ISSN 1119-9261

THE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

Vol. 10 July 2022

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To be cited as: (2022) J.I.C.L Vol. 10

A Publication of the Department of Jurisprudence and International Law, Faculty of Law, University of Ilorin.

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The Editor
The Journal of International & Comparative Law
Department of Jurisprudence & International Law, University of Ilorin.
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University of Ilorin
P.M.B. 1515
Ilorin.

Contributions to the Journal express the views of their authors and not necessarily the views of the Editorial Board of Department of Jurisprudence & International Law, University of Ilorin.

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LAW AND RESPECT FOR HUMAN RIGHTS IN NIGERIA: INTERROGATING THE CLIMATE CHANGE ACT 2021.

KPEA-UE Bariyira Simple*

Abstract

Respect for human rights and good governance is one of the indices of a modern and democratic State. Protection of human rights is a covenant or duty of government towards its citizens. Following the wave of economic globalization across countries of the world, human rights are constantly exposed to violation in great proportion by actors, states, including multinational corporations. Basic human right such as the right to a satisfactorily healthy environment remains unprotected as a result of the activities of the petroleum industry in the face of inefficient petroleum institutions and weak regulatory framework. One of the global environmental challenges affecting the world today is climate variability which is caused by the presence of greenhouse gases in the atmosphere through both natural and man-made channels. In order to address the far-reaching negative impacts of climate change on man and the entire ecosystem in Nigeria, the National Assembly in 2021 enacted the Climate Change Act which provides a framework for mainstreaming of climate change actions, a system of carbon budgeting and the establishment of the National Council on Climate Change. This paper aimed at interrogating the Climate Change Act 2021 towards attaining human rights protection in Nigeria. In adopting the doctrinal research methodology, it is found that the Act made spirited attempt to provide mechanisms for the protection of human right to a clean and safe environment in the face of oil exploration. It is recommended amongst others that section 18 of the Act which empowers the Council to accept gifts of land, money or other property as may be specified by the person or organization making the gifts should be expunged from the Act as such provision is capable of breeding corruption and undermining the Council's quest in the protection of human right to a satisfactory and healthy environment.

Keywords: *Human Rights, Environment, Climate Change Act 2021, Climate Change*

1.0 Introduction

The devastating effects of human interface with the environment have given birth to the concept of 'ecocide.' Ecocide therefore is the unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the

environment being caused by those acts.[1] Emission of greenhouse gases is an offshoot of industrialization which has trails of environmental doom on the people. Climate change is an existential threat to human and planetary ecosystem.[2] The entire ecosystem is destroyed leaving man to live on a contaminated and polluted environment which threatens his life, safety and health. Human-induced climate change is causing dangerous and widespread disruption in nature and affecting the lives of billions of people around the world, despite efforts to reduce the risks. People and ecosystem least able to cope, like Nigeria, are being hardest hit.[3] This report is a dire warning about the consequences of inaction at global, regional or national level. It shows that climate change is a grave and mounting threat to our wellbeing and a healthy planet. Agriculture, food production, food security and health (increased malnutrition as well as increased water and vector-borne illnesses), energy safety and migration will all be impacted by the rise in temperature.[4] Most challenging is that the highly industrialized countries up North that create the most of emissions are not necessarily the same countries facing the most severe consequences of climate change. The up North with the highest carbon dioxide polluters of China, United States of America, India and Russia contribute more to climate variability than the less industrialized countries. In fact, China is responsible for approximately 30 percent of the world's emissions while United State of America is responsible for 14 percent of the world's emissions. This shows that global emission rates as well as progress on adaptation is uneven.

The question then is whether or not the widespread damage, harm and destruction of the ecosystem can be brought to an end? To avoid mounting loss of life, biodiversity and infrastructure, ambitious, accelerated action is required to adapt to climate change, at the same time as making rapid, deep cuts in greenhouse gas emissions. Nigeria as a nation has taken legislative measures to reducing the emission of greenhouse gas emission and to mitigate the negative effects of climate change. This direct response is the enactment of the Climate Change Act 2021. This paper

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[1] 'Independent Expert Panel for the Legal Definition of Ecocide, June 2021-Stop Ecocide International' <stopecocide.earth> accessed 12th January 2023.

[2] D. Tindall amd others, 'COP27 Failed. So Why Continue with These UN Climate Summits?' (November 2022)- The Conversation <theconversation.com/cop27> accessed 20 January 2023.

[3] Intergovernmental Panel on Climate Change Report, 28 February 2022 <ipcc.ch/2022/02/28/pr-wgii-ar6/> accessed 20 January 2023.

[4] M. Schaeffer and others. (2013). Africa Adaptation Gap Technical Report: Climate Change Impacts, Adaptation Challenges and Costs for Africa. UNEP, 4-10. accessed 12 January 2023.

therefore interrogates the provisions of the Act to ascertain the extent to which it tends to protect human rights, particularly, the right to a safe, healthy and satisfactory environment.

2.0 Conceptual Review

A proper understanding of this paper by the average reader will require a demystification of key concepts that are germane. Accordingly, words like human rights and climate change will be explained in this section.

2.1 Human Rights

Human right is a compound word comprising the words 'human' and 'rights.' Human means being, relating to, or belonging to a person or to a people as opposed to animals.[5] Right means anything that is due to a person by just claim, legal guarantee or moral, principle.[6] Its means a power, privilege or immunity secured to a person by law.[7] A right is a legally enforceable claim that another will do or will not do a given act, a recognized and protected interest that violation of which is a wrong.[8] Therefore, a right is correlative to duty. According to Okogbule, the concept of right and the correlative duty is one of the problematic issues within the human rights *corpus*.[9] This, according to the author is particularly akin in relation to solidarity rights such as the right to development.[10]

Human rights therefore are sets of claims by individuals which have been recognized and legitimized by any particular legal system.[11] The use of the phrases "recognized and legitimized" connotes that it is a legal system that recognises human rights. Tomuschat thinks differently when it is said that in general, human rights are those rights which a person enjoys by virtue of being human without any supplementary condition being required.[12] These are rights held by all human

[5] 'Meaning of Human,' Cambridge English Dictionary <https://dictionary.cambridge.org> accessed 8 January 2023.
[6] B. A. Garner(ed), *Black's Law Dictionary* (9th Edn, West-A Thompson Reuters Business 2000) 1436.
[7] *Ibid*., This is akin to property right to dispose one's estate.
[8] (n 6); This akin to a breach of duty that infringes one's right.
[9] N. S. Okogbule, *Globalization and Human Rights in Africa: Explosing the Mutual Impact Relationship* (Lagos: Sibon Books Limited, 2012) 33.
[10] *Ibid*., Solidarity right also covers the right to Self-determination.
[11] (n 9), adopting the idea of the Legal Positivists.
[12] C. Tomuschat, *Human Rights; Between Idealism and Realism* (Oxford: Oxford University Press, 2003) 3.

beings irrespective of any other rights or duties that they may have in other capacities.[13] The main purpose of right is to protect the owner and holder of such right against claims which are on the basis of those principles.[14] Today, there are three types or three generations of rights.[15] They are the first generational rights, tagged civil and political rights and freedoms such as freedom of speech, religion and assembly, movement and fair hearing.[16] The second generation rights tagged the economic and social rights covering rights such as education, dwelling, employment and appropriate level of living[17] and the third generation rights tagged the solidarity rights and covering group rights to self-determination. These rights are innate, inalienable and are given to everyone by virtue of being a member of humanity.

2.2 Climate Change

Climate change, as a concept, was adopted to replace the phase 'climatic change' in 1966 following a proposal made by the World Meteorological Organisation to encompass all forms of climatic variability on time-scales longer that ten years regardless of the cause.[18] This coinage or usage came upon the realization that human activities, if not checked, can drastically alter the climate to reflect an anthropogenic cause.[19]

Climate change means a significant variation of the weather conditions like the conditions becoming warmer, wetter, or drier over several decades or more.[20] It is a global modification of the climate over a period of time –from decades to millions of years.[21] Statutorily, climate change is the alteration of the climate resulting from direct or indirect human actions or activities that alter the configuration of the global atmosphere in addition to the usual climate changeability observed

[13] *Ibid*.

[14] M.R. Sarani and Others, 'The Concept of Right and Its Three Generations' (2017) (6) *International Journal of Scientific study*. <https://www.ijss.sn.com> accessed 23 January 2023.

[15] *Ibid.*

[16] The Universal Declaration of Human Rights 1948, Articles 2 to 21; The International Covenant on Civil and Political Rights 1966; The Constitution of the Federal Republic of Nigeria 1999, Chapter IV on Fundamental Rights, Sections 33-46.

[17] The International Covenant on Social, Economic and Cultural Rights (ICSECR),1966; The Constitution of the Federal Republic of Nigeria, 1999, Chapter II on Fundamental Objectives and Directive Principles of State Policies (FODPSP). Regrettably, this chapter of the Constitution is made non-justifiable by virtue of Section 6(6)(c) of the same Constitution.

[18] B. Jessup and K. Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge: Cambridge University Press 2013) 266.

[19] M. Hulme, 'Concept of Climate Change' in W. Blackwell (ed), 'The International Encyclopedia of Geography' (2016) *Association of American Geographers*, 15.

[20] Melisa Denchak, 'Climate Change: What We Need to Know' <www.nrdc.org> accessed 23 January 2023.

[21] 'Solar Impulse Solution, Climate Change: How to Stop Climate Change' <www.solarimpulse.com> accessed 23 January 2023.

over comparable period of time or a general weather conditions of a place over many years.[22] In Nigeria, the Climate Change Act[23] defines the concept to mean a change of climate, which is attributed directly or indirectly to human activity and natural climate variability that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over a comparable time period.[24] Therefore, though there is no consensus on the duration to be compared, all the authorities agreed that such statistical calculation of the variation must be over a long period of time. The climate, which means the average weather condition comprises five interacting parts namely; the atmosphere (air), hydrosphere (water), cyrosphere (ice), biosphere (living things) and lithosphere (solid earth crust).

Such alteration in the atmosphere is caused directly or indirectly, naturally or through anthropogenic means by the emission of greenhouse gases into the atmosphere. Greenhouse gases means the constituents of the atmosphere that contribute to Greenhouse effects[25] and include carbon dioxide,[26] methane,[27] nitrous oxide,[28] hydro fluorocarbons,[29] per fluorocarbons,[30] Sulphurs hexafluoride,[31] and indirect greenhouse gases.[32] In order to mitigate the effects of climate change, the international community has placed an international climate change obligation on States to make commitments under international conventions on climate change and other environmental matters. Climate change duties are equally conferred on public and private entities to implement climate change actions consistent with the national goal of low carbon climate resilient development, including mitigation and adaptation measures.

[22] United Nations Framework Convention on Climate Change 1992, art. 1(2).
[23] Climate Change Act 2021.
[24] (n 23).
[25] *Ibid*., s. 35.
[26] *Ibid*., s. 35(a).
[27] *Ibid*., s. 35(b).
[28] *Ibid*., s. 35(c).
[29] *Ibid*., s. 35(d).
[30] *Ibid*., s. 35(e).
[31] *Ibid*., s. 35(f).
[32] *Ibid*., s. 35(g).

3.0 Global Measures at Protecting Human Rights: Climate Change and the Environment in Perspective

In the bid to protect the environment which in the long run is protecting lives and properties, several efforts have been made by the international community to combat Climate change and its effects. The mustard seed was the International[33] United Nations Framework Convention on Climate change[34] as held in 1992 and was ratified by 197 countries including the United States. UNFCCC is the primary framework for international climate change cooperation and its main objective was to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic- induced interference with the climate system.[35] The Convention laid emphasizes the intergenerational principle,[36] common but differentiated principle,[37] and precautionary principle.[38] Others are sustainable development[39] and cooperation among states.[40] The Convention equally established the Conference of the Parties[41] as the supreme body for the regular review of the implementation, examine the obligation of the parties, promote information sharing, facilitate cooperation among parties, adopt and consider reports and make necessary recommendations towards the implementation of the Convention.[42] Recently, the COP held the COP27. Nonetheless, the Convention appears not to have achieved its tall objectives.

Following the need for enforcement, the Kyoto Protocol was adopted in 1997 and came into force in 2005. It was the first internationally legally binding treaty which extends the 1992 Convention that commits states parties, especially developed countries to greenhouse gases reduce emissions by average of 5 percent below 1990 levels based on the sacrificial consensus that global warming is occurring and caused by man-made carbon-dioxide emissions. It equally established a system to monitor countries progress but the treaty did not compel nations such as China and Indian who

[33] <https://www.dfat.gov.au.international-cooperation-on-climate-change> accessed 12/01/2023.
[34] (n 22).
[35] Lindsay Maizland, 'Global Climate Agreements:Successes and Failures' <https://www.cfr.org> accessed 14 January 23
[36] (n 22), art. 3 (1).
[37] *Ibid*., art. 3 (1).
[38] *Ibid*., art. 3 (3).
[39] *Ibid*., art. 3 (4).
[40] *Ibid*., art. 3 (5).
[41] *Ibid*., art. 7(1).
[42] *Ibid*., art. 7(2).

are major emitters to take action.[43] Emission trading scheme, clean development mechanism and joint implementation are some of the flexible mechanisms set out under the protocol for climate change mitigation. Critics argued that states must first make adjustments at home before attempting to buy their way out of their obligations under the Convention.

The Paris Agreement is the first binding global climate change agreement, adopted at the Paris Conference (COP21) in December 2016. It sets out a framework of keeping the increase in global average temperature to well below 2C above pre industrial levels and pursuing further efforts to limit it to 1.5◦C and greater generation of fund for implementation among others. As a contribution to the objectives of the agreement, counties have submitted comprehensive National Climate Action Plans known as Nationally Determined Contributions (NDCs). This means each party state can define its own commitment towards the reduction of emissions in terms of amount and means under respective national circumstances. Hence Countries set their own targets but there are no enforcement mechanisms to ensure they meet them.[44] There was also an international effort called the Climate Change Conference held in Scotland 2021 and known as the Glasgow Climate Pact aimed at staving off dangerous climate change.[45] The Pact reaffirms the Paris Agreement temperature goal of holding the increase in the global average temperature to well below 2 °C above pre-industrial levels amongst others and "recognizes that limiting global warming to 1.5 °C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around midcentury, as well as deep reductions in other greenhouse gases. However, achieving the target is not ensured, as with existing pledges the emissions in the year 2030 will be 14 percent higher than in 2010.[46] The difference between this agreement and previous COP agreements is that coal was mentioned as a driver, or major cause of climate change, making the Glasgow Climate Pact the first ever climate deal to explicitly plan to reduce unabated coal power.

[43] (n 33).
[44] I*bid*
[45] *Dewan, Angela. "COP26 climate agreement reached in Glasgow with unprecedented reference to fossil fuels". CNN. Archived from the original on 13 November 2021. Retrieved 13 November 2021.*
[46] (n 45).

4.0 Climate Change Act 2021 and Human Rights Protection in Nigeria

Generally, every person has a right to life and no one shall be deprived intentionally of his life.[47] Man has a fundamental right to freedom, equality and adequate conditions of life in an environment of quality that permits a life of dignity and well-being.[48] This right to life is a necessary part of human existence.[49] Hitherto, the right to life was perceived the most fundamental right. However, the fulfillment of the most fundamental human needs which guarantee life is dependent on many elements of the environment; air to breath, water to drink, food to eat, and shelter for protection and the quality of environment generally.[50] The security and welfare of the citizens shall be the primary purpose the state through government.[51] It follows therefore that the duty to protect life rests squarely on the State and this duty encompasses the obligation to prevent situation that might imperil human life.[52] The right to a clean safe, and healthy environment is one of the human rights that needs to be protected as a result of the pivotal roles the environment plays in the society.

Nigeria is a party to all the climate change treaties. It has equally ratified same and today has enacted its own climate law; Nigeria Climate change Act.[53] The Act is a strong step in the protection of environmental rights especially because it demonstrated the readiness of Nigeria to live up to its expectation in actualizing its commitment to Paris Agreement, Nationally Determined Contributions (NDCs), Kyoto Protocol, the United Nations Framework Convention on Climate Change, UN SDGs and other standards and guidelines on climate change adaptation and mitigation. The Act aimed primarily at providing a framework for mainstreaming of climate change actions, provide for a system of carbon budgeting and the establishment of the National Council on Climate Change.[54] The Act equally provides a framework for national climate actions by mandating the Ministry of environment to set among others, a carbon budget, keeping average increase to 2.C above pre industrial levels.[55] Nigeria's long-term vision demonstrates its

[47] CFRN, 1999 (n 17), s. 33(1).
[48] United Nation Conference on Human Environment otherwise Stockholm Declaration, 1972, principle 1.
[49] S. C. Dike, 'Nigeria's Petroleum Industry, International Oil Companies, and Human Rights Concerns: Need for Operational Due Diligence' (2017) (1) *African Journal of International Energy and Environmental Law, 27.*
[50] L. Atsegbua and other, *Environmental law in Nigeria: Theory and Practice* (Ambik Press, 2010) 173.
[51] CFRN, 1999 (n 17), s. 14(2)(b).
[52] (n 50)
[53] (n 23)
[54] *Ibid*.
[55] IUCN. A Review of Nigeria's Climate Change Act: Potential for Increased Climate Litigation' <https//www.iucn.org> accessed 16 January/2023.

commitment to Paris Agreement Implementation. The federal government has said Nigeria's 2050 long term low emission vision document is a demonstration of the nation's commitment to play a leading role in the implementation of the Paris agreement. This was part of the pledge made by the president at the Conference on Climate Change (COP26).[56]

One of the achievements of the Act towards the protection of the environment is the establishment of a National Council on Climate Change[57] with the powers to make policies and decisions on matters concerning climate change in Nigeria.[58] The Council has crucial responsibilities among which are; to coordinate the implementation of sectoral targets and guidelines for the regulation of GHG emissions and other anthropogenic causes of climate change;[59] approve and oversee the implementation of the Action Plan;[60] administer the Climate Change Funds;[61] ensure the mainstreaming of climate change into the national development plans and programs.[62] Others are to formulate policies and programs on climate change;[63] formulate guidelines for determining vulnerability to climate change impact and adaptation assessment;[64] recommend legislative, policy, appropriation, for climate change adaptation and mitigation;[65] mobilize financial resources to support climate change actions;[66] collaborate with the Federal Inland Revenue Service to develop a mechanism for carbon tax in Nigeria.[67]

The Council equally has the function of collaborating with the Federal Ministries of Environment and Trade to develop and implement a mechanism for carbon emission trading;[68] review international agreements related to climate change towards ratification and compliance;[69] disseminate information on climate change laws, local vulnerability, risks and adaptation and

[56] COP26 was held in Scotland from October 31 to November 13 2021
[57] (n 23), s. 3(1).
[58] *Ibid*., s. 3(1).
[59] *Ibid*., s. 4(a).
[60] *Ibid*., s. 4(b).
[61] *Ibid*., s. 4(c).
[62] *Ibid*., s. 4(d).
[63] *Ibid*., s. 4(e).
[64] *Ibid*., s. 4(f).
[65] *Ibid*., s. 4(g).
[66] *Ibid*., s. 4(h).
[67] *Ibid*., s. 4(i).
[68] *Ibid*., s. 4(j).
[69] *Ibid*., s. 4(k)

mitigation measures;[70] and provide advice and recommendations on technical, scientific and legal matters on climate change.[71]

Public participation in environmental matters is one of the rights of the citizens. According to the Policy and Legal Advocacy Centre,[72] public participation is one of the tripod of good governance in a democratic regime. The other two are transparency and accountability. Participation essentially has to do with involvement and inclusiveness of the citizens in the affairs of government, in this case, mitigation of climate change. For instance, the Constitution provides that the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution.[73] The question then is how has the Climate Change Act satisfied this sense of involvement and inclusiveness in climate change mitigation and adaptation?

In answer, the Act established the National Council on Climate.[74] To ensure compliance with the principle of adequate participation which is at the nucleus of good governance, the Council is composed of wide membership that cuts across several *strata* and interest groups in Nigeria. The Council shall consist of the President of the Federal Republic of Nigeria, who shall Head the Council as Chairman;[75] the Vice-President who shall be the Vice-Chairman;[76] the Minister responsible for Environment;[77] the Minister responsible for Petroleum Resources;[78] the Minister responsible for Budget and National Planning[79] and the Minister of Justice.[80] Other members are the Ministers responsible for Mines, and Steel Development;[81] Finance;[82] Agriculture and Rural Development;[83] Power;[84] Women Affairs;[85] Transportation;[86] and Water Resources.[87] The

[70] (n 23), s. 4(l).
[71] *Ibid*., s. 4(m).
[72] Policy and Legal Advocacy Centre (PLAC) 2016 <placing.org> accessed 28 January 2023.
[73] (n 17), s. 14(2)(c).
[74] (n 23), s. 3(1)
[75] *Ibid*., s. 5(1)(a).
[76] *Ibid*., s. 5(1)(b).
[77] *Ibid*., s. 5(1)(c).
[78] *Ibid*., s. 5(1)(d).
[79] *Ibid*., s. 5(1)(e).
[80] *Ibid*., s. 5(1)(f).
[81] (n 23), s. 5(1)(g).
[82] *Ibid*., s. 5(1)(h).
[83] *Ibid*., s. 5(1)(i).
[84] *Ibid*., s. 5(1)(j).
[85] *Ibid*., s. 5(1)(k).
[86] *Ibid*., s. 5(1)(l).
[87] *Ibid*., s. 5(1)(m).

Council is equally comprised of the Governor of the Central Bank of Nigeria;[88] the National Security Adviser;[89] the Chairman of Nigerian Governors' Forum;[90] the President of Association of Local Governments of Nigeria;[91] and a representative of the private sector on climate change or environment related matters, nominated by the most representative registered national umbrella association.[92] Finally, it shall consist of a representative of women;[93] youths[94] and persons with disabilities[95] while each shall be nominated by the most representative registered national umbrella association; a representative of environment related Civil Society Organisation (CSOs) appointed by the President, on the recommendation of the Minister responsible for Environment[96] and the Director-General of the National Council on Climate Change, who shall be the Secretary.[97]

The incorporation of the instrumentality of partnership in the Act equally expresses the desire of the Act to achieve public participation. There is need for the Council to partner with the Ministry of Education, Civil Society Organisations (CSOs), women, youths and others to monitor plans, programmes, projects, and engage in climate advocacy.[98] The need to achieve public participation and engagement is further heightened when the Act provides for climate change education.[99] By this provision, the Secretariat is tasked to advise the MDAs responsible for regulating educational curriculum in Nigeria on the integration of climate change into the various disciplines and subjects across all educational levels including primary, secondary and tertiary education. Climate change education can be achieved through partnerships with the relevant MDAs and approval and sponsorship of related scientific researches and similar projects and programmes towards climate change mitigation and adaptation. The obligation of furnishing data and such other information related to Nigeria's drive for climate change mitigation and adaptation shows the intention of the Act to protect the environment against abuse.

[88] *Ibid*., s. 5(1)(n).
[89] *Ibid*., s. 5(1)(o).
[90] *Ibid*., s. 5(1)(p).
[91] *Ibid*., s. 5(1)(q).
[92] *Ibid*., s. 5(1)(r).
[93] *Ibid*., s. 5(1)(s)(i).
[94] *Ibid*., s. 5(1)(s)(ii).
[95] *Ibid*., s. 5(1)(s)(iii).
[96] *Ibid*., s. 5(1)(t).
[97] *Ibid*., s. 5(1)(u).
[98] (n 23), s. 25(1)(2).
[99] *Ibid*., s. 26(1)(2)

Virtually every sector of the society is represented in the Council. The appointment of persons from different *strata* of the society to formulate programmes for achieving the long-term goals on climate change mitigation and facilitate the coordination of climate change action as well as mainstreaming climate change actions in line with national development plans demonstrates that the Act epitomizes public engagement and participation of Nigerians in policy and decision-making on climate change.

From the letters of the Act, the Act upholds the principle of checks and balances in the appointment of key officers of the Council. For instance, a Zonal Coordinator or State Director of the Council shall be appointed by the Council on the recommendation of the Minister responsible for Environment.[100] Also, the appointment of secretarial and clerical officers of the Council is carried out by the Secretariat subject to the approval of the Council. The remuneration and allowances of the Director-General and principal officers of the Council are determined by the Salaries and Wages Commission.[101] This provision is commendable as it prevents the Council and Secretariat from arbitrarily fixing bogus, outrageous, extravagant and immoderate sums as remuneration and allowances.

The establishment of the Climate Change Fund under section 15(1) of the Act is a highly commendable provision geared towards environmental protection in Nigeria. However, under the application of the funds, priority is given to the administration of the Council rather than climate change mitigation and adaptation. Specifically, the Act states that the Fund shall be applied on the cost of administration of the Council and offices established under the Council;[102] payment of emoluments; allowances and benefits of members of the Council, reimbursing members of the Council or any committee set up by it[103] and other expenses and payment of salaries, other remunerations and allowances and other retirement benefits payable to the staff of the Council[104] and development and maintenance of any properties of the Council.[105] This paper submits that primarily, the application of the Funds should have been channeled into the conducting assessment of climate change impacts, efforts towards transiting to clean energy and sustaining a reduction in

[100] *Ibid*., s. 11(2)(a).
[101] (n 23), s. 12.
[102] *Ibid*., s. 15(2)(a).
[103] *Ibid*., s. 15(2)(b).
[104] *Ibid*., s. 15(2)(c).
[105] *Ibid*., s. 15(2)(d).

GHG emissions. Regrettably, these fundamental purposes appear to take back seats in the order of application of the Climate Change Funds.[106]

To ensure accountability and compel compliance with the provisions of this law, the Act makes it an offence for any person, private or public entity to act in any manner that negatively affect efforts towards mitigation and adaptation measures under it.[107] The Council is empowered to determine the penalty for anyone who commits such offence.[108] It is the submission of this paper that such discretion given to the Council to determine penalty for offenders of the Act may breed corruption and encourage fragrant disobedience to the provisions of the Act. This fear is imminent especially as the Council may not provide stringent penal measures for offenders. And where this is the case, there will be no deterrent to would-be offenders.

The Act provides a framework formational climate actions by mandating the Ministry of Environment to set among others, a pilot carbon budget for Nigeria, keeping average increase in global temperature within to 2.◦C and pursue efforts to limit the temperature increase to 1.5 0 C above pre industrial levels.[109] The Secretariat and concerned MDAs are mandated under the Act to formulate an Action Plan in every five-year cycle[110] which shall serve as a basis for identifying the activities aimed at ensuring that the national emissions profile is consistent with the carbon budget goals[111] and establishing national goals, objectives and priorities on climate adaptation.[112] Nigeria's long-term vision demonstrates its commitment to Paris Agreement Implementation.

In order to further protect the environmental rights of citizens, Part IV of the of the Act places climate change obligations on the MDAs, public and private entities to ensure the integration of climate change activities into their core mandates. Going further, all budgets submitted by MDAs must be properly vetted and costed for climate change considerations with adequate allocations in their annual budget[113] and adhere to annual carbon emission reduction targets in line with Action Plan and carbon budget. It is therefore an offence for any MDA and its principal officers who fail to meet its annual carbon emission reduction targets. Such offender will be sanctioned and where

[106] *Ibid*., s. 15(2).
[107] (n 23), s. 34(1).
[108] *Ibid*.
[109] *Ibid*., s. 19 (1); IUCN. A Review of Nigeria's 2021 Climate Change Act: Potential For Increased Climate Litigation' <https//www/iucn,org> accessed 17 January 2023.
[110] (n 23), s. 20(1).
[111] *Ibid*., s. 20(4)(a)(i).
[112] *Ibid*., s. 20(4)(a)(ii).
[113] (n 23), s. 22(3).

appropriate, fined.[114] The same position is equally applicable to all public entities and public entities with employees numbering 50 and above.[115] This is to ensure that there is a collective effort at reducing emission of GHGs thereby guaranteeing a safe and clean environment.

To ensure the reduction of emission of GHGs, the Council is tasked to promote and adopt nature-based solutions to reducing GHG emissions and mitigating climate change issues in Nigeria. The Ministry of Environment is mandated to set a registry with sub-natural nodes for capturing REDD+ activities including updates on Forest Reference Emission Level (FREL).[116] Considered that climate change are caused by anthropogenic factors especially in agriculture, the ministry is focused on reducing emissions from deforestation and forest degradation while enhancing the role of conservation, sustainable management of the forests and the enhancement of forest carbon stocks.[117]

5.0 Conclusion

So far, the enactment of the Climate Change Act by the Federal Government and Nigeria's resolve of 2050 long term low emission vision document are clear demonstrations of the nation's commitment to play a leading role in the implementation of the Paris agreement in particular and protection of the rights to a safe, clean and healthy environment by combating global climate change through measures to reduce GHG emission. It is concluded that to achieve this objective, Nigeria needs to adopt a regional approach by cooperating with other jurisdictions within the continent while strengthening her institutions to be independent and robust enough to implement extant laws. It is observed by this paper that the emphasis placed on the application of the Climate Change Fund towards the administration of the Council and maintenance of its properties may negate the very essence of the Fund. Finally, it is concluded that though the Act empowers the Council to borrow money from financial organizations or other institutions for the purpose of executing its statutory mandates,[118] it appears that the Act neglects or fails to stipulate the maximum amount or limit the Council is mandated to borrow. This failure on the part of the framers of the Act has the potential to breed corruption, open doors to all kinds of frivolous and

[114] *Ibid*., s. 22 (5).
[115] *Ibid*., s. 24.
[116] *Ibid*., s. 28(1).
[117] *Ibid*., s. 28(2).

[118] (n 23), s. 17.

bogus borrowing spree by the Council and appears to negate the principles of checks and accountability.

Recommendations

In order to further advance its purposes, this paper makes the following recommendations:

1. Section 15(2) of the Act that provides for application of Climate Change Funds should be amended so as to give priority to the conduct of assessment of climate change impacts, efforts towards transiting to clean energy and sustaining a reduction in GHG emissions which form the fundamental purposes of establishing the Climate Change Funds rather than the payment of costs and administration of the Council.
2. Section 34(1) of the Act which provides that the Council may determine penalty to be suffered by any person, or private or public entity who contravene the Act should be amended so that stringent and severe penalties be clearly spelt out by the Act. This way, such stringent penalties will serve as deterrent to would be offenders and discourage any fragrant disobedience to the provisions of the Act on the altar of lesser penalties yet to be determined by Council.
3. The provision of section 18 of the Act which empowers the Council to accept gifts of land, money or other property as may be specified by the person or organization making the gifts should be expunged from the Act as such provision is capable of breeding corruption, impair enforcement and undermining the tenets of the Act.
4. For there to be an effective management by the Council, the Federal Government must ensure zero interference with the mandates and functions of the Council.
5. There is equally need for a strong political will on the part of Federal Government to fund the activities and functions of the Council and Secretariat towards optimal performance in the fight to attain reduction in the emission of GHGs.
6. Section 17 of the Act which empowers the Council to borrow money from financial organizations or other institutions for the purpose of executing its mandate should be amended to peg the maximum amount to be borrowed per annum to #1,000,000.00 (One Million Naira Only). This amendment would close the doors against corruption practices and all kinds of frivolous and bogus borrowing spree by the Council.

7. While strengthening Nigeria's institutions to be independent and robust enough to implement the various treaties on climate change and the Climate Change Act, Nigeria needs to adopt a regional approach by cooperating with other jurisdictions within the continent to achieve climate justice. This is in line with the 'Together for Implementation' core theme of the Conference of Parties (COP 27) held at Sharm El-Sheikh, Egypt 2022.

ENHANCING HUMAN DEVELOPMENT IN NIGERIA THROUGH CONSTITUTIONAL REFORM USING THE HUMAN RIGHTS-BASED APPROACH

Somadina Ibe-Ojiludu, Ph.D, OFM Cap.

Abstract

Development indexes and scholarship portray Nigeria as non-developed. This non-development is acutely felt in the sphere of human development. This write-up interrogated the state of Nigeria's human development by showing that the violation of human rights law is at the heart of Nigeria's lack of human development. The paper offered some constitutional reform proposals that could potentially cure the country's perceived human development weaknesses. The work adopted the human rights-based approach to development. Consequently, it answered the following research question: Is it possible to realise human development in Nigeria using the human rights-based approach to development by way of constitutional reform?

Keywords: *Human Development, Human Rights-Based Approach to Development and Constitutional Reform in Nigeria*.

