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EDITOR'S COMMENTS

This current issue of Chukwuemeka Odumegwu Ojukwu University Law Journal in accordance with the general aims and objectives of the Journal is wide-ranging in scope. The papers published in it cover most contemporary areas of law. While this is an academic journal, it is the expectation of the Journal that the satisfaction to be derived from its contents should transcend merely the intellectual. In accordance with that view, all the papers published in this volume of the Journal are scrupulous in examining and interrogating current, practical and topical issues of law. We extend our deep appreciation to the authors and contributors of the published papers, and acknowledge that those papers enriched this Journal. May I, on behalf of the Editorial Board of Chukwuemeka Odumegwu Ojukwu University Law Journal, offer this work to our readers.

Chike B. Okosa, PhD
Editor

Igbariam, Anambra State

October 31, 2024

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EXAMINATION OF THE ROLE OF A LEGAL ADVISER TO A POLITICAL PARTY IN ENSURING CANDIDATE ELIGIBILITY UNDER THE NIGERIAN ELECTORAL LAWS*

Abstract

The legal adviser to a political party plays some critical and important roles in the running of the affairs of the party. One of such role is the responsibility of ensuring that the candidates selected by the party are eligible under the Constitution and the Electoral Act. The legal adviser must interpret the law regarding age limits, residency requirements, and the absence of disqualifications to avoid invalidation of candidacies. Political parties in Nigeria are essential vehicles for political representation, bound by law to function democratically and adhere to regulatory frameworks. Failure to comply with these requirements often leads to legal disputes and sanctions. A legal adviser to a political party plays a significant role and serves as the custodian of the party's legal framework, ensuring that its activities comply with the law to prevent disputes and electoral sanctions. In this article, we examined the basic concepts of the research work, the historical backgrounds and theoretical frameworks. We equally examined in details the role of a legal adviser as it pertains to ensuring candidates eligibility to contest election under the Nigerian electoral laws. Doctrinal research methodology was employed in the course of this work. This research work will open up further discussions on the topic and it will help in strengthening our democracy.

Key words:

Role, legal adviser, political party, candidate eligibility, Nigerian electoral laws

1. Introduction

The legal adviser to a political party plays a critical role in guiding the political party to navigate the complex legal landscape of Nigerian democracy. By ensuring compliance with the Constitution, Electoral Act, and other relevant laws, and by providing sound legal interpretations, the legal adviser helps the party avoid legal pitfalls and achieve its political objectives in an orderly, lawful manner. The legal adviser helps to ensure that the party's actions are in line with constitutional provisions, especially in matters relating to ensuring candidate's eligibility. Section 84[1] outlines the process of the nomination of candidates and the conduct of primaries. The legal adviser plays a crucial role in guiding the party to comply with this section to avoid disqualification of candidates. The writer examined in details the roles of a legal adviser as it pertains to ensuring candidate's eligibility to contest election. The understanding of the role of legal adviser in ensuring candidate's eligibility to contest election will go a long way in strengthening the Nigeria's democracy.

1.1 Legal Adviser to a Political Party in Nigeria Defined

A legal adviser to a political party in Nigeria is a key official who provides legal counsel and support to ensure that the party operates within the bounds of the law. Their primary responsibility is to advise the party on legal matters, including compliance with the Nigerian Constitution, the Electoral Act, party Constitutions, and other relevant laws. This role extends to ensuring candidate's eligibility to contest election. The legal adviser is often part of the party's National Working Committee (NWC) and plays a crucial role in maintaining the legal

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[1] Electoral Act 2022.

framework for the party's activities, ensuring that the political party adheres to regulations imposed by the Independent National Electoral Commission (INEC). The Constitution[2] provides the framework for political parties, including the need to adhere to democratic principles. The legal adviser helps to ensure that the party's actions are in line with constitutional provisions, especially in matters that have to do with ensuring candidate's eligibility to contest election. The Electoral Act[3] outlines several steps to be taken by political parties in the electoral processes. The legal adviser plays a crucial role in guiding the party to comply with the sections of the Electoral Act to avoid disqualification of candidates. In *PDP v INEC,*[4] the Peoples Democratic Party (PDP) had internal disputes over the nomination process for its candidates. INEC refused to recognize candidates nominated through a process that it deemed non-compliant with the Electoral Act. The court held that INEC's decision was lawful as the party had failed to comply with the relevant provisions of the Electoral Act. The legal adviser's role includes ensuring the party's internal processes comply with legal standards to prevent such disputes. In *Onuoha v Okafor & Anor,*[5] which involved the internal party democracy of the Nigerian Peoples Party (NPP) during the Nigeria's Second Republic, where a candidate challenged the party's nomination process. The Supreme Court stressed that political parties must operate within the bounds of their own constitution and the law. Any deviation could lead to legal challenges. Also in *Ugwu v Ararume,*[6] the PDP replaced its candidate after the primary elections, leading to a lawsuit. The candidate challenged the legality of the substitution under the party's guidelines and the Electoral Act. The court ruled in favour of the candidate, emphasizing the role of legal compliance in party processes. The legal adviser should provide legal guidance during candidate substitution to ensure it complies with the party's Constitution and the Electoral Act. Also in *Labour Party v INEC & Anor,*[7] the Labour Party faced issues when its legal adviser failed to ensure proper documentation during the party's primaries. INEC disqualified their candidates based on improper documentation. The court affirmed INEC's decision, highlighting the importance of proper legal guidance in candidate nomination. This case demonstrates the significant role of the legal adviser in overseeing party documentation and legal compliance.

1.2 Political Party in Nigeria Defined

A political party in Nigeria is an organized group of individuals with shared political ideologies, seeking to influence government policy by nominating candidates for public office, winning elections, and controlling government power. Under the Nigerian law, political parties are regulated entities, recognized by the Independent National Electoral Commission (INEC), and are expected to function democratically and in compliance with the Constitution, the Electoral Act, and other legal frameworks. Political parties in Nigeria play a critical role in democracy by aggregating the interests of citizens, providing a platform for political participation, formulating policies, and fielding candidates for elections. Their activities, internal governance, and financial dealings are regulated by INEC to ensure fairness and transparency. **S**ection 221[8] provides that only a political party can sponsor candidates for elections. This section underscores

[2] Constitution of the Federal Republic of Nigeria 1999 (as amended).
[3] Electoral Act 2022.
[4] (2014) 17 NWLR (Pt 1437) 525.
[5] (1983) 2 SCNLR 244.
[6] (2007) 12 NWLR (Pt 1048) 367.
[7] (2022) LPELR-56945(SC).
[8] Constitution of the Federal Republic of Nigeria 1999 (as amended)**.**

the exclusive role of political parties in the electoral process. Section 222[9] **o**utlines the requirements for the registration of political parties, such as having a constitution, registered office, and being accessible to the public. Section 84[10] g**o**verns the conduct of primary elections and nomination of candidates by political parties. It mandates democratic procedures and compliance with the law to ensure transparency in the selection process while section 225[11] provides for the regulation of political parties by INEC, including financial transparency and submission of reports on their activities.[12] Also in *PDP v INEC***,**[13] **t**he Peoples Democratic Party (PDP) challenged INEC's decision to recognize candidates nominated through a faction of the party, arguing that the recognized faction was not the legitimate party leadership. The court upheld INEC's decision, emphasizing that political parties must follow their own internal constitutions and procedures in conducting party activities. This case highlights the importance of internal party democracy and legal compliance principles that political parties must adhere to in Nigeria. In *INEC v Musa***,**[14] several political associations challenged INEC's refusal to register them as political parties, arguing that INEC's criteria for registration were unconstitutional. The Supreme Court held that INEC's powers were limited to ensuring that parties met the constitutional requirements and could not impose additional conditions. The court emphasized the role of political parties as fundamental to democracy. This case demonstrates the foundational principle that political parties must be allowed to function freely, provided they comply with the constitutional framework. See *APC v Marafa***.**[15]

1.3 Meaning and Concept of a Candidate to an Election

A candidate in the context of an election refers to an individual who has been nominated or has offered himself or herself for election to a public office. This concept is governed by specific laws and regulations within the electoral process. In Nigeria, a candidate is typically someone who has been officially recognized by a political party and is presented to contest in an election. Under Section 152[16] a "candidate" is defined as a person who has been validly nominated by a political party to contest an election for any elective office. A candidate may also be an independent candidate where such provisions exist in the legal framework, although Nigeria currently operates under a system where only political parties may present candidates. Section 29[17] provides that political parties must submit the names of their candidates to the Independent National Electoral Commission (INEC) within a specific timeline after party primaries. Section 131[18] outlines the basic qualifications required to contest for the office of the President, including the requirement to be sponsored by a political party. In *Audu v INEC (No.2),*[19] Prince Abubakar Audu was the gubernatorial candidate for the All Nigeria Peoples Party (ANPP) in Kogi State. INEC disqualified him after the primaries on the ground that he had been indicted by a Judicial Commission of Inquiry. Audu challenged his disqualification, claiming he had already been nominated as a candidate by his party. The Supreme Court held that Audu's nomination as a candidate by his political party was valid and that INEC did not have the powers

[9] *Ibid*.
[10] Electoral Act 2022**.**
[11] Constitution of the Federal Republic of Nigeria 1999 (as amended)**.**
[12] *Onuoha v Okafor & Anor supra.*
[13] (2014) 17 NWLR (Pt 1437) 525.
[14] (2003) 3 NWLR (Pt 806) 72.
[15] (2020) LPELR-49677(SC).
[16] Electoral Act 2022.
[17] *Ibid*.
[18] Constitution of the Federal Republic of Nigeria 1999 (as amended).
[19] (2007) 12 NWLR (Pt 1048) 220.

to disqualify a candidate nominated by a political party. The court stressed the importance of political parties in the nomination process, affirming that once a candidate has been properly nominated, the candidate must be allowed to contest. This case underscores the significance of the nomination process by a political party, which is central to recognizing an individual as a candidate under Nigerian law. In *Atiku Abubakar v INEC & Ors,*[20] in the lead-up to the 2007 presidential election, Atiku Abubakar, then Vice President, was disqualified by INEC on grounds of an indictment. He argued that having been nominated by his political party, the Action Congress (AC), he should not be disqualified. The Supreme Court ruled that only a court of law could disqualify a candidate from an election. INEC had no power to disqualify a candidate who had been nominated by a political party and met the constitutional requirements. The court reaffirmed that once a candidate is duly nominated; the candidate can only be disqualified based on constitutional grounds. Also in *PDP v Sylva,*[21] Timipre Sylva, who had earlier won the People's Democratic Party (PDP) primary for the Bayelsa State gubernatorial election, was substituted by the party with a different candidate. Sylva challenged this substitution, arguing that once a candidate has been nominated, they cannot be replaced except through lawful means. The court held that a political party has the prerogative to decide on who its candidate for an election is, provided that due process is followed. The Supreme Court emphasized that political parties must adhere to their guidelines when nominating and replacing candidates. In this case it can be deduced that the nomination of a candidate is a function of the political party and that INEC does not have the power to disqualify a candidate without judicial authority. Also, political parties are central to the electoral process as they determine who stands for election and that once nominated, a candidate enjoys certain legal protections and can only be disqualified based on constitutional and legal provisions.

1.4 Meaning and Concept of Candidate Eligibility to Contest Election in Nigeria

Candidate eligibility to contest an election in Nigeria refers to the legal and constitutional requirements that an individual must meet to qualify as a candidate for any elective office. These criteria are outlined primarily in the Constitution[22] and the Electoral Act.[23] The eligibility criteria differ depending on the office being contested.[24] The common qualifications include: citizenship. The candidate must be a Nigerian citizen by birth.[25] In terms of age, different age limits are specified for various offices,[26] In terms of educational qualification, a minimum of a school certificate (or its equivalent). A candidate must be a member of a political party and must be sponsored by that party. Certain grounds disqualify a candidate, such as being under a declaration of allegiance to another country, insanity, bankruptcy, or conviction of certain criminal offences within a specified period before the election. In *Kawu v Yar'Adua,*[27]

[20] (2007) 12 NWLR (Pt 1049) 122.
[21] (2012) 13 NWLR (Pt 1316) 85.
[22] Constitution of the Federal Republic of Nigeria 1999 (as amended).
[22] (2007) 12 NWLR (Pt 1048) 220
[23] Electoral Act 2022.
[24] Example: presidency, governorship, or legislative positions. Section 131provides qualifications for the office of president. Section 177 provides for qualifications for the office of governor. Section 65 provides for qualifications for membership of the National Assembly. Section 106 provides for qualifications for membership of a State House of Assembly. Section 84 of the Electoral Act 2022 provides that a person shall not be qualified to contest in an election unless they fulfil all the qualifications prescribed by the Constitution and other relevant laws.
[25] Example, for presidential and governorship elections.
[26] For president: 35 years; for governor: 30 years; for senate: 35 years; for house of representatives: 25 years; for state house of assembly: 25 years.
[27] (2008) 19 NWLR (Pt 1120) 1.

Muhammadu Yar'Adua was declared the winner of the 2007 presidential election. Kawu and other petitioners challenged his eligibility, arguing that Yar'Adua's nomination process did not follow due process and that certain constitutional requirements were not met. The Supreme Court upheld Yar'Adua's eligibility, emphasizing that the constitutional and statutory requirements were satisfied, and the nomination by his political party was valid. The court affirmed that once a candidate meets the constitutional requirements, challenges to eligibility must be based on solid legal grounds rather than procedural irregularities. This case reaffirmed that eligibility to contest an election is primarily governed by the Constitution and Electoral Act. Compliance with constitutional provisions is the paramount factor in determining eligibility. See also *Action Congress v INEC*,[28] and *Atiku Abubakar v INEC.*[29] In *Ojukwu v Obasanjo,*[30] Chukwuemeka Odumegwu Ojukwu challenged the eligibility of President Olusegun Obasanjo to contest the 2003 presidential election, arguing that Obasanjo was not validly nominated by his party and had not met some constitutional qualifications. The Supreme Court held that Obasanjo met all constitutional qualifications, including being a Nigerian citizen, age, and educational requirements. The court reiterated that once the constitutional requirements are satisfied, a candidate is eligible, and further challenges must be grounded in law. The court reaffirmed that the Constitution is the ultimate authority in determining candidate eligibility, and courts cannot disqualify candidates based on procedural matters unless they contravene constitutional provisions.

1.5 Concept and Meaning of Nigerian Electoral Laws

Nigerian Electoral Laws refer to the body of laws that regulate the conduct of elections in Nigeria. These laws are designed to ensure that elections are free, fair, and transparent, protecting the integrity of the electoral process while safeguarding the democratic rights of citizens. The primary aim of these laws is to provide a legal framework for the administration of elections, including the qualifications for candidacy. Nigerian Electoral Laws are codified in several statutes, including the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Electoral Act 2022, and various court judgments that interpret these laws. These laws are enforced by the Independent National Electoral Commission (INEC) and the judiciary, which plays a crucial role in addressing electoral malpractices and disputes. We shall examine these laws.

2.1 The Constitution of the Federal Republic of Nigeria 1999 (as amended)

The Constitution[31] is the supreme law of Nigeria, and it provides the foundation for all electoral processes in the country. It defines the fundamental rights of citizens, including the right to vote and be voted for, and sets out the framework for the conduct of elections, the qualifications and disqualifications of candidates, and the role of the electoral body.[32] See *Atiku Abubakar v INEC.*[33]

2.2 The Electoral Act 2022

[28] (2007) 12 NWLR (Pt 1048) 220.
[29] *Supra*.
[30] (2004) 12 NWLR (Pt 886) 169
[31] Constitution of the Federal Republic of Nigeria 1999 (as amended).
[32] See *Ibid*, Section 14(2) (c) which establishes the participation of people in their government as the cornerstone of Nigeria's democracy. Sections 65, 106, 131, and 177 thereof lay down the qualifications required for candidates contesting for elective offices while Sections 66, 107, 137, and 182 thereof provide the disqualification grounds for candidates.
[33] (2007) 12 NWLR (Pt 1049) 122

The Electoral Act 2022 is the principal statute governing the administration of elections in Nigeria. It provides the legal framework for the registration of voters, the conduct of political parties, the regulation of campaign finance, the role of INEC, and the resolution of electoral disputes. The Act also provides penalties for electoral offences such as rigging, violence, and vote-buying. In *Action Congress v INEC,*[34] the Action Congress challenged the decision of INEC to disqualify certain candidates on the grounds of non-compliance with the party's internal nomination procedures. The court held that INEC must adhere to the guidelines established under the Electoral Act regarding candidate nominations, reaffirming that INEC cannot impose additional conditions beyond those provided by law. This case underscores the importance of strict compliance with the provisions of the Electoral Act in the nomination of candidates by political parties.

2.3 INEC Guidelines and Regulations

INEC, as the electoral umpire, is vested with the authority to make rules and regulations for the conduct of elections. These guidelines are not statutes but serve to supplement the Electoral Act. The guidelines detail the administrative processes for voter registration, conduct during campaigns, voting procedures, and the collation of results. INEC issues election guidelines that outline how elections are to be conducted, including procedures for electronic accreditation and voting, ballot counting, and collation of results. In *Hope Uzodinma v Emeka Ihedioha*,[35] Hope Uzodinma challenged the declaration of Emeka Ihedioha as the winner of the Imo State Governorship election, arguing that results from several polling units were unlawfully excluded from the final tally. The Supreme Court declared Uzodinma as the duly elected governor of Imo State after recognizing that the INEC guidelines were not adhered to in the collation of results. This case demonstrates that INEC guidelines, although not legislation, play a crucial role in determining the outcome of elections. Courts will intervene when these guidelines are violated, provided it affects the outcome of the election. INEC guidelines and regulations provide additional procedures to ensure transparent elections in line with the Electoral Act.

2.4 Judicial Interpretation and Electoral Jurisprudence

The judiciary plays an essential role in interpreting electoral laws and resolving disputes that arise from elections. Judicial precedents shape the evolving nature of electoral law in Nigeria, as courts frequently adjudicate cases of electoral fraud, candidate disqualification, and improper conduct of elections. In *Buhari v INEC,*[36] Muhammadu Buhari challenged the results of the 2007 presidential election, alleging widespread electoral malpractice, including vote rigging and non-compliance with the Electoral Act. The court dismissed the petition, ruling that Buhari's legal team failed to provide sufficient evidence of substantial non-compliance with the law to annul the election. This case solidified the judicial requirement of proving substantial non-compliance to invalidate an election. The courts are reluctant to nullify elections unless the petitioner can show that the irregularities affected the overall outcome.

3. Historical Background of the Role of a Legal Adviser to a Political Party in Nigeria

The role of a legal adviser to a political party in Nigeria has evolved in tandem with the country's legal and political development. Political parties in Nigeria, which predate the nation's independence, have always operated under various legal frameworks that require adherence to constitutional provisions and statutory regulations. As Nigeria transitioned from colonial rule to independence, and through several military and civilian regimes, political parties became more

[34](2007) 12 NWLR (Pt 1048) 220
[35] (2020) 5 NWLR (Pt 1728) 28
[36] (2008) 19 NWLR (Pt 1120) 246

structured, necessitating the formalization of legal advisory roles to ensure compliance with laws governing elections, political participation, and internal party governance. We shall now examine the historical background of legal adviser in Nigeria democratic process.

3.1 Pre-Independence Period and Emergence of Political Parties

In the pre-independence period, political parties were nascent entities formed to represent various regional and ethnic interests in the struggle for self-governance. Legal advisory roles were largely informal, as these early parties had no formalized internal structures. The emergence of the Nigerian National Democratic Party (NNDP) in 1923, led by Herbert Macaulay, was among the first attempts to form a political party with a structured legal framework. However, legal advice during this period was more related to the colonial laws rather than formal party constitutions or electoral laws. In *Olafisoye v FRN***,**[37] although post-independence case, reflects how colonial-era political organizations had to navigate legal frameworks that were often oppressive and controlled by colonial authorities. This case highlights the fact that early political parties operated under legal challenges imposed by colonial laws, with limited formal legal advisory roles.

3.2 Post-Independence Era (1960-1966)

After independence in 1960, political parties in Nigeria began to formalize their operations. The role of the legal adviser became crucial as political parties were now governed by Nigeria's constitution and emerging electoral laws. The First Republic saw major political parties like the National Council of Nigeria and the Cameroons (NCNC), the Action Group (AG), and the Northern People's Congress (NPC). These parties appoint legal advisers to interpret constitutional provisions, electoral laws, and assist in resolving internal disputes. In *Adegbenro v Akintola*,[38] **t**he case involved a dispute within the Action Group (AG). Action Group (AG) was one of the major political parties during the First Republic. The party's legal adviser played a significant role in interpreting party rules and constitutional provisions during the leadership crisis. The Privy Council upheld the removal of the Premier, which reflected the importance of sound legal advice in navigating political party crises. This case demonstrates the early role of legal advisers in resolving internal party disputes and interpreting party Constitutions. Also in *Lakanmi v Attorney-General (Western Nigeria),*[39] the case arose from the 1966 military coup, but it reflects the transitional legal challenges faced by political parties as Nigeria moved from civilian to military rule. The court held that the government's seizure of assets was unconstitutional, which underscores the role of legal advisers in defending party interests. This case highlights the role of legal advisers in constitutional disputes affecting political parties.

3.3 Military Rule and the Decline of Political Parties (1966-1999)

The role of political parties was suspended during military rule[40] which severely limited the formal functions of legal advisers. Political parties were banned, and military Decrees governed the country. However, the role of legal advisers re-emerged during periods of transition from military to civilian rule, particularly during the drafting of new Constitutions in 1979 and 1999. In *Awolowo v Shagari***,**[41] which arose after the 1979 presidential election, where Obafemi Awolowo challenged the election of Shehu Shagari. The legal advisers of the Unity Party of Nigeria (UPN) played a crucial role in framing the legal argument regarding the interpretation

[37] (2004) 4 NWLR (Pt 864) 580.
[38] (1963) AC 614**.**
[39]**(**1970) NSCC 143**.**
[40] 1966-1979 and 1983-1999.
[41] (1979) 6-9 SC 51.

of electoral laws. The Supreme Court ruled in favour of Shagari, holding that the election was conducted in substantial compliance with the law. This case reflects the re-emergence of legal advisers in political party operations during the transition to civilian rule. Also in *Anyaoku v Adeleke***,**[42] the case involved the legality of certain actions taken by political parties during the 1983 elections. Legal advisers were active in ensuring compliance with electoral guidelines of the Second Republic. This case illustrates the expanding role of legal advisers in ensuring that political parties adhered to electoral laws during Nigeria's transition back to democracy.

3.4 Fourth Republic and Modern Role of Legal Advisers (1999-Present)

With the return to democratic rule in 1999, political parties in Nigeria became more structured, and the role of legal advisers became more formalized. The Constitution[43] and the Electoral Act[44] provided the legal framework for political party operations. Legal advisers now play a central role in ensuring compliance with INEC regulations, party Constitutions, and Electoral Laws. They are also involved in litigation, representing parties in pre-election and post-election disputes. The Constitution of the Federal Republic of Nigeria 1999 **(**as amended**)**[45] **r**egulates the formation of political parties, placing the responsibility on legal advisers to ensure compliance with registration and operational requirements. The Electoral Act 2022[46] **r**egulates the conduct of party primaries, placing a duty on legal advisers to ensure compliance with nomination processes. In *PDP v INEC***,**[47] the PDP's internal party primary was disputed, and the legal adviser's role was pivotal in guiding the party's compliance with internal rules and the Electoral Act. The court emphasized the need for strict adherence to party Constitutions and Electoral Laws. This case highlights the modern role of legal advisers in ensuring internal compliance and defending party interests in court. See also *APC v Marafa & Ors.***.**[48]

4. Historical Background of Political Parties in Nigeria

Political parties in Nigeria have a rich and complex history, deeply intertwined with the country's struggle for self-governance, independence, and democratization. The development of political parties has evolved across four main periods. They are as follows:

4.1 **Pre-Independence Era (1923-1960)**

The emergence of political parties in Nigeria dates back to the colonial era, specifically in 1923, with the formation of the Nigerian National Democratic Party (NNDP**),** led by Herbert Macaulay. The NNDP was Nigeria's first political party and was primarily formed to represent the interests of Lagosians in the colonial Legislative Council elections. The party's primary focus was on self-governance and resisting colonial policies that were deemed detrimental to the Nigerian people. The formation of political parties during this period was governed by colonial laws, including the Clifford Constitution of 1922**,** which introduced limited electoral participation for Africans in the Legislative Council.

4.2 **First Republic (1960-1966)**

Following Nigeria's independence in 1960, political parties became central to the country's nascent democracy. Three major parties dominated the political landscape during the First

[42] (1983) 13 NSCC 142.
[43] Constitution of the Federal Republic of Nigeria 1999 (as amended)**.**
[44] Electoral Act 2022.
[45] Section 222 thereof.
[46] Section 82 thereof.
[47](2014) 17 NWLR (Pt 1437) 525.
[48](2020) LPELR-51806(SC)**.**

Republic: the National Council of Nigeria and the Cameroons (NCNC**),** the Action Group (AG)**,** and the Northern People's Congress (NPC**).** These parties were regional in orientation and focused on ethnic and regional interests, which eventually contributed to political instability. The Constitution[49] and the Electoral Act[50] governed the operations of political parties and elections during this period. Section 41 of the 1960 Constitution provided for political participation, allowing political parties to contest elections and form the government. In *Adegbenro v Akintola***,**[51] which arose from a political crisis within the Action Group (AG) in the Western Region, where a faction of the party sought to remove the Premier, Samuel Akintola. The Governor of the Western Region acted based on the advice of the NPC-led federal government. The Privy Council upheld the Governor's decision to remove Akintola, emphasizing the power of the Governor to remove a Premier if the Premier no longer commanded the confidence of the legislature. This case highlights the deep political rivalries and constitutional challenges that characterized the First Republic and the role of political parties in these conflicts.

4.3 Military Rule and Suspension of Political Parties (1966-1999)

Military coups in 1966 ended the First Republic, leading to the suspension of political parties. The military regimes that followed[52] banned political parties, governing through military Decrees. During these periods, political activity was suppressed, and the legal frameworks for political parties were either suspended or strictly regulated. Military Decree[53] and subsequent Military Decrees suspended the operation of political parties, effectively ending political pluralism until the return to civilian rule. The 1979 Constitution reintroduced political party participation in the run-up to the Second Republic. In *Lakanmi v Attorney-General (Western Nigeria),*[54] the military government's seizure of property following the 1966 coup was challenged. Although not directly about political parties, it highlights the legal constraints placed on political activities during military rule. The Supreme Court held that the military government's actions were unconstitutional, marking a rare judicial challenge to military authority. This case demonstrates the broader legal and political climate under military rule, which impacted political party activity. Also in *Uwaifo v Attorney-General (Bendel State),****[55]*** the legality of actions taken by the military government that affected political activities was examined in this case. The case highlights the challenges political parties faced under military rule, even in the lead-up to the Second Republic.

4.4 The Second and Third Republics (1979-1993)

Political parties were reintroduced during the Second Republic, with the National Party of Nigeria (NPN)**,** the Unity Party of Nigeria (UPN)**,** and other parties dominating the political landscape. However, the Second Republic was short-lived due to another military coup in 1983. The Third Republic saw the establishment of two government-created political parties, the Social Democratic Party (SDP**)** and the National Republican Convention (NRC**).**[56] However, the annulment of the 1993 presidential election led to the collapse of the Third Republic. The

[49] The Constitution of the Federal Republic of Nigeria 1960.
[50] The Electoral Act, 1962.
[51] (1963) AC 614**.**
[52] 1966-1979 and 1983-1999.
[53] No. 9 of 1966**.**
[54] (1970) NSCC 143.
[55]**(**1983) 4 NCLR 1**.**
[56] Transition to Civil Rule (Political Parties Registration and Activities) Decree No. 15 of 1989 established the two-party system during the Third Republic.

Constitution of the Federal Republic of Nigeria 1979 governed the political party system during the Second Republic. In *Awolowo v Shagari***,**[57] Obafemi Awolowo of the UPN challenged the election of Shehu Shagari of the NPN, arguing that Shagari did not meet the constitutional requirement of securing at least one-quarter of the votes in two-thirds of the States of the federation. The Supreme Court ruled in favour of Shagari, holding that the election was conducted in substantial compliance with the law. This case is a landmark case in Nigerian electoral jurisprudence, illustrating the key role of political parties in electoral disputes. Also, in *Abiola v FRN*,[58] that arose from the annulled 1993 presidential election, which was widely believed to have been won by Chief MKO Abiola of the SDP**.** The election's annulment by the military regime led to widespread protests and legal challenges. This case demonstrates the fragility of political party participation under military rule and the importance of free and fair elections in sustaining political parties.

4.5 Fourth Republic (1999-Present)

The return to democratic rule in 1999 ushered in the Fourth Republic, which saw the proliferation of political parties. The Constitution of the Federal Republic of Nigeria 1999 (as amended) and the Electoral Act 2022 provide the legal framework for the formation, registration, and operation of political parties. Since 1999, political parties have played a central role in Nigeria's democratic process, with the People's Democratic Party (PDP)**,** the All Progressives Congress (APC)**,** and other parties dominating the political space. Section 222[59] provides the legal requirements for the formation and registration of political parties. Section 82[60] regulates party primaries, placing an obligation on political parties to conduct transparent and democratic processes in nominating candidates. In *PDP v INEC*,[61] the PDP's internal party primary was disputed, and INEC refused to recognize the outcome of the primary. The Supreme Court emphasized the need for political parties to adhere to their internal rules and the Electoral Act in conducting party primaries. This case highlights the critical role of political parties in the electoral process and the legal challenges they face in adhering to party constitution.

5. Theories of a Political Party in Nigeria

Political parties in Nigeria are foundational elements of the country's democratic process. Theories surrounding political parties in Nigeria focus on their role in the political system, internal governance, and their relationship with the law and the electorates. These theories guide how political parties are formed, operate, and influence governance. The key theories relating to political parties include:

5.1 Democratic Theory

This theory asserts that political parties are central to a functioning democracy. Political parties serve as intermediaries between the government and the people, offering voters the ability to choose between competing ideologies and policy preferences. Section 40[62] guarantees the right to freedom of association, which includes the formation and membership of political parties. The Electoral Act 2022 lays the legal framework for the registration, functioning, and regulation of political parties, ensuring that they operate democratically. In *INEC v Musa*,[63] several

[57](1979) 6-9 SC 51.
[58] (1993) 6 NWLR (Pt 299) 255; (1993) LPELR –SC.59/1993.
[59] Constitution of the Federal Republic of Nigeria 1999 (as amended)**.**
[60] Electoral Act 2022**.**
[61] (2014) 17 NWLR (Pt 1437) 525**.**
[62] Constitution of the Federal Republic of Nigeria 1999 (as amended).
[63] (2003) 3 NWLR (Pt 806) 72.

associations challenged INEC's refusal to register them as political parties, contending that the registration criteria violated their right to freedom of association. The Supreme Court upheld the right to form political parties under Section 40 of the Constitution, emphasizing that political parties are essential to the democratic process. This case illustrates the democratic theory of political parties as enshrined in the Nigerian Constitution. Again, in *PDP v INEC,*[64] the PDP challenged INEC's recognition of a faction's candidates in violation of internal party democracy. The court held that political parties must adhere to democratic norms in their internal affairs. This case reinforces the democratic theory that political parties must operate within democratic principles.

5.2 Representation Theory

Political parties represent the interests, ideologies, and policies of specific groups or the broader electorates. Under this theory, parties aggregate and articulate public interests, giving a voice to various social and political groups in the society. Section 221[65] provides that only political parties can sponsor candidates in elections, emphasizing their role in representing public interests. In *Labour Party v INEC & Anor*,[66] the Labour Party's candidates were disqualified due to failure to follow proper party procedures. The Supreme Court upheld INEC's decision, emphasizing that political parties must follow legal procedures to represent their candidates. This case shows the importance of political parties in representing the interests of their members and candidates. Also in *APC v Marafa,*[67] the APC was barred from fielding candidates in Zamfara State due to a flawed nomination process. The court held that the party's non-compliance with the law deprived its members of representation. This case illustrates that political parties must adhere to legal standards to fulfil their representative role.

5.3 Institutional Theory

This theory views political parties as institutions that organize political activity and ensure the stability of governance. Parties are seen as long-term organizations that structure political competition, manage elections, and govern between elections. Section 84[68] regulates the nomination process, ensuring that political parties, as institutions, follow democratic procedures. See *Onuoha v Okafor & Anor.*[69] See also *Ugwu v Ararume,*[70] where the PDP substituted a candidate after the primaries, leading to a legal challenge. The court held that the party's substitution violated its own guidelines, emphasizing the institutional nature of political parties. This case underscores the institutional theory that parties must maintain consistent procedures for governance and election processes.

5.4 Competition Theory

Political parties are vehicles for competition in the electoral arena. This theory holds that political parties compete for political power by offering voters different policy options, leadership, and governance approaches. Section 222[71] requires political parties to have a constitution, indicating the need for organized competition within the legal framework. In *INEC v Action Congress,*[72] the Action Congress (AC) challenged INEC's refusal to recognize its

[64](2014) 17 NWLR (Pt. 1437) 525.
[65] Constitution of the Federal Republic of Nigeria 1999 (as amended):
[66] (2022) LPELR-56945(SC).
[67] (2020) LPELR-49677(SC).
[68] Electoral Act 2022.
[69] (1983) 2 SCNLR 244.
[70] (2007) 12 NWLR (Pt 1048) 367.
[71]Constitution of the Federal Republic of Nigeria 1999 (as amended).
[72] (2007) 12 NWLR (Pt 1047) 220.

candidates for the 2007 general elections. The court held in favour of the AC, stating that political parties must be allowed to compete freely, provided they meet legal requirements. This case highlights the competitive nature of political parties in the electoral process. In *INEC v PDP*,[73] PDP contested INEC's decision to cancel the results of certain polling units during an election. The court ruled that INEC's actions must not undermine the competitive nature of elections by selectively cancelling results. This case reinforces the competition theory that parties must be allowed a fair playing field in elections.

6. Theories of a Legal Adviser to a Political Party in Nigeria

A legal adviser to a political party plays a critical role in ensuring that the party's operations comply with the legal framework, providing guidance on internal governance, electoral compliance, and dispute resolution. Several theories underpin the role and responsibilities of a legal adviser in the political system, especially in Nigeria, where political party activities are strictly regulated. The theories are as follows:

6.1 Advisory Theory

This theory posits that the legal adviser serves primarily as a source of guidance and legal expertise to the party. The legal adviser's role involves interpreting and applying the laws that affect the party's operations, advising on electoral laws, internal party rules, and constitutional provisions. The legal adviser ensures that the party operates within the boundaries and ambits of the laws, protecting the party from legal liabilities. Section 40[74] guarantees freedom of association, which includes political parties, and by extension, the need for legal guidance to ensure proper conduct. The Electoral Act 2022 provides the legal framework for the conduct of elections and political party operations, making it essential for legal advisers to ensure strict compliance. In *PDP v INEC*,[75] the PDP was involved in a dispute over its internal primary election procedures and turned to its legal adviser for guidance on complying with the law. The court ruled that internal party disputes, such as primary election processes, must adhere to democratic principles, highlighting the role of legal advisers in ensuring compliance with party rules. This case underscores the advisory role of legal advisers in political party operations. Also in *APC v INEC*,[76] the APC's failure to comply with INEC's guidelines for nominating candidates led to disqualification of the candidates, raising questions about the role of the party's legal adviser. The court upheld INEC's decision, emphasizing that the party's legal advisers should have ensured full compliance with the Electoral Act. This case highlights the critical advisory role of legal advisers in guiding political parties to comply with legal procedures.

6.2 Compliance Theory

This theory focuses on the legal adviser's responsibility to ensure that the political party complies with all applicable laws, including constitutional provisions, the Electoral Act, and INEC guidelines. The legal adviser is tasked with interpreting these laws and ensuring that the party operates within the legal limits in all its activities, including candidates' selection, campaign financing and internal party governance. Sections 82 and 84[77] lay out the guidelines for candidates' selection and party primaries, which must be adhered to by political parties. INEC guidelines stipulate the rules for party registration, election monitoring, and compliance

[73] (2020) LPELR-49685(CA).
[74] Constitution of the Federal Republic of Nigeria 1999 (as amended).
[75] (2014) 17 NWLR (Pt 1437) 525.
[76] (2020) LPELR-49685(SC).
[77] Electoral Act 2022.

with campaign finance regulations. In *INEC v Action Congress,*[78] the Action Congress was disqualified due to non-compliance with the electoral regulations. The party's legal adviser was criticized for failing to ensure compliance. The court upheld the disqualification, emphasizing that legal adviser must ensure full compliance with INEC's guidelines. This case demonstrates the importance of the legal adviser's role in ensuring compliance with electoral laws. See also *Labour Party v INEC & Anor.*[79]

6.3 Dispute Resolution Theory

Under this theory, the legal adviser plays a crucial role in resolving internal disputes within the political party, such as disagreements over candidate selection, breaches of party rules, and conflicts arising from party congresses. The legal adviser ensures that disputes are handled in accordance with the law and party constitutions, preventing unnecessary litigation and promoting internal cohesion. Section 85[80] outlines the legal framework for resolving disputes within political parties, emphasizing the role of legal advisers in mediation. Most political parties have Constitutions that provide dispute resolution mechanisms. In *Sheriff v PDP*,[81] a factional dispute arose within the PDP over the leadership of the party. The party's legal advisers were involved in attempts to mediate the conflict. The Supreme Court ruled in favour of the Makarfi-led faction, emphasizing the need for political parties to resolve disputes through legal and constitutional means. The role of legal advisers in resolving internal party disputes is crucial to maintaining party unity and legality. In *APGA v Umeh,*[82] a dispute arose within APGA regarding leadership and primary election procedures. The court emphasized the need for political parties to follow their own constitutions and legal frameworks in resolving internal disputes and reinforces the legal adviser's role in ensuring that disputes are resolved in accordance with the party's Constitution and applicable laws.

6.4 Strategic Theory

Legal advisers also play a strategic role in shaping the legal and political strategy of the political party. This theory asserts that legal advisers are involved in advising on electoral strategy, candidate eligibility, and other legal matters that could affect the party's success in elections. This includes advising on litigation, challenges to electoral outcomes, and the legal aspects of political campaigns. Section 221[83] restricts sponsorship of candidates to political parties, meaning that legal advisers must ensure that the party's candidates meet eligibility criteria. Electoral Act 2022 equally provides a legal framework for electoral litigation and dispute resolution, which legal advisers use to guide their party's strategy. In *Faleke v INEC,*[84] following the death of the APC gubernatorial candidate in Kogi State, legal advisers played a key role in determining the strategy for substituting the candidate. The Supreme Court ruled on the succession plan, emphasizing that legal advisers must carefully navigate constitutional and electoral laws in strategizing for elections. This case illustrates the legal adviser's role in shaping party strategy during electoral contests. See also *Buhari v INEC*.[85]

7. Theories of Candidate Eligibility to Contest Elections in Nigeria

[78] (2007) 12 NWLR (Pt 1047) 220.
[79] (2022) LPELR-56945(SC).
[80] Electoral Act 2022.
[81] (2017) LPELR-41805(SC).
[82](2008) 34 NSCQR 351.
[83] Constitution of the Federal Republic of Nigeria 1999 (as amended).
[84] (2016) 18 NWLR (Pt 1543) 61.
[85] (2008) 19 NWLR (Pt 1120) 246.

The eligibility of a candidate to contest an election in Nigeria is governed by both constitutional and statutory provisions. Several legal theories underlie the concept of candidate eligibility, ensuring that only qualified individuals are allowed to run for public office. These theories include:

7.1 Constitutional Theory

The Constitutional Theory holds that the primary legal framework for determining candidate eligibility is the Constitution of the Federal Republic of Nigeria 1999 (as amended). This theory stresses the supremacy of the Constitution in setting the minimum qualifications for candidates and disqualification grounds. Sections 131, 177, 65 and 106[86] set out the qualifications for President, Governor, National Assembly members, and State House of Assembly members, respectively. Sections 66, 107, 137, and 182[87] specify disqualifications for candidates in various elections. In *Atiku Abubakar v INEC,*[88] Atiku Abubakar was disqualified from contesting the 2007 presidential election based on an indictment, not a conviction. He challenged his disqualification. The court held that only a conviction by a court of law can disqualify a candidate, emphasizing that the Constitution, not mere administrative actions, governs eligibility. This case reinforced the Constitutional Theory, underlining the need for compliance with constitutional provisions regarding disqualification. In *Kawu v Yar'Adua,*[89] the eligibility of Umaru Musa Yar'Adua was challenged on the grounds of non-compliance with the nomination process by his party. The court held that since Yar'Adua fulfilled the constitutional requirements for the presidency, he was eligible. This case further emphasized the Constitutional Theory, highlighting the centrality of constitutional provisions in determining eligibility.

7.2 Public Trust Theory

The Public Trust Theory argues that candidates for public office must meet certain moral, ethical, and legal standards to maintain the trust of the public. Those who are disqualified due to criminal convictions, bankruptcy, or allegiance to a foreign State cannot be trusted to serve the public. Sections 66, 107, 137, 182 of the Constitution[90] stipulate disqualification grounds related to public trust, including criminal convictions, allegiance to a foreign State, and bankruptcy. In *Peter Obi v INEC,*[91] Peter Obi challenged the disqualification of candidates on the grounds of prior convictions. He argued that only candidates who had been convicted for serious offences should be disqualified. The court upheld that criminal conviction is a legitimate ground for disqualification, as it relates to the candidate's ability to hold public trust. This case supports the Public Trust Theory by affirming that candidates with certain criminal records cannot be trusted with public office.

7.3 Democratic Theory

The Democratic Theory emphasizes the importance of fair and equitable participation in the democratic process. The theory suggests that the qualifications for candidacy should be inclusive, ensuring that the electoral process remains open to a wide pool of citizens while still maintaining certain minimum standards. Section 84[92] requires that candidates be members of political parties and be sponsored by their parties to participate in elections. In *Action Congress*

[86]Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[87] *Ibid*.
[88] (2007) 12 NWLR (Pt 1049) 122.
[89] (2008) 19 NWLR (Pt 1120) 1.
[90] Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[91](2007) 11 NWLR (Pt 1046) 565.
[92]Electoral Act 2022.

v INEC,[93] the Action Congress challenged the eligibility of several candidates on the grounds that they were not properly sponsored by their political parties. The court ruled that only candidates properly nominated and sponsored by their parties in line with the democratic process could participate in the election. This case emphasizes the Democratic Theory, highlighting the importance of political party membership and nomination as essential democratic practices.

7.4 Meritocratic Theory

The Meritocratic Theory suggests that candidates must possess certain qualifications that reflect merit and capability to govern effectively. These include educational qualifications, experience, and personal attributes that demonstrate a candidate's competence to hold public office. Sections 131(d), 177(d), 65(2) (a), and 106(c) of the Constitution[94] require candidates for elective offices to have at least a school certificate or its equivalent. In *Dangana v Usman*,[95] the eligibility of Usman to contest the governorship election was challenged based on his educational qualifications. The petitioner argued that Usman did not possess the necessary school certificate. The court held that Usman met the minimum educational qualifications, reaffirming that the merit-based criteria were satisfied. This case supports the Meritocratic Theory by emphasizing the need for candidates to meet educational standards that demonstrate their capability to hold office.

7.5 Fair Process Theory

The Fair Process Theory emphasizes that all candidates must be subject to the same fair and transparent processes in their selection and eligibility. It also encompasses the right of candidates to a fair hearing if their eligibility is challenged. Section 84(2)[96] ensures that the process of nomination by political parties must be democratic and open to all eligible members. In *Ugwu v Ararume*,[97] Ararume's name was substituted as the gubernatorial candidate of his party after he had already been nominated. He challenged this substitution, arguing that it violated his right to a fair process. The court ruled in favor of Ararume, stating that the substitution of his name was unlawful and violated the democratic process of party nomination. This case upholds the Fair Process Theory, asserting that candidates must be treated fairly and in accordance with the rules of the electoral process.

8. The Role of a Legal Adviser to a Political Party in advising on the legal eligibility of Candidates in Nigeria

A Legal Adviser to a political party performs so many roles including advising on the legal eligibility of Candidates. Section 131[98] outlines the qualifications for the office of President, including citizenship, age, education, and other criteria. The Electoral Act, 2022 provides for the disqualification of candidates based on factors such as criminal conviction or failure to meet other legal qualifications. In *Atiku v INEC*,[99] the court examined the eligibility of Atiku Abubakar to contest in the 2007 presidential election. The Supreme Court held that a candidate could not be disqualified unless the criteria explicitly stated in the Constitution and Electoral Act was met. In *Buhari v Obasanjo*,[100] Muhammadu Buhari challenged the eligibility of Olusegun Obasanjo to run for a second term, alleging violations of constitutional provisions.

[93] (2007) 12 NWLR (Pt 1048) 220.
[94] Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[95] (2012) 4 NWLR (Pt 1291) 1.
[96] Electoral Act 2022.
[97] (2007) 12 NWLR (Pt 1048) 367.
[98]Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[99] (2007) 12 NWLR (Pt 1049) 1.
[100] (2005) 13 NWLR (Pt 941) 1.

The Supreme Court ruled in favour of Obasanjo, affirming the importance of following the constitutional criteria for eligibility. The legal adviser plays a crucial role in advising political parties on the legal eligibility of candidates for elections in Nigeria. This is to prevent disqualification due to non-compliance with constitutional and statutory requirements. Nigerian electoral laws are explicit on the qualifications and disqualifications for various political offices, and any deviation from these requirements can result in the nullification of a candidate's nomination or election. Ensuring that a candidate is legally eligible is a fundamental duty of the legal adviser. The Nigerian Constitution and the Electoral Act contain provisions regarding the qualifications required to run for office, including citizenship, age, education, and the absence of certain disqualifications like criminal records or bankruptcy. See *Atiku v INEC***.**[101]

9. Conclusion

The Legal Adviser plays a vital role in advising on the legal eligibility of Candidates to an election. This duty is pivotal in maintaining the integrity of the party's participation in elections. Adherence to the provisions of the Constitution, the Electoral Act, and INEC guidelines is non-negotiable for avoiding disqualification and ensuring that candidates can legally contest elections. The relevant case laws further illustrate the legal consequences of non-compliance. The role of a legal adviser is critical in our democratic journey when it comes to advising on the legal eligibility of candidates to an election. Effective discharge of this duty is essential in strengthening the democratic process in Nigeria.

[101]**(**2007) 12 NWLR (Pt 1049) 1**.**

ARE MEMBERS OF THE NATIONAL ASSOCIATION OF RESIDENT DOCTORS FREE TO EMBARK ON STRIKE IN NIGERIA? *

Abstract

In Nigeria of today incessant strike or industrial action by members of the National Association of Resident Doctors ("NARD") has become a common place. This endangers the lives of many who depend on the medical services and assistance rendered by this group of people. Considering the extent of damage done to the health sector by withdrawal of service of the members of NARD, this paper questions the legality or otherwise of the strike action often embarked by this group. It is found that members of NARD fall within the group that renders 'essential services' and therefore prohibited from embarking on industrial action. The question remains how this group will be tamed to abide by the provisions of the law. Without discounting the need for government to invest in the health sector, it is suggested that the National Industrial Court of Nigeria when approached should always grant injunctive reliefs against NARD and its members.

Introduction:

The Nigerian health sector is a challenged one.[1] It is faced with myriads of problems, including incessant strike or industrial actions by resident doctors under the umbrella of National Association of Resident Doctors ("NARD"). This group consists of qualified doctors who work either in private or public hospitals while undergoing further practical training called "residency". The majority of medical services rendered in the hospitals are carried out by this group of doctors. Therefore, the health crisis facing Nigeria is further worsened any time NARD embarks on strike. This paper, therefore, examines the legality or otherwise of the strike actions or industrial action often embarked by this group. This raises several issues that will assist us arrive at the right answers. First, the following issues are raised:

(a) Whether or not the members of the NARD are persons engaged in the provision of essential services within the meaning of Trade Disputes Act, and the Trade Union Act as amended by the Trade Union (Amendment) Act, No. 17 of 2005.

(b) If the answer to issue (a) is in the affirmative, whether the members of the NARD are as such prohibited from taking part in any strike, or engaging in any conduct in contemplation or furtherance of any strike, by the provisions of section 31 (6) (a) of the Trade Union Act, Cap. T 14, LFN, 2004, as amended by the Trade Union (Amendment) Act, No. 17 of 2005.

(c) If the answer to issue (b) is in the affirmative, whether or not the National Industrial Court of Nigeria ("NICN") when approached by government or its agent, can grant declaratory and injunctive reliefs against NARD and its members.

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[1] In Nigeria, patients are confronted with so many problems ranging from lack of equipment and expertise to diagnose certain ailments and treatment of them thereof. In addition to this, industrial action or strike has come to exacerbate already existing problems. This has encouraged capital flight through medical tourism often embarked by the rich to developed countries. Medical tourism cannot rescue someone who needs urgent medical attention in a critical area of the health sector that our country is known to offer limited options. A good number of people have died in air ambulance before reaching their preferred destination for medical attention. Considering these and many more problems facing Nigeria's health sector, all hands must be on deck to find out how we can improve our health system. As a contribution to the debate on how we can solve so many problems facing our health sector, this paper is restricted to looking at how to stop the incessant strikes often embarked by the members of NARD.

The above issues are hereunder examined to determine the direction of the law.

Issue (a): *Whether or not the members of the NARD are persons engaged in the provision of essential services within the meaning of Trade Disputes Act, and the Trade Union Act as amended by the Trade Union (Amendment) Act, No. 17 of 2005.*

Section 31 (9) (b) of the *Trade Unions Act, Cap. T 14, LF.N, 2004*, as amended by the *Trade Union (Amendment) Act, No. 17 of 2005* ("Trade Unions Act") provides that "essential services" for the purpose of the Trade Unions Act shall be as defined in the First Schedule of the *Trade Disputes Act, Cap. T8, LFN, 2004* ("Trade Disputes Act").

The First Schedule of the *Trade Disputes Act* (the "First Schedule") defines "essential services" under three (3) distinct paragraphs each representing a separate group of services. The services of the NARD fall with the second, which defines 'essential services' to include:

"2. Any service established, provided or maintained by the *Government of the Federation or a State, by a local government council, or any municipal or statutory authority, or by private enterprise* –

(a) for, or in connection with, the supply of electricity, power or water, or of fuel of any kind;
(b) for, or in connection with, sound broadcasting or postal, telegraphic, cable, wireless or telephonic communications;
(c) for maintaining ports, harbours, docks or aerodromes, or for, or in connection with, transportation of persons, goods or livestock by road, rail, sea, river or air;
(d) *for, or in connection with,* the burial of the dead, *hospitals, the treatment of the sick, the prevention of disease*, or any of the following public health matters, namely sanitation, road-cleansing and the disposal of night-soil and rubbish;
(e) for dealing with outbreaks of fire." [Emphasis supplied]

Of particular importance to this discussion is Paragraph 2(d) above. The introductory part of Paragraph 2 of the First Schedule to the *Trade Disputes Act* maintains that the place(s) of work or where the service(s) of those who provide essential services could be "…established, provided or maintained by the Government of the Federation or a State, by a local government council, or any municipal or statutory authority, or by private enterprise…*"* So, it does not matter if the service is provided in the public or private sector. What matters is the nature of the service(s) rendered. It is obvious the members of NARD are employees working in "hospitals" and whose services relate to "the treatment of the sick and prevention of disease". It does not matter whether the hospital is of public or private holding. It is of common knowledge to Nigerians that members of NARD whether in public or private "hospitals" do treat the "sick" and work for the "prevention of diseases". Therefore, on the strength of the provision of section 124(1)(a) of the *Evidence Act 2011* (the "Evidence Act") the above notorious facts about the work of the members of NARD require no proof. It, therefore, follows that members of NARD are persons engaged in the provision of essential services within the meaning of the Trade Unions Act.

From the above, it is safe to say that the members of NARD are persons engaged in essential services within the meaning of Trade Disputes Act, and the Trade Union Act as amended by the Trade Union (Amendment) Act, No. 17 of 2005. In doing this, reliance is placed on the decision of the National Industrial Court of Nigeria in *Hon. Attorney-General of Enugu State v. National*

Association of Government General Medical and Dental Practitioners &anor.[2]In that case, the question arose for determination as to whether the members of the National Association of General Medical and Dental Practitioners ("NAGMDP") in the employment of the Enugu State Government were engaged in essential services. This Court, *per* Hon. Justice B. B. Kanyip, held that the members of NAGMDP, inasmuch as they were engaged in services for hospitals and in connection with the treatment of the sick, were people engaged in essential services "as per paragraph 2(d) of the First Schedule to the Trade Disputes Act. In coming to that conclusion, the Court had considered the concept of "essential services" as espoused by the International Labour Organization ("ILO") and concluded that the "ILO conception of essential services approximates with the notion under Nigerian law in classifying the hospital sector as an essential service."

It is therefore my view that Resident Doctors, inasmuch as they are engaged in the provision of services in hospitals related to the "treatment of the sick and the prevention of diseases", are engaged in essential services under the Trade Disputes Act.

Issue (b): *If the answer to issue (a) is in the affirmative, whether the members of the NARD are as such prohibited from taking part in any strike, or engaging in any conduct in contemplation or furtherance of any strike, by the provisions of section 31 (6) (a) of the Trade Union Act, Cap. T 14, LFN, 2004, as amended by the Trade Union (Amendment) Act, No. 17 of 2005.*

Section 31 (6) (a) of the Trade Union Act provides that –

> No person, trade union or employer shall take part in a strike or lockout or engage in conduct in contemplation or furtherance of a strike or lockout unless the person, trade union or employer is not engaged in the provision of essential services.

In clear and unambiguous words, the above section disqualifies a person or trade union whose members are engaged in the provision of essential services from participating in a strike, lockout, or conduct in contemplation or furtherance of a strike. Therefore, as I have already argued under issue (a) above, "essential services" for the purposes of the Trade Unions Act is as defined in the First Schedule of the Trade Disputes Act. Thus, it has been proved beyond doubt that the members of NARD are persons engaged in the provision of essential services. It follows therefore that for as long as the provisions of s. 31 (6) (a) of the Trade Unions Act as quoted above remain in force, the members of NARD have no lawful right to go on strike or engage in conduct in contemplation or furtherance of a strike. Again, I rely on the decision of the NICN in *Hon. Attorney-General of Enugu State v. National Association of Government General Medical and Dental Practitioners &anor*.[3] In that case, consequent upon the finding that the defendants were engaged in essential services, the Court held that the defendants cannot embark on strike action or threaten to embark on one. In the words of the Court, it held that: "The defendants are engaged in the provision of essential services within the meaning of the term under the Trade Disputes Act. Consequently, the defendant cannot embark on any strike action or threaten to embark on one."

Therefore, I am of the view that just as it is with the defendants in the National Association of Government General Medical and Dental Practitioners Case above, so it is with the members of NARD. They are disqualified by the law from embarking on strike or industrial action because they provide essential services.

[2] Unreported Suit No. NIC/EN/16/2010, decided on 20 June 2011
[3] Unreported Suit No. NIC/EN/16/2010, decided on 20 June 2011

Issue (c): *If the answer to issue (b) is in the affirmative, whether or not the National Industrial Court of Nigeria ("NICN") when approached by government or its agent, can grant declaratory and injunctive reliefs against NARD and its members.*

First, with the provision of section 254C (1)(a)(b) of the *Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010* the controversy surrounding the exclusivity or otherwise of the jurisdiction of the National Industrial Court of Nigeria (NICN) has been put to rest. It is no longer a subject of disputation. The above section confers exclusive jurisdiction in civil causes and matters to NICN in any or all of the following matters: labour, employer, trade unions, industrial relations and matters arising from workplace, the condition of service, including health, safety, welfare of labour, employee, worker(s) and matters incidental thereto or connected therewith. This section has effectively divested the State High Courts, Federal Capital Territory High Court, and the Federal High Court the jurisdiction of entertaining matters bothering on any or all of the above subjects or fields.[4] Thus, the section also put beyond doubt the controversial issue of whether or not the NICN is a superior court of records under section 6(3) & (5) of the *Constitution of the Federal Republic of Nigeria, 1999* by adding the NICN to the list of superior courts of records.

With the above provisions, it is no longer in doubt that the NICN is the proper forum to ventilate issues bothering on strike(s) or industrial actions. Therefore, the NICN is the right court to be approached for the grant of declaratory and injunctive reliefs against striking workers who embark on strike or industrial action despite that they provide 'essential services'. Most often, it is the government, either State or Federal, or its agent that normally seeks relief in the court against striking workers. In order occasion, especially in matters bothering on the provision of services, private employers of labour could be the complaining party to approach the court: especially when it involves essential service providers working in the private sector.

On whether or not the NICN can grant declaratory and injunctive reliefs, the NICN itself in *Hon. Attorney-General of Enugu State v. National Association of Government General Medical and Dental Practitioners &anor*,[5]declares that it: "… has powers under sections 14, 16 and 19 of the National Industrial Court Act 2006 to grant declaratory and injunctive reliefs, and do all such things as are necessary to resolve a labour dispute and stop multiplicity of suits." It follows that in respect of the declaratory relief, the government or complaining party with locus standi against the strike or industrial actions embarked upon by the NARD is entitled to a declaratory relief confirming that all NARD members render 'essential services'.

Coming to the grant of injunctive relief, such as perpetual injunctions, the Supreme Court's opinion (per Adekeye JSC) in *Goldmark Nig. Ltd. v. Ibafon Co. Ltd.*[6] is relevant. The court is of the view that:

> The grant of the relief of perpetual injunction is a consequential order which should naturally flow from the declaratory order sought and granted by court. The essence of granting a perpetual injunction on a final determination of the rights of the parties is to prevent permanently the infringement of those rights and to obviate the necessity of bringing multiplicity of suits in respect of every repeated infringement.

[4]See, *Sunday Ainabebholo v. Edo State University Workers Farmers Multi-purpose Co-operative Society &Ors* (2015) LPELR-24513(CA); and *Central Bank of Nigeria v. James EjembiOkefe* (2015) LPELR-24825(CA)
[5] Unreported Suit No. NIC/EN/16/2010, decided on 20 June 2011
[6] (2012) 3 KLR (Pt. 309)1251 at 1288, paragraph D-F

Commissioner of Works, Benue State vs. Devcon Ltd. 1988 3 NWLR pt. 83, pg. 407, LSPDC vs. Banire 1992 5 NWLR pt. 243 at pg. 620, Afrotec vs. MIA (2001) 6 WRN pg. 65, Globe Fishing Industries Ltd. vs. Coker (190) 7 NWLR pt. 162. Pg. 265."

Thus, the NICN is invited to note that s. 31(7) of the Trade Unions Act makes it a crime for anybody to contravene the provision of s. 31 (6) (a) of the Trade Unions Act (which *inter alia* prohibits persons engaged in essential services from embarking on strike). It therefore follows that the NICN does not only have a duty to punish crimes but also to prevent the commission of crimes. Therefore, restraining the members of NARD through injunctive reliefs sought by governments or their agents will be a proactive enforcement of section 31(6)(a) of the Trade Unions Act. In this direction, the Supreme Court in *Amechi v. INEC*[7] held: "The court has a duty to enforce the provisions of the laws validly enacted by National Assembly pursuant to powers derived from the Constitution."

Conclusion:

In this paper, it is established that the members of NARD are persons engaged in essential service within the meaning of Trade Disputes Act, and the Trade Union Act as amended by the Trade Union (Amendment) Act, No. 17 of 2005. Being persons who are engaged in essential services, the members of NARD are prohibited from taking part in any strike, or engaging in any conduct in contemplation or furtherance of any strike, by the provisions of s. 31 (6) (a) of the Trade Union Act, Cap. T 14, LFN, 2004, as amended by the Trade Union (Amendment) Act, No. 17 of 2005. It is also shown that in consequence, the government or its agents or a legitimate complainant is entitled to both declaratory and injunctive reliefs to prohibit industrial action or strike amongst 'essential service providers.

[7] (2008)1 KLR (Pt. 247)237 at 297, paragraph D

COMPARATIVE CONSTITUTIONALISM: A CATALYST TO STABLE WORLD ORDER*

Abstract

Comparative Constitutionalism as an order creating mechanism in societies around the world, as it relates to the title under consideration dates back to what is usually referred to as "the state of nature". In that society, the predominant practice was the survival of the fittest or "the rule by might." Thus, the need to transpose from the state of nature to state of society became imperative. The state of society is naturally a regulated environment that ensures law and order. While in the exercise of the common sovereignty belonging to the community, the central power also became egregious in time with the donated power; thereby denying the freedoms of the people, hence the quest for Comparative Constitutionalism. This paper therefore, examines how the concept of Comparative Constitutionalism has brought about relative peace, order and stability to once chaotic and primitive world? In achieving this goal, this paper depends on the doctrinal approach for its research methodology, taking into account both primary and secondary sources. Concluding, this article recommends that both the ruled and the ruler should be bound by the limits stipulated in the constitution and laws of the land for order, peace and tranquillity.

Key Words: *Constitutionalism, Law and Order, Rule of Law*

1. Introduction

The instrument of comparative constitutionalism as catalyst of global order seems to suggest two aspects; first, that it is an order creating norm that has received global embrace. Secondly, constitutionalism in its comparative form underscores stability of nations across the world, given its inherent limiting powers. The former appears to support the concept as any instrument including international laws that serve as check to those that are reposed with powers both at the international and national levels. The later on the other hand, seems to reflect the conquering or limiting factor of the doctrine as a safeguard to the exercise of governmental powers in its absolute and or totalitarian terms within an independent sovereign state; which serves primarily, as an instrument to curtail the arbitrary use of power by the executive whether monarchical or presidential, and subsequently, the legislature and every other aspect of the exercise of governmental powers, tracing its roots to the then Great Britain, yet to the United States of America and to the uttermost parts of the world. The concept no doubt is a global "stabilizer" thereby randomly creating a peaceful world order from one state to another, thus greatly contributing to world peace and order. This paper, although holds nothing against the first position but in fact gives it support, however, agrees more with the second limb of what the title appears to suggest. For a fuller comprehension, it is expedient to begin this discourse by defining what a constitution means. Though definitions are not necessarily definite, they are however expedient, because they help to explain an idea or concept in concise terms. They are not definite in that they can be controversial or contentious. Such definitions are usually taken to serve the interests of the user and to be restricted to the context and circumstances in which they were propounded. As such, the definition of a country's constitution is of no exception.

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2. The Concept and Meaning of Constitution

The Black's Law Dictionary, defines Constitution as: *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.*[1] *A* nation's *history of government and institutional development.*[2] Prof. Wheare in his book titled Modern Constitutions as quoted by Timothy Amerit in his article[3] introduces yet another definition of a Constitution when he stated that: *The Constitution then for most countries in the world is a selection of the legal rules which govern the government of that country and which have been embodied in a document*.[4] The key element introduced is the legal character of the Constitution, as a body of legal rules or laws embedded in a document. This legal aspect or status of a constitution is an important characteristic of a modern Constitution which distinguishes it from a mere political charter. Timothy Amerit again in his article cited the duo, Professors Wade and Philips in their text book on Constitutional law, that: *Normally, a constitution is a document having a special legal sanctity which sets out the framework and principal organs of the government of a State and declares the principles governing the operation of those organs*.[5] In a similar vein, Prof. Kanyeihamba, further defines Constitution as:

> *A Constitution of a State consists of the basic and fundamental laws which the inhabitants of a State consider to be essential for their governance and wellbeing. The Constitution lays down political and other State institutions and distributes powers among them and puts limitations on the exercise of those powers*.[6]

From the combined effect of the above scholarly definitions, we can define a Constitution as a set of basic principles and laws upon which the State is organized and which establishes the major organs of government. It further defines their functions and powers and relationship amongst them, and sets out the rights and duties of the citizens, including putting limitations on the exercise of those powers and in most cases embedded in a documented form. Again, on the strength of the forgoing, a national Constitution may have both political and legal dimensions. In political terms, a Constitution is the basic decision of a people on how they want to live. It may be described as a socio-political frame-work through which the polity agree on who gets what, when and how. It has been described as a social contract or covenant between the State and its subjects on the manner of governance and exercise of State power. Conversely, in legal terms, a Constitution is the fundamental and supreme law of the country. It is the basic law from which all laws derive their life. It deserves the highest respect and obedience from the leaders and the people alike. It follows therefore that a Constitution represents the deepest norms and ideals by which the people govern their political life. However, this is not the case everywhere. As a matter of fact, a good Constitution should be a home-grown Constitution that is socially relevant and tailored to the people's needs and interests, all determined by the people themselves. However, this is not the case in many British former colonies. The independence Constitution of Nigeria, 1960 is a case in point, such that upon independence the Queen of England yet held forth as Head of State of Nigeria. Another example is the Uganda Constitution

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[1] B. Gardener (Ed.), "*Black's Law Dictionary*" (8th edn.) part 1.

[2] Ibid, part 3. This was the standard definition before the United States produced the first written constitution. It remains current in Great Britain and other nations that have unwritten constitutions.

[3] <http://timothyamerit.blogspot.com.ng/2014/08/constitutionalism-is-more-important.htm>l. accessed 10/02/2018.

[4] T. Amerit, ibid.

[5] Ibid.

[6] *Constitutional Law and Government in Uganda*.

of 1962, which was bestowed on Uganda by an Act of the British Parliament. In making a case for the humiliating position, Jim Paul aptly describes the process of Constitutional promulgation throughout Anglophone Africa in the following terms:

Independence Constitutions were like negotiated treaties. They were often more the product of ad hoc bargaining in London than the reflection of popular demands and manifestations of indigenous political culture. They were also often extraordinarily complex. But by accepting a Constitutional document worked out in London on the eve of independence, a regime in Africa could hasten the attainment of national sovereignty and the entrenchment of its own power. Once independent, the regime could change the Constitution to suit local needs, and not surprisingly, to tighten its own control over the political system.[7]

In affirmation of the above quote, Julius Nyerere explained in an article on the constitutional proposal of Tanganyika, thus:

> *Our Constitution differs from the American system in that it avoids any blurring of the lines of responsibility, and enables the executives to function without being checked at every turn. For we recognize that the system of checks and balances is an admirable way of applying the social change. Our need is not for breaks – our lack of trained manpower and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred of poverty, and the resistances which are inherent in all societies.*[8]

The above excerpt by Julius Nyerere by all intent and purpose smacks of "strongmanism" as against strong institutions in the world, particularly in most of Africa. His statement simply suggests a replacement of an external colonialism with that of an internal one in the most egocentric manner. It is a recipe for chaos, violence, corruption and in extreme cases war. This in like manner takes us to the importance of comparative constitutionalism as an acceptable phenomenon and as a catalyst for law and order in the world over. Nevertheless, in order to have a comprehensive understanding of the concept of constitutionalism, it is yet important that some scholarly definitions may suffice.

