa, Nairobi*, p. 27.
[11] Francis Kariuki, Smith Ouma, and Raphael Ng'etich, *Property Law*, (Strathmore University Press, Nairobi, 2016, p. 53.
[12] Ibid, p, 55.
[13] Ibid.
[14] Ibid.

the spirits of the dead for eternity making it the most sacred thing above all that we dwell in or on it.[15]

Furthermore, referring to the well-known *SM Otieno case*,[16] which involved a disagreement over a Luo man's final resting place — that is, whether to bury him on his ancestral land, Nyalgunga, or in his marital home, Upper Matasia — the court decided to support the Luo clan by allowing them to bury the deceased on their ancestral land. This decision was made in light of the relationship between land and culture.

Land and culture are intertwined. For instance, in sealing marital ties, an animal had to be slaughtered and its blood left to flow on the earth in the name of honouring the ancestors, failing which, all aspects of marriage including its fruitfulness in terms of children were considered jeopardised from the outset.[17] Libation was also poured for the ancestors during important rituals and occasions to honour them.

For these reasons, in Kenya and Africa at large, land is such an important asset and aspect of society, and as such, it may not be easily exchanged.

3.0 TRACING THE HISTORY OF LAND IN THE KENYAN RIFT VALLEY

The Rift Valley has been a centre of conflicts over land. Together with the majority of the formerly productive White Highlands, this multi-ethnic region has the highest vote share nationwide. [18] This section takes up the claim that the way colonialists and the

[15] Ibid.
[16] Virginia Edith Wambui Otieno v Joash Ochieng Ougo and Omollo Siranga (1987) eKLR.
[17] Supra note 11, p. 59.
[18] Ibid, p. 422.

first two post-independence administrations handled the land issue in this area created the conditions for the tribal conflicts that occurred there in the 19th and 20th centuries.

The Rift Valley province was home to a number of pre-colonial communities, including the Maasai, Samburu, and Kalenjin. Some of the most fertile regions in Kenya were divided up by the colonial government and set aside for European cultivation, giving other communities a chance to settle there as squatters, who supplied cheap labour for the settler farms.[19] The Mau Mau movement gained momentum as a result of the colonial government's attempts to suppress the rights of farm labourers to use the land for farming on their own account and to reduce the number of Africans on settler farms through expulsions.[20]

Agikuyu, Ameru, and Aembu groups, on the other hand, were the original inhabitants of the Central Province. Given that a large portion of the land was likewise alienated for settler cultivation, leaving the indigenous communities as squatters on the settler fields, the situation was not much different. Even though they established white highlands, the colonial powers restricted access to land rights while indirectly expanding land access.[21] The goal was to encourage migration into the White Mountains,

[19] Mwangi S. Kimenyi and Njuguna S. Ndung'u, 'Sporadic ethnic violence: Why has Kenya not experienced a full-blown civil war?' (2005), p. 138 in Paul Collier and Nicholas Sambanis (eds), *Understanding Civil War: Evidence and Analysis (*The World Bank, 2005), available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=a2a0147ab84f76e470c76f2607bbe9fa72a6b685#page=141 (accessed 28 January 2024).

[20] Catherine Boone, 'Land Conflict and Distributive Politics in Kenya' (April 2012) Vol. 55, No. 1, *African Studies Review*, p. 79, available at https://www.jstor.org/stable/41804129 (accessed 28 January 2024).

[21] Mwangi S. Kimenyi and Njuguna S. Ndung'u, Sporadic ethnic violence: Why has Kenya not experienced a full-blown civil war? (2005), p 138 in Paul Collier and Nicholas Sambanis *eds Understanding Civil War: Evidence and Analysis (*The world Bank, 2005), available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=a2a0147ab84f76e470c76f2607bbe9fa72a6b685#page=141 (accessed 28 January 2024).

which would drastically increase the Kikuyu population's range and cause them to relocate outside of Central Province.[22]

Furthermore, in the 1950s, during the state of emergency, land consolidation occurred in this region. Individuals who benefited from this procedure were those who supported the government rather than the Mau Mau uprising. When the state of emergency ended, many political inmates returned home only to learn that their land had been seized by colonial loyalists. [23] As a result, some chose to travel to cities in search of work and business opportunities, while others moved to the Rift Valley in anticipation of land redistribution after attaining independence.[24] Another group reunited with their family who had settled in the Rift Valley decades ago, and lived as squatters on land owned by settlers.[25] As a result, when partial redistribution of land previously owned by settlers began, these squatters became the immediate benefactors.[26]

In terms of land ownership, injustice occurred when the British colonists took land from indigenous people, only for politically powerful characters to restore it once Kenya attained independence in 1963. Rather than restoring stolen properties to their rightful owners, these politically connected individuals took advantage of the departure of white settlers, stealing land and leaving pre-existing owners landless.[27] Despite Kenya's

[22] Ibid.
[23] Walter Oyugi, 'Politicised Ethnic Conflict in Kenya, A periodic Phenomenon' (Addis Ababa, 2000) p. 7, available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=59065674ab2e6c78ba501257a18e6a6132b18e63 (accessed 31 January 2023).
[24] Ibid, at p. 7.
[25] Ibid
[26] Ibid.
[27] Aquiline Tarimo, 'Politicisation of Ethnic Identities: The Case of Contemporary Africa,' (2010) Volume 45 Issue No. 3 p. 297–308. *Journal of Asian and African Studies,* available at https://doi.org/10.1177/0021909610364775 (accessed 28 January 2024).

first post-independence administration implementing the 'willing-buyer-willing-seller' policy, the situation for indigenous communities in the Rift Valley did not improve.

This can be due to the acts of the Kikuyu, Meru, and Embu populations, which took advantage of the opportunity and founded various land-buying companies. Throughout the 1960s and 1970s, these organisations were instrumental in facilitating the settlement of hundreds of thousands of Kikuyu in the Rift Valley, a region previously inhabited by the Kalenjin, Maasai, and other pastoral communities.[28] It is worth noting that the aforementioned communities were not the only ones to relocate to the Rift Valley since the Kisii, Luo, and Luhya groups also moved to the Rift Valley and secured land with the help of Jomo Kenyatta's administration.[29] The formation of settlement plans and land purchase corporations in the Rift Valley may be interpreted as introducing ethnic considerations to the land, resulting in political and tribal confrontations. During the 1970s, the Kenyan government took over the majority of European-owned farms, which it then sold or transferred to individuals and businesses through government-financed agreements.[30] The government acquired property in the Rift Valley, and around half of it was subdivided and allocated to create small-scale farms for residents or communities relocating to the region.[31]

Despite protests from indigenous populations in the Rift Valley, the settlement pattern continued. For example, in 1969, the Nandi community expressed their dissatisfaction

[28] Supra, note 23, p. 7.
[29] Ibid.
[30] Catherine Boone, 'Land Conflict and Distributive Politics in Kenya' (April 2012) Vol. 55, No. 1, *African Studies Review*, p. 79, available at https://www.jstor.org/stable/41804129 (accessed 28 January 2024).
[31] Ibid, at p. 79.

at a meeting in Nandi Hills known as the "Nandi Declaration." During this assembly of radical politicians, they opposed what they saw as an intrusion on their ancestral territory by "outsiders." [32] Criticising Kenyatta's selling of Nandi land to non-Nandi individuals, they referred to the settlement plans as "Kenyatta's colonisation of the Rift."[33] Catherine Boone also added that in the 1950s and 1960s, politicians purporting to represent Indigenous Rift Valley tribes passionately opposed this settlement pattern, pushing for the return of land taken from them during the British colonial era. [34]

President Kenyatta attempted to calm this rebellion by enlisting the help of influential Kalenjin personalities in the administration, with Vice President Daniel Moi playing a key role.[35] However, this was only a temporary solution, as Moi took over as the president a few years later. During his first decade in power, President Moi was able to maintain control of the situation by leveraging the political-administrative culture developed during the one-party era. Concurrently, he created a mechanism to limit the ability of non-indigenous groups in the Rift Valley to obtain further territory in the region.[36]

It is clear that successive Kenyan government administrations have used their discretionary authority in granting land in the Rift Valley to deliberately construct political support that will improve their position against rivals. [37] As a result, disputes

[32] Supra, note 23.
[33] Supra, note 31.
[34] Ibid, at p. 82.
[35] Supra, note 23.
[36] Ibid.
[37] Catherine Boone, supra, note 31, at p. 78

over land in Kenya are closely linked to differences about how state power has been used for political purposes.[38]

4.0 THE INSIDER AND OUTSIDER NARRATIVES IN LAND OWNERSHIP

One could wonder why communities would mercilessly evict their neighbours or commit destructive acts and violence against groups with whom they had previously coexisted peacefully for many years. This section attempts to establish a link between how land has been allocated and held in the Rift Valley and how politicians have used this opportunity to advance their interests, often creating insecurity in land ownership. It adopts a primary argument that when politicians feel a threat to their positions, they rely on land grievances to regain political mileage.

As previously stated, a major chunk of land in the Rift Valley was allocated to non-indigenous communities who were commonly referred to as "invaders," "foreigners," or "immigrants." Politicians regularly use this argument to persuade their supporters that their land rights were being infringed, tying the outcome of an election to their fate. They created a narrative of potential political and territorial loss for these perceived intruders, laying the groundwork for violence. This dynamic gave rise to insider and outsider narratives, which influenced the nature of the violence seen throughout the Rift Valley. The Rift Valley's indigenous groups regarded themselves as oppressed and disadvantaged as a result of the new settlement pattern, which appeared to benefit non-indigenous communities. This created a sense of unease among them, as they feared that the growing flood of immigrants into their area would result in the loss of

[38] Ibid, at p. 78.

both their land rights and political influence in the region. The indigenous populations saw the uninvited arrivals as foreigners seeking to establish dominion over their territory. This narrative served as the foundation for later violence aimed at driving them away from their land.

Land ownership remained a major source of controversy in the Rift Valley during the Kenya African National Union (KANU) government. Opportunistic politicians took advantage of the situation to exploit local concerns and encourage violence in order to gain electoral and political support.[39] Politicians and supporters of the ruling party, as well as many regular individuals, fiercely lobbied for the return of the alleged "stolen" lands to their "original owners."[40]

The commencement of multiparty democracy in 1991 caused the elites loyal to President Moi to see a danger to their political authority and interests. In response, they renewed proposals for territorial delineation, designating particular areas, like as the Rift Valley, as a "KANU area." KANU's opponents were labelled as "settlers" and "foreigners."[41] The goal was to zone out certain areas, preventing the opposition from receiving the necessary percentage of votes.[42] The Daily Nation Newspaper in 1992 noted an instance where Luo families fled their homes in Kericho after leaflets

[39] Ibid at p. 78.
[40] Catherine Boone, 'Politically Allocated Land Rights and the Geography of Electoral Violence: The Case of Kenya in the 1990s', (2011) Volume 44 Issue 10, *Journal of Comparative Political Studies*, pp. 1327, available at https://doi.org/10.1177/0010414011407465 (accessed 28 January 2024).
[41] Francis Kariuki, Smith Ouma, and Raphael Ng'etich, *Property Law*, (Strathmore University Press, Nairobi, 2016), p. 423.
[42] Ibid, at p. 59.

threatening them with death were circulated, something which saw ten persons killed from the tribal attacks.[43]

5.0 ELECTORAL VIOLENCE AS A TOOL FOR POLITICAL DOMINATION AND PUNISHMENT: LAND, INCITEMENT, AND DISPLACEMENT IN KENYA

The above section has illustrated how opportunistic politicians rely on pre-existing land grievances to divide and turn communities against each other, something which created the "insider" and "outsider" narratives. This section adopts an argument that elections provide a perfect opportunity to evict members of opposing communities either as a strategy to win the elections or as a punishment mechanism for members of opposing communities.

It is important to note that occurrences of electoral violence typically occur before or immediately after an election. During each election cycle, candidates predict whether the outcome is likely to favour them. If they believe the outcome will be bad, they may resort to pre-election violence as a strategic technique to reduce political competition.[44] Post-election violence is often caused by members of the general public expressing dissatisfaction with the election results. Notably, these protests can undermine the credibility of the incumbent and, in some cases, gather momentum to unseat them.[45] Existing research indicates that post-election protests are often triggered by factors such as election violence and fraud.[46]

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[43] Mwatela K., Kennedy Masibo, and Caleb Atemi, '10 Killed in more tribal fighting' *The Daily Nation*, (Monday, 16 March 1992), pp. 1-2.
[44] Emilie Hafner-Burton, Susan D. Hyde, and Ryan S. Jablonski, 'When Do Governments Resort to Election Violence? '(January 2014) Volume 44 Issue No. 1, British Journal of Political Science, pp. 155, available at http://dx.doi.org/10.1017/S0007123412000671 (accessed 28 January 2024).
[45] Ibid, at pp. 156- 157.
[46] Ibid, at p. 157.

While an incumbent may use pre-election violence to reduce electoral competition from opponents, this technique can unintentionally increase the likelihood of post-election unrest.[47] As previously stated, post-election protests threaten the incumbent government's authority, potentially causing the incumbent to intensify the use of violence in order to silence popular discontent and maintain power. This, in turn, may spark post-election violence.[48]

During the 1992 electoral cycle, violence in the rift valley started way before the elections were held, while in 2007, violence broke out in various parts of the country immediately after the announcement of the presidential election results. This section adopts an argument that this is no coincidence seeing that the violence and evictions would be done for either of the three reasons listed below:

i. Evictions and violence against opposing communities would be used as a strategy to win the elections.

ii. Evictions and electoral violence would be used to punish members of a community simply because they supported and/or voted for a particular candidate.

iii. Cleared-up land would be used to reward communities or gain political support from communities.

To begin, electoral violence may be used in an electoral season as a strategy to achieve victories and increase political representation. In this scenario, pre-election violence

[47] Ibid.
[48] Ibid.

may erupt with the intention of instilling fear and worry in voters, compelling them to leave their homes and, as a result, prevent them from voting. As previously stated, the implementation of multiparty democracy in 1991 caused the elites connected to President Moi to see the fear of losing political power, jeopardising their political interests. In response, they reignited calls for territorial delineation, referring to regions opposed to KANU as 'settlers and outsiders.'[49] The goal was to zone out the region and prevent the opposition from obtaining a minimum proportion of votes.[50] The series of violence in the Rift Valley functioned as a motivation to mobilise potential supporters and encourage voting, while also attempting to reduce the opposition's vote share by discouraging or stopping likely voters connected with opposition parties from participating in the elections.[51] According to Catherine Boone, the land regime was critical, not just in identifying the locations of much of the violence, but also in shaping the systems and processes that enabled rural violence to occur.[52] When the elections were held on 29 December 1992, many Kenyans were unable to vote owing to displacement and damage caused by ethnic conflicts.[53] Many eligible voters had misplaced important documents such as their identity cards, which would have aided their voter registration.[54] Furthermore, several people were unable to return to their

[49] Francis Kariuki, Smith Ouma and Raphael Ng'etich, *Property Law* (Strathmore University Press, Nairobi, 2016), p. 59.
[50] Ibid, at p. 59.
[51] Catherine Boone, 'Land Conflict and Distributive Politics in Kenya' (April 2012) Vol. 55, No. 1, *African Studies Review*, p. 86, available at https://www.jstor.org/stable/41804129 (accessed 28 January 2024).
[52] Catherine Boone, 'Politically Allocated Land Rights and the Geography of Electoral Violence: The Case of Kenya in the 1990's', (2011) Volume 44 Issue 10, *Journal of Comparative Political Studies*, pp. 1327, available at https://doi.org/10.1177/0010414011407465 (accessed 28 January 2024).
[53] Human Rights Watch, 'Divide and Rule: State- Sponsored Ethnic Violence in Kenya' p. 35, available at https://www.hrw.org/reports/1993/kenya1193.pdf (accessed 28 January 2024).
[54] Ibid.

home regions to vote. According to writers such as Kaimenyi and Ndung'u, the violence in the Rift Valley was intended to disrupt the voter registration process prior to the elections, preventing thousands of dissenters in war zones from voting and therefore ensuring a good outcome for KANU.[55]

Even before the elections began in 2007, there was violence in the Kuresoi and Molo constituencies, as well as the Mt. Elgon region. During this time, towns were specifically targeted and displaced to disrupt the vote by evicting settled populations.[56] A part of the population was dissatisfied with the December 2007 election results, while others were frustrated due to the intentional postponement of addressing longstanding land grievances that had been haunting society since independence.[57] Consequently, electoral violence provided an opportunity to rectify some of the historical injustices committed against specific communities. [58]

In 2017, leaflets and messages circulated in the informal settlements of Nairobi, warning of impending evictions.[59] Further, during the recently concluded elections in July 2022, roughly 10 days before the general elections, the Daily Nation Newspaper reported that while the Azimio flag bearer, Mr. Odinga campaigned in the Rift Valley,

[55] Mwangi S. Kimenyi and Njuguna S. Ndung'u, Sporadic ethnic violence: Why has Kenya not experienced a full-blown civil war? (2005), p 138 in Paul Collier and Nicholas Sambanis *eds Understanding Civil War: Evidence and Analysis (*The World Bank, 2005), available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=a2a0147ab84f76e470c76f2607bbe9fa72a6b685#page=141 (accessed 28 January 2024).
[56] Anderson D. and Lochery L., 'Violence and Exodus in Kenya's Rift Valley, 2008: Predictable and Preventable?' (2008) Volume 2 Issue 2, *Journal of Eastern African Studies*, p 331, available at https://doi.org/10.1080/17531050802095536 (accessed 31 December 2023).
[57] Aquiline Tarimo, 'Politicisation of Ethnic Identities: The Case of Contemporary Africa', (2010) Volume 45 Issue No. 3 pp. 297–308. *Journal of Asian and African Studies,* available at https://doi.org/10.1177/0021909610364775 (accessed 28 January 2024).
[58] Some K., "How state land policy shaped conflict" *Daily Nation* Kenya 10 February 2008, p. 9.
[59] Mutisya Joshua, 'Violence related to campaigns peaked in July' *Daily Nation* 5 August 2017.

an area presumed to be the opponent's stronghold (Kenya Kwanza), he urged the people in the region to remain steadfast and not be intimidated into voting for a particular candidate.[60] Further, on 2 August 2022, the Standard Newspaper noted that the then Deputy President who doubled up as Kenya Kwanza's flag bearer cautioned the national government officials of circulating hate leaflets in parts of Uasin Gishu county, ordering members of certain communities to leave Uasin Gishu county saying that some state operatives were out to plant seeds of discord and drive a wedge between the communities living in the Rift Valley. Similar sentiments were echoed by his co-principals and allies: Rigathi Gachagua; Musalia Mudavadi, and Moses Wetangula.[61] Additionally, elders from the Uasin Gishu county also condemned these hate leaflets and called for peaceful polls stating that the residents have coexisted peacefully and do not anticipate violence.[62] Similar sentiments were reported by the Star Newspaper and the Standard Newspaper, roughly four days to the polls.[63] This, therefore, shows that the political strategies of incitement, intimidation, and evictions that were used to win elections in the past are still arguably used in the present and might have a significant impact on the polls.

[60] Matara E, 'Raila Launches get-the-vote out strategy as he rallies Nakuru' *Daily Nation*, Friday 29 July 2022; See also Citizen TV, 'Odinga unveils "Firimbi Movement" to rally voters on August 9' (YouTube), available at https://www.youtube.com/watch?v=IAeYytTEtJw (accessed 31 July 2024).
[61] The Standard Team, 'Ruto Says State-Sponsored chaos will be used to deny him victory', *The Standard*, Tuesday 2 August 2022, 8. See also Citizen TV, 'DP Ruto Wants officials 'fear mongering' in the Rift Valley Punished' (YouTube), available at https://www.youtube.com/watch?v=SBQIP9ht5ZM (accessed 31 July 2024).
[62] Kolongei L., 'Elders Condemn hate leaflets, call for peaceful polls' *The Standard*, Tuesday 2 August 2022, 8.
[63] Kipkemoi F, 'DP Ruto alleges plot to incite communities in the Rift Valley' *The Star*, Thursday 4 August 2022, 8. See also Mugambi J and Njugune G, 'Kenya Kwanza now says hate leaflets authored by the state' Thursday 4 August 2022, 7.

Second, evictions and electoral violence were used as punishment against people of a community just because they supported and/or voted for another candidate. For example, in 1992, the Daily Nation reported an incident in which an Assistant Minister for Water in the KANU Regime said that ethnic confrontations in the Mt. Elgon region had been exacerbated by Forum for Restoration of Democracy (FORD) members. This was owing to FORD supporters' perception that if the new government (FORD) assumed power, Sabaots would be evicted and pushed to Sebei, Uganda.[64] Furthermore, influential KANU leaders attempted to intimidate and/or punish possible opposition votes belonging to "rival" ethnic groups. The goal was to discourage them from voting and/or forcibly remove them from their homes and farms, thereby preventing them from voting on election day.[65] According to Throup and Hornsby, the land-related violence experienced in the Rift Valley in the 1990s was motivated by the dual goals of securing resources for KANU-supporting areas and punishing opposition supporters.[66] It is clear that during the 1990s, the state's coercive authority to distribute and reallocate land was selectively employed to punish opposition supporters,[67] resulting in areas that were not connected with the ruling party becoming targets of expropriation.[68]

[64] Njeri Mwangi, 'Clashes: Many Parties blamed' *The Daily Nation,* Thursday, 2 January 1992, 4.
[65] Catherine Boone, 'Politically Allocated Land Rights and the Geography of Electoral Violence: The Case of Kenya in the 1990's', (2011) Volume 44 Issue 10, *Journal of Comparative Political Studies*, p. 1314, available at https://doi.org/10.1177/0010414011407465 (accessed 28 January 2024).
[66] Throup David, Hornsby C., "Multiparty Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election" (Athens: Ohio University Press, 1998), p. 542-543.
[67] Catherine Boone, 'Politically Allocated Land Rights and the Geography of Electoral Violence: The Case of Kenya in the 1990's', (2011) Volume 44 Issue 10, *Journal of Comparative Political Studies*, p. 1328, available at https://doi.org/10.1177/0010414011407465 (accessed 28 January 2024).
[68] Ibid.

In 2007, the Rift Valley violence was characterised by community discussions about territorial conflicts and private property rights.[69] This form of violence had ethnic implications, with the goal of driving non-indigenous groups out.[70] The rationale for this was that these communities had voted for the government and a Kikuyu candidate, despite being located in the Kalenjin's native territory. [71] Additionally, from the time when the referendum was held in 2005, politicians across the country rallied supporters against ethnic 'others.'[72] The rhetoric in the Rift Valley was especially caustic, characterising local Kikuyus as beneficiaries of state favouritism, 'guests' who had bought Kalenjin land during Kenyatta's reign. They were portrayed as a group that did not appreciate their 'hosts,' consistently voting against local preferences, and named local farms and trading centres after locations in Central Province.[73] However, the Commission of Inquiry into Post-Election Violence (CIPEV) observed that in the Rift Valley, the attacks were specifically aimed at members of the Kikuyu and Kisii communities perceived to be affiliated with the Party of National Unity (PNU) and President Kibaki, both of whom were viewed as beneficiaries of the "rigged election."[74]

Finally, the reclaimed property could be used to reward or gain political support from local communities. Land seizures and resettlements were used to boost the ruling

[69] Karuti Kanyinga, 'The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya' (2009) Volume 27 (Issue 3) *Journal of Contemporary African Studies*, p. 340, available at https://doi.org/10.1080/02589000903154834 (accessed 28 January 2024).
[70] Republic of Kenya, 'Commission of Inquiry into the Post-Election Violence 2008'.
[71] Karuti Kanyinga, The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya, (2009) Volume 27 (Issue 3) *Journal of Contemporary African Studies*, p. 340 available at https://doi.org/10.1080/02589000903154834 (accessed 28 January 2024).
[72] Gabrielle Lynch, 'Courting the Kalenjin: The Failure of Dynasticism and the Strength of the ODM Wave in Kenya's Rift Valley Province' (October 2008) Volume 107 Issue 429, *African Affairs*, p. 564, available at https://doi.org/10.1093/afraf/adn060 (accessed 28 January 2024).
[73] Ibid.
[74] Republic of Kenya, 'Commission of Inquiry into the Post-Election-Violence,' pp. 53-54.

party's popularity and voter turnout, particularly among destitute and landless Kalenjin and Maasai communities who may have questioned the contributions of the socioeconomic elite and the government as a whole.[75] According to Throup and Hornsby, the land-related violence in 1991-92 and 1993-94 was motivated by the desire to secure resources for KANU-supporting communities while penalising opposition supporters.[76] Furthermore, various observers and researchers highlighted the Kalenjin's extensive takeover of abandoned property and land which was made possible by eviction.[77] Persistent tribal conflicts in the Rift Valley drastically altered land ownership patterns and reduced the presence of non-Kalenjin landholders in the region.[78] By the decade's end, a lasting and intentional redistribution of land had occurred in the Rift Valley.[79] In 2007, the Daily Nation thus reported:

> *In the Rift Valley, the fertile land has attracted the interest of most farming communities…. But now, threatened by the increasing population, some indigenous residents wish to reverse the trend and are determined to keep the immigrant communities away.*[80]

[75] Catherine Boone, 'Politically Allocated Land Rights and the Geography of Electoral Violence: The Case of Kenya in the 1990's', (2011) Volume 44 Issue 10, *Journal of Comparative Political Studies*, p. 1328, available at https://doi.org/10.1177/0010414011407465 (accessed 28 January 2024).
[76] Throup David and Hornsby C., 'Multiparty Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election'(Athens: Ohio University Press, 1998), pp. 542-543.
[77] Karuti Kanyinga,' The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya' (2009) Volume 27, (Issue 3) *Journal of Contemporary African Studies*, p. 341, available at https://doi.org/10.1080/02589000903154834 (accessed 28 January 2024).
[78] Catherine Boone, 'Politically Allocated Land Rights and the Geography of Electoral Violence: The Case of Kenya in the 1990's', (2011) Volume 44 Issue 10, *Journal of Comparative Political Studies*, p. 1328, available at https://doi.org/10.1177/0010414011407465 (accessed 28 January 2024).
[79] Catherine Boone, 'Land Conflict and Distributive Politics in Kenya', (April 2012) Vol. 55, No. 1, *African Studies Review,* p.88, available at https://www.jstor.org/stable/41804129 (accessed 28 January 2024).
[80] 'Population pressure at the center of crisis in Rift Valley' *Daily Nation*, 9 Feb 2008.

6.0 POLITICIANS AND THE MOBILISATION OF VIOLENCE

Politicians not only used land grievances to rally their supporters, but they also used state resources to fund, deploy, lead, and protect those carrying out activities such as home burnings, killings, expulsions, and land seizures.[81] This section argues that in many cases, politicians actively participated in plotting electoral violence against certain groups and, when necessary, encouraged members of their community to act against individuals from opposing communities. There were instances where they financially supported such violence, while the government in power either ignored it or, in certain cases, used state resources and apparatus to carry out the attacks. Arguably, the fear of losing power in an election could drive an incumbent to resort to various forms of political repression, including violence.[82]

To begin with, politicians would orchestrate the evictions, occasionally going as far as to encourage members of their own communities to act against individuals from opposing communities.[83] For instance, Mueller observes that these groups were usually formed, backed, or enabled by the state's security apparatus and provincial administration. Key KANU politicians, listed in both human rights and government commission findings, were responsible for organising youth gangs.[84]

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[81] Catherine Boone, 'Politically Allocated Land Rights and the Geography of Electoral Violence: The Case of Kenya in the 1990's' (2011) Volume 44 Issue 10, *Journal of Comparative Political Studies*, p. 1327, available at https://doi.org/10.1177/0010414011407465 (accessed on 28 January 2024).
[82] Emilie Hafner-Burton, Susan D. Hyde and Ryan S. Jablonski, 'When Do Governments Resort to Election Violence? '(January 2014) Volume 44 Issue No. 1, *British Journal of Political Science*, pp. 155, 157, available at http://dx.doi.org/10.1017/S0007123412000671 (accessed 28 January 2024).
[83] Materu F.S., The Post-Election Violence in Kenya: Domestic and International Legal Responses: Background to the post-election violence" *The International Criminal Justice Series*, Vol 2, T.M.C. (Asser Press, 2015) p. 34.
[84] Mueller Susane D., 'The political economy of Kenya's crisis' (2008) Volume 2, Issue 2, *Journal of East African Studies*, pp 185–210, available at https://doi.org/10.1080/17531050802058302 (accessed 28 January 2024).

Furthermore, during the 1991-1992 and 1996-1997 electoral cycles, persons characterised as "influential supporters of Moi" organised rallies in Rift Valley constituencies, pushing Maasai and Kalenjin populations to establish their land rights as the region's original occupants. They also threatened violence against the "immigrants" who had established in the former white highlands.[85] As previously stated, Lynch observes that politicians, members of the ruling party, and many ordinary individuals highlighted the importance of returning "stolen" land to its "original owners." [86] The politicians promised members of the Kalenjin, Maasai, and other pro-KANU tribes that they would pursue a policy known as "Majimboism," which essentially meant federalism. However, in practice, this amounted to ethnic cleansing.[87] Majimboism mandated that land be allocated based on ethnic identification, which resulted in violence against members of non-Rift Valley populations.[88] For some politicians, Majimboism was seen as a deceptive cover for a plot to unlawfully seize the property of non-indigenous communities in the Rift Valley province.[89]

In some cases, politicians actively orchestrated and oversaw planned violence, while the government used its official machinery and power to expedite evictions, sometimes deploying armed officers to carry them out. The Akiwumi inquiry focused on a specific

[85] Throup David and Hornsby C., *Multiparty Politics in Kenya: The Kenyatta and Moi States and the Triumph of the System in the 1992 Election*, (Athens: Ohio University Press, 1998), p. 80.
[86] Catherine Boone, 'Politically Allocated Land Rights and the Geography of Electoral Violence: The Case of Kenya in the 1990's', (2011) Volume 44 Issue 10, *Journal of Comparative Political Studies*, p. 1327, available at https://doi.org/10.1177/0010414011407465 (accessed 28 January 2024).
[87] Nation Team, "Rift Valley calls off "Majimbo Rally" *The Daily Nation,* Wednesday 11 September 1991, pp 1-2; Republic of Kenya, 'Kenya's Unfinished Democracy: A Human Rights Agenda for the New Government'(December 2002) Vol 14, No. 10(A), , 5 Available at https://www.hrw.org/reports/2002/kenya2/kenya1202.pdf (accessed 28 January 2024).
[88] Ibid, Republic of Kenya,), p. 5.
[89] Nation Team, "Rift Valley calls off "Majimbo Rally" *The Daily Nation,* (Wednesday September 11, 1991), pp. 1-2;

occurrence in 1993 when the Luo community was evicted by police officers backed by bulldozers bearing government registration stamps, which demolished practically all of the houses. The ruthless and premeditated attacks on supposed "immigrants" attempted to push selected communities off their farms, economically cripple them, and inflict psychological damage, with armed officers frequently carrying out the evictions.[90] Politicians' involvement in tribal politics can be seen in the events of 1992 in Transzoia and sections of Bungoma Districts when the Saboti MP and KANU Chair voiced worry over the local MP and councillors' silence amid continuing hostilities. Political observers believe politicians played an important role in these incidents. [91] The National Council of Churches of Kenya's Cursed Arrow study, released in April 1992, blamed high-ranking government officials and linked Rift Valley violence to political objectives. The Inter-Parties Symposium Task Force Report released the same month, described organised violence under central leadership, frequently involving local administration and security forces, with high-ranking officials supposedly compensating warriors for their damaging deeds.[92] The Kilikumi Report, published in September 1992, linked politicians to tribal violence, claiming that attacks were politically motivated and planned by individuals close to the President. It discovered that government officials encouraged the violence and determined that it came from the misguided belief that some ethnic groupings might obtain property by driving others away. The study named Kalenjin government officials and security officers, presenting proof that warriors were hired

[90] Republic of Kenya, Report of the Judicial Commission appointed to Inquire into Tribal Clashes in Kenya (Akiwumi Report, 1999), Chaired by Hon Justice A.M Akiwumi, pp. 3, 30 and 31.
[91] Telewa M. and Yahya Mohamed, 'Clashes have left several dead and thousands homeless' *Daily Nation*, (Friday 3 January 1992), p 13.
[92] Africa Watch, "Divide and Rule: State- Sponsored Ethnic Violence in Kenya." p. 39.

and paid for by senior government officials, carried in government vehicles and helicopters, and frequently released by the provincial administration and security forces.[93]

In 2007, the Commission of Inquiry into Post-Election Violence (CIPEV) identified a pattern of planned and orchestrated violence by politicians, businesses, and criminal groups. Kikuyu gangs targeted people of the Luo, Luhya, and Kalenjin communities in slums such as Naivasha, Nakuru, and Nairobi. Similarly, organised Kalenjin adolescents in the North Rift attacked and ejected Kikuyus, implying that certain attacks targeted specific ethnic groups while omitting others entirely.[94]

Finally, politicians organised and carefully planned attacks. The Commission of Inquiry into Post-Election Violence (CIPEV) report emphasised the attacks' careful preparation, with victims receiving advance warnings and a large number of attackers deployed from locations other than the violence location. The presence of petrol and guns at numerous locations underlined the necessity for arrangements for acquisition, concealment, and transportation.[95] In the Kericho District, the Akiwumi report noted prophetic warnings given to the Luo community before their eviction,[96] and similar sentiments were recently expressed to non-indigenous communities in certain Rift Valley areas in the recently concluded general elections.[97]

[93]Ibid, pp. 39-41.
[94] Republic of Kenya, Commission of Inquiry into Post-Election Violence, p. 54.
[95] Ibid.
[96] Republic of Kenya, 'Report of the Judicial Commission appointed to Inquire into Tribal Clashes in Kenya (Akiwumi Report),' Chaired by Hon Justice A.M Akiwumi, p. 31.
[97] Matara E., 'Raila Launches get-the-vote out strategy as he rallies Nakuru', *The Daily Nation*, Friday 29 July 2022; 'Odinga unveils "Firimbi Movement" to rally voters on August 9' by *Citizen TV*, available at https://www.youtube.com/watch?v=IAeYytTEtJw (accessed 29 July 2022); The Standard Team, 'Ruto Says State-Sponsored chaos will be used to deny him victory,' *The Standard*, Tuesday 2 August

Moi was not a candidate in 2002, therefore Kalenjin political elites did not have to mobilise support for him.[98] Furthermore, the choice of Uhuru Kenyatta as the KANU candidate integrated Kikuyu-Kalenjin interests since Uhuru was perceived to preserve both Moi and Kalenjin interests while also protecting Kikuyu interests.[99] This factor elucidates the absence of ethnic clashes during the 2002 elections. The 2013 and 2017 elections were relatively peaceful, with few reported incidences of violence, especially in the Rift Valley. One may argue that William Ruto's collaboration with Uhuru Kenyatta established a sense of security in both communities, contributing to a decade of relative calm in the country.

7.0 THE LAND DEBATE DURING THE 2005 BOMAS DRAFT CONSTITUTION

The proposed constitution included a comprehensive framework for land administration, emphasising access and control while categorising land as public, community, or private.[100] It sought to provide equitable, efficient, and accountable landholding in Kenya,[101] with the state in charge of ensuring fair access to land and protecting landholders.[102] The state was expected to promote a favourable socioeconomic and legal environment for property creation, development, and management.[103] Unfortunately, the proposal was rejected in the 2005 referendum,

2022, 8; Kolongei L., 'Elders Condemn hate leaflets, call for peaceful polls', *The Standard,* Tuesday 2 August 2022, 8 ; Kipkemoi F., 'DP Ruto alleges plot to incite communities in the Rift Valley', *The Star*, Thursday 4 August 2022, 8; Mugambi J. and Njugune,' G Kenya Kwanza now says hate leaflets authored by the state,' Thursday 4 August 2022, 7.

[98] Francis Kariuki, Smith Ouma, and Raphael Ng'etich, *Property Law*, (Strathmore University Press:Nairobi, 2016), p. 423.

[99] Ibid, at p. 423.

[100] Article 78 (2), The Bomas Draft 2005.

[101] Article 77 (1). The Bomas Draft 2005

[102] Article 77 (2) The Bomas Draft, 2005.

[103] Article 84 (2) The Bomas Draft 2005.

resulting in violent land conflicts in Mt. Elgon and Kuresoi. Mt. Elgon's unrest stemmed from disagreements over plot allocation in a settlement scheme,[104] whilst Kuresoi saw confrontations between Kikuyu and Kalenjin over land ownership, including farms seized from fleeing settlers.[105] These conflicts may have arisen as a result of the missed opportunity to address common land rights issues following the constitution's rejection.[106] Violence in Kuresoi continued for weeks before the 2007 general election, possibly to discourage voter turnout in the multi-ethnic district.[107]

8.0 LEGAL AND INSTITUTIONAL DYNAMICS OF LAND REFORM IN KENYA POST-2010

The post-2007 election violence highlighted the critical need for constitutional reform, a demand endorsed by Kofi Annan, who led the African Union Panel of Eminent African Personalities in negotiating a solution.[108] President Kibaki's Party of National Unity (PNU) and Raila Odinga's Orange Democratic Movement (ODM) forged a historic agreement centred on power-sharing and a pledge to solve long-standing concerns that contribute to electoral violence, which included constitutional and land reforms.[109] In the sphere of land, the pledge resulted in the initiation of a national land policy, which was ultimately approved in 2009.[110] This strategy sought to address major land disputes

[104] Karuti Kanyinga, 'The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya' (2009) Volume 27, (Issue 3) *Journal of Contemporary African Studies*, p. 339, available at https://doi.org/10.1080/02589000903154834 (accessed 28 January 2024).
[105] Ibid.
[106] Francis Kariuki, Smith Ouma and Raphael Ng'etich, *Property Law,* (Strathmore University Press: Nairobi, 2016), at p. 423.
[107] Karuti Kanyinga, 'The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya' (2009) Volume 27, (Issue 3) *Journal of Contemporary African Studies*, p. 339, available at https://doi.org/10.1080/02589000903154834 (accessed 28 January 2024).
[108] Ambreena Manji, 'The Struggle for Land and Justice in Kenya; Land and Constitutional Change,' *Eastern Africa Series*, NED- New Edition, Boydell and Brewer, p 80.
[109] Ibid, at p. 80.
[110] Sections 26, 39, 174, 175, 178 and 179, National Land Policy (Sessional Paper No. 3 of 2009).

related to the 1992, 1997, and 2007 elections,[111] focusing on particular remedies for historical injustices and protecting the land rights of minority communities and disadvantaged groups.[112] The principles of this initiative were later included in Kenya's 2010 Constitution, ensuring that these marginalised communities are recognised, protected, and have access to property.[113]

Moreover, the National Land Commission (NLC) was established under Kenya's 2010 Constitution to handle land-related issues and offer a framework for resolution. The commission's functions include conducting research on land and natural resource use, making recommendations to relevant authorities,[114] and initiating investigations into current or historical land abuses, and recommending appropriate remedies.[115] However, issues have developed, resulting in jurisdictional conflicts between the National Land Commission and the Ministry of Lands, which has traditionally handled land issues. A case demonstrating this is *Republic* v *National Land Commission (NLC) Ex-parte Cecelia Chepkoech Leting and 3 others*,[116] involving a dispute over prime land in Upper Hill, Nairobi. Mr Letting had allegedly been allocated the piece of land by the former president of Kenya, Daniel Arap Moi. The commission sought to investigate how Mr. Letting had acquired the piece of land with a view to repossessing it as required by the National Land Commission Act which gave the institution the mandate to review all grants and dispositions of public land, either on its own motion or upon receipt of the

[111] Ambreena Manji, 'The Struggle for Land and Justice in Kenya; Land and Constitutional Change,' *Eastern Africa Series*, NED- New Edition, Boydell and Brewer, p 80.
[112] Section 171-183, National Land Policy (Sessional Paper No. 3 of 2009).
[113] Chapter 5, Constitution of Kenya (2010).
[114] Article 67(2)(d), Constitution of Kenya (2010); See also the National Land Commission Act, 2012, the Land Act, 2012, the Land Registration Act, 2012.
[115] Article 67 (2) (d), Constitution of Kenya (2010).
[116] Republic v National Land Commission Ex-Parte Cecilia Chepkoech Leting & 3 others [2016] eKLR.

complaint with a view to establishing their legality or propriety.[117] The court ruled that the NLC had jurisdiction only over public lands and could not proceed with investigating how Mr Letting acquired the land.[118]

9.0 THE LACK OF POLITICAL GOODWILL IN IMPLEMENTING LAND REFORMS

The 2010 Constitution introduced major land reforms to address Kenya's challenges, primarily through the implementation of land regulations stated in the fifth schedule. Unfortunately, the administration has lacked the political will to implement these laws as intended. Many of the laws that were supposed to go into effect in August 2015 were delayed. For example, the Community Land Act was enacted in 2016.[119] It sought to address communal land issues but does not properly account for the intrinsic nature of commons and traditional ethnic societies.[120] Instead, it introduces its mechanisms, which have the ability to perpetuate community land loss through privatisation,[121] mirroring the shortcomings of the abolished Land (Group Representatives) Act and the Trust Land Act.[122]

Another proposed reform in the 2010 constitution addresses minimum and maximum land holdings. This reform, which aimed to provide legal frameworks for land acreages, eliminate inequality, and promote equitable land allocation, was due to go into effect

[117] Section 14, The National Land Commission Act (Act 5 of 2012).
[118] 'National Land Commission loses bid to repossess land from ex-PS Leting' *Business Daily*, Tuesday 20 December, 2016, available at https://www.businessdailyafrica.com/bd/economy/national-land-commission-loses-bid-to-repossess-land-from-ex-ps-leting-2134458 (accessed 28 January 2024).
[119] Francis Kariuki, Smith Ouma, and Raphael Ng'etich, *Property Law*, (Strathmore University Press: Nairobi, 2016), at p. 331.
[120] Ibid, at p. 428.
[121] Ibid at p., 428, See also The Community Land Act (Act 27 of 2016).
[122] Francis Kariuki, Smith Ouma and Raphael Ng'etich, Property Law, Strathmore University Press, Nairobi, 2016, at p. 428.

by August 2015.[123] However, it remains unpassed for the time being, leaving many ordinary Kenyans as squatters and landless, susceptible to the political class, which owns the vast majority of the country's land.[124]

10.0 RECOMMENDATIONS AND WAY FORWARD

Kenya now has institutional frameworks capable of tackling various land-related issues, an improvement that did not exist before 2010. However, there is a lack of institutional independence and clear standards for these two organisations' roles and powers, as demonstrated in 2014 when the Supreme Court was asked to issue an advisory opinion on their relationship.[125] Further, corruption is another challenge facing these institutions. For instance, in 2018, the chairperson of the National Land Commission, Professor Mohammed Swazuri and sixteen others were charged in an Anti-Corruption Court for using his office to improperly confer a benefit and facilitating the award of compensation of a public parcel of land to a company.[126] With lack of institutional independence and corruption threatening to kill the successes introduced by the 2010 Constitution into the land regime, there is a need to resolve the wrangles that exist between the Ministry of Lands and the National Land Commission in order to ensure that they achieve the mandate given to them, especially in resolving historical injustices related to land and land ownership. Furthermore, many proposed land reforms and policies aimed at resolving Kenya's land issues are yet to be realised. For

[123] Clause 3, Minimum and Maximum Land Holding Acreage Bill (2015), available at https://www.kpda.or.ke/documents/Policies/Minimum%20and%20Maximum%20Land%20Holding%20Acreage%20Bill%202015.pdf (accessed 28 January 2024).
[124] The bill still remains unpassed. See the Land Laws (Amendment) Act 2015 (52nd Item), available at https://kenyalaw.org/kl/index.php?id=5189 (accessed 28 Janau
[125] In the Matter of the National Land Commission [2015] eKLR.
[126] Professor Swazuri Charged with Graft' EACC News. available at https://eacc.go.ke/default/professor-swazuri-charged-with-graft/ (accessed 28 January 2024).

instance, the Truth and Justice Reconciliation Commission released its report in 2013 but up to date, political leaders, in government as well as in opposition, have found it politically inconvenient to act on the report.[127] Among the issues identified by the report were the causes of the continuous historical land injustices in Kenya. The law relating to the maximum and minimum land holding is another important land reform issue that has not been successfully implemented leaving loopholes for the powerful persons in the society to own most of the land leaving ordinary Kenyans as squatters and landless and at the mercy of the political class, something which can be used again to mobilise electoral violence just as in the past. There is therefore an urgent need to implement the various law reforms and recommendations by various commissions as a step towards achieving land justice in Kenya.

