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EDITORIAL COMMENT

The debut of KWASU Business and Private Law Journal (KWASUBPLJ) ISSN: 0795-7408 is a dream come true. It has always been in our plan as a department to publish a world-class intellectual journal as part of our contribution to knowledge. As we can see members of our advisory board cut across some major Nigerian Universities, Africa, and the globe.

This edition contains well-researched articles in diverse areas of law such as Revenue Law, Land Law, Law of Arbitration, Property Law, and International Law amongst others.

Contributions to this first edition of the journal came from different academia from different institutions within and outside Nigeria. We are proud to say that the Journal has an international spread.

The publication continues once annually as contributions are attended to on a roll-on basis. As we go to press with this first volume, preparations are in top gear to bring out another Call for Paper for the second volume which is scheduled to come out in the year 2025.

We use this opportunity to thank the contributors to this maiden edition on their pioneering effort. We look forward to more well-researched papers and encourage more contributions from seasoned academics, and members of the bar in subsequent editions. Submission should be e-mailed to bplj@kwasu.edu.ng.

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TABLE OF CONTENTS

INSTRUCTION TO AUTHORS iii

EDITORIAL COMMENT iv

EDITORIAL BOARD/EDITORIAL ADVISORY COMMITTEE. v-vi

LIST OF CONTRIBUTORS vii

TABLE OF CONTENTS viii

THE CONCEPT OF OWNERSHIP AND QUANTUM OF INTEREST OWNED UNDER LAND USE ACT 1

Abubakar Balarabe Kura

AN APPRAISAL OF WOMEN'S PROPERTY RIGHT IN NORTHERN NIGERIA 17

Jamila Metcho Kasim, Asmau Muhammad Sulaiman Ficmc and Amina Muhammad Bello

LAND LAWS AND WOMEN INHERITANCE RIGHTS IN NIGERIA 30

Inyang, Justina Benson

TAXATION OF OUTBOUND TRANSACTIONS IN NIGERIA 46

Sabit Abosede Lawal, PhD, Muhammed Taofeeq Abdulrazaq, PhD, SAN

THE NIGERIA'S MINISTER OF FINANCE AND THE POWER TO AMEND THE SCHEDULE TO THE VALUE ADDED TAX AC 62

Jirinwayo Jude Odinkonigbo

A LEGAL AND SOCIO-CULTURAL ANALYSIS OF THE RELATIONSHIP BETWEEN XENOPHOBIA AND TAXATION IN SOUTH AFRICA 75

Oyesola Animashaun, PhD

MAJOR MILESTONES IN SOUTH AFRICAN UNFAIR TRADE; REGULATION AND INSTITUTIONAL FRAMEWORKS: LESSONS FOR NIGERIA 95

Sani Ibrahim Koki, PhD

TAX AVOIDANCE: A FINE LINE BETWEEN LEGALITY AND ILLEGALITY 111

Isau Olatunji Ahmed, PhD

THE LEGAL EFFECT OF THE DIGITISATION OF TAX PAYMENT FOR ECONOMIC DEVELOPMENT IN NIGERIA 127

Selome Oluwaseun, Ashimi, Mujidat Subair-Bakare

TAX COLLECTING STRATEGIES INTRODUCED BY REVENUE AUTHORITIES IN NIGERIA DURING THE COVID-19 PANDEMIC 143

Olariyike Damola Akintoye PhD

THE PROSPECTS AND CHALLENGES OF ADOPTION OF ARBITRATION IN SETTLEMENT OF TAX DISPUTES IN NIGERIA 163

Adeojo Ifedamola Blessing

THEORETICAL BACKGROUND OF CORPORATE GOVERANCE IN NIGERIA 177

Adelowo Stephen Asonibare, G.L Umoru & J.N Nwazi

THE EFFICACY OF ONLINE DISPUTE RESOLUTION (ODR) FOR THE RESOLUTION OF INTERNET-RELATED DISPUTES IN NIGERIA 198

Kudirat Magaji W. Owolabi, Ph.D

THE GAINS OF ARBITRATION OVER LITIGATION: A REALITY OR A HOAX? 212

Enemhinje Ehigiator, PhD

AN OVERVIEW OF PRIVITY OF ARBITRATION CONTRACT 227

Dr. Agbo Friday Ojonugwa, Dr. Daniel Philemon Saredau

ENFORCEMENT OF ALTERNATIVE DISPUTE RESOLUTION CLAUSES AND ARBITRAL AWARDS UNDER THE ARBITRATION AND CONCILLIATION ACT 2023 237

Yebo S. Dabup, Dusu T. Shut, Truth R. Biangten

THE ADEQUACY OF NIGERIAN LAW IN FOSTERING INDUSTRIAL PEACE THROUGH COLLECTIVE BARGAINING 251

Oyesola Animashaun, PhD

A CRITICAL ANALYSIS OF TRADE-BASED MONEY LAUNDERING ACTIVITIES IN NIGERIA 268

Bukola Oyaleke

A CRITICAL ANALYSIS OF CONSENT UNDER POSTHUMOUS CONCEPTION: COMPARATIVE LEGAL AND INSTITUTIONAL LESSONS FOR NIGERIA 281

Joel Drisu Umaru

ANALYSIS OF THE JURISDICTION AND INHERENT CHALLENGES OF THE FEDERAL HIGH COURT IN NIGERIA 293

Ogochukwu C. Nweke, Okwudiri Nwosu

ADMISSIBILITY AND IMPORTANCE OF FINGERPRINT EVIDENCE AS A SOURCE OF ELECTRONIC EVIDENCE 308

Elijah Oluwakorede Adeyeye

THE EFFECT OF INTERNAL DISPLACEMENT ON THE ECONOMY AND THE MITIGATING IMPACT OF INTERNATIONAL HUMANITARIAN LAW IN NIGERIA 325

Baraje Biliqis Abdulkadir, PhD, AbdulkareemAdemola Mashood

ANALYSIS OF THE LEGAL FRAMEWORK FOR ALTERNATIVE SOURCES OF ENERGY IN NIGERIA 340

Viko, Iyadah John, PhD, Ifurueze, Amarachi Mariana, Chukwuemeka, Israel Dinne

The Concept of Ownership and Quantum of Interest Owned under Land Use Act

Abubakar Balarabe Kura*

Abstract

The concept of ownership is very imperative in determining the quantum of interest to be owned under the Land Use Act. The idea revolves around who owns what, to what extent your right could be restricted upon the object you are occupying; and whether what you are occupying belongs to you or you only have possessory right and not actual ownerships. The common law position subscribed by Nigerian legal system clearly borrowed English land tenure system whereby the land is owned by Crown and no absolute ownership but rather possessory right or right of occupancy. Similarly, the customary and Islamic land tenure systems did not contemplate absolute ownership but rather the right of the occupier is restricted subject to the right of other people. The main questions to be determined are, is absolute ownership of landed property recognised in Nigeria, or mere possessory or occupancy right subject to the right of family or community and does the Governor have absolute ownership of land? This article contemplates the extent of interest owned under Land Use Act and as to whether the owner has no absolute right to ownership and what he owns is mere right of occupancy which can be limited under the extant laws.

Keywords: Land, Ownership, Right of Occupancy, Governor Trusteeship

1. Introduction

The concept of ownership is very imperative in determining the quantum of interest to be owned under the Land Use Act. The idea revolves around who owns what, to what extent your right could be restricted upon the object you are occupying; and whether what you are occupying belongs to you or you only have possessory right and not actual ownerships. The common law position subscribed by Nigerian legal system clearly borrowed English land tenure system whereby the land is owned by Crown and no absolute ownership but rather possessory right or right of occupancy.[1] Similarly the customary and Islamic land tenure systems did not contemplate absolute

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[1] Niki Tobi, Cases and Materials on Nigerian Land Law (Mabrochi International Company Ltd, 1997) 2

ownership but rather the right of the occupier is restricted subject to the right of other people.[2] The inference to be drawn is that in Nigeria no absolute ownership of landed property is recognised, but rather the possessory or occupancy right is subject to the right of family or community. In this regard, this article contemplates the extent of interest owned under Land Use Act and as to whether the owner has no absolute right to ownership and what he owns is mere right of occupancy which can be limited under the extant laws.

2. Concept of Ownership

The concept of ownership stems from right in rem with respect to a thing a person is entitled to deal in the subject.[3] There is a need to draw distinction between right of ownership of property and dominion on one hand and what Austin determines as servitudes on the other. A right of ownership gives a person a power which is indefinite and entitled him to using and disposing of the subject of the right,[4] while servitudes gives person a limited power of using and disposal of the subject.[5] The key of the distinction according to Austin is duration of term for example, the term of years to possess a property could be regarded as servitude and not ownership because it is limited to such and no absolute ownership could be ascribed.[6]

In Roman law, "the right of property or dominion is not defined at all. Things are described; the modes of acquiring property in them are described; servitudes are described but of right of property no direct description is given."[7] The word ownership is used to describe relationship that exists between person and particular objects or things, in other word, ownership is the relationship between a man and any right that is vested in him.[8] Ownership refers to internal power of disposal as being indefinite power and liberty of user because it is impossible to determine the number of ways to deal with things physically.[9] Salmond defining ownership said it "in its most comprehensive signification, denotes, the relation between a person and the right that is vested in him.[10]According to Holland ownership is an aggregate of all rights pertaining to the possession,

[2] Ehi P. Oshio "The Indigenous Land Tenure and Nationalization of land in Nigeria" Boston College Third World Journal, Vol. 10 Issue 1 (1990) 45
[3] Vivian Chinelo Arinze, "An Assessment of the Meaning and Context of Ownership and the Role of Legal System in its Determination: Prospects and challenges" Nnamdi Azikiwe University Journal of Commercial and Property Law, Vol 9 (2) (2022) 98
[4] Austin Jurisprudence, 5th Ed., Vol. 11 "on the Study of Jurisprudence" P. 1073
[5] Ibid
[6] ibid
[7] Nidhi Kumari "Ownership as a Social Concept" Acade Mike Articles on Legal Issues (2015) www.lawctopus.com
[8] Salmond Jurisprudence, 11th Ed by Dr. Glanville Williams P. 302.
[9] Wilson, G-P. "Jurisprudence and Discussion of ownership" Cambridge Law Journals, Vol. 15 No. 2 (1957) 225
[10] Ibid

enjoyment and disposition of an object.[11] Katz developed her theory of ownership with argument that the agenda setting right only allows the owner to use her property in a way that she feels is worthwhile".[12] The gist of Katz Theory is that the right of owner is to some extent constrained and it highlighted and explained when it is legitimate to restrict owner's power to dictate uses.[13]

The Norman Conquest of 1066 abolished all private allodial property and transfers the ownership of land to the crown and what was "seisin" which combined the concept of possession and ownership.[14] The idea of possession pre-exists, the idea of ownership. Ownership is an offshoot of possession.[15] The idea of ownership grows as a result of civilization and increase of population when people are transiting from pastoral to agriculture economy. The need to build home and shelter, cultivate land preoccupied the mind of people hence struggle to accumulate land become prevalent.[16] At early stage there is no distinction between ownership and possession until much later with advancement and civilization, the distinction became paramount and important. Under Roman law, dominion is referred to as ownership which denotes absolute right to a thing, while possession implied physical control over a thing.[17]

Keeton perception to ownership is explained thus

> The right of ownership is a concept clearly easy to understand but difficult to define with exactitude. There are two main theories with regards to the idea of ownership. The great exponents of the two views are Austin and Salmond. According to one view, ownership is a relation which subsists between a person and a thing which is the object of ownership. According to second view ownership is a relation between a person and a right that is vested in him.[18]

There are three theories of ownership viz Lockean, utilitarian and contractualist. The Lockean theory was proposed by John Locke which was modified by Robert Nozick as justice in acquisition and justice in transfer; meaning a person is free to own his person and body, and labour produced by it; therefore, everyone also owns those objects with which he or she mixes his or her labour in

[11] Nidhi Kumari "Ownership as a Social Concept" Acade Mike Articles on Legal Issues (2015) www.lawctopus.com
[12] Larissa Katz, "Spite and Extortion: A jurisprudential Principle of Abuse of (Property) Right" Vol. 122 :6 Yale (2012) 1448-1449.
[13] Sara E. Hamil "Common Law Property: Theory and Jurisprudence in Canada" Queen LJ 40:2 (2015) 686
[14] Roger T. Simonds, "John Locke's Use of classical Legal Theory" Vol. 3 No. 4 International Journal of classical tradition (1997) 428.
[15] ibid
[16] Nidhi Kumari "Ownership as a Social Concept" Acade Mike Articles on Legal Issues (2015) www.lawctopus.com
[17] Paranjape, N. V., Studies in jurisprudence and legal theory, Central Law Agency (2013) 410
[18] Ibid P. 411

so far there is enough goods left in common for others.[19] According to utilitarian theory, ownership could only be shaped in line with general welfare of the society. In essence the limitation and delimitation of bundle rights in ownership is measured up in terms of society welfare. In other words, societal welfarism determines the bundle of rights in ownership.[20]

It is imperative to look at jurisprudential meaning of the term ownership vis-à-vis the quantum of interest to be hold in land under Nigerian law. The term ownership is complex concept which has no precise meaning.

> In Blacks' law Dictionary it was defined as collection of right to use and enjoy property, including rights to transmit it to others. The complete dominion, title or proprietary right in a thing or claim. The entirety of the powers of use and disposal allowed by law. The right of one or more persons to possess and use a thing to the exclusion of others. The exclusive right of possession, enjoyment, and disposal; involving as an essential attribute the right to control, handle and disposal.[21]

Niki Tobi in his book, 'Cases and Materials on Nigerian Land Law' defined ownership as.

> Ownership connotes the totality of or bundle of the rights of the owners over and above every other person on a thing. It connotes a complete and total right over a property. The owner of a property is not subject to the right of another person. Because he is the owner, he has the full and final right of alienation or disposition, without seeking the consent of another party because as a matter of law and fact there is no other party's right over the property that is higher than his. He has inalienable right to sell the property at any price, even at give-away price. He can even give it non gratis that is for no consideration.[22]

Professor Nwabuze explained the concept as

> Ownership is the most comprehensive and complete relation that can exist in respect of anything. It implies the fullest amplitude of rights of enjoyment, management, and disposal over property. To put it in other way round, it implies that the owner's title to these rights is superior and paramount over any other rights that may exist in the land in favour of other person.[23]

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[19] Lars Bergstrom "The Concept of ownership", Who Own Our Genes? Proceeding of an international conference, October 1999, Tallin Estonia, the Nordic committee on Bio ethics, 2000 www.phlarchive.org accessed on 21/8/2021.
[20] Ibid.
[21] Black's law Dictionary, St Paul Minn. West Publishing Co. (5th Edition) 997.
[22] Op. Cit Niki Tobi P. 24.
[23] Nwabueze, B. O., Nigerian Land Law, (Nwamife Publishers limited, Reprinted 1982) 7.

The community reading of the above definitions indicates that, even though there is no precise meaning to the concept of ownership, but the definitions highlight certain attributes which must be possessed before ownership could be ascribed to anything be it property or otherwise, as follows.

1. Absolute right to use and enjoy the property.
2. Absolute dominion, control, and disposal of the property to the exclusion of any other person or restriction from any other person.
3. Power of alienation without restriction.
4. Superior right over any other person in the property.

The concept of ownership as it relates to land alludes absolute right over property, this goes down well with civil law principles, while the common law principles which Nigerian law subscribed to contemplate that right to use and enjoy the land is limited, and the owner of a property is subordinate to the other people's right.[24]

Ownership has different characteristic and attributes which are:

1. Ownership can be absolute or restricted; it is absolute when the owner has absolute right for the use and disposal of a thing to the exclusion of any other person. It is restricted when the power of use, enjoyment and disposal may be curtailed either by law (authority) or by voluntary agreement for example an owner can restrict his ownership by agreement when he leases or mortgages the property and can be restricted by operation of law when law permitted that easement created for other people on the property.[25]

2. The ownership does not diminish with the death of the owner. He can devolve the property to his successors.

3. Even though infants and lunatics can own property but their right to disposal is restricted as they are not competent to enter into valid contract as other adult and sane persons.[26]

Apart from this exception in case of infants and lunatics, the owner is unrestricted in point of disposition. He can alienate the property in whatever way he chooses. However, the reality of modern times disproved this attribute of ownership. Many countries now have town planning laws and acquisition laws which tempered with this disposition right of the owner as the government

[24] Abubakar M. Madaki, "Certificate of Occupancy; its Concepts and Means for Planned Development and Environmental Control in the state", Ahmadu Bello University, Zaria Journal of Private and Comparative Law, Vol. 1, No. 2 (2006) 68.
[25] Op. cit, Ndilu Kumari.
[26] Fitzgerald, P.J., Salmond on jurisprudence.' 12th Edition (Universal Book Publication 2013) 259

may acquire any property for public purposes irrespective of the owner's descent. In nutshell, the owner can only dispose his property subject to state laws.[27]

4. Ownership has unlimited point of duration, in other word ownership is perpetual in nature until when the owner surrenders it or transfer it.

Ownership is of many kinds corporeal and incorporeal, sole and co-ownership, trust and beneficial ownership, legal and equitable ownership, vested and contingent ownership and absolute and limited ownership. Ownership is corporeal when it relates to the objects and incorporeal when it relates to right. Sole ownership relates to one person ownership while co-ownership is when two or more persons own a thing. Ownership can either be original or derivative: original ownership happens in following situations; the first situation is when a person acquired a thing which has no previous owner for example a virgin land in deep forest cleared by a person, a fish in the ocean or bird in the air. Under Roman law the general rule is that the first occupier became the owner.[28] Secondly, through extinctive method that is when somebody acquires a thing and abandons it and the second owner acquired it and held its possession for a period of 12 years under common law is said to be the owner through extinctive acquisition and prescription.[29] Derivative ownership is when the current owner drives his right from previous owner. It takes place when ownership is acquired by inheritance or gift or purchase.

3 Right to Ownership of Landed Property in Nigeria

The aim and philosophy of Land Use Act is to regulate ownership of land and control land rights for easier access to land to foster economic development as well as to promote national cohesion. This could be deduced from the terms of reference given when constituting Land Panel Committee who came up with recommendations that pave the way to the Promulgation of Land Use Act

The Constitution of Nigeria Section 43 provides:

> Subject to the provisions of this constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.
>
> 44 (1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes

[27]Dignanth Raj Sehgal, "Jurisprudential Aspect of ownership", Ip leaders' intelligent legal solution (2020) https://blog.ipleaders.in last visited on 4th September 2021
[28] Dwedhi, Jurisprudence and legal theory 7th edition (Central Law Publication, 2017) 52
[29] Ibid

> prescribe by law that among other things (a) requires the prompt payment of compensation therefore; and (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.[30]

The right to own property is a fundamental human right as encapsulated in the above provisions. It is important to understand what is capable to be owned and the nature of the interest to be hold in land in Nigeria. The opening phrase of the above provision start with "Subject to the provisions of this constitution" which means some provisions may curtail and derogate the right to own immovable property, in other words, right to own landed property as enshrined in the constitution is derogative and can be limited, for example, all mineral resources are owned by Federal Government, if mineral resources are found in a land owned by a person could he assert his right to own such resources or will it be taken by government thereby derogating such right? This clearly emphasizes the need to determine what is capable to be owned.

See 44(3) provides:

> Notwithstanding, the foregoing provision of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial water and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such a manner as may be prescribed by the National Assembly.[31]

Under Customary Land Tenure System in Nigeria, ownership of land did not signify absolute ownership; in the classicus case of *Ahmadu Tijani v. Secretary of Southern Nigeria*[32] Viscount Haldane held that individual ownership of land was unknown to customary law. From the above, since the customary land tenure did not recognize ownership by individuals, then what an individual can hold as interest in land is possessory rights or something above that but did not reached ownership in the strict sense of meaning of the concept. Under the customary land tenure, the head of the community or family occupies a unique position in relation to land, he charges and control the land and in loose sense called the owner and he holds the land for the use of the community or family.[33] Where an individual appropriates any part of such land, he only possesses

[30] Sec 43 & 44 of the constitution of FRN, 1999 as amended.
[31] Ibid Sec 44(3).
[32] (1921) 2AC399.
[33] Osho P. Ehi "The Indigenous Land Tenure and Nationalization of Land in Nigeria" Boston College Third World Law Journal Vol. 10 Issue 1 (1990) 47

usufruct occupancy rights, and the land remains community or family land. The land cannot be disposed of without the consent and sanction of that community or family.[34]

Some scholars criticize this concept that individual ownership is alien to the native law and custom. They emphasized that the first settler has been an individual who later pass title in the property to his family upon his death. It is correct to say that the whole idea of communal ownership was a later development.[35]

The land ownership under customary Land tenure by its nature has two facets and two interests are recognized. This has been aptly put by Famoriyo.

> The basis of land ownership in Nigeria has long been the Family (community) from which other interest are carved out. There are essentially two categories of interest recognized in land. The first, that of superior interest which are proprietary in nature and confer the highest decision-making rights to the holder, having regard to the laws and customs prevailing in the locality. Secondly, there are inferior interests which are rights exercised by individuals not in perpetuity as in superior rights and are subject to the laws, customary, sanctions, rules, and regulation of the community.[36]

The nature of the holdings of the community, family or individual to land does not permit ownership, according to Nwabueze, if the community, village, or family cannot alienate its land outright, then it may be argued that its right in the land fall short of ownership but mere possessory or usufruct rights.[37]

The coming of colonial and imposition of Received English Law shaped the nature of land ownership in most part of the country, several ordinances and legislations are passed as discussed earlier in this chapter; the effect of the legislations are to vest land ownership in the government to hold for the benefit of the entire people and subjecting what a person can be able to hold is right of occupancy.[38]

The Land Use Act which is a major legislation in Nigeria regulating ownership and control of land delimits an interest a person can hold in land. Section 1 of LUA vested all land comprising in a state, in the Governor of that state to hold unto in trust for the benefit of all citizens of that

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[34] Ibid
[35] Muhammad Tawfiq Ladan, Introduction to Jurisprudence; Classical and Islamic (Malt House Press Ltd, 2006) 163.
[36] Famoriyo, S., "Land Tenure, Land Use and Land Acquisition in Nigeria," Institute for Agricultural Research, Ahmadu bello University, Zaria, Nigeria.
[37] Op. cit, Nwabueze, B. O., P. 55.
[38] Sec 3 and 4 Native Land Acquisition Act of 1917, See 2 and 4 of Niger Land transfer Act (No 2 of 1916.

state.[39]The Governor can only grant Right of Occupancy in favour of the citizens for term of years.[40] Kayode Eso, JSC emphasized this position thus:

> The tenor of the Act as a single piece of legislation is the nationalization of land in the country by the vesting of its ownership in the state leaving the private individual with an interest in land which is a mere right of occupancy and which is the only right protected in his favour by law, after the promulgation of the Act.[41]

The question now is what is right of occupancy? What quantum of rights is entrenched in the right of occupancy? Is the right of occupancy synonymous with ownership? The land Use Act did not define right of occupancy but rather created mainly two rights of occupancy: statutory and customary. These rights are defined as: Customary Right of Occupancy means the right of a person or community lawfully or accompanying land in accordance with customary law and includes a customary right of occupancy granted by a local Government under this act.[42]

Whereas statutory right of occupancy is defined as "Statutory right of occupancy means a right of occupancy granted by the Governor under this Act."[43]

The Land Tenure Law of Northern Nigeria, 1962 upon which Land Use Act was fashioned defined Right of occupancy as "a title to the use and occupation of land and includes a Customary Right of Occupancy and a Statutory Right of Occupancy." [44]According to Madaki, Right of Occupancy is an interest in land which is grantable to any person by the Governor, Local Government and President to occupy and use land.[45] Right of occupancy granted by the Governor or local Government or deemed granted by them is considered the highest right to land in Nigeria and it allows the holder to use or occupy land to the exclusion of all other persons except the Governor.[46]

The right created by Land Use Act which is Right of Occupancy short fall of the concept of ownership. The attributes of ownership as highlighted in the previous part does not conform to quantum of rights embedded in right of occupancy. The Act permits the holder or occupier right to

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[39] Sec 1 Land Use Act, Cap L5 Laws of the Federation of Nigeria, 2004
[40] Ibid Sec 5.
[41] Nwakocha v. Governor of Anambra State (1984)6SCV 362 at 404.
[42] Sec 51 LUA
[43] ibid
[44] Section 2 of the Land Tenure Law of Northern Nigeria, 1962 no 25 of 1962
[45] Abubakar M. Madaki, "Certificate of Occupancy: It's concepts and Means for Planned Development and Environmental Control in the State," *Ahmadu Bello University, Zaria Journal of Private and Comparative Law,* Vol. 1 No 2(2006) 71
[46] Op. Cit, Namnson Bassey Udoekenan, P. 185, Similarly Omotola, J.A., "Nature of Right of Occupancy under the Nigerian Land Use Decree" *ABU Journal of Islamic and Comparative Law,*
P.22

use and occupy land subject to the right of the Governor over the said land. It was argued that, under the Act, land in Nigeria is incapable of being owned in the strict sense of the concept of ownership but a person can only own the right of occupancy:

> The vesting of all land in the state does not abrogate private interest in land. The Act therefore allows private individuals to hold an interest in land, otherwise called right of occupancy. The Act also recognized and converted all existing interest in the developed land, which were vested in any person before coming into effect of the Act. The legal implication of this is that all lands in Nigeria are incapable of ownership. What is capable of ownership is right of occupancy.[47]

The Governor of a State under Land Use Act has superior interest over and above the holder or occupier of right of occupancy, in fact, it is the Governor who can grant right of occupancy, (particularly statutory)[48] control and manage all land in urban area,[49] consent to its alienation through whatever means,[50] revoke it.[51] etc. The above powers of the governor over any land against the interest of the holder of right of occupancy negate absolute ownership to the holder of right of occupancy. This position has been aptly captured by Prof. Omotola where he said, "We accept, that section 1 has the effect of divesting the citizens of absolute ownership. This is to say the ultimate owner of land at least in law is the Governor."[52]

Apart from the provisions of Land Use Act which restrict the absolute nature of ownership to land in Nigeria, there are other provisions in other laws curtailing the quantum of interest a person can hold in land. The Constitution of the Federal Republic of Nigeria vests all the Mineral resources in the Federal Government to the exclusion of any other person.[53] Similarly, Petroleum Act[54] and the Nigerian Minerals and Mining Act, 2007[55] vest all lands in which mineral resources have been found in commercial quantities in all waters, streams, Exclusive Economic Zone, or any part of Nigeria, in the Federal Government. The ownership of oil and gas and solid mineral resources is

[47] Onoja, E. and Ikoni, U. D., Land Use Policy Environment, Protection and Sustainable Development in Nigeria, in Gwadue G. Jande, ed, "Land Use Policy and Administration in Nigeria," (Peach Global Publications, 2005) 164.
[48] Sec 1 and 14 Land Use Act.
[49] Ibid sec 5
[50] Ibid Sec 21 and 22.
[51] Ibid Sec 28.
[52] Omotola, J. A., "Does the Land Use Act Expropriate", J.P.P.L.I (1985)2.
[53] Section 44(3) Constitution of Federal Republic of Nigeria, 1999 as Amended.
[54] Sec 1 of the Petroleum Act, 1969
[55] Sec 1(2) of Nigeria Minerals and Mining Act, 2007 http://www.placng.org/lawsofnigeria/node/360 last visited on 5 April 2018

vested in the Nigeria Government, even though some call for shared ownership of such resources with the occupants of such land where the mineral resources are found.[56]

The combined effect of these provisions is that the Nigerian Constitution, Land Use Act (being the main prime law governing tenure rights in Nigeria) and other enabling laws do not guarantee or ascribed absolute ownership of land to the holder of right of occupancy, but rather the laws delimit and guarantee right to occupy and use land subject to the Governor's interest in such land. Even though, the LUA recognizes the customary interest ownership to land which pre-exist the Act as deemed grant, those interests or customary ownership were subsumed by the Act and converted to either statutory or customary right of occupancy.[57] The implication of this is to subject all interest or ownership to land under customary land tenure system to the limitations imposed by the Act as such no claim to absolute ownership could be held.

The prime question is upon whom the ownership of land in Nigeria is vested if community or individuals can only hold right of occupancy subject to the governor's power. The ownership of land is vested in the governor by virtue of section 1.[58] This position has been criticized by Prof. Omotola that, reading section 1 of the LUA alone will not give the true picture of the interest held by the governor and whether it divest people from their ownership to land. The true nature of the interest held by governor could be understood by thorough reading of the whole Act. Where he disagreed that that the Governor is the absolute owner he made reference to Section 28 and opined that section 28 of the Act which gives the governor power of revocation will be unnecessary if it is true that he is already an owner in the true sense under section 1 as there will be nothing to revoke.[59] He concluded that the nature of interest vested in the Governor was not clear and that the nature of the trust which is created in favour of Nigerians is obscure.[60] Those that argued the Act vested the ownership of land in the Governor of a state supported their argument with the provision of Section 2 of the Act; this is because the section vested in the governor power to control and managed all land vested in him.[61] It is my humble opinion that upon the discussions above, neither the individual, family, community nor the Governor hold absolute ownership to land in Nigeria in the strict sense meaning of the concept of ownership. The limitations to absolute ownership of

[56] Lanre Aladeitan, "Ownership and Control of Oil, Gas and Mineral Resources in Nigeria: Between Legality and Legitimacy", *Thurgood Marshall Law Review*, Vol. 38 (2013)185
[57] Section 34 and 36 Land Use Act, Cap L5 LFN, 2004.
[58]Ibid Section 1
[59] Op. cit Omotola, 3 J. A. P.3
[60] Ibid
[61] Abubakar M. Madaki, "The Land Use Act Policies: An overview", *Journal of Private and Comparative law, Ahmadu Bello University, Zari*a, Vol. 1 No. 1 (2006) 85

individuals, family and community are discussed earlier while the provision of revocation under Section 28 of the Act curtailed absolute ownership to lands vested in the Governor.

4. The Governor Trusteeship and Ownership of Land

The promulgation of Land Use Act tremendously changed the operative land tenure system applicable in Nigeria. By the Act, uniform tenure is applicable in every part of the country. The Act vested all lands in the hand of the Governor of a state to hold as trustee for the benefit of all Nigerian citizens. The governor has power to hold the land as trustee, power to grant right of occupancy, power to revoke grant, power to determine compensation, power to charge ground rent, power to control and manage the land, and power to issue certificate of occupancy. Section 1 of the Act conspicuously stated that all lands are vested under the Governor of a state. It provides:

> Subject to the provision of this Act, all land comprised in the territory of each state in the Federation is hereby vested in the Governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with provisions of this Act.[62]

Even though the clear wordings of the above section indicate that the lands were vested in the governor to hold in trust for the benefit of the Citizens, the term trust is used in a loose figurative sense, it confirms no rights which a beneficiary has against a trustee in English law, Professor Nwabueze while commenting on similar section in Land and Native Right Act opined that:

> It is as well perhaps to emphasize that the concept of trusteeship is used here in a loose and figurative sense; it confirms upon individual natives no rights which a beneficiary has against a trustee in English law. No Native can claim against the government on account from any benefits accruing from the lands. The obligation of the governor is to administer the land for the use and common benefit of the native as a whole.[63]

It was only a legal interest that was vested in the Governor.[64] The interpretation of section 1 to confer trustee power on the Governor generated debate from different academic scholars. Prof. James held the opinion that the nature of the interest hold by the Governor by virtue of section 1 of LUA is trustee-ownership; the same opinion was held by Prof. Omotola and Niki Tobi.[65]

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[62] Section 1 Land Use Act
[63] Op. cit, Nwabueze P.239
[64] Omotola, J. A., "The Nature of a Right of Occupancy under the Nigerian Land Use Decree", Journal of Islamic and Comparative Law, Centre for Islamic legal studies ABU, Zaria P24.
[65] The Summary of their opinion was quoted by Abubakar M. Madaki in his Article "The Land Use Act Policies: An overview" *ABU Zaria Journal of Private and comparative Law*, Vol. 1 No 1 (2006) 87

Similarly, there is an argument as to whether the trust created by Section 1 LUA is akin to the trust created under conventional English Law. The finest view is what held by A. M. Madaki thus.

> It is our submission that, when the whole Act is considered there will be no basis of comparison between the word 'trust' in the Act and the trust concept known to English jurisprudence. Trust is used in the Act to imply the principles that will ensure that the land is administered for the benefit of all Nigerians.[66]

Closely connected power of the Governor to be derived from the trusteeship is the provision of Section 2 of LUA which provides; "All land in urban areas shall be under the control and management of the Governor of each state".

By this provision the management and control of all lands designated as urban area is vested in the governor of the state where the land is situated. The individual right to ownership, control and management of land was removed from him and vested in the Governor. The interest which an individual, family or community can hold in land is limited to mere right of occupancy.[67]

5. Governor's Power to Grant and Revoke Right of Occupancy and Ownership.

The LUA empowers the Governor of a state to grant statutory right of occupancy. Section 5 LUA provides:

> 5(1) it shall be lawful for the Governor in respect of land, whether or not in an urban area to (a) Grant statutory rights of occupancy to any person for all purposes.
> (b) Grant easements appurtenant to statutory rights of occupancy
> (2) Upon the grant of a statutory right of occupancy under the provisions of sub section (1) of this section, all existing rights to the use and occupation of the land, which is the subject of statutory right of occupancy shall be extinguished.

The grant under the above section is regarded as express grant of statutory right of occupancy. The Act went further under Sec 34 through transition program to deem any land situate in urban area held by any person before the commencement of the Act as statutory right of occupancy as if said was granted by the governor.[68] In other words, subject to the section 34 of the Act all lands held

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[66] Abubakar M. Madaki, "The Land Use Act Policies: An overview" *ABU Zaria Journal of Private and comparative Law*, Vol. 1 No 1 (2006) 87

[67] Iheanyichukwu Joachim Onuoha, et.al. "Application of the Power of Governors to Charge Ground Rent under Nigerian Land Use Act of 1978" *Journal of Technology (Science & Engineering*) 73:5 (2005) 197.

[68] Sec 34 LUA, Cap L.5 LFN, 2004

by any person in urban areas are converted to statutory rights of occupancy by operation of the law as if the same was granted by the governor. The Governor has power to designate the areas forming part of urban areas within his state.[69]

Even though Section 5(2) of the Act provides that upon the grant of statutory right of occupancy all other rights in such land extinguished, this is only operative if there is no valid existing right on such land and where other right exist, it has been revoked through valid process of the law. In *C.S.S Bookshops Ltd v. R.T.M.C., Rivers State,* the Supreme Court held that:

> The mere grant of a right of occupancy over an existing right of occupancy or interest does not amount to the revocation of such existing interest. In the instant case, the grant of the right of occupancy to the 1st Respondent by the 2nd respondent which was done in violation of the provisions of section 28 of the Land Use Act is invalid, null and void and did not confer any valid title to the 1st Respondent.[70]

The LUA spelt out the powers of the Governor to revoke right of occupancy either statutory or customary, and whether it is express or implied, for overriding public interest. The provision is to curtail the arbitrary power of the governor to revoke the grant unreasonably.[71] Section 28 (2) LUA stated instances upon which a governor can revoke statutory right of occupancy for the following reasons:

(a) Where the occupier alienate land in whatever form through assignment, sublease, mortgage etc. without compliance with provisions of the Act or any other regulations.

(b) Requirement of land by Federal, State, or local Government for public purpose.

(c) Requirement of land for mining or oil pipeline purposes in case of customary right of occupancy.

Similarly, customary right of occupancy can be revoked by the Governor for the same purposes stated above with addition of one other instance, to revoke the land for requirement of extraction of building materials.[72] The Governor also can revoke the right of occupancy where the holder of the right of occupancy breached any condition stated in the certificate of occupancy or failed to accept and pay for the certificate of occupancy issued to him as evidence of the right of occupancy.[73] The purpose upon which the Governor is revoking the right of occupancy must be

[69] Ibid Sec 36.
[70] *C.S.S Bookshops Ltd V. R.T.M.C., Rivers state, (2006)* All FWLR part 319 p.819@823
[71] Sec 28 (1) & 38 LUA Cap L5 LFN, 2004
[72] Sec 28 (3) LUA
[73] Ibid Sec 28(5)

expressly conveyed to the holder of the right of occupancy as pre-requisite requirement before revocation to be effective.[74] The purposes can either be one or combination of number of purposes.[75] It is important to note that, the law clearly defines the extent of Governor's power in revoking the right of occupancy; the Governor does not have any additional discretion to determine what constitutes overriding public interest outside the purview of section 28 and 51 of LUA.[76] The Nigerian Supreme Court in *C.S.S. Bookshops V. R.T.M.C Rivers State* held that:

> Any revocation of a right of occupancy by the Governor in exercise of power under the Act must be within the confine of the provision of Sec 28. Consequently, any exercise of this power of revocation for the purposes outside those outlined or enumerated by sec 28 of the Act or not carried out in compliance with provision of the section, can be regarded as being against the policy and intention of the Land Use Act resulting in exercise of the power being declared invalid, null and void.[77]

From the provision of section 28 there are two types of revocation non penal revocation for overriding pubic interest and Penal revocation for failure of the holder to fulfil the terms of the grant one way or the other.[78] Revocation under the first leg will entitle the holder to compensation as provided under section 29 of the Act, while revocation under the latter for breaching terms and conditions contained in the certificate of occupancy requires no compensation. It was held in the case of Baker Marine Nig Ltd V. Chevron Nig Ltd that breaching any terms as contained in the certificate of occupancy particularly development clause or purpose clause automatically empowers the governor to revoke the certificate of occupancy and by extension right of occupancy.[79]

A cursory look at section 2 and 5 of the Act reveals that the Governor has control over all land under his domain and he can do and undo in respect thereof. This gives him power similar to ownership to dispose the land in the manner he wishes but the provision of section 28 derogates and curtails the Governor's power in the control and disposition of the land. The requirement that the Governor can only revoke right of occupancy for overriding public interest or public purposes,

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[74] Ibid Sec 28(6&7)
[75] Oghenkevwe Odima, "Legal and Regulatory Requirement for the compulsory Acquisition of land in Nigeria" Land Law and Tenancy (2016) www.spaajibade.com last visited on 27/4/2018.
[76] Teingo Inko-Tariah, "Overview of the Legal Requirement for Revoking of Certificate of Occupancy in Nigeria" (2017) www.legallnaija.com last visited on 27/4/2018.
[77] C.S.S. Bookshops V. R.T.M.C Rivers State (Supra)
[78] Akintunde Otubu., "Private Property Rights and Compulsory Acquisition Process in Nigeria: the Past, Present and Future", *Acta Universitatis Danbubius Juridica,* Vol. 8 No.2 (2012)
[79] (2006)13NWLR Pt.997 P.287

service of notice of revocation to the owner or occupier, payment compensation and failure of the owner to comply with terms and condition contained in the certificate of occupancy shows that the Governor has no absolute power or ownership of the said land. By section 28 of the Act power of Governor over the land in his domain is short of ownership as it lacks absolute control and disposition in the strict sense of the term ownership. If the Governor has ownership of the land in Nigeria under section 1 of the Act as argued earlier, then it is superfluous for the Governor to notify the holder of right of occupancy for his intention to revoke under section 28.

6.0 Conclusion

The concept of ownership is paramount in determining what a person can own under the Land Use Act. Even though there is no accepted universal definition of the term ownership, but the attributes of ownership cut across all definitions which includes Absolute right to use and enjoy the property, absolute dominion, control, and disposal of the property to the exclusion of any other person or restriction from any other person, power of alienation without restriction and superior right over any other person in the property. The findings of this article are that neither, the Governor, the owner, head of the family, community or traditional ruler has the ownership of land in Nigeria under the Land Use Act because none of the above-mentioned entity has absolute control, dominion, and disposal without restriction. The governor cannot revoke right of occupancy without payment of compensation, service of notice and the purpose must be for overriding public interest or public purpose. The holder of right of occupancy has only mere possessory right for term of years and its subject to revocation before the expiration of the term of years. The head of family or community cannot alienate the land without the consent of other members. All these restrictions proved that no one has absolute ownership of land in Nigeria.

An Appraisal of Women's Property Rights in Northern Nigeria

Jamila Metcho Kasim*, Asmau Muhammad Sulaiman & Amina Muhammad Bello*****

Abstract

In Northern Nigeria, women's property rights are complicated, and the subject is firmly ingrained in social norms, religious beliefs, and legal structures. This paper adopts the doctrinal research methodology through statutes, case law, and opinion of authors to examine how women's property rights are currently being operated specifically looking at women in Northern Nigeria. The work explores the underlying historical and cultural factors that have influenced the practice surrounding property ownership in Northern Nigeria. Notably, certain customary practices frequently give male heirs the advantage, demoting women to supporting roles in property disputes. However, Northern Nigeria is governed by a legal system that upholds the ideal of gender equality. The study also examines the legal framework that supports women's property rights, including the Nigerian Constitution, land laws, and gender-specific legislation while examining their contributions and shortcomings. The paper found that the economic and social norms of Northern Nigerian women's property rights are also examined. Denying these rights has an impact on women's financial stability, empowerment, and economic independence, perpetuating gender inequities. In the end, the paper presents insights into the current gaps and prospects for increasing women's property rights. It equally emphasizes the value of coordinating cultural expectations with legal requirements, spreading knowledge and legal literacy, and creating an atmosphere where women can freely use their right to own and acquire property. This paper contributes to the continuing discussion on equal observance of property rights in Northern Nigeria by negotiating the complex interplay between culture, religion, and the law.

Keywords: Land, Women, Rights, Property, Constitution.

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1.0 Introduction

Women's property rights are a crucial aspect of gender equality, as they directly impact women's social status and ability to live autonomously. In Northern Nigeria, these rights are shaped by a complex interplay of legal, religious, and customary systems. Despite the Nigerian constitution's guarantees of equality and non-discrimination, women in the region face significant barriers to owning and inheriting property.[1] The source of this problem derives from the fact that most customary laws restrict women from possessing land. The paradox of this is that in rural parts of Nigeria, women are the main cultivators of land. It is then not surprising that women wear the face of poverty in Nigeria.[2] This has been linked to numerous local customs in the country's regions. However, in Nigeria, the freedom of women to own and acquire property is a critical component of women's fundamental rights.[3]It could be by will, gift, succession, and purchase.[4]

The fact that women are disregarded and treated with prejudice with respect to the right to equal opportunity is one of the difficulties highlighted by the norms and practices of the various ethnic groups within the Nigerian communities.[5] By and large, each of the three major ethnic groups existing in Nigeria, to wit: Hausa, Igbo, and Yoruba, has its regime towards the right of women to own property and the extent of such right.[6] Women have consequently been treated as subservient and dependent on male support.[7] Furthermore, women are mostly in charge of the families, and the numerous societal norms and practises continue to place women in situations where they are treated unequally to their male counterparts. Women are frequently not allowed to hold

[1] Yinka Olomojobi, 'Women's Right to Own Property', available at <https://ssrn.com/abstract=2716902> accessed, 31 August 2024.
[2] ibid
[3] Ibid
[4] Succession deals with how to distribute a deceased individual's property according to the law.
[5] McFerson, Hazel M., 'Poverty among Women in Sub-Saharan Africa: A Review of Selected Issues ', (2010) (11)(4) *Journal of International Women's Studies;* 57.
[6] Yetunde Aluko, 'Women's ownership Rights to landed property in Nigeria' (2019) International Journal of Gender Studies in Developing societies, available @https://www.researchgate.net/publication/335616250, last accessed on 7/9/2024.
[7] Jibril Idrisu, 'Women And Property Rights Under Customary Law In Nigeria', available at <https://nji.gov.ng/wp-content/uploads/2021/12/WOMEN-AND-PROPERTY-RIGHTS-UNDER-CUSTOMARY-LAW-IN-NIGERIA-BY-HON.-JUSTICE-JIBRIL-IDRISU-JP-RTD-converted.pdf> accessed 9 August 2023.

property in their own names according to local customs.[8] They either have restricted access to and control over property, or it depends on their relationship with male relatives.[9]

The 1999 Constitution of the Federal Republic of Nigeria has guaranteed equal rights and opportunities to both genders in the acquisition and owning of properties —moveable and non-moveable— within the territorial jurisdiction of Nigeria.[10] Based on constitutional provisions, many of the inconsistent ethnic beliefs and norms against the female gender have been declared null and void and in-operative in other jurisdictions which care for equal participation and undue discrimination. It is based on the above that the paper specifically seeks to discuss the extent of the rights of women in Northern Nigeria to own and acquire property vis-à-vis the challenges involved. It equally addresses the need for a significant change in the narrative. To achieve this, the paper is divided into four segments containing an introduction, the definition of terms, female inheritance in Northern Nigeria, and the challenges faced by women. This can be achieved by employing a mixed methods approach, combining legal analysis with a review of primary and secondary sources.

2.0 Definition of terms.

2.1.1 Property

The word 'property' has different meanings depending on the context of its usage. Property has been defined to mean the "right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership.[11] It has equally been defined as "Any external thing over which the rights of possession, use, and enjoyment are exercised."[12] More apposite to the topic is the definition given by John Salmond[13] where he defines the term property as including "… nothing more than corporeal property — that is to say, the right of ownership in a material object, or that object itself".[14] Property is made up of things and services that a person or organization is granted the sole right to acquire, use, and dispose of by society. Property is something rare that one has, hence it involves possession and ownership of items that are already owned. It is an

[8] Chinedu Ona & Hilda Obi-Obiora, 'Women and The Right to Acquire and Own Land in Nigeria: Examining the Conflicts between Statutory and Customary Law' (2022) Journal of Public and Private Law, available @ https://journals.ezenwaohaetorc.org/index.php/UNIZIKJPPL/article/download/2172/2216 accessed on 7th September 2024.
[9] Ibid
[10] See section 42 of the CFRN (as amended).
[11] Bryan A Garner (Ed), *Black's Law Dictionary* (8th edn, West Publishing Co 2004) 3841
[12] Ibid
[13] Ibid, p. 3142, *citing* John Salmond, *Jurisprudence*, (Glanville L. Williams ed., 10th ed. 1947) p. 423–24.
[14] Ibid

essential cornerstone of rights because every claim to a right begins as a claim for something, such as the right to keep or hold something. Anything that is owned by a person or an organization is also referred to as property.[15] It could be by inheritance, purchase, gift or by will. Furthermore, the property is divided into two:

i. Real property: Real property encapsulates land, and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. It can equally be either corporeal (soil and buildings) or incorporeal (easements).[16]
ii. Personal property: This refers to any movable or intangible thing that is subject to ownership and not classified as real property.[17] It further includes everything except real property. It includes credits, savings-bank deposits, notes, bonds, the proceeds arising from the sale of realty, and the right to a certificate in foreclosure, the time of redemption having passed.[18] It is equally termed otherwise as intangible property.

2.1.2 Rights

Like the term "property", right is not subjected to just a single definition. It can be glued from the perspective of fundamental rights accruing to a person, simply because he is human. Notwithstanding, in this context, rights refer to the interest, claim, or ownership that one has in tangible or intangible property.[19] In short, it is the right to own and acquire properties, moveable and non-moveable property as guaranteed under the Constitution of a state.[20]

2.1.3 Northern Nigeria

Northern Nigeria is the largest region in Nigeria. The region makes up over 70% of the landmass of Nigeria.[21] This region had a different administrative structure before the British colonialism which was heterogenous in structure and composition. It was a feudal system of government where the power was centralized. She is blessed with mineral resources such as crude oil and tin. Northern Nigeria is a good tourist attraction site with special traditional delicacies. She is also a major ground for agriculture in Nigeria. This region, unfortunately, has challenge with her educational system as most of her population do not have good formal or Western education. Recently, the

[15] (n 4)
[16] (n 7), p. 3845.
[17] Ibid
[18] Ibid, *citing* William Herbert Page, *A Treatise on the Law of Wills*, (1941) p. 44–45.
[19] Ibid, p. 4120.
[20] See section 43 of the 1999 Nigerian Constitution (as amended).
[21] National Bureau of Statistic 2023

region has been bedevilled by insecurities leading to displacements of communities, killings, rapes and abductions of women and children being the worst hit.[22]

During the colonial era and until 1967, 'Northern Nigeria' meant the northern region of Nigeria. It refers to the states that were created out of the defunct region. The states are nineteen (19) in number, which includes, Adamawa, Bauchi, Benue, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Nasarawa, Niger, Plateau, Sokoto, Taraba, Yobe and Zamfara States. The area is characterized by the adoption of the Islamic and customary laws. It has been noted above that customary law as a source of law in Nigeria is said to include Islamic law.[23] Islamic law takes place of customary law and it is being applied by the Area or Shariah courts to the majority of the population, although there exist some other areas of the North where customary law is applicable.[24] It could well be argued that in Northern Nigeria, Islamic laws and customary laws are applicable depending on the state in question.

The women in Northern Nigeria, who are married under the Islamic law, enjoy right to have access to property they acquired or contributed to their husband's household. In practical terms however, this is usually not attainable by reason of societal hindrances and the misunderstanding of some Islamic concepts by their male counterparts.

2.2: The Position of the Islamic Law and Ethnic Customary Law in Northern Nigeria

Discussion on the right of women in Northern Nigeria to acquire and own properties cannot be comprehensively captured without a brief overview of the system of law in operation in Northern Nigerian communities. Generally, the Nigerian legal system is characterized by a multiplicity of laws. It is made up of the received English law, the customary law and the Islamic (Sharia) law, the local legislation and judicial pronouncement. Customary law is prevalent in the southern part of the country whilst Islamic law is widely made recourse to in many states in the Northern part.[25] Notwithstanding, there are Northern states that did not solely adopt Islamic law as their customary law due to the historical background and the need of their citizens. In other words, the Islamic law

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[22] Almu Bello, Miracle A. Adesina and Kehinde K Kanmodi, 'Northern Nigeria: An overview', available at <https://www.researchgate.net/publication/327915628> accessed 15 November 2023.

[23] Megbele, Ogechi Jessica, ' A Comparative Study of Women's Rights of Inheritance In Nigeria Under Islamic Law and Some Customary Laws', available at <https://www.delsu.edu.ng/clt/A%20COMPARATIVE%20STUDY%20OF%20WOMEN%E2%80%99S%20RIGHTS%20OF%20INHERITANCE%20IN%20NIGERIA%20UNDER%20ISLAMIC%20LAW%20AND%20SOME%20CUSTOMARY%20LAWS.pdf> accessed 14 November 2023.

[24] For married women under the ethnic customary law in northern states (such as the Markis, Dawakin Tofa and Yabo groups), depending on individual immediate society customary practices, their rights to own property may be affected in one way or the other.

[25] Eghosa Osa Ekhator, ' Women and the Law in Nigeria: A Reappraisal', (2015) (16)(2) *Journal of International Women's Studies*; 285 available at <http://hdl.handle.net/10034/622436> accessed 7 August 2023.

represents the customary practices of many peoples of the Northern region. Some Northern states such as Adamawa state in the Northeast of the country apply both the customary law and the Islamic law due to the religious diversity of the people and their historical background.[26] The same situation happens in Plateau state, Taraba state, Kebbi state, Kogi State, Nasarawa, and Kaduna State, Borno etc.[27]

In the case of *Alkamawa v. Bello*[28] an opinion was given by the way that Islamic law transcends the customary status it has been placed. The learned Justice posited, "Islamic Law is not same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and permanent and more universal than the English Common Law."[29]

Islamic law also known as Sharia law is a complex body of laws with different schools of thought that may have slightly varying in interpretations. In as much as Islamic law limits women's right to inherit, it prescribes equality in women's ability to own, manage and dispose of property.[30] Muslim women enjoyed property rights centuries before women in the West, even in countries regarded as paragons of gender equality.[31] The jurist's do not differentiate between the sexes in terms of buying, selling, investing, or lending, and make no distinctions between types of property (e.g. land, real estate, or money).[32] The provisions of the Quran endowed men and women with the equal right to manage, possess, and acquire property, "if you perceive in them right judgment, deliver to them their property."[33]

Property rights are central to women's economic advancement as well as their full incorporation in the polity. Property provides a mechanism for women to build wealth, leverage, and autonomy. Owning land, for instance, can provide a source of income that may help offset barriers to women's participation in the labour force. The resources that property confers also help to improve women's status in families, communities, and states.[34]

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[26] Magaji Chiroma, ' Application of Islamic Personal Law And The Judicial Process In Adamawa State: Issues And Challenges', (2022) (7)(1) *UNIMAIDJICOL*; 1-19
[27] Ibid
[28] (SC 293/1991) [1998] 2 (19 JUNE 1998).
[29] Ibid
[30] Bishin, Benjamin G., and Feryal M. Cherif. "Women, Property Rights, and Islam." *Comparative Politics*, vol. 49, no. 4, 2017, pp. 501–19. *JSTOR*, http://www.jstor.org/stable/26330985. Accessed 17 Mar. 2024.
[31] Ibid
[32] Ibid
[33] Quran 4:6.
[34] Bina Agarwal, A Field of One's Own: Gender and Land Rights in South Asia (Cambridge University Press, 1994); Carmen Diana Deere and Magdalena Leon, Land and Property Right in Latin America (Pittsburgh: University of Pittsburgh Press, 2001)

The applicability of the Islamic doctrine in property acquisition by inheritance has its genesis in the fact that under Nigerian law, marriages take place under three distinct legal systems: Indigenous Native Law and Custom, Islamic Law, and statutory law. Under the indigenous system, the pattern of inheritance under customary law vary according to each ethnic group. Inheritance is commonly patrilineal and sharing of assets tends to be mostly in favor of the male child. Yoruba customary law is more generous to women. It permits daughters to inherit equally with their brothers but recognizes that the widow cannot inherit from the late husband. Where a woman is married under the Ibo customary law her position is more alarming as she seems, by mere accident of birth, to be sentenced to a life of disinheritance. As a daughter she cannot inherit her father's estate which is reserved for the absolute inheritance of the male children.[35] The female child cannot be the family head in Ibo culture. As a widow she cannot administer her dead husband's estate. Her only right is a right of residency subject to good behavior. She is completely deprived of inheritance rights and her situation becomes more pitiable if she has no issue at all or has only female. Under Islamic law, succession follows a regulated framework, requiring adherence to Islamic principles for eligibility. The Maliki school of Islamic law is applied in Nigeria, recognizing three grounds for inheritance: marriage, blood relations, and clientship. There are three categories of heirs: sharers at law, residuaries, and distant kindred, each with specific entitlements. For instance, a wife inherits a quarter in the absence of certain heirs, while daughters may receive one-half or two-thirds depending on specific circumstances[36]. These provisions reflect the careful consideration of various familial relationships in Islamic succession. The Quran unequivocally affirms women's right to inherit, setting a precedent recognized by the religion. Generally, women receive half the inheritance of men, though exceptions exist, such as when a mother receives an equal share to the father.[37] This demonstrates that women's rights and responsibilities are not entirely subordinate to men's in the eyes of God.[38]

In a different light, Interdiction (hajr) was a legal mechanism that enabled a responsible adult to exercise control of property owned by three categories of individuals whom the law considered

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[35] *Mojekwu v Iwuchukwu* [2004] 7 M J S C p 161 however establishes the succession right of a female child where the land is held under Mgbelekeke kola tenancy applicable in Onitsha.

[36] Q:4:11 & 12

[37] See Chapter 4 of the Holy Quran

[38] Chapter 4 verse 7 says: "*Men shall have a share in what their parents and near relatives leave and women shall have a share in what their parents and near relations leave; whether it be little or much, it is legally theirs' wives inherit 1/4, if no child and 1/8 if there are children"*

unfit: minors, the mentally incapacitated, and women, either after puberty and before marriage, or, according to some Malikis school, after marriage.

The fourteenth-century jurist, Khalil B. Ishaq and Ibn Juzayy have explained the application of this mechanism to women.[39] To emerge from the condition above, males and females must go through a process of "liberation" (tarshid) whereby four witnesses testify that he or she is capable of handling his or her affairs.[40]

According to Ibn Juzayy, after marriage, a woman's freedom to dispose of her property remains limited to one-third of her assets. If a married woman makes a gift to a slave, and the value of the gift exceeds one-third of her property, the excess is void, while another view holds that the entire transaction is void.[41] Ibn Juzayy states that a married woman can spend all of her money in return for consideration (bi-wad). If she makes her husband the beneficiary of all of her property and allows him to derive profit from it, she cannot dispose of it off, with or without consideration, unless he permits her to do so.[42]

Woman is better protected under the Islamic as she can own property in her own right as well as inherit property from parents or husbands whether the husband/parents died Testate or intestate, although in the event of a divorcee she loses all rights to her husband's property,[43] while in Eastern Nigeria inheritance follows the Igbo custom. Traditionally, male children are favoured over females for the inheritance of a father's property, including house and land. In Igbo customary law, widows typically do not inherit their deceased husband's property. They may only retain the house and a portion of land. This grants them possessory, not proprietary, rights. This practice stems from the belief that inheritance follows blood, and widows are not blood relatives of their

[39] Khalil b. Ishaq, Abrdge de loi musulmane selon le rite de l'imam Mdlek, tr. G.-H. Bousquet, (Alger, Maisonneuve, 1961), vol. 3, 151; al- Dardir (d. 1201/1786), al-Sharh al-Kablr, commentary on the Mukhtasar of Sidi Khalil, with glosses by al-Dasiqi (Bulaq, 1295/1878), vol. 4, 103 [hereinafter "Dardir-Dasuqi, Sharh"]; Ibn Juzayy, al-Qawdnin al-fiqhiyya, 277-79. For a short version without the later development, see Ibn Zayd, Risala (Cairo, n.d.), 117-18. For a comparative discussion, see Bellefonds, Traite de droit musulman compare (Paris: La Haye, 1973), vol. 3, 31

[40] Shatzmiller, Maya. "Women and Property Rights in Al-Andalus and the Maghrib: Social Patterns and Legal Discourse." *Islamic Law and Society*, vol. 2, no. 3, 1995, pp. 219–57. *JSTOR*, http://www.jstor.org/stable/3399469. Accessed 18 Mar. 2024.

[41] ibid

[42] Ibid

[43] Grace, Gonda Akolokwu, Barakat, A. Raji Property Rights of Married Women under Customary Law in Nigeria: Myth or Reality. Available@ https://www.researchgate.net/profile/Grace-Akolokwu/publication/333421036_PROPERTY_RIGHTS_OF_MARRIED_WOMEN_UNDER_CUSTOMARY_LAW_IN_NIGERIA_MYTH_OR_REALITY/Links/5ced043d299bf109da751dcf/PROPERTY-RIGHTS-OF-MARRIED-WOMEN-UNDER-CUSTOMARY-LAW-IN-NIGERIA-MYTH-OR-REALITY.Pdf last accessed on 16/11/2024.

husbands. Additionally, native law recognizes children from such unions as legitimate, but their mothers do not have the same status as wives under the marriage ordinance.[44]

In Yoruba customary inheritance, when a person passes away without a will, the estate is divided. This is done per stripe, where it is first divided equally among wives, and then each wife's share is further divided equally among her children, regardless of gender.
Another Yoruba practice, 'Ori Ojori', ensures equal distribution of the deceased's property to each child, promoting fairness and reducing conflicts. In summary, under Yoruba Custom, girl-children have equal inheritance rights from their deceased father's estate. However, in Yoruba native law and customs, wives typically do not have inheritance rights in their deceased husband's estate, unless it can be proven that the property was gifted to them during the husband's lifetime.[45]
The Court of Appeal and Supreme court have over the past two decades delivered pivotal decisions on women's inheritance rights, particularly in Igbo communities in the eastern part of the country, challenging discriminatory customary laws and highlighting their unconstitutionality.[46]

The April 2014 judgments of the Supreme Court on male primogeniture appear like the judicial reform of the customary law of inheritance. In effect, the Court only affirmed the reliefs sought by the plaintiff/respondent. It did not formulate any issue for determination regarding the male primogeniture rule, nor did it make any direct invalidation of the rule.

In some non-Muslim areas in the North, for instance non-Muslim ethnic groups in the middle belt of Nigeria had no provision for females to inherit as children and as wives/widows [47] This was the position among the Ham people of Kaduna State. Inheritance is patrilineal.[48] Under this form of inheritance practice, those who are entitled to inherit include, the male children of the deceased, his brothers, his brother's male children, parents, and grandparents. Wives, sisters,

[44] Anthony Diola, Reform of the customary law of inheritance in Nigeria: A Lesson from South Africa (2014), African Human Right Law Journal. Available @ https://www.saflii.org/za/journals/AHRLJ/2014/31.html#pgfId-1137148
[45] Ibid
[46] Mrs Lois Chituru Ukeje & Another v Mrs Gladys Ada Ukeje (unreported) 2014 LPELR-22724(SC); Onyibor Anekwe & Another v Mrs Maria Nweke (unreported) 2014 LPELR-22697(SC).

[47] Suleiman & Amuda-Kannike: Some Religio-Cultural Practices against the Property Rights of Women and Children in Nigeria and Specified African Countries (2019) available @ jol-file-journals_479_articles_183749_submission_proof_183749-5653-467735-1-10-20190220.pdf accessed on 17/11/24.
[48] Abdullahi, H.J. and Hamza, I. (2003) 'Women and land in Northern Nigeria: the rights', in Wanyeki, L.M. (Ed.): *Women and Land in Africa: Culture, Religion and Realizing Women's Rights*, Zed Books Ltd., New York.

aunts, and all female relations are excluded. However, patrilineal female relations such as sisters related through father, and aunts through paternal grandfather are considered as possible inheritors. However, due to the Secular Land Use Act, they can now purchase land and develop it. The general practice in most of northern Nigeria is for a man to allot a piece of land to his wife to farm, but she cannot claim it as of right. On the other hand, rights bestow security on the owner as she can sell, bequeath, and use the land in perpetuity.

3.0: **The Islamic and the Conventional Approach towards Women's Right to Own and Acquire Properties: A Comparison**

The provisions of the Islamic law which form the basis of the customary practices in many Northern states, are traceable to the primary sources of the Islamic code of conduct, it enables and empowers women to own property in their name, acquire and solely manage their self-acquired and inherited properties including landed properties.[49] The Quran as a primary source of Islamic law in its numerous provisions, provides for the sole right of women to own, acquire, manage, and dispose of properties independently. It says: "*Men shall have a share in what their parents and near relatives leave and women shall have a share in what their parents and near relations leave; whether it be little or much, it is legally theirs wives inherit 1/4, if no child and 1/8 if there are children*."[50] While the above verses generally discussed the right to ownership of any property accruing from inheritance, Qur'an Ch.4:32 gives a general provision recognizing the right of women to independently acquire wealth on their own, be it through inheritance, purchase, or gift. It says, "*For the men, there is a share of what they have earned and for the women there is a share of what they have earned*."[51]

The primary and secondary sources of Islamic law recognize the sole right of a woman to own properties in her name, and this aligns with the provisions of the Constitution of the Federal Republic of Nigeria 1999, which provides in section 43 of the Constitution for the right of persons, without restriction as to gender, to own and acquire properties anywhere within the territorial jurisdiction in Nigeria. Section 43 of the Constitution provides: "*Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property*

[49] U.V. Awhefeada, ' Married Women's Property Rights In Nigeria: A Critical And Comparative Analysis', (2011) (3)(1) *DELSU Law Review;* 128
[50] Qur'an 4 (An Nisaa) verse 7.
[51] Qur'an 4 (An Nisaa) vetse 32.

anywhere in Nigeria."[52] Equally, section 42(1) (a) & (2) of the Nigerian 1999 Constitution (as amended) provides that:

There are also conventions and treaties, in which Nigeria is a party guaranteeing and advocating for the recognition of women's right to property ownership. One of these instruments is Article 2 of the African Charter on Human and People's Rights[53] which guarantees similar rights in the following terms:

> *Every individual shall be entitled to the enjoyment of the rights and freedom recognized and guaranteed in the present charter without discrimination of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion of national or social origin, fortune, birth or other status.*

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has also stipulated some provisions empowering women to own, manage and give away their property exclusively. The CEDAW under Article 16 provides that:

> *States Parties shall…the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment, and disposition of property, whether free of charge or for a valuable consideration.*

Nigeria has ratified the CEDAW Treaty, hence its provisions are binding; anything contrary will be declared null and void. Meanwhile, the Islamic law which is regarded as the customary practice in some parts of Northern Nigeria did not in any way deprive, restrict or deny the female gender the right to ownership of properties, be it real or personal.

4.0: The Plight of Northern Nigerian Women in respect of Property Acquisition: Where lies the Challenge?

Although the Islamic law allows women access to property they acquired or contributed to their husband 's household, in practical terms however, this right is not attainable for the reason that, many women are kept in seclusion in Northern Nigeria[54] Islamic law acknowledges that men and

[52] Ibid
[53] African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Chapter 10 LFN 1990; No 2 of 1983) Laws of the Federation of Nigeria 1990.
[54] (n 1), p. 10

women have the same freedom with regard to land, housing, and property. However, it appears that Muslim women in Northern Nigeria do not actually wish to own land because it is considered customary for the husband to provide for the wife.[55] It must however be categorically spelt out and reiterated that in the Northern states with Islamic law as the dominant customary practices, women are accorded the right to inheritance.

This notwithstanding, there are certain challenges which impinge the full exercise of the right, such as lower literary and educational level, misinterpretation of Shariah provisions on the rights of women, and power dynamic which favours male gender due to misconception of the Shariah doctrine.[56] While it may not be substantiated that the Islamic law as a specie of customary law practiced and administered in Northern Nigeria puts a restriction on the right of women to acquire and own properties on their own, the attitude of the many in the region shows and proves their erroneous understanding of it. They lack a well-grounded understanding of the Islamic law provisions. It is on this basis that some set of women in the region, especially non-literate or poor educational background, have been denied the right and chance to personal ownership of properties without any justification.

Similarly, in northern states with the application of the customary practices, there are some practices with restriction on the right of women to independently acquire and manage properties. There are some notable customary practices by some northern groups which infringe upon the right of females to own property such as the practices of the Markis group, Yabo's group, Dawakin Tofa group, among others. However, there are set of customary practices among some northern groups which impede the rights of female gender to solely acquire, own and manage properties either by inheritance, gift, will or purchase.

5.0: Conclusion

Women's right in Northern Nigeria remain constrained by a blend of Islamic law, customary practices, and statutory provisions, despite constitutional guarantees of equality. Islamic customary

[55] Ibid

[56] Women have been subjected to such restriction on the belief that they are inferior to their male counterpart. Based on this erroneous inferiority assumption about women, they are viewed and portrayed by their male counterpart as being incapable of efficient management of their properties without the help of any of their male relative. This strongly reinforces the marginalization and exemption of women from property acquisition in their own name. The inferiority encapsulates the belief by some set of people that women have less capacity, when compared with their opposite gender, to make rational decisions for themselves or on behalf of others. They are subjected to the control of the men. While in a clear look of the issue, inferiority of women is a clear contravention of the Islamic law which is regarded as the customary law of the Northern states in Nigeria.

law is operational in the Northern region and serves as the mirror of the people it regulates; it recognises and protects the right of women to own, acquire and manage properties in their name. Although Sharia law allows women to inherit and own property, it is also believed that married women need the support and services of their husbands for the efficient management and control of their self-acquired properties. The inheritance rules and societal expectations often place women at a disadvantage. Similarly, where customary practices are still prevalent, it restricts women's access to land and property, and there is need for proactive measures towards abolishing customary practices which have negative impact on the right of women to own property. Addressing these challenges requires both legal reforms and cultural shifts.

6.0 Recommendations

Based on the findings of this work, the following recommendations are offered:

a. There should be a concerted effort to harmonize statutory law with Islamic and customary laws. This can ensure that women's property rights are not overridden by religious or traditional practices. Legislative reforms should focus on ensuring that women receive equal inheritance shares and are able to exercise full control over their property without interference from male guardians.
b. Civil society organizations and government agencies should lead targeted campaigns to educate women, especially in rural areas, about their property rights under the Constitution, statutory laws, and Islamic law.
c. Advocacy programs should involve religious and community leaders to encourage reinterpretations of Islamic law and customs that align with gender equity principles. This could involve issuing fatwas (Islamic legal rulings) or promoting community-based initiatives that support women's rights to property.

By implementing these recommendations, the systemic barriers preventing women from realizing their full property rights in Northern Nigeria can be addressed, paving the way for greater gender equality and economic empowerment.

LAND LAWS AND WOMEN INHERITANCE RIGHTS IN NIGERIA

***INYANG, JUSTINA BENSON**

Abstract

This paper examines land laws and cultural practices surrounding women's inheritance rights in Nigeria. Women are more engaged in practically every economic sector, not just producing much of the Nigeria's food, women hold principal obligation for gathering the water and other basic needs used daily by their families. These patterns notwithstanding, women own only a projected less than two per cent of all titled land and are often deprived of the right to inherit property. There are several cultural, social, political, and legal influences that impact women's lack of inheritance rights, and precise patterns of ownership and disenfranchisement differ widely. Despite the provisions of the Nigerian Constitution and international human rights instruments, women in Nigeria continue to face significant barriers to inheriting property and assets. The purpose of this work is to examine women's inheritance rights in Nigeria, and the legal and institutional framework for checking discriminatory practices against women inheritance rights. It is aimed at identifying the provisions in the legal instruments relating to women inheritance rights, and determining whether there are novel ways of enhancing these rights in Nigeria. This paper argues that a combination of legal reform, education, and cultural shift is necessary to ensure women's inheritance rights are fully protected and respected.

KEYWORDS: Land laws, Women inheritance rights, Legal reform, Cultural shift, Customary law, Islamic law.

1.0 Introduction

Inheritance is the practice of receiving private property, titles, debts, entitlements, privileges, rights, and obligations upon the death of an individual.[1] The procedures of inheritance vary among societies and have been reformed over time. Officially bequeathing private property and/or debts can be executed by a testator through will, as confirmed by a notary or by other legal means. Inheritance could also be said to be the exercise of passing on of belongings, assets, and properties to recipients.[2] Severally, when inheritance matters are brought up, it tends to be quite a

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[1] Definition of Inheritance available at https://www.britannica.com/dictionary/inheritance> accessed 12 June 2024

[2] Leadway Capital, 'Inheritance and Customary Laws in Nigeria' (31 October, 2018) available at <https://www.leadwaycapital.com/inheritance-and-customary-laws-in-nigeria> accessed 23 June 2024

delicate issue for any family. In Nigeria, when a person passes on without a Will, the possessions of the deceased may be disseminated using the customary laws. Alternatively, the immediate family members can apply for a letter of administration from a state high court or the ministry of justice. Nigeria has over 250 ethnic tribes and this means that the method of inheritance under customary law will be different according to each ethnic group. Inheritance is frequently patrilineal, and allocation of assets tends to be in favour of the male child.[3]

Women have been confronted with the challenge of disinheritance whether in their birth families or marital families. In her birth household, the woman is requested to inherit from her marital family where, in some customs, she is in real fact considered as a chattel to be inherited by a relative of her decease husband. Under some customs in Nigeria, upon the demise of her husband, the widow is considered as part of the properties left behind by her deceased husband and will not be permitted to inherit her deceased husband estate.[4] Long standing cultural norms, social practices and religious views have fuelled the continued disinheritance of women notwithstanding the existence of statutes and current judicial pronouncements that advocate for equal rights of all citizens. The predicament of the woman in Nigeria is appalling because, not only is she saddled with destructive customary widowhood practices that she may have to go through to grieve her husband and in some cases, prove her guiltlessness in the demise of her husband, she might also face the encounter of being expelled from her matrimonial home. The widow, in some cases, may be stripped of all the belongings herself and her husband laboured to obtain over the years.[5] These customary practices display an overwhelming compassion for the male child and sustain the unfair treatment of women. The Preamble to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) notes that despite the provisions on equal rights of men and women contained in the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenants on Human Rights, discrimination against women continues.[6]

Inheritance rights are a fundamental aspect of women's economic empowerment and independence. The ability to inherit property and assets is crucial for women's financial security, autonomy, and well-being. However, in Nigeria, women's inheritance rights are often limited by a

[3] ibid
[4] Onuoha Augustine, 'Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue' (2008) 10(2) The International Journal of Not-for-Profit Law 79-91.

[5] Okeaya Inneh, Benin Native law and Custom at a Glance, (Benin City: Gift-prints Associate, 2007)114-116
[6] UN Women, Convention on Eradication of all Forms of Discrimination Against Women (2016), available at <https://www.unwomen.org/en/digital-library/publications/2016/12> accessed 24 June, 2024

combination of legal and cultural factors. This paper will explore the legal framework and cultural practices surrounding women's inheritance rights in Nigeria, highlighting the challenges and opportunities for reform.

2.0 Legal Framework

The Nigerian Constitution and international human rights instruments, such as the African Charter on Human and Peoples' Rights, guarantee the right to equality and non-discrimination. The Constitution provides that *"all persons are equal before the law" and that "no person shall be discriminated against on the grounds of sex."* However, the country's inheritance laws are largely based on customary and Islamic law, which often prioritise male heirs.

2.1 Customary Law

The word 'customary' refers to pertaining to a culture, a way of life, a tradition, a generally accepted behaviour or way of doing things[7]. The Evidence Act[8] defines custom as a rule which in a particular district, has, from long usage obtained the force of law. Customary law then becomes the law which progresses from the conventional practices, customs, and way of life of a people. Customary law is a significant foundation of Nigerian law mainly because it rules many issues concerning the people's lives, for example matrimony according to native law and custom, succession or inheritance, divorce, land tenure and chieftaincy matters. It was the only lawful system that existed among native peoples and societies before the arrival of colonial rule. Customary Law has been defined differently by scholars and given different interpretation by judges. Prof Taslim Olawale Elias, CJN defined customary law as *"A body of customs accepted by members of a community as binding upon them."*[9] In the words of Niki Tobi JSC, customary law is: *"the customs, rules and traditions which govern the relationship of members of a community*[10]*"*. The Supreme Court in Saidan v Mohssen [11] defined customary law from the Nigerian perspective as: "Any system of law, not being common law and not being a law enacted by any competent

[7] Black's Law Dictionary (4th Edition) available at <https://heimatundrecht.de> accessed 17 May 2024
[8] LawGlobal Hub, Section 2 (1) Evidence Act 2011 available at <htttps://www.lawglobalhub.com> Evidence Act 2011> accessed 12 June 2024
[9] Ese Malemi – The Nigerian Legal System: Text and Cases (2012) available at <https://search.worldcat.org>title>oclc> accessed 18 May, 2024
[10] ibid
[11] LawGlobal Hub, Kharie Saidan Vs Fatima Khalil Mohssen (1973) LLJR-SC
available at <htttps://www.lawglobalhub.com> …supreme court> accessed 12 June 2024

legislature in Nigeria, but which is enforceable and binding within Nigeria as between the parties subject to its sway."

From the above-mentioned definitions submitted by these eminent jurists and scholars, it is clearly shown that customary law is the acknowledged customs and culture of a given people or society which after a long usage acquire a lawful support. Women have been faced with the challenge of disinheritance whether in their birth families or marital families. In her birth household, the woman is requested to inherit from her marital family where, in some customs, she is in real fact considered as a chattel to be inherited by a relative of her decease husband. Under some customs in Nigeria, upon the demise of her husband, the widow is considered as part of the possessions left behind by her deceased husband and will not be permitted to inherit her deceased husband estate.[12] Long standing cultural norms, social practices and religious views have fuelled the continued disinheritance of women notwithstanding the existence of statutes and current judicial pronouncements that advocate for equal rights of all citizens. The dilemma of the woman in Nigeria is appalling because, not only is she saddled with destructive customary widowhood practices that she may have to go through to grieve her husband and in some cases, prove her guiltlessness in the demise of her husband, she might also face the encounter of being expelled from her matrimonial home. The widow, in some cases, may be stripped of all the belongings herself and her husband laboured to obtain over the years.[13] These customary practices display an overwhelming compassion for the male child and sustain the unfair treatment of women. As witnessed, inheritance rights like most rights are lopsided towards the male gender. The cultural norms of the various constituent tribes, poverty, societal norms, religious opinions, and illiteracy have all sustained the enduring inequitable representation of women directly and indirectly.[14] Even though there are laws, conventions and treaties that speaks for the equal treatment of all human beings irrespective of their sex, tribe, origin and circumstance of birth, these discriminatory practices still operate today unrestrained.