3. The Concept and Meaning of Constitutionalism

According to Fehrenbacher, Constitutionalism is " *a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law*."[9] Fellman David, in a more elaborate and indebt fashion puts it thus:

> *Constitutionalism is descriptive of a complicated concept, deeply embedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials ... Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme,*

[7] J. Paul, 'Some Observations on Constitutionalism, Judicial Review and the Rule of Law in Africa', (1974) (5) *Ohio State Law Journal*

[8] J. Nyerere," How much power for Leader," (1962) (7) (7) *African Report*, 7

[9] D. Fehrenbacher, '*Constitutions and Constitutionalism in the Slaveholding South'* (University of Georgia: 1989) 1

constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law.[10]

From the forgoing, the scholars in their divergent positions on what constitutes constitutionalism agree and have in common that it entails as a basic law, a law of the constitution or a law duly brought forth from the womb of the common will of the people with binding force which serves as a source as well as a limiting factor to the exercise of governmental powers within a state, but that is not all that it is, of what a constitution is about. We shall make this plane in the course of this work. Thus, no government, president or monarch, no institution of law or enforcement, should be created or be allowed to exist and to function without a constitution. No one should have power over others, unless and until that power and the conditions of its use have been strictly defined. In the words of Thomas Paine, *"government without a constitution is power without right"*.[11] While the notion of constitution is coterminous with government itself, constitutional government or constitutionalism is not.[12] It connotes a government defined, regulated and limited by a constitution, written or unwritten and limited not just in a conventional or political sense but as a matter of a law, with all its coercive force.[13] In view of the above and the topic under consideration therefore, we summarize Comparative Constitutionalism as the study, comparison and exchange of essentially the constitutional experiences of countries around the world, their internal legal mechanisms, and political, legal and even social institutions. It is also the study of differences and similarities among the constitutions and laws of nations. But what is even more paramount is, how the concept of Comparative Constitutionalism has been imbibed and enforced as an order and tranquillity creating instrument around the globe, particularly from the prism of the "recipient states" i.e. states that have the need to learn of the concept. Example is the case of Nigeria adopting comparative mechanism as it concerns the Constitutional regime of the United States of America. However, the question is does Nigeria as a people and governments past and present depicts anything the practice of constitutionalism, same as it has been projected by the American community? Another was the obvious quest for the entrenching of the concept in the spirit of Comparative Constitutionalism by the peoples of the Middle East, which refusal and resistance by the "sit tight" autocrats is no doubt the unending war in Syria and Yemen. The no lost love situation between the people and their rulers, as it is apparent in Egypt, Iran, Tunisia and others. In Africa the story is not different, from Zimbabwe to the Democratic Republic of Congo, where in fact no such thing as democracy. Others are Uganda, Benin Republic and still counting. Such that there is no full-blown war in most of these countries, is perhaps the semblance of practice of the concept of Comparative Constitutionalism.

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[10] (David Fellman, 'Constitutionalism' in P. Wiener, (ed.) "*Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*", vol. 1, pp. 485, 491–92 (1973–74). "Whatever particular form of government a constitution delineates, however, it serves as the keystone of the arch of constitutionalism, except in those countries whose written constitutions are mere sham. Constitutionalism as a theory and in practice stands for the principle that there are - in a properly governed state - limitations upon those who exercise the powers of government, and that these limitations are spelled out in a body of higher law which is enforceable in a variety of ways, political and judicial. This is by no means a modern idea, for the concept of a higher law which spells out the basic norms of a political society is as old as Western civilization. That there are standards of rightness which transcend and control public officials, even current popular majorities, represent a critically significant element of man's endless quest for the good life."

[11] Cited in Blaustein and Sigler (eds.), "*Constitutions that have made History*" (Paragon, NY: 1988), 1

[12] B. Nwabueze, "Ideas and Facts in Constitution Making;" The Morohundiya Lectures, Faculty of Law, Ibadan. First Series, p. 2.

[13] Ibid.

4. A Compendium of the Emergence of the Concept of Constitutionalism

This research work considers two views as to the emergence of constitution as an instrument in paper that limits both the led and leader in a defined territory as is provided for in the law of the Constitution. As has been noted elsewhere that, though constitutionalism, the spirit of constitution, had been alive and practiced for many years, England's Magna Carta, the Great Charter, has been widely accepted by history as the world's first major constitutional document.[14] However, Prof. B.O Nwabueze, in his book the *Idea and Facts of Constitution Making* states that the first attempt at a written frame, was by which Oliver Cromwell in England was made the Lord Proctor of the Commonwealth, upon the proclamation made by the republic after the execution of Charles 1, which was titled simply as an Instrument of Government.[15] In defence of his position, he maintained that, England's Magna Carta (1215) although has been described as charter, was not of popular liberty, but of feudal reaction and as tending to the restoration of feudal privileges and feudal jurisdiction, which by all intent was inimical to the Crown and to the growth of really popular liberties.[16] Nor was its Bill of Rights of 1689, a bill of rights strictly so called, both because it was concerned essentially to assert and secure, also not the rights of the individual, but the supremacy of Parliament over the Crown and a few individual rights protected such as – the right to bear arms, the prohibition of excessive bail, the right to jury trial and the prohibition of forfeiture before conviction- were not legally binding upon parliament. The notion of constitutional government only became firmly entrenched as an unquestioned principle of government in England following revolutions that took place in the nation, which includes: the civil law that culminates into the restoration of Charles 11 in 1660 upon certain conditions, the Glorious Revolution of 1688 that led to offer to William of Orange and his wife Mary, the throne of England, after the flight of Mary's father to France, James 11.[17] A part of the offer was what was known as a Bill of Rights, which contained thirteen stipulations. Flowing from the above, this paper argues that, British Constitution is regarded unwritten not because it is not cast on stone but that the binding force of the document is not directly derivable from the document itself in abstraction as in the case with a written constitution. In converse, the British constitution re-allocates the inherent coercive content associated with the law of the constitution wholesale to the parliament, thereby making the parliament sovereign. Thus, the idea of constitutionalism is older than the existence of written constitutions.[18] As such:

> *[T]he triumph of parliamentary government, with a bill of rights, over monarchical absolutism in England, established constitutional government as an undisputed principle of government.[19] The principle having been firmly established in England, subsequently, moved across the seas and became yet strongly accepted on the continent of Europe – France, Italy, Germany, Scandinavia, Poland, Hungary and in North America.[20] This has been rightly described as England's pre-eminent contribution to the history of Western freedom[21] vis-à-vis global peace and order, vide colonialism, international relations or the likes to the rest of the world.*

[14] Blaustein and Sigler, op. cit.
[15] B. Nwabueze, p. 1.
[16] M. Mckechnie, Magna Carta (1905), p. 449.
[17] Ibid, p. 3.
[18] Ibid.
[19] Ibid, p. 4.
[20] D. Treadgold, *Freedom: A History* (1990), p. 187-227.
[21] H. Muller, *Freedom in the Western World: From the Dark Ages to the Rise of Democracy* (1963), p.290.

5. A Written Constitution

The thought of a written constitution as a law binding on both executive and the legislature owes its origin to the United States.[22] This was followed with the establishment of the Constitution in 1787. The inspiring idea was born and popularized as a formal document possessing the force of law and as a supreme, overriding law. From the United States (US), the notion has yet been transmitted to most countries of the world today. What is even more innovative and inspirational was the idea of a written constitution as something separate from and external to government; something antecedent to government and connoting a system of fundamental principles according to which a nation, state, corporation or the document embodying these principles.[23] Accordingly, in this sense, a constitution embraces not only a frame of government but also the relations of the government to the individuals that compose the state or other associations as well as the fundamental objectives of the association. In the same vein, affirming the constitution as a single, written document of American Innovation, Wheare states as follows:

> *Until the time of the American and French Revolutions, a selection or collection of fundamental principles were not usually called 'the Constitution… since that time the practice of having a written document containing the principles of government organization has become well established and Constitution has come to have this meaning.*[24]

In the words of Chief Justice John Marshall while aligning his thoughts in the American innovation on the constitution opined in the popular case of *Marbury v Madison*,[25] that it is, "the greatest improvement on political institutions." The constitution in its written form, from the United States was exported to Poland on 3, May 1791, France on 3, September 1791, Sweden 1809, Venezuela 1811, Ecuador 1812, Spain 1812, Norway 1814, Mexico 1824, Central American Federation 1825, Argentina 1826 and Liberia's Constitution of 1847, which was likely the first of its kind in Africa, until its overthrow in the year 1980.[26] In admiration of the effectual nature of written constitution in the administration of the human community, Mark states as follows:

> *[W]ord magic'-a reverence for things written. The Constitution is a tangible and visible symbol of the things (i.e. ideas and values) that people hold dear… By having a written document, the seems less mutable, less vulnerable to the whims of individuals. The Constitutions thus symbolizes the idea of the rule of law.*[27]

Mcllwain, while eulogizing the acceptance of the concept the world over, given its pre-eminence in the attainment of world peace and order. States thus: *The precedent for this, first developed in North America, was naturalized in France and from there transmitted to most of the continent of Europe, from which it has spread in our own day to much of the orient.* This development since Professor Mcllwain wrote in the 1940s, has enjoyed a new boost by the emergence from colonialism of a number of nations across Africa and Asia which needed written constitutions to launch themselves into the new dawn of their independent existence and impose checks against the abuse of majority power in the interest of tribal, racial and or religious minorities. So much has the development encompassed the world that only 5 countries are today

[22] B. Nwabueze, p. 15.
[23] Ibid, p. 5.
[24] K. Wheare, *Modern Constitution* (1966).
[25] 1 Cranch 137 (1803).
[26] B. Nwabueze, p. 5.
[27] M. Cannon,' Why celebrate the Constitution?' in National Forum, (1984) (LXIV) (4), *Phikappa Phi Journal*, 3

without a written constitution as against over 180 with written constitution?[28] Thus, Constitutionalism places limits upon government, proscribing the means by which official power may be exercised. Constitutionalism establishes boundaries between the state and the individual, forbidding the state to trespass into certain areas reserved for private action.[29] Having adumbrated what a Comparative Constitutionalism is about on reasonable basis, we shall proceed further to give an overview of doctrines, concepts and or institutions that guarantee constitutionalism in a state as well as the world at large for a stable, orderly and peaceful society. However, before we go on to shed light on them, a glimpse should be had on instances and situations of how societies or nations survived, and in fact, are surviving without a functional operation and implementation of the concept of constitutionalism, put it differently, a government that is unlimited, total, authoritarian or the like, without the presence of limiting laws on the exercise of powers by those that are charged with it and the people over which the power is being prescribed for. One example of this is the exercise of absolute power usually by the monarch after the transition of man from the rule of men to that of law and state of nature to state of society.

6. Absolute or Unlimited Power

A government of absolute or unlimited, putting it differently, a government without the presence of a law of the constitution or legislation is intrinsically bad, being inherently incapable of nurturing and promoting the best qualities in the people.[30] An absolute government neither desires nor asks for the people's assistance in governing the state; its desire is that they should not aspire to govern it themselves.[31] An absolute or unlimited government creates other far worse evil traits and propensities according to B. O Nwabueze, among the people. Firstly, it divides, rather than unites, them. "Divide and rule" is an old and familiar tactic by which absolute governments everywhere seek to maintain themselves in power and to perpetuate their rule for an indefinite length of time and it is no less beloved of an indigenous absolute ruler than a colonial.[32] Various barriers are erected to keep the people divided and their attention and interest diverted from the conduct of public affairs.[33] In affirming this position, Alexis noted thus: "*A despot it has been said, easily forgives his subjects for not loving him, provided they do not love each other."*[34] Conversely, Alexis puts it succinctly that:

> *When the public govern, there is no man who does not feel the value of public good-will, or who does not endevour to court it by drawing to himself the esteem and affection of those amongst whom he is to live… under a free government, as most public offices are elective, the whose elevated minds or aspiring hopes are too closely circumscribed in private life constantly feel that they cannot do without the people who surround them.*[35]

Prof. Nwabueze, while pointing out the mark of a good government, evincing compassion, limitations and or boundaries for self-restraint; states that, in nurturing and promoting the best qualities in the people - the show of characters of obedience to government as the constituted

[28] https://www.worldatlas.com/articles/countries-with-uncodified-constitutions.html, accessed, 20/02/2018.
[29] Blaustein and Sigler, ibid.
[30] B. Nwabueze, "Ideas and Facts in Constitution Making;" The Morohundiya Lectures, Faculty of Law, Ibadan. First Series, p. 53.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] A. Tocqueville, "*Democracy in America*" (1835) ed., Richard Heffner (1956) p. 194.
[35] A. Tocqueville, ibid, p. 195.

authority, its laws and its disposition in the settlement of private quarrels and redress of grievances; the habit of integrity, probity, fairness, self - restraint in the conduct of social relations and public affairs and the quality of public - spiritedness and patriotism in matters affecting the interest of the community. According to him, that form of government is the best which has a tendency to foster such qualities in the people.[36] It is the view of this paper that these aforementioned qualities and more are quickly eroded in a society where absolute power holds sway. In so doing, Nwabueze further implied that, a worse evil is the capacity of absolute power to corrupt. Echoing the famous saying of Lord Action, "power corrupts but absolute power corrupts absolutely,"[37] Nwabueze in his book, *Ideas and Facts in Constitution Making* quips that this represents a universal political truth, founded upon experience. Its wielder is quite the first to be corrupted. No ruler in all history has been known to be above the corruptive influence of absolute power.[38] It transforms a person's natural disposition; the wielder becomes a quite different person after some years in the enjoyment of absolute powers. Yet another evil is that, the values of the society are corrupted. As everyone tends to take moral and service tone from the absolute ruler's standard of integrity, probity, it generally filters down the entire body of the society.[39]

The notion of the state as a distinct corporate entity is corrupted and perverted; the absolute ruler is usually treated as though it is synonymous with the state. The state's financial resources are disbursed by him as he would disburse his own private wealth, with no restriction whatsoever or obligations of accountability. It is safe to conclude in the circumstance that, the absolute ruler is indeed the state, given that "*the same individual was the author and interpreter of the laws and the representatives of the nation at home and abroad, he was justified in asserting that he constituted the state."*[40] In which case, repression of individual liberty is inseparable from a dictatorship. Every expression of opinion, association and political activity, which are critical of its rules are viewed as hostile to the interest and dangerous to its security, which must therefore be repressed.[41] Nwabueze, while enunciating the evils of the exercise of absolute powers, opined that, apart from other numerous monster sides of absolute powers, it also has a natural and inexorable tendency to be exercised autocratically. A typical example of this was when Nigeria was in military rule. During the first era of military rule from 15th January, 1966 to 30th September, 1979, there were 50 decrees and between 1st January, 1984 and 15th May, 1985, a period less than one year, 14 decrees were promulgated, which explicitly made the constitutional guarantee of fundamental rights inapplicable in relation to any matter arising from those decrees. The most disturbing of all was that no court was to enquire into the question whether a guaranteed right had been or was being or was likely to be contravened by anything done or purported to be done thereunder.[42] Following the decrees, thousands of people were detained without trial, political parties and tribal unions proscribed, the publication and circulation of some newspapers and magazines prohibited, criticism of government and political discussions were severely restricted, public assemblies and processions proscribed and property or assets of citizens were inadvertently expropriated without due process of law.

Another clear instance of the evils of unlimited or authoritarian powers in the absence of an entrenched or practicable constitutionalism is the One-Party experience of most African

[36] B. Nwabueze, p. 52.
[37] Ibid, 54.
[38] Ibid.
[39] Ibid.
[40] A. Tocqueville, ibid. 63

[42] B. Nwabueze, ibid. 55.

states. A good example is the Ghanaian Preventive Detention Act, 1958. According to Nwabueze, from July, 1958 when the Preventive Detention Act came into force, it was estimated that over 1,000 persons were incarcerated in preventive detention facility in Ghana for periods ranging up to ten years, "in conditions of severity worse than those laid down by law and accorded to convict prisoners,"[43] as quoted by Busia in Nwabueze's Ideas and Facts of Constitution Making.[44] Further, the International Commission of Jurists in a report in 1961 had commented adversely on some characteristics replete with the Ghana Preventive Detention Act, notably the long duration of detention without making such subject to regular review. The fact that detainees were neither told the reasons neither for their detention nor given opportunity to face their accusers, the inadequate, often flimsy grounds for detention and above all, the ousting of the court's jurisdiction to inquire into the propriety of detention in individual cases.[45] In most cases the detainees were members of the opposition. Similar to that of Ghana was Tanzania, the minister of home affairs is empowered to detain anyone at any time and for any period of time, irrespective of whether a state of emergency has been proclaimed or not. Another variable of the Tanzania Preventive Detention Act is that it requires an annual review by an advisory Committee but the minister is not bound to accept or act upon it, nor can an order of detention be inquired into by any court of law.[46] The bane of the absence of the law of the constitution as an instrument of governance which serves as safe net to both rulers and the ruled is not necessarily the absence of a constitutional document, but that even in cases where a constitution is in place it will not have the effect of constitutionalism, the spirit of the constitution, because either the constitution in some cases is a legitimizing authority and nothing more, other times it is just expressed in the preamble of the constitution which is absolutely lacking the force of law. For instance, in an action impugning the Preventive Detention Act, 1958 on the basis that it was repugnant to the fundamental principles embodied in the presidential declaration, the Supreme Court of Ghana held that the declaration did not "constitute a Bill of Rights",[47]that it created no "legal obligations enforceable by a court of law," and that no right was accruable to the citizen. According to the court, the declaration had no more effect than the Queen's coronation oath. The Court further stated that, "in our view", the declaration merely represents the goals to which every President must pledge himself to attempt to achieve.[48] The idea of a preamble according to Nwabueze, is that it forms no part of a statute, and as such cannot create legal rights or obligation. Civil rights purportedly guaranteed in a preamble can therefore have no more than a moral force, serving merely as an exhortation to government to respect the rights in its action. In a situation as this, even though the constitution is written it will not have a binding force on those that exercise governmental powers, thereby magnifying the person(s) occupying the office far and above the people and state, actions are taken solely within the whims and caprices of a " figurehead" ruler, thus making strongmen out of it rather than strong institutions which essentially the concept of constitutionalism can adequately guarantee.

A far worse evil the world has avoided thus relatively, crystallizing stability and order, is the presence of constitutionalism embedded in the constitutions of nearly all states around the world thereby curtailing and or eliminating communism in its extreme (total) form and its attendant consequences. In highlighting the aforementioned, Nwabueze, Max and Eskstein respectively stated thus:

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[43] Busia, "*Africa in Search of Democracy*" (1967), p. 129.
[44] B. Nwabueze, ibid, 89.
[45] (1961) (3)(2) *Journal of the International Commission of Jurists*, [65-81]; B. Nwabueze, ibid, 88-89.
[46] B. Nwabueze, ibid, 89
[47] Article, 1
[48] Re Akoto, (1961) G.L.R. 523

> *The evils of total rule of the socialist/communist type go far beyond those of authoritarian or absolute, unlimited power.*[49]*It is a despotism with a vengeance, an extreme form of despotism worse than fascism, because "more ruthless, barbarous, unjust, immoral, antidemocratic, unredeemed by any hope or scruple."*[50] *Totalitarianism simply magnifies the elements of autocracy to their farthest limits."*[51]

Going forward, Nwabueze says socialist/communist rule does not only curtail individual liberty as would be the case of authoritarian and absolute rule, but it destroys it in its entirety and with its individuality. Respect for human rights and man as man, his personality, his impulse and emotions, is almost totally destroyed.[52] Man is treated as a disposable property, his life is subordinate to the state, and may be taken at the arbitrary whim of the state. A regime of terror and total arbitrariness is unleashed on the society, a terror in which travel bans, internal exile, constant surveillance, terrorist like secret police and other instruments of coercion, the concentration camp, executions and frequent use of armed forces against the population are all extensively employed by the state.[53] The sheer brutality of the socialist/communist regimes, often involving torture is simply inhuman and degrading to the human person. Yet a depressing experience of the absence of the spirit of the constitution, in a case of the unrestrained use of power, example, total power, is the abolition of private property ownership with the intent to totally destroy the individual liberty of action, this is unjustifiable, for it is the desire for private acquisitions that provides the motif force, for most of our actions.[54]

In a society where totalitarian government holds sway, under the constitution, the socialist government has full authority to implement the socialist socio-economic order by way of a central direction of all economic activities, which means in effect that its actions in this behalf are legal, that is, socialist legality, but since the power, by its nature, does not admit of being circumscribed by predetermined rules of law, total arbitrariness is built into the system. The position becomes as if the government authorizes to act in all matters just as it pleases. The rule of law, in communist thinking, makes the state "unfree", a "prisoner of the law". In order, therefore, to be able to act justly, the state has to be "released from the fetters of abstract rules. A free state was to be one that could treat its subjects as it pleased."[55] This paper is of the view that, the manifest inhumanity perpetrated by rulers across societies and generations past, and in few occasions as currently practiced in countries such as North Korea, in an atmosphere devoid of Comparative Constitutionalism or constitutional government, is a recipe for global quagmire, because the crises that will emanate from individual countries around the world would eventually metamorphose into an international catastrophe, since the world has been reduced into a global village by several international instruments; the issue of refugees alone will throw the world into a perpetual dilemma. According to Nwabueze, the almost, destruction of man's individuality and human liberty under socialism/communism suggest two consequences. Firstly, it renders the regime so susceptible that popular resistance and violent uprisings become inevitable and order of the day, since individuals, deprived of liberty of action and forced into a common mould and a regimented existence, would always try to break free of it.[56] Ralf, while

[49] B. Nwabueze, ibid, p. 62
[50] M. Eastman, "*Stalin's Russia and the crises of socialism*" (1940) 82
[51] Eskstein and Apter, (eds.)., "*Comparative Politics*", (1965), 433
[52] B. Nwabueze, ibid, p. 62.
[53] Ibid.
[54] Ibid.
[55] F. Hayek, "*The Road to Serfdom*" (1944), pp. 70-71.
[56] N. Nwabueze, p. 68.

describing the state affairs in a nation without the presence of constitutionalism embedded had this to say:

> *Revolts and uprisings are endemic to societies in which those at the bottom of social hierarchies including labour are no better of anywhere else, the place of capital is taken by a new class of political bureaucrats, and that of wage disputes and strikes, or elections and changes of government by procedures of unwilling adaptation which are always liable to break down.*[57]

To further appreciate the role of Comparative Constitutionalism as catalyst to world order, a summary of one of the reasons that precipitated the Second World War will be instructive. It was no doubt the total absence of the law of the constitution, which led to the Fascist and Nazism regimes in Italy and Germany respectively that subsequently metamorphosed into the Second World War. Flowing from the above, an individual ruler's ability to exhibit and or exercise of total, authoritarian, absolute or unlimited powers within a country in which he presides with the possibility that it may metamorphose into a global chaos or catastrophe, is no longer a thing of dispute, given the instances below. Among other reasons the following narrative about the very origin of the Second World War, marks a strong point.

7. Rise of Fascism and the Nazi Party

In 1922, Benito Mussolini and the Fascist Party rose to power in Italy. Believing in a strong central government and strict control of industry and the people, Fascism was a reaction to the perceived failure of free market economics and a deep fear of communism.[58] Highly militaristic, Fascism also was driven by a sense of belligerent nationalism that encouraged conflict as a means of social improvement. By 1935, Mussolini was able to make himself the dictator of Italy and transformed the country into a police state.[59] To the north in Germany, Fascism was embraced by the National Socialist German Workers Party, also known as the Nazis. Swiftly rising to power in the late 1920s, the Nazis and their charismatic leader, Adolf Hitler, followed the central tenets of fascism while advocating for the racial purity of the German people and additional German *Lebensraum* (living space). Playing on the economic distress in Weimar Germany and backed by their "Brown Shirts" militia, the Nazis became a political force. On January 30, 1933, Hitler was placed in position to take power when he was appointed Reich Chancellor by President Paul von Hindenburg.[60]

8. The Nazis Assume Power

A month after Hitler assumed the Chancellorship, the Reichstag building got burned. Blaming the fire on the Communist Party of Germany, he used the incident as an excuse to ban those political parties that opposed Nazi policies. On March 23, 1933, the Nazis essentially took control of the government by passing the Enabling Acts. Meant to be an emergency measure, the acts gave the cabinet and Hitler the power to pass legislation without the approval of the Reichstag. Hitler next moved to consolidate his power and executed a purge of the party (The Night of the Long Knives) to eliminate those who could threaten his position. With his internal foes in check, Hitler began the persecution of those who were deemed racial enemies of the state.[61] In September 1935, he passed the Nuremburg Laws which stripped Jews of their citizenship and forbade marriage or sexual relations between a Jew and an "Aryan." Three years

[57] R. Dahrendorf, '*Reflections on the Revolution in Europe'* (1990), p.80.
[58] <https://www.thoughtco.com/world-war-ii-road-to-war-2361456>. accessed 22/02/2018.
[59] Ibid.
[60] Ibid.
[61] Ibid.

later the first pogrom began (Night of Broken Glass) in which over one hundred Jews were killed and 30,000 arrested and sent to concentration camps.[62] The important point to note from the brief narrative above, about the genesis of the Second World War, was that it was apparently orchestrated by the duo, Mussolini and Hitler (allies) in their respective countries of Italy and Germany, and that it was tilted towards expropriating maximum powers for themselves, enough to completely curtail and stifle individual and corporate liberty without any form of restraint whatsoever. First, it was nurtured and perfected in their domains, same which was extended to other territories, before culminating it into the Second World War. Thus, this paper argues that there is no disagreement that all of the world problems have been tackled in their entirety because of the presence of Comparative Constitutionalism in most of the constitutions of countries around the world. However, the place of Comparative Constitutionalism as a precursor to world peace and order is not in dispute. Such norms that are usually associated with the concept of Constitutionalism are, Rule of Law, the People, and Separation of Powers and more have greatly brought about that tranquility and order the world has not known before its emergence. We undertake to discuss one of them in a nutshell.

9. The Rule of Law

One of the norms that have sustained and popularized the concept of constitutionalism across the globe is no less than the rule of law. One meaning of the rule of law is that, it is the idea of law based on respect for the supreme value of human personality and all power in the State being derived and exercised in accordance with the law.[63] Also, it may be understood as the safeguards offered by principles, institutions and procedures with different weight being apportioned in different parts of the world.[64] The rule of law as placed side by side with the "rule by law", there is such concept called the rule by law, as viewed by this paper. The difference between "rule by law" and "rule of law" is important. Under the rule "*by*" law, law is an instrument of the government, and the government is above the law. In contrast, under the rule "*of*" law, no one is above the law, not even the government. The core of "rule of law" is an autonomous legal order.[65] Under the rule of law, the authority of law does not depend so much on law's instrumental capabilities, but on its degree of autonomy, that is, the degree to which law is distinct and separate from other normative structures such as politics and religion. As an autonomous legal order, rule of law has at least three meanings. First, rule of law is a regulator of government power. Second, rule of law means equality before law. Third, rule of law means procedural and formal justice.[66] In the heart of rule of law is the supremacy of the constitution. In Nigeria, section 1 (1) (2) and (3) of the 1999 Constitution as amended captured the supremacy of the constitution, which is as follows:

> *This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria. The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution. If any other law is inconsistent with the*

[62] Ibid.
[63] H. Seervai, 'The Supreme Court of India and the Shadow of Dicey' in the *Position of the Judiciary under the Constitution of India,* pp. 83-96 (1970).
[64] Ibid, p. 196-197.
[65] T. Amerit,ibid.
[66] Ibid.

> *provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.*[67]

In South Africa it is stated as follows: *"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*[68] Article vi(2) of the Constitution of the United States of America, states thus:

> *This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.*[69]

Relying on Article 2 of the Ugandan Constitution, Manyindo DCJ (as he then was) in *Major General David Tinyefuza v. Attorney General*[70] observed on the supremacy of the constitution thus:

> *" ... once a polity has enacted a Constitution then the rule of law, that is the Constitution becomes the cornerstone of all laws and regulates the structure of the principal organs of government and their relationships with one another and to the citizens, and determines their main functions. Needless to emphasize, all laws must conform to the Constitution as the supreme law of the land. It is the Constitution, and not the Executive, Legislature or Judiciary, which is supreme. Under Article 2 (I) and 2 of the Constitution it has binding force on all authorities and persons throughout Uganda."*[71] *The supremacy of rule of law has been, since the middle ages, a principle of the Constitution. It means that the exercise of powers of government shall be conditioned by law and that the subject shall not be exposed to the arbitrary will of his ruler."*[72]

The rule of law as mildly explained above amongst other norms of Comparative Constitutionalism, such as Separation of Powers, Democracy, Supremacy of the Constitution vis-a-vis the laws - which was dealt with briefly above and many more. However, in all, the most worrisome aspect is the attitude of governments. Particularly, the executive with regards to obedience to court orders as touching the court's powers of review is pertinent. This, in the opinion of this paper, stands out as the cornerstone of the rest of the other norms.

10. Conclusion

Concluding, this research work is of the view that the world today may have nothing less than total disarray, but for Comparative Constitutionalism or the culture and Spirit of the Constitution embedded in nearly all of the constitutions of countries across the globe. This, for instance, has helped vide the courts in the enthronement of the rule of law rather than the rule of men, which portends a life of hopelessness, lawlessness, chaos and horrendous society, with no respect for the liberty of the individual as well as in the corporate sense. To live those days were regrets and pains without end. It turns society from its primordial status to attaining a civil and orderly one. The courts from one continent to another where constitutionalism is entrenched have reviewed both the executive and legislative actions that are found to be ultra- vires their

[67] The Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[68] Constitution of the Republic of South Africa, 1996.
[69] The Constitution of the United States of America (as amended).
[70] Constitutional Petition No. 1 of 1996 p. 69
[71] *Major General David Tinyefuza v. AG* Constitutional Petition No. 1 of 1996 p.69.
[72] E.C.S. Wade and Godfrey Phillips, in *Constitutional Law*, (8th ed.) 62

powers, null and void. The courts themselves have been conspicuously excluded from certain actions of the executive and legislature, such as matters of impeachment of the President or his Vice and Governor or his Deputy, save and except due process of law were jettisoned. The people are significant when it comes to the realization of the concept of Constitutionalism in a country. The people's concerted and systematic opposition to arbitrary and selfish exercise of powers by those that are entrusted with it has eased out many draconian and tyrannical rulers. Thus, this paper recommends that a proactive and vibrant judiciary is quintessential for the effective utilization of the concept of Comparative Constitutionalism. The various arms of government must ensure that upholding the rule of law is the basis for a peaceful and orderly society. That citizen must ensure that they participate in the political process at all times so as to hold their leaders accountable. Government must treat all segments of society on non-discriminatory basis in order to avoid wide spread violence and other matters incidental thereof.

NIGERIA'S CHALLENGE TO AFRICA'S POST-COLONIAL BORDERS AND A REAPPRAISAL OF THE *UTI POSSIDETIS JURIS* DOCTRINE*

Abstract

Establishment of colonialism in Africa was in breach of international law. When in 1885, European States at the Berlin Conference declared most of Africa as *terra nullius*, and the inhabitants incapable of governing themselves, they contradicted the existence of more than two centuries of trading relationship with the continent. Most colonial territories in Africa were acquired by agreements with African Chiefs and Kings under which colonialists guaranteed African leaders that the colonialist would extend her favour and protection to them. Colonialists extrapolated their rights under these treaties to sovereign powers and expropriated the territories they covenanted to protect. Acting as sovereigns, they made boundary treaties and demarcated their respective areas of influence. Recently, Nigeria expressed discontent with the artificiality of postcolonial African boundaries, and their divisive effect on African societies. The objective of this paper is an analysis of the nature of the doctrine of *uti possidetis juris* as a whole, and a general reappraisal of its application to postcolonial African borders. The methodology adopted is doctrinal. The paper relied on primary and secondary sources. These include writings of scholars and journal publications and articles, conference papers, books, case law comprised in the judgments of international and domestic tribunals, resolutions, treaties, declarations and other materials, both electronic and print. The methodology does not indicate any necessity for investigation of the details of boundary demarcations and the technicalities of border delineations: thus, the enquiry did not proceed in that direction. This paper theorised that application of *uti possidetis juris* to postcolonial African borders constituted an effort to ratify illicit colonial acquisition and demarcation of African territories. The paper found that the doctrine's international law outlook developed in Latin America and was extended to Africa during decolonisation to transform administrative colonial borders into international boundaries at the date of independence. The paper argued that this practice ratified the absurdity of colonial borders which divided societies and confined disparate peoples into a single geographical space. The paper on examining recent instances of the doctrine's application in Africa and outside Africa found that the doctrine seemed to have achieved an overarching presence so that its application was no longer limited to decolonisation situations. The paper then disclosed that the doctrine possessed severe shortcomings, concluded that its application in postcolonial Africa was improper, and recommended that recourse to the doctrine should not be inevitable.

Keywords: *Berlin Conference; Border; Boundary, Colonial border, Postcolonial; Uti Possidetis,*

I. Introduction

Defined territory is a central attribute of statehood.[1] Territory in this sense, being a physical territory suggests a section of terrestrial space subject to the exclusive authority and control of the state. Since exercise of sovereignty is limited to a state's territory, clarity of territorial limits is inevitable to the exercise of jurisdiction and sovereignty. The *uti possidetis* rule converts administrative borders into international boundaries and freezes colonial boundaries at the time of independence. The doctrine has been severely criticised as an *ex post facto* ratification and

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[1] Art. 1 of Montevideo Convention 1933

continuation of arbitrary and unconscionable colonial division of African societies and peoples. About August 15, 2022, Nigeria's Presidency described the boundaries between Nigeria and her neighbours as artificial. Expatiating on this, the Presidency's spokesman stated that, *'All these boundaries are very much artificial. The Europeans in Congress of Berlin just took a piece of paper and were drawing lines across places where they have never been; they never intended to be, separated people who should be united and uniting people, perhaps, who should be separated…..*'[2] On November 28, 2022, Nigeria's President Muhammadu Buhari called on members of the Economic Community of West African States to remove *'[o]utdated physical and psychological boundaries, as well as other colonially-inspired differences'*[3] From this perspective, this paper will reappraise application of the *uti possidetis* doctrine to Africa's postcolonial borders. Part II will conduct a historical analysis of the development of the doctrine and its application to postcolonial Africa. Part III with look at the paradox of colonial borders, and the damage they inflicted on African societies. Part IV will consider recent applications of the doctrine in Africa, while part V will survey recent applications of the doctrine outside Africa. In part VI, the paper will point out the shortcomings of the doctrine, while part VII will question the rationale for application of the doctrine to Africa. Part VIII will conclude.

II. Historical Background to the *Uti Possidetis* Doctrine

Uti possidetis is a term originating from Roman Law. It was an interdict under which disturbance of current possession of immovable property, as between two individuals, was forbidden.[4] Upon transfer of the expression *uti possidetis* from Roman law, to International Law, the concept underwent a change. In International Law, use of force is lawful and the right of conquest was recognized, unlike its basic purpose in private law which was to preclude and nullify, the use of force. In International law, it no longer denoted a judicial or quasi-judicial procedure for a proscription, but was articulated in the words *uti possidetis, ita possideatis* - '*As you possess, so may you possess*.' In this regard, it provided a date from which rights were to be

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[2] 'Boundaries between Nigeria, neighbours artificial - Presidency' <https://www.vanguardngr.com/category/national-news/>Accessed November 29, 2022

[3] Ibekimi Oriamaja, 'ECOWAS must remove colonially imposed physical and psychological barriers. – President Muhammadu Buhari', <https://www.tracknews.ng/tag/ecowas-must-remove-colonially-imposed-physical-and-psychological-barriers-president-muhammadu-buhari/> Accessed November 29, 2022

[4] John Bassett Moore, *Costa Rica - Panama Arbitration Memorandum on Uti Possidetis*, (Commonwealth, Virginia: 1913) 5-8; [Writers are not agreed about the origin of the process. Some find the origin in measures for protecting occupants of public lands, who, while unable to show original title and thus could not maintain an action for ownership, received on the strength of his possession, the recognition and sanction of the State, and freedom from disturbance by his adversary. Subsequently, the interdict evolved to an ancillary process to decide which party, as possessor, should have the advantage of standing on the defensive in litigation to determine ownership. The substance of the decree is embraced in the words *uti possidetis, ita possideatis: "As you possess, so may you possess."* See Muirhead, *Historical Introduction to the Private Law of Rome,* (2nd ed. 1899) 206; Freddy D Mnyongani, 'Between a rock and a hard place: the right to self-determination versus *uti possidetis* in Africa', (2008) XLI CILSA [463-479] 468 [*Uti possidetis* originated in Roman private law as a Praetorian Edict to settle property ownership. The Edict provided provisional possession in litigation involving property ownership, by providing more rights to the possessor. The reluctance of the Edict to disturb possession was to maintain order. The possessor's rights were, weakened if he obtained the land in a clandestine manner or had used force. It was a general practice in Roman law that the '*status quo would be preserved; irrespective of the means by which possession had been gained'*. This notion of preserving the '*status quo'* inspired the principle of *uti possidetis* as it later came to be applied to territory in international law.] See Enver Hasani '*Uti possidetis juris*: From Rome to Kosovo' (2003) 27(2) *Fletcher Forum of World Affairs* [85-97] 85; Steven R. Ratner 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', (1996) 90 *AJIL*, 593; Joshua A. Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial "National" Identity* (Martinus Nijhoff: 2000)110–111

calculated, without recourse to earlier disputes.[5] In early 19th century, Spanish colonies of Central and South America proclaimed their independence. They adopted a rule that the frontiers of the Spanish provinces which they were succeeding would be the boundaries of the newly established republics, and gave the name of *uti possidetis juris* to this principle. While the doctrine was largely a basis for defining borders, it offered an advantage because its application was expected to eliminate territorial conflicts among the states *inter se* due to clear demarcation of each border based on colonial-era administrative lines.[6] While seeking to prevent boundary conflicts, the rule had a further purpose of preventing renewed European colonization in Latin America on the basis that parts of the continent were *terra nullius* and open to acquisition by effective occupation. It strengthened local control on the basis of constructive, rather than actual possession. It thus constituted a proclamation of constructive possession, and changed emphasis from effective occupation to endorsement of colonial administrative borders.[7] Notwithstanding differences between the political and historical backgrounds of Africa and Latin America, Africa's decolonisation witnessed the introduction of the doctrine. However, Africa's colonisation did not parallel that of Latin America. While a single colonial power was involved in Latin America, Africa had about seven colonial powers, each with more than one colony at different times. Furthermore, border-creation in Africa differed from Latin America. African boundaries were basically geometric lines without regard to local ethnic or other considerations.[8] African heads of state and government in a summit in Cairo, Egypt, 1964, adopted a resolution which considered that borders of African states, on the day of their

[5] John Bassett Moore, (n 3) 86 [At the end of Spanish rule in America, the new States followed the dividing lines of former Spanish administrative units. However, these units had not been properly demarcated by the Spaniards. Boundary disputes arose from the ensuing uncertainty. Arbitrators appointed to settle these disputes were requested by the parties to apply the rule of *uti possidetis* at independence. This anticipated that, by perusing Spanish decrees, precise demarcation of the former administrative units could be traced. This assumption was unrealised. Evidence disclosed that the new States exercised authority beyond the border limits of their apparent territorial jurisdiction. States that expanded in this manner insisted that the meaning of *uti possidetis* was administrative possession as it *actually* existed at independence, while opposing parties contended that the principle required restriction of sovereignty to areas *rightfully* occupied by the antecedent colonial unit. The two conflicting theories of *uti possidetis* were known as *uti possidetis de facto* and *uti possidetis juris*, respectively.] See AO Cukwurah, *The Settlement of Boundary Disputes in International Law*, (Manchester: 1967) 112; Joshua Castellino& Steve Allen, *Title to Territory in International Law: A Temporal Analysis*, (Dartmouth: 2003) 11; Enver Hasani, (n 4) 85-6

[6] Paul R. Hensel, Michael E. Allison & Ahmed Khanani**,** 'Territorial Integrity Treaties, *Uti Possidetis*, and Armed Conflict over Territory', Paper presented at 2006 Shambaugh Conference *Building Synergies: Institutions and Cooperation in World Politics*, University of Iowa, 13 October 2006, 8 [Each state was acknowledged as holding all territories presumed to have been held by its colonial predecessor as at the last period the borders could be considered to have been under Spanish authority. The advantage of this principle is that it created a rule that legally, no territory of old Spanish America was unoccupied. It was expected to eliminate boundary disputes between the new states, and prevent new territorial claims by extra-regional (European) states, because the entire continent was deemed to be under the sovereignty of independent states.] See Ian Brownlie, *Principles of Public International Law*, (5th ed., 1988) 133; Joshua A. Castellino, (n 4) 63ff, 142-143; Gordon Ireland, *Boundaries, Possessions and Conflicts in South America*, (Harvard: 1938) 327-329; Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (McGill-Queen's:2002) 28ff; Steven R. Ratner, (n 4) 593-595, 598-601; Surya P. Sharma, *Territorial Acquisition, Disputes, and International Law*(MartinusNijhoff:1997) 119-129; Malcolm N. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', (1996) 67 *British Yearbook of International Law* [75-154] 141-150

[7] Malcolm N. Shaw, 'Peoples, Territorialism and Boundaries', (1997) 3 *EJIL* [478-507] 492; Freddy D Mnyongani, (n 4) 469 [In Latin America, *uti possidetis* brought the concept of *terra nullius* to an end by recognising the new states as possessors of all territories presumed to have been held by their colonial predecessors. Its application, by accepting identification of each border's location based on colonial-era administration lines eliminated or reduced potential border conflicts.]

[8] Malcolm N. Shaw, (n 7) 493

independence constituted a tangible reality; reaffirmed the respect of all member states for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence; and declared that all member states pledged themselves to respect the borders existing on their achievement of national independence.[9] Despite the deliberate failure of this resolution and several other continental documents to use the *uti possidetis* term, the rule and concept has been imported into and applied to the African decolonisation and post colonisation context. In *Burkina Faso vs. Republic of Mali*,[10] the ICJ Chamber held that the 1964 resolution *'deliberately defined and stressed the principle of uti possidetis juris'*. It theorised that the fact of new African states agreeing to respect administrative boundaries and frontiers established by colonial powers *'must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope*'. Shaw, echoing this stance, in support of application of *uti possidetis* to Africa's post colonisation context, argues that acceptance of colonial borders by Africa's leaders and OAU constituted recognition and confirmation of an existing principle,[11] and, avoidance of conflict upon a succession of sovereign authorities in the territorial context, which is primary reason for the principle, applies equally to the postcolonial scenario.[12]

III. The Paradox of Colonial Borders

Borders, also known as boundaries or frontiers,[13] are lines that delimit a region from other regions.[14] In international law, a boundary is a line delineating the territorial jurisdiction of a state or other entity possessing international status.[15] Borders mark the limits and sovereignty of a specific territory, and delimit territories over which states exercise authority.[16] Boundaries as a concept have legal and political ramifications. Legally, they disclose the magnitude of a state's sovereignty and confines of its national legal system, while politically they are observable limits of size and location.[17] Though the concept of borders in contemporary times correlates with the idea of territorial possession, it was only in the 19th century that States adopted territory as a vital attribute of statehood. Prior to that, population and government were more important than territory. Thus, marking a state's jurisdiction and sovereignty by drawing a boundary on a map and demarcating borders on the ground is of recent origin.[18] Functionally,

[9] OAU Resolution AHG/Res.16 (1) adopted by the First Ordinary Session of the Assembly of Heads of State and Government held in Cairo, from 17th to 21st July 1964. This principle on respect of colonial boundaries is currently protected by article 4(b) of the Constitutive Act of the African Union.

[10]1986 ICJ Reports 565, the Chamber noted that the essence of *uti possidetis* lay in its primary aim of securing territorial boundaries at the moment of independence. Such territorial boundaries might be mere delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case application of the principle resulted in administrative boundaries being transformed into full international frontiers.

[11] Malcolm N. Shaw, (n 7) 494

[12] Ibid. 497

[13] Martin Glassner, *Political Geography* (John Wiley & Sons:1993); Dina Sunyowati, Haidar Adam & Ria Tri Vinata, 'The Principles of *Uti Possidetis Juris* as an Alternative to Settlement Determination of Territorial Limits in the Oecusse Sacred Area (Study of the NKRI and RDTL Boundaries)', (2019) 34(2) *Yuridika* [279-301] 285

[14] Starke, *Introduction to International Law* (Sinar Grafika: 10th ed. 2002); Dina Sunyowati, Haidar Adam & Ria Tri Vinata, (ibid.) 285

[15] BA Garner, (ed.) *Black's Law Dictionary* (10th ed. 2014) 223

[16] Adolph C. Ulaya, 'The Doctrine of *Uti Possidetis* and its Application in Resolution of International Boundary Disputes in Africa', (LL.M Thesis, Mzumbe University, 2015) 36

[17] Freddy D Mnyongani, (n 4) 465; see also Malcolm N Shaw, (n 6) 77

[18] Aman Kuma, 'A Relook at the Principle of *Uti Possidetis* in the Context of the Indo-Nepal Border Dispute', (2021) 12(1) *Jindal Global Law Review* [95–115]; Daniel-Erasmus Khan, 'Territory and Boundaries' in Bardo

proper demarcation of borders between countries lessens the prospect of border conflicts and assists enforcement of laws on both sides of the border. Thus borders are significant factors in identity management, law enforcement and national sovereignty.[19] The basic difference between internal and international boundaries is that international boundaries establish permanent geographic and legal outlines with full international consequence. They identify the confines of sovereignty and territorial jurisdiction between separate international persons. They possess vital consequences for international responsibility and jurisdiction. They may not be altered arbitrarily, but only through the consent of relevant states. Internal borders do not possess any of these features. However, in current practice, internal lines may in the process of independence morph into international boundaries.[20]

In its early period, international law, was an implement of colonialism. An example of a rule created by colonisers to justify their unlawful territorial acquisition was demarcation of colonial borders. Colonisers who drew the borders of most postcolonial states were driven solely by their commercial interests.[21] Colonialists' geopolitical, economic, and administrative policies determined demarcation of the borders. Little regard was had to historical, cultural, or ethnic realities of the natives in creating these borders. The borders split historical and cultural groups, and, confined in the same territorial space, different cultures, religions, languages and identities.[22] Upon decolonisation, these newly independent former colonies were compelled by the *uti possidetis* principle to continue with colonial borders.[23] Thus, so as to gain statehood recognition, dissimilar political entities with different complex features were constrained to embrace a Western model of statehood that expressed certain views of territory, nation, and ethnicity.[24] The result of colonial borders that either separated cultural groups or confined different cultural groups inside a common territory is that all over the global South, colonial borders have resulted in postcolonial states which lack correspondence between their borders and socio-political identity.[25]

Fassbender & Anne Peters (eds.), *The Oxford Handbook of History of International Law* (Oxford: 2012) [The idea of borders is traceable to Egyptian, Assyrian, Chinese, and Roman origins. In the 12th and 13th centuries, demarcated borders became important to territorial consolidation of European monarchies. Precise boundaries as a feature of the postcolonial state is a European development.] See Tayyab Mahmud, 'Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars along the Afghanistan-Pakistan Frontier,' (2010) 36(1) *Brooklyn Journal of International Law* 23; Verkijika G. Fanso, *Traditional and Colonial African Boundaries: Concepts and Functions in Inter-Group Relations*, (Présence Africaine: 1986) 137–138

[19] Dina Sunyowati, Haidar Adam & Ria Tri Vinata, (n 13) 286; Ria Tri Vinata, Masitha Tismananda Kumala, & Penijati Setyowati, 'Implementation of the *Uti Possidetis* Principle as a Basic Claim for Determining Territorial Integrity of the Unitary State of Republic Indonesia, (2021) 24(2) *International Journal of Business, Economics and Law* [A criterion to be satisfied by a state as a subject of international law is possession of territory. Certainty and clarity of boundaries are fundamental. A change in the status of a country's territory will have a juridical effect on the state's sovereignty, including the citizenship of those who live in the region.]

[20] Malcolm N. Shaw, (n 7) 490

[21] Aman Kuma, (n 18)

[22] Tayyab Mahmud, (n 18) 25 [Inherited colonial borders, which have been accepted by the postcolonial states, often provoke challenge and resistance from the local population due to the shared yet divided questions of identity and difference] Aman Kuma, (n 18); Mohammad Shahabuddin, 'Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar,' (2019) 9(2) *Asian Journal of International Law* 334, 336

[23] Aman Kuma, (n 18)

[24] Mohammad Shahabuddin, (n 22) 335

[25] Tayyab Mahmud, (n 18) 50.; see generally, Aman Kuma, (n 18); Enver Hasani, (n 4) 89 [Similar to Latin America, African concept of self-determination is territory-based instead of ethnicity. This resulted in non-recognition of self-determination claims by indigenous groups in these regions. Conversely, in Asia, colonial frontiers largely paralleled the European system in preserving pre-colonial state structures. The result was that

Colonisation involved territorial acquisition by forceful occupation of African territories or entering into agreements with local African leaders. Having obtained the local territories by force or subterfuge, colonialists concluded boundary treaties among themselves to demarcate their areas of influence.[26] Binding treaties among colonial powers was the device by which most of these boundaries were established or altered. For instance, the Anglo-German Treaty of 1890 between Britain and Germany established the boundaries of Germany's sphere of influence in Tanganyika. The 1919 Franco-British declaration (Milner-Simon Declaration) delimited Lake Chad area. The 1913 Anglo-German Agreements delimited the area around Bakassi Peninsula between the colonies of Cameroon and Nigeria. The agreement between Britain and Portugal in November 18, 1954 established changes on the boundaries between the colonies of Nyasaland and Mozambique with respect to Lake Nyasa area and the Chisamulo and Likoma islands.[27] In fixing these boundaries, ignorance of historical, geographical and social factors, often led to situating antagonistic groups in the same unit.[28] Subsequent efforts to deviate from *uti possidetis* and depend on ethnic or historical parameters have been unsuccessful.[29] Exercise of the right to self-determination within the decolonisation context was constrained to colonial territorial boundaries. Although the purpose of this was to protect the stability of the new states and avoid post-independence territorial conflicts among African States, it however, resulted in colonial territorial boundaries becoming international boundaries for postcolonial African states.[30]

IV. Recent Instances of the Doctrine's Application in Post-Colonial Africa

postcolonial state borders in Asia were congruent with already existing precolonial sovereignties with state traditions. Their self-determination pattern was a full restoration of pre-colonial forms of state organization. This was particularly apparent South East Asia.]

[26] Adolph C. Ulaya, (n 16) 39 [African states that were not colonized like Ethiopia had their territorial boundaries fixed by treaties with colonial governments. In the second half of the 19th century and first half of the 20th century, the British, signed various treaties with independent Ethiopia to demarcate the Ethiopia-Sudan, Ethiopia-Kenya and Ethiopia-British Somaliland boundaries.]

[27] Adolph C. Ulaya, (n 16) 4-5; Enver Hasani, (n 4) 87-8 [Africa, was divided much earlier than the Berlin-Congo Conference (1884-1885), which is incorrectly portrayed as a meeting that divided Africa. The Final Act of the Berlin-Congo Conference, signed on February 26, 1885, simply prohibited slave trade and provided for free movement of goods and persons within the territories under the sovereignty of colonial powers (Britain, France, Germany, Portugal, and Belgium). Unlike in Europe where territorial sovereignty was based on effective administrative control, sovereign rights of these powers over their respective colonial territories were based on longitudes and latitudes starting at the coasts of Africa. Upon decolonization, majority of these abstract lines calibrated along longitudes and latitudes, whose basic function was demarcation of colonists spheres of influence, were, on the principle of *uti possidetis juris* transformed into international boundaries. Consequently, 40 percent of African borders are straight lines that separate a great number of ethnic groups.] See Norman Rich, *Great Power Diplomacy: 1814-1914* (McGraw-Hill: 1992) 237-242; Arthur Berriedale Keith, *The Belgian Congo and the Berlin Act* (Clarendon: 1919) 314-315; Friedrich Kratochwil, 'Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System', (1986) 39(1) *World Politics* [36-41] Joshua Castellino, 'Territoriality and Identity in International Law: The Struggle for Self-Determination in the Western Sahara,' (1999) 28(3) *Millennium: Journal of International Studies,* 529 [Quoting Lord Salisbury, British Prime Minister of late 19th century '*We* (the colonial powers) *have engaged... in drawing lines upon maps where no white man's feet ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew where exactly these mountains and rivers and lakes were'.*]

[28] Steve Allen & Joshua Castellino, 'Reinforcing Territorial Regimes: *Uti possidetis* and the Right to self-determination in Modern International Law, (2003) 48 *Amicus Curiae*

[29] Enver Hasani, (n 4) 88; Kelvin Mbatia 'The Threat of a Rising Sea Level: Saving Statehood through the Adoption of *Uti Possidetis Juris',* (2020) *Strathmore Law Review*, [65-83] 81

[30] Malcolm N. Shaw, *International Law* (Cambridge, 6th ed. 2008) 526-7; Malcolm N. Shaw, (n 7)494, 497; Adolph C. Ulaya, (n 16) 4-5

State succession is an old subject of international law.[31] In the *Burkina Faso v. Mali* case, the Court stated that *'[t]here is no doubt that the obligation to respect pre-existing international boundaries in the event of a state succession derives from a general rule of international law'*.[32] Article 11 of Vienna Convention on Succession of States in Respect of Treaties provides that *'a succession of states does not as such affect a boundary established by a treaty.'* Article 62 (2) of Vienna Convention on the Law of Treaties states that '*A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from treaty between two or more states and one or more international organizations if the treaty establishes a boundary'.* These are in accord with the rule that termination of a treaty on the grounds of a fundamental change of circumstances does not apply where the treaty establishes a boundary.[33] The OAU, formed in 1963 is currently the AU. Article 2 of OAU Charter provides that one of the purposes of the Organization is to defend the sovereignty, territorial integrity, and independence of its members. In article 3, member states, in pursuit of the purposes stated in article 2, affirmed and declared their adherence to the principle of respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence. Article 3 of AU Constitutive Act provides that the objectives of the Union shall *inter alia* be to defend the sovereignty, territorial integrity and independence of its member states. Article 4 of the AU Constitutive Act provides *inter alia* that the Union shall function in accordance with the principle of respect of borders existing on achievement of independence.

Although *uti possidetis* as a rule of international was developed and first applied in Latin America, its basic principles awaited the case of *Burkina Faso v. Mali*,[34] for amplification. The dispute was in respect of territory between Burkina Faso and the Republic of Mali. Both parties requested the ICJ to adjudicate the dispute based on the principle of the intangibility of frontiers inherited from colonisation. This gave the chamber an opportunity to elaborate the *uti possidetis* doctrine. The Chamber noted that, the principle of *uti possidetis juris*, accords pre-eminence to legal title over *effectivités* as a basis of sovereignty, and its purpose is to secure respect for territorial boundaries which existed when independence was achieved. The Chamber specified

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[31] Oscar Schachter, 'The Once and Future Law' (1993) 33 *Virginia Journal of Int'l Law* 253; Carter & Trimble, *International Law* (Little, Brown & Co.2nd ed. 1993) 480; Dina Sunyowati, Haidar Adam & Ria Tri Vinata, (n 13) 279

[32] (n 10) 566

[33] The rule that a delimitation, established by a treaty, is unchangeable irrespective of the treaty's subsequent fate was confirmed in the *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand),* ICJ Reports 1962, 34, where the ICJ stated "*In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious*." The rule also asserted in the *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Reports 1994, 37, para. 73, where the ICJ stated "*A boundary established by treaty … achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary … [W]hen a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed*." See *Jure Vidmar,* 'Confining New International Borders in the Practice of Post-1990 State Creations', (2010) *Max-Planck-Institut für ausländischesffentliches Recht und Völkerrecht* [319-356] 320

[34] (n 10) The compromise by which the parties submitted the case to ICJ specified that settlement of the dispute should be based on respect for the principle of '*intangibility of frontiers inherited from colonisation'*. The ICJ opined that the principle had developed into a rule of customary international law and was unaffected by emergence of the right of peoples to self-determination.

that, when those boundaries were mere delimitations between different administrative divisions or colonies of the same sovereign, application of *uti possidetis juris* transformed them into international frontiers.[35] In *the Land and Maritime Boundary between Cameroon and Nigeria; Equatorial Guinea Intervening*[36], Cameroon applied to the ICJ to determine *inter alia*, sovereignty over the Bakassi Peninsula and a parcel of land in the Lake Chad area, both of which were in dispute between Cameroon and Nigeria. Cameroon's case was based solely on boundaries demarcated by former rulers of both territories during colonialism. Cameroon argued that colonial agreements which delimited territories of both parties, and which were inherited by both parties on independence, created valid boundaries binding on both parties. *Uti possidetis* was applied by the Court as the rule in determining the disputed boundaries, and upheld the validity of the colonial boundary agreements invoked by Cameroon. At certain points where the maritime boundary was not evidenced by any colonial delimitation, *uti possidetis* could not apply; rather the court delimited the boundary on equitable basis, based on the applicable existing international law requested by the parties. In *the Frontier Dispute between Burkina Faso and Niger*[37]both countries, before they attained independence in 1960 were French colonies. The parties submitted a Special Agreement to the ICJ which *inter alia* provided for the applicable laws in the delimitation of their disputed boundaries. The Special Agreement provided for the applicable laws to include the principle of intangibility of boundaries inherited from colonization and an Agreement of 28th March 1987. Pursuant to the special agreement, the ICJ was guided by the principle of intangibility of boundaries inherited from colonization. In the 1987 Agreement, the parties agreed to apply the *Arrêté* of 31st August 1927 to determine the delimitation line that existed when both countries gained independence. The *Arrêté* of 31st August 1927 was an Act of the French colonial administration, amended by the Erratum of 5th October 1927 which was adopted by the Governor-General *ad interim* of French West Africa with a view to fixing the boundaries of the colonies of Upper Volta and Niger as clarified by its Erratum of 5th October 1927.The ICJ interpreted the *Arrêté*(as amended by its *Erratum)* in its context, taking into account the circumstances of its enactment and implementation by the colonial authorities.

Without doubt, colonial boundaries were arbitrarily established. However, even with this obvious arbitrariness, the ICJ has held that *uti possidetis* '*is a firmly established principle of international law where decolonization is concerned;* 'and that in the decolonization context, *uti possidetis* has become a principle of customary international law, applicable not only in Latin America, where it was initially developed.[38] The assertion that *uti possidetis* has become part of customary international law is debatable. Clearly, its application in the decolonisation process was not prescribed by any particular norm of international law, but was simply '*a policy decision in order to avoid conflicts during decolonization*.'[39] A tendency to overstate the application of

[35] See Enver Hasani, (n 4) 97

[36] ICJ Judgement delivered on October 10, 2002

[37] ICJ Judgment delivered on April 16, 2013

[38] *Case Concerning the Frontier Dispute (Burkina Faso/Mali)*, (n 10)

[39] See Jure Vidmar, (n 33) 323-4; Steven R. Ratner, (n 4) 598; Helen Ghebrewebet, *Identifying Units of Statehood and Determining International Boundaries*, (Verlag Peter Lang: 2006) 76 et seq., arguing*: "The necessary element for the establishment of customary law, opinio juris is lacking … Neither the Latin American republics nor the African states considered themselves bound to adopt the uti possidetis principle in delimiting their new international boundaries. Rather, they eventually agreed to adopt a status quo policy for reasons of expedience and convenience in the interests of peace and security."* See G. Abi-Saab, 'Le principe de l' *uti possidetis* son rôle et ses limites dans le contentieux territorial international', in: MG. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law*, (2007) 657 (657 et seq.). [It is notable that *uti possidetis* was applied in order to transform colonial boundaries to international borders, irrespective of the origin of these

the doctrine should be resisted. It should be confined to its status as a provisional doctrine with a primary purpose of regulating the transfer of sovereignty in the process of state succession. It is limited to territorial delimitation for creation of a new state by suggesting continuation of pre-existing borders of whatever origin in the absence of special factors, Although it halts the territorial circumstances during the independence process, it does not suggest an unalterable boundary.[40]

V. Recent Instances of Application of the Doctrine Outside Africa

In the *El Salvador/Honduras* case[41], it was stated that the basic aim of the *uti possidetis* principle lies in securing reverence for territorial boundaries existing at independence. This is so even if such boundaries are ordinary delineations between different administrative divisions or colonies of the same sovereign. In that circumstance, application of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers. While it seems accepted that the principle is applicable generally to decolonization situations, it remains unclear whether it is applicable to all situations of independence, regardless of the factual situation. This particular issue, arose in the context of the Yugoslav and USSR situations.[42] Article 5 of the Agreement Establishing the Commonwealth of Independent States signed at Minsk on 8 December 1991 provided that *'[t]he High Contracting Parties acknowledge and respect each other's territorial integrity and the inviolability of existing borders within the Commonwealth*'.[43] The European Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, adopted by the EC and its Member States on 16 December 1991, provided for a common policy on recognition, which required *inter alia 'respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement*'[44] The Yugoslav Arbitration Commission in Opinion No. 2, emphasised that *'[i]t is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the states concerned agree otherwise'*.[45] The Commission held in Opinion No. 3 that except if otherwise agreed, the former boundaries become frontiers protected by international law.[46] Nevertheless, *uti possidetis* remains a presumption, and not an absolute rule with indubitable application. In the absence of evidence to the contrary, demarcated units in a sovereignty will achieve independence within that territorially-defined unit. It is irrelevant that derivation of such units arose from ethnic or historical ties, arbitrarily, or due to use of force subsequently accepted. The period of transition to independence is the applicable time frame, though specific factors may lead to an earlier date. In other words, parties must contend with the state of affairs as at the appropriate time, even if significant historical changes took place previously.[47]

VI. Shortcomings and Criticisms of the *Uti Possidetis* Doctrine

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boundaries. The basis for this elevation of colonial borders to international borders, was a deemed necessity to prevent decolonised territories from reverting to *terra nullius* and also to minimise boarder conflicts among postcolonial states.]

[40] Malcolm N. Shaw, (n 7) 495

[41] ICJ Reports (1992) 351, at 386

[42] Malcolm N. Shaw, (n 7)495-6

[43] Signed by the Republics of Belarus, the Russian Federation and the Ukraine, 31 ILM (1992) 138

[44] 92 ILR 174

[45] 92 ILR 168

[46] Ibid. 171

[47] Malcolm N. Shaw, (n 7) 504 [Post-independence, parties may through any method permitted by law consent or acquiesce to alterations in their boundaries]

Despite its extensive acceptability as a binding principle of international law, the doctrine has severe criticisms and shortcomings.[48] The doctrine is founded on the travesty that at the point of attainment of independence, international borders were confined to arbitrarily drawn colonial boundaries which did not take local identities into consideration and which in any event were never anticipated to become international borders.[49] In its current demand of unquestioning compliance, the doctrine reduces intricate issues of national identity to a simple process of drawing lines in the alleged interest of orderliness. Unfortunately, this method does not contemplate the probable injury that could result in the preservation of an unjust and unstable order.[50] Besides, allowing creation of new states without considering the consequences of this process for the identity of affected peoples is a major flaw of application of *uti possidetis* to decolonisation.[51] Mahmud suggests that *'[t]he doctrine* of *uti possidetis, far from being grounded in any sound legal principle, is thus more a political instrument to legitimize existing state boundaries.'* His position is that *uti possidetis* provides a cover of lawfulness over colonial disposition of territories of the global South by evading the issues of the origins of these dispositions.[52] This position is ratified by Shaw who concludes that the principle *'bestowed an aura of historical legality to the expropriation of the lands of indigenous peoples'*.[53] Nesiah argues for a definite rejection of *uti possidetis* because it extends the evils of colonialism into the postcolonial period. He suggests that the route to travel is creation of genuine boundaries that trail genuine community, demarcated variously through ethnos, political allegiance, culture, language, religion, etc.[54] Granted, that *uti possidetis* does not theoretically, preclude post-independence consensual border alterations,[55] the problem with translating this to reality is that such border alterations can only be accomplished by cession of territory, or in a rare case, exchange of territories. Practical factors make either of these procedures, within the postcolonial African context, impossible.

Precolonial sovereign authorities were supplanted and replaced by colonial regimes. Decolonisation failed to restore the authority of precolonial regimes. Since they had been superseded by colonial regimes, they no longer constituted a valid basis for claims or territorial integrity in the decolonisation process. Thus, the goal of decolonisation was not to restore

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[48] Farhad Sabir oglu Mirzayev, 'General Principles of International Law: Principle of *Uti Possidetis*', (2017) 3 *Moscow Journal of International Law*[31-39]; Anne Peters, 'The Principle of *Uti Possidetis Juris*; How relevant is it for Issues of Secession? in Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov, (eds.) *Self-Determination and Secession in International Law*, (Oxford: 2014) 95-137; Malcolm N. Shaw, (n 30) 528-529 [Notwithstanding its acceptance as a general principle of customary international law and its applicability to frontier disputes, among the major challenges to the doctrine is its inability to solve all boundary disputes.]

[49] See Steven R. Ratner, (n 4) 595; see Jure Vidmar, (n 33) 323

[50] Steve Allen & Joshua Castellino, (n 28)*;* Steve Allen & Joshua Castellino, (n 5)

[51] Steve Allen & Joshua Castellino, (n 28) [During decolonisation, the only choice African peoples had was to exist inside territorial structures created for them. Postcolonial states comprised peoples constrained to live within the same boundaries with only two things in common. First, a history of having been under the same colonialist, and, second, the fact of being compelled to inhabit a territory created by the colonialist to constitute the post-colonial state. Political unification entailed propounding a thesis of state nationalism under which ethnic and national differences of the groups comprising the postcolonial state could be eradicated by nation-building. In the absence of the autocratic colonial government, the latent structural divisions which they had suppressed began to emerge with serious consequences for the postcolonial state.]

[52] Tayyab Mahmud, (n 18) 65- 66

[53] Malcolm N. Shaw, (n 6) 98; Enver Hasani, (n 4) 89

[54] Vasuki Nesiah, 'Placing International Law: White Spaces on a Map' (2003) 16(1) *Leiden Journal of International Law* 1, 27.

[55] Freddy D Mnyongani, (n 4) 472; Steven R. Ratner, (n 4) 600

precolonial sovereignties, but to give specific rights to colonial peoples.[56] International law in emphasising *uti possidetis* introduced a novel inflexibility to international boundaries which touches on the nationality idea. The doctrine limits issues of legitimacy to a purely territorial basis, in preference over other legitimating elements as ethnicity, tradition, linguistics, religion, ideology or history.[57] By forcing disparate people to circumscribe their political aspirations within predetermined territorial bounds, *uti possidetis* reverses the vision of self-determination that seeks to protect vulnerable peoples by allowing them political and territorial arrangements of their own.[58] In opinion no. 2, the Badinter Arbitration Committee, declared that *[w]hatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis de jure) except where the states concerned agree otherwise.*[59] Common ethno-linguistic unit of a people as the basis of sovereignty is inevitable to exercise of the right of self- determination. Redrawing of borders is inevitable to this reality, thus rendering it unattainable. In effect, granting the inviolability of established borders priority over the right of national self-determination, has converted the right of self-determination to merely a right to preserve orderliness, instead of being a redemptive power of liberty for oppressed national minorities.[60]

VII. Propriety of Application of the *Uti Possidetis* Doctrine in Post-Colonial Africa

Establishment of colonial rule was accomplished through violation of international law. Declaration of African lands as *terra nullius* subverted international law because the lands were not *terra nullius*. The fact of colonialists entering into treaties of protection with the local chiefs and Kings contradicted the ascribed status of *terra nullius*; you don't protect a *terra nullius*.[61] The peoples described as incapable of governing themselves, had founded empires that rivalled those of Europe, and had for centuries transacted with Europe in commercial enterprise. These people denoted with incapacity to govern themselves, apparently had sufficient perspicacity to enter into binding treaties with Europeans.[62] In the 1971 *Namibia (South-West Africa) Case*[63], the ICJ stated:

> *'African law illustrated ... the monstrous blunder committed by the authors of the Act of Berlin, the results of which have not yet disappeared from the African political scene. It was a monstrous blunder and a flagrant injustice to consider Africa south of the Sahara as terrae nullius, to be shared out among the Powers for occupation and colonization,*

[56] SKN Blay, 'Self-determination vs. Territorial Sovereignty in Decolonisation', (1985-86) 18 *NYU Journal of Int'l Law & Policy,* 461-2

[57] Steve Allen & Joshua Castellino, (n 28) [The fundamental premise of *uti possidetis,* that only states are entitled to participate in the boundary re-alignment process, entrenches a state-centric doctrine that only the colonial or postcolonial state, instruments of European domination of non-European peoples, should be accorded international personality.]