The politicisation of land and mobilisation of electoral violence has also been identified as a major cause of land-related conflicts. It is therefore important to have politicians who mobilise and incite electoral violence on grounds of land grievances prosecuted and charged. There is also a need for Kenyans to elect leaders based on merit and not based on tribal lines as this has been exploited to rally divisions among communities.

11.0 CONCLUSION

This article has shown how opportunistic politicians can use pre-existing land grievances to incite election violence, particularly when they sense a danger to their political power. Although the 2010 Constitution was adopted 14 years ago and Kenya

[127] Maliti T., 'How Kenya's Truth Commission Report Became a Political Ghost' *JusticeInfo.Net*, 29 May 2020, available at https://www.justiceinfo.net/en/44424-how-kenya-s-truth-commission-report-became-a-political-ghost.html (accessed 28 January 2024).

has been independent for more than 60 years, land ownership remains a contentious subject. Electoral violence can still be organised around ethnicity and land ownership since, the National Cohesion and Integration Commission recently stated that pre-existing social conflicts, including ongoing disputes over land or resources, increase the likelihood of election violence, particularly in the Rift Valley.[128]

While the 2010 Constitution aimed to rectify historical land injustices, ongoing tensions between the Ministry of Lands and the National Land Commission may delay the anticipated new era of land administration. It is imperative to provide these bodies with the necessary support to resolve land-related issues. Collaborative efforts between the government and the people of Kenya are essential to effectively address and solve land disputes in the country.

[128] Republic of Kenya, 'Towards a Violence-Free 2022 Election,' p. 30.

GREENING HUMAN RIGHTS: PROMOTING THE RIGHT TO A HEALTHY ENVIRONMENT THROUGH THE INSTRUMENTALITY OF HUMAN RIGHTS LAWS AND THE CONSTITUTION IN NIGERIA

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Abstract

Nigeria is one of the countries where the right to a healthy environment is provided for in the Constitution but is not explicitly justiciable. Amid concerns about environmental pollution and climate change, the Constitution and human rights legislation have become principal tools for advancing environmental justice by "greening" existing provisions to implicitly address environmental issues. While this approach is a positive development, it is not the most effective means of protecting the right to a healthy environment, as the right is not a strictly defined area of law and overlaps with other laws that can change at any time. This article recommends making the right to a healthy environment justiciable and enforceable by transferring it from Chapter II, which is non-justiciable, to Chapter IV of the Constitution, which is justiciable, to ensure the practical realisation of this right.

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1.0 INTRODUCTION

Human rights and a healthy environment are by their very nature indivisible, interdependent, and interrelated.[1] Human rights cannot be protected without the protection of the environment where people reside and environmental rights can only be realised when human rights are respected.[2] For instance, "the realisation of the right to health depends on the realisation of the right to a healthy environment, whereas a healthy environment is a precondition for the fulfilment of other rights,"[3] such as the right to life and the right to an adequate standard of living.

Internationally, the interconnections between a healthy environment and human rights are now well established. It is common knowledge that environmental issues such as pollution, deforestation, or the misuse of natural resources can negatively affect individuals' and communities' enjoyment of fundamental human rights, such as the right to life and the right to an adequate standard of living. These are rights which are guaranteed under international human rights laws and about which 'governments bear certain responsibilities.'[4] Furthermore, environmental issues can also impact governments' capacity to protect and fulfil the rights of their citizens. In this way, human rights and environmental protection can be constructed as being 'mutually supportive.'[5] The right to a healthy environment (whether substantive or procedural)

[1] L. Wortsman, "Greening" The Charter: Section 7 and the Right to a Healthy Environment" (2019) 28 *Dalhousie Journal of Legal Studies* 245.
[2] E. M. Akpambang, "Promoting the Right to A Healthy Environment through Constitutionalism in Nigeria" (2016) 4(3) *International Journal of Environment and Pollution Research,* 40.
[3] World Health Organisation, *Human Rights-Based Approach to Health and Environment* (World Health Organization 2008) 1.
[4] B. Lewis, "Human Rights and Environmental Wrongs: Achieving Environmental Justice through Human Rights Law" (2012) 1(1) *IJCJ,* 65.
[5] Ibid, 65.

guarantees some level of environmental standards to persons or communities "whilst also ensuring access to information, participation in the decision-making process and access to justice amongst others."[6] Generally, there is no international or multilateral treaty that particularly guarantees "the right to a healthy environment or the protection of the environment."[7] However, there are a plethora of international, regional, soft law mechanisms, and national constitutions which make allusions to the right to a healthy environment.[8]

As early as the 1972 Stockholm Conference on the Human Environment, efforts were made to explore and understand the interrelatedness between human rights and environmental protection.[9] The 1972 *Stockholm Declaration* sparked dramatic changes not only in environmental law but also in human rights law and constitutional law.[10] The bold assertion, in Article 1 recognised environmental protection as a pre-condition for the enjoyment of many human rights thus:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.[11]

[6] O. K. Anaebo & O. E. Eghosa, "Realising Substantive Rights to Healthy Environment in Nigeria: A case for Constitutionalisation" (2015) 17(2) *Environmental Law Review*, 82.
[7] S. Turner, *Substantive Environmental Right – An Examination of the Legal Obligations of Decision-Makers towards the Environment* (Kluwer: Leiden, 2009).
[8] B. Lewis, "Environmental Rights or a Right to the Environment: Exploring the Nexus between Human Rights and Environmental Protection" (2012) 8 *Macquarie J. Int'l & Comp. Envtl. Law,* 36.
[9] D. Shelton, "Human Rights and The Environment: What Specific Environmental Rights Have Been Recognized?" (2006) 35 *Denver Journal of International Law & Policy,* 129.
[10] Ibid.
[11] United Nations Conference on the Human Environment, June 5-16, 1972, Stockholm, Switz., Declaration of the United Nations Conference on the Human Environment, Principle 1, 11 I.L.M. 1416, 1417-18.

The *Rio Declaration* in recognising the need for a healthy environment, states that human beings are "entitled to a healthy and productive life in harmony with nature."[12] These declarations exemplify the link between human rights and environmental protection. Similarly, the 1994 Draft Declaration of Human Rights and the Environment boldly asserted that "human rights, an ecologically sound environment, sustainable development" are interdependent and inseparable.[13] The Draft Declaration further conferred on all persons the right to freedom from pollution, environmental degradation and activities that negatively impact the environment, and portend danger to life, health, livelihood, and well-being within or outside national frontiers.[14]

From the Stockholm Declaration to the present, most advances in developing environmental rights have occurred first and almost exclusively at the national level and subsequently at the regional level. At the national level, some countries' constitutions have categorically provided for the right to a healthy environment,[15] while others, such as India and Canada, have continually greened existing human rights laws to protect the right to a healthy environment.[16]

At the regional level, there has been a lot of recognition of the importance of the right to a healthy environment and codification of the same. For instance, Article 11 of the

[12] Rio Declaration on Environment and Development, Principle 1, U.N. Doe. A/CONF.151/26 (Aug. 12, 1992)
[13] Draft Declaration of Human Rights and the Environment, E/CN.4/Sub.2/1994/9, Annex 1, Part I, Paras.1, 2 and 5.
[14] Ibid, Part II, Para. 5.
[15] Constitution of Costa Rica 1949 as amended, Article 50; See also Constitution of the Republic of Korea 1987, Article 35(1); Constitution of the Republic of South Africa 1996, Section 24, Chapter 2.
[16] A. B. Abdulkadir, "The Right to A Healthful Environment in Nigeria: A Review of Alternative Pathways to Environmental Justice in Nigeria" (2014) 3 (1) *Afe Babalola University: Journal of Sustainable Development Law and Policy,* 118.

Additional Protocol to the Inter-American Convention on Human Rights 1994[17] states that:

> Everyone shall have the right to live in a healthy environment and to have access to basic public services; the state parties shall promote the protection, preservation, and improvement of the environment.[18]

This article vested the obligation to promote the right to a healthy environment on the state parties after recognising the right as a human right. In the case of the African continent, Article 24 of the *African Charter on Human and People's Rights* states that "All peoples shall have the right to a general satisfactory environment favourable to their development." The import of these provisions is that state parties are required to take reasonable preventive measures in preventing pollution and ecological degradation while at the same time promoting conservation, as well as securing an "ecologically sustainable development and use of natural resources."[19]

In 2022, 50 years after the pioneering Stockholm Declaration, the right to a healthy environment finally gained global recognition[20] as this right was the subject of a historic UN resolution confirming that everyone, everywhere, has the right to live in a clean, healthy and sustainable environment, with 161 votes in favour of the resolution.[21] The resolution notes that the right to a clean, healthy, and sustainable environment is "related to other rights and existing international law,"[22] and affirms that the "promotion of the human right to a clean, healthy and sustainable environment requires

[17] Additional Protocol to the Inter-American Convention on Human Rights 1994.
[18] Ibid, Article 11.
[19] J. B. Marshall & F. Bashir, "Human Rights Approach to Environmental Protection in Nigeria: An Appraisal" (2020) 8(4) *International Journal of Business & Law Research* 135, 147.
[20] EDO, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (Environmental Defenders Office Ltd, 2022) 8.
[21] The United Nations Resolution A/76/L.75.
[22] Ibid.

the full implementation of the multilateral environmental agreements under the principles of international environmental law."[23] It is believed that the resolution will help "reduce environmental injustices, close protection gaps and empower people, especially those that are in vulnerable situations, including environmental human rights defenders, children, youth, women and indigenous peoples"[24] in advocating for the protection of the environment. It will also help States accelerate the implementation of their environmental and human rights obligations and commitments, as the resolution calls upon international organisations, states, business enterprises, and other pertinent stakeholders to adopt policies, that will enhance "international cooperation, strengthen capacity-building, and continue to share good practices to scale up efforts to ensure a clean, healthy and sustainable environment for all."[25] This resolution is a step in the right direction.

It is important to note that by 2022, nearly 80 per cent of the UN member states have recognised the "legally binding right to a healthy environment somewhere in their laws, if not constitutionally, then through court decisions, in statute,[26] or via the ratification and domestication of international environmental agreements.[27] A good number of countries have signed non-binding, soft-law declarations that recognise the right to a healthy environment.[28] Although Nigeria has enacted several environmental laws, it

[23] Ibid.
[24] Statement made by UN Secretary-General, António Guterres, quoted in "UN General Assembly declares access to clean and Healthy Environment a Universal Human Right" *The Africa Renewal* 28 July 2022, available at https://news.un.org/en/story/2022/07/1123482 (accessed 31 July 2024).
[25] The United Nations Resolution A/76/L.75.
[26] L. Wortsman, ""Greening" The Charter: Section 7 And the Right to A Healthy Environment" (2019) 28 *Dalhousie Journal of Legal Studies*, 245.
[27] Ibid.
[28] D. R. Boyd, "Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment" in J. H. Knox & R. Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 17, at 18.

remains one of the few states holding out against the meaningful implementation of a right to a healthy environment, as the Nigerian government has failed to constitutionally make the right to a healthy environment justiciable despite the clamouring for same and amidst various constitutional amendments that have been done.

Despite the international consensus on the close link between human rights and a healthy environment, there is still no global agreement about the precise legal place of the environment in the international human rights discourse[29] as the declarations and resolutions mentioned above do not create binding obligations, but merely important statements that may be used to inform the Nigerian government's approach when considering introducing the right to a healthy environment as part of the constitutionally enforceable human rights in the Nigerian's constitution.

This article is divided into seven parts. Part One is the introductory part. This part of the article gives a background overview of the current problem that the article studies. Part two discusses the concepts of human rights and the right to a healthy environment, as well as provides the conceptual background and context for the discussions in the article. Part three examines the interrelatedness between human rights and the right to a healthy environment. The relation between these two concepts is no doubt recognised nationally and internationally. Part four of the article dwells on the right to a healthy environment in Nigeria. The article demonstrates that although the constitution of Nigeria has not explicitly recognised a justiciable right to a healthy

[29] K. Tang and O. Spijkers, "The Human Right to a Clean, Healthy and Sustainable Environment" (2022) 6 *Chinese Journal of Environmental Law*, 87.

environment, the courts have implicitly accepted that such a right exists within the rights contained in chapter four of the constitution and the provisions of the African Charter on Human and People's Rights (a regional treaty) which have been domesticated in Nigeria. Part Five of the article argues for the making of the right to a healthy environment an explicit justiciable and enforceable human right within the provision of Chapter IV of the Constitution of Nigeria. This can be achieved in two ways: by amending the constitution to provide for a justiciable right to a healthy environment or by expanding the scope of the extant justiciable rights embedded in the constitution to include the right to a healthy environment. This article urges that incorporating the right as a justiciable right in the constitution is the best option, though it might be difficult due to the stringent constitutional amendment procedure.[30] Part six of the article discusses the benefits accruing from the recognition of the right to a healthy environment. Part seven of the article, which is the concluding part, recommends that the Nigerian constitution should be amended to incorporate the justiciable substantive right to a healthy environment for better protection of the rights in Nigeria.

2.0 CONCEPTUALISATION

2.1 Human Rights

There is no universally acceptable definition of the concept of human rights. Various definitions of the term have been proffered by several scholars and jurists.[31] According to Donnelly:

[30] See Section 9 of the Constitution of the federal Republic of Nigeria 1999 (as amended), for the amendment procedure.
[31] E. M. Akpambang, "Promoting the Right to A Healthy Environment through Constitutionalism in Nigeria" (2016) 4(3) *International Journal of Environment and Pollution Research,* 40.

> [H]uman rights are a complex and contested social practice that organises relations between individuals, society, and the state around a distinctive set of substantive values implemented through equal and inalienable universal rights.[32]

He further asserted that human rights exist not only for a mere human existence but also "for an existence that gives a deeper human moral reality," meaning that human rights are meant to support a life of dignity and ethical fulfilment, not just basic survival. "[33] In the same vein, Cranston posited that:

> Human rights by definition is a universal moral right, something which all men everywhere, at all times ought to have, something of which no one may be deprived without grave affront to justice, something which is owing to every human being simply because he is human.[34]

Simply put, human rights are the basic rights and freedoms that belong to every person in the world, from birth until death. They are inalienable fundamental rights to which a person is inherently entitled simply because he or she is a human being; they are not granted by any state and represent basic values common to all, regardless of nationality, race, sex, national or ethnic origin, colour, religion, political or other opinion, language, or any other status,[35] and must be respected by countries worldwide.[36]

The first international instrument that recognised human rights was the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948. The legal document set out the fundamental human rights to be universally protected. The

[32] J. Donnelly, "Human Rights" Working Paper No. 23 (2005) available at http://www.du.edu/gsis/hrhw/working/2005/23-donnelly-2005.pdf (accessed 31 July 2024).
[33] J. Donnelly, *The Concept of Human Rights* (St. Martins's Press, 1985) 39.
[34] M. Cranston, *Human Rights Today* (Ampersand Books 1962) 40.
[35] UN Human Rights Office "What are Human Rights?" available at https://www.ohchr.org/en/what-are-human-rights (accessed 31 July 2024).
[36] Icelandic Human Rights Centre, "The Concept of Human Rights" available at https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights (accessed 31 July 2024).

principles of universality and inalienability of human rights are the cornerstone of the UDHR as clearly stated in Article 2:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The principles, as first emphasised in the UDHR, are repeated in many international human rights conventions, declarations, and resolutions that were enacted after the UDHR.

2.1 Right to a Healthy Environment

The concept of human rights as known today was popularised after the Second World War, however, "the right to a healthy environment, as one of those human rights, was never a priority."[37] Today, this emerging concept of the right to a healthy environment and what it entails, has continued to be a subject of hot debate by human rights activists and environmentalists, as the concept continues to gain relevance internationally.[38] At present, none of the countries that have made express provisions in their constitutions for the right to a healthy environment[39] have attempted to offer an operational definition of the right to a healthy environment. Neither has the international instruments recognising the right to a healthy environment defined the

[37] A. Singh, "Right to Clean Environment: A Basic Human Right" available at www.legalservicesindia.com (accessed 31 July 2024).
[38] D. Shelton, "Human Rights and The Environment: What Specific Environmental Rights Have Been Recognized?" (2006) 35 *Denver Journal of International Law & Policy,* 129.
[39] Article 41 of the Constitution of Argentina 1853; See Article 79 of the Constitution of Colombia 1991; See Article 46 of the Constitution of the Republic of the Congo 1992; Constitution of Costa Rica 1949; See Article 69 of the Constitution of the Republic of Croatia 2001; Constitution of the Republic of Chechen 2003. See also the Constitution of the following countries: Constitution of Angola, Argentina, Belarus, Belgium, Burkina Faso, Cameroon, Cape Verde, Chad, Chechnya, Chile, Colombia, Congo, Ecuador, Finland, Georgia, Ghana, Hungary, India, Mexico, Niger, Namibia, Portugal, Russia, Romania, Sao Tome, Saudi Arabia, Slovakia, Ukraine, and Zambia.

concept. The right to a healthy environment has been defined as a right to protect the elements of the natural environment that enable a dignified life. It encourages the preservation of basic human rights such as the right to life, clean water, and food.[40] The right to a healthy environment is a human right advocated by human rights organisations and environmental organisations to protect the "ecological systems that protect human health."[41]

3.0 RELATIONSHIP BETWEEN HUMAN RIGHTS AND A HEALTHY ENVIRONMENT

The interrelation between human rights and environmental protection is undisputable in environmental law jurisprudence. The aim of human rights law is to ensure that the environment does not degenerate to the extent where the substantive right to life, right to dignity of the human person, the right to a family and private life, right to an adequate standard of living, right to education and other human rights are adversely impaired.[42] Just as there is concern for environmental protection in the realm of international human rights law, there is likewise concern for human rights protection in the realm of international environmental law. In a way, "concern for human rights protection underlies environmental law instruments, to the extent that these instruments aim to protect the environment, which will ultimately benefit human

[40] E. M. Akpambang, "Promoting the Right to A Healthy Environment through Constitutionalism in Nigeria" (2016) 4(3) *International Journal of Environment and Pollution Research*, 40.
[41] J. H. Knox, "Constructing the Human Right to a Healthy Environment" (2020) 16 (1) *Annual Review of Law and Social Science,* 79.
[42] D. Shelton, "Human Rights and The Environment: What Specific Environmental Rights Have Been Recognized?" (2006) 35 *Denver Journal of International Law & Policy,* 129.

beings and mankind."[43] It has become accepted that the protection of human rights involves the protection of the environment.[44]

There is a growing body of national, regional, and international laws that recognise the interconnection between human rights and a safe environment. This is coupled with a trend across different countries towards the adoption of laws with an express provision for the human right to a healthy, safe, and sustainable environment. An examination of international and regional court decisions, UN treaty bodies and UN special rapporteurs on human rights, and national laws will lead to one conclusion, which is the fact that there is "an explicit link between the degradation of the environment and its impact on people's enjoyment of a wide range of human rights."[45] The International Court of Justice has recognised that the protection of the environment is a vital part of contemporary human rights doctrine because it is an essential condition for numerous human rights such as the right to life and the right to health. Judge Weeremantry of the International Court of Justice expressed it thus:

> The protection of the environment is... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[46]

[43] United Nations University "The Recognition of the Right to a Healthy Environment: The Concern for Environmental Protection in International Human Rights Instruments" available at unu.edu (accessed 31 July 2024).
[44] P. Cullet, "Definition of an Environmental Right in a Human Rights Context" (1995) 13 *Netherlands Quarterly of Human Rights* 25, at p.26.
[45] Environmental Defenders Office, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (Environmental Defenders Office Ltd, 2022) 16.
[46] Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 92 (Sept. 27) (separate opinion of Judge Weermantry).

Sharing in the sentiment of the International Court of Justice, the three regional courts on human rights; the European Court of Human Rights,[47] the Inter-American Court of Human Rights[48] and the African Court on Human and People's Rights,[49] have variously held that there is a link between the human rights and environmental protection. National courts around the world in precedent-setting cases have also affirmed this belief. In *Jonah Gbemre* v *Shell Petroleum Development Company Nigeria Ltd and Others*,[50]The Federal High Court of Nigeria per Justice Nwokorie in ordering that gas flaring must be stopped as it violates the guaranteed constitutional rights to life and human dignity, held that "these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free healthy environment."[51] Similarly, in the Indian case of *Subash Kumar v. State of Bihar,*[52] the Supreme Court of India held that:

> The right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.

Furthermore, in the case of *Indian Council of Environ-Legal Action v. Union of India*,[53] the Indian Supreme Court restated the position thus:

> When certain industries by the discharge of acid produced by their plants, caused environmental pollution, that amounted to a violation of the right to life enshrined in Article 21 of the Indian Constitution… The respondents are

[47] Lopez Ostra v. Spain, Application no. 16798/90.
[48] Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).
[49] The Social and Economic Rights Action Centre and Another v. Nigeria.
[50] *Gbemre v. Shell Petroleum Development Company Nigeria Ltd and Others* (2005) AHRLR 151.
[51] Ibid.
[52] (1991) A. I. R. 420.
[53] (1996) All India Reports (AIR) SC 1446.

> absolutely liable to compensate for harm caused to villagers in the affected areas; including harm to soil and underground water.[54]

The above decisions portray the national courts' attitude towards the protection of the right to a healthy environment through the greening of the existing human rights provisions of the countries' respective constitutions and also show how the realisation of the right to a healthy environment positively affects other rights such as the right to life.

It is important to note that the right to a healthy environment as recognised by countries and international bodies in national and international legislations, is expressed in different ways, as it may impose a procedural obligation, a substantive obligation, or a combination of both.[55] What this implies is that in some laws, the right to a healthy environment is a procedural one as the state is told what to do, to safely guide the right to a healthy environment while in others it is a right bestowed on the citizen. A good example of a procedural obligation is the Hawaii Constitution which after providing for the citizen's right to a healthy environment went further to provide for the enforcement procedure thus: "any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law."[56]

In the case of the substantive obligation, it provides that "each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement

[54] Ibid.
[55] J. H. Knox, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Compilation of Good Practices,' UN Doc A/HRC/28/61 (3 February 2015).
[56] Hawaiian Kingdom Constitution of 1864 (as amended), Article 11, Section 9.

of natural resources."[57] From Hawaii Constitution, it can be seen that some constitutions combine the procedural and substantive obligations, another example is the Norway Constitution which provides that "the State authorities shall issue further provisions for the implementation of these principles."[58] Similarly, Article 66(1) of the Portuguese Constitution states that "everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it."[59]

It must be noted that the right to a healthy environment does not necessitate creating a new "environmental component" of the right to life, liberty, or security of the person, rather, it entails the recognition that environmental degradation can cause the loss of life, liberty, or security of the person just as surely as other state actions.[60]

4.0 THE PROTECTION OF HUMAN RIGHT TO HEALTHY ENVIRONMENT IN NIGERIA

The Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution) makes provision for the environmental objectives of the government. Section 20 of the Constitution mandates the government to "protect and improve the environment and safeguard the water, air and land, forest and wildlife in Nigeria."[61] With the incorporation of this provision into the 1999 Constitution, hopes were raised that environmental issues have at least been recognised as a constitutional subject in the

[57] Ibid.
[58] Norway Constitution 1814 as amended in 2020, Article 112.
[59] Constitution of the Portuguese Republic 1976(as amended), Article 66.
[60] L. M. Collins, "Are We There Yet? The Right to Environment in International and European Law" (2007) 3:2 *JSDLP*, 119 at 127.
[61] See section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as Amended). In *Attorney-General, Lagos State* v *Attorney-General, Federation* (2003) 2 NWLR (Pt. 833) 1, the Supreme Court of Nigeria held inter alia, that the main object of section 20 of the 1999 Constitution is to protect the external surroundings of the people and ensure that they live in a safe and secure atmosphere free from any danger to their health or other convenience.

country, however, these hopes were short-lived due to the hurdles surrounding the enforceability of the Chapter II of the 1999 Constitution. A major shortcoming of the constitutional right to a healthy environment under Chapter II of the 1999 Constitution is that it is often difficult for communities or individuals most affected by environmental degradation to take advantage of their constitutional rights as the Chapter is not justiciable by Section 6(6)(c) of the 1999 Constitution. "A justiciable action is enforceable in court. The sections that constitute Chapter II of the Nigerian Constitution are generally unenforceable in court."[62] The provisions of Chapter II are generally not enforceable in court unless there is another provision of the constitution on the same subject or an enactment on the subject in Chapter II.[63]

A second critique of the constitutional right to a healthy environment is that the Chapter applies only to state action on the directive of what ought to be done and there is no bindingness. "The import of this constitutional limitation is that the observance by the Nigerian government of environmental objectives and principles is not obligatory but purely directory."[64] In critiquing the non-justiciability of Chapter II of the constitution and its effect on the protection of the environment in Nigeria, Fagbohun opined that "…it must be emphasised that a constitutional provision like section 20 is an initiative that is grossly incapable of catalysing desired environmental policy performance."[65]

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[62] E. M. Akpambang, "Promoting the Right to A Healthy Environment through Constitutionalism in Nigeria" (2016) 4 (3) *International Journal of Environment and Pollution Research*, 40.
[63] *Olafisoye v. F.R.N* [2004] 4 NWLR (pt 864) 580.
[64] E. M. Akpambang, "Promoting the Right to A Healthy Environment through Constitutionalism in Nigeria" (2016) 4 (3) *International Journal of Environment and Pollution Research*, 40.
[65] O. Fagbohun, *The Law of Oil Pollution and Environmental Restoration: A Comparative Review* (Odade Publishers, 2010) 317-318.

Addressing these barriers to environmental justice is a critical precondition to the realisation of constitutional environmental rights for many individuals. In response to the need for the protection of the right to a healthy environment and the principle developed in the case of *Olafisoye* v *F.R.N,*[66] which is to the effect that when "another provision of the constitution makes any provision in chapter II justiciable or an Act of the National Assembly is enacted around the subject, it becomes justiciable."[67] The Court is now regulating environmental liability via the enforcement of fundamental human rights in Chapter IV of the Constitution (by greening existing human rights laws). The Nigerian Constitution vests original jurisdiction for the enforcement of fundamental rights action in the High Court of a State where any provision of Chapter IV is, being, or likely, to be contravened.[68] A party seeking relief under Chapter IV of the 1999 Constitution and the Fundamental Rights (Enforcement Procedure) Rules 2009 must ensure that the main relief and consequential reliefs point directly to a fundamental right under Chapter IV and a clear deprivation of the same by the other party being sued.[69]

Under the provisions of Chapter IV of the Constitution and the Fundamental Human Right (Enforcement Procedure) Rules 2009, the Courts in Nigeria have begun to give credence to the protection of the right to a healthy environment by greening the

[66] *Olafisoye v. F.R.N* [2004] 4 NWLR (pt 864) 580, the court held that when Section 15(5) of the CFRN 1999 is read together with Item 60(a) of the Second Schedule of the CFRN 1999, it can be justiciable. This principle was further reenforced in the cases of *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation* (2019) 5 NWLR [Pt 1666] at 568–69; *A.G Lagos State v. A.G Federation & Ors* [2003] 12 NWLR [Pt 764] 1.

[67] A. Babalola, "The Right to a Clean Environment in Nigeria: A Fundamental Right?" (2020) 26 (1) *Hastings Environmental Law Journal,* 3.

[68] Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 46(1) (2); *Emeka* v *Okoroafor* [2017] 11 NWLR [Pt 1577] 410, 478.

[69] *Briggs v Harry* [2016] 9 NWLR [Pt 1516] 45, 72–73; *Egbuonu v Bornu RadioTelevision Corp.* [1997] 12 NWLR [Pt 531] 29, 38.

provisions of Chapter IV of the constitution and other human right laws. This development is traceable to the African Charter on Human and People's Rights. Article 24 of the African Charter provides that "all peoples shall have the right to a general satisfactory environment favourable to their development."[70] It is worthy of note that Nigeria is not just a signatory to the Charter but has also domesticated it. By adopting and domesticating the African Charter on Human and People's Rights (Enforcement and Ratification) Act 1983 into its legal framework, Nigeria has made the African Charter's provisions part of its national laws and has thereby given it effect locally.[71] In essence, Article 24 guarantees the African people's right to a healthy environment and by domestication, Nigeria has imbibed the right, making it enforceable in the country.[72] In the case of *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAC)* v *Nigeria*,[73] the African Human Rights Commission, in placing heavy reliance on the provisions of Article 24 of the Charter, stated that:

> The right to a generally satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources …[74]

Regardless of the fact that the provisions of Section 20 of the 1999 Constitution are non-justiciable, it is comforting to know that superior courts in Nigeria are now placing heavy reliance on the provisions of Chapter IV of the Constitution and the African

[70] Article 24 of the African Charter on Human and People's Rights (Enforcement and Ratification) Act 1983.
[71] R.T Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (Routledge, 2013) 4.
[72] O. K. Anaebo & O. E. Eghosa, "Realising Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation" (2015) 17(2) *Environmental Law Review,* 82-99.
[73] Communication No. 155/96, Case No. ACHPR/COMM/A044/1.
[74] Ibid, Paragraph 52 of the Commission's Judgment.

Charter on Human and Peoples' Rights in declaring environmental pollution as unconstitutional, and a breach of the fundamental human right to life. In *Jonah Gbemre* v *Shell Petroleum Development Company Nigeria Ltd and Others*,[75] the plaintiff in this case alleged that his community (Iweherekan Community) had suffered the hazards of gas flaring for decades.[76] The Federal High Court of Nigeria per Justice Nwokorie in ordering that gas flaring must be stopped as it violates the guaranteed constitutional rights to life and human dignity, held thus:

> …these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free healthy environment.
>
> The actions of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicants' community is a gross violation of their fundamental right to life (including a healthy environment) and dignity of the human person as enshrined in the Constitution.[77]

The case of *Gbemre* v *Shell*[78] is a precedent-setting case and has been regarded as a milestone in the protection of the environment in Nigeria. It is the first judicial authority to declare that gas flaring in the course of oil extraction is illegal, unconstitutional, and a breach of the fundamental human right to life and a healthy environment.

It is interesting to note that the Supreme Court has also followed suit in protecting the right to a healthy environment. In *Centre for Oil Pollution Watch* v *Nigerian National Petroleum Corporation,*[79] two of the Supreme Court Justices expressed remarkable views that the Nigerian Constitution and the African Charter on Human and Peoples

[75] Gbemre v. Shell Petroleum Development Company Nigeria Ltd and Others (2005) AHRLR 151.
[76] Ibid.
[77] Ibid, 155.
[78] Ibid.
[79] [2019] 5 NWLR [Pt 1666] 518, 587 and 597.

Rights, to which Nigeria is a signatory, recognise the fundamental rights of the citizenry to a clean and healthy environment to sustain life through the provisions of Section 33 of the Nigerian Constitution, Article 24 of African Charter, and Section 17(4) of the Oil Pipelines Act respectively. Particularly, in the concurring judgment of Kekere-Ekun, J.S.C, His Lordship held that:

> Sections 33 and 20 of the Nigerian Constitution; Article 24 of the African Charter; and Section 17(4) of the Oil Pipelines Act show that the Constitution, the legislature and the African Charter for Human and Peoples' Rights, to which Nigeria is a signatory, recognise the fundamental rights of the citizenry to a clean and healthy environment to sustain life.[80]

As a whole, the provisions of the African Charter and Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 provide strong evidence of converging trends towards greater uniformity and certainty in human rights obligations as they relate to the environment in Nigeria. Nevertheless, it has been argued that the greening of existing human rights by the Courts represents a further legal pathway that has been utilised in protecting the right to a healthy environment, it has yielded little success in parallel with the human rights challenges.[81] The continued reliance on the right to a satisfactory and adequate environment entrenched in the African Charter that has been ratified and embodied into our municipal law,[82] is not a safe foundation as the National Assembly[83] may choose at any time to amend, modify, or repeal the statute and the

[80] Ibid, 559–560 and 597–598

[81] O. K. Anaebo & O. E. Eghosa, "Realising Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation" (2015) 17(2) *Environmental Law Review*, 82-99.

[82] E. M. Akpambang, "Promoting the Right to A Healthy Environment through Constitutionalism in Nigeria" (2016) 4 (3) *International Journal of Environment and Pollution Research,* 40; See the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. A9, Laws of the Federation of Nigeria 2004

[83] Under the Nigerian 1999 Constitution, the legislative powers of the Federal Republic of Nigeria are vested in The National Assembly for the Federation. It consists of a Senate and a House of Representatives section 4 (1) of the Constitution of the Federal Republic of Nigeria.

courts of law, as well as victims of environmental rights in Nigeria, would be helpless in such a situation.[84] Thus, scholars have strongly argued that the African Charter is not an appropriate tool for promoting the right to a healthy environment in Nigeria.[85] Hence, "constitutionalising environmental rights will be a better alternative."[86] These opinions are well founded on the dictum of Ogundare, J.S.C., in the case of *General Sani Abacha and 3 Ors* v *Chief Gani Fawehinmi,*[87] when he pointed out that although the domesticated African Charter enjoyed "a greater vigour and strength" than any other national law, yet such enjoyment of global fragrance did not "prevent the National Assembly…from removing it from our body of municipal laws by simply repealing" it and that "whether such modification or repeal is wise or just is not a judicial question."[88]

The writers share in the sentiment of the learned authors, given the fact that the right to a healthy environment is not yet a strictly defined area of law, but one whose provisions overlap other areas of law whose provisions can change anytime. It is suggested that a constitutionally justiciable right to a healthy environment will go a long way in helping Nigeria strengthen its framework for environmental protection.

[84] E. M. Akpambang, "Promoting the Right to A Healthy Environment through Constitutionalism in Nigeria" (2016) 4 (3) *International Journal of Environment and Pollution Research*, 40.
[85] Ibid, E.O. Ekhator, "Improving Access to Environmental Justice under the African Charter on Human and Peoples Right: The Roles of NGOs in Nigeria" (2014) 22 (1) *African Journal of International and Comparative Law* 63; O. K. Anaebo & O. E. Eghosa, "Realising Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation" (2015) 17(2) *Environmental Law Review,* 82-99.
[86] Ibid, 26.
[87] (2000) FWLR (Pt. 4) 533.
[88] Ibid at 598.

Research from countries with a constitutionally protected right to a healthy environment provides persuasive evidence of the tangible benefits of such a right.[89]

5.0 CODIFICATION OF THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT IN THE CONSTITUTION

The inclusion of environmental rights or protection within the human rights framework has been the subject of stringent criticisms.[90] It has been contended that to treat or place the protection of the environment within the human rights architecture will dilute the human rights regime[91] and ultimately lead to a dangerous decoupling.[92] However, evidence from countries such as South Africa, Brazil, and Argentina, that have successfully integrated environmental rights into their respective constitutions shows that such fears expressed by the critics are largely unsubstantiated. Instead, these countries have experienced stronger environmental governance without hindering economic growth or diluting the human rights regime.

Notwithstanding the criticisms of the interrelatedness between human rights and the environment, the right to a healthy environment has been recognised globally as the foundation for the application or enforcement of other fundamental human rights.[93]

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[89] L. Wortsman, '"Greening" The Charter: Section 7 And the Right to A Healthy Environment' 2019) 28 Dalhousie Journal of Legal Studies 245.
[90] T. Bulto, 'The Environment and Human Rights' in A. Mihr and M. Gibney (eds.), *SAGE Handbook of Human Rights* (London, 2014) 1015.
[91] P. Alston 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 American Journal of International Law 607.
[92] O. K. Anaebo & O. E. Eghosa, "Realising Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation" (2015) 17(2) *Environmental Law Review,* 26.
[93] L. A. Atsegbua, V. Akpotaire, F. Dimowo, *Environmental Law in Nigeria: Theory and Practice* (Ababa Press: Lagos, 2004) 131. Also see U.J. Orji "Right to a Clean Environment: Some Reflections" (2012) 42(4-5) *Environmental Policy and Law,* 285.

As highlighted earlier in this article, the right to a healthy environment is not constitutionally enforceable in Nigeria, rather, heavy reliance has been placed on the African Charter, which is beset by many ills. This article, therefore, argues for the incorporation of the right to a healthy environment in Nigeria in Chapter IV of the constitution which contains rights that "are enforceable against the State and citizens"[94] instead of heavily relying on the African Charter. The advantages of making the right to a healthy environment enforceable in the Constitution are compelling. These include the ability to hold the government, corporate entities, and individuals accountable for actions that lead to environmental and health harms, to prevent new governments from rolling back protections put in place by previous governments, and to seek redress for potential future harms, even in cases where scientific evidence may not be conclusive. These elements are immensely important to building a stronger framework for environmental protection.[95]

The incorporation of the right to a healthy environment, which is enforceable, in the Constitution of Nigeria can be actualised by "amending the constitution to provide for a justiciable right to a healthy environment or by expanding the sphere of the extant justiciable rights embedded in the constitution to include the right to a healthy environment."[96] In support of constitutionalising the right to a healthy environment in Nigeria, Ako and Adedeji proposed that this can be achieved through:

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[94] E.O. Ekhator, "Improving Access to Environmental Justice under the African Charter on Human and Peoples Right: The Roles of NGOs in Nigeria" (2014) 22 (1) *African Journal of International and Comparative Law,* 63, 66.
[95] L. Wortsman, ""Greening" The Charter: Section 7 And the Right to A Healthy Environment" (2019) 28 *Dalhousie Journal of Legal Studies* 264.
[96] O. K. Anaebo & O. E. Eghosa, "Realising Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation" (2015) 17(2) *Environmental Law Review,* 26.