The inheritance practices of intestate estate under the customary laws in Nigeria have almost as many differences as there are ethnic groups in the country and they are primarily patrilineal that is relating to, based on, or tracing descent through the paternal line. Under native law and custom, inheritance and succession are determined principally by the customary rules of the place of origin

[12] ibid n4
[13] Okeaya Inneh, Benin Native law and Custom at a Glance. (Benin City: Gift-prints Associate. 2007) 122-124
[14] Victoria Ikpese, Gender Dynamics of Inheritance Rights in Nigeria: Need for Women Empowerment. (Onitsha: Folmech Printing & Pub. Co. Ltd. 2009) 52-58

of the dead person and not by where he resides or where the property is located.[15] These practices follow the primogeniture rule which is a system of inheritance or succession by the male child.

2.2. Islamic Law

Islamic law applies to Muslims in Nigeria and is based on the Quran and the Hadith. Islamic law provides that women are entitled to inherit property, but their share is half of what their brothers or sons receive. For example, if a man dies leaving a wife, son, and daughter, the wife is entitled to one-eighth of the estate, while the son and daughter share the remaining seven-eighths equally. Nevertheless, the inheritance rights of women continued to be inferior to those of men because in Islam someone always has a duty of looking after a woman's expenditures. According to Quran 4:11[16] a son is eligible to twice as much inheritance as a daughter.

3.0. Challenges

Women in Nigeria face significant challenges in asserting their inheritance rights. Some of the challenges include:

i. Patriarchy

Patriarchy is a social system in which males are the principal authority figures central to social organisation, maintaining roles of political control, moral authority, control of possessions, and where fathers hold authority over women and children.[17] That control is preserved by eliminating women from access to necessary economically productive resources and by limiting women's sexuality. Attached to this philosophy is total control over all domains of life by men including but not limited to instruction on cultural, political, economic, and social rights. It is a facilitator for the subjugation of women that enhances that no woman has access to economic resources such as land.[18] Patriarchy maintains gender discrimination in any culture, and it includes the disinheritance of the females.

ii. Widowhood

[15] Oni B. "The Right of Women to Inheritance Under Native Law: An Evaluation" (2008) Nigerian Journal of African Law (NJAL) 49-54
[16] Quran 4:11
[17] Pavla Miller, Patriarchy, 1st edition (London: Routledge 2017) 27-41
[18] Land is the basis for obtaining credit facilities which could enhance the economic emancipation of women.

A widow, *stricto sensu*, is not permitted to share in the possessions of the deceased husband at customary law. In **Oloko v Giwa,**[19] the court held that generally, widows do not inherit their deceased husband's possessions. They are only permitted to stay in the house and a portion of farmland. Widows have only possessory rights and not proprietary rights over their deceased husband's property. It was the view of the court that inheritance follows blood[20] and since a widow is not a blood relation of her husband, therefore she has no entitlement to any share in the property. Also in **Aileru v Anibi,**[21] Jibowu J noted as follows:

> *Marriage according to native law and custom is recognised by our law and the issue of such marriage is legitimate. There is no question (but) that the plaintiffs are legitimate children of their deceased fathers, but their mothers have not the same status under native law and custom as wives of marriage under the marriage ordinance.*

Furthermore, in **Bolaji v Akapo** , Sowemimo J. (as he then was) held as follows:

> *The only person entitled to a grant of a letter of administration under Yoruba native law and custom which would be applicable by virtue of S.27 of High Court of Lagos Act, were the plaintiffs, four of the Children of the deceased, but not the wives who are regarded as part of his estate.*

Women cannot inherit since the widow is in fact considered as part of the estate (acquired by the deceased husband upon payment of her dowry at the time of marriage) to be inherited by the son or relative.[22] As a consequence of this diminutive legal status that has been accorded the female members of the family under customary law, women are now considered as mere commodities with no right or duties of her own.[23] For example, the Court of Appeal in Lagos, in the case of **Ogunkoya v Ogunkoya**[24] held that:

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[19] Lawyard, 'Death, Disposition and Discrimination: the Law and Custom in Relation to Inheritance Rights of Women in Nigeria' available at< https://www.lawyard.org>featues>death-disposition-and-discrimination-the-law-and-custom-in-relation-to-inheritance-rights-of-women-in-nigeria> accessed 14 June, 2024

[20] That is, devolution of a deceased man's property flows within a man lineage, it extends neither to his wife nor her lineage.

[21] ibid n19

[22] Augustine (n4) 3

[23] George Coker, Family Property Among the Yorubas. (London: Sweet & Maxwel. 1996) 226.

[24] DELSU, 'A Critical Appraisal of Interstate Succession,' (2017) available at <https://www.delsu.edu.ng>clt> accessed 12 May 2024

"Wives are also regarded as chattels who are themselves inheritable by other members of the family of the deceased under certain conditions."

The socialisation of gender norms includes passing societal theories regarding gender roles from one generation to the next. For example, women are generally considered as weaker and not perfect for some leadership roles. Children can be influenced from an early age to know that women and men have dissimilar and proper gender roles in society. Those children may then grow up to preserve the actuality of these harmful and limiting roles in society.[25] It is in this fashion that cultures that disinherit widows are preserved. One generation teaches the next that widows are not to inherit their husband's possessions even though husbands and sons can inherit properties belonging to their late wives and mothers respectively.[26] This unfair custom is preserved even by women. Thus, the widow who struggles to inherit her husband's possessions is seen as deviant. Fundamentally, the power structure at the foundation of discrimination and violence against women is strengthened through the procedure of internalising stereotypes and gender roles.

iii. Religion

Religion is a range of social cultural systems, including designated behaviour and practices, morals, beliefs, worldviews, texts, sanctified, places, prophesies, ethics, organisations, that generally relate humanity to supernatural, transcendental, and spiritual elements.[27] From the philosophies peculiar to a particular religion, believers obtain their moral, ethics & lifestyle choices. Religion plays a very essential role in the lives of human beings and its commands on issues are very strongly believed. The popular religions in Nigeria are Ancestral Worship, Islam, and Christianity, and they all have related opinions about the inheritance rights of women as compared with men. The biblical rules of inheritance were outlined in *Numbers 27:1-11***.** In summary, a wife is given no share in her husband's estate, but the husband is the first to inherit from the deceased wife's estate even before her sons. A daughter can only inherit if no male heirs exist. A mother is not an heir to her deceased son's estate at all whereas a father is. Widows and daughters, if male children exist, were at the mercy of the male heirs for provision.[28]

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[25] Joann Filomena, Widowed: Moving Through the Pain of Widowhood to Find Meaning and Purpose in Your Life Again. (New York: Morgan James Publishing. 2017). 45-47

[26] *ibid*

[27] 'Religion – Definition of Religion by Merriam-Webster,"' available at https://www.merriamwebster.com/dictionary/religion> accessed 12 March 2024.

[28] This is the reason why widows and orphan girls are among the most destitute members of the Jewish society

To the pagan Arabs before Islam, inheritance rights were restricted solely to the male relatives. Women were articles of inheritance, and they were considered part of the belongings of a man. But the arrival of Islam as a religion conveyed a revolution in the viewpoint towards women and recognised the right of women to inherit from the deceased's estate. The Quran provides thus: "From what is left by parents and those nearest related, there is a share for women, whether the property be large or small - a determinate share."[29]

By clearly affirming in the Quran that women have the right to inherit for themselves, it alters the status of women in a peculiar way, women have inheritance rights which are known and upheld by the religion. The overall rule governing the transfer of property in inheritance is that the female share is half the male's except in cases where the mother receives equal share to that of the father.[30] The Quran is complete with unmistakable proof to show that women are not entirely subjugated with men in the sight of God in terms of her rights and responsibilities. An example is: "And women shall have rights similar to the rights against them, according to what is equitable, but men shall have a degree over them."[31]

From these points raised above, it is detected that both religions practiced in Nigeria – Christianity and Islam - affect, wholly or in part, against women's rights to inheritance. A woman is not observed as man's equal, consequently both religions will barely grant equality of share in inheritance. The varying systems of religion consign woman to the background thereby covertly or overtly strengthening the inferiority of women.

iv. Marriage

Bride price as money, property , or other form of wealth paid by a groom or his family to the woman or the family of the woman he will be married to or is just about to marry.[32] Also, Encyclopedia Britannica posits that traditionally, the payment of bride price is an issue of social and symbolic as well as economic reciprocity, being part of a long series of exchanges between the two inter-marrying families, as it unites friendly relations between them, offers an obligation that the woman and her children will be well treated, represents her value to the community, and offers a level of recompense to her birth family for the forfeiture of her labour and company.[33] So serious is this practice in Nigeria that in most customs, a woman is considered legally and

[29] Quran 4:7
[30] Quran 4:7,11,12,176
[31] Quran 2:228
[32] Dalton, George, 'Brief Communications: "Bridewealth" vs. "Brideprice'' (1966) 68 (3) American Anthropologist. 732–737.
[33] https://www.britannica.com/topic/bridewealth, accessed 12 February 2013

completely married to her spouse if her bride price has been paid and also a marriage is not considered to have been terminated until the return of bride-price paid has been admitted.

Nowadays, bride-price payment is negotiated in a manner similar to bargaining of foodstuffs in any open market and this is performed by the elderly men of both families without the contribution and involvement of the bride and her mother.[34] Some scholars believe that this singular practice marks the beginning of the social "permissibility" of the discrimination of the woman in the minds of the husband and his family and this is displayed in numerous ways throughout the span of the marriage[35] particularly at the demise of her husband. The following are considered as the negative effects of bride price on women:

a. Transfer of right: The condition of the practice is a sign and validation that a woman is regarded as a chattel with a price tag that is acquired by a man who pays the price. The "purchaser" like a procurer of commodities in law has a right to deal with the "purchased chattel" in any way. This is the approach of men under customary law in respects to their wives.

b. **Loss of right:** Following the payment of the bride price, the woman remains married to the man who paid it. If the matrimony breaks down, the woman must give the bride price back to the man for her to recover her liberty. Non-repayment of the bride price makes the woman to be continuously married to the man to the degree that any child given birth to by the woman outside the matrimony is deemed to be the child of her separated husband. The issue is more serious when the woman is not capable of refunding the bride price for financial reasons.[36]

As held in **Davis v Davis & Ors**, if wives are regarded as possessions of their husbands, they are therefore objects of inheritance themselves.[37] In some customs, it has been contended that it is the man who pays the bride price (dowry) for a wife. The idea is that a man got his wife for an amount and as such, she is a piece of possession. Arising from that idea, in our customary thinking, such a woman cannot inherit her late husband's property, rather, she is to be inherited by one of her late husband's brothers. After all, how can property inherit another possession? One may correctly conclude that it is the matter of payment of bride price by a man in order to secure his wife's hand in marriage that keeps her in a position of inheritable property: after all she is

[34] **Melissa Mordi, The Real Cost of Bride Price, (2019) available at <** https://guardian.ng/features/the-real-cost-of-bride-price/> accessed 8 July 2021

[35] Under the guise of patriarchy in customary practices

[36] **Ibid n34**

[37] Justia Law, Davis vs Davis/1992/Tennessee Supreme Court Decisions,available at <https://www.law.justia.com>cases>tennesse>supreme-court> accessed 23 June 2024

regarded to be paid for and bought. It was based on this belief that the Court of Appeal in Lagos had held in the case of ***Ogunkoya v Ogunkoya,***[38] that 'wives are also viewed as chattel that are inheritable by other members of the family of the deceased husband under certain conditions.'

4.0. Recommendations

To address the challenges facing women's inheritance rights in Nigeria, this paper recommends:

i. Education and Awareness Building

Awareness building through education and training can build better understanding of the effect of discriminatory inheritance traditions on women. According to U.N. Commission on Human Rights, "education and awareness building among both men and women on the status of women's equal ownership of, access to, and control over property… are essential to the achievement of these rights for women." The Commission also acknowledged that civil societies (including women's organisations) have a basic role to play in this respect, and called for better efforts by governments, international organisations, and NGOs to magnify information and human rights education on women's assets and inheritance matters. Target people for such roles include political candidates and party leadership, voters, parliamentarians, law enhancement and service agencies (including the judiciary), paralegals, and youth classes and schools.[39]

Awareness-raising and education activities could be reinforced and extended to guarantee that these target groups:

▪ Cultivate a common knowledge of the law and human rights,

▪ Understand the types of legal provision that are obtainable and how to access them,

▪ Enhance an environment favourable to attaining human rights,

▪ Create a lobby group that can partake in networks and synchronised coalitions to bring pressure to bear on policymakers,

▪ Facilitate understanding about relevant legal measures and about one's rights and the capability to claim them,

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[38] International Journal Corner, Succession in Title and Rights of Women in Southwest Nigeria: the Realities and Prospects for a Changing Society, available at <https://www.internationaljournalcorner.com>articles> accessed 22 June 2024

[39] OHCHR, UN Commission on Human Rights, available at <https://www.ohchr.org/en/hr-bodies/chr/commission-on-human-rights> accessed 23 March 2010

To efficiently fight discrimination against widows, Nigeria, as a signatory to this regional instrument, needs to, as a matter of importance, reconsider the content of its syllabus and textbooks used in schools with a vision towards altering the negative opinion of women as inferior humans. Arguably, all discrimination against women is based on this opinion. It is also necessary for the Nigerian government to encourage the rights of women through the media.[40] This can be done in partnership with Advertising Practitioners Council of Nigeria, National Broadcasting Commission, National Film and Video Censors Board and Actors Guild of Nigeria and other relevant bodies.

ii. Legal Aid Services and Support

Legal support is the provision of backing to people who are unable to afford legal representation and access to the court system. Legal aid is regarded as essential in giving opportunity to justice by safeguarding equality before the law, the right to counsel and the right to a fair trial. Legal aid is vital to ensuring equal access to justice for all, as enshrined in Article 6.3 of the European Convention on Human Rights concerning criminal law cases and Article 6.1 of the same Convention both for civil and criminal cases. Particularly for people who do not have adequate financial means, the provision of legal aid to clients by governments intensifies the possibility, within court proceedings, of being helped by legal professionals for free or at minimal cost, or of getting financial assistance.[41]

As alertness of human rights associated with land, property, and inheritance grows, there is enlarged demand for support to attain those rights and resist unfair cultural practices. The present level of services is inadequate to meet women's needs. Three main actions can assist increase the level of legal aid services for women seeking to resolve assets and inheritance disputes:

- Deliver information and service-oriented resources that permit women to access courts and legal systems,
- Create national legal support platforms (e.g. a national paralegal network),
- Improve and device substitute services and outreach instruments (e.g., hotlines for information and referral).[42]

iii. Advocacy and Lobbying

[40] Open Journal Systems, available at <https://www.mcser.org/journal/index.php/mjss/article/viewfile/> accessed 19/11/2022

[41] *Regan, Francis,* The Transformation of Legal Aid: Comparative and Historical Studies*, (UK: Oxford University Press. 1999) 111-124*

[42] ibid n39

Advocacy and lobbying are important in creating political will to backing women's property and inheritance rights.[43] Such undertakings can focus on assorted groups, including elected officials, traditional authorities, professional groups (including the media), religious leaders, law enforcement officials, NGOs, and legal service providers. Advocacy and lobbying activities can strive to:

▪ Enhance government accountability by monitoring compliance with international human rights treaties,

▪ Support usage of local associations in arbitration and alternative dispute resolution,

▪ Alter, modify, and substitute laws to guarantee compliance with the provisions of CEDAW, enhance the incorporation of CEDAW and other human rights conventions into national laws,

▪ Increase the number of women in law enforcement, political and judiciary positions,

▪ Improve and increase the tutoring of girls, review curricula to mirror the rights of girls and women,

▪ Create coalitions among civil society, international, governmental, and other groups to improve and device a common agenda,

▪ Boost local attempts to deliver legal services, which would make such facilities both more extensive and sustainable in the long-term,

▪ Contain gender concerns in the creation and analysis of macroeconomic policies, national budgets, and fiscal strategies.[44]

iv. Networking

Networking offers an opportunity for partnership, mentoring, and sharing of ideas, resources, and encouragement. Women's network groups connect women from all different spheres of life, to share experiences, brainstorm new initiatives, and increase connections. A successful women's network needs to have a good, strong structure behind it from the start. Firstly, it's important to decide on a meeting schedule like the location of meeting and regularity of meetings. It is also a

[43] I Know Politics, Focus Areas available at <https://www.iknowpolitics.org/en/focus-areas/> accessed 17/02/2013
[44] Marcia Avner, The Lobbying and Advocacy Handbook for Non-profit Organisations, Second Edition: Shaping Public Policy at the State and Local Level. (UK: Fieldstone Alliance, 2013). 122-124

good idea to think about and agree on the best way to manage communications, some ideas be to set up a virtual group for discussion outside of meeting times.[45]

The Beijing Declaration adopted at the 1995 Fourth World Conference on Women emphasised the important role that civil society, in cooperation with governments, plays in the implementation of the Beijing Platform for Action. One element of the Platform for Action is the realisation of women's inheritance rights, which can be addressed by national and international organisations, donors and other funders, and regional entities.

Activities on the part of such groups should aim to:

- build an international network concerned with women's property and inheritance rights,
- promote access to resources,
- build coalitions to share tasks and workload,
- promote a supportive policy environment in specific settings,
- effectively use media outlets to disseminate information.[46]

v. Legal and Institutional Reform

United Nations Commission on Human Rights Resolution 2002/49 upholds that "discrimination in law against women with regards to having access to, acquiring, and safeguarding land, property, and housing, as well as maintaining of land, property, and housing, forms a violation of women's human right to protection against discrimination."[47] The resolution also demands "Governments to back the alteration of customs and traditions that segregate against women and deny women security of tenure and equal ownership of, access to, and administration of land and equal rights to own assets and to adequate housing." Likewise, the Beijing Platform for Action calls on governments to review laws and administrative practices to guarantee women's equal rights and access to economic resources. Current research on women's rights to assets suggests ways in which national constitutions and other laws can be revised and amended to

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[45] Mary Scott Welch, Networking - the Great New Way for Women to Get Ahead. (California: Harcourt Brace Jovanovich, **1980) 82-91**

[46] UNWomen, About available at <https://beijing20.unwomen.org/en/about> accessed 03/03/2011

[47] UN Digital Library, available at <https://digitallibrary.un.org/record/> accessed 19/01/2020.

guarantee compliance with CEDAW and other human rights treaties. Additionally, efforts to improve institutions (or create them where none exist) should centre on a range of groups, including educational institutions, law enforcement agencies, the judiciary, and legal support resource centres. Transformation efforts can help to achieve several significant aspects:

▪ Strategies to reconcile traditional practices and statutory law,

▪ Enhanced access to both courts and forums for alternative dispute resolution.[48]

vi. Poverty Alleviation and Economic Reform

Poverty alleviation seeks to enhance the quality of life for those people presently living in poverty. Another term that is frequently used is poverty reduction. These are all procedures put in place to decrease the rate of poverty. A direct link has been drawn between the attainment of women's inheritance rights and women's general economic enablement. Decreasing the cycle of poverty and disinheritance requires actions on numerous fronts, including:

▪ ensuring satisfactory support services to guarantee effective legal representation for women on all socioeconomic stages, enhancing the supply of basic needs by mass production of goods to make them inexpensive for indigent women,

▪ guaranteeing gender-sensitive programme budgeting on both the national and local stage,

▪ increase access to small-scale and microenterprise financial facilities for women, as well as loans and credit with which to acquire assets and boost economic opportunities,

▪ contemplate options for providing financial aid to women seeking political positions.[49]

5.0. Conclusion

Depriving women who constitute about 50 per cent of the Nigerian population is counterproductive to the progress of our nation. The obstructions to the enforcement of the right of women to inheritance that exist in different states of the country should be discontinued to pave way for their efficient and effective enforcement. Governments at all levels, NGOs and members of the civil society should come together to the aid of oppressed women and widows who lack access to justice. Traditional rulers, particularly in many of the southern states should carry out effective mass awareness in their individual domains on the importance of

[48] https://cega.berkeley.edu/research/institutional-reform-and-de-facto-womens-rights/, accessed 12/11/2021
[49] Fayyas Baqir. Poverty Alleviation and Poverty of Aid. (London: Routledge. 2020)

safeguarding women's inheritance rights. According to the Supreme Court in the famous case of Ms. Gladys Ada Ukeje, "any culture that disinherits a daughter from her father's property or wife from her husband's estate by reason of God-instituted gender differential should be punitively dealt with."

Fortunately, this issue was settled by the Supreme Court in 2014. The judgment of the apex court ensued from a suit filed by Ms. Gladys Ada Ukeje at the Lagos High Court requesting that being a daughter she was equally eligible to manage and inherit the property of her late father. The Lagos High Court had given judgment in her favour, prompting appeals to the Court of Appeal and eventually the Supreme Court, both of which ruled in her favour. In affirming the High Court and Court of Appeal judgments, the Supreme Court held that the Customary Law which striped a female child, regardless of the conditions of her birth, from inheriting or participating in the allotment of the property and estate of her father, was a violation of her right to freedom from discrimination enshrined in section 42 (1) (2) of the Constitution of the Federal Republic of Nigeria. Justice Bode Rhodes-Vivour, who read the lead judgment on the appeal filed in 2004 by Mrs. Lois Chituru Ukeje (wife of the late Mr. Lasarus Ogbonna Ukeje) and their son, Mr. Enyinnaya Lasarus Ukeje, held that the Appeal Court was right to have annulled the aspect of Igbo traditional law and custom that denies female children such inheritance. All the other Justices concurred with him.[50]

To limit inequitable practices against women, agents of socialisation must be efficiently involved and employed in upholding and entrenching the rights of women. It is in acknowledgement of this fact that the Optional Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, 2003, Art 2(2)[51] stipulates the use of at least two agents of socialisation, mass media and education, in combatting discrimination against women.

These traditional practices upset the principles of equity and good conscience because it does not assure that the widow, who during her matrimony and during the deceased husband's life, might have worked to bring about the achievement of such assets. It is therefore morally disgusting to divest her of ownership of such assets. If a husband and wife are considered as one in law and

[50] HBriefs, Mrs Lois Chituru Ukeje, Anor v Mrs Gladys Ada Ukeje, available at <https://hbriefs.com/sc/mrs-lois-chituru-ukeje-anor-v-mrs-gladys-ada-ukeje-2014/> accessed 06 April 2022

[51] OHCR, Protocol on the Rights of Women, available at <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen> accessed 11/05/2021

before the eyes of God[52] and man, it is assumed that they should share what belongs to them equally and should be free to exercise their rights to share same.

Taxation of Outbound Transactions in Nigeria

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Abstract

With the globalisation of world economy, international business taxation plays a vital role in international or cross-border transactions. International transaction may be divided into various categories depending on the type of the transaction, with the highest division being 'inbound' and 'outbound' transactions. The inbound and outbound transactions are subject to tax liability, depending on the tax system practiced by the countries that a person or corporate entity establishes itself. Two common bases of any national tax system are the worldwide tax system and the territorial tax system. The aim of this paper is to critically examine the rules guiding the taxation of outbound transactions. The paper highlighted the applicable taxes that outbound transactions are subject to, in Nigeria, as well as the reliefs and incentives that may be enjoyed in conducting outbound transactions. In the course of this paper, a doctrinal methodology is adopted. The paper noted that, the major challenge of transacting cross-border transactions is the issue of double taxation, and Nigerian residents in outbound transactions are only allowed credit for taxes paid to foreign jurisdictions on their foreign source income. The paper found out that Nigeria has entered into bilateral Agreements with some countries, amongst which are the Republic of Ireland, Commonwealth countries and the ECOWAS countries. It also noted that, non-resident companies who has not disposed chargeable asset in Nigeria, but only brought the income, or portion of it to Nigeria is liable to CGT on such amount. The paper recommends amongst others that, it is necessary for Nigerian Government to enter into bilateral Agreements with more foreign countries as this will eliminate double taxation, with the conclusion that, entering more double taxation arrangements will bring tax evasion to a minimal, and this will invariably pave way to economic development.

Key Words: Taxation, Outbound, Transaction, Nigeria, Double taxation, Tax Treaty

1.0 Introduction

The aim of every National Government is to get a reasonable share of tax from international business, as well as encourage local business, or to see that its own businesses are not unfairly discriminated against.[1] As a result of this aim, some rules on business transactions are stipulated.

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So, with the global business environment growing and increasingly complex, multinational businesses must tread carefully to avoid the risk associated with non-compliance of rules and regulations regulating outbound transactions. This is because, with the recent technology advancement, which has given rise to cross-border business activities with, or without physical presence, the tax laws governing cross-border transactions are more complex and demand familiarity with the basic tax rules that apply to both Nigeria and foreign persons.

According to Abdulrazaq, international *tax is concerned with the tax system as soon as it moves beyond the purely domestic scene*'.[2] International taxation or Cross-border taxation[3] can be divided into various categories, based on the type of the transaction, with the highest division being 'inbound' and 'outbound'. Inbound transaction relates to foreigners doing business and investment in other countries,[4] while outbound transaction relates to a country's resident, and perhaps citizens, carrying on business and investment in any foreign country. Regarding Nigeria therefore, an outbound transaction relates to Nigerian residents,[5] and perhaps, citizens, deriving their income from foreign countries. The taxing jurisdiction of such activities is one of the questions which international taxation aims to solve.

The focus of this paper is to critically examine the taxation of outbound transactions in Nigeria. The paper is divided into five parts. Part 1 introduces the paper. Part 2 discusses the rules governing the taxation of outbound transactions. The part considers the rules of residency as it applies to individuals and corporate entities, and the rules to determining the tax liability of companies engaged in foreign transactions. In part 3, the legal frameworks for the taxation of outbound transactions is examined. Here, the paper critically highlights the various taxes that persons[6] engaged in outbound transactions are subject to, and the various enactments guiding the engagement of outbound transactions in Nigeria. The part argues that, subjecting a foreign company to capital gains tax (CGT)[7] for the disposal of chargeable asset(s) not done in Nigeria, merely because the whole amount or any part of the amount is received or brought to Nigeria is

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[1] Muhammed Taofeeq Abdulrazaq, referencing *Taxing Profits in a Global Economy* (OECD, Paris, 1991), in MT Abdulrazaq, *Revenue Law and Practice in Nigeria* (3rd edn Malthouse Press Limited, 2015) at 339.
[2] Ibid, MTAbdulrazaq, *Revenue Law and Practice in* Nigeria, at 339.
[3] These two words will be used interchangeably in this paper.
[4] For more detail on the concept of inbound transactions, see, Sabit Abosede Lawal, 'Rules Governing the Taxation of Inbound Transactions and the Concept of Significance Economic Presence in Nigeria', (2021) 7(2) *JILJ*, pp 281-294.
[5] A country is said to be resident in Nigeria if such company is incorporated in Nigeria by the Corporate Affairs Commission under the Companies and Allied Matters Act, 2020. See also, Companies Income Tax Act 2004 (as amended), s 13.
[6] 'Person' in this context means both natural persons (individuals) and corporate entities.
[7] Hereafter referred to as CGT

unjust. Also, the tax rates as provided under the various enactments in Nigeria are examined. These enactments include, but not limited to the, *Personal Income Tax Act* (PITA),[8] *Companies Income Tax Act* (CITA) 2007 (as amended),[9] *Petroleum Industry Act,* (PIA) 2021,[10] *Companies Income Tax (Significant Economic Presence) Order, Capital Gains Tax Act* (CGTA) 2004 (as amended)[11], *Deduction of Tax at Source (Withholding) Regulations* 2024[12], as well as *Finance Acts* 2019, 2020, 2021, and 2023.[13] All these enactments impose taxes on the income of all taxable persons. Part 4 examines the Double Tax Arrangements (DTAs)[14] and Double Tax Treaties (DTTs)[15] This part notes that DTAs and DTTs are very crucial in outbound transactions and argues that double taxation is one of the challenges of outbound transactions which must be critically looked into. It noted that, although Nigerian Government has entered into DTAs with some countries, however, Nigeria should increase the numbers of these countries to ease the tasks of the companies engaging in outbound transactions. The paper goes further in its part 4.1 to analyse some provisions on Double Tax Reliefs (DTRs)[16] and incentives granted to outbound transactions in Nigeria. Part 5 concludes the paper by reaffirming that, individuals and corporate organisations must be aware of tax implications on their outbound transactions for effective tax planning and to avoid unintended tax liability, and that, Nigerian Government should enter into DTAs with more countries in order to ease the tax liability of Nigerian companies, and to aid the economy development of Nigeria, amongst others.

2.0 Rules Governing the Taxation of Outbound Transactions

Residency is a key factor in determining the tax liability of a person who engages in outbound transactions. The mode of determining residency by countries varies. While some countries determine the residence of an incorporated organisation based on formal criteria such as place of incorporation, some countries base residency on factual criteria such as place of effective management and other countries have a mixed system where they adopt both the place of incorporation and place of effective management as residence of corporate entities.[17] Nevertheless,

[8] Personal Income Tax Act No. 20, 2011 (as amended by Act No. 3, 2020). Hereafter referred to as PITA 2020
[9] Companies Income Tax Act 2007 (as amended by the Finance Acts 2019, 2020, 2021 & 2023), Hereafter referred to as CITA 2007 (as amended).
[10] Hereafter referred to as PIA 2021.
[11] Hereafter referred to as CGTA 2004.
[12] Hereafter referred to as Withholding Regulations 2024.
[13] Hereafter referred to as FAs 2019, 2020, 2021, & 2023.
[14] Hereafter referred to as DTAs.
[15] Hereafter referred to as DTTs.
[16] Hereafter referred to as DTRs.
[17] See, OECD (2014), 'Addressing the Tax Challenges of the Digital Economy, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing' <http://dx.doi.org/10.1787/978926421878-en>, accessed 14 October, 2024.

Nigeria adopts the place of incorporation rule.[18] Basically, with regard to taxation of international transactions, two broad models or rules are identified, and they are, the worldwide system,[19] and the territorial system.[20] A country that operates the former system subjects its residents to tax on their worldwide income, which include both profits derived from sources inside and from any other country outside its territory. In order to implement the residence system, it is incumbent on the tax administration in the country of residence to collect information regarding the foreign-source income of their residents. Hence, these countries hardly adopt pure worldwide system of taxation. Rather than this, foreign-sourced profits are taxed upon repatriation,[21] and not on an accrual basis. Thus, tax credit for tax paid on profits generated abroad is usually limited to the amount of taxation that would have been imposed on the foreign earnings by the residence country, thereby ensuring that the worldwide system does not impair the resident country's taxation of its own domestic source income.[22]

On the other hand, a country that operates the territorial system subjects its residents to tax, only on the income derived from sources located in its territory. To this effect, residents are taxed only on their local income, that is, incomes that are deemed to have their source(s) inside the country. Therefore, determination of the source of business income is a vital issue in a territorial system. Notwithstanding the above two different systems, each adopted by various countries, there are some countries that apply a combination of both systems. However, taxation of outbound transaction is generally done by countries that operate a worldwide or residence system.

3.0 The Legal Framework for the Taxation of Outbound Transactions in Nigeria

As noted above, Nigeria practices a worldwide or residence-based tax system whereby the worldwide income of its residents is taxed, with a credit or deduction for taxes paid to foreign jurisdiction(s) on their foreign source income. This is one of the challenges inherent in outbound transactions and needs to be addressed. However, the non-residents are taxed only on the income derived in Nigeria. In *Addax Petroleum Services Ltd. v Federal Inland Revenue Service*,[23] the court held amongst others that, a foreign company is taxed on profits attributable to its fixed base in Nigeria. In Nigeria, the basic statutory enactments that govern the taxation of individuals and

[18] Isaac Olajide Oni, *Nigerian Companies Income Tax: Law and Practice* (Spectrum Books Limited, 2008).
[19] This is otherwise known as the residence rule.
[20] This is otherwise known as the source rule.
[21] This is otherwise known as the deferral system.
[22] OECD (2014), 'Addressing the Tax Challenges of the Digital Economy' (n 17).
[23] [2013] 9 *TLRN*, 219.

incorporated companies on outbound transactions include the, PITA,[24] CITA,[25] PIA,[26] CGTA,[27] Withholding Regulations 2024,[28] as well as FAs 2019, 2020, 2021, and 2023.[29] All these enactments impose tax on the income of all taxable persons who reside or is deemed to reside, for the relevant year of assessment, in one of the States of the Federation,[30] or such person is established by or under any law in force in Nigeria, or elsewhere.[31] The applicable taxes, their basis of liability and tax rates on outbound transactions are herein examined.

3.1 *Companies Income Tax*

In Nigeria, resident companies[32] are liable to companies' income tax (CIT)[33] on their worldwide income. Section 9(1) of the CITA provides that, profits of any company accruing in, derived from, brought into, or received in Nigeria shall be liable to CIT.[34] These are profits in respect of any trade or business carried on; any premium arising from the right granted to any person for the use or occupation of any property, where applicable; fees, dues, and allowances (wherever paid) for services rendered; and discounts, charges or annuities.[35] Hence, any profit of a company from outbound transactions which are brought into or received in Nigeria would be subject to Nigerian CIT. To this effect, all income of an outbound person is liable to Nigerian CIT except where such income(s) when derived from abroad is not brought into or received in Nigeria.

Section 13(1) of the CITA makes provision for when a Nigerian company could be said to have accrued profits, as to have arisen wherever, regardless of whether such profits have been brought into or received in Nigeria. Hence, a Nigerian company that accrues profit in Belgium is deemed to have accrued it in Nigeria, regardless of whether it has been brought into Nigeria. This is

[24] (N 8).
[25] (N 9).
[26] (N 10)
[27] (N 11).
[28] (N 12).
[29] (N 13).
[30] See, PITA 2011 (n 8), ss 1 & 2.
[31] CITA, ss 9, 13 & 105 (as amended by the FA 2019).
[32] For clarity purposes, some terms need to be defined here. To this effect, a company means, '*any company or corporation (other than a corporation sole) established by or under any law in force in Nigeria or elsewhere*'. See, CITA 2007, s 105(1). A Nigerian company is defined as '*any company formed or incorporated under any law in Nigeria*.' See ibid, s 105(1) (as amended by FA 2020, s 21(a)). A resident company is that which has its place of residence in Nigeria, and a company has its place of residence in Nigeria, where such company is registered or incorporated by the Corporate Affairs Commission under any law in Nigeria.
[33] Hereinafter referred to as CIT.
[34] See, CITA 2007, s 9(1) (as amended by FA 2019, s 2(a)).
[35] See generally, ibid, s 9(1). Some of the profits that can accrue to an organisation are stipulated under section 9(1) (a) – (h) of the CITA 2007, ibid. However, this section must be read alongside with section 23(1), ibid.

because, CITA states that, the profits of any company shall be taxed in Nigeria where such profits accrued in, derived from, brought into, or received in Nigeria.[36]

In *Tufic K. Koran v Commissioner for Income Tax,*[37] the court held amongst others that, the words "accruing in", and "received in" import a clear territorial limitation to Nigeria. The court went further to state that, the words "derived from" appear to be designed to meet among other things, cases where profits arise from transactions carried out in Nigeria by non-resident taxpayers. With both the statutory and judicial authority as enunciated by the court in this case, taxing income on worldwide basis may lead to double taxation which can only be resolved if Nigeria has a Tax Treaty (TT)[38] with the country where the outbound transaction was carried out.

The CIT rate for outbound transactions is subject to section 40 of the CITA (as amended), in accordance with the classification of the company. The CIT rate falls within 0 per cent to 30 per cent depending on whether the company is small, medium sized or large company.[39] According to the definition section,[40] a small company is '*a company that earns gross turnover of ₦25,000,000 [twenty-five million] or less'* and it is therefore exempted from tax.[41] A medium-sized company is a company that earns gross turnover that is greater than twenty-five million (₦25,000,000), but less than one hundred million (₦100,000,000),[42] and it is subject to a tax rate of 20 per cent.[43] A large company is any company which is neither a small nor a medium-sized company.[44] This means that, such company must have a gross turnover of one hundred million (₦100,000,000) and above. The CIT rate of a large company is 30 per cent.[45] On a practical note, virtually all the companies that engage in outbound transactions are large companies based on the above definitions and thereby subject to 30 per cent CIT rate. Nevertheless, dividends, interest, rents, and royalties earned in foreign countries, and brought into Nigeria through Government-approved channels[46] are exempt from Nigerian tax.[47] In addition to the CIT is the tertiary education tax at

[36] Ibid.
[37] 12 WACA 331.
[38] Hereafter referred to as TT.
[39] See, CITA, s 40 (as amended by FA 2019, s 16).
[40] Ibid, s 105(1), (as amended by FA 2019, s 22).
[41] Ibid, s 23(1)(o), (as amended by FA 2019, s 9(a)(ii)(o).
[42] Ibid (n 40).
[43] Ibid (n 39).
[44] Ibid (n 40).
[45] Ibid (n 39).
[46] For the purpose of this provision, CITA defines "Government-approved channels" to mean, '*the Central Bank of Nigeria, any bank or other corporate body appointed by the Minister as authorized dealer under the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act or any enactment replacing the Act*'. See, CITA, s 23(1)(k).
[47] Ibid.

the rate of 2.5 per cent on the assessable profit of any company registered in Nigeria, other than a small company as specified under section 40 of the CITA (as amended).[48]

3.2 *Personal Income Tax*

The PITA[49] imposes tax on the income of individuals amongst others.[50] Sections 2 and 3 of the PITA 2011 provide for the basis of tax liability and outline the scope of chargeable income of outbound transactions by individual residents. Section 2 stipulates that, tax of an amount to be determined from the Table set out in the Sixth Schedule of PITA shall be payable for each year of assessment on the total income of every individual or body of individuals deemed to be resident for that year in the relevant State under the provisions of PITA.[51] This means that, the residence of an individual is an important factor to determining its tax liability. With regard to an individual, a resident is someone that has lived permanently in a particular place, or a person that has stayed for more than 183 days in a particular area of Nigeria.[52] It therefore means that, the tax residence of an individual is a place available for the individual's domestic use in Nigeria, on a relevant day. However, it excludes any hotel, rest house or other place at which he is temporarily lodging, unless no permanent place is available for his use on that day.[53]

Section 3 of PITA stipulates the income of individuals that are chargeable to personal income tax (PIT).[54] The section provides that, tax shall be payable for each year of assessment on the aggregate amounts each of which is the income of every taxable person, for the year, *from a source inside or outside Nigeria*.[55] This means that, individual residents in Nigeria are taxable on their worldwide income. The section further enumerates the source of income that are liable to tax. This includes, but not limited to, gain or profit from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised; and any salary, wage, fee, allowance or other gain or profit from employment including compensations, bonuses, premiums, benefits or other perquisites allowed, given or granted by any person to any permanent or temporary employee. However, this latter provision does not cover

[48] See, the Tertiary Education Trust Fund (Establishment, Etc.) Act, s 1(2) (as amended by the FA 2021, s 28(2).
[49] (N 8).
[50] See ibid, s 1(a)
[51] Ibid, s 2(1) & (1A) (a).
[52] Ibid, s 10(a)(ii).
[53] Ibid, 1st sch. par 1.
[54] Hereafter referred to as PIT.
[55] Emphasis supplied.

any sums as or expenses incurred by the employee in the performance of his duties, and from which it is not intended that the employee should make any profit or gain.[56]

Other sources of income that are liable to be taxed are, gain or profit including any premiums arising from a right granted to any other person for the use or occupation of any property; dividend, interest or discount; any charge or annuity; and any other profit, gain or other payment, not mentioned above.[57] In spite of the worldwide system of taxation that Nigeria practices, it must be noted that, income from dividend, interest, rent, royalties, fee, commission that are earned from abroad and brought into Nigeria by a Nigerian resident are exempted from tax.[58] However, this exemption is subject to a proviso that such income is brought to Nigeria in convertible currency and paid into a domiciliary account in a bank approved by the Nigerian Government.[59]

3.3 *Capital Gains Tax*

Capital gains tax is the tax that accrues on the disposal of asset. Therefore, any gain that accrues to a chargeable person, including individuals and companies, on the disposal of chargeable assets are subject to tax under the CGTA at the rate of ten per cent.[60] By section 3 of the Act, all forms of property whether situate in Nigeria or not, including options, debts, goodwill, and foreign currency, other than those specifically exempt, are liable for CGT.[61] However, the gains on the disposal of shares are exempt from CGT. CGT is also applicable on the chargeable gains received or brought into Nigeria in respect of assets that are situated outside Nigeria.[62] The effect of the above provisions is that CGT is applicable to a disposal of chargeable asset by Nigeria residents, as well as any person that is in Nigeria for temporary purpose, and has no intention to establish his residence in Nigeria, provided the period or sum of the periods for which he is present in Nigeria, in the year of assessment is more than 182 days. In addition, where the disposal is by a non-Nigerian company, such company shall be liable to CGT '*on the amount (if any) received or brought into Nigeria in respect of any chargeable gains….*'[63] The reason for subjecting the amount

[56] PITA 2011 (n 8), s 3(1).
[57] See generally, ibid, s 3(1). See also, ibid, s 3(2) for what constitutes allowance, employment, income and gains or profits arising from a right granted to any other person for the use or occupation of property.
[58] Ibid, 3rd sch. par 30.
[59] Ibid.
[60] CGTA 2004 (n 11), s 2(1).
[61] Ibid, s 3.
[62] Ibid, s 4.
[63] Ibid, s 4(b)(c). For more discussion on CGT (n 7), see, Sabit Abosede Lawal, 'Towards Effective Capital Gains Tax Operations in Nigeria', 10 UIJPIL, at pp 317-337.

to CGT is that such amount is treated as '*gains accruing when they are received or brought into Nigeria*'.[64]

It is the opinion of these writers that subjecting a foreign company to CGT for the disposal of chargeable asset(s) not done in Nigeria, merely because the whole amount or any part of the amount is received or brought to Nigeria is unjust. This is because, neither the disposal nor the gain has taxable connection with Nigeria, and the gains would have been taxed in the jurisdiction where the company is resident or where the asset is disposed. Therefore, imposing CGT on the amount brought into Nigeria will lead to multiple taxation against the company. It is therefore recommended that this provision be looked into by the Nigerian legislature, such that CGT should apply to the amount brought, only if it is invested in purchasing chargeable asset(s) and/or upon the sale of such asset. This amendment to the law is necessary because it is not all countries that have double taxation treaty with Nigeria, and so the relieve(s) derived under the treaty will not be available to the affected company.

3.4 *Withholding Tax*

Withholding tax (WHT)[65] is basically an advance payment of income tax which may be used as tax credit to offset or reduce tax liabilities of the years of assessment to which the income that suffered the deduction relates.[66] According to the Federal Inland Revenue Service (FIRS)[67] WHT is not a tax, but a prepaid tax.[68] There are varying rates of WHT, and these ranges from two and half (2.5) per cent to ten per cent for companies, and five per cent to ten per cent for individuals, depending on the transactions.[69] Basically, there is no difference between the WHT rates applicable to resident companies or individuals, and non-resident companies or individuals.[70] However, non-resident companies who receive Nigerian royalties are subject only to WHT at the rate of ten per cent, while those who are residents in a country having DTT[71] with Nigeria may

[64] Ibid, s 4(b)(c).
[65] Hereafter referred to as WHT.
[66] See, FIRS, 'Withholding Tax', <https://www.firs.gov.ng/faq/WithholdingTax>, accessed 17 October 2024.
[67] Hereafter referred to as FIRS.
[68] FIRS, 'Withholding Tax' (n 66).
[69] Ibid.
[70] PWC, 'Nigeria Corporate – Withholding Taxes' (16 September 2024), <https://taxsummaries.pwc.com/nigeria/corporate/withholding-taxes> accessed 8 October, 2024.
[71] (N 15).

enjoy a reduced WHT rate of seven and half (7.5) per cent.[72] Additionally, interest payable to a non-resident investor is liable to WHT at ten per cent rate.[73]

3.5 *Petroleum Profits Tax / Hydrocarbon Tax*

Currently in Nigeria, two legal regimes are applicable for the taxation the petroleum upstream sector, under the *Petroleum Profits Tax Act* (PPTA) 2004 (as amended),[74] and the PIA 2021.[75] While the PPTA 2004 provides for Petroleum Profits Tax (PPT),[76] the PIA provides for the Hydrocarbon Tax (HT). Although, HT is a novel term for taxation of the profits of the Nigerian petroleum industry, both Acts apply to the Nigerian petroleum upstream sector, and they make provisions for the ascertainment of crude oil revenue for the purpose of taxation. However, under the PIA, oil producing companies are subject to 30 per cent CIT, as against what operates under the PPTA.[77] Nevertheless, the PIA will very soon replace the PPTA in its entirety, once all the concessions under the PPTA 2004 convert to those, as applicable under the PIA 2021.

Presently therefore, holders of the existing un-converted concessions the PPTA, and thus liable to PPT rate of 85 per cent or 65.75 per cent of the chargeable profits,[78] and the converted ones are subject to 30 per cent HT and 30 per cent CIT, totaling 60 per cent. However, the companies that are awarded licenses and leases, such as the Petroleum Prospecting License (PPL) and Petroleum Mining Lease (PML) are liable to pay hydrocarbon tax[79] at the rate of 15 per cent and 30 per cent of profits from crude oil in onshore and shallow water for a PPL and PML respectively.[80] Moreover, the marginal operators in the deep offshore water area are subject to 30 per cent CIT only. Nevertheless, the PIA provides for the conversion from OPL to PPL, and from OML to PML,[81] and upon conversion, the holder will benefit from the new fiscal provisions and tax rate of

[72] For the countries having DTTs with Nigeria, and the WHT rate applicable to each of them, see, PWC, 'Nigeria Corporate-Withholding Taxes' (n 70).
[73] See generally, Sabit Abosede Lawal, 'The Remittance of Withholding and Pay as You Earn Tax in Nigeria', (2016) 7(3) The Gravitas Review of Business and Property Law, at 156-167.
[74] Hereafter referred to as PPTA 2004 (as amended).
[75] (N 10).
[76] Hereafter referred to as PPT.
[77] See, PIA, s 260(5).
[78] See, PPTA (n 74), s 21(1) & (2).
[79] Hydrocarbon tax applies to crude oil, field condensates and natural gas liquids derived from associated gas and produced in the field upstream of measurement points. See, Streamsowers & Kohn, 'Petroleum Profits Tax Act, Petroleum Industry Act and Proposed Amendments in Finance Act', <https://www.lexology.com/library/detail.aspx?g=f6b0bc1d-d5b5-47fd-83c5-ebb70f908d60> accessed 29 October, 2024.
[80] PIA (n 10), s 267(a) & (b).
[81] Ibid, s 92(1).

60 per cent under the PIA.[82] Hence, all profits from crude oil sold in an outbound transaction is chargeable either to the PPT, or hydrocarbon tax in Nigeria.

4.0 Double Tax Arrangements and Treaties for Outbound Transactions

Double Tax Arrangements are very important for outbound transactions. This is because, there are situations where two or more countries tax the worldwide profits of resident company, or where countries like Nigeria tax a worldwide income, and the foreign country where the income is derived subject the same company to tax liability. This situation gives rise to international double taxation. In order to reduce the tax liability of such company, there is need to enter into DTAs.[83] To this effect, Nigeria makes provision for Double Tax Reliefs by entering into bilateral Agreements with some countries, in form of Double Tax Treaty.

A tax treaty is a written agreement between two countries which assists in minimising the risk of double taxation and double non-taxation.[84] Thus, the essence of a tax treaty is to eliminate double taxation. So, Nigerian Government having a DTA with any country is to relieve any Nigerian company engaging in outbound transactions from double taxation, amongst others. Prior the implementation of DTA with any other country, it is a condition that such country must reciprocate the gesture with Nigeria. However, the National Assembly must ratify the Treaty before it becomes operative. Evidencing this assertion, Regulation 1 of the *Deduction of Tax at Source (Withholding) Regulations* 2024 provides that:

> Reduced rates as specified under a Treaty between Nigeria and any other country for the avoidance of Double Taxation shall apply to an eligible recipient who is resident in a treaty country to the extent that such reduced rates are contained in the relevant Treaty or Protocol duly ratified by the National Assembly.[85]

[82] Ibid, 92(10). See also, Gabriel Ogunjemilusi, 'Petroleum Industry Act (PIA): A New Fiscal Framework for the Taxation of Oil and Gas Industry', < https://portal.citn.org/wp-content/uploads/2021/11/PIA-PRESENTATION-Gabriel-OGUNJEMILUSI-1.pdf>, accessed 13 September, 2024.
[83] (N 14).
[84] Bomes Resources Consulting (BRC), 'Nigeria: Double Tax Treaty With Other Countries' (23 April, 2024), <https://www.bomesresourcesconsulting.com/nigeria-double-tax-treaty-other-countries.html#:~:text=Nigeria%20has%20tax%20treaties%20with,Sweden%2C%20and%20the%20United%20Kingdom.>, accessed 12 October, 2024.
[85] Withholding Regulations (n 12), reg 1(b).

According to Somorin, a DTR[86] is part of a DTA,[87] and not an Agreement on its own, and it must be noted that, Double Tax Treaties or Arrangements have supremacy over Nigerian tax laws.[88] Prior to May 2023, Nigeria has DTAs with 16 countries, and these countries are, Belgium, Canada, China, Czech Republic, France, Italy,[89] Netherlands, Pakistan, Philippines, Romania, Singapore, Slovakia, South Africa, Spain, Sweden, and United Kingdom.[90] However, on 1 May, 2023, Nigeria, through her Minister of Finance, signed a new Order on tax treaty with the ECOWAS countries,[91] and the Treaty has been gazetted.[92] The treaty took effect from 1 January, 2024 and it applies to PIT, CIT, PPT / HT, Tertiary education tax, National information technology development levy, and Capital gains tax. Nevertheless, there are some countries that the National Assembly is yet to ratify tax treaty with. These countries are Kenya, Mauritius, Poland and South Korea.[93] Nigerian laws make express provisions for the application of DTRs. The reliefs and some incentives granted for the benefit of outbound transactions, under the provisions of the Nigerian laws are herein considered.

4.1 Double Tax Reliefs and Incentives Granted to Outbound Transactions in Nigeria

The legal frameworks providing for bilateral double tax reliefs regarding business income of outbound transactions are, sections 38 and 39 of the PITA, sections 44 to 46 of the CITA 2007, and section 41 of the CGTA 2004. By these provisions, the Minister of Finance is empowered to issue an Order declaring that arrangements specified in the Order have been made with the Government of any country outside Nigeria with a view to affording relief from double taxation in relation to tax imposed on profits. The main objective of the Agreement is usually to avoid double taxation and to prevent tax evasion.[94] The provisions of the above enactments regarding DTAs are the same, and so the provisions of the CITA will be emphasised in this section.

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[86] See (n 16).
[87] See (n 14).
[88] Teju Somorin, *Teju Tax Reference Book I* (Malthouse Press Limited, Lagos 2012) at 604.
[89] The DTA with Italy is only on Air and Shipping outbound transactions. See, FIRS, 'Tax Treaties' <https://www.firs.gov.ng/tax-treaties/>, accessed 29 October 2024.
[90] See, FIRS, 'Tax Treaties and Related Matters', <https://www.firs.gov.ng/tax-treaties-and-related-matters>, accessed 23 October 2024. See also, PWC, 'Nigeria Individual – Foreign Tax Relief and Tax Treaties' <https://taxsummaries.pwc.com/nigeria/individual/foreign-tax-relief-and-tax-treaties>, accessed 23 October 2024.
[91] The ECOWAS countries are, Benin, Burkina Faso, Cape Verde, Cote D'Voire, The Gambia, Ghana, Guinea Bissau, Guinea Conakry, Liberia, Mali, Niger, Senegal, Sierra Leone, and Togo. According to the PWC, the Treaties have been ratified in Nigeria, but yet to be ratified by the counter-party countries. See, PWC, Nigeria Corporate – Withholding Taxes (n 70).
[92] See, PWC, 'Nigeria Enters Tax Treaty Agreement with ECOWAS Member Countries' (17 May 2024), <https://pwcnigeria.typepad.com/tax_matters_nigeria/2024/05/nigeria-enters-tax-treaty-agreement-with-ecowas-member-countries.html>, accessed 28 October 2024.
[93] See, Bomes Resources Consulting (BRC), 'Nigeria: Double Tax Treaty with Other Countries' (n 84).
[94] Teju Somorin, *Teju Tax Reference Book I* (n 88) at 604.

Section 44 of the CITA makes provision for tax reliefs in respect of Commonwealth income tax.[95] It provides that:

> If any Nigerian company which has paid, by deduction or otherwise, or is liable to pay, tax under [the CITA] for any year of assessment on any part of its profits, proves to the satisfaction of the [FIRS] Board that it has paid, by deduction or otherwise, or is liable to pay Commonwealth income tax for that year in respect. of the same part of its profits, it shall be entitled to relief from tax paid or payable by it under [the CITA] on that part of its profits at a rate thereon to be determined as follows:
>
> (a) If the Commonwealth rate does not exceed one half of the rate of tax under [the CITA], the rate at which relief is to be given shall be the Commonwealth rate of tax;
>
> (b) In any other case the rate at which relief is to be given shall be half the rate of tax under [the CITA].[96]

The above shows that, for any outbound transaction made by any Nigerian company, in the Republic of Ireland or with any country within the Commonwealth, such Nigerian company would be entitled to Commonwealth income tax relief provided there exists reciprocal arrangements by such country. Aside from the tax relief arrangements that are granted for outbound transactions with the Republic of Ireland, or any country within the Commonwealth, does it mean that if there is any outbound transaction by any Nigerian company with other foreign countries (outside the Commonwealth Countries or Republic of Ireland), there would not be any DTR granted to Nigerian companies? Section 45 of CITA answers this question by making provision for DTA[97] with other foreign countries aside from those countries mentioned under section 41 of CITA. The section provides that:

> If the Minister [of Finance] by Order declares that arrangements specified in the

[95] According to section 44(3), a Commonwealth income tax means, '*any tax on income or profits of companies charged under a law in force within the Commonwealth or in the Republic of Ireland which provides for relief from tax charged both in that Country and Nigeria….*'

[96] CITA 2007 (n 9), s 44(1)(a) & (b). The 'rate of tax' in accordance with the section, for any year of assessment means, '*the rate determined by dividing the amount of tax imposed for that year (before the deduction of any double taxation relief granted by [Part VII of CITA]*) by the amount of the total profits of the company for that year….' Ibid, s 44(3).

[97] See (n 14).

> Order have been made with the Government of any country outside Nigeria with a view to affording relief from double taxation in relation to tax imposed on profits charged by [the CITA] and any tax of a similar character imposed by the laws of that country, and that it is expedient that those arrangements should have effect, the arrangements shall have effect notwithstanding anything in [the CITA].[98]

Nevertheless, if the Minister makes an Order relating to DTA, with the government of any Commonwealth country or the Republic of Ireland, the relief in respect of Commonwealth income tax, under section 44 of CITA, shall cease to have effect as respects that country, and shall be deemed to have ceased to have had effect as from the beginning of the first year of assessment for which the arrangements are expressed to apply, except in so far as the arrangements otherwise provide.[99] However, it must be noted that, the Order made by the Minister pursuant to section 44(1) may include provisions for relief from tax for periods commencing or terminating before the making of the Order as well as to provisions as to profits that are not themselves liable to double taxation.[100] In addition to the above provisions on DTAs which create reliefs for Nigerian companies on outbound transactions, there are some other incentives which serve as reliefs. Some of these incentives relate to the Export processing zones (EPZs)[101] and the Free Trade Zones (FTZs).[102] EPZs and FTZs are locations within Nigeria designated by the Government as free areas where export trade activities can be carried on free of tax and foreign exchange restrictions. However, the tax exemption for FTZ companies is subject to such companies filing income tax and transfer pricing returns, where applicable, to the FIRS.[103] Furthermore, a company that is 100 per cent export oriented, but located outside an EPZ will enjoy a three-year tax holiday. However, five conditions must be fulfilled to enjoy the incentive. They are, first, the undertaking is 100 per cent export oriented. Second, the company must be one that is not formed by splitting up or reconstruction of an already existing business. Third, its export proceeds must form at least 75 per cent of its turnover. Fourth, the company is not formed by transfer of machinery or plants previously utilised for any purpose to the new undertaking, or where machinery or plant previously used for any purpose is transferred does not exceed 25 per cent of the total value of the machinery or the undertaking. Fifth, such company must repatriate at least 75 per cent of the export earnings

[98] CITA 2007 (n 9), s 45(1).
[99] Ibid, s 45(2).
[100] Ibid, s 45(5).
[101] Hereafter referred to as EPZs.
[102] Hereafter referred to as FTZs.
[103] See, the Lagos State Trade Zones Regulations 2009.

to Nigeria and place it in a Nigerian domiciliary account.[104] Also, the profits of any Nigerian company in respect of goods exported from Nigeria are exempt from tax, if the proceeds from such exports are repatriated to Nigeria, and are used exclusively for the purchase of raw materials, plants, equipment, and spare parts.[105] It must be noted that, for any Nigerian company to benefit from this provision, such company must fulfill all the conditions as the conditions operate simultaneously. In *Olokun Pisces v Federal Inland Revenue Service*,[106] the Federal High Court held amongst others that, any company that satisfied section 23(1)(q) will be saved from tax liability. However, the conditions set out under the section is questions of fact and not of law, and thus, they must be present simultaneously.[107] Moreover, capital allowances are another form of tax relief under the CITA. They are granted on the acquisition of qualifying capital expenditures that are utilised solely for the purpose of the business. The allowances serve to reduce the profits of a company conducting outbound transactions, and ultimately to reduce its tax liability.[108] The onus of proving tax exemption is on the party seeking such tax exemption.[109] Notwithstanding the above countries that Nigeria has DTAs with, there are many other countries that Nigeria should have DTAs with. This is because, many Nigerians (Individuals and Corporate entities) have business dealing in many nations of the world, their income in those nations are subject to tax liability, and taxing their worldwide income by the Nigerian Government will be tantamount to double taxation, and this is one of those reasons why tax evasion is rampant. In order to relieve the Nigerian companies and individuals of the problem inherent in double taxation, it is recommended that Nigerian Government should enter into DTAs with more countries.

5.0 Conclusion

The rules governing the taxation of outbound transactions depend on the tax system being practiced in the affected country. Countries that tax income generally adopt either the territorial based tax system, or the residence-based tax system. In the former, only the local income, being income from a source inside such country is taxed, while in the latter, residents of the country are taxed on their worldwide income, comprising of both their local and foreign income, and non-residents, only on their local income. It is revealed that the worldwide system of taxation is prone

[104] See generally, CITA (n 9), s 35(3).
[105] See, CITA 2007, s 23(1)(q) (as amended). See also, the Nigerian Export Processing Zones Act, Cap. 107, Laws of the Federation of Nigeria, 2004. See also, Lagos State Trade Zones Regulations 2009.
[106] [2018] 38 *TLRN* 30.
[107] Ibid at 49.
[108] See, CITA 2007 (as amended), 2nd sch). See also, ibid, s 39, on the incentives granted to the gas industry.
[109] (N 106). See also, *Best Children International Schools Ltd. v Federal Inland Revenue Service* [2019] 40 *TLRN* 33 at 52.

to double taxation. Nigeria practices the worldwide or residence-based tax system and has sufficiently made provisions for the taxation of outbound transactions through various enactments.

More so, to avoid double taxation, Nigeria has entered DTAs with some countries, including the Commonwealth countries, the Republic of Ireland, and the ECOWAS countries. With the DTAs, it is believed that Nigerian companies engaging in outbound transactions will be relieved of double taxation, and more revenue will accrue to both the companies and Nigerian Government, because tax evasion will be reduced to a minimal level. However, Nigerian Government should enter DTAs with more countries to ease the tax liability of Nigerian companies, and to aid the economic development of Nigeria. Likewise, individuals and corporate organisations must be aware of tax implications on their outbound transactions for effective tax planning and to avoid unintended tax liability. In addition, the legislature needs to amend the provisions relating to CGTA, wherein a non-resident company who has not disposed chargeable asset in Nigeria, but only brought the income, or portion of it to Nigeria would be subject to CGT. It is the belief of this writer that, if the recommendations made in this paper are implemented, this will pave way for economic development.

The Nigeria's Minister of Finance and The Power to Amend the Schedule to the Value Added Tax Act

Jirinwayo Jude Odinkonigbo*

Abstract

This paper examines the validity of the exercise of a delegated power by the Nigeria's Minister of Finance to amend the Schedule to the Value Added Tax Act. It probes into the following issues: the extent to which a legislative power can be delegated to other arms of government – especially as it relates to amendments, variations and/or modifications of a principal legislation; and whether there is control or reasonable oversight over the exercise of delegated powers to ensure there is no executive dictatorship or lawlessness. Contrary to the prevailing judicial precent in Nigeria, it is argued herein that a Minister can amend the Schedule of an Act of Parliament – in this case, the Value Added Tax Act. However, this paper questions the absence of control of delegated powers in Nigeria. It is, therefore, contended that though the Minister's delegated powers are circumscribed by the Constitution and the relevant principal legislation, the control and oversight of the exercise of delegated powers in Nigeria is minimal or non-existent. Therefore, the enactment of Statutory Instrument Act/Law in the common law tradition is proposed for Nigeria to provide for the examination, publication, and scrutiny of regulations and orders made pursuant to delegated powers.

Keywords: Delegated legislation, Value Added Tax Act, Minister of Finance, 1999 Constitution, Nigeria

1 Introduction

First, it must be noted that the principle of the doctrine of separation of powers is not a watertight one;[1] otherwise, a strict interpretation of the doctrine would mean that no arm of a constitutional democracy (i.e. the legislature, executive or judiciary) is allowed to exercise another's function.

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[1]Sections 4, 5, and 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) emphasize the principle of separation of powers in Nigeria's constitutional democracy by conferring legislative, executive and judicial powers of government to different arms of both the Federal and State Governments. The Court of Appeal in *Ahmad vs. S.S.H.A.* (2002) 15 NWLR (Pt. 791) 545 explains the implications of the principles of separation of powers as follows:

> The doctrine of separation of powers has three implications: (a) that the same person should not be part of more than one of these three arms or divisions of government; (b) that one branch should not dominate or control another arm. This is particularly important in the relationship between the executive and the courts; (c) that one branch should not attempt to exercise the function of the other; for example, a President, however, powerful ought not to make laws or indeed act except in execution of laws made by the legislature. Nor should a legislature make interpretative legislation; if it is in doubt it should head for the court to seek an interpretation.

However, the reality is that in today's world, the need to meet the exigencies of technicalities, emergencies, and timeliness of certain socio-legal issues that will help the government of the day respond promptly and swiftly with the needed expertise in the field where the problem arose or

foreseen to arise, there is the need for the deployment of delegated powers outsourced from their traditional base(s) to another arm invested with different powers – such as the power to enforce, make or interpret laws.[2] Thus, the National Assembly may delegate law-making powers to other arms of government. This includes the power to make regulations, guidelines, rules, etc., to enhance the effective implementation of a principal legislation. But it must be noted that the operations of separation of powers and delegated powers are permitted and circumscribed by the Constitution and/or a principal legislation. It follows that both the donor and donee of delegated power(s) must not go outside the provisions of the constitution; and, in particular, a donee of delegated power must not exceed the statutory limits established by the relevant principal legislation. This implies that both the donor (legislature for instance) and the judiciary (when approached) must keep their eyes on the boundaries drawn by the principal Act or limits of operation expressly or impliedly permitted by the Constitution in the exercise of such delegated powers. Thus, this paper examines the validity or otherwise of the exercise of a delegated power by the Nigeria's Minister of Finance to amend the Schedule to the Value Added Tax Act – a principal legislation. In doing this, the paper examines the following: (a) the extent to which legislative power can be delegated to other arms of government – especially as it relates to amendments, variations and/or modifications of a principal legislation made by the National Assembly; (b) whether or not there is control or reasonable oversight over the exercise of delegated powers to ensure there is no executive dictatorship or lawlessness; (c) what Nigeria must do to ensure power still reside with the people and not hijacked by the executive and/or their unelected agents.

Before discussing the above issues, it must be noted that in this paper, there is an assumption that the National Assembly has the power to legislate on value added tax as a subject. This does not mean that I agree with the proposition because in my previous papers, I took the position that value added tax as a subject is a matter that is neither in the exclusive legislative list nor within the

[2] K.C. Wheare, "Controlling Delegated Legislation: A British Experiment" (1949) vol. 11(4) The Journal of Politics 748. See also, Rt. Hon Sir Geoffrey Palmer, "Deficiencies in New Zealand Delegated Legislation" (1999) 30 VUWLR 1 at 2. In recognition of this principle, the United States Supreme Court acknowledges that "... in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power ..." see *Mistretta vs. US* (1989) 488 US 361, 371-372. See also, Griffith, "The Place of Parliament in the Legislative Process" (1951) 14 Mod. L. Rev 279, 292; and O Hood Phillips, P. Jackson and P. Leopold, *Constitutional and Administrative Law* (Seet & Maxwell: 2001, 8 edition) at 668.

province of concurrent legislative list. It can also not be found in other parts of the constitution as a subject assigned, either concurrently or exclusively, to the National Assembly. As a result, I maintain in my previous papers that the value added tax is a residual matter that the constitution assigns exclusively to State Houses of Assembly.[3] Despite this position, it is assumed in this paper that the National Assembly has the power to legislate on value added tax as a subject. Therefore, this paper focuses on whether the Minister of Finance, in the exercise of delegated power entrusted to her by the principal Act, *i.e.* the Value Added Tax, exceeded her powers; and if so, what should be done to checkmate any abuse of such delegated powers.

1.1 A review of relevant issues in this matter

The determination of the relevant issues identified above revolves round the validity and/or extent to which the powers conferred by section 38 of the Value Added Tax Act ("VAT Act") is exercised by the Minister of Finance (the "Minster"). This section confers on the Minister the power to amend the rate at which VAT is exigible; and, also, the power to amend, vary or modify the list set out in the First Schedule to the VAT Act – which implies the power to amend a schedule of a principal legislation by a Minister who is a member of the executive arm. In particular, this paper considers the validity of the various VAT Modification Orders issued by the Minister which varies the list of exempt and zero-rated items.

A. The extent to which legislative powers can be delegated to other arms of government – especially as it relates to the amendments, variations and/or modifications of a principal legislation made by the National Assembly:

It is not in doubt that the use of delegated legislation is part of Nigeria's legal history. Apart from our common law inheritance of this practice, the source of delegation of powers is not only the Constitution[4] but also different Acts and Laws of the National Assembly and State Houses of Assembly respectively: provided the Act or Law is not in conflict with the Constitution. Therefore, this paper does not question the validity or otherwise of the use of the instrument of delegated powers/legislation per se. Rather, it questions the extent or degree to which delegated powers could be entrusted to and exercised by other arms of government. For instance, it is a given that no arm of government – such as the legislature – can grant rulemaking power outside the powers assigned

[3]See the following: Jirinwayo Jude Odinkonigbo and Nduka Ikeyi "Is the Power of State to Impose Sales Tax in Nigeria Fettered by the Imposition of Value Added Tax by the Federal Government" (2015) vol. 41(4) Commonwealth Law Bulletin 577 – 596; and Jude Odinkonigbo, "Attorney General of Rivers State v Federal Inland Revenue Service: Which Level of Government in Nigeria's Federal Structure has the Power to Impose and/or Collect Value Added Tax?" (June 2021) vol. 3(1) ESUT Law Journal 198 – 210.

[4] See section 46(3), 248, 254, 259, 264, 269, 274, 284 and 279 for powers granted different heads of courts by the Constitution to make rules with respect to the practice and procedure of their courts. See also Paragraph 15(f) of the Third Schedule to the Constitution which grants the Independent National Electoral Commission the power to make rules and regulations guiding political parties.

to it by the Constitution. If a legislature exceeds its constitutional bounds in conferring power on another body or person(s), such grant, and subsequent exercise of that power thereof will be null and void. When a parliament validly delegates its own power to a Minister or any agent of the executive, it is expected that the delegatee must conform with the condition(s) – if any – attached to the exercise of such power. This means that a Minister or an agent of the executive must not go beyond the powers conferred on him/her; otherwise, such will be ultra-vires the principal legislation from which the power flows in the first place. Also, such delegated powers must not be exercised in an unreasonable manner.

Also, this paper questions the grant of delegated powers by the legislature without mechanism(s) for oversight and control of the exercise of the power(s) delegated. Indeed, an unchecked exercise of delegated powers will lead to abuse and possibly dictatorship. It is for this reason that this paper makes case for the incorporation of Statutory Instrument Act/Law in our jurisprudence – a common practice in developed common law countries.

The next issue is whether the National Assembly acted within its powers to confer on the Minister of Finance the powers contained in section 38 of the VAT Act; and if so, whether the then former Minister of Finance, Mrs. Zainab Ahmed, acted within the law when she delisted and/or added some items to the First Schedule of the VAT Act via the Valued Added Tax (Modification) Orders of 2020 and 2021 (both "Modification Orders", while each is "Modification Order 2020", and "Modification Order 2021" respectively). By these Modification Orders, the First Schedule to the VAT Act was altered – to delist and/or add certain items to the list of VAT-exempt and zero-rated items.

First, an answer to the above depends on whether VAT is a subject that the National Assembly can validly legislate on – either as a subject contained in the exclusive legislative or concurrent list. In previous publications, I took the position that the VAT Decree of 1993 which appears to survive as an existing law cannot be supported by the current Constitution since VAT as a subject could not be found in either the exclusive or legislative list of the Constitution. We will not repeat same argument here. Rather, we refer our reader(s) to the materials where the argument was exhaustively canvassed.[5]

For the purpose of this paper, let us assume the VAT Act is sustainable as an Act of the National Assembly under the extant Constitution. With this assumption, it is safe to say that since the Constitution gives the National Assembly the authority to legislate on VAT and related matters, same National Assembly can validly delegate the power to perform certain acts under the principal

[5] See footnote no. 2.

legislation to a Minister who is an agent of the executive arm of government. Regardless, it appears that the major constitutional question lies on whether a Minister or any agent of the executive can amend, or alter a Schedule to an Act, which is part of a principal legislation. Section 38 of the VAT Act grants the Minister of Finance the power to "... (a) amend the rate of tax chargeable; and (b) amend, vary or modify the list set out in the First Schedule to this Act."

A cursory review of the above cited provision of the VAT Act shows that the power granted the Minister of Finance is a power to amend an Act of the National Assembly. It is therefore important to examine whether the legislature can donate powers to the Minister to amend or vary a principal legislation enacted by the National Assembly – i.e. whether this magnitude of legislative delegation is allowed under our law. In exercise of this power, the Minister promulgated or issued the Modification Orders. The Modification Orders expanded and altered the First Schedule to the VAT Act by delisting and redefining certain terms listed therein. In particular, the Modification Order 2020 published in the Federal Government's official Gazette No. 18, vol. 107 of February 4, 2020, modified the First Schedule to the VAT Act by defining and expanding the list of exempted goods and services and providing clarification to the amendments made by the *Finance Act*, *2019* to the VAT Act. The highlights of the amendment and/or expansion of the list of exempted goods and services made by the Minister via 2020 Modification Order include the following:

1. Adoption of basic food items as contained in the Finance Act, 2019 and the exclusion of items sold at hotels, eateries, restaurants, lounges, and similar places. The exclusion was also extended to basic food items sold by contractors, caterers, and similar vendors.
2. It also expanded the meaning of the following items: baby products; downstream gas utilisation; educational books; educational materials; equipment; farming machinery and implements and farming transportation equipment; fertilizers; locally produced agricultural and veterinary medicines; locally produced animal feeds; medical equipment; medical products; pharmaceutical products; plant; purchase; medical services; shared passenger road-transport service; lease and rental of residential building.
3. The order further extended the list of items exempted from VAT with their Common External Tariff (CET) Codes. In particular, the Order provided the Codes for these items: medical and pharmaceutical products; plant, machinery and equipment purchased for utilisation of gas in downstream petroleum sector; petroleum products (incorporating provisions of the Value Added Tax Act (Schedule Modification) Order, 2018 signed by the Minister of Finance to exempt petroleum product like automotive gas oil, aviation turbine kerosene, household kerosene, liquefied petroleum gas and premium motor spirit from VAT; fertilizer, locally produced agricultural and veterinary medicine and farming

machinery; essential raw materials for the production of pharmaceutical products; renewable energy equipment; raw materials for the production of baby diapers and sanitary towels.

In 2021, the Minister of Finance promulgated another Modification Order. This time, the new Order replaced the 2020 Modification Order. The newly promulgated Modification Order 2021 was published by the Federal Government in its official Gazette No. 167, vol. 108 of 21 September 2021. It amended and/or expanded the list of exempted items in the First Schedule to the VAT Act as follows:

1. List of exempted items:
   i) Petroleum product
   ii) Renewable energy equipment
   iii) Raw materials for the production of baby diapers and sanitary towels; raw materials for the production of pharmaceutical products
   iv) Locally produced animal feeds
   v) Military hardware, arms, ammunition, and locally manufactured uniforms used by the armed forces, paramilitary and security agencies of governments in Nigeria.
   vi) Gas supplied by gas producing companies to Electricity Generating Companies (GENCOs), electricity generated by GENCOs and supplied to the National Grid or Nigeria Bulk Electricity Trading Company (NBET) and electricity transmitted by Transmission Company of Nigeria (TCN) to Electricity Distribution Companies (DISCOs), and
   vii) Agricultural seeds and seedlings
2. Expansion and/or amendment of the definitions of the following terms:
   - Airline transportation ticket
   - Basic food items
   - Baby products
   - Commercial aircrafts, commercial aircrafts engines, commercial aircrafts spare parts
   - Educational books
   - Educational materials
   - Equipment
   - Farming machinery and implements and farming transportation equipment.
   - Fertilizers

- Locally produced agricultural chemicals and locally produced veterinary medicine.
- Locally produced animal feeds
- Machinery
- Medical Equipment
- Medical products
- Medical services
- Pharmaceutical products
- Plant
- Purchase
- Utilization of gas in downstream petroleum operations
- Shared passenger road-transport service
- Petroleum products
- Unit micro-finance bank

1. Inclusion of "Shared Passenger Road-transport Service" amongst list of exempted items contained in Part II of the First Schedule to VAT Act.
2. The term "non-oil exports" was deleted from the list of zero-rated products.
3. The list of items with Common External Tariff (CET) Codes were extended.

The former Minister of Finance, Budget and National Planning, Mrs. Zainab Shamsuna Ahmed, relied on the powers conferred on her office by section 38 of the Value Added Tax Act, Cap. VI, Laws of the Federation of Nigeria, 2004 (as amended) to effect the above changes.

It is plausible to argue that since the First Schedule to the VAT Act is a part of the Act itself, the power to vary, amend, delist, or add anything to the schedule lie with the National Assembly that is conferred with the legislative power, under section 4 of the 1999 Constitution, to do so. This is so because the making and amendment of an Act of the Parliament/National Assembly is an exercise of the plenary or primary law-making powers of the Parliament/National Assembly. It is akin to the power of a court to adjudicate over matters brought within its jurisdiction. However, it is already shown that the principle of separation of powers is not a watertight one under our constitutional democracy. This notwithstanding, the donation of powers reserved for each arm of the government is circumscribed and limited by the Constitution and relevant Acts of the National Assembly. Though section 38 of the VAT Act empowers the Minister of Finance to amend, delete and/or expand the list of items in the First Schedule to the VAT Act, it is doubtful that section 38 will survive judicial scrutiny that may question the authority of the National Assembly to abdicate and/or give away its core constitutional power of enacting or amending a principal legislation. On

the contrary, it is also arguable that the National Assembly cannot keep up with societal changes and the need to update the list of exempted or zero-rated items in the First Schedule to the VAT Act. Whichever way the court decides, the control of the exercise of delegated power(s) entrusted to the agents of other arms of government is a serious issue in Nigeria. The lack of guiding principles on how to go about the exercise of the delegated powers conferred on the Minister by section 38 of the VAT Act to vary the Schedule to the Act is problematic. It does not state any factor(s) to be considered by the Minister before varying the schedule. It also does not make provision for consultations with stakeholders to make inputs to any variation of the schedule. This leaves the exercise of the delegated power at the whims and caprices of the Minister, which may have far-reaching implications on businesses and economic life of the country. Indeed, it confers an autocratic power on the Minister to do whatever he desires without any form of control and/or checks. Let us examine relevant case laws to see what the court thinks about the propriety of amending a principal legislation and/or its schedule by a delegate.

2.0. Relevant Cases

In *The Registered Trustees of Hotel Owners and Managers, Lagos vs. Attorney-General of the Federation and Minister of Finance*[6] (the "HOMAL Case"), the Federal High Court ("FHC") was called upon to determine the constitutionality or otherwise of section 1(2) of the *Taxes and Levies (Approved List for Collection) Act, Laws of the Federation of Nigeria, 2004* ("TAL Act"), which is similarly worded like section 38 of the VAT Act. Section 1(2) of the TAL Act provided[7] that: "The Minister of Finance may, on the advice of the Joint Tax Board and by Order published in the Gazette, amend the Schedule to this Act". On 20th May 2020, the FHC held, among other things, that section 1(2) of the TAL Act is inconsistent with the Constitution of the Federal Republic of Nigeria, 1999; and as a result, the amendment of the Schedule to the TAL Act by the Minister is unconstitutional, null and void.