[58] Tayyab Mahmud, (n 18) 65- 66

[59] (n 45)

[60] Eric Allen Engle, 'The Failure of the Nation-State and the New International Economic Order: Multiple Converging Crises Present Opportunity to Elaborate a New *Jus Gentium*' (2003) (16) *St. Thomas Law Review;* [187-206] 203

[61] In the *Western Sahara* case: *(Advisory Opinion, ICJ Reports 1975,* 124.) Judge Dillard summarized the matter in his separate opinion *"[a]s was cryptically put in the proceedings: you do not protect a terra nullius. On this point there is little disagreement."*

[62] In the *Land and Maritime Boundary between Cameroon and Nigeria* (n 36) in the separate opinion of Judge Al-Khasawneh, at 496 para 5, the Judge stated that it is difficult to understand how a local ruler would be considered to be entitled to absolute sovereign immunity and to have been divested of his territorial sovereignty at one and the same time.

[63] *Namibia (South-West Africa) Case*, 1971 ICJ Rep. 55

> *even when in the sixteenth century Victoria had written that Europeans could not obtain sovereignty over the Indies by occupation, for they were not terrae nullius. By one of fate's ironies, the declaration of the 1885 Berlin Congress which held the dark continent to be terrae nullius related to regions which had seen the rise and development of flourishing States and empires. One should be mindful of what Africa was before there fell upon it the two greatest plagues in the recorded history of mankind: the slave-trade, which ravaged Africa for centuries on an unprecedented scale, and colonialism, which exploited humanity and natural wealth to a relentless extreme. Before these terrible plagues overran their continent, the African peoples had founded states and even empires of a high level of civilization....'*

Exercise of sovereignty over African lands by colonialists violated international law. African lands did not devolve to colonialists by either occupation, conquest, cession, prescription, or accretion, which in international law, are the usual ways to acquire territory. The most expansive title the colonialists could have obtained over African lands through the Treaties of Protection they entered into with African rulers was as trustees. None of these treaties anticipated a transfer of sovereignty. In 1885 the British Foreign Office gave its view that *"[a] protectorate involves not the direct assumption of territorial sovereignty but is 'the recognition of the right of the aborigines, or other actual inhabitants to their own country, with no further assumption of territorial rights than is necessary to maintain the paramount authority and discharge the duties of the protecting power.'"*[64] No law or practice establishes support for any suggestion that treaties of protection in sub-Saharan Africa normally permitted for the transfer of sovereignty to the colonial/protecting power.[65]

It would certainly be wrong to theorise that pre-colonial African societies did not possess borders to physically mark out the territorial limits of the societies one from another. The difference between precolonial borders and colonial era borders was that while the borders of precolonial African societies were congruent with the legitimating elements of the different societies, such as ethnicity, tradition, linguistics, religion, ideology or history, colonial era boundaries were based solely on the economic interests of the colonist.[66] This border-drawing exercise by the colonisers implemented without regard to historical, cultural, or ethnic realities, split historical and cultural groups, and enclosed dissimilar cultures, religions, languages,

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[64] FO 40319, No. 92 (14 January 1885) cited by Malcolm N. Shaw, *Title to Territory in Africa*, (Clarendon: 1986) 283*fn* 155; *Land and Maritime Boundary between Cameroon and Nigeria* (n 36) separate opinion of Judge Al-Khasawneh, at 497 para. 7

[65] *Land and Maritime Boundary between Cameroon and Nigeria* (n 36), separate opinion of Judge Al-Khasawneh, at 499 paras. 8 & 9 *'So far, I have attempted to demonstrate that existence of any category of protectorates the so called "colonial protectorates" where the protecting power was free to dispose of the protected territory at will is a proposition that neither state practice nor judicial precedents supports and is in all probability, no more than a fiction existing in the minds of some commentators who try to find ex post facto legitimization for unfathomable and illegal acts by the invention of sub-categories where normally applicable rules do not operate.'*

[66] Adolph C. Ulaya, (n 16) 7; Enver Hasani (n 4) 90 [Most colonial era African borders were calibrated according to particular longitudes and latitudes, regardless of either the topography, terrain or desires of local populations.] William FS Miles, *Hausaland Divided: Colonialism and Independence in Nigeria and Niger*, (Cornell: 1994) 68 [*Borders were drawn essentially according to the geopolitical, economic and administrative interests of the colonial powers, often taken into account at a global scale. The most often cited example is that of the division of the Hausaland, between today's Niger and Nigeria. The Franco-British treaties of 1904 and 1906 redrew the border in favor of the French side, in exchange for France's renunciation of fishing rights off the coast of Newfoundland.]* See Wondwosen Teshome, 'Colonial Boundaries of Africa: The Case of Ethiopia's Boundary with Sudan', (2009) 9(1) *Ege Akademik Review* [337-367] 343

identities, and affiliations in single territorial units.[67] Applicability of *uti possidetis juris* provides a convenient legal expedient to evade the uncomfortable task of interrogating the legality of the colonial enterprise in Africa. The principle, in according pre-eminence to legal title over *effectivités* as a basis of sovereignty, deliberately refuses to inquire into the manner of obtaining legal title and thus promotes a 'the *means justifies the ends*' approach to law and justice. In order for application of the doctrine of *uti possidetis juris* to postcolonial borders in Africa to found a legally and morally defensible system, it should transcend a simply formalistic consideration of the issues involved. Such issues include determination of state practice at the relevant time and whether that practice –assuming it permitted acquisition of title to African territories - could be invoked in an African case when no African State participated in formation of such alleged practice; the relevance of the rule of *pacta sunt servanda* on the passing of title and the effect of the rule of *nemo dat quod non habet* on the exchange of African territories amongst colonial rulers and border demarcation treaties by colonial rulers.[68]

The Cairo resolution by African heads of state and government *inter alia*, held that borders of African states, on the day of independence, constituted a tangible reality; and declared that all member states pledged themselves to respect the borders existing on their achievement of national independence.[69] Preceding adoption of this resolution, competing views existed. In 1945, the Manchester Pan-African Congress concluded that, *'The artificial division and territorial boundaries created by the imperialists powers are deliberate steps to obscure the political unity of the African people.* 'The Kwame Nkurumah-led Pan African movement desired political unity of African peoples. Another Pan-African movement for restructuring colonial boundaries in accordance with the wishes of natives also existed. Pan-Africanists positions clearly opposed post-independence preservation of colonial boundaries.[70] At Accra in 1958, the All-Africa Peoples Conference approved a resolution that *inter alia* denounced artificial frontiers drawn by colonial powers, principally the ones that divided peoples of the same ethnicity. The resolution demanded prompt elimination of or modification of such frontiers.[71] However, the views of Nyerere of Tanganyika and Balewa of Nigeria on colonial boundary legacy diverged from that of the Pan Africanists. Balewa held that though these boundaries were artificial and in some instances, divided communities, attempt to compel such communities by coercion to change the current boundaries should be discouraged, since such interference would result in instability. Ethiopian and Madagascan leaders held that it was no longer possible, or desirable to modify the boundaries.[72] By 1964 while voting in favour of resolution 16(1) on preservation of colonial boundaries, most African leaders had accepted the principle of colonial boundary heritage. The only exceptions were Morocco and Somalia which reserved their right to claim territory on the basis of religion, history or ethnicity.[73] Article 4(b) of the AU

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[67] Tayyab Mahmud, (n 18) 25; Aman Kuma, (n 18); Mohammad Shahabuddin, (n 22) 336. *['[P]ost-colonial states are essentially products, via colonization and decolonization, of the international legal norms and associated rules crafted by Europe. International law has contributed to the formation of post-colonial statehood and the ensuing atrocities, which involve a wide range of issues such as: the drawing of post-colonial boundaries.'*]

[68] See *Land and Maritime Boundary between Cameroon and Nigeria* (n 36) separate opinion of Judge Al-Khasawneh, at 494-5 para 3

[69] (n 9)

[70] BO Michael, 'Panafricanism, African Boundaries and Regional Integration', (2012) 8(4) *Canadian Social Science* [232-237] 233; Adolph C. Ulaya, (n 16) 81

[71] Touval, Saadia, *The Boundary Politics of Independent Africa* (Harvard: 1972) 56-57

[72] See James Mayall, 'The Malawi-Tanzania Boundary Dispute', (1973) 11(4) *The Journal of Modern African Studies*[611-628] 621; BO Michael, (n 70) 233; Adolph C. Ulaya, (n 16) 81-2

[73] Ian Brownlie, *African Boundaries. A legal and Diplomatic Encyclopedia*, (C. Hurst & Co: 1979)11; Adolph C. Ulaya, (n 16) 6

Constitutive Act in providing that; '*The Union shall function in accordance with the following principles ... (b) respect of borders existing on achievement of independence'* has now enshrined this principle of preservation of colonial boundaries at the time of independence.

Noticeably, whilst the Cairo and OAU resolutions and declarations accept the principle of respect for borders inherited at independence, they carefully avoided use of the word '*uti possidetis'* to describe the obligation they were assuming. The question now is whether their commitment may be interpreted to mean a commitment to the *uti possidetis* rule or whether it amounts to something other than that? The ICJ in *Burkina Faso and Mali*[74] suggested that the fact that the new African States agreed to respect boundaries and frontiers drawn by the colonial powers *'must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scop*e', and in this context, the 1964 OAU Resolution *'deliberately defined and stressed the principle of uti possidetis juris.'* Shaw, in agreement with this position, argues that the circumstances in which African states inherited territorial boundaries and the wording of the 1964 Cairo resolution replicate the doctrine of *uti possidetis juris.*[75] In other words, as a result of the Cairo resolution, excluding territorial boundaries which are settled by proof of title to the territory, history and *effectivités*, the doctrine of *uti possidetis* would be applied in settling territorial boundary disputes among African states.[76]

In interpreting the provisions of the OAU declaration, Judge Yusuf in his separate opinion in the *Frontier Dispute between Burkina Faso and Niger*[77] disagreed with the common idea that, the 1964 Cairo resolution which was later enshrined in the AU Charter reflects the Latin American principle of *uti possidetis*. According to him, the 1964 resolution as well as the OAU/AU principles on respect of borders and the doctrine of *uti possidetis*, are neither identical nor equivalent. He stated it was error in the *Burkina Faso/Mali Frontier Dispute* to interpret the principle of territorial integrity in the OAU Charter as an '*indirect*' reference to *uti possidetis*. His position is that as *uti possidetis juris* was not cited in the preparatory works of the OAU or any of its official documents; '*The lack of reference to uti possidetis was not due to a lack of awareness by the OAU/AU member States of the existence of uti possidetis juris as a principle or of its use by the Spanish-American Republics following their own decolonization a century earlier. Rather, different situations, and historical circumstances, dictated the adoption of different legal rules and principles'.* Judge Yusuf also suggested that, *uti possidetis juris* and the OAU/AU principle on respect of borders, due to their different origins, purposes, legal scope and nature, are distinct. He stated that the essence of the OAU/AU principle on respect of borders is; '*The principle of respect for boundaries enshrined in the Cairo Resolution of 1964 ... places the boundaries existing at the time of independence in a 'holding pattern,' particularly to avoid armed conflict over territorial claims, until a satisfactory and peaceful solution is found*

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[74] (n 10) 565-6

[75] Malcolm N. Shaw, (n 30) 526

[76] Adolph C. Ulaya, (n 16) 40

[77] Judgment of 16 April 2013, [*As a preliminary remark, it may be noted that none of the official documents of the OAU or of its successor organization, the AU, relating to African conflicts, territorial or boundary disputes, refers to or mentions in any manner the principle of uti possidetis juris. As stated by a keen observer of the origins and evolution of Pan-African organizations, and an advocate of an "uti possidetis africain", "it would be important to underline that the American precedent was never explicitly invoked during the travaux préparatoires of the Addis Ababa Conference, and even less by the Heads of State in their inaugural speeches". Equally significant are the differences between the two principles with regard to their origin and purpose, their legal scope and content and their legal nature*.]

by the Parties to a territorial dispute in conformity with international law, or until such time as closer integration and unity is achieved among all (or some) African States in keeping with the Pan-African vision'. He concludes that, *uti possidetis juris* and the OAU/AU principle on respect of borders should not be treated as identical or equivalent.[78] Herbst[79]concludes that though African borders, because of their failure to correspond to local concepts of demographic, ethnographic and topographic rationality, are considered artificial and arbitrary, nevertheless, the post-1885 boundary system served the political ends of colonialists and thus was in their view, rational. The boundaries remained unchanged thereafter because they serve the political needs of both the former colonialists and current African leaders. Until African leaders consider readjustment of current borders, a lesser evil than their maintenance, these current borders will continue to be preserved.

VIII. Conclusion and Recommendation

One of the results of colonialism is that upon decolonisation, former colonies, possessing juridical sovereignty but lacking in empirical authority were automatically integrated into the international society of states, albeit as junior members. Premised on this, international law, which foundationally, was basically a legal system to regulate the relationship of European nations *inter se* became applicable to the newly decolonised nations. A major paradox of decolonisation was the overwhelming willingness of newly decolonised nations to accept without interrogation, legal concepts that did not offer practical advantages to them. Colonial borders, just like the colonial system itself, was a perversion and distortion of the social solidarity of different African peoples and societies. Carrying them into the postcolonial state accounts to a great extent for the continued fragility of most postcolonial African states. The sole purpose of the *uti possidetis* rule is to sanctify colonial borders. It is largely accepted that validation of the doctrine lies in its ability to create territorial stability during transition periods. That however is an unjustifiable deification of formalism over profound legal and moral issues. Imposition of colonial rule in sub-Saharan Africa, by either conquest, or deliberate and wilful breach of treaties of protection entered into with natives, besides its violation of international law, presents deeply troubling moral issues. Colonial borders, in pursuit of colonists' economic and administrative interests were demarcated in such a manner as to either deliberately and indifferently divide and separate precolonial local societies, or merge in one territorial unit, societies that had no business being together. At the same time, the different European colonisers, by their border demarcation treaties, exchanged amongst themselves, the local lands they covenanted to protect. Imposition of colonial rule, involved the creation of an impossible legal fiction- the fiction that local Kings and chiefs possessed absolute sovereign authority and immunity to enter into binding treaties regarding their domains, and were simultaneously divested of this territorial sovereignty at one and the same time. It remained shocking to the local Kings and Chiefs, and should also be in the current age that the effect of entering into a treaty of friendship and protection was a forfeiture of sovereignty. The doctrine of *uti possidetis* glosses over the breach of fundamental legal concepts and proceeds on the basis that in the dealings of colonialist Europe with colonized Africa, the vital tenets of *pacta sunt servanda* and *nemo dat quod, non habet* do not exist or apply. If *uti possidetis* intends to establish a system that may be both legally and morally defensible, it ought to transcend a measured disregard of

[78] *Burkina Faso v. Niger* (Separate opinion) 200, according to Judge Yusuf this error was made by the ICJ in the *Burkina Faso v Mali Frontier Dispute*, (n 10) 565-566; see also Adolph C. Ulaya, (n 16) 74-5

[79] Jeffrey Herbst, 'The Creation and Maintenance of National Boundaries in Africa', (1989) 43(4) *International Organization* 692; see Enver Hasani (n 4) 97

the issues involved.[80] Disturbingly, it has not done that. What the doctrine seeks to achieve is to ensure that previous conduct that is violative of current principles of international law and ethically offensive by modern standards is protected from scrutiny. From this perspective, Nigeria's present dissatisfaction with colonial borders is not merely a displeasure with past inequitable practices, but also frustration with the current system of international law that by the creation of an unconscionable fiction ensures that African states are compelled to live in the dysfunctional spaces imposed on them by their erstwhile colonisers. It is recommended that application of *uti possidetis* should not remain the default mode in settlement of boundary issues in postcolonial Africa. The doctrine's veneration of erstwhile colonial forms at the expense of fundamental societal issues of postcolonial African societies renders it destabilising of the citizenship and nationality realities that challenge most African states. While its utter abrogation is not advocated, it should be made to assume the position of one of the least preferred modes of settlement of border issues.

[80] See *Land and Maritime Boundary between Cameroon and Nigeria* (n 36) separate opinion of Judge Al-Khasawneh, discussing similar issues in a different context.

INTERSECTION OF LAW AND GENDER *VIS-À-VIS* THE NON-SUBORDINATION THEORY*

Abstract

A non-subordination perspective shifts the focus of attention from whether subordinate women to men. This perspective sometimes referred to as dominance theory, sees sex differences as part of a larger conceptual system designed to legitimate the power imbalance between men and women. The aim of this paper was to look into the women's right and power in the liberal state, sexual harassment, domestic violence, pornography, sexual orientation discrimination and women in the military as part of a larger conceptual system designed to validate the power differences between men and women it will also look at the challenges in implementation of non-subordination theory and the solution to these challenges. The research methodology was doctrinal approach, using expository and analytical research design. The main sources of data collection were various legal literatures, both from the physical library and the e-library. It was observed non-subordination theory is designed to legitimate the power imbalance between men and women. It was recommended that that every case should be treated on its merit to avoid dichotomy against the women, also more local legislation should be enacted in the state Houses of Assembly, for instance, the likes of Widowhood/Widower-hood (Malpractices) Prohibition Law, 2005 of Anambra State. And that government should promote policies that can reduce the level of discrimination meted out on women and ensure equity in distribution of resources among the citizens, especially protecting the interest of women.

Key Words: *Gender, Intersection, Law, Non-Subordination, Theory*

1. Introduction

Non-subordination theory deals with a rule or practices that server to subordinate women to men. It is designed to legitimate the power imbalance between men and women. Leading feminist legal theorist Catharine Mackinnon calls this theory feminism. "Unmodified" because it analyses the situation of all women and men and abandons "gender-neutral absolutes, such as difference and sexuality and speech and the state which according to Mackinnon are characteristics of liberal feminism.[1] This paper introduces non-subordination theory by pairing John Stuart Mill's description of women's nineteenth century subjection as a solitary breach in the fundamental laws of modern civilization with Catharine Mackinnon's characterization of women's legal subordination as the ability of these with power-men-to identity their own point of view, systematically as universal point of viewlessness and also explores non-subordination theory's claim that the law defines sex and sexual difference in ways that naturalize women's relative powerlessness in this society, primarily through legal materials relating to sexual harassment, domestic violence, pornography, sexual orientation discrimination and women in the military. It also looks at the challenges in implementation of Non-subordination theory and the solution to these challenges. The theory postulates that equality analysis is insufficient to address the central inequalities faced by women sexual harassment, violence against women,

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[1] C A Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (vol 16, N.P. 1987).

poverty and control of women's sexuality. It also postulates that we must move beyond questions of sameness and difference to the construction of women's sexuality that under pins these move central inequalities. The questions are: How far is non-subordination theory contributes to the equality principles? Is it a supplement, a full replacement or something else?

2. Women's Right and Power in the Liberal State

John Stuart Mill[2] the reading spokesman for nineteenth century liberalism finds the subordination of women an aberrational blind spot of liberalism while Catharine Mackinnon[3] on the other hand finds the subordination of women a move or less in evitable consequence of liberalism's emphasis on the individual, its claim to objectivity and its idealism. John Stuart Mill said that the principle which regulates the existing social relations between the two sexes-the legal subordination of one sex to the other is wrong in itself *and* now one of the chief hindrances to human improvement. He went further to say that it ought to be replaced by a principle of perfect equality admitting no power or privilege on the one side nor disability on the other. Catharine Mackinnon went on to say that the sex equality law has been so ineffective at getting women what they need and are lives of reasonable physical security, self-expression, individuation and minimal respect within the dominant approach. The path is termed gender neutrality legally and the single standard philosophically. To women who want equally yet find that they are different, the doctrine provides an alternate route be different from men. This equal recognition of difference is termed the special benefit rule or the special protection rule under the sameness standard; women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured with him, our womanhood judged by our distance from his measure. Gender neutrality is this simply the male standard, and the special protection rule is simply the female standard, but do not be deceived masculinity or maleness, is the referent for both. As applied, the sameness standard has mostly gotten men the benefit of those few things women historically had. In reality, which this approach is not long on because it is liberal idealism talking to itself, virtually every quality that distinguishes men from women is already affirmatively compensated in this society.

2.1 Domestic Violence

According to William Blackstone[4] the husband at English common law was legally entitled to use some physical force to provide his wife with moderate correction". So too, under early American common law, a husband as master of his household could subject his wife to chastisement short of permanent physical injury[5] of civil war, partly through chastisement. However, during the reconstruction Era a new body of common law of wises beating, in order to protect the privacy of the marriage relationship and to promote domestic harmony.[6] By the end of the nineteenth century, wife beating was viewed as a crime but increasingly characterized as solely the practice of "lawless or unruly men of the dangerous classes", Domestic violence among the economical and racially privileged classes disappeared from public vica. Beginning in the 1960s, the women's movement sought to make private violence a public issue. Feminist created shelters to protect the health and safety of battered women and children. Activist also under took public education campaigns to call attention to male violence and state inaction. So

[2] *The Subjection of Women: Essay* (World Classics Edition 1912).

[3] Feminism unmodified: Discourses of life and law 34-38, 40-41, (1987).

[4] William Blackstone, Commentaries on the Laws of England 432-3 (1765).

[5] R B Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy, 105 Yale L. J.21/7,2/18 (1996).

[6] *Ibid* at 2120.

too, advocates began using legal strategies to reform how law cases of intimate abuse. As the legal landscape has changes, so has the language used to describe it. Battered women's advocates initially introduce the term “domestic violence” to replace more colloquiai terms such as "wife beating" more recently, the terms "intimate violence" and intimate partner violence" serve to the abuse of elders, children, domestic partners and siblings. Descriptions of such violence also are evolving. The popular meaning of "battering' is physical assault but many researchers now argue that the quest for control and not physical violence per se, best describes an abusive 'relationship, and, control over necessities. Indeed, some evidence suggests that psychological abuse can be at least or move harmful to victims as physical assaults.[7] It is estimated that one quarter to a third of women in the world have experienced physical or sexual violence screening safety. The Impact of Domestic Violence by an intimate partner or acquaintance at some point in their lifetime. Slightly over a quarter of men are estimated to have experienced such violence. Approximately, 16 percent of women and 5 percent of men have experienced stalking from which they felt very fearful, or believed that they or someone close to them would be harmed as a result. Nearly half of all homeless women and children have fled violence. Most systematic studies conclude that women are significantly more likely to be victims of intimate violence than men. One survey found that females were the victims in 72 percent of intimate murders and the victims in about 85percent of the non-lethal intimate violence.[8] Other research suggests, that women are at least as physically aggressive a man, but less likely to inflict serious injury. According to a 2008 report from the Centre’s for Disease control and prevention, is a leading cause of death for women ages 15 to 44, and the leading cause of pregnant women. Over 90 percent of female homicide victims are killed by men with whom they have had a relationship.[9] Women are most likely to be injured in an intimate relationship in the course of trying to end it. One study found that married women who lived apart from their husbands were nearly four times more likely to report that their husbands had raped, physically assaulted and (or stalked them than women who lived-with their husbands (20 percent and 5.4 percent, respectively).[10] Finally, in the last decade, domestic violence deaths have been in decline for several reasons.

(1) The increased provision of legal services for victims of intimate partner abuse.

(2) Improvements in women's economic status and

(3) Demographic trends, most notably the aging of the population.[11] Researchers note that domestic violence programs enable many women to leave relationships before they feel that they need to use deadly force in self-protection.[12]

However, the recent economic recession may have increased risks of serious injury, both because of the heightened stress and reduced economic options associated with unemployment, and cutbacks in some government-funded support services. Thus, domestic violence can come in different forms.

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[7] M E Johnson, *Balancing Liberty, Dignity and Lethality*.

[8] C M Rennison and S Welchans, Bureau of Justice Statistics, Special Report: Intimate Partner Domestic Violence.

[9] J C Campbell, Prediction of Homicide of and by Battered Women in Assessing Dangerousness: Violence by Batterers and Child.

[10] P Tjaden and N Thoennes, Full Report of the Prevalence Incidence and Consequences of Violence against Women, Findings from the National Violence against Women.

[11] Amy Farmer & Jill Tiefenthaler, Explaining the Recent Decline in Domestic violence, 21 contemp. Econ. Pol 158(Apr 2003).

[12] Laura Dugan, Explaining the' decline in Intimate Partner Homicide: The Effects of changing Domesticity, women's status and Domestic violence Resources, 3 Homicide stud.187(1999).

(a) Violence within the Home Domestic violence is the most prevalent form of gender based violence. It typically occurs when a man beats his female partner. Psychological abuse always accompanies physical abuse and majority of women abused by their partners are abused many times. Physical, sexual and psychological violence against within a couple and in the family consists of battery, sexual abuse, female genital mutilation and other traditional practices harmful to women and girls, marital rape, dowry-related violence, incest, non-spousal violence. Like a son's violence against his mother and violence related to exploitation and deprivation of freedom. In spite of all the available data on gender-based violence, there is no accurate information on gender based violence in some countries. A culture of silence surrounds cases of violence against women in most countries like Nigerians, making it difficult to get a true picture of its extent. Some of the reasons why it is difficult to get an accurate account are that, most of the gender-based violence occurs in private spheres within families, inside homes and out of sight.

(b) Violence against Women within the general Community Physical, sexual and psychological violence occurring within the general community include battery, rape, sexual assault, sexual harassment and intimidation in school or work, forced treatments and abusive medication, the exploitation and commercialization of women's bodies which is related to increased poverty that is mainly as a result of unbridled economic liberalism. These types of violence occurring within the general community also include contraception imposed on women by constraints or force, forced sterilization of abortions, selective abortion of female foetus and female infanticide.[13]

(c) Violence against Women Perpetrated by the State Physical, sexual and psychological violence are too often perpetrated or tolerated by states that priorities customs or traditions over the respect of fundamental freedom. In some countries, the rise of religious fundamentalism is extremely disturbing as regards women's right to their economic autonomy and their freedom of choice. The social exclusion of women is so great that it constitutes a new form of apartheid. Women are considered second class beings of lesser value, deprived of their fundamental rights. Violence against women is also exercised as a weapon of war in situation of armed conflict. It has many forms including murder, rape, sexual slavery, hostage taking and forced pregnancy.[14] Other additional violations of human rights and fundamental freedoms are trafficking in women and girls for sex trade, forced prostitution, rape, sexual abuse and sex tourism that have become the focus of international crimes.

3. Sexual Harassment

The term "sexual harassment" did not come into use until the mid-1970s and was not fully articulated as a form of discrimination based on sex until 1979. There are basically two types of sexual harassment-sexual harassment in the workplace and sexual harassment in Educational Institutions.

3.1 Sexual Harassment in the Workplace

There are basically two types of sexual harassment in the workplace (1) quid quo harassment in which the harasser requires sexual contact or favours as a condition of employment or advancement and (2) hostile environment harassment based on unwelcome conduct of a sexual nature that has the purpose or effect of unreasonably interfering with an individual's work

[13] *Ibid*.

[14] <http//www.Ips news.Net/Africa/nota.asp> accessed on 6/09/2024.

performance or creating an intimidating, hostile or offensive work environment. The prevalence of harassment has not changed much since researchers started collecting data in the late 1970s,despite the development of legal doctrine making it harassment have doubled over the last decade, victims only report small instances of relationships, concerns about loss of privacy and doubts that an effective response to a complaint would be forthcoming. The questions are usually in what sense is sexual harassment a form of sex discrimination? What is its primary harm? Why do harassers harass? Is it a desire for sex or control? Docs the reason matter for purposes of anti-discrimination law? In Meritor savings Bank V. Vinson[15] in 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor savings Bank (bank).and manager of one of its branch offices with Taylor as her supervisor, respondent started as a teller, head teller and assistant branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave. Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment by Taylor, She sought injunctive relief, compensatory and punitive damages against Taylor and the bank and attorney's fees. At the 11-day bench trial, the parties presented conflicting testimony about Taylor's behavior during respondent's employment. Respondent testified that during her probationary period as a teller trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and during *the* course of the meal suggested that they go to a hotel to have sexual relations,. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favours, usually at the branch, both during and after business hours, she estimated that over the next several years she had intercourse with him some 40 or 50 sometimes. In addition, respondent testified that Taylor fondled her in front of other employers, followed her into the women's restroom when she went there alone, exposed himself to her and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated when she started going with a steady boyfriend. Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her allegations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval. The District Court denied relief but the Court of Appeals for the District of Columbia circuit reversed and the Supreme Court affirmed. In *Harns v. Forklif Systems*[16], Lac Teresa Harns worked as a manager at Forklift systems, Lac. An equipment rental company from April 1985 until October 1987.Charles Hardy was Forklift's President. The Magistrate found that, throughout Harris' time at Forklift Hardy often insulted her because of her gender and often made her the target of unwanted sexual innvendos. Hardy told Harris on several occasions, in the presence of other employees, You are a woman, what do you know" and "We need a man as the rental manager at least once, he told her she was "a dumb ass woman"...Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate (Harris) raise"...Hardy occasionally asked Harris and other female employees to get coins from his front

[15] 4.477 U.S 57 (1986).

[16] 5.510c U.S. 17 (1993).

pants pockets. He threw objects on the ground in front of Harris and other women and asked them to pick the objects up...he made sexual innvendos about Harris and other women's clothing. In Mid-August 1987, Harris complained to Hardy about his conduct hardy said he was surprised that Harris was offended, claimed he was only joking and apologized...He also promised he would stop and based on this assurance Harris stayed on the job. But in early September, Hardly began a new while Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "what did you do, promise the guy, some sex Saturday night". On October 1, Harris collected her paycheck and quit. Harris then sued Forklift, claiming that Hardy's conduct had created an abusive work environment for her because of her gender. The United States District Court for the Middle District of Tennessee adopting the report and recommendation of the magistrate found this to be "a close case", but held that hardy's conduct did not create an abusive environment. The court found that some of Hardy's comments offended Harris, and would offend the reasonable woman"...but that they were not "so severe as to be expected to seriously affect Harris psychological wellbeing. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance. Neither do I believe that Harris was subjectively so offended that she suffered injury.... Although hardy may at times have genuinely offended Harris, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to Harris. The United States Court of Appeals affirmed but the Supreme Court reversed.

3.2 Sexual Harassment in Educational Institutions

The law on sexual harassment in educational settings is less developed than the law governing harassment in the work place. There are three specific areas of harassment relating to educational institutions

(1) School is legal liability for sexual harassment
(2) Speech and conduct codes intenders to climate offensive conduct in schools and
(3) Faculty-student dating

(a) **School Legal Liability for Sexual Harassment** In the United States of America, Title ix of the Education Amendments of 1972 broad, prohibits sex discrimination by educational institutions that receive any federal funding Title ix has had substantial application in the sexual harassment context. The Supreme Court in the United States has interpreted Title ix to prohibit quid pro quo harassment and hostile environment harassment as form of intentional sex discrimination and to permit law suits for money damages. In *Gebser v. Lago Vista Independent School District*[17], parents of a female student sued the school district after police found that their eight-grade daughter was having a sexual relationship with one of her teachers. By a 5-4 vote, the court held that schools are not liable for harassment of a student by an employee unless officials had actual notice of the specific misconduct and responded with "deliberate indifference" The school's failure in that case to have a non-discrimination polity and internal grievance procedure, which are both required by Title IX's implementing regulations, was not sufficient to render it liable for the harassment. In *Davis v. Monre Country Board of Education*[18] *a* divided Supreme Court clarified the standards for school's liability for peer harassment. There a fifth-grade female student alleged repeated acts of harassment by one of her male classmates, including verbal and physical assaults such as attempts to touch her genital area. Despite several

[17] 6.524 U.S 274(1998).
[18] 7.567 U.S 629(1999).

complaints by the girl's mother to the teacher, principal and, eventually the school board, the school failed to take adequate remedial action. Even though the boy plead guilty to criminal sexual battery, the school took three months to even agree to change the girls seat so she wouldn't have to sit next to him in every class. The majority in Davis held that a school district's "deliberate indifference to known acts of harassment" by students could give rise to liability.

(b) Speech and Conduct Codes to Prevent Harassment In the United State of America, one approach to addressing sexual and racial harassment in educational institutions, "verbal conduct" or "expression" that interferes with a students' ability to benefit from the educational environment. Some proposals relate specifically to the internet and email systems.

(c) These codes have drawn fierce criticism from free speech advocates, who consider them a form of censorship and urge that the appropriate remedy for hurtful speech is not less, but move speech. By contrast, advocates of regulation argue that in a sexist racist society, "free speech" is available only to those with the power to use it, and that anti-harassment codes are critical to protect the dignity and integrity of individual who cannot effectively fight back with counter speech. In the university setting, racist and sexist speech is said to prevent some students from participating fully in the university community and from developing their psychological and intellectual potential.

(d) Faculty-Student Dating

(e) Faculty-student dating has been another subject of campus concern in the U.S.A. the limited available data suggests that such relationships are not uncommon. The conventional assumption is that broad prohibitions are unnecessary, unenforceable or unduly paternalistic.

A growing number of Institutions in the USA attempt to discourage faculty-students' relationship. Some commentators ban all amorous relationship between faculty and undergraduates or between graduate students and their supervisors. Other schools counsel against such relationships and place a heavy burden on the faculty member to establish consent if a student complains. Some constitutions prohibit faculty-student relationship where the professor has direct academic responsibility for the student if a relationship arises, the faculty member must make other arrangements for supervision of the student's work.

3.3 Pornography

"Sex sells" has always been true, but increased technological innovations have created increased opportunities for private consumption of pornography. Since the early 1980s, some feminists have joined with religious conservatives and other activists to combat pornography on several fronts. While the conservatives case against pornography focuses on the corruption of morals and erosion of "family values", the feminist rationale emphasizes the role of pornography in subordinating women through objectifying and degrading images and eroticization of abuse. One effort to combat pornography took the form of local ordinances that prohibited trafficking in pornography and provided monetary damages from the maker or seller to anyone injured by pornography.

3.4 Sexual Orientation Discrimination

The term "homosexual" emerged in the nineteenth century to describe same sex orientation. The term "gay" which has been traced to medieval Europe came into broader use in the1960s as a reference for both individuals and a political movement. Although the term historically was gender neutral, in contemporary usage gay refers to men and lesbians often self-identify as "queer". Bisexual is used to designate individuals whose sexual orientation can be homosexual

and heterosexual. Transgender individuals arc those whose sexual identity does not match the biological characteristics with which they were born. Estimates of the number of individuals who are gay, lesbian or bisexual are difficult to come by in part because sexual preferences are not always fixed, exclusive or openly acknowledged. Most studies depending on their methodology and definitions place the figures between 6 and 13 percent of men and 2 and 6 percennt of women. The dominant legal view is that discrimination based on sexual orientation is not discrimination based on sex because it affects both men and women equally. Similarly, some courts and legislatures have declared that same sex couples cannot legally marry and that individuals in those relationships do not have parental rights concerning the child of their partner. However in 2004, Massachusetts became the first state in the U.S.A to legalize same sex marriage. As of 2012, nine states and the District of Columbia granted same sex couples the right to marry on the same terms as opposite sex couples. An additional seven states allowed same sex couples to enter a marriage equivalent status that uses another name such as domestic partner but provides the same rights and obligations as marriage. Most remaining states however have enacted statutory or constitutional provisions prohibiting the celebration or recognition of same-sex marriages. The questions are: What is at stake in the same-sex marriage debate? Is the best way to achieve gender equality through recognizing traditional marriage for gays and Lesbians or arc there alternative models? Who should decide?

3.5 Women in the Military

Throughout history, cultural expectations and legal restrictions have severely limited female involvement in the armed forces. Until the early 1970s, women constituted less than two percent of the military and discrimination in placement and promotion was widespread. Enrollment was limited through quotas on female applicants, exclusion from combat positions, military academics and training programs and disqualification of women who became pregnant or had minor children. In the mid-1970s many of these restrictions were modified or withdrawn without judicial intervention .As a result, female participation in the armed forces substantially increased reaching 10 percent by the late 1980s, 13percent by the turn of the twentieth century and 15 percent by 2009. Currently women serve in 93percent of all army occupations and make up approximately 14 percent of the active army. Still, women's service in the military has remained controversial, especially with respect to combat positions.

4. Challenges in Implementation of Non-subordination Theory

(1) Problems of Overgeneralization: Applying a rule or practice to serve to subordinate women to men will create dichotomy. This is because some women even with their natural characteristics perform better than men.

(2) Low performance: Applying a rule or practices to serve to subordinate women to men could lead to low performance in a work place. This is because assuming or legitimizing the power imbalance between men and women will limit women who have power more than men to perform well.

(3) Problem of Intimidation: Applying rules designed to legitimate the power imbalance between men and women could lead to intimidation by men. This is because men would use the advantage of women's relative powerlessness in the society to intimidate them.

(4) Problem of sexual harassment pornography domestic violence, rape etc.: Applying rules designed to legitimate the power imbalance between men and women could leads to sexual harassment, pornography, domestic violence, rape etc.

(5) Problem of fear: Applying Non-subordination or dominance theory could bring fear on the part of women. This is because men do not want solely the obedience of woman, they want their sentiment. This obedience could be on fear, either fear of themselves or religious fears

(6) Every case should be treated on its merit irrespective of sex instead of applying rules or practices to subordinate women to men. This will go a long to increase the productive of the workplace and have balance equivalent opportunities.

5. Recommendations

It is recommended that every citizen must try his/her best to make sure that non-subordination theory surrounding gender based violence is aptly assimilated in within its context, in this milieu. Thus:

(a) Focused advocacy campaigns of the non-subordination theory should help tackle some of the direct causal factors responsible for the gender based violence on females. There should be public campaign to put a stop on gender based violence by organizing rural women who have no access to public opinions and who are illiterates to report all cases of domestic violence for prosecution of offenders.

(b) Health care providers should play important roles in collaboration with systems such as the legal, police, media, social and educational sectors and civil society organizations to give necessary support to the victims and to give evidence when required. Health professionals are often in a position to identify the Health consequences of any violence and to respond effectively to the health implication accordingly.

(c) Section 12(1) CFRN 1999 should be amended by the National Assembly in a way that international treaties favourable to women can apply directly, for instance, CEDAW which is an international treaty like and very paramount in addressing women's rights though ratified but not yet domesticated and as such unenforceable.

(d) More local legislation should be enacted in the state Houses of Assembly, for instance, the likes of Widowhood/Widower-hood (Malpractices) Prohibition Law, 2005 of Anambra State.

(e) Government should promote policies that can reduce the level of discrimination meted out on women and ensure equity in distribution of resources among the citizens, especially protecting the interest of women. It should be noted that good governance is what will bring a lasting solution on the long run and it depends a lot on the government to cater for the welfare of the masses.

6. Conclusion

Non-subordination theory is designed to legitimate the power imbalance between men and women, in doing this, it is submitted that every case should be treated on its merit to avoid dichotomy against the women. In so doing I strongly believe that we will have a balanced and efficient equivalent opportunities.

COMPARATIVE ANALYSIS OF THE TRADITIONAL PRACTICE OF KILLING GOATS AND THE PERFORMANCE OF OTHER TRADITIONAL RITES: THE SAME AS THE CERTIFICATE OF OCCUPANCY IN THE LAND USE ACT*

Abstract:
This study conducts a comparative analysis of traditional practices (killing of goats and performance of other traditional rites) and the Certificate of Occupancy in Nigeria's Land Use Act, exploring similarities and differences between these two approaches to land ownership and usage. While traditional practices hold cultural and spiritual significance, the Certificate of Occupancy represents a legal document. The analysis reveals convergences and divergences between these approaches, highlighting the importance of integrating traditional practices into modern land management systems. The research promotes cultural preservation, community engagement, and inclusive land reform, encouraging a nuanced understanding of the complex relationships between culture, tradition, and law in Nigeria. The findings contribute to the development of a more inclusive and sustainable approach to land ownership and usage, reconciling traditional practices with modern land management in Nigeria. The paper recommended that government should recognize and incorporate traditional practices into Nigeria's land use policies and laws, ensuring cultural sensitivity and community engagement. Also to develop a dual-system approach that acknowledges both traditional practices and modern land ownership documents like the Certificate of Occupancy.

Keywords: *Traditional practices, Certificate of Occupancy, Land Use Act, Land ownership, Cultural heritage*

1.0 Introduction

In many African cultures, traditional practices and customs have been an integral part of the social fabric for centuries. These practices have played a significant role in shaping societal norms, values, and beliefs. One such practice is the killing of goats and performance of other traditional rites, which have been used to mark important milestones, seal agreements, and resolve disputes. While these two practices may seem unrelated at first glance, they share some striking similarities. Both involve the transfer of rights and interests, whether it be the transfer of spiritual rights through the killing of goats or the transfer of legal rights through the issuance of a Certificate of Occupancy. Both also involve a sense of ownership and possession, whether it be spiritual or physical. In Nigeria, the Land Use Act of 1978 revolutionized the concept of land ownership and occupancy.[1] The Act introduced the Certificate of Occupancy, a legal document that serves as proof of ownership and occupancy of land. While the Certificate of Occupancy has become a vital document in modern land transactions, traditional practices continue to play a significant role in many communities. Land is said to be fragile and scarce. This implies that it is not enough and difficult to acquire and also human activities can damage or destroy the land resources. It is short in supply and needed to be effectively utilized in order to satisfy the aspiration of those who acquired it. Land is the basic necessity of life which provides food, shelter, and Livelihood to man.[2] The economic, social and environmental future of our country depends on the wise use of land. It is construed that no development can be effective without land. Thus, land without dimension of tenure is meaningless concept. For

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[1] Land Use Act (1978) Federal Republic of Nigeria Official Gazette. No.14.

[2] Oxford Advanced Learner's Dictionary (2006). Oxford University Press (7th edition). 400.

available land to be equitably managed among the people and promote maximal use of it by prospective resource owners, there is need for a worthy land policy to be in place for effective control and management of land in order to witness the desired development in Nigeria. Prior to 29th March, 1978 when the Land Use Act was enacted, there were land laws which governed land tenure systems in Nigeria. These laws were in use in the country and were later found to be substandard because despite their existence, the problems of land tenure continued in Nigeria. One major problem was the difficulty in obtaining land by the government in major urban centres for national development because of land speculations, racketeering and high cost of compensation usually demanded by the land owners whenever government acquired land to execute its projects.[3] Against this background, the Federal Government in a deliberate effort to unify land tenure, streamline and simplify ownership of land in Nigeria, set up the Land Use Panel in 1977 with certain terms of reference.[4] The references were considered and adopted by the government which promulgated the Land Use Act, 1978. Land use Act is usually concerned with the legislation that provides the right to use of land in both urban and rural areas of Nigeria. The right includes the rights of occupation and development, alienation and many privileges associated with land. Virtually, every nation of the world relies on land, all human activities are carried out on land which is the basic factor of production.

The need to acquire land by man has tremendously increased over the years. Prior to the promulgation of land use Act, Land is completely owned by individuals, families and communities with the head who hold the land in trust for the use of the entire people. But the advancement of land use Act of 1978 altered the existing land tenure and vested all lands in the government. Having observed all these in recent years, it is clearly understood that these goals has not in any way comes to reality rather the Act has been used to achieve personal goals and objectives by various past administrators and government of various levels. Another issue is that major objectives and purposes of the land use Act of 1978 has been seriously deviated from, the aim of the land use Act was to solve the diversified land policies in Nigeria and ensuring an easy accessibility of all Nigeria to land but in today's concept, land has been shared among highest bidders and buyers.[5] Activities of land grabbers, scam agents and the number of professionals required are some of the biggest challenges in legitimately and successfully acquiring a land in Nigeria. The Nigerian Land Use Act 1978 is the principal legislation that regulates contemporary land tenure in Nigeria. Upon its enactment, the law brought about radical, if not revolutionary, changes in the erstwhile land tenure systems in the country.[6] The law was aimed, among other things, at reducing unequal access to land and land resources, a situation that had caused a great deal of hardship to the citizenry. Massive and unfettered access to land and land resources by the citizens could stimulate the needed economic growth in an economy that depends heavily on agriculture and mineral resources. The Land Use Act was equally targeted at reducing the high cost of land required for industrial estates and mechanized agriculture. For these reasons, the law appeared to nationalize land when it placed it in the hands of the government as a custodian, to hold in trust and administer for the use and common benefit of all Nigerians. However, after more than three decades of the operation of the law, it is apparent that most of the problems it sought to cure have resurfaced and certain provisions of the law have

[3] Public Land decree (1976) Public Land Decree No 23. Laws of the Federation of Nigeria, 1990 (Edn,): 24-26.
[4] Ojigi, M.L. (2012). Geospatial mapping for crime indexing and monitoring in Minna and Environs, Niger State of Nigeria. *Nigerian Journal of Surveying and Geoinformatics,* 2(1), 83- 100.
[5] Okafor B. N and Nwike E. C. (2016). Effects of the Land Use Act of 1978 on rural land development in Nigeria: a case study of Nnobi. *British Journal of Environmental Sciences,* 4(3), 1-16
[6] Land Use Act (Degree No.6) 1978: Law of the Federation of Nigeria.

themselves worked hardship on the citizens and tended to impede economic development, which the Act initially sought to stimulate.[7]

The land system of a given society is the manner in which land is owned and possessed. It is an institutional framework within which decisions are taken about the use of land, embodying that legal or customary arrangement whereby individuals or groups or organizations gain access to economic and social opportunities through land.[8] The land system is also constituted by the rules and procedures which govern the right and responsibilities of both individuals and groups in the acquisition, use and control of land. Despite their significance, traditional practices have often been overlooked in favour of modern legal frameworks. However, many studies have highlighted the importance of exploring the intersections between traditional practices and modern legal systems. This comparative analysis seeks to explore the parallels between these traditional practices and the legal concept of Certificate of Occupancy, examining the similarities and differences between these two seemingly disparate practices. By doing so, we hope to gain a deeper understanding of the cultural and legal significance of these practices and their implications for land ownership and usage in modern society.

1.1 Statement of Problem

While traditional practices such as the killing of goats and performance of other traditional rites continue to play a significant role in many Nigerian communities, their legal recognition and relevance in modern land transactions remain unclear. The Land Use Act of 1978, which introduced the Certificate of Occupancy as proof of ownership and occupancy of land, has largely overlooked the cultural significance of traditional practices in land ownership and usage.[9] As a result, the following problems persist:

1. Lack of clarity: The relationship between traditional practices and the Certificate of Occupancy remains unclear, leading to confusion and conflicts in land transactions.
2. Cultural erasure: The dominance of modern legal frameworks threatens to erase the cultural significance of traditional practices in land ownership and usage.
3. Inequitable access: The prioritization of the Certificate of Occupancy over traditional practices may limit access to land for marginalized communities who rely on these practices.
4. Legal inconsistencies: The coexistence of traditional practices and modern legal frameworks may lead to inconsistencies and contradictions in land ownership and usage.

This study aims to address these problems by comparatively analyzing the traditional practice of killing goats and performance of other traditional rites with the Certificate of Occupancy in the Land Use Act, and exploring the implications for land ownership and usage in modern Nigeria. Specifically, this study seeks to:

- Examine the historical and cultural significance of traditional practices in Nigeria
- Analyze the legal framework surrounding the Certificate of Occupancy in the Land Use Act
- Compare and contrast the traditional practices with the Certificate of Occupancy
- Identify areas of convergence and divergence between the two
- Explore the implications of this comparative analysis for land ownership and usage in modern Nigeria.

[7] Nwocha, M. E. (2016). Impact of the Nigerian Land Use Act on economic development in the country. *Journal of Acta University Danubius Administration*, 8(2), 43-56

[8] Udo, R.K. (1985.) *The Land Use Decree 1978 and its antecedents*. University Lectures, University of Ibadan 44-46

[9] Land Use Act (1978) Federal Republic of Nigeria Official Gazette. No.14.

By exploring the similarities and differences between these traditional practices and the Certificate of Occupancy, this study aims to contribute to a deeper understanding of the complex relationships between culture, tradition, and law in Nigeria.

2.0. Literature Review

Traditional practices in land ownership and usage have been an integral part of indigenous cultures and communities for centuries. These practices are often rooted in customary law, cultural beliefs, and historical context. In Nigeria, traditional practices and modern legal frameworks have long coexisted, yet their relationship remains understudied. Research has focused on the legal aspects of land ownership and usage, neglecting the cultural significance of traditional practices. African scholars have highlighted the importance of traditional practices in land ownership and usage, emphasizing their role in maintaining social harmony and balance. However, their work has not fully explored the legal implications of these practices. In contrast, legal scholars have examined the Land Use Act and its impact on land ownership and usage, but have overlooked the cultural context of traditional practices. Recent studies like those by Oyebade[10] and Adewole have attempted to bridge this gap, exploring the intersections between traditional practices and modern legal frameworks. However, their focus has been on specific case studies, rather than a comprehensive comparative analysis. The literature review highlights the need for a more comprehensive understanding of the relationship between traditional practices and modern legal frameworks in Nigeria, and the importance of exploring the cultural significance of traditional practices in land ownership and usage.

2.1 Land Use Act of 1978

The Land Use Act (formerly called the Land Use Decree) was promulgated on 29th of March 1978. According to Chapter 202 of the Laws of the Federation of Nigeria 1990, the Land Use Act is "An Act to Vest all Land compromised in the territory of each State (except land vested in the Federal government or its agencies) solely in the Governor of the State , who would hold such Land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals resident in the State and to organisations for residential, agriculture, commercial and other purposes while similar powers will with respect to non-urban areas are conferred on Local Governments (27th March 1978) Commencement." Prior to the enactment of the Land Use Act in 1978, there were three main sources of land law: Customary Law (varied from custom to custom), English received law (which comprises of the common law, doctrine of equity and statues of general application), and local legislation.[11] The Parliament of the then northern Nigeria passed the Land Tenure Law in 1962, which governed all interest affecting land. In the then Southern Nigeria, however, customary system of land tenure governed land interest and land was owned by communities, families and individuals in freehold (Bolaji, 2011). Land was acquired either by inheritance, first settlement, conveyance, gift, outright purchase or long possession, as such, causing conflicts and violence in terms of ownership.

The Land Use Decree was promulgated on 29 March, 1978 following the recommendations of a minority report of a panel appointed by the Federal Military Government to advice on future land policy. The land Use aAct distinguishes throughout between urban and non-urban (hereafter 'rural') land. In urban areas (to be so designated by the Governor of a state), land was to come under the control and management of the Governor, while in rural areas

[10]Oluyede P.A.O. (1999). Nigerian conveyancing Practice, Drafting and Precedent, Hienemann Educational Books.
[11]Oseni, W.T. (2011). Doctrine of equity and statutes in Nigeria (2nd edn) 55-58.

it was to fall under the appropriate local government.[12] Famoriyo stated that the Decree envisaged that 'rights of occupancy', which would appear to replace all previous forms of title, would form the basis upon which land was to be held.[13] These rights were of two kinds: statutory and customary.[14] Statutory rights of occupancy were to be granted by the Governor and related principally to urban areas. In contrast, a customary right of occupancy, according to the Decree, 'means the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by Local Government under this Decree.' Local governments were empowered to grant customary rights of occupancy to any person or organization (for mining, oil and gas), residential and other purposes with the provision that grants land for agricultural or grazing purposes should not exceed 500 or 5000 hectares respectively without the consent of the State Governor.[15] With the minor exception of land subject to Federal or State claims, the Decree also empowered the local government to 'enter upon, use and occupy for public purposes any land within the area of its jurisdiction' and to revoke any customary right of occupancy on any such land.[16] Under the Land Use Act 1978, all land in Nigeria is vested in the government. Nigeria operates two systems of land tenure. They are; customary and non-customary (statutory) system of land tenure. Customary land tenure system is a system of landholding indigenous to the people, and Local governments may grant customary rights of occupancy to land in any non-urban area to any person or organization for agricultural, residential, and other purposes, including mining, oil and gas extraction. In the statutory tenure system, individuals and entities can obtain a statutory right of occupancy for urban and non-urban land.[17] Statutory occupancy rights are granted for a definite term, which is set forth in the certificate. The Land Use Act, promulgated in 1978, was motivated by the need to make land accessible to all Nigerians; prevent speculative purchases of communal land; streamline and simplify the management and ownership of land; make land available to governments at all levels for development; and provide a system of government administration of rights that would improve tenure security.[18] To achieve these objectives of the Act, various provisions are made in the law to fast-track a seamless administration and implementation of the policy of the Act. However, after 40 years of implementing and administering the Act, one could say that the Act has failed to achieve its set objectives. It is well-known, for instance, that the Act divests citizens' freehold title to their land. And, of course this is antithetical to their economic prosperity as land ceased from being an article of commerce upon the commencement of the Act.[19] Administratively, the Act created a monstrous fiefdom in the governor of the state and confounded the roles of the local government and state in land administration in Nigeria.

2.3 Historical and Cultural Significance of Traditional Practices in Nigeria

Traditional practices of land ownership and usage date back thousands of years, with indigenous cultures developing complex systems of land management and governance. In Africa, Asia, and Latin America, pre-colonial societies had their own land tenure systems, often

[12] Udo, RK (n 8) The Land Use Decree 1978 and its antecedents. University Lectures, University of Ibadan 44-46
[13] Famoriyo. S. E. (1980). Land Tenure and Agricultural Development in Nigeria. Nigerian Institute of Social and Economic Research, Ibadan 14-20
[14] Udo, RK (n 8) The Land Use Decree 1978 and its antecedents. University Lectures, University of Ibadan 44-46.
[15] Omotola, J.A. (1985). Essays on the Land Use Act. 1978. Lagos University Press, Lagos 4-5.
[16] Adegboye, R.O. (1967). The need for land reform in Nigeria. Journal of Environmental Studies, 9 (33), 9-350.
[17] Land Use Act (1978) Federal Republic of Nigeria Official Gazette. No.14.
[18] Ukaejiofo, A.N. (2008). Perspectives in land administration reforms in Nigeria. Journal of the Environment Studies, 5(3) 43.
[19] Nwocha, M. E. (2016). Impact of the Nigerian Land Use Act on economic development in the country. *Journal of Acta University Danubius Administration*, 8(2), 43-56

based on customary law and communal ownership. European colonization disrupted traditional land practices, imposing foreign legal systems and private property rights, often leading to land dispossession and displacement of indigenous peoples. In the mid-20th century, land reform movements emerged in Latin America, Africa, and Asia, aiming to redistribute land and recognize traditional rights. In recent decades, there has been a growing recognition of indigenous peoples' rights to their lands, territories, and resources, as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Traditional practices in Nigeria hold significant historical and cultural value, reflecting the country's rich cultural heritage. Traditional practices often involve honouring ancestors, emphasizing the importance of lineage and heritage. Traditional rites and ceremonies foster community cohesion and social harmony. Traditional practices define Nigerian cultures, distinguishing them from other cultures. Traditional practices are often rooted in spiritual beliefs, connecting the physical and spiritual worlds. Traditional practices like the killing of goats are sometimes tied to land ownership and usage. Traditional practices have been used to resolve disputes and maintain social balance. Traditional practices mark important life milestones, such as birth, coming of age, marriage, and death. Some traditional practices are linked to agricultural cycles and fertility rites. Traditional practices have inspired Nigerian art, music, and literature. Traditional practices have helped Nigerians resist colonialism, slavery, and cultural erasure.

2.4 Legal Framework Surrounding the Certificate of Occupancy in the Land Use Act

The legal framework surrounding the Certificate of Occupancy in the Land Use Act in Nigeria is as follows:[20]

1. Vesting of Land: The Land Use Act vests all land in the Governor of each state, who holds it in trust for the people [Section 1].
2. Control and Management: The Governor controls and manages land in urban areas, while Local Governments control and manage land in non-urban areas [Section 2].
3. Land Use and Allocation Committee: The Governor establishes a committee to advise on land management, resettlement, and compensation [Section 3].
4. Grant of Rights of Occupancy: The Governor grants statutory rights of occupancy for residential, agricultural, commercial, or other purposes [Section 5].
5. Certificate of Occupancy: The Governor issues a Certificate of Occupancy as evidence of a statutory right of occupancy [Section 10].
6. Terms and Conditions: The Certificate of Occupancy contains terms and conditions, including rent, improvements, and breaches [Section 10].
7. Revocation: The Governor may revoke a right of occupancy for overriding public interest, breach of terms, or refusal to pay rent [Section 28].
8. Compensation: Holders and occupiers are entitled to compensation for unexhausted improvements upon revocation [Section 29].
9. Jurisdiction: High Courts and other designated courts have jurisdiction over land matters [Section 34].

The Land Use Act provides a legal framework for land administration, emphasizing state control and regulation. The Certificate of Occupancy is a crucial document, serving as proof of occupancy rights and outlining the terms and conditions of land use.

2.5 Compare and Contrast the Traditional Practices with the Certificate of Occupancy

Although there is no direct reference to the indigenous land tenure in the Act, the recognition and preservation of customary land law within the language of the Act may imply

[20] Land Use Act (1978) Federal Republic of Nigeria Official Gazette. No.14.

the survival of the indigenous land tenure. Section 24 of the Land Use Act preserves the customary law rules governing devolution of property, while Section 25, which prohibits partitioning of land, and expressly exempts cases which are regulated by customary law. Under Section 29, where the holder or occupier entitled to compensation is a community, the governor is empowered to direct payment of the compensation either to the community or to its chief or leader to be disposed of by him for the benefit of the community in accordance with the applicable customary law. Furthermore, under Section 50 of the Land Use Act, a 'customary right of occupancy' is defined as 'the right of a person or community lawfully using or occupying land in accordance with customary law' and an 'occupier' is similarly defined as 'any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law....' This is in addition to Section 48 of the Land Use Act, which preserves all existing laws relating to the registration of title to, or interest in, land subject to such modifications as will bring those laws into conformity with the Act or its general intendment. It is submitted that customary land law is an existing law within the meaning of section 48 of the Act. Indeed, it can be asserted that Section 1 of the Land Use Act merely borrows and enacts the notion of corporate ownership and trusteeship under the indigenous land tenure system. The position of the Governor under the Act appears to be comparable to that of the head of the community or family in relation to communal land under customary law. But this would seem to be half-truth only: when the powers of the Governor are closely analyzed, the area of conflict with the head of the community can easily be identified, especially in relation to the power of management and control of the land. Here are some similarities and differences between and traditional practices with the certificate of occupancy;

Similarities:

1. Both involve rights to land use and occupancy.
2. Both have cultural and historical significance.
3. Both involve some form of recognition or validation (traditional rites or Certificate).

Differences:

1. Certificate of Occupancy is a legally recognized document, while traditional practices are not necessarily recognized by modern law.
2. Certificate of Occupancy applies to specific plots of land, while traditional practices often apply to communal or ancestral lands.
3. Certificate of Occupancy has a specific duration (e.g., 99 years), while traditional practices often imply perpetual rights.
4. Certificate of Occupancy can be transferred or sold, while traditional rights are often tied to family or community lines.
5. Certificate of Occupancy is a written document, while traditional practices often rely on oral tradition and community knowledge.
6. Certificate of Occupancy is enforced by the state, while traditional practices rely on community norms and sanctions.
7. Certificate of Occupancy focuses on individual ownership, while traditional practices emphasize community and cultural connections to land.

2.6 Areas of Convergence and Divergence between Traditional Practices and Certificate of Occupancy

Areas of convergence:

1. Cultural significance: Both killing goats and performance of other traditional rites hold cultural and spiritual significance.
2. Community involvement: Both involve the community and promote social bonding.

3. Symbolism: Both have symbolic meanings, such as purification, protection, and fertility.
4. Ancestral connection: Both honour ancestors and the land.
5. Ritualistic nature: Both involve ritualistic practices.
Areas of divergence:
1. Purpose: Killing goats is often for land ownership and usage, while other traditional rites may be for various purposes (e.g., fertility, protection).
2. Frequency: Killing goats may be a one-time event, while other traditional rites may be recurring.
3. Location: Killing goats may be specific to a particular location, while other traditional rites may be practiced in various settings.
4. Animals involved: Killing goats involves goats, while other traditional rites may involve other animals or no animals at all.
5. Specificity: Killing goats is a specific practice, while other traditional rites may be more diverse and varied.

2.7 The implications of this Comparative Analysis for Land Ownership and Usage in Modern Nigeria

The comparative analysis of traditional practices and the Certificate of Occupancy has significant implications for land ownership and usage in modern Nigeria:
1. Legal recognition: Traditional practices may gain legal recognition, providing a framework for their integration into modern land ownership and usage.
2. Cultural preservation: The analysis highlights the importance of preserving cultural heritage and traditional practices, ensuring their continued relevance in modern Nigeria.
3. Community engagement: The study emphasizes the need for community involvement in land ownership and usage decisions, fostering more inclusive and participatory approaches.
4. Land reform: The comparison may inform land reform efforts, reconciling traditional practices with modern land management systems.
5. Certification and titling: The analysis could lead to the development of certification and titling systems that incorporate traditional practices, enhancing security of tenure and property rights.
6. Dispute resolution: The study may inform alternative dispute resolution mechanisms, incorporating traditional practices to resolve land-related conflicts.
7. Urban planning: The analysis could influence urban planning strategies, incorporating traditional practices and cultural heritage into modern urban development.
8. Economic development: The study may contribute to economic development policies, leveraging traditional practices to promote sustainable land use and resource management.

3.0 Conclusion

In conclusion, the comparative analysis of traditional practices (killing of goats and performance of other traditional rites) and the Certificate of Occupancy in the Land Use Act reveals both similarities and differences. While both involve rights to land use and occupancy, the traditional practices are deeply rooted in cultural and spiritual significance, whereas the Certificate of Occupancy is a legal document. The analysis highlights the importance of recognizing and reconciling traditional practices with modern land management systems, promoting cultural preservation, community engagement, and inclusive land reform. The study demonstrates that traditional practices and modern land ownership and usage are not mutually exclusive, but rather complementary aspects of Nigeria's rich cultural heritage and legal framework. By integrating traditional practices into modern land management, Nigeria can foster a more inclusive, sustainable, and culturally sensitive approach to land ownership and

usage. Ultimately, this research emphasizes the need for a nuanced understanding of the complex relationships between culture, tradition, and law in Nigeria, and encourages policymakers, scholars, and communities to engage in dialogue and collaboration to ensure that land ownership and usage practices align with the country's cultural and legal heritage.

3.1 Recommendations

Based on the comparative analysis, the following recommendations are made:

1. Government should recognize and incorporate traditional practices into Nigeria's land use policies and laws, ensuring cultural sensitivity and community engagement.
2. Develop a dual-system approach that acknowledges both traditional practices and modern land ownership documents like the Certificate of Occupancy.
3. Empower local communities to manage land according to their traditional practices, with support from government and legal frameworks.
4. Protect and preserve cultural heritage sites and traditional practices related to land ownership and usage.
5. Sensitization and education of stakeholders, including communities, policymakers, and legal professionals, about the importance of traditional practices and their integration into modern land management.
6. Legal reform: Reform Nigeria's Land Use Act to recognize traditional practices and provide a legal framework for their integration into modern land ownership and usage.
7. Collaborative dispute resolution: Establish a dispute resolution mechanism that incorporates traditional practices and modern legal frameworks to resolve land-related conflicts.

By implementing these recommendations, Nigeria can strike a balance between preserving cultural heritage and promoting modern land ownership and usage practices, ensuring a more inclusive and sustainable approach to land management.

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DISMANTLING OBSTACLES AND IMPEDIMENTS TO EFFICIENT ADMINISTRATION OF VALUE ADDED TAX IN NIGERIA*

Abstract

The present paper seeks to unravel the obstacles impeding efficient administration of Value Added Tax (VAT) in Nigeria VAT is in a type of tax charged on supply of goods and services being imposed at each stage of the process of production. Law of taxation has conferred different tiers of government with powers to impose and collect taxes. Among the different taxes collected by the federal government is the VAT. However, the purpose and intention of introduction of VAT has not been fully realized, owing to inefficiency and ineffectiveness in administration of the tax, among others. Thus the aim and objective of this paper is to pin-point those impediments with a view to surmounting them. The methodology adopted was doctrinal, using the primary and secondary sources. The paper, in the main, examined the legal framework, the legal issues arising there from, the nature and application of VAT, etc. It was the findings of the paper among others that although VAT is a viable economic option that could be explored with optimum benefit, certain problems among which is administrative have hampered these benefits. In that light, the paper concluded with strong recommendations for amendment of the extant VAT laws, restructuring of administrative and revenue sharing formula of VAT, mounting of public enlightenment/educational programmes to make VAT more acceptable, among others.

Keywords: *Taxation Impediments, Taxation Efficiency, Dismantling, Tax Administration*

Introduction

1.1 What is VAT?

The term, "Value Added Tax (VAT), is actually very well defined by its name[1]. It is closely related to the Gross Domestic Product which is used to measure the wealth of a country. Thus VAT is first a branch of taxation. Tax is a momentary charge imposed by the government on persons, entities, transactions or property to yield public revenue[2]. Taxation is defined as "the imposition or assessment of a tax, the means by which the State obtains the revenue required for its activities[3]. Thus VAT is a tax assessed at each step in the production of a commodity, based on the value added at each step by the difference between the commodity's production cost and its selling price[4]. VAT acts as a sales tax on the ultimate consumer[5].

1.2. Evolution of VAT in Nigeria

In Nigeria, and indeed some parts of Africa, the payment of taxes is not strange. This is because, even before independence, taxes were collected either by the colonial masters or emirs/chiefs by different names. The history of revenue in Nigeria dated to the pre-colonial era when tax and levies were paid to the fathers/lords as the case may be to Obas, Kings and Emirs. The tax or levies were to be paid in cash or in kind during the pre-colonial era. It was used to support the sustenance of the colonial administration. Agriculture used to be a major sources of

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[1] Value Added Tax is hereinafter referred to as VAT. It is imposed by the value Added Tax Act 2004, now fount in chapter VI laws of the Federation 2007 (hereinafter referred to as VAT) Act LFN 2007 (As amended).

[2] BA Garner (ends) '*Black's Law Dictionary* (10th edn. St Paul Minis; Thomson Reuters, 2004)

[3] ibid p. 1500.

[4] ibid p. 1499.