> …amending the CFRN to make the environmental rights enforceable or passing new legislation on the issues. It is however preferable to raise the status of environmental rights to a constitutional level to avoid the trade-offs that are common occurrences in the legislative process. The supremacy of Constitutional guarantees plays out in the very nature of the constitution as the ground norm of laws in any democratic nation.

The proposal for the amendment of the constitution is a great way of actualising this goal. It is, however, going to be difficult taking into consideration the provisions of Section 9 of the Constitution of the Federal Republic of Nigeria 1999, which contains stringent constitutional amendment procedures. It has been argued by Anaebo and Eghosa that "due to the cumbersome amendment procedure in the constitution, a constitutional right to the environment will not be actualised in Nigeria in the nearest future,"[97]and "a possible pathway will be the expansion of the extant civil and political rights in the constitution."[98] The expansion of the extant human rights instrument by greening their provisions is a good leeway but is not the best approach in solving the problem due to the lack of certainty of the provisions and they not being made specifically to address the right to a healthy environment. Given the global recognition of the importance of clean air, safe water, healthy ecosystems, and a stable climate to the ability of both current and future generations to lead healthy and fulfilling lives, it is anticipated that the federal legislature will soon do the needful by amending the constitution to incorporate the right to a healthy environment.

[97] Ibid, 26.
[98] Ibid.

6.0 BENEFITS OF A CONSTITUTIONALLY ENFORCEABLE RIGHT TO A HEALTHY ENVIRONMENT

The benefits of a constitutionally enforceable right to a healthy environment are compelling and are immensely important to building a stronger framework for environmental protection.[99] The following are the benefits associated with the recognition of a right to a healthy environment.

6.1 Empowering Citizens to Pursue Environmental Justice and Achieve Better Outcomes for the Environment

The enforceability of the right to a healthy environment in the constitution will have a positive influence on access to justice for environmental matters in Nigeria by allowing individuals in Nigeria to rely on the right to better advocate for a healthier environment. "Access to justice is the right to seek justice for legal issues and includes access to effective remedies."[100] A glance at countries that have provided for a constitutionally justiciable right to a healthy environment revealed that several positive developments have been recorded in their law reform and better enforcement of environmental laws, regulations and policies.[101] For example, in South Africa, whose constitution contains a justiciable right to a healthy environment, the citizens have been able to enforce the provisions of the Constitution in advancing healthy environmental practices. In the case of *Director Mineral Development, Gauteng Region*

[99] L. Wortsman, '"Greening" The Charter: Section 7 And the Right to A Healthy Environment' (2019) 28 Dalhousie Journal of Legal Studies 264.
[100] EDO, *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (Environmental Defenders Office Ltd 2022) 37.
[101] Ibid.

and Another v Save the Vaal Environment and Others, [102] the respondents, an association of property owners along the Vaal River concerned about upholding the environmental integrity and value of the Vaal River succeeded in their action to prevent open-cast mining in the area. Similarly, in Brazil, the constitutional recognition of a right to a healthy environment in 1988 led to a significant increase in the enforcement of environmental laws. This reform empowered public and non-governmental organizations to promptly report alleged abuse of environmental rights to an independent body, the "*Ministerio Publico*" which investigated the reported cases and prosecuted those found wanting.[103] Between 1984 and 2004, in the state of Sao Paolo alone, the *Ministerio Publico* instituted over 4,000 public civil actions with respect to environmental violations, addressing issues ranging from air pollution to deforestation.[104]

This, therefore, shows that the constitutional enforcement of the right to a healthy environment in Nigeria will result in stronger environmental laws, regulations and policies which will "empower individuals and communities to defend their environments, providing a framework for holding offenders accountable and finding new legal arguments and recourse."[105]

The justiciability of the right to a healthy environment will go a long way in offering some hope to many communities already hard-hit by environmental degradation and

[102] [1999] 133/98, 2 All SA 381.
[103] D. R. Boyd, "Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment" in J. H. Knox & R. Pejan, (eds), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 17 at 28.
[104] Ibid.
[105] M. A. Orellana, "Time to Act – Recognising the Right to a Healthy Environment" available at https://www.universal-rights.org/time-act-recognising-right-healthy-environment/ (accessed 31 July 2024).

climate change. To make the enjoyment of the right a reality for those most impacted, it is suggested that governments should recognise the right at the national level and develop strong environmental protection laws and policies to safeguard the rights of populaces.

6.2 Encourages Stronger Environmental Laws and Governance

There is great potential for a constitutionally protected right to a healthy environment under Chapter IV of the constitution to strengthen the Nigerian approach to environmental protection. This is conspicuously evident in research from other countries that have enacted in their constitution a right to a healthy environment. Such jurisdictions validate the point that constitutionally protected environmental rights result in benefits including: "the provision of alternative avenues for redress for environmental harm, the strengthening of environmental laws, and the improvement of environmental performance."[106] For example, Argentina's constitutional reform in 1994 to include the right to a healthy environment amongst the bulk of the justiciable human rights in Argentina's constitution, led to the enactment of new legislation spelling out the "minimum standards for industrial waste and clean water and governing access to environmental information."[107] Similarly, in the Philippines, the constitutional recognition of the right to a healthy environment strengthened the environmental laws of the Philippines and also brought about the enactment of special rules of procedure for environmental litigation, with the aim of facilitating the protection of the right to

[106] L. Wortsman, ""Greening" The Charter: Section 7 And the Right to A Healthy Environment" (2019) 28 *Dalhousie Journal of Legal Studies* 256.
[107] Ibid, 261.

a healthy environment through the smooth prosecution of environmental right abuses.[108]

The bulk of extant environmental legislations in Nigeria[109] including the constitution which is the ground norm, fail to provide for a justiciable right to a healthy environment in Nigeria. As such, these statutes provide little in the way of redress for environmental and health hazards.

A constitutionally enforceable right to a healthy environment will facilitate increased implementation and enforcement of extant environmental laws and strengthen the Nigerian approach to environmental protection.

6.3 Healthier Environment

As our generation faces serious environmental and social crises, the potential of the constitutionally enforceable right to a healthy environment for progressive development and a healthier environment cannot be overemphasised. The human right to a healthy environment brings together the environmental dimensions of civil, cultural, economic, political, and social rights, and protects the core elements of the natural environment that enable a life of dignity.[110] Studies have revealed that a constitutional justiciable right to a healthy environment is positively related to

[108] UNGAOR, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 73rd Sess, Annex, Agenda Item 74(b), UN Doc A/73/188 (2018) at para 42.
[109] For a comprehensive list of some of the extant environmental laws in Nigeria see M. T. Ladan, "Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria" (2012) 8(1) *Law, Environment and Development Journal* 116.
[110] M. A. Orellana, "Time to Act – Recognising the Right to a Healthy Environment" available at https://www.universal-rights.org/time-act-recognising-right-healthy-environment/ (accessed 31 July 2024).

increases in the proportion of populations with access to safe drinking water.[111] The studies further demonstrate that the constitutional justiciable right to a healthy environment provides tangible benefits in terms of a healthier environment.[112]

7.0 CONCLUSION

The article examined inter alia, the correlation between human rights and the environment, and argued that environmental degradation has the possibility of affecting the realisation and enjoyment of other categories of enforceable fundamental rights, such as the right to life, food, health, education, and even the right to freedom of religion. Taking into cognisance the prominent role, a healthy environment plays in human life and well-being, the article postulated that the right to a clean and healthy environment should be rendered enforceable under the Nigerian Constitution by including it in Chapter IV of the constitution which contains enforceable fundamental human rights as it is obtainable in some other countries.

The recognition of the right to a healthy environment under Chapter IV of the Nigerian Constitution is important because it will strengthen Nigeria's approach to environmental protection. Research from countries with constitutionally enforceable environmental rights provides compelling evidence of their advantages. These include providing an alternative route to access remedies, preventing the rollback of

[111] David R Boyd, "Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment" in John H Knox & Ramin Pejan (eds), *The Human Right to a Healthy Environment* (New York: Cambridge University Press, 2018) 17., L. Wortsman, '"Greening" The Charter: Section 7 And the Right to A Healthy Environment' (2019) 28 Dalhousie Journal of Legal Studies 264.
[112] Ibid.

environmental standards, and strengthening environmental laws - tangible benefits that can significantly contribute to improved environmental performance.

ONLINE DISPUTE RESOLUTION AS AN EFFECTIVE MEANS OF RESOLVING E-COMMERCE DISPUTE IN NIGERIA

Oluwatobi Adetona*

ABSTRACT

Commercial transactions have been a part of humankind since the evolution of humanity even until the present dispensation. However, just as commercial transactions have been a part of mankind, so has the evolution and continuous change of the means of transaction. This work focuses not on the present commercial transaction but on the advent and impact of technology on commercial transactions. Therefore, electronic commerce, being the main focus, is aligned to dispute resolution which is another dimension to this work. This work examines e-commerce in tandem with online dispute resolution and using the doctrinal research method, this work discovers that the use of technology to resolve disputes in the online commercial sector is necessary and pivotal in this age and time. Also, there is a need to align the current practice in Nigeria with what is obtainable in the United Kingdom or China which is the comparative countries in this work.

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1.0 INTRODUCTION

A new paradigm of trade based on the use of the internet or electronic medium to conduct business is known as e-commerce. Many difficulties have been brought to the attention of lawmakers, legal professionals, regulators, international organisations, and others, due to the recent rise of electronic commerce globally. As companies and customers use new technologies to complete transactions without the need for in-person meetings, they look to the legal frameworks already in place for clarity to understand their rights and responsibilities, potential tax liabilities, and degree of security, when supplying personal and financial data. In addition, they look for ways to get justice in cases of contract violations, problems with trust and privacy, non-compliance, or fraud.[1]

This resulted in the development of Online Dispute Resolution (ODR), which is now the method of choice for resolving issues involving e-commerce due to its flexibility, low cost, and efficiency of process. Notwithstanding the aforementioned advantages, ODR still faces several difficulties, particularly for developing countries such as Nigeria. The efficient use of ODR in Nigeria is seriously threatened by many issues, including inadequate infrastructure and technology, regulatory gaps in communication and enlightenment, issues with privacy and confidentiality, and regulatory framework shortcomings.[2] Hence, this work will consider an overview of electronic commerce in Nigeria, the significance and barriers to electronic commerce transactions in Nigeria,

[1] R. Mohamed, "International Law on E-Commerce: Legal Issues and Impact on the Developing Countries," being a paper presented at the China University of Political Science and Law, Beijing, China on 27 September 2013, available at: https://www.aalco.int/E-Commerce%20and%20International%20Law%202013.pdf (accessed 22 June 2024).
[2] Ibid pp 8-11.

and lessons from the United Kingdom and China on the use of ODR for settling e-commerce disputes alongside other sub-issues.

1.1. Clarification of Concepts

This section will define key terms used throughout this work to ensure clarity and consistency in the interpretation and understanding of concepts within the article.

1.1.1 Online Dispute Resolution

The phrase "Online Dispute Resolution," or "ODR," refers to a broad category of technical advancements meant to supplement or even replace traditional methods of resolving disputes. Online Dispute Resolution (ODR) shares and enhances the core components of Alternative Dispute Resolution (ADR) mechanisms by emphasising less complicated and more efficient methods of resolving conflict.[3]

Oxford University defines ODR, as one kind of ADR that utilises the simplicity and speed of the Internet and Information and Communication Technology (ICT). ODR is the best, and often the only means to enhance the way customer complaints are resolved, increase consumer trust in the marketplace, and promote the long-term growth of e-commerce.[4] Therefore, the most appropriate setting for the use of ODR is e-commerce.

[3] Resolution Systems Institute, "Online Disputes Resolution," available at https://www.aboutrsi.org/special-topics/online-dispute-resolution (accessed 25 July 2024).
[4] Pablo Cortés, "What Should the Ideal ODR System for E-commerce Consumers Look Like? The Hidden World of Consumer ADR: Redress and Behaviour," available at: https://www.law.ox.ac.uk/sites/default/files/migrated/dr_pablo_cortes.pdf (accessed 25 July 2024).

1.1.2 E-Commerce

Electronic commerce, sometimes referred to as e-business or e-commerce, is the purchasing and selling of goods and services via electronic networks like the Internet.[5] E-commerce has become prevalent across the world, and this is why it is posited that international electronic commerce increased from $19.3 trillion in 2012 to $27.7 trillion in 2016, according to the U.S. International Trade Commission (USITC).[6] The United Nations Conference on Trade and Development (UNCTAD) estimated that in 2017, the value of electronic commerce worldwide was $29 trillion.[7]

The number of internet users in Nigeria has increased astronomically.[8] Additionally, companies have moved their customer-facing communication and transactions online. One of the main reasons why electronic-based transactions are currently being encouraged is because of the impact of globalisation.

2.0 EVOLUTION AND GROWTH OF ELECTRONIC COMMERCE IN NIGERIA

By the beginning of 2023, there were approximately 122.5 million internet users in Nigeria[9] and Nigeria is among the top nations with the greatest proportion of internet

[5] T. Oguntunde & O.T Damilola, "Abandonment Factors Affecting E-commerce Transaction in Nigeria," (2012) 46 *International Journal of Computer Application,* p 41, available at: https://www.scirp.org/(S(czeh2tfqw2orz553k1w0r45))/reference/referencespapers.aspx?referenceid=3086703 (accessed 23 July 2024).
[6] United States International Trade Commission, "Global Digital Trade 1: Market Opportunities and Key Foreign Trade Restrictions" (August 2017), available at https://www.usitc.gov/publications/332/pub4716.pdf (accessed 13 March 2024).
[7] United Nations Conference on Trade and Industry (UNCTAD), "Digital Economy Report 2019, Value Creation Capture: Implications for Developing Countries," available at https://unctad.org/en/PublicationsLibrary/der2019_en.pdf (accessed 13 March 2024).
[8] T. Orimobi, "The Growth of E-Commerce in Nigeria: A Brief Overview," *Mondaq*, 9 November 2018, available at: https://www.mondaq.com/nigeria/it-and-internet/753436/the-growth-of-e-commerce-in-nigeria--a-brief-overview (accessed 13 March 2024).
[9] S. Kemp, "Digital 2023: Nigeria," DataReportal, 13 February 2023, available at https://datareportal.com/reports/digital-2023-nigeria (accessed 13 March 2024).

users. However, traditional commerce which requires the buyer and seller to be physically present to form a valid contractual transaction is what is common in Nigeria's business sector. This is because, transactions persist following this approach (the traditional commerce approach), which hinders the expansion of the electronic commerce sector, because of the widespread belief that only a select few can make online transactions and that only the elites can pay the associated costs, and this has contributed to the slow growth of electronic commerce transactions in Nigeria.[10]

The growth of e-commerce in Nigeria would have remained stunted if there had not been online payment methods like Nigeria's Visa-Packed ValueCard, Interswitch, and e-Transact. These online payment methods enable local intra and inter-bank online transaction banks. In a similar vein, the online banking apps of First Bank and Guaranty Trust Bank at the time gave hope for electronic commerce.[11]

By 2010, the rise of social media usage had started to alter Nigeria's electronic commerce narrative. This was made possible by social media platforms, which gave entrepreneurs the opportunity to market their products and services to prospective customers. People grew receptive to the idea of doing business online as a result, but delivery remained a critical factor, particularly for interstate and even worldwide shipments.[12]

Jumia opened up electronic commerce in Nigeria in June 2012. In seven years of business, the Jumia online marketplace partnered with 50,000 local African businesses

[10] Speedaf Nigeria, "The Evolution of E-Commerce in Nigeria," *LinkedIn,* 27 July 2022, available at: https://www.linkedin.com/pulse/evolution-e-commerce-nigeria-speedaf-nigeria?trk=pulse-article_more-articles_related-content-card (accessed 13 March 2024).
[11] Ibid.
[12] Ibid.

and individuals and employed about 4,000 people.[13] Konga, the second-biggest e-commerce business in Nigeria, is its nearest rival. The short-term profitability of local electronic commerce businesses is currently unattainable, but data revealed that there were 92.3 million internet users in 2018, rising to 187.8 million in 2023, suggesting more competitors and increased demand for e-commerce.[14]

2.1 Models of Electronic Commerce

Various forms of electronic commerce models exist, contingent upon the characteristics of market interaction and technological differentiations.[15] They include the following: Business-to-Business (B2B), Business-to-Consumer (B2C), Consumer-to-Consumer (C2C), Consumer-to-Business (C2B), Business-to-Government (B2G), Government-to-Business (G2B), and Government -to-Citizen (G2C). For this work, only those relevant to the context will be examined.

2.1.1 Business-to-Business (B2B)

Electronic trade that is carried out between business organisations is known as business-to-business, or B2B. In this instance, business organisations make up both the supplier and the buyer. Over 85% of all electronic commerce volume is made up of business-to-business (B2B) e-commerce, which is made up of various marketplaces and trading platforms.[16] For example, all wholesale transactions for Dell are B2B. Dell uses electronic commerce to purchase the majority of its parts and uses it to sell its goods

[13] W. Enang, "History of E-Commerce in Nigeria," *ProGuide,* 3 December 2022, available at: https://proguide.ng/history-e-commerce-nigeria/ (accessed 13 March 2024).
[14] Ibid.
[15] S. Korper & J. Ellis, "The E-commerce Book: Building the E-Empire," *Perlego,* 2000, available at: https://www.perlego.com/book/1900219/the-ecommerce-book-building-the-eempire-pdf (accessed 13 March 2024).
[16] E. Turban et al, "Overview of Electronic Commerce" (January 2018), pp.3-39.

to both consumers and businesses (B2B and B2C).[17] Another good example of this model in the world today is *Alibaba.com* which is the world's largest B2B marketplace.

2.1.2 Business-to-Consumer (B2C)

This work further focuses on the Business-to-Consumer (B2C) sales model, which is one of the most popular and well-known.[18] The business model involves only two parties interacting with one another: the seller and the customer, without the need for a middleman or other third party like a broker or store.[19]

Additionally, the business-to-consumer (B2C) paradigm embodies e-tailing or the retail application of Internet commerce. For instance, Jumia enhances the offline purchasing experience by bringing it online in Nigeria. Similar to this, Nigerian restaurants offer websites where patrons can order any food item or confectionery, such as Domino's Pizza, Cold-Stone Creamery, Chowdeck, and Jumia Food, among others. In a similar vein, ride-hailing services like Uber and Bolt prioritise their customers. As a result, these companies use the internet to provide global sales and services to customers 365 days a year, 24 hours a day, seven days a week. Also, consumers have the liberty to shop on these websites at any time of the day from the privacy of their homes as the internet has been called "the mall that never sleeps."[20]

[17] Ibid.
[18] M. Faiz, et. al, "Importance of Business to Consumer Model of E-Commerce," 25 June 2021, *International Journal of Civil, Mechanical and Energy Science,* available at: https://www.academia.edu/49385481/Importance_of_Business_to_Consumer_model_of_E_commerce (accessed 15 March 2024).
[19] Ibid.
[20] Ibid.

2.2 The Legal Framework for E-Commerce in Nigeria

Generally, Nigeria does not have a specific law on electronic commerce that addresses the concerns and interests of both businesses and consumers. However, there are other laws that address certain issues that deal with the use of electronic commerce which will be discussed.

2.2.1 The Constitution of the Federal Republic of Nigeria (1999 as amended)[21]

The Constitution of the Federal Republic of Nigeria 1999 as amended, is the ultimate law of the land, binding on all authorities and individuals inside the Federal Republic of Nigeria.[22] It serves as a guide for both the people and the government and it also outlines the responsibilities and rights of citizens.

In essence, the rights of citizens are fully provided for and guaranteed under Chapter Four of the Constitution. For transactions involving Internet commerce, this is crucial. Customers are entitled to a number of rights, including the right to life, the respect of their personhood, personal liberty, a fair trial, privacy, freedom of opinion, conscience, and religion, freedom of expression, and the ability to form associations.[23] Customers therefore have the right to privacy and a fair hearing, in the event that disagreements emerge during online transactions.

[21] Cap C.23, LFN 2004 (as amended) hereinafter referred to as CFRN 1999.
[22] Section 1(1) of the CFRN.
[23] Section 33-40 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

2.2.2 Federal Competition and Consumer Protection Act (FCCPA) 2018[24]

In general, the FCCPA aims to defend the rights of all Nigerian consumers, enable fair, effective, and competitive marketplaces in the country's economy, and make safe products more accessible to all residents. Its key objectives are to (a) promote and maintain competitive markets in the Nigerian economy;[25] (b) promote economic efficiency;[26] (c) protect and promote the interests and welfare of consumers by providing consumers with a wider variety of quality products at competitive prices;[27] (d) prohibit restrictive or unfair business practices, which prevent, restrict, or distort competition or constitute an abuse of a dominant position of market power in Nigeria;[28] and (e) contribute to the sustainable development of the Nigerian economy.[29]

Under the FCCPA, a long list of rights is guaranteed for data subjects or e-consumers. These rights include the right to information in a plain and understandable language; the right to disclosure of the price of goods or services; the right to product labelling and trade descriptions; the right to disclosure of reconditioned or second-hand goods; right to sales records; right to select suppliers; right to cancel advance reservation, booking or order; right to choose or examine goods; right to return goods; right to general standards for the marketing of goods and services; right to fair dealings; rights pertaining to the quality and safety of goods and services; and the right to safe, good

[24] Cap C25 LFN 2004.
[25] Section 1(a) of the FCCPA.
[26] Ibid, Section 1(b).
[27] Ibid, Section1 (c).
[28] Ibid, Section 1 (d).
[29] Section 1(e).

quality goods.[30] Nevertheless, none of the consumer rights mentioned address the protection of personal information pertaining to individuals who use electronic commerce.

2.2.3 Cybercrimes (Prohibition, Prevention) Act 2015[31]

One significant obstacle to electronic business is cybercrime. In order to combat cybercrimes, the Nigerian government passed the Cybercrimes Act in 2015. Unsolicited texts, emails, frauds, and phone calls are popular ways for cybercrimes to be committed electronically. These actions are typically taken as a lead-up to the actual cybercrime.

The Cybercrimes (Prohibition, Prevention) Act 2015 ensures the protection of crucial national information infrastructure, promotes cybersecurity and protects computer systems and networks, electronic communications, data and computer programs, intellectual property, and privacy rights. It also offers a comprehensive, unified, effective legal, regulatory, and institutional framework for the prohibition, prevention, detection, prosecution, and punishment of cybercrimes in Nigeria.

It is noteworthy that the Cybercrimes Act protects customers' right to privacy, which is ingrained in the Constitution as their basic human right. Additionally, it criminalises several actions commonly associated with service providers in the normal course of business.

[30] Section 114-131 of the FCCPA.
[31] Act No 17, Page A617-660.

2.2.4 National Information Technology Development Agency Act 2007[32]

The National Information Technology Development Agency (NITDA) Act 2007 was enacted to create an effective, impartial, and independent regulatory framework for the development of the Nigerian information technology sector and digital economy.[33] The NITDA Act seeks to establish fair business practices and contains privacy principles in its provisions. Section 1 of the NITDA Act promotes the use of innovative digital services, systems, practices and emerging technology in Nigeria and it also protects the rights and interest of all consumers in the digital world. Hence, the NITDA Act is a specific framework that focuses on the digital economy which encompasses electronic commerce transactions amongst other things.

The NITDA Act also establishes the National Information Technology and Development Agency to establish standards and guidelines for the development, standardisation, and regulation of information technology practices in Nigeria.

2.2.5 Nigeria Data Protection Act 2023[34]

The Nigeria Data Protection Act (NDPA) 2023 provides a comprehensive legal framework for the protection and regulation of personal information. The Act applies to all transactions intended for the processing of personal data, and the actual processing of personal data in respect of natural persons domiciled in, resident in or operating in Nigeria, or if the data processing takes place in Nigeria, or the processing of a data

[32] Act No 25, Page B805-811.
[33] Section 1 of the NITDA Act.
[34] Act No 37, Page 40. A756.

subject in Nigeria by a data controller or processor who does not reside in Nigeria.[35] Moreover, the Act makes adequate provisions for the protection and the rights of consumers.[36]

2.2.6 Evidence Act 2011[37]

The Evidence Act 2011 is the legislation that guides judicial proceedings in or before courts in Nigeria and for related matters. According to Section 1 of the Act, parties in a dispute before the court can give evidence as to any fact existing or non-existing in the proof of their cases.

Regarding the nature of electronic commerce transactions, the Act allows the rendering of computer-generated evidence. Section 84(1) provides for the admissibility of "computer-generated evidence." Thus, it indicates that for transactions conducted online, for proof of evidence in a dispute relating to the transaction, both parties can tender before the court the transaction details as produced from the computer.

Similarly, the Evidence Act lays the bedrock for the admissibility of any evidence before the court relating to any issue. Additionally, the Evidence Act provides for the area of electronic signature which is common in electronic commerce. The use of electronic signatures to execute a document is recognised under section 93(2) of the Evidence Act of 2011.

[35] Section 2(1) of the Nigeria Data Protection Act (NDPA) 2023.
[36] Section 34, 35, 36 and 37 of the NDPA 2023.
[37] Act No 18, Page A294.

2.2.7 Advance Fee Fraud and Other Related Offences Act 2006[38]

Certain offences linked to advance fee fraud and other similar offences are forbidden and punished by the Advance Fee Fraud and Other Related Offences Act of 2006. It aims to outlaw some crimes and make it illegal to use computer-related technologies to commit new ones. Due to the rising use of computers, information technology, and internet commerce, advanced fee fraud is becoming more and more common in the digital world. Those who use credit cards and conduct other online transactions are typically the target victims. Advanced fee fraud involves a perpetrator sending emails to victims asking them to transfer large amounts of money to them in a dishonest way. After this occurs, the offenders lose contact with the victim because they have deceived them.

According to the Act, anyone who, under false pretences and with the intention of defrauding another person, induces that person to confer a benefit on him or any other person in Nigeria or any other country by acting or allowing something to be done with the understanding that the benefit has been paid for or will be paid for, is guilty of an offence under this Act.[39]

It is also important to identify some international legal frameworks on electronic commerce, which are generally accepted principles and laws from which countries can develop their legislations, policies, and practices that are well suited to the growth and development of electronic commerce in their territories. These international legal frameworks include the following: United Nations Convention on the Use of Electronic

[38] Cap. A6 LFN.
[39] Advance Fee Fraud Act, Ibid, Section 1(2).

Communications in International Contracts 2005;[40] United Nations Commission on International Trade Law on Electronic Commerce (UNCITRAL Model Law) 1996;[41] United Nations Commission on International Trade Law Model on Electronic Signature 2001[42] and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Consumer Protection in the Context of Electronic Commerce.

The OECD guidelines seek to encourage fair business advertising and marketing practices while also eliminating any uncertainties that both consumers and businesses encounter in electronic commerce transactions.

3.0 SIGNIFICANCE AND BARRIERS TO ELECTRONIC COMMERCE TRANSACTIONS IN NIGERIA

How business is conducted has been revolutionised by electronic commerce, which, like all business models, has its benefits and drawbacks. The significance of electronic commerce includes improved flexibility, ease, and convenience as consumers are seen as the market kings as well as consumer sovereignty. [43] Oppenheim and Ward[44] asserted

[40] The Electronic Communications Convention ensures that agreements made and other communications sent electronically are equally enforceable and legitimate as their conventional paper-based counterparts, hence promoting the use of electronic communications in international trade.
[41] The UNCITRAL Model Law on Electronic Commerce (1996), which is based on the fundamental principles of non-discrimination against the use of electronic means, functional equivalency, and technology neutrality, is the most widely enacted text. It establishes rules for the equal treatment of electronic and paper-based information as well as the legal recognition of electronic transactions and processes.
[42] By defining standards of technical dependability for the equivalency of electronic and handwritten signatures, the Model Law on Electronic Signatures (MLES) seeks to promote and facilitate the use of electronic signatures. As a result, the MLES may help States create a contemporary, uniform, and equitable legislative framework to handle the legal handling of electronic signatures and provide clarity on their status.
[43] R. Jacob, "Importance of E-Commerce" (2020-21) available at https://www.scribd.com/document/676831735/86155e0d975ce2c97eb4990f461b2c63 (accessed 20 March 2024).
[44] C. Oppenheim & L. Ward, "Evaluation of Websites for B2C E-Commerce, Aslib Proceedings: New Information Perspectives," 58(3), pp 237-260.

that convenience is currently the main reason why people conduct business online. [45] The ability to make cashless payments online with debit cards, credit cards, internet banking, and other payment portals, as well as an enhanced delivery method (Jumia is a prime example of this), [46] are additional significant features.

Another benefit is fewer overhead costs. Since electronic commerce enterprises do not need physical storefronts, they may cut expenses on things like rent, utilities, personnel, and operating and maintenance expenditures.[47] Additionally, electronic commerce strengthens and unites individuals. For instance, individualised marketing messages and customised goods and services contribute significantly to the development of positive customer connections. It enhances the company's reputation and competitiveness, permits more flexible work schedules, and makes public service delivery easier. A few examples include online health services (online consultations with physicians or nurses), online tax filing via the Inland Revenue website, university tuition payment, and even streaming music and movies on services like Spotify and Netflix.

There are still various obstacles or restrictions preventing the successful use of electronic commerce among the three main stakeholders—consumers, businesses, and society—despite the many benefits that it offers to these groups of people. One of the obstacles is the low level of computer literacy, particularly in poor nations. For

[45] M. Faiz, supra note 19.
[46] Jumia, "Jumia Marketplace," available at: https://group.jumia.com/business/marketplace (accessed 15 March 2024).
[47] V. Jain, et al, "An Overview of Electronic Commerce (E-Commerce)," 2021, Vol 12, No 27 *Journal of Contemporary Issues In Business and Government*, available at: https://cibgp.com/article_10898_98b20a1dbfbdb8f7084003b4a035911d.pdf (accessed 14 March 2024).

example, the level of digital literacy is low in Nigeria. Because they are hesitant to adopt electronic commerce and because they are afraid of fraud and the compromise of their personal data, many Nigerians are still not comfortable with online purchases.

Another significant drawback is the expense of internet and computer connectivity. In undeveloped nations, most users do not have access to the internet.[48] The majority of people in developing nations do not have the necessary income to have access to telephone services, particularly those who live in rural areas and have poor incomes. As a result, the penetration of computer equipment is still low.[49] Lack of fundamental technical understanding, security, and data protection are other obstacles. For example, a lot of internet companies use the personal information of their clients to offer tailored services, tailored advertisements, and targeted connections with clients.

Additional impediments include transactional trust; Okoro & Kigho[50] stated that many consumers nowadays obtain information online but still make in-person transactions. Internet fraud and other delivery and logistical issues continue to be major obstacles to e-commerce.

[48] J. Lawrence and U. Tar, "Barriers to E-Commerce in Developing Countries" (2010) Vol 3, No 1 *Information, Society and Justice*, available at https://www.academia.edu/39019308/Barriers_to_ecommerce_in_developing_countries (accessed 22 March 2024).

[49] Organisation for Economic Co-operation Development (OECD), "Promoting Entrepreneurship and Innovative SMEs in a Global Economy Towards a More Responsive and Inclusive Globalisation," (June 2004).

[50] E. Okoro & P. Kigho, "The Problems and Prospects of E-transaction (The Nigerian Perspective)," (2013) *Journal of Research in International Business Management*, available at: https://www.interesjournals.org/articles/the-problems-and-prospects-of-etransaction-the-nigerian-perspective.pdf (accessed 14 March 2024).

3.1 Efficacy of Online Disputes Resolution in Resolving E-Commerce Disputes in Nigeria

ODR's electronic format is both a benefit and a disadvantage because it depends on the participants' communication abilities and psychological capacity to establish trust at a distance. ODR proponents emphasise the need of developing standard operating procedures to promote information exchange and a pleasant psychological atmosphere. Regretfully, issues with the ODR environment are likely to occur, primarily because it is impossible to completely ensure justice and rights without compromising the desired speed and cost-effectiveness. Since managing online agreements is typically more challenging than managing agreements created in traditional venues, additional challenges may come up during the enforcement phase.[51]

Its advantages can be summed up as follows: lower costs compared to in-person litigation and alternative dispute resolution; flexibility because parties do not need to be physically present; efficiency because time barriers are not an issue and parties can exchange documents and replies instantly online; involvement and influence because in-person biases and influence are reduced; and, finally, the ability to maintain confidentiality between parties.[52]

ODR has become the preferred technique of conflict resolution for many businesses. In industrialised nations, eBay, PayPal, and ICANN are the leaders in online dispute resolution. Nonetheless, others believe that the conventional approach to handling expensive and complicated legal situations may not always hold. ODR technology has

[51] Ibid.
[52] Ibid.

produced platforms for quick settlement of disputes. In jurisdictions where they have been implemented, it has also, when optimised, assisted in the containment and avoidance of disputes, which has decreased the number of cases that end up in the normal courts.[53]

ODR technology has a lot to offer when it comes to resolving e-commerce disputes in Nigeria. The regrettable reasons behind the backlog of cases and delays in the legal system are frequently discussed in public. The judicial system is well-known for having problems with issues such as inadequate court facilities and staffing, corrupt practices, inadequate compensation or welfare for judges, and institutional bottleneck procedures. Even with the establishment of Small Claims Courts, there are still difficulties. It is safe to state that online dispute resolution works well when applied correctly to resolve transactions via the internet. This is because it violates the custom of adhering to the law in court. Additionally, it is affordable and adaptable.

Furthermore, e-commerce has produced special chances for cross-border transactions; but e-commerce has also given rise to a variety of problems and necessitates an alternative dispute resolution process. Online dispute resolution (ODR) may offer a viable remedy for the rise in online disputes and the court system's slow response time to settle them. No ODR system will be successful or used unless it is user-friendly, instils

[53] About 60 million disputes that arise yearly through eBay are all solved using ODR eBay's ODR system is a high volume ODR process that addresses disputes from a systems perspective. EBay handles over 60 million disputes a year. EBay's ODR system handles problems like "item not received," "item not as described," and "unpaid item." There is a special platform for claims related to eBay's Vehicle Purchase Protection and Business Equipment Purchase protection plans; Annaleigh Hobbs "Online Dispute Resolution: Companies Implementing ODR," available at: Companies Implementing ODR - Online Dispute Resolution - Library Guides at University of Missouri Libraries (accessed 8 July 2024). This would have amounted to a disaster to the court processes if there were no ODR arrangements.

confidence in its use, and offers expertise—that is, legitimacy, value, and participation.[54] Online dispute resolution also gives the disputing parties greater satisfaction because it offers solutions with numerous conveniences. Compared to the usual judicial system, this procedure is quicker, less expensive, and more accessible.

4.0 LESSONS FROM THE UNITED KINGDOM AND CHINA ON THE USE OF ODR FOR SETTLING E-COMMERCE DISPUTES

This work will not be concluded without examining how ODR has been used to settle and solve e-commerce disputes. In doing this, the focus countries here would be the United Kingdom and China.

4.1 United Kingdom

Regarding the immense potential of online dispute resolution (ODR) to satisfy the demands of the system and its users in the twenty-first century, the Online Dispute Resolution Advisory Group offered a number of recommendations in 2015. Its goals are to increase access to justice and facilitate the quick, simple, and affordable resolution of conflicts. This paper explores a number of domains where ODR is now being effectively applied, both domestically in the UK and abroad. Additionally, ODR provides a significant potential to assist individuals who lack access to public funds for dispute resolution or find legal expenses prohibitively expensive, particularly during a time of constrained public budgets and rising legal costs.[55]

[54] O. M Atoyebi "Analysing Online Dispute resolution of E-commerce Dispute in Nigeria," *The Nigerian Lawyer*, 19 August 2022, available at https://thenigerialawyer.com/analysing-online-dispute-resolution-of-e-commerce-disputes-in-nigeria/ (accessed 8 July 2024).
[55] Civil Justice Council, "Online Dispute Resolution for Low Value Civil Claims," February 2015, available at Online Dispute Resolution (judiciary.uk) (accessed 8 July 2024).

Operating under Practice Direction 51R—Online Civil Money Claims Pilot—the Online Civil Money Claims (OCMC) Pilot, housed in the County Court and is to run from 7 August 2017 to 1 October 2025.[56] The pilot's objective is to evaluate an online claims procedure. The trial program aims to offer a more expedient and user-friendly means of initiating a County Court case for sums up to £25,000 (£10,000 for parties without legal representation). Additionally, claims against unrepresented defendants or in cases where the defendant's legal representative is not registered on His Majesty's Courts and Tribunals Service's (HMCTS) Online Service, may be brought in person by litigants if they believe the defendant will not be represented by counsel.[57]

Launched in March 2018, the digital service enables debtors to settle disputes entirely online for amounts outstanding up to £10,000. This implies that no third party is required for the issuance, handling, or settlement of claims. While represented defendants are required to use the online portal, unrepresented defendants may reply to claims either online or on paper. The deadlines and process differ from those of a regular County Court money claim that was initiated outside of the pilot. Where the parties are legally represented, claims involving up to three parties are allowed.

Over 100,000 civil money claims were filed in the first 18 months after the service's debut, according to a 2019 Ministry of Justice announcement. By enabling users to submit claims online from the comfort of their own homes and eliminating complicated legal jargon from the application, the service seeks to expedite and simplify the claims

[56] Practice Direction 51R – Online Civil Money Claims Pilot, available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51r-online-court-pilot (accessed 8 July 2024).
[57] Ibid., section 2.

submission process. The majority of consumers finish the initial claim form in less than 15 minutes. The service has been rated as satisfactory or very satisfactory by nearly 90% of users, and claims are being processed in minutes rather than days.[58]

Despite Brexit, the United Kingdom is still required to comply with consumer protection established under the European Union (EU) ODR Regulation. A business must provide a link from its website to the European Online Dispute Resolution platform website. This is because a large portion of the UK's consumer laws have their roots in the EU. [59] The goal of this platform is to expedite the resolution of disputes between customers in one EU member state and businesses located in another. For a business, using the platform is not required. Even though the company only conducts business in the UK and has no plans to use the platform to settle disputes, it is nonetheless required by law to disclose the link.[60] Rather than an EU directive, this duty to offer a link originates from an EU regulation, making it directly application as EU legislation.

4.2 China

Regarding ODR development, China is a noteworthy example to study and is hailed as a pioneer in ODR improvements, given its status as a worldwide leader and driving force

[58] HM Courts & Tribunals Service, "More Than 100,000 Money Claims Issued Online," 5 November 2019, available at: https://www.gov.uk/government/news/more-than-10000-civil-money-claims-issued-online#history (accessed 25 July 2024).

[59] It was established by the EU Regulation 524/2013 of 21st of May 2013. This Regulation details the set procedures, definitions, and legal guidelines concerning the ODR platform. It contains three chapters divided into a total of 22 articles, ten of which are dedicated to the establishment, management, and functioning of the ODR platform.

[60] The ODR lists the most complained about sectors such as Airlines: 15.22%, Clothing (including footwear): 10.11%, Information and communication technology (ICT) goods: 6:58%, Electronics goods: 4.49%, Hotels and holiday accommodation: 3.95%. Other sectors include furnishings, leisure goods, vehicle spares and accessories, domestic appliances, and mobile telephone services; Lemya Majabri, "EU ODR Platform: The Ultimate Guide for Successful Dispute Resolutions," available at: EU ODR Platform: The Ultimate Guide for Successful Dispute Resolutions - ODR Guide (accessed 9 July 2023).

in technology and e-commerce. With the development of Internet communication tools and technology, online dispute resolution in China offers a flexible and convenient platform. In China, mediation procedures have always been necessary. Since the beginning of traditional mediation in ancient China, they have had a system and procedure whereby impartial parties with assistance could resolve disagreements.[61]

Nonetheless, the expectations around mediation methods have evolved along with the generations. China has now modified its mediation practices to align with contemporary political, social, and commercial standards. It was not until the early 2000s that online dispute resolution became popular in China. The Domain Name Dispute Resolution Centre is the name of the first ODR platform in China.[62] The advancement of the internet compelled ODR to advance in terms of growth and promotion. By 2016, the Chinese Supreme People's Court had prepared materials to encourage the advancement and adoption of ODR. Five major adjustments in mediation have at some point been implemented by the Chinese government. One of these important adjustments is the application of contemporary technology to online dispute settlement. By 2018, they had over 1,000 courts and 12,000 mediation organisations in ODR as a result of this government initiative.[63] A more practical platform where parties can apply for usage, choose their mediator, attend the resolution, and come to an agreement is the result

[61] ODR Guide, "Online Dispute Resolution ODR in China and Its Future," available at Online Dispute Resolution ODR in China and its future - ODR Guide (accessed on 8 July 2024).
[62] Z. Lu and X. Zhu, "Study on the Dispute Resolution System in China," (2017) 129 *Advances in Engineering Research*, 6th International Conference on Energy, Environment and Sustainable Development (ICEESD).
[63] From the Traditional to the Modern: Mediation in China, Weinstein International Foundation, available at From the Traditional to the Modern: Mediation in China (weinsteininternational.org) (accessed 8 July 2024).

of this innovation. They can use their laptops, phones, or tablets to accomplish all of these tasks.