1.0 Introduction

Human development constitutes one of the tripartite divisions of development.[1] And health, education and decent standard of living comprise the three major components of human development.[2] With regard to human development, Nigeria is rated as non-developed by development indexes and scholarship. The United Nations Development Programme (UNDP), for instance, places Nigeria in 'low human development category'.[3] A writer once spoke about the incontrovertible evidence and symptoms of Nigeria's low human capital status and affirmed that Nigeria's problem of non-development can be 'squarely placed on poor human capital development, among other reasons.[4]

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[1] See Somadina Ibe-Ojiludu, 'The Failure of Nigeria's Economic and Financial Crimes Commission (establishment etc.) Act 2004 as a Development Act'. *Law and Development Review* [2018] 11(1) 127, 131; W Twinning, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) 323.

[2] See, for instance, the following: UNDP, 'Definitions' < http://hdr.undp.org/en/composite/HDI > accessed 16 November 2018; UNDP, 'About Human Development' <http://hdr.undp.org/en/humandev > accessed 16 November 2018; United Nations Development Programme (UNDP), 'Human Development Index (HDI)' <http://hdr.undp.org/en/content/human-development-index-hdi > accessed 16 November 2018 and JJ Osei-Tutut, 'Human Development as an Intellectual Property Metric'. *St. John's Law Review* [2016] 90 711, 712.

[3] UNDP, 'Human Development Indices and Indicators: 2018 Statistical Update Briefing note for countries on the 2018 Statistical Update: Nigeria' < http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/NGA.pdf > accessed 15 January 2023.

[4] Yetunde Aluko, 'Human Capital Development: Nigeria's Greatest Challenge'. *Journal of Management Policy and Practices* [2012] 13(1) 162, 166 – 171, especially 170.

Nigeria's lack of development in all the facets of Human Development is attributed, not to lack of capital or the spirit of capitalism or entrepreneurial ethos, but to leadership deficit.[5]

In the human rights based approach to development (HRBAD), development (whether human, socio-political or economic) is viewed as a right. Consequently, bringing development to people is not a favour to them. It is not charity. It 'creates claims'[6] which are legal in nature. This is understandable because HRBAD is linked to human rights. The approach hinges in those rights in international law and obligations which are undertaken by states as duty holders.[7] Thus, the HRBAD is concerned about those rights protected in international human rights law. International human rights law is principally a normative term which refers to those rights which are validated in recognised sources.[8] With the HRBA, development becomes an entitlement. Thus, lack of development in any of the facets of development is a deprivation of right. Therefore, deficiency in education is a deficiency in the enjoyment of right to education. The same is applicable to deficiency in health and in decent standard of living. Consequently, the violation of human rights law is at the heart of Nigeria's lack of human development since the country suffers some deficiency in the components of human development.

The constitution of a country, because of its supremacy, is often viewed as one of the legal structures for the protection of human rights.[9] Thus the assertion that legally binding standards which relate to the recognition and protection of the rights of the human persons are largely based on the provisions of the constitutions adopted at the country level.[10] The Constitution of the Federal Republic of Nigeria 1999 (as amended) houses certain human rights bordering on human development. The rights to health, education and adequate standard of living are examples of those rights. However, as will be seen later in this write-up, the realisation of these rights is weakened in the said constitution.

Utilising the doctrinal methodology, this paper attempts to answer this research question: Is it possible to realise human development in Nigeria using the human-rights based approach to development by

[5] Etim Frank, 'The Underdevelopment of Nigeria and Africa: The Mo'Ibrahim Paradigm'. *Mediterranean Journal of Social Sciences* [2016] 7(2) 70, 77.
[6] P. Uvin, *Human Rights and Development* (Kumarian Press, 2004) 129, as quoted in D. Banik, 'Implementing Human Rights-Based Development: Some Preliminary Evidence from Malawi' (Expert Seminary: Extreme Poverty and Human Rights, Geneva, 23 – 24 Febuary, 2007).
[7] D. Banik, 'Implementing Human Rights-Based Development: Some Preliminary Evidence from Malawi' (Expert Seminary: Extreme Poverty and Human Rights, Geneva, 23 – 24 February 2007) 2, quoting A. Eide, 'Human Rights-Based Development in the Age of Economic Globalization: Background and Prospects' in B. A. Andreassen and S. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard University Press, 2007) 250
[8] I. Bantekas and I. Oette, *International Human Rights: Law and Practice* (2nd edition, Cambridge University Press, 2016) 5.
[9] See William Brennan, 'The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights'. *New York University Law Review* [1986] 61(4) 535;
[10] Alan S. Gutterman, 'What are Human Rights?' *Human Rights of Older Persons* [2023] 7 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4320947 > accessed 15th January, 2023.

way of constitutional reform? The write-up offers some constitutional reform proposals that can potentially cure the country's perceived human development weaknesses.

Section 2 of this write-up follows the introduction. The section dwells on the 'health-component' of human development and how the violation of the right which enhances it – the right to health – is at the heart of Nigeria's health development challenges. Section 3 is on the 'education-component' of human development and how the violation of right to education is at the core of the country's deficiency in education development. Section 3 is followed by section 4 which focuses on 'decent-standard-of-living component' of health development and how the violation of right to a decent standard of living for oneself [and one's family if one has one] is at the centre of Nigeria's lack of decent standard of living. Section 5 indicates the summary of findings, recommendations, contributions of this paper and conclusion.

2.0 Health and the Violation of Right to Health in Nigeria

The most recent value for life expectancy in Nigeria is 53 years old.[11] Whereas it is 52 years for male[12], it is 53 for female[13]. Also, for every 1000 Nigerians, there is the probability of 368 male/318 females dying between the ages of 15 and 60.[14] The respected Lancet has affirmed that 'healthcare in Nigeria lags behind other West African Nations'[15]. Despite the fact that Nigerians spend more '(mostly from out-of-pocket payment)' on health than many West African countries, they have a lower life expectancy than many of their neighbouring countries in West Africa.[16]

Inter-Nations is a non-governmental organisation which is interested in facilitating study about moving abroad. It describes the state of healthcare in Nigeria as poor and punctuated by unsafe blood supply, shortage of medical supplies, poor hygiene and handicapped by 'brain drain' of medical staff, leaving the country with four doctors for every 10, 000 inhabitants.[17] A Lancet publication indicates that universal health coverage in Nigeria has been slow with a poor penetration of the health insurance (the

[11] The World Bank, 'Life Expectancy at Birth, Total (Years) – Nigeria' <https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=NG> accessed 19 January 2023. This is for the year 2020, the most recent in the cited website
[12] The World Bank, 'Life Expectancy at Birth, Male (Years) – Nigeria' <https://data.worldbank.org/indicator/SP.DYN.LE00.MA.IN?locations=NG> accessed 19 January, 2022.
[13] The World Bank, 'Life Expectancy at Birth, Female (Years) – Nigeria' <https://data.worldbank.org/indicator/SP.DYN.LE00.FE.IN?locations=NG> accessed 19 January, 2023.
[14] See World Health Organisation, 'Nigeria' <https://www.afro.who.int/countries/nigeria> accessed 19 January 2023.
[15] The *Lancet* Nigeria Commission, 'Healthcare in Nigeria Lags Behind Other West African Nations' https://www.thelancet.com/pb/assets/raw/Lancet/infographics/nigeria/image-1647432251710.pdf
[16] Ibrahim Abubakar, Sarah Dalglish, Blake Angeli, Olutobi Sanuade, et al, 'The *Lancet* Nigeria Commission: Investing in Health and the Future of the Nation'. *Lancet*. [2022[399, 1155, 1155.
[17] InterNations, 'Moving to Nigeria' <https://www.internations.org/nigeria-expats/guide/moving-to-nigeria-15540/healthcare-in-nigeria-3> accessed 16 May 2019.

coverage captures less than 5% of Nigerians who are mainly in the formal sector). The out-of-pocket spending on health is very high. [18] Budgets of government at all levels are very low.[19]

At the heart of Nigeria's deficiency in health development is the violation of right to health. For instance, the problem of brain drain of medical workers is a symptom of weak economic and socio-political conditions. People seek for greener pasture only when the future of these conditions are bleak.[20] This bleakness is shown in 'frustration and demoralization of professionals arising from generally poor working conditions, nepotism …, tribalism, and corruption, especially in public service'; the deterioration and poverty of socio-economic infrastructure; high rate of unemployment, currency depreciation or devaluation, rise in the cost of living and drop in real income; and non-conducive economic policies'.[21]

The afore-mentioned weakened conditions are products of violated human rights of economic and socio-political natures. The Nigerian constitution, for instance, provides for right to good governance when it provides for government's accountability and responsibility to the people of Nigeria and that the the welfare and security of Nigerians is the primary purpose of government.[22] The idea of good governance is still developing. [23] It however appears provided for in the Universal Declaration of Human Rights (UDHR). The declaration provides that 'Everyone is entitled to a social and international **order** in which the rights and freedoms set forth in this Declaration can be fully realized'. Those rights referred to encompass both civil and political rights and economic, social and cultural rights. Thus, weak economic and socio-political conditions which engender brain drain violate the guaranteed right to good governance in the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Also, the poor health condition of Nigerians is a reflection of unrealised right to health. Right to health is provided for in the Constitution of the Federal Republic of Nigeria 1999 (as amended). Section 17(3)(d) of the said constitution provides that 'the state shall direct its policy towards ensuring that … there are adequate medical and health facilities for all persons'. Also, article 16 of the African Charter on Human and Peoples' Rights, a charter that is ordinarily enforceable in Nigeria by virtue of African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 which domesticated

[18] A. Awosusi, T. Folaranmi and R Yates, 'Nigeria's New Government and Public Financing for Universal Health Coverage'. *The Lancet* [2015] 3(9) < https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(15)00088-1/fulltext#articleInformation> accessed 19 January, 2023.

[19] Ibid.

[20] The following reference has been suggested as largely responsible for brain drain:
[21] S. Sako, 'Brain Drain and Africa's Development: A Reflection'. *African Issues* [2002] (30) (1) 25, 26 – 27.
[22] See Constitution of the Federal Republic of Nigeria 1999 (as amended) ss. 14 (2) – (4), 22
[23] See D. Bach-Golecka 'The Emerging Right to Good Governance'. *American Journal of International Law* [2018] (12) 89.

the charter in Nigeria[24], provides that 'Every individual shall have the right to enjoy the best attainable state of physical and mental health. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.

3.0 Education and the Violation of Right to Education in Nigeria.

A non-governmental organisation once affirmed that nearly two-thirds of students in Northern Nigeria are 'functionally illiterate'.[25] The quality of education is poor in Nigeria.[26] Some see poor funding as an important contributing factor to this poverty in the quality of education in Nigeria.[27] According to a World Bank analysis in 2012, 'Nigeria is the least country in terms of budgetary allocation' to education. Whereas Ghana allocated 31%, Uganda 27%, Morocco 26.4%, Swaziland 24.6%, Kenya 23%, Cote d'Ivore 30%, South Africa 25.8%, Mexico 24.3%, Botswana 19%, USA 17.1%, Norway 16.2, Burkina Faso 16.8%, India 12.7% and Colombia 15.6%, Nigeria allocated 8.4%.[28] Nigeria's 8.4% is below the 26% recommendation from UNESCO in 1995 for budgetary allocation to education.[29]

One out of every six out-of-school children in the world is a Nigerian[30] (some put it at one out of every five out-of-school children[31]). 10. 1 million children between the ages of 5 and 14 are out of school in Nigeria.[32]

Equally noticeable in the abysmal state of education in Nigeria is the violation of right to education. At the heart of the problem of out-of-school children is the violation of laws that enhance right to education. Pupils are out of school in Nigeria sometimes because of the non-tuition fees sometimes levied on them by governments and school authorities. Ekiti State in Nigeria, for instance, imposed what it termed Education Development Levy which became a subject of litigation between it and the Catholic Church which owns and runs many educational institutions in the state.

[24] See, for instance, the Court of Appeal's *IGP v. ANPP* (2007) 18 NWLR (Pt. 1066) 457, (CA) 500 [B – C]. The charter is enforceable on the combined effect of section 6 (6) (c) and item 60 of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
[25] Global Partnership for Education, 'Nigeria' <https://www.globalpartnership.org/country/nigeria# > accessed 19 January 2023.
[26] R.I. Asiyali, 'Improving Quality Higher Education in Nigeria: The Roles of Stakeholders'. *International Journal of Higher Education* [2015] (4)(1) 61, 62
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] UN's Economic and Social Council, 'UNICEF'S Country Programme Document: Nigeria' E/ICEF/2017/P/L.30 (17 July 2017) para. 11.
[31] See 'UNICEF For Every Child: Nigeria'< https://www.unicef.org/nigeria/education > accessed 19 January, 2023. See also Global Partnership for Education, 'Nigeria' < https://www.globalpartnership.org/country/nigeria# > accessed 19 January 2023.
[32] UN's Economic and Social Council, 'UNICEF'S Country Programme Document: Nigeria' E/ICEF/2017/P/L.30 (17 July 2017) para. 11.

Some of these aforementioned fees or levies like that of Ekiti violate section 18(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (1999 Constitution) which provides for 'free, compulsory and universal primary education'. Not minding its place in the non-justiciable chapter 2 of the 1999 Constitution[33], S. 18(3) is justiciable by virtue of item 60a of the constitution's Exclusive Legislative List. The said item provides that the provision of chapter 2 of the 1999 Constitution is justiciable by virtue of an Act of the National Assembly which provides for the 'establishment and regulation of authorities for the Federation or any part thereof (a) to promote and enforce the observance' of the content of chapter of the said constitution.[34] Compulsory, Free Universal Basic Education Act 2004 is an example of such an Act. The non-tuition levies also violate Compulsory, Free Universal Basic Education Act 2004 whose section 2 unequivocally provides that basic education must be free and compulsory for every child.

4.0 Decent Standard of Living and the Violation of Right to Decent Standard of Living in Nigeria

Scholarship[35] and development indexes show that the availability of necessary resources, structures or income for maintaining a decent standard of living in Nigeria is poor. If poverty is defined or measured as living on an amount that is less than $1.90 everyday[36], then many are poor in Nigeria. The life of about 65.6% of Nigerians are not decent. 65.6% of Nigerians are poor.[37] Thus, they live on less than $1.90 a day.

Also at the heart of Nigeria's deficiency in decency of standard of living is the violation of right to a decent standard of living. Nigeria is one of the 30 most unequal countries of the world.[38] One of the ways of bridging inequality is through the institution of a national minimum wage.[39] But the national minimum wage prescribed by the extant minimum wage law in Nigeria, National Minimum Wage Act 2019, is insufficient. Whereas the Act prescribes ₦30, 000 as the minimum wage, a 2013 study[40]

[33] Section 6 of the Constitution of the Federal Republic of Nigeria provides that chapter 2 of the same constitution is not justiciable. This will be discussed in details in this write-up.
[34] See Constitution of the Federal Republic of Nigeria 1999 (as amended), second schedule (legislative powers), part 1: Exclusive Legislative List, item 60 (a)).
[35] See the following: Evelynn Nwamaka Osarentin Ogbeide and David Onyinyechi Agu, 'Poverty and Income Inequality in Nigeria: Any Causality?'. *Asian Economic and Financial Review* [2015] 5(3) 438.
[36] see, for instance, World Bank, 'Nearly Half of the World Lives on Less Than $5.50 a Day' (October 17, 2018) Press Release (Press Release No: 2019/044/DEC-GPV) < https://www.worldbank.org/en/news/press-release/2018/10/17/nearly-half-the-world-lives-on-less-than-550-a-day > accessed 20 January 2023.
[37] Evelynn Nwamaka Osarentin Ogbeide and David Onyinyechi Agu, 'Poverty and Income Inequality in Nigeria: Any Causality?'. *Asian Economic and Financial Review* [2015] 5(3) 438.
[38] OXFAM, *Inequality in Nigeria: Exploring the Drivers: Even it Up* (OXFAM International 2017) 9
[39] See, for instance, the following: R Dickens and A Manning, *Has the National Minimum Wage Reduced UK Wage Inequality* (Center for Economic Performance, London School of Economics and Political Science 2002) and D Lee, 'Wage Inequality in the United States During the 1980s: Rising Dispersion or Falling Minimum Wage?'. *The Quarterly Journal of Economics* [1999].
[40] C. Nwude, 'The Politics of Minimum Wage in Nigeria: The Unresolved Issues. *Asian Journal of Empirical Research* [2013] 3(4) 477, 483 – 484.

prescribes ₦65, 896 as the ideal minimum wage. As at December 31, 2013, the exchange rate of Naira to dollar was roughly ₦160[41]. Thus, ₦65, 896 was equivalent to $411.85. Based on the current exchange rate of Naira to dollar, which is roughly ₦458 to a dollar, ₦65, 896 of 2013 will translate today to ₦188, 238 as the adequate minimum wage based on the aforementioned 2013 study.

Since the N30, 000 national minimum wage in Nigeria is far below the ₦188, 238 envisaged by a 2013 study, one can say that the country's national minimum wage is in breach of article 15 of the African Charter on Human and Peoples' Rights which provides that 'every individual shall have the right to work under equitable[42] and satisfactory conditions and shall receive equal pay for equal work'. N30, 000 as national minimum wage is inequitable. It is thus unconscionable since one of the essential duties of Equity is to prevent unconscionable conducts[43].

In addition, it is within the context of article 11 of International Covenant on Economic, Social and Cultural Rights' right to an adequate standard of living for oneself and one's family that the reasonability of section 16(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) is appreciated. The section stipulates that the State 'shall direct its policy towards . . . reasonable national minimum living wage . . . for all citizens'. From the analysis above vis-à-vis the aforementioned 2013 study, N30, 000 cannot be considered a living wage that is reasonable.

5.0 Summary of Findings, Recommendations, Contributions of this Paper and Conclusion.

At the heart of Nigeria's lack of human development is the violation of human rights. This has been demonstrated with some instances in the three preceding sections of this write-up. The write-up would now recommend certain constitutional reforms that can contribute in accelerating Nigeria's human development.

5. 1. *Suo Motu* and Justiciability of Chapter 2 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Most of the rights that enhance human development in Nigeria are domiciled in chapter 2 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (1999 Constitution) which is titled 'Fundamental Objectives and Directive Principles of State Policy'. The chapter houses rights bordering on economic, social and cultural rights which it variously refers to as 'economic objectives', 'social

[41] 'U.S. Dollar-Nigerian Naira History: 2013'. <https://www.poundsterlinglive.com/history/USD-NGN-2013> accessed 23 January 2023.

[42] Emphasis is mine.

[43] For reflection on unconscionability as one of the essential duties of equity, see, for instance, P Davies and G Virgo, *Equity and Trusts: Text, Cases and Materials* (Oxford 2013) 7.

objectives', 'educational objectives', 'environmental objectives' and 'directive on Nigerian cultures'.[44] These objectives and directive form part of chapter II of the 1999 Constitution.

Those rights that boost human development captured in the said chapter 2 include the right to education, the right to a decent standard of living and the right to health. The right to education is captured in section 18 of chapter 2 of the 1999 Constitution which provides that:

> (1) Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.
> (2) Government shall promote science and technology
> (3) Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide
> (a) free, compulsory and universal primary education;
> (b) free secondary education;
> (c) free university education; and
> (d) free adult literacy programme.

Within the same chapter 2 of the 1999 Constitution, the right to a decent standard of living is captured in section 17 (3) (a) which provides that 'the State shall direct its policy towards ensuring that 'all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment'. The right to health is further captured in the same section 17. According to section 17 (3) (d), 'The state shall direct its policy towards ensuring that …there are adequate medical and health facilities for all persons'.

These afore-mentioned rights are not justiciable based on chapter 6 (6) (c) of the 1999 Constitution. The chapter provides that the 'judicial powers vested in accordance with the foregoing provisions of this section …shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution'.

One way of accelerating human development in Nigeria through constitutional reform is by making chapter 2 of the 1999 Constitution, which houses rights to health, education and decent standards of living, justiciable. One can however argue that this is not enough. This is because the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act[45] 2004, which domesticated in

[44] Constitution of the Federal Republic of Nigeria 1999 (as amended) ss. 16 – 18 & 20 – 21.
[45] Cap A9 LFN 2004

Nigeria the African Charter on Human and Peoples' Rights, gives a legal backing to the enforcement of some of those rights in Nigeria. The charter guarantees right to education[46] and right to the enjoyment of best attainable state of physical and mental health[47]. Yet, governments in Nigeria are rarely challenged in court with regard to rights to health, education and the enjoyment of decent standard of living. One can attribute this to poverty. Legal fee is expensive to many pauperized Nigerians. One way out of this can be by inserting in the Nigerian Constitution a clause to the effect that the judiciary can intervene *suo motu* with regard to issues bordering on economic, social and cultural rights. This will help in giving effect to those rights (which include rights to health, education and the enjoyment of decent standard of living) that encourage human development even in the face of the inability of the poor to access the court to enforce them.

The idea of *suo motu* intervention is not entirely new in common law jurisdictions. In Nigeria[48] and other common law jurisdictions like the United Kingdom[49] and India[50], it is common for the judiciary to intervene *suo motu* with regard to cases of contempt in facie curiae. Thus, providing in the 1999 Constitution for *suo motu* intervention by the judiciary with regard to rights to health, education and the enjoyment of decent standard of living does not completely rupture the legal order.

5. 2. The Dualist Model of the Nigerian Constitution

The bifurcation in the application of international law in municipal courts or in the binding effect of international law in the municipal legal landscape is reflected in the doctrines of monism and dualism. The doctrines define the process of domestication of international law.[51] Section 21(1) of the 1999 Constitution defines Nigeria as a dualist state. According to the section, a treaty between Nigeria and any other country shall have the force of law only to the extent to which the said treaty is enacted by the National Assembly into law. The present 36 State Houses of Assembly are involved in this domestication process if the treaty the National Assembly is acting upon is concerned with a matter that is not included in the Exclusive Legislative List. In such a situation, a bill for an Act of the National Assembly which would give effect to the matter in question shall not be presented to the president for

[46] African Charter on Human and Peoples' Rights 1520 UNTS 363 (1981), article 17.
[47] Ibid, article 16.
[48] In INEC & Anor v. Oguebego & Ors (2017) LPELR-42609(SC), the Supreme Court of Nigeria reasoned that 'For words or actions used in the face of the Court, or in the course of proceedings, to be contempt, they must be such as would interfere with the course of justice. A superior Court of record has the inherent jurisdiction to deal with contempt in facie curiae and punish for the offence summarily. It must once again be emphasised that the summary power of punishing for contempt should, however, be used sparingly and only in serious cases….'
[49] See, for instance, Lord Denning, *The Due Process of Law* (Butterworths 1980) 5 – 18
[50] See, for instance, M. Galanter, 'Snakes and Ladders: Suo Moto Intervention and the Indian Judiciary'. *Florida International University Law Review* [2014] 10(1) 69, 74.
[51] Whereas in dualist states, a domestic legislation must be passed in order to give effect to international treaty or international law, in monist states, such a legislation is not needed. In a monist state, an international treaty which a country is a party to becomes a binding law at the municipal level without the aid of a domestic legislation.

his assent and shall be considered not-yet-enacted unless it is ratified by a majority of the 36 State Houses of Assembly.[52]

The newly introduced section 254 (c) (2) of the 1999 Constitution appears to have relaxed the rigidity of the afore-cited section 21(1) of the same constitution with regard to the need for domestication before an international law regime becomes effective at the municipal level. The relaxation, however, is only with regard to labour matters. According to the said section 254 (c) (2), notwithstanding anything that is contrary in the 1999 Constitution, the National Industrial Court shall have the power and the jurisdiction to handle any matter which is connected with or pertaining to the application of any international treaty, convention, protocol which Nigeria has ratified and which is related to industrial relations, employment, workplace, labour or matters related therewith.

Because of the dualist model of the Nigerian constitution, innovative principles in International Covenant on Economic, Social and Cultural Rights[53] (ICESCRs) are unrealised in the country. The principle of progressive realisation is an example of such principles. According to the Covenant, 'each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving **progressively** the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.[54] Low health and education budgets are attributable to the non-application of the principle of progressive realisation which is not legally effective in Nigeria because of the dualist nature of the country's reception of international treaty. If efforts were deployed by the Nigerian governments towards the progressive realisation of right to health, for instance, the 15% requested to be set aside by governments in Africa towards health budget in the Abuja Declaration of 2001[55] would have been realised by now. If effort was invested by Nigeria towards increasing the health budget by 1% of the state budget every year, the 15% could have been surpassed by now, 22 years after the Declaration.

From the above, it is clear that dualism can be a hindrance towards the realisation of human development in Nigeria. If Nigeria were a monist state, invoking the doctrine of progressive realisation would not be alien to her courts and legal space. It is recommended that the dualist nature of the Nigerian constitution be relaxed in favour of international treaties that enhance human development by way of protecting certain economic, social and cultural rights like the right to health, right to education and right to a decent standard of living. Considering this recommendation is not a constitutional

[52] Constitution of the Federal Republic of Nigeria 1999 (as amended), s. 12 (3).
[53] International Covenant on Economic, Social and Cultural Rights (adopted 16 December, 1966, entered into force 3 January, 1976), 991 UNTS 3
[54] Ibid, Art. 2(1). Emphasis is mine.
[55] WHO, 'The Abuja Declaration: Ten Years On' <https://www.who.int/healthsystems/publications/Abuja10.pdf> accessed 26 January 2023.

'heresy', after all something similar was done in the new and innovative section 254 (c) (2) of the 1999 Constitution with regard to labour matters which eased the regime of rigid dualism canonised by the afore-cited section 21(1) of the same constitution.

5. 3. Conclusion

This paper has shown some ways that human development in Nigeria can be enhanced through constitutional reform. While acknowledging the importance of making chapter 2 of the 1999 Constitution justiciable, it makes a case for the introduction of *suo motu* intervention by the judiciary in order to boost the realization of rights that enhance human development: right to health, right to education and right to a decent standard of living. The paper further calls for the relaxation of the rigidity of dualism in the 1999 Constitution in order for Nigerians to benefit from certain doctrines, like the principle of progressive realization, which favour the afore-mentioned rights that enhance human development. To buttress this point, the paper then cites the innovative section 254 (c) (2) of the 1999 Constitution which, to promote the plight of the Nigerian worker, did something similar with regard to the accommodation of international law instruments related to industrial relations.

Journal of International and Comparative Law (JICL) Vol.10 2022

LEGAL PLURALISM AND CONSTITUTIONAL DEVELOPMENT: ANY CONNECTING DOTS?

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Abstract

The relics of colonialism, adherence to Islamic law and the existence of various customary laws in different communities make the Nigerian socio-political space an umbrella for the co-existence of pluralistic laws. Legal pluralism therefore is rife in Nigeria. The country has witnessed occurrences which make it appear that the rights of a certain majority are guaranteed at the expense of others, who are seen as the minority. Ordinarily, the existence of plural systems and laws should be recognized by constitutions to ensure that no category of persons is marginalized. A constitution that acknowledges the existence and guarantees the right of all citizens would serve to resolve friction in the society. The existence of a pluralistic legal framework must be incorporated into constitutional order of every given society. Legal pluralism has its advantages but yet a number of disadvantages. It becomes imperative to ask the following questions viz: What effect, if any, does legal pluralism have on constitutional development? What are the most effective strategies to wane these effects? This paper thus aims to study the relationship between legal pluralism and constitutional development and the effect that one has on the other. It discovers that legal pluralism is not so much of a constitutional issue as long as the constitution continues to guarantee the rights to personal liberty and the right to retain the identity of all individuals and groups. The problem seems to be the imposition by the majority of the notions of what is right on the minority. The paper adopts the doctrinal method of legal research and discovers that multiple legal systems can exist within a single polity regardless of constitutional recognition. Yet, tribal and religious conflict may be rife despite an all-inclusive constitutional framework, though the latter cannot be over-emphasized. The research discovers further that in a legally pluralistic society, all positions must be recognized and protected without prejudice to number or might. The paper makes recommendations that revolve around two central considerations; a constitutional order that guarantees majority and minority rights and activism that tend towards tolerance and peaceful co-existence.

Keywords: *Legal Pluralism, Constitutional Development, Nigeria*

1.0 Introduction

The quest for peace, justice and strong institutions has led to an unending diagnosis of the diverse actors and factors that make up what is generally known as the Nigerian legal system. Nigeria boasts of a land mass of over nine hundred and twenty-three thousand square meters (923.000) and is home to a population of over two hundred and nineteen million [1](219,000,000) people. Its

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[1] https://www.worldometers.info/world-population/nigeria-population. Accessed 3Ist January, 2023.

people are made up of over 250 ethnic groups with over 500 languages and with different customary laws. The Sharia legal code is also applied among some Muslims. It goes without saying therefore that Nigeria is an amalgam of different people and cultures. Nigeria can correctly be described as a legally pluralistic polity. It is conceded that creating a nation out of such disparate elements requires a constitutional framework that is deliberately crafted to be a model in nation building, generating national consciousness by being liberal emphasizing mutual tolerance and accommodation of differences.[2] It is also understandable that every inquiry into challenges within the legal system begins from the constitution. Yet, it does seem that in a bid to create a link between some concepts/challenges and the constitution, we tend to neglect a host of other solutions. At its very best, continual efforts should be made to provide a balance that ensures the adequacy of constitutional provisions which are interpreted tune with reality.

The fulcrum of this paper is a discourse on Legal Pluralism and Constitutional Development. An attempt would be made to define these concepts in Part 1, the challenge of legal pluralism would be examined in Part II, a brief discussion on constitutional development would be made at Part III, Part IV proposes a better approach while identifying part of the mischief sought to be cured. Part V concludes the paper.

1.1 Concepts & Definitions

1.1.1 Legal pluralism

Legal pluralism is a phenomenon which is found everywhere. Every social setting has a diversity of legal orders, from the local to the international level. There are municipal laws of various types; religious, state, district or regional. There are also national, transnational and international laws of various types. For example, in Nigeria, we have different customary, indigenous, Sharia laws and laws affiliated with distinct ethnic or cultural groups within a society.

Legal pluralism is, 'the existence of multiple sources of law (both state and non-state) within the same geographical area.'[3] A justice system is said to be plural when it draws the rules and institutions of its laws from two or more normative traditions. Indeed, given a sufficiently broad

[2] https://www.worldometers.info/world-population/nigeria-population/ Ayua I.A, "Nationalism, Ethnic Identity and Conflict Management" (2004) Judicial Excellence: Essays in Honour of Hon. Justice Anthony I. Iguh, 265 at p.266.
[3] Geofrey Swenson, "Legal Pluralism in Theory and Practice" (2018) I*nternational Studies Review*, Volume 20 p 438–462 at 438.

definition of the term legal system, virtually every society is legally plural, whether or not it has a colonial past.[4]

One of the challenges of legal pluralism in any country including Nigeria is the question of choice of law. When two normative systems of law exist in a state it is often difficult to determine which law applies to an individual or a transaction because of the potential that two normative systems may be applicable.

1.1.2 Constitutional Development

The word constitution does not lend itself to an apt definition. However, for our purpose, it could be defined as a set of fundamental principles or established precedents according to which a state or other organisation is governed.[5] The importance of a constitution in any given society cannot be overemphasized. The constitution is the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties. The word constitution may be understood in a dual context. The first is a document embodying the rules that regulate government while the other is a set of extra and extra-legal rules that establish and govern the government.[6]

For our purpose, constitutional development may also be understood in two senses. The first connotes a history of the development of constitutions of a country while the other relates to the development of the content of the constitutions.[7]

2.0 The Challenge of Legal pluralism in Nigeria:

Nigeria is a federation. Federalism is an arrangement whereby powers of government within a country are shared between a national, country-wide government and a number of regionalised (i.e. territorially localised) governments in such a way that each exists as a government separately and independently from the others operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all the others.[8]

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[4] Sally Merry, "Legal Pluralism" (1988) Law & Society Review, Vol. 22, No. 5 pp. 869-896.
[5] The New Oxford American Dictionary, (Oxford University Press, 2005)
[6] Mike Ozekhome, "Constitutional Foundation for a Modern Society",New Developments in Law and Practice in Nigeria, Essays in Honour of Dele Adesina SAN at p. 2.
[7] The latter seems to be more related to the theme of the conference
[8] Nwabueze B.O, *Federalism in Nigeria under the Presidential Constitution,* (Sweet & Maxwell: 1983) p.1.

Section 2 of the 1999 Constitution (as amended) provides:

> **(1).** Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria.
>
> **(2).** Nigeria shall be a Federation consisting of States and a Federal Capital Territory.