[5] ibid.

revenue for government until focus was shifted to oil. The condition of the economy became vulnerable to the condition of the world oil market from 1970 till date. The fluctuation of price in the world oil market in the Nigerian economy caused government to approach the issue of diversification. Value Added Tax was introduced into Nigeria's tax system as a means of increasing government revenue given the steadily rising costs of governance on one hand and the dwindling and erratic returns from petroleum, Nigeria's principal source of revenue[6]. The Federal Government was dissatisfied with the non-oil revenue[7], hence it aimed to increase the base of the economy[8]. The Minister of Finance at the time echoed this desire when he said that,

> 'Oil predominates in the government revenue. For some years now, the thrust of economic policy has been to reverse this intolerable trend by diversifying revenue source strengthening the non-oil revenue base and making the economy more resistant to destabilizing shocks. It is in furtherance of this policy that Government has decided to undertake a reform of non-oil tax[9]

Factors necessitating a replacement of Sale Tax with VAT in Nigeria[10] are;

i. The base of the Sales Tax in Nigeria as operated under the No. 7 of 1986 is narrow. It covered only nine categories of goods plus sales and services in registered hotels, motels and similar establishments. The narrow base of the tax negates the fundamental principle of consumption tax, which by nature is meant to out across all consumable goods and services, VAT base is broader and included most professional services and banking transactions, which are high profit-generating sectors.

ii. Only locally manufactured goods were targeted by the Sales Tax of 1986, although this might not have been the intention of the law. VAT is neutral in this regard. Under VAT, a considerable part of the tax to be realized is from imported goods. This means that under the new VAT, locally manufactured goods will not be placed at a disadvantage relative to imports.

iii. Since VAT is based on the general consumption behaviour of the people, the expected high yield from it will boost the fortunes of the State government with minimum resistance for the payers of the tax[11]

These factors resulted in the setting up of two Study Groups namely, Ugoh Study Group and there- let Study Group by the Federal Government to review Nigeria's tax systems. The first committee, set up by the Federal Ministry of Finance, was mandated to review Nigeria's direct tax system while the second committee of up by the Federal Ministry of Budget and Planning was mandated to review Nigeria's indirect tax system, study the feasibility of introducing VAT in Nigeria and, if found feasible, design a system for Nigeria in the original form of VAT or a modified form (modified VAT or MVAT)[12]. Interestingly, the Committee set up to review the indirect tax system revealed the inherent problem of applying VAT in Nigeria, being a federation. In November 1991, the Committee submitted its report wherein it expressed its reservations about the constitutionality of VAT and its application in Nigeria[13]. It explained in

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[6] MN Okoli and AS Matthew, Correlation between Value added Tax and National Revenue in Nigeria An Ecm model (2015) Vol *6115TE Journal*.

[7] ibid 27-29.

[8] C Uche & O Ugwoke, 'The law and Practice of Value Added Tax in Nigeria (2003) *Bulletin of International Law* 265-267.

[9] Federal Minisry of Finance, 'Progress Report of the Modified Value Added Tax (MVAT) Committee', (1992) 1 (19) Appendix 1 (MVAT) Committee.

[10] Chartered Institute of Taxation of Nigeria (CITN), '*Tax Guide'* (Lagos: CITN, 2002) 540.

[11] Chartered Institute of Taxation of Nigeria (CITN), '*Tax Guide'* (Lagos: CITN, 2002) 540.

[12] Uche & Ugwoke (n8) 265.

[13] ibid.

its report the uncertainty of the true nature of VAT whether it was intended to be a Federal Tax or a replacement for Sales Tax and the appropriate formula for sharing the proceeds if it were to be a Federal Tax[14]. The Committee also observed that VAT was best suited for countries with a unitary structure as opposed to countries with a federal structure. Nonetheless, the Committee went ahead to endorse VAT as desirable[15]. In its report, it was recommended that VAT should replace Sales Tax in its entirety and have a single tax rate[16]. It was further recommended that, the proposed VAT legislation should pay special attention to the state-federal relationship since VAT would replace the Sales Tax[17]. Finally , it was recommended that a modified VAT be adopted and a MVAT[18] Committee established to prepare the groundwork for the eventual introduction of VAT[19]. The VAT Decree was signed into law on the 24th August, 1993 as VAT Decree No. 102 to commence on the 1st of December, 1993. But for administrative convenience, the operational date was moved to 1st January, 1994[20]. Since 1993, the Value Added Tax Act, had been amended more than half a dozen times the latest being the Value Added Tax (Amendment) Act of 2007. Worthy of note also is the unveiling of the Finance Act 2019[21] with its attendant amendments of the VAT Act. The Finance Act itself has also suffered further amendments which seen to have got some cumulative effects on the VAT going forward.

1.3. Nature of VAT Transaction

VAT is imposed "on the supply of all goods and service other than those goods and services listed in the First Schedule to this Act"[22]. If the charging provisions were to be strictly construed, VAT will be chargeable on international, inter-Sate and intra-State supplies of goods and services. Apparently in recognition of the need of territorial limitation of the tax to goods and services… supplied in Nigeria, the FIRS. Information Circular 9304 provides that "supplies made outside Nigeria are outside the scope of Nigerian VAT"[23]. Even without making this qualification, it is hard to see how the tax can be administered extra-territorially considering the principle in *Boucher* v *Lawson*[24] that no nation will take account of the revenue law of another nation. The VAT Act had witnessed significant changes in the design of its charging clause. At inception, VAT was chargeable and payable on goods and services listed in column A of Schedules 1 and 2 while Schedule 3 contained the list of exempted goods and service[25]. Based on the original design, there were 17 chargeable goods[26] and 24 chargeable services[27]. However, following the policy to expand the base of VAT, a new design was adopted which imposed tax on the supply of all goods and services other than the goods and services listed in the Schedule to the Act[28]. The new design, therefore, fundamentally changed the standard for determining chargeable goods. The bright line rule for determining whether a particular good or service is

[14] EE Ijewere, '*Towards Efficient VAT Operation in Nigeria*: (A lecture organized by the MVAT Committee at Obafemi Awolowo University, the life , Nigeria on 20th May 1993).
[15] ibid.
[16] ibid.
[17] AA Traite, 'Value Added Tax International Practice and Problems, (1988) IMF, 4-7.
[18] Report of the Modified Value Added Tax (MVAT) Committee, Vol 1 Appendix xi-xii.
[19] ibid.
[20] Finance LFN 2019.
[21] VAT (Amendment) Act LFN 2007 s,. 2.
[22] FIRS Information Circular No. 9304 of 20th August, 1993 on Value Added Tax (VAT) item 6 (ii)..
[23] (1815) Cas T.H. 194, 95 ER 125.
[24] VAT (n21) s 2.
[25] Schedule 1 VAT Act No. 102 1993.
[26] . ibid. Schedule 2.
[27] VAT (n 21) s 2.
[28] ibid. s 13.

taxable under the extant law is whether it is specifically exempted in the First Schedule. In the absence of any specific exemption, the good or service will be taxable thus giving the tax a very wide base. Taking the social, political and economic development of Nigeria into consideration, section 3 of the Act exempts the under listed goods and service, listed in the Schedule which is divided into two parts[29] which are Good, Exempt and Services, Exempts Examples of goods and services falling there under are: "all medical and pharmaceutical products, Basic food items, Books and educational materials, Baby products, agricultural and farming equipment, plant and machinery, all exported goods, Proceeds from the disposal of short term Federal Government of Nigeria Securities and Bonds; Proceeds from the disposal of short term State, Local Government and Corporate Bonds (including supra-national Bonds)" medical services; Services, rendered by Community Banks, People's Bank and Mortgage Institutions; Plays and performance conducted by educational institutions as part of learning and all exported services. The meaning and scope of the exempted goods and services are not defined in either the Statute or the FIRS Circulars. For example, the scope of what is meant by "basic food" is not clear; Generally, what is a basic food depends on the status in life of an individual and varies from person to person[30]. The present practice by the FIRS is to limit the meaning of basic food to uncooked and unprocessed food items, such as garri (a staple cassava food in Nigeria) while processed food items such as spaghetti, corn flakes, baked beans and cheese are taxable. It is submitted that in the absence of clear definition of what constitutes basic food item, the current practice which imposes tax on processed and manufactured foods is open to challenge. This will also accord with the principle that ambiguity in tax laws should be construed in favour of the taxpayer. Mention must be made as regard to the emergence of the finance Act 200 and its subsequence amendment on the shaping of the nation's tax laws with particular reference on the VAT[31]. The new Act was inaugurated to promote fiscal equity by mitigating regressive taxation, reform domestic tax laws and align with global best practices. In particular, the impact of the Finance Act on VAT shall be examined under a sub-head in the course of this discourse.[32]

2. Legal Framework for VAT Administration

2.1. The Constitution

Section 4 (i) (a) & (b) of the constitution [33] vest the legislative powers of the Federal Republic of Nigeria on the National Assembly to make law for the peace, order and good governance of the Federation. These powers were identified to be matters within the Exclusive Legislative List, Concurrent List and any other matter with respect to which at is empowered to make laws in accordance with the provisions of the Constitution[34]. S (44 (a) of the Constitution provides that "Nothing in subsection (1) of this section shall be construed as affecting any general law for the imposition or enforcement of any tax ….[35] Thus the compulsory imposition of tax on a citizen is not derogation from the right of a citizen to his property, but a necessary exercise of governmental powers. In the case of *Independent Television /Radio* v ESBIR[36], the court held that "by virtue of section 24 (4) of the 1999 constitution, the payment of tax is an

[29] *Chapple* v *Cooper* (1844) 13 M & N 253.
[30] VAT (n21) s 29
[31] The sub-head is '3' where the another exhaustively examined the interventions brought along by the Finance Act on VAT in Nigeria.
[32] 1999 Constitution of the Federal Republic of Nigeria (As Amended).
[33] ibid section 4 (4) (a) & (b)
[34] ibid.
[35] (2015) 12 NWLR (pt. 1474).
[36] ibid.

obligation of a citizen. Failure of the citizen to pay tax shall strip him of the protection afforded by section 44 (1) of the Constitution[37]. The legislative power of a State is vested in the House of Assembly which is identified as matter not included in the Exclusive Legislative List, any matter in the Concurrent Legislative List any other matter with respect to which it is empowered to make laws.[38] Notwithstanding, the National Assembly may by an Act provide that the collection of any (of the aforementioned) tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State[39]. The House of Assembly of a stall may without prejudice to the powers conferred on the National Assembly make provision for the collection of any tax, fee or rate or the administration of the law providing for such collection by a Local Government Council[40] .

2.2. **Federal Inland Revenue Service (Establishment) Act**

Another law that provides for Value Added Tax is the Federal Inland Revenue Service (Establishment) Act[41]. The Service provides for the administration of all federal taxes including the VAT[42]. The Act was enacted as part of the reform processes aimed at correcting the lapses in the tax system in Nigeria. The Act incorporated some of the recommendations of the Study Group[43] set up for Tax Reforms in Nigeria

2.3 **Taxes and Levies Act**

The Taxes and Levies Act is another law that provides for taxation of VAT. Due to the conflict of power as to the imposition and collection of tax, the National Assembly enacted the Taxes and Levies Act[44]. The Act stipulates all the taxes collectable by each tier of Government. It is the Federal Government that collects the VAT through the State VAT offices, for the benefits of both federal and State Governments. Federal Government only deducts administrative cost of collection of the VAT.[45]

2.4 **Finance Act**

On 13th January, 2020, President Buhari (as he then was) signed the Finance Bill into law, thus making it an Act after it secured legislative approval[46]. The new document seems to have amended eighty tax provisions across the companies income tax, petroleum profits tax, personal income tax, including the value added tax, among other[47]. According to Government, the new Act would promote fiscal equity by mitigating regressive taxation, reform domestic tax laws and align with global best practices. The impact of the Finance Act on VAT includes broadening the scope of VAT coverage. The new Act had done that by expanding the definition of "goods" to include any intangible products, asset or property over which a person has ownership where he derives benefits, and which can be transferred from one person to another, excluding interest in land[48]. The new Act also has provided clarification to the effect that VAT should now be

[37] ibid. Second Schedule Part i.
[38] ibid. Second Schedule Part I Paragraph 7.
[39] ibid. Section 4(2) (v) and Second Schedule Part II Paragraph 9
[40] Federal Inland Revenue (Establishment) Act No. 13 of 2007
[41] ibid. 1st Schedule.
[42] ibid.
[43] Taxes and LEVIES Act (Amendment) Order 2015
[44] Item 4 Part I Schedule to the Act (Approved List for (election) 2015.
[45] S Musa, "Buhari Okays Finance Act', *ThisDay Newspaper* (Lagos: 23 January, 2020) Frontpage.
[46] ibid p. 27.
[47] Finance Act LFN 2020 s 38.
[48] ibid. s 33.

accounted for on cash basis rather than accrual bases[49]. Furthermore, the Finance Act has modified the VAT Act[50] to clarify the VAT Exemption status of services rendered by microfinance banks (MFB), among others.

3. Obstacles to Efficient VAT Administration in Nigeria

Governments have been in search of methods to curb the problems emanating from administration of VAT in Nigeria. These problems crop up both from the law on administration to the implementation and its enforcement. It also goes to affect the tax authorities, tax officials, the politicians and taxpayers. These challenges appear to impede some of the successes of the Value Added Tax, some of which are highlighted below:

i. **Poor Tax Administration**; Tax administrators and individual agencies suffer from limitations in manpower, money, tools and machinery to meet the ever-increasing challenges and difficulties. Tax statistics are not collated, analyzed on a routine basis, not to mention, having it stored, or made more easily accessible or retrievable[51]. Apart from certain States, there seem to be total absence of a systematic data on taxable persons, tax compliance, tax evasion/avoidance and other indices that could be used to make micro or macro analysis of certain variables[52]. Even these states aforementioned and the FIRS Headquarters in Abuja, collection of information in form of data is mostly based on projections rather than their eventual or actual collection, financial reports and budgets, to worsen matters, the scanty information held could hardly be released for political purposes[53]. With the advent of the Freedom of Information Act (FOIA)[54]; public officers can now be compelled to release information upon the request of any applicant. Again, the tax system in Nigeria is such that only input VAT directly attributable to production is recoverable from output VAT making all other VAT non-recoverable.

ii. **Hidden Tax:** The VAT's biggest flaw is that, unless mandated otherwise, the amount of VAT paid by taxpayers is hidden[55]. VAT is not printed on the sales receipt perhaps because politicians hide the steep price of the VAT and their policies from taxpayers. One fundamental principles of sound taxation is transparency and most nations' VATs flagrantly violate this principle. Even if the VAT is shown on receipts, taxpayers are highly unlikely to keep their receipts and total their VAT for the year. This can lead taxpayers to demand more government services because they wrongly perceive that the prices of such services are lower than they appear. In a democratic state, the cost of taxes and governance should be as explicit as possible so that taxpayers and voters can make better informed decisions about the government.

iii. **Taxing Services**: The Nigerian economy is becoming increasingly service-based, but the VAT has difficulty taxing services. In fact, all consumption taxes, including Federal and State Sales Tax, struggle to tax services because tax authorities have difficulties determining actual sales when no physical property changes hands[56]. Many times, Government Agencies often

[49] ibid. s 35.
[50] LC Micah, Tax System in Nigeria – Challenges and the Way Forward (2012) Vol. 3 (s) *RJFA*, 10.
[51] ibid. 27-29.
[52] Finance Act (n 47) Sections 39 and 50.
[53] Freedom of information Act (FOLA) Section 2(1) and 25..
[54] CS Dubay, "The Value Added Tax is Wrong for the United State', Heritage Foundation (USA; 21 December 2022).
[55] ibid. 7-9.

[56] Dubay (n 54).

forgo levying VAT on most services because of this difficulty compared to the cost of their services, service providers generally purchase low –cost inputs from suppliers.

iv. Underground Economy: The hidden or underground economy is usually taken to mean any undeclared economic activity. The major issues are how Inland Revenue Authorities would tackle hidden economy covering businesses that ought to be registered to pay VAT, but are not. People who work in the hidden economy such as the rural areas with difficult seem to pay no tax at all on their earnings, and also, people who pay tax on some earnings but fail to declare other additional sources of income, are captured here under[57]. There are number of serious policy issues that may result from the growth of the underground economy in Nigeria. Tax evasion caused by higher tax rates will siphon off revenue. The opportunity to participate in the underground economy represents a "subsidy" to certain types of economic activity where evasion is easier. The underground economy makes official statistics on economic growth less reliable. It can reasonably be argued following Palda[58] that anything which drives more activity into the underground economy reduces productivity.

v. Fraud: A credit invoice VAT has an inherent self enforcement mechanism because of the trail of paperwork required, but even then, the fraud would still be prevalent. Fraud is different from the underground economy. It consists of business engaging schemes to secure larger refunds than those to which they are entitled to. VAT fraud can take the form of false claims of taxes paid, refunds claimed for non refundable purchases, business set up only to issues false invoices of taxes paid and hidden sales. The wealthy taxpayers are usually the most wanting where the VAT fraud is concerned. Accountants and tax consultants who are employed by such defaulters ostensibly to assist them commit tax fraud, such as filing fraudulent tax returns in order to reduce or evade tax liabilities, should also be prosecuted.

vi. Complex and Cumbersome Legislative Processes: In a country with over eighty million illiterates out of perhaps population of over two hundred million it is quite hard to make tax payers understand the legislation relating[59] to VAT. It is important to consider the psychology of the people when framing tax legislation aimed at receiving an acceptable degree of voluntary compliance among taxpayers. The socio- economic factors no doubt dominate the lives of peoples of our various countries and ought to provide the solid foundation on which tax legislation should be based on. The fact of transporting tax legislation from developed countries like United kingdom, USA to be modified here would not reflect the peculiarities of our socio-economic and cultural values. A nation's tax system is often a reflection of its communal values or the values of those in power[60]. It is difficult to understand such a comprehensive and complicated legislation which might have been fashioned after that of the developed countries.

Intervention by the Finance Act

The Finance Act has brought along the following changes to the VAT transactions in Nigeria.

i. Increase in VAT rate and Palliative Measures to Manage its Impact

To mitigate the impact of the revised VAT rate increases from 5% to 7.5%, the new Act[61] has introduced palliative measures for micro and email enterprises which initiate a VAT compliance

[57] KF Palda, 'Evasive Ability and the Efficiency Cost of the Underground Economy' (2022) Vol. 3 3(5) CJE 1120-1123.
[58] Dubay (n54)
[59] ibid.
[60] ibid.
[61] VN Onyeka, 'The Effect of the Evasion and Avoidance on Nigeria's Economy (2000) Vol. B (24) EJM, 158-160.

threshold. Thus the cost of VAT administration[62] will reduce because the FIRS can now focus its compliance monitoring efforts on large businesses only.

ii. **Broadening Scope of VAT Coverage**

The erstwhile provisions of the VAT Act[63] did not contain a definition of foods. Consequently, VAT-able goods had, in practice, been limited to tangible goods that are not exempted under the First Schedule to the Act. Thus incorporeal property was generally accepted as non-VAT-able, by taxpayers, on the bases that such property neither constitutes goods nor services and supply thereof cannot attract VAT. However, the new Act[64] seeks to expand the definition of "foods" to include any intangible product, asset or product over which a person has ownership where he drives benefits, and which can be transferred from one person to another, excluding interest in land.

iii. **Cash Basics for Accounting for VAT**

The Finance Act provides classifications that VAT should be accounted for on each rather than accrual basis.[65] Accounting for VAT on cash basis means that a taxpayer can only recover input VAT that has been "paid" against output VAT that has been "collected". For taxpayers who do not have input VAT to claim, it is only VAT that has been collected that should be remitted to the FIRS. The amendment**[66]** would help manage taxpayers cash flows and reduce the risk that a business would ultimately bear the VAT burden for its customers, particularly in cases of bad debt.

iv. **Exemption of Services Rendered by Microfinance Bank from VAT**

The newly inaugurated Act**[67]** has now modified the VAT Act to clarify the VAT exempt status of service rendered by Microfinance banks (MFB). Prior to the CBN's directive in 2005 to all community banks to recapitalize and convert to Microfinance Banks (MFB's), the service of community banks were exempted from VAT in line with the First Schedule to the VAT Act. However, after the statutory mandate to convert to MFBs, there was no corresponding amendment to the VAT Act to confirm the continued exemption to the renamed banks, which have the same objectives as the community bank. Thus, this amendment is welcome as it has removed the uncertainty and thereby brings a final clarification to the non-applicability of VAT to services rendered by MFBs[68].

5. **Conclusion and Recommendations**

Governments need money. Modern governments need lots of money. How they get this money and whom they take it from are two of the most difficult political issues being faced by any government in a modern political economy. The authors have been able to demonstrate that VAT is regarded as one of the major sources of government revenue for the sole purpose of generating revenue as well as providing social welfare for the citizens. However, the above vital role of VAT has been challenged by some obstacles which seem to have militated against its envisioned role in the socio-economic transformation of the country. In that light, the authors advocate corrupt-free and efficient administrative machinery with personnel who are adequately

[62]Finance Act (n47) s 38..
[63] ibid.
[64] VAT (Amendment) Act 2007 First Schedule to the Act.
[65] Finance Act (n 47) s 33.
[66] ibid.
[67] ibid s 35.
[68] ibid. s 42.

trained, well-equipped and motivated. Likewise, to avoid the present scenario where states impose illegal taxes and levies, it is being proposed that there should be unified, effective and unbiased tax administration with full representation from the three tiers of government. The authors are of the view, and firmly too, that VAT administration can achieve good result only if the following conditions are met, enthronement and sustenance of simple tax rules and procedures, low tax burden, convenience to taxpayers, minimal compliance costs, easy access to information, among others.

IMMUNITY OF THE ARBITRATION PANEL VIS-A-VIS THE OTHER ALTERNATIVE DISPUTE RESOLUTION (ADR) PANELS*

Abstract

Immunity is an exemption from prosecution. Immunity helps to ensure the finality of an award. Arbitral immunity exempts arbitrators from certain acts or omissions arising out of or in relation to their function, Alternative Dispute Resolution (ADR) is a term generally used to refer to mechanism for the resolution of disputes either as alternative to the traditional court system or as a supplement or complement to that. Any method advising the parties to settle their dispute outside the court is an "ADR" process. Some of the ADR methods usually employed for amicable resolution of dispute are negotiation, conciliation, mediation and certification. They are geared towards amicable settlement of dispute or decision making. This paper intends to discuss the immunity of arbitration panel vis-à-vis that of the other ADR panels. The methodology adopted is doctrinal. The research found out that there have been arguments on whether arbitrators and other ADR panels like negotiator, conciliator, mediators and certifiers are supposed to be immune since they are persons acting in judicial capacity. This has generated a lot of confusion in our judicial system. The position of the relevant laws is not clear cut on this. Though there are arguments in favour of the grant of arbitral immunity. The research concluded that the main consequence of the distinction between arbitration panel and the other ADR panels is that arbitrators are immune from action for negligence, while the answers with respect to immunity of the other ADR panels are not clear-cut. In some circumstances some of them are not immune while in some they are.

Keywords:

Immunity, Arbitrators, Mediators, Negotiators and Certifiers

1. Introduction

ADR has been defined differently by several authors, commentators and scholars. Brown and Marriot[1] defined ADR as a range of procedure that serve an alternative to litigation through the court for resolution of disputes, generally involving the intercession and assistance of neutral and impartial third party. Karl Mackie[2] described ADR as a structured dispute resolution process with third-party intervention which does not impose a legally binding outcome on the parties. ADR is further defined as a structured negotiation process during which the parties in dispute are assisted by one or more third person (s), the 'Neutral', and is focused on enabling the parties to reach a result whereby they can put an end to their differences on a voluntary basis[3]. It is worthy to state that as much as ADR and arbitration share much features, there are some differences between them. Arbitration is based on contract and requires that the parties have agreed to submit their disputes to the jurisdiction of an arbitral tribunal. Once the parties have

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[1] H Brown and A A Marriot, *In ADR: Principles and Practice*, 2nd edn (London: Sweet and Maxwell,1999) p 12

[2] K Mackie, *The ADR Practice Guide: Commercial Dispute Resolution* (Tottel, 3rd edn., 2007) p 8. See also Kehinde Aina on Dispute Resolution (NCMG Intetnational and blankson LP, 2012); Idornigie P O, *Commercial Arbitration Law and Practice in Nigeria* (Law Lords, 2015) p 29

[3] Goldsmith, Pointon and Ingen-Honz, *ADR in Business, Practice and Issues Across Countries and Cultures* (Kluwer Law International, 2006) p 6

agreed to submit themselves under that jurisdiction, the outcome of the decision is binding. ADR is also based on contract which provides that the parties in dispute agree to involve a neutral. However, in mediation the neutral has no jurisdiction to enforce any decision on any party.[4]

In contrast to the process of ADR, the arbitral tribunal require the parties in dispute to delegate the power to determine their legal right to the arbitrator. Arbitration processes is solely or at least primarily driven by lawyers and the arbitrator and it is adversarial in nature. Conversely, ADR is a voluntary and non-legalistic process, as it is not focused on determining the parties legal right but on identifying the basis on which the parties may be willing to settle their dispute voluntarily, consequently, ADR process do not necessarily require the involvement of lawyers though, some form of lawyer involvement may be desirable. Another notable differences between Arbitration and ADR is the power of the arbitrator to act as amiable composituers which is often in conjunction with the power to decide ' *ex aequo et bono*' when the rule permits, that is to decide in fair dealing and good faith.[5] The outcome of arbitration is determined in accordance with applicable law while in ADR the outcome of the settlement is determined by the will of the parties and this accounts for why ADR is said to be an interest based procedures. Alternative Dispute Resolution (ADR) refers to any method of resolving disputes without litigation. ADR regroups all processes and techniques of conflict resolution that occur outside of any governmental authority. The most famous ADR methods are the following: Arbitration, Mediation, Conciliation, Negotiation and Certification. All ADR methods have common characteristic that is, enabling the parties to find admissible solutions to their conflict outside of traditional legal/court proceedings, but are governed by different rules. For instance, in negotiation there is no third party who intervenes to help the parties reach an agreement, unlike in mediation and conciliation, where the purpose of the third party is to promote an amicable agreement between the parties. In Arbitration, the third party (an arbitrator or several arbitrators) will play an important role as it will render an arbitration award that will be binding on the parties. In comparison, in conciliation and mediation, the third party does not impose any binding decision. ADR refers to any means of settling disputes outside of the courtroom.

When we talk of immunity of Arbitration panel we mean legal immunity or immunity from prosecution. It simply means a legal status where by an individual or entity cannot be held liable for a violation of the law, in order to facilitate societal aims that outweigh the value of imposing liability in such cases. Such legal immunity may be from criminal prosecution, or from civil liability (being subject of lawsuit), or both.[6] Arbitral immunity exempts arbitrators from certain acts or omissions arising out of or in relation to their function[7] There have been arguments on whether Arbitrators are supposed to be immune since they are persons acting in judicial capacity. Judicial immunity is a common law principal that states that any person acting within a judicial capacity shall enjoy immunity from any liability that may result from him discharging his obligations and duties provided he acts within jurisdiction.[8] The concept of arbitral immunity derives justification from judicial immunity in common law jurisdiction.[9] In

[4] ibid

[5] Brown and Marriot (*supra*) p59

[6] https://en.m.wikipedia.org accessed on 21/7/22 @ 11:30am

[7] See Black's Law Dictionary 8th edn (United State Thomson West, 2004) p. 765

[8] Adedoyin Rhodes – Vivour, Commercial Arbitrators law and practice in Nigeria through the cases, (South Africa; Lexis Nexis 2016) P. 216.

[9] Judicial immunity dates back at least to two early 17th century English cases, Floyd v Barker 77 Eng. Rep. 1305(1607) and The Marshalsea, 77 Eng. Rep. 1027 (1612) in which Lord Coke announced the rule of Judicial Immunity, stated its purposes, and specified its limitations

Bremer Sduffban's case, [10] Donaldson held that courts and arbitrators are in the same business, namely the administration of Justice. Donaldson J. however affirmed that the only difference is that the courts are in the public and arbitrators are in the private sector of the industry. Some scholars and opponents argued that arbitrators should not enjoy the same immunity of judges. That there are differences between an arbitrator and a judge in the carrying out of their functions. Firstly, that a Judge's power is gotten directly from a state, while an arbitrator's power is gotten from the agreement of the parties. Also that the Judge is accountable to the state while the arbitrator is accountable to the parties and the arbitral institutions where applicable. Furthermore, in most jurisdictions an arbitrator's decision is not subject to appeal or is subject to appeal on limited grounds while a Judge's decision can be revised or rectified on appeal. An arbitrator is paid by the parties while a Judge derives his remuneration from the State.[11] Arguments are thus advanced that parties and arbitral institutions deserve a right of action against arbitrators who act carelessly, negligently or compromise in any form the expectations of the parties.[12] There are arguments in favour of the grant of arbitral immunity.[13] Immunity helps to ensure the finality of an award. It also ensures the protection of the public in those cases in which truly the judicial functions are exercised.[14]

2. The Other Alternative Dispute Resolution (ADR) Panels

Alternate Dispute Resolution (ADR) is a term generally used to refer to mechanism for the resolution of disputes either as alternative to the traditional court system or as a supplement or complement to that. Any method advising the parties to settle their dispute outside the court is an "ADR" process. Some of the ADR methods usually employed for amicable resolution of dispute are negotiation, valuation, conciliation, mediation and certification. They are geared towards amicable settlement of dispute or decision making. A decision can be equated to and treated almost like a judgment of a court. On the other hand, the parties or a party may simply ignore some decisions without their consequences or no consequence at all. A more serious question is whether the decision maker, be that arbitrator, Certifier, Conciliator. Negotiator, Mediator or what have you can incur liability by making the decision.[15] Before one undertakes to play the third party role, he needs to know in advance whether a duty of care is cast on him, upon pain of liability in case of failure to act accordingly. For proper understanding of the above mentioned Alternative Dispute Resolution Mechanisms, it is better to discuss them *ad seriatim.*

3. Immunity of Arbitrators Explained

Arbitration is the involvement of a neutral umpire called (an Arbitrator) in the settlement of a dispute between parties who have pre-submitted themselves to its proceedings wherein the Arbitrator, having heard both parties gives a decision also known as an Arbitral Award which will be binding on parties and enforceable in court of competent jurisdiction. Arbitration is also the fastest wide spread ADR method and it is recognized across the globe. It is statutorily recognized and governed in Nigeria by the Arbitration and Conciliation Act Cap A18 LFN, 2004. Even though this method of ADR is expensive vis-a-vis other mechanism, same is

[10] Bremer Sduffban v South *Indian Shipping Corp* 1981 AC 1999-21

[11] See R, Mullerat, J. Blanch, *"The liability of Arbitrators: A survey of Current Practice"* Dispute Resolution International Vol. No. 1 June 2007 P. 106.

[12] A Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* 6tth edition (New York: Oxford University Press, 2015 pg 325.

[13] ibid

[14] ibid

[15] C E, Ibe, *Insight on the Law of Private Dispute Resolution in Nigeria* (Enugu: EL "Demark Publishers, 2008) Pg 43.

however preferred for its procedural and formalized system. Arbitration has a close similarity with litigation most especially in the aspect of calling of witnesses and tendering of documents. However it is more of party involvement than advocacy. In respect of certain categories of persons it has long since been settled that they cannot be held liable in damages for their action in negligent or otherwise.[16] In Nigeria certain categories of executives are immune to civil suits and criminal prosecution during their tenure of office. These include governors and the president.[17] This in effect means that temporarily they incur no liability personally for whatever they do or omit to do during their continuance in office. One of the reasons adduced for justifying this position lies on the notion that a person occupying such a high position needs no distraction and that to allow suits or charges against him will open a flood gate of opponents who would sooner than later use la suits against him/them to bug down the system.[18]

The question which arises is, are arbitrators bound by the theory of duty of care? Can they be sued in damages for a breach of, contract or of duty of care? Jurisprudentially, are they immune or liable for negligence or breach of contract in respect of their decision? The traditional justification of immunity is the public interest considerations that an arbitrator fulfils a quasi-judicial function and should as a result be protected in the same manner as a judge.[19] It is worthy to note that in Nigeria, the Arbitration and Conciliation Act[20] makes no provisions on the immunity of arbitrators. However, common law is applicable in Nigeria and arbitral immunity from suits exists at common law. Thus, courts in various common-law jurisdictions have consistently recognized that arbitrators perform duties of a judicial character and enjoy the same immunity as judges in view of the adjudicatory nature of their functions.[21] The Lagos State Arbitration Law specifically provides for arbitral immunity adopting the provisions of the English Arbitration Act 1996.[22] Also in jurisdiction where there are no express provisions on Arbitral immunity, common law is deemed to be applicable. Equally the provisions of the English Arbitration Act, 1996 on the immunity of an Arbitrator were adopted with little or no modifications in Ghana.[23] The new Act[24] in its Section 13 provides for immunity of an arbitrator, appointing authority and arbitral institution. This is a new development. There was no such provision in the previous Act.[25] Section 13 of the Arbitration and Mediation Act (AMA), 2023 provides thus;

1. An arbitrator, appointing authority or an arbitral institution is not liable for anything done or omitted in the discharge or purported discharge of their functions as provided in this Act, unless their action or omission is shown to have been in bad faith.

[16] *Rondel v Wosely* (1962) QB 443 where it was held that barristers cannot be sued.
[17] Constitution of Federal Republic of Nigeria 1999. S. 308 (1); *Bola Tinubu v LMB Securities Plc* (2001) 10 SCNJ 1
[18] C.E Ibe, *insight on the Law of Private Dispute Resolution in Nigeria* (Enugu: EL 'Demak Publishers, 2008) pg 45-46
[19] G. Born, *International Commercial Arbitration*, 2nd Edn (2014), Ch 13. 02, P. 1967; Fouchard, Gaillard, Goldman (1999), P. 588, No. 1077. See however criticisms by P. Lalire, note on Courd' Appel de Paris' (1999) 13 Rev. de I'Arb. 113, 117, no. 23
[20] CAP A18 LFN 2004
[21] *Lendon v Keen* (1996) 1 KB, 994; Arenson Casson Beckman Ruttley & Co. (1977) AC 405 (HL).
[22] Lagos State Arbitration Law 2009, S. 18(1) – (3)
[23] Alternative Dispute Resolution Act 2010, S. 23(1); Liberia-Liberian Commercial Code of 2010 and Kenya – Arbitration Act 1995 as amended in 2010, S. 16 B.
[24] Arbitration and Mediation Act, 2023
[25] Arbitration and Conciliation Act Cap A18 LFN, 2004

2. Subsection (1) applies to an employee of an arbitrator, appointing authority or an arbitral institution as it applies to the arbitrator, the appointing authority or the arbitral institution in question.

This section shall not affect any liability incurred by an arbitrator by reason of the arbitrator's withdrawal under section 12 of this Act. In conclusion, arbitrators should be able to perform their functions without threats, harassment or intimidation from a losing party.

4. Immunity of Mediators Explained

The concept of mediation postulates the involvement of a neutral and impartial third party with the spirit of resolving the conflict between disputants by giving free speech having heard from both parties and their interest in the issue at hand. Mediation is more structured and procedural in nature. Unlike a conciliator, a mediator does not evaluate but only facilitate the mediation process with specific focus on settling the dispute via natural agreement between parties. To many people mediation means a lot and is defined to mean a voluntary and confidential process where a neutral third party called a mediator assisting the disputants to negotiate and arrive to a decision. It may be voluntary or follow a contractual or statutory obligation or an order of court for settlement. But once the mediation is initiated, it becomes voluntary and the procedures to be adopted depend on the mediator, he could meet them separately or together but it is advised to meet them separately. This helps to reduce hostility between the parties and help them to engage in meaningful discussion. A mediator is usually taken to be a person accepted by the parties whose role is to help the disputants reach an agreed settlement. A mediator is actually not a decision maker. He does not himself suggest a solution to the parties and cannot compel them to reach a settlement. He merely helps disputing parties to resolve their dispute by themselves. A mediator does not seek to expose the guilty and pacify the innocent. Rather, he aims at getting the parties to use compromise as a veritable instrument of settling their problem.[26] The question here is: Are mediators bound by the Atkinian theory of duty of care? Can they be sued in damages for a breach, be that of contract or of duty of care? Jurisprudentially, are the immune or liable for negligence or breach of contract in respect of their decision? Recall that the Atkinian theory of negligence posits that you must take reasonable care to avoid acts or omissions which you can reasonably foresee will likely injure your neighbor. This theory is subject to the jurisprudential theory now being considered. In the case of mediation, the mediator does not himself make a decision as has been stated before. The mediator is immune on grounds of logic and common sense. He has no authority to bind the parties and so his decision may or may not be accepted by any or all the parties, in which case the matter is at an end. It is this state of affairs that thus frees the mediator from liability and thus he is immune as stated by an erudite scholar, C E Ibe[27] in one of his textbooks. It is important to note that the old Act did not make provision for mediation at all. The new Act[28] in its Section 81 provides for immunity of a mediator. This is also one of the innovations made in the new Act. There was no such provision in the previous Act.[29] The new Act recognizes and codifies mediation as a dispute resolution mechanism for the first time.[30]

Section 81 of the New Act[31] provides thus;

[26] C.E Ibe, 'Insight on the Law of Private Dispute Resolution Nigeria (Enugu: Demak Publishers, 2008) pg 25.
[27] ibid
[28] Arbitration and Mediation Act, 2023
[29] Arbitration and Conciliation Act Cap A18 LFN, 2004
[30] See, Part II, Sections 67-87 ibid.
[31] Arbitration and Mediation Act, 2023

> Mediators and mediation providers are not liable for any act done or omitted in the discharge or purported discharge of their functions under this part, unless their action or omission is shown to have been in bad faith.

Prior to this Act there were no extant legal provisions on mediation and this Act is a federal law that codifies explicit guidelines to govern the practice of mediation in Nigeria which is a major development for growing the practice and popularity of mediation. The new Act addresses key gaps and shortcomings of its predecessor, offering enhanced clarity, flexibility, and procedural frameworks for both arbitration and mediation processes. By incorporating provisions for the enforceability of mediation settlements, allowing for electronic mediation, and providing a comprehensive approach to international mediation, the new Act reflects a progressive and inclusive approach to dispute resolution.

5. Immunity of Conciliators Explained

Conciliation is the process of facilitating an amicable resolution between the parties, whereby the parties to the dispute use conciliator who meets with the parties separately to settle their dispute. Conciliator meets separately to lower the tension between parties, improving communication, interpreting issues to bring about a negotiated settlement. There is no need of prior agreement and cannot be forced on party who is not intending for conciliation. It is different from arbitrator in that,

(A) The party initiating conciliation shall send to the other party a written invitation to conciliate and this party, briefly identifying the subject of the dispute.

(B) Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.

(C) If the other rejects the invitation, there will be no conciliation proceedings.

Also parties are permitted to engage in conciliation process while the arbitral proceedings are on. This is a dispute resolution mechanism in which a neutral third party trusted by disputant gives a non-binding decision after hearing both sides and considering the merit of their respective cases. It may involve one conciliator or three conciliators.[32] Under part II of our Arbitration and Conciliation Act reference is made to one or three conciliators whereas the rules provide for one, two or three conciliators[33]. In part II of our Arbitration and Conciliation Act, the appointment of the third conciliator is done by the two parties after each has solely appointed one. In other context the issue of immunity obviously does not arise in some instances because of the very nature of the third party involvement. The conciliator is immune on ground of logic and common sense. He has no authority to bind the parties and so his decision may or may not be accepted by any or all the parties, and this state of affairs thus frees the conciliator from liability and thus he is immune.

1.5. Immunity of Certifiers Explained

Certification is a situation where an independent person is appointed by the parties for him to peruse the documents or certificates to see whether they are genuine and then form an opinion as to their genuineness. A certifier is usually a qualified professional. He may be an engineer, architect, a builder or a quantity surveyor. Building contracts usually provide that some acts should be done to the satisfaction of a third party that is required to issue a certificate

[32] See Arbitration and Conciliation Act Cap A18 LFN, 2004, S. 40.
[33] ibid Section 40

as evidence of such satisfaction.[34] The question has always been whether a certifier is an arbitrator or not. The answer, it has been contended, is not clear-cut. This is so because in quite a number of arbitrations, the duty of the arbitrator may simply amount to certification[35]. Since it is the certifier that has to determine the quality of work done and certify that the job is worth what is claimed. The duty of determining the state and stage of work can either be arbitration or certification. It can even be a valuation. Therefore, the dividing line between certification and arbitration in such a situation becomes difficult to draw. However, certain factors will usually be considered in arriving at a conclusion. The first consideration would be to ascertain whether a dispute has indeed because a dispute is most likely to arise in that connection. If a dispute has arisen or one is anticipated, obviously certification in that instance is actually tantamount to arbitration. Another factor that ought to be considered is the extent of the certifier's independence. If the certifier was simply engaged by one of the parties, then of cause, he is not an arbitrator because one party cannot unilaterally appoint an arbitrator or arbitrate between him and other party. Indeed, under those circumstances, the certifier is not independent. On the other hand if both parties choose and commission the certifier who is not subservient to any of them, in that case, certification is conterminous with arbitration. This is so because the certifier is independent and has to render a decision in that manner to resolve the issue.[36] It is important to note that the argument in favour of in posing a duty of care on and thus making valuers and certifiers liable is based on the grounds that they exercise their professional skills and competence. That is to say that certifiers are not entitled to judicial immunity; they are consequently liable for negligence, for over-certifying.

6. Immunity of Negotiators Explained

A negotiation for settlement exists where a third party on his own volition without the agreement of the disputing parties goes into the dispute with an intention to settle it between them. Negotiation is the preeminent mode of dispute resolution while the two most known forms of ADR are arbitration and mediation, negotiation is almost always attempted first to resolve a dispute. Negotiation allows the parties to meet in other to settle a dispute. The main advantage of this form of dispute settlement is that it allows the parties themselves to control thr process and the solution. Negotiation is much less formal than other types of ADRs and allows for a lot of flexibility. The decision reached during negotiation for settlement does not bind the parties unless it is accepted by them.[37] In *Inyang v Essien*[38] the court held that the decision did not bind the parties and that what the body did was an attempt to settle the dispute and make peace among them, that the decision of the body could not constitute a *res judicata.* In *Ekwueme v Zakari's* case the court dismissed the action holding that the parties where not bound by the decision since they did not prior to the negotiation for settlement agree to be bound by the decision. In a negotiation for settlement the decision will become binding on the parties if they accept it. In that instance it transmutes into settlement.

7. Conclusion

Arbitrators should be able to perform their functions without threats, harassment or intimidation from a losing party. However, arbitrators are professionals who are being

[34] Gaius Ezejiofor, *The Law of Arbitration in Nigeria* (Longman Publishers, 1997) Pg 9

[35] C E Ibe, *'Insight on the Law of Private Dispute Resolution in Nigeria'*(Enugu: EL Demak Publishers,2008) Pg 39

[36] ibid; see also Gaius Ezejiofor, *The Law of Arbitration in Nigeria* (Longman Publishers, 1997) pg 9; the case of *Chambers v Gold Thorpe* (1901) 1 ICB 624; *Sutclift v Thachrah* (1984) AC 727

[37] Chidi Ekwueme v Sam Zakari (1972) 2 ECSLR, 631

[38] (1957) 2 FSC 39,

remunerated for the tasks they perform. All jurisdictions, civil law and common law recognize that arbitrators own duties to the parties. Irrespective of whether they follow the contractual or jurisdictional approach. The main consequence of the distinction between arbitration panel and the other ADR panel already discussed is that arbitrators are immune from action for negligence, while the answer with respect to immunity of the other ADR panels are not clear-out. In some circumstances some of them are not immune while in some they are. Recently, the immunity of mediators and other mediation providers are now recognized by virtue of the promulgation of the new Act. Arbitration is a quasi-judicial in nature and cannot take the place of litigation as its subjects to the agreements between the parties in accordance with the applicable laws. Arbitration is usually seen as part of the wide range of Alternative Dispute Resolution Mechanism which is complementary to the traditional court system of dispute resolution. ADR and arbitration should not be competing with each other, rather they need to complement each other in that ADR is more likely to promote the development of arbitration. It must be stated that both mechanisms may produce an enforceable outcome, although ADR is rather a consensual and contractual agreement in nature. In view of the above, it is recommended that other ADR panels should enjoy the same immunity the arbitrators are enjoying.

ACCESSIBILITY OF INFORMED CONSENT PRACTICES IN NIGERIA AND THE POSITION OF HUMAN RIGHTS[1]

'The patient has the right to know, and the physician has the duty to inform'.- Dr. William J Curan

Abstract

Informed consent is a cornerstone of healthcare, rooted in both legal and ethical frameworks. It empowers patients to make autonomous decisions about their bodies and medical treatment(s) as well as fosters trust, respect and patient- centered care. Unfortunately, despite its universal application, this practice is a concern in Nigeria. Physicians in Nigeria have been found to be non-complaint in adopting the practice of informed consent. Many patients are not informed of their diagnosis by their healthcare provider, nor are they allowed to be aware of the medications being administered to them. Possible complications that may arise from anesthesia or surgery is hidden. In most circumstances, consent forms for medical treatments are signed by family members or relatives on behalf of a competent, non-minor patient, without the patient's direct consent. Reports show that 71.4% of healthcare providers do not obtain informed consent while 57.1% do not have access to written information about their treatment. These practices are mostly perpetuated at the primary and secondary levels of healthcare and traceable to the culture and cosmology of the people. This paper explores the extent of the accessibility of informed consent practices in Nigeria as well as its limitations.

Keywords: *Patients, Healthcare, Informed consent, Human rights and Accessibility*

I Introduction

Informed Consent (IC)[2] is a legally enforceable right in Nigeria based on constitutionally recognized and protected rights to bodily integrity/ autonomy, self-determination and the right to privacy.[3] The law regarding medical treatment and health research is that patients cannot be involved in medical treatment or research without Voluntary Informed Consent (VIC).[4] This principle is guided by the Code of Medical Ethics (CME). The Code recognizes that adequate consent be obtained from a patient, his relations (if a minor) or appropriate medical authority before conducting any surgery or medical treatment on a patient – thus an essential element of good medical practice is the recognition by the attending physician or dental surgeon, of the inherent right of the patient to his body.[5] This therefore means that a patient has the right to accept, reject or forgo a given medical option.[6] Nevertheless, although the physician has absolute discretion and authority, free from unnecessary non-medical interference to determine when to give his services and the nature of care to give to a patient under his care but he must accept responsibility for any negligent act or omission for failure to seek consent.[7] Accordingly,

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[2] Informed Consent herein referred to as IC

[3] Constitution of the Federal Republic of Nigeria 1999 (as amended 2011) s 37.

[4] VIC Means Voluntary Informed Consent

[5] R. 19 (a*) CME.*

[6] *Medical and Dental Disciplinary Tribunal (MDDT) v. Okonkwo* (2001) 4 SCN 780.

[7] R.8 (h) *CME.*

the physician is therefore absolved from any liability that might occur in event of the patient's decision to forgo treatment. But the physician is more likely to be held liable for negligent act or omission if he has been found to have failed as an expert in his field to provide information to a patient seeking answers to specific issues relating to the patient's condition or care. This attracts a charge of assault and battery as well as indictment for professional negligence on the part of the physician.[8] Some scholars have argued that informed consent is controversial, reason being that the concept is a "myth, a fiction, unattainable, or a snare to entrap physicians.[9] Others maintain that the concept is alien to African's psyche and cultural setting, and cannot conceivably be sought for from an African patient in every procedure.[10] This problem is attributed not just to poverty, ignorance and illiteracy but also to the country's sociocultural environment.[11] Historically, Nigeria is the most populated country in Africa with a population of about 233,668,528 million people as at 2024.[12] It accounts for almost a fifth of the population of Africa. It has a diverse sociocultural environment, with 250 distinct ethnic groupings and languages. The population is made up of Muslims (50%), Christians (40%), and indigenous religious follower (10%). Four major ethnic groups dominate the Nigerian social, geographic and political environment: the Hausa and Fulani tribes in the North, the Yoruba in the Southwest, and the Igbos (Ibos) in the Southeast. Although, Nigeria is endowed with rich natural resources, mismanagement of resources by the leaders has left the country very poor.[13] The per capita gross domestic product (GDP) is about USD$2537.00 in purchasing power parity, but over 60% of the populations live below the poverty level.[14] The infant mortality rate as at 2019 is 60.662 deaths per 1000 live births and 59.181 deaths per 1000 deaths in 2020, a 2.44% decline from 2019. In 2024, the current infant mortality rate is 53. 674 deaths per 1000 live births, a 1.95% decline from 2023.[15] The average life expectancy is 47 years, and the overall literacy level is 68%. Nigerians are known for their fervent religious worship and religion plays an important role in enforcing ethical precepts.[16] Multiplicity of ethnic groupings is only multiplicity of religious denominations. All parts of the country espouse the tradition of extended family relationship and respect for elders.[17] These diverse economic, social and cultural mixes in Nigeria play significant roles in the patient-physician relationship and influence how informed consent is practiced in Nigeria. Furthermore, it fuels medical paternalism and sustains a culture of submission to authority whether such authority is apparent or real. The consequence of such paternalism being incongruous with the concept of individual autonomy because paternalism according to Beauchamp and Childress, intentionally override a person's preferences of actions by another especially where the person whose actions overrides, justifies it by appeal to the goal of benefitting or of preventing or mitigating harm to the person whose preferences or actions are overridden.[18] The result of this paternalism, which gives way to the trend of unethical practice, has regrettably left Nigerian patients with the mentality of "leaving

[8] Ibid R. 19 &20(e).
[9] OI Irehobhude & O Aniaka, 'Informed Consent' (2005) (1) (3) *Journal of Comparative Health Law & Policy;* 97
[10] Ibid, 98.
[11] ER Ezeome & PA Marshal 'Informed Consent Practices in Nigeria' (2008) (2) (1) *Journal of Bioethics*;1
[12] National Bureau of Statistics, Demographic Statistics Bulletin 2022-2024 <https://www.nigeriastat.gov.ng/pdfuploads/DEMOGR... >.
[13] Ibid, Ezeome and Marshall.
[14] Quartz Africa, Sun 25 June 2018, The Poverty Level in Nigeria: Around 86-9 Million Nigerians are living in extreme poverty< http://www.92.com/Africa.nigerianbias>.
[15] Report from Global Matric. Nigeria Infant Mortality Rate 1950- 2020 < http://www.macrotrends.net>.
[16] Ezeome & Marshal (n11) 3.
[17] Ibid 3.
[18] Irehobhude & Aniaka, (n9) 99.

everything in Gods' hands… the belief that the Lord gives and the Lord takes where consequences arise. Unfortunately, this has left Nigeria in the degenerative and abysmal state of its healthcare system.[19] This paper, explores the historical foundation of informed consent practices and highlights those factors that impede or limit the application of informed consent practices in the country. This paper consists of five (5) parts. Following the introduction in part 1, part 2 explains the meaning and importance of informed consent, part 3 discusses the historical underpinnings of informed consent practices in Nigeria. The 4th part brings to fore the barriers or limitations to accessing medical consent in Nigeria and the last part which is part 5 concludes the paper by discussing briefly the position of human rights on consent in healthcare.

2. Brief Overview of Informed Concept

2.1 Meaning of Informed Consent in Healthcare

In health law and policy, informed consent is a doctrine that requires healthcare practitioners to obtain the consent of their patients upon whom treatment is to be administered or surgery performed before embarking on the treatment or surgical procedure.[20] This is ethical as well as legal, derived from the patient's right to autonomy – the right to decide what is to be done with his body. To buttress the above, the Supreme Court of Canada in the landmark case of *Ciarlaviella v Schacter*,[21] held that bodily integrity embodies a patient's right to decide the type of medical procedures that the individual will accept and the extent to which they will be accepted. The power of bodily integrity permits a patient to accept or reject medical treatment which the patient does not consent to as seen in the Nigerian Case of *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo.*[22] This goes to show that the standard of care required in medical cases is that of utmost good faith and the duty is to do no harm – *prenon non micere*.[23] It is akin to the consent that is required by the international human rights instruments on indigenous rights.[24] The consent must be free, prior, and informed. By informed, it means that the healthcare provider must disclose or provide in a clear and concise information about the purpose and nature of treatment or research. The information must include the benefits, risks, potential outcomes and alternatives.[25] Ensure that the individual comprehends the information, either documented or oral. Free implies that consent is not valid if obtained by manipulation or coercion.[26] Consent, if obtained involuntarily, by duress or coercion will result

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[19] Ilodigwe MN & Nwali RM, Medical Negligence in Nigeria, U*npublished Seminar Paper (University of Nigeria)* 10 March 2015.

[20] I Iyioha & YAkorede, 'You Give Me Welfare but Take my Freedom: Understanding the Mature Minor's Autonomy in the Face of the Court's Parens Patriae Jurisdiction' (2010) (13) (2) *Quinnipiac University Health Law Journal;* 279 at 283

[21] (I993) 2 SCR 119.

[22](2001) 7NWLR (pt.)

[23] Peter Moffet and Gregory Moor , 'The Standard of Care: Legal History and Definitions; The Bad and Good News'(2011) (3) (1) WJL< http://www.nch.nlm.nih.gov.pmc> accessed 26 July 2024; *Helling v. Carey* 83 Wash. 2d 514, 519P.2d. 981(1974).

[24]FO Esiri, Medical Law and Ethics in Nigeria. (Malt House Publication LTD, 2006); the international understanding of the indigenous participation pre-supposes the existence of asset of group rights belonging to specific people that are considered 'original inhabitants on 'aboriginal' to the territory in which a state is located in contrast to other citizens of their state who are considered foreigners on their territory.

[25] LB Fontana & J Grugel, 'The Politics of Indigenous Participation through Free, Prior, Informed Consent: Reflection from the Bolivian case', (2016) (2) (3) An *International Human Rights Journal*; 77

[26] United Nations Development Group Guidelines on Indigenous Peoples Issues (UN Development Group Publication 2008)13;' Preliminary Working Paper on Free, Prior and Informed Consent of Indigenous Peoples in relation to Development affecting their Land and Natural Resources' Submitted by Antonella Leila Motor and the Tebtebba Foundation, UNODC E/CN/4/Sub.2/AC.4/2004/ 4 *Para* 20.

to an action for battery.[27] That is to say that, for consent to be valid, it must be given voluntarily by a patient who has the legal capacity to give such consent.[28]

2.2 The Importance of Informed Consent.

The Supreme Court of Nigeria recognized the importance of informed consent in medical care in the case of *Medical and Dental Practitioner Disciplinary Tribunal v Okonkwo;*[29] Thus, the patient's consent is paramount… the patient's relationship with a doctor is based on consensus, the choice of an adult patient with a sound mind to refuse informed consent to medical treatment, bearing state intervention through judicial process leaves the practitioner helpless to impose a treatment on the patient. This is the core of informed consent. The recognition of a patient's right to give consent is not unique to Nigeria. The English common law recognized the right of every person to bodily integrity and its protection against invasion by others.[30] Similarly, Cardoso J, in United States case of Mary *Schloendorff v Society of the New York Hospital* [31] stated the capacity to give informed consent thus: "every human being of adult age and sound mind has a right to determine what should be done to his body…." Thus. it is important for a patient to be adequately informed of his medical condition and be given the opportunity to choose whether or not to receive such treatment. However, in making a distinction between consent obtained for clinical practice and consent for medical research. It is important to mention that consent for clinical practice involves medical procedures, treatment or surgery while consent for medical research is for research purposes and equally regulated. The Belmont Report and the Nuremburg Code regulates informed voluntary consent for human research. This research must be explained to the patient involved that the consent obtained is for research and not for therapeutic purposes, so the patient has a right to withdraw at any point in time from such research. [32] However, it is important to mention that the scope and focus of this article is on consent for clinical purpose. Although intermittently consent for medical research will be mentioned as both are synonymous with each other.

2.3 Forms of Informed Consent

There is no statute that defines categories of consent in Nigeria. However, in practice, consent to medical treatment may be express or implied.

2.3.1 Express Consent

Consent is said to be express where a patient either by written or oral means agrees to a medical treatment or procedure to be carried out on him. Express consent is important in conditions or procedures which have attendant risks. For instance, surgery which requires administration of anesthetic injection; procedure which involves extensive gynecological examinations; and cases of major diagnostic procedure.[33] In the above-mentioned situations, written consent is preferable. Adequate information and explanation of the procedure must be given by the physician in order for the patient to make an informed decision. Therefore, a witness is required to attest to such consent, the attester could be a family member or members of staff of the hospital depending on the circumstance.

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[27] Battery is the application of force on the person of another- Law of Torts
[28] This refers to a minor who has no legal capacity to give consent to medical treatment
[29] (2001) 7 NWLR (Part711) 79
[30]Mason Mc and Smith C, Law and Medical Ethics (Butterworth Publishers.2006) 340
[31] 105 NE 92, 93 (NY 1914)21
[32]Patricia Imade Gbobo and Mercy Oke-Chinda, An Analysis of the Doctrine of Informed Consent in Nigeria's Health Care Services (2018) (3) (69) *Journal of Law, Policy and Globalization*.16-18
[33] Ibid,17

2.3.2 Implied consent

Implied consent comes to play with the action or demeanor of the patient in agreeing to take part in a procedure or treatment.[34] Implied consent is more common in medical or general practice. Where a patient walks into a hospital, stretches out his hands for a procedure or examination without uttering a word but just action, is a form of implied consent. Implied consent is limited in nature as it applies only to minor procedures. Where invasive procedure or examination is to be carried out on a patient, a written consent must be obtained after a detailed explanation of the importance of such procedure or treatment has been given to a patient. However, in cases where implied consent is in doubt, a verbal consent is imperative.

2.3.3 Extra verbal consent

Extra verbal consent needs to be obtained where implied consent is in doubt especially in cases where sensitive and private parts of the body such as the vagina; breast or genitals are to be examined. Procedures where verbal consent is imperative include, insertion of ureteral catheter Chest x-ray, insertion of intravenous cannular, wound dressing, insertion or removal of drainage tube, examination of genitals, breast or rectum, insertion of Naso gastric tubes. Moreso, informed consent can only be given by a competent adult in the right mental state. In the case of a minor or other persons incapacitated in mind or body, a close relative, guardian in locus parentis may sign on behalf of such patients but the interest of the minor must be paramount.[35] The absence of a statue defining the nature of consent would be addressed on the basis of standard professional practice and not by what the law provides. Therefore, obtaining the consent of a patient is not just a legal requirement but also a standard professional practice.[36] The three key components of consent are linked to ethical issues relating to human subjects which include autonomy, beneficence, and justice. Prior to the Nuremberg trials in 1946 and the horrifying accounts of inhuman experimentation carried out by medical physicians sworn under the Hippocratic Oath to do no harm – *non-maleficence*. The voluntary consent of a patient is absolutely essential, and sufficient knowledge should be provided as well as the comprehension of the elements of the subject matter involved as to enable understanding and enlightened decision making.[37] These elements include the nature, duration, and purpose of the experiment; the method and means by which the surgery is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or challenges which may possibly come from his participation in the experiments.[38] Informed consent was treated under the common law writ of trespass to person while modern informed consent was first invoked in the case of *Salgo v Leland Stanford Jr, University Board of Trustees*[39] in non-experimental health care in the 1957 and was further expounded by the Kansa Supreme Court in *Nathanson v Kline.*[40] Consent is said to be informed when it proceeds voluntarily, without fraud, duress or misrepresentation, from a person who has the capacity to understand and appreciate the nature and consequences of the decision to be made as well as the implication, whatever decision he has made. A patient must receive all necessary information to make relevant decision to either

[34] Gbobo & Oke-Chinda (n 32) 17.
[35] Child Rights Act 2003 Art 3 (1).
[36] AMA, Code of Medical Ethics: Informed Consent & Shared Decision Making <https://www/ama-assn.org.ethics.infor.>...
[37] Irehubude & Aniaka, (n9) 98
[38] GJ Anna MA Godin,' The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation' (Oxford University Press New York 1992).
[39] (1957) 15 Cal App 2d 560, 315 P 26 170
[40] (1960) 186 Kant 393, 350 p 2d 1093

accept or reject a course of action and the onus is on the physician to explain to the patient his rights in this regard to enable him make such decision(s). This duty is on the physician and it is the patient's right. The physician owes the duty to inform the patient in the language he understands because failure to do so, will amount to a disregard of his medical duties toward the patient.[41] In Nigeria, for a patient to be competent to receive medical information, such a patient must have attained the age of 18 years, must not be mentally challenged or unconscious. Any patient below the age of franchise in Nigeria or is certified as mentally impaired or unconscious will be automatically disqualified from making treatment-related decision (s).[42] The reason is because in Nigeria, the competence to make health-related decision is not based on functional assessment of the patient's capacity to understand the nature of the decision to be made but is based on status. Thus, a minor incapable of making health-related decision, can have a next of kin decide on his behalf or by proxy but this view has been overruled by the Supreme Court of Nigeria in the popular case of *Dr. Rom Okekearu v Danjuma Tanko*[43] where a tort of battery was made out against a medical practitioner who amputated the injured finger of a patient without obtaining consent from the patient. The court held: 'I place reliance on the Clerk and Lindsell on tort 15 ed p. 429 '… all that was needed to be proved in this class of battery is, the fact that the doctor failed to obtain consent from the patient before carrying out the operation', it goes further in paragraph 4-9 at page 662 stating that "in all other cases, the patient must be given sufficient information about proposed treatment to enable him give an informed consent." Although Tanko lacked capacity because he was fourteen, years at that time, 'Besides, I cannot see the justification of ignoring him to obtain the consent of his aunt (pw2), the appellant did not tell the trial court why he ignored Tanko, a young man who gave valid evidence as plaintiff. There is also no evidence that Tanko was in a state of comma, a state which would have made it impossible to give consent. A rational human being of fourteen years is capable to give consent.' The court therefore overruled the appellant and awarded damages of ten million naira to the respondent (Tanko) and dismissed the appeal. This case brings to the fore the Mature Minor Rule in medical treatment.[44] Thus, in the US case of *Mary Schloendorff v. Society of New York Hospital*,[45] the plaintiff Mary Schloendorff also known as Mary Gamble – an elocutionist from San Francisco – was admitted to New York hospital to evaluate and treat a stomach disorder. Some weeks into her stay at the hospital, the house physician diagnosed a fibroid tumor. The visiting physician recommended surgery, which Schloendorff adamantly declined. She consented to an examination but not for the surgery. During the procedure, under anesthetic condition, the doctors performed surgery to remove the tumor. Mary thereafter developed gangrene in the left arm, ultimately leading to the amputation of some fingers. She blamed the surgery and filed a suit. The court found for Mary that the operation to which she did not consent constituted medical battery. But the hospital which was nonprofit making was held by the court not liable in the action of its employee, analogizing to the principle of charitable immunity. A patient's right to decide what is best for him is sacrosanct. The physicians' decision of medical opinion of what is best for the patient cannot override that.[46] However, there are exceptions to this rule. This exception occurs with respect to underage children or a minor; an unconscious patient whose next-of-kin may not be immediately ascertained or contacted; and in saving lives

[41] Irehubude & Aniaka (n9).
[42] This view may be different in Canada where under 'the Mature Minor Rule,' which permits a minor who fully comprehends the nature and consequences of the proposed treatment to legally consent to treatment.
[43] (2002) 15 NWLR (pt. 791) 657 SC
[44] Ibid (MMR)
[45] 105 NE 92 (CEAPP 1914)
[46] *Sideway v Board of Governors Bethlem Royal Hospitals, 93 NE (Ct app 1918).*

in an emergency situation. In the under listed circumstances, physicians may initiate treatment without prior informed consent. The physician should also inform the patients surrogate at the earliest opportunity and obtain consent for ongoing treatment in keeping with these guidelines.[47]

3. Historical Underpinnings of Informed Consent Practices

Prior to the late 1950s, there was no firm ground in which commitment to IC could take root. This is to say, that there is no relevant history of the physicians or researchers management of information in their encounter with patients and subjects. The major writings of prominent figures in ancient, medieval and modern medicine contain storehouse information about commitments to disclosure and discussion in medical practice.[48] Beginning with the classic text of ancient medicine, the Hippocratic Corpus, the primary focus of medical ethics became the obligation of physicians to provide medical benefits to patients and to protect them from harm. The purpose of medicine as expressed in the *Hippocratic Oath* was to benefit the sick and keep them from harm and injustice. Throughout the ancient, medieval and modern periods, medical ethics developed predominantly within the profession of medicine. With few exceptions, no serious consideration was given to issues of either consent or self-determination. The proper principles, practices, and virtues of truthfulness in disclosure were occasionally discussed, but the perspective was largely one of maximizing medical benefits through the careful management of medical information. The central concern was how to make disclosures without harming patients by revealing their conditions to them. Outright deception was regularly justified as a morally appropriate means of avoiding such harm. The emphasis on the principle, "first, do no harm" promoted the idea that a healthcare professional is obligated not to make disclosures because to do so would be to risk a harmful outcome. Eighteen and nineteen centuries ushered in Benjamin Rush and John Gregory. These writers are cited for their enlightenment views about disclosure and public education. But neither of them advocated for informed consent practices. Rather, they wanted patients to be educated so they could understand physicians' recommendations and be motivated to comply with treatment. They were not optimistic that patients would form their own opinion and make appropriate medical choices. They advised physicians to yield to (patients) in matters of little consequence, but maintain an inflexible authority over them in matters that are essential to life. Gregory underscored that the physician must be keenly aware of the harm that untimely revelations might cause. Sadly, there is no assertion of the importance of respecting rights of self-determination for patient or obtaining consent for any purpose other than a medically good outcome. Gregory and Rush appreciated the value of information and dialogue from the patients' points of view, but the idea of informed consent was not foreshadowed in their writings. The authors of this paper regard this as an oversight and a serious lapse on their part.

Another remarkable writer is Thomas Percival. Percival's historic medical ethics did not make mention of consent solicitation and respect for decision making. Like previous codes and treaties, Percival did however, struggle with the issue of truth-telling, he believed that the patients right to the truth must yield to the obligation to benefit the patient in cases of conflict, thereby recommending benevolent deception. Percival maintained that:

> "(T) a patient … who makes inquiries which, if faithfully answered, might prove fatal to him, it would be a gross and unfeeling wrong to reveal the truth. His right to it is suspended, and even annihilated; because its beneficial nature being reversed, it would

[47] Irehobude & Aniaka (n 9).
[48] Wandler Micheal. 'The History of Informed Consent Requirement in the United States Federal Policy: Harvard University Library < http://www.mrsharvard.edu/urn-3:Hul.InstReps:dash.current.termsof-use/LAA 2001>.

> be deeply injurious to himself, to his family and to the public. And he has the strongest claim, from the trust reposed in the physician, as well as from the common principles of humanity to be guarded against whatever would be detrimental to him … The only point in issue is whether the practitioner shall sacrifice that delicate sense of veracity, which is so ornamental to, and indeed forms a characteristic excellence of the virtuous man, to this claim of professional justice and social duty.[49]

But Percival's friend Rev. Thomas Gisborne, opposed this, and said; the practices of giving false assertions intended to raise patients hope by lying for the patients' benefit is deceitful. The physician…is invariably bound never to represent the uncertainty or danger as less than he actually believes it to be". In his defense, Percival stated that the idea was neither to lie to the patient nor act improperly in beneficent acts of deception and falsehood rather the objective is to give hope to the dejected or sick patient. Further, the *American Medical Association (AMA)* without modification in *1847* accepted virtually without modification, *Percival paradigm* and recoded it in its *"Code of Medical Ethics 1847"*. AMA's position on the obligation of physicians in regard to truth telling remained same with that of *Percival's*. The code of medical ethics did not include rules of veracity although many codes today contain rules of obtaining an informed consent. However, the major problem today is implementation.