E-processes have completely changed the Chinese legal system. As of 2019, three Internet Courts have been established nationwide, in the major cities of Hangzhou (established in 2017), Beijing (established in 2018), and Guangzhou (established in 2018). These courts have resolved over 120,000 disputes.[64]

Presently, internet disputes and e-commerce claims are the purview of the Hangzhou Internet Court. It is the most reputable court for online mediation. The majority of the mediation proceedings must be completed online by the disputants, making the procedures used by the Hangzhou court, distinct.[65] The mediator then gets in touch with the parties via phone, internet, or video chat.

Comparable is the Beijing Internet Court. The Beijing court's preference for artificial intelligence (AI) and move away from in-person judicial proceedings are its most notable features. Although ODR experts have anticipated the application of AI in dispute resolution in the future, the Beijing judiciary has led the way globally in this area.[66] The creation of an AI judge as a component of an online litigation centre has been the most notable development. This will significantly lessen the necessity for parties to

[64] The Supreme People's Court of the People's Republic of China (Five Aspects of Progress in Chinese Internet) White Paper, Vol. 73, No. 4, 2019 cited in T. Ballesteros, "International Perspectives on Online Dispute Resolution in the E-Commerce Landscape," available at: https://www.elevenjournals.com/tijdschrift/ijodr/2021/2/IJODR_2352-5002_2021_008_002_002 (accessed 25 July 2024).
[65] The National Center for Technology & Dispute Resolution (NCTDR), "Hangzhou Internet Court," available at https://odr.info/hangzhou-internet-court/ (accessed 25 July 2024).
[66] "Beijing Internet Court Launches AI Judge" *XINHUANET* 27 June 2019, available at: http://www.xinhuanet.com/english/2019-06/27/c_138178826.htm (accessed 25 July 2024).

physically appear in court. The AI judge, who has a feminine appearance and voice, will be essential in finishing mundane, repetitive tasks.[67]

The Guangzhou Internet Court still lags behind the Beijing Internet Court in terms of structure, mimicking that of the Hangzhou Internet Court. The "Rules of Online Litigation of the People's Court of China (Rules)" are a collection of guidelines set by the Supreme People's Court of China to govern these three courts. On 1 August 2021, the Rules were enacted and came into force. There is not enough information available right now to confirm whether the courts have applied the Rules or not. Overall, ODR is thriving in Chinese court procedures, and there are no signs that this will slow down.[68]

Businesses that process complaints online have effectively incorporated ODR into their operations. As of March 2021, the Alibaba Group boasted a global consumer base exceeding one billion consumers, making it the largest e-commerce ecosystem in the world. The Alibaba Group owns Taobao, which is widely recognised as the world's largest C2C e-commerce site. It is sometimes compared to eBay in China. Ten million active merchants and an increasing 423 million active buyers make up Taobao's community.[69]

ODR's acceptability and further expansion in China were made possible by the rise in online conflicts. ODR has thrived because it is highly effective at resolving disputes in the virtual environment where e-commerce transactions take place. Electronic information technology grew in tandem with the internet's expansion. Electronic

[67] T. Ballesteros, "International Perspectives on Online Dispute Resolution in the E-Commerce Landscape," available at: https://www.elevenjournals.com/tijdschrift/ijodr/2021/2/IJODR_2352-5002_2021_008_002_002 (accessed 25 July 2024).
[68] Ibid.
[69] L. Liu & B.R Weingast, "'Tabobao' Federalism and the Emergence of Law, Chinese Style," (2018) 102 *Minnesota Law Review,* p. 1583.

signatures, online payment technologies, and information secrecy are now available for usage on ODR platforms in China. These elements combined to provide a strong foundation for the widespread use and recognition of online dispute resolution systems in China.

5.0 CONCLUSION AND RECOMMENDATION

In retrospect, this work has taken an in-depth study on online dispute resolution for e-commerce transactions in Nigeria. This work explored themes like the history and antecedents of ODR in Nigeria alongside e-commerce. It went further by providing the perspective and applicability of the present extant legal framework on digital dispute resolution. This work also considers the evolution and impact of digital dispute resolution for e-commerce cases in the United Kingdom and China, hence, learning from global best practices.

In conclusion, the full implementation and enforcement of online dispute resolution (ODR) mechanisms are essential for addressing e-commerce disputes effectively. Given the delays and inefficiencies often associated with Nigeria's court processes, adopting ODR can significantly alleviate these challenges. This approach promises not only to streamline dispute resolution but also to benefit disputants and enhance the overall efficiency of the Nigerian justice system. It is therefore recommended that stakeholders prioritise the integration of ODR to foster a more accessible and efficient resolution framework.

SAFEGUARDING THE RIGHT OF SEAFARERS IN THE MARITIME INDUSTRY: ASSESSING THE SUITABILITY OF THE PROVISIONS UNDER NIGERIAN LAW

Ilemobade Olateru-Olagbegi*

ABSTRACT

The growing disparities between the beautiful blueprints that exist for the protection of seafarers' right and what obtains in practice has become troubling. Seafarers are pivotal to the functionality of the maritime industry, which is the economic nerve of many countries, including Nigeria but the illustrious social welfare promised by the Maritime Labour Convention 2006 has not manifested in the lives of seafarers in Nigeria. Hence, this article investigates the reason for the dichotomy between rights in theory and practice, explores the unique challenges faced by seafarers in Nigeria, highlights novel challenges occasioned by the COVID-19 pandemic, and chronicles the inadequacies of the Nigerian Maritime Administration and Safety Agency (NIMASA) in protecting seafarers' rights. This article contends that to ensure the effective realization of seafarers' rights, the practice of ratifying international conventions without proper domestication must be abandoned. Additionally, regulatory agencies must prioritize enforcing existing rights and holding violators accountable.

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1.0 INTRODUCTION

The maritime industry plays a pivotal role in global trade, with seafarers serving as the sector's backbone. In Nigeria, with its vast coastline and status as an oil exporter, the significance of maritime activities cannot be overstated. Seafarers, who work tirelessly to ensure the seamless operation of ships and the transportation of goods, often face challenging and perilous conditions. Despite their critical contribution, their rights have historically been overlooked, making safeguarding their welfare and ensuring fair treatment a pressing concern.

The Nigerian maritime sector, governed by various national laws and international conventions, including the Merchant Shipping Act 2007, the Labour Act, and Nigeria's ratification of the Maritime Labour Convention 2006 (MLC 2006),[1] sets the legal framework for seafarers' rights. These instruments aim to protect seafarers from exploitation, ensure proper working conditions, and promote their social well-being. However, there remains an ongoing debate about the adequacy of Nigerian legal provisions in providing comprehensive protection to seafarers.

Seafarers are a unique community of people within the maritime industry because they are citizens of practically every country on the globe. However, the nature of their work not only isolates them into a distinct interstitial group existing on the outskirts of society but also subjects them to a plethora of foreign laws and jurisdictions that can lead to their rights being violated.

[1] International Labour Organisation, "Nigeria ratifies the Maritime Labour Convention, 2006 (MLC, 2006)" available at Nigeria ratifies the Maritime Labour Convention, 2006 (MLC, 2006) | International Labour Organization (accessed 8 September 2024).

It is essential to recognise that, despite the inherent dangers of their profession and the importance of affording seafarers' protection, challenges emerge when inconsistencies in legal frameworks across different jurisdictions result in unequal protection of their rights.[2] As a result, seafarers must be assured of their rights, no matter where their voyage takes them. This protection becomes even more crucial when considering that, according to the World Economic Forum, 90% of the world's goods are transported by sea, largely due to the indispensable services provided by seafarers. Without their effective performance, the global economy would face severe disruptions.[3]

Nigerian laws provide for some of these rights, including the right to a safe and secure workplace, fair wages, reasonable terms in employment contracts, and even the right to arrest a ship.[4] However, despite the dangerous nature of seafaring, Nigerian seafarers' labour rights are often violated by shipping companies without adequate redress.[5] In addition to working in environments prone to health challenges, seafarers often experience delayed or unpaid wages, a lack of proper medical care, and unfair contract terms.[6]

[2] K.X. Li & Jim Mi Ng, (2002) "International Maritime Conventions: Seafarers' safety and Human Rights" 33 Journal of Maritime Law & Commerce 3.
[3] Spencer Feingold & Andrea Willige, "These are the world's most vital waterways for global trade" available at https://www.weforum.org/agenda/2024/02/worlds-busiest-ocean-shipping-routes-trade (accessed 31 August 2024).
[4] Kenneth C.K "Seafarers Rights in Nigeria" available at Seafarers' Rights In Nigeria - Employee Rights/ Labour Relations - Employment and HR - Nigeria (mondaq.com) (accessed 31 August 2024).
[5] 'Unpaid benefits: We won't abandon you, Labour assures disengaged seafarers, beneficiaries' (Vanguard, 11 September 2023) available at https://www.vanguardngr.com/2023/09/unpaid-benefits-we-wont-abandon-you-labour-assures-disengaged-seafarers-beneficiaries/ (accessed 6 September 2024)
[6] G. Exarchopoulos et al., "Seafarers' welfare: A critical review of the related legal issues under the Maritime Labour Convention 2006" (2018) 93 Marine Policy 93 62, 63.

This paper will critically assess the adequacy of Nigerian law in protecting seafarers' rights. It will examine how well national legislation aligns with international standards, identify gaps in legal protections, and propose reforms to improve the working conditions and welfare of Nigerian seafarers.

2.0 OVERVIEW OF INTERNATIONAL MARITIME LAW

International maritime law governs the rules and regulations related to navigation, maritime conduct, and rights over the world's oceans. It comprises treaties, customary laws, and conventions that regulate activities such as shipping, resource exploitation, marine environmental protection, and dispute resolution between states. International maritime law also establishes the legal framework governing activities and interactions on the world's oceans, ensuring the protection of seafarers' rights, safety, and welfare.

This section provides an overview of the key components of international maritime law that are pertinent to the protection of seafarers, including the International Labour Organisation (ILO) conventions, the Maritime Labour Convention (MLC) 2006, and other relevant international agreements. These frameworks not only influence domestic law but also provide a benchmark for assessing the adequacy of Nigeria's legal provisions in protecting seafarers' rights.

The International Labour Organisation (ILO) plays a pivotal role in setting international labour standards, including those specific to the maritime sector. Historically, seafarers have often lacked fundamental rights, prompting the ILO to address these gaps through various conventions and treaties. Notable ILO conventions include the International

Convention for the Prevention of Pollution from Ships (MARPOL).[7] Although primarily focused on environmental protection, MARPOL also impacts seafarers by setting standards that indirectly affect their working conditions. There is also the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW),[8] which establishes the qualifications and training required. for seafarers, ensuring their competence and safety at sea. The International Convention for the Safety of Life at Sea (SOLAS) 1974 also exists. The primary goal of the SOLAS Convention is to establish minimal safety-compatible requirements for the design, functionality, and equipment of ships. It is regarded as the most significant convention regarding the safety of commercial vessels.[9]

The Seafarers' Hours of Work and the Manning of Ships Convention 1996 is another ILO Convention[10] that addresses issues related to working hours, rest periods, and the minimum number of crew members required on ships to ensure safe and efficient operations. It seeks to prevent overwork and fatigue, which are significant risk factors in maritime accidents.

These ILO conventions form the backbone of international maritime labour standards, providing a universal baseline that member states are encouraged to adopt and implement within their national legal frameworks. By ratifying these conventions,

[7] International Convention for the Prevention of Pollution from Ships 1973.
[8] The Standards of Training, Certification & Watchkeeping for Seafarers 1978.
[9] IMO, "International Convention for the Safety of Life at Sea (SOLAS), 1974," available at https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx (accessed 8 September 2024).
[10] Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180), available at https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C180,/Document (accessed 8 September 2024).

countries commit to upholding the rights and protections they enshrine, thereby fostering fair and safe working environments for seafarers globally.

Additionally, there is the Maritime Labour Convention (MLC) 2006, which came into force on 20 August 2013 and is also known as the Seafarers' Bill of Rights. The MLC aims to guarantee respectable living and working circumstances for all seafarers by building on 68 existing marine labour treaties and recommendations, as well as more broadly based fundamental principles.[11] It is important to flag that the MLC is more concerned with seafarers' rights and sets out the minimum standards to be met by states.[12] The MLC applies to anyone working in any capacity onboard a ship.[13]

Nigeria ratified the MLC 2006 on 18 June 2013 and also acceded to the 2014 amendments of the MLC through the tacit amendment procedure; however, the country is yet to domesticate the Convention and the amendments, in line with Section 12 of its 1999 Constitution as a dualist state. Hence, seafarers in Nigeria are yet to derive the intended benefits,[14] leaving a gap between international commitments and actual legal enforcement at the national level.

3.0 THE NIGERIAN MARITIME LEGAL FRAMEWORK

The Nigerian maritime sector is critical to the country's economy, given its extensive coastline and significant role in international shipping and trade. To regulate this vital

[11] Nautilus International, "The Seafarers' Bill of Rights: A guide to the ILO Maritime Labour Convention, 2006" p.1, available at https://www.nautilusint.org/globalassets/public-resources/pdfs/nautilus_guide_to_maritime_labour_convention.pdf (accessed 8 September 2024).
[12] Ibid.
[13] Ibid., p. 3.
[14] Olabisi O. George, "A law to incorporate the 2014 amendments of the Maritime Labour Convention into the laws of the Federal Republic of Nigeria" (2017/2018) International Maritime Law Institute, p.13, available at https://imli.org/wp-content/uploads/2020/12/Olabisi-George-Draft.pdf (accessed 9 September 2024).

industry, Nigeria has developed a comprehensive maritime legal framework aimed at ensuring safety, security, and the protection of seafarers' rights, as well as promoting efficient trade.

This legal framework is shaped by a combination of national laws, regulations, and international conventions that Nigeria has ratified or acceded to. However, challenges remain in implementing these laws effectively, particularly in fully aligning national legislation with international standards. This section examines the key components of Nigeria's maritime legal framework as it relates to seafarers, highlighting the progress made and identifying areas in need of reform to better protect maritime workers and advance the industry's growth.

The foundation of Nigeria's maritime legal framework is the 1999 Constitution, which outlines the legal responsibilities of the government to regulate maritime activities.[15] Section 12 of the Constitution, in particular, requires the domestication of international treaties ratified by Nigeria to have full legal effect within the country. This constitutional provision highlights Nigeria's status as a dualist state, meaning that international conventions must be enacted as part of domestic law before they can be enforced locally.

The Constitution further confers jurisdiction on the Federal High Court to the exclusion of any other court in civil causes and matters relating to any admiralty jurisdiction.[16] The Admiralty Jurisdiction Act further provides for the extent of the jurisdiction

[15] Sections 20 and 44(3) of the 1999 Constitution.
[16] Section 251(1)(g) of the 1999 Constitution.

conferred on the court.[17] However, it is important to point out that there have been jurisdictional clashes regarding the right court between the Federal High Court and the National Industrial Court,[18] as to which is vested with the jurisdiction to entertain maritime labour claims - which bothers on claims by seafarers, such as unpaid crew wages. The subsisting position is the decision of the Court of Appeal in *The Vessel MT Sam Purpose (Ex Mt. Tapti) & Anor* v. *Bains & Ors*,[19] where the appellate court held that it was the National Industrial Court that had the exclusive jurisdiction to determine claims for crew wages.

The Nigerian Maritime Administration and Safety Agency (NIMASA) Act 2007 creates the NIMASA as the principal regulatory body responsible for maritime safety, labour, security, and the overall sector.[20] The NIMASA Act provides the framework for the promotion of maritime development, enforcement of safety standards, and regulation of seafaring activities. The agency is also tasked with implementing international maritime conventions, including those related to labour and environmental standards.

There is also the Merchant Shipping Act 2007 - which governs shipping operations in Nigeria and outlines the rules for ship registration, crew welfare, and vessel safety. It serves as a critical piece of legislation that covers areas such as crew conditions, pollution control, and the legal responsibilities of shipowners and operators. Part IX of the Merchant Shipping Act makes provisions on matters relating to the employment of

[17] Section 1(1) of the Admiralty Jurisdiction Act.
[18] The National Industrial Court was created pursuant to Section 254C (1) of the 1999 Constitution, after the third Alteration Act.
[19] (2021) LPELR-56460 (CA).
[20] Nduka, R. E., & Ifepe, N. A. (2021). Analysis of the Roles of the Relevant Regulatory Agencies in the Nigerian Maritime Industry. IRLJ, *3*, 11.

seamen. This includes establishing the Seafarers Services Office (with sub-offices in other places) and other things connected to how seamen engagement and discharge on Nigerian ships will be conducted. Part X goes on to provide for the welfare of seamen.

The Nigerian Maritime Labour Act 1999 also exists. Part V of the Act provides for the registration of seafarers and their employers. Part VI goes on to provide for the obligations of seafarers, while Part VII provides for the conditions of service of seafarers.

There is also the Coastal and Inland Shipping (Cabotage) Act 2003, which was enacted to promote Nigerians' participation in coastal shipping and reserve domestic shipping services for vessels owned, manned, and built by Nigerians. The law was designed to boost local capacity in the shipping industry while reducing the dominance of foreign-owned vessels in Nigeria's domestic maritime trade. Although the Cabotage Act does not directly contain provisions that relate to seafarers, it has been submitted that the implementation of the Act has resulted in an increase in the number of Nigerian seafarers employed.[21] But it was also pointed out that the welfare and remuneration of Nigerian seafarers working on cabotage vessels have not enjoyed the necessary attention.[22]

While Nigeria's maritime legal framework is robust in many respects, several challenges persist. The lack of domestication of certain international conventions, such as the MLC 2006, has prevented Nigerian seafarers from fully benefiting from international labour

[21] D. E. Onwuegbuchunam et al, "Assessment of Cabotage Act implementation and its effect on Nigerian seafarers" (2020) Journal of Sustainable Development of Transport and Logistics, 5(1), 124 - 132, p.132, available at https://jsdtl.sciview.net/index.php/jsdtl/article/view/94/67 (accessed 9 September 2024).
[22] Ibid., p. 124.

standards. Additionally, corruption and bureaucratic delays in enforcing existing laws and regulations often hinder the effectiveness of the framework.

However, opportunities exist to further strengthen the legal landscape. Reforms aimed at modernising the maritime sector, capacity-building for local stakeholders, and increased enforcement of international standards could significantly enhance Nigeria's maritime industry. The Blue Economy presents a promising frontier for Nigeria, where a strengthened legal framework can foster sustainable development, encourage investment, and improve the welfare of seafarers.

Nigeria's maritime legal framework provides the structural foundation for regulating the industry, but significant work remains in domesticating international conventions and improving enforcement to ensure the protection of seafarers and the efficient operation of maritime activities.

4.0 THE STATE OF SEAFARERS' RIGHTS IN NIGERIA VIS-À-VIS INTERNATIONAL STANDARDS

Globally, the rights of seafarers are at the core of many deliberations, symposiums and conferences in the maritime industry. There are grave concerns that the rights of seafarers in practice pale in comparison to what is outlined in numerous conventions, like the Maritime Labour Convention (2006), Dock Work Convention, and Minimum Wage Fixing Convention (1970).

The Maritime Labour Convention, 2006, enunciates various rights to safeguard the labour rights of seafarers; from establishing maximum hours and mandating rest hours to creating an imperative for the provision of medical care, welfare, and social security

protection, it galvanises all stakeholders to create a safe working environment for seafarers. However, there appears to be a striking difference between what is codified in the statutes and what is obtained in reality for many seafarers, particularly in Nigeria. Recently, these rights have been subject to more nuances as the COVID-19 pandemic forced many seafarers to stay longer than their contracted hours while anxiety, mental health issues and health protection became harder for shipowners to handle.

Hence, it is important to x-ray the rights of seafarers in an increasingly changing world, with a critical focus on Nigerian seafarers and how they fare in comparison with their global counterparts.

4.1 Unique challenges faced by Seafarers in Nigeria

Seafarers face a plethora of challenges in Nigeria ranging from unemployment, piracy, wage disparities, lack of sea-time, inability to access certifications from reputable maritime organisations, etc.[23] These challenges have impacted the ability of seafarers in Nigeria to compete favourably at the global stage.[24] Despite the availability of institutions like the Maritime Academy Nigeria (MAN) Oron, Federal College of Fisheries and Marine Technology, Lagos, Charkin Maritime Safety Centre, Rivers, the Joe Marine Institute of Nautical Studies and Research, etc.,[25] both foreign and indigenous

[23] Joshua "Addressing The Many Problems of Nigerian Seafarers" available at https://shippingposition.com.ng/addressing-the-many-problems-of-nigerian-seafarers/#:~:text=It%20is%20a%20fact%20that,bunkering%2C%20piracy%2C%20and%20theft (accessed 16 September 2024).
[24] Ibid.
[25] NIMASA, "Nimasa approved maritime training institutions and courses" available at https://nimasa.gov.ng/wp-content/uploads/2023/04/2023-UPDATED-LIST-OF-NIMASA-APPROVED-MTIs-by-QUALITY-ASSURANCE-QA30560.pdf (accessed 16 September 2024).

shipowners in Nigeria fail to employ the majority of Nigerian-trained seafarers.[26] It has been established that most international maritime organisations do not recognise a Certificate of Competency (CoC) presented by Nigerian seafarers.[27] The reason mostly alluded to is the problem of inadequate training of Nigerian cadets. All of these issues culminate in an unfavourable job market for Nigerian-trained seafarers.

Over 70% of Nigerian seafarers are jobless, a number that is likely to increase with the introduction of the Nigerian Seafarers Development Programme (NSDP).[28] The NSDP is a programme conceived by NIMASA to offer world-class training to cadets and seafarers in Nigeria. The programme has produced at least 3000 seafarers without any significant improvement in the floating of indigenous ships or improvement in shipbuilding capacity. NIMASA has been faulted for the high level of unemployment due to their inability to employ qualified people to train seafarers and the lack of competent administrators to oversee the activities of the various maritime training academies.[29] Elsewhere, it has been argued that NIMASA's lack of MoUs with top shipping countries has put Nigerian seafarers at a disadvantage compared to their Ghanaian counterparts.[30] These MoUs are part of strategic business arrangements where countries

[26] George Amos "Nigerian Seafarers: Regulatory Challenges And Effective Measures For Providing Better Working Conditions" available at https://www.linkedin.com/pulse/nigerian-seafarers-regulatory-challenges-effective-measures-amos-m9raf?utm_source=share&utm_medium=member_android&utm_campaign=share_via (accessed 17 September 2024).
[27] Ibid.
[28] Anozie Egole "Over 70% of Nigerian seafarers jobless –Expert" available at https://punchng.com/over-70-of-nigerian-seafarers-jobless-expert/ (accessed 16 September 2024).
[29] Gilbert Ekugbe "Expert: NIMASA, MoT Responsible for 80% of Unemployed Seafarers in Nigeria" available at https://www.thisdaylive.com/index.php/2023/06/30/expert-nimasa-mot-responsible-for-80-of-unemployed-seafarers-in-nigeria/ (accessed 17 September 2024).
[30] Yusuf Babalola "Why Nigerian Seafarers Can't Secure Jobs On Foreign Vessels" available at https://leadership.ng/why-nigerian-seafarers-cant-secure-jobs-on-foreign-vessels/ (accessed 16 September 2024).

agree to prioritise seafarers from specific countries based on the peculiarities of their agreements.[31] Nigeria has failed to carry out its diplomatic duty hence putting locally trained seafarers at a disadvantage. It has also been argued that Nigeria can secure MoUs with top shipping companies like Maersk, and Pacific International Line, to prioritise Nigerian cadets but we have failed to leverage this opportunity.[32]

Due to these conditions, the average seafarer in Nigeria does not have the leverage to negotiate a globally competitive wage when employed by indigenous shipping lines. Many seafarers in Nigeria are unable to renew their licences due to the poor remuneration they receive and this impacts their ability to take globally recognised courses which improves their ability to get onto foreign ships.[33] Also, some seafarers have decried the lack of insurance packages for seafarers in Nigeria, something which is paramount in other jurisdictions such as Ghana and the USA.[34]

Furthermore, seafarers in Nigeria work under deplorable conditions which impacts their living standards.[35] The salaries are poor while high workloads and long working hours without adequate hazard payment are prevalent in Nigeria.[36] This position is worsened

[31] Ibid.
[32] Ibid.
[33] Amaka Awuzie "Why Nigerian seafarers fail to secure jobs onboard foreign ships" available at https://businessday.ng/maritime/article/why-nigerian-seafarers-fail-to-secure-jobs-onboard-foreign-ships/ (accessed 16 September 2024).
[34] Ibid.
[35] NIMASA "Fair Treatment of Seafarers Must Remain a Priority – Transport Minister" available at https://nimasa.gov.ng/fair-treatment-of-seafarers-must-remain-a-priority-transport-minister/ (accessed 16 September 2024).
[36] Jensen, Olaf & SÃ¸rensen, Jens & Thomas, Michelle & Canals, M Luisa & Nikolic, Nebojsa & Hu, Yunping. (2006). Working conditions in international seafaring. Occupational medicine (Oxford, England). 56.

by a trajectory of NIMASA failing to ensure that shipowners honour the Collective Bargaining Agreement with seafarers.[37]

In addition, seafarers operating in Nigeria who man the ships plying the Gulf of Guinea are susceptible to piracy attacks and kidnappings. Despite a notable decrease in piracy attacks in Nigerian waters, the hijacking and looting of oil cargoes gas has become rampant and any seafarers who resist are either killed or kidnapped.[38] These attacks persist with over 1000 seafarers and individuals kidnapped in the past decade. Recently, in January 2024, a ship carrying chemicals was attacked and nine marine officers were abducted.[39] These risks and other unfavourable conditions mirror the unique position of seafarers in Nigeria.

In summary, it is important to understand the peculiar circumstances of Nigerian seafarers as it allows one to appreciate why the rights set out in various conventions seem alien to the Nigerian sphere. With a constant battle to fix the basics of certification, gendered perspectives to recruitment [40] and structural deficiencies in administration, the seafarers in Nigeria are heroes navigating troubled waters in its literal sense.

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[37] Maritime Today Online "Seafarers Day: Maritime workers berate NIMASA for poor working condition"available at https://maritimetodayonline.com/seafarers-day-maritime-workers-berate-nimasa-for-poor-working-condition/ (accessed 16 September 2024).
[38] UNODC "Maritime Piracy in the Gulf of Guinea" available at https://www.unodc.org/documents/toc/Reports/TOCTAWestAfrica/West_Africa_TOC_PIRACY.pdf (accessed 16 September 2024).
[39] Max Williams "Gulf of Guinea Maritime Security: Lessons, Latency, and Law Enforcement" available at https://warontherocks.com/2024/05/gulf-of-guinea-maritime-security-lessons-latency-and-law-enforcement/ (accessed 16 September 2024).
[40] Adaku Onyenucheya "FESAN Decries bias against female seafarers, low employment by ship owners" available at https://guardian.ng/news/fesan-decries-bias-against-female-seafarers-low-employment-by-ship-owners/ (accessed 16 September 2024).

4.2 Core Rights of Seafarers in Nigeria

The discrepancies between the rights spelt out in the Maritime Labour Convention (MLC) 2006 and what obtains in practice are troubling. These rights, designed to address the daily challenges and risks seafarers encounter, are frequently disregarded by ship owners and shipping companies. This was a common issue worldwide until the adoption of the MLC, which now sets mandatory minimum standards for the treatment of seafarers for all ILO member states that have ratified the convention, including Nigeria.

Nigeria ratified the MLC in 2013 and despite over one decade of interacting with the law, Nigeria has not domesticated the law. Instead, the principles enunciated in the convention have now formed the guiding principles which NIMASA utilises to bridge the gap between seafarers and other stakeholders in the maritime industry in Nigeria. Despite the numerous recognitions of the importance of abiding by the spirit of the Maritime Labour Convention (2006), seafarers in Nigeria continue to undergo unjust treatment with humongous disparities when compared with counterparts across the world.

Hence, this section explores the core rights of seafarers and their practical application in Nigeria, within a global context and in line with international standards. It examines the shortcomings and highlights the gaps between the legal framework and the realities faced by seafarers, identifying key loopholes that hinder the effective enforcement of these rights.

4.2.1 Fair terms of employment

All seafarers are expected to have terms of employment to set the tone of their commitment and duties. Seafarers undertake one of the most arduous tasks in the world, as the job is both physically and mentally exerting.[41] Travelling on the sea separates most seafarers from their families and loved ones for long periods, and it only accords with basic human decency that those who sacrifice invaluable family time for months should be adequately rewarded. Article IV of the MLC 2006 provides that every seafarer is entitled to a safe working space that complies with safety standards. It further outlines that every seafarer has a right to fair terms of employment. These terms are not limited to just monetary compensation but encapsulate decent working and living conditions on the ship. These terms must be in tandem with the fundamental rights and principles laid out in Article III of the convention. Article III of the MLC eschews all forms of forced or compulsory labour and discrimination with respect to employment.

Despite these noble provisions, the MLC 2006 has had a chequered impact on the rights of seafarers globally and in Nigeria. With seafarers still subject to the laws of the flag under which they sail, many are subject to unfavourable laws that detract from the standard rights provided by the MLC.[42] In reality, what the Bill of Rights of Seafarers has done is to create a minimal threshold that is subject to modifications from states.

[41] Muhammad Anyapa Yakubu, "A critical analysis of implementation of MLC 2006 Regulation 2.2 in Nigeria" (2021) The Maritime Commons: Digital Repository of the World Maritime University.
[42] Bauer, P. J. (2007). The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights, or an Impediment to True Reforms? Chi. J. Int'l L., 8, 643.

This might be laudable, but it has opened the room for disparities in the welfare of seafarers depending on their locality and the flag under which their ships operate.

In Nigeria, gaps in the laws governing the maritime sector contribute to unfair employment terms for seafarers.[43] These legal shortcomings allow shipowners and companies to exploit loopholes, often resulting in substandard working conditions, inadequate pay, and poor welfare benefits for seafarers. Without clear legal protections, seafarers are left vulnerable to exploitation, and many are unable to seek recourse for unfair treatment.

To address this, reforms are necessary to strengthen maritime laws, ensuring they meet international standards like those set by the Maritime Labour Convention (MLC) 2006. Providing a robust legal framework would give seafarers a fair opportunity to seek justice when they encounter unjust employment agreements. Until these gaps are closed, unfair terms in seafarers' employment contracts will persist,[44] making it crucial for the Nigerian government and maritime authorities to prioritise legal reforms that protect their rights and improve working conditions in the industry.

4.2.2 Decent working and living conditions

The core focus of the MLC 2006 is to safeguard the rights of all seafarers and provide them with decent working conditions. The Convention sets minimum standards for decent working conditions, covering key aspects of seafarers' employment and welfare.

[43] Couper, A. D., Walsh, C. J., Stanberry, B. A., & Boerne, G. L. (1999). *Voyages of abuse*. London: Pluto Press.
[44] Lawal, F. T. (2022) 'The implementation of Regulations 4.2 And 4.5 of the Maritime Labour Convention, 2006 in Nigeria' available in https://commons.wmu.se/cgi/viewcontent.cgi?article=3078&context=all_dissertations (accessed 8 September 2024).

Section 27 of the NIMASA Act empowers NIMASA to regulate matters relating to maritime labour standards and practices and the protection of the rights and welfare of seafarers with decent living and working conditions of the ILO's international labour standard. It is also important to point out that seafarers' trade unions exist to promote and protect seafarers' interests towards achieving decent working conditions.

NIMASA is legally mandated to ensure that maritime labour employers adhere to regulations and standards concerning crewing, wages, safety, and welfare on Nigerian vessels. This includes enforcing the implementation of agreed-upon collective bargaining agreements or conditions of service, addressing industrial relations issues, and ensuring that seafarers receive their rightful wages and compensation benefits.

However, stakeholders have lamented the gap in the monitoring and enforcement of Nigeria's labour laws and regulations. This gap has enabled companies to take advantage of the economic vulnerability and limited bargaining power of Nigerian crew members, leading to lower wages, poor working conditions, and restricted career opportunities.[45]

Addressing these enforcement shortcomings is essential for protecting the rights of seafarers and promoting a more equitable and sustainable maritime labour environment in Nigeria. Strengthening oversight, ensuring compliance, and enhancing the bargaining power of crew members will be crucial steps toward achieving this goal.

[45] "Work, living conditions of seafarers in Nigeria, others worsen, says report" *tbiAfrica* 9 August 2023, available at https://tbiafrica.com/2023/08/09/work-living-conditions-of-seafarers-in-nigeria-others-worsen-says-report/ (accessed 8 September 2024).

4.2.3 Health protection and medical care

Seafarers are exposed to hazards at sea and are entitled to medical care and protection on board any vessel.[46] This is for the detective carrying out duties; seafarers should have access to prompt medical care from the flag state, as the well-being of seafarers should not take less importance than people ashore.[47]

The health of seafarers is vital to the economic stability and progress of the global economy.[48] Regulation 4.2 of MLC, 2006 states that shipowners are liable for the financial cost of sickness, injury, or death that happened in relation to the job while aboard. Regulation 4.2 lays the foundation for Regulation 4.3, which captures the need for seafarers work environment to be rid of occupational hazards with their health and safety paramount to prevent accidents. The fragility of our health system for our maritime workers, especially seafarers, was of concern to seafarers in Nigeria, as they suffer from fatigue, stress, and sleeping disorders, which negates the claims that Nigerian seafarers are protected both physically and mentally.

Also, the Merchant Shipping (Health Protection and Medical Care for Seafarers) Regulations, 2001 generally provide mechanisms for safeguarding the rights of seafarers on Nigerian-flagged vessels. Section 1 of the regulations provides that every ship that the regulations relate to shall carry a medicine chest. According to Section 2 of the

[46] Kenneth C.K "Seafarers Rights in Nigeria" available at Seafarers' Rights In Nigeria - Employee Rights/ Labour Relations - Employment and HR - Nigeria (mondaq.com) (accessed 31 August 2024)
[47] Asikia, C. I. I., Phd, N. E., Nwabueze, E., Nwoloziri, C. N., & Mattias, U. (2022). Healthcare Maintenance and Safety Policy: Evidence from Port Harcourt Seaport. International journal of geography & environmental management (IJGEM), 8(2), 64-88.
[48] Li, X., Zhou, Y., & Yuen, K. F. (2022). A systematic review on seafarer health: Conditions, antecedents and interventions. Transport Policy, 122, 11-25.

same regulations, the content of the medicine chest must be in tandem with the number of people, destination, and duration of the voyage.

In addition, Section 9 of the Merchant Shipping (Health Protection and Medical Care for Seafarers) Regulations, 2001 states that medical advice must be available day and night to all seafarers on the voyage. Specifically, section 9(1) of the regulations provides that "the minister shall ensure by a pre-arranged system that medical advice by radio or satellite communication at sea, including specialist advice, is available at any hour of the day or night. Notably, Section 10 of the regulations mandates that any ship that carries more than 50 seafarers on an international trip for more than three days must have a doctor aboard.

These provisions highlight the commitment of Nigerian law to providing adequate protection for the mental and physical well-being of seafarers, but there has been an issue with reconciling these rights with what is obtained in practice.

4.2.4 Wage

The Nigerian Maritime Administration and Safety Agency (NIMASA) has launched the reviewed minimum wage document for Nigerian seafarers, developed in line with the Maritime Labour Convention MLC 2006 provisions.[49] The document, which is for 2023-2025, is a product of a collective bargaining agreement that involved employers of

[49] The Nigerian Maritime Administration and Safety Agency (NIMASA) "Nimasa launches reviewed Minimum Wage Document for Seafarers" available at https://nimasa.gov.ng/nimasa-launches-reviewed-minimum-wage-document-for-seafarers/ (accessed 1 September 2024).

labour in the maritime sector, the leadership of the Maritime Workers Union of Nigeria, MWUN, NIMASA, and other stakeholders in the industry.[50]

Under the Merchant Shipping Act 2007 (the Act),[51] the seaman working on board a Nigerian vessel has the right to his wages when the seaman commences work or at the time specified in the agreement. Further to the right to receive wages, a seaman also has the following rights: The right not to forfeit his lien on the ship or be deprived of any remedy for the recovery of his wages to which, in the absence of the agreement, he would be entitled, and so on.

Regulation 2.2 of the Maritime Labour Convention, 2006 sets out the parameters guiding the wages of seafarers and provides that seafarers must receive prompt and adequate payment of their salaries. The regulation states that the payment of salaries must not be greater than a monthly interval in consonance with the applicable collective bargaining agreement. A comprehensive analysis of the implementation of this provision has been conducted, and it revealed two key anomalies: seafarers wages are delayed, and these wages are meagre compared to the global benchmark.[52] The discrepancy between the wages received by Nigerian seafarers and their global counterparts is huge and does not even meet the stipulated ILO 7.[53] Beyond the timely payment of wages,

[50] The Nigerian Maritime Administration and Safety Agency (NIMASA) "Nimasa launches reviewed Minimum Wage Document for Seafarers" available at https://nimasa.gov.ng/nimasa-launches-reviewed-minimum-wage-document-for-seafarers/ (accessed 1 September 2024).
[51] Merchant Shipping Act 2007.
[52] Muhammad Anyapa Yakubu, "A critical analysis of implementation of MLC 2006 Regulation 2.2 in Nigeria" 2021 *The Maritime Commons: Digital Repository of the World Maritime University*.
[53] Ibid.

the MLC mandates shipowners to provide an avenue for seafarers to transfer the whole or part of their salaries to family or other named beneficiaries.[54]

Nigeria has not domesticated the MLC and as such the provisions contained in the Convention are not binding legal instruments. The provisions of the regulations are mere guiding principles for NIMASA and industry stakeholders to benchmark against global best practices.

4.2.5 Accommodation and Recreational Facilities

Ensuring seafarers have decent accommodation and recreational facilities on board is essential. The provision must be very decent and safe. Due consideration must be given to the inspection of this accommodation to ensure it is up to the minimum standard set by my international bodies.[55] **The Merchant Shipping (Crew Accommodation) Regulations 2010** provides specific guidelines regarding the accommodation of all Nigerian-going ships. It specifies the mode of building specific sections of the ships like the overhead deck and the flooring. Section 9 of the Merchant Shipping (Crew Accommodation) Regulations 2010 provides that the accommodation on ships must be built with the underlying principles of protecting the crew against injury to the greatest practicable extent, the protection of the crew's accommodation against the weather and the sea, the insulation of the crew accommodation from heat and cold, the protection of the crew accommodation against moisture due to condensation, etc.

Regulation 3.1 of the Maritime Labour Convention (2006), which is a consolidation of the Accommodation of Crews Convention (Revised), 1949 and the Accommodation of

[54] FRT80 Regulation 2.2, Standard A2.2 (3).
[55] Maritime Labour Convention 2006.

Crews (Supplementary Provisions) Convention, 1970, lays out specific guidelines for accommodation and recreational facilities. This regulation spells out in detail the nature of the mattress, floor space, locker sizes and other parameters for building on the ship.[56]

5.0 COMPARISON WITH GLOBAL BEST PRACTICES

The difference between the rights of seafarers in Nigeria and other jurisdictions is enormous. As earlier elaborated, seafarers in Nigeria face unique challenges that limit their ability to realise and enjoy the rights outlined to protect them. Despite the ratification of the MLC in 2013, many Nigerian-flagged ships still struggle to meet the minimum expectations for accommodation, food quality, medical care and recreational facilities.[57]

Seafarers on Nigerian-flagged vessels continue to work longer than 8 hours a day and some over the 14-hour in 24-hour threshold recommended by the MLC 2006, which means that the minimum 10 hours of rest in 24 hours is not observed.[58] This leads to fatigue and burnout for many seafarers, which precludes them from functioning optimally and sometimes leads to accidents at sea.[59]

Nigerian seafarers often earn significantly less than their international counterparts. This gap is especially pronounced when compared with seafarers from developed nations or those working on vessels flagged in countries with strong maritime traditions.