Section 3 (1) lists all the states of the federation thus:

> There shall be 36 states in Nigeria, that is to say, Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara.

Nigeria thus remains an amalgam of several groups, languages and creeds. In Africa, the British and the French superimposed their law onto indigenous law, incorporating customary law as long as it was not "repugnant to natural justice, equity, and good conscience," or "inconsistent with any written law." With the vast population described above comprising of ethnic groups each with its own history, culture and language provide a fertile ground for dissension, disagreement and conflict. The structure of the nation being a federation makes them amenable to plural laws, which makes legal pluralism rife. Yet, the aim is to achieve a vibrant nation with all the ethnic and religious groups living together in a tolerant manner. In Nigeria, we have systems of general law and customary law existing side by side in almost every locality. This pluralism of law so to say is by no means a peculiarity of the Nigerian legal system, it is a common feature of legal systems in nearly all the countries in Africa.[9]

3.0 Constitutional Development

In a quest for better governance, there is a tendency to interrogate existing structures. It is not unusual that such interrogations start from the constitution which is deemed the mother of all laws: the source upon which other laws are derived. The extant constitution does have its criticisms and shortfalls.[10] The first and oft referred to, is that it was enacted to law by a decree. Though they have been some amendments, the constitution is still not foolproof to criticisms. This not unusual.

[9] Agbede I.O, *Themes on Conflict of Laws*, (Princeton: 2018) p.10.
[10] So do the ones before it.

From the Hugh Clifford Constitution of 1922, to the Richard Constitution, the Macpherson's Constitution of 1951, Lyttleton's Constitution of 1954, Independence Constitution of 1960, Republican Constitution of 1963 till the 1979 constitution and to the present, there was always a need to address and improve the constitution.

To some people, the present 1999 constitution is nothing but a failed document incapable of redeeming the country from its present predicament, others believe that the question of constitution is not the major setback for the nation's development but that of attitude.

4.0 A More Encompassing Approach?

On the discourse, a question keeps resonating: Given the federal structure unequivocally established by the constitution and admitting that legal pluralism constitutes a challenge, can we say legal pluralism militates against constitutional development? Having accepted that Nigeria is an umbrella for different tribes, cultures, religions and temperaments, can we say that the fact of diversity remains strange after sixty-two years? Should we not forge ahead with practical solutions that work, no matter the constitutional structure in place?

I will approach this discourse from the perspective of a Private International Law practitioner. A perspective that acknowledges the diversity, the multifarious tribes, religions, cultures and the amenability and susceptibility of individuals to two or more of these laws and seeks a harmonious resolution of such conflicts where there arise. To believe in 'One Nigeria' is to seek a course that acknowledges and honours the right of every tribe and being; majority or minority.

I call to aid the wise words of Obafemi Awolowo where he said:

> "Nigeria is not a nation. It is a mere geographical expression. There are no Nigerians in the same sense that there are 'English', 'Welsh' or 'French'. The word Nigeria is merely a descriptive appellation to distinguish those who live within the boundaries of Nigeria from those who don't."

If we, as a people have opted to be bound as a nation despite our differences, I think pluralism should not be seen as anathema, rather it should be harmoniously managed. Legal pluralism does have its challenges but its prospects are mostly ignored. It poses a choice of law problem for Private International Law. Still, Private International Law permeates every aspect of civil law and continuously provides solutions to the questions it seeks to answer. This writer takes the view upon the premise of an agreement to be unified in our diversity, that legal pluralism is not exactly

a problem stultifying constitutional growth but a consequence of that agreement, which must be harmoniously managed. The problem here seems to be the suppression of the minority, while the majority have their rights guaranteed. In a multi ethnic polity like Nigeria, tribalism and ethnocentricity are greater challenges and this become rife where a group, sect or community believe they are marginalised.

A simple panacea to the challenges of Legal pluralism is to recognise the right of all and sundry. Constitutional interpretation should be cognisant and reflective of the diversity in our cultures and beliefs as a people. After all, the worst constitution would at least guarantee the rights of everyone. If there is no limit to the extent to which general law would supplant personal systems of law(customary/religious), then the constitutions continue to get interpreted without regards to the pluralistic nature of the legal landscape.

Legal pluralism merely testifies to the fact that we do not all have to agree on all issues. When this becomes a principle that guides actors in the administration of justice, then more attention would be given to personal law.

Laws should be interpreted and given such an effect that permits the state actors to regard personal systems of law of people and groups. [11]An example of this was seen in the case of Andrew Oneya v. IAR Soluade[12] where the Applicants counsel's argument was that the practical application of section 37 of the penal code was discriminatory. The Supreme court decided that section 28 (10) of the 1963 constitution (which is the same as 42 of the 1999 constitution) is not violated where a state law creates status crimes to apply only to a section of its residents by virtue of belonging to a **class or group defined either by ethnicity, religion or other form of classification or differentiation** (emphasis mine)[13]. The 1999 constitution itself provides in its Section 14 (1)(c) that: the participation by the people in their government shall be ensured in accordance with the provisions of this constitution.

There is almost always a discussion about the constitution at every point. From the 1922 Constitution till date, constitutional debates remain ongoing. The basic truism is that the best

[11] Personal systems of law or groups could be customary, ethnic or religious.
[12] (1970) NNLR,25.
[13] For a proper analysis of the case see Hakeem Olaniyan, "Issues affecting Islam & the Muslims." Vol. 4, ALMASLAHA, Journal of Law & Religion, pp 61-72 (2007-2008).

couched constitution cannot cure legal pluralism, if constitutional interpretation is not done taking cognisance of the diversity within our unified structure.

National funds, legislative man hours and a whole lot of resources are committed to series of constitutional reform by way of amendments but yet matters fundamental to survival of the Nigeria state are being swept under the carpet by self-interested political elite. Issues abound, which call for urgent concern.[14] The National Assembly, in March 2022 passed 44 bills to amend some key provisions of the 1999 Constitution and transmitted the same to the 36 states for their endorsement or otherwise. The process requires the endorsement of not less than two-third of the 36 Houses for any of the bills to sail through. However, far less than half of the states have transmitted their responses, despite N1 billion approved for the amendment; in fact, only 11 state legislatures considered and voted on the 44 amendment bills. The process would require 24 of the 36 states of the federation to concur the amendments contained in 44 bills to become law. The response has been far from encouraging.[15]

With two botched constitutional conferences in 2004 and 2014 respectively, one wonders what would happen next. While these sittings experiment, fail and keep trying, our daily affairs continue as a nation. The structure we have in the 1999 constitution if properly applied suffices to manage our concerns on legal pluralism, while we continually make efforts to further our research.

An author posited:

> If the frequency of the occasion and intensity of the views canvassed in Nigeria regarding what constitutional document to adopt to govern its polity is a yardstick for measuring the durability, legitimacy, acceptability and workability of such a document, then ours ought to be the most perfect Fundamental Law in Africa. However, compared with the global track record, ours may rival only the democratic and constitutional trials and errors that resulted in the wake of the fledgling Italian post war political experiments.

[14] Some of these are Federal restructuring to increase regional autonomy, Local Government autonomy, State police, removal of immunity clause etc, many of which would make the effect of Legal pluralism less felt.
[15] See Guardian Newspaper of 14th December, 2022.

> From the constitutional conferences of the colonial era to the constitutional "drafting", "review", "conferences", "debates and Constituent assemblies of the seventies through the nineties, we have gone through seemingly endless amendment exercises and have had a fair share of constitutional panel beating to get into the Guinness Book of Records. Not content with that feat, Nigeria would seem to want a league of its own."[16]

There seems to be no other time as ripe as this, to chart a course which takes realistic cognisance of our peculiarities as a people and seek harmonious solutions to our challenges.

5.0 Conclusion and Recommendation

- Legal pluralism is a direct effect of federalism and should be harmoniously managed. It is attestation to the fact of difference in people, cultures and perception.
- Constitutional interpretation should be done with cognisance of the fact of pluralism which necessarily exists in a federation.
- The rights of all persons must be protected and the minority must not be subjected to the whims and caprices of the majority
- Tribalism is more of a challenge to the Nigerian polity and conscious advocacy should be channeled against it.
- Emphasis should be shifted from linking every challenge to the constitution to more practical approaches
- Need for attitudinal change on the part of leaders who haven't lived up to the yearnings of the electorate.

[16] Auwalu Yadudu, "The Amending Process under Nigerian Law and Constitutions: Trends, Issues, Dilemmas and Processes" (2000) Issues in the Constitution, 301 at p. 305.

EXAMINATION OF THE RATIONALE BEHIND THE TRANSNATIONAL JUDICIAL DIALOGUE BETWEEN THE SUPREME COURT OF NIGERIA AND INDIA IN THE CASE OF FRN VS NGANJIWA.

Saliu O. Jimoh*

Abstract

Transnational judicial dialogue is specialized inter judicial engagements which often take place between courts in different jurisdictions with the aim of cross-fertilizing judicial ideas and sound judicial opinion across borders with the aim of enhancing justice and egalitarian society. By this specialized global vehicle, sound judicial wisdom is exported from and imported to the other either by way of training, advisory service or taking judicial precedent on matter of national importance with less authoritative position in the importing judicial docket as done by the Nigerian Apex Court in the case of FRN v Nganjiwa when faced with the question of how are judges accused of corruption on the bench treated. Being an issue with no precedent in the court's record, it had a conversation with its counterpart in India which revealed the existence of an authority on the issue. The authority the Nigeria court found useful in unrevealing the puzzle that resulted in the settled position of law to the effect that no judicial officer can be prosecuted for corruption except the National Judicial Council had exercised it disciplinary control and the President or Governor as the case may be has acted on its recommendations. The decision was condemned by the masses as it is seen as an attempt to create dual legislation on prosecution of crimes in Nigeria which is capable of endangering judicial accountability and judicial transparency in way the masses believed was done to shield their fellow judges accused of corruption. These condemnations necessitated the needs to look at the rationale behind the dialogue, the choice of India despite the challenges engulfing its judiciary and the appropriateness or otherwise of the precedent taken. The work relies on library and opinions by way of interviews of relevant stakeholders.

Keywords: *Corruption, Judiciary and Transnational Judicial Dialogue.*

1.0 Introduction

The Apex Court of Nigeria was woken up by the Federal Republic of Nigeria by way of an appeal in case of *Federal Republic of Nigeria v Nganjiwa*[1] at a critical time in Nigerian judicial history when allegation of judicial corruption was at its peak to settle a long range of constitutional controversies surrounding who between the National Judicial Council and the Court of law should first assume jurisdiction on allegation of crimes bothering on corruption involving judicial officers on one hand and whether the Economic and Financial Crimes Commission (EFCC) or any other prosecuting institutions in Nigeria have the vires to charge a judicial officers accused of corruption

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[1] FRN v.Nganjiwa Suit No SC/230/2018 delivered on the 25th May 2022.

where part of the charges or all also constitute misconduct in professional respect without first allowing the National Judicial Council (Council) to exercise its disciplinary jurisdiction one way or the other even where the Council has not shown interest in discipline the affected judicial officer.

Answering the question and in a just manner becomes imperative for the Apex court. Aside being the constitutional responsibility of the Court to hear and determine appeals from Court of Appeal but also because of the controversies the issue has generated right from the time the houses and residences of some of the judicial officers were invaded by security agencies[2] till the Court of Appeal set aside the right of the Commission to prosecute and the courts of law to entertain the prosecution of judicial officers charge with corruption in Nigeria.[3] Being a novel issue with less than zero precedent on it in the docket of the Apex Court, the Court was therefore called upon to create a path for the country and its numerous admirers on how to address the challenges of prosecuting judicial corruption cases being a vexed issue of entangled constitutional importance. In doing this the Apex court embarked on transnational judicial dialogue with the apex court of India which resulted into the importation and reliance by the court on a 1991 decision of the Supreme court of India in arriving at it decision not to allowed the Commission and the court of law to perform their statutory functions except NJC exercises its disciplinary control on the accused judges for misconduct in accordance with the provisions of the constitution.

The opinion of the Apex court received strong condemnations and criticism on many fronts. The decision was condemned for infringing on the constitutional power of court to entertain prosecution of all citizens brought before it, it was also attacked from the constitutional point of ceding judicial power of court to an executive body in the toga of judiciary as well as its capability to kill judicial accountability and transparency in administration of criminal justice, far from these, the choice of India, the age of the decision imported and applied as well and strong dissimilarities in state of laws between the two countries and finally the high prevalence of corruption both on

[2] Evelyn Okakwu, 'Exclusive: Untold Story of SSS Raids on Judges' Homes in Abuja, Five States' (Premium Time) 8th October 2016., https://www.premiumtimes.com/news/headlines/212351-exclusive-untold-story-sss-raids-judges-homes-abuja-fine-states.html?. accessed on the 3oth September, 2023.
[3] Nganjiwa vs FRN (supra) note 1.

the bench and in India as a country made taken precedent of corruption cases more of poison than blessings as shall be unraveled in this work

2.0 Why Transnational Judicial Dialogues

Transnational judicial dialogue refers to interstate as against intrastate judicial engagement where a State Court takes precedent or lessons from the decisions and opinions of court of another State on issues of constitutional or national importance. A practice where a court allows its decision on an issue of national or international importance to be influenced by the decision of another court in another State.[4] The transnational judicial dialogue is a judicial communication convention that permits court of one State to advance its adjudicatory skill or take lessons in resolving constitutional disputes in line with or in accordance with the way it has been dealt with by a sister or superior courts of another state [5] though not as a binding authority but as an influencing factor. It is an avenue for cross fertilisation of idea and legal principles in other to advance or compliment the receiving legal system where there are gaps or need to draw inspirations. [6]

Like the Nigeria Apex Court of old that embarked on transnational judicial dialogues to resolve legal questions (though academically not so recognised as such then)[7] without slaughtering legal conventions or hijacked the Constitution of the receiving country. So was the current justice of the Apex Court of Nigeria did in the case of *Federal Republic of Nigeria vs Nganjiwa.*[8] But their unanimous opinions as held by the leading Judgement of Justice Nwueze[9] and read by Justice Jauro[10] has been subject of discussions as to whether the opinions has not done more harm than justice to Nigerian constitutional practice and judicial development.[11] The Apex Court in its

[4] Congyan Cai & Yifei Wang, 'Transnational Judicial Dialogue in the rise of China: How Chinese Judiciary Enhances the Belt and Road Initiative, Asia Pacific Law Review, Vol.29, Issue 1, 2021. Pp 149-166.
[5] Melissa A. Waters, 'The Future of Transnational Judicial Dialogue' International Law in a Time of Change, Vol.104, 2010 p 4 at 48.
[6] Anne-Marie Slaughter. 'A Topology of Trans-judicial Communication', Law School Journals Vol 29, Issue 1 1995.
[7] Ibid.
[8] FRN v Nganjiwa (supra) note 1
[9] Justice of Supreme Court of Nigeria who wrote the lead judgment in the case of Federal Republic of Nigeria v Nganjiwa.
[10] Justice of Supreme Court of Nigeria who read the lead judgment in the case of Federal Republic of Nigeria v Nganjiwa.
[11] Editorial Board, 'Reinstatement of Justice Ajumogobia and the Matters Arissing' The Guardian, 31st January 2023. Available at https://guardian.ng/opinion/reinstatement-of-justice-ajumogobia-and-matters-arising/. Accessed on the 12th May 2023

opinion axed the Economic and Financial Crimes Commission Act (EFCC)[12] from prosecuting and the courts from entertaining the prosecution of any judicial officers accused of corruption until the National Judicial Council (NJC)[13] resolves however by first exercising its disciplinary control having found a judicial precedent from India on the issue very sacrosanct.[14]

3.0 The Fact of The Case of Federal Republic of Nigeria V Nganjiwa

In *Nganjiwa v. FRN*[15], The Appellant was arraigned before the High Court of Lagos State presided over by Justice Akintoye on a 14 Count Information dated 8th June, 2017 bothering on unlawful enrichment by a public officer and making of false information contrary to certain sections of the Criminal Code Law of Lagos State. Upon his arraignment, the Appellant raised a preliminary objection to the jurisdiction of the Lagos State High Court to try him on the ground that as a judicial officer under the employment of the Federal Republic of Nigeria and under the control of National Judicial Council (NJC), the due process of law was not followed before he was arraigned for criminal prosecution before the Court as the NJC should have been allowed to carry out its disciplinary control before the Economic and Financial Crimes Commission can prosecute him, therefore that the Court lacked the jurisdiction to try him.

Upon a thorough consideration of the objection and having painstakingly listened to both parties' arguments and counter arguments, in a considered ruling, the Trial Judge dismissed the objection of the Respondent, holding that he had jurisdiction in the matter being a court law created by the Constitution and clothed with the judicial power of the State.[16] The Respondent was dissatisfied with the decision of the trial court, the Appellant appealed to the Court of Appeal. In a well-considered decision, the Court of Appeal held that the condition precedent for the Appellant before them to be tried before the lower Court has not been met and fulfilled hence the High Court lacked jurisdiction to try the Appellant being a sitting judicial officer of Federal Republic of Nigeria as the charges proffered against him also constitute misconduct in a professional respect. [17]

[12] Cap E. Laws of Federation of Nigeria 2004.
[13] Section 153 of the Constitution of Federal republic of Nigeria 1999(as Altered).
[14] FRN v Nganjiwa (supra) note 1.
[15] Ibid.
[16] Ibid.
[17] Ibid.

Further dissatisfied with the views of the Court of Appeal, the Federal Republic of Nigeria through the Economic and Financial Crimes Commission appealed the decision and by majority decision, the Apex Court sitting as a full court being a constitutional matter refused the appeal and took the side of the Respondent and that of the affected Judges. And according to the Respondent he said the victory was for the judiciary.[18] How correct this is, forms part of the interest of this research work.

4.0 Effect of The Decision of The Apex Court on Nganjiwa's Case

According to the Supreme Court[19], though there is no constitutional immunity for judicial officers, however, where a serving Judge who is under the management, control and disciplinary jurisdiction of the NJC commits a crime tantamount to a violation of his judicial oath or code of conduct for judicial officers whether it constitute crime or not, such a judicial officer can only be disciplined by NJC who has right to first exercised its powers of discipline under the Constitution by investigating the alleged breach by the judicial officer.[20] Where it finds merit in the allegation against the judicial officer. The officer shall face disciplinary actions and the NJC may recommend the Judicial officer for removal to the appropriate authority which is either the President or the Governor as the case may be.[21]

The President or the Governor is at liberty to take or refused the recommendation by NJC else,[22] the erring judge remains a judicial officer immune from being prosecuted.[23]. The Prosecuting Institutions may only arraign a judicial officer where the NJC recommendation has been accepted and necessary steps taken by the President or the Governor as the case may be. Thereby removing the toga of judgeship from him. However, this has not been done before. One may therefore think that rule against double jeopardy under the Constitution will apply.[24] But the Apex Court in the same case was quick to say in the judgment that such does not apply to any such judicial officer who was only investigated and disciplined by the NJC.[25] The implication of the above is that the

[18] Being part of telephone conversation with Justice Hyeladzira Ajiya Nganjiwa on the 29th May 2023.
[19] FRN v Nganjiwa (Supra) note 1
[20] Ibid.
[21] Ss 153, 158, … CFRN 1999 as altered. See also the case of Ojibara v Governor of Kwara State & Anor (2004) LPELR-13022(CA)
[22] NJC vs Aladejana (2014) LPELR-24134(CA)
[23] FRN vs Nganjiwa (supra) note 1
[24] Section 36(9) CFRN 1999 as altered.
[25]FRN v. Nganjiwa (2022) Supra) note 1.

State or the prosecuting institution is at liberty to prosecute such a judicial officer and will not amount to double jeopardy.[26] It must be noted that this pronouncement is not a ratio in the case and therefore has only a persuasive effect as such will be subjected to serious argument whether or not such a judge who has been removed for breach of code of conduct with allegations bothering on crimes can be subjected to criminal trial again on the same or similar offenses.

Furthermore, the prosecuting institutions by the Apex Court's decision under reference, lacks jurisdiction even where complaint is made to the NJC and the Council takes no step to investigate or discipline the erring judicial officer as any attempt to by-pass the NJC when filing information against a judicial officer will amount to a failure to observe a condition precedent, and a violation of the Constitution.[27] By the pronouncement of the Apex Court in the case to hand, a judicial officer who commits theft, fraud, murder or manslaughter, arson and the likes which are offences outside the scope of the performance of his duty, may not be easily be arrested and prosecuted directly by the State without recourse to the NJC[28] as opposed to the position of the Court of Appeal in the same case.[29]

The same position had earlier been taken by the Court of Appeal in the National Judicial Council v Opene[30] where NJC was described as a judicial body and not an executive body or a further hand of the President or the Governor of a State (executive body) as it is real is under the Constitution.[31] When one read the judgement and highlights the opinions of stakeholders, It appears like the Apex Court took the side of NJC perhaps because they must have also mistaken it to be part of the judiciary because of its composition and controls in order to uphold the principle of separation of power or the element of Judicial independent.[32] It is however doubtful if NJC as well as the Constitution itself respect the sacred principles of separation of power and its real spirits, if not, NJC being a Federal Government body should not have anything to do with the discipline and control of the State Judicial officers.

[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] FRN v Nganjiwa (2017) LPELR-43391(CA).
[30] (2011) LPELR-47945 (CA)
[31] CFRN Ss. 153 and 158
[32] FRN v Nganjiwa (Supra), note1

5.0 Judicial Voyage to India

The Apex Court in open display of professionalism and in order to justify and fortified their opinions went in search for lessons or precedents from other jurisdiction under the international judicial practice of transnational judicial dialogue in order to do justice to the questions begging for answers from the court. One of such countries they found useful judicial authority was India; a country whose judiciary is rated to be one of the most corrupt on earth[33] was where the Apex Court visited to borrow experience on how judicial officers accused of corruption are prosecuted. Alas! The judicial activism paid off as the Court got one authority that appeared similar and deceivingly helpful. That was the case of *K. Veeraswami v Union of India and Ors*[34] decided over three decades ago.

The Court relied on the 1991 case of *K. Veeraswami v Union of India and Ors*[35] which was to the effect that before a judge can be arrested and prosecuted in India, the prosecutor must obtain sanction of competent authority in Indian in accordance with the extant statute in force. The competent authority in Indian in accordance with their law[36] is the Chief Judge of High Court if the alleged corruption involves other judges of the court and the Chief Justice of Indian if the allegation involves justice of the Apex Court or the Chief judge of High Court.[37] And in case of Chef Justice of Indian, it is the President of India who in turn shall consult other justices of the Supreme Court.[38] The section of the enactment also applies to other political office holders in India too[39]

The judicial adventure in search of solution to the puzzle the Apex Court found itself in the case of *Federal Republic of Nigeria vs Nganjiwa*[40] was a noble one and it was a journey embarked upon to a Commonwealth Country (India) who Nigeria shares similar legal system and common overlord with was a commendable one. While the decision cited by the Court from whom they borrowed the ideal of immunity of the judicial officers from prosecution is a good one, the

[33] Awantika Sarkar, "Corruption amongst The Living Oracles of Law" The Indian Journal of political Science, Vol 74 No 3, July- September, 2013, p 539-544.
[34] (1991) INSC 164 Delivered on the 25th July 1991.
[35] Ibid.
[36] Section 17A of the Prevention of Corruption Act of 2018.
[37] Ibid.
[38] Above. Being the majority decision of Ray and Venkatachaliah JJ of the Supreme Court of India
[39] Section 17A of the Prevention of Corruption Act of 2018.
[40] FRN v Nganjiwa (2022) (Supra) note 1.

surrounding facts and how the Indian Apex Court got to where they were then and how the court arrived at the decision never reflected in the decision of the Court in Nganjiwa's case. Or better still. It appeared the Apex Court never took the surrounding facts and factors peculiar to the decision in *K. Veeraswami v Union of India and Ors into consideration before it was applied in deciding Nganjiwa's case.*

The Apex Court did not mention in the judgment that it was the Prevention of Corruption Act of India[41] a law dully passed and which has been amended on many occasions in India that expressly prevents certain public officers and judges from direct prosecution for corruption and not because the judges are judicial officers or because of certain immunity as held in Nganjiwa's case. Furthermore, that it was not recounted also that it is the head of the courts and not another person drawn from another arm of government in the spirit of separation of power that complaints about judicial officers accused of corruption is made to for his sanction before prosecution or investigation is allowed to be made. Therefore, in India the executive play less or no role in either the discipline or prosecution of judicial officers unlike the NJC in Nigeria.

6.0 Further Fact About the Case of K. Veeraswami V Union of India & Ors not Imported

There are certain peculiar facts about the case of K. Veeraswami v Union of India and Ors[42] that never got mentioned that should have made the decision not too good a precedent for Nigeria. There was a dissenting decision in the case of K. Veeraswami v Union of India and Ors[43] delivered over thirty years. This shows that the decision was a very old opinion that perhaps has become spent and outdated as shall be discussed here. Coupled with this is that fact that there was no unanimity of opinions by the justices of the Apex Court of India hence the splits. These absence of unanimity shows that the issue of how to prosecute corrupt judicial officers in India was unsettled with finality since 1991.[44] India never barred the prosecution of judicial officers accused of corruption or stopped their prosecuting institutions as well as police from arresting judicial officers accused of corruption, rather it only put a comma, before their prosecution and they never permit the conversion of crimes to misconduct where judicial officers are involved.[45]

[41] Prevention of Corruption Act (supra), note 36.
[42] (1991) INSC 164 Delivered on the 25th July 1991.
[43] Ibid.
[44] K. Veeraswami v Union of India & Ords (supra) note 42.
[45] Section 17A Prevention of Corruption Act (supra) note 36.

Of more importance is the fact that the sanction to prosecute required in India is not by way of trial or prolong investigation as usually done by NJC in Nigeria[46] or by converting bribery allegation against a judicial officer to misconduct either to shield or punish the erring judge[47] but just one of notice and being one man show, the approval procedure is done promptly and judiciously.[48]

Furthermore, the decision in The decision *K. Veeraswami v Union of India and Ors*[49] cited with approval by the Supreme Court was not the most recent on prosecuting of judges even in India where it was imported from as there was a trial of Justice C S Kerman of High Court of India for contempt at the Apex Court of India in year 2017 when he accused the justice of India judicial of corruption.[50] He was contrary to the decision of the Apex Court of Indian in the case of *K. Veeraswami v Union of India and Ors*[51] cited by the Nigerian Supreme Court in *Federal Republic of Nigeria vs Ngnajiwa* and provisions of Prevention of Corruption Act of India tried and convicted. To this end, the decision relied upon by the Supreme court was no longer the extant law in Indian as the case of *Honble Supreme Court of India v Justice C S Karman* in latest on the issue.[52]

The decision in *Honble Supreme Court of India v Justice C S Karman* which set on fire the whole of the judiciary of India has enjoyed mixed reactions not only because of the unprecedented quorum of seven Justices of the Apex Court of Indian that sat on the trial of the case but it is the first time an action is brought against a sitting judge of India without authorisation or sanction as required by law [53] and in compliance with the earlier decision Apex court of India in the case *K. Veeraswami v Union of India and Ors.*[54] The mixed reactions that welcomed the decision in

[46] Ameh Ekekwonyilo, "Exclusive: How Judge Prosecuted for Bribery was Reinstated after Serving Five Years Suspension" Times Premium 25th July 2021. Also available at <https://www.premiumtimesng.com/news/top-news/475584-exclusive-how-judge-prosecuted-for-bribery-was-reinstated-after-five-years-suspension.html.>
[47] Ibid.
[48] S 17A Prevention of Corruption Act 2018.
[49] (1991) INSC164 Delivered on the 25th July 1991.
[50] In Re -Supreme Court of Indian v Justice C S Karma in Contempt Petition (C) No 1 of 2017. Delivered on the 8th February 2017.
[51] Ibid.
[52] In Re -Supreme Court of Indian v Justice C S Karma (supra) note 50.
[53] Dhananjay Mahapatra, "Justice Karnan Had Termed 33 Judges 'Corrupt', Got Six Month Jail" The Times of India 2th august 2020.Also available at https://m.timesoofindia.com.cdn.ampproject.org/v/s/m.timesofindia.com/india/justice-karma-had-termed-33-judges-corrupt-got-six-months-jail/amp.
[54] (1991) INSC164 Delivered on the 25th July 1991.

Honble Supreme Court of India v Justice C S Karman[55] also includes the fact that a sitting judge of Indian cannot be prosecuted without a complaint made in accordance with the extant law.[56]

Justice C S Kerman a sitting judge of High Court of Indian was cited for contempt 'in Suo-moto' and was convicted on the 8th February 2017[57] for requesting the investigation of sitting and retired justices of the High Court and Supreme Court of India for gross corrupt practices.[58] The Apex Court of Indian in order to save the face of the judiciary changed with impunity the age long law and practice of zero right to arraign and prosecute a sitting judge by itself when the Apex Court brought *suo-moto* a petition against Justice C S Karman[59] and the Court convicted the Respondent for contempt in an unprecedented manner[60] and without regards to the provisions of Prevention of Corruption Act of India which remained in force.

The contempt Charge being a criminal proceeding and the subsequent conviction by the Apex Court of India was a total departure from the laws and practices on discipline a judge accused of corruption in India and a departure from the Supreme Court of India decision in *K. Veeraswami v Union of India and Ors*[61]. Meanwhile, The Apex Court of Indian did not reverse its decision in *K. Veeraswami v Union of India and Ors* but also ignored with impunity the provisions of Prevention of Corruption Act of India[62] which barred the prosecution of Judges and public servant until sanction of the appropriate authority is first sought and had.[63]

In the trial and conviction Justice C S Kerman, the Apex Court of India resulted to the use of unprecedented contempt proceeding to ensure that the judge is punished promptly as it is only the parliament that that has power of removal of a judge but the power has remained a dead wood in the Constitution of India because of the inherent bottlenecks in it its invocation which the apex court is not deaf to.[64] The Supreme Court of Indian also violated the provisions of the Code of

[55] In Re -Supreme Court of Indian v Justice C S Karma(supra) note 50.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59]Ibid.
[60] Ibid.
[61] K. Veeraswami v. Union of India & Ors (supra) note 42
[62] S 17A of 2018.
[63] It used to be Section 6 of the Prevention of Corruption Act of 1947 as amended in 2018
[64] Sushmita Choudhary, Overview: Removal of Judges in India' Pleaders 25th August, 2020 Also available at < https://blog-pleaders-in.cdn.ampproject.org/v/s/blog.pleaders.in/overview-removal-of-judges-in-india/?amp=. Accessed on the 1st February, 2023.

Criminal Procedure[65] which is the primary legislation on administration of criminal justice in India.[66] In the arraignment and conviction of Justice C S Kerman in flagrant disrespect for the extant law on the issue[67]

It is not only in the case of Justice C S Kerman in India that a sitting judge had been proceeded against without compliance with the extant law on this, sometime in 2017, Justice Narayan Shukla of Allahabad High Court of Indian was arraigned for bribery along with six others on the 4th of December, 2019 despite the fact that he was a serving judge, though, he was not prosecute until sanction to prosecute from the appropriate authority was obtained for allegation bothering of gross corruption.[68] The judge was accused of accepting bribe in exchange for giving a favorable order to a private medical college barred from giving admission[69] the fact that he was a sitting judge did not change the coloration of the offense alleged from bribery to misconduct.