In the nineteenth century there was a notable exception to the consensus that surrounded Percival's recommendations. The first champion of the rights of the patient to information is *Connecticut Physician Worthington Hooker* in opposition to the model of benevolent deception that had reigned from Hippocrates to the AMA. The two best known physicians who championed the patient's rights to information are the Harvard Professor of Medicine *Richard Clarke Cabot* and *Hooker* this is prior to the second half of the twentieth century. *Hooker's* arguments are novel and ingenious but do not amount to a recommendation of informed consent. Hooker was more concerned with "the general effect of deception" on society and on medical institutions. He thought the effect to be disastrous. But in Hookers prescription, no more than in AMAs code is there any recommendation to obtain the permission of patient or to respect autonomy for the sake of autonomy. Hooker's concern was with expediency in disclosure and truth-telling rather than with the promotion of autonomous decision making or informed consent. Although the nineteenth century saw no hint of a rule or practice of informed consent in clinical medicine, consent practices were not entirely absent. Evident existed in surgery records of consent-seeking practices and rudimentary rules of obtaining consent since at least the middle of the nineteenth century. However, the consent obtained does not appear to have been meaningful consent because they had little to do with the patient's right to decide after being accurately informed. Practices of obtaining consent in surgery prior to the 1950s were pragmatic responses to a combination of concerns about medical reputation, malpractices, and practicality in medical institutions. It is important to say that such practices of obtaining permission do not constitute practices of obtaining informed consent, although they did provide modest nineteenth century grounding for the twentieth century concept of informed consent practices. This situation is similar in research involving human subjects. Little evidence exists then, until recently, when requirements of informed consent had a significant hold on the practice of investigators. In the nineteenth century, it was common for research to be conducted on slaves and servants without consent on the part of the subject. By contrast, at the turn of the century, American army surgeon *Walter Reed's,* yellow – fever experiment involved formal procedure for obtaining the consent of potential subjects. Although deficient by contemporary

[49] American Medical Association 1847 "Code of Medical Ethics", in proceedings of the National Medical Conventions, held in New York, May 1846, and in Philadelphia, May 1847.

standards of disclosure and consent, these procedures recognized the right of the individual to refuse or authorize participation in research. The extent to which this principle became engrained in the ethics of research by the mid twentieth century is a matter of controversy. Although, it has been reported that obtaining informed and voluntary consent was essential to the ethics of research and was common place in biomedical investigation. It is unclear that consent seeking on the part of investigator was standard practice. Anectodial evidence suggests that biomedical research often proceeded without consent. By the early 20th century, the legal history of disclosure obligations and rights of self-determination for patients evolved gradually. During this period, judicial decisions came to be and legal precedents set. A few early consent cases were built to eventuate in a legal doctrine. One of the best known and ultimately the most influential of the early cases is *Schlendorff v New York Hospital*[50] decided in 1914. Nevertheless, before the Schlendorffs case, there are three other cases such as Mohr *v. Williams*[51], *Pratt v. Davis*[52] *and Rolater v. Strain*[53]. The first two cases, *Mohr & Pratt* easily evaluated together though occurred in different states, both went before the courts over roughly the same time. The two courts also seemed to influence each other even though *Pratt* went before the lower court later than *Mohr;* the final *Mohr* ruling wound up citing *Pratt's* lower court decision.[54] Both cases came out the same way. They both introduced in American courts the concept that a patient has the right to make her own decisions. These two cases were regarded as the first significant consent cases.[55] In the case of Mohr, Mrs. Mohr consented to operation on her right ear, to remove diseased portion of her ear. She consented after a discussion with her family physician, who was also present during the surgery. Under anesthetized condition, the defendant surgeon discovered that her right ear was not as sick as he had previously thought, but that her left ear had serious problems. The surgeon felt that the plaintiff's left ear and not the right ear to which she consented to for a surgery should be operated upon. So, he performed the procedure on the left ear.[56] On realizing this, Mohr sued the surgeon after the operation further impaired her hearing. She argued that the operation was not consented to by her. That it was wrongful and unlawful. The Supreme Court of Minnesota held that the surgeon should have consulted with the patient and obtained her consent before performing any surgery. A doctor cannot assume that a patient has consented to surgery merely because the patient seeks the doctor's advice about treatment.[57] The court citing *Pratt v. Davis* ruled:

> Under a free government, at least, the free citizen's first and greatest right, which underlies all others is the right to the inviolability of his person, in other words, the right to himself – is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skilful or eminent, who has been asked to examine, diagnose, advise and prescribe (which are at least necessary first steps to treatment and care) to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anaesthetic for that purpose and operating upon him without his consent or knowledge.[58]

[50] *Mary Schloendorff v. Society of New York Hospital* 211 N.Y. 125, 129, 105 N.E 92 (1914).
[51] *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905).
[52] *Pratt v. Davis*, 224 111.300, 79 N.E. 562 (1906) .
[53] *Rolater v. Strain*, 39 Okla. 572, 137 p. 96. 97 (1913).
[54] *Mohr v. Williams* (n51*)* 96.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58]*Fortner v. Kech* 273 Mich, 261N.W.762 (1935).

In concretizing the principle of autonomy, the court in the case of *Schloendorff*[59] used rights of self-determination to justify imposing an obligation to obtain a patient's consent. Subsequent cases that followed and relied upon *Schloendorff* implicitly adopted its justifiable rationale. In this way the concept of self-determination in medical care and research came to be the primary rationale or justification for legal requirements that consent be obtained from patients. During the mid-era of the nineteenth century, the traditional duty to obtain consent evolved into a new, explicit duty to disclose certain types of information and then to obtain consent. This development needed a new term; and so informed was added onto 'consent', creating the expression informed consent in the landmark case of *Salgo v. Leland Stanford*[60] The court suggested that the duty to disclose the risks and alternatives of treatment was not a new duty but a logical extension of the already established duty to disclose the treatment's nature and consequences. Nonetheless, *Salgo's* case clearly introduced new elements into the law. What was set out as issues for determination in the case of *Salgo* was not whether consent had been given rather it was whether the patient had been adequately informed to give voluntary informed consent. The court thus created not just the language but the substance of informed consent by invoking the same right of self-determination that had heretofore applied only to a less robust consent requirement. Shortly after the above two cases introduced the duty of informed consent, the Kanasa Supreme court in the case of *Nathanson v. Kline,*[61] marked for the first time that physicians liability was rooted in negligence theory rather than battery.[62] The court established the duty of disclosure as the obligation to disclose and explain to the patient in the language as simple as necessary the nature of the ailment; the nature of the proposed treatment; the probability of success or of alternatives and perhaps the risks of unfortunate results and finally the right to disclose unforeseen conditions within the body.[63] The Kansas court decision in Nathanson's case required essentially the same extensive disclosure of the nature, consequences, risks and alternatives of a proposed procedure – as had *Salgo.* After *Nathanson's case,* battery and negligence appeared virtually identical in their disclosure requirements for informed consent. Following the case of *Kansas* was a stream of articles in the medical literature on the issues of consent authored by lawyer. These articles were written to alert physicians' awareness to both informed consent as a new legal development and to potential malpractice risks. Although the reactions of physicians in this era was not well documented but a handful of empirical studies of informed consent in clinical medicine proves some insight. A study in mid 60s revealed that as a result of the awareness, surgeons refused to participate because the consent forms were not operative and not yet a feature of the practice of surgery at that time. By the late 60's the indifference to consent procedures changed as most physicians appear to have come to recognize both a moral and a legal duty to obtain consent for all procedures and to provide some kind of disclosure to the patients. Additionally, the physician's views about proper consent practices in the late 60's differed remarkably from the consensus of opinion and convention from their views today because report shows that about thirty (30%) percent of physician surveyed, thought it ethically proper while half of the physicians surveyed thought it medically proper for a physician to perform a mastectomy[64] with no authorization from the patient other than her signature on the blanket consent form required for hospital admission, more than half

[59] *Schloendorff (*n 50).
[60] *Salgo v. Leland Stanford,* Jr. *University Board of Trustees* (1957) 317 p. 2d 170.
[61] *Nathanson v. Kline* (1960)186 Kan. 393, 350 p. 2d 1093.
[62] RR Faden & TL Beauchamp, 'History and Theory of Informed Consent' (2008) < https://booksgoggle.com.ng>.
[63] *Nathanson* (n 61) *88.*
[64] Mastectomy is the operation of removing the breast or mamma.

the physicians thought that it was ethically appropriate for a physician not to tell a cancer patient that she had been enrolled in a double blind clinical trial of an experimental – cancer drug.[65] By the 70's as a result of numerous or voluminous commentary in the medical literature, many physicians became more aware and cautious about informed consent. Empirical studies conducted at that time showed that at least there was enough documentable consent in such areas as surgery, organ donation and transplantation, and angiography to warrant empirical investigation.[66] Also during this period, the use of specific consent form gained acceptance although was not yet universally acceptable and in use. One of the remarkable negative fears expressed by the physicians at this period was that if patients' condition were to be voiced open to the patients, patients who needed surgery may reject surgery. But all these began to change by the late 1970, with the ascendancy of an interdisciplinary approach to medical ethics. Gradually, informed consent became a moral as well as a legal issue.[67] Prior to World War II, research ethics was not influential; however, one thing that unquestionably influenced thought about informed consent was the *Nuremberg trails.* The *Nuremberg military tribunals* unambiguously condemned the sinister political motivation of Nazi experiments in their review of "crimes against humanity". This code consists of a list of ten principles. One of the codes stipulates that the primary consideration in research is voluntary consent, an essential element under the code.[68] By 1960's the Nuremberg code served as a model for many professional and governmental codes. Several incidents involving consent violations subsequently moved the discussion of post-Nuremberg problems into the public arena and there was a rich and complex interplay of influences on research ethics, scholarly publications, journalism, public outrage, and case laws. The first significant case that arose in the United States during this period where certain patients without cancer were involved and needed to supply answer to whether a decline in the body's capacity to reject cancer transplants was caused by the cancer or by debilitation.[69] Some of these patients were informed orally that they were involved in the experiments but it was not disclosed to them that they were being given injections of cancer cells. No written consent was given and some subjects (minors) incompetent to give consent were involved. The Board of Regents of the State University of New York later censored Southam and Mandel for their role in the research and found them guilty of fraud, deceit and unprofessional conduct.[70] In that case, three doctors at the hospital injected live cancer cells into twenty-two chronically ill and debilitated patients. The doctors had obtained the permission of the hospital's medical director, but they did not obtain consent from any of the patients involved, even though the research was completely non-therapeutic. Some patients were informed that they were involved in the experiment but none was notified that they were receiving cancer cells. Likewise, none of the patients were notified that the test was unrelated to their usual therapeutic treatment.[71] Many of the Jewish Chronic Disease Hospital (JCDH) expressed concern about this cancer study of which William Hyman was one, they filed a suit to force the hospital to disclose these records.

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[65] Wandler (n 46) 98.

[66] Encyclopedia.com, History of Informed Consent < https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/informedconsent-i-history-informed >.

[67] Ibid.

[68] The Nuremberg Code was formulated in 1950 and 1960; Wandler M, the History of the Informed Consent Requirements in United States Federal Policy, 2001(1)(3) *Harvard Community Journal.*

[69] *Hyman v. Jewish Chronic Disease Hospital* 206 N. E 2d 338 (1965); Jones James H. '. Bad Blood. The Tuskegee Syphilis Experiment' (New York, Free Press) 93

[70] American Medical Association 1847 "Code of Medical Ethics", in proceedings of the National Medical Conventions, held in New York, May 1846, and in Philadelphia, May 1847.

[71] *Hyman* (n 69).

Hyman an attorney was concerned about both the abuse of the patients and the hospital's potential liability to have given experimental injections without consent.[72] It was revealed that the investigators had not presented the study to the hospital research committee and the subjects attending doctors have not been consulted before their patients received the injections, the Board of Regents' Disciplinary Committee held:

> A patient has the right to know he is being asked to volunteer and to refuse to participate in an experiment for any reason, intelligent or otherwise, well-informed or prejudiced. A physician has no right to withhold from a prospective volunteer any fact which he knows may influence the decision… There is evidenced in the record in this proceeding an attitude on the part of some physicians than they can go ahead and do anything which they conclude is good for the patient, and that the patient's consent is an empty formality with this we cannot agree[73].

With this decision, the Board of Regents placed great importance on obtaining subject's informed consent, regardless of the degree of harm or possible therapeutic benefits to the patients.[74] Several years later, a significant case involving consent violation emerged in the United States at Willow Brook State School an institution for "mentally defective" children in Staten Island, New York. This took place by mid-1950. Saul Krugman and his associates began series of experiments to develop an effective prophylactic agent for injections hepatitis. They deliberately injected newly admitted patients with isolated strains of the virus based on parental consents obtained under controversial circumstances that is manipulative. The lack of voluntary informed consent leads to the closure of the Krugman's research unit. The most notorious case of prolonged and knowing violation of subjects' rights in the United States was a much longer more egregious study which captured the states attention. Since the early 1930s, the United States Public Health (USPH) had been conducting a study on the effect of untreated syphilis on African American Males in Alabama. It was said to be designed as one of the first syphilis control demonstrations in the state. The purpose stated by the Tuskegee Syphilis Study was to compare the health and longevity of an untreated syphilis population with a non-syphilitic but otherwise similar population. The subjects knew neither the name nor the nature of their disease. The PHS doctor shockingly failed to obtain consent or informed their subjects about the circumstances of the study. Rather the subjects were only told that they were being treated for "bad blood", a term which was never defined for them and these patients – local African Americans males associated it to a host of unrelated ailments. The white physicians, in addition informed the patients that certain painful research procedures, such as spinal taps, were "Special free treatments" for the ailment, a clear lie on the doctor's part. The doctors clearly manipulated the subjects, relying on the fact that the subjects would trust the doctor's statements and opinion.[75] This study continued uninterrupted and without challenge between 1932 till 1970. In 1972 reporter *Jean Heller* published a profile of the situation on the first page of the *New York.* With this publication, attention focused on the *Tuskegee Experiment* and the US Department of Health, Education and Welfare (DHEW) appointed an ad hoc advisory Panel to review the study and the department policies and procedures for the protection of human subjects. The panel ruled that the Tuskegee Experiment should be discontinued and that subjects requiring care be given proper treatment. They further judged that the study was "ethically unjustified … One fundamental ethical rule is that a person should not be subjected to avoidable risk of death or

[72]Supra.
[73] The Board of Regents' Disciplinary Committee.
[74] Ibid.
[75] Faden (n60)321.

physical harm unless he freely and intelligently consents. No evidence showed that such consent was had and obtained from the participants of this study".[76] Sadly, the panel found that neither DHEW nor any other government agency had a uniform policy for review of experimental procedures or obtaining subjects' consent. Instead, the investigators in the biomedical profession who were conducting the experiments were the one who regulated research practices.[77] Then the panel decried the current situation and offered procedural and substantive recommendations for safeguarding subjects, the congress created a permanent body to regulate all federally sponsored research on human subjects.[78] By early 1970s, the US government had begun to mobilize efforts to draft a federal policy regulating human experimentation.[79] The Tuskegee Syphilis Experiment served as one reminder that the policy needed to be finalized and implemented as soon as possible to prevent further abuse of human subjects.

The United States did not begin the formulation of policies to protect human research subjects until the 1960's. Although the courts based on the numerous court decisions earlier given and international organization had earlier recognized the importance of offering protection to human research subjects. Its federal policies were slower to develop. The agencies that demonstrated maximum concern to this are Department of Health, Education and Welfare (DHEW) and the Food and Drug Administration (FDA) and the National Institute of Health (NIH), they reacted to problem of unregulated research and proposed their own solutions. Their major concern was about the lack of informed consent to medical research and this shaped the development of the ultimate US policy. The first federal policy on human subjects emerged at the Clinical Center of NIH. The Centre created a strict internal code that dictated specific points needed to obtain the subjects informed consent.[80] This landmark principle of the Clinical Center of NIH represents the first established policy regarding complete regulations for clinical testing of new drugs.[81]Henceforth, research subjects were treated as members of the research team as opposed to the period of 1930-1950. Sadly, other agencies did not adopt the policy of Clinical Center neither did they follow suit in establishing their own policies[82]. Report of Boston university's law – medicine research institute revealed that out of the fifty-two (52) medical departments in the then US only nine had a formal guideline regarding clinical research; only two (2) out of the nine (9) had guidelines that were generally applicable to all research.[83] Most of the investigators expressed dislike for self-regulation by committees and preferred to have all oversight directed to the investigators.[84] Obviously the reactions of the American Investigators toward the protection of human subjects were shown vividly by their little or no need to establish policies that guide research in law and medicine. Although, throughout the 1950s and 1960s, the US federal policymakers willingly allowed investigators the latitude they wanted but the period of 1960s – 1980s the FDA made a remarkable change in the promulgation of the *Drug Amendment Act of 1962.* Formerly the *Kefauver – Harris Bill* made important changes in the central laws governing the ethical drug history.[85] The most important and significant changes made during

[76] Report of the Tuskegee Syphilis Study AD HOC Panel to the Department of Health Education and Welfare, in KATZ Experimentation 948.
[77]Ibid, 949.
[78]Ibid, 950.
[79]Ibid. 952.
[80] Faden; Report of Law – Medicine Institute Study 1960
[81] Wandler (n48) 27.
[82] Ibid.
[83] Faden, (n 80).
[84] Wandler (48) 30.
[85] Ibid, 30.

the period include: the requirements that drugs advertising be more carefully controlled; that drug labeling fully disclose precautions and harmful side effects; that there be proof of therapeutic efficacy for drugs; and that the FDA establish complete regulations for clinical testing of new drugs.[86]

The bill emerged as a result of congressional concern about the use and control of drugs. Although hearings before Senator Estes Kefauver's subcommittee on Antitrust and Monopoly had focused mostly on price regulation and drug costs, it gained extra support after the Thalidomide problem in Europe demonstrated the dangerous side effects of drugs.[87] The drug testing situation spurred Senator Jacob Javits to add a consent requirement, marking the first time such a requirement was included in US legislation.[88] Investigators were therefore mandated to both inform subjects if a drug was experimental and to obtain the subjects consent before beginning any study or treatment. However, there was an exception, that if the investigator felt that it were not feasible or if obtaining consent was in the investigator's professional judgment, contrary to the subject's best interests consent need not be obtained. Javits exception proposed on the floor of the senate sadly is vaguely worded. But, remarkably his effort to propose the bill before the senate lead to establishment of consent requirement from patients and subject. This also established the physician's obligation to obtain consent and helped introduce the first consent requirement into American law.[89] Again the consent requirement provision went largely ignored because the FDA staff were busy enforcing other provisions of the bill and there were no legislative debate on the bill until Dr. Frances Kelsey, Chief of the Investigational Drug Branch, Division of New Drugs published it in a paper arguing that the best – interests exception could be validly invoked in only a few isolated cases, such as dealing with children or in emergency cases. This argument limited the exception and established a much tighter consent requirement.[90] Unfortunately though, the FDA regulation applied only to experimental drugs and devices, but not to all research. There was concern by Director of NIH James Shannon for lack of federal policy governing human research. Thus, Shannon met with the National Advisory Health Council (NAHC) in September 1965, in an effort to convince NAHC to establish formal controls on investigators' independence judgment[91] to regulate research on humans and adopted a resolution to address the moral and ethical issues of clinical research. Be it resolved that the NAHC believes that Public Health Service Support of Clinical research and investigation involving human beings should be provided only if the judgment of the investigator is subject to prior review by his institutional associates. This is to ensure an independent determination of the protection of the rights and welfare of the individual(s) involved. Also for the appropriateness of the methods used to secure informed consent, and of the risk and potential medical benefits of the investigation.[92] With this statement, the NAHC acknowledged the significance of obtaining informed consent. However, it made no mention of the definition of informed consent. What this recommendation established was a firm stand to protect individual research subjects. NAHCs resolution led to an established stand in the history of US that; for institutions to receive research grants, they must obtain prior committee review for the proposed research, and must not rely only on the judgment of the individual investigator; on the part of the independence review, they should include consideration of three key elements; the rights

[86] Ibid.32.
[87] Ibid 34
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Faden (n 62) 30.

and welfare of the subjects involved, the appropriateness of the methods used to obtain informed consent; and the risks and potential medical benefits of the investigation.[93]

Through the Institutional Guide to DHEW Policy on Protection of Human Subjects, published in 1971, also known as the "Yellow Book", which contained specific guidelines about institutional review, 'informed consent' was defined as the agreement obtained from a subject or from his authorized representative, to the subjects' participation in an activity[94]. The Yellow Book further listed six components of informed consent; a four explanation of the procedure, a disclosure of alternative procedures; a description of risk and discomforts; a description of benefits; an opportunity to ask questions about the procedures; and an instruction that the subject is free to withdraw consent and terminate participation.[95] The above brought to the fore a regulatory system whereby a review panel composed of both medical and non-medical members monitored investigators to make sure that informed consent was obtained and subjects protected. The effect of DHEW's system include establishing a specific definition of informed consent and seemingly tightened the consent requirements to better protect subjects. To further cushion the hard effect of research on subjects and to protect them, the Congress in 1974 passed the National Research Act. The Act served two purposes, first, it required DHEW to adopt as federal regulation in the NIH guidelines about protecting human subjects.[96] Second it created the National Commission for the Protection of Human Subject of Biomedical and Behavioral Research; whose purpose were to conduct a comprehensive investigation to identify the basic ethical principles underlying research on human and to recommend acceptable guidelines to DHEW; Congress and the President.[97] The National Commission's mandate extended before 1974 – 1978 and culminated into Belmont Report 1979. The Commission based its discussion on the three main ethical principles involving human research; respect for persons; beneficence and justice.[98] Each principle was then tied to a specific policy guideline, with respect for persons applied to informed consent, beneficence applied to risk/benefit assessment while justice applied to the selection of subjects and the distribution of benefits of research.[99] Furthermore, the commission[100] following the above format determined that the principle of respect for persons required some form of consent, to protect individuals' autonomy and personal dignity.[101] They assessed informed consent in terms of three necessary conditions namely information, comprehension and voluntariness.[102] The report adopted the standard of a reasonable volunteer, proposing that the extent of disclosure should be such that a reasonably volunteer could decide whether to participate.[103] The commission also emphasized Institutional Review Boards (IRB). In addition, the commission sponsored a study at the University of Michigan to examine functioning of IRBs; it was revealed that most research institutions were happy with the local IRB system because local IRBs protected the subjects. Also, it was specified that the forms for

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[93] Wandler (n48*)*32.
[94] Ibid 32
[95] Ibid.
[96] Ibid 33.
[97] Goldner J.A 'An Overview of Legal Controls on Human Experimentation and the Regulation Implications of Taking Professor Katz Seriously (1993) (38)(1) *Journal of Health law*; 43
[98] Morin K. The Standard of Disclosure in Human Subjects Experimentation, (1998) (19)(4*) Legal – Med Journal*; 57
[99] Ibid.
[100] The National Commission for the Protection of Human Subjects of Biomedical Behavioral Research United States.
[101] Ibid.
[102] Ibid.
[103] Ibid.

informed consent be more clearly modified. In response, the commission put out a well – received separate report on IRBs, discussing how to better craft the IRB system.[104] In 1981, the Commission also helped to shape the new regulations issued by DHHs, this regulation replaced those that had been issued in 1974, dealt with requirements for obtaining informed consent as well as the organization and functions of IRBs. This regulation applied only to research receiving federal funds because behavioral and social scientists wanted to only be regulated by the federal government. The major change from the 1974 regulation is, research that poses little or no harm to subjects was now exempted from institutional review.[105] The regulation equally seems less strict than they could have been. The US government at this stage has not imposed informed consent provisions in all possible areas of research. However, in 1991, there was the extension of the scope of DHHs established in 1981. There was the enactment of 45 CFR. Also, sixteen federal agencies including the FDA, the Department of Defense, and the Department of Energy adopted the DHHs regulations into their individuals' codes dealing with the protection of human subjects.[106]

The Common Federal Policy for the Protection of Human Subjects essentially governs all federal sponsored research, as well as commercially sponsored research that is performed for Pharmaceutical Companies and Medical Device Manufacturers. This uninform research standard require that research be considered by an IRB; it also listed guidelines for IRB organization and performance including the criteria for research approval.[107] There was also a prolonged section that gave detailed general requirements for informed consent; the information is to be provided in the language understandable to the subject. Without a clear language it would be deemed that consent whether oral or written is not informed.[108] In addition, the code defines eight essential elements of informed consent to wit: purpose of the research; duration of participation; procedures to be followed; procedures which are experimental; confidentiality; justice; foreseeable risks and discomforts and reasonably expected benefits. These highly specific requirements clearly delineated the boundaries of informed consent. Till date the code of Medical Ethics 45C F.R.S 46 is still in effect. Although there are other current regulations that provided for ways to protect research subjects. DHH's Office for the protection of Research Risk (OPRR) provides federal regulatory oversight of research facilities. Federally sanctioned IRBs grant studies internal approval and human subjects now give voluntary informed consent.[109] Out of the three, the operative regulatory mechanism is the requirement for authentic, uncoerced informed consent – the oversight of OPRR and the approval of an IRB helps government to check compliance to informed consent practices in the US. Informed consent now forms part of the backbone of the US federal policy, this shows that the US government has finally acknowledged the necessity of monitoring investigation and ensuring that human subjects receive the information they need to give consent. This copious historical background of informed consent brings to fore the beginning of informed consent practices globally.

3.1 Informed Consent practices in Nigeria

International regulation and guidelines for human treatment and research emphasize that physicians and researchers must obtain voluntarily individual based informed consent of

[104] The National Commission, Report and Recommendations: Institutional Review Boards (1979)
[105] Ibid.
[106] Ibid.
[107] Ibid
[108] Committee Report, s14 DHHS Regulations/Code.
[109] *Ibid*.

patients and research participant prior to treatment.[110] Equally many research ethic committees require written informed consent and the use of a consent form, which describes the purpose and procedures of the study and its potential risks and benefits, explains that voluntariness of the treatment or research and that subjects can withdraw at any time; and information about maintaining subject privacy and confidentiality in research and medical treatments[111]. Consent forms and other information provided to participants should be in a language understandable to the patient/participant or to the guardian or parent if the patient/participant is a child.[112] In developing countries like Nigeria, the informed consent doctrine is regarded primarily as emanating from Western notion of individualism as opposed to communalism lifestyle in Nigeria. Noteworthy is that African culture is characterized in terms of other people, the individual does not become conscious only of his own being, his own duties, his privileges and responsibilities towards himself but toward other people. According to Mbiti's Maxim "I am because we are, and since we are, therefore I am''.[113] Therefore the doctrine of informed consent favors self-reliance over interdependence, action over passiveness, rationalism over spirituality and uncertainty and forthrightness over collective harmony.[114] This is in contrast to deep religious and ancestral belief systems prevalent in most African cultures which points to an omnipotent, universalizing and fatalistic view of the world that cannot be easily controlled or influenced by mortal human being.[115] Communal and family member consent has been considered as essential in Nigeria as a result of widespread poverty and ignorance which leads to exploitation of medical patients and research individuals.[116] Unfortunately, the haves are more respected and regarded as knowing better than the have not's. The legitimacy and authority the communal leaders have on the people has been compared to those of Mayors, councilors, school principals or heads whose permission is mandatory before any interactions with people who are supposedly under their care[117]. This impliedly leaves the decisions regarding their subjects for them. In most situations, the intervention of community leaders or family heads as the case may be to obtain the voluntary informed consent of potential research patients/participants is an important step to safeguard and foster the wellbeing of vulnerable research patient/participants. This is because community leader engagement helps create community awareness and involvement of the patients/research participants in the community. Therefore, applying the Western concept of autonomy without adequate consideration for the important role of the community leaders and family heads will be a barrier to the application of informed consent in Nigeria. Given that the principle of voluntary informed consent is putatively rooted in individualistic values (especially rights of autonomy and self-determination) it would not be ethically and culturally feasible to effectively apply the principle in Nigeria. Persons whose culture embraces communitarianism concepts may be at a disadvantage in the benefit of the voluntary informed consent requirement because the principle of autonomy is often projected

[110] Council for International Organization of Medical Sciences (I.O.M.S) International Ethical Guidelines for Biomedical Research Involving Human Subjects, (IOMS; Geneva, Switzerland; (2002)
[111] *Ibid*
[112]. Onvomaha, F. P., Kass N and P. Akwengo P 'The Informed Consent Process in Rural African Setting (2008) (1) (1) <https://www.ncbi.nim.nih.gov/articles)> last accessed 10 August 2024.
[113]Ibid. 28
[114] A. Frimpong Mansoh, C. Chima, 2013.
[115] J S Mbiti, Bible and Theology in African Culture, " (1972) 1 (1) *Journal of Theology for Southern Africa.*
[116] Bhutta, Z.A. 'Beyond Informed Consent: Bridging the Know- Do Gap in Global Health', Health law journal (2) 95)2004.
[117]Onvoamba (n 112) 14.

onto individualism.[118] Arguably, personal autonomy should not be a paramount concern among research participants and patients in medical care. Each country should practice informed consent principles as it suits their social and cultural status. In this regard, informed consent should be considered as a process rather than a singular event if there is need to seek permission from community heads and family heads before performing a surgery or approaching an individual for research then this process should be adopted. In so far as the supposed decision is to the best interest of the patient and aimed at doing no harm.

Similarly, in South Africa and Ghana, the requirement of voluntary informed consent requirement is a requirement under the South African law that a patient must provide informed consent for all medical treatment (diagnosis or therapeutic).[119] A cross-sectional qualitative study conducted in Durham City Hospital South Africa in 2017 showed that one of the major issues affecting the application of VIC is that professional nurses in South Africa are deficient in knowledge of local regulations regarding IC and this causes a barrier to IC.[120] Report has showed that South African patients and research subjects are aware of the right to IC similar to Nigerian patients, but many were vulnerable due to indigence.[121] Unlike Nigerian patients who subject themselves to the discretion of the doctor and the will of the Almighty, South African patient prefers disclosure of all material risks, better communication skills by healthcare workers; and a shift toward informed or shared health care decision making.[122] Until recently, physicians in South Africa considered themselves accountable only to themselves, to their colleague in the medical field and to God Almighty. But this has changed now. In South Africa, the physicians have added accountabilities to their patients, to third parties such as hospitals and to healthcare organizations in South Africa and courts and to medical licensing and regulatory authorities.[123] Maintaining or promoting patients' autonomy is of paramount interest to South Africa physicians as advocated in the case of *Canterbury v. Spence.*[124]

4 Barriers to Informed Consent Practices in Nigeria

Informed consent practices can be influenced by sociocultural and religious factors which significantly affect patient's autonomy, decision -making and healthcare outcomes. Below are some of these factors; patriarchal structure, poverty, respect for autonomy, traditional healing practices, religious teachings, illiteracy, family involvement and inadequate laws.

4.1 Family Involvement

The key object of informed consent is to respect the autonomous person and to act in his interest. This principle may be unattainable in African setting because it is believed "that a person is because others are".[125] Unlike many other cultures outside Western Europe and America,

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[118] Ibid 17.

[119] *Staggbeing v. Elliot (*1912).

[120] S Chima, Understanding and Practice of informed Consent by Professional Nurses in South Africa: An Empirical Study – Brief Report, 2017 Conference paper (https://www.researchgate.net/publications>.

[121] Chima SC "Because I want to be informed, to be part of the Decision Making":Patient Insights on Informed Consent Practices by Healthcare Professions in South Africa 2015, 18, 1, 46

[122] *Ibid*

[123] Ibid

[124] *Canterbury v. Spencer*, 1972 464 F. 2d 772 (D.C. Cir.1972), the court held against Dr. Spence in this case thus; the root premise of the concept, fundamental in American jurisprudence, that'' [e]very human being of adult years and sound mind has a right to determine what should be done with his own body…''. True consent to what happens to one self is the informed exercise of a choice ,and that entails the opportunity to evaluate knowledgeably options available and the risks attendant upon each; *Bowers v.Talmage* 1964, 159 So.2d [Fia Dist. Ct. App1964]

[125] I Menkiti,' Personhood and Rights in African Tradition', < https:// www.doi.or/10.1080/02589346.2017.1339176> accessed 13 August 2024.

Nigerians stress a relational understanding of persons as embodied within their family and society. The classical description of family relationship in Nigeria and even in the entire Africa is communitarianism. In other words, duties engendered by rights and those by the idea of personhood will clash.[126] The extended family system sees it as a duty one owes his brothers, sisters, cousins, uncles, aunts, and so forth to help them when in need. This is not just kindness but an obligation that can only be fulfilled by doing one's very best for the family relations.[127] This is simply summed up with the Igbo adage; *ogbu akuwu ekpokoro nwanne ya ubochi nke ya onye ga ekpokoro ya?* This means literally that if a person does not commit himself to the needs of his brother, he shouldn't expect same from others when in need. The extended family members contribute immensely to the welfare and wellbeing of other relatives. They may even be bestowed with the obligation to the entire wellbeing of a family member, to educate the children of relatives and of course be in charge of decision making when need arises; take them to a health center when sick, pay the bills and even decide the treatment or procedure to be carried out on them without permission from the patient. These obligations though not mandatory but a duty owed to another for the sake of solidarity. Failure to do so attracts reprimands and condemnation by other members of the community or brotherhood. This is a major factor militating against consent because health related decisions are often made within the nuclear family and by any adult extended family member even when the patient has the capacity to give consent.

4.2 Belief in Deities:

There is a strong belief in a supreme being such as *Agbara; Amadioha; Ogwugwu; Egungu; Eredumare* depending on a person's denomination which controls both the living and the dead. This belief constitutes a challenge to the effective practice of informed consent in the health care service delivery in Nigeria. It is believed that deities, predestination affect the life of the people; all these are hinged on customs and traditions of the people. This belief vitiates the purpose of informed consent as the essence of informed consent is to enable a patient take control of their health situation by being involved in decisions relating to their lives rather than submitting their fate to deities and Supreme Being (ancestors). Where a person believes that his illness is caused by his *chi* – goddess of his fate he is unlikely to seek for orthodox care especially where such a person is illiterate and has strong belief in custom and tradition. There is likelihood that, he will submit his fate to his *chi* to heal him at his own time.[128]

4.3 Respect for Elders

In Africa, Nigeria inclusive, the cultural practice of respect for elders is a strong norm. This is a duty of obedience and gratitude that is due not only to ones parents but also to the elders because the young person is dependent on these elders for sustenance, education and protection.[129] Therefore despite the principle of autonomy and self-determination, a young person should not be involved in major decision making when the elders or senior members of the family are present. Therefore, it is regarded as proper for decisions regarding health to be

[126] Ibid.
[127] Ibid.
[128] E Amadi (n)
[129] This respect for elders can be seen in the manner of greetings especially among the Yoruba, children prostrate to greet the elders and in Igbo communities, where the younger children are expected not to call their elders by name but include sister, aunt, uncle or brother when addressing them. This is different from the Western world where the younger ones address the older ones by their names. Though the western world may see this act of young Africans as a shift from the common behavior but it is valuable to all Africans because of its symbolic nature .Being regarded a sign of obedience, respect and gratitude to elders.

directed to parents for the best interest of their children. Consent for teenage health problems, including for such sensitive issues as surgeons can only be made legitimately by the parents or older siblings where the presence of the parents is unavoidable. This is also as a filial duty to their younger ones. In these instances a voluntarily self-made informed consent will be almost impossible.[130]

4.4 Gender Disparity

The cultural environment in Nigeria portrays the male folk as superior to the female. This is a similar behavior in most African countries. Roles and hierarchy within the family is defined by the issue of gender. Women in most Nigerian homes are regarded as subordinate to the man. In fact, she is regarded as a lesser being compared to the man who the head/authority and decision making body in the home. This defined gender role is brought to bear on the patient-physician relationship. In order to carry out treatment or any seizure on a woman, the consent of her husband is required. Where they are unavailable, the consent of any other male elder of her family is required.[131] In many cases, consent for caesarean sections or assisted deliveries are obtained from the husband of the patient instead of from the patient. Similarly, before an abortion or similar operation is to be carried out on a woman, the physicians seek the consent of the husband even when the life of the woman is in danger. This privilege given to the menfolk may manifest injustice and leave the woman with life threatening disease. In an unreported case of Mr. & Mrs. Halimat (real names withheld)[132].Two years after the Parties got married, they separated. The woman developed complications as a result of pregnancy. The husband's permission was needed to operate on her but he vehemently refused to give consent. The doctors refused to operate on the woman because the consent form was not signed by the husband and the woman abandoned to her fate. It took the intervention of her relative to move her from the hospital to a prayer house where she miraculously delivered her child few days after. [133] This is not a normative behaviour in all parts of Nigeria and the defined gender role is not immutable because woman in Nigerian 21st century history especially in the North and Western parts have now been known to be preeminent and lords over their male folks. The increased social and economic pressures on families together with increase in the level of education acquired by the women folk, now make it possible and necessary that women contribute more to not only the economic upkeep of their families but also assume larger roles in decision making within the family.[134] In the southern part of Nigeria, many women take medical decisions without seeking the permission of their husbands; and when they involve husband, it's rather a matter of decision instead of by coercion. But it is important to mention here that there are dynamics of each individual family and this might impede or deter the voluntariness of informed consent decisions.[135] Finally, the practice of women depending on their menfolk for medical decision is more prevalent in rural areas among women who depend on their men folk to finance their health care. This is most applicable in the northern part of Nigeria where Islam is the predominant religion and the level of education is low[136].

[130] Ezeome E R & Marshall P A (supra)
[131] *ibid*
[132] The case was a mediation session in Women and Child Justice Initiative Nigeria (WOCJIN) 2019
[133] Eze Chinasa v Eze Nzubechukwu (WACOL Legal Clinic 15 July 2018) unreported, 2018 (real names withheld)
[134] Ezeome E R & Marshal P A (supra)
[135] *Supra; 7*
[136] *Supra*; 8

4.5 Problem of Health Care financing

The type of health care finance system existing in a nation affects informed consent practices because it influences the level of information disclosed. In the United Kingdom (UK) as opposed to Nigeria, medical care is viewed as a publicly provided good, and choices are constrained by, among other things, the total budget that the government commits to medical services.[137] Also in the US, informed consent laws generally reflect support for market allocation mechanisms and thus tend to expand the possibilities for patient choice through more thorough informed consent requirements but in Nigeria, the government espouses a policy of universal basic minimum health care through the National Health Insurance Scheme (NHIS). The reality is that individuals pay for what they get since the services and materials pledged by the Nigerian government are often not available as a result of paucity of resources.[138] In Nigeria, following extensive consultations with various stakeholders from different sectors of the economy, the National Health Insurance Scheme Decree No. 35 of 1999 of Social Health Insurance (SHI) system of health is a public-private sector partnership a shared responsibility between the people and the government for financing the health system – with the ultimate purpose of achieving Universal Health Coverage (UHC). Sadly, despite being implemented for over thirteen years, the NHIS impact on the health care financing system in Nigeria remains monstrously epileptic and covers merely three (3%) percent of the population.[139] Furthermore, charity organizations also play significant roles in healthcare financing. These constraints to a large extent distort voluntary informed consent by defining the level of disclosures that can be made to patients. More so, a patient cannot agitate for autonomy and decision-making rights when he depends on charity for treatment. Where the extended family plays a major role in financing the patients' health care services, the financer becomes de facto decision maker for the patient.[140] Arguably, this to a large extent underpins voluntariness of informed consent because whoever pays the piper dictates the tune.

4.6 Illiteracy

The level of education and sophistication of a patient affects the level of information disclosure that a physician is likely to give a patient. Physicians confirmed that getting informed consent from uneducated people is difficult and time consuming while those of educated people are much easier. The reason is that uneducated patients were least satisfied with the information provided to them. Study on informed consent on people living with breast cancer in Nigeria revealed that women with less education were more likely to seek their husbands' permission to participate in clinical research.[141] Also low educational level significantly predicted the participant's ability to read the informed consent form.[142] The overriding factor in all influences of informed consent in Nigeria is low level of education. It not only neutralizes the various cultural and social factors it equally bridges the gap between the physician and the patient. It encourages discussion on medical matters, and also puts the physician on guard. If one considers

[137] Annas G J & Miller F. H, The Empire of Death: How Culture and Economics Affect Informed Consent in the US, the UK; and Japan, (1994) (20)(3*) Journal of Law & Medicine*.
[138] *Ibid.*
[139] Nnamuchi O. & Odinkonigbo JJ & Obuka U B & Agu H, 'Successes and Failures of Social Health Insurance Schemes in Africa – Nigeria versus Ghana and Rwanda: A Comparative Analysis' (2019) (28)(1) *Journal of Health Policy and Law Review: An International Human Rights Journal*; 131-132.
[140] Ezeome E R & Marshall P A (supra)
[141] Use 137 here n make 137 ibid
[142] J Onah, UNESCO Laments the Level of Illiteracy in Nigeria, 2007 Business Day (Lagos, Nigeria) <http://businessdayonline-com/print/508-html>.

that in 2007, over 60 million Nigerians have been estimated to be illiterate.[143] Illiteracy is a far more inhibiting factor on informed consent practices in Nigeria than the other factors mentioned above.

4.7 Poor Economic Status

Informed consent in Nigeria's health care services is hampered by economic challenges experienced by patients. Studies have shown that people with poor economic status are likely to accept and obey instructions without either questioning or insisting for their rights.[144] The poverty level in Nigeria in 2011 was estimated at 35.0% and increased to 38.8% by 2016. Despite Nigeria's middle income status, four (4) out of ten (10) citizens lived below the natural poverty line in 2016[145] By 2018, World Bank reported that almost half the population of Nigerians are living below the international poverty line ($2perday) and unemployment peaked at 23.1%. At present, Nigeria is passing through a pandemic and various interstate lockdown as well as income inequality, insecurity, inflation, ethnic conflicts and political instability which have made it difficult for an average individual to cater for basic needs.[146] Furthermore poverty is associated with crippling factors such as lack of confidence and fear. These challenges have made it difficult for a person to institute a legal action for breach of his right to informed consent. Only improved economic status will reduce the inability of patients to seek redress in court for breach of their right to voluntary informed consent in health related matters in Nigeria.

4.8 Trust

Trust forms an integral part of the relationship between a physician and the patient. The effectiveness and success of any form of medical care is based on the trust a patient bestows on his physician.[147] The issue of the abuse of trust by physician is believed to have given rise to the issue of autonomy in the health care service delivery. It is argued that abuse of trust by physician has had no visible effect on the level of trust placed on physician by patients, in fact, the level remains high.[148] Trust is the total confidence or assurance or feeling of security that the physician will take a decision based on the best interest of the patient. Similarly, the essence of informed consent is to protect the self- determination or autonomy of the patient and remove imbalance or inequality in knowledge between a physician and the patient. As a result of inadequate knowledge, most patients in Nigeria have a high level of trust on their physician to make decisions in their interest without questioning such decision.[149] The level of dependence by patients on their physician limits the effectiveness of informed consent in Nigeria's health care delivery system.

5. Conclusion

In medical practice, there is a fundamental principle that every individual has a right to decide what happens to his or her own body. The position of human rights is that the law has an

[143] J. Onah, *ibid*

[144] O Aniaka, Patient Right and Socio- Cultural Challenges to Informed Consent in Nigeria' www.languageconnections.com/descarges/clinicaltrailsinsouthafrica.pdf Accessed 2 February 2017

[145] Punch Newspaper, 11 Feb 2020 < https://punchng.com. >.

[146] Index Mundi, Nigeria Population below Poverty Line, https://www.indexmundi.com 2019.

[147]DA Axelrod & SD Goold 'Maintaining Trust in the Surgeon- Patient Relationship: Challenges for the Millennium' (2000) 135 Archives of Surgery; 55.

[148] A Mark, F Camacho et al 'Trust in the Medical Profession: Conceptual and Management Issues'(2000) 37(5) Health Services Research 1419.

[149] Emmanuel R and Marshal AP 'Informed Consent Practice in Nigeria' (2009) (9) (3) Developing World Bioethics *Journal of International law;* 133-148.

obligation to protect and respect such right.[150] In other words for a procedure to be carried out on a person, such a person must give consent. The individual also has unfettered right to accept or refuse any treatment. However, the exception to this is in emergency situation or overwhelming interest of the public. Sadly, it is observed that in medical practice in Nigeria, consent to treatment is grossly inadequate because often necessary information is not disclosed to the patient (s).[151] This issue is mostly identified at the primary and secondary level of healthcare. The study confirms that majority of patients utilizing public healthcare systems are vulnerable because they are indigent and lack alternative means of obtaining healthcare services. The study further shows that most patients in Nigeria are denied their rights to informed consent because of factors such as religious belief, poverty, illiteracy and so forth. However, although these patients want to be informed and participate in health-related decision-making process but are limited by these sociocultural and economic factors. It found that there are inconsistencies between the policies and actual practice with patients and physicians differing in content and procedures or methodology of information disclosure. Other socio-cultural factors that further inhibit informed consent practices in Nigeria are poor communication skills by HCWs, language barriers, family heads and ignorance. It is of fundamental importance to further educate patient on their rights. The HCWs are required to be educated on patients' rights and the legal implications of failing to comply with the requirements of medical treatment. Most importantly, there is the need to improve the communication skills between the physician and the patients. This will further enhance patient – physician relationship, to protect patient rights and human dignity. Further research should focus on informed and shared healthcare decision making inorder to improve preventive healthcare services. The court is not left out in this gap; the judiciary is expected to do more in this regard by defining the limits of the duty of consent on the physician. The landmark case of Okonkwo has not been able to define this because its full impact on informed consent among physicians in Nigeria has not been realized. Its decision is merely regarded as aligning to religious belief and not the limits of the duty of consent a physician owed a patient. There are laws but its implication is inadequate. Nigerian courts are to align themselves with countries like US and UK where the courts have been able to close the gap of the limits of consent through a plethora of cases.

[150] Imade Gbobo P and Oke-Chinda M , *Ibid;24*
[151] Ibid

A CRITICAL ASSESSMENT OF THE NIGERIAN STARTUP ACT*

Abstract

Technology has revolutionized the global economy, leading to rapid innovation and disruption in the creation, distribution, and consumption of goods and services. Startups have been at the heart of this technological revolution, which has led to efforts by different countries to promote the growth of startups. The Nigerian Startup Act (NSA) is seen as a crucial tool for promoting innovation and supporting developing high-growth technology-based businesses in Nigeria. The Act establishes the legal and institutional frameworks for the technology startup ecosystem and provides a mechanism to attract and safeguard investment in the startup sector. Many believe that its implementation will significantly boost Nigeria's technological potential. This analysis examines the provisions of the Act, highlighting key areas that offer hope for the growth of the Nigerian startup industry, addressing the exaggerated expectations surrounding the Act, and outlining the necessary steps to achieve its objectives. The conclusion emphasizes that while the new legislation shows promise, it is unrealistic to expect the NSA alone to drive the growth of Nigeria's startup economy.

Keywords:
Startup, Regulations, Technology, Innovation, Ecosystem, Nigerian Startup Act (NSA)

1. Introduction

Rapid technological advancement has facilitated the establishment of new companies driven by technological innovation, known as startups.[1] These startups are young companies that provide specific technological solutions, products, or services, often leading to innovation and advancements in various industries and scientific fields.[2] Startups have emerged as a crucial component of the global economy, especially in the technology sector.[3] These innovative companies have challenged traditional service delivery methods and addressed human problems through disruptive technology. They also play a crucial role in creating wealth and global economic development.[4] At the same time, three out of four startups in the United States fail.[5] 61% of Nigerian startups failed between 2010 and 2018.[6] Several factors account for this high failure rate, including lack of funding, limited level of expertise, unfavourable government policies, regulatory bottlenecks, over-saturation of startups in select locations, talent shortage, high cost of doing business, etc.[7]The high mortality rate of startups and the growing realisation of the importance of technological innovation have made providing an enabling environment

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[1] A Conti, MC Thursby& F Rothaermel, 'Show Me the Right Stuff: Signals for High Tech Startups', *NBER Working Paper 17050*<http://www.nber.org/papers/w17050>

[2] A Skala, (2019). 'The Startup as a Result of Innovative Entrepreneurship'. In: *Digital Startups in Transition Economies.* Palgrave Pivot, Cham. <https://doi.org/10.1007/978-3-030-01500-8_1>

[3] *Ibid*

[4] UNCTAD, 'Technology and Innovation Report 2021' <https://unctad.org/page/technology-and-innovation-report-2021>

[5] Deborah Gage, The Venture Capital Secret: 3 Out of 4 Start-Ups Fail, The Wall Street Journal, https://chasegrowthcapital.com/wp-content/uploads/2016/11/THE-VENTURE-CAPITAL-SECRET-3-OUT-of-4-Start-Ups-Fail.pdf

[6] B Bailey *Nigeria records 61% start-ups' failure rate in 9 years*https://businessday.ng/uncategorized/article/nigeria-records-61-start-ups-failure-rate-in-9-years/

[7] Ibid

for their survival essential.[8] As such, governments implement policies to support startups.[9]Many countries have recognised the importance of promoting innovation and have established policies, legislation, and initiatives to foster technological growth. Technological innovation and enterprise have gained momentum in the past few years, leading to heightened tech-driven startups in Nigeria.[10] The Nigerian government sees considerable potential in the growth and contribution of the tech startup ecosystem to the Nigerian economy, as these startups have the potential to lead and dominate Africa's digital economy, a priority for governments.[11]Nigerian startups received USD1.37 billion of Africa's USD 4 billion funding in 2021, the highest volume of startups in Africa.[12]To attract more startup capital and grow startups in the country, the Nigerian government enacted the Nigerian Startup Act (NSA), with the principal objective of increasing the country's ICT sector by improving the financing and regulation of startups in the country.[13] Given the enormous relevance of technological innovation in today's world and the proclaimed benefits of the NSA, it is crucial to examine and ascertain the capacity of the NSA to promote the development of startups in the country. Section two provides the conceptual and theoretical framework underpinning starts, while section three examines the provisions of the Act. Section four outlines gaps in the Act that will undermine its transformative impact on the Nigerian startup ecosystem. Section five offers a conclusion.

2. Conceptual Framework

The startup concept has existed for some time, but its meaning needs to be clarified. Is it based on the sector in which the business operates? Must it be a technology company? Is a company's startup status determined by the innovativeness of its solutions or by size? 14 There is no universally accepted definition due to the difficulty delineating what constitutes a startup. Merriam-Webster Dictionary defines startup as "the act or an instance of setting in operation or motion or a fledgling business enterprise".[14] Cambridge Dictionary defines it as "a small business that has just been started".[15] These definitions emphasise the recency of commencement as the primary consideration in determining a business as a startup. Kelly Peter describes them as newly created businesses that search for a repeatable and scalable business model.[16] Disrupt Africa refers to startups as young businesses driven by innovation and the

[8] A Hyytinen, M Pajarinen& P Rouvinen, 'Does innovativeness reduce startup survival rates'? *Journal of Business Venturing*, Vol 30, Iss 4, p. 564

[9] Starting with the Italian Startup Act of 2012, other countries have passed similar laws including India (2013), Latvia (2016), Austria (2017) and Belgium (2017). See F Biancalani, D Czarnitzki& M Riccaboni, 2020. "The Italian Startup Act: Empirical evidence of policy effects," *Working Papers of Department of Management, Strategy and Innovation*, Leuven 648452, KU Leuven, Faculty of Economics and Business (FEB), Department of Management, Strategy and Innovation, Leuven. For discussion on startup legislation in Africa, see

[10]Ayomide Oguntoye, 'Analysts Review How Digital Platforms Have Become Integral to Nigeria's Economic Growth' <https://www.proshareng.com/news/TECH%20TRENDS/Analysts-Review-How-Digital-Platforms-Have-Become-Integral-To-Nigeria-s-Economic-Growth/54276>

[11] MK Inuwa, 'Digital Economy: Collaboration Amongst Stakeholders Accounts For Unprecedented Achievements-DG NITDA' <https://nitda.gov.ng/digital-economy-collaboration-amongst-stakeholders-accounts-for-unprecedented-achievements-dg-nitda/>

[12]Oturu& AM Dosumu, *The Startup Act: What it is and why it matters*, https://businessday.ng/news/legal-business/article/the-startup-act-what-it-is-and-why-it-matters/

[13] L Ojedokun, 'Improving the startup environment with Nigerian Startup Act', *PM NEWS*, 8th November 2022, available at https://pmnewsnigeria.com/2022/11/08/improving-the-startup-environment-with-nigerian-startup-act/

[14] https://www.merriam-webster.com/dictionary/start-up

[15] https://dictionary.cambridge.org/dictionary/english/start-up

[16]TP Kelly, *Startups in South Africa, Barriers to Growth and Opportunity through Unconventional Institutional Structures* (University of Cape Town: 2022) 9.

promise of tremendous growth or scaling, regardless of geography.[17]Baldridge emphasises that these young companies seek to develop a unique product or service, bring it to market, and make it irresistible and irreplaceable for customers.[18] Ries considers startups as ventures designed to create a new product or service under market conditions of great uncertainty.[19] *Their success depends on a thriving startup ecosystem that provides an enabling environment for entrepreneurs, offering funding, networking opportunities, and access to resources. Such an ecosystem enables them to overcome the two significant obstacles that account for startup mortality: regulation and financing.*

Startups are generally associated and often limited to innovative companies in the technology sector. This is subsumed in most definitions, emphasising scalability driven by technology today. The NSA makes the technological connection clear by defining a startup as "a company in existence for not more than ten years, with its objectives being the creation, innovation, production, development or adoption of a unique digital technology innovative product, service or process".[20] However, Graham challenges this connection, noting that the only essential thing for a business to be classified as a startup is growth, as everything else associated with startups follows from growth.[21]Nonetheless, Graham's view can be countered on the ground that technology is the primary driver of business growth in the Fourth Industrial Revolution.[22]From the above, a few salient features of startup emerge. Firstly, startups are relatively new or young companies, as much as ten years old, in the case of the NSA. Secondly, the business must focus on scalability and achieving rapid growth powered by technology. Startups have peculiar lifecycles and players. Bootstrapping refers to the self-funding stage, where the founders use their resources to support the business financially.[23]This limits the amount of debt accrued. Also, angel investors and venture capitalists assist startups in raising funds. Angel investors are the most common kind of investors who are interested in startups that already have products or services available. On the other hand, venture capitalists invest with long-term growth in mind. Accelerators, hubs, and incubators help startups by providing them with resources such as funding, training, working spaces, legal services, access to investors, etc, that startups need to grow.[24]

1 Overview of the Nigerian Startup Act

The NSA, the fruit of the combined initiative of Nigeria's tech startup ecosystem and the Presidency, seeks to harness Nigeria's digital potential by providing legal and institutional frameworks that align with the expectations of tech ecosystem stakeholders. The Act's specific objective is to promote the growth of the Nigerian startup ecosystem. Furthermore, the Act intends to promote the establishment, development, and operation of startups, nurture and grow

[17]*Ibid.*

[18] R Baldridge, 'What is Startup? The Ultimate Guide', *Forbes Advisor*, October 2022) <https://www.forbes.com/advisor/business/what-is-a-startup/>

[19] E Ries, 2011. *The Lean Startup: How Today's Entrepreneurs Use Continuous Innovation to Create Radically Successful Business*, New York: Crown Business.

[20] s. 47, The Nigerian Startup Act 2022,

[21] P Graham, 'Startup=Growth' <http://www.paulgraham.com/growth.html>

[22] The Fourth Industrial Revolution, or Industry 4.0, popularized by Klaus Schwab, conceptualizes the rapid change to technology, industries, and societal patterns and processes in the 21st century due to increasing interconnectivity and smart automation. See T Philbeck& N Davis, 'The Fourth Industrial Revolution'. (2018) *Journal of International Affairs. 72 (1): 17–22*.

[23] A Bhide, 'Bootstrap Finance: The Art of Start-ups', *HBR November*-December 1992, 110 - 117

[24] A Mustapha & J Tlaty, (2018() 'The Entrepreneurial Finance and the Issue of Funding Startup Companies', *European Scientific Journal Vol.14, No.13, 268*

technology-related talent, and pivot the nation's startup ecosystem as Africa's leading digital technology centre.[25] Before the enactment of the Act, Nigerian tech startups were regulated under general laws regulating companies in Nigeria, notably the Companies and Allied Matters Act 2020, the Federal Inland Revenue Service Act, the Nigerian Data Protection Regulation, and the National Information Technology Development Agency Act (NIDTA)[26]. Given that the Act is the product of government-industry collaboration, its enactment generated considerable excitement among technology industry stakeholders, who are optimistic it will yield transformative impacts on the country's economy.[27] This is anchored on the hope that, among other things, the NSA will bridge the engagement gap between startups and regulators. In contrast, startups will benefit from the funding mechanism, tax breaks, government loans, and credit guarantee schemes provided under the Act. At the same time, the need for cautious optimism has been expressed, given the pitfalls that have undermined hyped initiatives that failed to deliver expected outcomes.[28]

The Nigerian Startup Act (NSA) provides the legal and institutional framework for developing startups in Nigeria. Its objective is to promote cooperative engagement between startups and regulators. The law applies to companies incorporated under the Companies and Allied Matters Act 2020(CAMA)[29] as digital technology companies. Nigerians must own at least a third of the issued shares in the startup as either founder or co-founder.[30]The Act has ten (10) parts and applies to companies labelled as startups and institutions that incubate, hatch, and support labelled startups.[31]Part II and III established the National Council for Digital Innovation and Entrepreneurship ("The Council") and its operational structure, respectively.[32] Part IV contains the startup labelling process from eligibility to withdrawal of the startup label and resistance.[33]The Startup Investment Seed Fund ("The Fund") was created under Part V.[34] Part VI and VII provide training, capacity building, talent development, and tax and fiscal incentives.[35] Collaboration between the secretariat and other Regulators, both local, foreign, and international, is covered under Part VIII.[36] Part IX provides for Accelerators and Incubators, covering sections 38 and 39 of the Act. Part IX empowers the Council to establish and manage startup hubs, clusters, innovative parks, and technology development zones.[37]Part X contains miscellaneous sections, including pre-action notice and interpretation.[38]The rest of this section highlights the key aspects of this legislation.

3.1.The Council and the Secretariat

[25]*Ibid*

[26] National Information Technology Development Agency Act 2007Act No. 28, the Federal Republic Of Nigeria Official Gazette No. 99 Vol. 94 Lagos 5th October 2007, available at https://nitda.gov.ng/wp-content/uploads/2020/11/NITDA-ACT-2007-2019-Edition1.pdf

[27]T Odueso, 'The Nigeria Startup Act has been Approved', *Techcabal*, available at https://techcabal.com/2022/10/19/the-nigeria-startup-bill-has-been-approved/

[28] A Adepetun & J Chibueze, 'Start Up Act: Experts list gains, warn against pitfalls' (Guardian, 2022) <https://www.google.com/amp/s/guardian.ng/news/start-up-act-experts-list-gains-warn-against-pitfalls/amp>

[29] CAP C20 LFN 2004

[30] NSA, s1.

[31] *Ibid*, s2.

[32] *Ibid*, ss 3-12.

[33] *Ibid*, ss13-18

[34] *Ibid*, ss19-20

[35] *Ibid*, ss21-29

[36] *Ibid*, ss30-37

[37] *Ibid*, ss40-42

[38] *Ibid*, ss43-48.

Section 3 of the Act established the National Council for Digital Innovation and Entrepreneurship ("The Council") and confers it with corporate personality, and can sue and be sued in its name.[39]Membership of the Council includes the President of Nigeria,[40] the Vice President,[41] the Minister of Communications and Digital Economy,[42] the Minister of Finance, Budget and National Planning, the Minister of Industry, Trade and Investment, the Minister of Science, Technology and Innovation, the Governor of the Central Bank of Nigeria, four (4) representatives of Startup Consultative Forum, and one representative each from the Nigeria Computer Society and Computer Professional Council of Nigeria).The membership of the Council is widely drawn to cover all stakeholders in the Nigerian startup ecosystem, and the purpose is to allow stakeholders to promote their interests before the Council. Statutorily, the functions of the Council include formulating and providing general policy guidelines for the realisation of the objectives of the Act; giving overall directions for the harmonisation of laws and regulations that affect a startup; approving the programmes of the Secretariat established under the Act; ensure the monitoring and evaluation of the regulatory framework to encourage the development of startups in Nigeria; monitor and ensure the implementation of the policies and programmes of the Secretariat; support digital technological development; make, alter or revoke rules and regulations for carrying out the functions of the Secretariat; and perform such other functions as may be necessary towards achievement of the general intendment of the Act.[43] The Council is saddled with the power to review policies and directives of Ministries, Departments, and Agencies (MDAs),which may affect the operation, establishment, and investments in startups.[44] The Council shall operate through its Secretariat established under the Act, the National Information Technology Development Agency (NITDA).[45] Functionally, as the Secretariat, NITDA shall manage the process of travelling a startup, establish online platforms to provide access to startup information, collaborate with MDAs and other stakeholders on innovative digital technologies, ensure the religious implementation of the National Digital Innovation, Entrepreneurship, and Startup Policy (NDIESP),[46] develop, establish, support and incentivise digital technology innovation hubs, parks and community etc.[47]

3.2.The Fund

Section 19 of the Act established the Startup Investment Seed Fund (the Fund) to be managed by the Nigerian Sovereign Investment Authority (NSIA),which shall function as the Fund Manager.[48] The role of the Fund is to avail seed capital to Labelled Startups on the

[39] *Ibid*, s.3.
[40] The president presides over the Council.
[41] The Vice President presides over the Council in the absence of the President.
[42] Presides over the Council in the absence of the President and/or Vice President.
[43] The NSA 2022, s7(1).
[44] *Ibid*, s7(2).
[45] *Ibid*, s8(1).
[46] National Digital Innovation, Entrepreneurship and Startup Policy (NDIESP) was launched by NITDA in 2021 as a mission statement for startup innovation in Nigeria. The Policy comprises of five priority thrusts namely: Advancing Human Capital, Unlocking Access to Capital, Enabling Infrastructure, Boosting Demand, and Promoting Innovative Entrepreneurship. The Secretariat is charged under section 8 of the Act to see to the fill implementation of the Policy.
[47] See NSA, s.9(2)a-r, ss10-12 for the full functions of the Secretariat.
[48] The Nigerian Sovereign Investment Fund is in charge of the Nigeria Sovereign Wealth Fund and started operation with a seed capital of $ 1 billion in 2013. The Authority has the mandate of investing in areas with investment deficit and encouraging and incentivizing such areas for private investors and has, since its inception, it has concluded about 15 projects. See the website of the Authority at <https://nsia.com.ng/>

recommendation of the NSIA and provide relief to technology laboratories, accelerators, incubators, and hubs.[49] An annual sum of at least Ten Billion Naira (N10,000,000,000.00k) shall be paid into the Fund from sources approved by the Fund.[50]The Find is meant to reduce the challenge of securing venture capital for startups in Nigeria.

3.3. Startup Labelling Process under the NSA

The labelling process outlines the steps to be undertaken by new entities to be recognised as labelled startups under the NSA.[51]To qualify as a startup label, an entity must be a company incorporated under the Companies and Allied Matters Act and has been so incorporated for a period not more than ten years; its objects must be innovation, development, production, improvement and commercialisation of a digital technology innovative product or process; it must be a holder or repository of a product or process of digital technology or the owner/author of a registered software; and has at least, one-third local shareholders who are Nigerian founder and or co-founders.[52] Upon satisfaction of all the requirements, such entity obtains a startup label, a certificate issued to show that an entity is a startup having complied with the provisions of the Act.[53] The conditions are conjunctive and jointly required. Once labelled a startup, a startup shall be qualified to receive the incentives accruable to startups under the Act. The procedure for applying for a startup status involves submission of an application to the Secretariat on the Startup Portal supported by the requisite documents as may be prescribed by the Secretariat from time to time.[54] The Secretariat maintains the Startup Portal in exercising its power under sections10-11 of the Act. A startup label certificate shall be for ten years.[55]The Act does not address the renewability of startup labels. One cannot imagine a startup seeking renewal after ten years, at which time a Startup should have either scaled, been extinguished, acquired, or merged with a new entity. The duties/responsibilities of a startup are enumerated, and a startup that defaults on these statutory duties has 30 days to remedy the default or risk withdrawal of the label certificate.[56] Indeed, where a startup fails to cure any infringement of its duty under the Act or any of the conditions upon which the startup label was granted, the Secretariat shall withdraw the startup label of the startup and further inform investors and appropriate MDAs of the withdrawal.[57] The essence of informing investors and MDAs of such withdrawal is to put all stakeholders of the deviance of the startup. However, upon remedying its infractions(s), a startup shall have its startup label reissued upon application to the Secretariat.[58]

3.4.Tax and Fiscal Incentives

Specific tax and fiscal incentives are provided under the Act to encourage startups to survive their early years. A labelled startup that qualifies as a pioneer company under the Pioneer Status Incentives (PSI) shall have its application for a pioneer incentive expeditiously processed through the assistance of the Secretariat, working closely with the Nigerian Investment Promotion Commission (NIPC). In the same vein, the Federal Ministry of Finance shall simplify

[49] NSA, s19(3).
[50] *Ibid*, s19(2).
[51] This is covered under Part IV (sections 13-18) of the Act.
[52] *Ibid*, s13k2).
[53] *Ibid*, s13(1), s15.
[54] *Ibid*, s14.
[55] *Ibid*, s15(3).
[56] *Ibid* s.16
[57] *Ibid*, s17.
[58] *Ibid* s.18

and expedite the application process for any existing incentive that inure to startups.[59] A startup may be permitted to not pay income tax for its first period of 3 years and an additional two years, and the commencement date for the tax relief shall be from the date of issuance of the startup label.[60] Where a startup undertakes research and development, the startup may be entitled to a total deduction of the amount expended, provided the research expenditure was wholly incurred within Nigeria.[61] The incentives extend to foreign companies that transact with Nigerian startup companies. Accordingly, where a foreign company offers technical, consulting, professional or managerial services to labelled startups, the foreign company shall enjoy a 5% Withholding Tax (WHT)on income made by such foreign companies from Nigeria. Where a startup trains its employees (in-house training), such startup companies shall not be required to contribute to the Industrial Training Fund.[62] Startups involved in exporting products and services covered by the Export (Incentives and Miscellaneous Provisions) Act[63]are entitled to incentives and support from the Export Development Fund, Export Expansion Grant, and the Export Adjustment Scheme Fund.[64]The Secretariat shall ensure that startups have access to any grants, loans, and support facilities availed by the Central Bank of Nigeria, Bank of Industry, and similar bodies.[65] Section 28 empowers the Secretariat to establish the Startups Credit Guarantee Scheme (CGS) to function for developing and growing startups in Nigeria. The CGS shall aim towards providing accessible financial support to a labelled startup, creating a framework for credit guarantee for labelled startups, providing economic and credit guarantee information to startups, providing a financial capacity-building programme for startups, etc. The Act also provides that through the Ministry of Finance and other MDAs, the Federal Government of Nigeria shall develop and implement a policy framework allowing investors in labelled Startup to enjoy tax credits and reliefs for their investments up to 30%.[66] Furthermore, no capital gain tax is chargeable if investors seek to dispose of acquired assets through profits from their investments.[67]

3.5. **Collaboration**

The NSA makes ample provision for collaboration between startups and regulators (the Council, the Secretariat, and the Fund). This fosters cooperation among government institutions and avoids one institution frustrating startups' activities. Hence, it provides for collaborations between the Secretariat and the Central Bank of Nigeria(CBN), the Corporate Affairs Commission (CAC), the Security and Exchange Commission (SEC), and various MDAs.[68]

3.6. **Promotion of Innovation**

Intellectual property is a startup's most valuable asset. To promote innovation, the NSA guarantees the protection of startups' intellectual property within and outside Nigeria via registration, internationalisation, and commercialisation.[69] The protections include speedy and seamless registration of startup trademarks, patent rights, and other intellectual property rights.