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[56] Olabanji Olusegun "Merchant Shipping (Maritime Labour Convention) (Enforcement And Compliance) Regulations 2014" International Maritime Law Institute.
[57] Supra note 54.
[58] SRI "Hours of Work and Rest" available at https://seafarersrights.org/sri-seafarer-resources/mlc-advice-for-seafarers/key-topics/hours-of-work-and-rest/ (accessed 17 September 2024).
[59]Asanka Rajapakse, Gholam Reza Emad, Fatigue, an unsolved puzzle that continues contributing to accidents at sea, Marine Policy, Volume 155, 2023.

This pales in comparison to the experience in Denmark, which offers strong labour protections, including high wages, excellent working conditions, and comprehensive social security benefits. Danish seafarers benefit from strong union representation and collective bargaining agreements. Put into perspective, the Danish Maritime Authority recognises that foreign seafarers on Danish ships are entitled to social security protections.[60]

A study conducted by Song *et al*.[61] shows that the average seafarer in China earns wages that are above the national average and the majority of them derive maximum satisfaction from their jobs. This has been very instrumental in making the job attractive to young people but China is still looking for ways to address environmental stress and other issues emanating, like isolation from family and limited access to medical and entertainment facilities onshore.

Conversely, Nigerian seafarers are one of the lowest-paid in the world. The ILO set a benchmark of a minimum of $1,078 (₦1.7 million currently) for able seamen and a minimum monthly salary of $6, 633 (₦10.6 million) for a master.[62] This was made on the premise that the ratification of the MLC 2006 will provide an imperative for states to improve seafarers' welfare but the reverse has been the case in Nigeria. A decade after Nigeria ratified (2013) the MLC 2006, Nigerian seafarers do not earn something

[60] Danish Maritime Authority "Foreign seafarers on Danish ships" available at https://www.dma.dk/seafarers-and-manning/conditions-of-employment-mlc/foreign-seafarers-on-danish-ships (accessed 17 September 2024).
[61] Song, L., Huang, Z., Zhang, H., Tian, K., Yin, N., Xu, Y., ... & Zheng, C. (2021). The urgency to address the occupational health of Chinese seafarers for sustainable development. *Marine Policy*, *129*, 104518.
[62] Shulamite Foyeku "Nigerian seafarers among lowest paid in the world" available at https://shipsandports.com.ng/nigerian-seafarers-among-lowest-paid-world/ (accessed 3 September 2024).

remotely close to those benchmarks. Instead, the average monthly pay for a seafarer in Nigeria is $694 (₦1.1 million currently), despite noting that the global average is between $4,000 and $8,000.[63] This is exacerbated by poor working conditions such as a lack of robust medical insurance and hazard allowances.

Also, unlike many maritime nations, Nigeria lacks a comprehensive social security system for seafarers. This leaves many Nigerian seafarers without adequate protection in cases of long-term illness, disability, or retirement. The Philippines is known for its comprehensive approach to seafarer welfare. The Philippines has established a strong legal framework protecting seafarers' rights. The country has a dedicated agency (POEA) overseeing the deployment and welfare of seafarers and has implemented robust pre-deployment training and orientation programs.[64] However, it must be noted that the Philippines had been struggling to reconcile the interests of big actors with the interests of seafarers.

In addition, while Nigeria has made efforts to align with STCW (Standards of Training, Certification and Watchkeeping) requirements, there are still concerns about the quality and recognition of some Nigerian maritime education institutions. Singapore has implemented stringent safety standards and provides excellent training facilities. The Maritime and Port Authority of Singapore works closely with industry stakeholders to ensure high standards of seafarer welfare and competency.

[63] Ibid.
[64] Pia, J. V. P., Galam, R., & Bartusevičienė, I. (2024). Regulating seafarers' welfare: an examination of the protection of Filipino seafarers' well-being through a legal analysis of the POEA-Standard Employment Contract. International maritime health, 75(1), 10–18. https://doi.org/10.5603/imh.98244

Nigeria can learn from the approach of these nations and even our West African neighbour, Ghana, to improve the lots of seafarers on Nigerian-flagged vessels.

6.0 IMPACT OF COVID-19 ON NIGERIAN SEAFARERS

The COVID-19 pandemic had a devastating impact on the maritime industry globally. The pandemic ushered in an era of quarantines, border closures, social distancing, and self-isolation for the general public. But for the seafarers, it was a period of repatriation issues, renewals of certificates, resupply, crew changeovers, abandonment by ship owners, and licensing of seafarers, among many others.[65] Lucas *et al*. find that the COVID-19 pandemic left over 40,000 seafarers stranded at sea, leading to mental health and psychological issues.[66]

There was a plethora of negative issues that the pandemic raised against the physical, mental and financial state of seafarers, ranging from depression to difficulty in repatriation of funds to family to boredom.[67]

Nigerian seafarers were not spared from the agonies of the pandemic. Okeleke and Aponjolosun[68] show that a major impact of the pandemic on Nigerian seafarers was the disruption in their ability to discharge their contracted duties. Many Nigerian seafarers were under extreme pressure with an increasing workload and minimal support from the management of the ship during the extended period, which were not conceived by

[65] Doumbia-Henry, C. (2020). Shipping and COVID-19: protecting seafarers as frontline workers. WMU Journal of Maritime Affairs, 19, 279-293.
[66] Lucas, D., Jego, C., Jensen, O. C., Loddé, B., Pougnet, R., Dewitte, J. D., ... & Jegaden, D. (2021). Seafarers' mental health in the COVID-19 era: lost at sea? International maritime health, 72(2), 138-141.
[67] Coutroubis, A. D., Menelaou, A. A., & Adami, E. H. (2021). Impact of Coronavirus Disease (COVID-19) on seafarers' life and well-being. International Journal of Tropical Disease & Health, 41(21), 16-27.
[68] Okeleke, U. J., & Aponjolosun, M. O. (2020). A study on the effects of COVID–19 pandemic on Nigerian seafarers. Journal of Sustainable Development of Transport and Logistics, 5(2), 135-142.

the contractual arrangements of each seafarer.[69] These issues were worsened by the low vaccination rate of seafarers, crew changeovers, and the anxiety around repatriation of stranded workers.[70]

Ozabor, Kpang, and Obisesan[71] highlight the dire economic impacts of the pandemic on seafarers in Nigerian coastal communities. The study reveals that the shortage in movement of goods and services affected the economic fortunes of seafarers as there were few ships to work on. Additionally, it found that the pandemic led to many seafarers entering into poverty and struggling to make ends meet.[72]

The right of seafarers to decent working conditions, health protection, medical care, and welfare protection eroded during the pandemic in most parts of the world, including Nigeria.[73] Timilsina and Baygi[74] argue that the use of the COVID-19 guidelines can have profound benefits for the physical and mental health of seafarers but they find that the guidelines could not adequately address the concerns of repatriation and other unfavourable conditions.

Ultimately, the COVID-19 pandemic presented new dimensions and frontiers for the rights of seafarers. The issues along the extended contract period remained a major issue but the most pressing were the health protection of Nigerian seafarers. The

[69] Ibid.
[70] Wong, C. P. (2023). Impact of the COVID-19 pandemic on the well-being of the stranded seafarers. Maritime Business Review, 8(2), 156-169.
[71] Ozabor, F., Efe, S. I., Kpang, M. B. T., & Obisesan, A. (2023). Social and economic wellbeing of seafarers across coastal Nigeria amidst Corona virus disease. Heliyon, 9(8).
[72] Ibid.
[73] Timilsina, A., & Baygi, F. (2023). COVID-19 guidelines and its perceived effect on seafarers' health and wellbeing: A qualitative study. Plos one, 18(4), e0284155.
[74] Ibid.

pandemic highlighted the systemic failure to guarantee a safe and secure working environment for seafarers in Nigeria.

7.0 SPOTLIGHTING NIMASA'S INITIATIVES TO ENHANCE SEAFARERS' RIGHTS AND WELFARE IN NIGERIA

The rights of seafarers in Nigeria have come under increasing scrutiny, particularly in light of the challenges posed by the COVID-19 pandemic. As essential workers, seafarers have been pivotal in maintaining global supply chains, yet their rights often remain inadequately protected. Despite their recognition as the lifeblood of the industry, issues such as unpaid wages, harsh working conditions, and inadequate repatriation processes persist. Furthermore, despite the available legal framework, enforcement remains a significant challenge due to regulatory gaps and the influence of vessel owners, who prioritise profit over compliance.

The Nigerian Maritime Administration and Safety Agency (NIMASA), as the principal agency regulating the industry, has taken some initiatives over the years to enhance the welfare of seafarers in Nigeria. These efforts are crucial for addressing the systemic issues that have long plagued seafarers. The reality is that Nigeria has the potential to be a maritime powerhouse, with the right policies in place.

NIMASA has attempted to improve the welfare of seafarers through initiatives such as the Nigerian Seafarers Development Programme (NSDP) and the Collective Bargaining Agreements (CBA).[75] In 2008, NIMASA initiated the Nigerian Seafarers Development

[75] "NIMASA and the Nigerian Seafarer" *BusinessDay* 1 July 2024, available at https://businessday.ng/news/article/nimasa-and-the-nigerian-seafarer/ (accessed 10 September 2024).

Programme (NSDP) to train Nigerian youths to become seafarers and naval architects, fulfilling one of the Agency's core mandates of Indigenous maritime capacity building. The program was created to train Nigerian youths up to the degree level in Marine Engineering, Nautical Sciences and Naval Architecture in the best Maritime Training Institutions (MTIs) abroad. The goal is to position the recipients for competitive success in the global maritime industry as a means of developing Nigeria's maritime space.[76]

2,476 cadets were reported to have registered in the program as of July 2024; 979 of them had graduated and received their certificates of competency (COC). Over the last 14 years, 153 beneficiaries withdrew from the program, and regrettably, 12 beneficiaries of the program passed away.[77] In December 2023, NIMASA signed a training agreement with the Nigerian Liquefied Natural Gas Ship Management Limited (NSML) to facilitate Certificate of Competency (CoC) examinations, which is the final stage of the NSDP, for beneficiaries.[78] Despite these efforts, the operation of the program has been faulted on the basis that NIMASA was sending Nigerians out of the country to obtain certificates that the Agency could issue, hence calls for a review of the program and that participants in the program should not be limited to cadets.[79]

The NIMASA has also launched a reviewed minimum wage document for Nigerian Seafarers, in line with the provisions of the Maritime Labour Convention (MLC) 2006, in

[76] "NIMASA developing Nigerian Seafarers through Cabotage implementation," available at https://nimasa.gov.ng/nimasa-developing-nigerian-seafarers-through-cabotage-implementation/ (accessed 10 September 2024).
[77] "NIMASA and the Nigerian Seafarer" *BusinessDay* 1 July 2024, available at https://businessday.ng/news/article/nimasa-and-the-nigerian-seafarer/ (accessed 10 September 2024).
[78] "NIMASA, NSML partner to Train 150 NSDP Cadets," available at https://nimasa.gov.ng/nimasa-nsml-partner-to-train-150-nsdp-cadets/ (accessed 10 September 2024).
[79] "Seafarers fault overseas training for cadets" *The Punch* 4 January 2024, available at https://punchng.com/seafarers-fault-overseas-training-for-cadets/ (accessed 10 September 2024).

May 2024.[80] The document for 2023-2025 was a product of a collective bargaining agreement that involved relevant stakeholders in the maritime sector.[81] The agreement provides for an increase in wages, allowances and benefits. It also makes provisions that terminal operators pay aged dockworkers' redundancy and retirement benefits, give specific allowances to the surviving family members of deceased dockworkers, and implement a pension contribution plan for dockworkers, among other provisions.[82]

It is anticipated that over time, the advantages of these two NIMASA-facilitated initiatives would benefit seafarers in Nigeria and the maritime industry at large, confirming the investments and policy endeavours undertaken by the sector's premier regulatory body.

As discussions around seafarers' rights continue to evolve, it is crucial to push for comprehensive reforms that not only align with international standards but also address the specific needs and challenges faced by Nigerian seafarers. This approach ensures that policies are not only globally relevant but also practically beneficial to those within Nigeria's maritime industry.

8.0 CHALLENGES IN IMPLEMENTING SEAFARERS' RIGHTS IN NIGERIA

This section mirrors the factors that postpone the realisation and true enjoyment of the seafarers' rights as laid out in different conventions. It highlights the structural

[80] "NIMASA launches Reviewed Minimum Wage Document for Seafarers," available at https://nimasa.gov.ng/nimasa-launches-reviewed-minimum-wage-document-for-seafarers/ (accessed 10 September 2024).
[81] Ibid.
[82] "NIMASA and the Nigerian Seafarer" *BusinessDay* 1 July 2024, available at https://businessday.ng/news/article/nimasa-and-the-nigerian-seafarer/ (accessed 10 September 2024).

problems that, despite the fervent advocacy for better working conditions for seafarers in Nigeria by experts and other maritime bodies, render the efforts of private organisations and individuals less successful. It is expected that a resolution of the issues highlighted below will provide a tangible roadmap to building a maritime workforce that is in tandem with global best practices.

The first and major challenge is the lack of ratification and domestication of international maritime conventions. In general terms, Nigeria is a compliant member of the international community in terms of participation and discharge of obligations under international treaties. The country arguably has a good participation record in almost all the twenty-nine (29) subject areas into which the multilateral treaties deposited with the UN Secretary-General are classified.[83]

The non-implementation and enforcement of the IMO maritime conventions affect investments in the country as investors are concerned about the uncertainty and unpredictability of legal proceedings and legislative implementations.[84] For example, the Maritime Labour Convention (2006) has been ratified since 2013 by the Nigerian government but has not been domesticated. In the same vein, NIMASA has shown a trajectory of lip service to pushing for the implementation of the MLC with its periodic

[83] Aliyu H "The Challenges of Implementing International Treaties in Third World Countries: The Case of Maritime and Environmental Treaties Implementation in Nigeria" (2016) 50 Journal of Law, Policy and Globalization.
[84] A. Onyenucheya, "Lingering challenges, poor infrastructure undermine Nigeria's chances at IMO," (The Guardian, 22 September 2021) available at https://guardian.ng/business-services/maritime/lingering-challenges-poor-infrastructure-undermine-nigerias-chances-at-imo/ (accessed 10 September 2024).

news releases and media briefings on World Seafarers Day calling for the protection of seafarers' rights.[85]

Furthermore, Nigeria has failed to ratify several relevant conventions, which include but are not limited to, the Minimum Wage Fixing Convention, 1970; the Paid Educational Leave Convention, 1974; the Maintenance of Social Security Convention, 1982; and the Occupational Safety and Health (Dock Work) Convention, 1979, among many others.[86] This attitude shows a lack of political will to provide robust frameworks for the protection of seafarers' rights in Nigeria, especially in line with global best practices.

Accordingly, one observes a disconnect between the enthusiasm of the Nigerian Government to participate and be a state party to major international maritime treaties and conventions and the country's ability and willingness to implement and enforce the obligations and standards embodied in those treaties and conventions.

As observed earlier, a cursory examination of the extant policies, regulations, and practices in the Nigerian maritime sector reveals a wide gap between treaty obligations and prevailing practices. It would seem that critical maritime institutions are handicapped by a range of challenges, including technical capacity, workforce and skills shortages, funding, systemic inefficiency, and corruption. All of these limits their

[85] Maritime Today Online "Seafarers Day: Maritime Workers Berate NIMASA for Poor Working Conditions"
available at https://maritimetodayonline.com/seafarers-day-maritime-workers-berate-nimasa-for-poor-working-condition/ (accessed 17 September 2024).
[86] ILO "Up-to-date Conventions and Protocols Not Ratified by Nigeria" available at https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:103259 (accessed 17 September 2024).

capacity and ability to ensure adequate and consistent compliance with international standards in several operational and developmental aspects of the maritime sector.

Bureaucracy and corruption are also longstanding issues in Nigeria's maritime sector. Cumbersome administrative procedures, coupled with corruption at various levels, not only lead to inefficiencies but also deter foreign investment. Bribery and corruption in the NIMASA's NSDP have been partly responsible for the unemployment of seafarers. There are reports that NIMASA accepts waivers for junior officer positions, which are only allowed if the local equivalent of those skills is not available locally.[87] Regrettably, most of the NSDP trained seafarers are competent to occupy most of these positions, but find themselves being displaced by foreigners.[88]

9.0 RECOMMENDATIONS AND CONCLUSION

Safeguarding the rights of seafarers in Nigeria requires a comprehensive approach that blends the adoption of international conventions, reforms to national legislation, and practical measures to address their unique challenges. To start, Nigeria must prioritise the domestication and enforcement of the Maritime Labour Convention (MLC) 2006. This international framework provides a solid foundation for the protection of seafarers' rights by ensuring decent working conditions and defining the legal responsibilities of flag states and shipowners. It is essential for Nigeria to not only domesticate this convention but to ensure regular inspections and impose penalties for any violations, ensuring adherence to global standards.

[87] "Ending Exploitation of Nigerian Seafarers" This Day, available at https://www.thisdaylive.com/index.php/2019/05/10/ending-exploitation-of-nigerian-seafarers/ (accessed 18 September 2024).
[88] Ibid.

Domestically, amendments to the Merchant Shipping Act 2007 are crucial to aligning it with modern standards of crew welfare, employment contracts, and dispute resolution. Moreover, Nigeria's Labour Act must be reviewed to address the specific working conditions faced by seafarers, such as long-term contracts, the right to repatriation, and compensation for injuries sustained at sea. To support these legislative changes, a National Seafarers' Welfare Board should be established, functioning as an independent body overseeing seafarers' welfare, compliance with laws, and mediation in disputes between employers and workers.

Legal protection and access to justice are critical pillars in safeguarding seafarers' rights. Creating a specialised Ombudsman Office for Seafarers would also serve as an effective mechanism for handling grievances, from abuse and withheld wages to unsafe working conditions. This office would ensure that complaints are swiftly investigated and resolved in a transparent and impartial manner. Complementing these efforts, Nigeria could create a national seafarers' pension fund tailored to ensuring financial security post-service or in the event of workplace injuries. Health and safety must also take precedence, with comprehensive health insurance packages mandated for all seafarers. These packages should cover both physical and mental health care, given the unique stresses and isolation faced by workers at sea. Additionally, regular safety audits should be conducted on vessels to ensure compliance with health standards, alongside mental health awareness campaigns aimed at preventing burnout and promoting resilience.

Improving working and living conditions on board vessels is another priority. This can be achieved by introducing minimum wage requirements, setting clear standards for

the timely payment of wages, and mandating that vessels provide adequate living conditions such as clean water, nutritious food, and recreational spaces. To ensure that seafarers can collectively advocate for better conditions, trade unions must be empowered through legislative support, enabling them to negotiate better wages, improved working conditions, and enhanced job security.

Education and training also play a critical role in the long-term welfare of seafarers. Mandatory skills development programs should be established to equip them with the necessary tools for safety, financial literacy, and mental well-being. These programs would also provide education on international rights under conventions like the MLC, so seafarers know how to report violations and seek redress.

Addressing the problem of exploitation and human trafficking in the maritime sector is crucial. Nigeria could partner with international organisations to develop anti-trafficking measures aimed at preventing the exploitation of seafarers, particularly those working on foreign-flagged vessels. A secure identification system, such as a seafarers' passport or ID scheme, should be mandated to prevent identity fraud and protect against illegal recruitment. Repatriation rights are equally important. Clear protocols should be mandated in employment contracts, and employers who fail to comply should face strict penalties. Additionally, an emergency seafarer assistance fund could be established to help repatriate stranded seafarers due to employer negligence or vessel abandonment.

Incorporating technology into these solutions is also valuable. A digital monitoring system for vessels would allow authorities like NIMASA to ensure compliance with safety

and welfare regulations. An app for seafarers to report violations anonymously could further enhance their protection while offering resources on their legal rights.

Public awareness and advocacy campaigns should be rolled out to highlight the importance of the maritime industry and the rights of those working within it. Partnering with NGOs could help bolster advocacy efforts and bring about greater labour protections. Regional cooperation is also key, with Nigeria collaborating with neighbouring countries to protect seafarers working on foreign vessels and establishing a West African maritime safety network.

Finally, gender inclusion and anti-discrimination policies must be prioritised to protect all seafarers. This includes developing programs to encourage more women to join the industry and enforcing strict policies to combat harassment and discrimination. Together, these strategies will strengthen the framework for safeguarding seafarers' rights in Nigeria, ensuring their dignity, safety, and fair treatment.

In conclusion, safeguarding seafarers' rights in Nigeria requires a multifaceted approach that combines international commitments, legislative reforms, institutional strengthening, and practical measures. By ratifying and domesticating key conventions, amending outdated laws, and creating specialised support systems like the National Seafarers' Welfare Board and an Ombudsman Office, Nigeria can significantly improve the welfare and working conditions of its seafarers. Ensuring adequate health and safety protections, promoting access to justice, and fostering gender inclusivity will further enhance their rights. Through collaboration with regional partners and the integration of technology, Nigeria can create a more secure and equitable maritime sector. These actions, taken together, will not only uphold the dignity of seafarers but also position

Nigeria as a leader in maritime labour rights, ensuring that its seafarers are valued, protected, and empowered in a globalised industry.

UNDERSTANDING THE COMPLEXITIES OF OVERCROWDING IN NIGERIAN CORRECTIONAL SERVICE: EXPLORING LEGAL AND SOCIOLOGICAL FACTORS AND THEIR IMPACTS ON INMATE WELL-BEING AND THE INSTITUTIONAL DYNAMICS

Yetunde Ruth Ayeleso*

ABSTRACT

One major challenge that the Nigerian Correctional Service faces is the burden of overcrowding in its facilities across the country and this has birthed a bad impact on both inmates and the correctional institution. This research examines the legal and sociological factors contributing to overcrowding in Nigerian prisons. Through an in-depth appraisal, factors worsening the congestion were investigated and its impact on the well-being of inmates and institutional arrangements were explored. Potential solutions have been made to address and improve the condition of Nigerian prisons, ultimately seeking to enhance the effectiveness and humane operation of the correctional system.

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1.0 INTRODUCTION

The correctional service is a facility prepared for people who default in the law of the land; it is a secured building for criminals who the law of the land has caught up with. The Oxford Dictionary defines a prison as a building where people are kept as a punishment for a crime they have committed or while awaiting trial. When a legal system wants to control crime, it sets out punishment for the default of any of its legal provisions and may make serving a prison term one of the forms of punishment.

According to the United Nations, punishments are given to retribute, incapacitate, deter, rehabilitate, and repair.[1] In order to achieve the aim of punishment, the correctional service must be well managed with the availability of appropriate and sufficient infrastructures. The Nigerian Prison Service was reformed on 15 August 2019 and now goes by the name, "Nigerian Correctional Service," with the vision of having a credible correctional service that secures, reforms, rehabilitates, and reintegrates offenders into society.[2] However, this vision is punctured by the challenge of overcrowding, which significantly affects both inmates and the correctional institution. This challenge can be linked to both legal and sociological factors.

Over the years, several scholars have proposed reforming the Nigerian prison system, because of several notable challenges, which include congestion. Overcrowding occurs when the number of inmates is more than the facility provided. Prison cells in Nigeria

[1] United Nations Office on Drug and Crime, "Justifying Punishment in the Community," available at: https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-7/key-issues/2--justifying-punishment- in-the-community.html (accessed 5 May 2024).
[2] Nigerian Correctional Service, "Our Vision/Mission," available at Our Vision/Mission (accessed 11 May 2024).

accommodate three times more than their proposed capacity. It is so bad in some facilities that only a foot-and-a-half-length post is appointed to an inmate, where they can barely stretch their legs or move their body freely.[3] Overcrowding has been associated with a poor standard of living for the incarcerated in Nigerian prisons; it has been accounted to be responsible for physical and mental damage to inmates.[4]

The inefficiencies within Nigeria's legal system play a central role in contributing to prison overcrowding. Issues like lengthy trial processes and delays in case resolution contribute to a prolonged pre-trial detention as so many accused are awaiting trial. Also, rigid sentencing laws and the lack of alternative sentencing measures further compound the issue, resulting in an overreliance on imprisonment as the primary form of punishment.

Societal factors also contribute to overcrowding in the Nigerian Correctional Service, just as much as some practices in the legal system. Factors like economic disparities, high crime rates, and cultural stigmas surrounding rehabilitation, contribute to a disproportionate number of individuals from marginalised communities entering the prison system. Other sociological factors include socioeconomic inequalities, systemic discrimination, lack of access to resources and opportunities, and structural barriers that contribute to higher involvement in criminal activities and subsequent contact with law enforcement. Moreover, political interference in law enforcement and judicial

[3] Awopetu Grace, "An Assessment of Prison Overcrowding in Nigeria Implications for Rehabilitation, Reformation and Reintegration of Inmates," (2014) 19(3) *Journal of Humanities and Social Science,* p 21-26.

[4] Stephen Hoopgood, "Dignity and Ennui: Amnesty International Report: The State of the World's Human Right," London Amnesty International Publication, (2010) 2(1) *Journal of Human Rights Practice,* p. 151–165.

processes occasionally leads to arbitrary arrests and wrongful convictions, further straining the prison population.

The congestion at the Nigerian prisons has detrimental effects on the well-being of inmates and waters down the effort put into reintegrating the incarcerated back into the society. It leads to the spread of infectious diseases and increases the prevalence of mental health issues among inmates. Fights easily escalate in overcrowded facilities, which heightens the risk of violence, abuse, and gang-related activities. There is usually limited access to essential resources, which worsens these challenges and compromises the physical and mental health of inmates. Congestion in Nigerian prisons threatens the proper function of correctional institutions; it causes strain on infrastructure, which leads to deteriorating facilities and inadequate sanitation, while the management struggles to maintain order and provide effective rehabilitative programs. Furthermore, overcrowding fosters corruption within correctional facilities, undermining accountability, and hindering efforts to address inmate mistreatment and recidivism.

Understanding the complexities of overcrowding in Nigerian prisons requires a comprehensive examination of the legal and sociological factors. It is important to address the inefficiencies within the legal system, tackle societal root causes of crime, and promote the implementation of reforms to improve inmate well-being and institutional dynamics in Nigeria.

2.0 LEGAL FACTORS THAT CONTRIBUTE TO OVERCROWDING IN NIGERIAN CORRECTIONAL FACILITIES

The criminal justice system in Nigeria plays a significant role in the functioning of correctional facilities in the country. The criminal justice system starts the process that leads to the incarceration of inmates through law enforcement agencies. The Police step into a situation, investigate the crime committed, make necessary arrests, and gather evidence. The case is then handed over to the State prosecution, who files charges and initiates the trial in court. The decisions made by law enforcement officials regarding who to arrest and charge in court can have a direct impact on the number of persons entering the prison system. The following are some identified legal factors that contribute to overcrowding in Nigerian Correctional Facilities.

2.1 Prolonged and Inefficient Legal Processes

The Nigerian legal and criminal justice system operates hierarchically when handling cases. A legal case progresses from the lower court, and when parties are dissatisfied with its decision, they appeal to a higher court within the hierarchy. While the accused awaits trial, they are kept in detention facilities, and this in turn increases the population in prison. This hierarchy, legal technicalities, and bureaucratic delays like filing of paperwork, continuous filing of motions, legal complexity, arranging witnesses, adjournment, and case backlog (this is when there are several cases on the court list and it sometimes takes months to get a date for trial, hearing, or other proceedings) spike the crowd in prisons. These inefficiencies result in prolonged pretrial detention for the accused even for minor offences. As of 13 May 2024, the total Inmate population in Nigeria is 80,858; the total number of male inmates is 79,061; the total number of

female inmates is 1,797. The total number of convicted inmates is 25,447; the number of convicted male inmates is 25,006; while the number of convicted female inmates is 441. The total number of inmates awaiting trial is 55,411; males awaiting trial are 54,055 while females awaiting trial are 1,356. The result by percentage is that convicted inmates constitute 31%, while those awaiting trial make up 69%. Male Inmates make up 98% while female inmates are 2%.[5] These figures highlight that prison congestion in Nigeria is primarily driven by the high number of individuals awaiting trial.

2.2 Mandatory Sentencing

The State employs two types of sentencing to punish lawbreakers, mandatory sentencing and discretionary sentencing. Mandatory sentencing refers to a predetermined prison term set by law, often indicated by phrases such as "not less than" in legislative provisions. This means that while the court has the discretion to impose a longer sentence, it cannot reduce the prison term below the minimum prescribed by law.[6] They can be regarded as prescribed fixed sentences or sentencing ranges for specific crimes, limiting judicial discretion. This can result in longer prison terms for offenders, leading to an increase in the overall prison population.

[5] Nigeria Correctional Service, "Statistic Summary" (2024), available at: https://www.corrections.gov.ng/statistics_summary (accessed 13 May 2024).

[6] Emmanuel Samaila, "The Implications of the Mandatory Sentences in the Penal Code Law of Kaduna State 2017 (as amended) on the Jurisdiction of Criminal Courts in Kaduna State," (July 2022), *Law Pavilion*, available at https://lawpavilion.com/blog/the-implications-of-the-mandatory-sentences-in-the-penal-code-law-of-kaduna-state-2017-as-amended-on-the-jurisdiction-of-criminal-courts-in-kaduna-state/ (accessed 16 May 2024).

Discretionary sentencing occurs when a judge determines the appropriate punishment for a crime without being bound by a fixed minimum or maximum sentence prescribed by law.

The continuous inflow of people serving mandatory sentences can worsen the case of overcrowding in Nigerian prisons, which strains the facilities, resources, and staff. Not only do overcrowded prisons compromise safety, sanitation, and access to rehabilitation programs for inmates, but they also come with significant financial costs for the government associated with maintaining a large prison population. Therefore, taxpayers bear the burden of funding incarceration, which diverts resources from other critical areas such as education, healthcare, and social services.

Additionally, the problem associated with mandatory sentencing is that it restricts a judge's discretionary duty to consider circumstances surrounding a case when passing a sentence. This approach fails to employ mitigating factors, which in turn leads to prison or jail term sentences and increases the prison population. When a crime is committed, what distinguishes the crime from being a felony or a misdemeanour lies in the seriousness of the crime. An aggravated assault (an attack that causes serious bodily harm using a deadly weapon, like hitting someone with a heavy rod, with the intention to compromise the victim's life) is a felony, while battery (slapping someone in the face) is a misdemeanour.

Certain crimes that are typically classified as misdemeanours can escalate to felonies under specific circumstances. For instance, in some countries, possessing less than an ounce of marijuana is treated as a misdemeanour, but possession of more than an ounce may be considered intent to distribute, which is a felony. Similarly, section 355 of the

Nigerian Criminal Code states that "any person who unlawfully assaults another and thereby does him harm, is guilty of a felony and is liable to imprisonment for three years."

In addition, an offence like driving under the influence, which is usually a misdemeanour, can rise to a felony status if it results in harm or death of another person or if the offender is not a first-time offender.

2.3 High Dependence on Incarceration for Minor Offences

Prisons provide a short-term solution to crimes by removing offenders from society but do not address the root causes of criminal behaviour. For several minor offences, prison term is the punishment under Nigerian laws and alternative sentencing is hardly explored. Alternative sentencing focuses on long-term solutions by addressing the root causes of criminal behaviours, such as substance abuse or the lack of education and employment opportunities. Without embracing alternative sentencing options, the cycle of crime and incarceration is likely to persist, further escalating the growth of the prison population and overburdening the criminal justice system.

Not utilising alternative punishment like probation, community service, or treatment programs (for offenders suffering from mental illness) makes the courts resort to incarceration even for nonviolent or minor offences. This approach contributes to an increase in the prison population for offences that could otherwise be managed outside the prison system. Although the Nigerian Correctional Service has adopted rehabilitation programs to reintegrate inmates into society, prison overcrowding limits the resources and programs needed for effective rehabilitation. Implementing

alternative sentencing options, such as drug courts or mental health treatment programs, can help address underlying issues like addiction or mental illness. Without these alternatives, offenders are more likely to re-offend and return to prison, further exacerbating the problem of overcrowded prisons.

Exploring effective alternative sentencing options could make a significant difference in the Nigerian criminal justice system. One such option is the establishment of drug courts, which would allow for supervised treatment and rehabilitation instead of prison time for drug offenders. This approach not only helps individuals overcome their addiction but also reduces the burden on overcrowded prisons. Similarly, mental health courts could be developed to provide specialized treatment and support for offenders facing mental health challenges, promoting their well-being and reducing the likelihood of reoffending.

Community service is another viable alternative that could be adopted. Common in many Western countries, this form of sentencing allows offenders to contribute positively to society by working on community projects, thereby fostering a sense of responsibility and redemption. This type of alternative sentencing also helps reduce the prison population by reserving incarceration for more serious offences.

Restorative justice programs present another meaningful approach by focusing on reconciliation between the offender and the victim. These programs prioritise healing and resolution over punishment, allowing both parties to address the harm caused and work towards a mutual understanding. Such initiatives can contribute to lower recidivism rates and more harmonious community relationships.

Probation and parole programs also offer an effective alternative, enabling offenders to participate in community rehabilitation programs under supervision. This form of sentencing can be particularly useful for individuals who have committed less severe offences but still require oversight to ensure they comply with rehabilitation plans.

Implementing and expanding these alternative sentencing options is essential for creating a more effective and just criminal justice system in Nigeria. By focusing on rehabilitation and addressing the root causes of crime, such measures can help reduce prison populations and ultimately support a healthier, more balanced approach to criminal justice.

3.0 SOCIOLOGICAL FACTORS THAT CONTRIBUTE TO OVERCROWDING IN NIGERIAN CORRECTIONAL FACILITIES

Sociological factors are major catalysts to the congestion of Nigerian prisons. Crimes committed are products of human behaviour and one of the social theories of human behaviour is Albert Bandura's theory, which is that human behaviour is learned from the environment through observing models. The core assumption of this theory is that humans are active information processors and they believe there is a relationship between their behaviour and its consequences.[7] Bandura propounded that the behaviour people exhibit can either get them a reward or punishment; the reward they get is an encouragement to do more while punishment is a form of deterrence or discouragement from engaging in such an act.

[7] Andrew Obiajulu, "Social Deviance and Control: The Nigerian Experience," in A.A. Aderinto (ed), *Deviance and Social Control*: *An African Perspective,* (Ibadan University Press, 2014).

Jean Hampton is another social behaviour theorist who propounded that the ultimate objective of punishment is to bring about social tranquillity. He argued that people are self-determined beings with the ability to freely make choices often obstructed by various social factors like culture, religion, alcohol, drug addiction, psychosis, etc. In his theory, Jean emphasises treatment programs that aim to make offenders self-dependent and remorseful. Treatment, in this context, is all efforts aimed at the remission of criminal behaviours and the social reintegration of the offender. One of the efforts made for criminals to remit their offence is serving a prison term.

It is important at this junction to discuss some sociological factors contributing to overcrowding in Nigerian Prisons.

3.1 Socio-economic Discrepancy

Socio-economic discrepancy gives a broad view of the general inequalities and unfair treatment obtainable in society. It includes the gap in income, standard of living, education, wealth distribution etc. These disparities can significantly contribute to the overcrowding of Nigerian prisons through various interconnected factors.

3.1.1 Poverty and Crime

Amid Nigeria's ongoing economic crisis, many citizens are enduring severe financial hardship, which can push individuals to resort to criminal activities such as theft, drug trafficking, kidnapping, and other serious offences as a means of survival. As of 24 April 2024, the Naira had lost its value by 60% against the US dollar.[8] This has led to food

[8] Emele Onu, "Naira Poised for Worst Four-Day Drop Since January's Devaluation" *Bloomberg* 23 April 2024, available at https://www.bloomberg.com/news/articles/2024-04-23/naira-weakens-as-dollar-liquidity-fades-in-nigerian-forex-market (accessed 25 May 2024).

inflation and an increase in the price of goods and services in the country.[9] This is coupled with the insecurity that has kept farmers away from their farms. The removal of the fuel subsidy has led to an increase in petrol pump prices, increasing the cost of transportation and food prices, while the minimum wage does not qualify as a liveable wage, in light of the soaring inflation.

These economic challenges have deepened poverty and hardship, making daily survival increasingly difficult and contributing to a rise in insecurity and crime. Kidnapping, in particular, has become a lucrative but dangerous enterprise as individuals seek to survive through illicit means. Those apprehended for this crime face severe legal consequences. Under section 364 of the Criminal Code Act of Nigeria, kidnapping is classified as a felony punishable by a prison term of up to ten years. However, as kidnapping has reached epidemic proportions in Nigeria, some states have amended their criminal laws to impose even stricter penalties. For instance, Kano, Benue, Bayelsa, Enugu, Anambra, and Nasarawa states have introduced the death penalty as a punishment for kidnapping, while states like Kwara, Ondo, and Osun have opted for life imprisonment as the maximum sentence. This was confirmed in interviews with Punch Newspaper, highlighting the extent to which states are reinforcing laws in response to the growing threat of kidnapping.[10]

[9] Paul Atuma, "Why the Prices of Food Items will Continue to Rise,'' *Nairametrics* March 2024, available at https://nairametrics.com/2024/03/31/why-the-prices-of-food-items-will-continue-to-rise/ (accessed 24 May 2024).

[10] 'Kidnapping epidemic: Kano, nine others mull death sentence, life jail' Punch 24 January 2024, available at https://punchng.com/kidnapping-epidemic-kano-nine-others-mull-death-sentence-life-jail/ (accessed 7 July 2024).

3.1.2 Minor Crimes

Minor crimes are offences that are punishable by fine, forfeiture, or imprisonment of less than two years. These offences include burglary, petty theft, false information not leading to any bodily harm, traffic violations, public nuisance, violation of local laws like selling wares where it is prohibited, etc. The rate of these offences in Nigeria is presently high. The Nigerian law enforcement agencies often focus their interest on arresting and custodian sentencing of the offenders because it brings money into the system in the form of fines and those that are not able to pay end up being confined and charged to court thereby contributing to the already overpopulated prison.[11] Some of those arrested for minor offences end up in prolonged pre-trial detention while waiting for their matters to be heard in court and prisons in Nigeria often lack effective rehabilitation programs that could prevent repeat offences. These inefficiencies cause several violations of the poor and make the recommission of crime an unending cycle and offenders end up returning to prison, further adding to overcrowding in prisons.

Non-custodian sentencing like community service, driving disqualification, parole, probation etc. should be used as alternative sentencing to reduce the influx of people into Nigerian prisons. Also, the bail system in Nigeria can be problematic, particularly for those accused of minor crimes; many detainees cannot afford bail or do not have the necessary legal support to secure it, leading to extended periods of incarceration

[11] "Special Report: Criminalisation of petty offences in Nigeria violates the poor'' *Premium Times* 11 October 2022, available at https://www.premiumtimesng.com/news/headlines/558840-special-report-criminalisation-of-petty-offences-in-nigeria-violates-the-poor.html (accessed 7 July 2024).

while awaiting trial. A large portion of those in prison are offenders of misdemeanour and simple offences.

3.1.3 Lack of Legal Representation

So many inmates in Nigerian prisons are held in pre-trial detention due to their inability to access legal representation.[12] The Constitution of the Federal Republic of Nigeria guarantees everyone the right to represent themselves or to be represented by a legal practitioner. However, many individuals cannot afford the services of a lawyer, and the legal aid provided by government and non-governmental organisations is often overstretched and unable to meet demand. As a result, many accused persons are left with no choice but to represent themselves in court. Without adequate knowledge of the law or their rights, self-represented defendants are often unable to present an effective defence, increasing the likelihood of wrongful convictions or harsher sentences. In contrast, proper legal representation could have led to an acquittal or a more lenient sentence, highlighting the critical importance of accessible and effective legal aid in ensuring justice.

This reflects a legal system in which delays and inefficiencies contribute significantly to the overcrowding of Nigerian prisons. In cases where suspects are arrested for bailable offences but cannot secure bail, they are often held at police stations and later transferred to prison to await trial. Without legal representation to advocate for their release or expedite their cases, these individuals may spend years in pretrial detention.

[12] Taiye Omodoyin & Omolade Omiyinde, "Law Clinic and Access to Justice for Pretrial Detainees in Nigeria" (2021) *ResearchGate*, available at https://www.researchgate.net/publication/353368484_Law_Clinic_and_Access_to_Justice_for_Pretrial_Detainees_in_Nigeria (accessed 19 November 2024).

Furthermore, legal reforms that could address these issues remain unimplemented, leaving many accused persons to accept their circumstances as their fate unless they can successfully appeal. These systemic challenges highlight the urgent need for improved access to justice and efficient legal processes to reduce the prison population and ensure fair treatment for all accused persons.

3.2 High Crime Rate

The high rate of crime in Nigeria has significantly contributed to the overcrowding of the country's prisons, driven by a combination of interconnected factors. Economic hardship, exacerbated by the deliberate manipulation of poverty by the political class, has fuelled an increase in criminal activities such as kidnapping, terrorism, robbery, and banditry. These crimes are often motivated by the substantial financial gains derived from activities like ransom payments.