Finally, Indian judiciary is rated as one of the most corrupt in the world as of today.[70] Almost half of the population of Indian believe that their judiciary is corrupt[71] Justice Khare[72] said corruption in India court is massive and has grown beyond been covered up particularly at the lower and in the high courts too.[73] In September, 2009 a Senior Advocate of the Supreme Court of India in an interview opined that half of the nineteen justices of the Apex Court of India were corrupt.[74] In year 2010, Shanty Bhushan[75] caused commotion at the Apex Court of India when he moved an application accusing eight of the former Chief Justice of the Indian Supreme Court of gross

[65] Section 197 Code of Criminal Procedure 1973
[66] Bharti, Dalbir, "The Constitution and Criminal Justice Administration" APH Publishing 2005, p 320
[67] Section 179 Prevent of Corruption Act of India 1988
[68] The Indian Express, "Corruption Case: CBI Gets Govt, Sanction to Prosecute Retired Allahabad HC Judge' The Indian Express, 27th November 2021. Also available at https://indianexpress.com/article/indian/cbi-government-prosecute-retired-allahabad-hc-j...> accessed on the 5th august 2022.
[69] Ibid.
[70] Awantika Sarkar, "Corruption amongst The Living Oracles of Law" the Indian Journal of political Science, Vol74 No 3 July- September 2013, p 539-544.
[71] Nayana Renukumar, The Indian Judiciary on Trial: Tackling Corruption in Indian's courts" The Global Anticorruption Blog,12th February, 2016. Also available at https://globalanticorruption.com/2016/02/12/the-indian-judiciary-on-trial-tackling-corruption-in-indians-court/. Accessed on the 5th August 2022.
[72] V, N Khare was a retired Chief justice of Indian in the 70s
[73] Chandrani Banerjee, "Corruption is Rampant in the Lower Courts' Outlook 10th January 1970.
[74] Peachy Vibe, "Courts, Corruption and Judicial System" Legal Service India E. Journal, Also available at https://www.leggalserviceindian.com/legal/article-3993-courts-corruption-and-judicial-system.html. Accessed on the 5th August, 2022.
[75] He was a former Law Minister of law and Justice in Indian from 1977-1979 and a senior advocate of supreme court of Indian.

corruption and he was so sure that he asked to be jailed if upon investigation he lied[76]. According to Rijiju.[77] In five years, over one thousand six hundred complaints against judicial officers for corruption related misdeeds were received in by the government of India.[78]

7.0 State of Laws in Nigeria and India on Prosecution of Judicial Corruption Cases

India judicial practice though share some traits of similarity with Nigeria, but legislative wise, particularly on prosecuting or discipline judicial officers the two countries are miles apart. There are laws in India that expressly prohibit until certain criterion is met the prosecution of a judicial officer.[79] In fact, it is the provision of that law that was up for deliberation in the case of *K. Veeraswami v Union of India and Ors*[80] but no such similar law exists in Nigeria legal system that expressly makes it an illegality, the direct prosecution of a judicial officer accused of crime of corruption or bribery without authorisation. This was admitted by both the Apex Court and the Court of Appeal in the same case of Nganjiwa.[81]

The only one that come closer was the provisions of section 158 of the Constitution which talk of discipline and not prosecution of members of certain councils and commissions which include National Electoral Commission, Federal Character Commission whose staff and officers had been prosecuted for corruption without any clog or call for disciplinary action by the Commission before prosecution. When Judicial officers are accused of corruption, the court did no see anything wrong in assertion that discipline for misconduct should come first before prosecution.

To this end, many see the decision of the Apex court in the said case as perhaps a search for protection of their brethren by the courts from the Economic and financial Crimes commission or from allowing the executive to have a stage play on the lawn of the judiciary[82] Ali[83] said

[76] Peachy Vibe , (above), note 74
[77] Kiren Rijiju was a Minister of law and Justice in Indian in year 2021
[78] Kiren Rijiju "More than 1,600 Complaints Received Against judiciary in the Last 5 Years: Centre" NDTV, 2nd December 2021. Available at https://www-ndtv –com.cdn.ampproject.org/v/s/www.ndtv.com/india-news/more-than-1-600-
.[79] Section 6 (supra) foot note 37.
[80] Ibid K. Veeraswami v Union of India & Ors (supra) foot note 42
[81] Ibid.
[82] Being part of interviews conducted with Mallam Yusuf Ali SAN and John Baiyshea SAN, at Ghalib House, Unity Area of Ilorin and Harmony Chambers, Old Offa Road, Ilorin on the 26th March 2022. and 26th July 2021 respectively on the topic why prosecution of judicial corruption fails in Nigeria.
[83] Ibid.

I was in the court when Ahmed Raji Senior adopted and argued his brief for the respondent. I was no expecting anything different from the position taken by the Apex Court at a time when they were facing serious threat from the hands of the executives. It must have been a way to protect the sanctity of the courts and the judges..,[84]

Baiyshea[85] opined that *the decision was to shield the corruption judges from prosecution and nothing more and this will have a serious repercussion on the sanity and sanctity of the Judiciary in Nigeria.'* Egbewole[86] said in reaction to the theory of judicial brotherhood as advocated by the writer when he opined thus:-

"Whether right or wrong, the Apex Court has spoken and that is the law until it is reversed. The judges caught in the web of corruption now enjoy suspended prosecution depending on where the NJC wakes up from, I am not saying there are no corrupt judges on the bench, but the report of judicial corruption in Nigeria is overblown hence the theory of 'Black Dot '

Justice LLL[87] said 'even Generals in the Army are not prosecuted in Nigeria with their uniform on, the decision in Nganjiwa is not for the benefit of a particular judge but for the integrity of the Nigeria bench as a whole. But this does not rule out the possibility of one or two judges taken the benefit of it.[88]

It therefore beyond doubt that the Justices of the Apex Court embarked on the long-distance judicial activism in search of legal supports to ground procedural immunity or suspended prosecution for the judges accused of corruption in Nigeria.[89] A task well accomplished and the judges express satisfaction including the Respondent himself with the decision of the highest Court of the land[90]

[84] Malam Yusuf Ali Senior Advocate of Nigeria (above) note 82
[85] John Baiyeshea Senior Advocate of Nigeria (above) note 82
[86] Being part of interviews conducted with Professor Wahab Egbewole Senior Advocate of Nigeria in his Office at Asa Dam Area of Ilorin on the 22th July, 2022 on the topic Why Prosecution of Judicial Corruption Fails in Nigeria.
[87] Being part of the interview with Justice LLL a serving Judge of High Court of Lagos State sitting at Ikeja Division in his office on the 30th April 2022 on the how to prosecute judges accused of corruption.
[88] Ibid.
[89] Mallam Yusuf Ali (above), note 82
[90] Justice Hyeladzira Ajiya Nganjiwa (above) note 18.

8.0 Opinions on The Decision in Nganjiwa's Case

Drawing lessons from the decision of the Apex Court in Nganjiwas's case, Egbewole[91] opined that the decision is good in the sense that it will uphold judicial independence being the fundamental pillar upon which the entire judicial arm rested worldwide. An opinion which Momodu[92] agreed with in totally and further posited that without the independence of the judiciary, the hope of common man will be dashed in the face of the likely tyrannical rule by the executive arm and draconian laws by the legislature.[93] There is no doubt that judicial independence is a cardinal feature of every democratic constitution and occupied a unique position at the hearts of constitutional democracies, the absence of which the hope the common man reposed on the courts remains a mere mirage. [94]

It is not in doubt that the end product of judicial independence is to ensure stable judicial institution which will ensure judges are impartial in dispensation of justice between the governing and the governed[95] and forbids both internal and external interference in the process of decision making by third parties either by way of force, threat, lobby, intimidation or even persuasion from any quarters including from fellow judges whether high or low once it is seen that such is with the mind or heart of partisanship or interest base[96]. This is one of the positivism that came with the decision in Nganjiwa's case the judicial adventures of the Apex Court.

Another very cardinal take home from the decision in Nganjiwa's is that it strengthen the unity of the judges and foster strong brotherhood that does not permit intruders into their internal affairs by way discipline. It will also avoid a situation where a brother will have to sentence his fellow brethren base on a persuasive or superior argument of his adversary which may not be the truth in

[91] Professor Wahab Egbewole (above) note 86
[92] Being part of the interview conducted with Professor Momodu Kashim Momodu the Dean Bola Ajibola College of Law. Crescent University, Abeokuta, Ogun State and a member of Transparency International on the state of corruption at the Bench and the Bar in Nigeria on the 15th March, 2021 at BacoLaw, Crescent University, Abeokuta, Ogun State. Nigeria.
[93] Ibid.
[94] Niki Tobi, "Judicial Independence in Nigeria" International Legal Practitioner, vol. 6(ii),1981, pg 62-63. Also available at https://heinonline.org/HOL/LandingPage?handle=hein.journal/ilp6&div=2&id&page=. Accessed on the 15th September 2022.
[95] ibid
[96] Ibid.

most case particularly in a period when corruption in the judiciary has been over blown beyond proportion according to Egbewole which he called 'black dot theory 'of judicial corruption.[97]

9.0 The Shortcomings in The Decision in Nganjiwa's Case

Transnational judicial dialogue is one of the golden practices of the bench particularly where there are scarcity of judicial authority or relevant precedent locally on a fact in issue. From the above, it does not appear that recourse to India in search of judicial illusion by the Apex Court in Ngnajiwa's case is a good one. The reasons are enormous and one of which is the state of corruption on the Indian bench as discussed supra. Borrowing judicial inspiration from a respected or advanced jurisprudence is usually welcome and celebrated. But taking precedent from India judiciary at this point in time is not appropriate because of my challenges the Indian judiciary is undergoing at present. Currently, the global perception of India judicial system appears not to be better than that of Nigeria in term of negative corruption index of the country as whole which is slightly better than that of Nigeria as will be shown here.

Transparency International Report says 77% of respondents in Indian feel that Indian judiciary is corrupt[98] and as 2022, the corruption perception index of the whole of Indian is still very high.[99] Indian is rated 80th position among the most corruption countries of the world.[100] And by the 2023 report, the country has degenerated to number 85th in the new ranking of countries.[101] More importantly, the State of laws and judicial processes in the two countries on the vexed issue are also not the same. These striking disabilities in form of differences in the State of the laws in the two countries should have made taking lesson or drawing inference from India more of poison than a medicine for Nigerian judiciary as done in Nganjiwa's case.

While it is agreed that the Apex Court of Nigeria is not bound by the decision of any other country including India, at least it was persuaded by the decision of the Supreme Court of India in the case

[97] Professor Wahab Egbewole (above) note 86
[98] Global Corruption Survey Index Report 2007. <https://www-hindustantimes-com-dn.ampproject.org/v/s/www.hindustimes.com/indian/77-per-cent-believe-indian-judiciary-is-corrupt-iscorrupt-survey/story.>
[99] Transparency International, 2021 Corruption Perception Index reveals a decade of stagnating Corruption Level amid Human Right Abuses & Democratic Decline; released on 25th January 2022. Also available at <https://www.transparency.org/en/press/2021-corruption-perceptions-index-press-releas.>
[100] Ibid.
[101] Transparency International, Corruption Perception Index 2022 released in January 2023 Available at < https://www.transparency.org/en/cpi/2022. > Accessed on the 2nd February 2023.

of *K. Veeraswami v Union of India and Ors*[102]in reaching Its decision in Nganjiw's case. The state of law on discipline judicial officers in Indian as stated in the case of *K. Veeraswami v Union of India and Ors*[103] actually influences the decision in Nganjiwa's case has decided by the Apex Court. The Court however does not take time to investigate how adversely the decision has affected the way the India judiciary is viewed worldwide as one that makes judicial accountability impossible[104].

Just like India, there is also a strong tendency that the decision in Nganjiwa's case has the capacity and capability to kill judicial accountability which is also a vital part of judicial independence. The modern constitutions in any democratic societies though recognise the doctrine of separation of power but also put in place certain parameters to ensure that no one of the arms abuse or over stress its constitutional power over and above its bound[105] as absolute power begot absolute abuse. This is called 'checks and balances' because it absolutely impossible to have an arm operates totally independent of the other[106]. Surely, that will build anarchy and skim against orderliness which the division of powers and responsibilities by way of separation of power sought to achieve. The very judicial accountability the absence of which paved way for fourteen justices of the Apex Court in the spirit of judicial brotherhood to get rid of their brother the Chief Justice of Nigeria with the needed ease[107]

Notwithstanding the above, the law is and remains crystal clear that judicial officers have no constitutional immunity from criminal prosecution but now enjoy procedural immunity from prosecution. Though. it was conceded by the Appellant in the *Nganjiwa v. Federal Republic of Nigeria* and also in the case of *Opene vs National Judicial Council & ors*[108] (Supra) that there is no Constitutional immunity for judicial officers who committed crime and in Opene's case the Court of Appeal said the court cannot divest the regular court of the right to assume trial of a

[102] K. Veeraswami v Union of India & Ors (supra) note 42.
[103] Ibid.
[104] Nayana Renukumar, The Indian Judiciary on Trial: Tackling Corruption in Indian's courts" The Global Anticorruption Blog,12th February, 2016. Also available at https://globalanticorruption.com/2016/02/12/the-indian-judiciary-on-trial-tackling-corruption-in-indians-court/. Accessed on the 5th August 2022.
[105] F. Ogoloma, "The Theory of Separation of Powers in Nigeria: An Assessment" African Research Review, Vol. 6, No 3, 2012, p. 3.
[106] Ibid.
[107] Ameh Ejeikwonyilo, 'Supreme Court justices Write Protest Letter to CJN' Premium Times 2oth June 2022. Also available at < https://www.premiumtimesng.com/news/headlines/538236- supreme-court-justices-write-protest-letter-to-cjn.html, accessed on the 29th January, 2023.
[108] (2011) LPELR-4795(CA).

charge against a judicial officer accused of crime in favor of NJC[109], but because of the inordinate delay in trials in Nigeria, both NJC and the court can perform their respective constitutional duties without one holding the hands of the other one.[110] This position appears a better law than it is recently stated by the Apex Court.

10.0 Effect of The Decision in Nganjiwa's Case

Without much ado, the decision of the Apex Court under reference has radically changed the position of the law on the due process of law or condition precedent before prosecution of judicial officers. Egbewole[111] said this will be so until the Apex court has course to reverse it. The chances that is will happen soon is low as the Prosecuting institution appeared to have accepted the decision[112]. Therefore, no matter how it is viewed the threat posed by judicial immunity and the impact of the court pronouncement in relevant cases is indeed a challenge to a purposeful, effective and efficient prosecution of judicial corruption cases in Nigeria.

Currently just like in India of 1991, a judicial officer cannot be prosecuted or a trial court of the land constitutionally empowered and entrusted with the judicial power of the State has been ousted from assuming jurisdiction in any case or charge involving a judicial officer accused of crime is made.[113] This suffices until the NJC which is just an extension of the execute arm gives its consent and the head of such executive arm either at the Federal or State level assented to its recommendation removing a judge thereby tactically kill judicial accountability the twin sister of judicial independence and judicial transparency in Nigeria. The strong reliance placed on the decision of the Apex court of India in the case of *K. Veeraswami v Union of India and Or*[114] makes it look as if it is only in India that an ideal way of treating judicial officers exist or than the best practice in this area of law exist only in India. This poser necessitated a cursory look at practices in Denmark and United Kingdom in this respect,

[109] Ibid.
[110] Jimoh Saliu & Mujeeb Imran,' Judicial Immunity in Nigeria: Legal and SWOT Analysis of the Case of Nganjiwa v FRN' African Journal of Law, Ethics and Education, Vol 1. No 1, 2021. Pp2756-6870.
[111] Professor Wahab Egbewole (above) 86
[112] Being part of interview conducted with Wahab Shittu Senior Advocate of Nigeria and one of the leading external Prosecutor for EFCC on the 28th September 2022 via WhatsApp call.
[113] FRN vs Nganjiwa (supra) note1
[114] K. Veeraswami v Union of India & Ords (supra) note 42

11.0 Prosecution of Judicial Officers for Corruption in Denmark

The Special Court of Indictment and Revision is the judicial officers' disciplinary body in Denmark. The court is composed of five members appointed by the Queen for a period of 10 years among the judges of the Danish's various courts hierarchy.[115] Its disciplinary jurisdiction covers other staff employed by the courts system and the membership admitted no external persons but the judicial members only.[116] All forms of misconduct including delay in giving decision, rude or improper comment on the counsel, not given defence council adequate fair hearing are within the scope of the jurisdiction of the Special Court of Indictment and Revision and flagged as showing of 'unseemly conduct' and may result into removal or financial fines depending on the circumstances of each case and the decision of the court on this is.[117]

The decision of the Special court on discipline is final and cannot be reviewed by way of an appeal as the Danish judicial system is founded on principles of self-restraint.[118] It need to be further stated that the power of the Special Court of Indictment and Revision also including dismissal of judges too as well as attending to complaint in cases where the defendant's counsel is unlawfully excluded from criminal proceedings this is however appealable. [119]

However, where there is allegation of corruption against a judge or any judicial officer in Denmark, the position of law is clear on this. Such a judicial officer shall be subject to prosecution just like ordinary citizen of the country. [120] In the word of Langsted,[121] the Professor of law observed as follows: - *"Never has a judge been accused of corruption in Denmark. Should this happen, it would follow the usual line of police inquiry and evaluation of the District Attorney whether to*

[115] Office of the United Nations High Commissioner for Human Rights, "Questionnaire of the Special Rapporteur on the independence of judges and Lawyers" available at https://www.ohchr.org/sites/default/files/documents/issues/judiciarycouncils/Denmark.docx. Accessed on the 8th January 2023.
[116] Ibid.
[117] Jens Elo Rytter and Marlene Wind, "In need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms" International Journal of Constitutional Law, Vol 9 issue 2 April, 2012 pp 470-504.
[118] Ibid.
[119] The Danish Court Administration, Stockholm Institute for Scandinavian Law, 1957- 2010. Also Available at https://www.scandinavianlaw:se/dpf/51-27.pdf. Accessed and downloaded on the 31st October, 2022.
[120] Peter Damsholt Langsted and Lars Bo Langsted, "The Civil Consequences of Corruption According to the Laws of the Least Corrupt Country in the World-Denmark" Global Studies in Comparative Law, Vol 11, 2015, page 978 see also Transparency International UK, "Global Anti-Bribery Guidance" available at https://www.antibriberyguidance.org/qa-relation-bribery-offences-denmark/guidance. . Accessed on the 8th January 2023.
[121] Being part of online interview conducted with Professor Emeritus Lars Bo Langsted of Jurisdisk Insititut, Aalborg University, Department of Law, Denmark via Email on the 8th January 2023 at 4,44pm.

press charges or not"[122] *it must be noted* nothing in the Danish law conferred on the Special Court of Indictment and Revision power to try a judicial officers accused of crime such as bribery. Section 306 of the Danish Criminal Code[123] makes any natural person irrespective of his rank, class or status to be liable to prosecution where he is involved in either active or passive bribery, unlawful enrichment and may be liable to a fine or up to 6 years imprisonment terms.[124]

Section 144 of the Danish Criminal Code[125] expressly forbids a judge from wrongly receiving bribe by way of gift or other benefits in form of appreciation.[126] Where this happens in the word of Langsted, he will be subject to the Police or District Attorney and where necessary he shall be prosecuted accordingly. [127]

12.0 Prosecution of Judicial Corruption in United Kingdom

In United Kingdom, judicial corruption is not treated cosmetically. The Criminal legislation of United Kingdom being one founded on Common law make commission of crime by judicial officer one of the grave exceptions to the idea of judicial immunity. [128] By the salient Provisions of Act of Settlement of United Kingdom [129] which was reechoed in the Supreme Court Act, both Houses of Parliament are clothed with the power to petition to the Queen (now King) for the discipline by the way of removal a judicial officer either of the High Court or those of the Court of Appeal accused of act amounting to gross indiscipline of misconduct.[130]

In United Kingdom prosecution of judicial officer appears to be an aberration. What the law provides for is the removal of erring judge by the houses of Parliament. Even the removal of judicial officer for corruption or for any act of misconduct is sparingly exercised. [131] However, this does not suggest that a judge accused of corruption cannot be prosecuted or removed as this

[122] Ibid.
[123] Sections 122 and 144 of Danish Criminal Code Consolidated Act No 1650 of 17th November, 2020. (In Danish Straffelover).
[124] Peter Damsholt Langsted and Lars Bo Langsted, (above) note 120
[125] Ibid.
[126] Den Danske, "Ethical Principles for Judges" Dommerforening, available at https://www.dommerforeningen.dk/English/ethical-principles-for-judges. Accessed on the 8th January, 2023.
[127] Professor Emeritus Lars Bo Langsted (supra) foot note 111
[128] Sirros v Moore (1975) QB118, (1974) 3 ALL ER 776.
[129] Act of settlement of 1701 of United Kingdom
[130] Section 11(3) Supreme Court Act of United Kingdom 1981.
[131] Judges and Parliament -Courts and Tribunals Judiciary available at https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/judges-and-parliament/ accessed on the 1st February, 2023.

has been done once hence there is a precedent. Lord Denning even sounded a judicial notice to who cares to listen that immunity of judicial officer does not extend to commission of crime of corruption, acceptance of bribery or found to have perverted the course of justice when he held as follows: -

"it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he imposes, cannot be made the subject of judicial proceedings against him…***of course if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts."***[132] *[Emphasis Supplied]*

In any of these instances according to the Master of Roll, a judicial officer such is liable to be prosecuted. The Master of Roll must have found his inspiration to have held so in the removal of Justice Sir Jonah Barrington by the houses of Parliament who was removed unceremoniously from the bench of the High Court of Ireland, Admiralty Division in 1830 for gross act of corruption, misappropriation of fund due to litigants and other acts that partake in mass corruption and indiscipline.[133]

It also pertinent to state that by the provision of Paragraph 4 of the Judicial Complaints Procedure: UK Supreme Court[134] applicable to the justice of the Apex Court which provides thus: -

"Consideration of taking formal action will be appropriate, whether or not any complaint is made, where a member of the Court is finally convicted of any offence which might reasonably be thought to throw serious doubt on that member's character, integrity or continuing fitness to hold office or where a member's conduct otherwise appears to be such as to throw serious doubt on that member's continuing fitness to hold office." [135]

[132] Sirros v Moore (1975) QB118, (1974) 3 ALL ER 776.
[133] Judges and Parliament -Courts and Tribunals Judiciary (supra), foot note 131
[134] Ibid.
[135] Ibid.

The Compliant Procedure of the Apex Court of Great Britain envisage prosecution of judicial officers for crime before disciplinary measure can be taken and not other way round as we have it in Nigeria.

13.0 Prosecution of Judicial Corruption in India

Article 14 of the Constitution of India[136] guarantees the equality of persons and declare the State to be sovereign. He further proclaims that no person or authority is above the State. By this provision, any person who violates the law of the land or breach any criminal code in respective of the class is liable to be arrested in accordance with the law of India. This includes the judges and justices as no exception has been stated under Article 14 of the Constitution of India[137] Section 19 of the Indian Penal Code [138] define a judge as not only persons who is officially or constitutionally empowered or appointed to be a judge but also persons empowered by law to preside in any legal proceedings and decide issues at stake. Where his decision is confirmed by other authorities, it will be final and binding.

Having describe who a judge is, section 77 of the Indian Penal Code immunes a judge from criminal; liability for all act done while presiding over a case in his court even where the court sit elsewhere in so far, the act or omission is done or made in good faith so also is the provisions of the Judicial Officers Protection Act.[139] And the Judges (Protection) Act[140] grants immunity to judicial officers in deserving circumstances where the acted judicially and within the limit of their jurisdiction.[141] However, section 135 of the Civil Procedure Code[142] allows a judge to be arrested why on his way to the court or coming back. Section 3 of the Judges (Protection) Act [143] bar every court from entertaining, commence or continue any action against a judge either civil or criminal emanating from their action, conduct or statement while presiding over a case in court. This is however subject to the provision of subsection of the law that permits the Central or State Government, the Apex court, the High Court or any other authority to take legal action in terms of

[136] The Constitution of India 1950 as amended on 15th August 2021
[137] Ibid.
[138] Act No 45 of 1860.
[139] The Judicial Officers Protection Act No 35 of 1850 Act of Parliament (India)
[140] Section 3 of Judges (protection) Act No 59 of 1985 Act of Parliament (India).
[141] Manav Bhatt, "Judicial immunity: An analysis of English Common Law and India Legislations" Legal Service India E- Journal. Available at
[142] Civil Procedure Code of India 1908
[143] Judges (Protection) Act of India

civil and criminal against such person. Little wonder the Apex Court of Indian prosecuted CS. Kerman of the High Court of India[144]

Section 17A of the Prevention of Corruption Act[145]expressly prohibit the prosecution of certain public officers and judges from direct prosecution except the sanction or leave of an appropriate authority is obtained. In the case of High court Judge, the Chief Judge of the Court, where it involves the Judge, the Chief Justice of India. Where it involves the Justices of the Supreme Court, the Chief Justice of India and where it is the Chief Justice of India then the President of India must sanction the prosecution. The case of *SP CBI v Deepak, Chaudhary & Others*[146] support this position that before any officers exempted by this Act can be prosecuted, the sanction of the appropriate authority must be obtained and where a sanction is granted it cannot be set aside on the ground that the accused was not granted a hearing.[147]The above is further supported by decision of the Apex court of Indian in the case of *K. Veeraswami v Union of India and Ors*[148] that no judge of in State of Indian can be prosecuted except the appropriate authority sanctioned the prosecution.

However, the same court held contrary to its decision *K. Veeraswami v Union of India and Ors*[149] in the case of *Honble Supreme Court of India v Justice C S Karman*[150] where the Apex Court prosecuted Justice C S Karman for contempt of court for accusing the Apex court of Corrupt practices and was sentenced to terms of imprisonment for contempt of court. The decision was criticised for not following the decision of the said court held as far back as 1991 and on the ground that it violating section 6 of the Prevention of Corruption Act. [151]

From the above narrations, it is clear that in India, Judges accused of corruption whether in course of duty or otherwise, even despite the provision of the Section 17A of the Prevention of Corruption

[144] In Re -Supreme Court of Indian v Justice C S Karma, above.
[145] Prevention of Corruption Act of India 2018 as amended.
[146] AIR 1996 SC 186.
[147] Ibid.
[148] Ibid
[149] K. Veeraswami v Union of India & Ords (supra) foot note 42
[150] In Re -Supreme Court of Indian v Justice C S Karma in Contempt Petition (C) No 1 of 2017. Delivered on the 8th February, 2017.
[151] Dhananjay Mahapatra, "Justice Karnan Had Termed 33 Judges 'Corrupt', Got Six Month Jail" The Times of India 2th August 2020.Also available at https://m.timesoofindia.com.cdn.ampproject.org/v/s/m.timesofindia.com/india/justice-karma-had-termed-33-judges-corrupt-got-six-months-jail/amp.

Act[152] that appears to offer a subjective protection as well as provisions of other law above summarized, can be arrested and prosecuted. The only hurdle that requires to be crossed is the sanction of designated authorised person which must first sought and obtained before prosecution can be effected. By the decision of the Supreme Court of India in 2016 in the case of *Honble Supreme Court of India v Justice C S Karman* being the extant law, the Apex court of India has held that that sanction may not been be obtained in certain circumstance as in the case of Justice C S Karman. From state of legislation the India court has justification for it decsiosn in K Veeraswami v Union of India as their extant legislation support the conclusion they arrived at. The same thing cannot be said about Nigeria's Apex Court decision in Nganjiwa's case with different level of legislation too dissimilar with that of India on the subject matter.

14.0 Lesson from The Jurisdictions Considered

From the few jurisdictions considered above, it is only India that has laws that appear to place a little hurdle before the prosecution of judicial officer for crimes particularly the one involving corruption. The hurdle has by implication been judicially vacated by the Apex Court of India in the prosecution of Justice C S Karman. This shows that the provision of Section 17A of the Prevention of Corruption Act can now be done away with while judicial corruption or serious criminal breaches is traced to the door step of judicial officers. Summarily, there is no longer any impediment whatsoever to the prosecution of judicial officer accused of corruption in India even at the time the case of Nganjiwa was decided by the Supreme Court of Nigeria.

Ironically too, of all the countries considered above, India where there appears to be some sort of protection for corrupt judicial officer is the highest in the ranking of these countries next to Nigeria. In fact, India is far away at 85th position on the ranking list where Denmark emerged as the least corrupt country in the world and country with the best judiciary for the sixth continuous times in a roll.[153] It was stated by Langsted[154], that there has never been any report of corruption against any of Danish judicial officer but if there is he will be prosecuted. Such frank facts cannot be easily uttered by any Nigerian about state of corruption on the Nigerian judicial bench. The prevalence

[152] Prevention of Corruption Act of India 2018 as amended.
[153] Transparency International, 'Corruption Perception Index 2023', Available at < https://www.transparency.org/en/countries/denmark. Accessed on the 1st February 2023.
[154] Being part of online interview conducted with Professor Emeritus Lars Bo Langsted of Jurisdisk Insititut, Aalborg University, Department of Law, Denmark via Email on the 8th January 2023 at 4,44pm.

of corruption has been admitted by all and sundry including the Chief Justice of Nigeria.[155] It is on record that the last three Chief Justice of Federation vacated their office on account of one corrupt allegation or the other. In fact, Justice Walter Onnoghen was arraigned before Code of Conduct Tribunal and was appropriately sentenced on acts bothering on corruption.[156] The Chief Justice before the last was practicable booted out by his fellow brethren for absence of judicial accountability[157] to say but little.

It was unceremonious acts bothering on corruption that led to the decision of the Supreme Court of Nigeria in *Federal Republic of Nigeria v Nganjiwa* where the Court was called up to allow open prosecution of judicial officers accused of corrupt practices. This made the Supreme Court Justices to borrow leave from India on how it is done in their domain, a judicial territory not better than Nigeria in terms of judicial corruption perception. By the 2023 Transparency International report of Corruption Index, Nigeria still ranked the 150th most corrupt Nation of the World. While Indian was ranked 85th as against 80th position it occupied the previous year.[158]

From all these, one can say that the countries with little or no tolerance for judicial corruption and who has the laws forbidding judicial corruption and are ready to deploy it against any erring judicial officers without any form of feet dragging or reservations are far better in terms of judicial sanity and judicial transparency than countries with barriers or shield that cocooned its judicial officers particularly the few black dots on the white cotton of their Judiciary.

It is correct that Nigeria has laws that prohibits judicial corruption, but with the decision in Ngnjiwa's case still subsisting, no judicial officer can be prosecuted for corruption no matter how cogent and compelling the evidences are. Justice JJJ[159] said not allowing the judicial officers accused of corruption to face trial is a lesser injustice but returning them back to the bench by NJC is the greatest injustice to the society as the public is left confused on whether there are two laws that regulate the country; one for the judges and one for the others.[160].

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[155] Evelyn Okakwu, (above) note 2

[156] Ngozi O Medani, 'The Suspension of Justice Walter Onnoghen' Naqua LC Journal 2019 Also available at < https://www.acedemia.edu/38309359/THE_SUSPENSION_OF_JUSTICE-WALTER_ONNOGHEN_N-MEDANI_COPY_1_PDF. Accessed on the 1st February 2023.

[157] Evelyn Okakwu, (supra) foot note 2

[158] Trading Economics, 'India Corruption Rank 2023' available at < https://tradingeconomics.com/india/corruption-rank. Accessed on the 1st February 2023.

[159] Being part of interview with Justice JJJ in his Chamber at the High Court Complex, Abeokuta, Ogun State, 2023 on the topic Why Prosecution of Judicial Corruption Fails in Nigeria

[160] Ibid.

Assuming the Apex Court has rightly interpreted the laws and has come to the conclusion that NJC has the power to discipline judicial officers accused of corruption before prosecution can take place, thereby resolving the lingering issue of who should discipline a judicial officer in favor of NJC, one expects the NJC in accordance with the decision of the Apex Court to now open its books and attend to the complaints against these judicial officers in accordance with the decision of the Supreme Court. Rather than do this, the Council was busy returning the affected judicial officers who have wanton allegations of corruption unresolved against them to the bench without any form of disciplinary action initiated against these erring judicial officers. This amounts to a stab in the heart of the judiciary, and indeed a very difficult wound to heal.

The likely way out is for the NJC to live up to its bid and new responsibilities bestowed on them by the Apex Court unsolicited. There is no doubt that the decision of the Apex Court is not better than hijacking the Constitution by giving the NJC powers and rights that are never its constitutionally, the kind of power that from the available record they have never exercised and which the same Court has said they lack the power to exercise.[161]

In most of its proceedings, the Council only attends to complaints that has to do with misconduct and not crimes [162] as trial of criminal allegation is within the exclusive competence of the courts.[163] The fact that the NJC does not venture into the investigation of crimes in complaints before it against judicial officers was not placed before the Apex Court in Nganjiwas's case as NJC was not even a party to the case. This shows that the Apex Court need to timely create an avenue to review the decision with a strong intention to do justice to the present state of affairs which has further lowered the judicial integrity in the face of the elites and other critical stakeholders in the administration of justice without leaving out the general masses and the press who are eagerly waiting to see further disaster the decision will cause the arm.

The intention of the Apex Court in vesting the NJC with the power of discipline of judicial officer was explained by Ali[164] to the effect that it was perhaps done to protect the independence of the Arm and to rescue judicial officers from the oppressive claws of the Economic and Financial

[161] Garuba v Unimaid. (1986) 1 NSCC 246.
[162] Bridget Edokwe, 'NJC Reinstates Justice G. K Olotu as Judge of Federal High court' Barrister.NG.com, 29th January, 2023. Also available at < https://barristerng.com/njc-reinstates-justice-g-k-olotu-as-judge-of-federal-high-court/. Accessed on the 1st February 2023.
[163] Ss 36(4), 251 of CFRN 1999.
[164] Yusuf Ali (above) note 82.