[59] *Ibid*, s.25(1).
[60] *Ibid*, s.25(2).
[61] *Ibid*, s.25(3).
[62] *Ibid* s.25((4). See Industrial Training FundCap. 19 Laws of the Federation of. Nigeria, 2004
[63] Export (Incentives and Miscellaneous Provisions) Amendment 1992 No. 65 A 589.
[64] NSA s.26
[65] *Ibid*, s.27.
[66] *Ibid* s.29
[67] *Ibid*, s.29
[68] See ss 30-36 of the Act.
[69] See NSA s.31

On average, it takes 18 months or more to register trademarks and patents in Nigeria, but the NSA, though non-specific, guarantees fast registration to enhance intellectual property protection. Regarding funding, the NSA permits startups to raise funds through crowdfunding and commodities investment platforms duly licensed by the SEC.[70] Part VIII provides for startup accelerators and incubator support programmes by the Secretariat, provided that an incubator is registered with the Secretariat. The incubators and accelerators nurse and hatch startups to birth new startup companies in the ecosystem. They assist young innovators in bringing their intentions to fruition. Registered incubators and accelerators are provided to several supports under the Act.[71] Part IX makes provisions for startup clusters, hubs, innovation parks, and technology development zones covered.[72]

3.7 The Startup Portal

The Secretariat establishes the startup portal with the approval of the Council.[73] The startup portal makes the issuance of a licence to startups. It allows a startup to communicate with the federal government, private institutions, investors, and other related programmes. It serves as an avenue for them to access finance and other resources. It also allows them to get feedback from the public and enables them to receive information on registration, approval, incentives, schemes granted by the government, etc. The Secretariat shall appoint a Coordinator to maintain a register and records of labelled startups.[74]

3.8 The Forum

The Forum was established to share information and collaborate on issues relevant to the Nigerian startup ecosystem.[75] It provides information on a startup that qualifies to be labelled, information on incentives, and available local capabilities. It shall give the nomination of representatives to the council. The Forum comprises labelled startups, venture capitalists, angel investors, incubators, accelerators, innovation hubs, and two civil society organisations involved in innovation and technology.

3.9 Capital/Profit Reparations and Transfer of Technology

Section 37 requires that the Secretariat, in collaboration with the CBN, guarantee the repatriation of investments by foreign investors through the CBN's authorised dealer. This section ensures that foreign investors who have invested in labelled startups can easily and safely repatriate their capital at the official CBN rate. Furthermore, the Secretariat liaises with the National Office for Technology Acquisition and Promotion (NOTAP) to prioritise applications from labelled startups and ensure that the process of technology transfer and other related activities is smooth. This means that they should ensure that startups have access to a faster and more systematic method for acquiring and utilising foreign technologies, with discounted registration fees.

4. Shortcomings and Recommendations of the Nigerian Startup Act

The NSA aims to position Nigeria's startup ecosystem as Africa's leading digital technology centre, with excellent innovators with cutting-edge skills and exportable capacity. The Act provided institutional and legal frameworks for Nigerian startups to achieve this aim. However, some issues need to be addressed to improve the capacity of the Act to achieve its stated objectives. Firstly, given the domicile of the Council Secretariat in NITDA and the extensive

[70] *Ibid*, s.32.
[71] *Ibid*, s.39
[72] *Ibid*, ss.40 - 42
[73] *Ibid* s.10
[74] *Ibid* s.11
[75] *Ibid* s.12

role that NITDA has to play under the NSA, the first issue is whether there was a need to pass the NSA in the first place. Would it have been better to strengthen the role of the NITDA head and include the management of the startup ecosystem as part of NITDA's responsibilities? Domiciling the startup agency in NITDA suggests that their roles are similar. Is it possible that Nigeria has bought into the fad that passing legislation that incentivises the birth and growth of startup ecosystems will automatically spur and sustain investment in the nation's startup sector? Such perfunctory importation of a law or policy that might have worked in other countries may fail to consider the Nigerian context's peculiarities and the relatedness of the new law with existing legislation. As de Angelis observed," countries should promote startups not because they are a "nice to have" but because, if done right, startups can boost the innovation content of an economy and spur economic growth".[76] Secondly, regulations and bureaucracy are an impeding factor in the development of startups. Yet, in seeking to strengthen the regulatory environment for startups, the NSA sadly complicates it by creating a dizzying array of institutions, roles, and positions - Secretariat, Council, Forum, Agent, Coordinator, Secretary. The multiplicity makes it challenging to delineate the role of each office. The mezzanine bureaucracy that the Act created will hamper the ease of startup business in Nigeria. Therefore, these roles and positions should be streamlined for ease of business and engagement with startups. Thirdly, s.3 established the National Council for Digital Innovation and Entrepreneurship as an integral organ for realising the NSA's objectives. It includes the President and Vice President of the country and stakeholders drawn from the Nigerian startup ecosystem. Theoretically, the presence of the President and Vice President in the membership of the NCDIE will suggest that startup development has the highest priority. Still, it sounds like killing an ant with a sledgehammer, taking into account the entirety of the issues addressed by the Act. In practice, the composition will limit the Council's meeting and functioning, given the many demands on the plate of its members. Wolken noted, "many entrepreneurs—especially in countries like Nigeria where elderly politicians rule over a young populace—tech-savvy individuals tend to view the government as out-of-touch with their demands."[77] Creating a Council, which is the body that should "formulate and provide general policy guidelines for the realisation of the objectives of this Act", and filling it with the same "elderly politicians" that are out of touch with the demands of young entrepreneurs, appears counterintuitive. It is, therefore, recommended that the Council be streamlined, with the appointment of its Chairman by the President on the recommendation of the Minister for Communication and Digital Development similar to the appointment of the head of the Governing Board of NITDA.[78] This will ensure that the Council is more responsive to the dynamic demands of the startup ecosystem.

Part V provides for the establishment of the Startup Investment Seed Fund. The Fund shall receive at least10 billion Naira[79]annually, be applied to finance labelled startups, and provide relief to technology laboratories, accelerators, incubators and hubs. However, the source of the annual income needs to be specified but is left to be approved by the Council. Furthermore, the Fund shall be managed by the Nigeria Sovereign Investment Authority (NSIA). The role of the adds another layer to the complexity of the bureaucracy of the startup

[76] de Angelis, Luca. "When Too Much Is Too Little: Evaluating the Italian Startup Act." *The Journal of Private Equity*, vol. 21, no. 4, 2018, pp. 29–40

[77] Jordan Wolken, Startup Acts are the next form of policy innovation in Africa, https://www.atlanticcouncil.org/blogs/africasource/startup-acts-are-the-next-form-of-policy-innovation-in-africa/

[78] NITDA s.2(3)

[79] Approximately $23M, at N448/$. The Nigerian Fund should be compared to that recently announced by Algeria where a whopping 411m USD was allocated for the nation's startup fund

ecosystem. It is recommended that the Act be revised to specify the course of the revenue for the Fund and to domicile the Fund management within the Secretariat for easier administration. The NSIA may need to be more competent to perform the functions assigned under the Act, which includes creating an innovation grant budget and management framework to support research and development projects and issuing a framework which shall set out modalities to fund, manage, and access the Fund.[80] Furthermore, whereas the Fund shall provide finance for labelled startups[81], s. 28 empowers the Secretariat to "establish a Credit Guarantee Scheme ("the Scheme") for the development and growth of a labelled startup under this Act". The Scheme is meant to provide, among other things, accessible financial support to a labelled startup[82]. The NSA does not distinguish between the financing provided under the Fund and the Scheme. It also does not specify how the funds under the Scheme shall be raised. This, it is submitted, reinforces the need to make the Secretariat the Fund Manager for the Fund.

Part VI provides for training, capacity building, and talent development to develop the skills required by the startup ecosystem. The modalities provided therein appear hackneyed, regurgitating old formulas that have yet to work. For instance, it provides training facilitated by the Industrial Training Fund[83]. This organisation needs to be more competent in delivering the innovative ideas required by the startup ecosystem, akin to putting new wine in an old wineskin. The Secretariat shall establish centres for acquiring digital technology in Nigeria's six geopolitical zones to promote digital technology utilisation and strengthen digital technology management capability and information systems. It is recommended that emphasis should be given to the provisions of section 23, which encourages the Secretariat to create linkages with "research institution, the private sector, the Federal Government and other stakeholders in the startup ecosystem" since it may offer greater access and opportunities for training and nurturing the skills required by startups. In addition, nurturing startups is not the exclusive preserve of the Federal Government. Hence, all states within the Federation need to replicate the Act and introduce supportive measures to complement the federal government's efforts.

4. Conclusion

Startups are essential for Nigeria's growth and increased participation in the digital economy. These businesses drive innovation, promote productivity, attract investment, and stimulate entrepreneurship, which increases market competition. The Nigerian Startup Act is crucial legislation aiming to harmonise the nation's laws and government agencies' activities, ensuring a favourable startup ecosystem. The Act addresses the regulatory and financial obstacles hindering startups in the country. It is recommended that the Act be improved in line with the above recommendations. Despite the shortcomings, effective implementation of the NSA will enhance Nigeria's appeal as a destination of choice for startup investments, with the potential to transform the country's startup ecosystem.

[80] See s. 20, NSA
[81] S. 19 (3)(a)
[82] S. 28(2)(a)
[83] See s. 21(2), NSA

PROVOCATION AS A DEFENCE IN NIGERIAN LAW: A JURISPRUDENTIAL ANALYSIS*

Abstract

Provocation on its own it not a total defence as to make the accused discharged of his guilt. The defence of provocation can be best designated as a concession to human frailty, introduced by the common law to mitigate the strictness of the single penalty of death for a convict in a murder case. This paper aimed at examining the defence of provocation in Nigerian law, exploring its historical development, elements, and jurisprudential applications. The research adopted doctrinal methodology to examine the theoretical underpinnings of the defence of provocation. Through a critical analysis of case laws and statutes, this study revealed the challenges and controversies surrounding the defence, including gender and cultural biases, subjective interpretations, and the balance between justice and mercy. A comparative analysis with other jurisdictions highlights opportunities for reform and improvement. Therefore, the study recommended a swift resolution of the complexities surrounding the defence of provocation in order to contribute to the discourse on criminal law reform in Nigeria and improve our criminal law jurisprudence.

Key Words:
Provocation, Crime, Murder, Jurisprudence, Defence

1. Introduction

It is a grievous offence and a serious crime under the common law for a person to cause the death of another person and no defence will avail such person. However, it soon developed that there is a rebuttable presumption that practically speaking every common law crime requires adequate proof of guilty soul, making provision for a possible defence. The defence of provocation has enjoyed been an argumentative concern in Nigerian criminal law, generating considerations among researchers, practitioners, and legislators. Entrenched in the common law practice, provocation as a defence allows individuals who commit crimes in response to provocative conduct to mitigate their liability. Nonetheless, the application of this defence in Nigeria criminal justice system has raised concerns about its potential to propagate gender-based violence, reinforce harmful cultural norms, and undermine justice. Notwithstanding its significance, the jurisprudential foundations of the defence of provocation in Nigeria remain underexplored. This study seeks to address this gap by examining the historical development, elements, and applications of the defence in Nigerian criminal justice system. Through a critical investigation of case law, statutes, and comparative analysis, this study seeks to brighten the challenges and convolutions surrounding provocation as a defence, ultimately informing efforts to refine and improve its role in Nigerian jurisprudence.

2. Historical Development of Provocation as a Defence

The defence of provocation was first developed in English courts in the 16th and 17th centuries.[1] During that period, a conviction of murder carried a mandatory death sentence. This inspired the need for a lesser offence. At that time, not only was it acceptable, but was socially required that a man respond with controlled violence if his honour or dignity were threatened or

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[1] Provocation and Self-Defence in Intimate Partner and Sexual Advance Homicide" Briefing paper No.5/2012 NSW Parliamentary Research Service August 2012.

insulted. It was therefore considered understandable that sometimes the violence might be excessive and end in killing.[2]During the 19th century, as social norms began changing, the idea that it was desirable for dignified men to respond with violence when they were insulted or ridiculed began losing grip and was replaced with the view that while these responses may not be ideal, that they were a normal human reaction resulting from a loss of self-control, and as such, they deserve to be considered as a mitigating circumstance. During the end of 20th century and the beginning of 21st century, the defence of provocation, and the situations in which it should apply, have led to significant controversies, with many condemning the concept as an anachronism, arguing that it contradicts contemporary social norms where people are expected to control their behavior even when angry. Today, the use of provocation as a legal defence is generally controversial, because it appears to enable defendants to receive more lenient treatment because they allowed themselves to be provoked. Judging whether an individual should be held responsible for their actions depends on an assessment of their culpability. This is usually tested by reference to a reasonable person; that is, a universal standard to determine whether an ordinary person would have been provoked, and if so, would have done as the defendant did, if the predominant view of social behavior would be that, when provoked, it would be acceptable to respond verbally and if the provocation persists, to walk away, that will set the threshold for the defence. *Furor, brevis* or "heat of passion" is the term used in common law to describe the emotional state of mind following a provocation, in which acts are considered to be at least partially caused by loss of self-control, so the acts are not entirely governed by reason or expressed. It is the heat of passion which renders a man deaf to the voice of reason.

3. The Defence of Provocation and Elements

Provocation may be by words or by deeds. The modification contrary to the old common law rule that words alone could not constitute sufficient provocation that will lead to the reduction of murder to manslaughter, was seen in *Holmes v DPP*[3] where the exception "save in circumstances of a most extreme and exceptional character" was added making words of mouth in this circumstances to constitute sufficient provocation. There are variations to the meaning of provocation. Irrespective of these identified variations, provocation still includes any act or insult of such nature as likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation or in the relation of master or servant, to deprive him of the power of self-control and induce him to assault the person by whom the act or insult is done.[4] Provocation is defined by the Black's Law Dictionary[5] as the act of inciting another to do something (such as word or action) that affects person's reason and self-control, especially causing the person to commit a crime impulsively. Literally, provocation means an action or event that makes someone angry, that is, the intentional causing of annoyance or anger to another person that makes him to react violently. The foregoing is presumed when provocation is used generally, but when used in the technical sense, provocation is viewed from the legal perspective.[6] The term provocation includes assault, or any wrongful of such nature to be likely done to an ordinary person or in the presence of ordinary person to another.

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[2] Ibid.

[3] (1946) AC 588 75

[4] AA Daiby & O.O. Mbanugo – A Critical Appraisal of the Extent of Provocation, as a Defence to Criminal Liability in Nigeria.

[5] 11th ed.

[6]Abdulrazaq A: A Critical Appraisal of the Extent and Limit of the Defence of Provocation in Murder Charge in Nigeria, (2010) The Jurist, A publication of the LSS Unilorin p.59.

The Criminal Code[7] defines provocation with reference to an offence of which assault is an element. For clarity sake, and for ease of understanding, the section will be reproduced. It provides as follows:

> The term "provocation" used with reference to an offence of which assault is an element, includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in conjugal, parental, filial or fraternal relation, or in the relation of master or servant to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.
>
> When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the later stands in any such relation as aforesaid, the former is said to give the later provocation for an assault. A lawful act is not provocation to any person for an assault.
>
> An act which a person does in consequence of excitement given by another person in order to induce him to do the act, and thereby to furnish an excuse for committing an assault, is not provocation on that other person for an assault
>
> An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

Section 284[8] provides for the defence of provocation thus:

> A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation and is not intended, and is not such as is likely to cause death or grievous harm.
>
> Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered, and whether in any particular case; the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.

Also section 287[9] provides that when a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults him with such violence as to cause reasonable apprehension of death or grievous harm, and to induce him to believe, on reasonable grounds, that it is necessary for his preservation from death or grievous harm, to use force in self-defence, he is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous harm. However, the second limb of the section holds that this protection does not extend to a case in which the person using force, which causes death or grievous harm, first began the assault with intent to kill or to do grievous harm to some person; nor to a case in which the person using force which causes grievous harm endeavoured to kill or to do grievous harm to some person before the necessity arose, the person using such force declined further conflict and quitted it or retreated from it as far as was practicable.

[7] Section 283 Criminal Code.
[8] Criminal Code Cap C38 LFN 2004.
[9] Criminal Code Cap C38 LFN 2004.

Provocation as a defence to culpable homicide was provided for in the Penal Code. Culpable homicide (murder) ordinarily is punishable by death[10] but section 222[11] provides that culpable homicide is not punishable with death if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. Here the explanation is that whether the provocation was grave and sudden enough to prevent the offence from amounting to culpable homicide punishable with death is a question of fact. Culpable homicide is not punishable with death if the offender, in exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of that defence. Culpable homicide is not punishable with death if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. Here it is immaterial in such cases which party first provokes the other or commits the first assault. From the preceding submissions, it is clear that the Penal Code provided for the defence of provocation if properly pleaded to avail the defendant in matters of culpable homicide. It is worthy of note here that defence of provocation is not a complete defence, rather a partial defence that can if successfully pleaded, mitigate and reduce the severity of the offence.

Exploring different theories of provocation, including evaluative, volitional, and classical gloss theories, offers valuable insights and provides additional depth to the investigation. Evaluative theory evaluates the reasonableness of a defendant's actions in response to provocation, considering the circumstances and context of the situation. This theory goes beyond the classical gloss theory's focus on whether a reasonable person would have lost self-control, and instead assesses the defendant's actions based on a more nuanced evaluation of the provocation and defendant's response. Below are the key aspects of the theory:

i. Contextual consideration: The theory considers the specific context and circumstances surrounding the provocation and defendant's response.
ii. Reasonableness assessment: The theory evaluates whether the defendant's actions were reasonable in response to the provocation, taking into account the severity of the provocation and the defendant's response.
iii. Proportionality: This theory considers whether the defendant's actions were proportionate to the provocation, and whether the response was excessive or unjustified.
iv. Subjective and Objective elements: The theory considers both subjective factors(the defendant's personal characteristics, experiences and perception) and objective factors (the severity of the provocation and the reasonableness of the response)
v. Flexibility: The theory allows for a more flexible approach to evaluating provocation, recognizing that each case is unique and may require a nuanced assessment.[12]

This theory aims to provide a more comprehensive and fair approach to evaluating criminal responsibility, considering the complexities of human behaviour and the context in which actions occur.

[10] Section 220 Penal Code.
[11] Penal Code.
[12]Baier, K., *The Moral Point of View*. (New York: Cornell University Press, 1958)

The volitional theory of provocation is a legal theory used to determine whether a defendant's actions were provoked, and therefore potentially subject to reduced criminal liability. According to the proponents of this theory, a defendant's actions are considered provoked if they were caused by a reasonable loss of self-control in response to another person's proactive conduct. The key element is that the defendant's actions were voluntary, but their self-control was disrupted by the provocation. In other words, the defendant is held responsible for their actions, but the provocation is considered a mitigating factor that may reduce their culpability. This theory is often applied in cases of murder, manslaughter, or other violent crimes where the defendant claims to have acted in the heat of passion or under adequate provocation. The volitional theory of provocation is used to determine whether the defendant's actions were the result of a rational, voluntary decision, or if they were driven by extreme emotional disturbance or passion reducing their criminal responsibility.[13] This defence argues that the defendant's actions were a result of being provoked, and that they should not be held fully responsible for their behaviour under the circumstances. In order for the provocation defence to be successful, several key elements must be present. Firstly, there must have been a reasonable provocation. This means that the defendant must have been subjected to some form of serious, immediate threat or harm that would cause a reasonable person to lose control. Additionally, the defendant must have acted on this provocation without having time to cool off and regain their composure. It is important to note that the volitional theory of provocation is not a blanket defence that can be applied to all cases of provocation. The defence is not available if the provocation was not serious enough to warrant the defendant's actions. The success of this theory as a defence in murder trials can vary depending on the specific circumstances of the case and the jurisdiction in which the trial takes place. In some cases, the provocation defence has been successful in reducing charges from murder to manslaughter, resulting in a lesser sentence for the defendant. However, success rates can also depend on the arguments presented by the defence, the evidence available, and the opinions of judges. It is worth noting that the provocation defence is not universally accepted in all jurisdictions, and some places have stricter criteria for applying this defence. In some jurisdictions, the defence of provocation may not be available in cases where the defendant's actions were deemed to be premeditated or calculated. Overall, the success of the volitional theory of provocation in murder trials can vary from case to case, and its effectiveness will depend on the specific facts and circumstances of each individual case. Generally, the volitional theory recognizes that human emotions and reactions are complex and sometimes uncontrollable, and seeks to take this into account in the legal system when determining culpability for criminal actions.[14]

In addition, Classical Gloss Theory of provocation is a legal theory that was developed in the 19th century to explain the concept of provocation in criminal law. The proponents of this theory defined provocation as words or actions which would cause a reasonable person to lose their self-control and act rashly. This theory is also known as the "reasonable person" test, and it is still used in many common law jurisdictions today. The theory holds that a person who commits a crime in the heat of passion or under adequate provocation should be held less culpable than one who commits a premeditated crime.[15] The Classical Gloss Theory has been influential in shaping the development of provocation as a legal defence, and it remains an important part of criminal law in many countries of the world. There are certain elements that are notable with Classical Gloss Theory. These include:

[13] Frankfurt, H.G., 'Freedom of the Will and the Concept of a Person' in *Journal of Philosophy*, 68(1), 5-20.
[14] Kane, R.H., *The Significance of Free Will* (New York: Oxford University Press).
[15] R. v Morhall (1996) 1 AC 90

1. Reasonable person test: The theory uses objective test to determine whether the provocation was sufficient to cause a reasonable person to lose their self-control.
2. Loss of self-control: The theory requires that the defendant must have lost their self-control as a result of the provocation.
3. Heat of passion: The theory applies to crimes committed only in the heat of passion, which means that the defendant must have acted impulsively and without premeditation.
4. Adequate provocation: The theory requires that the provocation must be sufficient to cause a reasonable person to act rashly.

Provocation, be it in words or in action can never suffice as a justification to killing of a fellow human being. It can only reduce murder to manslaughter.[16] For an accused who pleaded provocation as a defence to succeed, there are certain ingredients which must be proved. These ingredients which must constitute his defence is referred to as elements of provocation. They constitute condition precedent that must be satisfied for the plea of provocation to avail a defendant or accused person. They include:

i. The provocation must be such as to cause a reasonable man to lose his self-control.[17]
ii. The act which causes death must be done in the heat of passion[18]caused by a sudden provocation.
iii. The provocation by one person is no excuse for killing another person who does not in fact offer any provocation to the defendant.[19]
iv. The mode of resentment must bear a reasonable proportion to the provocation offered.[20]
v. The killing must involve an assault.[21]

From the above, we can deduce that the provocation must be such as to cause a reasonable man to lose his self-control. Here it is said that for the plea or defence of provocation to avail the defendant or for it to be successful it must be such that has the capability of causing a "reasonable man" to lose his self-control. The test here is predicated on the effect which the provocation will have on a reasonable man, and not the actual effect on the accused.[22] This is not absolute because if a "reasonable person" would be proved by the word or action, whereas the accused himself was not provoked, his plea of provocation of a surety will fail. It can only avail him, if he in fact loses his-self-control in the circumstance irrespective of it being a circumstance in which a reasonable man will lose his self-control.[23] For purpose of clarity, a reasonable man in this content has been held to mean a reasonable man in the accused person's standing in life and standard of civilization. The issue of a reasonable man test has been an object of controversy, as various definitions by authors often confuse reasonable men the more.[24] The test asks whether a reasonable person with ordinary powers of observation, knowledge and

[16] A. M. Adebayo, *Casebook on Criminal Law: Text, Comments and Cases* (Lagos: Princeton & Associates Publishing Co. Ltd., 2018) p. 525.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] R. v Nwanjoku (1937) 3
[23] (n 21) 526.
[24] Adesola, MA, Provocation; a Ruck in the Texture of Justice, (1996) *The Jurist*, Publication of LSS Unilorin 56

understanding, would have acted in the same way as the defendant in similar circumstances. This is geared towards the determination of whether defendant's action was those of an ordinary, prudent and reasonable person. This test has been applied in Nigeria in various cases including provocation among others. The Supreme Court in the case of *R. v Udofia*[25], held that the reasonable man test is a relevant consideration in determining whether a defendant's actions were justified by provocation. In Nigeria, courts take into consideration the cultural status of the defendant. The relevance of this cannot be overemphasized, because an act committed by the deceased against an illiterate and primitive peasant may amount to legal provocation, while it may not do so if committed against "an educated and civilized person". Peculiarities of the defendant are not taken into consideration in the determination of plea of provocation. In *Bedder v DPP*,[26] the defendant charged with murder of a prostitute who jeered at him and kicked him for inability to have sex with her owing to his impotency, pleaded provocation and argued that the proper test was what would be the reaction of an impotent reasonable man in the circumstance. The House of Lords upheld a direction that the proper test was the effect which the conduct of the prostitute will have on an ordinary person and not on a sexually impotent person.[27] The writers strongly contends that the position held by the House of Lords undermines the psychological content of the defendant which also contributes to his reasonableness.

Another element of provocation to be considered is that the act which causes death must be done in the heat of passion caused by sudden provocation.[28] This element emphasizes on the fact that for defence of provocation to avail the defendant, the very act that caused the death of the deceased must be done in the heat of passion caused by sudden provocation. It must be done before there is time for passion to cool. Where enough time has elapsed for passion to cool between the provocative act and the killing, a plea of provocation will fail.[29] Premeditation therefore is the dividing line between provocation and murder. In *R. v Green*,[30] the defendant's plea of provocation was rejected by the West African Court of Appeal because between the provocation and the killing, enough time elapsed for his passion to cool. The facts of the case were that the prisoner's wife having left him went to stay with her mother where she began to accept the advances of A. The prisoner tried hard to win back his wife but failed. At about 9:00 pm, he visited his mother in-law and found his wife and A having sexual intercourse. He returned to his own house to brood over his misfortune. At about 1:00 am, he took a machete and returned to his mother-in-law's house to kill A if he was still there. He found his mother-in-law snoring and heard his wife and A talking in the dark room. He struck twice on the bed and killed his wife. The mother-in-law was also killed by him, when she ran into the room. The defence of provocation failed to avail him because the period of waiting (about four hours) destroyed the excuse of sudden provocation and heat of passion, because the defendant in the opinion of the court had enough time for reflection and for his passion to cool. As said earlier, premeditation is the dividing line between provocation and murder. The fact that he had enough time for his passion to cool destroyed and distressed the provocation plea. The same applied in the case of *Chinedu Osuji v State*[31]. Here it was held that the defence of provocation cannot be available to a defendant who was the aggressor. In this case evidence showed that the fight they had was separated, allowing a moment of calm and reflection, but he premeditatedly and

[25] (1963)1 SCNLR 416
[26] (1954) 1 WRLR 1119
[27] (n 21) 528.
[28] Usman Kaza v State (2008) LLJR-SC
[29] (n 21) 530
[30] (1955) 15 WACA 73. Also Uwagboe v State (2008) NWLR (pt. 1102) 621 SC
[31] (2016) NGCA 113.

callously picked up arms, pursued his armless victim, who had left the arena of fight and inflicted injuries on him that led to his death. The plea of provocation here failed.

In addition, the provocation by one person is no excuse for killing another person who does not in fact offer any provocation to the defendant.[32] In *R v Ebok*[33], it was held that even if the defendant lost his self-control as a result of the provocation offered by his ex-wife, he was nevertheless guilty of murder because the second woman did not offer him any provocation whatsoever. The fact of this case is that the defendant went to farm and met four women, one of whom was his ex-wife who had since married another man. He demanded the cloth she was wearing and she was untying it at the insistence of the other women. He stabbed her several times and killed her. He overtook one of the other three women as they were running away and killed her. In spite of the foregoing however, provocation offered by a group of persons acting in concert may be successfully pleaded where the person so provoked kills a member of the group.[34] Mode of resentment must bear a reasonable proportion to the provocation offered,[35] is another element necessary to prove provocation as a defence.[36] This means that the retaliation to a perceived provocation should be reasonably commensurate with the provocation offered and not more. In considering the question of proportion, the courts take into accounts the nature of the instrument with which the homicide was effected.[37] In *R. v Akpakpan*[38], a woman brought her daughter's dead body home and when her husband remonstrated with her against such conduct, she used filthy and offensive language to him and he stabbed her five times with a heavy dagger. It was held that the degree and method of violence used by him precluded the court from bringing a verdict of manslaughter. In *Harrison Owhorukpe v. COP*[39]when the defence of provocation is raised, the question is whether the appellant was in fact provoked to lose his self-control. If yes, the next question is whether the provocation was enough to make a reasonable man do as the defendant did. In this case, stabbing the deceased to death. There is no doubt that the act of the deceased in snatching the appellant's bottle of drink and breaking it, then proceeding to threaten the appellant with the broken bottle is enough to provoke a reasonable man to lose his self-control. The threat to the appellant's life ended when the appellant overpowered the deceased and took the broken bottle from him. A reasonable man would have given the deceased a couple of slaps and thrown away the broken bottle. Stabbing the deceased with the broken bottle was clearly disproportionate to the provocation. The stabbing of the deceased was not as a result of temporary loss of control, rather for the sole purpose of causing grievous harm. In such a situation, it is immaterial that the appellant did not intend to hurt the deceased. The killing was intentional and the defence of provocation would not avail the appellant. Another very important element is that the killing must have involved an assault. This is an essential requirement going by the community reading and application of sections 318 and 283 of the Criminal Code. The emphasis is on section 283 which makes reference to an offence which an assault is an element. Recall that the definition of assault in the code includes a battery and this then goes to say that every killing predicated on provocation must involve an assault.

[32] R. v Afonja (1955) 15 WACA 26, State v Enabosi (1966) NMLR 241
[33] (1950)19 NLR, 84, Also Amaka v State (1995)6 LKR 1241 (SC)
[34]This is shown in *R. v Ekpo*(1938) 4 WACA 110
[35]Eze v State (2018) LPELR 43715 (SC)
[36]Ihuebek v The State (2006) 5 SCNR 186 (vol.2) and Shande v The State (2005) 22 NSCQR 756
[37] R. v Nwanjoku (supra)
[38] (1956) 1 FSC 1
[39] (2015) LLJR -SC

4. Jurisprudential Analysis of Provocation

A defendant who has been brought or summoned before the court with regards to murder or manslaughter can plead provocation as cause of his/her action, and the court will hear him/her. The case of *R. V Nwanjoku*[40], which is the *locus classicus* of provocation has been influential in shaping the law on provocation in Nigeria and other common law jurisdictions. It was the bedrock on which provocation cases over the years have been decided. Here the court held that "Provocation, to be sufficient to reduce murder to manslaughter, must be such as would naturally provoke a reasonable person to lose self-control." What this decision heralds are that for provocation to avail a defendant, it must be severe enough to cause a reasonable person to lose control and act impulsively. Following this decision, the courts in Nigeria have over the years decided on many cases on provocation. In *Uluebeka v State*[41], it was held that provocation must be grave and sudden and must be such as to take away the defendant's self-control and that the act of killing must have been done in the heat of passion before there was time for passion to cool and that the retaliation must be proportionate to the provocation offered. That if the accused was actually provoked, he would have attacked the deceased and his own wife in the heat of the passion, that instead he attacked his wife at home and allowed the deceased to go to the farm before he went there to attack him. It was therefore held that the defence of provocation did not avail the accused. Again in *Ahmed v State,*[42] the plea of provocation and self defence availed the appellant and the trial court's verdict of murder was reduced to manslaughter. In *Akalezi v State*[43], the appellant was convicted of murder and sentenced to death. He appealed to the court of Appeal, and it was dismissed. Dissatisfied, he appealed to the Supreme Court, arguing that the trial court and Appeal Court erred in not considering provocation as a mitigating factor. The Supreme Court held; that provocation must be sufficient to make a reasonable person lose self-control. The appellant's act of killing the deceased with a machete after the deceased had slapped him was not justified. The trial and Appeal Courts correctly evaluated the evidence and dismissed the defence of provocation and so upheld the conviction and sentence. In similar vein, the Supreme Court in *Yusuf v State*[44], held that the appellant failed to prove that the provocation was sufficient to reduce his culpability from murder to manslaughter. Here the court said that provocation must be sufficient to make a reasonable person lose self-control, and as such the appellant's act of killing the deceased with a knife after a verbal altercation, was not justified by provocation. The court reaffirmed that provocation is a matter of facts (evidence) and not a matter of law.

The case of *Nwede v State*[45] sets a precedence in criminal law jurisprudence emphasizing that provocation must be supported by credible evidence. The Supreme Court held that the appellant's confessional statements did not raise a sufficient defence of provocation, and that the appellant's claim of provocation was not supported by evidence as he was not seen at the scene of the initial quarrel. It also held that the appellant's use of a machete with a longer reach than the pen-knife allegedly used by the deceased, is not commensurate and therefore dismissed the appeal on total absence of evidence amounting to provocation for the murder of the deceased, and upheld his conviction and sentence. In *Shalla v State*[46] where the deceased was alleged to have made offensive remarks on Prophet Mohammed (SWT), the court held that the plea of

[40] (1937)3 WACA 208
[41] (2000) 7 NWLR (pt.665)401
[42] (1999)7 NWLR (pt.612) 641
[43] (1993) 2 SCNJ 19
[44] (1998) 4 NWLR (pt.86) 96
[45] (1985) 3 NWLR (pt. 13)444
[46] (2007) LLJR SC

provocation was not available to the appellant as there were no evidence amounting to provocation. Same was also the decision of the court on *Usman Kaza v State*.[47] The court in *Chinedu Osuji v State*[48] in dismissing the case of the appellant, held that the defence of provocation cannot be available to an accused person who was the aggressor. Evidence adduced before the court showed that the fight they had was separated, allowing a moment of calm and reflection, but he premeditatedly and callously picked up arm, pursued his armless victim, who had left the arena of fight, and inflicted injuries on him that led to his death. The court's decision in *Eyo v State*[49] was not different. Eyo was convicted of murder and sentenced to death by the trial court. He appealed to the Court of Appeal arguing that the trial court erred in not considering provocation as a mitigating factor. Here the court held that the trial court correctly evaluated the evidence and dismissed the defence of provocation, and that the appellant's claim of provocation was not supported by evidence, as he was the aggressor in the fight. The court therefore upheld the conviction and sentence.

In addition to judicial precedents, there are many academic works that have addressed expansively the issue of provocation in Nigeria and beyond from different points of view. Motunrayo Oloyide in "The Dimensions of the Plea of Provocation in Criminal Trials; The Nigerian Experience,"[50] believe that the Nigerian position on the defence of provocation requires immediate attention when compared to other jurisdictions. In her argument, she posited that the doctrine of provocation has actually caused many problems for law students, judges and legal practitioners. She alluded that the doctrine is complex and difficult to understand, making it challenging for law students to grasp and apply. Also the ambiguity of the terms "provocation" and "reasonable man" are subjective and open to interpretation, leading to confusion and inconsistent application. She is of the view that the application of the doctrine is inconsistent. Oloyide on his own part found that there exist sentencing disparities. The doctrine can lead to inconsistent sentencing and judgment, as judges may weigh provocation differently, resulting in varying punishments for similar crimes. He also posited that court decisions on provocation have been inconsistent, creating uncertainty and difficulties for legal practitioners. This surely according to Oloyide has made the application of the plea of provocation grossly ineffective. Joshua Dressler, a proponent of the partial excuse theory of provocation defence, argues in favour of the defence of provocation that it is most relevant in the cases of murder irrespective of the pockets of inconsistencies.[51] In his 2002 paper "Why keep the Provocation Defence: Some Reflections on a Difficult Subject"[52] argued strongly on the need to keep the provocation defence, despite acknowledging the difficulties surrounding the defence. He rather preferred its reformation to abolishment. Friedman, L M.,[53] argues that the doctrine of provocation was developed to mitigate the severity of punishment for crimes committed in the heat of passion. He took cognizance of the fact that heat of passion can impair the reasoning and self-control of a person and proposed that the doctrine should be sustained to different intentional unlawful killing from unintended unlawful killings. Furthermore, Mackay, R D.[54] in his work, argues that

[47] (2008) LLJR-SC
[48] (2016) NGCA 113
[49] (2010) All FWLR (pt.533) 1913 CA
[50] The Dimensions of the Plea of Provocation in Criminal Trials; The Nigerian Experience <https://www.sabilaw.org.>; Accessed September 12, 2024.
[51] *Ibid*.
[52]<https://Onlinelibary.wiley .com >; Accessed September 12, 2024.
[53] Provocation and mitigating circumstances: A study of the origins and development of the Doctrine of Provocation. Journal of Criminal Law, Criminology and Police Science (1968)59(2) 155-164.
[54] 'The Defence of Provocation: A Critique" *Criminal Law Review*, 1995, 446-455

the defence of provocation is flawed and should be abolished, as it perpetuates gender bias and reinforces harmful stereotypes, but Hoder, J.[55] contends that the defence of provocation is based on the idea that the defendant was provoked into committing the crime, and therefore, their responsibility is diminished. Adejumo,O.[56] in his work, argues that the defence of provocation in Nigerian Criminal Law is flawed and needs to be reformed to address gender bias and ensure justice for victims of domestic violence. Ogundele J.O.,[57] critically appraised the defence of provocation in Nigerian criminal law, arguing that it should be reformed to ensure justice and accountability. He however argued that the defence is often used as a justification for violent crimes, particularly against women and marginalized groups. He also contended that the current legal framework and judicial interpretation of provocation are flawed and perpetuate harmful gender stereotypes. Ikejiani-Clark, M.A.[58]similarly argues that the defence of provocation in Nigeria perpetuates gender stereotypes and should be reformed from a feminist perspective to protecting women's right.

5. Challenges and Controversies

It is a well settled law that the defence of provocation is not a complete defence but a tenable plea which if successfully pleaded, can only have the effect of reducing the punishment which is that of murder, punishable with death, to manslaughter punishable with life imprisonment. This implies that not all provocation that will reduce the charge of murder to manslaughter. The court of Appeal in *Umar v Kano State*[59],held that the defence of provocation when successfully proved in a homicide case, would act to mitigate or reduce a capital punishment being the maximum penalty for the offence of homicide, to life imprisonment. In *Essien v State*[60] where the facts of the case were that on the 10th of September, a quarrel ensued between the appellant and the deceased, which led to a fight. In the course of the fight, both parties picked up separate knives, the deceased picking up a knife first. In the process, the appellant stabbed the deceased, one Edidion Blessing with a knife thereby killing him. The appellant made a confessional statement which he later retracted. The appellant was arraigned before the trial court on a one-count charge of murder contrary to the provisions of Section 319 of the Criminal Code Laws of Ondo State.[61] At the trial, the appellant pleaded not guilty to the charge. The prosecution called three witnesses and tendered five exhibits while the appellant testified on his own behalf. The trial court convicted the appellant for manslaughter and sentenced him to a term of ten (10) years imprisonment. Dissatisfied, he appealed to the court of Appeal. The Court of appeal dismissed the appeal unanimously. The judgment of the trial court was accordingly affirmed. The inability of the appellant to prove provocation resulted in the dismissal of the appeal and the subsequent affirmation of his conviction and sentence. For the plea of provocation to be successful and avail the defendant, he must adduce substantial evidence that will satisfactorily satisfy the requirements of the legal elements of provocation and as well convince the court that he was actually provoked by the deceased, and in the heat of passion making him to react out of loss of self-control, within a time frame that was too short for passion to cool, and that the retaliation

[55] Provocation and Responsibility, (1992) *Oxford Journal of Legal Studies*. 12(2), 215-237.
[56] "The Defence of Provocation in Nigerian Criminal Law; a Critical Analysis". *Journal of Law and Policy*, 1(1), 53-64
[57]Ogundele J.O, "Provocation and Criminal Liability in Nigeria: A Critical Appraisal." in *Nigerian Journal of Criminal Law and Criminology, 10(1), 53-64, 2020.*
[58]Ikejiani-Clark, M.A., "Rethinking the Defence of Provocation in Nigeria: *Feminist Legal Studies* (2017) 25(2). 147-164
[59] (2022) JELR 109148 (CA)
[60] (2021) LPELR-55181 (CA)
[61]Cap 37. Vol. 1

was proportionate to the provocation offered. This was affirmed by the Supreme Court in *Rafiu v People of Lagos State*[62] where it was held that for provocation to constitute a defence in a murder case, it must consist of three elements which must coexist, namely:

1) the act of provocation must be done in the heat of passion,
2) the loss of self-control, must be both actual and reasonable, and the act was done before there was time for passion to cool down,
3) the retaliation is appropriate to the provocation. Once these requirements are met, the court will avail the defendant and mitigate his sentence.

Again the Supreme Court in *State v Da'u*[63], held that a successful plea of provocation is not exculpatory; it is a mitigating factor that whittles down punishment for culpable homicide punishable with death to that of culpable homicide not punishable with death. The Court of Appeal followed suit in *Umar v Kano State*,[64] where it held that the defence of provocation does not exculpate an offender from criminal liability, rather it minimizes or reduces the sentence. Where a defendant charged with homicide successfully raises a defence of provocation, that defence does not exculpate him of punishment but it merely reduces culpability to manslaughter which carries a term of imprisonment unlike homicide which is punishable by death. Provocation as a recognized defence when successfully pleaded, has the effect of whittling down the punishment stipulated in the law for the offence committed.[65] This goes to show that defence of provocation, is not a complete or absolute defence even when successfully established, neither does it completely exculpate the defendant from criminal liability. It can only mitigate the punishment, as no amount of provocation can serve as a justification to unlawful killing.[66] This is the position for now, of a successful plea of provocation. It can only mitigate the sentence as a partial defence as against the successful plea of self-defence which absolves the defendant of criminal liability. The defence of provocation has faced various criticisms and challenges. The following challenges bedevil the successful establishment of the defence of provocation. The defence of provocation has been criticized for being gender-biased, as it is often used by men to justify violence against women. It may also be influenced by cultural, societal and religious norms and beliefs that perpetuate harmful stereotypes and justify violence and aggression, gender stereotype and victim blaming that may reinforce "jealous husband" or "possessive partner syndrome".[67] The scope of application of this defence is limited thereby precluding its availability to other heinous crimes. As it is today, the defence only applies to specific crimes, like murder or manslaughter and not to other violent offences. In delivering judgments, courts have applied the defence inconsistently, leading to unequal justice and potentially perpetuating systematic biases. Sentencing disparities depending on the judge and jurisdiction as well as the circumstances of the case can also pose a challenge even if the defence of provocation has been successfully established. Judges have significant discretion when applying the defence of provocation and can lead to inconsistent decisions. The 'reasonable man" test used to determine provocation is subjective and can be influenced by personal biases, leading to inconsistent applications. The defence also focuses on the provocation rather than addressing underlying

[62] (2021) LPELR-58368 (SC)
[63] (2021) LCN/5156 (SC)
[64] (2022) LPELR-56958 (CA)
[65]Onyia v State (2008) LLJR
[66] Section 318 Criminal Code Act Cap C38 LFN 2004, Musa v State (2009) ALL FWLR (pt.492) 1020 SC.
[67] American Psychiatric Associatin (2013). Diagnostic and Statistical Manual on Mental Health 5thedn. Arlington, VA American Psychiatric Publishing.

issues like mental health, trauma, or systematic injustices, for there to be justice, equity and fairness. Again, the law on provocation is not clearly defined. Disparity in its definition and mode of application by different courts leaves the defence mostly at the judge's discretion. These and other challenges like lack of or insufficient evidence on the part of the defendant to prove his case, public opinion influence, potential for abuse, thereby turning the defence as a pretext for violence or aggression, balancing justice with mercy, forms the bedrock for a legal reform.

6. Comparative Analysis

The defence of provocation is allowed in many jurisdictions of the world. Most of the jurisdictions, share semblance, but for a few with slight differences. In Nigeria, the defence of provocation can be pleaded in homicide cases, hurt, or assault. This we know stands not as a total defence in the case of homicide but can only mitigate or reduce the punishment for the offence of homicide but can absolve a defendant in the case of assault or hurt.

In United Kingdom Justice System, the defence of provocation is only available to defendants charged with murder, though has been faced with a lot of criticism for being discriminatory towards women and in favour of men.[68] In Australia, provocation acts as a partial defence to murder where a defendant successfully argues that they were provoked to use lethal violence. While several Australian States have taken steps towards reforming provocation to limit its applicability, or in the case of Victoria, Tasmania and Western Australia, to abolish provocation altogether. This is because of criticisms that the defence has been used by men who have killed their partners and has been a topic of controversy.[69] Advocates of abolition of this defence argue that intentional or reckless killing should always be considered murder, regardless of what provoked it. They believe no one should be able to excuse their actions by citing the actions or words of the victim. Supporters of the defence on the other hand believe it should be maintained to acknowledge that people have weakness and react differently to various forms of provocation.[70] However, in most jurisdictions, the application of the defence of provocation is quite limited and in some states it has been abolished altogether. In most jurisdictions in Australia, if a defendant charged with murder is found to have acted under provocation, they will not receive a full acquittal but will instead be found guilty of the less serious charge of manslaughter. The partial defence exists in recognition that a person who commits a fatal act when acting in response to provocation while their powers of self-control are compromised, does not have the same level of culpability as a person who forms the intent to kill under other circumstances. In Queensland and Western Australia, provocation can be relied on as full defence to an assault charge. This means that if a defendant charged with assault successfully relies on the defence of provocation, they will receive a full acquittal, whereas it is partial defence to murder charge.[71] It is a partial defence in murder charge in New South Wales,[72]and in Northern Territory. In South Australia, it was abolished in 2020 and in Victoria in 2005[73] citing that it is often misused by men who killed their female partners in circumstances of infidelity or where the victim was seeking to end the relationship. Traditionally in France, provocation operated as a complete defence in cases where a man killed his wife after finding

[68] The Law of Provocation <https://lawteacher.net.>; Accessed September 12, 2024.
[69] "Legal loophole protecting violent men; why the defence of provocation needs to change<https://theconversation.com>"; Accessed September 13, 2024.
[70]<https://www.armstronglegal.com>; Accessed September 13, 2024.
[71] Sections 268 & 269 Queensland Criminal Code Act 1899.
[72] Sec. 23(1) of Crimes Act 1900
[73] The Crimes (Homicide) Act 2005(Vic)

her in the act of adultery.[74]In the United States, the partial defence of provocation provides that a person who kills in the heat of passion brought on by legally adequate provocation, is guilty of manslaughter rather than murder. It exists in almost every state and other common law jurisdictions. Comparatively, while Nigeria allows provocation as a defence for assault and murder, the United Kingdom and Ireland only allows it as a defence for murder. It is a partial defence for murder in the United States Legal System, whereas in France it operated as a complete defence but today has been abolished.

7. Recommendations and Conclusion

The various identified challenges of the defence of provocation in the Nigerian Criminal Justice System, shall form the basis for the recommendation as a way forward to the effectiveness of the defence of provocation. Firstly, there should be a reform on the legislative framework. Laws on the defence of provocation in Nigeria are obsolete and need to be reviewed thereby enacting laws to accommodate the contemporary issues that are directly affecting the effectiveness of the plea of provocation. This should take into consideration the limited scope of the defence presently, to broaden its horizon to reflecting gender neutrality for a more liberalized approach. Laws allowing expert testimonies and witnesses from psychologists and sociologists who are professionals in human behaviour, if enacted will enhance justice delivery in this area of our jurisprudence. Secondly, community engagement and cultural sensitization coupled with public awareness geared towards the reduction of violent crime should be encouraged. This will promote a more nuanced understanding of the defence of provocation that will not be in vacuum but considering the complexities of human behaviour and traits. Again, the reasonable man's test which is hitherto subjective should be replaced with objectivity that will not only do justice but make it to be seen to have been done. A more objective rather than subjective test that looks into the circumstances of the case and the defendant's individual characteristics, should be incorporated as factors to consider in determination of provocation cases. Also, judicial education and review or provision of sentencing guidelines on defence of provocation will not only guide the courts in justice delivery, but will update them with world best practices with a view to delivering more consistent and informed decisions that will reduce disparities in sentencing. Furthermore, forensic analysis of human behaviour should be a vital part of our legal system. The gamut of the issue of provocation centres on human psychology which is influenced by so many variables like trauma, psychosis, etc. In conclusion therefore, this jurisprudential analysis of provocation in the Nigeria Criminal Justice System has revealed the complexities and challenges surrounding this defence. Through a critical analysis of the legal frame work, case law, and sociological context, it is clear that the plea of provocation is often employed as a strategic defence tactic, particularly in cases involving violent crimes. While the plea of provocation can be a legitimate defence in certain circumstances, its application in Nigeria's criminal justice system raises concerns about gender bias, cultural stereotyping, and the perpetuation of harmful gender norms. To address these issues, it is essential to reform the legal framework and judicial practices surrounding the defence of provocation. This may involve adopting a more nuanced understanding of provocation that takes into account the complexities of human behaviour, gender dynamics, and cultural context.

[74] Domestic Violence and the Gendered Law of Self Defense,<https://link.springer.com>; Accessed September 13, 2024.

LEGAL AND REGULATORY FRAMEWORK FOR ARTIFICIAL INTELLIGENCE (AI) IN CUSTOMARY LAW IN NIGERIA*

Abstract
Artificial Intelligence (AI) has come to stay in Nigeria. The absence of a dedicated legal framework for Artificial Intelligence (AI) in customary law creates a regulatory gap that could lead to inconsistencies in the application of Artificial Intelligence (AI) technologies in these culturally sensitive areas. The general legal framework for Artificial Intelligence (AI) in Nigeria is primarily guided by broader legislation on technology and data protection. The National Information Technology Development Agency (NITDA) Act 2007, for instance, outlines the framework for information technology development in Nigeria, but it does not specifically address Artificial Intelligence (AI). Similarly, the Nigeria Data Protection Regulation (NDPR) 2019 provides guidelines on data privacy, but it falls short of addressing the unique challenges posed by Artificial Intelligence (AI), especially in the context of customary law. In this article, the writer shall look at the definitions of basic concepts like legal and regulatory framework, Artificial Intelligence (AI) and customary law. The need for robust regulatory environment was examined. Proposals for legal reform was equally examined as well as future trends in legal governance of Artificial Intelligence (AI) in Nigeria

Key words:
Legal, regulatory framework, Artificial Intelligence (Ai), Customary Law

1. Introduction

In Nigeria, the legal framework governing the application of AI, particularly in customary law contexts, is still in its infancy. The country's legal system is characterized by a dual structure, combining statutory law with customary law, which varies significantly across different ethnic groups. Customary law is recognized under the Constitution of the Federal Republic of Nigeria 1999 (as amended), which provides for the application of both statutory and customary laws in matters concerning personal status, such as marriage, inheritance, and land tenure.[1] However, there is currently no specific legislation that addresses the use of AI in the administration or interpretation of customary law. In this article, the writer makes a case for the need for robust regulatory environment for Artificial Intelligence (AI) in Nigeria in the area of customary law as well as proposals for legal reform for its proper footing in Nigeria. The future trend in legal governance of AI in Nigeria in the area of customary law was properly examined.

2. Meaning and Concept of Legal and Regulatory Framework for AI in Customary Law in Nigeria

The Legal and Regulatory Framework for AI in Customary Law in Nigeria refers to the establishment of laws, regulations, and guidelines that govern the application of Artificial Intelligence (AI) systems in the administration of customary law. Customary law is rooted in the cultural and traditional practices of various ethnic communities in Nigeria, and AI presents both an opportunity and a challenge in ensuring that these laws are applied fairly, transparently, and consistently. A regulatory framework would address the following:

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[1] Sections 18, 277-280 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

1. Data Governance: How Artificial Intelligence (AI) systems acquire and process data related to customary law. This includes managing privacy concerns, ensuring data accuracy, and protecting sensitive cultural information.

2. Bias and Fairness: Artificial Intelligence (AI) algorithms must be trained to apply customary law without introducing or perpetuating bias, particularly where customary law conflicts with constitutional rights.

3. Accountability: Clear rules on who is responsible when Artificial Intelligence (AI) systems fail to apply customary law correctly.

4. Transparency: Ensuring that decisions made by Artificial Intelligence (AI) are explainable and understandable to the communities affected by these decisions.

This framework is necessary to integrate Artificial Intelligence (AI) into the legal system, ensure that it respects the diversity of Nigerian customs, and align it with national and international human rights standards. In *Oyewumi v Ogunesan*,[2] the dispute involved inheritance under Yoruba customary law, where a female child was denied inheritance rights. This case highlights the need for Artificial Intelligence (AI) systems to navigate between customary laws and constitutional rights. A framework would mandate that Artificial Intelligence (AI) systems be programmed to respect gender equality, ensuring that customary practices are not enforced when they violate the constitution. In this case, a legal framework would help ensure that Artificial Intelligence (AI) systems applying customary law are in compliance with Section 42 of the Nigerian Constitution, which prohibits gender-based discrimination. In *Lewis v Bankole*,[3] the case established the need for courts to interpret customary law in line with public policy. A framework is necessary to guide Artificial Intelligence (AI) in determining when customary practices are contrary to public policy or natural justice. A regulatory framework would require that Artificial Intelligence (AI) systems consistently apply public policy standards in cases involving customary law. Also in *Anekwe & Anor v Nweke*,[4] the case dealt with the disinheritance of a widow under Igbo customary law, which was found to be discriminatory. This case highlights the importance of having a framework that ensures Artificial Intelligence (AI) systems uphold human rights and the Nigerian Constitution when applying customary law. Artificial Intelligence (AI) systems must be programmed within a regulatory framework to avoid enforcing discriminatory customary practices, adhering to constitutional mandates such as Section 42.[5] In *Agbai v Okogbue*,[6] the case involved a challenge to the exclusion of female children from land inheritance under Igbo customary law. A framework for AI would ensure that decisions respect both customary traditions and constitutional equality rights. Customary law must be interpreted through the lens of constitutional rights, and the regulatory framework would ensure Artificial Intelligence (AI) systems reflect this balance. In *Duru v Nwosu*,[7] the case raised questions about the legitimacy of certain customs that were seen as outdated. A legal framework would allow Artificial Intelligence (AI) systems to identify and avoid applying outdated customary practices, ensuring that they are aligned with contemporary human rights standards. Outdated customs should not be enforced, and Artificial Intelligence (AI) systems need a legal framework to navigate these nuances. Constitution of the Federal Republic of

[2] (1990) 3 NWLR (Pt 137) 182
[3] (1908) 1 NLR 81
[4] (2014) LPELR-22697(SC)
[5] Constitution of the Federal Republic of Nigeria 1999 (as amended)
[6] (1991) 7 NWLR (Pt 204) 391
[7] (1989) 4 NWLR (Pt 113) 24

Nigeria, 1999 (as amended)[8] prohibits discrimination on the grounds of gender, ethnicity, and religion. This constitutional provision guides Artificial Intelligence (AI) systems in ensuring that discriminatory customary laws are not enforced. Artificial Intelligence (AI) systems applying customary law must ensure compliance with Section 42, avoiding the perpetuation of discriminatory practices. Section 17[9] allows courts to take judicial notice of customary law, provided that it is consistent with public policy and natural justice. A regulatory framework would ensure that Artificial Intelligence (AI) systems applying customary law are aligned with public policy and principles of natural justice as outlined in the Evidence Act. The proposed bill of Artificial Intelligence and Robotics Bill is aimed at regulating Artificial Intelligence (AI) applications in Nigeria, addressing issues such as bias, transparency, and accountability in Artificial Intelligence (AI) decision-making systems. The proposed bill, when enacted, will provide the overarching legal framework for regulating Artificial Intelligence (AI) , including its application in customary law.

3. Concept and Meaning of Artificial Intelligence (AI)

Artificial Intelligence (AI) refers to the simulation of human intelligence in machines that are designed to think and act like humans. These systems can perform tasks that typically require human intelligence, such as learning, reasoning, problem-solving, perception, and language understanding. AI operates through algorithms and can be categorized into various types, including narrow AI[10] and general AI.[11] In ***State v Loomis,***[12] Eric Loomis was sentenced based on a risk assessment score generated by an AI-based algorithm, COMPAS.[13] Loomis argued that the use of the AI algorithm violated his due process rights, as he could not assess the accuracy or reliability of the algorithm due to its proprietary nature. The Wisconsin Supreme Court upheld the use of the AI algorithm, stating that while it can be used, it should not be the sole determinant of a sentence. This case highlights the potential risks and challenges associated with the use of AI in judicial decision-making. Section 2(1)**[14]** mandates that any processing of personal data must be lawful, fair, and transparent. This provision is crucial in the context of AI, as the processing of data by AI systems must adhere to these principles to protect individual rights and prevent misuse. Article 22[15] provides individuals the right not to be subject to a decision based solely on automated processing, including profiling, which significantly affects them. This statutory provision is critical in AI, as it ensures that humans have a say in decisions that impact their lives, rather than being entirely subject to AI-driven outcomes.

4. Meaning and Concept of Customary Law

Customary law refers to traditional norms, practices, and rules that have been accepted by a community as binding, and govern the personal and communal relationships of the people. In Nigeria, customary law typically applies to matters of family, property, and inheritance. It is often unwritten and recognized by courts as long as it does not conflict with statutory law or principles of natural justice, equity, and good conscience. Customary law refers to the rules, practices, and customs that are traditionally observed and adhered to by a particular community

[8] Section 42
[9] Evidence Act, 2011
[10] Designed for specific tasks like facial recognition or speech translation.
[11] This can theoretically perform any intellectual task a human can do.
[12] 881 N.W.2d 749 (Wis. 2016).
[13] Correctional Offender Management Profiling for Alternative Sanctions.
[14]Nigeria Data Protection Regulation (NDPR) 2019, National Information Technology Development Agency (NITDA).
[15]European Union General Data Protection Regulation (GDPR) 2016.

or group. Customary law derives its authority from long-standing practices that are generally accepted by the community and followed over time. The nature of customary law in Nigeria is pluralistic, with variations in application depending on ethnic, religious, and regional communities. It operates alongside statutory law, with courts determining its applicability based on established norms and practices. Section 18(1) of the Evidence Act 2011 recognizes the existence of customary law as one of the laws applicable in Nigeria, alongside English law and statutory law. It also provides that customary law must be proved in court unless it is so well established as to be judicially noticed.[16] In *Oyewunmi v Ogunesan,*[17] the parties disputed the ownership of land in Ijebu-Ode, which was governed by the customary law of the community. The appellant claimed to have inherited the land under the traditional inheritance system. However, the respondent argued that they acquired the land under different circumstances. The Supreme Court held that customary law would apply since the land was located in a community that recognized the inheritance system governed by their customs. The court recognized the customary law on inheritance and ruled in favor of the appellant. This case illustrates the court's willingness to uphold customary law on land ownership, provided it does not conflict with statutory law. Similarly the case of *Adeseye v Taiwo,*[18] involved a dispute over marriage under Yoruba customary law. The appellant claimed that a valid marriage had occurred under Yoruba customs, but the respondent denied its validity. The court had to examine the elements of customary law marriage, including the performance of traditional rites. The Federal Supreme Court held that the marriage was valid under the recognized Yoruba customary law, since all traditional ceremonies were duly performed. This case demonstrates the importance of customary law in personal matters such as marriage, where statutory law might not provide specific guidance. In *Kimdey v Military Governor of Gongola State,*[19] the court addressed the issue of whether customary law could be applied in the recognition of chieftaincy titles. The appellants contended that they were denied their traditional title under the customary law of their community. The Supreme Court emphasized that customary law is valid and applicable, provided that it does not violate statutory provisions. The court recognized the customary law governing the appointment of chiefs and ruled in favor of the appellants. This case showcases how customary law governs cultural aspects like chieftaincy, where statutory law is silent or leaves discretion to local customs. It should be noted that customary law serves as an essential component of the Nigerian legal system, particularly in areas where statutory law does not fully cover the norms or practices of indigenous communities. Courts often recognize and enforce customary law as long as it is consistent with statutory law and does not breach the principles of fairness or public policy.

5. Need for a robust Regulatory Environment for Artificial Intelligence (AI) in the area of Customary Law in Nigeria

A robust regulatory environment is essential to ensure that the use of Artificial Intelligence (AI) in customary law respects cultural norms, promotes fairness, and upholds human rights. Without clear regulations, there is a risk that AI systems could perpetuate biases, undermine cultural values, or infringe on individuals' rights to privacy and fair treatment. A strong legal framework would provide guidelines for the ethical development and deployment of Artificial Intelligence (AI) in customary law, ensuring that these technologies are used in a way that enhances, rather than detracts from, the integrity of Nigeria's legal system. The regulation of Artificial

[16] See Section 18(1) of the Evidence Act 2011.
[17] (1990) 3 NWLR (Pt 137) 182.
[18](1956) 1 FSC 84.
[19](1988) 2 NWLR (Pt 77) 445.

Intelligence (AI) in customary law should also address the potential for conflicts between statutory and customary laws, particularly in cases where Artificial Intelligence (AI) is used to adjudicate disputes or make decisions that affect individuals' rights under customary law. For example, in *Oyewunmi v Ogunesan,*[20] the Supreme Court of Nigeria emphasized the need to consider local customs when interpreting laws related to land inheritance, illustrating the delicate balance between statutory and customary law.[21] A robust regulatory framework would help to maintain this balance by providing clear guidelines on how AI should navigate the complexities of Nigeria's dual legal system.

Current Legal Gaps

The current legal gaps can be understood through the following lenses:

Absence of specific regulations on Artificial Intelligence (AI) in Customary Law contexts

One of the most significant legal gaps in Nigeria's current framework is the absence of specific regulations addressing the use of Artificial Intelligence (AI) in customary law contexts. While there are general regulations on data protection and technology, such as the NDPR[22] and NITDA[23] Act, these do not provide the necessary guidelines for the application of Artificial Intelligence (AI) in areas governed by customary law. This gap leaves room for potential misuse of Artificial Intelligence (AI) technologies, which could lead to outcomes that are inconsistent with cultural norms or even violate the rights of individuals under customary law. The case of *Kharie Zaidan v Fatima Khalil Mohssen*[24] illustrates the potential conflicts that can arise when statutory and customary laws intersect, particularly in areas such as family law. In this case, the court had to navigate the complexities of applying both Sharia law and statutory law in a custody dispute, highlighting the challenges that could be exacerbated by the introduction of Artificial Intelligence (AI) without clear regulatory guidelines. The absence of specific Artificial Intelligence (AI) regulations could lead to similar conflicts, where Artificial Intelligence (AI) systems may not fully account for the nuances of customary law, resulting in decisions that are legally problematic or culturally insensitive.

Challenges posed by the dual legal system in Nigeria

Nigeria's dual legal system, which allows for the coexistence of statutory and customary laws, poses unique challenges for the regulation of Artificial Intelligence (AI). Customary law, being unwritten and highly variable across different ethnic groups, presents difficulties in codification and standardization, making it challenging to integrate into Artificial Intelligence (AI) systems. The dual system also raises questions about jurisdiction and the appropriate application of Artificial Intelligence (AI) in legal matters that involve both statutory and customary law. For instance, in *Aiyeola v Pedro,*[25] the court had to determine the validity of a marriage under Yoruba customary law, which differed significantly from statutory requirements. This case underscores the complexity of applying Artificial Intelligence (AI) in a legal system where different sets of laws may apply depending on the context. Without clear guidelines, Artificial Intelligence (AI) systems might struggle to accurately interpret and apply the relevant legal principles, leading to potential conflicts or inconsistencies in legal outcomes. The dual legal system also complicates the development of a unified regulatory framework for AI, as any such

[20] *Oyewunmi v. Ogunesan* (1990) 3 NWLR (Pt 137) 182.
[21] *Supra*.
[22] Nigeria Data Protection Regulation (NDPR) 2019.
[23] National Information Technology Development Agency (NITDA) Act 2007.
[24] (1973) LPELR-SC.71/1972.
[25] 91969) 1 All NLR 289.

framework would need to account for the diversity of customary laws and their interaction with statutory provisions. This complexity highlights the need for a comprehensive approach to AI regulation that takes into account the specific challenges posed by Nigeria's legal pluralism.

The inadequacy of existing Data Protection and Privacy Laws

Existing data protection and privacy laws in Nigeria, such as the NDPR, are inadequate to address the specific challenges posed by Artificial Intelligence (AI), particularly in the context of customary law. The NDPR provides general guidelines on data privacy, focusing primarily on the protection of personal data in digital transactions. However, it does not sufficiently address the ethical and cultural considerations that arise when Artificial Intelligence (AI) systems are used to process or interpret sensitive information related to customary law. For example, in cases involving customary practices around marriage or inheritance, Artificial Intelligence (AI) systems may need to process data that is deeply personal and culturally specific. The lack of clear regulations on how this data should be handled raises concerns about privacy, data security, and the potential for misuse of information. The inadequacy of current laws is evident in the case of *Abubakar v Yar'adua*,[26] where the Supreme Court had to consider both statutory and customary principles in a dispute over the election of the President, illustrating the complexities involved in balancing different legal frameworks. To address these challenges, there is a need for more comprehensive data protection laws that specifically consider the implications of Artificial Intelligence (AI) in customary law contexts. These laws should provide clear guidelines on data collection, storage, and processing, with a focus on protecting individuals' rights and ensuring that Artificial Intelligence (AI) systems are used ethically and responsibly.

Legal and Regulatory Framework for Artificial Intelligence (AI) in Customary Law

Need for legislation addressing Artificial Intelligence (AI) in Customary Law

Given the unique challenges posed by the intersection of Artificial Intelligence (AI) and customary law, there is an urgent need for specific legislation that addresses the application of Artificial Intelligence (AI) in this context. Such legislation should provide clear guidelines on how Artificial Intelligence (AI) systems can be developed and implemented in ways that respect cultural norms and uphold the principles of customary law. This would involve the codification of customary practices in a form that can be integrated into Artificial Intelligence (AI) systems while ensuring that these technologies do not undermine the integrity of customary law. In *Okonkwo v Okagbue*,[27] the Nigerian Supreme Court highlighted the importance of customary law in the context of family relations and inheritance, emphasizing that customary practices must be considered when applying statutory law. This case underscores the need for legislation that ensures Artificial Intelligence (AI) systems are equipped to handle the complexities of customary law in a manner that respects cultural practices and legal traditions. The proposed legislation should also address issues of transparency and accountability in Artificial Intelligence (AI) systems, ensuring that the decision-making processes of Artificial Intelligence (AI) are understandable and that there is recourse for individuals who may be adversely affected by Artificial Intelligence (AI) decisions. Such legislation could draw on international best practices while tailoring provisions to the specific cultural and legal context of Nigeria.

Possible amendments to existing Laws to accommodate Artificial Intelligence (AI)

[26] (2008) 19 NWLR (Pt 1120) 1.
[27](1994) 9 NWLR (Pt. 368) 301.