For clarity, the facts of the case are as follows:

Amongst other issues settled in this case, the plaintiff, *i.e.* the Registered Trustees of Hotel Owners and Managers, challenged the powers conferred on the Minister of Finance by section 1(2) of the TAL Act to amend the Schedule to the TAL Act. The action was commenced via an originating summons urging the court to determine the following issues:

[6] FHC/L/CS/1082/19

[7] *Taxes and Levies (Approved List for Collection) Act, LFN 2004* was invalidated by the Court of Appeal in *Uyo Local Government Council v. Akwa Ibom State Government & Anor* (2020) LPELR-49691 (CA).

(a) Whether by section 4 of the Constitution of the Federal Republic of Nigeria, 1999, the legislative powers of the Federal Republic of Nigeria are vested in the National Assembly.

(b) If question (1) is answered in the affirmative, whether the Minister of Finance, a member of the executive arm of government has constitutional power (legislative competence) to amend an act of the National Assembly or any part thereof.

(c) If question (2) is answered in the negative, whether section 1(2) of the Taxes and Levies (Approved List for Collection) Act, which vests the Minister of Finance with the power to amend the schedule to the Taxes and Levies (Approved List for Collection) Act, is inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria and therefore, unconstitutional, null and void in light of section 1(3) of the Constitution.

(d) If question 3 is answered in the affirmative, whether any purported amendment to the Taxes and Levies (Approved List for Collection) Act, by the Minister of Finance, a member of the executive arm of government, including but not limited to the schedule to the Taxes and Levies (Approved List for Collection Act (Amendment) Order, 2015 is illegal, null and void in light of section 1(3) of the Constitution.

In support of their respective positions, the parties pushed forward the following arguments:

The Plaintiff contended, among other things, that the power granted the Minister of Finance by section 1(2) of the TAL Act is a usurpation of the legislative powers of the National Assembly reserved for it by section 4 of the 1999 Constitution since the power to TAL Act or any part thereof amounts to an exercise of the primary and/or principal law-making powers of the National Assembly reserved solely for it by section 4 of the Constitution. To this extent, the Plaintiff moved the Court to declare section 1(2) of the TAL Act unconstitutional, illegal, and void.

For the 1st and 2nd Defendants, they argued that exercise of delegated powers is allowed under our law; and that the TAL Act survived as an existing law under section 315 of the 1999 Constitution. Being an existing law, the appropriate authority or anyone authorized by him/her can amend or modify the existing law. Therefore, the power granted to the Minister under section 1(2) of the TAL Act is constitutional.

In determining the above issues, the FHC (per A.O. Faji J.) held, inter alia, that:

1. The power conferred on the Minister by section 1(2) of the TAL Act does not qualify as a valid delegated power because the exercise of it, thereof, amounts to amending the principal Act – which includes the schedule to the Act, which principally reside with the legislature.

2. The Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015 ("TAL Act Order") seeks to add and change the text of the main legislation. The exercise of this power to legislate is reserved for the Parliament and cannot be shared with any other body or person because doing so will violate the principle of separation of powers set out in sections 4, 5, and 6 of the Constitution. Thus, the rule-making powers that may be delegated by the legislature are restricted to the issuance of subsidiary legislation to give effect to the enabling legislation and not to override or amend principal/enabling legislation – which includes the schedule to the principal or enabling legislation.
3. The power to amend or vary the terms and wordings of an enactment – especially the principal legislation - cannot be delegated because such power is reserved for the legislature and no other.
4. The power exercised by the Minister of Finance was not under section 315 of the Constitution but under section 1(2) of the TAL Act. The Minister of Finance does not qualify as an appropriate authority under section 315 of the Constitution to amend the TAL Act to bring it into conformity with the Constitution.
5. Therefore, the Minister's exercise of the power is null, void, and unconstitutional.

Similarly, in the case of the *Attorney-General of Bendel State v. Attorney-General of the Federation*[8], the constitutionality of an Act of the National Assembly was challenged. In this case, a Bill passed by both houses of the National Assembly was presented to the Joint Committee on Finance ("JCF") for reconciliation of issues arising from the Bill. Upon resolution of the issues, the JCF transmitted the Bill to the President for his assent. This triggered a constitutional challenge. In declaring the Act unconstitutional, the Supreme Court held that:

> ... a legislature which operates a federal written constitution in which the exercise of legislative power and its limits are set out has no power to ignore the conditions of law-making that are imposed by that Constitution which itself regulates its powers to make law. I am therefore unable to accept the proposition that such a National Assembly, once established, has some inherent powers derived from the mere fact of its establishment to delegate or transfer to its Joint Finance Committee, established or appointed only to resolve differences which have arisen between the two houses of that National Assembly during the passage of a money-bill, its exclusive constitutional power to make a valid law.[9]

[8] (1981) LPELR-605
[9] Ibid at page 35

There is one major difference between the above two cases – despite that, they highlighted the limits of delegated powers. In the Attorney-General of Bendel State's case, there is a violation of a constitutional stipulation or condition for enacting an Act of the National Assembly. The JCF ought to have reverted to the National Assembly after the reconciliation of the issues sent to it. Instead of this, it sent it to the President for his assent. The truth is that the JCF does not have the power to do this. No law or enactment authorizes the exercise of the power of direct reference or submission of the bill to the President.

The HOMAL case is different from the Attorney-General of Bendel's case. It is similar to the extant case under review – that is, whether the Minister of Finance can amend a Schedule of an Act of Parliament – which is considered a part of a principal legislation. In HOMAL case, the issue was the constitutionality of section 1(2) of the TAL Act which empowers the Minister of Finance, in consultation with the Joint Tax Board, to amend a schedule of the VAT Act. The court held that the exercise of this power is unconstitutional because it amounts to usurpation of legislative powers constitutionally and exclusively reserved for the National Assembly by section 4 of the Constitution. As earlier observed, the provisions of section 38 of the VAT Act is similar to section 1(2) of the TAL Act. The minor difference between the two is that there is no reference in section 38 of the VAT Act for consultation of the Joint Tax Board by the Minister before the schedule of the VAT Act could be amended or delisted. What is central to both is that the Minister is empowered to amend the schedules to each of the legislation.

With due respect, this paper does not support the decision of the court in the HOMAL case. Unfortunately, the HOMAL case does not recognize the complexity and technicality of the economic issues that demand expertise and timeliness in resolving urgent issues. Leaving every issue to be resolved by the legislature will cause serious delays and failure to respond to urgent economic issues. Indeed, urgency and expertise are the major factors that inform the grant of delegated powers. Amendment of the list of items in a schedule of an Act or Law relating to Value Added Tax or other economic issues demands urgency and expertise on the subject matter to be amended, added, or deleted. Granting the power to amend the Schedule of the VAT Act or the TAL Act to the Minister of Finance falls within the province of delegated powers that can be granted by the National Assembly. This shows that there is no watertight application of the principle of separation of powers, which, unfortunately, the Federal High Court in HOMAL's case relied on.

3.0 Whether or not there is control or reasonable oversight over the exercise of delegated powers to ensure there is no executive dictatorship or lawlessness

It is not in doubt that the Constitution provides for legislative oversight over the activities of both the Federal and State executives.[10] The legislature appears to be empowered by the constitution to control, monitor, and provide oversight functions over the activities of the executives. Unfortunately, however, it is not on record that Nigeria's National Assembly monitors, investigates or queries the exercise of delegated powers by the executive or its agents. Nigerians mainly resort to courts as a means of control of the exercise of delegated powers. Courts rely on established legal principles to draw lines for those who exercise delegated powers. While this is good, there is need for the legislature, the donor of delegated powers, to keep eyes over the exercise of the powers donated to other arms of government. However, unlike other common law countries that make use of *Statutory Instruments Act*[11], there is no law providing for the examination, publication and scrutiny of regulations and other statutory instruments in Nigeria. This vacuum lends credence to the fear of executive lawless or dictatorship in the exercise delegated powers.

4.0 What Nigeria must do to ensure power reside with the people and not hijacked by the executive or their unelected agents?

First, the legislature must ensure it exercises its oversight function through committees of the house to monitor the exercise of delegated powers by the executive through ministries, departments, and agencies of government. The focus will be to ensure that donees do not exceed the powers granted them; that regulations or orders made are not unreasonable; and that legal drafters in ministries, departments, and agencies convey the real intent of principal legislation(s) authorizing such delegated power(s) without causing ambiguity that could lead to an entirely different outcome.

Secondly, it is high time Nigeria enacted a Statutory Instrument Act that will mandate and spell out the procedure for examination, publication, and scrutiny of regulations; and, finally, it is advised that every principal legislation donating delegated power to make regulations and orders must provide as a condition that stakeholders in the industry must be engaged by ministries, departments or agencies so they could make inputs to proposed regulations, orders etc. It does not really matter whether inputs of stakeholders are taken; it is enough that the relevant executive body has heard the players in the industry and, perhaps, the public. Any aggrieved person can challenge the act of the executive if it bothers on legislative overreach/ultra vires matter and/or unreasonableness – since our courts allow liberal construction of *locus standi*. This will also prepare the market for changes that the regulation or orders will introduce.

[10] See sections 88, 89, 128 and 129 of the 1999 Constitution.

[11] For instance, see the Canadian Statutory Instrument Act (R.S.C., 1985, c. S-22) and the British Statutory Instrument Act, 1946.

5.0 Conclusion

From the above, it is obvious that the control of the exercise of delegated powers in Nigeria is minimal – if at all there is one in practice. This gives rise to executive dictatorship, which, unfortunately, allows ministers, departments, or agencies to churn out regulations and orders without proper checks and balances since the National Assembly care less in controlling or monitoring powers that it outsources. There is the need for the National Assembly to wake up to its responsibilities in monitory the activities of the executive and its agents. In addition, there is the need for the enactment of *Statutory Instruments Act* that will provide for the examination, publication, and scrutiny of regulations and orders.

On the legality or otherwise of the issuance of the Modification Orders by the Minister of Finance, a cursory look at the exercise of the power to amend the VAT Act's Schedule appears to be delegated powers duly exercised. But the implication of the decision of the Homal's case suggests otherwise. The decision of the court in the case supports the position that any subsidiary legislation capable of altering enabling legislation can only be made by the National Assembly or an appropriate legislature. Hence, such power cannot be validly delegated. The implication is that the Minister's Modification Orders were made ultra vires. Unfortunately, we do not agree with the position of the HOMAL's case. We contended that due to the reasons given above for the use of delegated powers, especially as it concerns the amendment of a Schedule of principal legislation may not be a matter that should be left for the legislature to handle. Technicalities and complexities of certain subject matters require that experts or people well-informed of the subject matter under consideration should be allowed to handle it and save the precious time of the court. Thus, our main concern regarding the exercise of delegated powers/legislation focuses on lack of control and oversight of the exercise of delegated legislation.

6.0 Recommendations

The paper recommends the setting up of committees of parliament or legislature to oversee the exercise of delegated powers and ensure there is no overreach or abuse.

The paper also recommends that there should be consultation of stakeholders for their inputs before regulations, orders etc are issued.

A Legal and Socio-cultural Analysis of the Relationship Between Xenophobia and Taxation in South Africa

Oyesola Animashaun, PhD*

Abstract

Xenophobia which refers to morbid hatred of foreigners is prevalent in South Africa, with the special manifestation of violent attacks on black Africans whenever there is any perception of a socio-political problem or infrastructural deficiency. The immigrants are blamed by the locals for relative prevalence of HIV/AIDS, unemployment, housing and electricity shortage and other issues. The article examines the effect of xenophobia on revenue collection in South Africa. It also discusses the adequacy of the legal protection offered immigrants, notwithstanding that they are legal or undocumented migrants, in South Africa, using the doctrinal method. The article found that the protection offered to the immigrants is deficient and that the inadequate provisions in the statutes made the black immigrants vulnerable to xenophobic attacks, which inadvertently affect the tax revenue collected by the state negatively. Further, the article found that the court has been consistently defended the rights of migrants in line with the South Africa Constitution, 1996. The article concludes with certain recommendations to prevent xenophobia, in a bid to enhance tax revenue collection in South Africa.

Keywords: Xenophobia, taxation, immigrants (foreigners), revenue, South Africa, and Nigeria.

1.0 Introduction

In simple term, xenophobia, is the fear or hatred of foreigners or strangers. It is embodied in discriminatory attitudes and behaviour, and often culminates in violence, abuses of all types, and exhibitions of hatred.[1] Xenophobia may be limited to anti-immigration rules which unnecessarily limit immigrants' options and made them inaccessible to health care services or educational

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[1] Hussein Solomon and Hitomi Kosaka, 'Xenophobia in South Africa: Reflections, Narratives and Recommendations' (2019) 2(2) *Southern African Peace and Security Studies* 5-30.

facilities.[2] Studies on xenophobia have attributed such hatred for foreigners to a number of causes like- the fear of loss of social status and identity, a threat, perceived or real, to citizens' economic success, a way of reassuring the national sovereignty and its boundaries in times of national crisis, a feeling of superiority and poor intercultural information.[3] Xenophobia is also described as "new racism" or "cultural racism", it must not be confused with racism; it differs from the latter of which, culture rather than race is the basis of exclusion.[4] Though, xenophobia as a subcategory of racism, usually addresses much larger groups than the former,[5] the term "xenophobia" is defined as, "a strong feeling of dislike or fear of people from other countries".[6] Xenophobia is also described as the fear of anything that is strange or foreign or the deep dislike of foreigners by nationals of a recipient state. In the definitions above, the words dislike, fear, and hatred project a negative attitude towards foreigners. It is not a natural response by native populations to the presence of foreigners, rather a socio-political phenomenon that contributes to the marginalisation of migrant groups in social and national settings. According to Crush the phenomenon is "crucially linked," to aggressive nation-building and nationalism by the ultra or the radical right leaning ideologue.[7] Racism refers to broadly ascribed characteristics, while xenophobia addresses more restricted qualities like language, religion, culture, or similar aspects, often fused to an ethnicity. Akinola posited that xenophobia is "a systemic political, social and economic expression of imperialism" that may be aggravated by "deepening impoverishment" and "inter-state labour mobility".[8] Although economic competition aids the conflicts, but "nefarious activities of some foreigners"

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2 Arianne Shahvisi, 'Austerity or Xenophobia? The Causes and Costs of the "Hostile Environment"' (2019) 27 *NHS Health Care Analysis* 202–219; Woojin Lee, John Roemer & Karine Van der Straeten, 'Racism, Xenophobia, and Redistribution (2006) 4(2–3) *Journal of the European Economic Association* 446–454.

3 M. Mogekwu, 'African Union: Xenophobia as Poor Intercultural Information', (2005) 26(1) *Ecquid Novi* 5-20; Sascha Riaz, Does Inequality Foster Xenophobia? Evidence from the German Refugee Crisis' (2023) 50(2) *Journal of Ethnic and Migration Studies*, 359–378; VOA News, 'Violence Monitor: Xenophobic Attacks Stem from Frustration' VOA (Washington, DC April 17, 2015) https://www.voanews.com/a/xenophobic-attacks-stem-from-fustration-violence-monitor/2723955.html accessed 29 July 2024.

4 J Crush and S. Ramachandran, Xenophobia, International Migration and Human Settlement. Human Development Research Paper 2009/47: United Nations Development Program. 2009.

5 A.O. Akinola, 'Introduction: Understanding Xenophobia in Africa' in Akinola AO (ed), *The Political Economy of Xenophobia*. (Cham: Springer Publishing, 2018).

6 Oxford Advanced Learners Dictionary: International student's edition (7th ed. Oxford University Press, 2006).

7 J. Crush, 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa' (2000) 38(6) *International Migration* 103-133; J. Crush and S. Ramachandran, 'Xenophobia, International Migration and Human Settlement' Human Development Research Paper 2009/47: United Nations Development Program, 2009.

8 Akinola, 'Introduction: Understanding Xenophobia in Africa' in Akinola AO (ed), *The Political Economy of Xenophobia* (Springer Publishing, 2018).

are no explanation because violations of the law belong as task to the criminal justice system of a state.[9]

Xenophobia appears as mutinous acts of nationalistic self-empowerment in excess of a punishment of offences and is characterised by its ignorance of questions of individual culpability and responsibility.[10] Notably, foreigners' conviction precedes any wrongdoing.[11] Xenophobia in South Africa is more than a fear or dislike of foreigners, it is rather violent activity brought on by intense tension.[12] Valji laments that "patterns of xenophobic hostility thus constitute a violation of the human rights of a targeted and identifiable group that undermines the very values upon which this new democracy is premised".[13] Xenophobic sentiments are certainly not unique to South Africa, however, its distinctiveness emanates from the high levels of outrageous intolerance, the widespread hostility and violent outcome.[14] Moreover, South African Xenophobic sentiments, attitudes and violence is directed mainly at fellow Africans usually of dark colour. Although it is seldomly directed at Asian, particularly Pakistanis in certain instances, which made some authors to termed it Afrophobia.[15]

South Africa is continually affected by extremely violent and widespread xenophobia,[16] resulting in the death, maiming and destruction of the properties, livelihood, and businesses of the predominantly black immigrants. The South African politicians, probably except for Julius Malema and his political party- the Economic Freedom Fighters (EFF), used the foreigners as scapegoats - a cover for their corruption, maladministration and wrongdoings. Foreigners were blamed for unemployment, crime, spread of HIV/AIDS and any other conceivable problem in the South African society![17] Unfortunately, most of the older politicians such as Jacob Zuma, Thabo

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9 Ibid 4.

10 Ibid.

11 Ibid.

12 B. Harris 'Xenophobia: A New Pathology for a New South Africa?' In D. Hook and G. Eagle (eds), *Psychopathology and Social Prejudice.* (University of Cape Town Press, 2002), 169-184 @170.

13 N. Valji, Creating the nation: The rise of violent xenophobia in the new South Africa. (Unpublished Masters Thesis, York University, 2003) http://www.csvr.org.za/docs/foreigners/riseofviolent.pdf accessed 29 July 2024.

14 I. Palmary, 'Refugees, Safety and Xenophobia in South African Cities: The Role of Local Government. Working Paper for the Centre for the Study of Violence and Reconciliation. Johannesburg: CSVR.; Harris (n 12) 169-184; Max Friedrich Steinhardt, *The Impact of Xenophobic Violence on the Integration of Immigrant* IZA DP No. 11781 IZA – (Institute of Labour Economics, 2018).

15 Moses E. Ochonu, 'The rise of Afrophobia in South Africa' https://blogs.lse.ac.uk/africaatlse/ accessed 29 July 2024; N.P. Dlamini, T.C. Adetiba, A.O. Enaifoghe and V.H. Mlambo, 'Afrophobia and South Africa's Image on the Continent: Implications for Inter-State Relations and Diplomacy (2020)17(3) *African Renaissance* 9; B. Olupohunda, 'Why do South Africans Hate Nigerians?*' The Punch* (Lagos, 20 June 2013) 3.

16 Sean Maliehe and Jürgen Schraten 'The Roots of Xenophobia in 19th Century Imperialism (2022) 54(2) *Acta Academica* 69-94

17 Thabi Myeni, 'S African minister suggests foreigners are to blame for no jobs' Aljazeera (Doha, 16 June

Mbeki, and others had lived in exile as favoured refugees during the apartheid period.[18] The refugee status of most of the current South African leaders was acknowledged in the case of *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others*[19] when Kondile, AJ stated in paragraph 30 of his judgement that

> 'During the liberation struggle many of those who now find themselves among our country's leaders were refugees themselves, forced to seek protection from neighbouring states and abroad'.

However, the response of Jacob Zuma, the erstwhile president of South Africa after the 2015 xenophobic attack is instructive.

> Our brother countries contribute to this. Why are their citizens not in their countries? It is not useful to criticize South Africa as if we mushroom these foreign nationals and then ill-treat them . . . Everybody criticizes South Africa as if we have manufactured the problem. Even if people who are xenophobic are a minority, but what prompts these refugees to be in South Africa? It is a matter we cannot shy away from discussing.[20]

Some African countries suffered due to their support of the liberation struggle in South Africa. Nigeria for instance was classified as a frontline state for its stance in opposing apartheid such that Nigeria lost its most favoured nation status (MFN) with the United Kingdom due to the South African emancipation struggle.[21] In 1978, the Nigerian government partially nationalized the British-owned Barclays Bank and the British Petroleum (BP) and renamed the latter African

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2022) https://www.aljazeera.com/news/2022/6/16/s-africa-minister-suggests-foreigners-to-blame-for-no-jobs accessed 29 July 2024; Gareth Newham, 'South Africa's problems are not caused by foreigners' (5 September 2019) https://issafrica.org/iss-today/south-africas-problems-are-not-caused-by-foreigners; Accord, It's not just Xenophobia (March 29, 2011) https://www.accord.org.za/publication/its-not-just-xenophobia/ accessed 29 July 2024.

18 Sapphire K. Peterside, Jide Ibietan, and Oluwatimilehin Deinde-Adedeji 'Xenophobia and Migrants' Irritants in Nigeria-South Africa Relations: A Discourse' (2020) 8(4) *International Journal of Innovative Social Sciences & Humanities Research* 48-60; Awosusi, O. E. 'A Critical Review of Nigeria's Regional Hegemonic Aspirations Through Afro-Centric Engagements from 1999-2019: Call for a National Rethink' (2020) 2(1) *Journal of Political Science, Public and International Affairs* 21; O. Abegunrin, Nigeria and the Struggle for the Liberation of South Africa. in O Abegurin (ed), *Global Politics in the Twenty-First Century, Africa*. (Palgrave Macmillan, 2009).

19 (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006)

20 Maromo, 'African Nations to Blame for Influx: Zuma' *Independent* (Pretoria, 27 April 2015) 1.

21 Victor Okoro Ukaogo, and others 'Afro-centrism as the Centerpiece of Nigeria's Foreign Policy: A Historical Misnomer in the Aftermath of Xenophobic Attacks in South Africa' (2020) 7(1) *Cogent Arts & Humanities* 1-14 Aljazeera 'Xenophobia in South Africa' https://Xenophobia%20in%20South%20Africa%20 %20 Causes,%20attacks %20and%20history.htm accessed 29 July 2024; Elemanya A Vincent, Xenophobic Attacks on Nigerians in South Africa: Causes and Implications (2022) 9(12) *International Journal of Multidisciplinary Research and Development* 84-88; Belinda Dodson, 'Locating Xenophobia: Debate, Discourse, and Everyday Experience in Cape Town, South Africa' (2010) 56(3) *Africa Today* 2-22.

Petroleum (AP) in order to dissuade the British from recognizing the puppet regime in Rhodesia.[22] Further, in a bid to cushion the pains of the endangered states in the continent, the Nigerian government in December, 1976, launched the Southern African Relief Fund to fund the liberation of Angola, Namibia and South Africa,[23] however it seems as if South Africans, including their elites has forgotten the sacrifice of these African countries.

It is instructive to state at this juncture that the legal foundation for xenophobia may have been laid in the South African Constitution of 1996, which, in the preamble promises that "South Africa belongs to all who live in it" but limits the protection of the law to only "every citizen". Section 1 of the Constitution also grants an unconditional "human dignity", but section 3 restricts it to citizens.[24] In practical policy terms, xenophobia undermines social cohesion, peaceful co-existence, good governance and human rights observance.[25] While it is undisputable that unrestricted immigration may be harmful on any nation, it is noteworthy to state that xenophobic attacks, which made no demarcation between legal and undocumented immigrants, have a negative effect on the economy of South Africa. It is in the light of this that this treatise examines the legal and socio-cultural impact of xenophobia on taxation in South Africa.

2.0 Literature Review

Intolerance, bullying and xenophobic attacks against foreigners of African descent intensified dramatically since 1994 in South Africa. Xenophobia in South Africa significantly increased after the installation of the black majority democratic government in 1994.[26] There have also been

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22 Ibid; P.F. Wilmot, *Apartheid and African Liberation* (University of Ife Press Limited, 1980); I.S. Zabadi, 'Nigeria's New Multilateral Diplomacy' in Bola A. Akinterinwa (ed), *Nigeria's New Foreign Policy Thrust: Essays in Honour of Ambassador Oluyemi Adeniji* (Vantage Publishers Limited, 2004) 343-358; I.S. Zabadi and F.C. Onuoha, 'Nigeria and South Africa: Competition or Cooperation' in Thomas A. Imobighe and Warisu O. Alli (eds), *Perspectives on Nigeria's National Politics and External Relations: Essays in Honour of Professor A. Bolaji Akinyemi*, (University Press PLC, 2012) 384-408.

23 W.A. Fawole, Nigeria's External Relations and Foreign Policy under Military Rule (1966–1999) (Obafemi Awolowo University Press Ltd, 2003) 156; H.Y. Al-Hassan, *Evaluating Nigerian Foreign Policy at 50* (National Press Centre, 2010) 22; S.O. Akinboye 'Nigeria's Foreign Policy' in Anifowose and Enemuo (eds), *Elements of Politics* (Sam Iroansi Publications, 1999) 31.

24 See also M. Strathern, 'What is Intellectual Property After? in J. Law and J. Hassard (eds*), Actor Network Theory and After* (Blackwell Publishing, 1999) 159.

25 Jonathan Crush and Wade Pendleton 'Xenophobia? Citizen Attitudes to Immigration and Refugee Policy in Southern Africa' Waterloo, ON Southern African Migration Programme. SAMP Migration Policy Series No. 30 (rep.,2004) i-49.

26 O. Ogunnowo and S. Joshua, 'Xenophobic Attacks in South Africa and Nigeria's Foreign Policy: Rethinking Nigeria's Afrocentrism (2019) 7(1) *African Research Review*, 1-19; O. Ogunnubi and L. Amusan, 'Nigeria's Attitude Towards South Africa's Perceived Xenophobia: Exploring a Shared Hegemonic Power for Africa's Development. In A. O. Akinola (Ed.), The Political Economy of Xenophobia in Africa (53-68) (Springer International Publishing, 2019); E.O. Oni and S.K. Okunade, 'The Context of Xenophobia in Africa: Nigeria and South Africa in Comparison' in A. O. Akinola (ed), *The Political Economy of Xenophobia in Africa* (Springer International Publishing, 2018); J. Onuoha, Beyond Diplomacy: Contemporary Issues in International Relations (Great AP Express Ltd., 2008); R.O. Roosevelt and O. Felix, 'Xenophobia in South

reported cases of harassment of travellers who were on legitimate business at the Oliver Thambo Airport. The disrespectful treatment of Africa's first Nobel winner, Prof. Wole Soyinka in 2005 was widely reported. Soyinka who was invited to deliver a lecture in honour of Mandela was detained and denied entry into South Africa, until the last-minute intervention of the authority.[27]

In addition, violence against foreign citizens, especially persons of African descent are becoming increasingly common and intense. South Africans' perceptions of migration and immigration are a mixture of half-truths and misleading stereotyping,[28] which is further triggered by intense nationalism or nativism. In contradistinction with other variants of xenophobia, South African xenophobia is directed particularly at Africans of dark hues, sometimes at Asian, and never at whites. African who are derogatively referred to as Makwerekwere,[29] are the primary targets of these attacks, but local leaders and groups also threaten, evict, and attack South African citizens married to foreigners or those sympathetic to them.[30] The fact that this xenophobic attacks are usually led by political party officials, social media campaigns, and community level organisations, seems to challenge the country's constitutional commitments to political freedom, racial and ethnic tolerance, property rights, and the rule of law.[31] They also raise fundamental

Africa: Rethinking the Nigerian foreign policy of Afrocentrism' O. (2015) 9(4) *African Research Review* 78-91; Oluyemi Fayomi, Felix Chidozie and Charles Ayo, 'A Retrospective Study of the Effects of Xenophobia on South Africa-Nigeria Relations' https://core.ac.uk/download/pdf/322258 37.pdf. Accessed 29 July 2024.

27 Olusola Ogunnubi and Uchenna A. Aja, 'Citizen Diplomacy in Nigeria-South Africa Relation' (2022) 9(3) *Journal of Ethnic and Cultural Studies* 133-151; K. Michael Masemola, 'The Airport Geography of Power as Site and Limit of NEPAD's Transnational African Assemblage (2018) 43(3) *Africa Development* 123-138; This Day Editorial, 'Nigeria: Soyinka's South Africa Ordeal' *This Day Newspaper* https://allafrica.com/stories/200509190547.html accessed 29 July 2024.

28 J. Hayem, 'From May 2008 to 2011: Xenophobic violence and national subjectivity in South Africa' J. (2013). 39(1) *Journal of Southern African Studies* 77–79; M.L. Hewitt, C.M. Masikane and J. Toendepi, 'Dynamics Informing Xenophobia and Leadership Response in South Africa' (2020) 20(1) *Acta Commercii,* 1–11; B. F. Ibrahim, I. Dele and H. Ukeaja, 'The Effects of Xenophobia on South Africa-Nigeria Relations: Attempting a Retrospective Study' (2019). 8(8), *International Journal of Humanities and Social Science Invention* 38–49.

29 A derogatory term used for a black person who cannot demonstrate mastery of local South African languages and who hails from a country assumed to be economically and culturally backward in relation to South Africa.

30 A.I. Tewolde, 'Reframing Xenophobia in South Africa as Colour-Blind: The Limits of the Afrophobia Thesis' (2020) 17(3) *Migration Letters* 433–444; J.P. Misago, 'Politics by Other Means? The Political Economy of Xenophobic Violence In Post-Apartheid South Africa' (2017) 47(2) *The Black Scholar* 40–53; T. Monson, 'Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity Arising Out of the 2008 Public Violence Against Non-Nationals' (South African Human Rights Commission, 2010); Callixte Kavuro, Politicians Shouldn't Incite Xenophobic Violence *Daily Maverick* (22 July 2020) http://www.sun.ac.za/english/Lists/news/DispForm. aspx?ID =7516 accessed 29 July 2024.

31 Klug, K, 'Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-Apartheid South Africa (2018) 34(3) *South African Journal on Human Rights* 469–491; D.M. Davis, Is the South African Constitution an Obstacle to a Democratic Post-Colonial State?' (2018) 34(3) *South African Journal on Human Rights* 359–374.

issues about the scale and mechanisms of exclusion, bordering, and 'insurgent citizenship' amidst socio-political heterogeneity. [32]

The South Africa police is also complicit in xenophobic attacks against foreigners. For instance, the police regularly arrest and detain foreigners based on their physical appearance, inability to speak any South African native language, or for simply fitting an undocumented migrant 'profile'.[33] Even, criminal elements, culprits and recidivists are protected by the locals and the law enforcement agents. For instance in 2008, a Mozambican, Ernesto Nhamuave, was set ablaze during xenophobic mob violence, no arrests were made and the case was closed despite the fact that there were eyewitnesses and video recording of the murder.[34] Police sometimes give assistance to looters or participate in looting foreigners' properties or allowed xenophobic attacks against foreigners.[35] However, in the few cases of police negligence which found its way to the court, the Supreme Court of Appeal held that police officers are liable for their failure to perform their statutory and constitutional duties as held in the leading case on state liability for police negligence, *Minister of Safety and Security v Carmichele.*[36] It is important to note that the complainant/respondent is a citizen of South Africa, one could only speculate whether the court will reach the same conclusion if a similar case involving a migrant is involved. In the cases of *Said and others v the Minister of Safety and Security*[37] and *Osman v Minister of Safety & Security*[38] the South African Police Services were found not culpable or discriminatory in protecting the properties of the complainants-foreigners.[39]

Lamenting the limitations of addressing xenophobia by the judiciary, Judge Phineas Mojapelo in 2015 indicated that there were no laws to address xenophobia, and it therefore "hid" behind other

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32 Jean Pierre Misago and Loren B Landau 'Running Them out of Time:' Xenophobia, Violence, and Co-Authoring Spatiotemporal Exclusion in South Africa' (2023) 28(4) *Geopolitics*, 1612; see the case of the *Union of Refugee Women v the Director: Private Security Industry Regulatory Authority* (supra).

33 N. I. Zikalala, J. T. Mofokeng and H. P. Motlalekgosi, 'Black like Me': A Critical Analysis of Arrest Practices Based on Skin Color in the Gauteng Province, South Africa' (2021) 10 *International Journal of Criminology and Sociology* 10: 652–61; S. Peberdy, *Selecting Immigrants: National identity and South Africa's Immigration Policies 1910-2008* (Wits University Press, 2009) 178; see also the speech of Buthelezi, M, 'After amnesty: The future of foreign migrants in South Africa' Address by the Minister of Home Affairs at the Southern African Migration Project Conference (20 June 1997). Pretoria, South Africa.

34 Misago and Landau (n 32) 1612.

35 Aljazeera 'Xenophobia in South Africa' https://Xenophobia%20in%20South%20Africa%20_ %20Causes,%20 attacks%20and%20history.htm; Elemanya .A. Vincent, Xenophobic attacks on Nigerians in South Africa: Causes and Implications (2022) 9(12) *International Journal of Multidisciplinary Research and Development* 84-88; Belinda Dodson 'Locating Xenophobia: Debate, Discourse, and Everyday Experience in Cape Town, South Africa' (2010) 56(3) Africa Today 2-22.

36 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) 11.

37 (EC13/08), unreported judgement handed down on 7 December 2011.

38 [2011] JOL 27143 (WCC).

39 See also Justin de Jager Addressing Xenophobia in the Equality Courts of South Africa (2011) 28(2) *Refuge: Canada's Journal on Refugees* 107-116.

crimes such as murder.[40] Thus, the case of Mido Macia, a Mozambican who was handcuffed and dragged behind a police van before dying in custody, was tried as a murder—despite clear linkages to institutionalized xenophobia perpetuated by state apparatus. Similarly, *Qwelane v South African Human Rights Commission and another*[41] and *Solidarity and another v. Black First Land First*[42] demonstrate how the law can be interpreted unfavourably toward minority groups—further contributing to a breakdown of trust in institutions tasked with interpreting the law without bias. It is also instructive that political and traditional elites' xenophobic statements that incite violence have not been investigated or tried.[43]

Various reasons have been advanced for this phenomenon. First, South Africans tend to exaggerate the numbers of foreigners in their country in order to problematize these migrants as a menace to be rid of, rather than an opportunity and to scapegoat non-citizens.[44] The second point is that xenophobia is a pervasive attitude of the majority of South Africans, including the poor and the rich, the employed and the unemployed, the male and the female, the black and the white, the conservative and the radical.[45] Third, the contact between the citizens and non-citizens are essentially transactional. Most face-to-face exchanges tend to be of economic transaction. Those citizens who have friends and personal acquaintances among the foreigners tend to be far more accommodating and tolerant than those who do not. Interaction, in other words, is a powerful antidote to xenophobia. Fourth, most citizens would prefer national governments to "get tough" with migrants and refugees. There is enormous suspicion that refugees are not genuine and there is significant fear that migrants are an economic threat– that migrants steal rather than create jobs.[46]

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40 *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C) at para 28

41 (686/2018). 2019.ZASCA 167; [2020] 1 All SA 325 (SCA); 2020(2) SA 124 (SCA); 2020 (3) BCLR 334 (SCA)

42 163/2020) [2021] ZASCA 26 (24 March 2021).

43 Okoro Ukaogo, Uche Uwaezuoke Okonkwo, Florence O. Orabueze, Virginia O. Eze & Stella Ugwu-Okoye Afro-centrism as the centerpiece of Nigeria's foreign policy: A historical misnomer in theaftermath of xenophobic attacks in South Africa, (2020) 7 *Cogent Arts & Humanities* 1-14; J. Danfulani, 'End of Apartheid: A Redefinition of Nigeria Foreign Policy' (2014) 19(11) *Journal of Humanities and Social Science*, 53-57.

44 Ayanda Charlie and Tamasin Ford 'Inside South Africa's Operation Dudula: 'Why We Hate Foreigners' BBC (18 September 2023) https://www.bbc.com/news/world-africa-66808346 accessed 29 July 2024; Brij Maharaj, ' Migrants and Urban Rights: Politics of Xenophobia in South African Cities' (2009-2) 8 *L'Espace Politique Online* http://journals.openedition.org/espacepolitique/1402 accessed July 2024; Right Watch, South Africa: Toxic Rhetoric Endangers Migrants-Stop Scapegoating Foreign Nationals Ahead of Elections (6 May 2024) https://www.hrw.org/ news/2024/05/06/south-africa-toxic-rhetoric-endangers-migrants accessed 29 July 2024.

45 Ibid.

46 Ibid.

Fifth, the locals disdain the new immigrants simply because of their accent and/or the colour of their skin.[47] Moreso, the immigrants and the citizens live in the same neighbourhood.

Still, xenophobia has triggered a conflict between African immigrants and indigenous black South Africans. The South African Human Rights Commission Report[48] indicated that these conflicts have triggered violent attacks namely, the burning of houses, brutal murders, and looting of foreign-owned businesses by locals. According to Chimbga and Meier, migrants are attracted to South Africa because of the availability of economic opportunities, mainly in the informal sector.[49] This statement is supported by Gordon et al.,[50] who noted that KwaZulu-Natal, compared to other provinces, is far less welcoming to foreigners. Kaluba emphasizes that racism is more behavioural, while xenophobia is attitudinal.[51] Xenophobia in South Africa arises from the locals claiming that the migrants rob them of job opportunities, markets, and social opportunities.[52] In general, South African citizens have experienced unemployment for some time, but the issue that unregistered migrant workers seemingly deprive the locals of those work opportunities seem farfetched. This is because the undocumented migrants could only access opportunities in the informal sector- has to pay rent for his shop and dwelling from the locals. The fact that the latter could not compete with the former sems ludicrous. Field[53] contends that economic inequality is the leading cause of xenophobia in low-income areas such as South Africa. According to Gordon et al.,[54] the settlers are blamed because they are entrepreneurs threatening the livelihood of local communities as the only opportunity opened to them are in the informal sector. Okolie & Joseph[55] argue that

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47 Ibid; J. Hayem, 'From May 2008 to 2011: Xenophobic Violence and National Subjectivity in South Africa' J. (2013) 39(1) *Journal of Southern African Studies* 77–79; M. L. Hewitt, C.M. Masikane and J. Toendepi, 'Dynamics Informing Xenophobia and Leadership Response in South Africa' (2020) 20(1), *Acta Commercii,* 1–11; Ibrahim and others (n 28) 38–49.

48 South African Human Rights Commission Annual Report. (2010). https://www.gov.za/documents/south-african-human-rights-commission-annual-report20102011

49 W.W.M. Chimbga and C. Meier, 'The Role of Secondary Schools in Averting Xenophobia in South Africa' (2014) 5(20) *Mediterranean Journal of Social Sciences*1691–1691.https://doi.org/10.5901/mjss.2014.v5n20p1691 accessed 29 July 2024.

50 S. Gordon, B. Roberts and J. Struwig, Intolerable Cruelty: Anti-Immigrant Sentiment in KwaZulu-Natal (2015) 13(2) *HSRC Review* 13 https://repository.hsrc.ac.za/handle/20.500.11910/1912 accessed 29 July 2024.

51 Daniel N. Mlambo, Nompumelelo Dlamini, Sinnah Makgoba and Luyanda Mtshali, 'The Three Facets of Xenophobia in Post-Apartheid South Africa' (2023) 10(4) *Journal of Ethnic and Cultural Studies,* 118-133; Hilary Nwaechefu and others, 'Addressing the Emerging Issues of Xenophobic Attack and Human Rights Violations in South Africa: Adopting a Human Rights-Based Approach' (2023) 21*The Age of Human Rights Journal* 5-10; A. Kaluba, Zambia, *Tackling Xenophobia in Zambia* Times of *Zambia*, (Lusaka, 2016) 5. https://allafrica.com/stories/ 20160425 1739. html accessed 29 July 2024.

52 M.J. Masenya, 'Afrophobia in South Africa: A General Perspective of Xenophobia' (2017) 4(1) *Bangladesh Sociological Society Journal* 81-88

53 D.N. Field, 'God's Makwerekwere: Re-imagining the Church in the Context of Migration and Xenophobia' (2017) 38(1) *Verbum et Ecclesia* 1–8.

54 S. Gordon, et al (n 50).

55 I.S. Okolie and O.O. Joseph, Examining the Triggers of Xenophobic Attacks in the Republic of South Africa.

xenophobia in the South African environment ranges from bullying, regular street harassment, government discrimination and harassment, to recurrent episodes of widespread violent attacks of varying scale and intensity. Foreign nationals living and working in South Africa are subjected to discrimination by the locals, the police, government employees, private companies hired to administer and deliver services, and individuals in charge of detention and deportation procedures.[56] Thus, higher levels of xenophobia can translate into a larger pool of potential perpetrators of hate crimes. [57]

3.0 Theoretical Framework

Numerous scholars have given various definitions and interpretations of xenophobia, however, the key to confronting xenophobia in the South African context is understanding the reasons behind its existence. The competition theory of xenophobia emphasizes the importance of economic factors; stating that competition for scarce resources among the locals and immigrants is the root cause of frustrations, leading to xenophobic violence.[58] Although, scarcity and competition for resource is not the sole source of xenophobia but it is an important factor. As with the distribution of wealth, the competition theory of xenophobia notes that conflict and competition increase because of increased economic stagnation. Competition over scarce resources result in tensions, violence, and intergroup conflict, a function of inter-group competition. Many scholars have used the competition theory to explain xenophobia, with emphasis on competition for housing and jobs. Thus, the hypothesis states that competition for housing or employment with African foreigners increases xenophobia.[59]

There is also the related theory of inequality. First, local income inequality foster perceptions of *relative* deprivation, thus individuals may 'feel deprived of some desirable thing *relative* to their

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O.O. (2021) https://www.researchgate.net/publication/355119797_Examining_the_Triggers_of_Xenophobic _ Attacks _in_ Republic_of_South_Africa accessed 29 July 2024.

56 Crush and Pendleton (n 25) i-49; R. Grosfoguel, L. Oso and A. Christou, 'A 'Racism,' Intersectionality and Migration Studies: Framing Some Theoretical Reflections (2015) 22(6) *Identities*, 635–652; J. Crush and V. Williams, 'Criminal Tendencies: Immigrants and Illegality in South Africa (Migration Policy Brief No. 10). Southern African Migration Project (SAMP, 2003); J. Crush and others, 'The Perfect Storm: The Realities of Xenophobia in South Africa' Southern African Migration Project (2008) https://samponline.org/wp-content/uploads/2016/10/Acrobat50. pdf accessed 29 July 2024.

57 Lukas F. Stoetzer, Johannes Giesecke and Heike Klüver 'How Does Income Inequality Affect the Support for Populist Parties?' 2021 30(1) *Journal of European Public Policy* 1-20

58 S. Gordon, 'Xenophobia Across the Class Divide: South African Attitudes Towards Foreigners 2003–2012' (2015) 33(4) *Journal of Contemporary African Studies* 494–509.

59 N. Claasen and others, 'Applying a Transdisciplinary Mixed Methods Research Design to Explore Sustainable Diets in Rural South Africa' (2015) 14(2) *International Journal of Qualitative Methods* 69-9; M.A. Kingsbury, 'Family Policy in Post-Communist Europe and the Former Soviet Union: Assessing the Impact of Xenophobia' (The University of New Mexico, 2015).

own past, another person, persons, group, ideal, or some other social category'.[60] In principle, relative deprivation may be perceived in different domains, with respect to different reference categories and at different levels of analysis,[61] that is, interpersonal comparisons between members of a local community with respect to income – a key source of social status in interpersonal comparisons. While the relative deprivation framework shifts attention away from absolute deprivation such as poverty, unemployment, to relative income differences and social comparisons, it is nevertheless based on perceptions of the objective income distribution: the starting point for relative comparisons is individuals' perception of their position in the (local) income distribution relative to other members of the community. As Nagel posits, 'objective inequality … affects behaviour through subjective comparisons'.[62] Dias,[63] et al also posits that there is a positive relationship between nationalism, anti-immigrant attitudes, and inequality at the cross-national.[64] In cases where the social status of natives is more closely tied to a national hierarchy, natives have stronger incentives to increase the salience and politicisation of the cleavage between immigrants and natives, because national identity only carries meaning and value in opposition to other national (foreign) identities.[65] Thereby emphasising the adverse social and political effects of economic inequality, such as linking inequality to reduced political engagement, voters suppression and electoral fraud, political violence and crime.[66]

Another theoretical explanation for xenophobic tendencies in South Africa is the *isolation hypothesis*, which may be as a consequence of apartheid in South Africa.[67] The seclusion of the country from the rest of the world in the apartheid era may give a plausible explanation for the fear

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60 Sacha Riaz, 'Does Inequality Foster Xenophobia? Evidence from the German Refugee Crisis' (2024) 50(2) *Journal of Ethnic and Migration Studies* 359-378; I. Walker and T.F. Pettigrew, 'Relative Deprivation Theory: An Overview and Conceptual Critique' (1984) 23(4) *British Journal of Social Psychology,* 302.

61 H.J. Smith and T.F. Pettigrew, 'The Subjective Interpretation of Inequality: A Model of the Relative Deprivation Experience (2014). 8(12), *Social and Personality Psychology Compass,* 755–765.

62 Thomas Nagel 'What Is It Like to Be a Bat?' (1974) 83(4) *The Philosophical Review* 435-450.

63 Riaz (n 3) 363.

64 Frederick Solt, 'Diversionary Nationalism: Economic Inequality and the Formation of National Pride' (2011) 73(3) *The Journal of Politics* 821–830; Lukas F. Stoetzer, Johannes Giesecke and Heike Klüver, 'How Does Income Inequality Affect the Support for Populist Parties' (2021) 30(1) *Journal of European Public Policy* 1–20; Lusine Grigoryan, **'**National Identity and Anti-Immigrant Attitudes: The Case of Russia' in Jürgen Grimm, Leonie Huddy, Peter Schmidt, Josef Seethaler (eds), *Dynamics of National Identity: Media and Societal Factors of What We Are* (Routledge, 2016), 206-228.

65 Moses Shayo, 'A Model of Social Identity with An Application to Political Economy: Nation, Class, and Redistribution' (2009) 103(2) *American Political Science Review* 147–174.

66 Morgan Kelly, 'Inequality and Crime' (2000) 82(4) *The Review of Economics and Statistics* 530-539; Daniel Ziblatt, Shaping Democratic Practice and the Causes of Electoral Fraud: The Case of Nineteenth-Century Germany American (2009) 103(1) *Political Science Review* 1-21; T.Y. Wang and others, 'Inequality and Political Violence Revisited' (1993) 87(4) *American Political Science Review* 979-993.

67 Morris, Allan. 1998. 'Our Fellow Africans Make Our Lives Hell': The Lives of Congolese and Nigerians Living in Johannesburg. *Ethnic and Racial Studies*, 21 (6), 1116–1136.

and distrust that South African communities have towards foreigners. The Refugee Act which replaced the apartheid regime's Aliens Control Act believed in the idea that migration created uncertainty and immigrants were seen as "undesirable".[68] The fourth theoretical explanation for xenophobia in South Africa is the *bio-cultural hypothesis*. This theory suggests that xenophobic violence is not applied equally to all foreigners and that in South Africa, black foreigners are at greater risk of violence than other foreigners.[69] The bio-cultural hypothesis emphasises the levels of visible differences in the physical demeanour of other foreign Africans.[70] This hypothesis could explain that though the violence is targeted against foreigners but South Africans who were thought to be foreign on the basis of skin colour or speech are mistakenly attacked. Of the 62 people who died in the 2008 attacks, 21 were South African citizens, thus, some locals could be seen as foreigners and targeted during xenophobic attacks.[71]

4.0 Legal Protection Offered Immigrants under the South African Law

Immigration is intrinsically linked with South Africa's history, and migrant labour contributes significantly to the economy.[72] The ILO (International Labour Organisation) and OECD (Organisation for Economic Cooperation and Development) study posits that the contributions of migrants to South Africa is unquantifiable in terms of labour and human capital development, public finance, and general economy growth. ILO and OECD study stated that 'Immigrants appear to pay relatively more income tax than native-born South Africans who constitute 93% of the taxable population but contribute less than 87% of total income tax. All groups of foreign-born people pay relatively more'.[73] Despite the migrants' aggregate positive contribution to state finances, many indigenous South Africans would like to exclude all foreign-born persons from accessing welfare.[74] The author suggests that the South African public should be re-educated on the need to eschew entitlement syndrome.

J. Jonathan Crush, 'South Africa: Policy in the Face of Xenophobia' *Migration Information* (MPI Pretoria); Crush, (n 7) 103–133.

69 Human Rights Watch, Prohibited Persons: Abuse of Undocumented Migrants, Asylum Seekers, and refugees. in South Africa (Human Rights Watch, New York, 1998).

70 Harris, (n 12) 169–184

71 BBC (British Broadcasting Corporation), 'Locals Killed in South African Attacks' *BBC News*, (12 June 2008) <http://news.bbc.co.uk/2/hi/africa/7450799.stm> accessed 29 July 2024.

72 OECD/ILO (2018), How Immigrants Contribute to South Africa's Economy, OECD Publishing, Paris. http://dx.doi. org/10.1 787/9789264085398-e accessed 25 August 2024.

73 Ibid, 140.

74 Steven Lawrence Gordon, 'Immigration Policy in South Africa: Public Opinion, Xenophobia and the Search for Progress' in Pragna Rugunanan & Nomkhosi Xulu-Gama (Eds), *Migration in Southern Africa IMISCOE Regional Reader* 57.

The main law governing immigration of foreigners to South Africa is the Immigration Act,[75] which provided for temporary residence,[76] permanent residence,[77] exclusion, exceptions and prohibited persons,[78] offences, immigration courts, deportation of illegal immigrants and miscellaneous provisions.[79] While the Refugees Act,[80] which is the main law that governs the documentation of asylum seekers and refugees in South Africa grants certain rights to refugees.[81] However, the treatment meted out to refugees and immigrants by the south African law enforcement agents, politicians and the general public is at variance with the extant laws and the courts have affirmed the rights of this category of persons in the few cases that reached the court.

Irrespective of the fact that the South Africa's Bill of Rights gives procedural protections to all persons, the rights of refugees and migrants are routinely violated. Section 12 provides that the "freedom and security of the person" secures the right to "not be deprived of freedom arbitrarily or without just cause," to "not be detained without trial," to "not be treated or punished in a cruel, inhumane, or degrading way," and to be "free from violence from both public and private sources. However, current arrest procedures for migrants and refugees may not pass constitutional scrutiny because they are manipulable and inconsistently enforced.[82] The practice of arbitrarily accosting people to demand identification papers on the basis of their race or nationality clearly violates the right to equality under Section 9 of the 1996 Constitution.[83] Similarly, the police practice of identifying suspected immigrants on the basis of language, gesture, accent, or identifying marks is patently unconstitutional.[84] On 29 June 2017, the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs and Others,*[85] declared section 34(1)(b) and (d) of the

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75 No. 13 of 2002.

76 Sections 10-24 of the Immigration Act, 2002.

77 Sections 25-28 of the Immigration Act, 2002.

78 Sections 29-31 of the Immigration Act, 2002.

79 Sections 32-50 of the Immigration Act, 2002.

80 No. 130 of 1998

81 This law has been amended several times (2008, 2011, 2015 and 2017) but the majority of these only came into operation on 1 January 2020.

82 Ruvi Ziegler, 'Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?' (2020) (10) *Constitutional Court Review* 65–106; Jonathan Klaaren, 'A Comment on the Human Rights Watch Report 'Unprotected migrants: Zimbabweans in South Africa's Limpopo Province' (2007) 1 *AHRLJ* 249-257. J Crush, (2001) 'Immigration, Xenophobia and Human Rights in South Africa' (rep., pp. i-39). Waterloo, ON: Southern African Migration Programme. SAMP Migration Policy Series No.22; Jonathan Klaaren, Is Constitutionality Catching? A Survey of South African Immigration Legislation and Some Constitutional Issues, in J. Crush & R. Mojapelo (eds.), *The Aliens Control Act: A Review and a Critique* (1996).

83 Ibid.

84 United Nations Refugee Agency (1998) "Prohibited Persons": Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa'**.** https://www.refworld.org/reference/countryrep/hrw/1998/en/40600 accessed 25 August 2024.

85 [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC)

Immigration Act inconsistent with sections 12(1) and 35(2)(d) of the Constitution of the Republic of South Africa, 1996 and therefore, invalid. The court reiterated compulsory compliance with the following provisions:

(a) an immigration officer must apply the interests of justice criterion when considering arrest and detention of an illegal foreigner

(b) a detained person shall be brought before court within 48 hours from the time of arrest.

(c) the court must apply the interests of justice criterion when the arrested person is brought before it.

(d) the court may authorise the further detention of the person concerned if it concludes that the interests of justice do not permit the person's release.

(e) if the further detention of the person concerned is ordered, he or she must again be brought before court prior to the expiry of the authorized detention period and the court must again apply the interests of justice criterion at that stage.

(f) the court may then again authorise the further detention of this person, but by no more than 90 calendar days, if it concludes that the interests of justice do not permit the person's release; and

(g) whenever the person concerned is brought before court, he or she must be given an opportunity to make representations to the court.

Similarly, in *Nandutu and Others v. Minister of Home Affairs and Others*,[86] ("Nandutu case"), the South Africa's Constitutional Court nullified a decision of the Western Cape High Court and declared regulation 9(9)(a) of the Immigration Regulations constitutionally invalid as it discriminates against a foreign spouse and/or a child of a South African citizen or permanent resident. This decision of Nandutu is ground-breaking in protecting, respecting, and fulfilling the rights of a foreign spouse and/or a child of a South African citizen or permanent resident to dignity and family life.[87]

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86 [2019] ZACC 24 (Nandutu case)

87 See also *Rayment and Others v. Minister of Home Affairs and Others; Anderson and Others v Minister of Home Affairs and Others* (CCT 176/22) [2023] ZACC 40 (4 December 2023); *Bula v Minister of Home Affairs* [2011] ZASCA 209, 2012 (4) SA 560 (SCA); *Ersumo v Minister of Home Affairs* [2012] ZASCA 31, 2012 (4) SA 581 (SCA).

5.0 Taxation and Xenophobia

The view that foreigners are taking jobs from local South Africans is, for the most part, not based on data.[88] Rather, it is based on anecdotal evidence which borders on fantasy. There is a big difference between reality and myth, and this myth of foreigners taking jobs from South Africans has gone on for so long that many take it to be the truth.[89] In a study undertaken by the Observatory Group on the informal economy in Johannesburg, it was concluded that the belief that migrants dominate the informal sector is false. It was found that only two out of 10 people who owned businesses in the informal sector in Johannesburg were migrants".[90] The Observatory Group also found that black African immigrants play a beneficial role in the country by providing jobs, paying rent, paying VAT, paying tax and providing affordable and convenient goods.[91] In conclusion, the Observatory Group found that 31 per cent of the 618 black African immigrants who were interviewed rented properties such as shops and houses from South Africans, and employed 1 223 people, of whom 503 were South Africans.[92] Further, immigrants are well-integrated into the labour market in terms of employment and unemployment rates, and in general do not seem to displace native-born workers.

While the problem of illegal immigration should not be discountenanced the contribution of immigrants to the South African economy is unquantifiable. For instance, it costs the South African taxpayer R46 a day to keep an illegal immigrant in prison. It costs the taxpayers R400 000 for the repatriation of illegals from Durban.[93] However, the contribution of immigrant workers to gross domestic product (GDP) is estimated to be close to 9 percent in 2011. Nevertheless, immigration is raising income per capita in South Africa, while immigrants also make a positive net fiscal contribution.[94] The government's 2017 White Paper on International Migration acknowledges the

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88 Y. Gao, 'Analysis of Immigrant Employment in South Africa' (2022) 12 *Theoretical Economics Letters* 518-529; Vivence Kalitanyi and Kobus Visser, 'African Immigrants in South Africa: Job Takers or Job Creators?' (2010) 13(4) *S. Afr. J. Econ. Manag. Sci.* 376-390; World Bank, New Study Finds Immigrants in South Africa Generate Jobs for Locals https://www.worldbank.org/en/country/southafrica/publication/new-study-finds-immigrants-in-south-africa-generate-jobs-for-locals accessed 29 July 2024.

89 Ibid.

90 Sally Peberdy, 'International Migrants in Johannesburg's Informal Economy' SAMP Migration Policy Series No. 71. Waterloo and Cape Town (SAMP, 2016) https://idrc-crdi.ca/sites/default/files/sp/Documents % 20EN/samp-migration-series-no-71.pdf accessed 29 July 2024.

91 Ibid.

92 Ibid; D.C. Ukwandu, 'Reflections on Xenophobic Violence in South Africa What Happens to a Dream Deferred?' (2017) 9(9) African *Journal of Public Affairs* 43-57. Hashi Kenneth Tafira, *Xenophobia in South Africa A History* (Palgrave Macmillan 2018).

93 Brij Maharaj and Rinku Rajkumar, 'The 'Alien Invasion' in South Africa: Illegal Immigrants in Durban, (1997) 14 (2) *Development Southern Africa* 255-273 @260.

94 OECD/ILO, 'How Immigrants Contribute to South Africa's Economy' (OECD Publishing, 2018) http://dx.doi.org/ 10.1787/ 9789264085398-en accessed 29 July 2024.

positive contribution that immigration can make to the South African economy and introduces a range of policy and strategic interventions.[95]

The importance of taxation to the South African economy is better appreciated if the Tax-GDP ratio of 21 percent in 2023 is contrasted with the Nigeria's figure of 10.6 percent for the same period.[96] The South African Tax-GDP ratio dipped from 29.1 percent in 2021 to 21 percent in 2023 while the Nigerian figure climbed from 6.3 percent to 10.6 percent during the same period.[97] Xenophobic attack may be one of the reasons for the decrease in the tax to GDP ratio in South Africa. In addition, to underscore the importance attached to taxation in South Africa, an immigrant whose visa duration exceeds six months within a 12-month period is obliged to register with the South African Revenue Service (SARS) for tax purposes.[98]

Currently, South Africa's tax revenue is derived mainly from four sources being- personal income tax, value added tax, companies' income tax and the taxation of the mines.[99] Tax receipts are down sharply due to xenophobic attacks and Covid-19, which is likely to further spur an already high deficit spending.[100] Similarly, the government's tobacco and alcohol restrictions, provoked widespread ire and protests. Covid-19 restrictions may have driven the rise of a potentially durable tax-avoiding black market in these products. Nonetheless, some politicians at times invoking nationalist and racially tinged rhetoric, used responses to the pandemic to score political points and trigger xenophobic impulse.[101]

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95 DHA, 'White Paper on International Migration for South Africa' Government Gazette, Department of Home Affairs (Government of South Africa, 2017) https://www.gov. za/sites/default/files/41009_gon750.pdf accessed 29 July 2024.
OECD, (2023) 'Revenue Statistics in Africa' https://www.oecd.org/en/publications/revenue-statistics-in-africa-2023_15bc5bc6-en-fr.htmlaccessed 24 August 2024; Chisom Michael (January 8, 2024) 'Nigeria's climb to 10.6%: Tax-GDP ratio rollercoaster across African countries as SA's dip to 21%' https://businessday.ng/ business-economy/article/nigerias-climb-to-10-6-tax-gdp-ratio-rollercoaster-across-african-countries-as-sas-dip-to-21/ accessed 24 August 2024.

97 Ibid.

98 Section 22 of the Tax Administration Act 28 of 2011; section 5 of the Income Tax Act, No. 58 of 1962; see also the application of the foreign employment remuneration exemption under section 10(1)(o)(ii) of the Income Tax Act, No. 58 of 1962; see also the Employment Tax Incentive Act No. 26 of 2013 (the ETI Act).

99 Desmond Lachman and Kenneth Bercuson (eds), Economic Policies for a New South Africa Occasional Paper 91 (International Monetary Fund, 1997).

100 Wendell Roelf, 'South Africa's Revenue Shortfall to Reach $15 Billion Due to Coronavirus - Tax Commissioner' *Reuters* (Paris, 5 May 2020); Lynley Donnelly, 'South Africa Still Heading for a Fiscal Cliff, Warns Investment Bank' *DispatchLIVE* (Pretoria, 16 July 2020).

101 Benjamin Roberts, et al., 'Up in Smoke: Public Reflections on Decision to Extend the Ban on Tobacco Sales' *Daily Maverick* (Johannesburg, 4 May 2020); Ivor Sarakinsky, 'Cigarettes and the Smoking Gun' *Daily Maverick* (Johannesburg, 6 May 2020); Andrew Meldrum and Nqobile Ntshangase, 'South African Bans on Tobacco, Liquor Amid Virus Stir Debate' *AP* (Johannesburg, 27 May 2020); Prinesha Naidoo, 'South Africa Booze, Tobacco Ban Created New Criminal Networks' *Bloomberg* (Johannesburg, 7 September 2020) 93; Examples include assertions that post-lockdown restaurant and agricultural jobs should go to South Africans, rather than foreign immigrants—a sensitive issue given xenophobic riots and looting in recent years—and

Although, South Africa has a generally open foreign direct investment (FDI) regime, investors face high taxes, currency exchange volatility, substantial regulatory burdens, large locally entrenched firms, and Black Economic Empowerment Policy (BEEP) compliance costs,[102] but xenophobia is a disincentive; which result in declines in tax receipt.[103] Xenophobia continues to affect the labour force and market in that, it goes further to affect Foreign Direct Investment (FDI) flows several years into the future. Hunt[104] argued that skilled immigrants contribute to economic development by boosting research, innovation, and technological progress. It is noteworthy to state that South Africans enjoy Nollywood films[105] and that xenophobia against foreigners does not necessarily extend to the cultural products. There is a large market for Nollywood DVDs, particularly among poor South Africans. Moreover, two channels showing films from West and East Africa respectively have recently been added to local subscription TV, which caters to the middle class.[106]

Xenophobic attacks against foreigners and their businesses have immensely affected the national economic growth in both the short and longer term, Niyitunga [107] argued that migration is associated with economic prosperity in the host country. Migrants in a foreign land drive economic prosperity and thus influence economic growth and development in the host country.[108] Regarding its effects on business, Tshishonga[109] presented that the outbreaks of xenophobic violence against foreigners force them to go into hiding or leave their businesses unattended, as they watch their

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that aid for the tourism sector be prioritized for black-owned businesses. see also Antony Sguazzin, 'South Africa's Virus Response Exposes Government Divisions' *Bloomberg* (Johannesburg, 5 May 2020).

[102] Economist Intelligence Unit, 'South Africa: Investment Regulations' *EIU ViewsWire*, (Pretoria, 1 March 2017).

[103] Congressional Research Service South Africa: Current Issues, Economy, and U.S. Relations (Updated September 17, 2020) https://crsreports.congress.gov R45687 accessed 29 July 2024.

[104] J. Hunt, *Skilled Immigrants' Contribution to Innovation and Entrepreneurship in the US Open for Business: Migrant Entrepreneurship in OECD Countries* (OECD Publishing, 2010) 257–272.

[105] The term is used in the media to refer to the Nigerian film industry, which is an amalgam of the words "Nigeria" and "Hollywood", the American major film hub.

[106] John Sharp, 'Fortress SA': Xenophobic Violence in South Africa' (2008) 24(4) Anthropology Today 1-3; A. Feldman, 'Formations of Violence: The Narrative of the Body and Political Terror in Northern Ireland (University of Chicago Press, 1991); J. Ferguson, Global Shadows: Africa in the Neoliberal World Order (Duke University Press, 2006)

[107] E.B. Niyitunga, 'A Qualitative Review of the Recurrence of Xenophobic Violence and their Effects on South Africa's role in International Diplomacy. The 6th Annual International Conference on Public Administration and Development Alternatives (06–08 October 2021) 123. https://univendspace.unien. ac.za/handle/11602/1850 accessed 29 July 2024; E.B. Niyitunga, 'Good Health-Sustainable Development Nexus: Assessing the Prospects and Opportunities of Artificial Intelligence in Africa' (2022) 11 *Afri. J. Govern. Dev.* 47–78.

[108] H. Adam and K. Moodley, 'Imagined Liberation: Xenophobia, Citizenship and Identity in South Africa, Germany and Canada (Temple University Press, 2015) 37.

[109] N. Tshishonga, 'The Impact of Xenophobia-Afrophobia on the Informal Economy in Durban CBD, South Africa' (2015) 11 *J. Transdiscip. Res. South. Afr.* 163–179@ 165.

hard-earned properties being looted and burned to ashes.[110] It becomes difficult for them to re-establish their businesses, and some decide to relocate to other countries, an issue that makes South Africa lose labour force that could have boosted national economic growth and made it stable and sustainable. Mokoena states that most migrant-entrepreneurs contribute to South Africa's value-added tax (VAT) by bulk-purchasing goods from major South African wholesalers and industries.[111] Asha[112] and Fatoki[113] posit that migrants-entrepreneurs contribute positively to the local economy by renting shops or trading spaces for two to five years from South African nationals, thereby contributing to poverty alleviation and economic sustainability. Consequently, xenophobic attacks result in lower VAT collections, less income for property owners who, under normal circumstances, generate income from rental property, and impair poverty alleviation and economic development prospects.[114]

Xenophobia may lead to isolation of the South African business sector from the rest of the world,[115] notwithstanding that South Africa relies on human labour, such as professionals from other African states and beyond, to work in its industries and develop its academic, medical, legal, engineering, business, and scarce artisan skills.[116] The constant occurrences of xenophobia against migrants may deter scarce skilled professionals from migrating to South Africa for employment and development. Xenophobia affects an export-led growth model, saving rates and direct foreign investment, thereby leading to lower tax revenue.[117] Moreover, in 2008 R1.5 billion in foreign-owned businesses were damaged due to xenophobic acts. Such acts negatively impacted municipalities and governments and caused political instability since they were perceived to be slow in response to the violence.[118]

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[110] B.O. Adeleke, A.A. Omitola and O.T. Olukole, 'Impacts of Xenophobia Attacks on Tourism' (2008) 16 *IFE Psychologia* 136–147 @ 143.

[111] S.K.Mokoena, 'Local Economic Development in South Africa: Reflections On Foreign Nationals' Informal Businesses' South African Association of Public Administration and Management (4th Annual Conference Proceedings-Limpopo, 2015) 102–115.@109.

[112] A.A. Asha, 'Informal Small Business as Socio-Economic Adaptation Strategy of Migrants Living in Low-Income Townships and Villages of South Africa SAAPAM (4th annual conference proceedings. Limpopo 2, 2015) 298–308,

[113] O. Fatoki, 'Problems Experienced by Immigrant Spaza Shop Owners in South Africa (2016) 7 *J. Econ.,* 100–106 @100.

[114] K. Mahuni and W.G. Bonga, 'Nexus Between Doing Business Indicators and Foreign Direct Investment for Zimbabwe: A Time Series Analysis (2017) 2 *Dynamic Res. J*. 1–8,

[115] T. Mudzanani, A Thematic Analysis of Newspaper Articles on Xenophobia and Tourism in South Africa' T. (2016) 22 *Afr. J. Phys. Act. Health Sci.* 335–343@ 339.

[116] A.P. Adebisi, Xenophobia: Healing a Festering Sore in Nigerian-South African Relations (2017) 5 *J. Int. Relat. For. Pol*. 83–92@ 90.

[117] E.B. Niyitunga, 'Xenophobia: A Hindrance Factor to South Africa's Ambition of Becoming a Developmental State' (2024) 6 *Frontiers in Human Dynamics* 1-12.

[118] Tshishonga, (n 89) 163–179; S. Bekker, 'Explaining violence against foreigners and strangers in urban South.

5.0 Recommendations

A careful analysis of the foregoing depicts that xenophobia benefits neither the South African citizens, its economy nor the migrants, thus there is the need to stop xenophobia forthwith to boost the South African revenue. The article then recommends the following as antidotes.

- Seminars, workshops should be organized by South African government agencies and non-governmental agencies to educate the populace on the dangers of xenophobia, the rights of migrants and refugees and gender equality.[119]
- Programmes and policies that seek to create employment, control the border as well boost economic advancement should be adopted by the government.
- Campaigns against xenophobia should be introduced where educational materials such as posters, stickers and stories that digitally tackle xenophobia adopted.
- Media advocacy programmes that involve radio and television interviews, public service announcement that unmask the conditions of refugees and migrants should be made.
- A complete list and figure of foreigners living in South Africa should be collected by the respective African country's embassy in partnership with the South African government.
- The government of South Africa (GSA) must address labour disparities and encourage partnership and sharing specially between skilled migrant workers and locals. Skilled migrant workers could be made to foster apprentices and create symbiotic relationship with the locals, with GSA paying the apprentices' stipends and other fees.
- Hold public officials, police officers, and local leaders accountable for their role in xenophobia. Machinery must be instituted to investigate and prosecute community leaders as well as government officials who is involved in committing, planning, or promoting xenophobic attacks.
- Undocumented migrants should be deported at the expense of their respective country rather than being attacked.[120]

Africa: Outbursts during May and June 2008' (2010) 16(1) *The African Yearbook of International Law* 125–140; P. Fabricius, Xenophobia once again jeopardizes South Africa's interests in Africa (2017) https://issafrica.org/iss-today/xenophobia - again-jeopardises-south-africas-interests-in-africa accessed 29 July 2024. https://issafrica.org/iss-today/xenophobia-again-jeopardises-south-africas-interests-inafrica

119 A. Desai, 'Xenophobia and the Place of the Refugee in the Rainbow Nation of Human Rights' (2008) 12(2) *African Sociological Review/Revue Africaine de Sociologie* 49–68.

120 J.P. Misago, 'Towards Tolerance, Law, And Dignity: Addressing Violence Against Foreign Nationals in South Africa (International Organization for Migration 2009) 8–67 <http://www.migration.org.za/uploads/docs/ report-12.pdf> accessed 29 July 2024.

- The governments and stakeholders of the respective countries should organize educational seminars to educate, sensitize their nationals on the need to respect the traditions, belief and laws of South Africa.
- The South African government should adopt policies and legislations that discourage and criminalize xenophobic violence and acts.
- The South African government should tighten security in communities and locations that are xenophobic violence prone.[121]

6.0 Conclusion

The article found that xenophobia reduces the tax receipts as well as the influence and prestige of South Africa, amongst other African nations. Moreover, xenophobia negatively affects FDI and by extension the multiplier effects the FDI is supposed to have on the economy; and the tax receipts it is supposed to generate as personal income tax, companies' income tax, mining tax, sales tax and VAT. Thus, the author suggests that it is in the interest of South Africa and its nationals to desist from xenophobic attacks targeted at foreigners because it affects both South African nationals and foreign migrants as stated in this article. The author suggests that instead of killing or maiming foreigners, undocumented migrants should be deported at their respective country's expense. Moreover, South Africa may adopt an expensive capitation tax like the one adopted by Canada to discourage Chinese nationals immigration to Canada. This is outlined in the 1885 *Chinese Immigration Act*, which greatly reduced the numbers of Chinese migrants moving to Canada.[122] There is also the need to tighten the law in order to offer robust protection to migrants.

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121 Josephine Azuka Onyido, 'Impact of Xenophobia on Nigerian Students in South Africa' (2018) 8(6) *British Journal of Education* 72-87.

122 Laura Madokoro, On Racism and Taxation: Rethinking the Chinese Head Tax, 1885-1923 https://thenewcanadian history.com/2018/02/20/on-racism-and-taxation-rethinking-the-chinese-head-tax-1885-1923/ accessed 29 July 2024; Arlene Chan & Andrew McIntosh, 'Chinese Head Tax in Canada' (2020). https:// www.thecanadianencyclopedia.ca /en/article/chinese-head-tax-in-canada accessed 29 July 2024.

Major Milestones in South African Unfair Trade; Regulation and Institutional Frameworks: Lessons for Nigeria

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Abstract

South Africa on the African continent has regulated and institutionalized dumping as unfair trade practice by providing local legislations taming its effectiveness. U.S. and many industrialized WTO members incorporate the 'escape clause' as trade relief against this unfair trade practice using Anti-Dumping Agreement. Historically, Nigeria signed General Agreement on Tariffs and Trade in 1960 before the emergence of WTO in 1994 and has been a member of WTO since 1 January 1995. The only legislation dealing with dumping as unfair trade practice has been Customs Duties (Dumped and Subsidized Goods) Act 1958 while South Africa has series of legislations that have undergone amendments up to 2000 and the process continues using policy guides to curve the menace. The paper adopted comparative but historical legal studies of South African regulatory and institutional milestones alongside Nigeria, borrowing some instances from U.S. for clear and useful lessons. Nigeria deals with only obsolete legislation regarding this practice and the two attempts made in 2010 and 2015 to repeal the said Act proved abortive. The paper derived some fewer lessons for Nigeria for especially the National Assembly to as a matter of urgent importance revisit the proposed bill to situate Nigeria in its rightful place in terms of regulation and institutionalization of unfair trade practice as obtained in South Africa. In its concluding remarks the paper admitted that even the South African regulation and institutional frameworks are still at infancy stage, the effects of unfair trade practices are reduced to barest for local industries to continue to thrive.

KEY WORDS: South Africa, Nigeria, Unfair trade, regulation, institutionalisation.

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1.0 INTRODUCTION

The emergence of World Trade Organization in 1994 has been a major milestone between countries who engaged in free-trade relationships. These relationships began to poster wider gaps which led

to the conceptualization of protectionism and trade wars amongst world trading partners. As early as 1776 Adams Smith noted that the practice when manufacturers exported some of their surplus goods for sale at a loss for the purpose of 'doubling' the price of their goods in the home market.[1] Alexander Hamilton expressed concern several years later that the price would hinder the development of domestic industries.[2] The expansion of these practices resulted in more sustained scholarly and political attention, for instance in 1880, The United States of America adopted the practice to secure trade standing, this continued twenty-five years later, when the Department of Commerce and Labour dispensed similar advice to manufacturers to maintain domestic prices while establishing footholds in foreign markets.[3]

In general, the rules of the World Trade Organization (WTO) require each member to apply tariffs and duties equally to all other members, under the principle known as conditional most-favoured-nation (MFN) which has been central to the rules-based global trading system since 1947.[4] The WTO agreements allow exceptions to this treatment, including among other to remedy this unfair trade practice thereby helping domestic industries adjust to sudden surges of unfairly traded goods.[5] This is a remedy against unfair trade practice accepted by member states and has been frequently used as relief to domestic industries that have been or threatened materially as a result of imports.

The paper adopted a comparative critical legal and doctrinal methods of both South African version and somewhat the U.S. for clarity on the regulation and institutionalization of these milestones with more emphasis on the latter being on the same continent with Nigeria. Aside, the paper looked at the evolution of dumping being the unfair trade practice, and the agreed relief provided by the global trade regulator using 100 years of South African experience to situate Nigeria. There are criticisms regarding the regulation and institutionalization of the unfair trade practice as major economies appeared to have been the major beneficiaries of these regulations and institutionalization on the application of the 'escape clause' South Africa followed suit in its determination to foster formidable standing against the menace. The Nigeria's place in this important milestone appeared to be blocked as the paper found single legislation that regulates this

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[1] Adams Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: Methuen, 1904) p.2-19. The Statement was reproduced at *Congregational Research Service-Trade Remedies*: Anti-dumping, updated Sept.10, 2020 at http://crsreports.congress.gov R46296. By Christopher A. Casey.

[2] Christopher A. Casey, p. 2.

[3] See, Eg… Walter Goode, Dictionary of Trade Policy Terms, 5th Ed. (Cambridge University Press) 2007; Jacob Viner, Dumping: A Problem of International Trade (Chicago: University of Chicago Press)1923, p.1.

[4] Op cit note 2 at p. 1.

[5] Ibid at p. 1.

unfair trade practice despite the devastating effects posed to and identified by major and minor but serious economies of the world.

2.0 ORIGIN OF THE UNFAIR TRADE PRACTICE.

Historically, the unfair trade practice had been as old as mercantilism described by governments and authorities as major cause of trade-wars. For instance, the Canadian position on this differed from England, the American from South African. Jacob Viner was the first scholar to pull together previous writings on the subject. Viner noted an instance in the seventeenth century in which the Dutch were accused of selling in the Baltic region at 'ruinously' low prices in order to drive out French merchants[6]. The Canadian Minister of Finance, W.S. Feilding explained the situation as *'method of trade which now come to be known as slaughtering and evil[7]'*

Soon afterwards Canada, Australia, South Africa, United States, France, and Great Britain passed anti-dumping laws. Dumping as unfair trade practice of course was not a new issue so also its definition. Crudely but literally dumping is whatever you can get the government to act against under the anti-dumping law. Dumping takes two different forms: price discrimination and below sales[8]. Price discrimination means selling at lower prices at home markets while sales below cost signifies that foreign producer could not sustain its losses in the absence of market-distorting government policies back home[9].