Crimes Commission and other prosecuting institutions in the spirits of separation of power and judicial independence. How do one explain the place of sections 153 and 158 of the Constitution which created the NJC as an executive body? The sections when combined with sections 54, 55, 56 and 57 of the Constitution show clearly that it is the President that dictates what happens within the Council and that the so called NJC is not better than an extended hand of the President and in most case of the State Governors. This is a pure case of running away from flames to fire.

There are many decided cases[165] that have held that the NJC does not have power to remove any judicial officers from the bench, the power to hire and fire any judicial officers in Nigeria still lies with the Executive that is the President of Federal Republic. Then where is the power of discipline given to NJC when it can only bark but cannot bite? The Court that can bark and bite was denied of it constitutional obligations just because the judicial officers do not want to be prosecuted by EFCC?

15.0 Conclusion

The Supreme Court of Nigeria has roared, others can only bark. No court can dare try to speak on this issue again and if it does it will amount to nullity. Therefore, all other opinions, comments, complaints or debate on the issue of remains only in academic realm until the decision in Nganjiwa's case is revisited or the National Assembly passed a law to ameliorate the effect of the decision. However, transnational judicial dialogue has come to stay in enhancing justice and egalitarian society. Nigeria courts have taking the advantages on many occasions in resolving complex and maiden issue of national importance. Such issue will continue to resurface particularly in this jet age where artificial intelligence is almost taking over information dissemination and ways of doing things. Majority of our judges and justices are aliens to the world of information technology and are struggling to catch up with the new trends particularly when compared with their brethren from other advanced climbs where information technology originated and well accepted, leveraging on transnational judicial dialogue will bridged the gaps in this area and many more if only judicial precedents are taken from tested and trusted jurisdictions and not necessarily from the west.

[165] Ojibara vs Governor of Kwara State & Anor (2004) LPELR-13022(CA), NJC v Aladejana (2014) LPELR_24134(CA), OPene v NJC (2011) LPELR-479(CA). etc.

16.0 Recommendations

a. To right the wrong, is to make move for the Constitution to be amended to change the nomenclature of NJC from being an executive body to a judicial body with full power to appoint and remove by way of discipline its members as it is Denmark. The called should include excluding the decision of NJC on discipline of its member from being a subject of appeal. All member of NJC should be judicial officers or senior and well-respected members of the bar to be appointed by the arm and within the legal society.

b. By the decision in Nganjiwa's case, Nigeria judiciary appears to have traveled back to the state the India judiciary was in 1991, an age India itself had since put behind them in style, While other democracies of the world are flying to the future with good legislation to arrest corruption in all facet of their lives, the interpretation of the few anti-corruption laws in Nigeria are done to encourage corruption in the society including on the bench. Therefore, progressive interpretation of anti-corruption legislation with a view to discourage corruption at all sectors of the economy should be encouraged.

c. Countries with no barrier to prosecution of judicial officers accused of corruption are reported to be relatively free of corruption and occupied good position on the Transparency International Corruption Index Perception. Denmark remained the most corruption free country of the world and United Kingdom occupied the 15th position leaving India to number 85th and Nigeria to No 145th of the most corrupt nation of the world in year 2023. Therefore, whenever there is a need for transnational judicial dialogue the choice of jurisdiction is very important. Judicial precedent is better taking from jurisdiction that has proven and dependable bench and not from the ones where corruption remains a challenge.

d. There is also need to remove corruption and bribery from the definitions of misconduct by judicial officers at Paragraph 19 of the Part 1 to the Fifth Schedule of the Constitution as this will only create confusion and hideout for corrupt judicial officers. Once an act amounts to corruption it should be seen as crime and not a misconduct. The seat of a judicial officer is an exalted one. Judge are the image of God on earth. They are expected to be clean, honest and full of integrity and commission of crimes should be an aberration to them. A judicial officer

who therefore commit crimes require no judicial protection as this will continue to dent the image of the bench rub it of it most cherish legitimacy being the supporting pillar on which justice stands.

e. When taking judicial Precedent or having transnational judicial dialogue, attention should not on the precedent, rather the state of law, the fact leading to the decision, the circumstance and the acceptability of the decision by the people of the exporting country should be put into consideration and balanced with the peculiar circumstance at home. More importantly, precedent should be preferred from jurisdictions with better judicial history and records than countries with high level of corruption history and bad judicial reputation else the whole essence of judicial dialogue will be defeated.

RIGHT TO RECORD, SHARE NEWS OCCURRING IN PUBLIC PLACES VERSUS THE RIGHT TO PRIVACY AND DATA PROTECTION: SCOPE AND IMPEDIMENTS UNDER NIGERIAN LAW

Akinola E. Akintayo*

Abstract

Enabled by camera phones and wearable electronic gadgets; audio and audio-visual recordings and sharing of all manner of news and events occurring in private and public places have now become the norm. Every citizen with a camera-enabled smartphone and other digital devices have become the proverbial 'lonely bystander' who gather and disseminate news and events. Nowadays, most news and events are seen first on social media platforms and blogs as disseminated by private persons before they are reported on traditional media platforms. Recordings shared range from the sombre, the educative, the entertaining to the comical and the hilarious. Some of the recordings shared have helped in exposing corruption and fostering accountability and good governance. Others had the potentials of exposing citizens to ridicule and indignity and tended towards the offensive and undesirable. While this technology enabled development have liberalized news reporting, it has also created a host of new legal and ethical questions around privacy, data protection and freedom of expression. Employing a desk-based review and comparative analysis methodologies, the article explores and articulates the law regarding the right of private persons to record and share news and events in public places in Nigeria, including relevant legislation, case law, and the broader cultural and political context. The article also identifies limitations, gaps, prospects and challenges to the due exercise of the right in Nigeria.

Keywords: *Citizens journalists, Camera Phones and Wearable Electronic Gadgets, Freedom of Expression, Privacy, Data Protection*.

1.0 Introduction

Help me! Help me! Help me! Help me! He dey carry me dey go where I no know.[1]' Most readers of this piece will remember a viral video of a policewoman shouting the above words in a Keke (Tricycle) while struggling with the driver. The video trended widely on social media between

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[1] Don Jerry Tv 'Help me-E dey carry me go where I no no, Police woman cries out...' (19 May 2022) available at https://www.youtube.com/watch?v=pdKXKADWOxU (access 15 March 2023)

2021/2022 and has been made into hit songs by popular Nigerian artists. The expression has also been adapted into praise and worship songs in Nigerian churches.

The video was most probably shot and posted on social media by one of the passengers in the Keke. This scenario underlined the changing nature of news gathering and dissemination fostered and powered by current development in today's emerging technologies.

Enabled by camera phones and wearable electronic gadgets; audio and audio-visual recordings and sharing of all manner of news and events occurring in private and public places have now become the norm.

Every citizen with a camera-enabled smartphone and other digital devices have become the proverbial 'lonely bystander' who gather and disseminate news and events. Nowadays, most news and events are seen first on social media platforms and blogs as disseminated by private persons before they are reported on traditional media platforms.

Recordings shared range from the sombre, the educative, the entertaining to the comical and the hilarious. Some of the recordings shared have helped in exposing corruption and fostering accountability and good governance.

Others had the potentials of exposing citizens to ridicule and indignity and tended towards the offensive and undesirable. The growing popularity of this kind of news reporting was highlighted during the recent fuel and naira notes scarcity when social medial platforms were agog with video recordings graphically showing different reactions of the populace and driving the impact of the scarcity sharply home.

While this technology enabled development have liberalized news reporting, it has also created a host of new legal and ethical questions around privacy, data protection and freedom of expression. This article explores and articulates the law regarding the right of private persons to record and share news and events in public places in Nigeria, including relevant legislation, case law, and the broader cultural and political context to educate the general public as well as identify limitations, gaps, prospects and challenges to the exercise of the right in Nigeria.

2.0 Scope and Parameters of Private Person's Right to Record and Share News and Events in Public Places

Rights implicated by recording and sharing of events occurring in public spaces by private persons are the rights to privacy, data protection and freedom of expression. The rights are discussed seriatim below.

2.1 Privacy

Privacy is a contested concept lacking in precise meaning or contents. Thus, there are many approaches to ascertaining or determining the meaning and contents of privacy in specific cases. I however find the continuum of privacy interests approach of the South African Constitutional Court formulated by Ackermann J in *Bernstein v Bester NO*[2] the most useful. The approach is hinged on the legitimate expectation of privacy concept. The concept has two components viz: (i) a subjective expectation of privacy i.e. what feels private; and, (ii) objective reasonableness of the subjective expectation of privacy i.e. subjective expectation of privacy considered objectively reasonable by societal standards. In determining what is objectively reasonable, priority is given to the 'inner sanctum' or truly personal realm of a person's life. Expectation of privacy in the inner sanctum or truly personal realm is often objectively reasonable. Thus, privacy protection is strongest in the truly personal realm e.g. in bedrooms, marriage, procreation, sexual orientation, etc. However, the more a person moves into the community and interact in the public domain the more diluted his or her legitimate expectation of privacy with consequent reduction in the reasonableness of privacy expectations.[3] That is not to say that a person totally loses his/her right to privacy in the public domain or that privacy is always available in the inner sanctum.[4]

Thus, while a person in public space does not lose his or her right to privacy, the protection available is significantly diluted because it is to be exercised with due regard to the rights of others. Consequently, flowing from their freedom of expression, other persons interacting with the public domain have a right to capture and document the public domain. Consequently, the recording of

[2] 1996 (2) SA 751 (CC),
[3] Id 65 – 98.
[4] Right to privacy cannot, for instance, be invoked as a shield to prevent the investigation or prosecution of crime(s) in the inner sanctum.

the public spaces by audio and/or audio visual means by a person is not, as such, a violation of privacy of any person even if any such person is recorded in the process.

However, when a recording or documentation of a person is made in a public space, three considerations determine whether the recording or sharing of the recording will subsequently amount to violation of the right to privacy or not. The first is whether permanent or systematic record will result from the recordings. Where the recording is going to form part of a permanent or systematic record(s) or documentation of events, the storage and subsequent processing of the recording may violate privacy unless sanctioned by law which is justifiable and necessary in a democratic society. The second is whether there is targeted recordings or documentation of particular individual(s). Where this is the case, the recording will violate the privacy of the individual(s) targeted except there is consent or the recording is otherwise justified by law that is necessary and justifiable in a democratic society. The third is where the material(s) recorded is subsequently processed, published, or disseminated in a way or degree beyond that contemplated or foreseeable by person(s) recorded. For instance, if the recorded material was subsequently disseminated or viewed by persons which far exceeded exposure to passers-by present at the scene or beyond normal observations in the circumstance or otherwise used in way(s) beyond that contemplated or foreseen by the right-bearer(s).[5]

Application of the above principles are well captured and illustrated in *Peck v the United Kingdom.*[6] In Peck, the applicant suffered from depression and attempted to commit suicide. He was recorded by the close-circuit cameras (CCTVs) installed on the streets. His movement was brought to the attention of the police in the area and the suicide was prevented. The recordings were later posted by the police in newspaper articles and later TV shows to underline the positive impacts of CCTVs. The applicant sued for violation of his privacy by the police. The Court held that: video or photographic monitoring of individuals in public spaces is not a violation of privacy as such. However, the systematic and permanent record ensuing from the recordings in the particular instance violated applicant's privacy. The Court also held that the applicant could not have contemplated or foreseen that his activities on the day in question would be disseminated to such a large audience. Finally, the applicant on the day in question was not on a public street to

[5] *Peck v. the United Kingdom* (Application no. 44647/98, 28 January 2003) A decision European Court of Human Rights
[6] Ibid

participate in a public event, his consent was therefore required before broadcasting the video, alternatively; his identify could have been masked through technical means.

Thus, while a person is within his or her rights to document or record public spaces, persons and things that happens to comes into view in public places; subsequent storage, usage, dissemination, etc. of the resulting recordings beyond the manner and degree contemplated or foreseeable by recorded person(s) may amount to a violation of the right to privacy.

Recording and sharing of news adjudged a violation of the right to privacy may render the recorder or sharer liable to civil and penal sanctions under the Constitution and laws of Nigeria. The sharer or recorder may be liable to pay damages, compensation, or other forms of remedies that will adequately redress violation of the fundamental right guaranteed under the Constitution.[7] They may also be criminally liable for Cyberstalking under section 24 of the Cybercrimes (Prohibition, Prevention, Etc.) Act, 2015; criminal defamation under section 375 of the Criminal Code Act. Convictions for the above stated offences attract fines or 3 and 2 years imprisonment or both fines and imprisonment respectively, etc.

2.2 Data protection

Data protection is a clearer concept. It does not suffer from the vagueness and controversy inherent in the concept of privacy. The principal objectives of data protection is to reconcile respect for privacy and the protection of personal data of individual with the free flow of personal data to foster technological innovation and development.[8] Data protection is derived from the broader concept of privacy. However, data protection is not the same as privacy. The concept differs from privacy in the following ways: First, data protection have a more specific and at the same time broader focus than privacy. Second, data protection regulates the collection, processing and use of personal data and does not deal with other aspects of the private life of a person while privacy does. Three, data protection aims to facilitate free flow of personal data in a manner compatible with the rights and dignity of the human person while privacy have a broader concern. Four, while data protection is subject of specific data protection laws, privacy is often a matter of constitutional rights, although data protection is also increasingly becoming subject of constitutional rights.

[7] *Ushae v. C.O.P.* (2005) 11 NWLR (Pt. 937) 499.
[8] See for instance, Para 4 of the Preamble to the 1981 Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (Convention 108).

In terms of nomenclature, data protection, information privacy and data privacy are terms referring to similar concepts in different jurisdictions. Data protection is the term that is popular in Europe. Information privacy is popular in the United States and Canada while Data Privacy is a new term of art which recognises the nexus between privacy and data protection and seeks to combine the focus of the two concepts.[9]

The recognition of the importance of data protection in the current Fourth Industrial Revolution have spawned data protection frameworks at the international, regional, sub-regional and domestic levels across the world. At the international level, the Council of Europe Convention 108, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, is the first legally binding international data protection treaty. The Convention opened for signature on 28 January 1981. It is open to any country desirous of acceding to the Convention. Parties to the Convention are obliged to take necessary steps in their local laws to apply the principles of the Convention in their territory to ensure the protection of the fundamental rights of all individuals with respect to processing of personal data. The Convention was modernised in 2018 (Convention 108+) to take account of new challenges in the digital era and facilitate safer exchanges of personal data at international level as well as strengthen effective implementation of the Convention.

At the regional level, the European Union (EU) General Data Protection Regulation (GDPR) is the legally binding data protection framework within the EU. It was adopted on 14 April 2016. It regulates the collection, processing, use and transfer of personal data in the EU. It has extra-territorial application and is reputed to be the most influential privacy and data protection framework in the world. It is widely regarded as the data protection gold standard from which other frameworks across the world draw inspiration. At the African regional level, the African Union Convention on Cybersecurity and Personal Data Protection (the Malabo Convention) is the relevant framework. The Convention was adopted in June 2014. It is however yet to come into force as it requires 15 ratifications to activate. The required number ratifications are yet to be complete. The Malabo Convention combined electronic transactions, data protection and cyber security issues together in its provisions. The Convention obliges state parties to establish legal

[9] See for instance, A. B. Makulilo 'Privacy and data protection in Africa: a state of the art' (2012) 2 (3) *International Data Privacy Law* 163 at 164 – 167.

frameworks to ensure that processing of data respects the right to privacy of persons and sanction violations, etc. To facilitate the implementation of the Convention, the African Union asked the Internet Society in conjunction with global and regional experts and other stakeholders to develop the Privacy and Personal Data Protection Guidelines for Africa.[10]

At the sub-regional level, the ECOWAS Supplementary Act on Personal Data Protection (ECOWAS Supplementary Act) was adopted by the Heads of States and Government of ECOWAS in February, 2010. The Supplementary Act is a binding data protection framework within ECOWAS sub-region without the need for ratification. All that is required is domestication and incorporation of the framework into domestic law. The Supplementary Act obliges ECOWAS member states to 'establish a legal framework for the protection for privacy of data in terms of its collection, processing, transmission, storage and use of personal data without prejudice to the general interest of the State'.[11]

At the domestic level, the new Nigeria Data Protection Act 2023 (the Act) is now the data protection framework in Nigeria. The Act was signed into law on 12 June 2023 by the President of the Federal Republic of Nigeria. The Act provides rules for legal processing of data, the rights of data subjects and sanctions for failure to observe regulatory requirements. The Act also establishes the Nigeria Data Protection Commission (the Commission) to oversee the implementation and enforcement of the Act.

The different data protection norms examined above provide for rules for the processing of personal data. They also stipulate legal bases for the processing of personal data. The different data protection norms framed the meaning of data processing so widely that it seems to encompass any dealing with personal data. The ECOWAS Supplementary Act, for instance, defined data processing as:

> Any operation or set of operations carried out or not, with the assistance of processes that may or may not be automated and applied to data, such as obtaining, using, recording, organisation, preservation, adaptation, alteration, retrieval, saving, copying, consultation, utilisation, disclosure by transmission, dissemination or

[10] Internetsociety.org 'Personal Data Protection Guidelines for Africa A joint initiative of the Internet Society and the Commission of the African Union' (9 May 2018) available at https://www.internetsociety.org/wp-content/uploads/2018/05/AUCPrivacyGuidelines_2018508_EN.pdf (accessed 24 March 2023).
[11] Article 2 of the ECOWAS Supplementary Act.

> otherwise, making available, alignment or combination as well as blocking, encryption, erasure or destruction of personal data.[12]

From the above, it does appear that any dealing with personal data will amount to data processing. The photographing, audio and audio-visual recording and sharing of news and events occurring in public places by citizens' journalists qualify as processing of personal data if it records or captures private persons who happened to be in the public place at the time.

Under the new Act, for instance, processing of personal data is illegal unless it comes within allowable exceptions under the framework. The allowable exceptions under the new Act are: (i) processing of personal data for personal or household purposes provided that the processing does not violate the privacy of a data subject;[13] the processing is for the prevention, investigation, detection, prosecution of crime or the execution of penal sanction;[14] the processing is to prevent or control a national public health emergency;[15] processing is required for national security purposes;[16] processing is 'in respect of publication in the public interest, for journalism, educational, artistic and literary purposes…';[17] processing is required for the 'establishment, exercise, or defense of legal claims, whether in court proceedings, or in an administrative or out-of-court procedure'.[18] The Commission is empowered by the Act to by regulation prescribe types of personal data and processing that may be exempted from the application of the Act.[19]

Where the above-listed exceptions do not apply, there are five circumstances under which personal data can be lawfully processed under the Act. They are: (i) where the data subject has given consent and has not withdrawn that consent; (ii) where the processing is necessary for the performance of a contract to which the data subject is a party; (iii) if processing is necessary to comply with a legal obligation of the data controller or data processor; (iv) if processing is necessary to safeguard the vital interests of the data subject or of another person; (v) and, where processing is necessary in the public interest on in furtherance of official authority conferred on the data controller or data

[12] Article 1 of the ECOWAS Supplementary Act.
[13] Section 3 (1) of the Nigeria Data Protection Act, 2023.
[14] Section 3 (2) (a) of Nigeria Data Protection Act, 2023.
[15] Section 3 (2) (b) of Nigeria Data Protection Act, 2023.
[16] Section3 (2) (c) of Nigeria Data Protection Act, 2023.
[17] Section 3 (2) (d) of Nigeria Data Protection Act, 2023.
[18] Section 3 (2) (d) of Nigeria Data Protection Act, 2023.
[19] Section 3 (3) of Nigeria Data Protection Act, 2023.

processor; processing is in furtherance of the legitimate interests of the data controller, data processor or a third party the data is disclosed.[20]

From the above, consent and the processing of personal data in personal or household activities are the two item heads relevant to the present enquiry. Of course, where a person consents to audio or audio-visual recording and sharing of himself or herself, no issue(s) arises under the Act. However, where there is no consent and the processing of personal data in the particular instance falls outside the lawful basis for the processing of personal data mentioned above, the defence that is potentially open to a private bystander is the processing of personal data in personal or household activities under section 3 (1) of the Act mentioned above. Processing under this exception is not however permitted where the processing will violate the fundamental right to privacy of citizen(s).

The personal or household activities exception under the Act is similar to article 2 of the GDPR. Under article 2 of the GDPR, processing of personal data in the course of purely personal or household activity like taking or sharing of personal photos, blogging, posting on social media, etc. are outside the scope of the GDPR. It has however been held that the publication of a minor's photos taken by the grandmother on social media without the consent of the parents in circumstances where the social media accounts of the grandmother are not proved to be protected from public access does not come within the exception.[21] This decision implies that a private person who in the course of personal or domestic activity e.g taking of selfies, etc. in a public place captured or recorded a third party will be well within his or her right to so record within the personal or domestic activity exception. Such recordings cannot however be shared or disseminated beyond the personal or household sphere without the consent of the third party(ies) concerned. This will be deemed a violation of the fundamental right to privacy of the individual(s) concerned under the Act. This conclusion tallies with the position of the law of privacy on the scope of the right to record and share news and events occurring in public places discussed above. This require that recordings cannot be disseminated or published beyond the manner and degree contemplated or foreseeable by the person(s) recorded.

[20] Section 25 (1) of the Nigeria Data Protection Act, 2023.
[21] Data Guidance 'Netherlands: Gelderland Court issues judgment on minors' photographs on social media under GDPR' (21 May 2020) available at https://www.dataguidance.com/news/netherlands-gelderland-court-issues-judgment-minors (accessed 10 March 2023).

Processing of personal data in violation of the provisions of the Act is subject to administrative, civil and penal sanctions. Violators may be liable to the following orders from the Commission: a warning;[22] an order to cease and desist;[23] an order to remedy violation;[24] an order to pay compensation to victims;[25] an order to account for profits made from the violation;[26] an order to pay penalty or remedial fee(s).[27] Any person dissatisfied or aggrieved by any order of the Commission may apply for judicial review of the order within 30 days of the order being made.[28]

Refusal or neglect to comply with any order of the Commission is an offence which renders offenders liable to a fine or imprisonment which does not exceed one year or both fine and imprisonment.[29] Victims of unlawful processing of personal data may sue to recover damages from culpable data controller or data processor in civil proceedings.[30] Property or assets of person(s) convicted for offences under the Act may be subject to forfeiture in accordance with the Proceeds of Crime (Recovery and Management) Act.[31]

2.3 Freedom of Expression

Freedom of expression is one of the basic fundamental human rights protected by law at the international, regional and national levels. The Universal Declaration of Human Rights, 1948 (UDHR);[32] the International Covenant on Civil and Political Rights, 1966 (ICCPR),[33] the European Convention on Human Rights, 1950 (ECHR);[34] the African Charter on Human and Peoples' Rights, 1981 (African Charter);[35] and, the Constitution of the Federal Republic of Nigeria, 1999;[36] all provide for the right to freedom of expression. Many countries have also ratified thematic human rights instruments which provide for the right to freedom of expression.[37]

[22] Section 47 (2) (a) of the Nigeria Data Protection Act, 2023.
[23] Section 47 (2) (c) of the Nigeria Data Protection Act, 2023.
[24] Section 48 (2) (a) of the Nigeria Data Protection Act, 2023.
[25] Section 48 (2) (b) of the Nigeria Data Protection Act, 2023.
[26] Section 48 (2) (c) of the Nigeria Data Protection Act, 2023.
[27] Section 48 (2) (d) of the Nigeria Data Protection Act, 2023.
[28] Section 50 of the Nigeria Data Protection Act, 2023.
[29] Section 49 of the Nigeria Data Protection Act, 2023.
[30] Section 51 of the Nigeria Data Protection Act, 2023.
[31] Section 52 of the Nigeria Data Protection Act, 2023.
[32] Universal Declaration on Human Rights, Article 19.
[33] Art. 19 of the ICCPR
[34] Art. 10 of the ECHR
[35] Art. 9 of the African Charter
[36] Section 39 of the Constitution of Nigeria.
[37] *International Convention on the Elimination of all Forms of Racial Discrimination*, *the Convention on the Rights of the Child*, *the Convention on the Rights of Persons with Disabilities*, among others,

Freedom of expression may therefore be seen as an evolving norm of customary international law. This is flowing from the overwhelming rate of states' ratification of treaties containing freedom of expression provisions, plethora of freedom of expression soft laws, robust jurisprudence and practices of states.

In espousing the contents of freedom of expression, the African Commission on Human and People's Rights observed with respect to Article 9 of the African Charter that: 'The article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country.' [38]

Freedom of opinion and expression is a right that has both a personal and a social dimension. It is viewed as a necessary element for a person's complete development, a necessity for any community, and the lifeblood of every free and democratic society.[39] In *Kauesa* v *Minister of Home Affairs* & Ors,[40] the Supreme Court of Namibia held that free expression is necessary for the maintenance of a democratic state; that citizens must be free to speak, criticize and praise and that muted silence is not an ingredient of democracy because exchange of ideas is essential to the development of democracy.[41]

The right to freedom of expression extends beyond the frontiers of oral expression. It covers information and ideas of all kinds in writing or in print, in the form of art, or through any other media of a person's choice. It protects all forms of communication, including political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expressions, teaching and religious discourse.[42]

Freedom of expression is crucial to the realization of other rights as well. Freedom of assembly and association, and the right to vote are dependent on freedom of expression for effect and realization.[43] Nonetheless, the right to freedom of expression is not absolute. There are limitations

[38] *Media Rights and Others* v *Nigeria* Comm. No 24/98 (2000) para 54.
[39] UN Human Rights Committee. (2011). *General Comment No. 34, Article 19, Freedoms of opinion and expression*. UN Doc. CCPR/C/GC/34. Available at http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf (accessed 10 March, 2023).
[40] [1995] NASC 3.
[41] (2003) 3 CHR 234.
[42] Ibid.
[43] Ibid.

which must be necessary, proportionate and justifiable in a democratic society. Under international and domestic laws, states are empowered to impose limitations on freedom of expression if the limitation is in furtherance of objectives of national security, public order, public health and public morals.[44]

To pass human rights muster, however, limitations of fundamental rights must comply with the following standards: 'They must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest protected'.[45] Even then, the principle of proportionality must take cognizance of the form of expression at issue and the means of its dissemination. In *Bodrozic* v *Serbia and Montenegro,*[46] for instance, the UN Human Rights Committee observed that the ICCPR gives greater weight to freedom of expression when it comes to discussions about public figures and political figures in democratic societies. This decision is similar to the decision of the African Court of Human Rights in *Konate* v *Burkina Faso*.[47]

In *Sunday Times* (No 1) v *United Kingdom*, the European Court of Human Rights laid down the requirements for determining when an interference with the right to freedom of expression is necessary in a democratic society as follows: 'whether the "interference" complained of corresponded with a ''pressing social need'', whether the reasons adduced by the national authorities to justify the interference were ''relevant and sufficient'' and whether the measure taken was ''proportionate to the legitimate aims pursued''. [48]

Thus, the Rabat Plan of Action[49] which aims to harmonise articles 19 freedom of expression and article 20 prohibition of incitement, etc. provisions of the ICCPR recommends that laws restricting freedom of expression must pass the three-part test of legality, proportionality and necessity. It also recommends six factors for national courts to consider when assessing whether a particular speech ought to be prohibited as incitement as follows: the context, speaker, intent, content or

[44] European Convention on Human Rights, article 10, paragraph 2.
[45] CCPR General Comment No. 27: Article 12 (Freedom of Movement) (CCPR/C/21/Rev.1/Add.9)para 14
[46] Communication No. 1180/2003 (31 October 2005). U.N. Doc. CCPR/C/85/D/1180/2003. A decision of the UN Human Rights Committee.
[47] Application No: 004/2013. (Decision of the African Court on Human and Peoples' Rights).
[48] *Application No. 6538/74 (Judgment of the European Court of Human Rights) (26 April 1979)* para 62
[49] OHCHR 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence '(5 October 2012) A/HRC/22/17/Add.4.

form, extent of the speech and likelihood of inciting hatred. The right to freedom of expression and information must be effectively protected if democracy is to advance and if diversity and tolerance are to be encouraged.

The right to record and share news and events in public places is part and parcel of the right to freedom of expression. In *Branzburg v. Hayes,*[50] the United States Supreme Court observed that the First Amendment right to freedom of speech and the press protects the right 'to seek news from any source by means within the law.'[51] The nexus between the right to record and share and freedom of expression was explicitly made in *Glik v. Cunniffe* where the Court pronounced thus:

> The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.[52]

Consequently, the United States courts have vindicated a general right of private citizens to record matters of public interest occurring in public places under the prism of the First Amendment.[53]

A specie of the right of private citizens to record matters of public interest is the right to record police officers/public officials in the course of their official duties in public places. In *Branzburg v. Hayes*, the United States Supreme Court held that the First Amendment guarantee of freedom of speech and press in its traditional and historical sense is the right of the lonely pamphleteer who employed carbon paper just as much as that of large corporations and institutional press with latest photocomposition methods.[54] According to the Court, '[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'[55] The 'lonely pamphleteer' metaphor in *Branzburg* was replaced with the 'lonely bystander' metaphor in *Glik v. Cunniffe*[56] by the U.S. Court of Appeals for the First Circuit 2011. The Court held in

[50] 408 U.S. 665 (1972)
[51] Id at 681 – 682.
[52] 655 F. 3d 1 (1st Cir. 2011) 13
[53] Fordyce v. City of Seattle, 55 F .3d 436, 439 (9th Cir.1995); Demarest v. Athol/Orange Cmty. Television, Inc., 188 F.Supp.2d 82, 94–95 (D.Mass.2002); Channel 10, Inc. v. Gunnarson, 337 F.Supp. 634, 638 (D.Minn.1972); among others.
[54] Note 50 above
[55] Ibid
[56] Note 52 above.

Gilk that there is a clearly established First Amendment right to film police officers in the conduct of official business in a public space. The Court held further that guaranteeing public's right to gather information about government officials aids in the uncovering of abuses and have salutary effect on governmental function more generally.[57] The Court also correctly notes that the line between private citizens and journalists have become very difficult to draw in contemporary times because of the changes in technology and society. The Court concluded that First Amendment right to film police officers performing official functions is not without limitation. It is subject to reasonable time, place, and manner restrictions.[58] For instance, the right may not be exercised in an unreasonable manner or in way(s) that will interfere or impair the due performance of police functions.

The right to record police officers in the course of official duties is protected as corollary of the right to share or disseminate the resulting recording.[59] In *American Civil Liberties Union of Illinois V Anita Alvarez,*[60] the defendant state attorney had argued that to record police officers while openly performing their functions in a public place is wholly unprotected. In rejecting that argument, the United States Court of Appeals for the Seventh Circuit held that the right to record public officials is included in the First Amendment freedom of speech and the press as incidental to the right to publish or disseminate the resulting recording. According to the Court, the right to disseminate or publish the resulting recordings will become ineffective or insecure in the absence of the prior right to record.[61] Thus, the principal right protected is the right to share or disseminate the resulting recording. The right to record is protected as ancillary and necessary right to the right to share or disseminate in order to ensure the sustenance and effectiveness of the right to share or disseminate. There is thus a constitutional right of citizens under the First Amendment to record matters of public interest generally as well as a right to record police officers in the course of their official duties in a public places specifically. This is circumscribed only by reasonable time, place, and manner restrictions as discussed above.

[57] Id at 10
[58] Ibid.
[59] *American Civil Liberties Union Of Illinois V Anita Alvarez* (United States Court of Appeals For the Seventh Circuit) 679 F.3d 583 (2012)
[60] Ibid
[61] Id at 23 – 24.

Nigeria's constitutional and human rights regime is largely borrowed from the United States of America. Consequently, the interpretation of relevant parts of the United States Constitution have a persuasive effect and can serve as guide to the meaning and contents of the Nigerian Constitution. Thus, although the texts of the First Amendment of the United States Constitution are not identical to section 39 freedom of expression and the press provisions of the Constitution of the Federal Republic of Nigeria, 1999, as amended (the 1999 Constitution), the texts and tenor of the provisions contain similar features. It follows therefore that a right to record and document public spaces generally and a special right to record and disseminate recordings of police officers in the course of official duties may be founded upon section 39 of the 1999 Constitution within the scope and ambit of the law and principles discussed above.