In addition to enacting new legislation, it is essential to consider amendments to existing laws to accommodate the integration of Artificial Intelligence (AI) in customary law contexts. Amendments could be made to the NITDA Act 2007 and the NDPR 2019 to include specific provisions on Artificial Intelligence (AI), particularly concerning its application in areas governed by customary law. These amendments would ensure that Artificial Intelligence (AI) systems are developed with cultural sensitivity in mind and that they operate within a clear legal framework. For example, the case of *Olomoda v Mustapha*[28] highlights the interplay between statutory and customary laws, particularly in matters of land ownership, where the court had to consider customary principles in determining the rightful owner. This case illustrates the need for existing laws to be amended to better accommodate the nuances of customary law in Artificial Intelligence (AI) applications, ensuring that Artificial Intelligence (AI) systems are capable of interpreting and applying both statutory and customary laws appropriately. Amendments to existing data protection laws could also be necessary to ensure that Artificial Intelligence (AI) systems respect individuals' privacy and data rights, particularly in cases involving sensitive cultural information. These amendments would help to create a legal environment where Artificial Intelligence (AI) can be used effectively and ethically in customary law contexts.

Role of Customary Courts in Artificial Intelligence (AI) Regulation

Customary courts play a crucial role in the administration of justice in areas governed by customary law, and they should be actively involved in the regulation of Artificial Intelligence (AI) . These courts are best positioned to provide insights into the cultural and legal norms that should guide the development and deployment of Artificial Intelligence (AI) systems in customary law contexts. By involving customary courts in the regulatory process, Nigeria can ensure that Artificial Intelligence (AI) systems are aligned with the values and principles of customary law. In *Eshugbayi Eleko v Government of Nigeria*,[29] the Privy Council recognized the authority of customary courts in adjudicating matters related to customary law, emphasizing the importance of respecting local legal traditions. This case underscores the need for customary courts to have a say in the regulation of Artificial Intelligence (AI), ensuring that these technologies are developed in a way that is consistent with customary practices. Customary courts could also play a role in resolving disputes arising from the use of Artificial Intelligence (AI) in customary law contexts, providing a forum where individuals can challenge Artificial Intelligence (AI) decisions that may conflict with customary law or cultural norms. This would help to ensure that Artificial Intelligence (AI) systems are not only legally compliant but also culturally sensitive and responsive to the needs of the communities they serve.

Prospects for a Comprehensive Legal Framework

Steps towards harmonizing AI Regulation with Customary Law Practices

To create a comprehensive legal framework that harmonizes Artificial Intelligence (AI) regulation with customary law practices, it is necessary to take a multi-faceted approach. This would involve codifying key aspects of customary law in a way that can be integrated into Artificial Intelligence (AI) systems while ensuring that the dynamic and evolving nature of customary law is respected. Additionally, collaboration between statutory legal authorities and customary courts will be essential to develop a unified approach to Artificial Intelligence (AI) regulation. A key step in this process would be the establishment of a regulatory body tasked with overseeing the integration of Artificial Intelligence (AI) into the legal system, with a

[28] (2010) 2 NWLR (Pt 1179) 433.
[29] [1931] AC 662.

particular focus on customary law. This body could work alongside existing institutions, such as the NITDA and the judiciary, to develop guidelines and standards for the ethical use of AI in customary law contexts. In *Oyewunmi v Ogunesan,*[30] the Supreme Court emphasized the need to consider customary law in the interpretation of legal issues, highlighting the importance of harmonizing statutory and customary legal principles. By taking a similar approach to Artificial Intelligence (AI) regulation, Nigeria can ensure that its legal framework supports the effective and ethical use of Artificial Intelligence (AI) in areas governed by customary law.

Potential for International collaboration on Artificial Intelligence (AI) Regulation

International collaboration could play a significant role in the development of a legal framework for Artificial Intelligence (AI) in Nigeria, particularly in the context of customary law. By engaging with other countries and international organizations, Nigeria can learn from global best practices in AI regulation and adapt these practices to its unique legal and cultural context. For example, the European Union's General Data Protection Regulation (GDPR) has set a high standard for data protection and privacy, which could serve as a model for Nigeria in terms of regulating Artificial Intelligence (AI's) impact on data privacy in customary law contexts. Collaborating with international bodies, such as the International Association for Artificial Intelligence and Law, could also provide valuable insights into the ethical and legal challenges posed by AI, helping Nigeria to develop a robust and culturally sensitive regulatory framework. International collaboration could also facilitate the exchange of knowledge and expertise, enabling Nigeria to build capacity in AI regulation and ensure that its legal framework is in line with global standards while remaining responsive to local cultural and legal norms.

Future trends in Legal governance of Artificial Intelligence (AI) in Nigeria

As Artificial Intelligence (AI) continues to evolve, the legal governance of these technologies in Nigeria is likely to become increasingly complex. Future trends may include the development of more sophisticated AI systems capable of handling the intricacies of customary law, as well as the emergence of new legal and ethical challenges related to Artificial Intelligence (AI's) impact on society. To stay ahead of these trends, Nigeria will need to continuously update its legal framework to reflect the latest developments in AI technology and ensure that these advancements are used in a way that respects cultural values and legal traditions. This could involve regular reviews of AI - related legislation, the establishment of advisory bodies to monitor Artificial Intelligence (AI's) impact on customary law, and the development of training programs for legal professionals to equip them with the skills needed to navigate the intersection of AI and customary law. In the case of *Abubakar v Yar'adua,*[31] the court's decision highlighted the need for a legal framework that can adapt to new challenges and technologies. As AI continues to advance, the Nigerian legal system will need to remain flexible and responsive to ensure that AI is used ethically and effectively in all areas of law, including customary law.

Conclusion

AI has come to stay Nigeria in the area of customary law. Though, it has not taken deep root in its existence in Nigeria, the wind of change is so enormous that all hands must be on deck to ensure its reception into the Nigerian legal system, including its application in customary law contexts. All stakeholders in the Nigerian legal system must ensure that the legal and regulatory framework of AI application to customary laws are developed in such a way as to preserve the cultural heritage of our customary laws and traditional systems.

[30] (1990) 3 NWLR (Pt 137) 182.
[31] *Supra*.

IDENTITY APPROACH IN WOMEN AND MINORITY RIGHTS: THE ECONOMIC IMPLICATION*

Abstract

The identity approach focuses on the definition of male and female and whether these are natural, biological, or psychological or social, also whether discrimination against transgender persons discrimination is because of sex. The approach also addresses masculinity and what attention it demands from women and the interrelationship of a person's multiple identities in other words whether characteristics such as race, ethnicity, age, disability, or sexual orientation interact with gender in ways that make discrimination more difficult to recognize than when only one characteristic is at issue. Thus, the approach focused on who speaks for women's interest, and to what extent claims on behalf of a group marginalize some of its members and differences among women. It focused on the special cases of transgender and intersex, masculinities, the primacy of gender, the challenges in implementation of the identity approach and the solution to these challenges. These culminated to the aim of this article which was to examine identity approach in women and minority rights with its economic implications. The research methodology was doctrinal approach, using expository and analytical research design. The main sources of data collection were various legal literatures, both from the physical library and the e-library. It was found that despite some reforms, barriers to women's economic empowerment remain. Thus, while recognizing that the nature of legal reform is very specific to an individual country context, examples of best practices from different states could serve as a useful roadmap for states looking to enhance women's economic empowerment through law reform. It was recommended that the government should develop a policy that should be treated based on one's individual capacity and not putting different characteristics in issue and that legal reform to remove barriers to women's economic empowerment can be used as a very powerful instrument to promote women's economic participation and help countries achieve higher growth and a range of other macroeconomic benefits.

Key Words: *Approach, Economic, Identity, Implication, Minority, Rights, Women*

1. Introduction

The topic examines a series of issues relating to identity and gender. The first such as race, ethnicity, ago, disability or sexual orientation interact with gender in ways that make discrimination more difficult to recognize than when only one it? What implications does the interaction of these characteristics have for law and policy? A second issue addresses fundamental issues involving the definition of male and female. Are these natural, biological (or essential) categories? Psychological? Social? Should a transgender female be able to marry a male? A female? Is discrimination against transgender person's discrimination "because of sex"? This topic also address masculine most of the theories in focused on the interests of women, but gender also constrains opportunities for men. What is masculinity and what attention does it demand from women? Finally, who speaks for "women's interest"? To what extent do claims

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on behalf of a group marginalize some of its members? Do feminists presuppose as the background norm a white, middle-class, heterosexual woman? When western feminists criticize cultural practices of other nations or religions that contribute to sexual inequality, are they being arrogant or even imperialist? Other theories tend to take for granted various identity assumptions-what a woman is, what sex is and what it means that a law or practice (or is not) in women's interests. The identity issues challenges some of these assumptions. In an important sense, much of the material in this topic could be viewed as an application of insights of theories about gender to those theories themselves. These analyses are in other words, a form of self-critique. Do they go too far? Far enough? In this paper, we will be looking at differences among women, what is a woman? The special cases of transgender and intersex, masculinities, the primacy of gender, the challenges in implementation of the identity approach and the solution to these challenges.

2. The Concept of Identity Approach in Women and Minority Rights

2.1 Differences among Women

The term “women" is used freely throughout the theories. To what extent do differences among women complicate the use of this term? This section examines two problems related to diversity among women. First the combination of a person's gender and other characteristics such as race, class or ethnicity may mask the existence of discrimination based on any single characteristic or the way those characteristics work together to create a different discriminatory dynamic second speaking of the women as if they were all the same tends to essentialize women, or reduce them to a set of common denominations - usually white, middle-class, heterosexual and able bodied. Both of these problems are cases of unrecognized discrimination-the former unrecognized by employers or courts, and the latter unrecognized by those, including feminists, seeking reform of the laws. As you consider each of these problems, consider whether or how they can be avoided. From a legal perspective, should each disadvantaging characteristics and every combination thereof be a separate category of analysis? From a political perspective to what extent does acknowledging differences between women. Undercut group- based arguments on their behalf?

2.2 What is a Woman? The Special Cases of Transgender and Intersex

Throughout the theories, male and female are assumed (for the most part) to be clear easily ascertainable categories. This section examines the challenges that transgender individuals and people with an intersex condition make to this assumption and to the law generally. The section includes two cases that take diametrically opposed positions on the law and policy implications of transgender. The San Francisco Human Rights Commission defines “Transgender” as an umbrella term that includes male and female cross-dressers, transvestites, female and male impersonators, preoperative and post-operative transsexual and transsexuals who choose not to have genital reconstruction and all persons whose perceived gender and anatomic sex may conflict with gender expression, such as masculine-appearing women and feminine- appearing men. All other terms cross-dresser, transvestite, transsexual are subsets of the umbrella term transgender. The term “intersex" is used to describe “anyone with a congenital condition whose sex chromosomes, gonads, or internal or external sexual anatomy do not fit clearly into the binary male/female normally. Transgender individuals and people with an intersex condition challenges designation is permanent most legal cases involves transgender arise with respect to marital status and employment rights.

2.3 Masculinities

The emphasis on these theories is on women but there is little doubt that understanding of masculinity are important, in their own right as well as because of their impact on women's interest. The questions are what is its relationship to femininity? Do the theories explored understate the distinctive burdens faced by men in a gendered society? Masculinities work can be used to understand more clearly how male privilege and dominance are constructed. It can make us see harms suffered by boys and men that we have largely ignored. It may also reinforce and strengthen the commitment to anti-essentialism in feminist theory. Exposing the complexities and multiplicity of masculinities leads towards understanding intersection and multiple forms of discrimination more clearly. Masculinities analysis may also remind us to be attentive to different patterns of inequality and to our interpretation of those patterns where one sex is sole or dominance should be something that triggers scrutiny. This should matter both when the dominant sex benefits or is harmed. We should question not only why one sex fills or dominates the pattern, but also the gendered meaning of both who is present and who is absent. When one sex is dominant, sometimes gender issues are rendered invisible. Examples of this are male predominance in the juvenile and adult criminal justice systems and women's predominance in the welfare system. Invisibility is fostered gendered - neutral language that covers the predominance of gender patterns but also by the acceptance of the pattern as usual, normal, and taken for granted. On the other hand, where both sexes are present, one or both may claim bias. We tend to frame competing claims of bias as requiring prioritization or hierarchy rather than seeing how they interconnect. We tend to argue over who has the more important issues to address or the most pressing "crisis". Resisting this "either/or" approach of a hierarchy of inequalities is critical for example, in education there are inequality issues for girls and boys, women and men. Rather than exclusively focusing on the issues of one sex to the exclusion of the other, as if only one can claim our focus or deserve our attention, we should see and insist on addressing both. Inequalities often interlock .A battle of the sexes, moreover, may only divert attention from more serious issues of race and class. Examining subordination in isolation undermines our understanding and our attack upon the interacting dynamic, even if gender-specific problem solving is needed. Raising issues about men when so many issues about women remain generates resistance and distrust. Masculinities analysis needs to continually challenge itself to challenge the hegemony of men and male power. The project of imagining positive, affirming, egalitarian masculinities is ongoing, but it is absolute essential. The following are the reasons of highlighting masculinities:

1. Men are not universal or undifferentiated.
2. Men pay a price for privilege
3. Intersections of manhood, particularly with race, class and sexual orientation are critical to the interplay of privilege and disadvantage to hierarchies among men, and factors that may entirely trump male gender privilege.
4. Masculinity is a social construction and not a biological given
5. Hegemonic masculinity norm dominates multiple masculinities
6. The patriarchal dividend is the benefit that all men have from the dominance of men in the overall gender order
7. The two most common piece defining masculinity are, at all costs, to not be like a woman and not be gay.
8. Masculinity is as much about relation to other men as it is about relation to women.
9. Men, although powerful, feel powerless
10. Masculinities study exposes how structures and cultures are gendered male

11. The spaces and places that men and women daily inhabit and work within are remarkably different
12. The role of men in achieving feminist goals is uncertain and unclear
13. The asymmetry of masculinities scholarship and feminist theory reflects the differences in the general position of men and women

2.4 The Primacy of Gender

The questions are: Do the theoretical approaches examined in these theories unreasonably elevate women's interests above those of their subordinate groups? Are feminists too quick to judge the practices of other culture on the basis of their own cultural assumption? In *Bah v Mukasey*[1] Petitioner Salimatou Bah, a native and citizen of Guinea entered the United States without valid travel documents in June 2003, and in January 2005 was placed in removal proceedings by service of a Notice to Appear (NTA), she applied for asylum, withholding of removal' and relief under the CAT, alleging, inter alia, that as a young girl, she suffered the barbarous act of female genital mutilation and the event still has direct consequences on her adult life. In a statement accompanying her application, Salimatou explained that she belongs to the Fulani ethic group, which strongly support the practice of genital mutilation as the best way to prevent the Fulani girls from having premarital sex and to force the Fulani girls to keep their virginity until the marriage. She claimed that at the age of eleven, her mother and aunt took her to a small area fenced with wood and stuffed with coconut leave, she was taken into a tent where five old ladies :with knives and other tools undressed her and had her lie on the ground, Salimatou scared and shaking, tried to escape, but the women restrained her she was then down by two of the women while two others opened her legs so that a fifth could make a deep cut on her private part without any anaesthetic or sanitary precaution. Salimatou screamed throughout the mutilation, and experience pain all over her body. She began bleeding heavily and feeling dizzy to the point where she was unable to stand on her won. After she was given traditional medicines, she convalesced for weeks during which time she was treated traditionally with dried leaves and some other local portions. Salimatou further stated that she later had problems with her menstrual period as well as complications during the deliveries of her children. She also stated that she can barely feel any pleasure during sexual intercourse with her husband. She sought asylum in order to live free from that barbarous act still in practice in Guinea. Pursuant to 8 united States Congress 1231 (b) (3) (A), an alien may not be removed to a country if the aliens life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group or political opinion. Evidence before the court showed that Guinean and for Fulani women are routinely subjected to various forms of persecution and harm beyond genital mutilation and as such the court granted the petitioner asylum since it is clear that her live or freedom will be threatened.

3. The Challenges in the implementation of the Identity Approach

(a) Difficulty in Treating Transgender and Intersex Cases There is a great deal of difficulty in treating transgender and intersex cases in implementation of the identity Approach. There is always a problem on how to deal with transgender and intersex cases in respect of how to place them.

(b) Regarding Women as if they were all the Same This is one of the challenges in implementation of the identity approach. Taking women to be the same in respect of dealing with them creates challenges than men and will not augur well when they are regarded as weaker sex.

[1] 529 F.3d.99 (2d cir. 2008).

(c) Putting different characteristics in place makes discrimination more difficult to recognize Identity Approach involves interrelationship of a person's multiple identities. Identity Approach involves different characteristics such as race, ethnicity, age, disability or sex orientation which interact with gender in ways that make discrimination more difficult to recognize that when only one characteristic is at issue.

(d) Identity Approach Amplify the Experience of Inequality The implementation of the identity approach involves different characteristics which have the probability of amplifying the experience of inequality than when only one characteristic is at issue.

4. Legal Response to Identity Approach of Gender and Sex

It is worth noting that the human rights of women and other minority identity groups have been recognised and guaranteed in all international human rights instruments that Nigeria has ratified and domesticated through its constitution and the Violence Against Persons (Prohibition) Act. These instruments include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and other international and regional conventions and covenants relating to the rights of women. The central theme in these legal documents is the prohibition of discrimination against women based on their gender and the penalties stipulated for acts of violence against women. The African Charter on Human Rights (Ratification and Enforcement Act) which is a nationally domesticated legislation, embodies articulations of African unity, equality, dignity and democratic rule as it is envisioned across the African continent. The African Charter in Article 61, calls for drawing inspiration from African practices compliant with human rights in the interpretation of equality, dignity and democratic rule. In Nigeria, it is important that this administration recognises that the Nigerian state and its political and democratic culture are yet to arrive at their full potential in terms of protecting, promoting and fulfilling the rights of women and minority groups. We are at the point, again, in Nigeria's history where the average Nigerian is either on the run or desperate to acquire enough means to be on the run. We are at the point, again, in Nigeria's history where we still record high rates of state and non-state party-enabled violence such as the 561 persons recorded to have violated the 2022 Human Rights Report published by The Initiative for Human Rights and other Nigerian-based human rights organisations. Nigeria, for instance, still at the point in Nigeria's history where political, faith and cultural leaders exploit their offices to recruit bullies among their loyalists and flocks to perpetuate violence against women and minority groups both online and in person. It is crucial that the current administration recognises that competent leadership does not only reside in able-bodied men but also across a vast range of several other bodies and identities of Nigerians that reside, dream and work hard both at home and abroad. It is crucial that this cognisance guides the selection and appointment of leaders of this administration towards a balanced nuanced representation as well as the social, political, historical and cultural references and groundings on which their policies and implementations are based. Unfortunately, Nigeria has performed poorly in representing women and minority identity groups in both elected and appointed cabinet positions, despite being blessed with competent women and minority identity groups who possess the leadership qualities required to effectively govern the various organs of the country. It was only a few months ago that Nigerian women lobbied for several bills among which was to assign 35 per cent of legislative seats to women and reserve 35 per cent of political party leadership positions for women. However, both the Senate and the House of Representatives rejected these bills. With the advent of a new government in Nigeria, there is

hope that elected officials, from the presidency to the various states, will strive for a balanced approach in subsequent appointments and ensure non-discrimination but rather the inclusion of women in key positions of government. By actively including women in key decision-making positions, elected officials would be taking a stand to actualise equality for women's rights. This stance would send a powerful message of inclusivity and recognition of women's valuable contributions to the development of Nigeria. Women's perspectives and expertise are vital in crafting policies and programs that address the diverse needs of the nation. Furthermore, appointing capable women to positions of authority would serve as a positive example and inspire other women to actively participate in the political sphere. This would foster a culture of gender equality and empower women to contribute their skills, ideas, and talents towards the progress of Nigeria. As Nigeria embarks on this new chapter of governance under the new dispensation, there is an earnest hope that the country's leaders will prioritize and champion the inclusive appointments of women, aiming for a 50/50 representation in the cabinet. Such a commitment would demonstrate a dedication to fostering a fair and representative government that harnesses the immense potential of all Nigerian citizens to strengthen the democratic polity and promote a just and inclusive society. By application, political appointments made by the new government of Nigeria are commendable. However, it is crucial to emphasize the urgent need for the inclusion of women in subsequent appointments at both the national and state levels. Nigeria has a wealth of competent women who are capable of effectively leading the country. By embracing gender equality in political appointments, Nigeria can send a powerful message of inclusivity and recognition of women's valuable contributions. This would not only inspire other women to actively participate in politics but also foster a fair and representative government that harnesses the potential of all its citizens, ultimately promoting a just and inclusive society.

5. The Role of IMF in addressing the Economic Implication of Identity Approach in Women and Minority Rights Law

The Fund's mandate is focused on macroeconomic and financial stability. In turn, narrowing gender gaps and promoting women's economic empowerment can have significant implications for countries' macroeconomic and financial performance. These gender-related outcomes, therefore, are directly relevant to the Fund's exercise of its core functions. A growing body of literature including analytical work by IMF staff has shown that improving women's access to opportunities and to decision-making roles can raise economic growth, lower inequality and enhance macroeconomic and financial stability. From this perspective, the IMF assists its members in addressing gender issues through its three key functions: surveillance, financial assistance, and capacity development. The IMF has already made efforts to integrate and operationalize gender-related issues more systematically in its work program and has also recently encouraged its members to implement legal reforms to close gender gaps and reduce gender inequality.[2] The following summarizes the ways in which IMF's operations can assist its members in connection with tackling legal impediments to women's economic empowerment.

5.1 Surveillance

Under Article IV(1)(i) of the IMF's Articles of Agreement, each member country shall "endeavor to direct its economic and financial policies toward the objective of fostering orderly **economic growth** with reasonable **price stability**" and "seek to promote stability by fostering orderly underlying economic and financial conditions." When conducting bilateral surveillance,

[2] For instance, the IMF has recently made recommendations on gender-responsive policies and budgeting to help mitigate the impacts of the Covid-19 crisis. IMF, UNDP, UN Women (2021).

the IMF focuses mainly on those economic policies of members that can significantly influence present or prospective balance of payments and domestic stability. Exchange rate, monetary, fiscal, and financial sector policies of the member are always subject to bilateral surveillance, including where related to gender (e.g., fiscal or financial sector policies focused on addressing gender gaps). Other economic policies, including those related to women's economic empowerment, are to be examined if they significantly influence a country's present or prospective balance of payments or domestic stability.[3]Gender issues fall under this purview, for example, when they are relevant for achieving and maintaining members' economic growth and stability.[4] Policies, including on gender, that fall outside the scope of bilateral surveillance may still be discussed in the context of bilateral surveillance with the consent of the member concerned. Accordingly, the IMF has for the last few years integrated gender analysis in surveillance in a number of countries, for example, by providing advice related to the potential growth impact of increasing women's participation in the economy.[5] For instance, in the 2019 Article IV Consultation for Japan, IMF staff found that women were underrepresented in managerial and policy-making positions and that the gender wage gap was large, both across all Japanese prefectures and also relative to other OECD countries.[6] At the same time, a funding gap for public social security, particularly pensions, was projected, affecting pension sustainability and intergenerational equity. Thus, the policy advice was tailored to help address these concerns. In particular, the IMF recommended that social security and tax reforms be removed to disincentive to full-time and regular work, such as the spousal tax deduction.

5.2 Financial Assistance to Members

In accordance with Article 1(v) of the Articles of Agreement, the IMF makes its general resources temporarily available to member countries to help them address their balance of payment problems under adequate safeguards to Fund resources. In addition to providing this financing to its members under its General Resources Account (GRA), the Fund has also established the Poverty Reduction and Growth Trust (PRGT) under the authority of Article V, Section 2(b)of the Articles of Agreement to support low-income members through concessional financing. Fund financing in the GRA and the PRGT is normally approved through Fund arrangements to support members' economic adjustment programs. Under the Fund's legal framework, program conditionality is included in those arrangements where measures that are within the country's direct or indirect control are considered of critical importance for achieving the goals of the member's program or for monitoring implementation of the program.[7] Specific policies to address gender gaps and women's economic empowerment can thus be included in the conditionality under a member's Fund-supported program where these requirements are met. As with all conditionality, the particular measures included as conditions must also be tailored to the member's specific needs and particular circumstances. For example, this was done in the 2019 IMF-supported program for Pakistan, where conditions were included to enhance the financial inclusion of women and narrow the educational gender gap. This Fund-supported program included a condition requiring the authorities to launch the "one woman one account" initiative to ensure financial and digital inclusion of around 6 million women by end-October

[3] Decision on Bilateral and Multilateral Surveillance, IMF Decision No. 15203-(12/72), July 18, 2012; took effect on January 18, 2013.
[4] IMF (2015a), at para. 75; IMF (2018), at para. 10.
[5] IMF (2018), para. 3.
[6] IMF, Japan: 2019 Article IV Consultation – Press Release; Staff Report; and Statement by the Executive Director for Japan, at p. 51.
[7] Guidelines on Conditionality (IMF), Decision No. 12864-(02/102), September 25, 2002, as amended.

2019. Further, the Fund-supported program also included a condition requiring the authorities to boost girls' educational enrollment by augmenting a social program with "a girl bonus" of 250 Pakistani rupee to be regularly provided on a quarterly basis by end-December 2019.[8]These measures were implemented by the time IMF staff conducted a first review of the program's progress in December 2019.[9] Annex IV to this paper provides more examples of countries in which the IMF has assisted member countries in addressing gender issues through program design and conditionality.

5.3 Capacity Development

Article V, Section 2(b) of the Articles of Agreement authorizes the IMF to provide technical services, upon request, as long as these services are consistent with the Fund's purposes. In light of this provision, the Fund engages in capacity development (which encompasses both technical assistance and training), by providing expertise to member countries to help strengthen institutional capacity to design and implement effective macroeconomic, financial, and structural policies. In this context, the IMF has provided capacity development to members aimed at improving gender outcomes.

6. Recommendations and Conclusion

The government should develop a policy that should be treated based on one's individual capacity and not putting different characteristics in issue. Also, special procedures should be adopted in treating special cases like transgender and intersex. Legal reform to remove barriers to women's economic empowerment can be used as a very powerful instrument to promote women's economic participation and help countries achieve higher growth and a range of other macroeconomic benefits.[10] In addition, legal reforms should be adopted that incentivize overall women's economic participation, even after legal impediments have already been removed via law reform. Legal reforms can entail a broad range of measures across different categories of laws, including repealing laws which discriminate against women, providing parental leave for women and men, making gender pay gaps illegal, implementing regulations that require appropriate facilities and infrastructure to allow women to benefit fully from participating in the economy, including subsidizing childcare, ensuring laws do not penalize secondary earners, providing incentives for training and hiring women in traditionally male dominated fields, as well as facilitating women's capacity to exercise all their rights including through reforms on access to justice. States that have high levels of female labor force participation have made extensive changes to their legal frameworks to facilitate this. However, the pace and nature of legal reform varies from country to country and is very specific to a country's historical, cultural and beliefs systems. In some cases, legal reform was brought about as a result of strong women's rights movements or after key historical events (e.g., in the aftermath of civil wars, political change, or economic turmoil). In other cases, legal reform has been more gradual and piecemeal. Furthermore, despite such reforms, barriers to women's economic empowerment remain. Thus, while recognizing that the nature of legal reform is very specific to an individual country context, examples of best practices from different states could serve as a useful roadmap for states looking to enhance women's economic empowerment through law reform. Some of these

[8] IMF, Pakistan: Request for an Extended Arrangement Under the Extended Fund Facility – Press Release; Staff Report; and Statement by the Executive Director for Pakistan, 2019, pp. 13–14.

[9] IMF, Pakistan: First Review under the Extended Arrangement Under the Extended Fund Facility and Request for Modification of Performance Criteria – Press Release; Staff Report; and Statement by the Executive Director for Pakistan, 2019.

[10] K M Puh and others, *Tackling Legal Impediments to Women's Economic Empowerment* (IMF eLibrary 2022) ISBN 9798400203640.

examples are part of best practices. International bodies like International Monetary Funds (IMF) can assist Nigeria in addressing gender gaps in accordance with its mandate, including by advising on key legal reforms aimed at removing barriers to women's economic empowerment. This support can be provided to Nigeria through the IMF's key functions (surveillance, financial assistance of members and capacity development). In the context of surveillance, this can be done particularly when relevant gender-related reforms are considered macro-critical because they have the potential to significantly influence present or prospective balance of payments and domestic stability. While the IMF has already focused on a number of aspects of gender-related reforms that are macro-critical, there is scope to expand this work further including addressing legal barriers to women's economic empowerment more systematically. Focusing on countries where these reforms are most macro-critical, advising members on these areas in accordance with its mandate and collaborating closely with other relevant international organization and institutions that are also involved in these issues would be key for the IMF in moving to the next stage of engagement on gender issues with its member countries. The IMF is already preparing for this by developing a strategy to mainstream gender work at the Fund[11] in accordance with its mandate.

[11] This is consistent with the IMF's commitment to support the UN's Sustainable Development Goals by weaving lessons from policy-oriented research on a number of issues into its operational work. Specifically, the Fund committed to tackling income and gender inequality and promoting economic and financial inclusion by promoting job creation, enhancing the redistributive role of fiscal policy in an efficient manner, and boosting access to financial services while preserving financial stability. Available at <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/46/Sustainable-Development-Goals> accessed 10 September 2024.

CHALLENGES AND PROSPECTS OF COMMUNITY HEALTH PRACTICE IN NIGERIA*

Healthcare is a Fundamental Right not a Leisure -*Barack Obama*

Abstract

Health is a fundamental and universal human right transcending gender, geographical location, and social status. Access to quality healthcare is essential for individuals to lead long, happy and fulfilling lives. Therefore, it is imperative that there is accessible, acceptable, available and affordable healthcare services at all levels of healthcare particularly at the primary or community level. This ensures that individuals can receive timely and effective care, promoting overall well-being and quality of life. The community healthcare delivery system serves as the central hub of healthcare, bridging primary, secondary and tertiary care. Thus, in a densely populated country like Nigeria, where numerous communities coexist, it is crucial to evaluate the challenges impacting the healthcare practice. This paper aims to highlight the challenges of healthcare practice as well as determine whether Nigeria's community health practice model aligns with the World Health Organization's (WHO) principles of providing available, accessible, acceptable and affordable healthcare. The paper adopts doctrinal research design from analytical approach. The research identified challenges such as poor infrastructure, financial and geographical constraints, cultural and social factors among others. It recommends that Nigeria should adopt the WHO's principles to improve its community healthcare practice.

Keywords: *Healthcare, Challenges, Prospects, Community Practice*

1 Introduction

Community health practice means the provision of healthcare services through early diagnosis of disease, recognition of environmental and occupational hazards to good health and prevention of disease in the community.[1] It is the aspect of medicine which is concerned with the health of the whole population and the prevention of diseases from which the population suffers, the identification of the root causes of diseases and health problems not only from the individual but also from the family, the community and the environment and the provision of the highest level of health[2] for all people in the community.[3] Community health consists of principles and practices aimed at achieving prevention of premature death, disabilities and diseases through organized community efforts with a view to assuring the promotion of optimal health of members of a community in the context of their environment.[4] For there to be community health

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[1] AS Ibama, DA Dotimi and R Obele, 'Community Health Practice in Nigeria- Prospects and Challenges' (2015) 7(1), *International Journal of Current Research* <https://www.journalcra.com/article/community-health-practice-nigeria-%E2%80%93-prospects-and-challenges>.

[2] Such level of health includes physical, mental, moral, social and spiritual health.

[3] A Alakija,'Essentials of Community Health, Primary Care and Health' (2000) <https://www.journalcra.com/article/community-health-practice-nigeria-%E2%80%93-prospects-and-challenges>.

[4] O C Abanobi, *Core Concepts in Epidemiology and Community Health Practice* (1st ed., Owerri Nigeria: Opinion Research and Communication Inc., 1999)

practice, there must be a community where this practice operates. The word community is a group of people living within a common geographical boundary that may not necessarily be of the same origin as in language, culture and practices, but are often of the spirit of joint ownership of issues of common interest and advancement.[5] The idea of the community as the centre of healthcare delivery services was advocated as far back as 1960s. The concept of Basic Health Services brought about Primary Health Care (PHC). The World Health Organization (WHO) health policy considered most importantly the principles of health services in relation to availability of health care services, accessibility to these services, acceptability and appropriateness from the late 1960s and the 1970s.[6] The goal of Primary Health Care (PHC) was to provide accessible health for all by the year 2000 and beyond. This however has not been achieved in Nigeria and seems unlikely in the next decade because of the poor state of the Nigerian primary health care and other challenges that will be highlighted in this paper. Notably, the fundamental principle of the Universal Health Coverage (UHC) is to ensure that healthcare is accessible, available and affordable to all particularly the most vulnerable populations. In Nigeria, the overall health system performance was ranked 187th amongst 191 member states by WHO in 2000 and there was a minimal decrease in 2023 with Nigeria ranking 157th out of 191 countries in World Health Report.[7] Nigerians are seen as citizens who suffer epileptic health attention from an exaggerated government health policy that is heavily plagued with half and nearly non implementation. It has been argued that majority of Nigeria's disease burden is largely due to preventable diseases and the high rate of poverty as a major cause.[8] Access to quality health facilities is marred by inefficient healthcare centres at the local level where we have majority of underprivileged citizens. Poor access to quality health information at the local level has become a major disturbing factor. Unavailability and inaccessibility of quality health personnel in primary healthcare delivery has been attributed to paucity of funds by agencies responsible for it. The cases of Ebola, Lassa fever, bird flu, cholera outbreaks, and Corona Virus Infectious Disease (generally referred to as COVID 19), although controlled, exposed the decadence in Nigeria's health sector.[9] In as much as Nigeria can boast of attaining 80% coverage in routine immunization in most vaccine preventable diseases except Tetanus Toxic Vaccination 2 (TTV2) in 2013, eradication of Guinea Worm as declared by the National Steering Committee on Certification (NSCC), WHO in 2008, and home based care strategy in three local governments in Rivers State (Ahoada West, Etche and Oyigbo LGAs) with the aim to reduce maternal, new born and child morbidity and mortality in 2013, there is still so much to be done.[10] Our maternal mortality rate (about 20.1 maternal deaths in every one hundred live births) is one of the highest in the world.[11] Other developing countries have shown commendable improvement towards participation in the birth control schemes and have almost embraced the contemporary development. Nigeria on the other hand still records instances of uncontrolled child birth, an overbearing child birth complications among other challenges.[12] Some other health indicators such as under 5 mortality rate and adult mortality rate are higher than the

[5] Ibama. Dotun and Obele (n1).
[6] Ibid.
[7] A Onuorah, 'Health Challenges in Nigeria: The Way Forward' <https://www.researchgate.net/publication/34693320-Health-Challenges >.
[8] Ibid.
[9] Ibid.
[10] Ibama, Dotimi and Obele (n.1).
[11] A Onuorah, 'Health Challenges in Nigeria: The Way Forward,' https://www.researchgate.net/publication/34693320_Health_Challenges_in_Nigeria_The_Way_Forward by_ >.
[12] Ibid.

average for Nigeria and other Sub-Saharan African countries. Fake, sub-standard, adulterated and unregistered drugs are still prevalent today in Nigeria.[13] In 2022, data report is that the mortality rate for adults male was 377.23 deaths per 1,000 male adults that is the probability of dying between the ages of 15 years and 60 years[14] while the mortality rate for adult females was at 357.01 per 1,000 female adults.[15] These deaths have been linked to various factors, including poor healthcare systems, lack of access to proper healthcare facilities, lack of infrastructures and equipment.[16] NAFDAC,[17] in their efforts to regularize food and drugs and minimize the high rate of mortality in Nigeria, has done a remarkable work, but has met stiff challenges and peculiar limitations. Self-medication is unabatedly rampant while Nigerian government continues to present a false picture of the health status of the country. The above listed among others are the challenges affecting the community health practice in Nigeria. The concern of this research is to assess these challenges to ascertain whether it aligns with the WHO's model of health practice system. This work is divided into five (5) sections. Following this introduction in section one, is a quick review of the legal and policy framework governing the healthcare practice in Nigeria. The third section analyses the challenges of community healthcare while the fourth section looks at the community healthcare practice through the lens of the core principles of primary healthcare in light of WHOs prescription of international best practice and deals with the prospects for further implementation. The final section concludes the research and proffers possible solutions.

2. Legal and Policy Framework on Community Health Practice in Nigeria

2.1 International and Regional Legal Framework

The right to health is crystalized in some of the international legal framework which Nigeria has ratified and domesticated in line with other progressive nations. Some of them include, the Universal Declaration on Human Rights (UDHR) 1948.[18]The UDHR promotes the right to adequate standard of living and wellbeing of every individual and that of his family, including food, clothing and shelter. Accordingly, both the ICESCR and the CRC provides for the right to health. The ICESCR, recognises the right to healthcare as a fundamental human right and obliges states to take steps to achieve the highest attainable standard of physical and mental health for all individuals.[19] The CRC on the other part, promotes the right to health of a child emphasizing reduction on infant and child mortality.[20] Equally, the committee on CEDAW calls on State parties to the convention to refrain from every act or omission that will affect the health of its citizens particularly women.[21] The ICERD provides for State parties recognition of the

[13] Ibid.

[14]National Bureau of Statistics Bulletin 2022, Statistical Reports for Women and Men in Nigeria <https://nigerianstat.gov.ng.elibrary >.

[15] Ibid.

[16] Doris Dokua Sasu, Main Causes of Death in Nigeria as of 2021. <https://www.statista.com/statistaics/1122916/main-causes-of-death-and-... >.

[17] National Agency for Food and Drug Administration and Control {NAFDAC).

[18] Universal Declaration of Human Rights adopted and proclaimed by UN General Assembly Resolution 217A (III) on December 10 1948. Art. 25.

[19] International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by Nigeria on July 29. 1993 when it was ratified as a treaty. The covenant was adopted and opened for signature, ratification and accession by UNGA Res.2200A (XXI) on 16 December 1966 and entered into force 3 January 1976.

[20] The Convention on the Right of the Child, adopted and opened for ratification and accession by the General Assembly Resolution 44/25 of 20 November 1989 entered into force on 2 September 1990, art 24.

[21] International Covenant on the Elimination of all Forms of Discrimination Against Women (CEDAW) Adopted and ratified by General Assembly Resolution 34/180 of 18 December 1979, entry into force 3 September 1981, Art. 12.

rights of persons with disabilities to the enjoyment of the highest attainable standard of health without discrimination.[22] The ACHPR, promotes the rights to the best attainable state of physical and mental health[23] while, the American Convention on Human Rights (ACHR) 1969, states that every person has the right to have access to medical care.[24] The above conventions promote rights to health and enjoin all State parties to ensure affordable and accessible health. The most elaborate of them all being the ICESCR or the ECOSOC convention and guarantee everyone's right to the enjoyment of the highest attainable standard of physical and mental health.[25] The ECOSOC right is further expatiated by the General Comment No. 14 on the right to health having been adopted by ICESCR in 2000. [26] The GC provides for State parties core obligation in relation to health to ensure access to essential healthcare services, access to medicines, equitable distribution of health facilities and services among others.

2.2 National and Regional Framework

Under the Constitution of the Federal Republic of Nigeria 1999 (as amended 2011), the right to health is deduced from the right to life under Chapter IV of the 1999 Constitution.[27] This section stipulates that everyone has a right to life, and no one shall be deprived of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria."[28] The Constitution equally, makes provision for the right to healthcare under the Directive Principles of State by virtue of section 17(3) (d) that, the State shall direct its policy towards ensuring that- there are adequate medical and health facilities for all persons.'' The Constitution also promotes the dignity of human person, as well as invalidates any law that is reasonably justifiable in a democratic society for the purpose of promoting the health of the community.[29] The only section attributed to health in the constitution is found under the Fundamental Objective of State Policy which the state claims that it does not have resources to promote. The constitution has undergone several amendments since 1999 yet, government still claims paucity of funds for the promotion of the right to healthcare. The National Health Act (NHA) 2014, is the most comprehensive law on the right to health in Nigeria. It is an improvement from the National Health Insurance Scheme Act 2004, whose purpose was "providing health insurance which shall entitle insured persons and their dependants the benefit of prescribed good quality and cost- effective health services. It makes adequate provisions for the privacy rights of patients.[30] It provides a framework for the regulation, development and management of a National Health System and sets standards for rendering health services in

[22] International Covenant on the Rights of Persons with Disabilities 2006, Art.25
[23] African Charter on Human and Peoples' Rights, 1981 Art. 16
[24] Art. 26
[25] ICESCR, Art. 12 (1d).
[26] The GC provides for the definition of the right to health in Art. 1; and further expanded the scope of the right to health in Arts. 2 to wit; safe portable water, food, nutrition, occupational health, environmental health and other health facilities as goods and services.
[27] CFRN 1999, s. 33
[28] Ibid.
[29] Ibid s. 34.
[30] Sandra Nwachukwu, 'Health Law Practice in Nigeria' (LLM, International & Comparative Law, May 2021) https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://mckinneylaw.iu.edu/admissions/llm/_docs/2021intlspeakerseries/Nwachukwu-NigeriaHealthLaw.pptx%23:~:text%3DNational%2520Health%2520Act%2520(NHA)%25202014,the%2520privacy%2520rights%2520of%2520patients.&ved=2ahUKEwjTlcPp97iDAxU2TkEAHfuWCQsQFnoECA8QBQ&usg=AOvVaw3BGh7FrzXX18YqCBcdJMMs.

Nigeria and for related matters.[31] The NHA is made up of seven parts divided into various sections. Each part contains fundamental provisions which if effectively and efficiently implemented will have a tremendous impact on health-care access and universal health coverage, health-care cost, quality and standards, practice by health-care providers, as well as patient care and health outcomes. The interplay of several factors including but not limited to duplication of roles, lack of communication between various actors and poor accountability has all led to the lack of strategic direction and an inefficient and ineffective health care delivery system. Part I of the National Health Act states that National Health System shall include: Federal Ministry of Health, Ministry of Health in every State and the FCT Health Department, parastatals under the federal and state ministries of health, Local government health authorities, ward health committees, village health committees, private health care providers, traditional health care providers; and alternative health care providers.[32] NHA gave clear and specific roles of the various levels of government, the Federal Ministry of Health, Minister of Health, National Council on Health, Technical Committee of the National Council on Health, and National Tertiary Health Institutions Standard Committees. The NHA handles issues of leadership and governance by providing clear roles and functions of each level of government in healthcare delivery, facilitate community oversight of health facilities, gives rational allocation of health funds based on need, not politics, ensure policymaker accountability to constituents, assure value for money, transparency and accountability and provide for coordination, financing expenditure tracking and community participation.[33] The NHA provides for healthcare financing. The commission for Macroeconomics and Health estimates a cost of about US$34 per person per year (per capita) to deliver an essential package of interventions to meet the Millennium Development Goals (MDGs). Total per capita health expenditure in Nigeria is estimated at between $10-15 at average exchange rates with private Out- Of Pocket Expenditure (OOPE) accounting for 60 to 75%.[34] The poor spend a disproportionately higher percentage of disposable household income on healthcare and in the absence of social protection mechanisms (health insurance, social security or credible exemptions). NHA in its section 2 provides for the establishment of Basic Health Care Provision Funds (BHCPF) to be financed by the Federal Government annual grant of not less than one percent of its consolidated Revenue Fund.[35] The Act is expected to improve financial access, financial protection of citizens when ill, and promote equity through the reduction of out- of pocket expenses in healthcare. The major aim

[31] Osahon Enabulele and Joan Emien Enabulele, 'Nigeria's National Health Act: An Assessment of Health Professionals' Knowledge and Perception' (2016) 57(5) 260-265 *Nigerian Medical Journal* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5036296/#:~:text=With this development%2C Nigeria after,Nigeria and for related matters.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] This BHCPF shall use 50% of the fund for provision of basic minimum package of health services to citizens in eligible primary or secondary health care facilities through the National Health Insurance Scheme (NHIS); 20% shall be used for provision of essential drugs, vaccine and consumables for eligible primary health care facilities; 15% for the provision and maintenance of facilities, equipment and transport for eligible primary healthcare facilities; 10% shall be used for the development of human resources for primary health care and 5% of the fund shall be used for emergency medical treatment to be administered by a committee appointed by the National Council on Health. The funds for 20%, 15% and 10% shall be disbursed through State and Federal Capital Territory Primary Health Care Boards for distribution to Local Government and Area Council Health Authorities. The Agency shall not disburse to Local Government Health Authority if not satisfied that the money earlier disbursed was applied in accordance with the provisions of this Act, state or local government that fails to contribute its counterpart funding and states and local governments that fail to implement the national health policy, norms, standards and guidelines prescribed by the National Council on Health.

of the NHA is to improve service delivery by improving access to healthcare through the provision of emergency service and Basic Minimum Health Care Package (BMPHS) as provided in the.[36] The NHA made provision for communicating with patients through the act of record keeping and confidentiality[37] and the option to lay complaints by patients or clients.[38] Access to health records by health workers or healthcare providers at appropriate time is permitted by the Act.[39]

The Compulsory Treatment and Care for Victims of Gunshots Act 2017,[40] enacted by the National Assembly of the Federal Republic of Nigeria and aims to ensure that victims of gunshot wounds receive prompt and adequate medical treatment and care without unnecessary delays or financial barriers.[41] The Act compels immediate treatment with or without an initial monetary deposit[42] and prohibits victims' abuse by the police or other security agencies.[43] The Act also compels the submission of the fact to the nearest police by the recipient hospital within two hours of commencing treatment[44] and the immediate reaction of the police to commence investigation with a view to determining the circumstances under which the person was shot.[45] The Act prohibits arrest or invitation of such victim by the police for questioning unless the Chief Medical Director of the hospital where treatment is administered certifies him fit and no longer in dire need of medical care.[46] The Act provides for liability for negligent act or failure to accept and treat a victim of gunshot.[47] Any emotional, and psychological damage to the victim on conviction amounts to imprisonment for a term of not more than five years without the option of a fine.[48] A hospital that receives any person with wounds shall notify the family members or relatives of the victim as far as they may ascertain within 24 hours of becoming aware of the victim's identity, and if this duty is not carried out by any person or authority including any police officer, security agents, or the hospital, and such failure results in unnecessary death of any person with gunshot wounds, such a person is liable on conviction to a fine of N500,000.00 or imprisonment for a term of five years or both.[49] Record keeping by the facility or hospital where treatment is administered is expected.[50] Reliability to the above provision by a corporate or individual attracts punishment under sections 11 and 14.[51] In addition, the High court shall order a person or corporate body convicted of an offense to make restitution to the victim by directing that person or corporate body to pay to the victim an amount

[36] The National Health Act 2014, s 20-24.
[37] Ibid s 25.
[38] Ibid s 30.
[39] Ibid s 27-28
[40]The Compulsory Treatment and Care for Victims of Gunshot Act 201, enacted by the National Assembly of Nigeria.
[41] Law Pavilion, '14 Important Things Medical Practitioners in Nigeria Should Note' https://lawpavilion.com/blog/compulsory-treatment-and-care-of-victims-of-gunshot-act-2017-14-important-things-medical-practitioners-in-nigeria-should-note/#:~:text=The%20Act%20cited%20as%20%E2%80%9CCOMPULSORY,adequate%20medicai%20treatment%20and%20care.
[42] Ibid s 3(2)(a).
[43] Ibid s 3(2)(b).
[44] Ibid s 4(1)(a).
[45] Ibid s 4(1)(b).
[46] Ibid s. 5.
[47] Ibid s. 11
[48] Ibid s.10.
[49] Ibid s 11(c)
[50] Ibid s.12.
[51] Ibid s. 13.

equivalent to the loss sustained by the victim[52] and an order of restitution may be enforced by the victim or by the prosecutor on behalf of the victim in the same manner as a judgment in a civil action.[53]

The National Health Authority Act (NHA) 2022 enacted by the National Assembly of Nigeria to regulate and supervise the country's healthcare system. The objective is to improve healthcare delivery and quality, increase access to healthcare services, and promote community health and participation. The NHA 2022 repeals the NHIA 2014 as the authority ACT with the expanded function to regulate, promote, manage and integrate all health insurance schemes and practices in Nigeria. The NHIA makes health insurance mandatory for all residents of Nigeria with the introduction of the vulnerable group fund and implementation of the Basic Health Care Provision Fund (BHCPF) through the established State Health Insurance Schemes. With the NHIA the journey towards Universal Health Coverage (UCH) became a lot easier, safer and more equitable with the health insurance now mandatory to all Nigerians and to eliminate expenses for poor Nigerians.[54] Currently, over 10% of Nigerians are insured by the National Health Insurance Scheme (NHIS) and this among others led to the signing of the National Health Insurance Authority Act on 19 May 2022, which aims at ensuring the effective implementation of a national health Insurance Policy and attainment of the Universal Health Coverage (UHC) in Nigeria.[55] THE NHIA replaces the National Health Insurance Scheme Act 1999, which failed to enrol more than 10% of the population.[56] The aim is to highlight the new features of the NHIA Act and its policy implications for the Nigerian health system. Another Act which has been repealed by the NHIA Act 2022 is the National Health Insurance Scheme Act 2004, established for the purpose of providing health insurance to entitled insured persons and their dependents the benefit of prescribed good quality and cost- effective health services.[57] To further improve and harness private sector participation in the provision of healthcare services; and do such other things that will assist the authority to achieve UHC to all citizens by year 2030. For proper management, promotion and monitoring of ethical conducts of the health personnel in the health sector, the Medical and Dental Practitioners Act (MDPA) 2004 was set up. The Act makes provision for the determination of the standard of knowledge and skill to be attained by persons seeking to become members of the medical or dental profession and also reviews those standards from time to time as circumstances permit.[58] Securing in accordance with the provisions of the Act the establishment and maintenance of registers of persons entitled to practice as members of the medical or dental profession and the publication from time to time of lists of those persons.[59] Reviewing and preparing from time to time, a statement as to the code of conduct which the council considers desirable for the practice of the profession in Nigeria.[60] The MDPA, confers on the Disciplinary council the power to make rules for professional conducts and establish the Medical Practitioners Investigating Panel for the enforcement of the rules of

[52] Ibid s .14(1).
[53] Ibid s. 14(2).
[54] Ipinnimo, TM,' Comparing the Nigeria National Health Insurance Scheme Act 2004 and the National Health Insurance Authority Act 2022- What is New and its Implications for Health System' (2023) 1(2) WAJM <https://ibmed.ncbi.nlm.nih.gov >.
[55] Ibid
[56] Muanya C 'Over 170 Million Nigerians without Health Insurance' *The Guardian Newspaper* (Nigeria 25 September 2020) <https://guardian.ng/features/o...googlescholar>.
[57] Nigeria Health Watch, 'From A Scheme to an Authority- 5 Things You Need to Know About the New NHIA Act.' <https://nigeriahealthwatch.com .
[58] Medical and Dental Practitioners Act Cap. M8, Laws of Federation of Nigeria 2004 s.1(2) (a).
[59] Ibid, s. 1 (2) (b).
[60] Ibid, s.1(2) (c).

conduct.[61] They serve as standards in relationship with the profession and the public. Notably, the Medical and Dental Practitioners Act has 22 sections but despite the numerous and elaborate provisions of the Act, there is limited focus on community health. The MDPA focuses more on individuals than on community health promotion and education. It has no clear provisions on community health workers, restricts the scope of practice and potentially hinders innovative community health initiatives and lacks emphasis on community health development.[62]

2.3 Policies and Regulations

The Nursing and Midwifery (Registration) Act (NMRA) 1979. The Act was established by the category B parastatals of the Federal Ministry of Health (FMH) by Decree No. 89, 1979.[63] The Act outlines the functions, powers and composition of the NMRA.[64] It also provides for the registration and licensing of nurses and midwives.[65] The Act mandates the council to monitor and enforce standards of nursing education .The NMRA impacts community health through protection of safety of patients and professional standards.[66]The Act is to ensure enhanced health promotion and education, improved access to quality healthcare services by strengthening primary healthcare systems in the country.[67]The Code of Medical Ethics in Nigeria (Regulations) 2022[68] is included in articles 4 to 6 of the Medical Ethics Principles as[69] a principle that every physician and care giver ought to abide by or observe and uphold the dignity and honour of the profession and accept its self- imposed disciplines in their relationship with their patients. A healthcare worker is expected to maintain and respect these four pillars of medical ethics; beneficence, nonmaleficence, autonomy and justice. [70] The regulation enjoins every healthcare worker to abide by these ethics, deontological, teleological and virtue based. The first shows that the physician must know what the expected duties are, and what the rules are that regulate them. In teleological ethics, being moral is also about cause and effect. The Community Health Worker (CHW) must understand the consequences of his actions, and develop a virtuous character. He is expected to show kindness and compassion for the patients and avoid greed.

3. Challenges of Community Health Practice

Community health practice in Nigeria focuses on promoting, preventing and protecting the health of individuals and communities through provision of essential healthcare services such as maternal and child healthcare diseases and disease control, encouraging community involvement in healthcare decision making and planning as well as education on environmental hygiene among others. Despite the above, community health practice faces challenges such as:

3.1 Culture and Linguistic Barriers

At the community level of healthcare system, cultural beliefs on certain illnesses and diseases hinder the acceptance of healthcare services provided.[71] Often accepting treatment of malaria

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[61] Ibid, s.1 (2) (d).
[62] Medical and Dental Practitioners Act Cap M8, Laws of Federation of Nigeria 2004.
[63] Cited as Nursing and Midwifery (Registration) Act. Cap. N143, Laws of the Federation of Nigeria 2004.
[64] NMRA ss 5-10.
[65] Ibid.
[66] Ibid ss 15-20.
[67] Ibid.
[68] Code of Medical Ethics Nigeria 2022.
[69] The National Library of Medicine, The Code of Medical Ethics (2022) and its General Principles,' https://www.nmc.org.incode-of-..>.
[70] NCBI, Principles of Clinical Ethics and their Application to Practice,' <https://www.ncbi.nlm.nih.govpmc.>
[71] LJ Johnson, LH Schopp, F Waggie, et al, 'Challenges Experienced by Community Health Workers and their Motivation to Attend a Self-management Programme' [2022] 14(1) *Afr J Prm Health Care Fam Med*, 1-9

could be attributed to a taboo and treatment of same denied. Language barriers may equally hinder communication between the healthcare provider and the patients. Communication between the persons in the community and the healthcare provider is vital, as their workforce is like an important conveyor belt that transports the key health messages to the community and simultaneously increases the formal health professional's awareness of the social determinants contributing to the patients' health status. Community health workers in their roles are more effective when they receive the respect, they deserve from the formal health professionals and the community they serve because they feel that their contribution is valued.[72] One advantage of the CHW workforce is that often, they come from the communities they serve and therefore have a unique ability to speak the language of the community. Although the roles of the CHWs are not always understood, communication channels remain open as it has been shown that CHWs are effective in strengthening communication between the medical system and the community.

3.2 Work Environment and Ineffective Self-Management

Most CHWs raised workload and the environment as a barrier to successful implementation of their duties.[73] World-wide, it has been reported that increased workload and the absence of clearly defined boundaries for job causes stress.[74] A study amongst rural areas report that CHWs experience physical health conditions as a result of the poor environment they work in.[75]

3.3 Lack of Trust in Healthcare Providers

This could lead to delayed or forgone care. Patients may not adhere to treatment or follow instructions leading to decreased health outcomes, increased mortality rates and reduced preventive care. [76]

3.4 Limited Funding and Resources

Community health workers express that lack of resources to provide basic hospital needs is a major challenge. Often, kerosene lanterns, candles and torches/flashlights are substitute for proper electricity in most community health centres in Nigeria. Most drugs required for treatment and prevention of diseases are out of stock.[77] The issue of digital literacy has posed a challenge to health workers in communities who cannot access the internet services due to weak internet coverage, poor power supply and slow replacement of tools. Proper equipment's for treatment of disease are unavailable. In most cases transportation cost becomes a huge challenge. Many of the community roads are not useable for ease of access to the health centres.

3.5 Lack of Proper Public Education on Health and Safety

https://www.researchgate.net/publication/357782413_Challenges_experienced_by_community_health_workers_and_their_motivation_to_attend-a_self-management_programme.

[72] Ibid.

[73] LJ Johnson, LH Schopp, F Waggie, et al, 'Challenges Experienced by Community Health Workers and their Motivation to Attend a Self-management Programme' [2022] 14(1) *Afr J Prm Health Care Fam Med*, 1-9 https://www.researchgate.net/publication/357782413_Challenges_experienced_by_community_health_workers_and_their_motivation_to_attend-a_self-management_programme.

[74] Ibid.

[75] Majee W, Schopp, L Johnson and A Anakwe,'Emerging from the Shadows: Intrinsic and Extrinsic Factors Facing Community Health Workers in Western Cape,*' (2020) 17 (9) SAIJPH <https://www.ncbi.nlm.nih.gov >*.

[76] Ibid.

[77] Ibid.

An average Nigerian is not knowledgeable about basic first aid care. This makes it difficult for bystanders to provide help to accident victims.[78] Often accessing effective health facilities is difficult and this leads to more loss of lives. [79]

3.6 Staff Shortages and Underpayment of Staff

At the community level, staff are poorly remunerated.[80] This leads to the drive for better opportunities. There is preference for patronizing secondary and tertiary health centres where better treatments can be received from skilled professional leaving the community or primary health centres with unskilled professionals or even none at all.

3.7 Cost of Healthcare Service

Health status is dependent on the ability to pay, such that the affluent invariably enjoys better health outcomes than the poor. In Nigeria, the Users for Fee system of payment for healthcare services at the point of service is akin to purchasing ordinary commodities at a shop or market also known as Out –Of- Pocket (OOP) which is 70% cost of healthcare. High cost of services and medications limit access to healthcare.[81] Notably, less than 5% of the population enjoy the National Health Insurance Scheme (NHIS).

4. The Core Principles of Community Health

The community or primary healthcare has five core principles designed to work together and implemented to bring about a better health outcome for the entire population. These core principles include accessibility of health, community participation, cost effectiveness and availability of healthcare and inter-sectorial collaboration.

4.1 Accessibility of Healthcare

Accessing healthcare service in community health refers to the ability of individuals in the communities to obtain necessary healthcare services that is culturally or socially acceptable, available, affordable that is financially sustainable.[82] Accessing healthcare services, ranges from limited geographical access and long distance to healthcare facilities among others. Over 60% of Nigerian population live in rural areas.[83] Over 56% of women have difficulty in accessing healthcare as a result of financial barriers while one third of the total percentage of women have physical barriers in accessing healthcare. On daily basis people in the community die as a result of lack of access to health.[84] About one in every six children dies before the age of five in Nigeria.[85] Physical barriers to healthcare facilities has been found as a determinant of child mortality. Although, the aim of the NHA 2014 was to improve access to healthcare and the quality of health, yet access to health care remains a challenge.[86] In sum, the principle of accessibility of healthcare means that healthcare services must be equally shared by all people

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[78] Infoguide Nigeria, 'Problems and Prospects of Public Health Care in Nigeria' https://infoguidenigeria.com/problems-prospects-public-health-care-nigeria.

[79] Ibid.

[80] Wolter Kluwer, 'Trusted and Unified Solutions to Achieve what Matters Most.'<https://www.wolterskluwer.com/en/k >.

[81] Obiajulu Nnamuchi & Mariah Ilodigwe, Primary Health Care Approach to Achieving Universal Health Coverage in Nigeria: Are Extant Legal and Policy Regimes Adequate? (2022) 1 (17) *Nigerian juridical Review*

[82] *Ibid. https://www.researchgate.net/publication/34693320-Health-challenges-in-Nigeria-theWay-Forward-by-ANTHONY-ONUORAH..*

[83] National Bureau of Statistics, 2020.

[84] Sunday A Adedini, 'Barriers to Accessing Healthcare in Nigeria: Implications for Child Survival, (2014)4 (7) < <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3957799#;-text=Curre... > .

[85] Ibid

[86] Ibid.

of the community irrespective of race, creed or economic status. This principle helps to shift the accessibility of healthcare from the cities to the rural areas where the most needy and vulnerable groups of the population live.

4.2 Affordability of Healthcare

Affordable healthcare under primary health care simply means the provision of healthcare services that are financially accessible, physically accessible, culturally acceptable and equitable. In an effort to improve the quality of healthcare in Nigeria, the NHIS was introduced in 1999 to target universal health coverage, yet penetration remains persistently low. Less than 5% of the population was enrolled in the NHIS while an estimated 120 million Nigerians did not have health insurance coverage.[87] In 2022, to improve health coverage, the National Health Insurance Authority Bill was introduced repealing the National Health Insurance Scheme Act (NHISA). The aim of the extant law is to ensure coverage of about 83 million Nigerians who cannot afford to pay premiums as recommended by the Lancet Nigerian Commission. Although most employees at the federal civil service in Nigeria has subscribed to it, the NHIS is yet to capture most Nigerians particularly persons working in the large informal sector. One major impediment to increasing the participants to NHIS is the non- mandatory nature of health insurance in Nigeria.[88]In sum, the core of community healthcare is that for healthcare to be affordable, it must be financially sustainable.

4.3 Availability of Healthcare

The question one must ask is whether adequate healthcare services are available in rural areas in Nigeria? One may be tempted to respond in the affirmative reason being that numerous challenges plague the availability of healthcare practices at the rural area ranging from limited access to facilities, shortage of healthcare professionals, inadequate infrastructures, insufficient medical supplies, and financial constraints among others. Nigeria community can boast of over 30,000 healthcare centres but many are understaffed and underequipped. WHO reports in 2023 that about 60% of Nigerians lack access to essential health.[89] As a result of lack of adequate healthcare, the infant mortality rate has increased since 2020 to 74 deaths per 1,000 live births while maternal mortality is at the ratio of 615 deaths per 100,000 live births.[90] 1.98 doctors per 10,000 population. 20% of primary facilities are functional while 70% of healthcare lack basic equipment. To improve access to healthcare, certain innovations has been made. Telemedicine can bring about improved health outcomes, enhance convenience and flexibility, cost effective and increases easy access to healthcare. With the above, one can say that healthcare in Nigeria communities is available but not adequate.

4.4 Community Participation and Inter-Sectoral Collaboration

The last two core principles of community healthcare practice are essential components of community health practices. Community participation promotes involvement of community members in healthcare decision- making, active engagement in health promotion and disease prevention, as well as empowerment, feedback mechanisms, community- led initiatives and solutions on the one hand, on the other hand, inter-sectoral collaboration fosters partnership,

[87]TRADE, Nigeria Healthcare Commercial Guides, (2023) < https://www.trade.gov/country-commercial-guides/nigeria-healthcare>.
[88] Ibid.
[89] Ibid.
[90] Ibid.

coordination across government departments and agencies, increased resource mobilization, better addressing of social determinants of health and more effective and sustainable solutions.

4.5 Prospects for Implementation

Prospects for implementing or achieving an accessible, affordable, available healthcare practice in Nigerian communities can be three folds; the short term, medium term and long- term. Short term prospects entails more of government investment in health care infrastructure, organising community health worker programs and trainings, adopting telemedicine like some developed countries like USA where 78% of hospitals in the US use telemedicine and 90% of persons report satisfaction with it.[91] Medium term prospects projects the strengthening of the primary healthcare systems, improving healthcare workforce, enhancing community participation and ownership, integrating traditional and alternative medicine as well as increasing focus on preventive care and health promotion. Among others, achieving UHC establishing national health system and advancing digital health infrastructure, increase investment in healthcare research and development, improved healthcare outcomes and quality of life is a long-term prospect for improving accessibility to community healthcare practice in Nigeria.

5. Conclusion

Health care practice in communities is essential to achieving universal health coverage and improving national health care indices. The issues of patient adherence to health care directives, issues of self-management, limited resources and lack of proper education on health care and its importance need to be addressed to ensure quality and sustainable health care delivery in communities. These issues can be addressed by embracing such matters as the quality and distribution of health care services, the cost of providing them, the manpower, amongst others. These can be achieved by providing funds and materials for use in the health care centres through advocating for policy makers to gain support and political will in providing adequate resources in carrying out community health services, educating and employing more health care providers and volunteers and also engaging community oriented health professionals in effectively carrying out community health services to improve the population health status, ensuring adequate pay to avoid exploitation, more awareness creation on active community participation towards ownership of health programme/services to ensure sustainability and reduction of harmful cultural practices and negative influences that affect their health negatively. Training and retraining of health professionals on the concept of primary health care and community health practice is a key factor to minimize the challenges. Above all ensuring effective collaboration with other tiers of health like the secondary and tertiary tiers for referrals to save lives since most community-based hospitals lack adequate infrastructures and resources. To strengthen the community health system, hobnobbing with major key stakeholders and government at the state level to assist in the provision of basic amenities in the community hospitals. Notably, in the words of Dr Martin Luther King Jr, healthcare is a human right not a privilege it therefore behoves on Nigerian government to ensure that healthcare services at the community level are available, affordable and accessible to aid sustainability, enhance quality and reduce the morbidity and mortality rates.

[91] ALMA ATA, Primary Health Care: 25 years of the Alma –Ata Declaration, https://www.3.paho.org/english/dd/pin/alma-questions-htm >.

LEGAL IMPLICATION OF THE DIFFERENCE THEORY OF LAW AND GENDER IN THE FEMINIST JURISPRUDENCE*

Abstract

Formal equality assumes a basic sameness between men and women and the obligation of law to respect that sameness. substantive equality assumes some meaningful differences, and seeks to eliminate the disadvantages of those through various legal strategies. Non-subordination theory treats sameness and difference both as artificial constructs, designed to keep women in their place. Difference theory underscores important difference between women and men. Unlike substantive equality, however, difference theory sees at least some of these differences not as problems to be overcome but rather as potentially valuable resources that might provide a better model for legal and social institutions that do make characteristics and values. Therefore, the aim of this article was to examine the ethic of care and its legal implications, work and family, women in the justice system the challenges in the implementation of difference theory and the solutions to these challenges. The research methodology was doctrinal approach, using expository and analytical research design. The main sources of data collection were various legal literatures, both from the physical library and the e-library. It was found that conferral of value requires the transfer of some economic resources from the collective society to caretakers through the establishment of mechanisms that those who receive the benefit of caretaking in order to compensate those who do the caretaking. It was recommended that the state must use its regulatory and redistributive authority to ensure that those things that are not valued or are undervalued in market or marriage are nonetheless, publicly and politically recognized as socially productive and given value.

Key Words: *Difference, Feminist, Gender, Implication, Jurisprudence, Law, Legal, Theory*

1. Introduction

Difference theory underscores important differences between women and men. Formal equality assumes a basic sameness between men and women and the obligation of law to respect the sameness. Substantive equality assumes some meaningful differences and seeks to eliminate the disadvantages of that difference through various legal strategies. Non-subordination theory treats sameness and differences both as artificial constructs, designed to keep women in their place. Difference theory sees at least some of these differences not as problems to be overcome but rather as potentially valuable resources that might provide a better model for legal and social institutions than do male characteristics and values. Within this theory, women tend to be associated with the values of relationship, protection of the vulnerable and context-based reasoning, while men are identified with autonomy, individualism and risk taking. Feminist theories often view difference theory with suspicion because of the risk that attributing certain traditional virtues to women will reinforce the stereotypes upon which ideologies of subordination rest. At the same time, it is generally assumed that the increasing presence of women in law schools, legal practice, elected office, juries and the judiciary will affect how law

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is created, taught, practiced and applied. This theory explores the tension between embrace of gender variances as a means of improving legal institutions and rejection of gender stereotypes.