2.1 CONCEPTUAL MEANINGS.

For easy comprehension of this area, the paper went into voyage to discern from various articulations captured in legislations from focal members of the WTO and see whether it is worthy for countries like Nigeria to learn. Article VI: I of the WTO defines dumping thus.

> *Introduction of a product into the commerce of another Country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption.*

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[6] Finger. M. J, (1992) Dumping and Anti-dumping: The Rhetoric and Reality of Protection in Industrial Countries. *The World Bank Research Observer,* Vol.7, no. 2 (July 1992) p. 123.

[7] Ibid at p. 124, he made this statement in 1904 which showed how this unfair trade practice criticized amongst industrial countries alongside industrial revolution.

[8] Brink Lindsey, The U.S. Anti-dumping Law Rhetoric versus Reality. Centre for Trade Policy Studies,1999, no.7. p. 2. *Cato Institutes.*

[9] Ibid p. 3.

in the exporting country[10].

The U.S. version of dumping signifies that congress plays major role in shaping, overseeing and legislating trade policy through its constitutional authority over tariffs and foreign commerce[11]. Since World War II, the U.S. trade policy geared towards reducing international trade and investment barriers, open transparent and non-discriminatory rules-based trading systems through WTO, enforcing partner countries' trade commitments versus its trade laws, offering relief to U.S. workers and firms adversely affected by 'unfair' foreign trade practices and trade liberalization[12]. U.S. law defines dumping as the "sale or likely sale of goods [in the United States] at less than fair value[13], with the fair value defined as "the price at which the foreign like product is first sold… for consumption in the exporting country[14]" Simply put, dumping according to U.S. version is the sale of goods abroad for less than the price the goods would have commanded in the home market. This definition gives U.S. leverages to act as observed other WTO members as being protectionist providing shields to domestic industries through regulation and institutionalization of trade policies[15].

More so, South African version of unfair trade practice regulation and institutionalization dated back to 1914,[16] making it the fourth country after Canada, New Zealand, and Australia[17] to adopt specific anti-dumping legislation. Despite its long anti-dumping history, very little has been written on the subject, there appeared to have one detailed textbook to date,[18] this made the concept now startling.[19] However, South Africa is one of the traditional users of anti-dumping, though not a signatory to the General Agreement on Tariffs and Trade 1947. The Customs Tariffs Act 1914 introduced the concept of dumping and anti-dumping action into South African legislations[20] with

[10] Ibid. Christopher A. Casey, *Congregational Research Service*, p. 1.
[11] In Focus-Congregational Research Service updated March,16,2022: U.S. Trade Policy: Background and Current Issues, available at *http://crsreports.congress.gov*. accessed on 2nd July 2024.
[12] Ibid at p. 1.
[13] Christopher A. Casey, op cit note 10.
[14] Ibid at p. 2.
[15] S.I. Koki, Legal Studies of World Trade Organization Anti-Dumping Agreement in Accordance with Nigerian Legislations being a PhD thesis submitted to University of Bahri Republic of Sudan for the award of Degree of Doctor of Philosophy in International Trade and Commercial Law,2024. P. 10.
[16] Gustav Brink, One Hundred Years of Anti-dumping in South Africa; Being a research assistant to B. Com, University of Pretoria, and Associate Director of XA International Trade Advisors. 2016 p. 1.
[17] Ibid at p. 1.
[18] Brink, Anti-dumping and Countervailing Investigations in South Africa; A Practitioners' Guide to the Procedures and Practices of the Board of Tariffs and Trade,2002. P. 1.
[19] Blumberg, South Africa in Steel (ed) Anti-dumping under WTO: A Comparative Review 213-226; (1996) Brink, South Africa; A Complicated, unpredictable, long and costly judicial review system (2013)
[20] Op cit note16; Transvaal Customs Department (1905); Handbook 24 indicates that bounty dumping duties were provided for by the provincial Department in 1903; See also Viner (1966) at p. 209.

effect from 7th July 1914[21]. This Act was not detailed as regards dumping definition. It only defined 'normal value as.

> *The true current value for home consumption in the open market of similar goods in the principal markets of the country from which and at the time at which, the goods were imported, including carriage. to the port of shipment and the cost of packing and packages, but not including agents' commission when such commission does not. exceed five percent*[22]

These major milestones continued in South Africa to spill from the 1914, where several minor amendments effected between 1925,1945 and 1944 been the first major amendment[23]. The reforms regulated the application of anti-dumping duties on certain products[24] and redefined the terms 'export price'[25] 'domestic value'[26],domestic value derived in terms of the High Court's ruling in *Watson's Shipping Co. v. Commissioner of Customs*, it is indicated that the 'proof of domestic value' should be determined in terms of *Union Government v Fig Bros* and that 'ordinary course of trade' should be determined in terms of Watson's case. 'Actual cost'[27]and 'value for duty purposes[28] had also been redefined respectively with the major amendments.

GATT Article VI was applied to give effect to South Africa's obligation under it but never became part of its municipal laws[29]. The amendments continued in 1972 with findings that led to the legislative actions incorporating so many concepts captured in the Anti-Dumping Agreement of WTO. The unfair practice regulation and institutionalization has been thorough and continued in 1983,1986 and 1995[30] with more amendments that brought legislations on dumping and the relief against it successively in line with the WTO ADA[31].

[21] The Act was assented to on 3rd July ,1914 and published in the gazette extraordinary no. 531.
[22] See section 7 of Customs Tariffs Act 1914.
[23] See Section 28(2) of Customs Act 1944.
[24] Ibid Section 86,87 and 89, Watson's case 1927TPD 642; Union Gov. case 1925 CPD 280 respectively.
[25] Section 84.
[26] Section 84-89.
[27] Customs Act 1944, section 84.
[28] Ibid section 88.
[29] Eisenberg, (1993) The GATT and WTO Agreements; Comments on their applicability to the Republic of S/A 19 SAYIL 129. The text of both GATT and the Protocol of Provisional Application was published in Government Gazette 3896 of 18 Nov. 1947.
[30] See Customs Amendment Act, 1977 at section 15; *Hansard* (1986) 11555.
[31] See Section 1(a) of Board on Tariffs and Trade Amendment Act 1995.

The primary current legislation[32] is contained in the International Trade Administration Act, 2002, the South African Constitution, Access to Information Act[33] and the Administrative Justice Act[34] respectively. The International Trade Administration Act 2002 and subsequent regulations were generally in line with ADA although disagree in some instances with clarity for disobedience[35],this relates for instance to 'country-hopping reviews' in Anti-dumping regulation whereby dumping is based on the normal value of a country other than the exporting country.

3.0 NIGERIA'S PLACE ON THE REGULATION AND INSTITUTIONALISATION

Nigerian version of historical milestone entails that it has been a member of the General Agreement on Tariffs and Trade 1947, participated in negotiations leading to the emergence of WTO acceding to multi-lateral obligation that did not accommodate possible opt-out. The regulations as institutionalised in South Africa like in all other countries meant openness to trade liberalization, policy objectives and avoidance to market distortion and industrial harmony using legislative means to curtail unfair trade practice[36]. Just like U.S and South Africa, Nigeria needed to protect domestic industries from material injury or threats of injury caused by subsidized imports using legislative means as seen from the selected focal points. However, Nigeria appears to be the only growing economy that operates with a single regulation, without institutional standing regarding unfair trade practice. Some related regulations are not in line with its international commitment and obligations particularly in this area, for instance, as mono-economy solely over-dependent of crude exports and imports of refined products, the regulatory framework on this violates global trade regulations especially the General Agreement on Tariffs and Trade[37]. In essence the only legislation dealing with unfair trade practice in Nigeria is Customs Duties (Dumped and Subsidized Goods) Act 1958.[38] The Act has never been repealed or amended since promulgation despite its bias from colonial origin. There were attempts in 2010 and 2015 by some members of National Assembly to repeal/amend the Act which appeared to be thwarted efforts as the bill still lies with the National Assembly till date.

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[32] For details see Brink (2013) 'South Africa'523;(2012) 'Anti-dumping in South Africa' *Tralac Working Paper2-7*.
[33] Promotion of Access to Information Act, no.2 of 2000.
[34] Promotion of Administrative Justice Act, no.3 of 2000
[35] See Brink (2004)710-721; Brink (2012) Anti-dumping in South Africa 6-7; Brink (2015) X-raying injury for discussion on how the Regulation conform to or differ from the ADA.
[36] Anugbum O, (2020) Appraising the current legal framework for regulating dumping into Nigeria: Need for Legislative Reforms and Intervention. *Global Journal of Politics and Law Research*, Vol.8, no. 5, pp. 64-80. ECRTD-UK.
[37] See 'The Nigerian Oil and Gas Industry Content Development Act,2010.
[38] Being an Act, no. 9 of 16th October 1958.

The Northern and Southern protectorates of Nigeria were amalgamated in 1914 by the British Colonial Governor Fredrick Lugard in January 1914.The Act come under colonial administration as a result of Nigeria's accession to GATT 1947 with the latter undergoing series of modifications while the former remains the only applicable legislation on the subject matter. There were many attempts to repeal this obsolete Act in 2010 and 2015 when a Senator and member sponsored a bill to repeal the Act. This 'Bill' captures many of the reforms in today's 'escape clause' even though falls short within the WTO spirit, it could have been a starter-boaster for legislative actions against unfair trade practice that manifestly affect industrial sector leading to the collapse of many industries in the country.[39]

Generally, WTO members clearly define this unfair trade practice, the one that 'causes material injury' however, under the Act the President who has been empowered to impose duties but shall not exercise that power if it appears to him that to do so would conflict with the obligations of the Federal Government under the provisions for the time being in force of the GATT concluded at Geneva in the year 1947.[40] The 'Bill" relieved the President with the Minister and that section has been expunged. The bill appears to violate some of the WTO provisions on Anti-Dumping Agreement of the WTO[41]. The reforms and amendments in South Africa have successively done away with these abnormalities.

4.0 GATT AND UNFAIR TRADE REGULATION IN NIGERIA

The South Africa's definitions of unfair trade practice appear to be in tandem with the WTO spirit consisting of major economic indices that suited its role at global stage. The preamble to the GATT states that the purpose of the Agreement was to bring about 'the substantial reduction of tariffs and other trade barriers and the elimination of discriminatory treatment in international commerce, on a reciprocal and mutually advantageous basis[42].

Popular views shared with this paper believed that GATT was called to allow industrialized nations after the Second World War II resuscitate economic dominance and hegemony in the name of liberalization, this Act retained such provisions when in today's Nigeria citizens are price sensitive picking almost everything substandard including Garri provided it is in form of import[43]. These unbridled imports cause material injury to almost all sectors of the economy leading local

[39] S.I Koki, (2021) Examination of the Principle of Unfair Trade Under WTO and its Effects on Cotton, Textile and Garment (CTG) Subsector in Nigeria being an unpublished LLM thesis submitted to Bayero University, Kano for the Award of Master of Laws.

[40] See Section 3(1, a,b,c) of the Act.

[41] S.I. Koki op cit note 15, p. 250.

[42] The Preamble of GATT 1947, *http://www.wto.org/eng/docs_e/gatt47_e.pdf.* accessed on the 29 June,2024.

[43] Pam. A, 'Anti-Dumping and Countervailing Measures and Developing Countries; Recent Development. (2007-2010) *Nigeria Current Law Review*,50 at p. 2.

production to a near impossible with manufacturing sectors closing shops on daily basis[44]. The colonial mentality attributed to this Act further provides that 'for the imposition of a special duty on any goods deemed to be dumped by companies or subsidized by any government or authority outside Nigeria……'suggested that dumping was inevitable, but no clear definition made regarding the procedure for its determination as obtained in South Africa, U.S. and WTO[45].

WTO is aware that an unfair trade practice 'dumping' affects any importing country hence the inclusion of the 'escape clause' in form of trade relief and remedy against it. WTO frowns at it as condemnable when it causes material injury and set criteria on how material injury can be determined, the Act has no provisions on that but…. 'Where goods are subsidized' with no clear definition as to 'subsidized goods' as obtained in South Africa[46] same way as the proposed bill 2010.

Under the Act, goods are regarded as 'having been dumped if export price is lower than the 'fair market price' what then is 'fair market value'[47] like the South African version which defined the unfair practice with 'normal value'[48] the Act vested the power to determine 'dumping' and imposition of duties on the President as mentioned inter alia.

5.0 SUBSTANTIVE AND PROCEDURAL INADEQUACIES IN THE CUSTOMS DUTIES (DUMPED AND SUBSIDIZED GOODS) ACT 1958

Section 1: This is dealing with title which appeared to ignore the main thrust of Anti-dumping Agreement rather the 1947 GATT that was carried forward into today's instrument forming WTO, the 1947 GATT emerged where contracting parties meet usually to discuss and resolve world trade issues with challenges mostly from developing nations[49].These challenges called for series of trade rounds for transparency and openness between world trading partners[50].The GATT has never been adopted as binding instrument like the WTO and ADA that come into existence 1994.

Section 2: This section localizes the concept of dumping phenomenon containing only 5 items for interpretation, the ADA contains series of items interpreted for member states against its effects. Many technical terminologies are incorporated requiring evidentiary interpretation by experts in

[44] Injury can occur in four phases; 1. Material retardation of an established industry. 2.Material injury to a domestic industry. 3. Threat of material injury to a domestic industry and or 4. To be established industry.
[45] Chacko, K.T, Agreement on Anti-dumping *(Centre for WTO Studies, Indian Institute)*2011. P. 1.
[46] Section 3(3, a) of the Act.
[47] See Section 3 of the Act; Vermulst. E, (2005) The WTO Anti-dumping Agreement; *A Commentary* (Oxford University Press) p.4.
[48] Section 3 and 4 of the Act.
[49] The developing nations considered the 1947 GATT as protectionist approach by the major economies against them so as to allow trade without tariffs at the same time protecting their industries against the global north.
[50] See Section 1 of the Act.

the WTO dispute settlement body[51]. The concept of transhipping[52] especially for its vulnerability in that exporters may use to evade payment of duties and claim subsidy in some cases, and other issues concerning third country were not adequately addressed[53] by the Act.

Section 3: This deals with situation where duties may be imposed, the Act refers to President who imposes duties when it appears to him that the imported goods are dumped, here, there is no criteria for dumping, and the determination of dumping, dumping margin the number goes on and on. Conceptually, the calculation of dumping is a comparison between the export price and a benchmark price, the normal value, of the like product. Depending on the circumstances in the domestic market[54],Anti-dumping actions are actionable per say and it is the industry that was affected could provide these evidences and not the government or the President himself as contained in the Act[55].The Act lightly explained goods regarded as dumped[56], however, the notion of 'dumped imports involves a mixture of dumped and non-dumped transactions[57], determination of dumping are normally made on a producer-by-producer basis and therefore possible that certain producers are found not to have dumped.[58] Article 3.7 and 3.8 provide special rules for determination of threat of material injury, as important as the concept appears in ADA the Act only mentions it once under the proviso[59] to section 3(c).

Section 4: This section deals with the power to impose duties by the orders of the President and appears not to include delegation as far as imposition of duties is concerned, the office of the President may delegate that power[60],imposition of antidumping duties where injurious dumping has been found is discretionary, and use of a lesser duty rule is encouraged. Many WTO members include a public interest clause in their national legislation to enable them refrain from imposing duties, even where injurious dumping is found[61].If an anti-dumping duty is imposed, it must be collected on a non-discriminatory basis on imports of the product from all sources found to be injuriously dumped[62], and these aspects are dealt at DSU as opposed the Act.

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[51] See Section 2 of the Act.
[52] Article 2.5 deals with this under the country of origin.
[53] See Section 2(2) of the Act.
[54] The Act maintains cases how duties may be imposed neglecting these proofs.
[55] See Section 3(1,a,b,c)
[56] See Section 3(2)(a-b,i,ii)
[57] Panel Report, European Communities-Anti-dumping Duties on Imports of Cotton-type Bed Linen from India. WT/DS141/R, adopted in March 2001 as modified by the Appellate Body Report, WT/DS141/AB/R, and para 6.138.wto.text<*http://wto.org/english/thewto/understanding e.pdf* (accessed on the 20th June, 2024).
[58] Article 3 of ADA.
[59] See Section 3 (c) of the Act.
[60] See Section 5(1)(a) of the CFRN 1999(as amended)
[61] See paragraph 1.4.6 of WTO Training module op cit p34.
[62] Ibid at p 34.

Section 5: This section deals with relief in respect of anti-dumping, as mentioned inter alia determining dumping requires technical procedure calculated based on margins, the Act gives the Minister power to notify the Director of Customs to remit or repay the excess back to the importer, this is subject to abuse and discrimination against other importers, the issue of national treatment and most-favoured nation principles would be violated as against the WTO objectives. It is also restrictive within the period of only six months not minding the complex nature of the office of the President and Minister respectively[63].The Act contemplated fraud and penalty was provided where an applicant seeking relief makes false statement that he shall be liable to a fine of two hundred naira or imprisonment for three months of to both such fine and imprisonment and the amount paid shall be recoverable[64].Both fine and jail term appeared to be inadequate considering the current reality in exchange rate to foreign currencies and the quantum of imports. Nigeria is an import depending on nation in almost all sectors of the economy members incorporate zeroing to determine dumping and lesser duty rule[65].

Section 6: This section deals with duty draw back in respect of all or any duties under the Act on the export of goods subject to such conditions as the President may specify[66], this section amounts to violating WTO objective against national treatment where the criteria of like, similar products become subject of conflict and requires evidence before dispute settlement body[67], it is relatively easy to adopt an antidumping law, but very difficult to use in a WTO-consistent manner. The ADA as developed over time become a sophisticated, legalized trade instrument[68] and any member should comply with the obligation under the multi-lateral agreement.

Section 7: This section deals with the power to require information from importers, in the GATT and WTO instrument 1994 considered this aspect vigorously in a more concise manner as agreed by members avoiding conflicting interest leading to avoidable disputes, the Act gives the Director of Customs to require proof of the country of origin, this may be tempted and biased, the Act needs to specify the detailed procedure on standing as obtained in the ADA[69].

Section 8: This section deals with ascertainment of export price if the goods are imported under a contract of sale and it is not so the Minister shall determine it but according to Article 2.1

[63] See Section 5(1,2,3,4)
[64] See Section 5(5,6,a and b)
[65] Dan Ikenson, Zeroing in Anti-dumping's: Flawed Methodology under Fire, Free Trade, *Bulleting No.1.1* April 27, 2004.
[66] See Section 6(1,2) of the Act.
[67] Article 17 of ADA.
[68] WTO Text, Training manual op cit note 19 p.65.(accessed on 22nd June,2024)
[69] There is an acceptable rule regarding the country of origin 'non-preferential rule 'and Article 5.4 ADA.

ADA[70],the export price is the price at which the product is exported from one country to another normally indicated in export documentation, such as the commercial invoice, the bill of lading and the letter of credit so that the appropriate normal value would be found and in order to determine whether dumping in fact is taking place[71].Reference to contract of sale under this section implies adhering to another Act of 1893 which defines sale and goods as against its conception under the ADA[72].

The Act based the ascertainment of export price on contract of sale which the Act regulating same appeared to have faced similar position and this section appears to be confusing by giving the Minister power to determine the export price where the subsection (2) does not apply[73],there are instances where export price may not be reliable, for instance, where the exporter and importer are related, the price between them may be unreliable for transfer pricing reasons[74].Transfer pricing is taking place, for example, when goods, intangibles and services are traded within multinational enterprises. Frequently, this results in a situation where the transfer price does not reflect the true cost of the product or service. The Act does not cover service as subject of dumping while the ADA treated same as constructed export price when the imported products are first resold to an independent buyer in such case allowances for costs, duties and taxes incurred between importation and resale and for profits accruing should be according to ADA[75].

Section 9. In the ascertainment of fair market price the Act restricted its scope to effective comparison between the prices on two similar sales and if not in such circumstances the Minister shall determine the fair market price by reference to any price obtained for goods of that description or if he thinks fit[76], however, a fair comparison shall be made between the export price and the normal value at the same level of trade and at ex-factory and at nearly the same time, requires also to currency conversion using the rate of exchange on the date of sale[77],comparison of a weighted average normal value with a weighted average of prices of all comparable exports or on a transaction-to-transaction basis[78].

[70] Article 2.1 ADA.
[71] Op cit WTO Training Module p 7.
[72] Section 62(1) of Sale of Goods Act 1893, contract of sale is a matter governed by the general principles of contract as they exist under the common law or as modified by statutory provisions; See M.C. Okany, Nigerian Commercial Law, Africana First Publishers Plc (2009) p305.
[73] See Section 8(2,3)
[74] Op cit WTO Training Module p 7.
[75] Article 2.4 of ADA. Such allowances reduce the export price, increasing the likelihood of a dumping finding.
[76] See Section 9(1,2 and3)
[77] ADA 2.4.1.
[78] ADA 2.4.2.

Section 10. This section deals with construction of references to country of origin and other related issues, for instance goods wholly produced in that country, or if production cost/component was less than 25% before imported to Nigeria these good could be regarded as having originated from that country, however, the ADA rules of origin implies that antidumping duties are normally imposed on merchandize originating in or exported from certain country, although this may lead to circumvention[79] in instances like transhipments, the imposition of duties under the Act appears to lead to circumvention when imposing duties. The best idea is to adopt a set of non-preferential rules of origin to enforce duties imposed[80].

Section 11. Although the Act provides procedure for checks and balance thereby maintaining the federal character regarding arm of government, the concept of dumping is actionable per say meaning it is the industry that is affected would initiate action against it before the final imposition of AD duties or provision of subsidy[81], both offices are too committed for more serious sessions than attending to individual industries and artificial persons.

6.0 CURRENT LEGISLATION IN SOUTH AFRICA

The primary current legislation in South Africa is contained in the International Trade Administration Act, 2002 which incorporated in the subordinate Anti-dumping Regulation[82]. Unlike the Nigeria's current Act, Customs Duties (Dumped and Subsidized Goods) Act 1958, the ITAA defines dumping,[83]normal value[84]and export price,[85]provides that International Trade Administration Commission is responsible for conducting anti-dumping investigations[86] and that parties may apply to ITAC for Anti-dumping protection[87]. It contains various provisions on confidentiality,[88] but does not contain any other substantive or procedural provisions. The AD regulations in South Africa provide for the substantive issues, including the normal value

[79] The Dunkel Draft and Uruguay Round do not contain Circumvention as part of ADA; See also Koulen, The New AD Code Through its Negotiating History at p 191; also, p 72 *Training Module*. It is however adopted by U S, the EC and some Latin American countries.
[80] See paragraph 11.1.5 op cit Training module p 72.
[81] See Section 11 ousting the power of the President in respect of sections 4, 5, and 6.
[82] Brink (2013) *Tralac Working Paper* p. 2-7.
[83] ITA Act, Section 1.
[84] ITA Act, Section 32(2)(b)(ii).
[85] ITA Act, Section 32(2)(b)(i).
[86] Ibid S. 16(1)(a).
[87] Ibid S. 26(1)(c)(i)
[88] Ss.33-37.

methodology,[89]constructed export price[90]margin of dumping[91]material injury[92]and causality,[93] as well as the procedural[94]. The Act and Regulations are generally in line with WTO Anti-dumping Agreement and in some instances provide greater clarity as mentioned inter alia[95]. These innovations are meant to regulate to greater extent the dumping effects an unfair trade practice even though violate the Agreement in other respects[96]. Nigeria's Act could have been streamlined if these innovations are incorporated. The bill contains some of these innovations unfortunately has been lying before the National Assembly till today unattended to.

Based on these innovations South Africa initiated investigations to curtail unfair trade practices, for instance between 1995 and the end of 2014, South Africa initiated 229 investigations, ranking it amongst the top ten users[97], in 1999 the commitments were intensified after the Uruguay Round which provided industry with additional protection, Nigeria also participated at the Uruguay Round with appreciable input regarding unfair regulations.

In South Africa, there had been regulation of unfair trade where currency of a particular country is devaluated, this was since 1921 when the Board on Tariffs and trade reviewed the issue of competition resulting from depreciated currencies in exporting countries. If an industry alleged 'business is being damaged by such *goods being placed on the market in South Africa at a price less than the value of these goods as commodities, owing to the rate of exchange in the country of origin*[98]. After investigation the normal holding of the board was that where the currency of the exporting country is depreciated and this resulted in goods being imported into South Africa at injurious prices, the Governor-General could determine the rate at which the currency would be converted into local currency and the difference between these values was then be levied as an exchange anti-dumping duty[99]. The Board recommended that the legislation be amended to provide that exchange anti-dumping duties would be determined on the basis of the difference between the export price before and after the devaluation of the exporting country's currency[100]. These innovations were incorporated since 1931 and amendments were vigorously captured in today's regulations. More so, in South Africa the considered Anti-dumping on uneconomic

[89] AD Regulation 8.
[90] AD Regulation 10.
[91] AD Regulation 12.
[92] AD Regulation 13.
[93] AD Regulation 16.
[94] AD Regulation 21-37.
[95] Op cit Brink (2015) X-Raying injury.
[96] AD Regulation 60.1(c).
[97] http://www.wto.org/eng/tratop accessed on 2nd July, 2024.
[98] Board Report 1. (1921) 4.
[99] Ibid 5.
[100] Board Report no. 127(1931)4.

competition resulting from wars where the Board after careful analysis of the effect of the Second World War on industries and after finding that several industries had been established that would not have been viable under normal circumstances, recommended that legislation be promulgated to protect the State's industries against 'any form of uneconomic competition which may result from abnormal conditions obtaining after the war'[101]. Nigeria's accession into GATT 1947 and subsequent promulgation of the Act were in line with the effects envisaged after the first WW II but while South African continued to transform institutionalize its regulations on unfair trade, Nigeria remains static.

6.1 PARITY BETWEEN THE TWO

There has been a clarion call for the inclusion of public interest litigation/consideration in South Africa's unfair trade regulation as opposed Nigeria. In semi-refined paraffin wax (candle wax), the Board was confronted with a demanding public interest[102]issue. In this case the industry could not succeed because all the country's poor were dependent on candles for light and imposition of anti-dumping would have led to around 40% in prices of candles affecting nearly 30 million people, it has now been contemplated by the ITAA 2000.There is nothing like public interest litigation envisaged in the Act but captured by the bill[103].

South Africa has a relatively small but very diverse economy having many industries with only single or a limited number of producers[104]. These companies often do not enjoy the same economies of scale as their competitors in exporting countries and are therefore quick to experience material injury[105]. If South Africa would be face with problem of industry concentration despite its diverse economy Nigeria would have been in better position to deal with unfair trade practice to avert material injury affecting almost all the sectors of the economy.

6.2. LOW LEVEL OF WTO PARTICIPATION AND INVOLVEMENT

Both South Africa and Nigeria have never declared a dispute in the WTO, nor have they participated in any dispute as a third countries, the former has been challenged in four cases, none of these cases proceeded to a panel as South Africa revoked the measure in question following

[101] See Board Report271 (1942) 34.
[102] Brink (2009) 'National Interest in Anti-dumping Investigation' in South Africa,126(2) SALJ 316 for a detailed discussion on public interest in anti-dumping investigations.
[103] Proposed Section 25(2, c) of the Bill 2010.
[104] Brink op cit at p. 14.
[105] In Board Report 3384(1993) and Brink at p. 14.

consultations in three instances, however, the latter admittedly in its report that it has not been challenged[106] even once. The three instances are.

A. In *Pharmaceutical products,* India alleged that ITAC had improperly determined the normal value and constructed export price, that it had failed to determine injury on the basis of positive evidence, to evaluate all injury factors, to establish the facts properly, that its analysis was unbiased nor objective, and that it had not taken into account India's special situation as a developing country[107],Nigeria never attempted such declaration before dispute settlement bodies at WTO.

B. In *Acrylic blanketing material,* Turkey complained that ITAC had not followed the proper procedure in determining injurious dumping and imposing an anti-dumping duty on acrylic blanketing material[108].After ITAC had imposed anti-dumping duties on acrylic blankets, the exporter started exporting blanketing material in roll form and ITAC initiated an anti-circumvention investigation yet failed to notify the exporter and the Turkish government. The Act never known this emerging concept called *'circumvention.'*

C. In *Uncoated woodfree paper,* Indonesia complained that ITAC had not completed a sunset review over four years after initiation thereof while still maintaining the duty[109]. As ITAC's essential facts letter had already indicated that the duty would not be maintained, it immediately revoked the duty. The sunset review has not been captured under the Act but incorporated under the proposed bill[110].

South Africa had since the promulgation and amendments of unfair trade practices continued to impose and take measures to curve the menace in line with its WTO commitments, Nigeria is yet to find its rightful place in the fight against the phenomenon. In fact, recent legislations proved this allegation, for instance, the violation of WTO and GATT provisions in Nigeria's Local Content Development Act 2010 has been at the centre stage on this claim.

7. LESSONS

1. South Africa has balanced and robust regulatory and institutional legal frameworks on unfair trade practice and has been successively sustained to poster growth and development of local industries leading it to be the first in terms of GDP on the African continent.

[106] www.wto.org/reportsonnigeria2006 accessed on 29th june,2024.
[107] WTO South Africa- Anti-dumping duties on certain pharmaceutical products from India WT/DS168/1 (13 Apr. 1999)
[108] WTO *South Africa-Definitive Anti-dumping Measures on Blanketing from Turkey* WT/DS288/1.
[109] WTO *South Africa-Anti-dumping measures on uncoated woodfree paper* WT/DS374/1(16 May 2008)
[110] See proposed Section 26 of the Bill.

2. These regulatory and institutional legal frameworks have been on routine checks using mechanisms such as Board of Trade and Industry, Board on Tariffs and Trade, International Trade Administration Commission all with a view to tackle the effects of unfair trade practice.

3.South Africa incorporates public interest litigation/considerations to allow not only industrialists but also '*interested parties'* participate in dumping investigations and presentations of evidence before the courts for proper adjudication of unfair trade practices whose effects directly shown on the consumers.

4. South Africa's administration of justice regarding regulation and institutionalization of unfair trade has been stagnant because the judicial review of anti-dumping is still in its infancy, only five ITAC decisions have been challenged in court since 2003, two of which were appealed to the SCA[111]and one to the Constitutional Court[112].

5. South Africa has been applying the 'escape clause' being a relief to save domestic industries from material injury using the said mechanisms of investigations, interested parties and judicial reviews, being one of the traditional users yet it was not a signatory to the GATT Anti-Dumping Codes and has been imposing anti-dumping duties by no later than 1921[113].

LOOKING AHEAD.

This article has attempted to show that while unfair trade practice has been applied in the name of free trade and liberalization certain flaws are imminent. WTO members utilized one of trade remedies as relief 'escape clause' to regularize the effects using defined regulatory and institutional frameworks, Nigeria continues to apply the only single and obsolete Act of 1958. South Africa being the focal point in this article applied anti-dumping investigations and imposes measures against the practice with little resistance from other members. The 2010 proposed bill to amend the obsolete Act that has not been in line with the spirit of WTO should be revisited to poster industrial growth and development although it is not in full gear with the WTO spirit same way as South Africa's. The legislative arm has a greater role to play to save the ailing industrial sector that keeps closing-shops almost on daily basis.

[111] See *Progress Office Machines v SARS* [2007] SCA 118 (RSA); *ITAC v. SCAW* CCT59/09 [2010] ZACC6.
[112] See *ITAC v. SATMC* [2011] ZASCA 137.
[113] See Board Report 42 (1924) which indicates anti-dumping duties on Australian flour and Wheat in 1921.

Tax Avoidance: A Fine Line between Legality and Illegality

Isau Olatunji Ahmed*

Abstract

The need for the government to provide social amenities and embark on developmental projects that will improve the living standard of its citizenry as well as meet its overhead or recurrent expenses necessitated an intensified revenue generation efforts of government both internally and externally. One of the major sources from which the government generates revenue is by levying taxes on taxpayers which can either be individuals, corporate entities, goods, or services. However, government's revenue generation efforts from taxation are usually impeded by certain resistant such as tax avoidance. Tax avoidance, alongside other concepts such as tax planning and tax evasion, have been described as fiscal termites eating away at the potential tax revenue of government. However, unlike tax planning and tax evasion which are entirely considered as legal and illegal respectively, there is no clear-cut classification of tax avoidance as either legal or illegal. This has created a controversy as to the legality or otherwise of the concept of tax avoidance. The objective of this article is to examine the concept of tax avoidance, its legality or otherwise.

Keywords: Taxation, Planning, Evasion, Avoidance, legal, illegal.

1.0 Introduction

The need for the government to provide social amenities and embark on developmental projects that would improve the living standard of its citizenry as well as meet its overhead or recurrent expenses necessitated an intensified revenue generation efforts of government both internally and externally. One of the major sources from which the government generates revenue is by levying taxes on the taxpayers which can either be individuals, corporate entities, goods or services.[1]

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[1] Rotimi O. and Udu S. A., 'Revenue Generation and Engagement of Tax Consultants in Lagos State, Nigeria: Continuous Tax Evasion and Irregularities' (2003) 1(10) European Journal of Business and Social Sciences 26

Taxation is now generally regarded as important source of revenue generation for the government.[2] Firstly, it raises a significant amount of revenue for the federal/central government. For example, in Nigeria, the government of the country through its revenue agency, Federal Inland Revenue Service (FIRS), says it generated 1.97 trillion Naira in revenue in the first half of 2015 which represented 98% of the targeted revenue of 2.28 trillion Naira for January and June 2015.[3] Likewise, in the year 2018, the government disclosed that it generated 5.320 trillion Naira in Revenue.[4] This was said to be the highest revenue generated from taxation in the history of Nigeria as at that 2018. This shows how tax has become as a major source of revenue generation for the government of Nigeria. However, the government's revenue generation efforts from taxation are usually impeded by certain resistant such as tax avoidance. Tax avoidance, alongside other concepts such as tax planning and tax evasion, have been described as fiscal termites eating away at the potential tax revenue of government.[5]

The concepts of tax planning, alongside tax planning and tax evasion, contribute to loss of revenue to the government. However, unlike tax planning and tax evasion which are entirely considered as legal and illegal respectively, there is no clear-cut classification of tax avoidance as either legal or illegal. This has created a controversy as to the legality or otherwise of the concept of tax avoidance. It is therefore important to examine the concept of tax avoidance to know whether the concept is acceptable like tax planning or unacceptable like tax. The objective of this article is to examine the concept of tax avoidance to determine the legality or otherwise of the concept.

2.0 What is tax avoidance?

There is no fixed legal, legislative or statutory definition/meaning of tax avoidance owing to the difficulty of framing an exhaustive definition to cover the concept and as such, a precise definition is not easy to frame for the concept.[6] Although, the courts have sought to elucidate the meaning of

[2] Hungerford T. L., 'Corporate tax rates and economic growth since 1947', Economic Policy Institute (Washington DC, 4 June 2013) <http://www.epi.org/publication/ib364-corporate-tax-rates-and-economic-growth> accessed on 24 April 2024.

[3] Premium Times, 'FIRS realises N1.97trillion revenue', *Premium Times Newspaper* (Lagos 10 August 2015) <http://www.premiumtimesng.com/business/banking-and-finance/188103-firs-realises-n1-97trillion-revenue.html> accessed on 15 April 2024.

[4] Oladeinde Olawoyin, 'FIRS generates N5.3 trillion in 2018, highest in Nigeria's history-Official' (Lagos 8 January 2019) <https://www.premiumtimesng.com/news/headlines/304675-firs-generates-n5-3-trillion-in-2018-highest-in-nigerias-history-official.html> accessed on 15 May 2024.

[5] Tanzi V., 'Globalization, Technological Developments and the works of Fiscal Termites' International Monetary Fund Working Paper 2000, <http://ww.imf.org/external/.../wp00181.pdf> accessed on 13 May 2024

[6] Abdulrazaq M. T., *Principles and Practice of Nigerian Tax Planning & Management*, (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013)

tax avoidance especially by distinguishing the concept from tax planning, however, there has been no clear cut definition as of the concept of tax avoidance.[7]

Therefore, to find a suitable definition to understand the concept tax avoidance, reliance will be placed on definition in dictionaries and the definitions that have been provided by various authors. Definitions contained in various judicial pronouncements on tax avoidance as well as reports of tax committee set up by the government on tax avoidance will also be relied on

According to the Black's Law Dictionary, tax avoidance is defined as the 'act of taking advantage of legally available tax planning opportunities in order to minimize one's tax liability'.[8] In other words, tax avoidance occurs when persons arrange their affairs in such a way as to take advantage of weaknesses or ambiguities in the tax law. Although the means employed are legal and not fraudulent, the results are considered immoral, improper, abusive and against the spirit of the law.[9] The 'Radcliffe Commission'[10] defined tax avoidance as some act by which a person so arranges his affairs that he is liable to pay less tax than he would have paid but for the arrangement. A similar definition is given by Canada's Carter Commission[11] which defined tax avoidance as every attempt by legal means to reduce tax liability which would otherwise be incurred by taking advantage of some provision or lack of provision in the law. The definition of tax avoidance is also provided by the Organization for Economic Co-operation and Development (OECD) as follows:

> Tax avoidance which is generally used to describe the arrangement of a taxpayer's affairs that is intended to reduce his tax liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow[12].

In Australia, the Review of Business Taxation in 1999 defined tax avoidance as follows:

> Tax avoidance [is] a misuse or abuse of the law [that] is often driven by the exploitation of structural loopholes in the law to achieve tax outcomes that were

[7] *CIR v Challenge Corp Ltd [1986] S.T.C. 548; IRC v Willoughby [1997] 1 W.L.R. 1071, HL, [1997] S.T.C. 995*. James Kessler, 'Tax Avoidance Purpose and Section 741 of the Taxes Act' (2004) British Tax Review 375.

[8] Black's Law Dictionary (9th Ed.) (Ed. Bryan A. Garner) p. 1599

[9] United Nations, 'Committee of Experts on International Cooperation in Tax Matters 7th Session in Geneva, Revision of the Manual for the Negotiation of Bilateral Tax Treaties, (19th October 2011), No. E/C.18/2011/CRP.11/Add.1, <http://www.un.org/.../tax/.../CRP11_Add1_Tax%20Evasion.pdf>, accessed on 17 May 2024

[10] The Royal Commission on Taxation of Profits and Income, United Kingdom, 1955 para 1016

[11] Royal Commission on Taxation (The Carter Commission) 1966 Canada

[12] The Organization for Economic Co-operation and Development (OECD) Glossary of Tax Terms <http://www.oecd.org/ctp/glossaryoftaxterms.html> accessed on 14 April 2024

not intended by Parliament but also includes the manipulation of the law and a focus on form and legal effect rather than substance.[13]

Various authors have also provided useful definition of tax avoidance. According to Wheatcroft G.S.A, tax avoidance is the art of dodging tax without actually breaking the law, or alternatively, the right of every citizen to structure ones affairs in a manner allowed by law, to pay no more than what is required.[14] Professor David Ulph[15] defined tax avoidance as the use of artificial or contrived methods of adjusting taxpayers' social, economic or organizational affairs to reduce their tax liability in accordance with the law while not affecting the economic substance of the transactions.[16] These authors are of the view that tax avoidance must be defined as a transaction which avoids tax and which is entered into for the purpose of avoiding tax by adopting some artificial or unusual forms for this purpose and which is not a transaction which the legislature has intended to encourage[17].

The Courts have also had the opportunity to give succinct interpretation to the term 'tax avoidance' which usually arises from cases coming before the Courts on the grounds of contravention of sections in the tax law usually referred to as an anti-avoidance provision[18]. However, courts in Nigeria and the United Kingdom have adopted different approaches to the interpretation of tax avoidance and this has resulted in different meaning and definitions of the term.[19] The obvious result of this is that different approaches by the courts in interpreting tax law have resulted in different classification of transaction and as such, inter-country comparisons in this respect have proved fruitless in the search for common meaning of the term of tax avoidance.[20]

One of the clearest definitions of tax avoidance was provided by Lord Nolan in his judgment in the *Willoughby case*[21], which also very succinctly seeks to draw a line of distinction between tax avoidance and tax planning. Lord Nolan stated:

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[13] Second Reading Speech, Income Tax Laws Amendment Bill (No. 2) 1981, Hansard, House of Representatives, 27 May 1981.

[14] Wheatcroft G.S.A- 'The attitude of the Legislature and the Courts to tax avoidance', (1955) 18 (3) Modern Law Review 209

[15] He was formerly the Director of the Analysis and Research Division of Her Majesty Revenue & Customs (HMRC). He is now a Professor of Economics and Head of the School of Economics and Finance at the University of St. Andrews, <http://www.standrews.ac.uk/economics/staff/du1.html%20> accessed on 15 April 2024.

[16] KPMG Tax Business School - 'From debate to action- Drawing the lines and finding the balances', A discussion paper by David F. Williams of KPMG Tax Business School September 2007, <http://www.kpmg.co.uk/pubs/Tax_and_CSR_Final.pdf> accessed on 15 April 2024.

[17] Ibid 209

[18] Abdulrazaq M. T., *Principles and Practice of Nigerian Tax Planning & Management*, (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013) 109

[19] Ibid 109

[20] Ibid 109

[21] *CIR v Willoughby* [1997] 4 All ER 65 at p.73, See also the case of *CIR v Challenge Corp Ltd* [1986] S.T.C. 548

> The hall mark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hall mark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option.

From the above definition given by Lord Nolan, there is a difference between tax avoidance and tax planning. Further to this, Lord Templeman in the *Challenge Corporation case*[22] noted that:

> Income tax is avoided, and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax.

Tax Avoidance is further defined by the European Court of Justice[23] as wholly artificial arrangements which are designed to obtain a tax advantage which are aimed at circumventing tax laws[24]. In Nigeria, the case of *Akinsete Syndicate V. Senior Inspector of Income Tax*[25] provided an insight into the meaning of tax avoidance where the court held that tax avoidance by lawful means is acceptable even though the Court did not state which category of tax avoidance by lawful means is not acceptable.[26]

3.0 Legality or otherwise of tax avoidance

From the above definitions, it can be deduced that tax avoidance is a process of legally exploiting the tax system to reduce current or future tax liabilities by means not intended by parliament. It

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[22] *CIR (NZ) v Challenge Corporation Ltd, [1987] AC 155*

[23] The European Court of Justice (ECJ), officially just the Court of Justice, is the highest court in the European Union in matters of European Union law. As a part of the Court of Justice of the European Union it is tasked with interpreting EU law and ensuring its equal application across all EU member states. The Court was established in 1952 and is based in Luxembourg. <http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.html> , accessed on 17 April 2024.

[24] Imperial Chemical Industries Plc (ICI) v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes), ("ICI"), [1998] ECR I-4695.

[25] *Akinsete Syndicate V. Senior Inspector of Income Tax* F.S.C 164/66 (Unreported)

[26] Abdulrazaq M. T., Principles and Practice of Nigerian Tax Planning & Management, (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013) 109

often involves artificial transactions that are contrived to produce a tax advantage.[27] This means that tax avoidance is not entirely illegal bearing in mind that it involves the legal utilisation of the tax regime to one's own advantage in order to reduce the amount of tax that is payable by means that are within the law.

Tax avoidance comes in many different forms, some of which are socially acceptable and desirable, while others are not. In its acceptable form, tax avoidance is taking advantage of fiscal incentives offered by Parliament in order to encourage a particular activity rather than for fiscal reasons. It covers making full use of exemptions and concessions deliberately granted by Parliament, even if only for reasons of administrative convenience.

In its unacceptable form, tax avoidance extends to taking advantage of statutory exemptions in situations for which they were never intended by Parliament, and the exploitation of "loopholes," that is to say, situations clearly within the intended scope of the tax but in fact falling outside the ambit of any relevant changing section. The classic form of unacceptable tax avoidance consists in the deliberate fashioning of a transaction into which the taxpayer proposes to enter so that it does not attract the tax which it would do if it were entered into in the normal and straightforward manner. Accordingly, where there are manipulations of various kinds which have the effect of reducing considerably the revenue that is due to government such practices would be disallowed. While a taxpayer has the right to arrange his affairs in order to reduce his tax liability, where such taxpayer embarks on an artificial arrangement for the purpose of escaping and reducing tax liability otherwise due, such an arrangement may not be socially acceptable.

It is important to note however that it is not all the activities of taxpayers towards reducing or minimizing their tax liability that will amount to tax avoidance. While tax avoidance is an example of tax minimization, other examples of tax minimization are tax evasion and tax planning/mitigation. Although these labels (that is tax avoidance, tax planning/mitigation and tax evasion) are not used universally, they have been accepted internationally by the International Academy of Comparative Law at its 18th congress in Washington in 2010.[28] The distinction between tax avoidance, tax planning/mitigation and tax evasion can be viewed as a partially overlapping legal spectrum of tax minimising behaviour.[29] At one end is tax evasion, which is

[27] Blumsom A., 'What is the difference between tax evasion and tax avoidance' Nouse (United Kingdom, 22 January 2013) <http://www.nouse.co.uk/2013/01/22/what-is-the-difference-between-tax-evasion-and-tax-avoidance/> accessed on 15 April 2024.

[28] Brown B. K. and Snyder D.V., 'General Report Regulation of Corporate Tax Avoidance' <http://www.link.springer.com/content/pdf/bfm%3A978-94-007-2354-2%2F1.pdf> accessed on 15 April 2024.

[29] Prebble B.C., 'Should Tax Avoidance be Criminalised? Tax Avoidance and Criminal Law Theory' (LL. B Thesis, University of Otago 2011) 20

illegal and criminal. Tax planning/mitigation, at the other end of the spectrum, is tax minimization behaviour that the government is aware of and allows to continue. In some instances, the government may even encourage it.[30] Tax avoidance on the other hand lies between the two, exploiting the form of tax law while denying its substance. It can therefore be postulated that while tax avoidance is legal, it is immoral, improper, abusive and against the spirit of the fiscal legislation.

4.0 What makes a transaction to constitute tax avoidance.

There is no consensus as to what makes a transaction to be tax avoidance. However, different formulations have been proposed in identifying transactions that amounts to tax avoidance which revolves around the notions of form, purpose, and policy.[31] This is briefly discussed below.

i. Form

The first approach in identifying tax avoidance is the form of the transaction. 'Form' generally refers to the legal relationships that gives legal structure to transactions through which taxpayers achieve desired economic results which is the 'economic substance' of the transactions[32]. The strength of the form approach in identifying tax avoidance is that it is consistent with the nature of tax law as a legal instrument intended to apply tax consequences to underlying economic outcomes. The form approach identifies the economic outcome of a transaction and concludes that tax avoidance occurs when the taxpayer secures that outcome (or its economic equivalent) but avoids the normative tax treatment of that economic outcome intended by Parliament[33].

As a result, the form approach to tax avoidance supports the achievement of underlying fiscal and economic policies because it ensures that tax is levied in accordance with those policies, which themselves seek to impose tax consequences based on the economic outcome, not the legal form, of transactions.

However, the form approach has some its own drawbacks[34]. Firstly, taxpayers faced with choosing between alternate legal forms for their transactions should not be forced to choose the higher-taxed alternative so long as there are valid business reasons for choosing a lower-taxed course of action[35]. Secondly, the mere fact that taxpayer have chosen lower-taxed legal forms does not automatically

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[30] Example are some of tax incentives such as Pioneer Status under the Industrial Development (Income Tax Relief) Cap I 7 LFN 2004, The Nigerian Liquefied Natural Gas (NLNG) (Fiscal Incentives, Guarantees and Assurances) Act Cap. N8 7 LFN 2004 and so on.

[31] Cooper G. S., Tax Avoidance and the Rule of Law (Amsterdam IBFD Publications BV, 1997) 28

[32] Taylor M. D., Tax Policy, and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Thesis, University of British Colombia 2006) 37

[33] Ibid 38

[34] Ibid

[35] Ibid

mean that tax avoidance has occurred[36]. Such a choice could be justified for business reasons, even if that legal form is artificial and contrived[37]. Thirdly, the legislation itself often encourages taxpayers to use artificial and contrived legal forms to achieve economic outcomes by suspending the normal tax consequences of those outcomes[38]. Taxpayers taking advantage of such incentives cannot not be viewed as engaging in abusive tax avoidance merely because they have chosen contrived, tax-preferred legal forms for their economic activities[39]. They are merely engaging in permissible tax planning/mitigation[40].

ii. Purpose

The second common approach to identifying tax avoidance focuses on the taxpayers' purposes in undertaking their transactions. This approach holds that, where taxpayers engage in transactions for the purpose of reducing their tax liability, the transactions are abusive and should not be given effect for tax purposes[41]. The purpose-oriented approach is premised on the view that tax law is intended to apply to real economic activities, not to provide taxpayers with an incentive to engage in artificial transactions without real economic substance merely for tax purposes[42]. Therefore, the purpose-oriented approach would not permit a profitable company to benefit from a transaction that allowed it to operate its business under the umbrella of a related company because the sole purpose of the related company was to reduce the taxes that the profitable company otherwise would have paid[43].

Given the complexity of taxpayers' commercial affairs in which business decisions are routinely influenced by tax considerations, this purposive approach naturally raises the question as to what degree tax must be a motivating factor for transactions to qualify as tax avoidance[44]. Is the transaction be solely tax-motivated, or is it sufficient for it to be partly so? If 'purpose' is indeed an appropriate criterion for identifying tax avoidance, surely a transaction with no purpose other than to obtain a tax benefit would be abusive. On the other hand, it would not necessarily be

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[36] Ibid
[37] Cooper G. S., Tax Avoidance and the Rule of Law (Amsterdam: IBFD Publications BV, 1997) 30
[38] Arnold B. & Wilson J., 'The General Anti-Avoidance Rule - Part II" (1986) 36(5) Canada Tax Journal 1144
[39] Peterson v. Commissioners of Inland Revenue (2005) U.K. P. C. (P.C.) (Peterson)
[40] *CIR v Willoughby [1997] 4 All ER 65 at p.73, See also the case of CIR v Challenge Corp Ltd [1986] S.T.C. 548*
[41] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Thesis, University of British Colombia 2006) 39
[42] Ibid 39
[43] Ibid 40
[44] Ibid 40

abusive for a taxpayer pursuing an ultimately non-tax objective (such as a business, investment, or family purpose) to choose a less-taxed means of doing so.[45]

Some writers have advocated a 'choice doctrine' under which taxpayers are entitled to choose the lowest-taxed options for achieving their ultimate business goals or purposes[46] and this doctrine was well articulated by the House of Lords in *Brebner's case* where Lord Upjohn observed as follow:

> when the question of carrying out a genuine commercial transaction is reviewed, the fact that there are two ways of carrying it out - one by paying the maximum amount of tax, the other by paying no, or much less, tax - it would be quite wrong, as a necessary consequence, to draw the inference that in adopting the latter course, one of the main objects is avoidance of tax[47]

A distinct advantage of a purpose-oriented approach is that, in the tax avoidance context, the purposes of taxpayers' transactions are generally much easier to identify, based on objective evidence, than the underlying policy or "object and spirit" of the relevant legislative provisions[48]. In addition, the business purpose test, a form of purpose-oriented approach adopted by the United States Supreme Court in 1935[49], has been the primary anti- avoidance rule employed in the United States and appears to have had some effect in controlling tax avoidance[50]. However, the purpose-oriented approach is also not without some weaknesses. One is that, from a tax policy perspective, taxpayers' motives and purposes are generally irrelevant to the taxation of their transactions because tax consequences are typically intended to result more from objective economic circumstances than from taxpayers' purposes for their transactions - except for in specific situations where legislation may make purposes relevant, such as when distinguishing between business and personal expenses[51].

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[45] Ibid 40

[46] Baker P., 'Tax Avoidance, Tax Mitigation and Tax Evasion' , Gray's Inn Tax Chambers, London <http://www.taxbar.com/mainfram.html > accessed on 22 April 2024

[47] *Inland Revenue Commissioners v. Brebner, [1967] 2 A.C. 18(H.L.),* See *I.R.C. v. Wesleyan & Gen. Assur. Soc. (1948), 30 Tax Cas. 11, at 25 (H.L.)*

[48] Arnold B., 'In Praise of the Business Purpose Test', in Report of the Proceedings of the Thirty-Ninth Tax Conference, 1987 Conference Report (Toronto: Canadian Tax Foundation, 1988)

[49] *Gregory v. Helvering, 293 U.S. 465 (1935)*

[50] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Thesis, University of British Colombia 2006) 41

[51] Ibid 42

A more significant problem with the purpose- oriented approach relates to the numerous tax expenditure provisions that encourage certain activities by granting tax reductions and incentives at the expense of tax law's primary purpose of raising revenue[52]. With this in mind, some taxpayers will likely engage in certain transactions in order to obtain those tax incentives even without an underlying non-tax purpose.[53]

iii. Policy

The third main approach to identifying tax avoidance focuses on the policies underlying the legislation. Under this approach, tax avoidance occurs when taxpayers obtain tax consequences not intended by Parliament or by the scheme of the legislation, or when their activities defeat the policy underlying the legislation[54]. This approach has been articulated in several ways. For instance, the UK Tax Law Review Committee (TLRC) described tax avoidance as any action taken to reduce or defer tax liabilities in a way that Parliament plainly did not intend or could not possibly have intended had the matter been put to it[55].

Some authors, describes tax avoidance as an incongruence between the tax outcome and the government's purpose that results when the legislation is mechanically applied without attempting to give effect to its underlying purpose or policy[56] while some other authors have suggested that tax avoidance becomes abusive when taxpayers are in conflict with the general policy of the statute, and are taking advantage of faulty or incomplete legislative language which has been used to give effect to the policy[57].

The policy-based approach is premised on the idea that tax laws does have some underlying policy aims, and taxpayers' transactions can sometimes lead to results that run counter to that policy, particularly where the legislation as it is drafted does not anticipate the way the taxpayer uses the provisions[58]. From a tax policy perspective, the advantage of this approach is apparent. It focuses on the fiscal and economic policies underlying the legislation, and measures transactions against

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[52] Example of these are the allowances provided under the Second Schedule to the Companies Income Tax Act CAP C.21 LFN 2004, Pioneer Status under the Industrial Development (Income Tax Relief) Cap I 7 LFN 2004, The Nigerian Liquefied Natural Gas (NLNG) (Fiscal Incentives, Guarantees and Assurances) Act Cap. N8 7 LFN 2004 and so on.

[53] See the Canadian case of *Stubart Investments Ltd. v. R., 84 D.T.C. 6305 at 6324*

[54] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Thesis, University of British Colombia 2006) 43

[55] The Institute of Fiscal Studies Tax Law Review Committee <http://www.ifs.org.uk/comms/comm64.pdf> accessed on 15 April 2024

[56] Parsons R. W., Income Taxation in Australia (Sydney: Law Book Co., 1985) in Cooper G. S., Tax Avoidance and the Rule of Law (Amsterdam IBFD Publications BV, 1997) 30

[57] Hogg P., Magee J. & Li J., Principles of Canadian Tax Law, 4th ed. (Toronto: Carswell, 2002) 555

[58] *Imperial Oil Ltd. v. The Queen, 2004 D.T.C. 6044 (F.C.A.)*

that policy. This approach recognizes that, with respect to a given transaction, it should be possible to identify a normative ideal tax treatment intended by Parliament, or one which would have been intended by Parliament, even if the legislation does not specifically contemplate the given transaction[59]. This approach also allows for tax mitigation/planning because it acknowledges that some tax-reduction transactions accord with the purpose of the legislation[60].

On the other hand, the disadvantage of this approach is that it can sometimes be extremely difficult to clearly identify a policy underlying tax legislation.[61]. It is arguable that 'Parliamentary intent' is merely a fiction in the tax context, since it is highly unlikely that members of Parliament clearly understand the detailed legislative provisions that they enact or why they do so and therefore determine what the parliament intention is will be left for the courts.

However, determining the parliament intention can be problematic to the courts which are used to applying tax law based on its words, not to considering underlying tax policy more generally[62]. Although the policy approach to tax avoidance is good tax policy, it could prove impractical by requiring the Courts to go behind the legislation to deal with questions of underlying policies that Courts are not well suited to answering[63].

From close examination of each of the three main approaches to identifying tax avoidance, they all have their strengths and weaknesses, and none is adequate on its own. It has therefore been suggested that a coherent, tax policy-oriented approach to identifying tax avoidance should draw on elements of all three approaches, while retaining the focus on underlying issues of tax policy[64]. Some authors have propounded one of such integrated theory, which includes the following three elements as follows:

(a) tax avoidance transactions result in a mismeasurement of taxpayers' economic income so that they pay less tax than they would have paid if they were taxed on their economic income.

(b) tax avoidance transactions are engaged in by taxpayers for the sole or primary purpose of obtaining such a tax benefit; and

[59] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Thesis, University of British Colombia 2006) 45

[60] Cooper G. S., Tax Avoidance and the Rule of Law (Amsterdam IBFD Publications BV, 1997) 31

[61] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Thesis, University of British Colombia 2006) 46

[62] Ibid 45

[63] Ward D., 'The Business Purpose Test and Abuse of Rights' (1985) 1 British Tax Review 121

[64] Taylor M. D., Tax Policy and Tax Avoidance: The General Anti-Avoidance Rule from a Tax Policy Perspective (LLM Thesis, University of British Colombia 2006) 47

(c) the mismeasurement of economic income created by tax avoidance transactions is not a mismeasurement that was contemplated for administrative or policy reasons by the structure of the tax legislation[65]

It is therefore clear that in identifying tax avoidance, attention should be focused more on the means adopted to implement a particular arrangement, transaction, or scheme. This means that the greater the degree of artifice, the more likely it is that the arrangement, transaction, or scheme is of a kind which was not intended by the legislature to provide tax savings.[66]

5.0 The underlying incentive for tax avoidance

There are various and different reasons and incentives why taxpayers indulge in tax avoidance. These reasons can be classified into two categories.[67] The first category comprises factors that negatively affect taxpayers' compliance with tax legislation. These factors consist of low willingness to pay taxes (low tax morale), high costs to comply with tax laws, low quality of the service in return for taxes, lack of fairness and equity in the tax system, low transparency and accountability of public institutions, high level of corruption and lack of rule of law and weak fiscal jurisdiction.[68] The second category comprises reasons for the low ability of tax administration and fiscal courts to enforce tax liabilities. These factors can be summarized as resulting from insufficiencies in the administration and collection of taxes as well as weak capacity in auditing and monitoring tax payments which limit the possibility to detect and prosecute violators.[69]

Apart from the above, several studies also indicate that tax avoidance strategies are often pitched to companies as a way to increase financial accounting earnings, thus boosting the company's reputation and possibly share price.[70] In addition, some corporate leaders and analysts perceive tax avoidance as unproblematic, pointing to lawmakers' failures to make such practices illegal as an

[65] Brooks N., 'The Responsibility of Judges in Interpreting Tax Legislation' in Cooper G. S., Tax Avoidance and the Rule of Law (Amsterdam IBFD Publications BV, 1997) 96. See Rosenberg J. D., "Tax Avoidance and Income Measurement" (1988-1989) 87 Michigan Law Review 365

[66] Abdulrazaq M. T., *Principles and Practice of Nigerian Tax Planning & Management*, (2nd ed. Stirling-Horden Pub. Ltd. Ibadan 2013) 113

[67] The International Tax Compact (ITC), 'Addressing tax evasion and tax avoidance in developing countries' <http://www.taxccompact.net/.../2011-09-09_GT > accessed on 24 April 2024

[68] Ibid

[69] Ibid

[70] Graham J. R., 'Incentives for Tax Planning and Avoidance: Evidence from the Field 26' (MIT Sloan Research Paper No. 4990-12, 2013) http://www.ssrn.com/abstract= 2148407 m accessed on 22 March 2024

indication of its acceptability.[71] For example, in defending Google's tax arrangements, which reportedly involved the (legal) transfer of $9.8 billion of revenues from international subsidiaries into Bermuda in 2011, Google Chairman, Eric Schmidt, reportedly stated, 'I am very proud of the structure that we set up. We did it based on the incentives that the governments offered us to operate'.[72]

Corporate leaders, in some other occasions, have viewed tax avoidance as obligatory and as part of their fiduciary duties to shareholders.[73] For example, in response to criticism of General Electric (GE)'s tax practices, GE's 2010 Citizenship Report emphasized that the company fully complies with the law and there are no exceptions but at the same time acknowledged that it has a responsibility to its shareholders to reduce its tax costs as the law allows.[74]

A study analysing why a corporate tax executive would refuse to engage in tax avoidance strategies revealed that a majority (69.5%) of executives considered the potential harm to the company's reputation to be an important or very important factor in determining whether or not to adopt a tax avoidance strategy.[75] This means that the risk of harm to a company's reputation is more frequently cited consideration not to engage in tax avoidance than the risk of detection and challenge by the tax authority.[76]

Overall, many factors influence the decisions whether to engage in tax avoidance practices. Overall, tax avoidance involves no more than the selection of a method of transaction which is least costly in tax as it conveniently involves the techniques by which the lawyers and the accountants can so arrange a client's affairs to achieve a reduction in the amount of tax he would otherwise have to pay.[77]

6.0 The Extent of Tax Avoidance in Nigeria

[71] Fisher J. M., 'Fairer Shores: Tax Havens, Tax Avoidance, And Corporate Social Responsibility' (2014) 94 Boston University Law Review 348

[72] Ibid 349

[73] Ibid 349

[74] General Electric Corporation, GE 2010 Citizenship Report 17 (2010) http://www.ge.com/lu/en/docs/_131541718 8571_ge_2010_citizenship_report.pdf accessed on 22 April 2024

[75] Fisher J. M., 'Fairer Shores: Tax Havens, Tax Avoidance, And Corporate Social Responsibility' (2014) 94 Boston University Law Review 349

[76] Ibid 349

[77] Abdulrazaq M. T. 'Judicial and Legislative Approaches to Tax Evasion and Avoidance in Nigeria' (1985) 29(1), Journal of African Law 65

Tax avoidance has undoubtedly adversely affected the government revenue generation capability and the economy.[78] This is because tax avoidance has damaging effects on the economy as there is always the prospect of losing much needed revenue through avoidance of corporation.

According to Alison Holder,[79] the effects of tax avoidance on developed economies is minimal because these countries have strong regulatory framework to checkmate the menace of tax avoidance. On the other hand, the effect of tax avoidance on developing economies such as Nigeria on the other hand are most acute as tax avoidance in these countries has a very direct and life or death impacts because these countries lacks the strong regulatory framework to curb tax avoidance and most of these countries are mostly in need of the predictable sources of tax revenue to invest in essential services like healthcare, education, and infrastructure.[80]

In addition, Andrew Hogg was of the view that the damage of tax avoidance to the developed countries economy is bad enough. However, the damage of tax avoidance to the economy of a developing country such as Nigeria is worse, and that the revenue lost each year due to tax avoidance is very nearly one and a half times what the country receives in terms of aid.[81]

Furthermore, research have indicated that the costs of tax avoidance have a disproportionate large effect on developing economies than on developed economies. According to the Global Financial Integrity[82], close to $100 billion per year is lost in revenue to tax avoidance activities of corporations in developing countries[83] Another report compiled by Christian Aid estimates that damage to developing countries amounts to somewhere in the region of $160bn (£100bn) each year, money which if it was available to the governments of poorer countries could go somewhere towards improving essential services such as health and education[84].

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[78] Rushanara Ali, 'Tax avoidance hurts both Britain and developing countries', Labour List Magazine (United Kingdom, 9 February 2013) <http://labourlist.org/2013/02/tax-avoidance-hurts-both-britain-and-developing-countries/> accessed on 14 April 2024.

[79] She is the Policy Manager (Tax and Inequality) at Oxfam, leading on international and UK tax policy for Oxfam GB, <http://policy-practice.oxfam.org.uk/our-people/advocacy/alison-holder> accessed on 15 April 2024.

[80] World Finance Magazine, 'The true costs of tax avoidance' <http://www.worldfinance.com/strategy/the-true-costs-of-tax-avoidance> accessed on 15 April 2024.

[81] Sarah Graham, 'Starbucks, Amazon and Google tax avoidance: What is the impact on developing countries?' Metro Magazine (United Kingdom 17 December 2012) <http://metro.co.uk/2012/12/17/starbucks-amazon-and-google-tax-avoidance-what-is-the-impact-on-developing-countries-3317029/ > accessed on 14 April 2024.

[82] Global Financial Integrity (GFI) is a non-profit, Washington, DC-based research and advisory organization, which produces high-caliber analyses of illicit financial flows, advises developing country governments on effective policy solutions, and promotes pragmatic transparency measures in the international financial system as a means to global development and security <http://www.gfintegrity.org/about/> accessed on 15 April 2024.

[83] World Finance Magazine, 'The true costs of tax avoidance' <http://www.worldfinance.com/strategy/the-true-costs-of-tax-avoidance> accessed on 15 April 2024.

[84] A Christian Aid report, 'Death and taxes: The true toll of tax dodging' <http://www.christianaid.org.uk/images/deathandtaxes.pdf > accessed on 13 March 2024.

For some Non-Governmental Organizations like Save the Children[85], the impact and effect of tax avoidance is not just an economic but a political problem. According to Alex Cobham[86], the impact of lost revenues due to tax avoidance is much more direct, not just on the quality of development but on people's lives and impacts on things like mortality and health.[87]

The impact and effect of tax avoidance on the economies of developing countries such as Nigeria was well encapsulated by Raymond Baker[88] who described tax avoidance as the ugliest chapter in global economic affairs since slavery and is still one of the one of the worst problem affecting low-income economies.[89] This is due to the fact that tax revenue accounts for the major source of the government revenue after oil export as the government generally lack the legislative and administrative resources to tackle the issue head on.[90]For example, Nigeria lost several billions of dollars in tax revenues every year due to unreformed tax regimes and ineffective tax legislation that have aided tax avoidance by local and multinational corporations[91]. According to an investigative report by Premium Times in Nigeria, it was revealed that telecommunication giant, MTN, has been running circles around Nigerian revenue authorities using a complex but noxious tax avoidance scheme of shifting profits to countries with low or no tax rate called Transfer Pricing. The report indicated that in 2013, MTN set aside =N=11.398 billion from MTN Nigeria to pay to MTN Dubai and a similar transfer of =N=11.789 billion was made by MTN Ghana to the same MTN Dubai, making it a total of N23.187 billion that was shipped out of Africa to the Dubai offshore account which is a tax haven.[92]

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[85] Save the Children also known as the Save the Children Fund International is an international non-governmental organization that promotes children's rights provides relief and support children in developing countries. It was established in the United Kingdom in 1919 in order to improve the lives of children through better education, health care, and economic opportunities, as well as providing emergency aid in natural disasters, war, and other conflicts, <http://www.savethechildren.net/>, accessed on 12 March 2024.

[86] He was the head of research at Save The Children <http://www.savethechildren.net/>, accessed on 12 March 2024.

[87] World Finance Magazine, 'The true costs of tax avoidance' <http://www.worldfinance.com/strategy/the-true-costs-of-tax-avoidance> accessed on 15 April 2024.

[88] The founder and President of the Global Financial Integrity, <http://www.gfintegrity.org/about/> accessed on 15 April 2024.

[89] Baker R., 'The Ugliest Chapter in Global Economic Affairs Since Slavery' <http://www.taxjustice.net/cms/upload/pdf/Baker_070628_Conference_speech.pdf> accessed on 15 April 2024.

[90] World Finance Magazine, 'The true costs of tax avoidance' <http://www.worldfinance.com/strategy/the-true-costs-of-tax-avoidance> accessed on 15 April 2024.

[91] Bakre O. M., 'Tax Avoidance, Capital Flight and Poverty in Nigeria: The Unpatriotic Collaboration of the Elite, the Multinational Corporations and the Accountants: Some Evidence' (Paper presented at the Tax Workshop, University of Essex, United Kingdom, July 2006)

[92] Emmanuel Mayah 'How MTN ships billions abroad, paying less tax in Nigeria' Premium Times Newspaper (Nigeria 26 October 2015) <http://www.premiumtimesng.com/investigationspecial-reports/192159-investigation-how-mtn-ships-billions-abroad-paying-less-tax-in-nigeria.html> accessed on 29 April 2024.

7.0 Conclusion and Recommendations

The article provided an in-depth understanding of the concept of tax avoidance. The finding of the article revealed that tax avoidance involves the legal utilization of the tax regime to reduce the amount of tax that is payable by means that are within the law. The article further revealed that while tax avoidance is not entirely illegal and legal as tax evasion and tax planning respectively, it is immoral, improper, abusive and against the spirit of the law.

The article further revealed that while there is no consensus as to what makes a transaction to amount to tax avoidance, different formulations have been made in identifying transactions that amounts to tax avoidance which revolves around the notions of form, purpose, and policy. The article found that the incentive to engage in tax avoidance majorly revolves around low willingness to pay taxes (low tax morale), high costs to comply with tax laws, low quality of the service in return for taxes, lack of fairness and equity in the tax system, low transparency and accountability of public institutions, high level of corruption and lack of rule of law, weak fiscal jurisdiction, low ability of tax administration and fiscal courts to enforce tax liabilities.

The article also found that revenue loss to the menace of tax avoidance has continued to rise over the years in developing country such as Nigeria. It is therefore the recommendation of this article that the Nigerian government and its policy makers should, as a matter of urgency, put in place measures and policies to disincentives taxpayers from engaging in tax avoidance transactions and schemes.

The Legal Effect of the Digitisation of Tax Payment for Economic Development in Nigeria

Selome Oluwaseun, Ashimi* and Mujidat Subair-Bakare**

Abstract

The digitisation of tax payment holds significant potential to revolutionise Nigeria's taxation system and drive economic development. The Nigerian government has recently introduced various digital initiatives, such as the TaxProMax platform, to enhance tax collection and compliance. Taxation is a critical revenue source for governments, enabling the funding of public services, promoting economic growth, and reducing inequality. Digitisation can improve the efficiency and fairness of tax collection, but it also poses challenges, particularly for rural and low-income populations who may have limited access to technology or digital skills. This paper examines the legal effects of digitising tax payments in Nigeria and explores how these digital initiatives can foster economic development. Adopting a socio-legal approach, the paper analyses the legal, social, and economic implications of digitization. It investigates how digital technologies can enhance tax administration, improve revenue collection, and promote transparency and accountability. Contributing to the ongoing debate on the role of digital technologies in taxation and economic development, this paper offers insights into the legal effects of digitisation and proposes practical solutions to ensure Nigeria's tax system remains fair, transparent, and efficient in the digital age. It also addresses potential challenges and limitations, including data privacy concerns, cybersecurity risks, and the digital divide, and provides recommendations for policymakers and legal practitioners to ensure the effective implementation of digital tax payment systems.

Keywords: Tax payment digitisation, TaxProMax, Tax compliance, Tax administration, Economic development, Digital technologies.

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1.0.Introduction

The rise of digital technologies has significantly transformed various aspects of modern life, including the way taxes are paid. The use of online platforms, mobile apps, and biometric systems has revolutionised tax payment, making it easier, faster, and more secure. For instance, with platforms like the TaxProMax in Nigeria, taxpayers can now pay their taxes directly from their smartphones, eliminating the need for physical visits to tax offices or handling physical cash. This convenience can potentially increase tax compliance and enhance tax revenue mobilisation, thereby contributing to economic development.

Taxation is a cornerstone of economic development as it provides governments with the necessary resources to fund public goods and services such as education, healthcare, and infrastructure. These investments, in turn, attract foreign investment, stimulate economic growth, and help reduce income inequality. Therefore, efficient, and effective tax collection is crucial for economic development, and digitisation holds significant potential to improve the tax system.[1] However, the digitisation of tax payment is not without its challenges. Effective legal frameworks, including data protection laws and cybersecurity regulations, are essential to ensure the privacy and security of taxpayers' data. Many countries, including Nigeria, still lack comprehensive legal and regulatory frameworks to effectively address these challenges.[2] The implementation of digital tax systems also presents practical challenges, such as data privacy concerns, cybersecurity threats, and regulatory gaps that need to be addressed to fully realise the benefits of digitization.

The Nigerian tax system has historically faced numerous challenges, including low tax compliance, corruption, and tax evasion.[3] Digitisation offers a promising solution to these issues by automating tax processes, increasing transparency, and reducing human interference. For

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1 Ogunleke, A. O. (2021). "Tax reforms and Economic Development in Nigeria: A Critical Review. (2021) 11(13) *Journal of Economic Issues and Development,* pp. 1759-1782

2 Organisation for Economic Co-operation and Development (OECD). 'Nigeria: Revenue Administration in the Digital Age.' (*OECD:* 2019), <https://www.oecd.org/tax/tad/Nigeria-Revenue-Administration-in-the-Digital-Age.pdf > accessed April 27, 2024.

3 Jooji, I., Oyekan, M., Momoh, Z. and Onuh, S. "The Federal Inland Revenue Service (FIRS), Tax Compliance and the Fight Against Corruption in Nigeria." (2023) 8(9) *International Journal of Professional Business Review*, pp. 1-12.

example, by automating tax assessments and providing real-time updates to taxpayers, digital systems can significantly reduce opportunities for corruption and errors. Despite these benefits, digitisation alone is not a panacea for all economic development challenges. Other critical factors, such as good governance, investment in education and infrastructure, and a stable political environment, are also essential for promoting sustainable economic growth.

This paper aims to explore the legal effects of digitising tax payments on economic development in Nigeria. It will examine the potential benefits, challenges, and policy implications of digitisation for the country's tax system and economy. By adopting a socio-legal approach, the paper will analyse the interplay between legal frameworks, social factors, and economic outcomes. It will explore how digital technologies can enhance tax administration, improve revenue collection, and promote transparency and accountability. Furthermore, the paper will address potential challenges and limitations of digitisation, including data privacy concerns, cybersecurity risks, and the digital divide, and provide recommendations for policymakers and legal practitioners to ensure the effective implementation of digital tax payment systems.

2.1. Conceptual Clarification: Digitisation of Tax Payment

Digitisation of tax payment refers to the process of utilising digital technologies such as computer software, mobile applications, and internet-based platforms to automate and simplify the tax collection and payment process. This modernisation encompasses several key elements:

1. *Online Tax Returns:* Taxpayers can file their tax returns electronically, significantly reducing the need for paper-based submissions. This not only streamlines the process but also minimizes errors and enhances efficiency.
2. *Electronic Payments:* Taxpayers can use digital payment methods such as credit cards, bank transfers, and mobile money to pay their taxes. This facilitates prompt payments and reduces the inconvenience associated with traditional payment methods.

The digitisation of tax payment processes brings numerous advantages. Firstly, it simplifies and automates tax-related tasks, improving overall efficiency. Taxpayers can access various online services, including viewing and updating their tax accounts, making payments, and receiving notifications about their tax liabilities. These services help taxpayers stay informed about their obligations and avoid penalties for late payments or incorrect filings, thereby improving compliance and satisfaction. Moreover, digital tax systems promote transparency and accountability in tax collection. By providing taxpayers with access to their tax accounts and payment histories, these systems help prevent corruption and tax evasion. For example, in

countries where tax evasion and corruption are rampant, providing a transparent digital platform for tax transactions can significantly reduce opportunities for fraudulent activities.

Additionally, the digitisation of tax payment can enhance financial inclusion and financial literacy. In many developing countries, such as Nigeria, a significant portion of the population remains unbanked and financially excluded. By integrating digital payment methods into the tax collection process, tax authorities can encourage more people to open bank accounts and use digital financial services. This can help individuals' access credit, savings, and other financial products, fostering economic growth and stability. However, the digitisation of tax payment is not without its challenges. Issues related to data privacy and cybersecurity are paramount. As taxpayers' financial information becomes increasingly digitised, it becomes more vulnerable to cyber-attacks and unauthorized access. Ensuring robust cybersecurity measures and data protection regulations is crucial to safeguard this sensitive information. Furthermore, digital literacy remains a significant barrier. While digital platforms offer convenience, not all taxpayers may have the necessary skills or access to technology to use these systems effectively. In rural areas or among low-income populations, limited access to technology and inadequate digital skills can hinder the adoption of digital tax payment systems. Governments and tax authorities need to invest in digital literacy programs and infrastructure development to bridge this gap.[4]

2.1.1. Types of Digitisations of Tax Payment System

The digitisation of tax payment systems encompasses various methods and technologies designed to streamline and enhance the efficiency of tax collection and compliance. Here are some key types of digitised tax payment systems:

i. *Electronic Tax Filing (e-Filing):* Electronic tax filing allows taxpayers to submit their tax returns online using specialised tax preparation software or web-based platforms. This method reduces the need for paper-based submissions, helping taxpayers avoid errors and making the filing process more convenient. It also enables tax authorities to quickly process tax returns and issue refunds, significantly reducing processing times and enhancing taxpayer satisfaction.[5]

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4 Gervais, G. *Digital Transformation of Tax Administration: Lessons from Developing Countries. IMF Working Paper No. 19/72.* (Washington, D.C.: International Monetary Fund, 2019).