Over the last five years, the level of crime has increased dramatically.[13] For instance, the prison population rose from 63,142 inmates in 2016 to 73,631 inmates in 2018.[14] By 27 May 2024, this number had further climbed to 81,647 inmates,[15] far exceeding the official prison capacity of 50,153, as estimated by the World Prison Brief in 2021. These figures underscore the rising crime rates and their direct correlation with increased arrests, convictions, and, consequently, overcrowded prisons in Nigeria.

[13] Numbeo, ‘‘Crimes in Nigeria” available at https://www.numbeo.com/crime/country_result.jsp?country=Nigeria (accessed 26 May 2024).
[14] World Prison Brief, ‘Nigeria’ available at https://www.prisonstudies.org/country/nigeria (accessed 27 May 2024).
[15] Nigeria Correctional Service, ‘‘Statistic Summary’’ (2024) available at https://www.corrections.gov.ng/statistics_summary (accessed 27 May 2024).

The Nigerian judicial system is often plagued by technical and bureaucratic delays, which exacerbate the backlog of cases in court, a situation compounded by the high crime rate in the country. As a result, a significant number of individuals are held in pretrial detention, further straining the already overcrowded prisons. According to statistics from the Nigerian Correctional Service as of 28 May 28 2024, 67% of the prison population consists of individuals awaiting trial.[16]

Many of these detainees are held for bailable offences but remain incarcerated because they cannot afford bail, leading to prolonged detention and worsening prison congestion. For instance, in a recent case, about 30 boys charged with treason were held in custody for over 60 days. When finally brought before the court, the presiding judge imposed an exorbitant bail amount of ₦10,000,000 (ten million naira) each, sparking public outrage. This public reaction drew the attention of the Nigerian President, who intervened. Without this intervention, these boys would likely have been sent to prison, unable to afford the unreasonable bail.[17]

Similarly, Femi Jimoh, a pastor accused of robbery, spent nine years in detention simply because he could not meet his bail conditions.[18] Countless others remain in prison under similar circumstances, highlighting the urgent need for reforms to address the

[16] Ibid.
[17] 'Nigeria drops treason charges against children after outcry' *BBC* 5 November 2024, available at https://www.bbc.com/news/articles/cr4lzqe79x3o (accessed 19 November 2024).
[18] 'Pastor Accuses MFM Founder Olukoya of Using His Influence To Put Him In Prison For Nine Years Without Trial, Laments Police Torture, Abuse' *Sahara Reporters* 30 May 2024, available at https://saharareporters.com/2024/05/30/pastor-accuses-mfm-founder-olukoya-using-his-influence-put-him-prison-nine-years-without (accessed 20 November 2024).

inequities in bail practices and reduce the burden on Nigeria's judicial and correctional systems.

3.3 Cultural Stigma

Cultural stigma is another social factor that significantly contributes to the increasing population in Nigerian prisons through several interconnected factors. The cultural stigma surrounding mental health issues and substance abuse is still a challenge the National Mental Health Act 2023,[19] is yet to solve despite its robust provisions against the stigmatisation of people with mental disorders; these set of people often do not get the appropriate treatment and support they need, due to how the community people see them. When people with mental health conditions or substance abuse problems engage in criminal activities, they are incarcerated instead of receiving the necessary medical care at mental health institutions, and these, in turn, contribute to the prison population. Individuals from lower socio-economic backgrounds often face condescending treatment that restricts their access to quality education and employment opportunities. Struggling to navigate the economic hardships imposed by their circumstances, many are left with limited options for survival. This harsh reality often drives some to engage in criminal activities as a means of coping, ultimately leading to their incarceration.

Another cultural stigma that contributes to overcrowding in Nigerian prisons is the stigma that surrounds gender roles and domestic violence, which involve mostly women. The women who defend themselves against domestic violence or who are involved in

[19] Cap. 112.

crimes of survival (such as theft or prostitution) suffer stigma and are incarcerated for their crimes thereby contributing to the female prison population.

One major cultural stigma is the one attached to being an ex-convict; there is a stigma attached to being a former prisoner, and a lot of these people find it difficult to move past this stigma, and it is more difficult for them to reintegrate into society, and they find themselves committing another crime that will return them into prison. There is a lack of acceptance and support, ex-convicts face that eventually leads to recidivism, they often struggle to find jobs and rebuild their lives. And the cycle of re-offending and re-incarceration continues and keeps the prison population high.

3.4 Political Involvement

The interference of politics in the criminal justice system has negatively impacted Nigeria's prison population through the abuse of power by elected political officers and government officials. Corrupt politicians often exploit the legal system to target political opponents, activists, or protesters, using their authority to harass, arrest, and incarcerate individuals perceived as threats to their ambitions or those in power. This misuse of power results in the imprisonment of individuals who may not be guilty of the crimes they are accused of but are unjustly treated as criminals for challenging the status quo.

During the 2020 #EndSARS protests in Nigeria, numerous peaceful protesters were arrested, with some remaining in detention for over three years.[20] As of October 2024,

[20] 'Nigeria: Three years after #EndSARS at least 15 protesters languish in Lagos jail' *Amnesty International* 20 October 2023, available at https://www.amnesty.org/en/latest/news/2023/10/nigeria-three-years-after-endsars-at-least-15-protesters-languish-in-lagos-jail/ (accessed 20 November 2024).

allegations persist that some protesters are still imprisoned.[21] This highlights how some politicians manipulate law enforcement agencies to suppress dissent and target individuals who oppose their agendas. During the protests, many protesters were arrested on questionable grounds, denied bail, and subjected to prolonged arbitrary detention.[22] These actions were likely aimed at discouraging further demonstrations and silencing critics. Such political interference in law enforcement often results in the imprisonment of individuals for minor offences or fabricated charges, exacerbating prison overcrowding and undermining justice.

Politics can also compromise the quality of judicial outcomes. Some judges are influenced through bribes or political pressure to deliver specific verdicts or impose harsher sentences on individuals targeted by the political class. Such interference undermines the integrity and independence of the judiciary, eroding public trust in the justice system. This practice can result in unjust sentencing, where individuals are wrongfully convicted or disproportionately punished, ultimately contributing to the rising number of people in prison and exacerbating issues of overcrowding and systemic inequality.[23]

The judiciary's financial dependence being tied to the executive branch creates a significant challenge to its independence and efficiency. If the judiciary fails to align

[21] 'CSOs condemn alleged 4 years detention of #EndSARS protesters' *Vanguard* 21 October 2024, available at https://www.vanguardngr.com/2024/10/csos-condemn-alleged-4-years-detention-of-endsars-protesters/ (accessed 20 November 2024).
[22] 'Nigeria: Three years after #EndSARS at least 15 protesters languish in Lagos jail' *Reliefweb* 20 October 2023, available at https://reliefweb.int/report/nigeria/nigeria-three-years-after-endsars-least-15-protesters-languish-lagos-jail (accessed 6 June 2024).
[23] Mondaq, 'Top Nigeria Judges On Trial For Corruption' available at https://www.mondaq.com/nigeria/white-collar-crime-anti-corruption--fraud/551424/top-nigeria-judges-on-trial-for-corruption (accessed 6 June 2024).

with the executive's interests, its funding and benefits may suffer, undermining its ability to function effectively. Chronic underfunding hampers the judiciary's capacity to deliver timely and fair justice, leading to delays in case processing, prolonged pretrial detentions, and overcrowded prisons.

Moreover, political interference extends beyond funding. Politicians often influence legislative decisions to introduce laws and policies that disproportionately disadvantage average citizens, particularly those from less privileged backgrounds. These politically motivated laws, often excessively stringent for minor offences, can result in mass incarcerations, further straining an already overburdened correctional system and exacerbating social inequalities.

Elections in Nigeria are often accompanied by heightened political tensions that can escalate into violence, triggering crackdowns on law and order. These situations frequently result in mass arrests, significantly inflating the prison population. Additionally, political dynamics play a role in the detention of activists, journalists, and ordinary citizens, particularly those who challenge or oppose the interests of powerful politicians.

When crafting legislation, politicians with ulterior motives often prioritise personal or political gain over the welfare of the populace. This results in the neglect of critical rehabilitation and reintegration programs for prisoners. The few programs that do exist are typically underfunded, leaving them ineffective and underdeveloped. This lack of support contributes to high recidivism rates, as former inmates, unable to access meaningful assistance, often revert to criminal activities, ultimately returning to prison.

Political interference further exacerbates ethnic and regional biases within the criminal justice system. Politicians may exploit their influence to shield individuals from their own ethnic or regional communities while disproportionately targeting others. This discriminatory treatment undermines the justice system's integrity, fosters inequality, and increases incarceration rates among marginalized groups. Such practices perpetuate social divides and hinder efforts to establish a fair and balanced judicial process.

4.0 IMPACTS OF OVERCROWDING ON INMATES' WELL-BEING

Overcrowding in any space inevitably creates significant risks for those confined within it, and this holds especially true for prison inmates. While their rights are limited due to their incarceration, prisoners remain entitled to basic human rights under both international conventions and domestic laws. These protections serve as a reminder that, despite their circumstances, they are still human beings deserving of dignity and respect.

4.1 Health Risks

The overcrowded state of Nigerian prisons makes it a fertile ground for the spread of infectious diseases like malaria, tuberculosis (TB), HIV/AIDS, hepatitis, and various skin infections. Research carried out in Kaduna prison showed that as of 2011, psychiatric disorders were the most prevalent, affecting 24.1% of inmates. This was followed by gastrointestinal diseases at 22.6%, and malaria at 21.6%. Respiratory tract illnesses accounted for 10.9%, while dermatological and allergy-related conditions were 5.4%, and cardiovascular diseases were 2.4%. Other reported health issues included self-

inflicted accidents or intentional harm at 3.6%, tumours at 0.6%, and tuberculosis and HIV/AIDS at 0.2% and 0.1%, respectively.[24] These findings highlight the significant health challenges faced by inmates in Nigerian prisons, underscoring the urgent need for improved healthcare services and better living conditions.

Poor ventilation, cramped living conditions, and limited access to medical care contribute significantly to the rapid spread of diseases in Nigerian prisons. The strain on prison resources due to overcrowding results in insufficient and substandard food, leading to malnutrition and making inmates more susceptible to illness. This overcrowding not only jeopardises physical health but also exacerbates mental health issues, heightening stress, anxiety, and depression among prisoners. The constant noise, heightened tension, and violence stemming from overcrowded facilities can lead to severe psychological distress. Additionally, the lack of access to clean water, inadequate toilet facilities, and insufficient hygiene supplies contribute to the spread of diseases such as cholera and other gastrointestinal infections. When inmates suffer injuries, the limited number of medical staff and resources means that these wounds often go untreated, posing further risks of infection and long-term health complications.[25]

4.2 Violent Abuse

Overcrowding in Nigerian prisons significantly raises the likelihood of violence and abuse among inmates, and it can extend to prison staff, especially when facilities are

[24] O. Audu, K.W. Akorede & I.A. Joshua, "Five Year Review of Disease Profile of Inmates in Three Prison Formations in Kaduna State, Nigeria: A Case-Control Study" (2014) Vol. 13 No.5-6 *AJOL*, available at https://www.ajol.info/index.php/nhp/article/view/119291 (accessed 7 July 2024).
[25] Ojo Melvin, 'Prison health in Nigeria: A sociological discourse' (2013) 7(2) *African Journal of Political Science and International Relations,* p. 38-41.

understaffed. A congested environment heightens stress and tension, leaving inmates struggling for personal space and facing constant noise and competition for limited resources. This situation can lead to aggressive behaviour and conflicts, often escalating into physical violence.

Necessities such as food, water, bedding, and hygiene supplies are scarce in overcrowded prisons, forcing inmates to compete for these resources and fueling violent altercations. The sheer number of inmates makes it difficult for guards to supervise effectively, allowing conflicts to escalate unchecked and contributing to violence and abuse. Overcrowded prisons also see an increase in gang activity, as inmates form groups for protection and control of resources. These gangs can engage in violence, extortion, and sexual abuse, creating a cycle of abuse, retaliation, and insecurity. The absence of adequate supervision and safe spaces enables predatory behaviour to flourish.

During violent outbreaks, guards may resort to excessive force to restore order, resulting in physical abuse of inmates. The psychological toll of overcrowding can leave inmates feeling helpless, frustrated, and hopeless, increasing the risk of violent behaviour towards others and themselves.[26] Furthermore, the lack of mental health support exacerbates these issues, leaving inmates without the resources needed to cope with their circumstances, which can further fuel aggression and violence.

[26] Penal Reform International, "Overcrowding" available at https://www.penalreform.org/issues/prison-conditions/key-facts/overcrowding/ (accessed 20 November 2024).

4.3 Limited Access to Essential Resources

Overcrowding in Nigerian correctional facilities severely restricts access to already limited resources, including essential health services. The available medical facilities are under immense pressure, leading to inadequate care for inmates. The shortage of medical staff is exacerbated by the overcrowded conditions, making it nearly impossible for the few professionals on duty to adequately address the health needs of the large inmate population. Additionally, the strain of overcrowding leads to wear and tear on prison infrastructure, resulting in deteriorated and dilapidated conditions that are expensive to repair. Prison hospitals often lack the necessary medications to properly manage chronic conditions, causing many inmates' health to worsen and leading to preventable deaths from treatable illnesses.[27]

Legal aid and other vital services for inmates are also insufficient, further restricting their access to support that could improve their conditions or speed up their legal processes. The combined effect of these challenges leaves inmates vulnerable, struggling with poor health care, inadequate legal representation, and limited access to basic necessities.

4.4 Psychological Distress

Overcrowding in Nigerian prisons significantly exacerbates inmates' psychological distress, particularly affecting those with pre-existing mental health conditions. The cramped and congested living conditions, where inmates are kept close to one another,

[27] "New US report slams Nigeria for inhumane conditions, diseases in prisons" *BusinessDay* 25 April 2024, available at https://businessday.ng/news/article/new-us-report-slams-nigeria-for-inhumane-conditions-diseases-in-prisons/ (accessed 20 November 2024).

create an environment that is mentally taxing and draining. This lack of personal space can foster feelings of helplessness and severe stress.

The constant threat of physical and sexual violence compounds this mental strain, leading to heightened anxiety, fear, and trauma. Witnessing or experiencing such violence repeatedly can result in long-term psychological issues, including post-traumatic stress disorder (PTSD). The noise and chaos in overcrowded prisons disrupt sleep, causing insomnia and further contributing to mental exhaustion. The daily battle for basic necessities like food and water adds to the constant mental burden.

Uncertainty about the duration of an inmate's stay, especially for those whose trials have not been concluded, further aggravates anxiety and depression. Factors like isolation from family and loved ones, the absence of meaningful activities, and a lack of prospects for the future contribute to a pervasive sense of despair.

Additionally, a significant number of inmates resort to drug use as a coping mechanism to manage psychological distress, leading to drug abuse and addiction. This reliance further damages their mental health, creating a cycle that deepens their suffering and hampers any potential for recovery or rehabilitation.[28]

5.0 INSTITUTIONAL DYNAMICS

Institutional dynamics refers to the changes a certain policy, regulations, power structure, and organisational structure can bring within an institution. The institutional dynamics of the Nigerian Correctional Service refer to changes in the functioning and

[28] United Nation Office on Drug and Crime, 'Piloting drug treatment and counselling in Nigerian prisons' available at https://www.unodc.org/conig/en/stories/piloting-drug-treatment-and-counseling-in-nigerian-prisons.html (accessed 24 July 2024).

operations of the prison system as a result of both internal and external influences. These influences can include policy decisions, shifts in authority, and other factors that impact the system's effectiveness. In this context, the focus is on examining how overcrowding in Nigerian prisons is reshaping or has already reshaped the institutional dynamics of the correctional system.

5.1 Strain on Infrastructure

Overcrowding in Nigerian prisons causes significant strain on the infrastructure, leading to numerous challenges that worsen the already difficult conditions within the prison system. The basic facilities such as dormitories, kitchens, bathrooms, and common areas are designed to accommodate a specific number of inmates. When this number is exceeded, these facilities become overburdened, leading to poor living conditions. Inmates are often forced to sleep on floors, in hallways, or in shifts, due to the lack of sufficient bedding.

Overcrowding in Nigerian prisons significantly accelerates the deterioration of prison infrastructure. The excessive strain on facilities such as toilets and bathrooms lead to frequent breakdowns, malfunctioning fixtures, and unsanitary conditions. This overuse results in the rapid wear and tear of prison buildings, leaving many in a state of severe disrepair and contributing to the overall dilapidation of the physical infrastructure.[29]

When prisons house more inmates than their facilities are designed to accommodate, sanitation becomes a significant concern. Overcrowding leads to unhygienic conditions,

[29] ARC Foundation/Garden Court Chambers, "Prison Conditions in Nigeria" (September 2019), available at https://asylumresearchcentre.org/wp-content/uploads/2019/11/Nigeria_prison_conditions_Nov.pdf (accessed 25 July 2024), p. 45.

creating an environment conducive to the spread of diseases and infections, which can escalate into a serious health crisis within the prison system.[30]

Overcrowding strains, the supply of clean water and adequate food while placing immense pressure on prison healthcare facilities, which are frequently underfunded and ill-equipped to meet the increased demand.[31]

Overcrowding in prisons also significantly hampers the ability to manage and secure the facility effectively. Surveillance infrastructure, including CCTV systems and guard posts, often proves inadequate for monitoring a large inmate population, increasing the risk of violence, escapes, and other security breaches that endanger both inmates and staff. Additionally, rehabilitative programs such as educational and vocational training suffer under these conditions, as limited resources and space make it difficult to deliver these critical initiatives effectively.

5.2 Management Challenges

Overcrowding in Nigerian prisons can lead to different management challenges that will complicate the administration and operation of the prison system; management challenges such as outstretched prison staff are inevitable in an overcrowded prison facility. The ratio of staff to inmates may become unmanageable, leading to difficulties in maintaining order, ensuring security, and providing essential services and can sabotage prison security, which can lead to increased violence, jailbreaks, escapes, and riots.[32]

[30] Ibid., p.61.
[31] Ibid., p.65.
[32] Ibid.

The allocation of resources presents a significant challenge in overcrowded prisons, where ensuring the equitable distribution of essential supplies such as food, water, medical provisions, and bedding—often in short supply—can be difficult. This scarcity frequently leads to tensions and conflicts among inmates. Overcrowding also exacerbates health and sanitation problems, making it harder for prison management to maintain hygienic standards, while accelerating the spread of infectious diseases. Additionally, managing the mental health of inmates becomes increasingly challenging; the stress and anxiety caused by overcrowding can worsen pre-existing mental health conditions and contribute to the emergence of new issues.[33]

5.3 Rise in Corruption

Overcrowding in Nigerian prisons exacerbates systemic corruption through various mechanisms, creating a cycle that perpetuates poor conditions and undermines the justice system. The severe shortages of essential resources such as food, water, bedding, and medical supplies in overcrowded prisons often lead inmates and their families to resort to bribery to secure these necessities. This situation provides an avenue for some prison staff to exploit the scarcity for personal gain.[34] Additionally, overcrowded conditions leave vulnerable inmates—such as the young, elderly, or ill—at heightened risk of exploitation. They may face demands for bribes from staff or more powerful inmates in exchange for protection, better living conditions, or access to essential services. Such exploitation can escalate into physical or sexual abuse.

[33] Ibid., p.45
[34] 'EXCLUSIVE: Police accuse prison officials of extortion before remanding suspects' *Premium Times* 10 August 2022, available at https://www.premiumtimesng.com/news/headlines/547856-exclusive-police-accuse-prison-officials-of-extortion-before-remanding-suspects.html?tztc=1> (accessed 29 May 2024).

Moreover, families of inmates or the inmates themselves are often compelled to pay bribes to expedite legal proceedings or secure favourable outcomes in the face of case backlogs and administrative delays. These practices deepen corruption and erode public trust in the justice system.

Overcrowded prisons also increase the likelihood of smuggling contraband. Inmates may bribe prison staff to facilitate the entry of prohibited items such as drugs, mobile phones, and weapons. The scarcity of medical care in overcrowded facilities often compels inmates to pay for prompt or adequate treatment or for the chance to be treated outside the prison. Additionally, visitation rights may be restricted due to limited space and resources available to manage visitors. Families may be forced to pay bribes to secure more frequent or longer visits with their incarcerated loved ones than what is officially permitted.

5.4 Impeded Rehabilitation Initiatives

Overcrowding in Nigerian prisons severely hampers rehabilitation efforts, undermining the goals of the correctional system and reducing inmates' chances of successful reintegration into society. Rehabilitation programs, such as educational initiatives aimed at enhancing inmates' academic qualifications, are often compromised when prison space and resources are limited. Insufficient classroom space and a shortage of instructors lead to a decline in the quality of education available to inmates.[35]

Vocational training, another key aspect of rehabilitation, is also affected by overcrowding. These programs are vital for equipping inmates with practical skills to

[35] Gbolagade Adekanmbi and Ukoha Ezikpe, 'Prison Education in Nigeria' (2018) *Academia*, available at https://www.academia.edu/71867759/Prison_Education_in_Nigeria (accessed 28 May 2024).

secure employment after release. However, overcrowded workshops and training sessions limit the hands-on experience and individual attention that inmates receive, diminishing the effectiveness of such programs.[36] Addressing inmates' psychological needs through counselling and mental health services, although still basic in Nigerian prisons, is critical to rehabilitation. Overcrowded conditions restrict access to mental health professionals and counselling spaces, making it difficult to support inmates dealing with psychological issues. This lack of adequate mental health care impedes the rehabilitation process.[37]

Additionally, overcrowded prisons offer fewer opportunities for personal development activities like sports, arts, and religious services—activities that promote mental well-being, social skills, and a sense of community. The absence of these opportunities can hinder personal growth and rehabilitation. The heightened risk of violence and tension in overcrowded prisons further complicates rehabilitation. Hostile and unsafe environments make it difficult for inmates to engage in rehabilitative programs and increase the likelihood of negative behaviours. Inmates who are constantly concerned about safety or involved in conflicts are less likely to participate in constructive activities.

The strain on prison staff is also significant, as they struggle to maintain order and provide rehabilitative services. Overworked and stressed, staff members often prioritize security and basic needs over rehabilitation, leading to the neglect of programs aimed at inmate reform. With an overwhelming number of inmates, it

[36] Aishatu Armiyau, Issa Babadele, & Zuwairai Hassan, 'Mental Health Service Provision at a Nigerian Correctional Service' (2022) 20(2) *Nigerian Journal of Psychiatry*, p. 22-25.
[37] Ibid.

becomes challenging for staff to create and implement individualised rehabilitation plans tailored to the specific needs and circumstances of each inmate, which is essential for effective rehabilitation.

6.0 RECOMMENDATIONS

This research highlights the significant impact overcrowding in Nigerian prisons has on inmates' well-being and institutional operations. To reduce congestion in correctional facilities, attention must be given to the jail system. Jails, typically run by local or municipal governments, serve as short-term facilities for those awaiting trial or serving short sentences. In contrast, prisons, operated by state or federal governments, house those who are convicted and serve long-term sentences.

However, in Nigeria, there is no distinction between jails and state-run prisons—all inmates, regardless of their status or sentence length, are housed in federal correctional facilities. This oversight places immense pressure on the existing infrastructure. If local and state governments could step in to construct jails and state prisons, it would greatly ease the burden on federal correctional facilities.

The federal government should also prioritise building new facilities to accommodate the increasing number of inmates and repairing existing, dilapidated correctional centres. Additionally, constructing more psychiatric hospitals and community-based homes for mentally ill offenders would help alleviate pressure on prisons and improve rehabilitation and reintegration outcomes for forensic psychiatric patients.

Expanding non-custodial sentencing options, such as community service and probation, is another key strategy for reducing the strain on the prison system. Legal reforms are

essential for ensuring speedy trials, minimizing the reliance on pretrial detention, and making bail more accessible or utilizing non-monetary bail systems. Revisions to laws and policies that disproportionately target or punish poverty-related activities are necessary to lower the number of individuals imprisoned for minor offences. Streamlining judicial processes and implementing alternative dispute-resolution mechanisms can reduce pre-trial detention and ensure timely legal representation for all detainees.

Developing comprehensive rehabilitation and reintegration programs that support ex-prisoners in securing employment and housing is vital to lowering recidivism rates. Addressing the root causes of crime through investments in education, vocational training, and employment opportunities is key to decongesting Nigerian prisons. Community-based rehabilitation programs and support for reintegration can be powerful tools in reducing re-offending. As the saying goes, "an idle hand is the devil's workshop"—when individuals engage in positive activities that can provide financial stability, their likelihood of committing crimes decreases. This, in turn, leads to fewer detentions and lower prison populations.

7.0 CONCLUSION

This article has revealed that several key factors contribute to the overcrowding in Nigerian prisons. A significant issue is the long backlog of individuals awaiting trial, coupled with an over-reliance on incarceration as a solution, mandatory sentencing policies, and inefficient legal processes. These elements work in tandem to exacerbate congestion within the prison system.

Socioeconomic factors also play a substantial role in the growing prison population. Economic hardship, widespread poverty, inequality, unemployment, and the stigma faced by ex-convicts are pervasive societal challenges that drive many individuals into criminal activities, ultimately increasing the prison population.

The consequences of overcrowding are severe, leading to inhumane living conditions for inmates. The lack of sufficient medical care, poor nutrition, and limited access to exercise and recreational activities take a toll on the well-being of those incarcerated. This environment fosters significant mental strain, contributing to an uptick in violent behaviour, psychological issues, and a heightened risk of the spread of infectious diseases.

The strain on resources and the heavy workload on prison staff compromise safety and the quality of supervision, affecting both inmates and correctional officers. This creates a gap in the effectiveness of rehabilitation efforts, undermining the primary mission of the Nigerian correctional service and perpetuating a cycle of re-offending. Addressing these issues is crucial to creating a prison system that can support rehabilitation and reintegration while ensuring the safety and dignity of all involved.

CAPITAL PUNISHMENT IN NIGERIA: A CRITICAL NEED FOR REFORM

USMAN WALA*

ABSTRACT

The death penalty has long been a topic of heated debate, with many arguments put forth in its support. The Middle East and Africa are noted as some of the regions where the death penalty is still prevalent; most African nations continue to uphold it despite the increasing global push for abolition and adherence to international human rights standards. This paper seeks to significantly enhance and improve Nigeria's criminal justice administration and contribute to the reduction, if not elimination, of crime. The paper employs library research methods, using both primary and secondary legal sources, and utilises internet resources to provide contemporary insights and analyses.

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1.0 INTRODUCTION

Capital punishment, commonly known as the death penalty or execution, is a form of punishment where an individual is put to death by the state as a consequence of committing a serious crime. The term "capital" comes from the Latin word "capitalis" or "caput," which means "regarding the head."[1] Historically, this term referred to execution by beheading, a method used by the Romans. The word "caput" was also used to describe the head, the life, or the civil rights of a person. Thus, capital punishment signifies the most severe form of penalty, often referred to as the "chief" or "principal" penalty.[2] It entails the execution of a criminal following a legal sentence handed down by a competent public authority, ensuring that the legal process has been properly followed. Essentially, it means that the state legally imposes the death penalty on someone who has been convicted of a particularly grievous crime.[3]

Capital punishment has been a common practice throughout history. Societies used it not only to punish criminals but also to deal with political and religious dissenters. Historically, the death sentence was frequently coupled with torture, and executions were public spectacles designed to serve as a deterrent. Today, the death penalty is still the harshest form of punishment implemented globally. In the United States, there was a period when the death penalty was abolished, based on the argument that it was a "cruel and unusual punishment."[4] However, this decision was later overturned with

[1] Fathima Marikkar, "Crime and Capital Punishment in Japan: How Does the Japanese Society Respond?" (2009) 37, *Kanagawa University International Management Review*, 95-104, 95.
[2] Onyekaci Duru, "The Constitutionality of Death Penalty under Nigerian Law" (2012) *SSRN*, p.3.
[3] Mirjan Damaska, "Structures of Authority and Comparative Criminal Procedure" (1974) 84, *Yale Law Journal*, 480.
[4] Hannah Freedman, "The Modern Federal Death Penalty: A Cruel and Unusual Punishment" (2021) , 107 *Cornell Law Review*, 1689.

the introduction of new, presumably more humane methods of execution. The status of capital punishment varies widely across the globe. 36 countries continue to actively enforce it. In contrast, 103 countries have abolished it entirely for all crimes. Six countries have abolished it for ordinary crimes but still retain it for exceptional cases, while 50 countries have abolished it in practice, even though it remains legal on the books.[5] A significant aspect of the global stance on the death penalty is the prohibition of the execution of individuals who were under the age of 18 at the time of their crimes.[6] Since 2009, only a few countries, namely Iran, Saudi Arabia, Sudan, and Pakistan, have carried out such executions, which are prohibited under international law.[7]

In the European Union, the use of capital punishment is explicitly forbidden by Article 2 of the Charter of Fundamental Rights. The Council of Europe, which includes 47 member states, also prohibits its use among its members.[8] The United Nations General Assembly has repeatedly called for a global moratorium on executions, adopting non-binding resolutions in 2007, 2008, 2010, 2012, and 2014 with the aim of eventual abolition. Despite the significant number of nations that have abolished capital punishment, the majority of the world's population still lives in countries where

[5] Roger Hood & Carolyn Hoyle, "Abolishing the Death Penalty Worldwide: The Impact of a 'New Dynamic'" (2009) 38, no. 1, *Crime and Justice*, 1-63.
[6] Robyn Linde, *The Globalisation of Childhood: The International Diffusion of Norms and Law Against the Child Death Penalty*, (Oxford University Press: 2016).
[7] Hajed Alotaibi, "The Challenges of Execution of Islamic Criminal Law in Developing Muslim Countries: An Analysis Based on Islamic Principles and Existing Legal System" (2021) 7 no.1, *Cogent Social Sciences*.
[8] Sikiru Adewale, "Capital Punishment In Nigerian Criminal Justice Administration" (August 2019), available at: https://www.researchgate.net/publication/335514710_17_CAPITAL_PUNISHMENT_IN_NIGERIAN_CRIMINAL_JUSTICE_ADMINISTRATION (accessed 23 May 2024).

executions are carried out. This includes some of the most populous countries like China, India, the United States, and Indonesia.[9]

2.0 CHARACTERISTICS OF CAPITAL PUNISHMENT IN NIGERIA

In Nigeria, the legal system categorises criminal offences into three main groups based on their severity: simple offences, misdemeanours, and felonies.[10] Simple offences are minor infractions that typically result in less severe punishments, such as fines or short-term imprisonment.[11] Misdemeanours are more serious than simple offences but less severe than felonies, often carrying moderate penalties like longer-term imprisonment or higher fines. Felonies are the most serious offences, involving severe punishments including long-term imprisonment and, in some cases, the death penalty.[12]

Among felonies, certain crimes are classified as capital offences. They are considered so severe that they warrant the death penalty upon conviction. In Nigeria, several crimes fall under this category, including murder, homicide, treason, and instigating an invasion.[13] Murder involves intentionally causing the death of another person, while homicide can encompass a broader range of unlawful killings, including those not premeditated.[14] Treason refers to acts that betray the country, such as attempting to

[9] Ibid.
[10] Chikanma Aleru, "Sentencing in Environmental Offences in Nigeria: An Overview" (2022) Vol. 6 no. 1, *African Journal of International Energy and Environmental Law*, p. 106-121.
[11] Ibid.
[12] Ibid.
[13] Paul Osifodunrin, "Violent Crime in Lagos, 1861-2000: Nature, Responses and Impact" (2007) A Phd Thesis submitted to the University of Lagos (Nigeria) School of Postgraduate Studies.
[14] James Acker & Lanier Charles, "The Dimensions of Capital Murder" in *The American Court System*, (Routledge, 2020), pp. 1-39.

overthrow the government, and instigating an invasion involves encouraging or aiding an external force to invade Nigeria.[15]

In recent years, Nigeria has faced a growing threat from kidnapping, prompting legislative changes to classify this crime as a capital offence in some states. The aim is to deter potential kidnappers and address the increasing frequency and severity of kidnapping incidents.[16] States like Abia, Bayelsa, Akwa Ibom, Anambra, Ebonyi, Enugu, Imo, and Edo have enacted laws making kidnapping punishable by death.[17] This move is seen as a significant step towards combating a crime that has severe social and economic repercussions. The introduction of the death penalty for kidnapping in these states serves multiple purposes. It acts as a strong deterrent to those considering kidnapping, enhances public safety by reducing the incidence of such crimes, and reassures citizens of the government's commitment to protecting them and maintaining law and order.[18] Kidnapping not only endangers lives but also creates a climate of fear and insecurity, disrupting the peace and stability of affected regions.[19] For the death penalty to be imposed, the legal process involves a thorough investigation, trial, and conviction by a competent public authority. This ensures that due process is followed, and the rights of the accused are protected throughout the judicial proceedings. The government hopes that by implementing these stringent penalties, the threat of

[15] Sikiru Nurudeen, "Assessment of Nigeria's Counter-Terrorism Strategies: A Comparative Analysis of Presidents Goodluck Jonathan and Muhammadu Buhari Administrations" (2019) PhD dissertation, Kwara State University (Nigeria).
[16] A. Oludare, I. Okoye & L. Tsado, "An Exploratory Study on Kidnapping as an Emerging Crime in Nigeria," in *Crime, Mental Health and the Criminal Justice System in Africa: A Psycho-Criminological Perspective*, p. 89-119.
[17] Nat Ofo, "Effectiveness of Capital Punishment as Deterrence to Kidnapping in Nigeria" (2010), p. 1-36.
[18] Ibid.
[19] Ukoji Nwankwo & Okolie-Osemene James. "Prevalence of Lethal and Non-Lethal Crimes in Nigeria" (2016) Vol. 3 no. 1, Journal *of Advanced Research in Humanities and Social Science*, p. 10-25.

kidnapping can be significantly reduced, thereby improving the overall security situation in the affected states.[20]

The judge's authority in sentencing is restricted to imposing capital punishment once the accused is found guilty of a capital offence. Additionally, the legality of capital punishment is firmly rooted in the Constitution of the Federal Republic of Nigeria (as amended) 1999. Specifically, section 33(1) of the Nigerian Constitution states:

> Every person has a right to life, and no one shall be intentionally deprived of their life, except in execution of the sentence of a court in respect of a criminal offence for which they have been found guilty in Nigeria.

This constitutional provision implies that the death penalty is a legal form of punishment when it is executed following a court sentence for a criminal offence for which an individual has been found guilty. However, there are exceptions to the general rule of imposing capital punishment. Certain categories of offenders are exempted from the death penalty in Nigeria such as:

2.1 The Juvenile Offender

Section 368(3) of the Criminal Procedure Act[21] mandates that if a court convicts an offender less than 17 years old of a capital crime, the death sentence cannot be pronounced or recorded. Instead, the offender is detained at the discretion of the president or state governor. This principle was affirmed in the Supreme Court case *Modupe* v *State*.[22] International treaties such as the International Covenant on Civil and

[20] Nzeribe Adekunbi, "Death Penalty in Nigeria: To Be Or Not To Be: The Controversy Continues" (October 2013) Vol. 3 no.3, *Arabian Journal of Business and Management Review*, p.23-53.
[21] Cap. C.41, Laws of the Federation of Nigeria 2004; Section 272(1) of the Criminal Procedure Code, Cap 30, Laws of Northern Nigeria, 1963.
[22] (1988) 4 NWLR (pt. 87) 130 (1988) 9 SC.1.

Political Rights (ICCPR), the African Charter on Human Rights (ACHPR), and the African Charter on the Rights and Welfare of the Child prohibit imposing the death penalty on individuals under 18.

2.2 Pregnant Women

According to Section 368(2) of the Criminal Procedure Act[23] and Section 300(3) of the Criminal Procedure Code (applicable in Northern Nigeria), pregnant women cannot be sentenced to death. Instead, their sentences are commuted to life imprisonment if they are found to be pregnant at the time of conviction or before execution. This ensures that if a woman is sentenced to death but is later found to be pregnant; her sentence is changed to life imprisonment.

However, this exemption does not apply in some jurisdictions. For example, in Iran in 2011, a woman who was raped and became pregnant was unable to produce four witnesses to the crime, as required by Islamic law, and was subsequently executed while two months pregnant.[24]

2.3 Insanity and Mental Illness

In the Nigerian Criminal Code, particularly section 28, individuals deemed insane - including those charged with serious crimes, are not held criminally liable because they lack the mental capacity required for guilt. Insanity is described as a condition where an accused person lacks the mental capacity to be held legally responsible. This

[23] Cap C.41, Laws of the Federation of Nigeria, 2004.
[24] Sikiru Adewale, supra, note 9.

condition is considered to render a person unfit to be at liberty due to the unpredictability of their behaviour, which could endanger themselves and others.[25]

2.4 Women and Children

Nigeria is under-treaty obligation not to execute women with nursing children.[26] This refers to Nigeria's commitment under international treaties not to carry out the execution of women who are breastfeeding or have nursing children. It reflects an understanding that such an action would not only impact the woman but also her dependent child and is therefore considered a violation of human rights and humanitarian principles.

3.0 RATIONALE BEHIND IMPOSING THE DEATH PENALTY

3.1. Religious Beliefs

Some argue that the death penalty is justified by religious scriptures. It is contended that even before the establishment of governmental laws; the concept of capital punishment was endorsed by God in the Holy Quran and the Old Testament of the Bible. In Islam, Sharia law mandates capital punishment for certain crimes. For instance, the Quran states:

> The punishment for those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter.[27]

[25] Stephen Morse, "Mental Disorder and Criminal Law" (2011) 101, Journal *of Criminal Law & Criminology*, 885.
[26] Article IV(j), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, available at: https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa (accessed 24 May 2024).
[27] Qur'an Sura 5, Ayat 33.

Similarly, stoning to death for adultery is prescribed in Hadiths, particularly in Kitab Al-Hudud. A hadith states, "Allah's Messenger awarded the punishment of stoning to death to the married adulterer and adulteress and, after him, we also awarded the punishment of stoning." (Sahih Muslim, 17:4194). [28] According to the Catholic Encyclopedia, the death penalty is supported in the Bible. Genesis 9:6 states, "Whosoever shall shed man's blood, his blood shall be shed, for man was made to the image of God." Additionally, in Exodus 21, the death penalty is prescribed for murder, assault upon parents, cursing parents, and man stealing. Leviticus also states, "And he that killeth any man shall surely be put to death" (Leviticus 24:17) and "Breach for breach, eye for eye, tooth for tooth; as he hath caused a blemish in man, so shall it be done to him" (Leviticus 24:20).[29]

3.2 Fair Retribution

A punishment is deemed just when it appropriately reflects the gravity of the crime committed. The principle of 'let the punishment fit the crime' is widely accepted as a fundamental tenet of criminal justice.[30] For crimes like murder, the penalty must acknowledge the sanctity of human life. Murder stands apart from other offences not just in degree but in nature as well. Allowing for the possibility of a capital sentence ensures that society fully acknowledges the seriousness of such crimes.

[28] Ziba Mir-Hosseini, "Criminalising Sexuality: Zina Laws as Violence Against Women in Muslim Contexts" (2011) *International Journal on Human Rights*, 15, 7-16; Ziba Mir-Hossein , "Marriage on Trial: A Study of Islamic Family Law" (2001), pp. 140-223.
[29] Sikuru Adewale,"Capital Punishment in Nigeria Criminal Justice Administration: Need for Changes" (Research Gate, 2019).
[30] Barbara Hudson, *Understanding Justice 2/e: An introduction to Ideas, Perspectives and Controversies in Modern Penal Therory,* (McGraw-Hill Education: UK, 2003).

Without the option of the death penalty, the criminal justice system's penalties would reach a limit and fail to distinguish murder from lesser offences. Critics of the death penalty argue that it amounts to nothing more than vengeance. However, this perspective misunderstands the purpose of criminal sentences.[31] Vengeance implies that private individuals take the law into their own hands to exact punishment.[32] Capital sentences, on the other hand, are not carried out by private individuals but by the state through a legal criminal justice process. This process is not an act of revenge but a means of administering fair retribution.[33]

3.3 Deterrence

The death penalty is seen as a deterrent that can save innocent lives by dissuading potential murderers.[34] It is considered the most effective deterrent for crimes like murder, being the most feared penalty. Convicted murderers often go to great lengths to avoid this sentence, indicating its deterrent effect.[35] While it may not deter all murderers, the severity of a capital penalty is assumed to deter some potential offenders. Research indicates that a majority of Nigerians support retaining the death penalty, viewing it as a deterrent that prevents repeat offences and is a suitable punishment for murder.[36]

[31] David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition,* (Harvard University Press, 2010).
[32] Steven Eisenstat, "Revenge, Justice and Law: Recognising the Victim's Desire for Vengeance as a Justification for Punishment" (2004) 50 *Wayne Law Review,* p. 1115.
[33] Ric Simmons, "Private Criminal Justice" (2007) 42 *Wake Forest Law Review,* p. 911.
[34] Richard Lempert, "Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment" (1981) 79, No. 6, *Michigan Law Review*, pp. 1177-1231.
[35] Ibid.
[36] Ibid.