A number of cases touching directly on the right to record and share recordings of law enforcement officers in the course of official duties in public places have come before Nigerian courts. Sadly, the courts have not risen to the occasion to progressively and proactively interpret section 39 of the Constitution in line with best practices of which the United States is an example. Cases that came before the courts have either been dismissed on technical ground or too restrictive views of the matter were taken. This may have been due to lack of awareness of developments in that area of the law or conservativeness of the courts or both.

In *Diana Ele Uloko v. Inspector General of Police*,[62] for instance, applicant, her sister and others were participating in the 2020 End SARS protest in Abuja. The applicant alleged that while she was recording and posting the peaceful protest on her social medial handle with her Samsung phone, the police came to disrupt the protest. She claimed she and her sister attempted to run away but were ambushed by the police. The applicant alleged that the police rough handled and assaulted her sister in the process of arresting her and when the police realized she was recording the assault they pounced on her as well, beat her up, seized and broke her phone. She brought an action against the police before the Federal High Court, Abuja Division, for the assault, intimidation, harassment and destruction of her phone, etc. The principal issue the applicant raised before the court was that activities of the police violated her freedom of expression under section 39 of the Constitution. In resolving the issues, the Court, side stepped the freedom of expression component

[62] Suit No. FHC/ABJ/CS/1519/2020. Delivered by the Federal High Court, Abuja Division on the 26th day of August, 2021.

of the claim and focused on the ancillary issues. According to the Court: 'Admittedly, the Applicant has raised a constitutional question which in my humble opinion, touches on alleged harassment, intimidation, threatening, physical assault and damage to her mobile phone suffered at the hands of officers of the Respondent on 11/10/2020 during the End SARS protest in Abuja'.[63] Thus, the Court left out the violation of section 39 which was the main claim of the Applicant before the Court. This summation and analysis of Applicant's claims by the Court affected the Court's eventual decision Thus, even though the suit was undefended by the Respondent, the Court held that the Applicant has not furnished sufficient evidence for the claims to succeed because Applicant's case must succeed or fall on its own strength and not on the strength or weakness of defendant's case. The Court consequently struck out the Applicant's case. Thus, the Court missed a golden opportunity to pronounce upon the nexus between freedom of expression and the recording and sharing of news and events occurring in public places by private persons.

Also, in *Rachel Ochanya Uloko v. Inspector General of Police*[64] similar issues and claims arose as the one in *Diana Ele Uloko* above before the same Federal High Court, Abuja Division. The Court reached the same decision and struck out the case.

In *Incorporated Trustees of Digital Right Lawyers Initiative (DRLI) v. Commissioner of Police, Delta State*,[65] DRLI brought application for the enforcement of fundamental rights on behalf of Prince Nicholas Makolomi who was detained beyond constitutionally permissible time limit by the Police. The detainee was a journalist reputed to have video recorded members of SARS who left an injured citizen on the ground and fled with his car on his phone and shared the recording online. The recording was alleged to have sparked the End SARS protest of 2020. The detainee was subsequently arrested and detained while the Respondent refused all entreaties to release or charge him to court. The applicant consequently brought a suit to enforce his fundamental right to personal liberty before the Federal High Court, Asaba Judicial Division. The Court found that the detainee was detained for at least 3 days before being charged to court by the Respondent. The Court held this is outside the constitutional time limit of 1 or 2 days stipulated under section 35 of

[63] Id at 6 – 7.
[64] Suit No. FHC/ABJ/CS/1520/2020. Delivered by the Federal High Court, Abuja Division on 26th day of August, 2021.
[65] Suit No. FHC/ASB/CS/140/2020. Judgment of the Federal High Court of Nigeria, Asaba Judicial Division. Delivered on the 24th day of November 2020.

the Constitution. The Court held that this was a violation of the detainee's right and awarded N200,000 damages against the Respondent. The Court did not make any pronouncement on the freedom of expression dimension of the case disclosed by the facts. Granted that the claim of the Applicant before the Court was restricted to violation of personal liberty, the Court ought to have considered, even if *obiter*, the freedom of expression issue disclosed from the facts. More so, since the main defence of the Respondent for the arrest and detention of the detainee was alleged defamation and cybercrime offences made against the detainee. Discussion of the scope and extent of freedom of expression of the detainee to record and share the recorded activities of members of the SARS in question vis-à-vis allegation of defamation and cybercrime alleged against him would have further enriched the freedom of expression jurisprudence in Nigeria.

The courts lost the opportunities in the above cases to shape and develop the right of private persons to record and share news and events in public spaces, especially the right of private persons to record law enforcement officers in the course of their official duties in public places as concomitant of the right to share such recordings. We hope opportunities will again present themselves in the future and that the courts will seize those opportunities to redeem themselves.

Unfortunately, the right to record and share news and events occurring in public spaces, like most other freedoms, can be put to both noble and ignoble uses. Some of the ignoble ends the right can be deployed includes spreading disinformation/fake news, propagating hate speech, injuring the reputation and dignity of persons, maliciously exciting discontent and disaffection among the citizens and/or against the government, etc. To address the challenges posed by the negative use of this right, there are existing laws as well as new ones that have been enacted to counter the ignoble use of the right. A perusal of the laws however revealed that most fall short of international human rights standards subscribed to by Nigeria for the limitation of the right to freedom of expression. In the section below, I identify and examine the different laws, where and how they fall short of standards and the reforms needed to make them compliant with international human rights standards.

3.0 Limitations and Impediments to Citizens' Journalists' Rights to Record and Share News Occurring in Public Places under Nigerian Law.

While fake news, hate speech, defamation, etc are significant problems of freedom of expression which necessitates regulation of the right, it is a contrasts that what is actually required to engage

the downsides and evils of freedom of expression is actually more and not less freedom. More freedom to access and disseminate relevant information is a more effective method to counter the evils of fake news, hate speech, etc.

Although not yet sanctioned by Nigerian courts, analysis above revealed that the right to record and share news and events in public places, in furtherance of the required more freedom, are part and parcel of freedom of expression under comparative foreign laws and jurisprudence. Like other constitutional rights, however, the right is not without impediments and limitations. This part of the essay discusses some of the potential impediments and limitations to the exercise of the right to record and share news and events occurring in public spaces in Nigeria.

The first impediments to the exercise of the right to record and share news Nigerian law is the offence of Cyberstalking in section 24 (1) (a) and (b) of the Cybercrime Act, 2015. The section prohibits the sharing of messages or other matter which is 'grossly offensive pornographic or of an indecent, obscene or menacing character…';[66] or which the sharer or sender knows to be false for purposes of 'causing annoyance inconvenience danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, ill will or needless anxiety to another…'.[67] The two provisions above were given judicial approval by the Court of Appeal in *Incorporated Trustees of Paradigm Initiative for Performation Technology Development and Ors v AGF and Ors*[68] *(Paradigm Initiative)* and *Solomon Okedara v AGF*[69] (*Solomon Okedara*). In *Paradigm Initiative,* the provisions of section 24 (1) of the Cybercrime Act were challenged as unconstitutional and a violation of freedom of expression guaranteed in section 39 of the 1999 Constitution. According to the claimants, words like 'annoyance', 'inconvenience', 'needless anxiety', 'insult', 'indecent', 'obscene' etc. that were used in the provisions have no definite meaning and are not defined in the statute. They are therefore liable to subjective interpretation and arbitrary enforcement by law enforcement officers. This, the Applicants allege may be used to chill the robust exercise and enjoyment of the right to freedom of expression in the Constitution. The trial Federal High Court sitting in Lagos struck out the case of the Applicants as unmeritorious. The Applicants appealed to the Court of Appeal. At the appellate court, the Applicants referred the Court to the Supreme

[66] Section 24 (1) of the Cybercrime Act, 2015.
[67] Section 24 (1) (b) of the Cybercrime Act, 2015.
[68] Suit No: CA/L/556/2017. Judgment of the Nigerian Court of Appeal. Delivered 1 June 2018.
[69] Suit No: CA/L/174/2018. Judgment of the Nigerian Court of Appeal. Delivered 28 February, 2019.

Court of India decision in *Shreya Singhal v Union of India,*[70] and Kenya High Court decision in *Geoffrey Andare v the Hon. Attorney General and 2 Ors*[71] where the Courts in both jurisdictions declared similar words in their statutes vague, overbroad and unconstitutional. The Court of Appeal refused to follow the examples of the Indian and Kenyan Courts. The Court held that the decisions of the foreign courts are of persuasive effects only and may only be followed if there are no indigenous legal materials dealing with the issue at stake. The Court posited further that section 36 (12) of the 1999 Constitution which sets out the contents of any statute creating criminal offences in Nigeria deal directly with the issues at stake. The Court reasoned that perhaps the foreign jurisdictions referred to has no provisions similar to section 36 (12) of the 1999 Constitution and that was why those courts decided their cases the way they did. Consequently, the Court held that there was nothing vague, overbroad or unconstitutional in the provisions of 24 of the Cybercrime Act, 2015.

In *Okedara,* similar issues on section 24 of the Cybercrime Act arose again before the Court of Appeal. The cases of *Shreya Singhal and Geoffrey Andare* were also cited to the Court. The Court of Appeal in *Okedara* did not even acknowledge, talk less of comment, on those cases. The Court also dismissed the appeal and held that section 24 is constitutional. Although, the Court of Appeal in both *Paradigm Initiative* and *Okedara* was right to say that foreign decisions are not binding on the courts, the Court however erred in both cases by not giving due regard and weight to relevant decisions of foreign courts contrary to the objectives and direction of the Fundamental Rights (Enforcement Procedure) Rules, 2009 (FREP Rules) in fundamental human rights cases. Paragraph 3 (b) of the FREP Rules enjoined the courts to '…respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware…' Judicial decisions based on municipal, regional and international bills of rights form part and parcel of the laws the courts are enjoined to respect.

The second noticeable impediment is section 38 of the Cybercrime Act. Section 38 of the Act requires internet service providers to keep and retain for a period of two years traffic data and subscribers information as may be prescribed by authority responsible for regulating

[70] Writ Petition (Criminal) No.167 of 2012.
[71] Petition No 149 of 2015.

communication services in Nigeria and release the information if requested by the regulating authority or law enforcement agency.[72]

In *Paradigm Initiative,*[73] the Applicants argued that section 38 of the Act is a restriction of freedom of expression and privacy because it undermines internet users' ability to communicate anonymously online.[74] According to the Applicants, the requirements under the section for internet service providers to disclose data of online users to law enforcement agencies will inhibit open communication and robust debates in violation of the freedom of speech and privacy of online users. Applicants also argued that the absence of judicial oversight to police enforcement agencies exercise of power under section 38 and safeguard the rights and safety of online users renders the law incompatible with international standard and failed the constitutional test of being justifiable and necessary in a democratic society. The Court of Appeal rejected these arguments of the Applicants and held that section 38 is not a violation of the privacy and freedom of expression of online users. According to the Court, section 38 is a veritable tool to assist law enforcement officers in the investigation and detection of crime. The Court is also of the view that section 38 (4) of the Cybercrime Act is sufficient safeguard for the confidentiality and privacy of online users' data.

The defects and challenges inherent in section 38 of the Cybercrime Act was however confirmed by Shagbaor Ikyegh JCA in *Paradigm Initiative.* Although, the learned Justice supported the lead judgment, the Justice observed that section 38 of the Act requires further look by the National Assembly. According to the learned JCA, to leave the provisions of section 38 (2) (b) and (3) of the Cybercrime Act the way it is would be an 'invitation and encouragement of unbridled interference with the rights of the citizen to the privacy of their communications at the whims and Caprices (sic) of the relevant authority or law enforcement agencies'.[75] In the Jurist's view, section 38 of the Act ought to be made subject to judicial oversight in terms of requiring an order of court of competent jurisdiction to be obtained upon ex-parte application with particulars showing prima facie reasons why data requested should be released by service providers to the relevant authority or law enforcement agency(ies). [76] The learned Jurist concluded that the absence of such safeguard

[72] Section 38 (1) and (2) of the Cybercrime Act, 2015.
[73] Supra, note 68 above.
[74] Id at 10 – 11.
[75] Id at 35.
[76] Ibid.

would lead to capriciousness and impunity of relevant authority and law enforcement agencies in the derogation of constitutionally guaranteed rights of citizens. I completely agree with position of the learned Justice of the Court of Appeal above.

Another significant impediment to the due exercise and enjoyment of the right to record and share news is the criminal defamation provisions of the Nigerian Criminal Codes and the Penal Codes Acts for the South and North of Nigeria respectively. Section 375 of the Criminal Code Act, for instance, provides that: 'Subject to the provisions of this chapter, any person who publishes any defamatory matter is guilty of a misdemeanor and is liable to imprisonment for one year and any person who publishes any defamatory matter knowing it to be false is liable to imprisonment for two years.' Defamatory matter is defined in the Code as one which is likely to injure the reputation of any person by exposing him or her to hatred, contempt or ridicule or is likely to damage the person defamed in his or her profession or trade by an injury to his or her reputation.[77] Thus, the sharing of any recording deemed to be defamatory within the context of the definition above is likely to be met with the harsh provisions of the laws above, especially if they affect or relate to the rich and the powerful or political office holders in the country as experiences have so far shown.

The consensus in international, regional and domestic human rights circles is that harsh punishments appertaining to criminal defamation laws are unjustifiable restriction of the right to freedom of expression.[78] For one thing, there is tendency for the laws to be used by the rich and powerful to stifle criticism and public debate. For another, it has been rightly observed that, '[t]he threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression. Such sanctions clearly cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals' reputations.'[79] Criminal defamation laws fail the constitutional/human rights tests of necessity because there are adequate non-criminal sanctions to protect and redress infractions of individual reputations.

[77] Section 373 of the Criminal Code Act.
[78] Article 19 'Defining defamation: Principles on Freedom of Expression and Protection of Reputation' Policy Brief (2017) available at https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf (accessed 15 January 2023) 10 – 12; I. J. Udofa, 'Right to Freedom of Expression and the Law of Defamation in Nigeria' (2011) 2 *International Journal of Advanced Legal Stud & Governance* 75 at 80 – 81.
[79] Article 19 (ibid) at 11

Lastly here, the offence of sedition is another significant impediment to the exercise and enjoyment of the right to record and share news and events. The offence of sedition is provided for in section 50 and 51 of the Criminal Code Act. The sections prohibit any publication which has the intention of (i) bringing into hatred or contempt or exciting disaffection against the person of the President or of the Governor of a State or the Government of the Federation; or (ii) exciting the citizens or other inhabitants of Nigeria to attempt to alter, otherwise than by lawful means, any matter established by law in Nigeria (iii) raising discontent or disaffection among the citizens or other inhabitants of Nigeria; or (iv) promoting ill-will and hostility between different classes of the population of Nigeria.

Publication is defined in section 50 (1) of the Criminal Code Act to include all written or printed matter and everything, *whether of a nature similar to written or printed matter or not*, *containing any visible representation, or by its form, shape, or in any manner capable of suggesting words or ideas,* and every copy and reproduction of any publication.[80] Although sedition deals principally with written or printed matter or words, the words italicized above clearly suggests that publication covered by the offence of sedition goes beyond the confines of written or printed matter to all forms of publications as long as they contain visible representation or are capable of suggesting words or ideas. Audio and audio visual recordings will clearly come within the ambit of sections 50 and 51 of the Criminal Code, the latter qualifying as words and the latter qualifying as visible representations suggesting words or ideas. Consequently, audio and audio visual recordings deemed to have seditious intention are likely to be caught by the provisions of sections 50 and 51 of the Code.

The alarming impact of sedition on freedom of expression stems from the fact that any criticism or condemnation of the President of the country or Governor of a state or government which brings the President, Governor or government into disaffection, hatred or contempt, no matter how well intentioned, is likely to run afoul of the law of sedition. What is even more troubling is that truth is not a defence to a charge of sedition.[81] Thus, well founded criticisms and accusation of government may amount to sedition. The implication of this on democracy and accountable government is aptly captured by Adegboruwa thus: 'What it means is that state actors can get away

[80] Emphasis supplied
[81] See for instance, Q*ueen v. Amalgamated Press of Nigeria Ltd* (1962) WNLR 272

with the deployment of the instrumentalities of state to gag citizens, subject them to arbitrary trials and in that wise, shut all avenues for dissent.'[82] Sedition also fails the constitutional test of necessity because it is overbroad and not proportionate to the legitimate objectives of the law. This position is in tandem with the Court of Appeal decision *Nwankwo v. State*[83] where the Nigerian Court of Appeal declared sections 50 and 51 of the Code incompatible with sections 36 and 41 of the 1979 Constitution (now sections 39 and 45 of the 1999 Constitution) and therefore unconstitutional. It has, rightly in my view, been argued that not all provisions of section 50 of the Code is unconstitutional.[84] Those provisions dealing with raising discontent or disaffection among the citizens or other inhabitants of Nigeria or promoting feelings of ill will and hostility between different classes of the population are reasonably justifiable in a democratic society and are likely to pass constitutional muster. Therefore, the Court of Appeal ought not to have declared the whole provisions invalid.[85] Granted that the Court may have erred in declaring the whole section unconstitutional, the fact remains that the portion relating to criticisms of government and government functionaries which was specifically before the Court and was declared unconstitutional remains on the statute books and is still being used by government functionaries to harass and prosecute innocent citizens till date despite the declaration of unconstitutionality since 1983.[86]

This not to say that the rights to freedom of expression and the concomitant right to record and share news and events in public places are absolute. They are subject to internal limitation clauses in section 39 (3) and the general limitation clauses in section 45 of the 1999 Constitution. Thus, laws made to prevent disclosure of information received in confidence, or to ensure the authority and independence of courts, or those made in furtherance of the regulation of telephony, wireless broadcasting, television or the exhibition of cinematograph films will generally not be incompatible with the right to freedom of expression.[87] Laws made to impose restrictions on persons holding public offices in the Federal or state governments, or to impose restrictions on

[82] E. Adegboruwa 'Criminalization of the freedom of expression – Part 2' *The Guardian* (3 December 2021) available at https://guardian.ng/opinion/criminalization-of-the-freedom-of-expression-part-2/ (accessed 18 January 2023).
[83] (1983) 1 NCLR 366
[84] I. J. Udofa, 'Right to Freedom of Expression and the Law of Defamation in Nigeria' (2011) 2(1) *International Journal of Advanced Legal Studies and Governance* 75 at 81.
[85] Ibid.
[86] See for instance, 'CPJ Nigerian editor charged with sedition, jailed' (29 January 2008) available at https://cpj.org/2008/01/nigerian-editor-charged-with-sedition-jailed/ (accessed 18 January 2023).
[87] Section 39 (3) (a) of the 1999 Constitution.

members of the Armed Forces, Nigeria Police Force or other security services or agencies established by law will also pass constitutional muster.[88] The right to freedom of expression is also subject to laws made 'in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom or other persons.'[89]

However, laws made in furtherance of the permissible grounds of restriction above must pass 'the three-part test' of legality, legitimacy and necessity. The test of legality requires that restrictions on the right to freedom of expression must be provided by law; such law(s) must be sufficiently precise to enable individuals order their conducts and affairs according to law; such law(s) must be accessible to the general public; must not confer unfettered discretion on those charged with the responsibility to execute or enforce the law; must give sufficient guidance to those with the responsibility to enforce the law on the kinds of acts and omissions that will amount to violation of the law and those that will not; must not be discriminatory; and, must not provide for penalties or sanctions that are incompatible with human rights.[90] The legitimate test require that restrictions must be in furtherance of one or more of the objectives or purposes under the permissible grounds for restrictions mentioned above. The necessity test requires that the means employed must be necessary to achieve the intended legitimate aims or objectives; employed the least restrictive means; and, must be proportionate.[91]

A close scrutiny of the laws impeding the right of private citizens to record and share news and events examined above alongside others in that category often violate one or more standards or requirements of 'the three-part test' articulated above. Thus, in the development, analysis or assessment of laws restricting freedom of expression, the three-part test developed by courts, jurists and scholars of freedom of expression needs to be kept in mind to serve as a beacon or guide to human rights compliant regulation of the right to freedom of expression.

4.0 Conclusion

The article examined the evolving right of private persons to record and share news and events occurring in public places and its different dimensions in Nigeria. The scope and parameters of the

[88] Section 29 (3) (b) of the 1999 Constitution.
[89] Section 45 (1) of the 1999 Constitution.
[90] Human Rights Committee, General Comment No. 34 (CCPR/C/GC/34) paras 24 – 26.
[91] Id paras 33 – 36.

right were examined. The limitations and impediments to the due exercise of the rights vis-à-vis the rights to privacy and data protection in Nigeria were also examined. The essay finds that, although not yet judicially recognized in Nigeria, the right to record and share is part and parcel of the right to freedom of expression under comparative foreign laws and jurisprudence. It also finds that although private persons have a right to record and share news and events in furtherance of their rights to record matters of public interest occurring in public spaces; and in a more limited instances, in furtherance of their right to process personal data in personal and domestic activities, the rights to privacy and data protection of other people present in the public spaces circumscribed the right of private persons to record and share news and events occurring in public places in significant ways. The article also finds that there will be significant impediment to the due exercise of the right if and when it is recognized in Nigeria. This is because existing frameworks for regulating the right to freedom of expression in Nigeria will unduly restrict the scope of the exercise and enjoyment of the right in Nigeria.

It is therefore recommended that the framework for regulating freedom of expressions in Nigeria should be brought up to par with comparative international human rights law standards for a more rights friendly and emerging technology compliant legal regime in Nigeria**.**

THE IMPERATIVE OF TEAM BUILDING AND TEAMWORK: A CRITIQUE

Ayinla, L. A. (Ph. D)*

Abstract

Team building and teamwork appears to be an ordinary concept that much attention is not paid to it. However, the idea of togetherness can never be over emphasised, in that the need for collaboration and collaborative team building and teamwork have always been a catalyst for concrete achievements. Social relationship in term of socializing, networking and ensuring cordial relationship towards a better understanding of each player in team / stakeholder on any project or work is essentially desirable for efficiency and achievement of the desired goal(s). This paper adopts the qualitative / doctrinal research method to attempt a critique of this concept for better appreciation and assimilation towards a better application of same in our daily and academic life for meaningful development.

Key Words*: Team, Teamwork, Team Building and Exercise, Networking and Efficiency*

1.0 Introduction

It is pertinent to state that this paper was first delivered by this author as a resource person during the Disability Law Advocacy Project (DLAP), organized by Open Society Initiative for West Africa (OSIWA) Disability Law Advocacy Project (DLAP), Implemented by the Department of Jurisprudence and International Law, Faculty of Law, University of Ilorin

DLAP & Open Society Initiative for West Africa (OSIWA)[1], specifically titled Capacity Building Workshop on Grant Management & Disability Rights.

To start with, Team building is a compound word or term that describes different forms of activities adopted to enhance social relations by defining roles within team, group or set of people on a project that has to do with collaborative task, duty or job. There is an age long saying that united we stand and divided we fall, this statement underscores and emphasises the importance of togetherness, collaboration and networking to validate the statement that no man is an Island. It was therefore in furtherance of a team work for optimal performance that team building Exercise was incorporated as one of the topics for discussion and this author assigned as the presenter. Thus, this paper will look at Teamwork, Team Building, Team Building Skills, Why Team Building Works, Team Building Exercise, Steps, key elements of Team Building and Outcome.

2.0 Team Building and Teamwork

Team building is described as a collective term for the various types of activities embraced to develop social relations and defined roles within teams, usually involving collaborative task or work.[2]

Team building is an activity or activities used to enhance social relation.[3] Team building is a continuous process that helps group develop in a cohesive unit. The members share expectations for accomplishing the task and as well trust and support one another including individual members of differences.[4] Teamwork is therefore, seen as a collaborative effort of a

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[1] At Ideal Nest Hotels, Osogbo Osun State, between Jan. 31 – 2nd February, 2020.

[2] See https://en.m.wikipedia.org>wiki accessed 7th May, 2024

[3] Ibid

[4] See https://hr.berkeley.edu>interaction accessed 7th May, 2024

group to achieve a common goal or to complete a task in an effective and efficient way[5]. This is located within the context of a team that is more of a group of individuals who are interdependent individuals that works in unison towards the achievement of a common goal. The black's Law Dictionary describes Teamwork as work done by a team.[6] In fact, TEAM is used as an acronym to mean T-together, E-everyone, A-achieves, M-more.[7]

Team building is so important that it enhances capacity building towards ensuring timeous delivery of the project. A well-built team with the necessary skills will actually and eventually deliver by achieving the goals systematically. This is peculiar and visible in School / Institutions (cluster, commissioned work or students project, healthcare firm or group), football, basketball, racing- within the athletes and more importantly academics in project management (typical of this, is the Disability Law Advocacy Project). Therefore, to achieve the objectives of a project, then, the members work as a team. Team building enhances social relation, involves defining roles within team and collaboration for collaborative outcome.

2.1 Steps to Team Building

It is important to note that in ensuring team building, it is imperative to ensure that a good foundation is laid for good and purposeful leadership. It is as well important to build solid relationship with each member of the team. There is the need to establish good relationship between the team members or participants. However, it necessary to encourage and emphasise teamwork among the participants or members. The need to create and establish ground rules and regulations to guide the team is very desirable to ensure justice, equity and fair play.

[5] See Teamwork, https://en.m.wikipedia.org/wiki/Teamwork accessed 7th May, 2024
[6] Bryan A. Garner ed., Black's Law Dictionary, 9th Edn. (U.S. Thomson Reuters: West Publishing Co., 2009) p. 1602
[7] See Cheryl Viola, www.visitjeromeidaho.com accessed 7th May, 2024

Besides, it is important to always be able to strike a balance between evaluating team performance and individual performance.[8]

3.0 Team Building Skills

There are some key team building skills that should be possessed by a team. They are respect, positive attitude, relationship building, sense of responsibility, understanding feeling, honesty and collaborative influence. Team building skill should be encompassing to include goal setting and ability to assign role, ability to communicate (that is to communicate goals, responsibility, reasoning, ideas, progress and results), ability to listen, reflect, ability to match make (that is to ensure team bonds and link members together to achieve a winning combination), ability to solve problem, ability to delegate, ability to give and get feedback, ability to organize and resolve conflicts.[9]

The possession of the above skills will go a long way to impact positively on the outcome and achievement of a team in term of energy, time, and resources that have been invested in the project.

4.0. Why Team Building Works

Certain reasons have been adduced as to why team building works. It is asserted that networking, socializing and getting to know each other better makes team building to work. Moreover, teamwork and boosting team performance understanding also helps participant to work together for future progress. In the same vein, healthy competition increases productivity towards winning as a result of provision of incentive. In like manner, celebration, team spirit, fun, motivation is a major reason why team building works because winning brings about

[8] See 5 Steps to Building Productive Teams at Work, https://www.jobberman.com/discover/building-productive-teams? Accessed 8th May, 2024.
[9] See Team Building Skills: Examples and Meaning, https://teambuilding.com/blog/team-building-skills accessed 8th May, 2024.

celebration as usually seen in football or academic achievements due to the fact that it is the team bonding that takes the project to the next level.

Furthermore, collaboration and fostering of innovation and creativity also foster recording great achievements. It is also pertinent to note that communication and working better together is a most important reason why team building works, in that the dissemination of the information and its final application is cardinal to the ultimate goal of the project.

Notwithstanding the above, plethoral of reasons have been adduced why team building works and summarised to include the fact that it improves productivity, boost morale, improves communication, encourages problem-solving skills, fosters innovation and learning, offers mental satisfaction, creates healthy work culture, enables appreciation of the entire workforce, enhances corporate relationship in industry, enables conflict resolution, creates sense of value in the employees/members and allows the employees/participants to see one another in a different positive light.[10]

There is need to marry intellectual exercise with physical exercise for effectiveness and efficiency in achieving desired goals. It is a fact that thinking is hard job. This is likened to the study of law that renders a man acute, duteous, ready in attack, prompt in defence and full of resources. Thus, it is imperative to ensure and guide against all work without exercise that could make a scholar, intellectual, researcher or a team member a dull participant.

5.0 Team Building Exercise

Team building involves providing skills, training and resources that a team needs to work effectively[11], in order to achieve a strong, reliable and effective team. Thus, the fact that the

[10] See 12-reasons-why-team-building-works, https://www.opengrowth.com/blogs/reasons-why-team-building-works accessed 7th May, 2024
[11] See Team Building Exercises and Activities-Making Team Building an Everyday Priority, https://www.mindtools.com/akp37i0/team-building-exercises-and-activities accessed 7th May, 2024

team will venture to go to the field to implement the project, then it is imperative to have header (head, coordinator or leader) – Teamwork (the group as a whole) – hands-together (unity of purpose or purposeful bonding). It appears that a number of concept and idea revolves round the totality of the discussions on team building and teamwork. Therefore, it is important to know one's team, to work towards a common goal, develop strong team skills and ensure connection with other team.[12]

6.0 Team Work Spirit & key elements of Good Team Building

The spirit of team building towards teamwork is highly desirable for optimal performance in achieving set goals of a team. The key elements of a good team is seen in shared goal, interdependence, bonding / togetherness and stability towards management of self-coordination within a large or larger given social system.[13]

In the same vein, a team should be productive in view of available resources due to guidance from coaches or supervisors, project monitor or monitoring group or sponsor from supporting organization to justify the sponsorship.

Furthermore, each member of the team should have a clearly defined role within the sphere of the project, so as to have a clear purpose of being in the team and not just making up the number to avoid redundancy.[14]

[12] See for useful team building exercises and activities, Useful 66 Team Building Activities to Bring Your Team Together (and have fun), https://www.sessionlab.com>blog accessed 7th May, 2024. See also Team Building Exercises for Work in 2024, www.betterup.com accessed 7th May, 2024.
[13] https://en.m.wikipedia.org>wiki accessed 7th May, 2024, see also Thompson, Leigh, Making the Team: A Guide for Managers, 4th edn., (Upper Saddle River, New Jersey: Prentice Hall, 2011) ISBN 978-0-13-014363-1
[14] Chang, Bordia and Duck et al., Punctuated Equilibrium and Linear Progression: Toward a New Understanding of Group Development, Academy of Management Journal. 2003, 46 (1): 106-117. Doi: 10.2307/30040680, JSTOR 30040680

In 2020, Tennenbaun and Salas identified seven characteristic of successful team collaboration or team building as capability, cooperation, coordination, communication, cognition as in shared understanding, coaching and availability of favourable conditions like resources.[15]

7.0 Outcome / Conclusion

To realize a strong, reliable and effective team that is formidable enough to manage and deliver a project, the central tenets of teamwork as shown in communication, interaction, interdependence and collaboration should be adhered to. In fact, it is advised that for more effective teamwork, adequate team size based on set objectives should be maintained, the need to comply with the laid down rules and regulation guiding the member or size of the team statutorily or based on international best practices.[16]

It should be stated herein that as a result of individual personal strength, skills and as well weakness, coming together to work as a team further presents an opportunity and avenue to learn from one another to improve productivity, efficiency which brings about resource building / capacity building thus propelling a well prepared members full of new skills to approach immediate and future challenges.[17]

If all this is ensured, then all barriers would have been broken to achieve team work.

The achievements made so far in the department of Jurisprudence and International Law, Faculty of Law and University of Ilorin as a whole is attributable to team building and teamwork. Thus, creating a purposeful synergy is central to development

[15] See https://blogs.oregonstate.edu>inspire accessed 7th May, 2024
[16] https://en.m.wikipedia.org>wiki accessed 7th May, 2024. See also Montebello, Anthony R., Buzzotta, Victor R. Work Teams That Work, Training and Development, 1993 47 (3).
[17] See for further dynamics, https://your.yale.edu/we-know-teamwork-important-how-important accessed 7th May, 202

RESERCH PROGRESS REPORT

CHALLENGES ASSOCIATED WITH THE IMPLEMENTATION OF THE PROVISIONS OF THE DISABILITY LAW IN NIGERIA

Barau Christy*

1.0 Introduction

One of the biggest triumphs in the internationalization of human rights is the creation of regional and worldwide human rights systems. These systems are crucial platforms for the protection and advancement of human rights, particularly those of people with disabilities.[1] People with disabilities have made valiant attempts to establish their legal rights as legitimate members of society throughout the world. Prior to the 1970s, the majority of laws addressing the difficulties these people faced focused more on providing some kind of social security or public assistance programs. There was a change in the 1970s and 1980s centered on the rights of disabled people to the same protection under the law as enjoyed by the rest of the population.[2] People with disabilities have fought for their rights by demanding that they be judged on their own merits rather than based on preconceived notions about their condition. They also argued that society needed to alter in order for them to engage more completely in secular pursuits.