5 World Bank Group. 'Tax and Customs Administration Global Program, "Digitizing the Tax Process."' (*World Bank Group:* 2017, https://openknowledge.worldbank.org/bitstream/handle/10986/28552/Digitizing/eBook.pdf> accessed April 27, 2024.

ii. *Online Tax Accounts:* Providing taxpayers with access to their tax accounts through secure online portals or mobile applications allows them to log in using unique identifiers such as PINs or passwords. Through these accounts, taxpayers can view their tax liabilities, payment history, and communications from the tax authority. Online tax accounts help taxpayers stay informed about their obligations and take proactive steps to manage their taxes.[6]

iii. *Automated Tax Assessments:* Some tax authorities utilise artificial intelligence (AI) and data analytics to automatically assess taxpayers' tax liabilities based on information from tax returns, financial statements, and other data sources. Automated tax assessments can improve accuracy and reduce the workload for tax authorities by quickly identifying discrepancies and potential issues. For example, Estonia, a leader in e-governance, employs automated tax assessments to streamline its tax collection process.[7]

iv. *Electronic Payments:* This system allows taxpayers to use digital payment methods such as credit cards, bank transfers, and mobile money to pay their taxes. Electronic payments provide a convenient and secure way for taxpayers to fulfil their tax obligations without the need to visit physical tax offices or handle cash transactions. This system can also help reduce the costs and risks associated with cash handling for tax authorities. In Nigeria, the introduction of the TaxProMax[8] platform enables electronic payments, making it easier for taxpayers to comply with their tax responsibilities.

v. *Digital Invoicing and Receipts:* Digital invoicing and receipts facilitate the electronic issuance and storage of invoices and receipts for tax purposes. This system helps businesses and individuals maintain accurate records and simplifies the tax reporting process. It also aids tax authorities in monitoring and verifying transactions, thus reducing tax evasion and fraud.

vi. *Tax Compliance Software:* Specialised software solutions assist taxpayers in ensuring compliance with tax laws and regulations. These tools often integrate with accounting systems and provide functionalities such as automated tax calculations, compliance

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6 OECD. *Op Cit.* Note 2.

7 Espinosa, V.I. and Pino, A. "E-Government as a Development Strategy: The Case of Estonia." (2024) *International Journal of Public Administration*, pp. 1-14.

8 It started on the 7th day of June 2021. TaxPro-Max is an online tax administration solution launched by the FIRS to facilitate the automation of tax processes, including registration, filing, payment, and reporting.

checks, and deadline reminders. Tax compliance software can help businesses avoid penalties and streamline their tax-related processes.

vii. *Mobile Tax Applications:* Mobile tax applications enable taxpayers to manage their tax affairs using smartphones and tablets. These apps provide functionalities such as filing tax returns, making payments, and accessing tax information on the go. Mobile tax applications increase accessibility and convenience for taxpayers, particularly in regions with high mobile phone penetration but limited internet access.

3.1. Digitisation of Tax Payment System in Nigeria

Digitisation of tax payment in Nigeria is in its nascent stages, but the country has made considerable strides in recent years. The Nigerian government through the Federal Inland Revenue Service (FIRS) has been proactive in adopting digital solutions to improve the tax system.[9] For instance, the FIRS has introduced the Electronic Tax Clearance Certificate (eTCC) and the Electronic Filing Portal allow taxpayers to process tax-related transactions online, significantly reducing the need for paper-based submissions and in-person visits to tax offices. Also, the introduction of the TaxProMax platform is another notable example, allowing taxpayers to file returns, make payments, and obtain receipts electronically. This platform is designed to simplify the tax compliance process, making it more user-friendly and accessible. Additionally, the Integrated Tax Administration System (ITAS) facilitates the automation of tax administration processes, enhancing the accuracy and speed of tax assessments and collections.[10] These platforms aim to enhance efficiency, transparency, and convenience for both taxpayers and tax authorities. Despite these advancements, several challenges hinder the full realisation of digitised tax systems in Nigeria. A significant barrier is the lack of access to digital tools among many taxpayers. Limited internet access, particularly in rural areas, and the affordability of smartphones and other digital devices pose significant obstacles. As of 2023, the internet penetration in Nigeria stands at above 50%, leaving a substantial portion of the population without reliable internet access.[11]

Cultural factors also play a role in the slow adoption of digital tax systems. There is a prevalent preference for cash transactions and a general mistrust of electronic payments among the populace.

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9 Banjo, I. O. and Longe, J A. "Tax Administration in a Digital Economy: The Nigerian Experience." (2020) 18(3) *Journal of Tax Administration,* pp. 12-24.

10 Mohammed, S.D., Mas' ud, A., Karaye, Y.I., Sallau, M.M., Adam, A.D. and Sulaiman, B.A. "An Evaluation of Tax Digitalization Efforts by Federal Inland Revenue Service and their Impacts on Tax Collection 2002-2021." (2023) 3(2) *Journal of Accounting and Taxation*, pp.105-122.

11 Sasu, D.D. 'Internet penetration rate in Nigeria from 2017 to 2023.' (*Statista:* Sep 6, 2023) <https://www.statista.com/statistics/1176092/internet-penetration-rate-nigeria/> accessed June 23, 2024.

This scepticism can be attributed to past experiences with digital fraud and a lack of familiarity with digital financial services. To address these issues, the Nigerian government, through the National Information Technology Development Agency (NITDA) is investing in digital literacy programs,[12] these programs will have a direct impact on the sensitization of taxpayers about the benefits and security of digital tax systems.

The digitisation of tax payment in Nigeria is expected to have far-reaching implications beyond tax collection and administration. One significant benefit is the promotion of financial inclusion. By integrating digital payment methods into the tax system, the government can encourage more Nigerians to open bank accounts and use digital financial services such as mobile money. This shift can help increase access to credit, savings, and other financial products, fostering broader economic participation.[13] Furthermore, digitisation can improve tax transparency and accountability. Digital systems provide taxpayers with easy access to information on government spending and revenue, which can help combat corruption and enhance the management of public funds. For instance, platforms like the Open Treasury Portal allow Nigerians to monitor government financial transactions, thereby promoting greater accountability. While the digitisation of tax payment offers numerous benefits, it also raises concerns about privacy, data security, and cybersecurity. The sensitive financial information of taxpayers is vulnerable to hacking and cyber-attacks. Ensuring the security of this data is paramount to maintaining public trust in digital tax systems. The Nigerian government must implement robust cybersecurity measures, including encryption, secure authentication methods, and regular security audits, to protect against potential threats.

3.2. Effects of Digitisation of Tax Payment in Nigeria

The digitisation of tax payment in Nigeria has the potential to bring about significant changes, both positive and negative, in the country's taxation system and broader economic landscape. By revolutionising tax collection and administration, it can enhance efficiency, transparency, and compliance, while also presenting challenges that need to be carefully managed to ensure equitable and effective implementation across different regions and socioeconomic groups.

Positive Effects:

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12 Na'ankwat, D. 'NITDA Targets 95% Digital Literacy in Nigeria by 2030.' (*Voice of Nigeria:* February 26, 2024) https://von.gov.ng/nitda-targets-95-digital-literacy-in-nigeria-by-2030/ accessed June 23, 2024.

13 Longe J.A. "Nigeria: Digital Taxation in the Age of the Fourth Industrial Revolution." (2020) 4(3) *Tax Law and Developing Economies,* pp. 1-24.

1. *Increased Tax Revenue:* Digitising tax payment processes can enhance the efficiency of tax collection by reducing human errors and administrative delays. Automation minimizes the opportunities for tax evasion and fraud, leading to higher and more accurate tax revenues for the government. For example, the integration of digital payment platforms can help the FIRS identify and track unpaid taxes more effectively. In Estonia, for instance, the implementation of digital tax systems has led to a significant increase in tax compliance and revenue,[14] demonstrating the potential for similar outcomes in Nigeria. By providing a seamless, transparent, and efficient process, taxpayers are less likely to engage in evasion tactics, and tax authorities can quickly identify discrepancies and enforce compliance. This system, coupled with automated reminders and easier payment methods, ensures that taxes are paid on time, thereby boosting the overall revenue collection.
2. *Enhanced Transparency:* Digital tax systems offer increased transparency for both taxpayers and the government. Taxpayers can easily track their payments, view their tax liabilities, and confirm that their payments have been correctly recorded. For the government, digital records provide a clear audit trail, reducing the risks of corruption and the mismanagement of public funds.[15] This transparency builds trust in the tax system and encourages compliance. The case of South Korea, which has implemented comprehensive digital tax administration, showcases how transparency can lead to higher compliance rates and reduced instances of corruption, with taxpayers able to monitor their contributions and the government's expenditure.[16] Additionally, the public's ability to see how their tax money is being utilized can foster a greater sense of civic responsibility and willingness to comply with tax laws.
3. *Improved Financial Inclusion:* Digitisation can drive financial inclusion by integrating more Nigerians into the formal financial system. Digital tax payment methods encourage individuals and businesses to use banking services and mobile money platforms. This inclusion can open access to other financial products and services, such as loans, savings accounts, and insurance, fostering economic growth. In Kenya, the widespread use of mobile money services like M-Pesa has not only revolutionised financial transactions but also enabled the government to collect taxes more efficiently from a broader base,

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14 Espinosa, V.I. and Pino, A. *Op Cit.* Note 7.

15 Charles, L. and Eswar, P. 'Digital Technologies for Financial Inclusion in Nigeria.' (*IMF Blog:* February 10, 2024) <https://blogs.imf.org/2019/11/12/digital-technologies-for-financial-inclusion-in-nigeria/> accessed April 27, 2024.

16 Bunn, D., Asen, E. and Enache, C. "Digital Taxation Around the World." (2020) 20(1) *Tax Foundation*, pp. 1-45.

demonstrating how digital platforms can enhance financial inclusion and tax revenue simultaneously.[17] By replicating such models, Nigeria can bring more people into the financial system, thus broadening the tax base and increasing overall economic activity.

4. *Improved Financial Literacy:* As more Nigerians use digital financial services for tax payments, there is an opportunity to enhance financial literacy. People become more familiar with managing their finances online, understanding financial products, and the importance of timely tax compliance. This knowledge can lead to better financial decision-making and economic stability. For instance, educational campaigns and user-friendly interfaces of digital tax systems in countries like Brazil have helped increase financial literacy, as citizens engage more actively with their financial obligations and understand the benefits of proper tax compliance.[18] Such educational initiatives can be tailored to different demographics, ensuring widespread understanding and utilization of digital tax platforms.
5. *Increased Convenience and Efficiency:* Digital tax systems reduce the time and effort required to comply with tax obligations. Taxpayers can file returns, make payments, and access tax information online without visiting tax offices. This convenience can lead to higher compliance rates and reduce the burden on tax administration resources. The U.K.'s HM Revenue and Customs (HMRC) digital services have shown how online tax filing and payment systems can streamline processes, reduce queues at tax offices, and enable taxpayers to fulfil their obligations at their convenience, ultimately leading to improved compliance rates.[19] Additionally, automated systems can process returns and payments much faster than traditional methods, reducing waiting times for refunds and other services.
6. *Enhanced Security:* Digital tax systems, when properly implemented, offer robust security measures to protect taxpayers' sensitive financial information. Encryption, secure authentication methods, and regular security updates can help prevent fraud and identity theft, providing peace of mind for taxpayers. In countries like Singapore, strong cybersecurity frameworks for digital tax platforms have significantly reduced cases of tax fraud and identity theft, ensuring the protection of taxpayer data and maintaining trust in the digital tax system.[20] Regular audits and updates to the security infrastructure can further

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17 Abdulhamid, N.A. "Disruptive Technology, Mobile Money, and Financial Mobilization in Africa: M-Pesa as Kenya's Solution to Global Financial Exclusion?" (2020) *Disruptive technologies, innovation and development in Africa*, pp.187-202.

18 Bunn, D., Asen, E. and Enache, C. *Op Cit.* Note 15.

19 James, M. *The UK Tax System-An Introduction*. (United Kingdom: Spiramus Press Ltd., 2021), p. 20.

20 Bunn, D., Asen, E. and Enache, C. *Op Cit.* Note 15.

bolster trust in the system, ensuring that taxpayer information remains confidential and secure.

Negative Effects and Challenges

1. *Data Security:* The digitisation of tax payment necessitates secure and reliable data management systems. Protecting taxpayers' sensitive information from theft, loss, or unauthorized access is paramount. Any breaches could undermine public trust in the digital tax system and deter compliance. In India, incidents of data breaches in digital financial services have highlighted the need for robust security measures to protect taxpayer information and maintain confidence in the system.[21]
2. *Cybersecurity Risks:* Digital tax systems are vulnerable to various cyber-attacks, including malware, phishing, and other hacking attempts. Cybersecurity threats can disrupt tax administration, lead to significant financial losses, and compromise taxpayer data. Continuous investment in cybersecurity infrastructure and practices is crucial to mitigate these risks. For example, Germany's approach to securing its digital tax platforms includes regular updates and stringent cybersecurity protocols, which have been effective in preventing large-scale cyber-attacks.[22]
3. *Digital Divide:* The shift to digital tax systems may exacerbate existing inequalities between urban and rural areas and among different socioeconomic groups. Urban populations generally have better access to the internet and digital devices, while rural areas often lag in digital infrastructure. Additionally, low-income individuals may lack the resources and digital literacy to utilize online tax services effectively. This digital divide could result in uneven compliance and benefits from the digitization of tax payments. In Mexico, efforts to bridge the digital divide by expanding internet access and digital literacy programs in rural areas have shown that targeted interventions can help mitigate these disparities.[23]
4. *Regulatory and Infrastructure Challenges:* The successful implementation of digital tax systems requires substantial investment in information technology infrastructure, legal frameworks, and public education. The Nigerian government must ensure robust legal regulations around data protection, cybersecurity, and digital transactions. Additionally,

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21 Bargavi, M., Senbagavalli, M., KR, T. and KR, T. "Data Breach–Its Effects on Industry." (2022) 1(2) *International Journal of Data Informatics and Intelligent Computing*, pp.51-57.

22 Bunn, D., Asen, E. and Enache, C. *Op Cit.* Note 15.

23 *Ibid.*

there must be adequate investment in infrastructure to provide reliable internet access and digital literacy programs to educate taxpayers on using digital tax platforms. Estonia's experience with digital tax systems underscores the importance of a strong regulatory framework and comprehensive infrastructure to support digital tax administration effectively.[24]

By considering these case studies and addressing these challenges, Nigeria can better navigate the complexities of digitizing its tax system and fully realize the potential benefits for economic development.

3.3. Digitisation of Tax Payment and Economic Development in Nigeria

The digitisation of tax payment in Nigeria is poised to bring a multitude of benefits that can significantly impact the nation's economic development. By leveraging digital technologies for tax administration, Nigeria can enhance revenue collection, promote transparency, support financial inclusion, and drive innovation across various sectors.[25] One of the most direct benefits of digitising tax payment is the potential increase in tax revenues. Automated systems can improve the accuracy and efficiency of tax collection, minimizing evasion and fraud. Higher tax revenues enable the government to allocate more resources to critical sectors such as infrastructure, education, and healthcare. For instance, increased funding for infrastructure projects can improve transportation networks, reduce logistics costs, and attract investments, thereby stimulating economic growth. Similarly, better-funded education and healthcare systems can enhance human capital, leading to a more productive workforce and a healthier population.

Digitisation can also lead to enhanced fiscal discipline and reduced corruption in tax collection. Digital systems provide clear, traceable records of transactions, making it harder for corrupt practices to go unnoticed.[26] This transparency builds trust in the tax system and creates a more predictable and stable business environment. As a result, both domestic and foreign investors are more likely to invest in Nigeria, knowing that their investments are safeguarded by a transparent and accountable fiscal regime. This influx of investment can further spur economic development by creating jobs, fostering innovation, and enhancing competitiveness.

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[24] Espinosa, V.I. and Pino, A. *Op Cit.* Note 7.

[25] African Development Bank. 'Nigeria Tax Administration: The Role of Digital Technologies.' (*African Development Bank:* November 2, 2023) <https://www.afdb.org/en/news-and-events/feature-stories/nigeria-tax-administration-the-role-of-digital-technologies-34773/> accessed 30 April, 2024.

[26] Okunogbe, O. and Santoro, F. "The Promise and Limitations of Information Technology for Tax Mobilization." (2023) 38(2) *The World Bank Research Observer*, pp.295-324.

Financial inclusion is another critical benefit of digitising tax payment. By integrating digital financial services into the tax collection process, the Nigerian government can encourage more people to participate in the formal financial system. This is particularly important in a country where a significant portion of the population is unbanked. Digital tax payments can serve as a gateway for individuals to open bank accounts, use mobile money, and access other financial products and services. Increased financial inclusion can lead to greater economic participation, enabling more people to save, borrow, and invest, thus supporting broader economic growth.[27] For businesses, the digitisation of tax payment can streamline processes and reduce administrative burdens. Automated tax systems can simplify compliance, reducing the time and resources spent on tax-related tasks. This efficiency allows businesses to focus on their core activities, driving productivity and growth. For example, small and medium-sized enterprises (SMEs) can benefit significantly from reduced compliance costs, allowing them to reinvest savings into their operations, expand their businesses, and innovate.

The adoption of digital tools and technologies in tax administration can also contribute to the modernisation of Nigeria's public sector institutions. By becoming more efficient and effective, tax authorities and other public agencies can improve the quality of public services. Enhanced digital capabilities can lead to better data management, quicker response times, and more informed decision-making. This modernisation can have a ripple effect, improving the overall governance and operational efficiency of the public sector, which in turn supports economic development. The digitisation of tax payment can act as a catalyst for the broader development of Nigeria's digital economy. As more businesses and individuals adopt digital payment systems, they are likely to engage more with other digital technologies and platforms. This engagement can stimulate innovation in various digital sectors, such as e-commerce, online banking, and mobile money.[28] For instance, increased use of digital payments can boost e-commerce by providing secure and efficient transaction methods. Similarly, greater reliance on online banking can enhance financial services and products available to consumers and businesses.

4.1. Challenges and Limitations to the Digitisation of Tax Payment System in Nigeria

Despite the significant potential benefits of digitising tax payment systems, Nigeria faces several challenges and limitations that must be addressed to ensure successful implementation and

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27 Bull, G. and Klapper, L. "Digital Financial Inclusion and Development. In *Handbook of Microfinance, Financial Inclusion and Development,* (London: Edward Elgar Publishing, 2023) pp. 164-180.

28 Anuforo, P., Joel, M., Ndirmbitah, B.K. and Maindo, F. Evaluation of Nigerian Cashless Payment Policy and its Impact on Economic Growth: A Synthetic Review. (2024) 30(1) *Journal Of International Sharia Economics And Financial*, pp. 22-47.

maximise the positive impacts on economic development. One of the most pressing challenges is the inadequate infrastructure in many parts of Nigeria. Poor internet connectivity and limited access to digital devices hinder the effective implementation of digital tax systems across the country. Rural areas often suffer from insufficient technological infrastructure, making it difficult for residents to engage with digital tax platforms. To address this, the government must invest heavily in improving internet coverage and access to digital devices nationwide.

Financial literacy remains low in Nigeria, contributing to widespread financial exclusion. Many Nigerians lack the necessary skills and knowledge to navigate digital tax systems effectively. This can result in lower compliance rates and increased frustration among taxpayers who are not familiar with digital tools. Educational initiatives aimed at improving digital and financial literacy are essential to ensure that all citizens can benefit from and effectively use digital tax systems.

Trust is a crucial factor in the adoption of digital systems. Many Nigerians are sceptical of digital tax systems due to concerns about data privacy, cybersecurity, and transparency. Incidents of cybercrime and data breaches can further erode trust. The government must prioritize building robust cybersecurity measures and transparent practices to protect taxpayer data and build public confidence in digital tax platforms. The quality and completeness of taxpayer data are vital for the success of digital tax systems. In Nigeria, poor record-keeping and a lack of inter-agency data sharing led to incomplete and inaccurate taxpayer information. This can impede the efficiency of digital tax systems and result in incorrect tax assessments. Enhancing data collection methods and fostering collaboration between different governmental agencies can help improve the accuracy and reliability of taxpayer data.

Implementing and managing digital tax systems require specific skills and resources that may be lacking within Nigerian tax authorities. There is a need for continuous training and capacity-building initiatives to equip tax officials with the necessary skills to handle digital systems effectively. Additionally, adequate funding is crucial to support the development and maintenance of these systems. Nigeria's tax regime is complex, with a wide range of taxes and exemptions. This complexity can make it challenging to develop user-friendly digital tax systems that cater to all taxpayers. Simplifying the tax code and streamlining processes can make it easier to digitise the system and enhance user experience. Tax policy in Nigeria is often influenced by political considerations and powerful interest groups. Implementing reforms that disrupt existing power structures or adversely affect certain groups can be challenging. Political will and a commitment to long-term economic benefits are necessary to overcome resistance and push through necessary

reforms. The threat of cybercrime and fraud poses a significant risk to digital tax systems. Cyber-attacks can result in substantial financial losses for taxpayers and damage the credibility of digital tax platforms. Implementing robust cybersecurity measures, conducting regular security audits, and ensuring that systems are well-designed and managed can mitigate these risks.[29]

5.1. Conclusion and Recommendations

Digitisation of tax payment in Nigeria presents opportunities to significantly impact economic development positively. It can increase tax revenues, which are essential for funding critical sectors like infrastructure, education, and healthcare. By enhancing fiscal discipline and reducing corruption, digital tax systems can create a more transparent and accountable tax environment, thereby attracting more foreign investment and supporting economic growth. Moreover, promoting financial inclusion through digital payment methods can expand access to financial services and stimulate economic activity across the country. However, to fully realize these benefits, the Nigerian government must address several challenges including infrastructure limitations, such as inadequate internet connectivity and digital infrastructure in many parts of the country, which hinders the widespread adoption and effectiveness of digital tax systems. Additionally, there are concerns regarding low financial literacy among a significant portion of the population, impacting their ability to use digital financial services and tax systems effectively. Data security is another critical issue, as ensuring the security and privacy of taxpayers' sensitive information in digital platforms remains a challenge amidst evolving cyber threats.

Here are some recommendations to address these challenges:

1. *Development of a Comprehensive National Strategy:* The Nigerian government should formulate and implement a comprehensive national strategy for the digitization of tax payment. This strategy should outline clear objectives, timelines, and metrics to measure success. It should also involve collaboration between government agencies, private sector stakeholders, and international partners to ensure alignment and effectiveness.
2. *Investment in Information Technology Infrastructure:* Significant investments in information technology infrastructure are necessary to support the digitisation of tax payment. This includes improving internet connectivity, establishing secure data centres, and deploying digital payment systems across the country. Robust infrastructure will

[29] Nairametrics. 'Overcoming the Challenges of Digital Taxation in Nigeria.' (Nairametrics: 2018) <https://nairametrics.com/2019/05/27/overcoming-the-challenges-of-digital-taxation-in-nigeria/> accessed April 30, 2024.

facilitate seamless interaction between taxpayers and tax authorities, enhancing efficiency and user experience.

3. *Public Education and Taxpayer Awareness:* Education and awareness campaigns targeting taxpayers are essential to promote the benefits and usage of digital tax systems. The government should implement robust public education programs that highlight the convenience, security, and efficiency of electronic tax filing and payment methods. Training programs for tax officials are equally important to ensure they possess the skills and knowledge required to effectively manage digital tax platforms.
4. *Strengthening Legal and Regulatory Frameworks:* There is a critical need to strengthen the legal and regulatory frameworks governing tax collection and digitisation. This includes enacting comprehensive laws on data privacy and cybersecurity to protect taxpayers' sensitive information. Aligning these laws with global best practices will enhance the credibility and trustworthiness of digital tax systems in Nigeria.
5. *Development of Data Protection Laws:* Implementing comprehensive data protection laws that safeguard taxpayer information is essential. These laws should address issues such as data ownership, consent, and the rights of taxpayers to access and correct their personal information. Clear guidelines on data handling and security protocols will mitigate risks associated with cyber threats and enhance public trust in digital tax systems.
6. *Investment in Technological Resources and Training:* Adequate investment in technological resources, including hardware, software, and cybersecurity measures, is necessary for the successful implementation of digital tax systems. Continuous training programs for tax officials should focus on enhancing their proficiency in using digital tools and technologies. This investment will ensure that tax authorities can effectively manage and operate digital tax platforms to maximize their benefits.
7. *Public Awareness Campaigns:* Conducting ongoing public awareness campaigns is crucial to dispel misconceptions and fears surrounding digital tax systems. These campaigns should emphasize the benefits of digitisation, such as reduced compliance burdens, faster processing times, and enhanced taxpayer services. By fostering a better understanding of digital tax systems among the public, the government can increase adoption rates and promote widespread usage.

In conclusion, the digitisation of tax payment systems in Nigeria presents a transformative opportunity to strengthen economic development, improve governance, and enhance financial inclusion. By addressing infrastructure challenges, enhancing legal frameworks, investing in

technology, and training, and conducting effective public education campaigns, Nigeria can position itself at the forefront of digital transformation in tax administration. Implementing these recommendations will pave the way for a more efficient, transparent, and inclusive tax system that supports sustainable economic growth and development across the country.

Tax Collecting Strategies Introduced by Revenue Authorities in Nigeria During the Covid - 19 Pandemic

Olariyike Damola Akintoye*

Abstract

Despite its negative impact on global economies, the Covid -19 Pandemic also brought about the opportunity for companies, financial institutions and businessmen and women to re-think and look for new strategies to continue to do their businesses. Therefore, even though the Covid-19 Pandemic adversely affected most economies of the world, it also brought about changes to business practices globally as new ideas were introduced. Some of these innovations are the use of technology and artificial intelligence. Tax authorities in Nigeria are not left behind as they introduced some innovations/ incentives in the way they carry out their functions, some of which are, the introduction of an online platform for the payment of tax and the filing of tax documents, extension of time and waivers for some categories of taxpayers by the Federal and State tax authorities. The paper used the Federal Inland Revenue Service, the Lagos State Internal Revenue Service and the Kwara State Internal Revenue Service as case study. The paper aims to examine how tax authorities can effectively continue their business activities when faced with a similar public emergency like the Covid-19 Pandemic. The paper attempts to answer some questions which are; what are the innovations, in terms of incentives and strategies introduced by revenue authorities during and after the pandemic in Nigeria; What are the good corporate governance measures or practices that must be adhered to while re-thinking revenue generation: The research method used in carrying out this work is doctrinal in nature as recourse was made to primary and secondary sources of gathering information. The paper finds out that even though revenue authorities in Nigeria did not do too badly during the Pandemic, they can still perform better given similar situations or circumstances. The paper, therefore, comes up with recommendations on how revenue generation can be enhanced, borrowing a leaf from other advanced countries. The paper, however, concludes that nothing should be done to compromise good corporate governance practices in a bid to generate more revenue.

KEY WORDS: Covid-19 Pandemic; new tax collection strategies; revenue agencies in Nigeria, Good Corporate Governance Practices.

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1. 0 Introduction

The Covid-19 Pandemic made those in business rethink and to come up with new ideas and methods on how best to carry out their businesses so that it does not grind to a halt. Covid-19 brought changes to business practices globally, and many agencies and companies, financial institutions, and businessmen no longer do business as they used to before the Pandemic. For instance, tax authorities both at the Federal and State levels in Nigeria introduced some innovations in the way they carry out their functions. One can therefore say that the pandemic positively impacted the economy because it brought the opportunity to think out of the box in its wake. For instance, it introduced innovative tax collection strategies such as online platform for payment and filing of tax documents, import duties waiver for certain commodities and some other tax incentives.

The paper aims to examine new strategies or incentives introduced by revenue agencies in Nigeria during the Covid-19 Pandemic period and the effect that the Pandemic had on revenue generation authorities' mode of operation in Nigeria. The research method used in carrying out this work is doctrinal in nature, as recourse was made to primary and secondary sources of gathering information. The paper examines the tax authority in charge of Federal Tax Administration in Nigeria, the Federal Inland Revenue Service (FIRS) and the tax authorities administering taxes in two of the states in Nigeria, the Lagos State Internal Revenue Service (LIRS) and Kwara State Internal Revenue Service (KWIRS).The paper also attempts to answer some questions which are; what are the innovations/incentives introduced during and after the pandemic to meet the income generation target of government and; what are the good corporate governance measures or practices that must be adhered to while rethinking revenue generation? The paper concludes that nothing should be done to compromise good corporate governance practices.

The major objective of the research is to identify innovations introduced by Revenue agencies in Nigeria to enhance revenue generation despite the public health emergency occasioned by the outbreak of the Covid-19 Pandemic.

2.0 Advent of Covid-19 and its Effect on Economic activities

2.1 Advent of Covid -19

On the 31st of December 2019, the World Health Organisation (WHO) office in the People's Republic of China picked up a media statement by the Wuhan Municipal Health Commission on cases of 'viral pneumonia of unknown cause' in Wuhan.[1] By the 9th and 30th of January 2020 respectively, the Chinese authorities identified the outbreak of the novel Coronavirus.[2] The Coronavirus was declared a global public health emergency of international concern by the WHO, at the second meeting of the International Health Regulations Emergency Committee.[3] Africa recorded its first case in Egypt on February 2020 and since then, the WHO has recorded 666,910,083 confirmed cases of COVID-19 and 6,704,756 deaths globally as of 5th January 2023.[4] The Covid-19 period was a trying one for the world at large as it succeeded in disrupting every aspect of life[5] due to the rate of its spread and death rate, nations of the world had to shut down their economy and everything was at a standstill as a result of the lockdown.[6]

Covid-19 was first discovered in Nigeria on February 27th, 2020, through an infected Italian Businessman. Cases increased due to the inflow of people into the country from different parts of the world. On Monday 23 March 2020 all airports in Nigeria were closed to international flights while incoming travellers were placed under supervised isolation for 14 days, and by 14th November 2021, the Nigeria Centre for Disease Control (NCDC) has recorded 213,076 confirmed cases and 2,949 deaths. As of 11th January 2023, NCDC website said there are 266,463 confirmed cases.[7] The rapid spread of the Coronavirus had a devastating effect on every sector of the economy, including the financial sector which necessitated the adoption and introduction of innovative measures targeted at stemming the tide and at the same time preventing the total

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[1] Fatima Bello, Nkiruka Chidia Maduekwe and Izuoma Egeruoh-Adindu, 'Guidelines for the Justice and Legal Education Sectors to Facilitate Adherence to the National Covid-19 Guidelines' in M.T Ladan (eds), A support document to aid Covid-19 Compliance in the delivery of Legal Education and implementation of the Administration of Criminal Justice in Nigeria (2021)

[2] World Health Organisation (WHO), 'Timeline:WHO's COVID-19 Response' <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#!> accessed 20 December 2023

[3]Stetement on the Second Meeting of the Health Regulationsemergency Committee Regarding the Outbreak of the Novel Covid-19 <https://www.who.int/news/item/30-01-2020-statement -on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus> (2019-ncov) accessed 12 December 2022

[4] WHO, 'WHO Coronavirus (COVID-19) Dashboard' < https://covid19.who.int/> accessed 5 January 2023

[5] Baber Hasnan , Spill over effect of Covid-19 on the Global Economy TMI 177-196, 2020, (October 20, 2020). Forthcoming, Transnational Marketing Journal (TMJ), 8(2), 177-196., Available at SSRN: <https://ssrn.com/abstract=3717456> or < http://dx.doi.org/10.2139/ssrn.3717456> accessed 22 September 2022

[6] Adesoji Farabiyi and Simplice Asongu, ''The Economic Consequences of the Covid-19 Pandemic in Nigeria'' 2020 SSRN Electronic Journal < https://www.researchgate.net/publication/342518936> ; <https://www.researchgate.net/publication/342518936 >accessed 22 September 2022

[7] NCDC Website <https://covid19.ncdc.gov.ng> accessed 11 January 2023

collapse of the economy. While many are familiar with the medical and non-medical containment measures[8] introduced by countries all over the world, a lot of people did not know the measures put in place by financial institutions and businesses which helped keep them afloat during and after the pandemic.

2.2 Effect of Covid-19 on the Economy and Introduction of New Incentives by Revenue Authorities

Lockdown and other regulatory control affected business operations across the world[9] and revenue generation.[10] It caused a decrease in the revenue available to the various governments[11] in contrast to the volume of expenditure of the government to meet her myriad obligations to the citizens.[12] The Nigerian government introduced new incentives and strategies to beef up her revenue. Kwara State introduced a tax holiday of one year for all existing small and medium enterprises, Jigawa state did the same from 1st July 2020- 30th June 2021 and 18 months tax holiday for new enterprises from 1st July 2020- 31st Dec 2021. In Katsina and Anambra States, a 20% and 10% rebate was issued to new taxpayers respectively. Lagos state Internal Revenue was also not left behind as it also introduced tax incentives. While some countries waived taxes on tourism and airline companies, others reduced taxes.

3. 0 The Federal Inland Revenue Service

The Federal Inland Revenue Service (FIRS) is the body responsible for the assessment, collection, supervision, accounting, and enforcement of all federal taxes in Nigeria. The Federal Inland Revenue Service (Establishment) Act, No.13, 2007, established the FIRS as a body corporate with perpetual succession, a common seal, and the power to sue and be sued. In addition, it created the Federal Inland Revenue Service Board which has overall supervision of the Service, as specified under the Act and consists of an Executive Chairman and fourteen other members drawn from

[8] Some of the measures include the declaration of phased lockdown, international and national travel restrictions, social and physical distancing, compulsory use of face masks, regular hand washing and use of alcohol-based hand sanitisers, amongst others.

[9] Daniel Twesige, ''Analysis of Finance and Accounting Measures to Mitigate the Impact of Covid-19 Pandemic among Businesses in Rwanda During and in a Post Covid Environment''. Open Journal of Accounting, II, 199-212. doi: 10.4236/ojacct.2022.113011. < https://www.scirp.org> accessed 20 December 2022

[10] Kumaran Kanapathipillai, '' The Impact of the Silent Enemy (Covid-19 Pandemic) on the Marketing Efforts Undertaken by the Automotive Industries in Malysia'' European Journal of Management and Marketing Studies (EJMMS) 2020 DOI: <http://dx.doi.org/10.46827/ejmms.v5i4.886> accessed 5 January 2024

[11] Daniel Bachman, ''The Economic Impact of Covid-19'' (2020) Delloitte Insights <https://www2.deloitte. com/us/en/insights/economy/covid-19/economic-impact-covid-19.htm>l accessed 2 December 2023

[12] Yunfeng Shang,Haiwei Li. ,Ren Shang, ''Public Finance have been negatively affected by the Covid-19 Pandemic: Effect of Pandemic Outbreak on Economies Evidence from Business History Context , Frontiers in Public HealthJournal Published online 2021 March 12 doi: 10 3389/fpubh.2021.632043 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7994505/https;//www.frontiers.org>fpubh.2021.632043> accessed 5 January 2024

different government parastatals and establishments.[13] The Executive Chairman, according to the Act, is someone who is experienced in taxation and appointed by the President of Nigeria subject to the confirmation of the Senate. He is the Chief executive and accounting officer of the Service and is responsible for the execution of the policy and the day-to-day administration of the affairs of the Service.

3.1 The Functions of the Federal Inland Revenue Service

In Section 8 of the Act[14] the following functions of the Service are enumerated:

(a) Assess persons including companies, enterprises chargeable with tax;[15]

(b) Assess, collect, account, and enforce payment of taxes as may be due to the Government or any of its agency;[16]

(c) Collect, recover, and pay to the designated account any tax under any provision of the Act or any other enactment or law;[17]

(d) In collaboration with the relevant Ministries and Agencies, review the tax regimes and promote the application of tax Revenues to stimulate economic activities and development;[18]

(e) in collaboration with the relevant law enforcement agencies, carry out examination and investigation with a view to enforcing compliance with the provisions of the Act;[19]

(f) make, from time to time, a determination of the extent of financial loss and such other losses by government arising from tax fraud or evasion and such other losses (or Revenue forgone) arising from tax waivers and other related matters;[20]

(g) adopt measures to identify, trace, freeze, confiscate or seize proceeds derived from tax fraud or evasion;[21]

(h) adopt measures which include compliance and regulatory actions, introduction, and maintenance of investigative and control techniques on the detection and prevention of non-compliance;[22]

(i) collaborate and facilitate rapid exchange of information with relevant national or international agencies or bodies on tax matters;[23]

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[13] Federal Inland Revenue Service (Establishment Act) 2007, s 3(2)(a-j)
[14] FIRS (EA) 2007 s 8(1)(a-t) and 8(2)
[15] FIRS (EA) 2007 s 8(1)(a)
[16] FIRS (EA) 2007 s (8)(1)(b)
[17] FIRS (EA) 2007 s (8)(1)(c)
[18] FIRS (EA) 2007 s (8)(1)(d)
[19] FIRS (EA) 2007 s (8)(1)(e)
[20] FIRS (EA) 2007 s (8)(1)(f)
[21] FIRS (EA) 2007 s (8)(1)(g)
[22] FIRS (EA) 2007 s (8)(1)(h)
[23] FIRS (EA) 2007 s (8)(1)(i)

(j) undertake exchange of personnel or other experts with complimentary agencies for purposes of comparative experience and capacity building;[24]

(k) establish and maintain a system for monitoring international dynamics of taxation to identify suspicious transactions and the perpetrators and other persons involved;[25]

(l) provide and maintain access to up to date and adequate data and information on all taxable persons, individuals, corporate bodies, or all agencies of government involved in the collection of revenue for the purpose of efficient, effective and correct tax administration and to prevent tax evasion or fraud;[26]

(m) maintain database, statistics, records and reports on persons, organisations, proceeds, properties, documents or other items or assets relating to tax administration including matters relating to waivers, fraud or evasion;[27]

(n) undertake and support research on similar measures with a view to stimulating economic development and determine the manifestation, extent, magnitude and effects of tax fraud, evasion and other matters that affect effective tax administration and make recommendations to the government on appropriate intervention and preventive measures;[28]

(o) collate and continually review all policies of the Federal government relating to taxation and revenue generation and undertake a systematic and progressive implementation of such policies;[29]

(p) liaise with the office of the Attorney-General of the Federation, all government security and law enforcement agencies and such other financial supervisory institutions in the enforcement and eradication of tax related offenses;[30]

(q) issue taxpayer identification number to every taxable person in Nigeria in collaboration with States Board of internal Revenue and Local Government Councils;[31]

(r) carry out and sustain rigorous public awareness and enlightenment campaign on the benefits of tax compliance within and outside Nigeria;[32]

(s) carry out oversight functions over all taxes and levies accruable to the Government of the Federation and as it may be required, query, subpoena, sanction and reward any activities

[24] FIRS (EA) 2007 s (8)(1)(j)
[25] FIRS (EA) 2007 s (8)(1)(k)
[26] FIRS (EA) 2007 s (8)(1)(l)
[27] FIRS (EA) 2007 s (8)(1)(m)
[28] FIRS (EA) 2007 s (8)(1)(n)
[29] FIRS (EA) 2007 s (8)(1)(o)
[30] FIRS (EA) 2007 s (8)(1)(p)
[31] FIRS (EA) 2007 s (8)(1)(q)
[32] FIRS (EA) 2007 s (8)(1)(r)

pertaining to the assessment, collection of and accounting for revenue accruable to the Federation;[33] and

(t) carry out such other activities as are necessary or expedient for the full discharge of all or any of the functions under the Act.[34] In addition to the above, the Secretary may, from time to time, specify the form of returns, claims, statements and notices necessary for the due administration of the powers conferred on it by the Act. We may now look at the effect of the covid-19 Pandemic on revenue generation by the FIRS in Nigeria.

4.0 New tax collecting strategies Introduced by the Nigerian Government During the Pandemic

For countries to achieve favourable economic conditions, they introduced tax incentives. Nigeria being not an exception, introduced the following incentives and innovations during the pandemic to prevent the economy from total collapse.

i. Extension of filing period of Personal Income Tax returns for Foreign Affairs, Military, and Police sector till 30th of June 2020.

ii. FIRS waived tax penalty for late returns, for taxpayers who pay taxes promptly as an encouragement for tax payment.

iii. The federal government announced one-month extension to file Companies Income Tax (CIT), withholding tax as well as two months delay in submission of audited financial statements and 20% tax discount for qualified taxable companies.

iv. Import duty waiver for pharmaceutical firms and some other tax incentives.

v. FIRS created VAT automated collection system known as VATrac. This system aided VAT collection for businesses like supermarkets, eateries, and standard shops.

vi. FIRS also encourage the public to make use of its available e-platforms which can be used for tax filing returns, payment of taxes, tax clearance certificates etc.

vii. Taxpayers who faced challenges in offsetting their liabilities, were given the option of paying in naira.[35]

viii. Taxpayers were allowed to file their annual CIT returns without the need to accompany it with the mandatory audited accounts.

[33] FIRS (EA) 2007 s (8)(1)(s)
[34] FIRS (EA) 2007 s (8)(1)(t)
[35] Naira is the Nigerian Local Currency.

All these measures contributed immensely to the continuous generation of revenue during the period in question.

For instance, the FIRS generated N5.320 in 2018, N5 trillion in 2019, N4.95 trillion in 2020, and N6.405 trillion in 2021. The 2021 figure represented a 30.6 percent increase when compared to the amount generated in 2020 and a 28 percent rise when compared to N5 trillion generated in 2019.[36] The fact that the Federal government of Nigeria through the FIRS generated 5 trillion naira in 2019 when there was no pandemic and 4.95 trillion naira in the heat of the pandemic shows that there is not really a wide gap between what was generated pre-covid-19 and during the covid-19. This is because the FIRS throughout the covid-19 period, continued to generate revenue through innovative means and from manufacturers, e-commerce, and the telecommunication sector.

Olaoye in a study on the impact of Covid-19 outbreak on tax revenue generation in Nigeria concludes that the Covid-19 outbreak did not have a remarkable negative impact on tax revenue generation in Nigeria.[37] The FIRS through its official website reported that it collected 5 trillion naira in 2019, 4.95 trillion Naira in 2020 and 6.405 trillion naira in 2021.[38] These figures show that the pandemic negative impact is minimal as one would have expected that the margin between the two years will be more than what was declared. In fact, some researchers are of the opinion that the pandemic has contributed positively to the growth of tax revenue generated in Nigeria.[39] This growth is a result of the various innovations and strategies introduced by the government during the pandemic. Businesses such as the health sector, power generation sector, security companies, and Pay as You Earn (PAYEE), generate revenue for the country. Value Added Tax (VAT) was another source of revenue and taxes were also gotten from seaports that transported some essential cargoes needed for the survival of the nations. All the above, aided generation of revenue by FIRS.

However, some other researchers believe the effect of the pandemic is reflected more in the falling development index such as manufacturing and fixed investment.[40] Taxes generated from road, self-

[36] <https://punching.com> firs-others-revenue-collection-cost- accessed August 8 2022
[37] Olaoye A.A, "Impact of Covid-19 on Tax Revenue Generation in Nigeria: A Differential Analysis" 2020, Journal of Economic Research & Business Administration Al-Farabi Kazakh National University 92 <https://be.kaznu.kz> <https://doi.org/10.26577/be.2020.v134.i4.08> accessed December 20 2022
[38] ibid
[39] Ibid
[40] Adesoji Farabiyi and Simplice Asongu''The Economic Consequences of the Covid-19 Pandemic in Nigeria'' 2020 SSRN Electronic Journal <https://www.researchgate.net/publication/342518936> ; <https://www.researchgate.net/publication/342518936> accessed 22 September 2022

employed persons and services declined by 60% highest decline recorded for taxes paid by self-employed persons.

5.0 The Lagos State Internal Revenue Service

Lagos State remains the leading, as well as the highest revenue yielding state in Nigeria and continues to be leading other states revenue agencies.[41] Over the years, Lagos state has increased its Internally Generated Revenue (IGR) by introducing incentives and strategies geared towards effective revenue generation and collection. The Covid-19 pandemic period was another period for the Lagos state government, to come up with palliative measures to grant relief to taxpayers. On the 9th of July 2020, the Lagos Internal Revenue Service (LIRS), issued a public notice, to introduce additional measures for its taxpayers in the face of the Covid-19 Pandemic. This is preceded by a 3-month extension of the deadline for filing annual returns on incomes and claims by taxable persons from the 3rd of March 2020 to the 30th of June 2020. The additional palliative includes the following:[42]

(i) Payment of outstanding liabilities in instalments. This is in line with the provision of the Personal Income Tax Act (PITA)[43] which grants the LIRS the power to extend the time within which tax is paid.

(ii) Waiver of penalty on late payment of monthly PAYE. Monthly PAYE remittances which were supposed to be made between the periods of March -May 2020 being the period of the lockdown, due to the covid-19 pandemic.

(iii) Waiver of penalty on late filling of self-assessment return. By virtue of Section 44 of PITA, every taxable person is required to file an annual tax return on or before 31 March every year. The LIRS waived any penalty due to the late filing of 2019 returns which became due on the 30 of June 2020, following the 3-month extension.

(iv) Waiver of penalty and interest on all outstanding tax audit liability from 2009 -2015. This is upon the condition that the concerned entities shall present and keep to a structured payment plan that terminates on or before 31st December 2020.

(v) Grant of tax credit on donations. Individual taxpayers who made cash and kind donations to the Lagos State Government, due to the covid-19 pandemic, shall be granted a tax credit of 20%

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[41] Moses Adeniyi, 'LIRS: A Leading Light for other States Revenue Agencies' <https://lagosstate.gov.ng/vita-data-lagos-bureau-of-statistics-21> accessed 29 March 2023

[42] Blackwood and Stone LP Tax Law firm, 'Covid-19 Palliative Measures:Lagos State Internal Revenue Service (LIRS) Grants Further Covid-19 Reliefs to Taxpayers' <https://blackwoodstone.com/covid-19 palliative-measures-lagos-state-internal-revenue-service-lirs-grants-further-covid-19-reliefs-to-taxpayers> accessed 29 March 2023

[43] Personal Income Tax Act (PITA) 2011 s 68

against their 2021-year assessment tax return. This will only be subject to a cap of 35% of the tax due in 2021, if 20% of the donations made exceeds 35% of the tax due in 2021.

(vi) Increased payment channels to make remittance of taxes easier, simpler, and more convenient: During the pandemic, The LIRS provided more payment channels and made the list of additional payment channels available to the public.

(vii) Form of Tax Audit Reconciliation Committee (TARC). In order to comply with social distancing measures as stipulated by the government, tax audit reconciliation meetings will now be held via video conferencing.[44]

Taxpayers were advised to take advantage of these palliative measures proposed by the LIRS and make the requisite payments before the state's deadlines. However, PITA does not have any specific provision which supports the grant of credit on donations by individuals and so the state government is expected to provide further guidance and ultimately the necessary legislation required for granting of tax credit on donations made by individuals.

In furtherance to the public notice, the executive chairman of LIRS, issued a circular, with the subject, 'Implementation Guideline- Covid-19 Tax Palliatives.' It is pertinent that LIRS achieved 88% budget performance in the year 2020 and that this level of performance is unparalleled by any other state government in the country. The Service grossed in 418 billion naira in tax revenue despite the Covid-19 pandemic impacts, and the End SARS mayhem.[45] The LIRS Chairman, attributed the progress to, data driven tax administration and technology adoption, the purpose driven institutional arrangements, human resourcing, social contact strengthening and the political will of the Lagos state government.

In the same vein, Lagos State had the highest IGR with 753.46 billion, representing 40% of the total IGR in 2021. Lagos is followed by the Federal Capital Territory (FCT) with 131.9 billion naira and Rivers with 123billion naira.[46]

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[44] Lagos State Government Public Notice Implementation and Tax Incentives and Reliefs for Taxpayers (Individuals and Businesses) in Lagos State.9 July 2020

[45] The Chairman LIRS Mr Ayodele Zubair has told a delegation from the Nigeria Governors Forum (NGF) and a Federal Ministry of Finance Budget and National Planning (FMFBNP) that the Service grossed 418 billion naira in tax revenue despite the Covid-19 Pandemic. The delegation was in Lagos, as part of NGF's determination to improve internally generated revenue in states by fostering peer learning. As a pilot, six states of Gombe, Delta, Nasarawa, Ebonyi, Sokoto and Ekiti states representing each of the geopolitical zones were selected to take part in an IGR Exchange visit to LIRS, the Ministry of Finance, Land Bureau, Geographical Information System and other revenue generating agencies of the state. The theme of the 3-Day visit was, ''Exploiting New Growth Areas for Revenue Mobilisation'' Tribune Online May 30 2021 <https:tribuneonline.com/how-lagos-grossed-n418bn-tax-revenue-in-2020--lirs-chair/>; The Guardian Nigerian News 16 April 2021<https://guardian.ng/news/igr-Lagos-tops-other-states-with-n418.99bn-in-2020>

[46] Pascal Oparada, 'The Nigerian States with the Highest Internally Generated Revenue' Business Economy, January 19, 2023 Business Economy. <https://www.legit.ng/business-economy/1498215-the nigerian states-highest -interally-generated>

According to Olagundoye and Olagundoye, internally generated revenue did not decline during the pandemic because taxes were paid since majority were paid salaries during the pandemic and transactions were conducted online via platforms. This proves that in times of crises, IGR may not be adversely affected, if all the channels of generating income are available to taxpayers.[47]

6.0 The Kwara State Internal Revenue Service

In line with the Federal Government Directive that States should take steps to boost their internally generated revenue and become less dependent on the central government, the Kwara State[48] Internal Revenue Service (KWIRS) was established in the year 2015[49] to ensure compliance and block leakages occasioned by malfunctioning in the erstwhile tax agency.

The Executive Chairman of the KWIRS, credited increased adoption of technology and steady blockage of leakages within the tax administrative system for the increase. She said the feat was recorded without any new raise in the tax rate adding that the agency had operated a manual tax administrative system since inception and that despite this, the Service has recorded steady IGR growth over the years with the exception of the year 2020 when the economy was almost crippled by the Covid-19 Pandemic.[50] The following is a breakdown of the means through which KWIRS continues to generate revenue during the 2020 pandemic.

1. Taxes were generated from PAYEE (pay as you earn), despite the pandemic and workers' salaries continued to be paid hence taxes were deducted from source from the salaries paid. This is a good source of revenue generation in Kwara State.
2. Despite the lockdown, health personnel were allowed to go to work. Taxes were deducted from the services rendered by these personnel and from drugs bought by the patients. KWIRS had its officials placed in hospitals who oversaw collecting tax rates.
3. Taxes were deducted from the incentives paid by the government such as health hazards paid to health workers, and security agencies.
4. Citizens were encouraged through online platform of the benefit of paying their taxes, especially during the pandemic. This agency via its platform enlightened the citizens on the need to pay tax to enhance the smooth running of the State.

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[47] Femi Olagundoye & O Olagundoye, ''The impact of Covid-19 on Internally Generated Revenue of South- West Nigera'' International Journal of Finance and Accounting ijfa/10.47604/ijfa 7(4)18-34 .< https://doi.org/10.47604/ijfa1666 > accessed 30 March 2024

[48] One of the 36 states in Nigeria.

[49] Known as the Kwara State of Nigeria Law No. 6 of 2015.

[50] < https://kwarastategov.ng ; https://www.vanguardngr.com> accessed November 14 2022

5. KWIRS employed alternative dispute resolution (ADR) for recovery of tax to generate revenue.[51]

KWIRS generated 19billion naira in the year 2020, despite the pandemic, although it is less than the N30.64 billion generated by the same agency in the previous year. The next section will look at some of the incentives and innovations introduced by the KWIRS which enabled the state government to continue to make money.

6.1 Kwara State Internal Revenue Press Statement on Palliatives Provision and Measures On COVID-19[52]

Following the outbreak of Coronavirus pandemic across the world and the official announcement of the first case in Nigeria on the 27th of February, 2020, and the subsequent spike in the number of active cases, which necessitated a shutdown pronouncement by the Kwara State Government in line with the Federal Government directive on the 23rd of March, 2020, the Kwara State Internal Revenue Service, implemented the following measures to safeguard the lives of its Staff, ease the burden on taxpayers, and ensure business continuity in line with best practices as an ISO Certified organization:[53]

1. Donation of palliatives to Informal Sector Taxpayers to cushion the effects of Covid-19 on their businesses in April and June 2020.
2. A further extension of the deadline for filing Annual Returns from 31st of March to 30th of September 2020.
3. 30% discount/waiver on arrears on ground rent and land charge for property owners and land occupiers if they pay between 1st April and 30th September 2020.
4. Granting of a moratorium ('Grace Period' during which Personal Income Tax collection is suspended) to informal sector taxpayers to enable them to recover from the financial stress caused by Covid-19 from 1st May 2020 to 30th June 2020.
5. Suspension of all enforcement activities on tax defaulters in Informal Sector, Educational Sector, Hospitality Sector, Low-Income Earners, and Property owners from 1st April to 30th of September 2020.

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[51] Ibid

[52] Press Statement on Palliatives Provisions and measures on Covid-19, July 30, 2020, htpps://twitter.com/kwarairs/status/1278716699395739648 accessed 11 July 2023
Press Release of Thursday July 30, 2020

[53] Press Statement on Palliatives Provisions and Measures on Covid-19, July 30, 2020, htpps://twitter.com/kwarairs/status/1278716699395739648 accessed 11 July 2022

6. Waiver of interest and penalty for High-Net-worth Individuals (HNIs) and Corporate Organisations that pay up their tax arrears between 1st June 2020 and 30th of September 2020.
7. Implementation of alternative dispute resolution (ADR) in the process of tax recovery under the guidance of Covid-19 safety measures.
8. Deployment of Personal Protective Equipment (PPE); Nose masks, face shields and hand sanitizers to taxpayers and staff.
9. Introduction of Virtual meetings for the KW-IRS Management Team and different Committees.
10. Reduction in the workforce by a way of duty schedule to allow for compliance to physical distancing in our offices.
11. Deployment of temperature monitors, wash hand basins with running water and soap and hand sanitizers across our offices.
12. Encouragement of taxpayers to make payments to the Kwara State IGR Accounts via PAYDIRECT at any of the local commercial banks.[54]

For further enquiry and assistance as it relates to Revenue payments, taxpayers were also furnished with the Telephone number, Email address and the website of the KW-IRS.[55]

The above measures were in response to the reality that the entire world was going through a tough time and the need for everyone to adjust to the new situation and abide by all the safety guidelines as provided by the State Government. At least seven out of the twelve measures stand out as touching on safeguarding the total collapse of the economy. They are.

i. Extension of deadline for filing of annual returns for six months from 31st March to 30th September 2020 to enhance payment by taxpayers.
ii. 30% waiver on arrears on ground rent and land charge for property owners to encourage payment of tax.
iii. Granting moratorium (temporary suspension) to informal sector taxpayers, to enable them recover from the financial stress caused by Covid-19 during the lockdown from 1st May 2020 to 30th June 2020

[54] Press Release signed by Shade Omoniyi Executive Chairman of KWIRS
[55] Telephone : 07006959477, Email: Info@kw-irs.com, Website: www.kw-irs.com

iv. Suspension of all enforcement activities on tax defaulters in informal sector, Educational Sector, Hospitality Sector, Low Income Earners, and Property owners from 1st April-30th September 2020

v. Waiver of interest and penalty for High-Net-Worth Individuals (HNIs) and Corporate Organisations that pay up their tax arrears by 30th September 2020penalties and interest for high paying taxpayers and corporate organisations to encourage citizens to pay their taxes.

vi. Implementation of alternative dispute resolution (ADR) in the process of tax recovery under the guidance of covid-19 safety measures and

Encouragement of taxpayers to make payment to the Kwara State IGR account via PAYDIRECT at any of the local commercial banks.

The Kwara State government generated N30.7 billion in 2019 but this dropped to N19.604billion in 2020, a 56 percent decrease. However, there was remarkable improvement in the revenue generated in 2021 when a total of N29.96 billion was generated, representing 95.61 percent achievement of its annual budgetary target. [56]

7.0 Good Corporate Governance Measures and Global Best Tax Practice

7.1 Good Corporate Governance Measures

Good corporate governance is the art of directing and controlling the organisation by balancing the needs of the various stakeholders.[57] The Cadbury Report[58] which was released in the UK in 1991 outlined that.

> Corporate governance is the system by which businesses.
>
> are directed and controlled and a key factor in underpinning.
>
> the integrity and efficiency of a company. The core principles
>
> of good corporate governance are, fairness, accountability,
>
> responsibility and transparency.[59]

Let us examine each of the core principles of good corporate governance.

[56] This was the highest target hit since the agency was founded in 2015.
[57] <https://www.managementstudyguide.com> accessed November 15, 2022
[58] < https://www.jbs.cam.ac.uk/cadbury/report/index.html>
[59] The Core Principles of Good Corporate Governance Wed 19 February 2014 Pearse Trust

(a) Fairness:

Fairness refers to equal treatment of all stakeholders, including employees, communities, and public officials. The fairer the entity appears to stakeholders, the more likely it is that it can survive the pressure of interested parties.[60] When we link this principle with the relationship between tax authorities and taxpayers, there should be fairness in the way taxpayers are treated. That is, taxpayers in the same category should be treated equally. If tax authorities abide by this principle, taxpayers will comply more with tax laws, and this will result in more revenue for the government.

b) Accountability

Corporate accountability refers to the obligation and responsibility to give an explanation or reason for the company's actions and conduct.

- The board should present a balanced and understandable assessment of the company's position and prospects.
- The board is responsible for determining the nature and extent of the significant risks it is willing to take.
- The board should maintain sound risk management and internal control systems.
- The board should establish formal and transparent arrangements for corporate reporting and risk management and for maintaining an appropriate relationship with the company's auditor, and
- The board should communicate with stakeholders at regular intervals, a fair, balanced and understandable assessment of how the company is achieving its business purpose.

a) Responsibility

The Board of Directors is given the authority to act on behalf of the company. They should therefore accept full responsibility for the powers that it is given and the authority that it exercises. The Board of Directors is responsible for overseeing the management of the business and affairs of the company, appointing the chief executive, and monitoring the performance of the company. In doing so, it is required to act in the best interests of the company.

Accountability goes hand in hand with responsibility. The Board of Directors should be made accountable to the shareholders for the way in which the company has carried out its responsibilities. However, the LIRS and the KWIRS, like other tax authorities in Nigeria, are

[60] Principles of Good Corporate Governance <https://www.pearse-trust.ie/blog/bid/108866/the-core-principles-of-good-corporate-governance> accessed January 5 2023

responsible to the government because the executives are appointed to their offices by their respective state governments. However, in the case of the FIRS the chief executives are appointed by the President. They, therefore, owe their allegiance to the president or governor that appoints them. This is in tandem with the dictum which says, 'he who pays the piper dictates the tune.'

d) Transparency

Transparency refers to the openness and willingness to disclose financial performance figures which are truthful and accurate. Disclosure of material matters concerning the organisation's performance and activities should be timely and accurate to ensure that all investors have access to clear, information which accurately reflects the financial, social, and environmental position of the organisation. Organisations should clarify and make publicly known the roles and responsibilities of the board and management to provide shareholders with a level of accountability. Transparency ensures that stakeholders can have confidence in the decision-making and management processes of a company.

7.2 Global best practice in Tax Administration

Tax administration is a complex phenomenon and good governance has been described as key to its effective and efficient functioning.[61] This has engendered several international initiatives being taken to establish good practices and set an international benchmark in assessing tax administration. [62]While tax burden is always one of the primary concerns for corporate management and finance, it is questionable whether tax has always been among the core factors of corporate governance.[63] Christian Nowotny mentioned this in an earlier paper when he said.

> Without doubt, taxation is one of the most powerful motivational
> forces in corporate life. Tax consequences are important determinants of capital structure, dividend payments and the arrangement of groups of companies, among many other things. In view of this, it seems quite surprising that codes of "good"

[61] Vegh Gyongyi and Hans Gribrau. ''Tax Administration and Good Governance'' EC Tax Review Vol.27 ,January 2018 https://www.researchgate.net/publication/26235752_Tax_Administration_Good_Governance accessed January 7 2023.
[62] Vegh Gyongyi and Hans Gribrau. Ibid accessed January 7, 2023.
[63] Christian Nowotny, ''The Low Profile of Tax in Corporate Governance or as a Corporate Governance Issue''. 2018

> corporate governance promulgated in many European countries during the past years typically do not mention taxation explicitly.[64]

He further points out possible reasons for this relative low profile of tax as a corporate governance issue; tax is considered as too technical to be discussed at the board of directors, as the minutes on the discussion of tax issues at the board of directors may attract the attention of tax authorities, and secondly, corporate governance codes are primarily designed for attracting investment,[65] as opposed to tax agencies that are expected to generate as much revenue as they could for the government. Nevertheless, this traditional relationship between tax and corporate governance has been changing, and tax is pushing forward its frontiers into what has traditionally been considered corporate governance affairs. Many tax authorities, particularly in the advanced member economies of the Organisation for Economic Co-operation and Development (OECD), are adopting a new cooperative compliance approach, which aims to ensure tax compliance through the voluntary enhancement of internal control and corporate governance.[66]

Whilst a cooperative compliance programme aims at the voluntary raise of compliance level on the part of corporate taxpayers, high standards cannot be met without working on governance and internal control. As Wolfgang Schön (2008) points out, companies are not a single individual, but a nexus of contracts, and tax obligations are allocated within the organisation and legal framework of company. Even though management has the willingness to comply with tax rules, non-compliance could occur in business operations without the knowledge of the management and accounting division.

Co-operative compliance programmes are intended to be beneficial both for taxpayers and tax authorities. Dave Hartnett, former Permanent Secretary for Tax at Her Majesty Revenue and Customs puts it thus ‘’for corporate *who embrace corporate responsibility, we see the business as a lower risk and where the compliance track record is sound, we audit less often and then focus*

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[64] Christian Nowotny, ‘’Taxation, Accounting and Transparency: The Missing Trinity of Corporate Life’’ (2007) <https://www.semantic scholar.org/paper/taxation%2c-Accounting%2c-and-Transparency%3A DOI:10.1007/978-3-540-77276-7_8>

[65] Ibid

[66] Satori Araki, Tax and Corporate Governance ; What Tax Authorities Expect of Companies March 18 2018 <www.International American Centre of Tax Administrations (CIAT)> <www.ciat.org/tax-and-corporate-governance-what-tax-authorities -expect -of-companies>

on bigger risks''[67] . Thus, enhanced governance and internal control are a key to a stable relationship with the tax authorities.

The following are the suggested good corporate governance practices in revenue generation.

(i) Introduction of Automated Tax Administration System (ATAS): The norm is that people detest tax collectors generally because of lack of trust, but digitisation of the tax system will take people out of the picture, thus building taxpayers' trust and building trust will inevitably shore up the revenue.

(ii) Employing the services of external auditors to check tax authorities' accounts; This is a good governance global best practice. It is against the rule of accountability and transparency for the auditor to be a staff of the agency it is auditing, as there is the tendency to dance to his master's tune. This is in line with the adage," He who pays the piper dictates the tune''.

(iii) Accountability, fairness, transparency, independence, and social responsibility

(iv) Safeguarding integrity in financial reporting

(v) Making timely and balanced disclosure

(vi) Respecting the rights of taxpayers

(vii) Recognising and managing risks

(viii) Laying a solid foundation for management and oversight

(ix) Structuring the Board to add value.

(x) Promoting ethical and responsible decision- making.

8.0 Conclusion and Recommendations

The social distancing that the Covid-19 Pandemic introduced sniffled economic growth, which led to the shutdown of financial markets, corporate offices, businesses, and events by the exponential rate it spread and the fear and uncertainty about how bad it could get.[68] The rising number of Covid-19 cases and rising number of death cases led to a significant increase in global inflation rate, global unemployment rate and global energy commodity index. That the Covid-19 pandemic has devastated the global economy, and that it has rendered many of the world's population impoverished is an understatement. Moreover, the pandemic has generated some uncertainties

[67] <https://www.ciat.org/tax=and-corporate-governance-what-tax-authorities-expect-of-companies/? lang-en>

[68] Ozili Arun, '' Spillover of covid-19; Impact on the Global Economy'' 2020 DOI:10.2139/ssrn.3562570 2022 Article in SSRN Electronic Journal · March 2020 DOI: 10.2139/ssrn.356257 <file:///C:/Users/User/Downloads/oziliandaruncovidspilloverglobaleconomy> accessed September 9, 2022

regarding economic and social policies and this phenomenon is lately the brunt of every government across the globe.[69]

Almost all the sectors of the Nigerian economy, such as the manufacturing sector, entertainment industry and other service sectors like education and distribution were economically affected because monetary policy decisions and international travel restrictions seriously affected the level of economic activities.

However, the pandemic's negative impact on revenue is more pronounced in countries that are most dependent on international trade, tourism and petroleum exports.[70] The good news is that sub-Saharan African tax collectors have performed almost the same way as their counterparts in the much wealthier Latin America and substantially better than South Asian Countries.[71] This is because despite the total lockdown, Nigeria still recorded substantial revenue from tax sources in the second quarters of 2020. This is contrary to IMF Projection[72]which predicts slower growth for the Nigerian Economy.[73]

In conclusion, this paper has attempted to expose the impact Covid-19 Pandemic had on revenue agencies at both the Federal and State levels in Nigeria. This work is therefore a contribution to this line of knowledge as not much has been done on the impact of Covid-19 on revenue authorities. Other literary works on the impact of Covid-19 have concentrated on its impact on tourism, insurance implications, travel restrictions, and the general economy, among others.

The paper therefore puts forward the following recommendations.

1. That all the other states of the federation should borrow a leaf from Lagos State to replicate their success story in revenue generation.
2. That our revenue agencies should borrow a leaf from other advanced countries by giving their staff the option to continue to work from home, post Covid.
3. Digitisation of the tax system will minimise one-on-one interaction between tax officials and taxpayers thus building taxpayers' trust and building trust will inevitably shore up the revenue.

[69] Prince Asare,Vitenu Sackey and Richard Barfin, ''The impact of Covid-19 on Global Economy'' The Economic Finance Letters 2021 Vol.8. No.1 22-43 ISSN: 2212-430 DOI 10: 13140/RC22.27511.41921 accessed September 10 2022

[70] Feldstad and Therkilsen, '' Implication of the covid-19 Pandemic for revenue generation in poor countries'' 2020 DIIS working Paper No 13, p61.

[71] Ibid

[72] IMF Fiscal Affairs Projection 2020

[73] Ayodele Adegboyega, ''IMF Predicts slower growth for Nigeria Economy, Nigeria Economy, October 11 2022 <https://punching.com>nigeria-economic-growth>

4. That tax disputes resolution proceedings should be conducted virtually as this will save both human and material resources.
5. Finally, that in a bid to generate more revenue, nothing should be done to compromise good corporate governance practices.

The Prospects and Challenges of Adoption of Arbitration in Settlement of Tax Disputes in Nigeria

Adeojo Ifedamola Blessing*

Abstract

Tax is a good means of generating revenue in Nigeria, this has necessitated the various enforcements measures and incentives created by the government to facilitate the prompt payment of tax. Disputes are inevitable in human society; hence it is important to know how they can be resolved. It has been discovered over the years that litigation is not the best means of resolving tax disputes due to its technicalities which usually occasion delay in dispensation of justice. This study aims at advocating for the use of arbitration in settlement of tax disputes in Nigeria by analysing what arbitration is and how it can be effectively used as a means of resolving tax disputes. In the course of this study the evolution of tax disputes will be carefully scrutinised as a basis for tax disputes resolution, while considering the negative effects of litigation as a dispute resolution mechanism. This study uses Nigeria as a case study, with the careful analysis of the legal nature of arbitration. The research work uses doctrinal approach. The work also reveals the importance of arbitration in tax dispute resolution. The research concludes that there is a need to create greater awareness on arbitration among taxpayers. The paper therefore recommends the need to sensitise members of the public on the use of arbitration in resolving tax disputes in Nigeria.

Keywords: Arbitration, Tax Advocacy, Tax Disputes, Resolution, Litigation, Nigeria.

1.0 Introduction

Basically, the use of arbitration in resolving tax disputes in Nigeria has not been recognised. The reason for this is that Section 251 (1) a-b of the Constitution of the Federal Republic of Nigeria, 1999[1] vests exclusive original civil jurisdiction over tax disputes in the Federal High Court (FHC). By the foregoing constitutional prescription, the FHC has been empowered to adjudicate over tax disputes. In lieu of this, this paper advocates for the use of arbitration in settling tax dispute as a

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[1] Constitution of the Federal Republic of Nigeria 1999 Cap. C 28, Laws of the Federation, 2004

means of enhancing prompt tax dispute resolution in Nigeria. Before going into the discussion on tax disputes it will be apposite to look at the definition of tax.

1.1 Definition of Tax

Tax is a compulsory levy that is imposed on income, business profits, goods, services, and transactions of the people. It is an obligatory levy which the citizens must pay to enhance the capacity of the government in providing infrastructures in a State. Oyuntsetseg and Maclure,[2] define tax as a compulsory levy that is imposed on taxpayers by the government to cater for its expenditures. The duo also define tax, as an avenue of transferring wealth from the citizens to the government in order to cater for the expenditure of the government [3]. In Philip E. Taylor's work[4] tax was defined as 'The Economic of Public Finance', as a mandatory levy from the government to the citizen for the benefit of the public. The renowned scholar Smith defines tax, as a compulsory levy imposed by the government on the citizens to provide for the welfare of the public at large. According to him, a good tax must meet the following standards: it must be commensurable to the income paid, must be certain, must be profitable and convenient to pay and it must be cost effective.[5]

Based on the various definition that have been provided above, it is necessary to conclude that tax is a mandatory requirement that the government imposes on its citizens at large. A good tax system allows its citizens to collectively enjoy the benefits attached.[6]

2.0 History of Taxation in Nigeria

Taxation began in the 1930s in Nigeria, although taxes were collected in an informal manner. Taxation was not enacted as a law in Nigeria, taxes were levied on the people using various mechanisms in the Northern, Western and Southern parts of Nigeria. The use of Zakat (A tax on Muslims for charitable, religious, educational and welfare purposes), Shukka-shukka (a tax on crops that were not liable to Zakat) , Kurdin-kasa (an agricultural tax paid by farmers on their cash

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[2] Oyuntsetseg D. (2022) 7 (Charles E, Mclure Jr. 'Taxation' Britannica Retrieved 3 March 2015) "TAX POLICY OF THE MONGOL EMPIRE (1206- 1405) <https://www.degruyter.com>pdf> accessed on 26 June 2023.

[3] Ibid

[4] https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=http://repository.umy.ac.id/bitstream/handle/123456789/5123/CHAPTER%2520II.pdf%3Fsequence%3D6%26isAllowed%3Dy%23:~:text%3DTaylor%252C%2520in%2520The%2520Economic%25220of,all%252C%2520with%2520little%2520reference%2520to&ved=2ahUKEwjfyseKuvuGAxXPTEEAHa3dDuQQFnoECA4QBg&usg=AOvVaw3b3BN5J8PvHJjeBdOocG1b accessed on 26 June /2023

[5] Oyuntsetseg D. (2022) 7 (Charles E, Mclure Jr. 'Taxation' Britannica Retrieved 3 March 2015) "Tax Policy of The Mongol Empire (1206- 1405) <https://www.degruyter.com>pdf> accessed on 26 June 2023.

[6] accessed 26 June 2023

crops) , Jangali (a tax on livestock, also known as the cattle tax)and community tax (was levied on every adult member).[7] In the west, taxes were collected through the use of Owo ori (levy for services provided) and Isha-kole (was levied on citizens by chiefs and community leaders). The East was not left out of the move, the traditional rulers and village heads imposed tax on members of their community via community services and dues.[8] The North had a highly organised system of collecting tax, the Southern part of the country had no centralized system of taxation, also in the West taxes were paid in kind by doing manual labour like building, clearing bushes and many others.[9] During the British colonization, Lord Lugard introduced tax law in Nigeria by the "Land Revenue Proclamation of 1904".[10] He implemented the 'Stamp Duties Proclamation in 1903' in a bid to harmonize tax system in Nigeria. Nigeria's tax system has undergone various transformation over the years. Some of such transformations are: Native Revenue Proclamation in 1906, Native Revenue Ordinance of 1917, Native Direct Taxation (Colony) Ordinance No. 41 of 1937, Non-Native (Protectorate) Ordinance of 1939 and Direct Tax Ordinance No. 4 of 1940 amongst others.[11]

Basically, modern day tax can be divided into two categories, direct and indirect tax. Direct taxes are taxes levied directly on a person income or company's income.[12] The burden of direct tax cannot be shifted; the taxpayer is informed of his tax through the 'assessment notice' and a receipt will be issued thereafter. Examples of this tax include Personal Income Tax (PAYE), Capital Gain Tax and Company Income Tax (CITA) amongst others.[13] Indirect taxes are levied directly on the consumer of the goods and services, and it is paid to the government indirectly by the manufacturer. This type of tax allows the burden to shift from one person to another. For example, the manufacturer of a product levels the tax on the consumer of the product, thus the consumer indirectly pays the tax. Examples of this tax are Value Added Tax (VAT), Stamp Duties and Excise Duties amongst others.[14]

Arbitration is the only alternative dispute resolution (ADR) technique that will be focused on in this research work. Hence it is pertinent to give a definition.

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[7] https://www.investsmall.com/taxation-in-nigeria-history-of-taxation/amp/ accessed on 2/7/2024.
[8] Ibid
[9] Ibid
[10]<htttps://www.harlemsolicitors.com/2013/10/15/a-legal-examination-of-the-role-of-taxation-in-revenue-generation-and-economic-development-in-nigeria/#:~text=There%20was%20no%20tax%20law,the%20eastern%20Nigeria%20in%201928> accessed on 27/06/2024.
[11]<htttps://www.harlemsolicitors.com/2013/10/15/a-legal-examination-of-the-role-of-taxation-in-revenue-generation-and-economic-development-in-nigeria/#:~text=There%20was%20no%20tax%20law,the%20eastern%20Nigeria%20in%201928> accessed on 27/ 06/ 2024
[12] https://www.investopedia.com> accessed on 29/08/2024.
[13] Footnote n 14 above
[14] Ibid

3.0 Definition of Arbitration

Arbitration and Conciliation Act 2004 has been repealed by the Arbitration and Mediation Act, 2023. The Act did not define the concept of arbitration; hence recourse will be made to definition proffered by scholars. Halsbury Laws of England defines arbitration as the determination of a dispute between parties after the careful consideration of the issue in controversy before an arbitrator, rather than a court of justice in accordance with the stipulated legal procedure. [15] Abifarin in his book[16], defines arbitration as the only known adjudicatory form of alternative dispute resolution available instead of making recourse to the normal litigation procedure. The reason why Abifarin arrived at this conclusion is because, arbitration is the only means of ADR that has the capacity of receiving and enforcing award. Stroud's Dictionary defines arbitration in the case of *Collins v Collins*[17] as a determination of dispute between parties with or without the presence of an arbitrator.[18] Bernstein opined that, arbitration is a situation where disputants agree to the term of settlement, by a neutral third party in a judicial proceeding.[19]

Arbitration is one of the integral parts of Alternative Dispute Resolution (ADR) which is a mechanism for resolving disputes instead of making recourse to a court of competent jurisdiction. Alternative dispute resolution means settlement of disputes without going to Court. It is pertinent to advocate for the implementation of arbitration as a mechanism for tax disputes resolution in Nigeria, when one considers the disadvantages that emanate from resolving tax disputes through the normal court procedure, it will be discovered that an alternative means of resolution is inevitable. Can arbitration be a preferred solution to the problem emanating from litigation? The answer is yes, Arbitration should be a veritable tool for settling tax dispute based on the following reasons. Firstly, it fosters good relationships between parties even after the dispute had been resolved this is not the case with litigation, where it is believed that in local parlance litigants can never be friends after dragging themselves before the regular law court. Secondly, disputants collectively agree to be bonded by the decision of the third party. The third party is expected to be neutral and to also act in accordance with the dictate of the law, this to ensure a just and fair

[15] Halsbury Laws of England Fourth Edition Nexis Lexis (2013), 1408.
[16] Olufemi Abifarin; The Process and Practice of Dispute Resolution in Nigeria, Princeton & Associates Publishing Co. Ltd, May 2021.
[17] 28 L.J. Ch 186.
[18]Stroud Judical Dictionary, Third Edition (2), 180.
[19] Bernstein, R. The Handbook of Arbitration, London, Sweet and Maxwell (1998), 420.

conclusion is reached[20]. A judge in arbitration proceeding is called an 'arbitrator'. He is expected to dispense justice in a just and fair manner.