Nigerian court decisions upholding the death penalty often emphasise its value in deterrence. For example, in *Akinyemi v State*, [37] the court justified the death sentence as a deterrence measure for a society with dangerous citizens. This reasoning was echoed in the decision of the Edo State Government to execute four criminals, who had committed heinous crimes.[38] Proponents argue that the death penalty not only reduces violent murders but also serves as a system of justice. Jeremy Bentham suggested that death is considered the greatest of all evils and thus an effective punishment. However, opponents argue that the deterrence justification is flawed, as many states with the death penalty have higher murder rates than those without.[39]

3.4 Incapacitation

Capital punishment also effectively prevents murderers from committing further killings. This incapacitation is crucial due to the ongoing risk posed by those who have already taken a life. For instance, Bureau of Justice Statistics data shows that out of 52,000 state prison inmates serving time for murder in 1984, an estimated 810 had prior murder convictions.[40] If some of these murderers had received the death penalty for their initial crimes, innocent lives could have been spared. Life imprisonment without parole, the second most severe penalty, still leaves prison staff and inmates vulnerable. Without the death penalty, a murderer serving a life sentence effectively has the freedom to kill again, as no additional punishment can be imposed. Moreover, a prisoner

[37] (1999) 6 NWLR 465, 607.
[38] Osemwengie Ben Ogbemudia, "Edo Explains Execution of Criminals on Death Row," *The Nation (Sunday Newspaper)*, 30 June 2013, 6.
[39] Carol Steiker, "No, Capital Punishment is not Morally Required: Deterrence, Deontology and the Death Penalty" (2005) 58 *Stan. Law Review*, p. 751.
[40] Paul Cassell, "In Defense of the Death Penalty" (2008) Institute *for the Advancement of Criminal Justice Journal*, p. 14.

serving a life sentence may escape, be granted parole, or receive clemency. Only a capital sentence can permanently eliminate the threat posed by the most serious murderers.

3.5 Retribution

As Okonkwo and Naish suggested,[41] one rationale for punishment involves a retrospective examination of the crime and determining a suitable penalty based on the perpetrator's culpability. This approach aims to address public abhorrence toward the crime, suggesting that capital punishment serves not only as a deterrent but also as a form of retribution, emphasising the principle of "an eye for an eye."[42]

3.6 Constitutional Justification

Supporters of the death penalty, argue that it is constitutional and legal in Nigeria. Akintayo Iwilade[43] asserts that the death penalty is justified under Section 33(1) of the 1999 Constitution (as amended), which allows for derogation from the right to life under certain circumstances. Despite some arguments against its constitutionality based on claims of inhumanity, Nigerian courts have consistently upheld the legality of the death penalty.

The Court of Appeal in *Adeniji* v *State*[44] and the Supreme Court in *Kalu* v *State*[45] have all affirmed the constitutionality of the death penalty under specific constitutional

[41] Okonkwo & Naish, *Criminal Law in Nigeria*, Second Edition, (Sweet & Maxwell: London, 1980), p.28.
[42] Sikuru Adewale, supra note 30.
[43] Akintayo Iwilade, "Re: Illegality of Death Penalty," *The Punch Newspaper*, 8 July 2013.
[44] Professor Jolandile Roux, "The Impact of Death Penalty on Criminality" (2002) 11; Li-Ann Thio, "The Death Penalty as Cruel and Inhuman Punishment Before the Singapore High Court? Customary Human Rights Norms Constitutional Formalism and the Supremacy of Domestic Law in *Public Prosecution* v *Nguyen Tuong Van*" (2004) 4, *UN Commonwealth Law Journal*, 213.
[45] Professor Jolandile Roux, Ibid.

provisions. Additionally, the death penalty is likened to the principle of self-defence, where individuals may be deprived of their right to life to protect others.[46] This limited restriction on the right to life is deemed necessary to safeguard the majority of citizens from threats to their lives by others.

4.0 OPPOSITION TO THE CAPITAL PUNISHMENT/DEATH PENALTY

In 1998, Anthony Porter faced imminent execution in Illinois for a crime he did not commit.[47] Just before his scheduled execution, doubts about his mental competency led to a stay. Further investigation revealed his innocence, and another man, Alstory Simon, confessed to the murders. Porter was eventually released, but only after spending over 16 years on death row.[48] Opponents of the death penalty argue that killing in the name of justice is senseless and that it violates the fundamental right to life.[49] The movement to abolish capital punishment has roots in Enlightenment ideas and gained momentum after the adoption of the Universal Declaration of Human Rights in 1948.[50] The death penalty is seen as a violation of human rights, including the right not to be subjected to cruel or inhuman treatment. Critics argue that it not only affects the convicts but also their families, friends, and the broader community.[51]

Opponents of the death penalty raise several key arguments against its use. They argue that the irreversible nature of the death penalty can lead to the execution of innocent

[46] Criminal Code Act Cap C38, LFN, 2004, Section 286.
[47] George Ryan, *Until I Could be Sure: How I Stopped the Death Penalty in Illinois,* (Rowman & Littlefield Publishers: 2020).
[48] Shawn Armbrust, "Chance and the Exoneration of Anthony Porter" in *Machinery of Death*, (Routledge: 2014), pp. 157-166.
[49] Carol Steiker, supra, note 40.
[50] John Bessler,"The Long March Toward Abolition: From the Enlightenment to the United Nations and the Death Penalty's Slow Demise" (2018) 29 *U. Fla. JL & Pub. Pol'y*, p. 1.
[51] Ibid.

individuals, highlighting the importance of fair trial rights and the potential for miscarriages of justice.[52] Despite safeguards in the Nigerian system, such as qualified legal representation and careful review by the state governor, concerns about wrongful convictions persist. Critics also question the effectiveness of the death penalty as a deterrent, pointing to cases where murderers have escaped capital punishment only to commit further crimes.[53] They argue that the death penalty is unjust, vindictive, and retributive, contradicting principles of rehabilitation and dignity.[54] Moreover, opponents argue that the death penalty is a remnant of outdated notions of vengeance and that justice should be focused on proportional sanctions rather than exacting the same harm on offenders. Proponents of capital punishment frequently engage in debates with its opponents regarding the interpretation of specific verses in religious texts such as the Holy Quran and the Holy Bible.[55] They also discuss the broader question of whether individuals forfeit their right to life when they commit murder. Critics, on the other hand, often argue that it is illogical for the government to use killing as a means to demonstrate that killing is morally wrong.[56]

Internationally, there is a trend towards the abolition of the death penalty, as seen in the Rome Statutes of the International Criminal Court and other international instruments.[57] The UN General Assembly has passed resolutions calling for a moratorium

[52] Ernest Van den Haag & John Phillips Conrad, *The Death Penalty: A Debate*, (Springer Science & Business Media: 2013).
[53] Ibid.
[54] Hugo Adam Bedau, *The Case Against the Death Penalty*, (American Civil Liberties Union: 1973).
[55] Candalyn Rade, Holland Ashley, Jordan Gregory, & Sarah Desmarais, "Systematic Review of Religious Affiliations and Beliefs as Correlates of Public Attitudes Toward Capital Punishment" (2017) 30 (1) *Criminal Justice Studies*, pp. 63-85.
[56] Ibid.
[57] Steven Freeland, "No Longer Acceptable: The Exclusion of the Death Penalty under International Criminal Law" (2010) 15 (2) *Australian Journal of Human Rights*, p. 1-34.

on the death penalty, reflecting a global shift towards abolition.[58] In summary, opponents of the death penalty argue that it is inherently flawed, citing concerns about wrongful convictions, its ineffectiveness as a deterrent, and its inconsistency with evolving principles of justice and human rights.

5.0 RECOMMENDATIONS

First, abolishing capital punishment would be a significant step toward creating a more humane and just society. Life imprisonment is a viable and humane alternative, providing a punishment that respects human dignity while ensuring that innocent people are not wrongfully executed. The irrevocability of the death penalty poses an inherent risk of irreversible errors within the criminal justice system. Cases of wrongful convictions, as seen in various instances around the world, highlight the potential for tragic outcomes that cannot be corrected. Transitioning from the death penalty to life imprisonment not only protects innocent lives but also encourages a more thoughtful approach to sentencing.

Secondly, the focus of punishment should evolve from mere retribution to fostering the rehabilitation of offenders. Instead of viewing punishment solely as a form of societal vengeance, the justice system should prioritise reforming behaviour and providing opportunities for positive change. Programs focused on education, job training, and therapy can help offenders address the root causes of their actions, such as substance abuse, trauma, or lack of economic opportunity. By investing in rehabilitation, society can help individuals build a path toward becoming law-abiding and productive citizens.

[58] Ibid.

This approach benefits both the individual and the broader community, reducing the risk of reoffending and promoting social stability.

Thirdly, for individuals who have served their sentences or been pardoned, it is crucial that society's response is one of acceptance and support. The stigma attached to having a criminal record can hinder a person's reintegration into society and contribute to higher rates of recidivism. Programs that facilitate re-entry into the workforce, access to housing, and mental health support can make a significant difference in helping individuals transition successfully. By creating an environment that welcomes reformed individuals and provides them with the necessary resources to succeed, society can cultivate a culture of second chances and redemption.

It is also important that the underlying socio-economic factors contributing to crime are addressed. Poverty, inequality, lack of access to education, and systemic injustice are often root causes of criminal behaviour. Governments should implement policies that address these challenges, such as initiatives aimed at reducing poverty, expanding educational opportunities, and promoting social welfare. Investments in community-based programs, such as mentorship, job creation, and vocational training, can empower individuals with the skills and opportunities needed to lead fulfilling, law-abiding lives. By addressing these systemic issues, societies can reduce the drivers of crime and build a more equitable and just society.

If capital punishment continues to be part of the legal system, significant reforms are necessary to ensure that the practice is as humane as possible. This involves adopting execution methods that minimise pain and suffering, such as lethal injection, and strictly regulating the process to prevent unnecessary suffering. Additionally,

transparent oversight and the use of independent reviews can help ensure that these practices are carried out ethically and with respect for human dignity. While abolition remains the more humane choice, if the death penalty persists, it should be implemented in a manner that upholds fundamental human rights.

Finally, on the global stage, there should be concerted efforts to promote the abolition or restriction of the death penalty. This can be achieved through advocacy for legislative changes and the ratification of international treaties and conventions that support these ideals. Organisations, human rights advocates, and policymakers should collaborate to create a unified approach that prioritises the protection of human life and dignity. Shared global standards and cooperation can influence countries to adopt more humane practices and encourage a global movement toward the reduction or elimination of capital punishment.

By implementing these recommendations, societies can move toward a criminal justice system that values rehabilitation, reintegration, and the reduction of social inequalities, fostering a fairer, more compassionate world. This shift can transform the approach to crime and punishment, ensuring that the justice system serves not just as a mechanism for retribution but as a vehicle for human development and social harmony.

6.0 CONCLUSION

Overall, the recommendations outlined in this study highlight the urgent need for reform in Nigeria's approach to capital punishment. The substitution of life imprisonment for the death penalty would eliminate the risk of executing innocent

individuals, while also providing a more rehabilitative approach to criminal justice. Offenders who have served their sentences or have been pardoned should be reintegrated into society without discrimination, fostering a more inclusive and ethical community. Addressing the root causes of crime, such as poverty and injustice, is crucial to reducing crime rates and improving the overall quality of leadership in the country. In addition, capital punishment, if maintained, should be carried out in a humane manner to minimise the suffering of the offender. Replacing outdated methods of execution with more civilised practices, such as lethal injection, would demonstrate a commitment to respecting human dignity.

FEDERAL RULES OF EVIDENCE IN THE UNITED STATES OF AMERICA AND THE CHALLENGES OF AUTHENTICATION IN THE AGE OF DEEPFAKE TECHNOLOGY

Prince Amadi[*]

ABSTRACT

Technology has deeply impacted society and how activities are conducted. This is not different from the development of deepfake technology. Deepfake is of serious concern to the public generally, but more particularly, it is of grave concern to the admission of evidence at trial. This paper espouses deepfake technology's inherent challenges to the Federal Rules of Evidence in the United States. As the use of this technology and its dangerous tendencies expands, it continues to bear on its multiplier effects in the judicial system concerning the authenticity of pieces of evidence in the courtroom. The paper argues that in the wake of this unprecedented development of deepfake technology, capable of manipulating evidence and misleading the courts, courts must deploy extra measures to ensure that evidence presented before it is the original. Thus, the paper proposes measures that courts may implement to address the challenges of deepfake.

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1.0 INTRODUCTION

The rise of deepfake technology has been rapid in recent years making it easy for individuals to generate artificial media files such as images, sound, or video.[1] With the aid of deepfake technology, almost perfect media are created to the deception of even the most careful among humans. To do this, a specific machine learning algorithm-deepfake is used to create images, audio, or video of individuals who never did nor said the things represented in the manipulated media.[2] In some quarters, it has been argued that deepfakes can be put to good use as seen in entertainment, where jokes and other comic reliefs were generated for the sole purpose of entertainment and modification in the film industry.[3] Still, the use of deepfakes has gone beyond entertainment to other realms of life, such as politics, and private and business lives; thereby resulting in the rise in misinformation, defamation, and alteration of political campaigns and causing personal harm to individuals.

The most targeted in this category are politicians, musicians, and movie stars.[4] A typical illustration of the use of this technology is the superimposition of the picture of former

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[1] D. Harwell, "*Top AI* Researchers Race to Detect 'Deepfake' Videos: 'We are Outgunned," available at, In the race to detect deepfakes, AI researchers say they are "outgunned" - The Washington Post (accessed 7 May 2023).

[2] K Fagan "A Viral Video That Appeared To Show Obama Calling Trump a 'Dips---' Shows a Disturbing New Trend Called 'Deepfakes,'" available at: Deepfake: Fake Obama Video Calling Trump Dipshit Is a Disturbing Trend (businessinsider.com) (accessed 26 March 2023).

[3] L. Lamyanba, R. Maklachur, R, & K.J Soon, "Challenges and Applications of Face Deepfake" in J. Hieyong & S. Kazuhiko (eds.), *Communications in Computer and Information Science: Frontiers of Computer Vision*, 27th International Workshop, IW-FCV 2021 Daegu, South Korea, 22–23 February 2021, Revised Selected Papers, (Springer: 2021 Daegu, South Korea), p. 131.

[4] U. M. Bahar, S. Afsana, et al, *Deep Insights of Deepfake Technology: A Review* retrieved from [2105.00192] Deep Insights of Deepfake Technology : A Review (arxiv.org) (accessed 27 March 2023).

President Barack Obama over voice to create a video where it depicts him cussing and abusing former President Donald Trump.[5] In the viral video, Obama was represented as calling Trump "a dipshit."[6] The video was later discovered to be a deepfake. Despite BuzzFeed's pacification afterwards to the effect that the video was a product of deepfake technology, the ugly impact persists and reigns supreme within the political sphere. Obama is not alone in this. Other celebrities equally suffered similar and more horrifying experiences of deepfakes. The manipulation of former House Speaker, Nancy Pelosi's speech speaks volumes of the inherent danger of deepfakes.[7] In 2017, a face swap of Gal Gadot was made to create a video of her having sex with her stepbrother.[8] As expected, at first this was believed to be true, perhaps, still believed by many who have already seen the video. Sadly, the video was generated using a machine learning algorithm – deepfakes. Others whose images have been superimposed to create porn include Scarlett Johansson, Maisie Williams, Taylor Swift, and Aubrey Plaza; all of whom have suffered in their individual lives because of the deepfakes manipulation of their images.[9]

Outside the United States, a tapestry of deepfakes also exists. In 2018, the public was greeted by an atmosphere of speculation by the Gabonese social media regarding a purported New Year address to the country ascribed to the president. Many believe the

[5] Ibid.
[6] Ibid.
[7] A. Henry, P. Giorgio, et al, "The State of Deepfakes: Landscape, Threats, and Impact" (September 2019) *Deeptrace*, p. 11.
[8] S. Cole, "AI-Assisted Fake Porn is Here and We Are All Fucked," available at: AI-Assisted Fake Porn Is Here and We're All Fucked (vice.com) (accessed 26 March 2023).
[9] Ibid.

address was a product of deepfakes, a manipulation to deceive the people of Gabon.[10] This is a follow-up to the rumours of the health complications surrounding the then country's President, Ali Bongo, whose consistent absence from public functions for several months triggered concern amongst the people of Gabon. Although Deeptrace Labs thinks the video of President Ali Bongo is real, the people of Gabon, especially the political opponent of the president, think otherwise. On a similar note, in June 2019, a scandal emerged surrounding a sex tape allegedly featuring the Malaysian Minister of Economic Affairs, Mr. Azmin Ali, and a rival minister's male aid.[11] The aid claimed the video was real, however, Mr Ali disclaimed the truthfulness of the video and went on to add that the video "was a realistic deepfake" that was solely intended to destroy his political career by his opponents.[12] Although Mr Ali vehemently rejected the claim that the video was real, experts concluded that there was nothing in the video to suggest that it was deepfake or manipulated. This again reveals the political upheavals which deepfakes portends.

Just like the social and political sphere, the judicial system is no exception to the dangers of deepfakes. While the impact of deepfakes is felt across the board in the legal system, of particular interest is its consequences on evidence presented at trial under the Federal Rules of Evidence. Admissibility of evidence is primarily governed by

[10] "The Bizarre and Terrifying Case of the "Deepfake" Video that Helped Bring an African Nation to the Brink" *MotherJones,* 15 March 2019, available at https://www.motherjones.com/politics/2019/03/deepfake-gabon-ali-bongo/ (accessed 26 March 2023).

[11] "A gay sex tape is threatening to end the political careers of two men in Malaysia" *SBSNews,* 17 June 2019, available at https://www.sbs.com.au/news/article/a-gay-sex-tape-is-threatening-to-end-the-political-careers-of-two-men-in-malaysia/ilgqdaqo5 (accessed 26 March 2023).

[12] Ibid.

the Federal Rules of Evidence in the federal courts within the United States.[13] The essence of the rules of evidence on admissibility rule is to ensure that the evidence presented at trial is credible, reliable, and authentic as it pertains to its originality and relevance to the material facts for determination before the court.[14] To this end, any evidence presented in court that seeks to establish a fact must be authenticated, which is to say, a particular piece of evidence must be what it is claimed to be in other to count on the reliability and trustworthiness of such piece of evidence.[15]

Having the above in mind, this article seeks to examine primarily the challenges posed by deepfake technology to the Federal Rules of Evidence as it pertains to the authentication of evidence in the United States of America. Although this article examines deepfakes and the way they impact proceedings in court, it is imperative to point out that this examination is narrowly tailored to the authentication of evidence in criminal trials following a challenge of audio-visual or voice-recording evidence. By focusing on the authentication of evidence for the avoidance of admission of deepfakes at criminal trials, it does not suggest that the question of deepfakes does not arise in civil proceedings. There are, of course, problems with deepfakes in civil trials as there has been discussion on the impacts of deepfakes on civil trials elsewhere.[16] Consequently, the cardinal focus of this article is the determination of authentication of a piece of evidence- that is, evidence sought to be tendered but objected to as a deepfake during criminal proceedings. Put differently, the article aims to determine

[13] Section 104 of the Federal Rules of Evidence.
[14] Sections 102 and 901 of the Federal Rules of Evidence; R. A. Delfino, "Deepfakes on Trial: A Call To Expand the Trial Judge's Gatekeeping Role To Protect Legal Proceedings from Technological Fakery," *Hastings Law Journal,* Volume 74, Issue 2 at 321.
[15] Section 901(a) and (b) of the Federal Rules of Evidence.
[16] R. A. Delfino, *Supra*, note 14, p. 296.

whether a particular piece of evidence is indeed original or deepfake. It equally discusses the determination of the question of means or procedure to arrive at the authentication of the particular piece of evidence and when such a piece of evidence should be authenticated. In addition, it will also consider whose duty it is to authenticate and whether an objection to evidence as deepfake will be limited to certain circumstances or whether it will be a free-for-all practice. The foregoing forms the rubrics of this study. Indeed, the above queries form the gamut of this paper and the legal architectural foundation upon which the structure and the super-structure of this paper are built.

By way of caution, this article argues that courts must be extremely careful in admitting or rejecting evidence at trial due to the threat deepfakes hold today. Importantly, the article raises concern about the perversion of justice in the likely event that deepfake is admitted in evidence. In conclusion, the article suggests ways the courts may deploy to ameliorate the admissions of deepfakes at trial or rejection of original evidence in the belief that it is a deepfake. To that end, this paper is divided into four sections. The first section presents an introductory prelude to the paper. The second part explores the origin and rise of deepfake technology. Here the history and the meaning of deepfake is considered. The third section examines the traditional means of authentication of audio-visual, digital, and scientific images. The fourth section considers the authenticity of evidence under the Federal Rules of Evidence and the emergence of deepfakes. Here the challenges of deepfakes at trial are analysed. Part Five is the concluding part where suggestions are offered on how the court may navigate criminal trials and authentication of evidence to avoid the admission of deepfakes.

2.0 THE RISE OF DEEPFAKES

2.1. The Concept of Deepfakes

Deepfake Technology is an algorithm for the making of a fake version of an image, voice, or video with the sole aim of depicting an action by someone who never performed such action. Although its central purpose remains the same, writers have created categories or types of deepfakes depending on the objective of the creator. This is rightly captured in the words of Gamage et al., where the authors noted that "deepfake phenomenon must be positioned…and…be examined under the lens of the contexts of its uses (or potential uses), along with its effects."[17]

Following this sequence, deepfakes have come to be classified or typified into information deepfakes and 'DeepNude.' The patterns of use and intent of the makers reveal that information manipulation, on one hand, and fake nudes are top in the making of deepfakes. As Gamage et al noted in their study, "cyber security reports in 2019 predict 96% of all deepfakes to be pornographic."[18] This awful development includes child pornography. Of course, it will be splitting hair to differentiate child pornography from 'pornography.' However, the distinction lies in the danger of deepfake and its non-discriminatory use against children.

Apart from deepnude which is used to manipulate images, deepfakes are also used to create fake information, distorted information, or disinformation. More than deepnude, fake information causes more harm within the political arena. This is, of course, seen

[17] D. Gamage, et al., "Are Deepfakes Concerning? Analysing Conversations of Deepfakes on Reddit and Exploring Societal Implications," (2022), p. 3.
[18] Ibid.

in the political reactions of the public to the videos of Obama, Pelosi, and the President of Gabon. While such videos have been debunked as fake, a shadow of it somehow still clogs most of the people who have seen the videos. Although the videos of Barack Obama, Nancy Pelosi, and Ali Bongo, have been debunked, the public still harbours feelings of distrust. This is of course understandable as we have seen from earlier discussions that it is difficult to differentiate original images from deepfakes. In this sense, deepfakes create tension in the body polity of society.

2.2 The History of Deepfakes

The exact origin of deepfake technology is obscure as its use has been long within the film industry. Still, the year 1997 has been noted as the year of a breakthrough in the notion of AI-powered algorithms with the ability to replicate images and videos.[19] Attribution of the concept of deepfake was given to the work of Bregler et al.[20] In their paper, Bregler et al gave an illustration of the use of what they describe as dubbing "using a footage (sic) to create automatically new video of a person mouthing words that she did not speak in the original footage." However, the wave of deepfakes began to gain prominence in the field of computer science in 2014. At its earliest stage of development, deepfake was used in the manipulation of mainly images and voice. Not much was achieved at this time until 2016. In 2016, more researchers began paying attention to the emerging technology to understudy its workings. In that line,

[19] C. Bregler, M. Covell, et al, "Video Rewrite: Driving Visual Speech with Audio," available at, https://www2.eecs.berkeley.edu/Research/Projects/CS/vision/human/bregler-sig97.pdf (accessed 27 March 2023).
[20] Ibid.; Borges, Luis, et. al, "Combining Similarity Features and Deep Representation Learning for Stance Detection in the Context of Checking Fake News" (2019) *ACM Journal of Data and Information Quality*, Vol. 9, No. 4, Article 39.

researchers with the aid of a neural network developed somewhat realistic facial expressions in videos with what was termed Face2Face.[21]

With years of improvement the technology became more sophisticated and by 2017 the term 'Deepfake' was first used following a posting of a video made using the technology algorithm set on Redditor.[22] The video was a face swap of celebrities with the body "of a porn actor" to create a somewhat fake action of sexual activity as though it was performed by celebrities and politicians.[23] Since then, deepfakes have been used against celebrities, politicians, and even private individuals to either coerce them or intimidate them into going against their will. The makers of deepfakes can achieve their aim because it is not easy to detect deepfake videos and images. This paper explores the dangers posed by deepfakes, particularly, the challenges of distinguishing between deepfakes and real images or videos in criminal trials.

3.0 TRADITIONAL MEANS OF AUTHENTICATION OF EVIDENCE AT TRIAL

As the heading of this section suggests, this part will explore how evidence was traditionally considered and authenticated during criminal trials before the *tsunami* of deepfakes. The essence of this is to demonstrate the idea that the traditional means of authentication of evidence is no longer tenable to fuel the aim of justice and fact-finding and truth-seeking through the ascertainment of facts relevant to the

[21] R. MD Shohel, N. N. Mohammad, et al., "Deepfake Detection: A Systematic Literature Review," available at IEEE Xplore Full-Text PDF: (accessed 27 March 2023).
[22] L. Lamyanba et al., *Supra*, note 3, p. 132.
[23] L. Lamyanba et al., *Supra*, note 3, p. 132; James Vincent, "Watch Jordan Peele use AI to make Barack Obama deliver a PSA about fake news" *The Verge*, 17 April 2018 https://www.theverge.com/tldr/2018/4/17/17247334/ai-fake-news-video-barack-obama-jordan-peele-buzzfeed (accessed 27 March 2023).

administration of criminal justice. To wit, this section is divided into theories of authentication of evidence and the treatment of audio-visual, digital images, and computer and scientific evidence under the rules of evidence.

3.1 Theories of Authentication of Evidence

Theories of evidence suggest principles by which a piece of evidence is subjected to in determining whether such evidence is authentic and admissible in evidence.[24] Given the rules of practice and history of evidence, the authenticity of every piece of evidence comes under the gripe arm of the theories herein below to decipher whether it meets the requirements of the law for admissibility.

3.1.1. The Pictorial Testimony Theory

The pictorial testimony or witness theory is to the effect that a witness testifies before the court regarding the content of a picture or video, that it is what it claims to be.[25] It involves the fair and accurate description or depiction of the event depicted in the picture or video,[26] both in fairness and accuracy.[27] The rule is best described as the witness with the best knowledge theory since the parameter for a witness to qualify under this theory hinges on nothing other than how well the witness knows of the event. The witness need not be the photographer or video recorder to qualify under this rule of authentication of evidence.[28]

[24] It is, however, important to observe that it is not in all circumstances that original or authentic evidence is admissible. Such evidence may be excluded where the method of its acquisition does not conform with the laid procedure for obtaining such evidence.
[25] In the Matter of the Welfare of L.J.L. (Unpublished), available in Westlaw and cited 2006 WL 3719652.
[26] Ibid.
[27] Ibid.
[28] United States of America v Kenneth Stephens, 202 F.Supp.2d 1361 (April 25, 2002); New York, S. & W. R. Co. v Moore, 105 F. 728, 728 (2d Cir. 1901).

As noted by Delfino, the premise upon which the "pictorial communication theory" is rested is on the overall idea that "any photographic or video evidence" is only but a "graphic portrayal of oral testimony," which, like every category of evidence requires verification by the witness.[29]

3.1.2 Silent Evidence Theory

In the category of theories of authentication of evidence is the silent evidence theory. The philosophy of this theory holds the view that once a photographic image or video certifies the basic requirements as to its source and process of production, that is sufficient to establish a fact, it is thus admitted in evidence without the necessity of calling for the oral testimony of a witness in confirmation of what is contained in the photograph or video.[30] The rationale for this argument is built on the reliance on the process by which the photographic image of video was created.[31] Thus, once a proper foundation is laid establishing trust and reliance on the process through which the picture or video is generated, the need for oral testimony is dispensed with.

The theory of "silent evidence" was more elaborated in the case of *Wise* v *State of Indiana,*[32] where the court, while quoting *Mays* v *State of Indiana*[33] in approval, opined that "[T]here must be a strong showing of authenticity and competency" for the silent evidence theory to apply. The court went on to hold that:

> When automatic cameras are involved, there should be evidence as to how and when the camera was loaded, how frequently the camera was

[29] R.A. Delfino, *Supra*, note 14, p. 327-328.
[30] *United States* v *Gray*, 531 F.2d 933 (8th Cir. 1976); *Berner* v *State of Indiana* 397 N.E.2nd 1012 (Dec. 12, 1979).
[31] *United States* v *Gray, supra*
[32] 26 N.E.3d 137 (Feb. 13, 2015).
[33] 907 N.E.2d, 131-32.

> activated, when the photographs were taken, and the processing and the changing of the film after its removal from the camera.[34]

In judicial cases, silent evidence is properly applied if the factors to silence the need for oral testimony are met. From the cases, these factors are competency, that is, the instrument's efficiency in capturing the evidence. Second, the frequency of use is enough to establish the good condition of the instrument. Third, security of the content- image or video at the time of removal from the instrument. These factors are jointly considered and once met, a photographic image or video may be admitted in evidence without calling for the oral testimony of someone with the knowledge of the process of making the photograph or video.

During the trial, it is either pictorial or silent witness theories that are used to authenticate a piece of photographic or video-recording evidence for purposes of admissibility. How these theories are used in specific types of evidence during the trial will form the basis of the discussion of the next segment of this section. The aim is to x-ray how evidence has been examined in the past years for authentication. In the end, the argument in this segment will be that these methods are no longer viable to sift altered or manipulated creation of deepfake technologies.

3.2 Treatment of Audio-visual, Photographs, Digital Images, and Scientific Evidence under the Rules of Evidence

In the discourse of the treatment of the above-listed categories of evidence, it is germane to note that the Federal Rules of Evidence under its authentication provisions does not specifically mention the theories of authentication of evidence in the way they

[34] *Mays* v *State of Indiana*, Ibid.

have been discussed in this paper. The theories have roots in the English common law which was inherited by America and developed as part of its legal system.[35] Still, by way of legal integration, the vestiges of the theories are silently incorporated into the Federal Rules of Evidence and applied by the courts.[36]

3.2.1 Audio-visual Evidence

Audio and video recording was not a problem until it became an issue at trial. This is of course the consequence of advancement in technology, just as with deepfake technology. With the introduction of audio and video recording came the need for adaptation in judicial proceedings - that is to say, the authentication requirement for admissibility. With the evolution of audio and video recording, the courts applied "strict and elaborate" requirements for authentication before any audio or video recording could be accepted as a true and accurate depiction of what is claimed.[37] As noted by Clifford S. Fishman, the "authentication regime" for audio recordings, and by extension video recordings was first formulated by the Georgia Court.[38] In *Steve M. Solomon, Jr.,* v *Edger,*[39] the Georgia court opined that:

> A proper foundation for [the use of a mechanical transcription device] must be laid as follows: (1) It must be shown that the mechanical transcription device was capable of taking testimony. (2) It must be shown that the operator of the device was competent to operate the device. (3) The authenticity and correctness of the recording must be established. (4) It must be shown that changes, additions, or deletions have not been made. (5) The manner of preservation of the record must be shown. (6) Speakers must be identified. (7)

[35] W. Jonathan, *Imagining the Law- Common Law and the Foundations of the American Legal System*, (Norman F. Cantor HarperCollins Publishers: New York, 1998), at p. 35.
[36] Rule 901 of the Federal Rules of Evidence.
[37] S. F. Clifford, "Recordings, Transcripts and Translations as Evidence," (2006), Vol. 81 *Washington Law Review*, 473 at 478.
[38] Ibid.
[39] 88 S.E.2nd 167 (Ga. Ct. App. 1955).

> It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress.

These optimum requirements will later be adopted with approval in the case of *United States* v *Mckeever.*[40] These requirements, upon the findings of the court in *Mckeever,* became the canon of interpretation in so far as authentication of audio and video recordings were concerned. These canons of interpretation for the authentication of evidence remained the standard of practice until they were codified under the aegis of Federal Rules of Evidence.

The Federal Rules of Evidence changed the requirement from the long list of requirements as laid down in *Steve M. Solomon, Jr.,* v *Edger* and adopted in *United States* v *McKeever* as a "badge of honour" for authentication of audio-visual recordings.[41] The Federal Rule of Evidence, Rule 901(a), as against the long list of requirements in *McKeever,* only requires a proponent of any audiovisual recording to satisfy that available evidence is "sufficient to support a finding that the item is what the proponent claims it is."[42] Although the overall standard for fulfilling authentication requirements is "sufficient to support a finding", Rule 901(b) provides instances for meeting this condition and there are a total of nine instances.

While the instances in Rule 901(b) are nine in number, of particular importance to this discourse are those enumerated in Rule 901(b) (1, 5, 6, and 9). Accordingly, under Rule 901(b)(1), the testimony of a participant to the recording suffixes in establishing the authenticity of an audio-visual recording.[43] The interpretations of the courts have been

[40] 169 F.Supp. 426, 430 ((S.D.N.Y. 1958).
[41] United States v Liberto, 4459219, WL, 1, 4 (USDC, D, Maryland, 2021); United States v Vidacak, 553 F.3d 334, 349 (4th Cir. 2009).
[42] Rule 901(a) Federal Rules of Evidence.
[43] United States v Brown, 136 F.3d 1176, 1181 (7th Cir. 1998).

that it need not be strictly someone who took part in the conversation, for example, a telephone conversation. But one who witnessed such a conversation is enough to give evidence as to its authenticity to meet the requirement of Rule 901(a). Still, it is noteworthy that the other elements as detailed in 901(b) (5, 6, and 9) are taken together, not in the strictest of terms, but showing that they have been met.[44] This approach has been considered a "more liberal approach" to sustaining the standard of authentication under Rule 901(a).[45]

3.2.2 Photographs

This subsection discusses digital images. However, digital images here include photography and X-rays. Writing historically about the sequence of development of photographs and digital images, Delfino observed that "although photographic evidence became a means of persuading the jury in legal proceedings by the end of the 19th century, the courts were initially hesitant to admit photographs into evidence."[46] Delfino further observed that the reason for the courts' hesitation centred around the logic of a witness testifying "on behalf of a photograph."[47] Of course, such hesitations were timely and precautionary as photographic evidence was a recent phenomenon and no rules of evidence were in place at that time to test the accuracy of photographs and ascertain their authenticity.

[44] United States v White, 116 F.3d 903, 920-21 (D.C. Cir. 1997); Alonzi v People, 597 P.2d 560, 562 (Colo. 1979); United States v Fuller, 441 F.2d 755, 762 (4th Cir. 1971).
[45] S. F. Clifford on Translation and Transcription, *Supra*, note 37, p. 480.
[46] R. A. Delfino on Deepfakes on Trial, *Supra*, note 14, p. 414.
[47] Ibid.

The general scepticism about a photograph and its admissibility in evidence was only allayed after the court in *United States* v *Ortiz,*[48] allowed its admission in evidence. In *United States* v *Ortiz,* the court allowed the admission of an enlarged photographic signature. The court allowed the photograph after the testimony of the photographer "by whom the photographs were made" and "the accuracy of the method pursued" for authenticity "and the results obtained by him" which established "knowledge of the process and the accuracy of the photograph in a land suit.[49] The Supreme Court's decision in *Ortiz* became a prelude to the wave of relaxation of the admissibility of photographs and the standard requirement for their authentication. In that vein, and after several years apart, the court came up with the standard of "showing sufficient to permit a reasonable juror to find the evidence is what its proponent claims."[50] In *Rembert,*[51] the court cited the cases of *Jackson* v *United States*[52] *and United States* v *Smith,*[53] in approval of the "showing sufficient…" as the standard method for the authentication of a photograph for admission in evidence.

The method of photographic authentication is 'flexible' and 'liberal.' From the cases above, the threshold is minimal, and the burden is light on the proponent of a photographic image. Notably, the same principle applies to the authentication of X-ray images as the proof of accuracy and the chain of custody requirements also apply to the process of making X-ray images. Thus, the central element in the determination of the authenticity of X-ray photographs is the requirement that the instrument by which

[48] 176 U.S. 422, 431 (Feb. 1900).
[49] United States v Ortiz, Ibid.
[50] United States v Rembert, 863 F.2d 1023, 1026 (D.C. Cir. 1988).
[51] Ibid.
[52] 395 F.2d 519 (D.C. Cir. 1968).
[53] 490 F.2d 789 (D.C. Cir. 1974).

it was taken and the process through which it was produced were "trustworthy and that they were properly taken."[54]

3.2.3 Digital and Computer Images

The terms 'digital images' and 'computer images' are used interchangeably. A reference to a digital machine, in most instances, would mean a reference to a computer with some degree of sophistication. The rhetoric regarding whether digital is the same as a computer or if there exists some iota of difference is unresolved, and the aim of this paper is not to inundate readers with the dilemma of the similarities or dissimilarities of these terms. Instead, here the analysis will be squared pegged on how images resulting from digital or computer machines are authenticated in court for purposes of admission.[55]

Just as seen in the discussion of photograph and audio-visual evidence, the court also viewed digital images with the same scepticism it viewed photographs and audio-visual recordings at the beginning.[56] The implication of such scepticism was a strict standard of authentication. The strict standard rule for the authentication of digital evidence by the court was later relaxed, and eventually replaced by the general standard of authentication under Rule 901(a) and (b).

Rule 901(a) laid the general condition for authentication. The principle is one of general application in so far as authentication of evidence is concerned. On digital images, the relevant provision to this discussion is Rule 901(b)((9). The Rule makes provision for the

[54] American Jurisprudence, Second Edition, Section 973.
[55] C. Gutherie & M. Brittan, "The Swinton Six: The Impact of *State* v *Swinton* on the Authentication of Digital Images" (2007) 36 *Stetson Law Review*, 661,
[56] Cunningham v Fair Haven & Westville R.R. Co., 43 A. 1047, 1048-1049 (Conn. 1899).

authentication of digital images. The clarity of and the relevance of the Rule is with the clear references to evidence of "a process or system showing that it produces an accurate result."

3.2.4 Scientific Evidence

The practice amongst courts in the determination of authentication of scientific evidence is made through the application of Rule 702 of the Federal Rules of Evidence. This development is warranted by the courts' abandonment of the principle in *Frye* v *United States,*[57] where it was initially decided that the authentication of scientific evidence is sufficient where there is evidence "sufficiently established to have gained general acceptance in the particular field in which it belongs."[58] Thus, before the abandonment of the standard in *Frye,* the condition for establishing the authenticity of scientific evidence was through the oral testimony of an expert in the field of science called in question demonstrating "general acceptance" of the process used in producing the evidence within the community of practitioners.[59]

As noted above, the court made a U-turn to the standard in *Frye*, reasoning that it did not conform to the Rules of Evidence. In its place, the court came up with a new standard to the effect that scientific evidence can be authenticated on "the requirement that an expert's testimony" of "scientific knowledge" establishes a standard of evidentiary reliability."[60] This standard is further elaborated following the expansion of rules of evidence. From the letters of Rule 702, to authenticate scientific

[57] 293 F. 1013 (D.C. Cir. 1923).
[58] Frye v United States, ibid at 1014.
[59] Ibid.
[60] Ibid at 590.

evidence, the proponent must satisfy that the testimony of the expert witness is such that it will aid understanding of the "evidence or to determine the fact," based on "facts or data," that the testimony "is based on a reliable principle and method," and that the testimony is "reliably applied to the principles and methods to the facts of the case."[61]

4.0 AUTHENTICATION UNDER THE FEDERAL RULES OF EVIDENCE AND THE CHALLENGES OF DEEPFAKES

As noted in the introduction of this paper, the central focus of the discussion here is on the effect of evidence alleged to be deepfake in criminal proceedings and this section is at the core of this concern. To that end, the unanswered questions that have triggered this paper and the minds of other scholars and writers on the effect of deepfake at trial will be addressed.[62] In doing so, this section is further subdivided into three. The first subsection will consider the current standard of authentication under the Federal Rules of Evidence against the backdrop of deepfake technology. The finding will reveal that the standards and practices available under the authentication rule are not sufficient to tackle the menace of deepfake as they appear in court. The subsequent subsection will dovetail into areas of major concern in the authentication conundrum, which previous researchers have not turned attention to, a more fundamental in the discussion on the dangers of deepfake in the trial of fact. The final subsection will make

[61] Rule 702(a – d).
[62] R. A. Delfino, "Deepfake Defense – Exploring the Limits of the Law and Ethical Norms in Prosecuting Legal Proceeding from Lying Lawyers" (2023), *Loyola Law School, Los Angeles Legal Studies Research Paper* No. 2023-02, 84.5 Ohio St. L.J. 1068, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4355140 (accessed 9 May 2023); M. Agnieszka, "The Threat of Deepfakes in Litigation: Raising the Authentication Bar to Combat Falsehood," 2021, 23 *Vanderbilt Journal of Entertainment and Technology Law,* available at https://scholarship.law.vanderbilt.edu/jetlaw/vol23/iss2/5 (accessed 9 May 2023).

suggestions on the way forward. Here, suggestions will be made regarding efforts, stakeholders in the administration of criminal justice must make to ensure the curtailment of the challenges of deepfakes.