About 25 million Nigerians were reported to have at least one handicap in the 2011 World Report on Disability. And by 2021, almost 32 million Nigerians are expected to have a disability of some kind.[3] In Nigeria, disability issues are often viewed with the lens of charity or welfare, which often occasion social exclusion and disempowerment of the group.

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[1] United Nations, Office of the United Nations High Commissioner for Human Rights and Inter-Parliamentary Union, From Exclusion to Equality: Realizing the Rights of Persons with Disabilities, Handbook for Parliamentarians, Professional Training Series No. 14 (United Nations, 2007), available at: http://www.ohchr.org (accessed 28 January 2023)

[2] R. F. Antonak, 'Development and Psychometric Analysis of the Scale of Attitudes Toward Disabled Persons', 13 (2) Journal of Applied Rehabilitation Counseling (1982): 22–9.

[3] J. O. Mmatli, 'Translating Disability-Related Research into Evidence-Based Advocacy: The Role of People with Disabilities', 31 Disability and Rehabilitation (2009): 14–22

People with disabilities live with the painful reality of pity and shame every day. Their access to many facets of life, including as education, health care, and job, is restricted due to the discrimination they experience. Particularly over the past ten years, the disability rights movement has taken root in many nations around the world. In many ways, it is a "visibility project" whose main message is to remind us of something we do not need to be reminded of—namely, that people with disabilities are human beings and, as such, possess the same human rights as everyone else and the right to enjoy them to the same extent. The purpose of the growing human model of disability is to recognize that people with disabilities belong in society's mainstream and that achieving independence and participating on really equal terms is not just a desired social goal but also a legal obligation. To create really inclusive societies for everyone is their ultimate goal.

Disability law is primarily concerned with, and defined by, issues relating to the role of the law in causing, maintaining, opposing, and contesting disablement. These issues are crucial and have significant social justice consequences.[4] "Disability" is thought to mean the disadvantage or oppression that results from it. Like other social structures and behaviors, the law and the justice system function in ways that are damaging to actualize and support the disadvantage faced by those with attributed impairments. On the other hand, they also offer ways to challenge limiting behaviors and institutions.

On December 13th, 2006, the Convention on the Rights of Persons with Disabilities and its Optional Protocol were approved. the third of May 2008 marked the convention's implementation. State parties must carry out the Convention's provisions for it to have an impact on the lives of people with disabilities, as well as those of their families, caregivers, and communities. Adopting the necessary legislative, administrative, and other measures for the implementation of the rights recognized in the Convention is one of the duties of State parties under Article.

On March 30, 2007, and on September 24, 2010, Nigeria accepted the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol. States adopt a specific action known as ratification when they indicate their commitment to abide by the legal rights and obligations outlined in the Optional Protocol or the Convention. Nigeria is therefore

[4] J. Buckingham, 'Writing Histories of Disability in India: Strategies of Inclusion', 26 (4): Disability and Society (2011): 419–31.

required by law to uphold the CRPD's human rights provisions.[5] Thankfully, President Muhammadu Buhari signed the Discrimination Against Persons with Disabilities (Prohibition) Act 2018 into law nine years after Nigeria adopted the United Nations Convention on the Rights of Persons with Disabilities. The Law awarded punitive damages to anyone who had been discriminated against because of their disability while enshrining the recommendations of the Convention on the Rights of Persons with Disabilities. A National Commission for Persons with Disabilities has also been established by the government to manage disabled people's access to housing, education, and healthcare. The new Act is seen as the first step Nigeria must take to fulfill its CRPD responsibilities. It is pertinent to note that, in addition to the federal legislation, state-level disability laws have been passed in the following states: Kano, Niger, Bauchi, Plateau, Kwara, Kogi, Ekiti, Lagos, Ondo, and Anambra.

It is important to emphasize that certain documents, including as treaties, conventions, and protocol, have legal force for the states who ratify them. To fully implement an international treaty on their national territory, countries that have ratified it must issue implementing orders, amend existing laws, or enact new legislation. Through treaties, nations can be compelled to uphold the terms of their agreements. On the other side, non-binding documents include declarations, resolutions, norms, and principles. They may be employed in some circumstances to persuade governments to present a more favorable view of their nations' human rights records. The CRPD's rules apply in this situation to Nigeria and its federating states.

1.2 Expressing the Aim and Objectives

The aim of this research is to examine the challenges associated with the implementation of the provisions of the Disability law in Nigeria. The work is guided by three specific objectives as follows: to identify the rights of people with disabilities in Nigeria; to determine the level of awareness and utilization of the Disability Right laws in Nigeria; and to examine the challenges associated with the implementation of disability right law in Nigeria

[5] B. O. Nwabueze, The Presidential Constitution of Nigeria (Sweet & Maxwell, 1982), pp. 32–3; see M. A. Ajomo, The Development of Individual Rights in Nigeria's Constitutional History (Nigerian Institute of Advance Legal Studies, 1993), pp. 1–3.

1.3 Articulated Research Questions

The following questions were formulated: What are the rights of people with disabilities in Nigeria; what is the level of awareness and utilization of the Disability Act law in Nigeria; and What are the challenges associated with the implementation of the provisions of the disability law?

1.4 Significance of the study and Methodology

According to the World Bank, the percentage of people who are disabled worldwide is projected to be 25%.[6.] This makes it a matter of necessity for policy makers to look at the needs of these people.

It is sufficient justification to acknowledge the degree to which persons with disabilities have experienced discrimination in their daily activities given the country's societal abandonment of the disabled. The purpose of the current study is to identify the main obstacles to the application of the disability law's provisions in Nigeria. The study's conclusions will serve as the foundation for the stakeholders' judgments regarding how best to defend these people's rights.

The research adopted four methodologies of data collection: interview, on-site visit, focus group discussions and desk review research method.

2.0 Overview of the Literature Review

2.1 Rights of people with Disability

A truly democratic country is one in which constructive efforts are made to promote and protect all of its citizens from various backgrounds so that they can cooperate in achieving the country's objectives. But through its attempts to establish policies and laws that forbid discrimination based on race, ethnicity, national origin, gender, marital status, sexual orientation, age, color, and disability, the Nigerian government has made and is still making concerted efforts aimed at achieving the goal outlined in the same standard as the Convention on People with Disabilities (CPWD).[7] These efforts have not yet, nonetheless, been translated into actuality.

[6] UNICEF and the Victor Piñeda Foundation, It's About Ability: Learning Guide on the Convention on the Rights of Persons with Disabilities (2009), available at: http://www.unicef.org (accessed 13 July 2013)

[7] This was declared by Mr Danlami Umaru Basharu, President of the National Association of People with Disabilities, on 19 December 2011. Source: http://www.fmi.govt.ng/22-million.nigeria (accessed 18 July 2013).

This failure is due in part to the government's lack of a strong commitment to achieving inclusivity and affirmative action policies that would protect those with disabilities. Nigeria currently boasts a population of about 150 million people, 22 million of whom are disabled in some way, whether physically or mentally.[8]

However, stigma and discrimination continue to be pervasive issues in Nigeria that affect every aspect of PWDs' life. These phenomena are seen in everyday life, including job, home and family, and even at the societal level, where they extend to difficulties in maintaining a minimal quality of living. People with disabilities frequently say that prejudice and stigma are worse than their primary problem.[9] There is a lack of knowledge among family members of people with disabilities about the effects of these prejudiced attitudes and discriminatory behavior. It appears that stigmatization can result in self-stigma, particularly when PWD and their families internalize society's judgments of them. They might even start to believe what other people are saying and thinking about them, which frequently results in self-blame and a drop in self-esteem. Many persons with disabilities may reduce their social networks and miss out on life's opportunities because they fear rejection due to stigma. This may then result in isolation, unemployment, and a decrease in income. The main motivation for many people to conceal their disability and refuse assistance is past or present discrimination.[10] Thus, evidence abounds in many countries, particularly in developing countries, that PWD routinely experience human rights violations.

These violations also include housing conditions that are filthy and inhumane, as well as insufficient, demeaning, and damaging care and treatment provided by medical facilities. Inadequate housing, discrimination in access to school, and work possibilities are all included.[11] Beyond all these violations, every person, including PWD, is entitled to the protection of his or her fundamental human rights. Based on the principles of equality and non-discrimination, this explains the relevance of all international human rights conventions and their applicability to individuals with disabilities, such as the Universal Declaration of Human

[8] Section 42, Constitution 1999 (Nigeria); see K. Ayo, 'Ability in Disability: The Empowerment of the Disabled', in J. M. Coetzee's Life and Times of Michael L., Working Paper (2009).

[9] Michael, note 8 above, pp. 187–8.
[10] Ibid
[11] M. Miles, 'Some Historical Texts on Disability in Classical Muslim World', 6 (2–3) Journal of Religion, Disability and Health (2002): 77–8.

Rights. 39 More particular conventions, such as the Convention on the Rights of Persons with Disabilities, are also applicable to people with mental health issues. 40 These offer unequivocal proof that the rights of disabled people in society must not, sadly, be hampered by issues that go beyond a single instance of maltreatment. This makes it important to look into some of the fundamental concerns pertaining to the rights of people with disabilities in Nigeria in order to gauge the amount of the government's concern for their plight.

2.2 Rights of PWD to Equity in Education

PWD youth still lack the legal right to the same type of education as their non-disabled peers in Nigeria after more than a century of state-sponsored education. The causes of this include lack of sufficient education, poverty, family or societal neglect, etc. The vast majority of schools, colleges, and universities in Nigeria are still ill-equipped to accept willing PWD in a mainstream setting. Students with disabilities are consequently obliged to accept segregated "special" facilities that lack the tools and materials to give them the skills they need to either find employment or live independently as adults. Disability segregation is not a result of congestion in regular schools or a lack of resources, but rather a result of a lack of commitment and ability to handle the issues. There are attempts as earlier noted concerning the provision of services to individuals with disability as can be inferred from the Nigerian National Policy on Education[12] which provides that 'every Nigerian child shall have a right to equal educational opportunities irrespective of any real or imagined disability, each according to his or her ability'. [13] This provision is further complemented thus: 'equal access to educational opportunities for all citizens of the country at primary, secondary and tertiary levels both inside and outside the formal school system'.[14] However, due to lack of mandatory legislation, the manifestation of such services has not been forthcoming.[15] It has been rightly observed that there has been severe criticism of Nigerian education, among which is its failure to take account of learners living with disability. The need to consider individual differences, especially those of disabled persons, is not unconnected with the fact that children do not all develop the same way.

[12] Recently a special school for the almajiris (beggars) has been established in the northern part of the country; there have been other efforts before, like the Nomadic Education and Adult Literacy programme
[13] Section 1(4)(c), National Policy on Education 2004 (Nigeria).
[14] Ibid., subsection 5(c) of section 1.
[15] M. M. Akanbi, Advocating Mandatory Laws for the Protection of Rights of Persons with Disabilities, paper presented at the inauguration seminar of the Nigerian Universities Deaf Students Association, Unilorin Chapter, held at the University of Ilorin (2007), p. 3.

Lack of equitable educational opportunities for people with impairments is a significant issue in Nigeria when it comes to the disability issue. The right to an equitable education is not covered by the fundamental rights clause even if it is one of the directive principles and governmental policy. Equal educational opportunity is therefore difficult for people with disabilities to enforce against the government due to its non-justiciability. This goes against the universally recognized human right to education for all, which is safeguarded by a number of international agreements. This is a really alarming occurrence. As a result, in Nigeria, there are differences in the educational possibilities offered to disabled and non-impaired people. It will simply not be possible to realise the goal of Education for All if the Nigerian government does not achieve a complete change in circumstances.[16] Even with the increasingly obvious set of areas of action for the Nigerian government that have not been sufficiently explored, the current obstacles facing people with disabilities in realizing their right to education remain significant. There is evidence from the paucity of national government, local government, and family policies that can help lessen the typical obstacles that disabled people encounter in obtaining a quality education.

A significant step in this direction was the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD). According to the CRPD, inclusive education is the main method for granting disabled people their right to an education. The definition of inclusive education systems in this context is all people learning together in regular classrooms in their locality or community, regardless of the range of their abilities and disabilities, with teaching strategies, resources, and learning environments that meet the needs of all girls and boys. A rights-based analysis serves as the foundation for inclusive education systems, which may empower students, celebrate diversity, end prejudice, and advance more inclusive society. With regard to addressing inequalities, this can be a potent strategy. By challenging widely held beliefs and behaviors, it can also combat discrimination, enabling us to appreciate and welcome the diversity in our cultures.

The Federal Government of Nigeria in its quest to address inequality in education for people with disability established the National Council for Special Education in 1976, with the aim of looking into the issues of the disabled and providing advice to the government from time to

[16] Instructively, the Dakar Framework for Action adopted a World Declaration on Education for All (EFA) in 2000, establishing the goal of providing every girl and boy with primary school education by 2015. It also clearly identified Inclusive Education (IE) as a key strategy for the development of EFA.

time.[17] In accordance with a direction from the federal government, a special unit was also established at the federal ministry of education, and special education sections were established at all state ministries of education. Additionally, a facility and a center for impaired students' education were constructed. Due to inadequate and inappropriate institutional settings, a lack of conceptual understanding and a general lack of capacity, this endeavour has failed to make any progress toward improving the suffering of disabled people in Nigeria.

There is proof that academically, impaired students in segregated learning environments perform poorly compared to typically developing students in regular schools. The majority of the postsecondary instruction offered to impaired students focuses on "social training" and "general life skills." However, government effort[18] in this perspective has also faced some setbacks, hindering people with disability against personal, vocational and social adjustment. These obstacles also include a lack of adequate educational funding as well as specialized educational resources, infrastructure, and tools that might allow those with disabilities to access educational opportunities without facing discrimination. In addition, there is the high cost of educational supplies and tools for these students, many of whom, of course, cannot afford to purchase things like Braille machines and papers, typewriters and typing sheets, carbon papers, thermoforming papers, tape recorders and cassettes, and ear-mould hearing devices. Most educational institutions in Nigeria don't plan their buildings with the needs of people with disabilities in mind. The difficulty of poor and ineffectively implementing the policies developed to improve the education of students with disabilities only serves to exacerbate these failures.

The idea is that giving disabled people the chance to get an equitable and high-quality education will help them win other rights over the course of their lives, facilitating improved access to jobs, healthcare, and other services. To fulfill this function of "an enabling right," education must be of high quality, accessible equally, designed to combat discrimination, and allow each kid to thrive in accordance with their unique talents and interests.

[17] M. A. Oladejo, 'Educating Nigerian Disabled Students: Problems and Prospects', Journal of School of Education (Federal College of Education (Special), Oyo, 2001), pp. 15–24.

[18] A. Garuba, 'Inclusive Education in the 21st Century: Challenges and Opportunities for Nigeria', 14 (2) Asia Pacific Disability Rehabilitation Journal (2003): 74.

2.3 Rights of PWD to Equity in Employment Opportunity

Poverty is both a cause and a result of disability. There is a strong correlation between poverty and disability, as well as a cyclical trend whereby impairment increases vulnerability to poverty and vice versa. People with disabilities have limited employment opportunities, which has negative economic and societal repercussions if the status quo is upheld. Instructively, the link between poverty and disability has been established, which prompted the United Nations to establish guidelines for equal opportunities for persons with disabilities, with rehabilitation as one of the principles for obtaining the highest level of independence.[19] However, despite many disability initiatives, accessibility to employment opportunity is far from being achieved for people with disability in Nigeria. The poor perception of disability and people living with it has fueled the lackluster attitude of governments in terms of policy direction and action on the provision of equal employment for PWD. This is unfortunate because the extent to which a society provides the means of sustenance is probably not a good measure of how much interest it has in and importance it attaches to the well-being of its PWD. Employment is crucial for every individual's economic and social well-being yet Nigerian attitudes and practices still demonstrate elements of discrimination against PWD in the realm of employment which are well entrenched in the labour market. Some of these elements are conspicuous in:

- the policies of employers against disabled workers;
- employment agencies, both public and private, when they direct disabled workers into low-status occupations;
- the provision of employment quotas for the disabled in society;
- the accessibility and compatibility of workplace facilities for the disabled.

In most of the management positions in organisations specialising in the employment of disabled people in Nigeria such as schools for the handicapped and even ministries responsible for the disabled are held by non-disabled people. This level of inequality accelerates the discriminatory spiral into which the majority of disabled people find themselves. This is in contradistinction with South Africa which has the most comprehensive disability legislation and policy that address integration and employment opportunity for the PWD.[20]

[19] United Nations Standard Rules in Equalization of Opportunity, note 1.
[20] See, generally, the Employment Equity Act 1998 (South Africa).

2.4 Rights of PWD to Equity in Transportation to the Workplace

In a similar vein, the attitude and commitment of Nigeria to transportation still demonstrates clear discrimination against people with disability. Essential transportation and mobility play key roles in the struggle to meet employment requirements and equal opportunities in the workplace and environment discriminate against people with disability in Nigeria. It must be noted that affordable and reliable transportation allows people – and especially those with disability – access to important opportunities in education, employment, healthcare, housing and community life. Because of Nigerian's lackadaisical attitude to the rights of people with disability in this realm, transportation infrastructures have remained disproportionately inaccessible to people with disability who often lack viable transportation options. Importantly, people with disability particularly need accessible, affordable transportation options that bring employment, healthcare, education, housing and community life within reach. However, transportation choices for people with disability are still limited and account for the persistent gaps in compliance that continue to create significant barriers for people with disability.

In Nigeria there is no evidence of a commitment from the government through policy formulation in this area to provide adaptable and accessible transportation as an essential means of mobility to the workplace. When people with disabilities cannot access a station or bus stop, they may be forced to go out of their way to find one that is accessible, which in some cases may make travel prohibitive. Adequate and adaptable transport services are crucial for those individuals with disability who rely on it to get around. Therefore, the failure of the Nigerian government to show commitment in providing accessible transport services not only causes frustration but can also cause missed health appointments and employment problems for those with disability.

It is argued that there is need for a programme of and support for new public transportation services and alternatives to assist individuals with disability with their transportation needs to the workplace. There ought to be mobility management programmes utilising a comprehensive and holistic approach to assist people with disability to use all types of transportation to meet their transportation needs.

2.5 Political Rights of PWD

There is no provision under the Nigerian Constitution which emphatically accords PWD any special rights to participation in government in the form of equal representation, nor is there

any in terms of exercising the rights of franchise.[21] Although it may be argued that membership of political party of one's choice and participation in elections are guaranteed to PWD by virtue of the Nigerian Constitution the reality of this argument is that no such opportunity exists for PWD in term of representation, a special voting environment or contesting for elective position. Unlike Nigeria, some countries have gone a step further in the protecting the political rights of PWD by inserting specific clauses that recognise PWD representation in government.[22] A good point of reference is the Constitution of Malawi that provides for the representation of various interest groups including disabled persons in the Senate[57] while the Constitution of Uganda requires that Parliament shall consist of a certain number of representatives of persons with disability. It provides: 'such numbers of representatives of the army, youth, workers, persons with disability and other groups as Parliament may determine'. Similarly, the Kenyan Constitution provides that Kenyan citizens shall be protected from discrimination on the grounds of race, colour, disabilities, etc. and no law shall be made in any provision that is discriminatory either of itself or in its effect.

So also, no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority. In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connotation, political opinions, colour, creed or sex. Thus, persons of one of such description are subjected to disability or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The results which can be inferred from the constitutions of these jurisdictions reveal a clear positive attempt at creating equal opportunities for citizens' self-actualisation, including able and disabled people. Though in some countries such rights exist as mere directive principles of

[21] There is no record of a single individual with disability currently in the Nigerian government: from the Presidency to the Members of the National Assembly, from Governors, Deputies and Ministers (even the minister of the ministry responsible for PWD), to Commissioners, from the Chairmen of the Local Governments in Nigeria to Councilors and even special advisers – there is not a single disabled person. This can be addressed only where the constitution provides for the employment of a certain percentage of the PWD in all government institutions/ministries and election into political offices.

[22] See, generally, M. Oliver, Disability Studies: Past, Present, and Future (Disability Press, 1997); UNICEF and the Victor Piñeda Foundation (1997) It's About Ability: An Explanation of the Convention on the Rights of Persons with Disabilities (UNICEF, 2008), available at http://www.unicef.org (accessed 13 July 2023), p. 67

state policy which are not ordinarily justiciable,[23] they remain the instrument with which to measure the performance of any government activity in the area of protection for disabled persons. Incidentally, while constitutional anti-discriminatory provision may appear to be a way forward because of the supremacy of the constitution, it is claimed in most countries with a written constitution that these constitutions give no justiciable rights to citizens in areas relating to the state's social policy.

The implication is that, disabled persons may not be able to invoke antidiscrimination provisions to seek redress against any violation in court. From this perspective the application of constitutional rights appears to be limited to public rights only, therefore while constitutional provisions protect disabled persons against discrimination by state entities, it does not offer protection against discrimination, for instance by private employers or private providers of goods and services. Even with the justiciable provisions in the constitution relating to discrimination such as the right to freedom against discrimination under Chapter IV of the Nigerian Constitution, it does not confer any special rights to people with disability as one of the prohibited grounds. Be that as it may, by general inference from the wording of the section, a person with disability should not suffer any form of discrimination as a result of his or her disability. However, he or she cannot invoke the section to assert their right against any violation based on disability.

2.6 Rights of PWD to Health and Medical Care

Having access to basic healthcare services is a precondition to equal opportunities, as outlined in the United Nations (UN) Standard Rules for Equalisation Opportunities,[24] and an essential component of being a valued and productive member of society. But in Nigeria, people with disability often experience inequality in securing sufficient healthcare services as a result of barriers to accessing health facilities and the discriminatory attitude of health practitioners.[25] This is because there is no special educational training or interpreter package for healthcare staff to handle the medical care of people with disability, particularly with hearing impairments or sight disability. Lack of an equitable health service for the disabled in Nigeria is spread across the spectrum from health promotion and disease prevention services to lack of health insurance or coverage for necessary services such as specialty care, long term care, care

[23] Section17 of Chapter II, Constitution 1999 (Nigeria), on Directive Principle of State Policy.
[24] United Nations Standard Rules on the Equalization of Opportunities for PWD, above.
[25] M. Oliver, Theories of Disability in Health Practice and Research (BMJ Publishing Group, 1998), pp. 1446–9.

coordination, prescriptions, durable medical equipment and assistive technology.[26] The challenges extend to poverty, poor communication, discriminatory attitudes, lack of understanding and education in connection to this vulnerable group. It is contended that, without adequate education on how to handle the specific medical care of PWD, the attitudes of the Nigerian healthcare providers will remain similar to those held by the general public to people with disability. It is thus posited that medical practitioners in all settings should be educated in providing medical care for patients with any form of disability. Thus there is a need for department/ministry of health commitment to providing a fair and equitable health service that is responsive to disabled patients' needs.

These and related challenges will definitely affect the quality of life, productivity and well-being of the disabled person in Nigeria. Some countries have tried to develop strategies to address disability in the process of overall development strategies.[27] For instance, South Africa's key policy areas included, notably, prevention, healthcare, rehabilitation and research. Policy objectives, strategies and mechanisms for each area were developed. The strategy identified the need for legislative scrutiny which may lead to new legislation or the amendment of existing law.

Notwithstanding the doubt over the authenticity of the 1993 Decree on Nigerians with Disability, it is pertinent to note it has a section which directs all public health institutions to provide free medical and health services including general medical needs to the vulnerable. This type of provision, if implemented, would achieve the promotion and protection of the affected class of people in this paradigm.[28] Similarly, where disability is suspected in the course of medical treatment, health institutions are duty-bound to provide free health service and submit a comprehensive report to the National Commission for People with Disability which, upon acknowledgment, shall be entitled to compensation for all health services rendered to the disabled. Likewise, upon the recommendation of a treating physician, a disabled person shall be entitled to a permanent Disability Certificate which shall make him or her qualified as a disabled person entitled to all the rights and privileges for free health service, while the purchase, importation, transfer or gift of health materials to a disabled person shall not be

[26] M. J. Paris, 'Attitudes of Medicine Students and Health-Care Professionals toward People with Disabilities', 74 (8) Archives of Physical Medicine and Rehabilitation (1993): 818–25.
[27] South Africa Integrated National Disability (SAIND), White Paper, 1997.
[28] Section 4, People with Disabilities Decree 1993 (Nigeria).

subject to any tax, duties, surcharges or levies whatsoever. Given the challenges PWD are still experiencing in the health sector, it is especially important to understand the complex and interrelated factors that contribute to health and healthcare inequalities and to identify practical solutions. It must be the foremost duty of the Nigerian government to protect people with disability and this can be achieved with particular reliance on the strength of human rights laws. Thus, where government commitment and the policy environment are favourable, the majority of people with disability may experience significant changes in the quality of life and access to equal rights.

2.7 Rights of Accessibility to Public Facilities

Another important area which inappropriately exposes people with disability to discrimination and neglect is in the realm of accessibility to public facilities. The existing structural design of buildings in Nigeria, in both the public and private sectors and communities, do not take into account of making them accessible for people with disability. In order to secure the rights of people with disability (the lame, crippled and blind), the government should ensure through the town planning departments in all the states of the federation and the Federal Capital Territory, Abuja, that new buildings are constructed in accordance with codes and guidelines for accessibility while old buildings should be remodeled to meet the codes. Similar efforts are required in the area of road construction and transportation that are adaptable to the particular circumstances of the disabled person in society.

2.8 Rights of Access to Sporting Activities

In its quest to promote and protect the rights of persons with disability, the Nigerian government's efforts in this area are commendable. The government has allowed persons with disability to be actively involved in its sporting programmes at the national and international level.[72] To this end Nigerian people with disability have participated in almost every arena of big sporting event like the Olympics with tremendous achievements. This government attitude supports the intention of the 1993 Decree on Nigerians with Disability which provides that public and private sports facilities shall be accessible to the disabled and accordingly have directed all the appropriate authorities and organs to ensure that the disabled are not discriminated against in any sporting or rehabilitation facilities.

The Nigerian government has even established Rehabilitation Commissions in most of the states of the Federation with a coordinating body known as the National Council for Rehabilitation of the disabled, functioning at the Federal level under the aegis of the Ministry

of Social Development, Youth, Sports and Culture. However, while these efforts do undoubtedly represent an accomplishment, gaps still exist in certain areas of legislation, financing, architectural barriers, transportation, personnel, attitudes and leisure education for this almost forgotten group of individuals.[74] These efforts demonstrate one of the principal and overriding aims of the system set up by the European Convention on Persons with Disability to bring about a situation in which each and every individual in a country without discrimination is effectively protected.[29]

3.0 Discussions

3.1 Challenges / Problems in the Implementation of the Law

The Nigerian government has laws, policies, plans, strategies and guidelines in raising awareness about persons with disabilities which are as follows:

i. The National Policy on Albinism 2012
ii. The National Policy on disability in Nigeria 2017
iii. The Discrimination against Persons with Disabilities (Prohibition) Act, 2018; the law prohibits discrimination on the basis of disability and imposes sanctions including fines and prison sentences on those who contravenes it. The Ministry of information is saddled with the responsibilities to create awareness of this Act.
iv. The Constitution of the Federal Republic of Nigeria, 1999 (as amended); Section 34 of this Law provides generally for the dignity of human persons, and this provision covers persons with disabilities.
v. Lagos State Special Peoples Act, 2010: it is for the establishment of an office for persons with disabilities, and to safeguard the rights of such people.
vi. Nigerians with disabilities Decree 1993
vii. Disability laws and policies are existing at subnational (state) levels, for example, Plateau, Kwara, Ondo, Ekiti, Nasarawa, Lagos, Enugu, and Bauchi etc.
viii. The Nigerian government in a bid to combat stereotypes, prejudices and harmful practices relating to persons with disabilities had develop community-based sensitization and education campaigns; initiated school based disability rights

[29] Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, adopted 25 November 1981, GA Res. 36/55, 36 UN GAOR, Supp. (No. 5+) UNDOC A/36/51, at 171.

awareness programme; strengthened documentation and reporting on human rights violations against persons with disabilities that are rooted in stigma and customary beliefs.

ix. The Nigerian government through the media has been able to collaborate with relevant stake holders, e.g. Non-Governmental Organizations in raising awareness on disabilities and capabilities and skills of persons with disabilities. Campaigns and events honouring persons with disabilities who have made great achievements with the aim to empower other persons with disabilities and changing the mind set of people positively concerning persons with disabilities.

The challenges faced in implementing the above are under listed:

i. Weak enforcement of the law; the laws which have been made to protect the rights of persons with disabilities and in their interest are not properly enforced and implemented.
ii. Inadequate funding; resources allocated to implementing policies and plans are often inadequate. Furthermore, funds to conduct campaigns, or organize seminars are really not inadequate.
iii. Negative attitudes; beliefs and prejudices are the main barriers as people do not see disabled people beyond their disability.
iv. Lack of data and information / help Centre for Persons with Disabilities.
v. Inadequate policies and standards: policy design does not always take in to consideration the need of persons with disabilities.
vi. Lack of political will by the government to ensure to ensure that implementation is carried out.

3.2 Conclusion

A Human Rights Act for persons with disability is imperative, and could be established if the Nigerian government approached the issue with total conviction and commitment. It is the authors' view that the symbolic significance of the drafting, signing, ratifying and domesticating instruments on the rights of people with disability and the creation of an international, cross-cultural moral standard for the treatment of people with disability is capable of being brought about, as follows:

- the provision of clear guidance for policy-makers on the treatment of disabled people

- a change in people's perceptions and attitudes regarding stigmatising and discriminating against people with disability
- instilling a sense of recognition, pride and ownership by disabled people of their national and international 'human rights

Productive and decent work would provide the disabled with the opportunity to realise their aspirations and potential, to improve their living conditions and to participate more actively in society.

3.3 Recommendation

The following recommendations can be made.

- Public Education: The level of knowledge of the populace about disability act is still low, hence, public education should be intensified through the mass and electronic media. Seminars and lectures should be held nationwide to educate PWDs of their rights under the Act
- Collaborating with the Human Rights Commission to make representation to town councils and local authorities.
- Promoting awareness among legal practitioners and court officials about the legal rights of PWDs.
- Progressive effort should be made so that the Government gives due priority to, by recognizing disability issues. It is imperative to recognize the right of PWDs to self-representation and to strengthen their capacity to participate in the much important decision-making process. The various disability groups should also be given priority in the decision-making process.

RESERCH PROGRESS REPORT

GAS FLARING IN NIGERIA: AN INFRINGEMENT OF HUMAN RIGHTS AND ENVIRONMENTAL POLICIES

Khafilat Adedayo Balogun*

1.0 Introduction

Nigeria is endowed with quite a number of natural resources like; crude oil, natural gas, coal, limestone, tin, zinc, iron ore, lead, niobium and arable land.[1] Among these resources, crude oil has been the most source of revenue to Nigeria as it represents over 90 per cent of the total foreign exchange earnings.

On the other hand, Nigeria harbours the largest amount of natural gas reserves in Africa, totaling up to 206.53 trillion cubic feet.[2] This natural gas comes from two different sources- gas in isolated wells or non-associated gas, and gas discovered in the course of drilling for oil. It is worthy of note that while natural gas in isolated wells can be reserved underground until needed, non-associated gas inevitably escapes with crude oil, and when this occurs, there are two ways around it, which are; either to utilize or discard it as an unwelcomed by-product of oil. Over and above, two methods have been adopted to discard this unwanted by-product, i.e. by venting (for small quantity) or by flaring (for large quantity).[3]

Gas venting is the premeditated and organized release of natural gas into the earth's atmosphere. While, gas flaring is the practice of burning off gas that is associated with the extraction of crude oil. Why such an invaluable resource is discarded in to the air remains a concern to all and sundry. Although, hints from various oil licenses reveal that, optimizing

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[1] Organisation of the Petroleum Exporting Countries (OPEC) website, http://www.opec.org/opec_web/en/about us/167.htm accessed 27 January 2023.
[2]‘ Business ‘Top African Countries with the Most Natural Gas Reserves’ https://www.businessghana.com/site/news/business/272184/Top-African-Countries-with-the-Most-Natural-Gas-Reserves3 accessed 29 January 2023.
[3] Francis Ibitoye, ‘Ending Gas Flaring in Nigeria’s Oil Fields’ (2014) 7(3) Journal of Sustainable Development p 13.

associated gas requires an economic viable market for dealers to make investments that is suitable for the collection, conveyance, process and trading of the gas.[4]

Globally, gas flaring discharges over 350 million tons of carbon dioxide in a year. Meanwhile, according to satellite data estimates from the ministry of environment in Nigeria, oil companies flare over 313 million standard cubic feet of gas yearly, which means that the flared releases up to 16.5 million tonnes of carbon dioxide.[5]

Associated gas if well optimized, can be beneficial to Nigeria as a whole, ranging from serving the domestic needs of many households, generation of electricity for transmission or on-site needs, conversion to petrochemical industry feedstock, processing of gas to liquids and gas to solids, conversion to other forms of energy for such uses as thermal for district heating.[6]

While flaring occurs, excess gases are combined with steam and/or air, and then burnt off in the flare system to produce water vapour and carbon dioxide.[7] Additionally, the gas burning which is often accompanied by a very devastating roars, cloud of smoke and toxins, occurs in oil fields all day long-all year long.