4.0. Juridical Nature of Arbitration

According to Ayinla,[21] the judicial nature of arbitration falls under three theories, they are: Jurisdictional theory, the Contractual theory and the Hybrid theory which will be carefully considered below. Jurisdictional theory is the legal backing giving to arbitration process. That is, the legal basis of arbitrary panel to have its decision enforceable by a court of competent jurisdiction.

1. Jurisdictional Theory: Under this theory the State has the power to determine which dispute should be subjected to arbitration. The state has sovereignty over all arbitration matters, that is it has the power to decide which arbitration takes place in its jurisdiction and to ensure that it becomes subject to the law of the state[22] According to this theory, it is pertinent to pay careful attention to the law of the place where arbitration is taking place because it is an important determinant of its success.

2. Contractual Theory: Unlike Jurisdictional theory it emphasised that arbitration should be based on the agreement of both parties. In this scenario, it likens arbitration to a contractual agreement where the parties must agree to a contract before it can be implemented. Hence, there must be meeting of minds (consensus ad-idem) before arbitration can take place. Arbitration according to this theory is controlled by the parties without any state interference. Parties decide whether they want arbitration or not, they are free to make their choice which forms the basis of the arbitration.

3. Hybrid Theory: This theory was propounded by Professor Surville and developed by Professor Sauser-Hall.[23] This theory is of the opinion that the gap between the two theories earlier mentioned should be collapsed. This study centres on the contractual theory which is the agreement reached by parties to encourage autonomy of parties and the jurisdictional theory, which is the state control

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[20] Olufemi Abifarin; The Process and Practice of Dispute Resolution in Nigeria, Princeton & Associates Publishing Co. Ltd, May 2021, 58.

[21] Ayinla, Adebayo and Ahmed: An appraisal of the Nexus and disparities between arbitration and alternative dispute resolution(ADR) NAUJIL 8(1) 2017

[22] R. Maclean, 'A critical examination of the jurisdictional and contractual theories on the judicial nature of arbitration' <http:// www.unassignment.com/essay-samples/law/the-juridicial-nature-of-arbitration-law-commercial-essay.php> accessed 06/07/2023

[23] R. Maclean, 'A critical examination of the jurisdictional and contractual theories on the judicial nature of arbitration' <http:// www.unassignment.com/essay-samples/law/the-juridicial-nature-of-arbitration-law-commercial-essay.php> accessed 06/07/2023

of arbitration. The individual control comes in the aspect of deciding that an arbitration is needed by the parties, while the state comes in to enforce the agreement reached by the parties thereby giving it legal backing. This theory balances the thin line between jurisdictional and contractual theory.[24] However, arbitration might sometimes be confused with litigation, this is an error because the two terminologies differ.

4.1. Importance of Arbitration

It is pertinent to consider the advantages of the use of arbitration over litigation processes in Nigeria. Hence, advocating that arbitration of tax disputes in Nigeria should be given priority over litigation. They are:

1. It is cost effective: that is, it is a good way of effectively controlling cost compared to litigation. In litigation, most aggrieved parties are unable to approach a court when they are aggrieved, because of the exorbitant cost of its procedures. Arbitration has come to end this hardship and to help administer justice to parties. Thus, arbitration should be encouraged in tax dispute resolution in Nigeria.
2. It gives the parties the privilege to select the person who presides over the dispute. This privilege encourages parties to be neutral and open towards the decision of the arbitrator. For settlement of tax disputes, it has been constitutionally recognised that the Federal High Court has exclusive jurisdiction to preside over tax disputes. The Federal High Court is an arm of the Federal government; hence it is believed that it cannot work against its employers. In lieu of this an aggrieved person will not be willing to approach the court when aggrieved, because he believes that the judge is not independent. This is not the case with arbitration, where parties are given the opportunity to appoint the arbitrator.[25]
3. Arbitration has an edge over litigation in the aspect of formulation of rules. Parties can agree to limit the issues to be brought to the arbitrator, they can as well decide on the evidence to be presented, these help to facilitate arbitration.
4. Arbitration is private, parties are rest assured of the confidential of any information divulged in the course of the proceeding, this is not so for litigation which is held in the public. Hence, any person can partake in the proceeding. Tax disputes should be between the aggrieved parties and not for general consumption, which is one of the advantages of arbitration, hence it should be encouraged.

[24] Ibid
[25] Olufemi Abifarin; The Process and Practice of Dispute Resolution in Nigeria, Princeton & Associates Publishing Co. Ltd, May 2021

5. Arbitration is less formal when compared to litigation, which is rigid and full of technicalities. Less procedures and processes are involved, which ends with a logical agreement being reached by the parties.
6. Arbitration helps to foster good relationship between disputants, because one of its objectives is to ensure that parties are satisfied. This is not the case in litigation where a party must emerge the winner, while the other loses. It has really helped in fostering good relationship between parties, since they collectively agreed to allow the decision of the arbitrator/third party binding. Hence, a party cannot rescind the agreement because the judgement is not in his favour.[26]
7. Arbitration creates a good atmosphere for parties; thus, parties are relaxed and not comfortable when expressing themselves. This is not achievable in litigation, where the judge is seen as the superior who has the force of the law to pass any judgement. The court room atmosphere is usually tensed.
8. It also helps to decongest court rooms, that is, it eliminates bringing of frivolous cases to court. As a result, the court becomes less congested and well-coordinated. Ordinarily, cases that should have been resolved amicably becomes escalated by parties during litigation.
9. It further gives everyone a sense of belonging. This is due to the following services it provides- less formal procedure, cost effective, faster procedures and a less tense environment.
10. Apart from fostering good relationship between parties, it helps to create a neutral mindset in the heart of the parties such that they do not see arbitration as a win or die affair. This enables the acceptance of the decision of an arbitrator in good fate without questioning or rivalry.

5.0. Differences between Arbitration and Litigation

An arbitration settlement process can be made private while litigation process must be held in public, except in cases where the Constitution provides otherwise. Again, parties in arbitration have absolute control of the disputes, this is not the case in litigation. Arbitration is an alternative to litigation; it is a means of decongesting the court. Is arbitration an integral part of ADR in Nigeria? The answer to this question is yes. In arbitration, other professionals like Engineers,

[26] ibid

Surveyors and Accountants can preside over a dispute, which is not the case in litigation, which is the exclusive preserve of Judges. It is essential to know that arbitration is an adversarial method.[27]

It should also be noted that in arbitration an award is given, and the award is the final decision of an arbitrator, it is known as judgment of the court in 'litigation'. Some rules of courts provide for the use of alternative method before making recourse to a court of competent jurisdiction. Although, no such provision has been made for tax disputes. Hence, the reason why this research work is advocating for the use of arbitration in resolving tax disputes.

5.1Arbitration Tribunal

5.1.1 Establishment of the Arbitration Tribunal

Arbitration Tribunal was created to investigate arbitration matters and decisions reached by the arbitrator known is known as 'award', which can be enforced by a court of record, after going through the stipulated procedure. Arbitration also fosters good relationship between parties, because parties are given the opportunity to decide the procedure of the arbitration, hence, decision reached becomes binding on them. Arbitration is governed by Arbitration and Mediation Act,[28]which regulates the practice and conduct of arbitration in Nigeria. According to the Act, it is a means of settling international commercial disputes in the world. Section 19 of the Constitution[29] provides for 'respect for international law and treaty obligations as well as the seeking of settlement of international disputes through negotiation, mediation, conciliation, arbitration and adjudication'. The provision of Arbitration and Conciliation Act further buttress this provision. It is an institution where a neutral third party helps the aggrieved parties to reach a conclusive agreement, although the parties decide who will be the arbitrator.[30] It is a private way of settling disputes by excluding the general public from participating in the settlement of disputes. According to Ayinla and ors[31], arbitration is a quasi-judicial process of resolving dispute by a person who was not originally in the picture when the dispute began, called an arbitrator. The arbitrator has the obligation to carefully listen to parties without prejudice, then he proceeds to give his verdict, which becomes an award. The award given is enforceable by a court of record. Importantly, for

[27] Olufemi Abifarin; The Process and Practice of Dispute Resolution in Nigeria, Princeton & Associates Publishing Co. Ltd, May 2021
[28] Arbitration and Mediation Act, 2023.
[29] Of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
[30] See S. Schwab, Schiedsgenchtsbarkeit (3rd ed., 1979) at 1, cited by Brown and Marriot (4) 49.
[31] Ayinla, Adebayo and Ahmad: An Appraisal of the Nexus and Disparities between Arbitration and Alternative Dispute Resolution (ADR), NAUJILI 8 (1) 2017, 184.

arbitration to take place, parties must submit and agree to the terms. Hence, the willingness of the parties plays a significant role in the prompt resolution of the dispute.

6.0 Tax Disputes and How They Are Resolved in Nigeria

6.1 Tax Disputes

Disputes are inevitable in every human transaction; taxation is not exempted from such disputes. Importantly, disputes are bound to ensue between taxpayers and tax authorities which need to be settled one way or the other. Tax disputes also occur when there is contention between the government and its citizens regarding the payment of tax. That is, when there is controversy between the taxpayer and the relevant tax authority. Tax disputes can occur when an aggrieved taxpayer is not pleased with his tax ascertainment. It can also occur when tax authorities are displeased with tax return filed by the taxpayer. A taxpayer can be displeased with penalties, interest, and fines.

When tax disputes occur between the taxpayer and tax authority recourse is made to a court of competent jurisdiction to resolve such dispute.[32] Research has shown that our court rooms are congested and that they are filled with lot of cases that could be resolved via alternative means without making recourse to a court of competent jurisdiction. Due to the overwhelming cases in court, it has been discovered that cases take longer duration in court. For example, a court proceeding that took 24 years before it was resolved.[33] Rigid technicalities are strictly observed in court which usually lead to delay. Litigation processes are quite expensive and indigent disputants cannot afford them. The process of litigating in some cases destroy relationships, thus the saying, 'you don't go to court and come back as friend.'[34] It can be deduced from this assertion, that litigation does not foster good relationship between parties. These and a lot more are the reasons why it is essential to advocate for arbitration of tax disputes in Nigeria.

This study focuses on advocating for arbitration of tax disputes in Nigeria. Using the doctrinal approach, the advantages, and disadvantages of arbitration as a tool in resolving tax disputes in Nigeria will be extensively considered. Recommendations will also be proffered at the end of the work. Before going further, it is pertinent to look briefly into the history of taxation in Nigeria.

[32] Olufemi Abifarin; The Process and Practice of Dispute Resolution in Nigeria, Princeton & Associates Publishing Co. Ltd, May 2021
[33] ibid
[34] Olufemi Abifarin; The Process and Practice of Dispute Resolution in Nigeria, Princeton & Associates Publishing Co. Ltd, May 2021

Tax disputes are bound to ensue between parties because of the relationship that exist between them. Thus, disputes according to Thomas[35], is a situation where a party feels the course of action or thing being done by the other party is affecting his or her own interest, Olowu[36], defines dispute as something done by a party that is harmful to another. Having defined what a dispute is, it is pertinent to define tax disputes. Tax disputes are situations where disagreement ensues between a taxpayer and a tax administrator, the disagreement could be over the decision of the tax administrator, over the refusal of the tax administrator to refund to the taxpayer the overpaid tax, refusal to file tax return, prompt payment of tax, incorrect tax filing, wrong ascertainment of tax among others.

Law on administrative proceedings[37], defines tax disputes as 'disputes between the taxpayer (or the person deducting the tax) and the tax administrator or his officer regarding tax calculation, payment or recovery, underpayment or over payment of tax as well as regarding penalties for non-compliance with or violation of tax obligations[38]. In a bid to resolve tax dispute in Nigeria, the Federal Government inaugurated the Tax Appeal Tribunal (TAT) on the 4th of February 2010, to resolve disputes between taxpayers and tax authorities. This created controversy between the operation of the tribunal and the federal high court over tax disputes. Prior to the establishment of TAT in Nigeria, we had the Value Added Tax Tribunal (VATT) and the Body of Appeal Commissioners (BAC), who were saddled with the responsibility of settling tax disputes. Section 59 Federal Inland Revenue Service (Establishment) Act 2007 provides for the creation of TAT. This body was empowered according to this section to settle tax disputes, this is provided in the first schedule of the Act, paragraph 1 to 11. An aggrieved taxpayer can appeal against the decision of the Tribunal to the Federal High Court. However, the controversy that resulted from this section of the Constitution, which granted exclusive jurisdiction to the Federal High Court in respect of tax disputes have resulted in various decision of the court, regarding the jurisdiction of TAT over tax disputes. This can be seen in the following cases that will be discussed below; N.P.A v Enyamba, where it was held that section 251(1) (a) of the Constitution, which gives the FHC

[35] Thomas K. "conflict and negotiation process in organisations in Dunnette M. & Houghl (eds) handbook of industrial and organisation psychlogy(Pato Alto: C.A Consulting Psychosis' press,(1997) 119)
[36] Olowu, S. "conflict&conflict resolution" Ife psychologia (9) 3 (2001)
[37] 14 January 1999 No VIII-1029, vi inius, chapter, Article 2. Defintions, Law enacted by the Seimas of the Republic of Lithuania.
[38] <Https://www.lawinsider.com/dictionary/tax-disputes> accessed on 18/2/2023.

exclusive jurisdiction over revenue and other related matters excludes the jurisdiction of others including TAT.

The same decision was reached in *Faskin Foods (Nig) Ltd v Shosanya*[39] where it was further emphasized that the Federal High Court has exclusive jurisdiction over tax disputes. It went further that any law that is inconsistent with the provision of the Constitution shall become invalid, null and void. A similar decision was arrived at in T*SKJ II Construces Internationals Sociadade LDA v FIRS* (suit no. FHC/ABJ/TAII/12), where it was held that the provision of FIRSEA 2007 conflict with the Constitution, regarding the establishment of TAT, hence it is void. In the case of *NNPC v Tax Appeal Tribunal (TAT, Lagos Zone),*[40] where it was held that TAT was a quasi-judicial Tribunal and did not derogate from the FHC original jurisdiction over tax matters. The fact of the case was a dispute over an oil mining lease (OML) 118 Production Sharing Contract (PSC). NNPC as an agent of the federal government collected Petroleum Profit Tax assessed against the contractors, likewise Educational Tax for the year 2010. NNPC sought a declaration that the FHC only had exclusive jurisdiction over such matter and that TAT previous decision be overruled.

The contractor was to prepare the tax and file it to NNPC, who in return files it to the appropriate authority (FIRS). NNPC alleged that the returns filed was incorrect. It was further held that the jurisdiction of TAT does not conflict with that of FHC since it is a body properly established by Federal Inland Revenue Service of the government. Although, cases that have been earlier decided have disputed this. As seen in the case of *Esso v NNPC*[41], where it was held that the tribunal had jurisdiction to arbitrate over tax disputes in Nigeria. TAT was seen as an administrative body charged with the responsibility to help parties. In the case of Esso Exp. & Prod. (Nig) Ltd v FIRS[42], where it was held that tax disputes are not arbitrable and that any arbitral proceedings tailored towards resolving tax disputes will be void and of no effect. These and several other cases have led to various controversies on the jurisdiction of TAT over tax disputes. To conclude on the arbitrability of TAT over tax disputes, TAT is an administrative arm of the FIRS used in resolving tax disputes before making recourse to a court of record. It did not conflict with the jurisdiction of the FHC as it was held in *NNPC v FIRS.*[43]

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[39] (2006) All FWLR (pt 320) 1059 at 1076,

[40] Suit no: FHL/L/CS/630/2013.

[41] Funke Adekoya and Ibifubara Berenibara Case Review: Esso Petroleum and Production Nigeria Limited & SNEPCO v NNPC, http://www.aelex.com/media/Esso/Esso/Esso%20Petroleum%20 and%20 . accessed last on 8th December 2020.

[42] (2021) 8 NWLR (prt 1777), 43.

[43] Agbonika Josephine Aladi Achor, Tax Diapute Resolution in Nigeria: A Storm in a Tea Cup. Journal of Law, Policy and Globalization, ISSN 2224-3240 (paper) ISSN 2224-3259 (online) (29), 2014. www.iiste.org

7.0 Challenges of Arbitration

There is no phenomenon without its own challenges or disadvantages. Arbitration also has its own challenges. They are:

1. Arbitration has not actually received wide recognition: The Constitution has not been helpful in the area of tax dispute resolution, due to the provision of section 251(b) of the constitution that granted exclusive jurisdiction to the Federal high court on tax matter. Thus, it excludes other jurisdiction from presiding over tax matters and this has not encouraged the use of arbitration in resolving tax disputes in Nigeria.
2. Poor Awareness: Awareness of arbitration is relatively low in the country, people see the court as superior and believed that the decisions of other ADR cannot be binding on the court, thus they do not seek alternative solution. This has created a major barrier regarding the use of arbitration in Nigeria.
3. Enforcement of an award made by the arbitrator is a major challenge faced on the use of arbitration to resolve tax disputes. Most times, it is difficult to enforce the decisions of an arbitration tribunal. Such decisions of the tribunal can be overridden by a court of competent jurisdiction.[44]
4. Flexibility of an arbitration tribunal is a major challenge, because arbitration is flexible its decisions can be easily changed, rules can be amended and lots more. These can lead to the arbitrator given a verdict that is unjust, unfair, and unable to stand the test of time.
5. Delay is bound to ensue, because the parties have the full control to decide the way the proceeding will take, who will be the arbitrator, the venue amongst others. A party can decide to frustrate settlement by always disagreeing with the idea of the other party in other to delay justice. The saying Justice delayed is justice denied is the reason why prompt justice has always been advocated for.[45]
6. Arbitration does not take place in a court setting, although a court can appoint an arbitrator, this can make one of the parties to decide to opt out of arbitration and decide to make recourse to a court, this can be frustrating. Arbitration faces this challenge more often, even though some rules of the court has made provision for the use of arbitration before recourse to a Court.

[44] Olufemi Abifarin; The Process and Practice of Dispute Resolution in Nigeria, Princeton & Associates Publishing Co. Ltd, May 2021
[45] Ibid

7. Absolute control of the terms of arbitration by the parties involved can create problem, when a party wants Mr A as the arbitrator while the other wants Mr B. This will further lead to dispute which both parties might be unable to resolve amicably among themselves.

8.0 Conclusion and Recommendation

It can be deduced from the diverse opinions that have been stated during this study that, cases resolved through arbitration of tax disputes in Nigeria is relatively low. Due to the various ways that have been earlier utilised to resolve tax disputes, various disparities could be seen eminent. Like the various decisions of courts in the cases of *Esso v NNPC,*[46] *NNPC v FIRS,*[47] *NNPC v TAT,*[48] *Cad-bury Nigeria Plc v FBIR,*[49] *N.P.A v Eyamba* amongst others, it could be seen from the decisions held from these cases that controversies over the jurisdiction of VATT, BAC and TAT were determined.

The case of *NNPC v TAT* settled the controversy by declaring that TAT is only an administrative body, meant to attempt settlement before making recourse to a court of competent jurisdiction, thus TAT is not a court. In lieu of this, there should not be the issue of conflict regarding jurisdiction of the FHC. Also, TAT was established to replace VATT and BAC who could not survive the issue of jurisdiction, hence it was distinct when compared with the previous bodies. One important thing its creation was able to achieve is that it did not conflict with the exclusive jurisdiction of the FHC. Also, it can be deduced that arbitration was novel to tax disputes. The constitution equally did not help matters, as there is no provision regarding settlement of tax disputes via arbitration in Nigeria. Arbitration and Conciliation Act 2004 which is the only enabling enactment for arbitration has equally not been found helpful. It makes provision for settlement of commercial international dispute and not settlement of tax disputes. An urgent need for the advocation of settlement of tax disputes via arbitration is of paramount importance in Nigeria. This will go a long way in decongesting our courts and help in quick resolution of tax disputes by enhancing its effectiveness and efficiency. Advantages of arbitration cannot be exhausted, thus the need for this advocacy.

[46] Funke Adekoya and Ibifubara Berenibara Case Review: Esso Petroleum and Production Nigeria Limited & SNEPCO v NNPC, http://www.aelex.com/media/Esso/Esso/Esso%20Petroleum%20 and%20 . accessed last on 8th December 2020.
[47] Agbonika Josephine Aladi Achor, Tax Dispute Resolution in Nigeria: A Storm in a Tea Cup. *Journal of Law, Policy and Globalization,* (29), 2014. www.iiste.org.
[48] Suit no: FHL/L/CS/630/2013
[49]<https://www.google.com/url?q=https://assets.ctfassets.net/xh9wlpgzblok/61tarbULYpZxiCAcprKo1/57303826d94f26a113ddcf055f872c47/Cadbury_Nig._Plc

Below are recommendations to facilitate arbitration in Nigeria:

1. The government should enforce the Arbitration and Mediation Act 2023 in Nigeria, once this is done it will enable the aggrieved parties to make recourse to arbitration rather than litigation. This will help decongest our court and promote healthy environment habitable for living.
2. There is a need to sensitize the public on the use of arbitration in resolving tax disputes. This helps to create a better awareness for arbitration.
3. The need to ensure that an arbitrator is an expert in the dispute he is presiding over to ensure the delivery of a good and valid judgment.
4. States should be encouraged to establish arbitration centres in the state, just like the establishment of a court, this will go a long way in bringing arbitration to the limelight. Although some states such as Kwara and Lagos state have arbitration centres.
5. The rules of court should make provision for arbitration of tax disputes before an aggrieved person can make recourse to court.

THEORETICAL BACKGROUND OF CORPORATE GOVERANCE IN NIGERIA

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Abstract

This article delves into the theoretical foundations of corporate governance, focusing on the Nigerian context. It begins by defining corporate governance and discussing key theories, including Agency Theory and Stakeholder Theory, while acknowledging the importance of other theories. The evolution of corporate governance in Nigeria is highlighted through significant regulatory frameworks, notably the Companies and Allied Matters Act (CAMA) and the role of the Nigerian Securities and Exchange Commission (SEC). The article addresses critical challenges such as corruption, transparency, and the impact of the unitary board system, while evaluating recent reforms and improvements. By comparing Nigerian practices with international standards, it identifies areas of alignment and divergence. The conclusion synthesizes key findings, offering targeted recommendations for enhancing corporate governance in Nigeria and suggesting future research directions. This analysis serves as a valuable resource for policymakers, business leaders, and scholars interested in governance practices within emerging markets.

Keywords- Corporate Governance, Agency Theory, Stakeholder Theory, CAMA 2020

1.0 Introduction

Corporations are the key players in the global economic environment; being the main source of a country's economic growth, and the most attractive business deal to invest in. To maintain and increase the profitability of corporations and enlarge the investment flows, it is crucial to ensure a total understanding of the owners', investors', and managers' interests and find a way to balance them. All this is about corporate governance and the ways in which investors assure themselves of getting a return on the finance.[1]

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[1] Alla Mostepaniuk, 'Corporate Governance' (2017),<https://www.intechopen.com/; <https://www.researchgate.net/publication/ 319983192> 4, accessed April 1 2024.

2.0 Overview of Governance Structure

It has been argued that corporations are a product and a part of the society. Thus, understanding corporations involves insights into the way in which the corporation is viewed as a social phenomenon. This may be discovered by investigating historical and theoretical foundations and forming a conception of the functioning of the corporation as a dynamic entity. The models of companies that have been adopted in various jurisdictions are shaped by the theories concerning the place of companies within society.[2]

Theory means a set of statements or principles devised to explain a group of facts or phenomena, especially one that has been repeatedly tested or is widely accepted and can be used to make predictions about natural phenomena. [3]

Looking at the notoriety which corporate governance has gained, several different theoretical frameworks have evolved to explain and analyse the governance process. A closer look would show that each of the frameworks approaches corporate governance in a slightly different way, using different terminology, and viewed it from different perspectives. To appreciate how theorists have tried to make sense of corporate governance issues, reference can be made to widely discussed theories or approaches commonly used to understand how corporations are governed and how the system of governance can be improved.[4]

Notoriety in this context refers to the increasing public attention and scrutiny that corporate governance has attracted, particularly considering numerous corporate scandals and failures. Over the past few decades, high-profile cases of financial mismanagement, corruption, and poor oversight have highlighted the vulnerabilities in corporate governance systems. These events have sparked debates about the effectiveness of existing governance structures and the need for reform, thereby making corporate governance a topic of both public concern and academic interest. As a result, corporate governance has become notorious not only for its visibility but also for the controversies surrounding its implementation and effectiveness across different industries and regions.

Different theories concerning the origin and purpose of corporations influence the model of company adopted and thus shape the relationship that companies have with all the participants

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[2] Janet Dine, 'Theoretical Underpinning of Companies and their Governance', Cambridge University Press, 052166070X-The governance of Corporate Groups,<www.cambridge.org> 1accessed March 3 2024.

[3] Richard Adepeju, & Felix.Ojemhede Akahome, *Explaining and Understanding Corporate Governance in Banks and Other Financial Institution* (1st edn, Priceton & Associates Pub. Co. Ltd, 2021) 9.

[4] Robert Wearing, *Cases in Corporate Governance*, (1st edn. Sage Publications, 2005).5, cited in Olusola A. Akinpelu, *Corporate Governance framework in Nigeria: An International Review* (Bloomington: iUniverse, Inc., 2011), 58-59.

in their economic activity and with their regulators. Formulating a regulatory structure without such an enquiry invites incoherence. This explains the view of Bottomley that:

> The broad and basic purpose of examining corporate theory is to develop a framework within which we can assess the values and assumptions that either unite or divide the plethora of cases, reform proposals, legislative amendments, and practices that constitute modern corporation law. This law has not sprung up overnight. We need some way of disentangling the different philosophical and political perspectives from which it has been constructed.[5]

3.0 Conceptual Clarification

Corporate governance is a concept that has no generally accepted definition, as most scholars and stakeholders in the field tend to examine the concept from their own perspectives.[6] The lack of consensus on the definition of the concept has created a sense of intellectual vertigo in the ever increasing debate over corporate governance.[7] Notwithstanding the inability of scholars to reach a consensus on what the concept connotes, it is not escapist not to attempt to provide few working definitions in this piece of work.

Coyle defined corporate governance as the way in which companies are governed and to what purpose.[8] It also refers to the way the power of a corporation is exercised in the stewardship of the corporation's total portfolio of assets and resources with the objective of maintaining and increasing shareholder value and satisfaction of other stakeholders in the context of its corporate mission. It then implies that companies not only maximise shareholders wealth, but also balance the interests of shareholders with those of other stakeholders, employees, customers, suppliers, and investors to achieve long-term sustainable value. From a public policy perspective, corporate governance is about managing an enterprise while ensuring accountability in the exercise of power and patronage by firms.[9]

From the plethora of definitions above, corporate governance can be defined as ways by which a company is governed through effective mechanisms (sets of rules and practices). It defines the roles and relationships between the company's management, the board, shareholders, and

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[5] Dine (n 2), 1.

[6] Dominic Asada .(2006) 'Effective Corporate Governance and Management in Nigeria: An Analysis'. M. Phil. Thesis. Faculty of Law, University of Jos. <http://www.dspace.unijos.edu.ng/bitstream/10485/901/1/corporate governance.mgti nnigeria.pdf> 187, accessed Jan 15 2024.

[7] See Turnbull, 'Corporate Governance Theories, Challenges and Paradigms', cited in Vera Ekundayo, 'An Introduction on Corporate Governance: Its Meaning From Diverse Perspectives' [2012] 1 No. 2.B.U.S.L.J.) *Babcock University Socio-Legal Journal*, 97.

[8] Coyle Brian, *Corporate Governance Principles* (5th Ed, Study Text: ICSA International & Training Ltd, 2007) 3.

[9] Charles C Okeahalam, and Oludele A Akinboade, 'A Review of Corporate Governance In Africa: Literature, Issues and Challenges' [2003], *The Global Corporate Governance Forum.*<http://www.aercafrica.org/documents/rp149.pdf>1-34, 3.accessed 22 January 2024. .

other stakeholders, and the aims for which a corporation is governed. It is premised on the above that Umoru identified the main actors as the Chief Executive Officer (CEO), the board of directors, and the shareholders. Additionally, other key participants that influence this framework include staff, suppliers, customers, creditors, government entities, and communities.[10]

4.0 Theoretical Perspectives on Governance in Nigeria

Corporate governance theories offer various frameworks for addressing governance challenges within organizations and across the globe. These include agency theory, which focuses on aligning the interests of shareholders and executives; Stewardship theory, which views managers as inherently motivated to act in shareholders' best interests; Stakeholder theory, emphasizing the consideration of all stakeholders; Resource dependency theory, examining how external resource dependencies influence governance; Transaction cost Theory, assessing the costs associated with transactions; Political theory, exploring the impact of political processes on governance; and several Ethics-Related theories such as Business ethics, Virtue ethics, Feminist ethics, Discourse theory, and Postmodernism ethics.[11]

In Nigeria, governance framework primarily adopts agency theory, reflecting a focus on aligning managerial actions with shareholder interests through mechanisms like supremacy and control, board structure, disclosure and transparency, appointment and functions, shareholders' rights, Auditor's independence. However, elements of stakeholder theory are also present, addressing the rights and engagement of various stakeholders and promoting Corporate Social Responsibility (CSR). This integration highlights a broader approach to governance that balances shareholder interests with those of other stakeholders.

To better understand this comprehensive approach, it is essential to delve into the core principles of agency theory and stakeholder theory and explore how the specific mechanisms mentioned are employed in the Nigerian context to address governance challenges and foster a more inclusive approach to corporate management. However, before examining these theories, it is imperative to trace the historical evolution of corporate governance in Nigeria, as this

[10] Godwin Luke Umoru, *Corporate Citizenship in Law: Nigerian and Comparative Perspective* (Malthouse Law Books, Lagos, Nigeria, 2017), 209.

[11] Haslinda Abdullah & Benedict Valentine, 'Fundamental and Ethics Theories of Corporate Governance' (2009), Issue 4. 88-96, *Middle Eastern Finance and Economic*<shttp://www.eurojounals.com/MEFE.thm>,.88,accessed 20 March 2024.

provides essential context for understanding why certain practices emerged and how they have been adopted. In Nigeria, historical factors such as colonial legacies, economic changes, and legal developments have significantly influenced corporate governance practices. Tracing this background helps illuminate the specific challenges and dynamics of the nation's governance practices, as well as the relevance of various theories in addressing those issues.

4.1. **Historical Development of Governance Practices in Nigeria**

Adepeju and Akahome note that governance is closely linked to company law in Nigeria,[12] with key issues of regulation and control found within company legislation. This legal framework originates from Nigeria's colonial history, as the country inherited many British regulations upon independence.[13] Ofo describes the historical development of governance concepts in Nigeria as somewhat distorted and confusing, prompting a discussion of its emergence in identifiable phases.[14]

In 1912, the first local companies' legislation was promulgated as the Companies Ordinance which was based on the U.K. Companies Act, 1908, It was applied only to the Colony of Lagos but amended in 1917 and extended to the whole country. However, the two Ordinances were repealed and replaced with the Companies Ordinance of 1922 which was subsequently amended in 1929, 1941 and 1954. The Companies (Amendment) Ordinance, 1941 was re-designated as the Companies Act in 1963, later repealed by the Companies Act 1968.[15]

The companies Act of 1968 was a local adaptation of the English Companies of 1948. This is why Orojo concluded that "legislative activism in Nigeria while always internally stimulated, is nearly always characterized by too early a resort to external examples and procedures".[16] Nonetheless the above, the 1968 Companies Act was a remarkable improvement on the previous laws. For example, it made mandatory provisions for accounts and advocated for accountability of directors and more effective participation of shareholders in the affairs of the company.[17] However, according to Umoru, the 1968 Act was not without its legions of

[12] Adepeju & Akahome (n 3) 37.
[13] Elewechi.N.M Okike, 'Corporate Governance in Nigeria: The Status Quo' [2007] *Corporate Governance Journal*: Vol 15, Issue 2, 173-193 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=972517>- accessed on March 30, 2024.
[14]Nat Ofo, Historical Development of Corporate Governance in Nigeriahttp://www.thecorporateprof.com1-12, accessed July 3 2024; Umoru (n 10) 211.
[15] J.Olakunle Orojo, *Company Law and Practice in Nigeria* (5th edn, United Kingdom: Lexis and Nexis Butterworths, 2008), 15; S.C. Udemezue,, A Compendium of the Historical, Legal and Institutional Framework for the Practice of Company Law and Corporate Governance in Nigeria, [2021], NAU.JCPL Vol. 8 (2), *Nnamdi Aizkwe University, Journal of Commercial and Property Law*, p. NLPJ Vol. 13, 66-84, 67. Also available at https/ssrn/abstract=3849221.
[16] Deji Sasegbon, *Nigerian Company Law & Practice* (1st edn, Lagos, Deji Sasegbon & Co), cxv.
[17] Orojo (n 15)15.

limitations,[18] as it was not comprehensive enough to accommodate emerging development in business activities. Against the background of the developments at that time, the overhauling of the 1968 Act became expedient.[19]

The Companies Act, 1968 notwithstanding its lapses was in force for 22 years before it was repealed and replaced by the Companies and Allied Matters Decree (CAMD) 1990. The 1990 Decree was later redesigned as Companies and Allied Matters Act 1990 (CAMA). Expectedly, while the 1968 Companies Act was largely predicated on the English Companies Act 1948; the 1990 Act also drew substantial inspiration from the English Companies Act 1985 and English Companies (Amendment) Act 1987.[20]

The 1990 Act serves as the primary statutory framework for company law in Nigeria, described by Orojo as the result of careful consideration and extensive consultation, reflecting the consensus of its users.[21] Its comprehensiveness includes significant innovations, laying the groundwork for corporate governance practices,[22] even though corporate governance had not yet emerged as a distinct subject at the time of its enactment. Consequently, the principles of corporate governance in Nigeria can be largely traced back to CAMA 1990.[23] However, after the commencement of CAMA 1990, some corporate challenges erupted around the world which brought the issue of corporate governance to the front burner. Specifically, the collapse of Enron, WorldCom, and other notable incorporations in the early 2000s brought about global consideration of corporate governance.[24] Consequently, several countries began the review of their governance practices. Just like other countries in the world, Nigeria also witnessed a very high incidences of corporate failure and distress ranging from Unilever Plc, Cadbury Nigeria Plc, up to the banking sector.

Consequent upon the above, the 1990 CAMA was amended first in 1990 by the Companies & Allied Matters (Amendment) Decree No 32, 1990. Then again in 1991 by the Companies &

[18] Umoru (n 10).211.

[19] Chris Wigwe, *Introduction to Company Law and Practice* (2nd edn, Princeton & Associates Publishing, Ikeja: Lagos, 2022), 4.

[20] Jacob Abiodun Dada, *Principles of Nigerian Company Law* (4th edn, Wusen Publishers, Calabar,2023) 3.

[21]Orojo (n 15), 18.

[22] Dada (n 20) 4.

[23] Adepeju & Akahome (n 3) 37. Some of the innovations in CAMA 1990 include, establishment of a Corporate Affairs Commission (CAC), requirement for a minimum authorized share capital and minimum subscription, prohibition of non-voting shares and of weighted shares, abolition of the common law rules of constructive notice of filed documents, the reform and enactment of the indoor management rule, abolition of common law rules on pre-incorporation contracts and provision for ratification and adoption of such contract, introduction of specialized subjects like unit trust, merger and acquisitions, business name, incorporated trustees, and stronger and closer control over directors and companies accounts (See generally Part ix of CAMA 1990.).

[24] Umoru (n 10) 211.

Allied Matters (Amendment) Decree No 46, 1991; and later in 1992 by the Companies & Allied Matters (Amendment) Decree, No 46 1992. Later, the Investment & Securities Act (ISA) 1999[25] repealed sections 541 to 623 of CAMA and re-enacted the same sections as sections 1 to 148 of the ISA, 1999.[26] For example, provisions of the original Act (CAMA) dealing with Unit Trusts, Insider Trading, mergers & Take Overs, public offer and sale of securities, and related matters have been omitted from the Act and now contained in the Investment & Securities Act.[27] The Investment & Securities Act (ISA) 1999 was itself repealed and replaced by the Investment & Securities Act (ISA), 2007, which was later amended by the Investment & Securities (Amendment) Act, 2011[28].

Recently, CAMA 1990 was repealed and replaced by CAMA 2020,[29] which aims at providing a robust framework for reforming identified onerous legal, regulatory, and administrative bottlenecks which, for three decades, have made doing business in Nigeria substantially difficult (particularly for Micro, Small and Medium Enterprises- MSMEs), and impeded investments into Nigeria.[30]

The repealed Act imposed significant challenges on doing business in Nigeria, particularly for Micro, Small, and Medium Enterprises (MSMEs). One major hurdle was the mandatory requirement for multiple shareholders in private companies, which forced entrepreneurs to seek partners merely to meet this criterion, often leading them to choose less advantageous business structures. Additionally, the high registration fees and complex compliance procedures created financial burdens that discouraged entrepreneurship and delayed business operations. The lack of provisions for electronic transactions further hampered businesses, as they were unable to leverage modern technology for efficiency and security.

In contrast, the recently enacted CAMA 2020 addresses these issues by introducing more flexible regulations that reduce barriers to entry. The new law allows for single-member companies, significantly easing the incorporation process for individual entrepreneurs. It also lowers registration costs and simplifies compliance requirements, making it easier for MSMEs to operate. Furthermore, CAMA 2020 incorporates modern technological solutions such as

[25] No 46, 1999; Cap I24, LFN, 2004
[26] Udemezue (n 15) 67.
[27] Cap I24, LFN, 2004, repealed by ISA, 2007, as amended.
[28] The 2011 amendment relates to sections 20, 21, 23 & 26 of the 2007 Act.
[29] Signed into law on August 07, 2020. available at <https://www.cac.gov.ng/wp-content/uploads/2020/12/CAMANOTE-BOOK-FULL-VERSION.pdf?> accessed February 10, 2024.
[30] Banwo and Ighodalo, 'Companies and Allied Matters Act: Reforming Provisions that Impact the Nigerian Business Community'https://www.banwoighodalo.com/greyaccessed February 14 2024.

electronic signatures and digital filing systems, aligning Nigerian business practices with global standards and fostering a more conducive environment for investment and growth.

Today CAMA 2020 is the principal legislation while there are other specific legislations such as Investment and Securities Act 2007, The Nigerian Investment Promotion Commission Act of 1995, Banks and other Financial Institutions (BOFIA) Act 2020, Federal Competition and Consumer Protection Act (FCCPA) 2019, and the more recent Financial Reporting Council of Nigeria (Amendment) Act 2023.[31] There is also Nigerian Code of Corporate Governance 2018 ("The Code")" issued by the Financial Reporting Council of Nigeria (FRCN),[32] which aimed at resolving the challenges of applying the preceding multiple codes[33] by providing a set of corporate governance standards applicable to both private and public companies (whether listed or not). While applying the Code, each sector is permitted to make guidelines in line with and peculiar to its mode of operation.

To ensure effective regulation and enforcement of corporate governance principles, various laws and codes have established key institutions in Nigeria. The Companies and Allied Matters Act created the Corporate Affairs Commission (CAC), responsible for overseeing the formation and dissolution of companies.[34] The Investment and Securities Act established the Securities and Exchange Commission (SEC), which regulates the capital market, securities investments, and mergers and acquisitions.[35] Additionally, the Financial Reporting Council of Nigeria (FRCN) was formed to develop and publish accounting and financial reporting standards for public entities.[36] Thus, Nigeria's approach to corporate governance encompasses legal, institutional, and regulatory frameworks.

4.2 Understanding Agency Theory and Stakeholder Theory

4.2.1 Agency Theory

[31]Prior to this amendment, the Financial Reporting Council of Nigeria Act 2011 CAP. 216, Laws of the Federation of Nigeria (LFN), 2010 was the legislation in force, but the Act witnessed a change when about twenty-four (24) of its section were recently amended, thus paving way for the current FRCN (Amendment) Act 2023.
[32]Pursuant to Sections 50 and 52 of the FRCN (amendment) Act 2023.
[33] There were various sectoral codes applicable to only the affected regulated industries prior to the introduction of the Nigerian Code of Corporate Governance 2018, such as the SEC Code (2003) for public companies, the CBN Code (2014) for banks and discount houses, PENCOM Code (2008) for licensed pension fund operators, the NAICOM Code (2009) for the insurance industry.
[34] Section 1 (1) & 8 (1) (a). Hereinafter referred to as CAC.
[35] Hereinafter referred to as 'the Commission'
[36] Hereinafter referred to as 'the Council'. It formulated a uniform Code which is expected to be applicable to all Industries (Hereinafter referred to as NCCG 2018).

Agency theory is defined as the relationship between the principals, such as shareholders and agents, the company executives, and managers. Jensen and Meckling explained it as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some services on their behalf which involve delegating some decision-making authority to the agent.[37]

It is one of the major theories that show organization relationship with ownership.[38] The managers act as agents of the corporation. The owners or directors set the central objectives of the corporation. Managers are responsible for carrying out these objectives in day-to-day work of the company. In this regard, the owners are the principals, who may not probably have knowledge or skill for getting the objectives of the company executed consequent upon which they authorize the managers to act as "agents". By this, a contract between principal and agent is made.

The agent is expected to represent the best interests of the principal without regard for self-interest. However, the self-seeking nature of individuals has made the best situation usually impossible to attain because the managers, in managing the company on behalf of the shareholders, make decisions which affect their personal welfare as well as the welfare of the shareholders.[39] The capability of the managers to make unsupervised decisions may lead them to take decisions in their personal best interest but not the best interests of the owners. Company managers may prefer to pursue personal objectives at the detriment of the company. Such as aiming to gain the highest bonuses possible to supplement their salaries whether the company's profit is sufficient to sustain it or as company managers, they may require the use of the company's property or car and holiday packages by virtue of their status in the company.[40] However, Jensen and Meckling explained the problem of this theory as agency cost. He classified as monitoring loss, bonding loss, and residual loss of principal, which if not taken care of might affect shareholders' interest.[41]

Historically, the term 'corporate governance' emerged about forty years ago and is derived from the Latin words 'gubarnare' and 'gubernator,' which mean 'to steer the ship' and 'the helmsman

[37] Michael C. Jensen & William H. Meckling, 'Theory of the firm, Managerial Behaviour, Agency Costs and Ownership Structure', (1976) Vol. 3, No. 4, *Journal of Financial Economics*,305-360 (October),.5 <http://ssrn.com/abstract=94043> accessed 21 March 2024.
[38] Adepeju, & Akahome (n 3) 10.
[39] Brian (n 6) 6.
[40] ibid.
[41] Jensen & Meckling, (n 37) 6.

or captain of the ship,' respectively.[42] It evolved as a mechanism to address the agency problem. Most of the literature reviewed by the authors, at that point in time, focused on what is known as the Anglo-Saxon model that is largely prevalent in the UK and the USA where firms are more akin to the Berle and Means view of the world.[43] Corporate governance principles that have evolved have reflected what was considered as the best practice in the UK and USA and require listed companies to have unitary boards, independent outside directors, and board committees. In line with the underlying assumptions of the agency theory, these principles primarily focused on enhancing shareholder value and, in the process, richly reward top executives and have been the principal basis for governance codes around the world.[44]

4.2.2 Stakeholder Theory

Stakeholder theory is a perspective in organizational management and business ethics that highlights the need for businesses to consider the interests of all groups impacted by their actions, rather than focusing solely on shareholders. It asserts that companies have a broader responsibility to create value for a range of stakeholders thereby encouraging ethical practices and promoting corporate social responsibility.[45]. The OECD argues that there is a public policy perspective towards corporate governance as well as a corporate perspective, thus:

> From the public policy perspective, corporate governance is about nurturing enterprise while ensuring accountability in the exercise of power and patronage by firms. The role of public policy is to provide firms with incentives and discipline to minimize the divergence between private and social returns and to protect the interests of shareholders[46]

A stakeholder is any group or individual who can affect or is affected by the achievement or objectives of the firm, and they include Government, Investors/Shareholders, Suppliers Trade Associations, Customers, Local Communities, Creditors and Employees[47]. Freeman and Reed distinguish two senses of stakeholder to wit, the narrow definition which includes those groups

[42] Godwin O Demaki 'Proliferation of Codes of Corporate Governance in Nigeria and Economic Development', [2011] Vol.1 (6), *Business and Management Review*, 1-7.
[43] Santosh Pande, 'The theoretical Framework for Corporate Governance' (2011) (October)< http://ssrn.com/abstract=1949615>.2accessed April, 1, 2024.
[44] Ibid, 3.
[45] Akinpelu (n 4) 63.
[46] OECD Principles of Corporate Governance, 2004.
[47] Adepeju, & Akahome (n 3) 11.

which are vital to the survival and success of the corporation and the wide definition includes any group or individual who can affect or is affected by the corporation.[48]

The argument of the stakeholder theorists is that the principal-agent model appears to focus exclusively on the interests of shareholders and that it may happen that managers are over-concerned with shareholders who are interested only in short term profits and consequently managers neglect the long term.[49] The role of companies in society has received increasing attention over time, with their impacts on employees, the environment, local communities, as well as their shareholders, becoming the focus of debate. Social and environmental lobby groups have gathered information on business activities and have targeted companies that have treated their stakeholders in an unethical manner.[50]

Today, the theory has infiltrated many disciplines in some useful ways.[51] There are critical mass of scholarly works that use the theory in strategic management, finance, accounting, human resources management, production, information technology, marketing, law, health care, public policy, business ethics and corporate social responsibility.[52] Although, their review is barely half a decade old, the stakeholder literature has at least doubled since it was published. An increasing number of executives and companies are also embracing the theory and applying its concepts.[53]

4.3 Integration of Agency and Stakeholder Theories in CAMA 2020 Governance Mechanisms

a. **Division and Exercise of Power (Supremacy and Control)**: At the core of organizational governance is the division of powers among a company's various organs. Under common law, this distribution primarily relies on the memorandum and articles of association. The question of whether the general meeting or the board of directors holds controlling power has been a contentious issue in Nigeria and other Commonwealth countries, resulting in various judicial interpretations since the 19th century.[54] It is commonly assumed that the general meeting

[48] R.Edward Freeman,'Stakeholder Theory on Modern Corporation', *General Issues in Business Ethics*,< https://academic.udayton.edu/lawrenceulrich/Stakeholder%20Theory.pdf>, 42, accessed April 1, 2024.
[49]Akinpelu (n 4). 63.
[50] ibid.
[51] Jeffrey S Harrison, *et al* 'Stakeholder Theory as an Ethical Approach to Effective Management: Applying the theory of Multiple Contexts, (2015) Vol. 17, No 55, (August), *Review of Business Management, Sau Paulo*<http://.www.researchgate.net/publication/283194075> 860, accessed March 18 2024.
[52] Bobby Parmar, and others, 'Stakeholder Theory: The state of the Art' (2010) *The Academy of Management Annals*< http://.www.researchgate.net/publication/235458104>6-7.
[53] Harrison, *et al* (n 51) 860.
[54] Akinpelu (n 4).217.

members are the supreme authority in a company, with the board of directors acting as their agents.[55] However, recent decisions indicate that members cannot interfere with directors' decisions unless those decisions contradict the provisions of CAMA or the articles of association.[56]

The common law position is reflected in sections 87(2) to (4) of CAMA 2020. Subsection (2) states that the articles of association determine the distribution of powers between the general meeting and the board of directors, unless specified otherwise in the Act. Section 87(3) allows the board to manage the company even if the articles are silent, meaning they handle day-to-day operations[57] However, the authority granted to members in section 87(4) can be seen as largely ineffective, as it permits the board to disregard members' directions unless the articles specify otherwise or the board acts without good faith and due diligence. Unfortunately, CAMA does not define "good faith" or "due diligence," creating ambiguity.[58]

The significant power granted to directors has led to potential abuse and poses a challenge to corporate governance in Nigeria. This has allowed the board to act as "corporate monsters," diminishing shareholders' roles and placing them in a subordinate position within corporate administration.[59]

b. **Board Structure & Functions:** Board size is perceived as a corporate governance issue as an international best practice standard. An ideal board size and composition of a corporate board has been a subject of debate for so long, It is required that a board should be of sufficient size to be able to perform its duties and carry out its responsibilities effectively.[60]

By the adoption of unitary board system in Nigeria like every other jurisdiction such as the UK, USA, Australia and South Africa, the board consist of both the executive and non-executive directors with different responsibilities. While the executive directors are overseeing day-to-

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[55]. *Isle of Wright Railway* v *Tahourdin* [1883] 25 Ch.D, 320.

[56]. *Automatic Self- Cleansing Filter Syndicate Co* v *Cuninghame* [1906] 2 Ch.D, 34; *Shaw & Sons (Salford) Ltd* v *Shaw* [1935] 2 KB, 113.

[57] G.C. Okara, '*Examining Corporate Governance in Nigeria Under The Companies and Allied Matters Act 2020 and The Nigerian Code of Corporate Governance 2018: The Way Forward', (2011)* 184-197<https://www.researchgate.net/publication/350192640>, accessed 21 June, 2024.

[58]. M. O. Sofowora, 'Shareholders, Directors, Corporate Managers and the Balance of Power' [2000] 4, *Law and Business Quarterly*, 122, cited in Okara (ibid), 189.

[59] ibid.

[60] A S, Apeniga,' Determining the Ideal Size of Board of Directors of a Public Company Under Nigerian Law',1,<http://www.researchgate,net/publication/362658001?accessed01 July, 2024.

day operation of the company with specific managerial portfolios in a full-time employment of the company, the non-executive directors are not.[61]

Apart from a small company, all other companies are mandated to have at least two directors.[62] The same statute provides further that a minimum of three independent directors for every public company. Aside the number of independent directors, neither CAMA nor the NCCG 2018 mentioned the number of executive and non- executive directors of board of public companies.[63] However, the latter recommends the factors to be considered in determining the requite numbers when it states that 'appropriate mix of Executive, Non-Executive and Independent Non-Executive Directors.[64]

The aforementioned code justified the inclusion of the Independent Directors as persons tasked with the responsibility of providing independent and objective judgment in board deliberations and decision making process, thus bringing a high degree of objectivity to the board for sustaining stakeholders' trust and confidence.[65] It is deducible from the above that board consists of three categories of directors, viz, the executive directors, non-executive directors and independent directors.[66]

To better protect minority shareholders, firms are prohibited from appointing the same person to both the roles of Chairman of the Board and Chief Executive Officer in a public company.[67] The concern with an individual holding both the roles of Chairman of the Board and Managing Director is that it can lead to an excessive concentration of power. This concentration of authority can undermine the board's ability to provide necessary oversight and balance in its governance functions.[68] This concern is reflected in CAMA's approach, which does not establish a distinct office for a chairman.[69] Instead, CAMA specifies that the chairman of the board of directors, if one is appointed, is responsible for presiding over general meetings. Despite this, the chairman still holds significant powers and duties.[70] Given the significant responsibilities of company directors, their method of appointment is crucial. Recognizing the

[61] ibid, 3
[62] ibid, s 271(1).
[63] Apeniga (n 60) 3.
[64] Principle 2.3 (b), ibid.
[65] Principle 7, ibid.
[66] Apeniga (n 60)3.
[67]ibid, s256(1).
[68] G.C. Okara (n 57) 193.
[69] Joseph E.O Abugu, 'Issues and Problems in Corporate Governance in Nigeria' [2015] Vol. 6, No. 3: *The Gravitas Review of Business & Property Law*,1-15.
[70] ibid, s 256(3) CAMA 2020.

importance of this role, CAMA carefully regulates the appointment, functions, powers, and duties of company directors to ensure greater efficiency and effectiveness.[71]

The position of a director is so unique in corporate governance such that CAMA prescribes its duties which are generally divided into two, namely, the fiduciary duty and duty of care and skill. The essence is to serve as a watch dog or prevent abuse of powers and conflict of interest on the part of the directors in several areas of corporate governance.[72] Such as the issuing, transfer, and registration of shares, etc. He stands in a fiduciary relationship both to the company and the shareholders[73]. Some of his duties are as follows, duty to act in the best interest of the company,[74]duty to act for proper purpose, duty not to fetter discretion,[75]duty to avoid conflict of interest and make secret profit, and duty of care and skill.[76]

c. **Transparency and Disclosure**: As a fundamental principle of corporate oversight, various mechanisms are in place to enhance transparency and disclosure in a company's operations. Under the CAMA 2020 and in accordance with international financial reporting standards, companies are required to prepare and present their financial statements transparently. Additionally, they must file their financial statements annually with the Corporate Affairs Commission (CAC).[77] This framework ensures that shareholders, regulators, and the general public have access to up-to-date financial information about the company.

   Certain duties of disclosure are also mandated for directors. They must disclose any personal interests they have in transactions or arrangements entered into by the company to avoid conflicts of interest.[78] This requirement extends to proposed contracts with the company; whether the director is directly or indirectly interested, they must specify the particulars of their interest in writing.[79] Furthermore, the company must maintain a register of its members, which should be made available for inspection to foster transparency regarding share ownership.[80]

   Secondly, when a person is proposed for appointment as a director, they are duty-bound to disclose any positions they hold as a director in other public companies during the meeting in

[71] Akinpelu (n 4), 220.
[72] ibid, 225.
[73] s 305 CAMA 2020.
[74] ibid, s 305(3)
[75] ibid, s 305(6)
[76] ibid, s 308.
[77] Ibid, s 421(1).
[78] s. 301 (2), ibid.
[79] s. 303 (1), ibid
[80] ss. 109-113, ibid.

which their appointment is considered.[81] To promote effective governance practices, the rule now stipulates that a director may not hold more than five directorships in different public companies simultaneously.[82] This limitation helps reduce conflicts of interest and issues related to loyalty, encouraging better corporate governance practices.

d. **The Shareholders's Rights and Protection:** Shareholders,[83] as members of a company, possess several entitlements outlined in the Act and the company's Articles of Association,[84] including the right to attend, speak, and vote at Annual General Meetings (AGMs),[85] receive dividends[86] obtain a copy of the memorandum for a fee [87] and the right to act as acknowledged under the Act. While they own the corporation and can vote on changes to the memorandum, elect or remove directors, and approve major changes like mergers, their rights are limited in that they cannot determine dividend amounts, make investment decisions, or appoint the company manager and set their salary.[88]

CAMA recognizes that minority shareholders may be side-lined in corporate decisions and provides protections for them. Generally, only the company can seek redress for wrongs, as established in *Foss v Harbottle***.**[89] However, a member can now apply to the court for an injunction or declaration to restrain the company or its officers, known as member's direct action.[90] Additionally, CAMA offers various judicial remedies for breaches of directors' duties, including personal and representative actions,[91] derivative actions,[92] relief for unfairly prejudicial conduct,[93] investigations by the Corporate Affairs Commission (CAC), and winding up on just and equitable grounds.

In the case of private companies, the transfer of shares is governed by the company's articles of association. Currently, there are now some restrictions on the way shares may be transferred in relation to existing shareholder rights. Although the term "pre-emptive right of shareholders"

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[81] ibid, s 278(1). This ultimately reduces the incidences of conflicts of interests and issues with loyalty and encourages good corporate governance practices. This constitutes one of the major significant improvements in CAMA 2020 over previous principal legislation and other frameworks.
[82] s 307, ibid.
[83] Shareholders are often thought to be the same as members, but in companies with share capital, while all members are shareholders, not all shareholders are members.
[84] Dada (n 20). 335.
[85] s. 107, ibid.
[86] s. 426, ibid.
[87] s. 47,ibid.
[88] Akinpelu (n 4) 229.
[89] (1843) 2 Hare 461.
[90] Y.H .Bhadmus, '*Bhadmus on Corporate Law Practice* (5th edn, Enugu, Chenglo Ltd. 2021), 254.
[91] s. 344, CAMA 2020.
[92] ibid, s 346,
[93] ibid ss. 353(1) and 354, See also the case of Ijade Properties Ltd v. Omololu-Mulele (2000) FWLR (Pt. 5) 709

is not new within the context of Nigeria's corporate world, having been always left to a company's discretion.[94] This right has now been formalized by specifying that a company must offer shares to its current members in proportion to their existing ownership before selling them.[95] This means that when a public company plans to issue new shares, either through public or private placement, existing shareholders are given priority. This approach strengthens their protection against excessive dilution and ensures they are favoured over prospective new members.[96] From a broader perspective, this provision shields shareholders from unethical takeovers of the company through third-party agreements. Furthermore, CAMA 2020 mandates that a private company must secure the approval of all its members before executing any sale that surpasses 50% of the company's total asset value. However, this requirement can be modified by the company's articles of association. This measure protects shareholders from unscrupulous acquisitions and ensures that significant asset sales are subject to unanimous consent among members, though the articles of association can alter this provision [97]

e. **Accounts:** Every company is required to keep three major accounts, namely, accounting records, annual accounts, and group accounts. Companies maintain accounting records in line with this section's requirements. These records must accurately detail the company's financial activities, providing a clear view of its financial status at any given time, and enabling directors to verify that financial statements meet legal standards for format and content. Specifically, the records should include daily entries of all money received and spent, including the reasons for these transactions, as well as a comprehensive account of the company's assets and liabilities.**[98]** As an innovative measure, all public companies are now required to post their audited accounts on their websites. This requirement aligns with the existing regulations set by the Nigerian Stock Exchange and the Securities and Exchange Commission for listed companies.

f. **Appointment of Company's Auditor and Audit Committee:** Companies are mandated to establish audit systems that involve engaging external auditors, complemented by an audit committee. [99] Companies are mandated to establish audit systems that involve engaging external auditors, complemented by an audit committee. [100] CAMA elaborates on issues related

[94]Joy Ayara, *Corporate Governance Under CAMA 2020*,< https://simplylaw.com.ng/corporate-governance-under-cama-2020/>accessed 25 July 2024, 4.
[95] s.142, ibid.
[96] Arara (n 94).
[97] ibid.
[98] s.347, ibid.
[99] Akinpelu (n) 240.
[100] s 401 CAMA 2020

to auditors' qualifications,[101] duties,[102] liabilities,[103] re-appointment, removal,[104] filling of vacancies, and audit report. Notably, every public company is required to constitute an Audit Committee, which primarily examines the auditor's report and makes recommendations to the AGM. The committee consists of five members, including three independent members and two non-executive directors.[105]To ensure the reliability of its reports, all members must be financially literate, with at least one member belonging to a professional accounting body in Nigeria.[106]

g. **Stakeholders Rights and Engagements:** The decisions of a company are generally taken at the meeting of its members which constitutes the primary organ.[107] Meeting constitutes a major mechanism to ensure the protection of investors and their investments in any corporation. It also assists in monitoring the way the powers delegated to the board of directors are applied, while other officers of the company are placed under constant surveillance so as to make them accountable to the shareholders.[108]

There are three basic types of meeting, viz, statutory meetings, the annual general meetings, and extra-ordinary general meetings, each with its peculiarities and legal implications. More importantly is the annual general meeting (AGM) which is so important that it personifies the forum where the ultimate control of a company lies.[109] It provides a platform for members to interact with directors, discuss the company's prospects, and exercise their powers over the board, including issues like re-appointment.

Every company, except for small companies or those with a single shareholder, must hold an AGM each year, with no more than 15 months between AGMs. However, a company can delay its first AGM by up to 18 months from incorporation and may extend subsequent AGMs by up to three months if permitted by the commission.[110]

At annual general meetings, special business excludes routine matters like dividend declarations, financial statement presentations, director elections, auditor appointments, and

[101] ibid, s 402 .
[102] ibid, s 406.
[103]ibid, s 415.
[104] ibid, s 409.
[105] ibid, s 404.
[106] ibid, s. 405.
[107]Orojo (n 15), 273.
[108] Akinpelu (n 4) 231.
[109] ibid.
[110] ibid, s. 237(1)(a-b)

managerial remuneration disclosures, which are considered ordinary business.[111] CAMA mandates strict rules for conducting meetings, including detailed notice requirements—such as timing, content, and clarity—to ensure effective corporate governance. Public companies must advertise meetings in at least two daily newspapers 21 days in advance.[112] Notices must provide clear, detailed information on the meeting's location, date, time, and business agenda to help members decide on attendance.[113] Among other stakeholders are creditors, whose rights of creditors are also protected during insolvency or restructuring processes, as they must be adequately informed about decisions that affect their interests.[114] However, it can be argued that the AGM does not provide a substantial opportunity for stakeholders, aside from shareholders, to exercise their rights. In the opinion of the writers, the regulations governing business meetings do not offer a mechanism for other stakeholders to attend or exercise their rights. Those legally permitted to attend meetings include shareholders, directors, the company secretary, and auditors. Among these, stakeholders can primarily be considered shareholders, with limited involvement beyond that role.

The underlying issue here is related to the theories adopted in corporate governance, which often prioritize the interests of shareholders over those of other stakeholders. This shareholder-centric approach can limit the effective participation and representation of other stakeholders in corporate decision-making processes. Moreover, the adoption of the unitary board system, as seen in countries like Germany and Austria, which allows for a supervisory board composed of employees elected by shareholders at the AGM,[115] further inhibits the engagement of other stakeholders at the board level.

h. Corporate Social Responsibility (CSR): It means the organization's commitment to operate in an economically and environmentally sustainable manner, while recognizing the interest of its stakeholders.[116] It is ways the society expects business entities to carry on their operations in a legal, economic, environmental, and ethical manner for the benefit of the business in a particular society in general in a voluntary manner. It therefore entails responding positively to emerging societal priorities and expectations; willingness to act beyond regulatory limitations and balancing of shareholders interest against the interests of the wider society in

[111] Ibid. s 238.
[112] Ibid, s 241.
[113] Akinpelu (n 4) 234.
[114] ibid, s. 441.
[115] Kunle Aina, 'Board of Directors and Corporate governance in Nigeria' [2013]1: *International Journal of Business and Finance Management Research*.21-34 <http://www.bluepenjournals.org/ijbfmr. accessed 2 June 2024.
[116] K. Amaeshi, et al., Corporate social Responsibility in Supply Chains of Global Brands: A Boundaryless Responsibility, Clarifications, Exceptions and Implication', Journal of Business Ethics, vol 81, No.1, 223-234.

which the companies operate.[117] According to Umoru, the need for companies whose major objective is to maximize profits for the benefit of their shareholders to be concerned about serving the interests of society at large are: First, business cannot succeed in a society that is failing. This, therefore, clearly establishes the stake of a business organization in the health and well-being of the society to which it belongs. Secondly, customers of any product or service are unlikely to feel satisfied buying from a company that is perceived to violate expectations of ethical and socially responsible behaviour, particularly in developed countries.[118]

The concept of CSR, as emphasized by stakeholder theory and partially acknowledged in Nigerian frameworks, currently lacks direct legislation. While there is no specific law mandating CSR, several existing regulations indirectly require corporations to undertake social obligations.[119] The combined reading of relevant provisions on CSR suggests that corporations are encouraged to engage in CSR activities on a voluntary and discretionary basis rather than as a mandatory obligation.[120] This means that companies have the freedom to pursue CSR initiatives at their own discretion rather than being legally required to do so.

Although directors are expected to act in the best interests of the company, considering the impact of their decisions on various stakeholders, including the community and environment—this indirect encouragement for CSR activities aligns with both shareholder theory and stakeholder theory. This approach reflects a broader consideration of social impacts within Nigerian legislation.

4.4 Issues Arising from the Integration of Agency and Stakeholder Theories

i. The legislation addresses the division of powers between the general meeting and the board of directors, reflecting agency theory's focus on principal-agent relationships while highlighting tensions between shareholders and the board in line with stakeholder theory. However, ambiguities in terms like "good faith" and "due diligence" may leave room for director power abuse, indicating a need for clearer protections.

ii. The importance of board structure in addressing agency problems and enhancing stakeholder trust is emphasized through distinctions between executive, non-executive, and independent directors, which support diverse governance perspectives. Prohibiting one

[117] Umoru (n 10) 156.
[118] ibid,162
[119] ibid, 167.
[120] ibid.

individual from serving as both Chairman and CEO helps protect minority shareholders; yetclearer definitions of director roles and independence are necessary for improved governance.

iii. The need to reduce information gaps between shareholders and directors is crucial for accountability. Requirements for directors to disclose personal interests and for companies to maintain financial transparency promote trust and align with both agency and stakeholder principles. While it establishes a strong framework, ongoing enforcement and clarity are vital.

iv. The framework emphasizes shareholder rights and protections by addressing agency theory through judicial remedies for minority interests and incorporating stakeholder theory with provisions like pre-emptive rights. Its effectiveness hinges on robust enforcement and active shareholder engagement.

v. Accountability is promoted through comprehensive accounting records and transparency, aligning with agency theory by protecting shareholder interests and enhancing stakeholder engagement. By requiring public companies to post audited accounts, trust is fostered, but continuous emphasis on enforcement is essential. The emphasis on external auditors and audit committees enhances accountability and transparency, protecting shareholder interests. However, issues like auditor independence and limited shareholder engagement may undermine the effectiveness of these measures for all stakeholders.

vi. The role of meetings, especially AGMs, in protecting investors and holding the board accountable reflects agency theory. While AGMs enable shareholder engagement, they primarily benefit shareholders, limiting participation from other stakeholders like creditors, which can neglect the interests of those affected by corporate decisions.

vii Finally, the framework highlights Corporate Social Responsibility (CSR) as a commitment to sustainability and stakeholder interests, aligning with stakeholder theory. However, the lack of direct legislation on CSR in Nigeria leads to voluntary engagement, which may result in inconsistent commitments to social responsibilities and potentially undermine broader stakeholder interests.

5.0 Recommendations

i. Agency theory often prioritizes shareholder interests over other stakeholders, undermining their rights. Adopting models that recognize all stakeholders is essential for creating equitable governance and enhancing corporate sustainability.

ii. Current theories of corporate governance fail to capture the complexity and diversity of global business, as governance practices vary by cultural, political, and historical contexts. The view of Abdullah and Valentine are hereby upheld by the authors to the effect that ‘a single theory is insufficient; instead, a combination of approaches that integrates social relationships,

regulations, and enforcement is necessary. A holistic perspective that considers various theories and social sciences is essential for effective corporate governance'.[121]

iii. The unitary board system in Nigeria often allows non-executive directors, chosen by shareholders, to be dominated by executives, undermining effective governance. Initially appearing independent, these directors can be swayed by perks like insider trading and gifts, compromising their autonomy and turning them into mere 'rubber stamps.' Therefore, a two-tier board structure is suggested, as proposed by Kunle Aina, to create a distinct separation between management and oversight, enhancing discipline and true supervision.[122]

iv. It is recommended that the issue of Corporate Social Responsibility (CSR) be explicitly addressed in the principal legislation to ensure that companies have a clear legal framework guiding their social obligations and engagement with stakeholders.

6.0 Conclusion

Understanding the theoretical foundations of corporate governance is crucial for grasping its development and implementation, particularly within the Nigerian context. This article has explored the definition and historical progression of corporate governance, focusing on the key theories—agency and stakeholder—that inform governance frameworks. The integration of these theories in CAMA 2020 aims to reconcile the interests of shareholders and stakeholders, but it also exposes critical issues such as unclear regulatory definitions and the complexities of board structures. While this article provides valuable insights, it acknowledges that the myriad challenges surrounding corporate governance could not be exhaustively addressed. As Nigeria continues to evolve its corporate governance landscape, it is essential to tackle these challenges with a holistic and inclusive approach to promote accountability, build stakeholder confidence, and support sustainable business practices.

[121] Abdullah & Valentine (n 11) 88.
[122] Aina (n 115) 32.

The Efficacy of Online Dispute Resolution (ODR) for the Resolution of Internet-Related Disputes in Nigeria

Kudirat Magaji W. Owolabi, PhD*

Abstract

Businesses and transactions are increasingly moving online as the world becomes more digitalized. The growing volume of online commercial transactions worldwide, enabled by Information and Communication Technology (ICT), has expanded commerce beyond physical boundaries. However, this digital shift has also increased online disputes that parties desire to resolve without resorting to the courts. Hence, there is a need for a resolution method that aligns with digital techniques to address internet-related disputes. This paper assesses the effectiveness of online dispute resolution in resolving internet-related disputes in Nigeria. The research used qualitative research methodology and relied on library resources. The study revealed that Nigerian business organizations have not fully embraced ODR, despite its numerous benefits. The paper also identifies potential challenges for the smooth operation of ODR in Nigeria.

Keywords: ADR, ODR, Internet-related disputes, Nigeria.

1.0.Introduction

Over the years, ADR techniques have been viable for the resolution of both financial and commercial disputes.[1] The desire for ADR is often encouraged on the basis that it is cost-effective, promotes future harmonious relationships between disputants, and less time-wasting, amongst other reasons.[2]For these reasons, there is an increasing spread of ADR across the globe. However, this traditional way of dispute management has several limitations which are not suitable for the exigencies of modern Information Communication Technology (ICT) driven commercial

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[1] Steven Shavell, 'Alternative Dispute Resolution: An Economic Analysis' [1995] *Journal of Legal Studies*, 24(1), 1, 5; Frank A. Cona, 'Application of Online Systems in Alternative Dispute Resolution' [1997], *Buffalo Law Review*, (45) (3), 979, 982 <https://https://digitalcommons.law.buffalo.edu/buffalolawreviews/vol45/iss3/10> Accessed 9th June, 2024; Haitham A. Haloush & Bashar H. Malkawi, 'Internet Characteristics and Online Alternative Dispute Resolution' [2008], *Havard Negotiation Law Review,* (13) 327, 348.

[2] Miriam R. Arfin, 'The Benefits of Alternative Dispute Resolution in Intellectual Property Disputes' [1995] *Hastings Communications and Entertainment Law Journal,* 17 (4) 899, 901; Robert Mnookin, *Alternative Dispute Resolution'* (Havard Law School John M. Olin Centre For Law, Economics and Business Discussion Paper Series, Paper 232, 1998) 1, 6.

transactions. Today, the world is moving fast from the whole period of controlled rigidity to a more flexible and open one where people can interact to exchange ideas, culture, values and even contract or engage in commercial transactions without necessarily seeing one another or being at

the same place and at the same time.[3] This are possible with the help of technology and developments in telecommunication infrastructures such as the internet, mobile phones, and computers. Technological advancement using the internet has enhanced economic development as most commercial activities are now carried out online.[4]

The internet has been a very important tool for globalization.[5] It facilitates almost every aspect of modern life.[6] The rapid increase in the volume of online commercial transactions that are carried on across the globe every minute and ICT has enhanced commerce beyond physical contact.[7] The improvement and development of communication technology have contributed enormously to enhancing human communication[8] and improving social life.[9]

The nature of disputes which are generated from online commercial transactions are low-value claims but with a high volume of cases which are either too low to pursue in the law court or consumers ignore them due to the cost and time wasting attributed to the justice system.[10] Most times, consumers desist from shopping because where disputes arise, they are technically compelled to part with funds resulting from failed transactions. This implies that trust is lost, and the business organisations and the e-commerce platforms lose more potential consumers/ customers. Unfortunately, the major hindrances to increasing transnational online business

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[3] Antonio Sanchez-Beyon & Estrella Trincado Aznar, 'Business and Labour Culture Changes in Digital Paradigm: Rise and Fall of Human Resources and The Emergence of Talent Development' [2020] *Cogito Multidisciplinary Research Journal,* Vol. XII, No. 3. 225

[4] A Rangel, 'Privacy-invading Technologies and Recommendations for Designing a Better Future for Privacy Rights', [2013], *Intercultural Human Rights Law* 8, 204

[5]Lukman Adebisi Abdulrauf & Adelodun Daibu, 'New Technologies and the Right to Privacy in Nigeria: Evaluating the Tension Between Traditional and Modern Conceptions' [2016] *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,*7, 117<https://www.ajol.info/index.php/naujilj/article/view/136246> accessed 6th June, 2024.

[6] Epiphany Azinge, 'Information Technology and Legal Practice' [2002] *Nigerian Bar Journal,* Vol. 1(2)11-24; Serena David Dokubo, 'Information Technology and Legal Practice' [2002], *The Nigerian Bar Journal* Vol.1(2), 25-38.

[7] Epiphany Azinge (Fn6), 12; Serena David Dokubo, (Fn 6) 25.

[8]Aidonoije, P.A. and Agbale. O.P. 'E-contract (by mail) and the Clause, 'Subject to Contract': A Case Study of Nigeria and Australia', [2020] *Port Harcourt Law Journal,* 9 (1), 42.

[9]Igbale, A., 'Legal And Institutional Framework for E-commerce in Nigeria' being a paper discussed on Wednesday June 9, 2010, Bankers House, PC 18, Adeola Hopewell St. V/I, Lagos cited in Aidonoije, P.A., Anne, O.O., and Oladele, O.O, 'An Empirical Study Of The Relevance And Legal Challenges of An E-contract Of Agreement In Nigeria' Cogito Multidisciplinary Research Journal, [2020] Vol. XII. No. 3, 170.

[10] Louis D D, Colin R, and Zbynek L, 'Facilitating Expansion of Cross-Border E-Commerce-Developing a Global Online Dispute Resolution System' (2011) 25 (Lessons Derived from Existing ODR Systems-Work of the United Nations Commission on International Trade Law)' Penn State Law Legal Studies Research Paper.

transactions include a lack of confidence in online transactions and a lack of predictable internet commercial laws for the resolution of online disputes. For this reason, it has become apparent that a new legal regime is required for the resolution of commercial disputes.[11] Therefore, the demand for an ICT-inclined ADR becomes a necessity.[12]

This paper thoroughly examines the implementation of Online Dispute Resolution (ODR) in Nigeria and the associated challenges. The article explores the necessity of ODR in Nigeria, considering that traditional Alternative Dispute Resolution (ADR) mechanisms are already in place, and briefly investigates the relationship between ODR and ADR. It assesses the application of ODR to disputes, reflects on the current state of its legal framework, and discusses various related aspects such as shortcomings, benefits, arguments for and against ODR regulation in Nigeria, and the regulatory approaches in developed countries. Furthermore, the paper examines the recommended practices for ODR in Nigeria, drawing insights from successful ODR implementations in other countries.

2.0. Background Overview of the ODR

Online Dispute Resolution (ODR) is an improved alternative dispute resolution mechanism which dispenses with physical presence of parties at a particular location but utilizes ICT such as the internet space, mobile phones, or computers for virtual resolution of disputes. It is a deployment of applications and computer networks for resolving disputes with ADR methods.[13] It is a class of alternative dispute resolution which is making use of the advantages of increased usage of the internet and technological gadgets.[14] In this respect, it is often seen as being the online equivalence of ADR.[15] ODR has also been described as a broader term than virtual court hearings. It is the settlement of disputes through an online mode of interaction between parties.[16] It is used as a term to refer to all online dispute resolution. ODR is a form of dispute resolution which uses alternative

[11] OECD, *Guidelines for Consumer Protection in the Context of Electronic Commerce* (OECD Publishing, 2000)
[12] Henry H P, 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR' [1999] *Ohio St. J. on Disp. Resol.* 675.
[13] Henry H P,(fn 12), 675.
[14]Rabinovich-Einy O. and Katsh E., 'Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment' [2014] *International Journal of Dispute Resolution,* (22) (1) 7
[15] Esther van den Heuvel, 'Online Dispute Resolution as a Solution to Cross-Border E-Disputes' (2000) 8 https://scholar.google.com/scolar?hl=emn&as_sdt=0%2C5&q=esther+van+den+hauvel+on+line+dispute+resolution&oq=esther+van+den+hauvel+on+online+dispute+resd=gs_qabs&t=1654393583912&u=23p%3DHj7QU81Ym-cj accessed 4th June, 2024
[16]Jimoh Mujib Akanni, 'Advancing Online Dispute Resolution in Nigeria: Opportunities, Legal Challenges and the Ways Forward' [2020] *The Journal of Sustainable Development Law and Policy,* 11(2) 408.

methods for dispute resolution.[17] It extends to disputes that are partially or fully settled over the internet, having been initiated in cyberspace but with a source outside it. It is worthy of note that ODR evolved from a necessity to resolve disputes that arose in the online community.

ODR mechanism has been adopted by various countries in the resolution of disputes arising from e-commerce between individuals.[18] The operation of ODR is very essential for any technologically inclined nation including Nigeria due to the speed and convenience of ICT and the rise in ecommerce in the country.[19] The use of technology in dispute resolution and justice Administration in the developing economies has been ongoing for close to two decades. ODR emerged in the 21st Century from developments in the field of ADR and its adaptability to peculiarities of the online environment.[20] ODR was borne out of the need to deploy cutting-edge information technology innovation to aid access to justice.[21] Furthermore, the lockdown of courts and various ADR centres following the advent of COVID-19 further heightened the uncertainty in the administration of the justice system and the inevitability of ODR.