2. Conceptual Analysis of Feminist Jurisprudence

Feminist jurisprudence, also referred to as feminist legal theory is based on the belief that the law has been fundamental in women's historical subordination.[1] Feminist jurisprudence the philosophy of law is based on the political, economic, and social inequality of the sexes and feminist legal theory is the encompassment of law and theory connected. The project of feminist legal theory is twofold. First, feminist jurisprudence seeks to explain ways in which the law played a role in women's former subordinate status. Feminist legal theory was directly created to recognize and combat the legal system built primarily by the and for male intentions, often forgetting important components and experiences women and marginalized communities face. The law perpetuates a male valued system at the expense of female values.[2] Through making sure all people have access to participate in legal systems as professionals to combating cases in constitutional and discriminatory law, feminist legal theory is utilized for it all. Second, feminist legal theory is dedicated to changing women's status through a rework of the law and its approach to gender.[3] It is a critique of American law that was created to change the way women were treated and how judges had applied the law in order to keep women in the same position they had been in for years. The women who worked in this area viewed law as holding women in a lower place in society than men based on gender assumptions, and judges have therefore relied on these assumptions to make their decisions. This movement originated in the 1960s and 1970s with the purpose of achieving equality for women by challenging laws that made distinctions on the basis of sex.[4] One example of this sex-based discrimination during these times was the struggles for equal admission and access to their desired education. The women's experiences and persistence to fight for equal access led to low rates of retention and mental health issues, including anxiety disorders. Through their experiences, they were influenced to create new legal theory that fought for their rights and those that came after them in education and broader marginalized communities which led to the creation of the legal scholarship feminist legal theory in the 1970s and 1980s.[5] It was crucial to allowing women to become their own people through becoming financially independent and having the ability to find real jobs that were not available to them before due to discrimination in employment.[6] The foundation of feminist legal theory reflects these second and third-wave feminist struggles. However, feminist legal theorists today extend their work beyond overt discrimination by employing a variety of approaches to understand and address how the law contributes to gender inequality.[7] The first known use of the term *feminist jurisprudence* was in the late 1970s by Ann Scales during the planning process for Celebration 25, a party and conference held in 1978 to

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[1] M A Fineman, "Feminist Legal Theory" (2005) *Journal of Gender, Social Policy & the Law* 13 (1). SSRN 2132233.

[2] C Bowman and V Quade, "Redefining Notions: Feminist Legal Theory Pushes into the Mainstream" (1993) *Human Rights*, 20 (4): 8–11. JSTOR 27879789.

[3] A *Scales, Legal Feminism: Activism, Lawyering, and legal Theory (New York University Press, 2006).*

[4] *L Nancy, V M Robert, Feminist Legal Theory: A Primer (New York University Press 2015) ISBN 978-1-4798-0549-5. OCLC 929452292.*

[5] R West, "Women in the Legal Academy: A Brief History of Feminist Legal Theory" (2018) *Georgetown Law Faculty Publications and Other Works*.

[6] *Ibid*.

[7] C A MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence". *Feminist Legal Theory* (2018) pp. 181–200. doi:10.4324/9780429500480-11. ISBN 978-0-429-50048-0.

celebrate the twenty-fifth anniversary of the first women graduating from Harvard Law School.[8] The term was first published in 1978 in the first issue of the Harvard Women's Law Journal.[9] This feminist critique of American law was developed as a reaction to the fact that the legal system was too gender-prioritized and patriarchal.[10] In 1984 Martha Fineman founded the Feminism and Legal Theory Project at the University of Wisconsin Law School to explore the relationships between feminist theory, practice, and law, which has been instrumental in the development of feminist legal theory.[11] The foundation of the feminist legal theory was laid by women who challenged the laws that were in place to keep women in their respective places in the home. A driving force of this new movement was the need for women to start becoming financially independent.[12] Women who were working in law started to focus on this idea more, and started to work on achieving reproductive freedom, stopping gender discrimination in the law and workforce, and stop the allowance of sexual abuse.[13]

3. Analysis of the Difference Theory

3.1 The Ethics of Care and Its Legal Implications

The basic case for difference theory is the women have distinctive traits and values that should be affirmatively valued in the public realm as well as the realm of private relationships and family. The ethics of care focuses attentions on the unique context of the dispute and the parties' ongoing relationships and interdependencies. Preventing hurt, preserving relationships and developing cooperative solutions roofed in the concrete particulars of the conflict are objectives of a care-oriented ethical analysis. Mary Becker explains that we need to target both the over-valuation or masculine qualities and the cultural under valuation of feminine qualities. She went further to say that Relational feminism stresses the need to value community, relationships and traditional feminine qualities because these valuable qualities have been so undervalued in our overly individualistic and masculinity culture.[14] However, if certain characteristics are sex-related, where did these differences come from? Robin West argues that connectedness is biologically and materially rooted in such experiences as pregnancy, heterosexual penetration, menstruation and breast feeding.[15] Philosopher Sara Ruddick locates gender difference in the social practice of mothering, in which boys develop their identities by separating from their differently gendered mothers, which reinforces for boys the values of separation and individualism, while girls develop by identifying with their mothers, to whom they remain connected, which reinforces for girls the values of relationship and communal identity.[16] Difference theory has been deployed in support of variety of legal reform proposals. According to Bender it can be used to support the expansion of legal obligations such as the duty to rescue in tort law or a greater obligation on the part of the state to support families.[17] According to Browne, difference theory can be used to explain why women invest less in their own human

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[8] P Smith, "Feminist Jurisprudence" (2010) *A Companion to Philosophy of Law and Legal Theory*. pp. 290–298. doi:10.1002/9781444320114.ch18. ISBN 978-1-4443-2011-4.

[9] *Ibid*.

[10] C Bowman and V Quade, "Redefining Notions: Feminist Legal Theory Pushes into the Mainstream" (1993) *Human Rights*, 20 (4): 8–11. JSTOR 27879789.

[11] "Feminism and Legal Theory" *Atlanta Emory University School of Law Journal* (2017).

[12] C L Sagers, "Review of Postmodern Legal Movements: Law and Jurisprudence at Century's End". *Michigan Law Review* (1997). 95 (6): 1927–1943. doi:10.2307/1290030. JSTOR 1290030.

[13] *Ibid*.

[14] M Becker, *Care and Feminists* 17 wis. Women L.J 57 607.

[15] R West, *Jurisprudence and Gender*, 85, U. chi. L. Rev. 1 (1988).

[16] Sara Ruddick, Maternal Thinking: Toward a politics of peace (1989).

[17] L Bender, A Lawyer's Primer on feminist theory and Tort 38 & Legal Educ. 3, 31-36(1988).

market capital than men chose the jobs they do, and thus earn less.[18] The questions are: Is there a female experience of the world? If so, does it matter whether it is based in biology or social practice? What difference do you think that an ethics of care would make in the law?

3.2 Application in Work and Family

This focuses on values beyond equality that might support greater subsidies for families. Difference theorists draw attention to the needs of society's dependents-especially children, the disabled, and the elderly. They tend to view the assignment of responsibility for the burdens of dependency to the family. In the first instance, and within the family to women operates in an unjust manner because this arrangement has significant negative material consequences for the caretaker. This obvious observation introduces an additional but often overlooked dependency arises on the part of the person who assumes responsibility for the care it captures the very single point that those who care for others are themselves dependent on resources in order to undertake that care caretakers have a need for monetary or material resources. They also need recourse to institutional supports and accommodate need for structural arrangements that facilitate caretaking. Currently, neither the economic nor the structural supports for caretaking are adequate. Many caretakers and their dependents find themselves impoverished or severely economically compromised. Some of their economic problems stem from the fact that within families, caretaking work is unpaid and not considered worthy of social subsides. Caretaking labour interferes with the pursuit and development of wage labour options. Caretaking labour saps energy and efforts from investment in career or market activities, those things that produce economic rewards. There are foregone opportunities and costs associated with caretaking and even caretakers who work in the paid labour force typically have more tenuous ties to the public sphere because they must also accommodate caretaking demands in the private. These costs are not distributed among all beneficiaries of caretaking (institutional or individual). Unjustly, the major economic and career costs associated with caretaking are typically borne by the caretaker alone. Further, most institutions in society remain relatively unresponsive to innovations that would lessen the costs of caretaking. Caretaking occurs in a larger context and caretakers often need accommodation in order to fulfill multiple responsibilities. For example, many caretakers also engage in market work. Far from structurally accommodating or facilitating caretaking. However, work places operate in models incompatible with the idea that workers also have obligations for dependency. Work place expectations compete with the demands of caretaking. Thus, it is assumed that workers are those independent and autonomous individuals who are free to work long and regimented hours.

3.3 Impact on Women in the Justice System

Women were previously denied opportunities in the Justice system. The reasons for exclusion involved concerns not only the proper role of women but also about the distraction and discomfort of men. It was until 1972 did all accredited law schools eliminate explicit sex-based restrictions in the United States of America. Women Participate in the justice system in every respect, as parties, judges, lawyers and witnesses. In Nigeria, women participate in all spheres of judiciary ranging from judges, lawyers, magistrates, registrars, court clerks, bailiffs, etc. They are even surpassing the men. The questions are: Would you expect women to bring different values to the system? Are lawyers, judges likely to bring gender biases to the court room or to be subject to such biases in the workplace? If so good should the legal system respond?

[18] K Browne, *Sex and Temperament in Modern Society: Darwmian View of the Glass Ceiling and the Gender Gap* (N. P. 1995).

4. Challenges in the Implementation of Difference Theory

Balancing personal and professional commitments: This is one of the challenges in the implementation of Difference theory. The questions are usually: Do you expect to work full time throughout you career? If so, how do you expect to meet family needs? Do you plan to have children? If so, who will take care of them? What accommodations do you think are fair to expect from your employer? Implications of difference theory for laws relating to women's reproductive rights: The question is would the state be entitled or compelled for example to take greater control over the mother's risk-taking behavior during pregnancy to express a stronger ethic of care.

5. Legal Implication of the Difference Theory of Law and Gender

The difference model emphasizes the significance of gender discrimination and holds that this discrimination should not be obscured by the law, but should be taken into account by it. Only by taking into account differences can the law provide adequate remedies for women's situation, which is in fact distinct from men's.[19] The difference model suggests that differences between women and men puts one sex at a disadvantage; therefore, the law should compensate women and men for their differences and disadvantages. These differences between women and men may be biological or culturally constructed.[20] The difference model is in direct opposition to the sameness account which holds that women's sameness with men should be emphasized. To the sameness feminist, employing women's differences in an attempt to garner greater rights is ineffectual to that end and places emphasis on the very characteristics of women that have historically precluded them from achieving equality with men.[21] The sameness feminist also argued that there was already special treatment for these so-called "differences" in the law, which is what was oppressing women. The idea of there being differences between the sexes lead to the classical thought that feminist legal theory was trying to get rid of. It forced women to prove that they were like men by comparing their experiences to those of men, all in an attempt to gain legal protection. This all only led to women trying to meet norms that were made by men without questioning why these were accepted as the norm for equality.[22] Men and women cannot be seen or defined as equal because they have completely different lived experiences. Understanding that access must be equal, but difference must still be recognized to diffract fairness and power struggle including unpaid societal standards like caring for children and the home, rather than feminine characteristics. Feminist legal theory produced a new idea of using hedonic jurisprudence to show that women's experiences of assault and rape was a product of laws that treated them as less human and gave them fewer rights than men. With this, feminist legal theorists argued that given examples were not only a description of possible scenarios but also a sign of events that have actually occurred, relying on them to support statements that the law ignores the interests and disrespects the existence of women.[23] Over half of cases involving feminist issues in the Supreme Court of the United Kingdom included

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[19] *Berkeley, "Difference, Dominance, Differences: Feminist Theory, Equality, and the Law". Berkeley Journal of Gender, Law & Justice. (2013) **5** (1). doi:10.15779/Z388C4M.*

[20] *L Nancy, V M Robert, Feminist Legal Theory: A Primer (New York University Press 2015) ISBN 978-1-4798-0549-5. OCLC 929452292.*

[21] *Berkeley, "Difference, Dominance, Differences: Feminist Theory, Equality, and the Law". Berkeley Journal of Gender, Law & Justice. (2013) **5** (1). doi:10.15779/Z388C4M.*

[22] C L Sagers, "Review of Postmodern Legal Movements: Law and Jurisprudence at Century's End". *Michigan Law Review* (1997). 95 (6): 1927–1943. doi:10.2307/1290030. JSTOR 1290030.

[23] *Ibid*.

elements feminist jurisprudence in their judgments.[24] The most common form of feminist legal reasoning was placing the case within a wider context of the experience of those involved or another wider context, which could involve showing empathy for women involved in cases.[25] Judges also considered the impact of judgments on disadvantaged groups, challenged gendered bias and commented on historic injustice.[26] Some feminist facts entered into the courts reasoning as common knowledge with feminist scholars being referred to. Lady Hale has used Intersectional arguments, arguments that extend the concept of violence in cases that domestic violence outside of physical violence.[27]

6. Appraisal of the Difference Theory in Feminist Jurisprudence

As a critical theory, feminist jurisprudence responds to the current dominant understanding of legal thought, which is usually identified with the liberal Anglo-American tradition.[28] Two major branches of this tradition have been legal positivism, on the one hand, and natural law theory on the other. Feminist jurisprudence responds to both these branches of the American legal tradition by raising questions regarding their assumptions about the law, including:

a) that law is properly objective and thus must have recourse to objective rules or understandings at some level
b) that law is properly impartial, especially in that it is not to be tainted by the personal experience of any of its practitioners, particularly judges
c) that equality must function as a formal notion rather than a substantive one, such that in the eyes of the law, difference must be shown to be "relevant" in order to be admissible/visible
d) that law, when working properly, should be certain, and that the goal of lawmaking and legal decision-making is to gain certainty
e) that justice can be understood as a matter of procedures, such that a proper following of procedures can be understood as sufficient to rendering justice.[29]

In fact, each of these assumptions, although contested and debated, has remained a significant feature of the liberal tradition of legal understanding.

Feminist jurisprudence usually frames its responses to traditional legal thought in terms of whether or not the critic is maintaining some commitment to the tradition or some particular feature of it. This split in responses has been formulated in a number of different ways, according to the particular concerns they emphasize. The two formulations found most frequently in American feminist jurisprudence characterize the split either as the *reformist/radical debate or as the sameness/difference* debate. Within the reformist/radical debate, reformist feminists argue that the liberal tradition offers much that can be shaped to fit feminist hands and should be retained for all that it offers. These feminists approach jurisprudence with an eye to what needs to be changed within the system that already exists. Their work, then, is to gain entry into that system and use its own tools to construct a legal system which prevents the inequities of patriarchy from affecting justice.[30] Those who see the traditional system as either bankrupt or

[24] R Hunter, and E Rackley, "Feminist Judgments on the UK Supreme Court". *Canadian Journal of Women and the Law* (2020) 32 (1): 85–113. doi:10.3138/cjwl.32.1.04. ISSN 0832-8781. S2CID 213021194.
[25] *Ibid*.
[26] *Ibid*.
[27] A P Harris, "Race and Essentialism in Feminist Legal Theory". *Stanford Law Review* (1990) 42 (3): 581–616. doi:10.2307/1228886. JSTOR 1228886.
[28] This tradition is represented by such authors as Hart 1961 and Dworkin 1977, 1986.
[29] D Cornell, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (Routledge, 1990).
[30] R Dworkin, *Law's Empire* (Harvaard University Press, 1996).

so problematic that it cannot be reshaped are often referred to as transformist or radical feminists. According to this approach, the corruption of the legal tradition by patriarchy is thought to be too deeply embedded to allow for any significant adjustments to the problems that women face. Feminists using this approach tend to argue that the legal system, either parts or as a whole, must be abandoned. They argue that liberal legal concepts, categories and processes must be rejected, and new ones put in place which can be free from the biases of the current system. Their work, then, is to craft the transformations that are necessary in legal theory and practice and to create a new legal system that can provide a more equitable justice.[31] Under the sameness/difference debate, the central concern for feminists is to understand the role of difference and how women's needs must be figured before the law. Sameness feminists argue that to emphasize the differences between men and women is to weaken women's abilities to gain access to the rights and protections that men have enjoyed. Their concern is that it is women's difference that has been used to keep women from enjoying a legal status equal to men's. Consequently, they see difference as a concept that must be de-emphasized. Sameness feminists work to highlight the ways in which women can be seen as the same as men, entitled to the same rights, protections, and privileges.[32] Difference feminists argue that (at least some of) the differences between men and women, as well as other types of difference such as race, age, and sexual orientation, are significant. These significant differences must be taken into account by the law in order for justice and equity to be achieved. What has been good law for men cannot simply be adopted by women, because women are not in fact the same as men. Women have different needs which require different legal remedies. The law must be made to recognize differences that are relevant to women's lives, status and possibilities.[33] The two characterizations of the debate about what perspective is best for understanding the problems of the law do share some features. Those who argue a sameness position are often thought to fit, to some degree, with the reformist view. Difference feminists are seen as sharing much with radicals. The parallel between the two characterizations is that both argue over how much, if any, of the current legal system can and must be preserved and put to use in the service of feminist concerns. The two characterizations are not the same, but the important parallel between them allows for some generalization regarding the ways in which each is likely to respond to particular theoretical and substantive issues. However, while the two may reasonably be grouped for some purposes, they must not be conflated.

Although it seems that the sameness/difference and the reform/radical debates could create an impasse for feminists, some theorists believe that some combination of the two views can be more effective than either alone. Williams[34] for example, believes that rights can function as powerful liberatory tools for the traditionally disadvantaged. However, she also believes that in a racist society such as contemporary America, racial difference must be recognized because it creates disadvantage before the law. In this way, she claims that some features of the liberal tradition, like rights, need to be maintained for the liberatory work they can do. However, she argues that the liberal tradition of formal equality is damaging to historically marginalized groups. This aspect of law needs to be completely transformed. As an example of the ways in which rights are still needed by the traditionally disadvantaged, she examines the relationship to rights that is enjoyed by a white male colleague. His sense of his rights is so entrenched that he sees them as creating distance between himself and others, and believes that rights should be

[31] H L A Hart, *The Concept of Law* (Oxford University Press, 1961).
[32] H H Kay, "Equality and Difference: The Case of Pregnancy," 1 *Berkeley Women's Law Journal* 1-37 (1985).
[33] M Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Cornell University Press, 1991).
[34] P Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991).

played down. In contrast, Williams expresses her own relationship to rights, being a black woman, as much more tenuous. The history of American slavery, under which black Americans were literally owned by whites, makes it difficult for both blacks and whites to figure blacks as empowered by rights in the same ways that whites are. This example shows how Williams weaves together important elements of both reform and radical positions, and at the same time includes the element of empowerment that is seen in dominance positions. She claims that for blacks, and for any traditionally disadvantaged group, rights are a significant part of a program of advancement. One's relationship to rights depends on who one is, and how one is empowered by one's society and law. For those whose rights are already guaranteed, what may be necessary for social change is to challenge the power of rights rhetoric for one's group. But for those whose rights have never been secure, this will not look like the best course of action. Williams' suggestion is that we recognize that rights and rights rhetoric function differently in different settings and for different people. But this, then, is a response which relies on the radical and difference premise that difference must in fact be attended to rather than elided. In order that rights be made effective for historically marginalized people, we must first see that they do not in fact function for all people in the way that they do for those they were created for.

Another approach to drawing the two sides of the debate in feminist jurisprudence together is offered by Judith Baer, whose claim is that feminist jurisprudence to date has failed to either reform or transform law because feminists in both camps have made crucial mistakes.[35] The primary error has been that feminist jurisprudence has tended to misunderstand the tradition it criticizes. Although feminist jurists recognize that the liberal tradition has secured rights for men but not women, they have failed to make explicit the corresponding asymmetry of responsibility. Women are accorded responsibility for themselves and others in ways that men are not. For example, women are expected to be responsible for the lives of children in ways that men are not; as noted above, this has implications in areas like workplace law.The second major error Baer sees in feminist jurisprudence is that it, along with most feminism, has tended to focus almost exclusively on women. This has drawn feminist attention away from men and the institutions that feminism needs to study, criticize, challenge and change. It has also created a series of debates within feminism that are divisive and draining of feminist energy. Again, the solution is to recognize when reform (sameness) and radical (difference) approaches are effective, and to use each as appropriate. Baer argues that:

> *[f]eminist jurists need not – indeed, we must not – choose between laws that treat men and women the same and laws that treat them differently. We already know that both kinds of law can be sexist. Our gender-neutral law of reproductive rights treats women worse than men, but so did "protective" labor legislation. Conversely, both gender-neutral and gender-specific laws can promote sexual equality. Comparable worth legislation would make women more nearly equal with men. So have affirmative action policies. Women can have it both ways. Law can treat men and women alike where they are alike and differently where they are different.*[36]

Baer provides critiques of both reform and radical feminist jurisprudence. She concludes that neither alone is sufficient, but that both, applied where appropriate, could be. She argues that the feminist focus on women has encouraged an inability to think on a universal scale. This leaves feminists, and law under feminist jurisprudence, mired in the particularities of individual

[35] J A Baer, *Our Lives Before the Law: Constructing a Feminist Jurisprudence* (Princeton University Press, 1999) p. 55.
[36] *Ibid*.

cases and individual traits. To move out of this mire, she suggests three tasks for feminist jurisprudence:

> *First, it must do the opposite of what conventional theory and feminist critiques have done: posit rights and question responsibility. Second, it must develop analyses that will separate situations from the people experiencing them, so we can talk about women's victimization without labeling them as victims. Finally, it must move beyond women and begin scrutinizing men and institutions.*[37]

Baer does not suggest that feminism, nor feminist jurisprudence, should give up the study of women and women's situations. Rather, her suggestion is that this study as an exclusive focus is not sufficient for either reform or transformation. Because "women neither create nor sustain their position in society" feminists need to scrutinize those who do. Baer's suggestion is that what is needed is an account of "what it means to be a human being, a man, or a woman, which makes equality possible."[38] The mistakes that feminist jurisprudence has made have prevented its developing this account, which Baer thinks could be the foundation of what she calls a feminist post-liberalism sufficient for feminist jurisprudence.

7. Conclusion

In order to move from our current situation to a move just resolution for the dilemma of caretaking and dependency, we will need to move than a responsive state. The state will also have to be an active participant in shaping and monitoring other societal institutions. One fundamental task will be monitoring and preventing the exploitation and appropriation of the labour of some citizen through institutional and ideological arrangements. This must be prevented even when the justification for the labour's appropriation and exploitation is that is that it is used for the good of the majority. Further, it must be prevented even in contexts where social constraints and conventions coerce consent from the labour.

The state must use its regulatory and redistributive authority to ensure that those things that are not valued or are undervalued in market or marriage are nonetheless, publicly and politically recognized as socially productive and given value. Conferral of value requires the transfer of some economic resources from the collective society to caretakers through the establishment of mechanisms that those who receive the benefit of caretaking in order to compensate those who do the caretaking. Other societies do this in a variety of ways, such as using tax revenues to provide child care allowances and universal benefits that assist caretakers, or through a basic income guarantee. Money, however, is not enough. The active state must also structure accommodation of the needs of caretaking into society's institutions.

[37] *Ibid*, 68.
[38] *Ibid*, 192.

CASE REVIEW

GLOBAL TRANSITION TO CLEAN ENERGY: A REVIEW OF THE HAGUE DISTRICT COURT DECISION AGAINST ROYAL DUTCH SHELL*

Abstract

Recently, the Hague District Court delivered a ground-breaking decision against the Royal Dutch Shell ("RDS"), ordering RDS and its affiliates to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume would have been reduced by at least net 45% at the end of 2030, relative to 2019 levels. This judgment constitutes an important step in establishing the responsibility of multinational companies in achieving the clean energy goals of the global community and, also, stands a good chance of positively influencing the outcome of similar cases in many other countries where climate change activists are likely to pursue kindred suits – especially if the legal frameworks in such countries are conducive to such climate change litigations.

Keywords:
The Netherlands, Climate change, Royal Dutch Shell, Hague District Court, CO2 emissions, Milieudefensie

1. Introduction

In a class-action instituted by climate change activists, the Hague District Court on 26 May 2021 delivered judgment against RDS, ordering *"*RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels"[1]. This decision which signals judicial support for transition to clean energy is indeed ground-breaking being the first of its kind court order against a private entity to reduce its global CO2 emissions.[2]

2. The Legal Basis of the Suit

Non-governmental organizations with focus on climate change[3] (the "NGOs") instituted the class action against RDS riding on Book 6 Section 162 of the Dutch Civil Code which identifies a tortious act as *"a violation of someone else's right[4] (entitlement) and an act or omission in*

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[1] Paragraph 5.3 of the Judgment.

[2] RDS has since indicated that it plans to appeal the decision. However, it is left for the appellate court to decide where the pendulum swings.

[3] The Non-Governmental Organisations that instituted the class action are Milieudefensie, Greenpeace Nederland, Fossielvrij NL, Waddenvereniging, Both Ends, Jongeren Milieu Actief and ActionAid. The claims of ActionAid were denied because its objects (with a special focus on Africa) as stated in its Articles of Association do not align with the interest served with the class action - which is for the benefits of the residents of Netherland and the Wadden region.

[4] The rights of the inhabitants of the Netherlands and the Wadden region which the court sought to protect are the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden

violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour." The NGOs argued that RDS has an obligation ensuing from the unwritten standard of care (pursuant to Book 6 Section 162 of the Dutch Civil Code), to contribute to the prevention of dangerous climate change. It was argued that this obligation rests on RDS as it determines the corporate policy of the entire Shell group.

3. Decision of the Court

3.1 Admissibility of Class Actions

The Court held that while the common interest of preventing dangerous climate change can be protected in a class action, the interest of the entire world's population is not suitable for bundling in a class action. This is because the principal interest of the world's population does not meet the requirement for 'similar interest' under Dutch law as there are huge differences in the time and manner in which the global population at various locations will be affected by the global warming caused by CO2 emissions. The class action is therefore limited to the interest of Dutch residents and inhabitants of the Wadden region.

3.2 Applicable Law

The court held Dutch law to be the applicable law since the damage of the Co2 emissions occurred in the Netherlands and the Wadden region; and the policy-setting responsibility of RDS for the Shell group is an event giving rise to the damage.[5]

3.3 RDS' Reduction Obligation

The Court held that RDS' reduction obligation ensues from the unwritten standard of care laid down in the Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful. In interpreting the unwritten standard of care, the court considered several factors including: (1.) the policy-setting position of RDS in the Shell group, (2.) the Shell group's CO2 emissions, (3.) the consequences of the CO2 emissions for the Netherlands and the Wadden region, (4.) the right to life and the right to respect for private and family life of Dutch residents and the inhabitants of the Wadden region, (5.) the UN Guiding Principles, (6.) RDS' check and influence of the CO2 emissions of the Shell group and its business relations, (7.) what is needed to prevent dangerous climate change, (8.) possible reduction pathways, (9.) the twin challenge of curbing dangerous climate change and meeting the growing global population energy demand, (10.) the ETS system and other 'cap and trade' emission systems that apply elsewhere in the world, permits and current obligations of the Shell group, (11.) the effectiveness of the reduction obligation, (12.) the responsibility of states and society, (13.) the onerousness for RDS and the Shell group to meet the reduction obligation, and (14.) the proportionality of RDS' reduction obligation. In this decision, the court, relying on the World Resources Institute Greenhouse Gas Protocol, recognised 3 scopes of emissions:

Scope 1: direct emissions from sources that are owned or controlled in full or in part by the organisation;

Scope 2: indirect emissions from third-party sources from which the organisation has purchased or acquired electricity, steam, or heating of its operations (e.g. suppliers);

region as enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

[5] This was held in accordance with Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligation.

Scope 3: all other indirect emissions resulting from activities of the organisation, but occurring from greenhouse gas sources owned or controlled by third parties, such as consumers.

Although the court noted that RDS does not actually cause the Scope 1 - 3 emissions of the Shell group by itself, it noted that RDS' adoption of the corporate policy of the Shell group constitutes an independent cause of the environmental damage and RDS must take responsibility for that. In arriving at the percentage of reduction required of RDS (net 45% at end 2030, relative to 2019 levels), the court considered the SR15 report.[6]

4. The Implication of the Decision

One apparent implication of the decision is that while it is for the benefit of only the residents of the Netherlands and inhabitants of the Wadden region, it potentially could affect the global business of the Shell group. This would mean that an entity's choice not to operate in the Netherlands – as long as its activities affects the residents of the country, ie Netherlands - may not be a concrete defence to a similar suit before the Dutch court. This applies in particular when one considers the decision of the court that *"every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this [environmental] damage and its increase".* The decision will inevitably affect Shell's decision globally and the court noted so that *"a consequence of this significant obligation may be that RDS will forgo new investments in the extraction of fossil fuels and/or will limit its production of fossil resources"*. The flip side is that this would likely affect investments in the African continent with many countries naturally endowed with these resources. That again has a direct effect on the Gross Domestic Product of countries like Nigeria whose economies are heavily reliant on crude oil and where the transition to clean energy is still at its lowest ebb. This decision is a further wake up call to Nigeria and other developing countries to rethink their economic policies towards clean energy and diversified green economies. These are issues that the relevant stakeholders must remain conscious of – especially now that the global community is determined to reduce the effects of greenhouse gases in the atmosphere. Regardless of the above position, it could be argued that the Dutch decision does not really have a global effect since the court restricted itself to the activities of the Shell Group affecting Dutch residents. In particular, the suit filed by ActionAid was not allowed because the court considered the interests of Dutch residents not sufficiently promoted by the organisation. Relying on ActionAid's articles of association, the court held that object of the organisation pertains to the world with a special focus on Africa. However, the court allowed the class action suits filed by *Milieudefensie et al* because the objects of their articles of association sufficiently promote the interests of Dutch residents. Therefore, the limitation of this decision is that what happens elsewhere may not be redressed in a Dutch court except if the claimant shows that it promotes the interests of Dutch residents and that the outside activities complained of affects Dutch residents adversely. Since, countries in Africa are battling with severe budget deficits and/or funding shortfalls, and have not boldly taken any step to enforce the United Nations Framework Convention on Climate Change ("UNFCCC"), International Convention on Oil Pollution Preparedness, Response and Cooperation ("ICOPPRC"), Paris Agreement, etc, there might be no political will to compel oil companies operating in the continent to observe the *Milieudefensie et al* decision. Regardless, it is clear that this decision will inspire similar suits by climate change activists - either in the

[6] IPCC Special Report on the impacts of global warming of 1.5ºc, 2018. The court noted that research has shown that a safe temperature increase should not exceed 1.5ºc by the year 2100 and the SR15 report identifies that limiting global warming to 1.5ºc requires a net reduction of 45% in global CO2 emissions in 2030 relative to 2010 and a net reduction of 100% in 2050.

Netherlands or in other jurisdictions across the globe. This is particularly in light of the fact that this case is following the decision of the Dutch Supreme Court in *Urgenda Foundation vs. State of the Netherlands*, where the Dutch State was ordered to reduce greenhouse emissions by at least 25% as of late 2020 relative to 1990. It remains to be seen what approach the courts will take if, or when, such lawsuits are commenced in Nigeria or elsewhere in Africa.

CASE REVIEW

THE *PILLARS (NIG) LTD V. DESBORDES* CASE –SO MUCH ADO ABOUT AN *OBITER DICTUM* IN A CONCURRING OPINION*

1. Introduction

On February 5, 2021, the Supreme Court of Nigeria delivered its decision in an appeal comprised in the case of *Pillars (Nig.) Ltd. v. Desbordes.*[1] The notice of appeal contained five grounds of appeal. The appellant's brief raised four issues for determination, while the respondents' brief raised two issues for determination. The Supreme Court, in a lead judgment delivered by Justice EA Agim, determined the appeal on the basis of the issues raised for determination in the appellant's brief. The Supreme Court determined issues number 1 and 4 against the appellant, held that no useful purpose would be served in determining issues numbers 2 and 3, and held that the appeal failed for lacking merit and consequently, dismissed it.

2. Facts of the Case

The appellant was the defendant at the trial court. The cause of action arose from the breach of a contract for a building lease. A certain Mr. Grant Desbordes held title to certain land. He and the appellant entered into a Development Lease Agreement for a duration of 26 years effective from October 24, 1977. Under the Lease, appellant agreed at its own expense to erect buildings in accordance with agreed specifications on a designated portion of the land. Completion of these constructions was agreed for on or before December 21, 1979. It was a further term of the Building Lease for appellant to make annual payments to Mr. Grant Desbordes in the sum of N2, 250.00. This payment was due on December 21 of each year for the entire lease period term of 26 years. Up till December 21, 1979, the stipulated period for completion of the construction, appellant failed to commence and conclude the construction. Mr. Grant Desbordes raised issue with the appellant regarding its non-compliance with the terms of the lease. On his instruction, his solicitor issued a Notice of Breach of Covenant to the appellant. Mr. Grant Desbordes afterward became deceased. Following his decease, Counsel, on the instructions of his estate issued statutory notices to the appellant for termination of the lease, and subsequently filed a case at the High Court. Both the High Court and Court of Appeal held the appellant in breach of the lease. The appellant then appealed to the Supreme Court.

3. The Decision and the *Ratio Decidendi*

The first ground of appellant's appeal to the Supreme Court was that: The learned Justices of the Court of Appeal erred in law in holding as follows: *'I am of the firm view that the trial judge came to the right conclusion that the evidence in support of service of notice and the fact that defence after denying in their pleading later admitted service of notice of intention are strong basis for the Court to accept PW1's evidence as credible against DW1 testimony*." The Particulars of Error were that

1. "Service of statutory notices is a condition precedent to the institution of the action (for forfeiture of lease and therefore fundamental, as it goes to the root of the action) as to vitiate the entire proceedings for failure to establish same.

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[1] Hereinafter referred to as Pillars' case. The decision is reported in [2021] 12 NWLR Part 1789, 122

2. Issues were joined by the parties on the services of the statutory notice to quit. The burden of proof of the said notice (Exhibit G) is on the plaintiff/respondent. The Rules of pleadings that he who asserts must prove is applicable.
3. The plaintiffs/respondents did not lead evidence of mode of service neither did they lead evidence of the person that effect the service of the statutory notice.
4. It is not the duty of the defendant/appellant to aid the plaintiff/respondent to prove service of the statutory notice.
5. The admission of the DW1 that service of Exhibit H (the notice of the lessor's intention to recover the possession) was effected on the defendant/appellant is not sufficient proof of Exhibit E (Notice of Breach of Covenant) and G (Notice of Quit).
6. Service of Exhibit E and G being fundamental cannot be inferred. Strict proof of same is very important.

The Supreme Court held that issue number 1 for determination which purported to arise from ground of appeal number 1 differed from the subject matter of the complaint in ground of appeal number 1. The Court held that usually an issue is derived from a ground. In the present case, if the subject matter of the issue differs from the subject matter of the complaint in the ground, it would be wrong to say that the issue for determination number 1 is related or derived from the ground of appeal number 1. In this regard, the Court held that that to the extent that issue number 1 for determination questions the decision of the Court of Appeal concerning the issuance and service of a valid Notice to Quit, it had no relationship with any of the grounds of the appeal. The court then held that as it is, no issue is distilled from ground 1 of this appeal, and that by not raising any issue for determination from it, the appellant abandoned the ground of appeal number 1. It was hereby struck out. In essence, the Court found that there was no ground of appeal complaining against the decision of the Court of Appeal confirming the decision of the trial Court that the respondents pleaded and proved service of notice to quit. The Court then held that the part of issue number 1 for determination that questioned the decision of the Court of Appeal concerning pleading and proof of service of notice to quit, not being derived from or related to any ground of the appeal was incompetent; it thereby struck it out.[2] It is important to reiterate and re-emphasise that the part of the notice of appeal that challenged service of a notice to quit on the appellant by the respondent was held by the Supreme Court as not properly before it. It was struck out and was not determined by the Supreme Court. This factor is of singular importance with reference to the subsequent *dicta* of the concurring opinion on the issue of a notice to quit.

4. Critical Analysis

A judgment is an official and authentic decision of a court upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to the determination of the court. It is the decision of a court resolving the dispute between the parties[3]. The term is also used to denote the reasons which the court gives for its decision, so that where the court consists of several judges, such as under the Nigerian appellate system, it may happen and often does happen that each judge gives a separate judgment or statement of his reasons, although there can be only one judgment of the court in the technical sense of the word[4]. The word judgment in its technical sense which is the sense, in which it is used in judicial proceedings, connotes a binding determination of a court or tribunal in a dispute between two persons. The determination is enforceable by the exercise of the

[2] The Court relied on *Modupe v. State* (1988) 9 SCNJ 1; *Apostolic Faith v. Umo Bassey James* (1987) 7 SCNJ 167, and a long line of cases established over time, that any issue raised for determination in an appeal that is not based on or covered by any ground of the appeal is not valid for consideration and must be struck out.

[3] *Oredoyin v. Arowolo* [1989] 4 NWLR Part 114, 172

[4] *Ogboru v. Ibori*, [No.1] [2005] 13 NWLR Part 942, 319

coercive jurisdiction of the courts at the instance of the party in whose favour the judgment has been given[5]. A judgment is the law's last word in a judicial controversy; it is the final consideration and determination of a court of competent jurisdiction upon matters submitted to it in an action or proceeding[6]. Judgment is a decision or determination in relation to a court just as '*ruling*'. However, in contradistinction to a ruling, a judgment is a final decision of the court resolving the dispute and determining the rights and obligations of the parties[7]. These definitions are however subject to qualification because decisions of the court declining to entertain the claim for procedural defects, or refusing to determine the ultimate issues for procedural or inherent vice still qualify as judgments.

4.1 Identifying What Constitutes the Judgment of a Court

An action is instituted for the enforcement of a right or the redress of an injury. Thus, a judgment, as the culmination of an action, declares the existence of the right recognizes the commission of the injury or negatives the allegation of one or the other. However, as no right can exist without a correlative duty, or any invasion of it without a corresponding obligation to make amends, the judgment necessarily affirms or else denies that such a duty or such a liability rests upon the person against whom the aid of the law is invoked. In other words, a judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding; or on one of the questions, if there are several[8]. Where a single Judge presides, the judgment of that court is what may be discerned as the *ratio decidendi* or *rationes decidendi* of the case in contrast to the passing remarks otherwise referred to as *obiter dictum* or *obiter dicta* made by the court in the course of preparing the judgment. The problem arises when three or five justices preside over a case or an appeal wherein one of the Justices is assigned the responsibility to write the lead judgment, and others, under the mandatory provisions of the constitution, are obliged to render either their concurring or dissenting judgment. In such a situation, it is the lead judgment that is in legal circles, regarded as the judgment of the court[9]. The decision of a court consisting of more than one Judge is determined by the opinion of majority of its members.[10] For the purpose of exercising any jurisdiction conferred on it by the Constitution or any other law, section 294(2) of CFRN 1999 provides that each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion. A judgment or ruling of an appellate court presided over by plural judges in contra-distinction to a single judge is encapsulated in the leading judgment or ruling of the court. Where the judgment of a court with plurality of judges sitting is announced or reported to be unanimous, the other judges would deliver concurring judgments. These may comprise brief or lengthy judgments[11]. Where a court consists of more than one Judge, the decision of the court is determined by the opinion of the majority of the members[12]. This majority opinion is the judgment

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[5] *Osafile v. Odi (No.1)* [1990] 3 NWLR Part 137, 130; *Usman v. KSHA*, [2008] All FWLR Part 397, 78

[6] *Travellers Insurance Co. v. US*, 51 FPD 673

[7] *Ushae v. COP* [2006] All FWLR Part 313, 86

[8] *Ogboru v. Ibori*, (n 4)

[9] *Abacha v. Fawehinmi*, [2000] 6 NWLR Part 660, 228; *Daramola v. Aribisala*, [2009] All FWLR Part 496, 1964

[10] s. 294 (4) & (5) of CFRN 1999; in *Pharmatek Industrial Projects Ltd. v. Trade Bank Plc*, [2009] All FWLR Part 495, 1678, it was held that in proceedings where the judgment of the court is split into plurality or majority and minority positions, what constitutes the judgment of the court is the majority position.

[11] *Akpoku v. Ilombu* [1998] 8 NWLR Part 561, 283

[12] s. 294(3) of CFRN, 1999; in *Saidu v. Abubakar*, [2008] 12 NWLR Part 1100, 201, Bulkachuwa, JCA stated at 244 D-E: *'The appeal emanates from the decision of an election tribunal where five justices presided, the decision was signed by 3 members including the chairman. Two other justices did not sign, even assuming they did not agree with the judgment there is nothing on the record to show that they were dissenting from the majority judgment. We are bound by what is in the record, there is a majority judgment, and even if the minority i.e. the two justices had dissented, the majority decision would still have been the decision of the lower tribunal.'*

of the court. The minority judgment or dissenting judgment is not the judgment of the court[13]. Appeals lie only in respect of the majority judgment, and not the minority judgment[14]. The jurisprudence of the Nigerian legal system is quite clear that it is the *ratio* or *rationes* contained in the lead judgment that constitute the authority for which the case stands. All other expressions contained in the concurring judgments, particularly those not addressed in the lead judgment are *obiter dictum* or *dicta*[15]. Consequently, in the *Pillars*' case, the judgment of the Supreme court is comprised in the lead judgment of the Court delivered by Justice EA Agim.

4.2 The Effect of a Concurring Opinion

A concurring judgment might be either a concurrence with the majority or lead judgment or a concurrence with a minority or dissenting judgment. In the jurisprudence and practice of law in Nigeria, it is the *ratio decidendi* contained in the leading judgment that constitutes the authority for which the case stands. All other opinions or expressions contained in the supporting or concurring judgments, particularly those not addressed in the leading judgment are *obiter dicta* and may be of persuasive effect in other occasions[16]. A concurring judgment is not expected to differ from the leading judgment. A concurring judgment as the name implies must agree with the leading judgment.[17] A concurring judgment which differs from or contradicts the lead judgment becomes a dissenting judgment[18], or at best amounts to *obiter dicta*[19]. In any event, A concurring judgment represents only the personal view of the concurring judge, and does not have any binding effect as precedent[20]. Appeals lie only in respect of the majority judgment and not the minority or concurring opinion. An *obiter dictum* in a concurring judgment cannot form the basis or reason to set aside the judgment because it is not the *ratio decidendi*[21]. The value of concurring judgments to our jurisprudence lies in the fact that often, the Judge who pens the concurring judgment is able to take a closer look at an aspect of the appeal before the court in respect of which the lead judgment may have overlooked, or treated superficially[22].

4.3 What Constitutes *Obiter dicta* and its Effect

General expressions in every opinion are to be taken in connection with the case in which those expressions are used; if they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision[23]. Statements going beyond the narrow question stated and decided by the court must be regarded as *dicta*[24]. A judicial opinion expressed on a point not necessarily raised and not involved in the case, or on a point in which the judicial mind was not directed to the precise question necessary to be determined to fix the rights of the parties constitutes *dictum*. Expressions in opinions not called for by the facts or circumstances of the case, are no more than *dicta*, entitled to weight only insofar as the reasons therefore may justify the language[25]. *Dicta* are not of binding authority unless they can be shown to express a legal proposition which is a necessary step to the judgment pronounced by the court in

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[13] *Ekpan v. Uyo* [1986] 3 NWLR Part 26, 63
[14] *Umanah v. Attah* [2006] 17 NWLR Part 1009, 503
[15] *Abacha v. Fawehinmi*, (n 9); *Daramola v. Aribisala*, (n 9)
[16] *Okeke v. Chidoka*, [2011] 5 NWLR Part 1241, 483
[17] *Olufeagba v. Abdul-Raheem*, [2009] 18 NWLR Part 1173, 384
[18] *Mohammed v. Abdulkadir*, [2008] 4 NWLR Part 1076, 111
[19] *Ibrahim v. Fulani*, [2010] All FWLR Part 508, 261
[20] *Lendsay v. Cotton*, 20 Am Jur 2d, 435
[21] *Umanah v. Attah*, (n 14)
[22] *Rebold Industries Ltd. v. Ladipo*, [2007] All FWLR Part 395, 522
[23] *Wright v. US*, 302 US 583, 58 S Ct 395
[24] *Technograph Printed Circuits Ltd. v. Packard Bell Electronics Corp*., 17 FPD 2d, 257
[25] 20 Am Jur 2d, 526

the case wherein the *dicta* are found[26]. *Obiter dicta* cannot found a ground of appeal except in the rare cases where it occasioned a miscarriage of justice, to wit, a misdirection which must have affected the judgment in a way that is crucial to the decision[27]. It is perfectly familiar doctrine that *obiter dicta*, though they may have great weight as such, are not conclusive authority. *Obiter dicta* in this context mean what the words literally signify-namely, *'statements by the way'*. If a judge thinks it desirable to give his opinion on one point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case and the reasons for the decision[28]. *Dicta* by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these *dicta* really form integral parts of the train of reasoning directed to the real question decided. They may, if they merely occur at large, be valuable for edification, but they are not binding[29]. Statement of an abstract legal principle even when made by the Supreme Court is binding precedent only insofar as it is applied to the facts of the case in which the pronouncement was made[30]. *Dicta* are of different kinds and of varying degrees of weight. Sometimes they may be casual expressions of opinion upon a point which has not been raised in the case and is not present to the judge's mind. Such *dicta*, though entitled to respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration.[31]

4.4 Distinguishing Between *Rationes Decidendi* and *Obiter dicta*

The *ratio decidendi* of a case is the reason for the decision. It is the principle or ground upon which the case is decided. The expression of a judge in a judgment must be taken with reference to the facts of the case which he is deciding, the issues calling for decision, and the answers to those issues.[32] The *ratio decidendi* constitutes the general reasons for the decision, which is different from the decision itself or the general grounds upon which the decision is based or abstracted from the specific peculiarities of that particular case[33]. Principles are distilled from the fact of the case in which they are promulgated. They draw their inspiration and strength from the very fact which framed the issues for decision. When therefore the facts are not similar, the principle need not apply or be applied to the new case. Principles therefore do not provide any patterns for definite situations. They merely constitute the starting point of legal reasoning[34]. Where the principles enunciated in the decisions of the Supreme Court are not relevant or applicable to the issue or issues arising for determination before the Court of Appeal or any other lower courts, it is not necessary that the Court of Appeal or any other lower court should apply the aforesaid principle[35]. *Obiter dicta* reflect inter alia, the opinions of the judge which do not embody the resolution of the court[36]. It is an ancillary statement made in the course of legal decision-making which does not constitute the integral part

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[26] *Michigan Trust Co. v. Canadian Puget Sound Lumber Co., Temple v. Canadian Puget Sound Lumber Co*., 30 E & E D 216

[27] *Bamgboye v. University of Ilorin* [1991] 8 NWLR Part 207, 1

[28] *Flower v. Ebbw Vale Steel, Iron & Coal Co*., [1934] 2 KB 132

[29] *Cornelius v. Philips*, [1918] AC 199

[30] *Pape Television Co. v. Associated Artists Production Corp*., 17 FPD 2d, 256

[31] *Leeds Industrial Co-operative Society Ltd. v. Slack* [1924] AC 851, some *dicta*, however, are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the court. It is open no doubt to other judges to give decisions contrary to such *dicta*, but much greater weight attaches to them than to the former class.

[32] *UTC (Nigeria) Ltd. v. Pamotei* [1989] 2 NWLR Part 103, 244

[33] *Adesokan v. Adetunji* [1994] 2 NWLR Part 346, 540; *Ajibola v. Ajadi*, [2004] 14 NWLR Part 892, 14

[34] *Clement v. Iwuanyanwu*, [1983] 3 NWLR Part 107, 39;

[35] *7Up Bottling Co. Ltd. v. Abiola & Sons Ltd* [1995] 3 NWLR Part 383, 257

[36] *UTC Nigeria Ltd v. Pamotei* (n 32)

of the decision for which the case stands[37]. It is what the Judge says by the way, that is, it is a statement the Judge makes in the course of the decision or judgment. It is in most cases a casual and passing expression of the Judge. It is mostly a statement of an illustrative nature based on hypothetical facts. It could be an observation made by the Judge on issues which do not fall for determination, considering the live issues before the court, either of first instance or of appeal[38]. They arise when a Judge thinks it is desirable to express opinion on some points, though not in issue or necessary to the case before him[39]. *Obiter dicta* are mere passing remarks which have no binding authority as a *ratio decidendi*, though they may have some persuasive efficacy. So, *dicta* by a Judge, no matter how eminent they may be, ought not to be cited as founding authoritative propositions of law, unless these *dicta* really form integral parts of the train of reasoning directed to the real questions decided. Otherwise, they may be valuable merely for edification, but are not binding[40].

4.4 Jurisdictional Incompetence of the *Obiter* in Pillars' Case

As stated earlier, the lead judgment of the Supreme Court was delivered by Justice EA Agim, JSC. In the lead judgment, the Court held the aspect of appellant's appeal that challenged service of a notice to quit on the appellant by the respondent was not properly before the Court. The Court thus lacked competence to determine it, and struck it out. The role of a court is to pronounce on and decide issues in dispute submitted to it. In such proceedings, it is the parties who play the primary role in the process. The parties perform this role at the trial stage by issues raised on their pleadings, where the case is tried on pleadings, and, at the appellate stage, by the issues arising from the grounds of appeal raised by the appellant. When an issue is not placed before the court, it should not determine it.[41] It is clear that in the lead judgment, the Supreme Court struck out issue for determination number 1 distilled from ground of appeal number 1. It does not appear that any doubt exists about the fact that the consequence of striking out an issue for determination is that, it puts an end to the ground of appeal from which it was distilled.[42]

In this *Pillars*' case, it is clear that for all the benevolence it is capable of mustering, the Supreme Court lacked competence to decide the issue of the validity of service of the statutory notice to quit by the respondent on the appellant as a condition precedent to the institution of the action for forfeiture of the lease. The issue was not before the Court. The ambit of questions envisioned for courts to deal with in exercise of their judicial powers under s. 6(1) & (2) of CFRN 1999, does not extend to hypothetical or academic questions.[43] Courts deal with cases on the basis of facts disclosed, and not with non-existent and assumed circumstances[44]. A court is not bound to answer every issue raised by a litigant unless the point so raised is necessary and material for resolution of the case before it. This is because courts, including the Supreme Court do not indulge in academic exercise or issue opinions about likely cases[45]. Courts are created to decide cases based on real and actual facts, and not to hold forth on imagined or hypothetical facts. Thus, courts do not

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[37] *Orthopaedic Hospitals Management Board v. BB Apugo & Sons Ltd*. [1995] 8 NWLR Part 416, 750

[38] *Onagoruwa v. State* [1993] 7 NWLR Part 303, 49

[39] *Buhari v. Obasanjo* [2004] FWLR Part 191, 1487; *FI Onwadike & Co. Ltd. v. Brawal Shipping (Nig) Ltd*. [1996] 1 NWLR Part 422, 65

[40] *Adesokan v. Adetunji* (n 33)

[41] *Comptoir Commercial & Industrial SPR Ltd. v. Ogun State Water Corporation*, [2002] 9 NWLR Part 773, 629

[42] *Odugbemi v Shanusi* [2018] LPER – 44868 [CA]; *Ikpeazu v. Otti* (2016) LPELR – 40055 (SC)

[43] *Mudiaga-Erhueh v. INEC*, [2003] 5 NWLR Part 812, 70; in *Okotie-Eboh v. Manager*, [2004] 18 NWLR Part. 905, 242, it was held that courts are not created to deal with hypothetical and academic issues; rather, they are established to deal with matters in dispute between parties. Courts deal with disputes which are present as between persons, and can declare their rights and equally enforce a judgment given.

[44] *Associated Press v. NLRB*, 301 US 103, 57 S Ct 650

[45] *Umanah v. Attah*, (n 14)

decide questions that have no relevance to the facts. In the absence of facts to which the law can be applied, the court will not embark on any exercise.[46]

An academic issue is one which does not necessitate answer or adjudication by a court of law because it is not necessary. Courts deal with live issues, which will have bearing in one way or the other on any of the parties or all the parties.[47] An academic matter in a suit is one which is raised for the purpose of intellectual or scholarly reasoning, which cannot in any way affect determination of the live issues in the matter. It is merely to satisfy intellectual curiosity[48]. A suit is academic if it is merely theoretical, and of no practical utilitarian value to the plaintiff even if judgment is given in his favour.[49] Courts do not expend judicial time and energy on academic issues.[50] A hypothesis is an assumption made, especially in order to test its logical or empirical results[51]. The duty of the court is to determine the merit of the case or dispute before it. The merit of the case is the real ground of an action or defence in contrast to some technical or collateral matter raised in the cause of the case.[52] A court's jurisdiction cannot be invoked for purposes of deciding a question not arising out of the facts of a case brought before it, but existing only in the light of hypothetical facts[53]. Hypothetical and academic issues or questions do not help in determination of the live issues in a matter. As a matter of law, they add nothing to the truth-searching process in the administration of justice. This is because they do not relate to any relief[54]. Where resolution of an issue raised by the parties before the court is not relevant to determination of the actual issue in dispute, the court will refuse to countenance such issue for being academic or hypothetical[55]. Thus, if a question presented to the court for resolution is unrelated to the controversy before the court for determination, the court will decline jurisdiction to entertain it[56]. Clearly, the concurring opinion in the *Pillars*' case,

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[46] *Igwe v. Alvan Ikoku College of Education, Owerri*, [1994] 8 NWLR Part 363, 459

[47] *Ijaodola v. Unilorin Governing Council*, [2018] 14 NWLR Part 1638, 32, the term for which appellant contested for the office of Vice-Chancellor for the University of Ilorin commenced in 2012 and came to an end in 2017. Hearing an appeal in 2018 to determine whether appellant was qualified, to have been the Vice-Chancellor for the term 2012 to 2017 had become an academic exercise. All the reliefs even if resolved in appellant's favour would not confer any right or benefit on him because the term for which he wanted to be Vice-Chancellor expired in 2017. Since no purpose would be served by the appeal it was a mere academic exercise.

[48] *Abubakar v. Yar'adua*, [2008] All FWLR Part 404, 1409; in *Chedi v. A.-G., Fed*., [2008] 1 NWLR Part 1067, 166, it was held that courts have no jurisdiction to give advisory opinions but they being courts of law can only adjudicate upon live or living issues. Issues that are not live are hypothetical or academic: the courts do not form the habit of engaging themselves in such an inconsequential exercise.

[49] *Plateau State v. A-G, Fed*., [2009] All FWLR Part 449, 531; in *Dickson v. Sylva, [2017] 10 NWLR Part 1573, 299*, it was held that courts assume jurisdiction only on live issues; academic issues which are, almost always, hypothetical, do not engage the attention of courts.

[50] *KRK Holdings (Nig.) Ltd. v. FBN (Nig.) Ltd*, [2017] 3 NWLR Part 1552, 326; in *Marine & Gen. Ass. Co. Plc. v. OU Ins. Ltd.*, [2006] 4 NWLR Part 971, 622, it was held that courts of law are not established to deal with hypothetical and academic questions. Courts are established to deal with live issues that relate to matters in difference between parties. In *Min. for Works & Housing v. Tomas (Nig.) Ltd*., [2002] 2 NWLR Part 752, 740, it was held that courts should not indulge in academic exercise. Courts deal only with live issues and steer clear of those that are academic. It would be improper for the Court to exercise jurisdiction in deciding academic questions, the answer to which cannot affect the parties in any way.

[51] *Abubakar v. Yar'adua*, (n 48)

[52] *Zabusky v. Debayo-Doherty*, [2013] 2 NWLR Part 1338, 320

[53] *Collins v. Porter*, 328 US 46, 66 S Ct 893; in *FCDA v. Koripamo-Agary*, [2010] 14 NWLR Part 1213, 364, it was held that a theoretical, hypothetical point is not for the courts to consider, as courts do not make moot decisions or decide hypothetical cases which have no bearing with what the court is required to decide. In *Geidam v. NEPA* [2001] 2 NWLR Part 696, 45, it was held that courts are loathe to make pronouncements on academic or hypothetical issues as it serves no useful purpose

[54] *Adeogun v. Fashogbon*, [2009] All FWLR Part 449, 531

[55] *ADH Ltd. v. Amalgamated Trustees Ltd*., [2007] All FWLR Part 392, 1781

[56] *Magraw v. Donovan*, 20 Am Jur 2d, 443

to the extent that it forms the subject matter of this review, is the aspect that deals with the issue of service of a notice to quit. As stated in the lead judgment, validity of the service of a notice to quit was not properly presented to the court. The Court struck out that issue and determined the appeal on the basis that the validity of the notice to quit was not an issue in the appeal. Flowing from this, the entire postulation of the concurring opinion regarding service of a notice to quit was in respect of an issue that was not before the court. Undoubtedly, a judge is not permitted to indulge in the discussion of theories or principles however attractive, if they have no bearing with the case the court is called to decide[57]. The judge does not have the power to render advisory opinions or to decide academic issues. The court is only competent to decide matters touching live issues in controversy between the parties[58]. The court, therefore, is not expected and does not indulge in answering academic questions or questions which never arose from the issues in the case before the court. Where therefore, the resolution of an issue one way or the other will be no more than engaging in academic exercise, the court will not and should not entertain such matter[59]. The court will not pronounce upon the legal validity of what one of the parties has done or refrained from doing unless such pronouncement is necessary for the resolution of the issues in controversy between the parties to a suit[60]. The courts do not discuss questions that have no relevance to the facts. In the absence of facts to which the law can be applied, the court will not embark on any exercise. Courts are established to decide cases based on real and actual facts not to pontificate on imagined and hypothetical facts[61]. The reasons why the courts are incompetent to indulge in academic exercises is because, the outcome, if decided one way or the other, will neither confer benefit on, nor injure any of the parties, but merely expound the law[62]. The ambit or compass of questions intended to be dealt with in exercise of judicial powers vested in the courts of this country under section 6(1) and (2) of CFRN 1999 do not extend to hypothetical questions[63].

4.4 Whether *Obiter dicta* in a Concurring Opinion Creates Law

Upon the Supreme Court delivering its decision in the *Pillars*' case, members of the legal profession, particularly property lawyers declared their conclusion that the decision created a seismic event in the landlord and tenant relationship. The conclusion was that deducible from the decision, an irregularity in the issuance or service of a notice to quit in an eviction proceeding is no longer fatal to the competence of the action. In other words, a defective notice to quit is not fatal merely because the deficiency in the requisite period the notice is required to run. According to this theory, subsequent issuance of the writ of summons or other originating eviction process serves *ex post facto* to cure the defect in the notice to quit. Reliance for this new-fangled position was placed on the *obiter dicta* of Justice Ogunwumiju, JSC's concurring judgment where her Lordship stated[64]:

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[57] *Dike v. Nzeka* [1986] 4 NWLR Part 34, 144

[58] *Martin Schroeder & Co v. Major & Co. (Nig.) Ltd* [1989] 2 NWLR Part 101, 1; *Fawehinmi v. NBA (No.1)* [1989] 2 NWLR Part 105, 494

[59] *NIDB v. Fembo (Nig.) Ltd*. [1997] 2 NWLR Part 489, 543

[60] *Biishi v. Judicial Service Committee*, [1991] 6 NWLR Part 197, 331; in *Kudu v. Aliyu* [1992] 3 NWLR Part 231, 615 the Court of Appeal held that if the decision of the lower court rested substantially on facts not pleaded or issues not raised by the parties or within their contemplation or if the findings which formed the basis of the judgment on appeal, are not borne out by the pleadings of the parties, and the issues thrown up by the judgment of the court do not arise from the leadings and were indeed not canvassed, such judgment will not be allowed to stand as to hold otherwise would amount to a fundamental breach of the legal principle that requires that cases should be decided not on hypothesis, but on the hard facts on which issue have been joined.

[61] *Igwe v. Alvan Ikoku College of Education, Owerri* (n 46)

[62] *Dabo v. Abdullahi* [2005] All FWLR Part 255, 1039

[63] *Mudiaga-Erhueh v. INEC* (n 43)

[64] *Pillars (Nig.) Ltd. v. Desbordes* (n 2) at page 144, paras.C-H

"The justice of this case is very clear. The Appellant has held on to property regarding which it had breached the lease agreement from day one. It had continued to pursue spurious appeals through all hierarchy of courts to frustrate the judgment of the trial court delivered on 8/2/2000, about twenty years ago. After all, even if the initial notice to quit was irregular, the minute the writ of summons dated 13/5/1993 for repossession was served on the appellant, it served as adequate notice. The ruse of faulty notice used by tenants to perpetuate possession in a house or property which the landlord had slaved to build and relies on for means of sustenance cannot be sustained in any just society under the guise of adherence to any technical rule. Equity demands that wherever and whenever there is controversy on when or how notice of forfeiture or notice to quit is disputed by the parties, or even where there is irregularity in giving notice to quit, the filing of an action by the landlord to regain possession of the property has to be sufficient notice on the tenant that he is required to yield up possession. I am not saying here that statutory and proper notice to quit should not be given. Whatever form the periodic tenancy is, whether weekly, monthly, quarterly, yearly etc., immediately a writ is filed to regain possession, the irregularity of the notice, if any, is cured. Time to give notice should start to run from the date the writ is served. If for example, a yearly tenant, six months after the writ is served and so on. All the dance drama around the issue of the irregularity of the notice ends. The Court would only be required to settle other issues, if any, between the parties. This appeal has absolutely no merit and it is hereby dismissed."

The interpretation given to this opinion raises the question whether *obiter dicta* in a concurring opinion constitutes a precedent capable of application in subsequent cases and capable of binding other courts. The Supreme Court is at the top of the judicial hierarchy in Nigeria. court. The decision of the Supreme Court is final and settles the position of the law in respect of a particular issue and becomes a binding precedent for all other courts of record in Nigeria.[65] The Supreme Court and other courts are bound by previous decisions of the Supreme Court where the law and facts in contention are the same or similar.[66] An expression in an opinion which is not essential to support the decision reached by the court is *dictum* or *obiter dictum*[67]. Under the doctrine of *stare decisis*, lower courts are bound by the principle of precedent. A lower court in the judicial hierarchy is bound by the *ratio decidendi* of a higher court, but not by the *obiter dictum*.[68] An *obiter dictum* of the Supreme Court neither binds the court itself nor subordinate courts. Only the Supreme Court's *ratio decidendi* in a case has binding authority on the court as well as lower courts. Tthough the apex court's *obiter dictum* may have considerable weight in determining the subsequent cases in courts, it remains persuasive. It is long settled, therefore, that an *orbiter dictum* is not a conclusive

[65] *CIL Risk & Asset Mgt. Ltd. v. Ekiti State Govt*., [2020] 12 NWLR Part 1738, 203; in *Osakue v. Federal College of Education, Asaba,* [2010] 10 NWLR Part 1201, 1, it was held that all courts established by the Constitution derive their powers and authority from the Constitution. The hierarchy of courts shows the limit and powers of each court, and to defy the authority and powers of a higher court is improper. In *UBN Ltd. v. Oki*, [1999] 8 NWLR Part 614, 244, it was held that in the hierarchy of courts in Nigeria, the Supreme Court is the highest. Thus, under the doctrine of *stare decisis* all courts below the Supreme Court must apply the law as laid down by the Supreme Court to cases before them.

[66] *Ogboru v. Okowa*, [2016] 11 NWLR Part 1522, 84; in *Uba v. Etiaba*, [2008] 6 NWLR Part 1082, 154, it was however emphasised that what the lower court is required to follow is the principle of law or order upon which a particular case is binding, such a principle is called the *ratio decidendi*. A statement made in passing by a Judge which is not necessary to the determination of the case is not a *ratio decidendi* of the case but an *obiter dictum*. It is vital to be able to draw a distinction between them for the purpose of judicial precedent.

[67] *Humphrey v. US*, 295 US 602, 55 S Ct 869

[68] *Clement v. Iwuanyanwu* (n 34); *FBN Plc v. May Medical Clinics Ltd* [2005] All FWLR Part 271, 171; *Awoniyi v Yaba College of Technology* [2006] All FWLR Part 300, 1645

authority.[69] A case is authority only for what it in fact decided. In other words, it is only the *ratio decidendi* of a judgment that binds the court and lower courts and not the *obiter dicta* in concurring judgments.[70]

5. Conclusion

As a matter of fact, the general decision of the Supreme Court in the *Pillars*' case dismissing the appeal and the particular decision striking out the first issue for determination stand on good law and are unimpeachable. The basis of this case review is the suggestion in the concurring judgment that an irregular notice to quit is validated by the filing of a writ to regain possession. In this regard, the suggestion in the opinion that *[t]ime to give notice should start to run from the date the writ is served*, if taken to its logical conclusion allows an eviction proceeding to be commenced without service of statutory or contractual notices, and for the landlord to rely on service of the originating processes as equivalent to service of the statutory or contractual notices. This suggestion, degrades to extinction, the law that proper service of statutory or contractual notices is a conditions precedent to the competence of an eviction proceeding. The umbrage of the learned Justice of the Supreme Court who penned the concurring opinion was clear. The Appellant breached the lease agreement, held on to property and continued to pursue '*spurious*' appeals through all hierarchy of courts for about two decades. The appellant's exercise of its constitutional right of appeal, however distasteful it might be, and whatever motives may lie at the back of it, may not provide a basis for excoriation of his exercise of that right. Furthermore, it is not clear that the appellant had any control over the speedy [or lack of it] determination of the appeal. As a result, however unrighteous the conduct of the appellant might be, and however righteous the anger of the court might be, it presents inadequate cause to formulate a general principle prescribing and sanctifying a violation of statutory and contractual provisions for service of requisite notices which comprise conditions precedent to maintenance of competent eviction proceedings. As the learned Justice stated, *[t]he justice of this case is very clear.* Truly the justice of the case was quite clear. It lay the lead judgment of the Supreme Court, and not in the concurring opinion. As set out in the case of *Leeds Industrial Co-operative Society, Ltd. v. Slack, dicta* sometimes may be casual expressions of opinion upon a point which has not been raised in the case and is not really present to the judge's mind. Such *dicta*, though entitled to respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. As stated earlier, a concurring judgment represents only the personal view of the concurring judge, and does not have any binding effect as precedent. Where then as in the *Pillars*' case, the legal position propounded by the *judex* is mere dicta, comprised in a concurrent opinion, on an issue which is not placed before the court for adjudication, clearly, it is incapable of creating law.

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[69] *Oteri Holdings Ltd. v. Oluwa*, [2021] 4 NWLR Part 1766, 334; in *Emerah & Sons Ltd. v. A-G, Plateau State, [1990] 4 NWLR Part 147, 788*, it was held that though *obiter dictum* in a judgment has no binding effect on lower courts, this does not however affect the principle that a lower court cannot refuse to be bound by decisions of higher courts even if those decisions were reached *per incuriam*.

[70] *Obasanjo v. Yusuf*, [2004] 9 NWLR Part 877, 144; in *Saif Ali v. Sydney Mitchell & Co., [1978] 3 All ER 1033*, Lord Wilberforce stated that in the House of Lords, since the Practice Direction of 1966, all propositions of law laid down in the speeches in previous appeals are persuasive only, whether they constituted an essential logical step in the author's reasons for disposing of the appeal in the way that he proposed, and so formed part of his *ratio decidendi* or, though not regarded by him as necessary for that purpose, were included as a helpful guide to judges in the disposition of future cases and so were *obiter dicta.*