4.1 Procedure under the Federal Rules of Evidence

Rule 901 of the Federal Rule of Evidence, as noted severally in this paper, governs the authentication of evidence. After a turn away from the common law rules through which the two theories on the authentication of evidence discussed above were formulated, the Federal Rules of Evidence came up with a single standard for the authentication of evidence.[63] As a general standard, the rule provides that to authenticate evidence of any nature, what is required to satisfy the requirement of authentication is for the proponent "to produce evidence sufficient to support a finding that the item is what the proponent claims it is."[64]

The rule applies generally so far as the authentication of evidence is concerned. Nevertheless, in Rule 901(b), examples of instances of authentication were provided as a guide and "not a complete list."[65] However, because the scope of this paper is narrow,

[63] Rule 901(a) of the Federal Rules of Evidence.
[64] Ibid.
[65] Rule 901(b): Here, the rule provides the following as list of instances of authentication of evidence (The following are examples only—not a complete list—of evidence that satisfies the requirement: (1) Testimony of a Witness with Knowledge: Testimony that an item is what it is claimed to be. (2) Non-expert Opinion About Handwriting: A non-expert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation. (3) Comparison by an Expert Witness or the Trier of Fact: A comparison with an authenticated specimen by an expert witness or the trier of fact. (4) Distinctive Characteristics and the Likes: The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances. (5) Opinion About a Voice: An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker. (6) Evidence About a Telephone Conversation: For a telephone conversation, evidence that a call was made to the number assigned at the time to; a particular person, if circumstances, including self-identification, show that the person answering was the one called; or a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone. (7) Evidence About Public Records: Evidence that a document

the discussion here will be limited to the instances in subrules (1, 5, 6, and 9) of Rule 901(b); as they are the provisions affected by deepfake, whether as audio, video, or voice recording.

4.2 Testimony of Witness with Knowledge

In Rule 901(b)(1), an item sought as evidence can be authenticated by the testimony of a "witness with the knowledge" that the item is exactly what it is called in question.[66] Under this provision, the central requirement for authentication is the knowledge of the testifying witness of the item which is subject to authentication.[67] Rule 901(b)(1) does not provide for the level of knowledge required to qualify as "evidence sufficient" to support the finding of fact. Simply put, what is required to fulfil the condition under 901(b)(1) is ordinary knowledge of the item and the testifier need not have personal knowledge of the item. The witness only requires personal knowledge of the item.

In *Chao* v *Westside Drywall,*[68] while considering whether a witness could testify as to the authenticity of a document, the court held that the witness could not testify as she had "no personal knowledge" of the item which she purports to authenticate through her testimony. The court noted that "the origin, contents, and significance of documents" were not discussed and that "the documents are facially devoid of any

was recorded or filed in a public office as authorised by law or Rule 902 of the Federal Rules of Evidence; or a purported public record or statement is from the office where items of this kind are kept. (8) Evidence About Ancient Documents or Data Compilations: For a document or data compilation, evidence that it; (A) is in a condition that creates no suspicion about its authenticity; (B) was in a place where, if authentic, it would likely be; and (C) is at least 20 years old when offered. (9) Evidence About a Process or System: Evidence describing a process or system and showing that it produces an accurate result. (10) Methods Provided by a Statute or Rule: Any method of authentication or identification allowed by a federal statute, or a rule prescribed by the Supreme Court).

[66] Lorraine v Markel American Insurance Company, 241 F.R.D 534. 538 (D.C. MA, 2007).

[67] Ibid.

[68] 709 F.Supp.2d 1037, 1049

identifying information supporting any conclusion about their author."[69] Given the shortcoming, the court concluded that there are no perceived "applicable alternative methods of authentication under" Rules 901 or 902, in the circumstance other than those requiring personal knowledge of the item by the witness.[70]

The item in this case was a document page in a book, sought to be identified and authenticated as genuine. While the rule as it applies might be sufficient in authenticating items of such nature for admissibility, it would be difficult, if not impossible to put a witness with only personal knowledge in the box to authenticate a deepfake. Several reasons will account for this difficulty. For example, evidence as to the production, trustworthiness, and credibility. A detailed discussion of these challenges will be deferred to the next subsection of this section.

4.3 Opinion on Voice Recording and Telephone Conversation

The next examples under Rule 901(b) are those concerning voice recording and telephone conversations.[71] To authenticate a voice, the rule requires and stipulates that "an opinion identifying a person's voice" which is heard "whether first-hand or through mechanical or electronic transmission or recording." This is on the basis of "hearing the voice at any time under circumstances that connect it with the alleged speaker." Authentication requirements under the example given in 901(b)(5) are like those of 901(b)(6). The only difference is that while the example under 901(b)(5)

[69] Chao v Westside Drywall, Ibid.
[70] Ibid.
[71] Rule 901(b) (5 – 6) of the Federal Rules of Evidence.

concerns voice identification in general, the later provision in 901(b)(6) speaks of the identification of a telephone conversation.[72]

Rule 901(b)(6) provides that to authenticate the existence of a telephone conversion, the proponent must show "that a call was made to the number assigned at the time to" whether a particular individual or a particular business entity. In the case of an individual, the conversation can further be authenticated "if circumstances, including self-identification, show that the person answering was the one called." In the case of business, it further provides that "if the call was made to a business and the call related to business reasonably transacted over the telephone."[73]

4.4 Evidence about a Process or System

The final example under Rule 901(b) is the evidence about a process or system. It provides for evidence about a process or system that can be authenticated by a sufficient showing of "evidence describing a process or system and showing that it produces an accurate result."[74] Writing in *Lorraine*,[75] the court opined that "methods of authentication listed in Rule 901(b) relate for the most part to documents" with relative attention that "[has been] given to… computer print-outs," which were particularly described in "Rule 901(b)(9), which was drafted with recent developments in computer technology in mind."[76]

[72] Ibid.
[73] Ibid.
[74] Rule 901(b)(9) of the Federal Rules of Evidence.
[75] Lorraine v Markel American Insurance Company, supra, note 67.
[76] Ibid.

In *Lorraine,* the court analogised the provisions of Rule 901(b)(7) & (9). The court reasoned that under Rule 901(b)(7), unlike Rule 901(b)(9), "there is no need to show that the computer system producing the public records was reliable or the records accurate."[77] The court proceeded to hold that when it comes to Rule 901(b)(9), it "recognises one method of authentication that is particularly useful in authenticating electronic evidence stored in or generated by computers."[78] Under these circumstances, two conditions were necessary to satisfy the requirements of Rule 901(b)(9). The first condition is "evidence describing a process or system used to produce a result." The other requirement is a "showing that the process or system produces accurate results."[79] Tracing the origin of the rule, the court espouses the idea that the rationale for its existence is for circumstances where the "accuracy of a result is dependent upon a process or system which produces it."

As noted by the court in *Lorraine* above, Rule 901(b)(9) was designed, having the developments in computer technology in mind. Still, it is doubtful if audio-visual images and recordings can conveniently be situated within the confines of "computer-generated" documents and thus allow the application of Rule 901(b)(9) as a method for its authentication. The succeeding subsection will answer this poser. The finding will reveal that authentication of evidence to differentiate original from deepfake cannot be properly carried out under the ambiance of the meaning of authentication of electronic or computer evidence as detailed in Rule 901(b)(9).

[77] Ibid.
[78] Ibid at p.548.
[79] Ibid at p. 549.

5.0 LIMITATIONS TO THE RULES OF EVIDENCE AND CHALLENGES OF AUTHENTICATION

Although Rule 901 is the primary rule for the authentication of evidence, other provisions of the Federal Rules of Evidence also regulate the authentication of evidence. Rule 901(b) and Rule 901(10) give credence to this assertion. Categorically, Rule 901(10) states that "any method of authentication or identification allowed by a federal statute, or a rule prescribed by the Supreme Court" may be used for the end of authentication. However, this paper argues that the present methods are inadequate to address the challenges of deepfake. Other scholars share this view.[80]

Given the complex nature of deepfakes, a different path should be taken while authenticating any evidence challenged as deepfakes. According to Delfino, the challenges with authenticating deepfakes include the problem of proof, deepfakes defence, and juror scepticism.[81] However, beyond the issues with deepfake identified by Delfino, more fundamental are the following questions; Firstly, when do we authenticate audio, video, or voice recordings alleged to be deepfakes? In other words, does every allegation that evidence is deepfake automatically warrant the necessity to authenticate?

Certainly, where this is done, the cost implication is that the theory of "deepfake defence" will become a standard of practice, slower than the wheel of justice. Acknowledging that justice is not a one-way traffic, it is then expedient to direct it in a manner that will not only serve the interest of one party, but that of the victim, the

[80] R.A. Delfino on Deepfakes on Trial, *Supra,* note 15.
[81] Ibid p. 340-348.

accused, and the society. Having this in mind, it is suggested that to answer this question, the allegation of deepfake should be limited to matters or facts essential and fundamental to establishing the guilt or innocence of the accused person standing trial.

The second question is, where an allegation of deepfake is raised in the trial of fact, to whom lies the responsibility of authentication? Should this burden be on the proponent of the evidence as provided in Rule 901 or the party alleging deepfakes? If it lies on the proponent of the evidence, will the proponent be trusted enough to impugn his evidence where the truth or otherwise of such evidence will harm his case? Human experience shows that man is a specie of sentiment who would naturally want to protect his interest against an adversary. Only a few manage to suppress this *innate bias*. Considering this human trait, will justice be served to trust the authentication of evidence, the result of which will determine the fate of a given matter? This is unlikely. With this in mind, we then turn to the next question, which is, how do we authenticate?

The authentication as discussed by judicial authorities has been theoretical. At best, it is demonstrative of the truth of a matter. While the procedure used over the years in the authentication of other forms of evidence might suffice, the procedure and theories as enunciated by the courts as the standard of establishing the genuineness of evidence will not work in the same manner with deepfakes. Deepfakes are products of complex algorithms. Although its creation has become common these days due to the availability of algorithms used in creating them, it is by no means suggestive that it is easy to explain. Amongst experts in the field of artificial intelligence, it is general knowledge that deepfakes are not easily detected. The argument then is that to guarantee the authenticity of an audio-visual or voice recording alleged to be deepfakes, neither the

theoretical rules of evidence nor the court's standard is sufficient in establishing the authenticity of a particular piece of evidence.

6.0 CONCLUSION

The challenges of deepfakes as observed in the section above go beyond the issue of proof, deepfakes defence, and juror scepticism. It lies more in the actual or real authentication of the alleged evidence. Before then, the question is, should every video, audio, or voice recording be challenged as deepfake and at what point should this challenge be raised? Allowing the occasion that permits every piece of evidence to be challenged as deepfakes is dangerous to the administration of criminal justice. Objection to evidence is not only made by the accused person but also by the prosecution. Therefore, where objection to deepfakes is allowed without limit, the impact on the cost of justice will be enormous. It is therefore suggested that only matters or facts that go to the root of the cause should be allowed to be tested on the allegation of deepfake.

The next point is who bears the responsibility? Given that deepfake is a novel technology that determines the justice of a case, the state should bear the responsibility of determining the authenticity or otherwise of the evidence in a criminal trial. Whereas the proponent should bear the responsibility for the authentication of such piece of evidence.

Finally, the means of authentication of evidence where the allegation of deepfakes is raised should be by way of laboratory examination by an expert in the field. The degree of knowledge required of the expert should be above average in the field of artificial

intelligence technology. Still, to ensure that deepfakes are not admitted, such results should be further compared with tests by a different expert(s). This way, the court is certain of the piece of evidence it admits in the trial of fact as an authentic and accurate representation of what it claims it is.

THE TAXATION OF CORPORATE DIGITAL ENTITIES UNDER THE MULTILATERAL CONVENTION: A CRITIQUE OF THE RULE OF PERMANENT ESTABLISHMENT

Philips Adekemi[*]

ABSTRACT

The digital economy has significantly enhanced efficiency and fostered innovation; however, it has introduced complex policy challenges, particularly in taxing corporate entities. A stable international tax framework is essential to resolving the issues and earning the trust of all stakeholders. The global tax community has adopted a two-pillar approach. Pillar One concentrates on establishing rules for nexus and profit allocation, while Pillar Two introduces a global minimum tax designed to mitigate the unresolved issues related to Base Erosion and Profit Shifting (BEPS). This approach is anticipated to foster equity and fairness in taxation and also empower international economies to adapt to evolving business models and profit realisation tactics employed by multinational enterprises. This paper evaluates the design of the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (MLC), offering insights and recommendations to address the unique challenges posed by the digital economy.

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1.0 INTRODUCTION

Globalisation remains a relevant concept among developed and developing countries as the increased global trade of goods and services has resulted in the promulgation of laws to guide trade and commerce both online and offline. This has also resulted in the need for States to place huge value on the revenues and humongous profits made by investors – private individuals and corporate entities in these business relations. In other words, no country wants to lose out from the profits of the trade of goods and services thus springing the conversation on the need to tax multinational enterprises and big corporate entities, hopefully not to their death as no one is concerned with their losses. The digital economy has remained abstract in terms of its activities, and the absence of a permanent establishment to attribute the activities of companies has made it difficult for the international tax system.

This paper seeks to holistically appraise the digital economy, and its operations and examine activities that will be taxable under this concept. The Multilateral Conventions on Pillar One and Two seek to address the challenges arising from the digital economy. Considering that the digital economy is most times necessarily not attributable to a physical presence or permanent establishment, it is imperative that the concept is thoroughly defined to understand its nuances and operations. The OECD/G20 Inclusive Framework expresses the need to strengthen the global tax system to keep up with evolving business practices and ensure that government finances are stable and sustainable.[1]

[1] 2 See, OECD/G20 Inclusive Framework Unveils Groundbreaking Multilateral Convention Addressing Global Tax Challenges, available at https://www.oecd.org/en/about/news/press-

The COVID-19 pandemic has heightened public demand for governments to ensure that large, profitable companies operating internationally pay their fair share of taxes where they should. Thus, to tackle this issue, there needs to be a consensus or tax clarity for these businesses to play their fair share in the post-pandemic economy.

Article 2 of the MLC does not clearly define what 'Taxable Presence' is or constitutes. Article 1 of the Multilateral Convention to Implement Amount A of Pillar One limits the scope of the Convention only to the Group Entities of Covered Groups. Article 3 defines a Covered Group as one with adjusted revenues greater than EUR 20 billion and a pre-tax profit margin greater than 10 percent.

Pillar One aims to update the international income tax system to better fit new business models by altering how profits are divided and where taxes are applied. It looks to give more taxing rights to market locations—essentially, the places where users are based—when a business is actively involved in that economy, either through local activities or by targeting those areas from other jurisdictions.

Pillar One also aims to enhance tax certainty by introducing new ways to prevent and resolve disputes. It seeks to balance the different goals of the Inclusive Framework members and eliminate certain unilateral measures. According to the outline, the main parts of Pillar One can be divided into three key components: a new taxing right for market areas to claim a portion of leftover profits calculated at the multinational enterprise (MNE) group or segment level (Amount A); a fixed return for specific basic

releases/2023/10/inclusive-framework-releases-new-multilateral-convention-to-address-tax-challenges-of-globalisation-and-digitalisation-.html#:~:text=11%2F10%2F2023%20%E2%80%93%20The,tax%20certainty%2C%20and%20remove%20digital (accessed 21 August 2024).

marketing and distribution activities happening in a market area, following the arm's length principle (Amount B); and processes designed to improve tax certainty through effective dispute prevention and resolution methods.

According to the OECD/G20 Base Erosion and Profit Shifting Project Tax, eleven essential building blocks have been identified as crucial for creating Pillar One, forming the foundation of this Blueprint.[2]

The possible application of the rule and the taxing components have raised serious issues in the international tax order if the rule is adopted in treaty practice. This paper shall examine the negotiation process of the Multilateral Convention to implement Amount A of Pillar One bearing in mind the negotiating style of previously enacted tax treaties. The second part of this paper shall seek to answer these questions and comprehensively trace the history of the Multilateral Convention to implement Amount A of Pillar One which has now been adopted by 138 members. This part shall trace the evolution from the work of the OECD, tax scholars, and stakeholders towards resolving base profit shifting. This part shall also examine the limitations of the digital economy and the illicit financial flows in some jurisdictions that may impede tax collection.

The second part of the paper will also examine the operation of a digital economy and shall seek to ascertain whether we have finally arrived at a solution for resolving the case of the taxation of digital economies in light of the aggressive tax avoidance and planning strategies of multinational enterprises (MNEs).

The third part of this paper shall examine the limitations to the rule proposed by the

[2] OECD/G20 Base Erosion and Profit Shifting Project Tax Challenges Arising from Digitalization – Report on Pillar One Blueprint INCLUSIVE FRAMEWORK ON BEPS.

MLC in resolving the concept of Entities and taxation of MNEs. The fourth and final part shall address possible alternatives, especially for Members whilst making recommendations to improve the treaty negotiations and acceptance by the wider international tax community.

2.0 DEVELOPMENT OF A COMPREHENSIVE BASE EROSION AND PROFIT SHIFTING (BEPS) ACTION PLAN

Tax treaties are the foundation of the international tax system. Currently, there are more than 3,000 tax treaties that govern most cross-border investments. These treaties are mostly based on the Model Tax Convention from the Organisation for Economic Cooperation and Development (OECD). This shows a growing alignment in the standards of international taxation.[3]

Tax treaties have been thoroughly studied over the years,[4] yet despite the growing similarities in their frameworks and nearly a century since the first modern treaties were established,[5] many fundamental questions about how they are applied, interpreted, and their overall effectiveness remain unanswered.[6] This uncertainty

[3] Yariv Brauner, 'Tax Treaty Negotiations: Myth and Reality' (2014) University of Florida Levin College of Law Legal Studies Research Paper Series No. 22-15.

[4] See, e.g., KLAUS VOGEL, KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS: A COMMENTARY TO THE OECD, UN, AND US MODEL CONVENTIONS FOR THE AVOIDANCE OF DOUBLE TAXATION ON INCOME AND CAPITAL, WITH PARTICULAR REFERENCE TO GERMAN TREATY PRACTICE (3d ed. 1997). This is the last English version of the originally German treatise. A posthumous fourth edition in English was published in 2015. See KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS (Ekkehart Reimer & Alexander Rust eds., 4th ed. 1997).

[5] See League of Nations, Double Taxation and Tax Evasion, Publications of the League of Nations II. Economic and Financial (1927). II. 40, Geneva, April 1927 (Draft Model Convention and Commentary for the Avoidance of Double Taxation); and League of Nations, Double Taxation and Tax Evasion, Publications of the League of Nations II. Economic and Financial (1928). II. 49, Geneva, Oct. 1928. (Model Convention IA. Two additional drafts were released in the same year with slight differences, known as drafts IB and IC).

[6] See, Yariv Brauner, The Klaus Vogel Lecture 2019: The True Nature of Tax Treaties 74 BULL. INT'L TAX. 28 (2020) [hereinafter Brauner, Vogel Lecture].

became particularly evident during recent global dissatisfaction with the international tax system, which has ultimately sparked the creation of the Base Erosion and Profit Shifting (BEPS) project which has turned out to be one of the most significant reform efforts in this area.[7]

In September 2013, the G20 Leaders endorsed the ambitious and comprehensive BEPS Action Plan, developed with OECD members. Based on this Action Plan, the OECD and G20 countries developed and agreed, on an equal footing, upon a comprehensive package of measures in just two years. These measures were designed to be implemented domestically and through tax treaties.[8]

As a result, many countries are experiencing a revenue crisis. Developed nations, despite still being the most powerful, are feeling this impact the most because they were hardest hit by the global financial crisis. They stand to lose the most from the shift in global economic power, face higher expectations to fund costly programs like welfare, and, being democratic, they tend to be more politically vulnerable and less adaptable.

Emerging economies may be less affected due to their growth, but they too are losing influence to multinational enterprises (MNEs) and are beginning to face pressures from civil society similar to those experienced by developed nations. Meanwhile, the developing world is undoubtedly at a disadvantage, as it has historically lacked a voice and is unlikely to have any influence when conflicting with MNEs that hold greater political and financial power. This shared challenge across countries creates a common

[7] See OECD, BEPS website at https://www.oecd.org/tax/beps/
[8] See Background Brief Inclusive Framework on BEPS OECD published January 2017.

interest in promoting international action on corporate taxation, particularly with the BEPS.[9]

With more than 130 countries and jurisdictions involved, the Global Forum on Transparency and Exchange of Information for Tax Purposes has been instrumental in promoting the consistent and effective application of international transparency standards since it was founded in 2009. Meanwhile, the financial crisis and aggressive tax strategies employed by multinational enterprises (MNEs) have brought the issue of BEPS to the forefront of political discussions. Governments worldwide face significant challenges, with estimated annual revenue losses ranging from $100 to 240 billion. Notably, the impact of BEPS on developing countries is believed to be even more severe in relation to their tax revenues compared to developed nations.

The consensus on BEPS developed through three clear phases. The first phase involved identifying the problem and led to the creation of the BEPS Action Plan, which was supported by G20 leaders. The second phase focused on consultations about specific actions and drafting solutions aimed at gaining wide backing from OECD and G20 countries. The third phase dealt with putting into action the mandates, recommendations, and best practices outlined in the final BEPS reports.

The initial ability to define the key elements of the BEPS initiative seems to have influenced how the responses to BEPS unfolded later. During the first phase, the lack of involvement from developing countries raised concerns about the OECD's role as a facilitator for international tax cooperation in the future. In response to this, the OECD

[9] Yariv Brauner What the BEPS? University of Florida Levin College of Law Legal Studies Research Paper Series Paper No. 15-40.

took significant steps in the second and third phases by broadening the range of jurisdictions participating in the BEPS project and actively engaging with regional meetings and providing technical support.[10]

The formulation of the BEPS Project underwent various phases and explorations and this reveals the engagement of various jurisdictions with the OECD via the platforms and avenues, conferences, and regional events by several stakeholders (economic advisors, country representatives) in the discussion. Thus, it is imperative to understudy how jurisdictions engaged and consulted with one another at various stages of the BEPS project to draw future lessons in the organisation and coordination process for future international tax.

2.1 Highlighting Global Tax Cooperation and the BEPS Project

The BEPS project is the second significant effort for global cooperation on taxation following the financial crisis. The first project mainly focused on transparency and was largely driven by inter-governmental efforts. Recently, the G20 and OECD have started working on tax policy to promote strong and sustainable growth across jurisdictions. This could potentially become the next major initiative for tax cooperation.[11]

[10] Assessing BEPS: Origins, Standards, and Responses Citation Allison Christians & Stephen Shay, General Report, in 102A Cahiers de Droit Fiscal International: Assessing BEPS: Origins, Standards, and Responses 17 (Int'l Fiscal Ass'n 2017) Pages 8 and 9.

[11] Para. 11 of the 2016 Chengdu G20 Finance Ministers' Communiqué provides: "We recognize the important role of tax policies in our broader agenda on strong, sustainable and balanced growth and of a fair and efficient international tax environment in diminishing the conflicts among tax systems. As highlighted in our discussion at the G20 High Level Tax Symposium, we emphasize the effectiveness of tax policy tools in supply-side structural reform for promoting innovation-driven, inclusive growth, as well as the benefits of tax certainty to promote investment and trade. In this regard, we ask the OECD and the IMF to continue working on the issues of progrowth tax policies and tax certainty." Communiqué, G20 Finance Ministers and Central Bank Governors Meeting, Chengdu, China, 24 July 2016.

The development and timing of these projects are key to understanding how BEPS came about and the path it creates for international tax relationships. The OECD re-established the Global Forum on Transparency and Exchange of Information for Tax Purposes as an inclusive organisation committed to improved standards for sharing information.

The Global Forum has been successful in ensuring that countries adhere to these standards for information exchange when requested. However, governments have increasingly sought more flexible ways to share information. This led to a new phase of the transparency initiative that aimed to broaden cooperation by including the automatic exchange of specific financial data. This work on transparency was driven by concerns over revenue losses in the wake of the financial crisis, public demands for disclosures of hidden financial accounts, and the need for better information sharing to fight against global terrorism and criminal activities.[12]

2.2 BEPS Implementation Process

The third and ongoing phase of the BEPS project focuses on the OECD's initiative to garner global backing for BEPS actions and to foster agreement on consistent implementation of those actions. This includes working towards a shared understanding of certain items that have not yet reached minimum standards. This phase of implementation started when the final reports were released in October 2015 and

[12] Assessing BEPS: Origins, Standards, and Responses Citation Allison Christians & Stephen Shay, General Report, in 102A Cahiers de Droit Fiscal International: Assessing BEPS: Origins, Standards, and Responses 17 (Int'l Fiscal Ass'n 2017).

received approval from G20 leaders in November 2015.[13]

To promote the implementation of BEPS, efforts were made to broaden the group of participating countries. This expansion included a diverse array of nations attracted by the potential benefits of collaboration through an inclusive framework. This framework aimed to develop additional guidance on various action items and facilitate the peer review process for those items within the BEPS initiative.[14]

3.0 THE OPERATION AND LIMITATION OF THE DIGITAL ECONOMY

The international tax system has faced significant challenges due to these pressures. With the rise of technologies such as radio waves, satellite-based services, distant catalogue sales, electronic commerce, and cloud computing, the traditional requirement for a physical presence to establish tax jurisdiction has become increasingly outdated.[15] Over time, the understatement of income by MNEs and engagement of trade mispricing pose serious challenges to the taxation of the digital economy as revenues cannot be successfully tracked and traced. The argument has been advanced on how illicit financial flows (IFFs) have been the bane of trade and commercial activities in most countries and pose a great hindrance to the digital economy.

Emphasising the challenges associated with reforming international tax law in light of the digital economy, it has been observed that the call for reform extends beyond just

[13] G20 Leaders' Communiqué, 15–16 November 2015. ("To reach a globally fair and modern international tax system, we endorse the package of measures developed under the ambitious G20/OECD Base Erosion and Profit Shifting (BEPS) project").
[14] The OECD technical bodies involved in the inclusive forum BEPS work consisted of working parties on the various Articles of the tax conventions and related questions.
[15] Charles I. Kingson, The David Tillinghast Lecture: Taxing the Future, 51 TAX L. REV. 641 (1996) [hereinafter Kingson, Taxing the Future].

digital activities. However, this demand has emerged alongside the growth of the digital economy and is most clearly illustrated within that framework. The digital economy enables multinational enterprises, typically based in developed nations, to operate entirely in developing countries. They can tap into these markets without needing a physical presence, which results in insufficient taxable presence.[16] This situation leads to favourable tax outcomes that would be much harder and more expensive to achieve in traditional economic scenarios. As a result, the digital economy has allowed taxpayers to have greater control over their tax obligations, making them largely optional.[17]

This menace is present in both the developed and developing countries**.** Illicit financial flows (IFFs) are not solely a challenge for Africa; they represent a global governance issue that necessitates a comprehensive approach, including reforms within the global financial system. These flows have the potential to enhance domestic resource mobilisation for the continent, which, if effectively harnessed, could significantly benefit Africa's post-2015 development agenda. This is particularly relevant in light of global economic trends that indicate reliance on development aid is no longer a viable long-term solution. The report also emphasises that effectively addressing IFFs can lead to improvements in governance across Africa and foster a more sustainable environment for local businesses and the private sector.

[16] See, e.g., Peter Hongler & Pasquale Pistone, Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy (WU Int'l Taxation Res. Paper Series No. 2015-15, 2015), https://ssrn.com/abstract=2591829 (last visited Jan. 19, 2019) [hereinafter Hongler & Pistone, Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy].
[17] Andrés Báez & Yariv Brauner, 'Taxing the Digital Economy Post BEPS ... Seriously' (2019) University of Florida Levin College of Law Legal Studies Research Paper Series Paper No. 19-16.

IFFs from commercial activities serve various purposes. These purposes include concealing wealth, avoiding taxes, and evading customs duties or local taxes. Many of these practices, particularly those related to taxation, are technically referred to as "base erosion and profit shifting," especially in discussions influenced by the OECD. In Africa, IFFs manifest in numerous ways. They include abusive transfer pricing, trade mispricing, the misrepresentation of services and intangible assets, and the use of unequal contracts, all aimed at tax evasion, aggressive tax avoidance, and the illegal transfer of foreign currency.

One common method of facilitating IFFs from Africa involves the misrepresentation of services and intangible assets, such as intra-group loans and management fees. These practices are increasingly contributing to IFFs, partly due to the growing role of services in global trade. Other factors include advancements in technology and a lack of accessible price comparisons. The rise of information and communication technologies has made transferring large sums of money incredibly easy, while also enabling new forms of misrepresentation. Determining the appropriate price for goods using the arm's-length principle is simpler than doing so for intellectual property, such as brand usage. Additionally, it is challenging to restrict the advisory services that related companies can provide to each other or to set limits on the amounts they can lend to one another.[18]

In South Africa, the Africa Union’s High-Level Panel discovered the tax avoidance mechanisms of multinational corporations. The South African authorities reported to

[18] Illicit Financial Flows Report of the High-level Panel on Illicit Financial Flows from Africa Commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development, 2021.

the panel, a case involving a multinational company that managed to evade $2 billion in taxes. This company claimed that a significant portion of its operations took place in the United Kingdom and Switzerland, jurisdictions known for their lower tax rates at the time. To facilitate this, the company shifted the legal aspects of its business to these countries. However, upon investigation, South African officials discovered that the subsidiaries and branches in the UK and Switzerland employed only a small number of low-paid staff members who held minor positions. Furthermore, these offices did not manage any of the commodities the company dealt with and were not legally authorised to take ownership of them.[19]

Although most of the company's customers were based in South Africa, a paper trail was fabricated for each transaction, directing them through the Swiss or UK offices to create the illusion that these locations played a crucial role in the business operations. Ultimately, the South African authorities were able to recover the taxes that had been evaded, as it was evident that the real activities of the company were carried out within South Africa.[20]

There is a growing concern about the taxation of the digital economy in the Asian region. The impact of international tax policy reforms in Asia could differ from other regions, given the unique landscape of digitalised businesses. Reducing the importance of physical presence in determining a company's income tax liability could increase the ability of Asian countries to tax foreign MNEs operating in Asia with few tangible assets. However, the home countries of Asia's technology giants could also lose revenue if

[19] Ibid.
[20] Ibid., page 28.

these firms have to pay more taxes in other countries where they are expanding. The consequences for revenue collection could be non-trivial, given that home-grown tech giants are growing rapidly and face similar implicit tax rates to US MNEs. Some Asian countries are also turning to Digital Services Taxes (DSTs) —withholding taxes or user-based turnover taxes on digital activities—as a unilateral means of taxing tech giants and other highly digitalised businesses.[21]

Article 38 of the MLC provides a breath of relief with regard to the definition and scope of digital service tax, an initiative flowing from public consultation. While it may be argued that digital service tax is expansive, the author considers it a step in the right direction. The adoption of these provisions (Articles 38 and 39) was a key aspect of the negotiation of the Convention.

> In addition to the operative provisions of Amount A, the MLC will contain provisions requiring the withdrawal of all existing digital service taxes (DSTs) and relevant similar measures with respect to all companies and will include a definitive list of these existing measures. The MLC will also include a commitment not to enact DSTs or relevant similar measures, provided they impose taxation based on market-based criteria, are ringfenced to foreign and foreign-owned businesses, and are placed outside the income tax system (and therefore outside the scope of tax treaty obligations). The commitment would not include value-added taxes, transaction taxes, withholding taxes treated as covered taxes under tax treaties, or rules addressing abuse of the existing tax standards. The development of the MLC will include work to further develop the definition of DSTs and relevant similar measures, and to provide for the elimination of Amount A allocations for jurisdictions imposing future measures that are within the scope of this commitment.[22]

The two-pillar framework aims to halt and eliminate unilateral actions, including Digital Services Taxes (DST) and other similar measures. In the absence of a globally

[21] International Monetary Fund Report- Asia-Pacific and Fiscal Affairs Departments Digitalisation and Taxation in Asia. DP/2021/017

[22] See, PUBLIC CONSULTATION DOCUMENT Pillar One – Amount A: Draft Multilateral Convention Provisions on
Digital Services Taxes and other Relevant Similar Measures 20 December 2022 - 20 January 2023.

accepted agreement among all countries, nations have tried implementing these taxes as a fallback option. Members of the Inclusive Framework acknowledge that such unilateral actions can be ineffective and may result in conflicts with other nations, as they can create situations of double taxation and provoke trade retaliations.

Historically, these DSTs have primarily targeted large digital companies, which will now fall under the new tax provisions outlined in Pillar One. By collaboratively agreeing to pause and eliminate these unilateral measures, the members of the Inclusive Framework have recognised that a coordinated strategy is preferable to a patchwork of individual actions that would introduce greater uncertainty for taxpayers and escalate tensions among governments.[23]

4.0 THE WAY FORWARD

4.1. Is There an Alternative?

The idea of establishing the permanent establishment of a company is crucial for Contracting States to determine taxation of income. Article 5 of the US Model Treaty requires "a fixed place of business through which the business of an enterprise is wholly or partly carried on.'' Thus, the management of the business must be determined. It is evident that the existing international tax regulations were not originally crafted for the modern digital economy.[24] While there have been efforts to adjust these rules in response to technological advancements and the growing significance of intangible

[23] OECD/G20 Base Erosion and Profit Shifting Project Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy OCTOBER 2021.
[24] See, e.g., Chang Hee Lee, Impact of £-Commerce on Allocation of Tax Revenue Between Developed and Developing Countries, 4 J. OF KOREAN L. 19, 21 (2004) ("[D]igital technology completely destroys the economic and legal basis for the existing rules of international taxation, implying the necessity of a complete overhaul ....").

assets, particularly in cross-border transactions, the modifications made have proven to be insufficient to effectively address these evolving dynamics. This is evidenced by the OECD's identifying the "[a]pplication of treaty concepts to profits derived from the delivery of digital goods and services" as a key pressure area that must be addressed by the BEPS project.[25]

The BEPS project must recognise that intangibles and e-commerce are distinct concepts that necessitate tailored approaches, rather than relying on outdated doctrines through analogy. For instance, it is no longer sufficient for tax jurisdiction to be solely based on physical presence, as is currently the case. This principle should be translated into clear operational guidelines.[26]

The adoption of withholding taxes on payments to non-residents for digital and cross-border technical services (for example, accounting, management, and subcontractor services), in some jurisdictions like Asia, has expanded the scope of digital services to include both business-to-business payments for online advertising as well as some business-to-consumer transactions (typically relying on financial institutions as withholding agents).

The revision of tax treaties and expansion of domestic rules to allow for revenue attribution to residents and non-resident companies with virtual Permanent Establishment (PE). This has introduced the concept of Digital Permanent

[25] This is evidenced by the OECD's identifying the "[a]pplication of treaty concepts to profits derived from the delivery of digital goods and services" as a key pressure area that must be addressed by the BEPS project, later reflected in action item 1. See OECD, ADDRESSING BASE EROSION AND PROFIT SHIFTING, supra note 10, at 47.
[26] Yariv Brauner, "What the BEPS?" University of Florida Levin College of Law Legal Studies Research Paper Series Paper No. 15-40.

Establishment, a taxable PE to which income tax obligations will exist when the activities of MNEs meet or exceed a global turnover and sales threshold.

The broad application of user-based taxes to both resident and non-resident companies will enable countries to capture some of the value being generated through interaction with users in their jurisdiction from a range of digital services by their citizens for highly digitalised businesses and realise the income from such businesses.

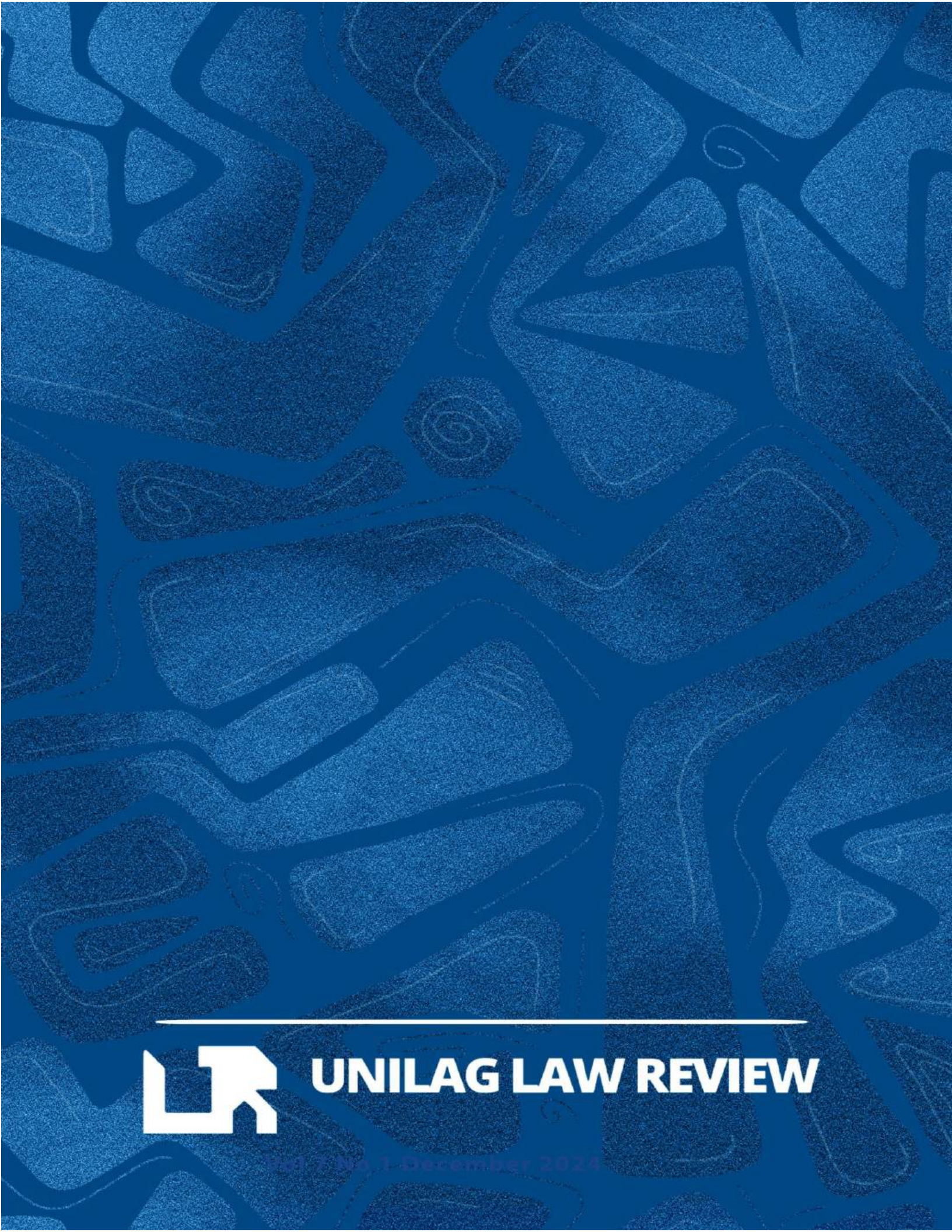
5.0 CONCLUSION

OECD's work on Pillar 1 and 2 is significantly relevant to the taxation of the digital economy, the redefinition of the concept of Personal Establishment and the avoidance of profit shifting by MNEs. The negotiation of the Treaty for years shows the positive dedication and commitment of Members and Stakeholders to make corporate enterprises and entities financially and tax-accountable for profits made from entities in various jurisdictions.

However, the reluctance of some Member States and Stakeholders who have refused to sign is seen in the monetary cap of Covered Entities and the greater benefits of the Convention to the developed jurisdictions neglecting the developing countries with few or no MNEs and profit-yielding companies who will be subject to the taxation rule. Furthermore, it is noteworthy that there is a greater fear among countries who have signed, on the loss of revenue and income, as the implementation of both Pillars may result in a deviation from the long-established principle of source States taxing the income and revenue made in their States.

The mandatory requirement for multinational enterprises to pay €750 million or more

in annual revenue to pay a global minimum tax of 15% on income received in each country in which they operate is projected to result in an increase in corporate tax globally by $220 billion year by 9 percent. However, this will negatively affect foreign direct and portfolio investment, especially in jurisdictions which rely heavily on income from corporate taxes.



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