Almost all ODR methods are in the form of written submissions but there are other forms of ODR which range from online arbitration, online negotiation and online mediation, which may be video or chat based. ODR formats may sometimes depend on the dispute, or the parties involved in the dispute. ODR has been gaining wide acceptance in conflict resolution, especially in e-commerce disputes, no surprise there, as the use of the internet for e-commerce transactions increases, new forms of disputes relating to that space/ e-commerce will also be on the rise.

Hence, for this paper, ODR can be categorised into three (3) Methods. Namely, (i) Online Arbitration (ii) Online negotiation (iii) Online Mediation and (iv) Online Negotiation.

2.1.Online Arbitration

Online arbitration, also termed e-arbitration or cyber-arbitration, encompasses arbitration proceedings conducted entirely or predominantly online, encompassing filings, submissions, hearings, and awards.[22] The contemporary definition has evolved to encompass any arbitration

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[17] Karoline Mania, 'Online Dispute Resolution: The Future of Justice' [2021] *International Comparative Jurisprudence*, 1(1) 76, 86 <https://www.sciencedirect.com/science/article/pii/S2351667415000074> Accessed 6th July, 2024.

[18] See EU Directive (2013/11/EU) on Alternative Dispute Resolution for Consumer Disputes and Regulation (EU No 524/2013) require all EU member states to implement ODR systems for resolving consumer complaints.

[19]Aishat S., 'Using ADR to Resolve Online Disputes', [2004] *Richmond Journal of Law and Technology*, 10 (3), 1, 6. < https://law.richmond.edu/jolt/v/10i3/article25.pdf> accessed 4th July, 2024.

[20] Ethan K, Ethan M, and Janet R, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (John Wiley & Sons, Inc: 2001).

[21] Ethan K, Ethan M, and Janet R, (fn.20)

[22] Mohamed S. A. W, 'ODR and E- Arbitration' (2013), *Online Dispute Resolution Theory and Practice*, Chapter 18 < http://www.mediate.com/pdf/ebnerl.pdf > accessed 22 June 2024

employing electronic submissions, teleconferencing, or video conferencing for the hearing process. Online arbitration follows a procedure similar to traditional arbitration but incorporates an electronic medium, either partially or wholly.

Upon its emergence in the United State (U.S), concerns were raised concerning its enforceability.[23] It was contended that electronic arbitration clauses commonly found in digital contracts, such as licensing agreements, contravened the written provision mandate of the Federal Arbitration Act due to their exclusively digital nature. Nevertheless, the courts resolved this matter by affirming that electronic signatures, as provides by the Federal Electronic Signatures in Global and National Commerce Act, held equivalent legal validity as formal signatures, and could confer legal effect upon electronically signed arbitration agreements.[24] Hence, online arbitration deviates from traditional arbitration in that the physical presence of all parties and arbitrators at a specific venue is not mandatory. It has been observed that online arbitration offers expeditious dispensation, cost-effectiveness, accessibility, and efficient case management.[25]

2.2. Online Negotiation

In the realm of online negotiations, communication between parties primarily takes place through remote means such as phone calls, fax, email, and video conferencing.[26] Although phone calls offer convenience in communication, evaluating document details is challenging without the aid of video conferencing. This can be facilitated through various video conferencing software applications such as Zoom, Google Meet, Skype, Netscape Conference, Microsoft Net meeting, and Vocal Tee's Internet Conference Professional.[27]

Fax and emails serve as suitable mediums for document exchange, often outperforming the capabilities of video conferencing. Online negotiation not only reduces time but also leads to economic savings. In the current era of globalization, it plays a critical role in conducting negotiations across the globe.[28] Various negotiation platforms exist for dispute resolution, with "blind bidding" standing out as an automated negotiation platform designed for economic

[23] Mohamed S. A. W (fn. 22)
[24] Perez-Tejada v. Mattress Firm, Inc. (2019); Guidotti v. Legal Helpers Debt Resolution. LCC (2014); Woods v. Vector Mktg Corp (2014).
[25] Mohamed S. A. W (fn. 22)
[26] Janice Nadler and Donna Shestowsky, 'Negotiation, Information Technology, and the Problem of the Faceless Other' [2015], *Northwestern University Pritzker School of Law*, 145-178.
[27] David B. Lipsky and Ariel C. Avgar, 'Online Dispute Resolution through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model' [2007], *University of Toledo Law Review,* 38(1), 101-142.
[28] David B. Lipsky and Ariel C. Avgar (fn.27).

settlement of claims where liability is undisputed, yet parties fail to reach a compensation agreement.[29] Notably, this platform operates autonomously without human intervention.

2.3. Online Mediation

Online Mediation is a method that closely resembles traditional mediation, but it takes place virtually instead of in person.[30] It is gaining popularity in Europe and the US and is considered to be the most utilized and improved form of ODR in the western world.[31] Online mediation utilizes various technologies such as emails, video conferencing, and chat rooms in addition to offline communications to resolve disputes.[32] While the role of a mediator remains unchanged, the selection process for mediators may differ from traditional mediation. One of the challenges of online mediation is the inability to interpret facial expressions, gestures, and body language, and in some cases, the mediator may not be a human, but rather a pre-programmed algorithm.[33]

From the foregoing, it is observed that ODR focuses on resolving disputes that stem from internet use, such as domain name conflicts or e-commerce issues with a cost-effective and efficient process. ODR simplifies dispute resolution without the need for physical meetings. Unlike litigation, which involves court filing and adherence to court rules, ODR provides a straightforward online alternative for resolving conflicts.

3.0.The Position of ODR in Nigeria

The internet and technology have significantly impacted business in Nigeria, allowing for convenient online shopping. However, this convenience comes with challenges. The reception of online commercial services in Nigeria has been negatively affected, as many people remain hesitant to engage in online trade due to concerns about potential disputes.[34]Customers may

[29] David B. Lipsky and Ariel C. Avgar (fn.27).
[30] Victor Terekhov, 'Online Mediation: A Game Changer or Much Ado about Nothing" [2019], *Access to Justice in Eastern Europe*, 3(2) 35, 38.
[31] Karolina Mania, Online Dispute Resolution: The Future of Justice [2015] *Int'l Comparative Jurisprudence,* 1(1) , 76.
[32] Van den Heuvel E., 'Online Dispute Resolution as a Solution to Cross-border E-Disputes: An Introduction to ODR' (Being a paper presented at Building Trust in the Online Environment: Business to Customer Disputer Resolution, a conference jointly organized Organization for Co-operative Development (OECD), Hague Conference on Private and International Law and Chamber of Commerce (ICC). The Hague, 11-12 December, 2002) https://www.oecd.org/data oecd/63/571878940.pdf accessed 14th July, 2024.
[33] Cortes P., 'Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues' [2008] *Rutgers Computer and Technology Law Journal*, 35 (1) 75.
[34]Jimoh Mujib Akanni, (fn.16) 408.

receive incorrect or substandard goods, leading to disputes that are difficult to resolve through traditional means such as litigation or ADR.[35]

For a way out, some business organisations deploy Customer relation management (CRM) for the management of complaints however, the lack of the requisite legal framework for neutral, transparent, and speedy resolution of such disputes is a major challenge. The customer relation management model only constitutes a set of remedial measures that are only matters of internal management policy. These policies which are focused on customers, are aimed at maximizing revenue, and serve as customer retention strategies rather than consumer protection.[36] It's time to start having these considerations about justice changes in Nigeria. Reiterating the need for the application of ODR mechanisms in Nigeria is not a fruitless endeavour, because numerous internet-based conflict resolution systems are already in the public and business sectors of many other countries including the UK, US, India, Canada, Germany, Netherlands, and so on.[37]

Nominet is a method used for ODR in the United Kingdom.[38] It is a domain name registry company that has been managing the United Kingdom domain names since 1996 and the Wales domain names since September 2014.[39] Nominet established a Dispute Resolution Service (DRS) to resolve UK domain name disputes without going to court.[40] To pursue a claim under the DRS, complainants must demonstrate that they have rights in a name that is the same or similar to the disputed domain name and that the registration has been abusive. [41]The first step in the DRS process requires the complainant to complete a form on Nominet's website, specifying the materials submitted and the desired remedy. The form is then sent to the registrant of the domain name. Nominet assigns a mediator who contacts both parties by telephone to seek a solution.[42] If the case does not settle via mediation, the complainant then pays to have an independent expert appointed. The expert's decision will be based solely on the materials presented by the complainant

[35]Jimoh Mujib Akanni, (fn. 16) 409

[36] Becker J U, Goetz G, and Sönke A, 'The Impact of Technological and Organizational Implementation of CRM on Customer Acquisition, Maintenance, and Retention' (2009) *International Journal of Research in Marketing*, 26(3) 207, 211.

[37] Jie Zheng, *Online Resolution of E- Commerce Disputes(Perspective from the European Union, the UK and China* (Springer Nature, 2020)

[38] Adrian S, 'Nominet's new rules on Uk Domains could Mean the End to Users' Privacy', The Guardian Newspaper (United Kingdom 11 June 2014) https://www.theguardian.com accessed on 22 June 2024.

[39] Nominet Council, 'Nominet confirms launch of cymru and wales in September' < https://www.nominet.uk/nominet-confirms-launch-of-cymru-and-wales-in-september/ > accessed on 20 May 2024.

[40] Laurence K, *Guidance Note: Nominet Dispute Resolution Service for Domain Names* (Scribd Publications, San Francisco 2007) 1-4.

[41] Leigh S, 'Nominet Dispute Resolution Service Decisions Subject to Review by the Courts', [2012], *Journal of Intellectual Property Law and Practice*, 7(3), 164-165.

[42] John D, 'A Place to make Amends' [2008], *The Journal of the Law Society of Scotland*, 21(6), 4,10 .

and the registrant.[43] Appeals from the expert's decision are permitted but rare, and both the expert's decision and any appeals are published on the Nominet website. Nominet's technology appears useful for developing and implementing ODR in Nigeria. It has the potential to allow for the resolution of more disputes compared to the traditional/face-to-face ADR mechanisms currently in place if it is adapted into the legal framework.

Cybersettle is an online dispute resolution (ODR) service provider based in the United States.[44]They've developed software for a 'blind bidding' service that expedites negotiations when the only point of contention is the amount owed.[45] In this process, both the claimant and defendant provide their highest and lowest acceptable settlement figures, which are kept confidential. If the two ranges overlap, a settlement can be reached, usually at a compromise figure.[46] The United States has successfully used this system and similar systems such as 'The Mediation Room' to speed up settlements for personal injury claims and minute disputes.[47] Nigeria could benefit from adopting Cybersettle's technology within its existing alternative dispute resolution (ADR) framework to expedite negotiations and ensure quicker resolution of disputes compared to traditional face-to-face ADR mechanisms.

In India, parties have the right to appoint arbitrators, mediators, or conciliators and conduct proceedings, including presenting evidence online.[48] They can actively participate in the online ODR process regardless of their location, as long as the arbitration clause specifies the same. While on the platform, the customer completes and submits an online complaint form, and sends the completed form to the relevant trader, who then recommends an ADR entity to the customer from a list of ADR providers.[49] Once the customer and trader have agreed on the use of a specific ADR body to handle their dispute, the ODR platform transfers the complaint to that entity. The ADR entity is required to assess the claim online and reach a resolution on the complaint within 90 days.[50]

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[43]Jimoh Mujib Akanni (fn. 16)

[44] Diane Levin, *Cybersettle makes the Case for Resolving Disputes Online* (Mediation Channel, USA 2008) 1-4.

[45] Dinesh S, 'Auctions and Bidding' [1987] *Journal of Economic Literature, American Economic Association*, 25(2), 699, 718.

[46] David A, 'Brother, Can You Spare a Dime? Technology Can Reduce Dispute Resolution Costs When Times are Tough and Improve Outcomes' [2011], *Nevada Law Journals*, 11(1), 523,530.

[47] Gavin K, *Strategic Negotiation* (Gower Publications, United Kingdom 2018) 1- 50

[48]Ujwala S, 'Conciliation as an Effective Mode of Alternative Dispute Resolving System', [2012], *IOSR Journal of Humanities and Social Science*, 4(3), 1, 4.

[49] Pavel L, 'Online Dispute Resolution to Resolve Consumer Disputes from the Perspective of European Union Law: Is the Potential of ODR Fully Used?' [2016], *Masaryk University Journal of Law and Technology*, 10(1), 113,117.

[50] Pablo C, 'Accredited Online Dispute Resolution Services: Creating European Legal Standards for Ensuring Fair and Effective Processes', [2008], *Information and Communications Technology Law Journal*, 17(3), 221, 237.

Major e-commerce giants like eBay, Alibaba, and Amazon have embraced Online Dispute Resolution (ODR) as a means of settling disputes between consumers who are vendors and buyers on their platforms. Alibaba's procedure for resolving marketplace disputes offers option to a buyer if, the goods are not received before the shipping deadline, or the goods are not received in compliance with the specified conditions. If the involved parties are unable to resolve a complaint within 10 days, a panel from Alibaba's ODR team will intervene and resolve the issue by imposing penalties on the defaulting party.

eBay is a prominent American multinational e-commerce corporation based in San Jose, California.[51] It serves as a platform for consumer-to-consumer and business-to-consumer sales and successfully resolves over 60 million disputes among traders annually. eBay deals with a particular kind of disagreement involving buyers not paying, frequently arising from allegations that the items provided did not align with the description.[52] In such cases, parties are initially encouraged to resolve the matter amicably through online negotiation. The online process offers practical advice to help parties avoid misunderstandings and achieve a resolution, and eBay provides guidance on the standards used to assess complaint merit. If negotiations fail to resolve the dispute, eBay provides a resolution service. This service allows the involved parties to present their arguments in a discussion area, after which a staff member from eBay will make a binding decision under its Money Back Guarantee policy.[53] It is important to note that any claim must be submitted to eBay within 30 days from the estimated delivery date to ensure a full opportunity for resolution. eBay's technology is relevant, and there are valuable lessons that Nigeria can draw from by incorporating similar methods into its dispute resolution legal framework.

Online Dispute Resolution (ODR) should be implemented and embraced in Nigeria due to its capacity to operate across borders, expediting the dispute resolution process and reducing associated costs.[54] ODR is viewed as a logical and essential progression in dispute resolution, offering swifter and more efficient outcomes compared to traditional methods.[55] It encompasses a wide range of artificial intelligence capabilities for resolving various disputes online and combines the effectiveness of ADR with the convenience of the Internet. ODR is not intended to compete

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[51]Bijal Z and Prashant A, 'Ebay is the World's Online Marketplace'[2014], *IOSR Journal of Business and Management*, 11(7), 23-29

[52] Emma D, *What To Do When an EBay Buyer Opened A Case against You* (Emmadrew Publications, Orlando 2017) 1-10

[53]Peter D, 'The Impacts of eBay on an Information Based Economy' [2007], *International Journal of Management and Enterprise Development*, 4(6), 609,613

[54] Joseph Nwazi, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria' [2017], *Journal of Law and Conflict Resolution*, 9(3), 26, 31.

[55] David R. P, *Online Dispute Resolution: Overcoming the Problems and Shackles of Territory*' (Canadian Forum Publications, Canada 2001) 1-13.

with or replace ADR, but rather complement it as a natural response to evolving human activities and emerging conflicts.[56]

4. 0. Significant Benefits of ODR to Nigeria

ADR has proved to be the most suitable and cost-effective method for resolving disputes arising from commercial and financial transactions in recent years.[57] However, the emergence of COVID-19, e-commerce and the increasing number of cross-border transactions and disputes call for reform of ADR itself and the necessity for the ODR method of dispute settlement. It must be stated that the lack of a regulatory framework for stringent management of complaints is the major setback for the ODR justice system even with a high volume of small claims complaints.[58] In the administration of the justice system, ODR has the potential to automate the dispute resolution processes which according to experts may soon threaten the legal profession and change the way lawyers do their businesses.[59] Nevertheless, the benefits of ODR include its quick and effective nature, convenience, its flexibility. There is a low cost involved in online dispute resolution. If online disputes are referred to court for settlement, it will be time-consuming because of the process involved in litigation. Thus, it is preferable to resolve disputes online. If a dispute that arises online should be referred to court for settlement, the cost of settlement might be more than the cost involved in the online transaction.

For the sake of convenience, traditional dispute resolution involves going to court, where cases are assigned to courts based on the jurisdiction where the matter arose or where the subject matter is situated. In the case of online disputes, it is challenging to assign the case to a specific jurisdiction. Therefore, online dispute resolution (ODR) is the best way to resolve issues arising from internet transactions. ODR is entirely internet-based and is not governed by court rules like traditional litigation. In terms of flexibility, the parties involved in the transaction can decide how, where, and the online means to use to settle their dispute. Parties do not have to be physically present to resolve their dispute. It is done over the Internet at any time.

The potential benefits of online dispute resolution (ODR) have yet to be fully realized in many countries, and even where it is employed, it is not being maximized. Nigeria, for example, has not

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[56]Arno R. L and John Z, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*'(Wiley Online Library, USA 2002) 287-297

[57] Joseph Nwazi, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in The Niger Delta Region of Nigeria' [2015] *Journal of Law and Conflict Resolution,* 9 (3), 27, 34.

[58] Rule C, Rogers V and Del Duca L 'Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments' [2010] *UCC LJ*, 24(1) 221.

[59] Steven S et al., 'International Commercial Dispute Resolution' [2010], *Int'l Law*, 44(1) 113;

fully embraced this convenient, cost-effective, accessible, and fast method of resolving disputes. Many Nigerian businesses could experience rapid growth and increased recognition if they adopt ODR. The lack of awareness about this dispute resolution technique, as well as limited access to information technology and computer literacy among many, poses a significant challenge. Furthermore, legal practitioners are also uninformed about ODR, which prevents them from advising their clients to consider online resolution. Given that online arbitration and mediation are just starting to gain recognition in Nigeria, it is not surprising that only a few people are aware of virtual dispute resolution techniques. Additionally, when using ODR, individuals often have to find legal content themselves, potentially leading to a lack of comprehensive understanding of the claims being made, as they may choose not to engage a lawyer.

No doubt, there is an ocean of opportunities for improvement of dispute resolution through technology that we need to embrace. Thus, the operation of ODR in Nigeria comes with challenges.

5.0.Potential Challenges of ODR in Nigeria.

The implementation of ODR in Nigeria may encounter various significant challenges. These challenges are prevalent in the country and have a substantial impact not only on ODR but also on the utilization and enjoyment of technological advancements. Some of these challenges include, but are not limited to, the following:

a) High cost and poor or lack of internet services

Access to the internet is not distributed equally worldwide. While some nations have relatively high connectivity, others, particularly developing countries like Nigeria, do not. [60] It is typical to encounter inadequate or unavailable internet services, which can hinder the initiation or completion of transactions or the resolution of disputes arising from such transactions.[61] This could result in substantial losses or setbacks for consumers and ultimately have an impact on the economy of the country. Many businesses and individuals in developing countries prioritize fundamental needs such as clean water, electricity, and housing, leading to limited access to reliable internet. [62] In Nigeria, the high cost of internet access makes it unattainable for many,

[60] Amy J. Schmitz, 'There's an "App" for that: Developing Online Dispute Resolution to Empower Economic Development' [2018], *Notre Dame Journal of Law, Ethics and Public Policy,* (32) (1), 14, 21.

[61]Uchenna Jerome Orji, 'Technology Mediated Dispute Resolution: Challenges and Opportunity for Dispute Resolution' Computer and Telecommunication Law Review, [2012] 18 (5) 131. https://www.scholar.google.com/scholar?hl=en&as_sdt=0%2C5%q=online+dispute+resolution+in+Nigeria+&oq=d=gs_qabs&t=1654285974542&u=%23p%3DpAgppF310uMJ accessed 3rd July, 2024.

[62] A. Tarhini, C. Mgbemena, Trab MSA and R. Mosa'deh, 'User Adoption of Online Banking in Nigeria: A Qualitative Study' [2015] *Journal of Internet Banking and Commerce,* (20) 132 http://www.icommercecentral .com/open-access/user-adoption-of-online-banking-in-nigeria-a-qualitative study.php?aid=62486 accessed 9th July, 2024.

particularly when considering that online dispute resolution may necessitate prolonged online presence during meetings. [63]

b). Poor power supply

Ensuring a stable power source is a fundamental necessity for stimulating economic advancement in any country. It greatly boosts efficiency across various business industries. In Nigeria, the ongoing problem of inadequate power supply has far-reaching adverse effects on the economy.[64] Many Nigerians face daily difficulties arising from unreliable public power supply, including extended periods without electricity, fluctuating voltage, and planned power outages. These power supply challenges also create barriers to the use of essential ICTs, which are crucial for effective online dispute resolution (ODR) processes. ODR heavily depends on computer technology, which in turn requires a steady power supply to operate at its best. The inconsistent power supply situation in Nigeria creates an unfavourable setting for the use of ICTs, ultimately impeding the potential success of ODR. Therefore, enhancing the power sector in Nigeria is crucial for enabling the successful implementation of ODR.

c). Lack of understanding and proficiency in ICT

The widespread adoption of Online Dispute Resolution (ODR) in Nigeria faces a major challenge due to the limited Information Communication Technology (ICT) skills among the population. [65] Although many countries, including Nigeria, have embraced ICT, there is still a significant gap in ICT knowledge and skills. This gap can be attributed to several factors, such as the high cost of personal computers and the government's lack of interest in providing ICT training to its citizens. As a result, many Nigerians lack the necessary knowledge and skills to effectively use computers, which are essential for ODR. Moreover, both individuals and organizations are often reluctant to invest in skilled ICT personnel due to associated costs. In summary, the insufficient ICT skills and the reluctance to invest in ICT personnel present significant challenges to the widespread acceptance of ODR in Nigeria. [66]

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[63] Rob Rachwald, 'Is Banking Online Safer than Banking on the Corner' Computer Fraud and Security' [2008] (3) 11-12 www.researchgate.net/publication/250726752_Is_banking_online_safer_than_banking_on_the_corner accessed 9th July, 2024.

[64] Robin V Cupido, 'The Growth of E-Commerce and Online Dispute Resolution in Developing Nations: An Analysis, [2016] *International Journal of Social, Behaviour, Education, Economics, Business and Industrial Engineering,* 10(1) 3254-3257; E.I. Henry, "Factors that Influence Customers' Attitude Toward Electronic Banking in Nigeria' [2018], *Journal of Internet Commerce,* 17 (3) 325-328 http://www.doi.org/10.1080/15332861.2018. 1463482> accessed 9th July, 2024.

[65] Wallet Peter, Information and Communication Technology (ICT) in Education in Sub-Saharan Africa: A Comparative Analysis of Basic E-readiness in Schools' [2015] *UNESCO Institute for Statistics,* 1-30 , 5.

[66]Adeobi Ifejiofor and Cosmas Nwankwo, 'The Undercurrents of ICT Skill Acquisition in Nigeria: Problems and Prospects'[2015] *International of Research in Business and Management,* (1) (8) 1-7, E.I. Stella, 'Strategic Impact of ICT on Modern Day Banking in Nigeria' (2014), *International Journal of Strategic Information Technology and Applications,* 5 (4), Available at<http://www.igi-global.com/article/strategic-impact-of-ict-on-modern-day-banking-

d). Absence of particular laws

The Arbitration and Mediation Act (AMA) of 2023 governs alternative dispute resolution (ADR) in Nigeria. However, the Act does not encompass online dispute resolution (ODR), and there are no specific regulations or laws overseeing ODR in Nigeria. This absence of a regulatory framework impedes the widespread adoption of ODR. [67] Having legislation that deals with ODR would improve its legitimacy and dependability. Without legal acknowledgment of the processes for settling disputes online, enforcing arbitration awards might be difficult and impractical. [68]

e). Confidentiality and Security

Confidentiality plays a crucial role in Alternative Dispute Resolution (ADR). Resolving disputes requires a strong focus on safeguarding data, information, and documents shared during discussions. However, Online Dispute Resolution (ODR) faces challenges in maintaining confidentiality and security. In ODR, parties must be able to communicate openly, knowing that their words will not be used against them. Breaching this trust can significantly undermine the entire process. The confidentiality of ODR is at risk due to the lack of security, potentially allowing third parties to access and distribute exchanged documents without consent. This security vulnerability acts as a deterrent, dissuading individuals from using ODR to resolve disputes.[69]

6.0. Conclusion/Recommendations

In Nigeria, ODR remains a novel mechanism for settlement of dispute which is yet to gain momentum considering the unavailability of a legal framework to regulate its operation. While a lot of business organizations lack information on the existence of such an electronic dispute resolution mechanism, the ones that are aware lack the resources to operate a viable ODR platform. Online Dispute Resolution, if used effectively, can be a valuable tool for resolving online transactions. It deviates from the typical litigation process, offering cost-efficient and flexible solutions. Online dispute resolution provides greater satisfaction to the parties involved by providing convenient solutions. It is faster, cost-effective, and more accessible compared to the traditional legal system. The paper, therefore, recommends as follows:

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in-nigeria/125028> accessed 10th June, 2024; P.I. Udobi-Owoloja, B.E. Akhigbe, Ubi, A.E., Gbajumo-Sheriff, M.A., & Umoru, B., 'Digital Banking and Bank Profitability in Nigeria' [2020], *Nigerian Journal of Management Studies.* 20(2), 24-34; Jayshree C., 'Internet Banking-Benefits and Challenges in an Emerging Economy' [2013], *International Journal of Research in Business Management,*1(2), 19-26.

[67]Owolabi W.M., K, 'Post Covid-19 Impacts on the Use of Technologies for Resolution of Corporate and Commercial Disputes in Nigeria '[2023], *Cavendish University Law Journal,* 3(1), 1, 15.

[68]Wallet Peter (fn 66)

[69] Jayshree C.,(fn 67).

- Consumers must have a good grasp of what ODR is and how it can help them resolve disputes quickly and inexpensively.
- Lawyers getting training in the art of online mediation.
- Mediators resorting to the internet more when mediating disputes; training themselves in online mediation simulations in as many languages as possible — e.g. Hausa, Igbo, Yoruba — and for different kinds of cases; persuading their clients to use the internet when resolving disputes too would increase ODR awareness and encourage people to use them when proposed by Nigerian brands.
- The eBay and Amazon technique can be adopted too but it would be in the business-to-consumer method because eBay's technique is for consumer-to-consumer disputes, and we don't have Nigerian brands which operate that way.
- Courts preaching ODR; insisting that there should be an ODR clause like there is for ADR, parties to a dispute will have no choice but to resort to ODR when disputes arise.
- Nigerian business organisations should also include ODR clauses in the terms of their contracts.

The Gains of Arbitration Over Litigation: A Reality or A Hoax?

Enemhinye Ehigiator, PhD*

Abstract

A lot has been said about the gains, advantages, and merits of arbitration over litigation. It is however trite that everything that has a good side also has a bad side. This paper seeks to examine the merits and demerits of arbitration viz-a-viz litigation, with a view to establishing whether the gain in arbitration outweighs the option of litigation as largely contended by legal practitioners and arbitrators. this paper shall discuss the meaning of arbitration, the merits in the use of arbitration, the demerits in the use of arbitration, the problems associated with litigation, the good side of litigation, matters that are not arbitrable, the friction between arbitration and litigation and the need for a healthy practice of arbitration side by side litigation. this paper seeks to establish that litigation and arbitration practice can complement each other in the scheme of things, especially with respect to dispute resolution.

Keywords: *Arbitration, Litigation, Arbitrability, Court, Arbitral Tribunal, Public Policy.*

1.0 Introduction

There is no doubt, that overtime, a lot of arbitrators and legal practitioners have placed arbitration and litigation on a collision course, which is quite unhealthy. Arbitration has a lot of advantages, which of course have dwarfed its disadvantages. However, the crux of this paper is to examine whether the much-touted gains of arbitration over litigation is a reality or a mere hoax. There is no gainsaying the fact that, Nigeria operates the adversarial system of litigation, same mechanism which has often been adopted in several arbitral proceedings in Nigeria and even beyond.

There has not been any universally or uniformly acceptable definition of arbitration, however Section 91 of the Arbitration and Mediation Act 2023 refers to Arbitration as "a commercial arbitration whether or not administered by a permanent arbitral institution"[1]. Litigation on the other hand, simply refers to a process, whereby a dispute or a legal issue is brought before the Court for resolution or for the Court/Judge to decide, one way or the other, while arbitration

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[1] Hagler Okorie, Arbitration Law: Practice and Procedure, (Princeton and Associate Publishing Company Ltd, 2024), p1

involves the presentation of a dispute, to one or more arbitrators, on the agreement of the parties to the dispute and the Arbitrator(s) is expected to make a binding decision on the dispute. The binding decision is called an Award. Arbitration is thus consensual, and it is a private dispute resolution procedure or mechanism, adopted by parties, rather than embarking on litigation. We must however note that, this is the point of divergence between arbitration and litigation. Moreso arbitration and litigation, in Nigeria and other jurisdictions, are adversarial in nature, hence the major characteristics of the adversarial system are usually adhered to, viz: party control of the presentation of its case, the use of lawyers for legal representation, presentation of evidence (Examination of Chief), cross examination, the arbiter (The Judge or Arbitrator) and neutral decision making. However, in arbitration, there is no room for an appeal of the decision of the Arbitral Tribunal, the awards are final, though it may be challenged, for it to be set aside in accordance with Sections 55 and 58 of the Arbitration and Mediation Act 2023, litigation on the other hand allows for appeal, up to the Supreme Court, which is the apex Court in the land.

2.0 The Meaning of Arbitration

Section 91 of the Arbitration and Mediation Act 2023, refers to Commercial Arbitration. Section 91(1) of the Act, which is the Interpretation section, it further throws light on the meaning of "Commercial" thus:

> *"Commercial includes matters arising from all relationships of a Commercial nature whether contractual or not, such as any trade, transaction for the supply or exchange of goods or services distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing engineering licensing investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operative, carriage of goods or passengers by air, seal, rail or road"*[2].

The above definition of commercial in relation to Arbitration, therefore, implies that the Arbitration and Mediation Act 2023, shall only apply to transactions which are commercial in nature, notwithstanding the fact that there are other types of Arbitration, such as Customary Arbitration, International Arbitration, etc. It is my opinion that the Arbitration and Mediation Act 2023 limits itself to commercial arbitration for the purpose of promoting economic growth by

[2] Section 91(1) of the Arbitration and Mediation Act 2023

providing efficient district resolution in commercial undertakings and to attracts foreign investments to Nigeria.

The Supreme Court of Nigeria in **Nigerian National Petroleum Corporation v Lutin Investments**[3], defined Arbitration, as:

> *"An Arbitration is the reference of a dispute or differences between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a Court of competent jurisdiction. The arbitrator, who is not an umpire, has the jurisdiction to decide only what has been submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority and consequently the whole proceedings will be null and void and of no effect. This will include any award he may consequently make".*

Similarly, Halsbury Laws of England[4] defines Arbitration in the following terms:

> *"Arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons, other than in Court of competent jurisdiction" (emphasis mine).*

Moreso, in the handbook of Arbitration practice[5] arbitration is defined as:

> *"a mechanism for the resolution of disputes which takes place, usually in private pursuant to an agreement between two or more parties under which the parties agree to be bound by the decision to be given by the arbitrator, according to Law or if so agreed, other considerations, after a fair hearing, such decision being enforceable at Law".*

In the words of Holdworth[6]

> *"The practice of Arbitration therefore, comes, so to speak, naturally to the primitive bodies of Law and after Courts have been established by*

[3] (2006) 2 NWLR (pt 965) 506, See P. 542 – 543, paras G-A
[4] Third edition, vol 1, p 180
[5] Bemstein, "Handbook of Arbitration Practice", 1988, P.9
[6] Hordsworth, History of English Law, Vol XIV, 1964, 187

the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle it with less formality and expense that is involved in a recourse to the Courts".

It is trite that, for there to be arbitration, there must be an arbitration agreement, a dispute must have ensued between the parties, the parties willingly choose the arbitral tribunal and other matters incidental to the smooth operation of the tribunal, parties must agree to be bound by the decision (Award) to be handed down by the Arbitral Tribunal etc.

2.1 The Merits in the Use of Arbitration

Ezejiofor in his book[7], argues that Arbitration would effectively shield parties from:

- The frustrating delays which have bedevilled the judicial processes, completely overwhelmed the judiciary, and reduced it to a position of helplessness.
- The comparatively heavier financial outlay involved in litigation.
- The disclosure of business secrets to competitors, which sometimes occur in litigation.
- The adverse publicity which some litigations attract to the litigating firms and
- The rigid formality which characterizes Court trials.

In this paper, I shall discuss several merits/advantages, in the practice of Arbitration, over the use of litigation:

(i) Finality of Award[8]

As a rule, an arbitral award is final, and it is subject to no appeal. However it may be set aside on specific grounds, but these grounds to set aside an arbitral award are limited. In litigation, the judgment of any Court (Except the Supreme Court or a consent judgment) is subject to appeal.

(ii) Confidentiality of the Proceedings

Arbitration enjoys privacy and secrecy in terms of the proceedings leading to the award by the arbitral tribunal. In numerous cases, the subject matter of the dispute may be such that

[7]G. Ezejiofor, The Law of Arbitration in Nigeria, (Longman Nigeria Plc 1997), vi
[8] Hagler Okorie, Arbitration Law: Practice and Procedure, (Princeton and Associate Publishing Company Ltd, 2024), p8

the parties are sensitive to it being taken to the public space, in that case, arbitration is most reliable and suitable, not litigation.

(iii) Flexibility in Practice and procedure

In Nigeria, the procedure adopted in arbitral proceedings is as provided for in the Arbitration Rules made pursuant to the Arbitration and Mediation Act. However, where the rules have no provisions relating to any matter in the arbitral/proceeding, the arbitral tribunal is required to conduct the arbitral proceedings in such a manner as it thinks appropriate as to ensure fair hearing.[9]

Under Section 31(1) of the AMA 2023, the arbitral tribunal can formulate and adopt any peculiar procedure as they wish, however, with the mutual consent of the parties. This means that they are encouraged to avoid the complicated path of procedure adopted by the Court.

(iv) Awards are easily reached[10]

Decisions/Awards of Arbitral Tribunal can be reached quicker than judgment in litigation. This is because of the relatively simple and informal nature of the procedure used and the Arbitrator's continuous presence during proceedings. There are minimal or no needless adjournment(s) in arbitral hearings.

(v) Cost effectiveness

Where parties co-operate with the arbitral tribunal, arbitration may be cheaper, faster and more cost effective than litigation, especially when litigation is prolonged over a period of years. However, in some quarters, it is believed that the cost of arbitration is higher than litigation as parties pay for cost of the arbitrators and the management of the process or for conducting the arbitral proceedings. Generally, in litigation, payment or the judges' salary and other administrative costs are handled by the Government.

(vi) Right of Choice of Law and Venue

Arbitration proceedings are determined by the choice of the parties as they enjoy the liberty and luxury of choosing both the venue and the law applicable. By this liberty, parties

[9] Section 31(1) of the Arbitration and Mediation Act 2023
[10] Hagler Okorie, Arbitration Law: Practice and Procedure, (Princeton and Associate Publishing Company Ltd, 2024),p8

normally elect to have a venue that is convenient to them. In terms of applicable law, parties also choose both substantive and procedural law in order of their convenience and interest. This different from litigation where proceedings are conducted according to already determined rules of court.

(vii) Preservation of inter-personal and business relationship:

Parties involved in business and friendly relationship and which they value highly, elect to settle their disputes arising from business concerns through arbitration. This is because arbitral proceeding is conducted under a congenial and friendly atmosphere. On the resolution of the dispute by arbitration, they continue with similar business as no relationship has been tampered with nor strained. This is quite different from litigation sphere, where one party must win and the other proceeds to appeal or suck in his defeat. However, we must not rule out the fact that a lot of disputes have failed to be resolved by arbitration and have proceeded to litigation; for instance, the Matter of the Estate of Chief F.R.A. Williams SAN, which said matter is still in court after an ill-fated arbitration process.

(viii) Dispute requiring expertise:

Arbitration is necessary on dispute that requires an expert and special skill. A specialized area requires arbitrators who are specialists with specialized knowledge on the area. For instance, issues bordering on civil engineering and contract on construction of building, you need a construction/civil engineer, quantity surveyor and the likes as tribunal members or arbitrator(s). This does not undermine the importance of an expert witness in litigation; however, it is cheaper if one or two members of the arbitral panel are experts in the subject matter.

(ix) Arbitral Representation of Parties:

In arbitration, parties may be represented by persons other than legal practitioners. A party is permitted to appoint or nominate any person of his choice to represent him in the arbitral tribunal. Conversely, in litigation, only lawyers called to the Bar have right of audience in Court. We must bear in mind that arbitration is party controlled, and the practice is not to be labelled as one, with so much formalities.

(x) Right of Tribunal:

In arbitration, parties mutually agree on the persons to settle their matter in the event of any dispute. On the other hand, in litigation, Judges are foisted on parties by the provisions of the law and the rules of Court. Hence, the parties are to agree on the choice of arbitrators, it will be almost impossible for the tribunal to be partial towards a party.

2.2 Demerits in the use of Arbitration

The following are some of the demerits of arbitration vis-à-vis litigation:

a. Arbitration sometimes may become highly complex as it may come under pressures from powerful law firms representing rich and influential party. Arbitration agreements are sometimes contained in ancillary agreements, or in small print in other agreements, and consumers and employees often do not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job.

b. If the arbitration is mandatory and binding, the parties waive their right to access the courts and have a judge to decide the case.

c. In some arbitration agreements, the parties are required to pay for the arbitration, which adds an additional prohibitive legal cost, especially in some consumer disputes, while in some arbitration agreements and rules, the recovery of the Counsel's fees is unavailable, making it difficult or impossible for parties to get legal representation; however, most arbitration laws and agreements provide for the same reliefs that could be granted in court, such as damages, injunctions, etc.

d. If the arbitrator or arbitrator forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumers or employee. There are very limited avenues for appeal, which means that the erroneous decision cannot be easily overturned.

e. Although arbitration is thought to be faster, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays.

f. Rules of applicable law is not necessarily binding on the arbitrators, although they cannot disregard the law, discovery may be more limited, in arbitration or even non-existent.

g. Although grounds for attacking an arbitration award in Court are limited, efforts to confirm the award can be fiercely fought, thus necessitating huge legal expenses that negate the apparent economic incentive to arbitrate the dispute in the first place.

h. The arbitral panel has limited powers, which the arbitral tribunal may exercise. The tribunal must depend for its full effectiveness upon the underlying national system of law. It has no power to compel attendance of witnesses or enforce its own orders/ awards.

i. It is not possible to bring multi-party disputes together before the same arbitral tribunal. Unlike a Court of law, the tribunal has no to order consolidation of disputes or actions. Third parties who are not privy to the agreement to arbitrate cannot be joined in the arbitration.

3.0 Resolution of Disputes Through Litigation

The resolution of disputes through the courts in Nigeria has been bedevilled with many problems, notable amongst these problems are the issues of congestion and delay in the hearing of cases, perceived and reported cases of corruption, procedural bottlenecks embedded in the judicial system, high cost of prosecuting cases in court and the hostility that litigation brings amongst disputants/litigants.[11] These problems have crippled the realization of the goals of employing the court system as a means for the attainment of justice and the promotion of an egalitarian society where the rule of law is sacrosanct. By virtue of this, the advanced system for settling disputes employed by the court has failed miserably in achieving the demands of Justice[12]. Below are the major problems associated with litigation, especially in Nigeria:

(i) The Problem of Congestion and Delay

In Nigeria, a major problem affecting the progress of the courts in administering justice is the issue of congestion and delay in the hearing and determination of cases. The delay in the hearing of cases is usually tied to the heavy workload of cases, that the judicial officers must contend with in their various courts. The delay is also caused by lawyers who write letters to courts asking for adjournments of their cases, inability of the judicial officers to sit always and with punctuality and the practice that requires cases to start afresh when the judicial officer hearing a case die, retires or is transferred to another Court[13]. Other causes of delay in the Courtroom include over-adherence to technicalities by judges and lawyers, procedural delays, and over-formalistic rules of procedure.

[11] F. Ebbah, "The institutionalization of ADR as a panacea to the problems affecting Courts in Nigeria", Published in NBA Asaba Law Journal Vol 1 No1, 2020, P.87.
[12] P. Harvey, "ADR: An Evolutionary Process", The advocate 56, no 4 (1998), 545
[13] N. Okoegbule, "Accessto Justice and Human Rights Protection in Nigeria: Problems and Prospects" SUR – International Journal on Human Rights, No 3 (2005), 99.

The problem of delay in the hearing and determination of cases have now given rise to a popular dissatisfaction among the litigating public. According to Bukar[14]. the Courts have failed in leaving up to expectation in the dispensation of justice because of delays which are readily associated with the litigation process. He further opines that these problems with litigation have led to ADR processes which are generally regarded as faster, cheaper, and less cumbersome than litigation[15].

The problem of delay and congestion is also attributed to the increasing rate of cases filed at the courts daily. While the population is increasing and becoming aware of their rights, there is no corresponding increase in the number of new courts in Nigeria. We are thus faced with a situation where more cases are added to the ones that the courts are finding difficult to dispense with. For instance, it was reported in 2019 that there were only 82 judges handling over 200,000 cases at the Federal High Court.[16] Thus, a judge of the Federal High Court in Nigeria had 2,430 cases in his docket on the average in the year 2019. This kind of situation will surely ensure that cases in the Federal High Court would be affected by delay and congestion.

(ii) The Problem of High Cost of Prosecuting Civil Cases in Court:

Litigation is generally a costly exercise especially when lawyers are involved[17]. The cost of prosecuting cases in Nigerian Courts is high relative to the economic situation in the country. This has to some extent reduced the access of ordinary Nigerians to the Courts. This high cost is usually seen in the fees charged by lawyers, filing fees, expert fees, and other sundry charges. Professional fees charged by lawyers are generally not cheap especially when the lawyer is a Senior Advocate of Nigeria (SAN) or a lawyer with many years of experience at the bar.

The point must be stressed that what really makes the litigation process to be expensive is usually due to the fees charged by Lawyers. The actual cost of filing cases in court is not too expensive compared to the fees charged by lawyers. Therefore, there is a need to distinguish what lawyers charge as fees for handling cases and the actual amount that is paid to the Court as filing fees. In this respect, there is now a common complaint that litigation is very confrontational, too expensive, too time-consuming and sometimes too complex which has now made ADR an increasingly viable

[14]Bagoni Bukar, "Emerging Trends in Alternative Dispute Resolution: From Mono Door to Multi-Door." Arbitration 79, no 1 (2013): 72.
[15]*Ibid*.
[16]See Justice Suffers as 82 Judges Handle over 200,000 Cases in Federal High Courts" Punch Newspaper Online, 21" July, 2019, www.punchng.com (accessed 5 April, 2020).
[17]Philip Naughton, "Alternative Forms of Dispute Resolution Their Strengths and Weakness," Const. L.J. 6, no. 3 (1990): 202.

option as a means of resolving disputes.[18]The high cost of maintaining an action in Court may be more apparent where the hearing of the case prolongs and the litigants keep on paying the appearance and other sundry fees of the lawyers for a very long time. This will surely over burden the litigants and may simply create the belief in them that going to Court is not worth it.

(iii) The Problem of Over Reliance on Technicality:

Many decisions are taken by judges in Nigerian Courts on the altar of technicalities. Due to the strict requirements of the Rules of Courts, judges are arm-twisted into applying technical justice instead of substantial justice. This clearly plays out in a lot of Election Petition cases where the petitioner is required to follow the procedure strictly without any allowance for deviation. Many cases have been struck out by the courts because the Petitioners/Claimants failed to make the proper application within the time frame required by the law. Such delays may have been occasioned by unforeseen circumstances or an act of God.

According to Cocodia, the creation of many judicial divisions in the Nigerian judiciary has not solved the problem.[19] He observes that in Nigeria, a major challenge is the fact that a large part of the Common Law and the Received English Law which are still relied on in Nigeria are no longer relied upon in England where we inherited them from due to their out-datedness, such as the Lunacy Act of 1871. He refers to this as an awkward situation strengthened by the fact that the courts in Nigeria have still not effected significant changes to the rules of English Common Law and Equity as otherwise demanded by the present reality of the Nigerian social condition.[20]

The technical setback arising thereof from this state of affairs has contributed in making the courts in Nigeria slow in the dispensation of cases. Consequently, the protection, security and facilities offered to the citizens by the law become undependable and lawlessness becomes the order of the day.[21]

(iv) The Problem of Corruption

Another major impediment to the efficacy of the Courts in dispensing justice in Nigeria has to do with the problem of corruption among judicial officers. The process of appointing judicial officers

[18]Funke Adekoya, "ADR and the Future of Legal Practice", Paper delivered at the NBA Ilesha Branch Law Week Awards on 28" November 2013.
[19]Jude Cocodia, "Identifying Causes of Case Congestion in Nigeria's Courts via Non- Participant Observation: A Case Study of Brass High Court, Bayelsa State, Nigeria," *International Journal of Politics and Good Governance* 1, no. 1 (2010):7.
[20]*Ibid*.
[21]*Ibid*.

in Nigeria does not really guarantee a corrupt free judiciary. For instance, the power to appoint judges of the Federal High Court in Nigeria is vested with the President[22] and that of the State High Courts is vested with the Governors of the States.[23] The President and Governors are partisan politicians who may want to appoint their cronies as judges in the Courts so as to get undue advantages in cases in which they have interests[24], this is not to undermine the facts that recommendations of persons for appointment of Judges flows from National Judicial Council (NJC).

It has therefore been argued that corrupt judicial officers may act as a barrier to the realization of justice for the weak and the oppressed in the society.[25] Chukwuemerie recognised the problem of corruption amongst judicial officers in Nigeria and opines that many judicial officers in Nigeria are people of integrity and learning but there is a high level of corruption in the judiciary which can no longer be denied.[26] It has also been argued that corruption will continue amongst judicial officers since the courts are public institutions notwithstanding whether they are poorly paid or not.[27] This argument is premised on the fact that since judicial officers are paid by the government, they may not be accountable to the litigants. The huge public reaction that greeted the said raid underscores the point that the judiciary in Nigeria has some issues dealing with corruption and needs to cleanse itself. The judiciary responded by coming up with a new National Judicial Policy. This Judicial Policy encompasses issues like judicial appointments, judicial discipline, judicial code of conduct, judicial education and training, transparency, and anti-corruption amongst others.[28] It is hoped that this new policy will enhance the transparency process in the judiciary and will help to weed out corrupt judges from the judiciary. Similarly, in 2018, the former Chief Justice of Nigeria, Justice Walter Onnoghen was arraigned at the Code of Conduct Tribunal on the allegation of corruption and was thereafter suspended from office by the Code of Conduct

[22]See Constitution of the Federal Republic of Nigeria, 1999 (as amended), s. 250.
[23]*Ibid*, s. 271.
[24]Section 271 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), gives the Governors of the States in Nigeria the sole powers of appointing judges to the High Courts on the recommendation of the NJC. The recommendation of the NJC can be rejected by the governor of the state where the Governor feels that his best interest will not be served by the recommended person. This scenario aptly played out in Rivers State in 2014 when the then Governor of Rivers State, Rotimi Chibuike Amaechi, refused to appoint Justice Okocha as the Chief Judge of Rivers State on the recommendation of the NJC and instead appointed Justice Agumagu who was not recommended by the NJC. The NJC reacted by suspending Justice Agumagu. This ugly confrontation between the Governor of Rivers State and the NJC led to the closure of the High Courts in Rivers State for about one year with its attendant dislocations in the justice delivery system in that State.
[25]*Ibid*.
[26]Andrew Chukwuemerie, "An Overview of Arbitration and the Alternative Dispute Resolution Methods (ADRS)," Civil Litigation (2010): 126.
[27]*Ibid*.
[28]See *"New Judicial Policy Gives NJC Power to Suspend Judges*" The Punch Newspaper Online edition, 24 October, 2016, www.punchng.com (accessed 12 April 2017).

Tribunal. The widespread and disparate opinions that greeted the arraignment and suspension of the then Chief Justice of Nigeria aptly show that the issue of corruption is a serious problem afflicting the courts in Nigeria.

(v) The unfriendly nature of Litigation

The main feature of litigation is the declaration by the court of the rights and liabilities of the parties involved in a dispute. This idea of declaring winners and losers by the court, has been criticized by Chukwuemerie who opines that the declaration of rights and liabilities leaves the parties quarrelling and does not really settle or resolve the dispute even though it grants a pound of flesh to the victorious party.[29] It has been recognized that the preservation of the cordial relationship that existed between the disputants before the dispute arose, is largely one of the important aims of dispute settlement in an African set up as opposed to judgments of the courts which only declare rights and liabilities.[30] In this respect, litigation is really not concerned with the need to preserve the relationship of the litigants unlike other dispute resolution methods like ADR mechanisms which are largely concerned with the preservation of the existing relationship between the disputants before the outbreak of hostilities.[31] On this premise, it is the view of Sander and Rozdeiczer that litigation has the tendency to quickly damage a good pre-litigation relationship and the trust between the parties and this has the effect of creating an impediment to any settlement by the parties.[32] Thus, even if many courts are set up and many judges appointed to take care of the congestion in the courtroom, the problem of hostility amongst disputants and the unfriendliness that using the courts bring cannot be erased. Therefore, to erase this problem associated with litigation, strategies must be put in place in the litigation process that will ensure that the relationship of the parties in court is taken into consideration by the courts in the dispensation of justice thereby making the Courts as an institution that promotes harmony among litigants. Where this is done, the problem of the unfriendly nature of litigation will be erased forever and litigants will find the court conducive for the resolution of their disputes.

4 Litigation and the Issue of Arbitrability

[29]Andrew Chukwuemerie, The Internationalization of African Customary Law Arbitration." A. J. L.CL. 14, no. 2 (2006): 149.
[30]Chukwuemerie, "An Overview of Arbitration"' n 22, 132.
[31]*Ibid*.
[32]Sander and Rozdeiczer, "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centred Approach," *Harvard Negotiation Law Review 11, (2006):20.*

Litigation overtime has been criticized, due to the already discussed problems associated with litigation. However, litigation, yet has some advantages, which this paper shall briefly highlight, viz:

i. **Right of Appeal:** In litigation, parties have the right to appeal a court's decision, an outright appeal and a cross appeal.

ii. **Public Record:** In litigation, proceedings are usually public, which promotes transparency and accountability.

iii. **Discovery**: Litigation allows for broader discovery, thereby enabling the parties to obtain more evidence and information.

iv. **Enforcement:** Court judgments are generally easier to enforce than Arbitration Awards.

v. **Class Actions:** Litigation permits class Actions which enable groups of people to pursue claims collectively etc.

However, the advantages of litigation, notwithstanding, arbitration is still far more recommended in the settlement of disputes, although another major stumbling block or impediment to arbitration is the issue of arbitrability. Arbitrability therefore refers to the question, whether a particular dispute or issue is suitable for resolution, through arbitration, rather than through litigation in a law court. There is no universally acceptable view as to what matters are arbitrable and the others that are not arbitrable. However, arbitrability is an Arbitration concept that relates to the issues is dispute and whether they are capable of settlement by arbitration.[33]

4.1 Arbitrable Matters

Where a judicial proceeding is commenced in a matter, which is subject of an arbitration agreement, the judicial forum is bound to refer to the matter for arbitration by the arbitral tribunal.[34] However, the limit of arbitrability is a sensitive issue in law and has been raging across the academic faculties. Matters that can be conveniently settled by arbitration are as follows:

(i) All disputes of civil or quasi-civil nature involving civil rights as there are within the jurisdiction of arbitration.

[33] Hagler Okorie, Arbitration Law: Practice and Procedure, (Princeton and Associate Publishing Company Ltd, 2024), p.39
[34] *Ibid*, p42.

(ii) Almost all disputes which include commercial transactions, civil and labour disputes in respect of which the parties are entitled to conclude a settlement. Here, arbitration can be engaged.

(iii) Disputes involving joint ventures, personal injuries, product liabilities, professional liability, real estate, securities, contract interpretation and performance, insurance claim and banking and non-banking transaction disputes, all are within the jurisdiction of arbitrability.

(iv) Construction of health care, telecommunication entertainment and technology-based industries.[35]

4.2 Non-Arbitrable Matters

Some matters, by their nature are not arbitrable, meaning they cannot be subjected to arbitration. Such matters include:

i. Criminal cases

ii. Family Law cases, which has to do with divorce, child custody and child support, are usually not arbitrable, as they involve public policy concerns.

iii. Probate and estate matters: This includes disputes over wills, trust, and inheritance, they are better resolved through litigation and not arbitration.

iv. Disputes involving government agencies.

v. Constitutional matters.

vi. Environmental and public health disputes

vii. Intellectual Property Disputes

viii. Matters that have to do with Bankruptcy.

It is worthy of note to state that one of the major determining factors with respect to arbitrability is the issue of public policy. Whenever a matter or an issue is considered to have public policy concerns, then it is considered non-arbitrable.

5.0 Conclusions

This paper does not intend to concentrate on arguments for and arguments against litigation and arbitration respectively. It is my view that litigation and arbitration do co-exist, and neither is good nor bad. Arbitration and litigation are both dispute resolution mechanisms, that serve important

[35] *Ibid* Pp 42-43.

purposes in the judicial system. Need I say that the high court civil procedure rules of over 25 States in Nigeria, have incorporated provisions in the Rules to accommodate Alternative Dispute Resolution (ADR) mechanisms, especially with the introduction of Multidoor courts within the judiciary of several states?

It is my opinion that arbitration and litigation already co-exist, just like Siamese twins, to complement each other, practitioners should desist from heating up the polity with undue, unnecessary, and non-existent competition between arbitration and litigation; without having recourse to the fact, that it is ultimately the choice of the parties, whether to submit their disputes to arbitration or litigation, for determination.

AN OVERVIEW OF PRIVITY OF ARBITRATION CONTRACT

Agbo Friday Ojonugwa PhD* and Daniel Philemon SaredauPhD**

ABSTRACT

It is a rudimentary principle of law that only parties to a contract can benefit from the contract and sue regarding the contract. The law knows nothing of jus quaesitum tertio arising by way of contract. Arbitration agreements either as a clause in a contract or in a separate document in reference to a contract, is essentially a contract, and the doctrine of privity of contract will apply so that only parties who have agreed to submit their disputes to arbitration can institute arbitration proceedings between themselves. However, the complexities of international trade and commerce is such that multiple parties enter into different contracts with different arbitration clauses in those contracts. For the purpose of expediency, joinders and consolidation will be required. Joinders are not without their attendant problems. Using the doctrinal approach, this paper examined privity of arbitration contracts, and the instances where parties who were not originally parties to the arbitration agreement may seek to be joined and the procedure for doing so. This paper recommends that the Nigerian Arbitration and Mediation Act 2023 be amended to provide provisions for multi-party and multi-contract arbitration.

Keywords: Privity of contract, Arbitration, Nigeria.

1.0 Introduction

To begin an arbitration process, parties must agree. Arbitration is a voluntary dispute resolution process that depends on willing submission by parties. Just as in simple contracts, the doctrine of privity of arbitration applies to parties. Hence, only parties to a contract can benefit from an arbitration agreement, institute arbitration proceedings, and enforce any award arising from an arbitral proceeding. Moreover, arbitral award is binding on parties only.

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The doctrine of privity of contract was enunciated by the House of Lords in Tweddle v. Atkinson,[1] and affirmed in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge and Co. Ltd[2] as Lord Haldane declared thus:

> My Lords, in the Law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right in personam to enforce the contract.

The doctrine is fully applicable to Nigeria, a common law country.[3]

2.0 Privity of Arbitration Agreement

Either before or upon the emergence of dispute, parties can agree to arbitrate. The most important point is that parties' agreement must precede arbitration. Accordingly, arbitration is a contractual dispute settlement forum. Article II of the New York Convention[4] states that:

> Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Article II (2) of the New York Convention[5] further requires the arbitration agreement to be signed by the parties, and a copy is required as evidence for the application of recognition and enforcement of foreign awards. All these are provided to satisfy the requirement of jurisdictional element before the effects of the tribunal's power can reach the parties to the arbitration agreement. The recognition or enforcement of an award may be refused if a lack of jurisdiction is apparent, or the agreement referred to in Article II is not valid under the law applicable to the parties.

Furthermore, the issue of privity may be examined by the enforcing court under Article V(2)(b) of the New York Convention, which allows the enforcing court to exercise its discretion to set aside an award on the ground of breach of public policy which imposes the requirement of privity. A strict application of the principle of privity by the enforcing court would rule out the participation

[1] (1861) 1 B&S 393, 121 ER 762
[2] [1915] AC 847
[3] *Chuba Ikpeazu v. African Continental Bank Ltd* (1965) NMLR 374
[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
[5] Ibid

of a third-party and have a direct impact on jurisdictional issues when the parties arrive at the point of setting aside, recognition or enforcement of arbitral awards.[6]

The UNCITRAL Model Law[7] also has similar provisions for the validity of an arbitration agreement Article 7 of UNCITRAL Model Law provides as follows:

> "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The main principle is that the rights and obligations of an arbitration agreement applies only to the parties to the agreement. This is a straightforward application of the doctrine of privity of contract, and a party to an arbitration agreement will be determined by a court through determining who has consented to the agreement to arbitrate. In a straightforward sense, the parties to an arbitration agreement are only the entities that formally executed, and expressly assumed the status of parties to, the underlying contract containing the arbitration clause.[8]

The party that executed a contract is not necessarily a party to either that agreement or the arbitration clause associated with it, as an agent or representative may execute an agreement on behalf of its principal, producing the result that the principal is a party to the agreement (but the agent or representative is not). Again, merely sending a copy of the contract (which contains an arbitration clause) to the other party, in order to seek his opinion on technical matters, does not mean that they have become bound by an agreement to arbitrate. There must be an agreement between the parties to submit to arbitration and be bound by an award.[9]

3.0. Third Party Involvement in Arbitration

Under the law, "party" is with reference to the arbitration agreement or to conciliation or any person claiming through or under him. Section 63 of the Lagos State Arbitration Law contains this provision. As a general rule, only parties to an arbitration agreement will participate in arbitration proceedings and will be bound by the award given, but law recognizes certain peculiar situations where a third party who was not privy to the arbitration agreement will be allowed to participate in the arbitration process and be bound by an arbitral award as discussed as follows:

a. Multi-party and Multi-contract Disputes

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[6] Hong-Lin Yu, THREE MAY NOT BE A CROWD - WHO IS IN THE DRIVER'S SEAT UNDER SECTION 9 OF THE CONTRACT (THIRD PARTY RIGHTS) ACT, <https://www.stir.ac.uk/research/hub/publication/521354> accessed on 17 March, 2024

[7] UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006

[8] <http://2010lawsamerbadran-2.pdf (aucegypt.edu)> accessed on 20th March, 2024

[9] <http://2010lawsamerbadran-2.pdf (aucegypt.edu)> accessed on 20th March, 2024

Parties to an arbitration agreement may enter into other multiple agreements with other parties during the course of a business transaction. This is quite common in international business transactions. The end of these agreements might be the same, but the parties are multiple. For instance, in concession agreements or project agreements and several other contracts dealing with construction, finance, shareholding and operation and maintenance of the project. In such transactions, there are multiple parties. When it is borne in mind that arbitration involves parties to the agreement, the usual problem is where there is dispute between the parties to the main contract, can parties to the several other contracts be made parties in the absence of privity?[10]

The arbitration clause may be contained in only one of those agreements while other contracts connected with other parties connected to the object of the contract may not contain an arbitration clause. If all contracts are entered into by parties that are the original parties, the mere logic presumes that they are aware that all possible disputes arising from each of the contract will be solved by arbitration although the arbitration clause is included only in the main contract.[11]

When several parties are involved in a dispute, it is usually desirable that the issues be dealt with in the same proceeding rather than in a series of separate proceedings. This saves time and money. It also avoids the possibility of conflicting decisions on the same issues of law and fact, since all the issues are determined by the same tribunal at the same time. In national courts, it is generally possible to join additional parties, or to consolidate separate sets of proceedings. In arbitration however, it is difficult and sometimes impossible to achieve this, because the arbitral process is based upon the agreement of the parties.[12] Multiparty arbitration may occur where there are several parties to a single contract (multiparty arbitration) and where there are several parties to several contracts (multi-contract arbitration).

b. Several Parties to a Single Contract

It is very common in the commercial world, particularly in international trade and commerce that individuals, corporations, or state agencies joined in a joint venture or some relationship of some kind in order to enter into contract with another party or parties.[13] Several parties may come together to contribute to financing a project or to share the risks involved therein. The situation

[10] Paul Oboarenegbe Idornigie, *Commercial Arbitration Law and Practice in Nigeria,* Lawlords Pubications, 2015, p. 180

[11] Albana Karapanco, Assignment of the arbitration agreement: Perspectives of Leading Jurisdictions, Central European University Hungary

[12] Redfern A. and Hunter M. *Redfern and Hunter on International Arbitration* (6th ed. Oxford University Press 2015) p. 141

[13] Ibid p. 142

envisaged is one typical of joint ventures, partnerships, and consortia. In all these situations, a number of entities come together in a business relationship governed by one contract.

The case of *Simens AG and BKMI Industrienlagen GmBh v. Dutco Construction Co*.,[14] arose out of a contract for the construction of a cement plant. Dutco filed a claim against its consortium partners Siemens and BKMI had to jointly appoint an arbitrator, or the ICC would select an arbitrator for both. BKMI and Siemens objected to joint proceedings due to their diverging interests. In the end, BKMI and Siemens jointly appointed an arbitrator, but under protest. The arbitral tribunal rendered an interim award on jurisdiction stating that it had been properly constituted. *BKMI and Siemens* challenged this award at the French Court of Appeal which dismissed the request for setting aside the award. The French Cour de Cassation (France's highest court) however considered the appointment process to be contrary to public policy because of the necessity of equality of parties.

The above case brings to fore, the problems associated with multiparty arbitrations. Issues of affording parties the right of selecting arbitrators which may result in many arbitrators on a panel and delimiting the number of arbitrators will run contrary to the rule of autonomy and fair hearing.

c. Several Parties to Several Contracts

In international commercial trade and commerce, it is not uncommon that several contracts are entered with different parties, each of which has a bearing on the issues in dispute. A major international construction project may involve not only the employer and the main contractor (which itself maybe a consortium of companies) but also a host of specialized suppliers and subcontractors operating under different contracts, different choice of law and different arbitration clauses.[15] A joinder may be sought for by any of those several parties as the arbitration procedure will one way or the other affect him.

In the case of *Abu Dhabi Gas Liquefaction Co. Limited v Eastern Bechtel Corporation*,[16] Abu Dhabi Gas Liquefaction Company Limited (ADGAS) was the owner of a plant that produced liquefied natural gas in the Arabian Gulf. The company started an arbitration in England against the main contractors under an international construction contract, alleging that one of the huge tanks that had been constructed to store the gas was defective. The main contractor denied liability,

[14](1992) I Bull Civ 473-482
[15]Redfern A. and Hunter M. *Redfern and Hunter on International Arbitration* (6th ed. Oxford University Press 2015) p. 144
[16] (1982) 2 Lloyd's Report 425

but added that if the tank were defective, it would be the fault of the Japanese subcontractor. ADGAS brought an ad hoc proceeding against the main contractor before a sole arbitrator in London. The main contractor then brought a separate arbitration proceeding also in London, against the Japanese subcontractor. There is little doubt that if the matter was litigated in an English court, the Japanese company would have been joined as a party to the action. However, ADGAS did not agree that the Japanese subcontractors should be brought into its arbitration with the main contractor, since it would lengthen and complicate the proceedings, nor did the Japanese subcontractor agree to be joined. It preferred to await the outcome of the main proceeding to see whether there was a case to answer. Lord Denning, giving the judgment in the English Court of Appeal, plainly wished that an order could be made consolidating the two sets of arbitral proceedings, to save time and money and to avoid the risk of inconsistent awards. He pointed out that there is a danger in having two separate arbitrations in a case like this which might result in getting inconsistent findings if there were two separate arbitrators.

4.0 Multiple Party, Joinder and Consolidation

Article 17(5) of the UNCITRAL Arbitration Rules[17] provides that an arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

There are however no provisions in the Rules for consolidation. It would therefore be necessary to achieve agreement on an ad hoc basis, taking into account requirements concerning fairness arising from the law of the seat and/or jurisdiction in which enforcement is contemplated.[18]

The ICC Rules[19] was recently amended to cater for, the issues of joinder and consolidation. Article 7(1) of the ICC Rules is instructive that when a party wishes to join another party to the arbitration proceedings shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat.

Article 7(5) of the ICC Rules further provides that any request for Joinder made after the confirmation or appointment of any arbitrator shall be decided by the arbitral tribunal once

[17] UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)

[18] Adrian Hughes QC & John Denis-Smith, The UNCITRAL Arbitration Rules, INSTITUTIONAL HISTORY AND ORGANISATIONAL FRAMEWORK, p. 313

[19] icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf

constituted and shall be subject to the additional party accepting the constitution of the arbitral tribunal and agreeing to the Terms of Reference, where applicable. In deciding on such a Request for Joinder, the arbitral tribunal shall consider all relevant circumstances, which may include whether the arbitral tribunal has prima facie jurisdiction over the additional party, the timing of the Request for Joinder, possible conflicts of interests and the impact of the joinder on the arbitral procedure. Any decision to join an additional party is without prejudice to the arbitral tribunal's decision as to its jurisdiction with respect to that party.

ICC Rules also made ample provisions for consolidation. Article 10 of the ICC Rules provides as follows:

> The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where: (a) the parties have agreed to consolidation; or (b) all of the claims in the arbitrations are made under the same arbitration agreement or agreements; or (c) the claims in the arbitrations are not made under the same arbitration agreement or agreements, but the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible. In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties"?

Section 40 of the Lagos State Arbitration Law[20], makes provisions for joinder of parties if the parties to arbitration agree to such joinder and consolidation is also provided for under the same section.

The courts can order consolidation of arbitration, but it can be very challenging for arbitration tribunals to consolidate multiple arbitrations in the absence of the consent of the parties, particularly in multi-contract transactions. It is trite that consent is the cornerstone to any arbitration. Parties to an arbitration are effectively giving up their due process right to have their disputes heard by a court in favour of arbitration. Without the consent of all the parties to arbitration – whether in the form of a prospective arbitration clause in a contract or in the form of a submission agreement to arbitration when a dispute arises – an arbitration cannot take place. This requirement of consent can make it very challenging to consolidate multiple arbitration proceedings into a single arbitration when there are multiple contracts in a transaction.

For instance, in many multi-contract transactions, it may be the case that not all the contracts contain arbitration clauses. Indeed, in many multi-contract transactions in the energy industry, each

[20] Lagos State Arbitration Law, CAP A10 Laws of Lagos State, 2009

individual contract is sometimes negotiated separately from the rest and includes different parties who may not be willing to have their disputes resolved by arbitration. In these circumstances, consolidation of disputes before a single arbitral tribunal is in recognition of the challenges associated with consolidating arbitrations, a number of arbitration institutions in recent years have sought to remedy the situation by introducing procedures for consolidation. However, many arbitration rules still do not contain any procedures for consolidation without the consent of the parties, and those that do have developed imperfect procedures that may not be effective in many real-world circumstances.

The UNCITRAL Arbitration Rules – likely the most widely used set of ad hoc rules in international arbitration – do not contain any provisions on the consolidation of multiple arbitrations with or without the consent of the parties. Accordingly, under the UNCITRAL Arbitration Rules, consolidation without the consent of the parties is a challenge. The AAA Commercial Arbitration Rules do not contain any provisions on the consolidation of multiple arbitrations. Thus, under the AAA Rules as well, consolidation without the consent of the parties is a challenge. By contrast, the LCIA Arbitration Rules include provisions relating to the consolidation of multiple arbitration proceedings. However, these rules only allow for consolidation where all the parties to the arbitrations consent, or where all the parties to the arbitration do not consent, but all the following criteria exist:

- the arbitrations to be consolidated are under the same arbitration agreement or compatible arbitration agreements.
- the arbitrations to be consolidated are between the same disputing parties; and
- no tribunals have been formed for any of the arbitrations to be consolidated[21].

5.0 Class Arbitration

A class or representative action is a legal proceeding that enables the claims of a number of persons with the same interest (the 'class members') to be brought by one or a number of claimants (the 'representative claimant(s)') against the same respondent. In a class action, only the representative claimant(s) is a party to the action, and although the class members do not take an active part in the proceedings, they are bound by the outcome.[22]

[21] Consolidation of International Commercial Arbitral Proceedings in the Energy Sector **George M Vlavianos** and **Vasilis F L Pappas** **Bennett Jones LLP**, **Global Arbitration Review - Guide to Energy Arbitrations - Third Edition** 08 January 2019

[22] Redfern A. and Hunter M. *Redfern and Hunter on International Arbitration* (6th ed. Oxford University Press 2015) p. 145

The case of *Green Tree Financial Corporation v Bazzle*[23] created a way for the infiltration of class-wide arbitrations. The case involved a lender who had entered standard-form contracts for home improvement loans with some borrowers. As is typical in contracts of this type, the contracts contained an arbitration clause, referring all disputes to 'binding arbitration by one arbitrator selected by us (the lender) with the consent of you'. The matter was commenced by two sets of consumers, who first brought two separate lawsuits before state courts challenging the lender's practices. Both lawsuits were referred to arbitration at the lender's demand, and in both cases the sole arbitrator (who was, in fact, the same individual in both cases) administered the cases as class-wide arbitrations and issued class awards in favour of the borrowers. The lender challenged the award submitting that in 'selecting an arbitrator' that was consented to by one of its customers as required by the express terms of arbitration agreement, it was not selecting an arbitrator to determine its dispute with other customers. On this basis, it argued that the terms of the arbitration agreement did not accommodate but rather forbade class-wide arbitration. A South Carolina Supreme Court upheld the class awards reasoning that there was nothing in either the contract or the Federal Arbitration Act to preclude class-wide arbitration. Unable to arrive at a majority opinion the US Supreme Court affirmed the judgment and found in the process that an arbitrator rather than the court must determine whether the contract forbids class arbitration.

On October 8, 2003, in response to the ruling of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle*[24], the American Arbitration Association issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In *Bazzle's* case, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims and that the Association was not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association. The Association's practice has been neither to

[23] 539 US 444 (2003)
[24] Supra

commence administration of a case nor to refer such a matter to an arbitrator until a court decides that it is appropriate to do so. The Association's determination not to administer class arbitrations where the underlying arbitration agreement explicitly precludes class procedures.[25]

The United States Supreme Court has however, in the recent case of *Oxford Health Plans LLC v. Sutter*[26] refused to upturn an arbitral award where consent for class arbitration was not expressly provided.

6.0 Conclusion and Recommendations

Arbitration is usually preferred to litigation for a variety of reasons one of which is party autonomy. Parties in a contract are free to choose arbitration, their arbitrators, and even the governing laws and rules. The complexity of international contracts when dispute arise between multiple parties creates a problem encroaching to the right of party autonomy. It is however recommended that the parties will be first and foremost taken into consideration when the need for joinder, consolidation and class action presents itself.

It is also recommended that the UNCITRAL Model Law and Rules, the *Nigerian Arbitration and Mediation Act 2023* be amended to provide comprehensive provisions for multi-party and multi-contract arbitration.

[25]AAA Policy on Class Arbitrations July 14, 2005,<https://www.adr.org/sites/default/files/document_repository/AAA-Policy-on-Class-Arbitrations.pdf (adr.org)> accessed on 26th March, 2024

[26] 133 S.Ct 2064 (2003)

Enforcement of Alternative Dispute Resolution Clauses and Arbitral Awards Under the Arbitration and Conciliation Act, 2023

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Abstract

Undoubtedly, Nigerian courts are over saturated with cases so numerous and ever-increasing that there is a dire need for alternate methods of resolving disputes. For there to exist a seamless dispensation and administration of justice in Nigeria, the necessary institutions ought to be available and accessible. The reality is that both litigants and lawyers are uncomfortable with the constant delay in the dispensation of justice. The adversarial method of dispute resolution, the cost of initiating actions and the uncertain outcomes of cases have propelled litigants to insert into or incorporate in their contractual agreements Alternative Dispute Resolution (ADR) clauses. The result or outcome for disputants who submit themselves to ADR mechanisms is known as the Arbitral Award and requires enforcement in favour of the party in whose favour the award is given. This paper seeks to examine how both ADR clauses and arbitral awards can be recognized and enforced, under the Act. This paper defines ADR and highlights the various types of ADR mechanisms, as well as some examples of ADR clauses that can be incorporated in contracts and agreements. Arbitral Awards are discussed, as well as the way they can be enforced, and the various grounds, as provided by the Act, on which the party against whom an arbitral award is to be invoked can make an application to a court of competent jurisdiction to set aside the arbitral award. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable to Nigeria, which is a signatory thereto.

Keywords: Alternative Dispute Resolution, Arbitration, Arbitral Awards, Clauses, Litigation, Contractual Agreements

1.0 Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (sometimes referred to as 'ADR'), as the word 'alternative' suggests, is a set of approaches or mechanisms for the speedier resolution of disputes at a more pocket-friendly cost, instead of going through the long, time-uncertain journey of courtroom litigation. ADR can also be defined as a group of flexible approaches to resolving disputes more quickly and at a lower cost, thereby obviating the need for the long-drawn adversarial

proceedings.[1] It is worthy to note that ADR takes off the focus from Courts, which means that parties in dispute must not always initiate their cases in Court; instead, they can opt for alternative dispute resolution, thereby making the Court the last resort. Before going further, it is instructive to define Alternative Dispute Resolution (ADR). Alternative dispute resolution (ADR) refers to the different ways people can resolve disputes without a trial.[2]

Alternative dispute resolution ("ADR") refers to any method of resolving without litigation.[3] Common ADR processes include mediation, arbitration, and neutral evaluation. These processes are generally confidential, less formal, and less stressful than traditional court proceedings.[4] ADR, it should be noted, is a great alternative to litigation because not only does it decongest the Courts, but it is also a money-saving alternative that speeds settlement. Disputants play a pivotal role in the dispute-resolution process, and this results in creative solutions, longer-lasting, time-saving outcomes, greater satisfaction, and lesser rancour, etc.

ADR is also known in some circles as Appropriate Dispute Resolution. Others refer to ADR as African Dispute Resolution.[5] Mechanisms in this category are Conciliation, Negotiation, Mediation, Mini-Trial, and Rent-a-Judge, etc. One major feature of the Nigerian legal system is that it is adversarial, in the sense that it is predicated on the rights of parties. Conversely, ADR is centred on parties' interests, i.e., ADR's focus is on the best interests of the disputing parties, which is the reason that ADR promotes a win-win situation as opposed to a winner-takes-all outcome. In most litigation scenarios, one party is successful, thereby leaving the unsuccessful in a state of dissatisfaction that can lead to the lodging of an appeal against the Court's decision, which further prolongs the litigation. The advantage of ADR is that it is much cheaper and swifter than litigation, particularly when ADR methods other than arbitration are employed. Although arbitration is less time-consuming than litigation, it is as expensive as litigation and therefore the most money-

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[1] Dele Peters; *Alternative Dispute Resolution (ADR) in Nigeria: Principles and Practice* (Dee-Sage Nigeria Limited, 2004).
[2] What is ADR? < https://rb.gy/dcud7h > Accessed on 29th April 2024.
[3] < https://www.law.cornell.edu/wex/alternative_dispute_resolution > Accessed 29th April 2024.
[4] Ibid at 2.
[5] Dele Peters: *What is Alternative Dispute Resolution?* (Dee-Sage Nigeria Limited, 2006).

consuming or expensive method of ADR, in comparison to negotiation, conciliation, mediation, neutral evaluation, etcetera. The expensive nature of arbitration is its major disadvantage.

2.0 Mechanisms of Alternative Dispute Resolution (ADR)

It is pertinent to consider the types or mechanisms of Alternative Dispute Resolution, to have a firmer grasp of ADR methods and the circumstances in which they are most suitable.