In Nigeria, particularly the Niger Delta, close to 2 million people live within 4 kilometers of these gas flare sites[8], for example, Shell Company flares gas in Rumola; a community in Port-Harcourt, whereas the flaring site is just about 300 meters away from the nearest dwelling house.[9] This ultimately connotes that, oil-bearing communities in the Niger Delta have been experiencing non-stop deafening smoke on a 24 hours daily and 365 days basis, since 1968.

The adverse effects this hazardous smoke has on the oil-bearing communities are greatly inhumane and also environmentally degrading. As proven, gas flaring has been reported to

[4] The World Bank, 'Global Gas Flaring Reduction Partnership (GGFR). https://www.worldbank.org/en/programs?gasflaringreduction/gas-flaring explained accessed 29 January, 2023.
[5] Punch Newspapers, "Gas Flaring in Nigeria", https://punchng.com/gas-flaring-in-nigeria accessed 30, January 30, 2023.
[6] Clarke Energy, 'Associated Petroleum Gas/Flare Gas' < https://www.clarke-energy.com/applications/associated/> accessed 29 January 28, 2023.
[7] ExxonMobil, 'Understanding Flares' https://www.exxonmobil.com.sg/company/overview/who-we-wre/understanding-flares accessed 29 January 2023.
[8] Ighalo, Enang, Nwabueze, 'Re-Evaluating the Problems of Gas Flaring in the Nigerian Petroleum Industry' University of Ilorin, Faculty of Engineering and Technology, An international scientific journal (2020) 147m76-87 www.worldscientificnews.com accessed 20 January 2023.
[9] Nelson N, 'National Policy and Gas Flaring in Nigeria', (2015), 5(14) Journal of Environment and Earth Science, pp 58-64

be the cause of many respiratory diseases, such as; asthma, bronchitis, breathing difficulty, cough and even eye irritation as well as skin irritation.[10]

Likewise, it has been declared that over 400 million tons of carbon dioxide from gas flaring are released into the atmosphere on a yearly basis in Nigeria,[11] this carbon dioxide to a large extent, contributes greatly to global warming. In the same vein, the cloud of smoke that emanates from gas flaring is capable of producing a number of atmospheric contaminants which causes acidification of the soil as a result of which crop growth are hindered[12] as well as causing both aquatic and wildlife to migrate.

All the aforementioned contravene the provisions of the national, [13] regional [14] and international[15] laws relating to fundamental human rights as well as the environmental rights [16] of Nigerian citizens particularly those staying near the flare sites. Accordingly, the Constitution guarantees the fundamental right to life as well as the right to dignity of the human person, the Universal Declaration of Human Rights also provides that: 'Everyone has the right to life, liberty and security of person'. And lastly, the African Charter on Human and People's Right provides that:

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

[10] Ighalo, Enang, Nwabueze, 'Re-Evaluating the Problems of Gas Flaring in the Nigerian Petroleum Industry' University of Ilorin, Faculty of Engineering and Technology, An international scientific journal (2020) 147m76-87 www.worldscientificnews.com

[11] Nigeria: Learning Clean Development Mechanism (CDM) Lessons 'Environmental Rights Action/Friends of the Earth Nigeria and Oil Watch, Africa, September, 2012. P.2.

[12] Kindzierski, 'Importance of Human Environmental Exposure to Hazardous Air pollutants from gas flares' (2000) 8, Environmental Reviews, 41-62.

[13] Section 33 of the 1999 Constitution of the Federal Republic of Nigeria- states that every person has the Right to life, and no one shall be denied of this right.

[14] (1982) 21 ILM 58 (African Charter) The African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered in to force 21 October 1986

[15] The 1948 Universal Declaration of Human Rights (UDHR), International Covenant on Political and Civil Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January (1976)

[16] 993 UNTS 3 (CESCR). Also known as the third-generation human rights as proposed by Karel Vasak. Environmental rights are those rights which go beyond the mere civil and social rights as expressed in many international human rights document

The right to life[17] and right to dignity of human persons[18] can only be achieved through a clean and healthy environment, but in contrast, the Associated Gas Re-injection Act (Amendment) 2004 and the Associated Gas Re-injection Bill, 2010, which permit companies to flare with the approval of the minister of petroleum, is in flouting of the 1999 Constitution.

Article 16 of the African Charter on Human and People's Right[19] specifically mention 'best attainable state of physical and mental health' that is the most reasonable or realistic condition that can make life a threat-free for an individual. But in contrast, all the dangers that are associated with gas flaring practice come along with nothing but a threat to an individual's life, thus an infringement of both human rights and environmental policies. It is against this backdrop that this research seeks to establish that, gas flaring in Nigeria is an infringement of Human Rights and Environmental policies.

1.1 Overview of the Background

The ultimate search for oil in Nigeria began in 1908, but the first detection occurred in Oloibiri village (now Bayelsa State) in the Niger Delta region in 1956,[20] by Shell British Petroleum (now Royal Dutch Shell). Even though oil was discovered in 1956, oil production began in 1958, and so was gas flaring.[21]

Since the first detection of oil, so many foreign oil companies like; ExxonMobil, Shell Petroleum Development Corporation (SPDC), Chevron, Total etc. have had the privilege of exploring oil in the Niger Delta region of Nigeria.

The first enacted legislation established to manage the petroleum industry in Nigeria was the "The Petroleum Act of 1969", which only focused on crude oil exploitation, because gas had not been recognized as an asset at that time. The petroleum Act which gave the minister the power to make amends on issues revolving around licenses, leases and prevention of pollution, was amended later that year, and it was named "Petroleum Act (Drilling and Production) Regulations of 1969. The adjustment simply orders the

[17] 1999 Constitution of the Federal Republic of Nigeria, S33(1).
[18] 1999 Constitution, S34 (1).
[19] Article 16, African Charter on Human and People's Right
[20] Olaniwun Ajayi, Nigeria (freshfields Bruckhaus Deringer LLP 2013) http://www.freshfields.com/uploadedFiles/siteWide/News_Room/insight/Africa-ENR/Nigeria/Nigeria%20Oil%20and%20gas.pdf accessed 29 January 29, 2023.
[21] Nelson N, 'National Policy and Gas Flaring In Nigeria', (2015), 5(14) Journal of Environment and Earth Science, pp 58-64.

submission of a feasibility study for gas utilization within five (5) years after production start date. However, the regulation failed to provide legal obligation to stop or reduce flaring both before and after the submission of the feasibility study, and neither were sanctions for non-compliance stipulated. These flaws contributed immensely to the failure of the regulations.

In a further attempt to curb gas flaring in Nigeria, Petroleum Amendment decree was approved in 1973. This decree gave room for neutral persons to gather associated gas for use without paying any royalty fee. Again, this decree failed, because the government nor anyone had the required infrastructural facilities needed to utilize associated gas.[22]

Six years later, the Associated Gas Re-injection Act (1979) was introduced, the legislation instructed any companies who wished to flare gas after January 1984 to get the special permission of the minister before doing so. Failure to comply with the Act was to attract forfeiture of concession. Nevertheless, there were massive outcry from major stakeholders who felt that the penalty was too stringent. Once more, the enactment failed.[23]

However, in 1984, the sanction for not re-injecting associated gas was changed to a low-cost fine, thus making gas flaring a cheaper option as opposed to the heavy rate of putting in place sophisticated facilities for re-injection. This low penalty has led to incessant gas flaring in Nigeria, especially in the Niger-Delta, because licensees find it more economical compared to the cost of setting up the needed infrastructural facilities. At the moment, companies producing more than 10,000bpd pay a fine of $2 per 1000 Standard cubic feet of gas flared. Companies producing less than 10,000bpd pay a fine of $0.5 per 1000 standard cubic feet of gas flared.[24]

Presumably, the Nigerian Government frights that if sanctions are too stringent, it might eventually lead to a termination of oil production processes by the foreign oil companies, which will certainly have a toll on the economy of the nation.

1.2 The Problems in Perspective

The problems that are associated with gas flaring are broad in nature as it centers around some major areas of different perspectives, from Human Rights, Environmental, down to

[22] Ibid.
[23]Ibid.
[24] Ibid.

Economic perspectives. However, this research shall centre around the human rights and environmental perspectives only.

The right to life[25] and right to dignity of human persons[26] provided for in the constitution and other international, and regional instruments, can only be attained through a clean and healthy environment, but in contrast, gas flaring legislations like; the Associated Gas Re-injection Act (Amendment) 2004 and the Associated Gas Re-injection Bill, 2010, permit companies to flare with the approval of the minister of petroleum, this indeed amounts to flouting of the 1999 Constitution as well as other instruments.

Furthermore, it may be correct to also infer that, the quality of life one leaves depends on the quality of air one inhales. The atmosphere in the oil-bearing communities in the Niger Delta has been tampered with due to the continual release of poisonous emissions, which when inhales can cause diseases like; cancer, lung diseases, blood diseases, asthma, chronic bronchitis, deformities in children, eye irritation, skin problems among others. Additionally, the daily flaring of gas also produces toxic impurities such as sulfur dioxide into the atmosphere, which in turn can cause grievous environmental issues, like acid rain that is reputed to impede the fertility of soil, production of crops, major cause of deforestation as well as shortens the life-span of aquatic animals- all these consequently result in food insecurity and mass hunger. And lastly, the offensive harsh sounds that emanate from the flaring cite can effortlessly pass for noise pollution.

1.3 Expressing the Aim and Objectives

The sole aim of this research is to establish that gas flaring in Nigeria is an infringement of human rights and environmental policies. While the general objectives shall revolve around the following; to examine the adequacy or otherwise of available legislations on gas flaring in Nigeria; to explore how gas flaring is an infringement of human rights and environmental policies in Nigeria; to examine (if any) the Human Rights and Environmental impacts of gas flaring in the Niger Delta region; to compare the practice of gas flaring in Nigeria with other two selected jurisdictions; to establish that the dwellers of oil-bearing communities in the Niger-Delta are agitated; to demonstrate how maximum optimization of associated natural gas can be beneficial to Nigeria.

[25] 1999 Constitution, S33(1).
[26] 1999 Constitution, S34 (1).

1.4 Articulated Research Questions

In order to ensure that the aim (to establish that gas flaring in Nigeria is an infringement of human rights and environmental policies) of this research is achieved, the following research questions have been formulated in line with the objectives of the study. These research questions therefore serve as a guide towards achieving the aim. That is: Is gas flaring an infringement of human rights and environmental policies; how is gas flaring an infringement of human rights and environmental policies in the Niger-Delta; to what extent has gas flaring abridged the rights of the Niger-Delta inhabitants; Are there legislations on gas flaring in Nigeria; how efficient are the laws (if any) on gas flaring in Nigeria; are the dwellers of oil-bearing communities in the Niger-Delta agitated and are there other alternatives to gas flaring?

1.5 Exposition of Research Methodology

For the purpose of justifying the aim for which this study intends to be conducted, both doctrinal and non-doctrinal research approach shall be adopted. The doctrinal approach shall rely on both primary and secondary sources of law. The primary source shall include the constitution, judicial precedents, statutes, treaties, international conventions and some regulations/policies that relate to gas flaring, human rights and environmental policies. On the part of the secondary source, data shall be collated from textbooks, journals, Articles, publications, online materials etc. and on a final note, data collated using the doctrinal method shall be subject to qualitative analysis.

While on the other side, the non-doctrinal research method, shall embrace a data collection approach wherein data shall be obtained from some selected oil-bearing communities in the Niger Delta, through the instrumentality of questionnaires and interviews. And on a final note, data collected shall be interpreted and analysed quantitatively.

1.6. Scope of the Research

The concept of gas flaring is broad; thus, it can be examined in various angles. Anyone can decide to look at it from either the human rights, environmental or economic perspectives. But, notwithstanding the many angles, this study shall focus mainly on the human rights and environmental perspectives as they relate to gas flaring legislations, and its impact on the dwellers of the Niger-Delta region.

Moving forward, this study shall examine the practice of gas flaring in two other jurisdictions that have proven to possess similar oil capacity as well as have better regulations on gas flaring to Nigeria. Although, gas flaring occurs in all oil fields across Nigeria, the population unit of this study shall cover only a few oil-bearing communities in the Niger-Delta region.

1.7 Overview of the Literature Review

Quite a number of authors have spilled their intellectual inks on gas flaring in Nigeria. These authors have expressed their opinions from different perspectives, as it relates to their areas of expertise. Regardless, the divergent perspectives, this work shall explore other similar literatures, by identifying their importance and stating the gaps to be filled.

Nelson[27] examined the efficacy or otherwise of the National Energy Policy of 2003. According to him, the policy failed in its objective of putting a halt to gas flaring in Nigeria, stating among others; Lack of Infrastructures necessary for the channeling of associated gas collected from all oil wells in Nigeria, to a common destination, where it can be preserved, processed and then transfer for onward distribution for financial gains; penalties, which according to him are too cheap, hence the reason most oil companies prefer to opt for gas flaring rather than the expensive alternatives to gas flaring; lack of requisite technology to determine the proportion of flared gas so as to determine the quantum of fines due. The author also emphasized the need to achieve a sustainable development in the formulation of environmental policies, which the National Energy Policy of 2003 failed to achieve. He buttressed this, by describing the socio-economic conditions of rural people in the oil-bearing communities as devastating, inhuman and yet remain a conflict zone with the indigenes always at loggerheads with the government. On the other hand, reluctance on the part of the Government to enforce policies to end gas flaring in Nigeria contributes immensely to the outpour of agitations embedded in the people of oil-bearing communities. The study recommends; diversification of the economy by exploring other channels of foreign exchange earnings like; agriculture, making available an enabling environment for policy implementation, by providing incentives to companies that harness associated gas which could be in the form of tax exemptions. He equally recommends that penalties should be fixed at a rationally higher rate in such a way that oil companies find flare reduction

[27] Nelson N, 'National Policy and Gas Flaring In Nigeria', (2015), 5(14) Journal of Environment and Earth Science, pp 58-64.

more economical. Although, the author has successfully assessed the National Energy Policy (2003), but it forms only one out of the plethora of legislations that have been passed in respect to gas flaring in Nigeria. This study shall therefore extend its horizon to embrace every other legislation as they relate to gas flaring in Nigeria. This is intended to proffer an answer to the research question of "are there efficient legislations on gas flaring in Nigeria? The legal framework for gas flaring in Nigeria shall be discussed under an independent heading in this study, hence the National Energy policy (2003) which is one out of the many legal framework cannot be dispensable.

Uwem Udok & Enobong Bassy Akpan[28] in their study, 'Gas Flaring in Nigeria: Problems and Prospects' examines the legal framework for gas flaring in Nigeria and then took a step ahead to identify the problems and prospects connected with the burning of Associated flared gas in Nigeria. The relevance of this literature to the intending study cannot be overemphasized as it relates hugely to the problems of gas flaring in Nigeria; an aspect which this study shall fundamentally consider. The authors are of the view that emissions from gas flaring activities are a major air pollutant in the Niger delta as it is evidently proven that people reside close to the sites. The authors further admit that the effects of this grievous practice are numerous but they can be summarily classified under health, environmental and other implications. While emphasizing on the environmental effects, emission of carbon dioxide, burning of fossil fuel, mainly coal, oil and gas are linked to global warming. In furtherance to the problems of gas flaring in Nigeria, the duos give an account of how the combination of atmospheric moisture with emissions of sulphur dioxide and nitrogen oxides have been causing acid rain, which in turn damages roofing sheets. Also, as a way of buttressing that the effects of gas flaring in the Niger Delta does not only pose a threat to the human race, but also to the fauna and flora. The literature was able to establish that atmospheric contaminants from gas flaring acidify the soil, diminish soil nutrients, hinder the growth of crops and Agricultural produces like palm trees are equally affected. In the same way water becomes too humid for fish to dwell in and hence the reason behind lessening fish existence in our oceans and rivers. This literature further laments the hostile effects gas flaring has on human's health; respiratory tract diseases, cancers, diseases of the central nervous system and blood steam. Lung damage, skin issues and deformities in children. In addition to the environmental and health impacts of gas flaring

[28] Udok U, Enobong B.A 'Gas Flaring in Nigeria: Problems and Prospects', (2017), 5(1) Global Journal of Politics and Law Research, pp 16-28.

in Nigeria, this literature also identifies economic loss as an independent impact because Nigeria losses billions of dollars' worth of gas which is burnt off daily in the air. Whereas instead of being burnt off, it can be utilized for domestic use as well as electricity generation which can indeed quench the need of the nation. The authors blame the non-effective legislations on the legislators, stating that none of the enacted laws out rightly prohibits gas flaring, but instead only attach cheap monetary penalties to companies who chose flaring over re-injection. Hence, the reason oil licensed operators prefer to flare gas.

All issues discussed by Udok and Akpan are very essential to this study, however, in addition to the legal framework, this study shall deem it necessary to examine the relevant institutional framework of gas flaring in Nigeria.

Olujobi [29] took a different dimension by detailing a comparative analysis of legal frameworks for combating gas flaring in Nigeria, Canada, the United Kingdom, Saudi Arabia and Norway. The literature gives hint as to who has the right to explore petroleum resources in Nigeria, the United Kingdom and Canada. According to him, the right to explore petroleum resources in Nigeria is vested solely on the Federal Government,[30] while in the United Kingdom, title to oil is conferred on the Crown (Petroleum Act 1998), meaning that the government has no business in petroleum dealings but only receive corporate taxes. However, in Canada, ownership of natural assets is distributed among the Federal government, the provincial governments, first nation groups and private freehold ownership. The petroleum regulatory bodies in Canada, the United Kingdom and Nigeria, are; the Energy Utilities Board, the Department of Trade and Industry and the Nigeria Gas Company respectively. Meanwhile, the National Energy Board in Canada is saddle with the responsibility of regulating gas flaring, through issuance of flare licensing and keeping tracked records of flared and vented gas. In contrast, the Nigerian Gas Company under the Ministry of Petroleum Resources regulates gas flaring by granting permits to flare gas, and lastly, the United Kingdom, the UK's Oil and Gas Authority issues licenses, while the Hazardous Installations Directorate regulates gas pipelines. In the United Kingdom, (the Petroleum Act, 1998) mandates all production facilities to conserve gas and to prevent unwarranted weakening of the ozone layer during the process of oil exploration. Oil producers are granted license to flare gas for a period of three (3) years with the condition

[29] Olusola Josha Olujobi, 'Analysis Of The Legal Framework Governing Gas Flaring In Nigeria's Upstream Petroleum Petroleum Sector and the Need for Overhauling' Covenant University, Business Management Department, (2020).
[30] Section 44(3) of the 1999 Constitution.

that flaring must not exceed forty (40) tons per day[31].A mechanism referred to as the, 'Flare Transfer Pilot Trading Scheme' which allows the trading of gas, was introduced as a measure to eliminate gas flaring. This scheme has indeed cause gas flaring to reduce to 11% in the United Kingdom.[32] World Bank 2006). In like manner, Nigeria equally introduced a related scheme known as the Nigerian Gas Flare Commercialisation Programme for the sole aim of optimizing associated gas. In addition to that, the European Emission Trading Scheme was equally initiated to eliminate emissions by the European Oil Companies via payment for additional CO2 grants, and this has been reported to have reduced gas flaring in Nigeria. Saudi Arabia on the other hand, through their national oil company (Aramco), makes provision for a gas recovery system with zero tolerant for gas discharge at every oil company's sites. In all the aforementioned countries, save Nigeria, a nonstop gas flaring is allowed for 48 hours, but must not exceed 144 hours in a month, except in exceptional cases where there has been a breakdown in the equipment, and in such a case, the permission of the Minerals Management Service must be sought. Oil companies in these jurisdictions are enjoined to adhere to keep a detailed flaring data, which are inspected from time to time by the Minerals Management Service and other relevant authorities. The above selected countries have their own different ways of approving gas flaring and venting, but still, this literature has declared that, the Canadian province of Alberta has the utmost transparent gas flaring and venting in Nigeria. This literature further suggests that Nigeria should imitate the Canada (Alberta) efficient regulatory procedures.

The work of this author is commendable, especially in the area of its comparative study, which gives an insight as to what is obtainable in other jurisdictions. But, having focus on Nigeria, the United Kingdom, Canada, Saudi Arabia and Norway, (with Nigeria being the only African country in discuss), this study intends to explore the laws and practice of gas flaring in at least one other African country aside Nigeria.

Iguh, Adaora, [33] in his article, 'Gas Flaring in Nigeria; an Abridgment of Human/Fundamental Rights' is of the opinion that, the actors of gas flaring in Nigeria are, all prospecting oil companies in Nigeria, particularly Shell PDC, ExonMobil and Chevron, while Total and Agip are categorized as minor actors. Iguh gives an account of how emissions from flare sites have been a disastrous contributor to climate change, thereby

[31] Scottish Carbon Capture and Storage 2014.
[32] World Bank, 2006.
[33] Iguh Adaora, 'Gas Flaring in Nigeria an Abridgment of Human/Fundamental Rights: Pinnacle Journal Publication [2016] 2(2) http://www.pippub.org

causing a lot of untold hardship in the form of deadly diseases, food insecurity, harsh weather condition etc. all of which are somewhat linked to the ultimate "Right to life" which is protected by the Constitution,[34] as well as other international and regional instruments like; the Universal Declaration of Human Rights[35] and the African Charter on Human and Peoples' Right, the African Charter on Human and Peoples' Right Ratification Enforcement Act, 1990. For instance, the Constitution guarantees the fundamental right to life and right to the dignity of the human person. While, the Universal Declaration of Human Rights also provides that:

"Everyone has the right to life, liberty and security of person".

And regionally, the Universal Declaration of Human Rights provides that:

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Having consider the adverse effects of gas flaring in Nigeria vis-à-vis the protection of life, as encapsulated in different national, regional and international instruments, the author concludes that, gas flaring is an abridgment of Human /Fundamental Rights. Furthermore, following the bunch of laws that have been passed against gas flaring since 1969, the author holds the view that gas flaring is illegal in Nigeria, while she equally admits that, none of these laws has been able to eradicate gas flaring in Nigeria.

The nexus that exists between this literature, and the proposed study; "Gas Flaring in Nigeria; An Infringement of Human Rights and Environmental Policies", lies in the fact that both acknowledge that, the subject matter in discuss (gas flaring) contravenes the policies of both human rights and that of the environment. In spite of this nexus, there is a slight variance in the methodology, as this study intends to adopt both doctrinal and non-doctrinal method as opposed to the doctrinal method which was used in arriving at findings in this literature.

The result of an exploratory study carried out by Madueke, Towobola and Raimi,[36] reveals the reasons gas flaring has been a reoccurrence menace in Nigeria. Among the reasons they posited are; non-provisions for industrial machineries necessary for the commercialization

[34] Section 33, Constitution of the Federal Republic of Nigeria 1999 (as amended)
[35] Article 2, Universal Declaration of Human Rights
[36] Madueke, Towobola and Raimi, 'Rederessing the Energy Challenge of Gas Flaring in Nigeria: The MEE's Approach' Journal of Sustainable Development Studies (2013) 2(2) 245-257.

of bulk gas; apathy on the part of the flarer; over-reliance on crude oil, and thus ignoring gas for both local use and export; and perpetual failed promises from the oil companies to stop flaring. This piece further acknowledges that gas flaring is an infringement of human rights, and thus has a strong conviction that an improved institutional framework for energy policy would make positive change, likewise, a better understanding between the government, the Energy regulatory bodies like (NNPC, DPR) and major mutinationals like Shell, Chevron, ExxonMobil and TotalFinaElf.

Aghalino[37], in his scholarly article, discussed, the measures that have been put in place towards mitigating gas flaring in Nigeria. These include the introduction of the National Fertilizer Company of Nigeria (NAFCON), Aluminium Smelter Company of Nigeria (ALSCON) and the Liquefied Natural Gas Project (NLNG), the West African Gas Project, the Nigeria Liquefied Natural Gas (NLNG) facility on Bonny Island; which is projected to process 252.4 billion cubic feet of LNG annually. In addition to these initiatives, the government also have an existing joint venture agreement with other multinational companies concerning the West Africa Gas Project to ensure the provision of gas for electricity generation and to aid industrial growth as well as economic development in the sub-region. On August 11, 1999, the Republic of Benin, Ghana, and Nigeria signed a Memorandum of Understanding with a group of companies consisting of Chevron, the Nigeria National Petroleum Corporation (NNPC), Ghana National Petroleum Corporation, SPDC, Solbagaz and Sotgaz for the project development.

Aghalino took a step further by examining the extant laws on gas flaring in Nigeria. For example, the Petroleum (Drilling and Production) Regulation[38] Decree No. 51, 1969 mandates licensee or lease to submit feasibility study, proposal or program for gas utilization within five years after the commencement of production. However, the non-compliance of this provision does not come with a sanction, so the oil majors refused to comply. The Associated Gas Re-injection[39], provides that oil majors must submit proposals for utilization of natural gas while they were also given ultimatum to stop flaring from 1st of January 1984, but again, this provision did not serve the purpose for which it was passed, as there were no records of success from the culprits. Consequently, in 1985, the Associated Gas Re-injection Amendment[40] Decree 7 of 1985, presented a penalty rate for companies

[37] S.O Aghalino, 'Journal of Sustainable Development in Africa' (2009) (11)4 219-238.
[38] Decree No. 51, 1969
[39] Decree 99 of 1979.
[40] Decree 7 of 1985.

who flare gas without permission. The rate was set at two kobo/1000 standard cubic feet, while it was increased to fifty kobo/1000 standard cubic feet in 1990, and then it was later increased to ten Naira/1000 standard cubic feet in 1998. However, aside the legislations and fiscal incentives, government has also established some institutions like; the Nigerian Gas Company, which is saddle with the responsibility of gathering gas and onward transmission, another institution is a gas division in the NNPC which has the duty of coordinating gas investment and to oversee the interest of government in joint venture agreements. Notwithstanding these measures, gas flaring still remains a menace in the Niger-Delta. To justify the aim for which this study shall be carried out, there is need to examine the efforts of the government towards jeering an environment devoid of gas flaring. And as such, this reason makes this literature a very relevant data to the intending study. However, having shown that all government efforts have yielded no positive outcome, a curious reader will be interested to know if dwellers of oil-bearing communities have in anyway demonstrate their grievances, and if so, how? It is to this end that this study intends to cover ways in which the oil-bearing communities in the Niger-Delta have shown their grievances.

Ighalo, Enang and Nwabueze,[41] are disappointed with the level of flared gas in Nigeria, even though, it is believed to be endowed with one of the largest gas reserves in the world. Their literature demonstrates how almost impossible it is to quantify the amount of gas being flared, as majority of flare activities are carried out in remote areas, where monitoring is difficult. According to the trio, there are two main reasons gas is flared, the first is in emergency cases, where flare is necessary for the purpose of easing pressure, and the second one occurs as a result of excess gas from production process. Regardless, the reason gas is flared, the fact remains that it poses serious threat to humans, soil, water, and the economy. Whereas, the government is very well aware of these dangers, and have in fact make an attempt to abate it through the introduction of some certain ventures and avenues like; the Nigerian gas master plan, which was founded for the purpose of utilizing natural gas through electric power generations; and the gas commercialization initiative. Recommendations made at the end of this literature reveals that; the authors are desirous of an enhanced foreign investment in the gas sub-sector as well as creating awareness among individuals and corporate entities of the importance of domestic gas consumption.

[41] Ighalo, Enang, Nwabueze, 'Re-Evaluating the Problems of Gas Flaring in the Nigerian Petroleum Industry' University of Ilorin, Faculty of Engineering and Technology, An international scientific journal (2020) 147m76-87 www.worldscientificnews.com .

Although, this work has acknowledged the adverse effects of gas flaring, especially on human and the environment, but the data base of the affected people was omitted, hence this study yearns to ascertain the level of damages gas flaring has caused in the Niger Delta.

Sinden[42] 'postulated that there is a human right to security from climate change by buttressing the court's stance in the celebrated case of Gbemre v. Shell Petroleum Development Co.[43] where the Federal High Court ordered Shell and the Nigerian National Petroleum Corporation to take speedy steps in discontinuing gas flaring in the plaintiffs' community. This literature merged both the constitutional and international human rights together and referred to them as "Human Rights". According to the writer, human rights have developed in three areas; the first being the civil and political human rights, which focuses on the autonomy of an individual for the protection of his dignity and autonomy from government's intervention. The second area is the economic and social rights wherein focus is on the protection of individual, particularly to ensure they are provided the basic material necessities of life. The third area, is described as an emerging area that focuses on a group of people with mutual objective to preserve their cultural identity and self-determination. It is however interesting to note that, the civil and political rights are usually more enforceable than the second and the third rights, which are usually couched in a less binding language. The author also declared that, most constitutions like the Nigerian constitution make provision for them in an entirely different section which is often reserved as non-justiciable rights, just like the environmental rights provisions which has been held in several cases to be non-justiciable. In view of this, the writer opines that a climate-change rights will likely be successful if brought under the traditional civil and political rights – as many countries including Nigeria, have found solution to hygienic environment through the constitutional provision of the right to life. This study has taken a hint on the best approach to tackle a non-justiciable right, especially in cases of environmental issues which are fundamental to the aim of this research.

Sinden's approach to solving gas flaring in the Niger Delta is quite different. To him, adopting customary arbitration approach will most likely solve the aged-long menace of

[42] Army Sinden, 'An Emerging Human Rights to Security from Climate Change: The Case Against Gas Flaring in Nigeria. (Cambridge University Press, 2020).
[43] Suit No. FHC/CS/B/153/2005; Motion Ex Parte under Section 46(1) of the constitution of the Federal Republic of Nigeria; Statement pursuant to Order 1, Rule 2(3) of the Fundamental Rights (Enforcement Procedure) Rules, and Verifying Affidavit.

gas flaring in the Niger Delta. An approach which is rooted from the traditional practice of settling disputes in which the head of the family or elders of the community are called upon to intervene. Just like arbitration, the parties are required to reach an agreement as to whether the decision of the arbitration will be binding on them or not. If their agreement is to the former, then the resolution shall be binding on them. The author banks on the fact that the approach of customary law usually end in a win-win situation as opposed to a win-lose situation. This means that the agitation of the Niger Delta is likely to be solved, while the needs of the oil operators are equally not expunged.

According to the writer, the customary approach has a greater advantage in the sense that the community representatives are directly affected, hence they know the importance of land preservation. Undoubtedly, this literature is significant to this study, save it relies solely on customary arbitration, this study shall therefore explore other means of settlements that could possibly solve the problems of gas flaring in Nigeria.

All the above literatures are important to the topic in discourse, the various gaps in each of them have also be identified and it is intended that this study will focus on them.

1.8 Conclusion

This research progress report has been able to encapsulate in detail how this study intends to unfold. The nature of the research, aim and objectives, statement of problem, methodology, scope, research questions and reviewed literatures have been carefully shown.

Despite legislations and policies being made with the view to curb gas flaring in Nigeria, it still remains a nightmare among dwellers of oil-bearing communities, especially in the Niger-Delta region of Nigeria. Ironically, the same oil companies that flare gas on a daily basis in Nigeria, also operate in other advanced countries where gas flaring is restricted and that with 100% compliance to their laws.

From all indications, all the above literatures are in unison, as they all condemn the practice of gas flaring generally. In line with this assertion, it is safe to proclaim that gas flaring is an infringement to both human rights and environmental policies.

In general, as far as gas flaring is concerned, it is almost impossible to deal with the environmental issues without affiliating it with human rights policies, hence the reason this study has undertaken to examine gas flaring in both contexts.