Mediation: In mediation, an impartial person called a "mediator" helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves. Mediation leaves control of the outcome with the parties. Mediation may be particularly useful when parties have a relationship they want to preserve. So, when family members, neighbours, or business partners have a dispute, mediation may be the ADR process to use. Mediation is also effective when emotions are getting in the way of resolution. An effective mediator can hear the parties out and help them communicate with each other in an effective and non-destructive manner.[6] Mediation may not be effective if one of the parties is unwilling to cooperate or compromise. Mediation also may not be effective if one of the parties has a significant advantage in power over the other. Therefore, it may not be a good choice if the parties have a history of abuse or victimization.[7]

Arbitration: In arbitration, a neutral person called an "arbitrator" hears arguments and evidence from each side and then decides the outcome of the dispute. Arbitration is less formal than a trial, and the rules of evidence are often relaxed. Arbitration may be either "binding" or "nonbinding." Binding arbitration means that the parties waive their right to a trial and agree to accept the arbitrator's decision as final. Generally, there is no right to appeal an arbitrator's decision. Nonbinding arbitration means that the parties are free to request a trial if they do not accept the arbitrator's decision.

Arbitration is best for cases where the parties want another person to decide the outcome of their dispute for them but would like to avoid the formality, time, and expense of a trial. It may also be appropriate for complex matters where the parties want a decision-maker who has training or experience in the subject matter of the dispute. If parties want to retain control over how their dispute is resolved, arbitration, particularly binding arbitration, is not appropriate. In binding arbitration, the parties generally cannot appeal the arbitrator's award, even if it is not supported by

[6] ADR & Benefits < https://www.courts.ca.gov/3074.htm > Accessed 1st May, 2024.
[7] Ibid.

the evidence or the law. Even in nonbinding arbitration, if a party requests a trial and does not receive a more favourable result at trial than in arbitration, there may be penalties.[8]

Neutral Evaluation: In neutral evaluation, each party gets a chance to present the case to a neutral person called an "evaluator." The evaluator then gives an opinion on the strengths and weaknesses of each party's evidence and arguments and about how the dispute could be resolved. The evaluator is often an expert in the subject matter of the dispute. Although the evaluator's opinion is not binding, the parties typically use it as a basis for trying to negotiate a resolution of the dispute. Neutral evaluation may be most appropriate in cases in which there are technical issues that require special expertise to resolve or the only significant issue in the case is the quantum of damages. Neutral evaluation may not be appropriate when there are significant personal or emotional barriers to resolving the dispute.[9]

Settlement Conferences: Settlement conferences may be either mandatory or voluntary. In both types of settlement conferences, the parties and their attorneys meet with a judge, or a neutral person called a "settlement officer" to discuss possible settlement of their dispute. The judge or settlement officer does not make a decision in the case but assists the parties in evaluating the strengths and weaknesses of the case and in negotiating a settlement. Settlement conferences are appropriate in any case where settlement is an option. Mandatory settlement conferences are often held close to the date a case is set for trial.[10]

Conciliation: Conciliation is an ADR process where an independent third party, the conciliator, helps people in a dispute to identify the disputed issues, develop options, consider alternatives, and try to reach an agreement. A conciliator may have professional expertise in the subject matter in dispute and will generally provide advice about the issues and options for resolution. However, a conciliator will not make a judgment or decision about the dispute. Conciliation may be voluntary, court ordered or required as part of a contract. It is often part of a court or government agency process.[11] Conciliation is most suitable if parties want to reach an agreement on some technical and legal issues and they want assistance with the process. It is also appropriate where the disputants want to make the decision with the other participants involved or they want advice on the facts in issue. Conciliation is suitable after parties have tried mediation and still cannot reach an amicable resolution of the issues in dispute.

[8] Ibid at 6.
[9] Ibid at 6.
[10] Ibid at 6.
[11] Conciliation < https://t.ly/WeueV > Accessed on 1st May 2024.

3.0. Goals of Alternative Dispute Resolution[12]

As far as administration of justice is concerned, ADR has myriad goals, chief of which is to reduce the ever-mounting workload on the dockets of courts. Put more succinctly, ADR seeks to relieve the judges of their large number of case files, thereby decongesting the courts and prevent undue cost and delay. Considering the various problems emanating from litigation in different jurisdictions, it is doubtful that ADR practice can ever decongest courts completely. There is no gainsaying, though, that there are methods of dispute resolution that are significantly less expensive and more expeditious than litigation.[13]

ADR seeks to enhance the involvement of the community in the process of dispute resolution. This is paramount in third-world or developing nations, such as Nigeria where a sizeable section of the populace is alienated from the courts. Developing suitable mechanisms of resolving disputes engenders communal involvement and clothes the dispute resolution procedure with a toga of legitimacy. Undoubtedly, this is crucial to people who would see conflicts resolved effectually and holistically. ADR facilitates access to justice, in the sense that parties who are able to resolve their conflict, through the aid of a mediator, may not consider themselves as having obtained justice. Instead, they are more likely to believe that they have succeeded in resolving their conflict amicably. Consequently, ADR promotes or increases the resolution of disputes in general, which obviates the need for some parties to file their cases in the regular courts.

ADR provides methods of dispute resolution that are more effective and less time-consuming than litigation. The most vital goal of ADR is the fourth goal stated above, because it provides a more real dispute resolution. As already stated, it is of the core of the study and practice of alternative dispute resolution to provide mechanisms and processes which will resolve disputes more effectively than an automatic choice to litigation.[14]

4.0. Alternative Dispute Resolution Clauses and the Role of the Courts

Dispute resolution clauses provide an agreed process for resolving a dispute and ideally avoid the need for litigation. They do not replace the role of the Courts or remove the rights of parties to seek justice through civil litigation.[15] Situations when the Courts may become involved include:

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[12] South African Law Commission Issue Paper 8. Available at < http:/server.law.wits.ac.za/salc/issue/ips.html > Accessed 1st May 2024.

[13] Ibid.

[14] Goals of Alternative Dispute Resolution (ADR) on (ADR) < https://www.lawyersnjurists.com/article/goals-alternative-dispute-resolution-adr-adr/ > Accessed 3rd May, 2024.

[15] Dispute resolution clauses < https://rb.gy/n4qofw > Accessed 3rd May 2024.

- Where a matter is urgent and requires immediate attention. A temporary injunction may be sought to compel or prevent a party from taking certain actions until the matter can be fully heard and determined.
- Dispute resolution processes specified in a contact are not followed.
- Dispute resolution processes specified in a contract are followed, but no resolution is reached.
- There is some doubt about the certainty or application of dispute resolution clauses. This may arise due to poor drafting or a lack of internal consistency.
- An agreement arising from a dispute resolution process specified in a contract needs to be enforced.
- Where a party wishes to set aside an arbitral award (though this is available only in limited circumstances).

If one party tries to take court action without first using the dispute resolution processes agreed in the contract, the other party can take legal action for breach of contract. Courts tend to deal with disagreements about dispute resolution clauses through a 'stay of proceeding' where the case does not proceed in the Court until the agreed dispute resolution process is completed.[16]

Common examples of ADR clauses are as follows:

1. The parties agree that any claim, dispute, or controversy arising out of, or relating to, this agreement, or the breach thereof, shall be resolved through final and binding Arbitration to be administrated by ("NAM") National Arbitration and Mediation and governed by NAM's Comprehensive Dispute Resolution Rules and Procedures in effect at the time such claim is filed. Any award of the Arbitrator is final and binding and may be entered as a judgment in any court having jurisdiction.[17]
2. The parties agree that any dispute or controversy, arising out of or in connection with this Agreement or any alleged breach thereof, shall be subject to mediation if all parties agree thereto. If the parties mutually agree to submit to Mediation, any such Mediation shall be administrated by National Arbitration and Mediation ("NAM") and governed by their Comprehensive Dispute Resolution Rules and Procedures and the Fee Schedule in effect at the time such claim is filed with NAM.[18]
3. The parties agree that any claim or dispute relating to this agreement, as well as any other matters, disputes, or claims between them, shall first be Mediated and/or arbitrated to

[16] *Ayisagi (Nig.) Ltd. v S.B. & F. (Nig.)* [2024] 6 NWLR (Pt 1933) 57 at Pp. 73 – 74, paras. F-B.
[17] ADR Clauses < https://www.namadr.com/resources/adr-clauses/ > Accessed 3rd May 2024.
[18] Ibid.

resolve any and all issues. Initially, the parties agree to consider mediating the dispute. The parties agree that any claim or dispute between the parties that arises out of this contract, or the relationship or obligations contemplated under this contract, including the validity of this Mediation and Arbitration clause, if not resolved through Mediation, shall be resolved through final and binding Arbitration to be administrated by National Arbitration and Mediation ("NAM").[19]

4. Should any dispute between Employee and Employer arise at any time out of any aspect of the employment relationship, including, but not limited to, the hiring, performance or termination of employment and/or cessation of employment with the Employer and/or against any employee, officer, alleged agent, director, affiliate, subsidiary or sister company relationship, or relating to an application or candidacy for employment, Employee and Employer will confer in, good faith, to resolve promptly such dispute. In the event that Employer and Employee are unable to resolve their dispute and should either desire to pursue a claim against the other party, both Employer and Employee agree to have the dispute resolved by final and binding Arbitration. The Employee and Employer agree that the Arbitration shall be held in the county and state where Employee currently works for Employer or most recently worked for Employer.[20]
5. The Parties shall attempt in good faith to negotiate a settlement to any dispute between arising out of or in connection with the Contract within twenty (20) Working Days of either party notifying the other of the dispute and such efforts shall involve the escalation of the dispute to the finance director of the Contractor and the commercial director of the Authority.
6. The Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation. If the matter has not been resolved within thirty (30) calendar days of a party's request for negotiation, either party may initiate proceedings or arbitration only as provided therein.
7. In event of any dispute or misunderstanding or disagreement arising from this agreement, the parties shall resort to mediation for the purpose of resolving such dispute or misunderstanding or disagreement.

Arising from the above samples or examples of ADR clauses, it is worthy to note that ADR clauses are best incorporated into the parties' agreements. The inclusion of ADR clauses in

[19] Ibid at 17.
[20] Ibid at 17.

commercial agreements has become commonplace and gained unprecedented acceptance. This means that, when conflicts arise between parties, litigation is not their first go-to option, because where ADR clauses are contained in the contracts or agreements, they are conditions precedent with which the parties must comply before filing actions in court. When a disputing party fails or neglects to comply with the ADR clause contained in the agreement and files an action in court, his opponent can raise a preliminary objection to the prematurity of the suit. In such a scenario the Honourable Court will most likely uphold the preliminary objection.

In the case of *Lieutenant Colonel David Emmanuel Garba (Rtd.) v. Nigerian Army & Ors*[21], the Court of Appeal, on the necessity for a party to comply with the condition precedent before filing an action, stated thus:

> "…It is however a settled principle of law, that where there exists a valid condition precedent to the institution of a matter, created by statute or contract, failure to fulfil the condition would mean that the Court is estopped from accommodating such litigant, and in fact is devoid of jurisdiction until the needful is done."[22]

5.0 Arbitral Awards Enforcement

At the end of the arbitral proceedings, the arbitral tribunal has the power to make awards. The award shall be in writing and signed by the arbitrator or arbitrators.[23] Section 47 (3) of the Arbitration and Conciliation Act, 2023 provides thus:

> "47 (3) The award shall state the –
>
> (a) reasons upon which it is based, unless the parties have agreed that the reason should not be given, or the award is an award on agreed terms under section 45 of this Act.
>
> (b) date it was made; and
>
> (c) seat of the arbitration as agreed or determined under section 32 (1) of this Act, which seat is deemed to be the place where the award was made."

Flowing from the above provision of the Act, it is deducible that arbitral awards are the end result of arbitral proceedings. After making the award, the tribunal, as can be gleaned from Section 47 (3) reproduced above, are mandated to state the reasons upon which the award is based, the date of the award and the seat of arbitration. The word 'shall' used in Section 47 (3) connotes something not optional but mandatory. The law is well-established that the word 'shall' used in a statutory

[21] [2019] LPELR-47390 (CA).
[22] Ibid.
[23] Section 47 (1), Arbitration and Conciliation Act, 2023.

provision is mandatory, not permissive.[24] Please see the case of *Speaker Kaduna State House of Assembly & Ors v. Rt. Hon Bityong Yakubu Nkom & Anor*[25] where the Honourable Court held thus:

> "The word "shall" in its ordinary meaning is a word of command which is normally given a compulsory meaning. The word is intended to denote an obligation. The word "shall" when used in a statutory provision, imports that a thing must be done. It is not merely permissive, it is mandatory."[26]

6.0. Recognition and Enforcement of Arbitral Awards

Sections 28 and 57 of the Arbitration and Conciliation Act, 2023 make provisions for the recognition and enforcement of awards. While Section 28 of the Act deals with the recognition and enforcement of interim measures, Section 57 relates to recognizing and enforcing of awards. For ease of reference, the provision of Section 28 (1) of the Act is reproduced hereunder:

> "28 (1) An interim measure issued by an arbitral tribunal is binding and, unless otherwise provided by the arbitral tribunal, shall be enforced upon an application to the Court, irrespective of the country in which it was issued, subject to section 29 of this Act.

Section 57 (1) of the Act provides as follows:

> "57 (1) An arbitral award shall, irrespective of the country or state in which it is made, be recognized as binding, and on application in writing to the Court, be enforced by the Court subject to the provisions of this section and section 58 of the Act."

In light of the above provisions of the Act, it is instructive to state that a party applying for the enforcement of an award shall supply the original award or a certified true copy; the original arbitration agreement or a certified true copy of it.[27] An award may, by leave of Court or a Judge, be enforced in the same manner as a judgment or order to the same effect.[28] By virtue of the Act[29] the Court includes the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court, unless the parties otherwise agree and except for the purpose of appointing an arbitrator (including an emergency arbitrator). Court means the Chief Judge of any of said courts.

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[24] *Nwankwo & Ors v Yar'Adua & Ors.* [2010] LPELR-2109 (SC); *Ugwu & Ors v Alaebo & Ors* [2016] LPELR-41510 (CA).
[25] [2019] LPELR-50961 (CA).
[26] Ibid at Pp. 13-14, paras. E-A.
[27] Section 57 (2) (a) (b), ACA 2023.
[28] Section 57 (3), ACA 2023.
[29] Section 91 (1), ACA 2023.

A party making an application for the enforcement of an award is to put the other party on notice. This is in tandem with the principle of fair hearing as enshrined in the Constitution.[30] It provides thus:

> "36 (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."[31]

Flowing from the foregoing, an Award Debtor is to be put on notice, for the purpose of fair hearing and to assist the Court in ensuring that the Debtor has not settled the award or of any appeal that may be pending. At this juncture it is worth repeating, for the purpose of emphasis, that a party relying on an award or applying for its enforcement shall supply:

(a) the original award or a certified copy of it.
(b) the original arbitration agreement or a certified copy of it; and
(c) where the award or arbitration agreement is not made in the English language, a certified translation of it into the English Language.[32]

Furthermore, the applicant shall make full disclosure of facts known to him that may affect the granting of the application to enforce the award. And, unless there are grounds for refusing the application, it is usually granted on terms. The award is usually enforced in the manner that a Court judgment or order is enforced, which presupposes that all judgment enforcement methods, including injunctions, are available for the enforcement of an arbitral award.

7.0. Refusal of Recognition and Enforcement of Award

A party to an arbitration agreement may request the Court to refuse recognition or enforcement of the award.[33] Section 58 (2) of the Act provides the only grounds on which the Court may refuse to recognize or enforce an arbitral award. The said provision is reproduced hereunder for the purpose of clarity:

> "58 (2) Irrespective of the country in which the award was made, the Court may only refuse recognition or enforcement of an award –
>
> (a) at the request of the party against whom it is invoked, if that party furnishes the Court with proof that –

[30] Section 36 (1), CFRN 1999 (As Amended).
[31] Ibid.
[32] Ibid at 27.
[33] Section 58 (1), ACA 2023.

(i) a party to the arbitration agreement was under some incapacity,

(ii) the arbitration agreement is not valid under the law to which the parties have indicated should be applied, or that the arbitration agreement is not valid under the law of the country where the award was made,

(iii) the party against whom the award was invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise not able to present his case,

(iv) the award deals with a dispute not contemplated by or does not fall within the terms of the submission to arbitration,

(v) the award contains decisions on matters which are beyond the scope of the submission to arbitration, so however that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced,

(vi) the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties,

(vii) where there is no agreement between the parties under sub paragraph (vi), that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the law of the country where the arbitration took place, or

(viii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made; or

(b) where the Court finds –

(i) the subject matter of the dispute is otherwise not capable of settlement by arbitration under the laws of Nigeria, or

(ii) that the award is against public policy of Nigeria."

Considering the foregoing provision, it is necessary to add that the discretion of the Court should be exercised judicially and judiciously.

7.1. Enforcement By Action on the Award

Domestic arbitral awards can be enforced by action when summary enforcement is not available or applicable. This means that parties in an arbitration agreement are obligated to perform a resulting award from the agreement. Failure to so perform is a breach of the contract or agreement between the parties, and the successful party has the right to institute an action regarding the breach and to obtain judgment in terms of the award. The Claimant must prove the existence of the agreement. He must also prove that the dispute arose from the arbitration agreement, that the arbitral tribunal was appointed properly and in accordance with the agreement. What is more, the

Claimant must show that the award was made pursuant to the arbitration agreement and that the Respondent or Defendant failed to perform the award.[34] The Court before which the action is filed must exercise its discretion to believe or not to believe any defence raised by the Defendant. If the defence is repugnant to the tenets of natural justice, the Court may refuse to recognize and enforce the award.

7.2. Enforcement of Foreign Arbitral Awards

The Act[35] makes provision for the enforcement of foreign arbitral awards. It provides that an arbitral award, irrespective of the country or State in which it is made, shall be recognized as binding on application in writing to the Court, subject to section 58 of the Act reproduced above. By virtue of said provision, i.e., section 57 (1) of the Act, the recognition of an award becomes automatic. The venue for making an application for the recognizing of a foreign award in Nigeria is the High Court of a State, the High Court of the Federal Capital Territory, Abuja or the Federal High Court. It should be borne in mind that the application should be made to the High Court that would have had the requisite jurisdiction to entertain the matter if the parties had not opted for arbitration in their agreement.

7.3. Enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Nigeria is a signatory to the New York Convention which came into force on 10th June 1958. Section 60 of the Act provides that where the recognition and enforcement of any arbitral award from a country other than Nigeria is sought, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is applicable, provided that the country is a party or signatory to the Convention and the differences or disputes emanate from a legal relationship, be it contractual or not, considered to be commercial under Nigerian law. Article 1.1 of the Convention states that the Convention shall apply to the recognition and enforcement of arbitral awards made in a country other than the country in which the recognition and enforcement is sought. It shall also apply to arbitral awards not considered as domestic awards in the same country where the recognition and enforcement is sought.

Furthermore, this is subject, first and foremost, to the condition that such contract State or country must have reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the Convention. Also, it shall apply to disputes arising from contractual legal

[34] Mustil & Boyyd; *The Law and Practice of Commercial Arbitration in England* (Butterworths 2001).
[35] Section 57 (1), ACA 2023.

relationships. In a nutshell, the Convention promotes the amicable settlement of international commercial disputes, which are a recurring decimal in international trade and transactions. The recognition and enforcement of the arbitral awards pursuant the Convention must be done in accordance with the rules of procedure in the country where they are sought. Recognition and enforcement of foreign arbitral awards in Nigeria, under the New York Convention are enforceable by application to the Court.[36]

The procedure for enforcing of arbitral awards under the New York Convention are basically the same as provided in section 57 and 58 of the Act. It is noteworthy that Article V of the New York Convention states the grounds for non-enforcement of arbitral awards to include incapacity, invalidity, lack of notice or fairness, the arbitral tribunal's procedure not being in accordance with the agreement of parties, the arbitral award not yet binding or having been set aside, the award not capable of settlement by arbitration under the country's law and where the arbitral award is contrary to public policy.

8.0. Conclusion and Recommendations

In this article the various mechanisms of ADR were considered, with particular emphasis on Arbitration, ADR clauses in contracts and agreements. The recognition and enforcement of arbitral clauses gives effect to the parties' intentions as expressed in their written agreements and contracts. The Courts have a duty to give effect to the agreements of parties where an ADR clause is contained in an agreement. However, there are circumstances in which a court may not give effect to ADR clauses. If the ADR clause is glaringly contrary to public policy, or the venue for the ADR is found to be intended to overreach the less advantaged party, the court will exercise its discretion judicially and judiciously, in accordance with the tenets of justice, equity and fairness. A judicial officer should weigh the circumstances carefully and resolve whether to give or not to give effect to the ADR clause(s).

The enforcement of an arbitral award is like that of a judgment of court. The successful party ought not to be deprived the enjoyment of the fruit of the judgment given in his favour. Accordingly, the successful party in an arbitration proceeding is entitled to enjoy the fruits of the arbitral award. It is needful to observe that Section 58 (2) of the Arbitration and Conciliation Act, 2023 can preclude a successful disputant from enjoying the award he receives from the arbitral tribunal, because the

[36] Section 57 & 58, ACA 2023.

aforesaid section provides that the adverse party may apply to set aside the arbitral award if the dispute is incapable of being settled by arbitration under Nigerian law.

It is recommended that where a party is dissatisfied with the outcome of arbitration, and intends to challenge the arbitral award therein, such a party should come by way of appeal to the Court of Appeal rather than applying to the High Court to set aside the award. The reasoning behind this is that since the main essence of ADR is to save cost as it is believed to be cheaper than litigation, parties having submitted themselves to arbitration, in a bid to reduce cost and also reduce the level of adversity, should not be made to have such a process reviewed by the High Court, rather an appeal to the Court of Appeal will lead to a swifter dispensation of justice. Implementing this recommendation is cost-saving for litigants, since it will shorten the litigation journey, thereby making it faster to obtain a final pronouncement on the matter(s).

What ensues is that arbitration panels will have coordinate jurisdiction with the High Court of a State and, since it appears to be a cheaper option than full-blown litigation, more people will resort to Arbitration. The private nature of such proceedings shields the parties' reputation, amongst other compelling reasons. Consequently, the High Courts, which have a wider jurisdiction, will be decongested, thus dispensation of justice will be speedier in the regular courts. This, it is believed, will encourage more disputants to resort to ADR where the need arises.

The Adequacy of Nigerian Law in Fostering Industrial Peace through Collective Bargaining

Oyesola Animashaun, PhD*

Abstract

The interests of the trade unions and management are diametrically opposed because the success of one party is a cost at the expense of the other party. For instance, if the union succeeds in its agitation and obtains a higher pay package, it reduces the profit posted by the management at the end of the accounting period. However, the management and employees (represented by the unions) must accommodate each other, as one cannot exist without the other. The article elucidates the functions of trade unions and the major causes of industrial disputes between the unions and the management. The article also addresses, using case law and statutes, the legal and industrial relations processes leading to collective bargaining and agreements, and the legal value of the collective agreement. The article found that collective agreements are mere gentlemen's agreements. The author therefore advocates, among other remedies, the need for the extant laws to be amended in such a way that collective agreement become a legally binding document.

Keywords*: Industrial peace, collective bargaining, trade unions, employee (worker), employer.*

1.0 Introduction

Industrial relations or employment relations is the multidisciplinary academic field and practice that studies the employment relationship that is, the complex inter- relations between the employers (represented by the management or the Employers' Association) and the employees (represented by the trade unions) and the state (represented by government functionaries). The importance of these three parties- the employers and the trade unions and the state need not be overemphasized. However, it is the workers' unions and its officials that are usually at the receiving end, suffering deprivations such as imprisonment, harassment, persecution, proscription of the unions, etc. Sometimes, the Nigerian state being the largest employer of labour doubles as an employer and an umpire in the industrial relations system. The central issue in industrial relations is the perennial problem of the employees willing to obtain high wages for putting in as fewer as possible hours while the employers strive to pay as little as possible for longer hours.[1] In order to

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foster industrial peace, then there must be a compromise between the parties who have varied and usually conflicting motives but cannot do without each other.[2]

2.0 Historical Overview of Trade Unionism in Nigeria

Trade union movements in Nigeria started as a result of agitations for the social well- being of workers who were mere servants under the British colonial masters. Although, it will be erroneous to say that no trade union had existed in Nigeria before the advent of colonization and the introduction of the formal employment relations. Labour relations had existed in informal forms in Nigeria before colonization- these include family union, communal union, and artisans' communalism like blacksmiths, market women and coppersmiths informal trade associations. These Associations exercised oversight functions on errant members; members were sometimes sanctioned for unethical trade behaviour such as poor services or non-delivery of items already paid for.[3] However, modern day unionism started in Nigeria in 1912 with the formation of the Nigerian Civil Service Union. Trade unions exist to regulate the terms and conditions of employment of workers; once this function is absent, then, the association will not be considered as a trade union. This function was succinctly affirmed by Oguntade JCA (as he then was) in *Udoh & 2 ors v. Orthopedic Hospitals Management Board & another.*[4]

Primarily, the reason for the existence of a trade union is to regulate the terms and conditions of employment of workers. This is another way of saying that trade unions are to ensure that the terms and conditions given to workers by employers are suitable.

Thus, the function of a trade union is primarily for the regulation of the terms and condition of employment of workers; and sometime for political actualisation of the workers' self-centred objectives, as trade unions have been found in some cases, to have become more political in their agitations in Nigeria. In the latter case, the unions were agitating against the decline in the standard of living of its members and the public. For instance, trade unions usually opposed the federal

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1 Oyesola Animashaun and Olawale Shabi, Fundamentals of Industrial Relations (Hybrid 2000) 4.
2 Ibid.
3 J. I. Roper, Labour Problems in West Africa (Penguin 1958) 2.
4 (1993) 7 NWLR (Pt. 254) 488.

government from increasing the price of petroleum products or increasing electricity tariff during the outbreak of COVID-19 when most workers have lost their livelihood.

2.1 Statutory definition of a trade union

Section 1(1) of the Trade Union Act,[5] defines 'a Trade Union' as "any combination of workers or employers, whether temporary or permanent, the purpose of which is to regulate the terms and conditions of employment of workers whether the combination in question would or would not, apart from this fact, be an unlawful combination by reason of any of its purpose, do or do not include the provision of benefits for its members". Section 1(2) of the Trade Union Act goes further to state that the fact that a combination of workers or employers has purposes or powers other than the purpose of regulating the terms and conditions of employment of workers shall not prevent it from being registered under the Act. Similarly, section 29(1) of the Trade Union Act provides that a trade union can be described as an organization that either "consists wholly or mainly of workers or employers of one or more descriptions and whose principal purpose is the regulation of relations between workers and employers or employers association or consists of constituent or affiliated organizations or representatives of such constituent or affiliated organizations and whose established purpose is the regulation of relation between workers and employers or workers and employers' associations.

It is clear from the above provisions, that, for an association to qualify as a trade union in Nigeria, the combination must be of workers or employers and its *raison d'etre* must be for regulating the terms and conditions of employment of workers. Both workers and employers can form separate trade unions, that is, employees' trade union or workers' trade unions or employers' association. However, both the employees and the employers cannot combine to form a trade union. The Trade Union Act defines a worker as 'any employee, that is to say, any member of the public service of the federation or of a state or any individual (other than a member of any such public service) who has entered into or works under a contract with an employer whether the contract is for manual labour, clerical work or otherwise, expressed or implied, oral or in writing and whether it is contract personally to execute any work or labour or a contract of apprenticeship'.[6] However our discussion in this treatise shall be confined to trade unions including workers' or employees' association, but to the exclusion of employers' association.

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5 T14 LFN, 2004.

6 See section 51 of the Trade Union Act, 2004

3.1 Legal status of a trade union upon registration

The law requires that a trade union must be registered before it can be allowed to perform any act in furtherance of its purposes. The principal purpose is to regulate the terms and conditions of employment of workers. Section 3(1) of the Trade Union Act prescribed that an application for the registration of a trade union must be made to the Registrar of Trade Union in the prescribed form and signed by at least fifty members of the union in the case of union of employees and by at least only two members in the case of a union of employers. Section 3(2) of the Act provides that no trade union will be registered except with the approval of the Minister of Labour and Productivity; and that no trade union shall be registered to represent workers or employers in a place where there already exists a trade union.[7] In *Osawe v Registrar of Trade Union,*[8] it was held by the Supreme Court that where the Registrar is satisfied that a registered trade union will adequately cater for the interest of applicants who desire to register a new trade union, the Registrar may not proceed with the application for registration. Thus, by virtue of section 3(2) of the Act, the Registrar of Trade Unions, on receiving an application to register any trade union, must ensure that there is no registered trade union in existence which caters for the same interest as the one applying for registration.

Upon Registration, a trade union is conferred with the status of an incorporated body; it acquires all the attributes of an incorporated body. It can sue and be sued in its registered name, it can hold property in its name, and it continues in perpetuity no matter the changes in its membership.[9] In *Bonsor v. Musicians Union*[10] Lord Keith stated that a registered trade union is treated as an incorporated association and that members are liable to pay subscriptions and levies under the union rules, but they are not liable for the debts of their union, nor could their personal property be available for an unsatisfied judgment debtor. However, 'the ILO's insistence on freedom of association is not to be taken as an endorsement for mushroom associations, or weak and powerless unions, that will not be able to protect the interests of their members through constructive engagement with employers in collective bargaining and, when necessary, industrial action'. [11] The ILO recognizes that its labour standards in the form of conventions and recommendations are

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7 See the recent registration of rival unions in Nigerian universities by the federal government.
-such as Congress of National Universities Academics (CONUA) National Association of Medical and Dental Academics (NAMDA) to lessen the impact of Academic Staff Union of Universities (ASUU)

8 (1985) 1 NWLR 755

9 E.E. Uvieghara, 'Nigerian Labour Law (Malthouse Press Ltd 2001).

10 (1956) AC 104

11 C.K Agomo, 'Nigerian Employment and Labour Relation Law and Practice' (Publication Press 2011).

products of consensus and are expressly made subject to local conditions and circumstances. Such conditions and circumstances may limit right to freedom of association.

The Trade Union Act is the principal Act that regulates the activities of trade unions in Nigeria. The Act has five parts: Part I (i.e. section 1 – 29) deals with registration of combinations as trade union, cancellation of registration, dissolution of trade union membership, exclusion of persons convicted of certain offences and disqualification from holding office in a trade union. Section 15 & 16 specifically provides that trade union dues are not to be applied for political purposes and certain proceedings. Section 17 of the Principal Act has been amended by section 4 of the 2005 Amendment Act.

Section 24 of Trade Union Act (TUA) provides that for the purpose of collective bargaining, all registered unions shall constitute an electoral college to elect members who will represent them in negotiation with the employer. Section 23 of TUA grants immunity for the unions and its officials when torts such as the tort of inducing breach of contract between employees and employer, tort of intimidation and tort of conspiracy is committed in contemplation or furtherance of a trade dispute.

3.2 Cancellation of Registration

Section 7 of the Trade Union Act provides for six grounds under which the Registrar of Trade Union must cancel the registration of trade union. Any of these six grounds must be proved to the satisfaction of the Registrar:

(a) that the registration of the trade union was obtained by fraud or as a result of a mistake; or
(b) that any of the purpose of the union is unlawful; or
(c) that, after receipt of a warning in writing from the Registrar, the union has deliberately contravened or continued to contravene any provision of the Act or the regulations; or
(d) that the principal purpose for which the union is in practice being carried on is a purpose other than that of regulating the terms and conditions of employment of workers; or
(e) that the union though still in existence, has ceased to function; or
(f) that the union has ceased to exist.

The Registrar must send a notice in the prescribed form to the trade union at its registered office whenever the Registrar proposes to cancel the registration of any trade union.

3.3 Membership of Trade Union

Freedom of Association is a constitutional right guaranteed by the Constitution of the Federal Republic of Nigeria, (CFRN) 1999. Other international instruments such as the African Charter on Human and Peoples' Rights; Universal Declaration of Human Rights, 1948; ILO Conventions guarantee peoples' right to associate with others, join or form political parties, trade union etc. however, fundamental right to freedom of association is not absolute; this is demonstrated in the Trade Union Act which excludes certain categories of workers from forming or belonging to any trade union. Section 11 of the Act excluded certain workers such as members of the Nigeria Army, Navy or Air Force, the Nigerian Police Force, the Customs and Excise Department, the Immigration Department, the Prison Services and the Customs Preventive Service, the Nigerian Security Printing and Minting Company Ltd, the Central Bank of Nigeria and every Federal or State Government establishment, the employees of which are authorized to bear arms. The Minister of Labour and Productivity is empowered to specify by order, any other such establishment from time to time.

Section 3(3) & (4) of the Act provides that any employee who is a projection of management is prohibited from union membership where, and only where, membership will lead to a conflict of his loyalties to either the union or his employer. To determining projection of management, a person whose status, authority, powers, duties and accountability, as reflected in the conditions of service, are such as normally inherent in a person exercising executive authority may be recognized as a projection of management. The rationale for excluding members of the Armed Forces and arms bearers from joining or forming trade unions is based on the fact that with guns in their hands, they could cause greater harm and danger to their employers. [12] Freedom of Association for trade union is guaranteed by the provision of section 12(4) of Trade Union Act. It provides that: "*Notwithstanding anything to the contrary in this Act; membership of a trade union by employees shall be voluntary and no employee shall be forced to join any trade union or be victimized for refusing to join or remain a membe*r". [13]

3.4 Voluntarism

The concept of voluntarism cannot be examined without recourse to the history of trade unionism in Nigeria. Trade union started in Nigeria in 1912 with the formation of the Nigerian Civil Service Union. Between 1912 and 1937, only three unions were functioning in the country; they were

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[12] J.E.O. Abugu, Notes on Trade Union Law in Nigeria (Faculty of Law, University of Lagos 2010).

[13] Section 12 of the Trade Union Act is in agreement with section 40 of the CFRN, 1999 ILO Convention 87 and 98 of 1948 and 1949 respectively. See also section 2 of the Trade Union (Amendment) Act 2005.

Nigerian Civil Service Union formerly known as Southern Nigeria Civil Service Union; the Railway Workers' Union and the Nigerian Union of Teachers. The growth of trade unionism was primarily as due to the enactment of the Trade Union Ordinance, 1938 which later metamorphosed into the Trade Union Act. The Ordinance guaranteed freedom of association and trade union's right.[14]

The right to freedom of association is fundamental and constitutional; it is also guaranteed by international treaties and ILO conventions.[15] The concept of voluntarism is the pivot upon which collective bargaining operates as a tool of industrial negotiation. Voluntarism has its ideological foundation in a libertarian socio-political system based on the absence of coercion by any arbitrary state or collective body. It is a philosophy which holds that all forms of human associations should be voluntary. The function the state performs is to act as mediator between labour and employers. Voluntarism is based on good faith which allows trade unions and employers to negotiate and regulate their conditions of work without interference from the state or its agents. The central principle of voluntarism is free collective bargaining between trade unions and employer or body of employers, which is regulated by the Constitution of the Federal Republic of Nigeria, 1999; the Trade Union Act, 1976, Trade Union Amendment Act, 2005, the National Industrial Court Act, 2006; The Trade Dispute Act which provides for steps to be taken in settlement of industrial disputes and other procedural rules like the ADR Instrument, 2015. The principle of voluntarism may also be guided by the ILO Conventions 87 and 98 of 1948 and 1949 respectively.

Chapter IV of the CFRN, 1999 does not provide for the right to collective bargaining expressly, however, the right to freedom of association[16] covers collective bargaining, which is free from any form of interference. The concept of voluntary collective bargaining has long been accepted by all parties in industrial relations scheme.[17] Voluntary collective bargaining has been recognized in government policy since 1948, through the Whitely Councils and the Joint Industrial Councils. This recognition accounted for the reason for government's issuance of an official policy on collective bargaining. The government thus observed and declared as follows:

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14 See A.G. Hoplains, 'The Lagos Strike of 1897- An Exploration in Nigeria Labour History; Past and Present' 1966 133-135. In 1897 artisan workman in public works departments embarked on a three-day strike from 9th of August to 12th August, 1987 which was in protest against arbitrary working hours invoked by the colonial matters.

15 See Article 10 of the African Charter on Human and Peoples' Rights, 1981; Conventions 87 and 98 of the International Labour Organization, 1948 and 1949 respectively.

16 Section 40 of the CFRN 1999.

17 See E.E. Uvieghara, *Nigerian Labour Law* (Malthouse Press Ltd, 2001)

'We have followed in Nigeria the voluntary principles which are so important an element in industrial relations in the United Kingdom...compulsory methods might occasionally produce a better economic or political result, but labour-management must, I think, find greater possibilities of mutual harmony where results have been voluntarily arrived at by free discussion between the two parties. We in Nigeria, at any rate, are pinning our faith on voluntary methods'.[18]

The importance of voluntary collective bargaining cannot be over-emphasized. Thus, Davies submitted that 'By bargaining collectively with management, organized labour seeks to give effect to its legitimate expectations that wages, and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the industrial and that jobs should be reasonably secure.'[19] Similarly, it has been noted that 'properly conducted collective bargaining is the most effective means of giving workers the right to representation in decisions affecting their working lives, a right which is or should be the prerogative of every worker in a democratic society.[20] Voluntary collective bargaining is gaining more popularity in industrial relations as it aids and develop workplace democracy; redistribution of power and resources from employers to employees. It lessens the employers bargaining power over individual employees. Voluntary collective bargaining also aids the promotion of efficiency by limiting industrial conflicts in the workplace. Industrial conflict is inimical to efficiency of labour and productivity. Voluntary collective bargaining aids settlement of industrial disputes without the stress and the need to embark on industrial actions.

3.5 Union Rules Book

Section 4(1) of TUA provides for the union rules. Every trade union shall have registered rules, which shall contain provisions with respect to the various matters mentioned in the First Schedule of the Act and where the Registrar registers a union, he must, at the same time register its rules and members upon request, shall be sent a copy of the rules on payment of a sum not exceeding fifty kobo. It is submitted that the provision ought not to have mentioned a particular amount, or even so, such amount may be reviewed from time to time by the Minister of Labour and Productivity. The rule book or constitution of a trade union is regarded by the courts as a contract document containing the terms of agreement between the members and union and defining the rights and obligations of parties. The status of the rule book was settled in the case of *Bonsor v. Musicians*

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18 For details, see International Labour Office Ministerial Conference Record of Proceedings, (38th session, Geneva, 1955) 33.

19 P. Davies. Friedland, Kahn Frund's Labour and the Law (Sweet and Maxwell 1983) 69.

20 See Donovan Commission 'Royal Commission on Trade Unions and Employers' Association, 3623 of 1968.

Union.[21] In *Nigeria Civil Service Union & Anor v. O.G. Essen & Anor,*[22] the Court of Appeal held that the constitution of a union is a contract document between the members of the union, and that the members have subsumed several rights into the letters of the constitution.[23]

4.0 Collective bargaining and collective agreements

Industrial conflicts are inevitable, thus, there must in place mechanisms to address or avoid frequent conflicts. Some of the processes through which industrial conflicts are resolved include collective bargaining and the end product of collective bargaining is collective agreement.

4.1 Collective Bargaining

Collective bargaining involves negotiations and deliberations on the improvement of the working conditions of employees generally. International Labour Organization (ILO) Collective Bargaining Convention No. 154 adopted in 1981 defines collective bargaining in its Article 2:[24]

The term collective bargaining extends to all negotiations between employers. A group of employers or one hand, and one or more workers' organizations on the other, for (a) determining the working conditions or terms of employment and or (b) regulating relations between employer or their organizations and a workers' organization or workers' organizations

Improved conditions of employment, favourable terms and conditions of employment are the major targets of collective bargaining.[25] Thus, it is paramount that workers must have an institution which could act as check or place some restrictions on the power of the employers, notwithstanding what may be the contents of the individual's contract of employment. The unions can influence the welfare of their members through the mechanisms and principles enshrined in collective bargaining.[26]

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21 (1956) AC 104.

22 (1985) 3 NWLR (pt. 12) 306.

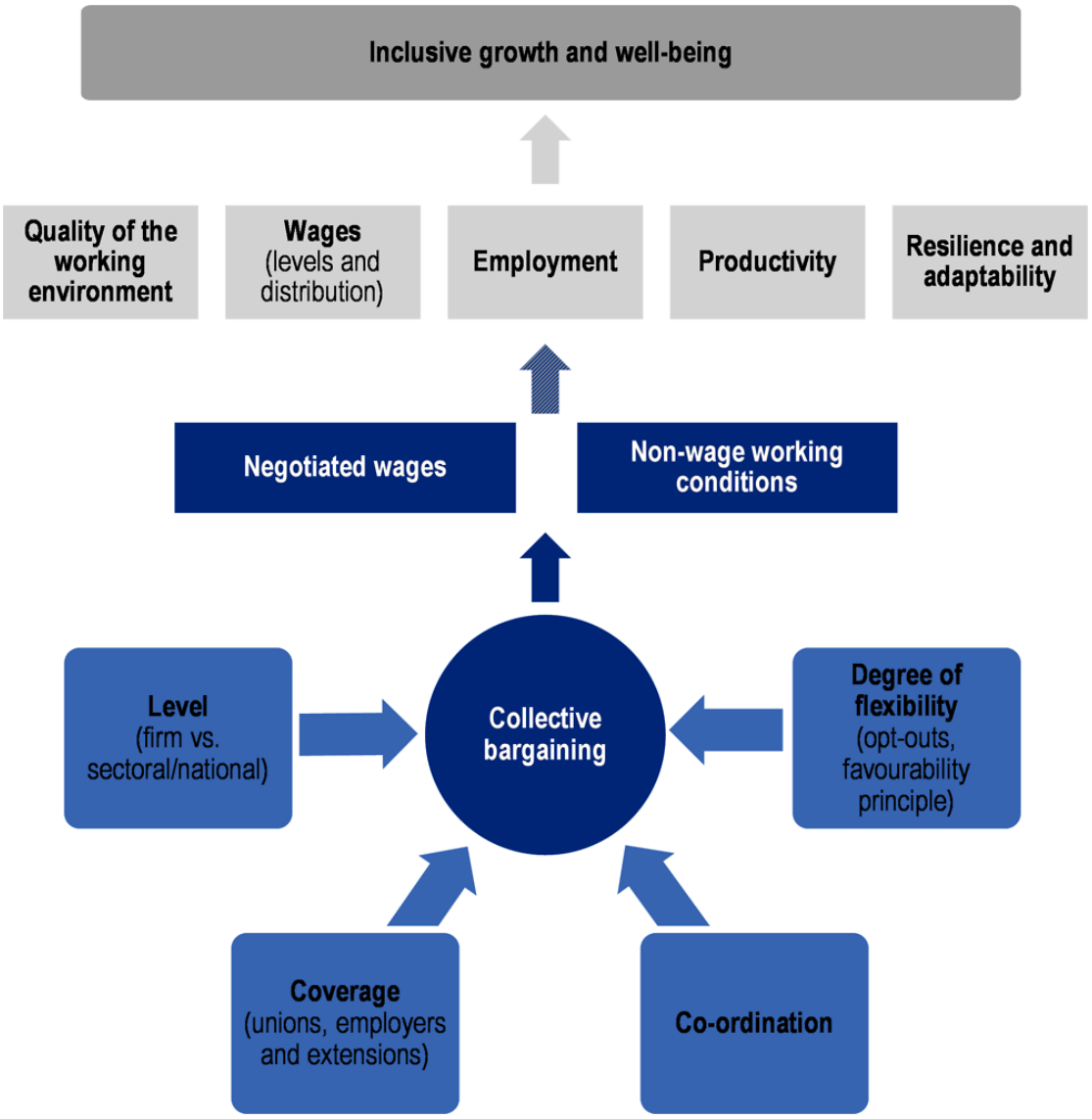
23 See *Alex Elufioye & Ors v. Ibrahim Haliru* & Ors.

24 See ILO Convention and Recommendations, 1977-1995 (Geneva International Labour Office, 1996) 93; See also Beatrice Webb, History of Trade Unionism (Longman 1926).

25 See the dictum of Lord Donovan in *Colli-more v Attorney Geneva of Trinidad and Tobago* (1970) AC. 538, 547; See also *Udoh v Orthopedic Hospitals Management Board* (1990) 4 NWLR (Pt. 142) 53.

26 John Wood "Collective Will and the Law" (1988) 17 *Industrial Journal*, 6; see also M Oslon, The Logic of Collective Action' (Harvard Press 1905) 20.

Figure 1: Collective Bargaining, Labour Market Performance and Inclusive Growth



Source: Oliver Denk, Andrea Garnero, Alexander Hijzen and Sébastien Martin 'The role of collective bargaining systems for labour market performance in OECD' (2019), *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work* (OECD Publishing) https://doi.org/10.1787/1fd2da34-en accessed 13 April 2024.

Emiola stated that, 'bargaining is the process of negotiating an agreement on the basis of 'give and take'.[27] Collective bargaining has been described as a means whereby terms and conditions of employment are settled by negotiation producing an agreement between employers and workers' organization.[28] Collective bargaining is collective dialogue, or collective negotiation between the employers' representatives and the workers' representatives with a view to reaching a collective agreement on the issues under negotiation.

Collective bargaining as indicated in Figure 1 above depicts the parties to include the unions and the employers and the coordinator which may be a government agency. Collective bargaining may be done at the firm, sectoral, regional, or national level. It stated that collective bargaining involves the negotiation of wages and non-wage working conditions, and if properly managed could lead to high productivity, sustainable and inclusive growth for the firm and improved well-being of the individual employee and the union. Negotiation itself is a dispute resolution mechanism under Alternative Dispute Resolution. Negotiation entails the parties discussing and agreeing to terms or reaching mutually acceptable resolution. This method involves discussions, concessions, compromises, communications, persuasion, and bargaining. Thus, bargaining could also mean negotiation.

The Trade Dispute Act provides for a mechanism through which leaders of a trade union or representatives of workers can sit down with the management round a negotiation table and iron out their differences in an atmosphere of mutual trust, freedom of contract and understanding. Thus, collective bargaining entails voluntariness of parties; this principle recognizes the rights of the parties to negotiate the terms and conditions of their employment. Under section 24(1) of TUA elected members who are elected through Electoral College will represent workers in negotiations with the employer. Thus, statutory, collective bargaining has been recognized as a veritable tool for the management of industrial relations and industrial disputes. Section 2 and 39(1) and (3) and 3 and 40(1) and (3), of the Trade Disputes Act, [29] the provisions require parties to any collective agreement to deposit three copies of such agreement with the Minister of Labour and Employment and/or Commissioner in charge of welfare of Labour at the State level, for an order before such collective agreement could become enforceable at law as between the employer and employees concerned. The decision in the said case certainly worked hardship both on the employer and employees as well as their representative unions concerned.

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27 Akintunde Emiola, 'Nigerian Labour Law (Emiola Publishers Ltd. 2008).

28 See section 91(1) Labour Act.

29 Cap T8 LFN 2004.

4.2 Types of Collective Bargaining

It is important to distinguish it between collective bargaining and collective agreement. There are also different types of collective agreements, which refer to the outcome of collective bargaining. For instance, there are single union deals, multiple unions deal, procedural agreements, and substantive agreements.[30] All of which refer to the agreement that has taken place as a result of the collective bargaining process.

4.2.1 Distributive Bargaining: is defined as a negotiation process by which one party benefits at the others expense. An instance of this is the redistribution of income in the form of higher wages, higher bonuses, or higher financial benefits. In this type of bargaining, the trade union needs to have enough market power to win the negotiation. The employer will want to pay as little in wages. Yet in order to convince them to pay more, the trade unions may need enough members to provide a significant incentive. In other words, a trade union that has 100 percent of the employers' workforce or those in the strategic sector of the economy has significant power e.g. Nigeria Union of Petroleum and Natural Gas Workers (NUPENG). Should they call a strike, it would cause severe disruption to the employer and the national economy. Consequently, any distributive bargaining will be skewed significantly in favour of this union.

4.2.2 Integrative Bargaining: whereby both sides aim to benefit in what is seen as 'win-win' bargaining. Both parties may bring together a list of demands by which an agreement is reached that benefits both parties. For example, unions may advocate for greater levels of staff training. Now this may cost the business more, but the latter will benefit from greater levels of productivity in the long run. If workers are better trained, they are equally going to be more productive and suffer less from industrial accidents. So, the business and the unions/workers may gain as a result.

4.2.3 Productivity Bargaining: involves both parties negotiating around productivity and pay. Unions may suggest that higher salaries would boost productivity, but management may resist this and suggest target-orientated bonuses or new ways of improving the process. Unions may suggest new ways of organizing the work force than may increase productivity and therefore create value to the firm. In turn, employers will increase employees' wages as a result. Simply put, productivity

[30] Paul Boyce 'Types of Collective Bargaining' (2021) https://boycewire.com/ collective- bargaining-definition-types-and-examples/ accessed 8 February 2024.

bargaining is where both parties agree to changes that would boost productivity in return for higher wages or other benefits.

4.3.4. Composite Bargaining: refers to a negotiation that focuses on a few elements that are not related to pay. They are generally related to employee welfare and job security. For instance, it covers factors such as working conditions, policies, recruitment, and disciplinary processes. The aim is to ensure a mutually beneficial long-term relationship between the employer and employees. It does this by highlighting issues that employees may have, which may impact their long-term future at the company. Organizations want to retain talent, particularly if it has invested time and money in training them. Factors such as workload and working conditions can impact on this long-term relationship, so it is in the best interest of both parties to ensure that the employees are happy.

4.3.5. Concessionary Bargaining: Concessionary bargaining is based on unions giving back previous benefits to the employer. For instance, trade unions may agree to lower wages in return for job security. This may come during an economic decline whereby job security is more important to the unions than higher wages. Overall, this may benefit the company as they won't have to pay for so many redundancies and can keep loyal and experienced workers in the organization. The main aim of concessionary bargaining is to strengthen the business to ensure its survival alongside its employees. Thus, unions give back previous benefits to secure the businesses' long-term future and therefore its members.

5. 0 Processes of Collective Bargaining

5.1. Preparing for Negotiations

This covers several areas that union members are most concerned with. For instance, the lack of canteen in the workplace may be an issue, or alternatively, workers want to get paid extra to work Saturdays and Sundays. Whatever the key issues, the first stage would be to compile these ready for the negotiation.

5.2. Proposing Key Demands

The list of key items or key demands are highlighted by the union members, compiled, deliberated, and agreed upon by union leadership. It may include items that are 'red lines' by which the negotiation must start with. Often this would be wages or key benefits to the employees. Negotiations break down if these are not met. There may also be some conditions by which the unions would ask their members to strike if certain criteria are met. For instance, this may be a set minimum wage or a higher wage for overtime.

5.3. Negotiation

This stage usually involves meetings whereby the details of demands of the parties are discussed. Both or either party may request certain parts of the deal be included or left out. As part of the process, both parties may take time to gather information on whether a specific course of action would be best. For instance, both parties would have done their homework on an increase in employees' salary by 10 percent- is it possible? Where is the fund coming from? In turn, the negotiation will continue for days, even weeks or a party may seek for an adjournment till a later day until an agreement is reached or negotiations completely break down.

5.4. Agreement Reached

An agreement is usually reached in principle, and it is at this stage by which the more intricate details are hammered out. In short, this stage is where the agreement is put into place and the final details are arranged.

5. 5. Administration of Agreement

It is at this stage by which unions will look to hold the employer to account and ensure the agreement is being implemented. For instance, are workers getting paid the agreed minimum salary? Or, has the firm built the newly requested canteen on time and to an agreed upon quality. Furthermore, some agreements may have a set expiry date by which another set of negotiations will take place. Thus, the collective bargaining system can be seen as a continuous process.

6.0. Processes of Making and Status of Collective Agreements

Section 54 of the National Industrial Court of Nigeria Act (NICN Act) 2006 defines "collective agreement" as "any agreement in writing regarding working conditions and terms of employment concluded between an organization of employers or an organization representing employers, of the one part; and an organization of employees or an organization representing employees, of the other part'. The end product of collective bargaining is collective agreements.[31] When parties to collective bargaining meet and negotiate, a compromise is reached; this compromise which entails "give and take" for amicable resolution is what is termed collective agreement. The law provides that such an agreement must have copies and three of these copies must be deposited with the Minister of Labour and Productivity within 14 days of reaching the agreement. The Minister of

[31] See Convention 98 of International Labour Organization on right to organize and collective bargaining.

Labour and Productivity has the power to make an order directing that the terms of the agreements or any part of it be binding on the employers and employees to whom the agreement relate.[32]

Under the common law, a collective agreement is not regarded as contractually binding on the parties thereto. In *Ford Motors Co. Ltd v Amalgamation Union of Engineering and Founding Wor*kers,[33] it was held that collective agreement does not intend to create legal relations except in certain public boards or corporations. The legal implication of this is that collective agreements are binding in honour only and their enforcement must depend on industrial and political pressure. The law on collective agreement has changed slightly from what it used to be at common law. At common law, collective agreements are unenforceable. They are at best considered as gentleman's agreements. In *Union Bank of Nigeria v. Edet,*[34]; *ACB v Nsibike*[35] and *Nigeria Arab Bank Ltd v Shuiabu*,[36] it was held that collective agreement made between one or more trade unions on the one side and one or more employers' association on the other side, are not generally intended to create legal relation except in the case of certain public boards or corporation, they are at best, a gentleman's agreement, an extra-legal document totally devoid of sanction. Although, Nigerian courts have held in other cases that collective agreements regulate industrial and labour relations.[37] In *Daodu v UBA*,[38] it was held that if a collective agreement is incorporated or embodied in the terms and conditions of a contract of service whether expressly or by implication, they would be bound by it.[39] In *Afribank (Nig) Plc v. Kunle Osisanya,*[40] the court held that, collective agreement will be enforceable where they have been adopted as forming part of the terms of employment. Thus, once collective agreements are incorporated into individual's contract of employment, they become binding and enforceable. Most of the strike actions in Nigeria were products of poor implementation of the provisions of collective agreement or outright neglect of the workers' plight. Under collective bargaining, leaders of a union articulate their grievances and negotiate with employers for an amicable settlement. The employers, in most cases the governments in Nigeria violate the collective agreement with impunity. According to a report obtained from the Trade Union Services and Industrial Relations (TUSIR) Department of the Federal Ministry of Labour,

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32 See section 2 Trade Union Act.
33 (1969) 1 All E.R. 494.
34 (1993) 4 NWLR 288; See also *ACB v. Nsibike* (1995) 8 NWLR (PT 416) 725.
35 (1995) 8 NWLR (Pt. 416) 725.
36 (1999) 4NWLR (PART 186) 450.
37 See *Cooperative & Commercial Bank (Nig.) Ltd & Anor v. Keneth C Okonkwo* (2005) 3 NWLR (Pt. 7) 109.
38 (2004) 29 WRN 53.
39 See also *Abalogu v. Shell* (1999) 8 NWLR (pt. 613) 12.
40 (2000) 1 NWLR (pt. 642) 598.

about 103 labour complaints and trade disputes was recorded by August 2021.[41] And of these, 14 resulted in strike actions. The total number of disputes that would have led to strikes which was resolved was only seven. However, about 74 per cent of these disputes are public sector-based, while 26 per cent is from the private sector.[42] These statistics contextualize the problem and offer evidence of the prevalence of industrial conflicts in Nigeria. A cursory look at both the traditional media and social media recently will show an avalanche of news briefs pertaining to strike actions. It is pertinent to state that some labour unions are synonymous with strike actions. Probably the Academic Staff Union of Universities (ASUU) with perennial strike actions will collect the first prize. Other labour unions in Nigeria are quickly catching up with ASUU in this position includes the National Association of Resident Doctors (NARD). NARD, with 16,000 doctors in its membership, represents about 40 per cent of doctors in Nigeria. NARD went on strike ostensibly to push the government to honour its agreement on pay arrears, hazard allowance, as well as insurance benefits to families of doctors who have died of COVID-19. Interestingly, the NARD went on strike four times since the coronavirus pandemic reached Nigerian shores in 2020.

7. 0 Conclusion

What then is the purpose of the process of collective bargaining if the product –collective agreement is a gentleman's agreement? Regrettably in Nigeria, most agreements entered on behalf of the government are not usually honoured, a situation which creates a doubt on the frequent calls for negotiations in the face of any industrial dispute. The government is supposed to serve as a regulatory and mediatory body even for other sectors of the economy in their face off with their workers. The Federal Government very well imputes the non-strike clause in the agreement but will not be willing to carry out the agreed terms to avoid the strike situation. This insensitivity of the government has caused an incessant growth of industrial disputes in Nigeria. The violation of the sanctity of collective agreement made the unions to violate the non-strike clause in the Trade Dispute Act which implores the unions to follow the route of mediation, conciliation, and arbitration and litigation before going for industrial action. For industrial actions to be reduced to a minimum, all the stakeholders and parties to collective bargaining should comply with the bargaining resolutions. Public officials should be abreast of government revenue projections and

[41] Dakuku Peterside 'Striking at the soul of the nation' *The Premium Times* 30 August 2021 https://www.premiumtimesng.com/opinion/481985-striking-at-the-soul-of-the-nation-by- dakuku-peterside.html accessed 7 February 2022.

[42] Ibid.

should never enter into agreements that they know the government may not keep in the long run. Similarly, unions should be reasonable, responsible, and present a united front in negotiations.

A Critical Analysis of Trade-Based Money Laundering Activities in Nigeria

Bukola Oyaleke*

Abstract

Money laundering is one of the three main trajectories of illicit financial flows globally, ravaging the financial institutions and global economic systems. Trade-based laundering of illicit funds has become a global threat. This is predicated on the rapid evolvement in business transactions. The paper examined activities that constitute trade-based money laundering in Nigeria. The paper also examined the various forms of trade-based money laundering and the methods through which money laundering are being carried out in Nigeria and globally. The legality or otherwise of trade-based money laundering was critically examined with a view to knowing whether trade-based money laundering is known to Nigerian jurisprudence. The paper submits among others that the legality or otherwise of the crime of money laundering is a question of law and not of fact. This is predicated on the fact that several statutes both nationally and internationally have criminalised money laundering activity and it is well known to the jurisprudence of most countries of the world. It is recommended that Nigerian Money Laundering (Prevention and Prohibition) Act, 2022 should be further amended to incorporate predicate offences that are trade-based related. Furthermore, it is recommended that the government should see to the effective implementation of the provisions of the Act. It is not enough to have strong and coherent body of laws and or regulations in combating laundering activities and other ancillary matters if there is no effective enforcement or implementation.

Keywords: Money laundering, Nigeria, TBML, illicit financial flows and financial institutions

1.0. Introduction

Illicit financial flows have become global emergency ravaging the financial institutions and global economic systems across board.[1] Money laundering is one of the trajectories of illicit financial flows. It is an illegal activity which threatens global economic systems or has the likelihood of threatening global economic systems. The effects of money laundering are evident nationally and internationally, both at the micro and macro levels. The need to develop workable and sustainable

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[1]https://www.imf.org/en/About/Factsheets/Sheets/2018/10/07/imf-and-the-fight-against-illicit-financial-flows accessed 10 May 2024

measures and solutions in combating its menace has been on the forefront globally.[2] In Africa, the roots of illicit financial flows are ancient and could be traced back to the era of decolonisation.[3] It was a deliberate effort by the colonial states to carry out capital flight from Africa using corporations. This narrative continues till date. This is possible due to deficiencies in the existing legal and regulatory frameworks that deal with issue such as implementation of anti-money laundering regulations and anti-corruptions measures.[4] Money laundering, corruption and commercial activities are major conduits through which illicit funds are moved globally.[5] The scope of this paper will be restricted to trade-based money laundering or trade-based illicit financial activities in Nigeria and the recommendations towards curbing same. The question begging for an answer is what is trade-based money laundering?

1.1 Conceptualising trade-based money laundering

It must be stated here that there is a dearth of literatures that borders on trade-related laundering of illicit funds specifically compared with avalanche of literatures that deals money laundering generally.[6] Specialisation in the field of study is still developing due to the fact that it is a new method used in laundering illicit proceeds of crime.

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[2] http://aidc.org.za/what-are-illicit-financial-flows-and-base-erosion-and-profit-shifting/ accessed 11 August 2024
[3]http://aidc.org.za/what-are-illicit-financial-flows-and-base-erosion-and-profit-shifting/ accessed 11 May 2024
[4] http://aidc.org.za/what-are-illicit-financial-flows-and-base-erosion-and-profit-shifting/ accessed 11 May 2024
[5] https://gfintegrity.org/issue/illicit-financial-flows/ accessed 11 September 2024
[6] See generally on the definition of money laundering: I. Bantekas, 'The Internal Law of Terrorist Financing' (2003) 97 *American Journal of International Law* at 315-333; W. Hetzer 'Money Laundering and Financial Markets'(2003) 11 *European Journal of Crime, Criminal Law and Justice* at 264-277; M.E, Beare *'Critical Reflections on Transnational Organised Crime, Money Laundering and Corruption'* (2003); G. Fabre *'Criminal Prosperity: Drug Trafficking, Money Laundering and Financial Crises After the Cold War'* (2003); K.D Magliveras 'Revision to the European Community's anti-money laundering Instrument: Critical Analysis'(2002) 18 *International Enforcement Law Reporter* at 181-185; W. Witherell, 'International Approaches to Combating Financial Abuse and Promoting Stable Financial Markets'(2002) 5 *Journal of Money Laundering Control* at 257-262; B Blunden, '*The Money Launderers: How they do it, and how to catch them at*'(2001); S. Salva 'Money Laundering and Financial Intermediaries'(2001) *Kluwer Law International*; KD Magliveras 'Banks, Money Laundering and the European Community' in J. Norton(ed), *'Banks, Fraud and Crime'*(2000) at 173-200; J. Madinger & S.A. Zalopany, *'Money Laundering: A Guide for Criminal Investigators'* (1999); C Nakajima & B.A. Rider *'Anti-Money Laundering Guide'*(1999); P. Temple, *'Essential Elements of the Prevention of Money Laundering*' (1998); M. Zeldin, *'*Money Laundering' (1998)1 *Journal of Money Laundering Control*; J. Fisher, 'Money Laundering Law and Forfeiture, Proportionality and Instrumentality: USA v. Bajakajian, The US Supreme Court Tries Again' (1998) 1 *Journal of Money Laundering Control*; DC Jayasuriya, 'Money Laundering: The Role of Legislation in Developing Economies'(1998) 1 *Journal of Money Laundering Control*; A. Itzikowitz, 'South-Africa: Prevention and Control of Money Laundering'(1998) 2 *Journal of Money Laundering Control*; CU Uche, 'The Adoption of a Money Laundering Law in Nigeria'(1998) 1 *Journal of Money Laundering Control*; L.J. Candler 'Commingled Funds: How to seize Proceeds of Electronic Crime'(1998) 1 *Journal of Money Laundering Control*; *M. Pheiffer 'Financial Investigations and Criminal Money'* (1998) 2 *Journal of Money Laundering Control*; D. Masciandaro 'Money Laundering Regulation: The Micro Economics'(1998) 2 *Journal of Money Laundering Control*; RK Interseer 'An Economic Analysis of Money Laundering' (1997) 1 *Journal of Money Laundering Control;* A. Haynes, 'Securitisation, Money Laundering and Fraud' (1997) 1 *Journal of Money Laundering Control*; E. Savona(ed), *'Responding to Money Laundering: International Perspectives'* (1997); JF Thony 'Processing Financial Information on Money Laundering

Lilley[7] defines trade-based money laundering as the medium by which drug dealers launder their illegal profits. He submitted further that this is usually done through the complex process of black-market peso exchange system operative in Columbia in which a peso exchange broker in Columbia deposits pesos in Columbian accounts of drug dealers doing businesses in the United States. Then, the pesos are exchanged for dollars that are usually tainted. The exchanged tainted dollars are deposited in US accounts through collusion of US based operatives who belong to the same money laundering network. US goods are then imported into Columbia-by-Columbia importers with the use of the tainted dollars. The goods are further smuggled into Columbia. He submitted that the Mexican drug cartel using trade-based laundering and other methods of laundering launders about $40 billion annually.[8]

I concede to the extent that trade-based laundering is used in laundering illicit funds, however, I am of the view that it is not only used in respect of drug money. Money laundering involves a wide range of predicate offences such as prostitution, human trafficking, tax evasion, fraud, drug trafficking, child labour, sex trade, blackmail to mention but a few. For instance, in a country like Nigeria which is the focus of this work, illicit funds laundered comes from predicate offences such as corruption, fraud, embezzlement, drugs, human trafficking and business transactions (trade-based laundering).

Therefore, it is safe to submit that in the present-day money laundering activities, the scope has expanded beyond drug trafficking but include any financial activity whereof illicit financial flows could be made and be concealed to prevent possible suspicion, arrest, prosecution, and conviction and not only restricted to drug money.

Thamasegaran et al[9] opined that "trade related laundering of illicit funds is the act of disguising the proceeds of crimes by manipulating the international trade system". They argued further that trade-based laundering is possible because there is an increase in trade activities, usage of many foreign exchange businesses and multiplicity in terms of trade financing arrangements. They stated further that the common mediums used to launder illicit funds through the instrumentality of the

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Matters: The Financial Intelligence Units'(1996) 3 *European Journal of Crime, Criminal Law and Criminal Justice at 257-282*; *United Nations, Control of the Proceeds of Crime: Report of the Secretary-Genera*l(UN Document E/CN.15/1996/3, 3 April, 1996); V. Tanzi *'Money Laundering and the International Financial System'* (May,1996) and R. Parlour, *'International Guide to Money Laundering: Law and Practice'* (1995); P. Birks *'Laundering and Tracing'* (1995)

[7]P Lilley *'Dirty Dealing: The Untold Truth about Global Money Laundering, International Crime and Terrorism'* (2006) 30

[8]Lilley (n 496) 30

[9]H Thamasegaran & B Shanmugam, 'International trade-based money laundering: the Malaysian perspective' (2007) 10 *Journal of Money Laundering Control* at 431

international trading system are over-and under-invoicing of goods and services, under-and over-shipment of goods and services, multiple invoicing of goods, a false description of goods and complex trade arrangements.[10] They argued that laundering of illicit funds affect countries globally through the international trading system. Such international trade transactions have negative impacts on economic growth and development of such countries. For instance, exporting goods at a reduced price compared to the ordinary market price reduces or has the likelihood of reducing the overall revenue generated within that time.[11] They argued further that a system that is effective by detecting misrepresentation of prices, the quantity and quality of goods and services is likely to reduce to the barest minimum the menace of trade-based laundering of illicit funds activities in most countries, Nigeria inclusive.[12] According to Thamasegaran et al[13] about US$4 billion was laundered through misrepresentation of prices through exports from South-American countries to the USA sometimes in 1995.[14] Also, about US$400 million was laundered from the USA to Greece in the same year.[15]

It is a common knowledge that the sole purpose of laundering is to conceal proceeds of illegally obtained wealth, however the objective behind laundering is not one-way traffic, but two-way traffic in the sense that entities engaged in laundering with the intent to cover up an already prohibited and committed act or omission, which in the world of money laundering is called predicate offence(s) on the one hand, and the need to create a constant financial flow or availability of fund to further propagate this 'already committed predicate offence' or use the laundered money to engage in other businesses which may be legitimate or illegitimate on the other hand. Therefore, it could be safe to submit that money laundering is an organised business activity.[16] This research paper is also in agreement with Thamasegaran et al[17] to the extent that strong, effective, and coherent anti-money laundering procedures/systems and or laws are needed to curb the menace of money laundering globally and in particular in the African Continent. However, having strong and coherent procedures/systems and or laws are not enough in curbing money laundering generally,

[10]Thamasegaran (n 498) 431
[11]de Boyrie, M.E., Pak, S.J. and Zdanowicz, J.S., 'Money laundering and income tax evasion: the determination of optimal audits and inspections to detect abnormal prices in international trade' (2004*) 12 Journal of Financial Crime*
[12]Thamasegaran (n 498) 431
[13]Ibid 431
[14]Zdanowics, J.S., Pak, S. and Sullivan, M. 'Brazil-United States trade: capital flight through abnormal pricing' (1999)13 *The International Trade Journal,* p 423-443.
[15] Pak, S.J., Zanakis, S.H. and Zdanowicz, J.S., 'Detecting abnormal pricing in international trade: the Greece-USA case' (2003) 33 *Interfaces,* No. 2, pp. 54-64
[16] Lilley (n 496) 28
[17]H Thamasegaran & B Shanmugam, 'International trade-based money laundering: the Malaysian perspective' (2007) 10 *Journal of Money Laundering Control* at 431

and trade related laundering where there is no strong political will on the part of the government in fighting same by making all necessary resources available. Nigeria is a country that has been bedevilled with incidences of corruption, fraud, prostitution and kidnapping to mention but a few; thereby culminating into high rates of trade related laundering notwithstanding the existence of the recently enacted Money Laundering (Prevention and Prohibition) Act, 2022, the ratification of the Palermo Convention and the Financial Action Task Force (FATF)'s recommendations on money laundering.

2.0: Methods of Money Laundering

Generally, there are three (3) methods usually employed by money launderers and they are: placement, layering, and integration.

2.1: Placement

This kick starts the laundering process. A launderer reduces the funds into a less suspicious and more portable It is the physical movement of the funds by depositing same in the bank either through structuring[18] and or smurfing, smuggling or the use of negotiable instruments like money orders or traveller's check.[19] It is usually seen as the most difficult stage of laundering because it involves movement of large currency and most times described as the 'choke point'.[20] The methods adopted to place illicit funds are multifaceted such as cash into an account, using front corporations like jewellery stores or check-cashing businesses and imports/exports companies. [21] The method to be used depends on the organization's level of sophistication and its geographical considerations.[22] It simply means the process through which illicit funds move from launderers to a financial institution.[23]

2.2: Layering

Layering involves engaging in multitude of financial transactions with a view to creating a smokescreen of legitimate financial activity. At this stage, a launderer engages the already layered

[18] A person structures a transaction when he breaks down a currency that exceeds $10, 000 into smaller units and below $10, 000, to evade the reporting requirements. This mode was used by a grandma in Florida who laundered $25 million ($25, 000,000) using California banks.
[19] K Sullivan '*Anti-money laundering in a nutshell: Awareness and Compliance for Financial Personnel and Business Managers'* (2015) 17
[20] JR Richards *'Transnational Criminal Organisations, Cybercrime and Money Laundering*' A Handbook for Law officers, Auditors, and Financial Investigators (1998) 48
[21] Richards (n 509) 48
[22] Richards (n 509) 48: see also Sullivan (n 508) 8
[23] Sullivan (n 508) 8

funds in making transactions and legitimate businesses deals such as the purchase of goods and services, properties, investments to mention but a few. In the context of trade-based laundering, an exporter that intends to launder his illicit funds will engage in the layering of the funds by purchasing high value products or legitimate products by using wire transfer from numerous accounts in order to conceal the true origins of the funds.[24] A successful layering operation is achieved by ensuring cross borders transactions-thereby creating a complexity for any possible suspicion and detection by the law enforcement agencies.[25] It could also been said to be the process whereby a launderer distances him or herself from the dirty money.[26] As a rule, layering should involve at least two jurisdictions, if not three. Layering creates a mouse and cat scenario between a launderer and the law enforcement agency. A launderer continues moving his illicit funds from one jurisdiction to another and the law enforcement agency or investigation body also continues chasing with a viewing to identifying and forfeiting the proceeds.[27]

2.3 Integration

This represents final stage of the laundering process wherein the illicit proceeds already 'placed' and 'layed' are incorporated back into the legitimate world of finances by several forms of instruments and investments like, bill of lading, bonds, bank notes and guarantees, luxuries living and securities to mention but a few.[28]

3.0. Illegality of Trade-Based Money Laundering

Money laundering is illegal. This is predicated on the fact that several statutes both nationally and internationally have criminalised money laundering activity and therefore same known to the jurisprudence of most countries of the world[29].

Section 18 of the Money Laundering (Prevention and Prohibition) Act, 2022 recognises money laundering as a criminal offence which upon conviction entitles the accused person so convicted to a term of imprisonment of not less than 4 years but not more than 14 years.[30] A body corporate that contravenes this section shall upon conviction be liable to a fine of not less than 5 times the

[24] Richards ((n 509) 49
[25] Richards (n 509) 49
[26] Sullivan (n 508) 8
[27] Sullivan (n 508) 10
[28] Richards (n 509) 50; see also: Sullivan (n 508) 10
[29] Haruna, A.S, 'Money laundering in Nigeria' (2019) 6(6) Journal *of Emerging Technologies and Innovative Research* at 16-46
[30] Section 18(2)(3) of the Money Laundering (Prevention and Prohibition) Act, 2022

value of the funds or the properties acquired as a result of the offence committed and a withdrawal of the license of such a body corporate.[31]

Sub-section 6 of the same section predicates offences that may constitute offences for money laundering in Nigeria. These are: corruption, human trafficking, racketeering, terrorism, environmental crimes, murder, grievous bodily injury, terrorist financing, smuggling of migrants, sexual exploitation of children, illicit trafficking in narcotic drugs and psychotropic substances, bribery, fraud, kidnapping, counterfeiting, illicit arms trafficking, illicit trafficking in stolen goods, corruption, extortion, forgery, piracy, insider trading, market manipulation, piracy of products, hostage taking, robbery or theft, smuggling that relate to customs and excise duties and taxes, tax crimes that relate to direct and indirect taxes, and market manipulation or any other criminal act allowed under the Act or any other law in Nigeria.[32]

It must be stated at this juncture that the relationship or the relevancy of these predicate offences to trade-based money laundering is the effect that those predicate offences are ways, mediums or avenues that illicit funds are made or gotten by entities that involve laundering activities using TBML mechanism. Therefore, there cannot be TBML without making a reference to all or any of the above-mentioned predicate offences. All or any of the above-stated offences are the foundation that holds the edifice of TBML. Without them, TBML cannot stand or else the narrative will be like building something on nothing which cannot stand.[33] It is settled that there cannot be a laundering of illicit funds without one or more predicate offences. It is the funds gotten from any of the predicate offences that entities which may be natural or artificial persons launder through trade-related laundering. Therefore, Money Laundering (Prevention and Prohibition) Act, 2022 that states these predicate offences is relevant to this paper because the Act 'exposes' and or 'states' offences through which entities that engage in TBML obtain their illicit funds.

Trade-based money laundering itself is also a criminal offence[34]. It further relies on other predicate offences to exist in law. It serves as a medium by which the illicit funds obtained from criminal activities or offences mentioned above are moved from one jurisdiction to another to evade possible suspicion, arrest and prosecution. What constitute predicate offences is determined by each member country to the FATF's Recommendations. Predicate offences to money laundering in Nigeria are as contained in the Money Laundering (Prevention and Prohibition) Act, 2022. It

[31] Section 18(4) & (5) of the Money Laundering (Prevention and Prohibition) Act, 2022
[32] Section 18(6) of the Money Laundering (Prevention and Prohibition) Act, 2022
[33] Lord Denning (MR) said in McFoy v. UAC (1961) 3 WLR Pt. 1404 at 1409
[34] Howard Chitimira and Oyesola Animashaun, 'The Adequacy of the Legal Framework for Combating Money Laundering and Terrorist Financing in Nigeria. **(**2023) 26(7) *Journal of Money Laundering Control* at 110-126

must be noted, however, that none of these offences are transactions-based offences which are directly related to the TBML, though they remain as major offences from which illicit funds are gotten and which are laundered using TBML in Nigeria.

In terms of trade-based laundering of illicit funds through any of the above-mentioned predicate offences, it must be established by credible evidence that the accused person which may be natural or a body corporate has intention to launder dirty money through the use of businesses transactions.[35] Furthermore, for there to be an effective laundering of illicit funds through trade, especially through over-and under-invoicing, there must be a *consensus ad idem* (collusion) between two or more parties which maybe between an exporter and importer, both controlled by one money laundering network to carry out the illegal transaction.[36] For instance, Company B (a foreign exporter) ships about 2 million cowries worth $2 each, but invoices Company C (a colluding domestic importer) for 2 million cowries at a price of only $1 each. Company C pays Company B for the goods by sending a wire transfer for $ 2 million. Company C then sells the cowries on the open market for $4 million and deposits the extra $3 million (the difference between the invoiced price and the 'fair market' value into a bank account to be disbursed according to Company B's instructions.[37]

According to article 6(1)(a)(i) of the Palermo Convention,[38] money laundering is defined as the conversion or transfer of property, knowing it is derived from a criminal offence, for the purpose of concealing or disguising its illicit origin or of assisting any person who is involved in the commission of the crime to evade the legal consequences of his actions; the concealment or disguising of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property knowing that it is derived from a criminal offence.

The position of the law under the Convention is apposite to what is required under the Money Laundering (Prevention and Prohibition) Act, 2022 in the sense that it must be proved beyond the reasonable doubt that the accused person has mental intent and knowledge that the property in question is a proceed of crime(s).[39] The courts had held in various international money laundering

[35] See generally section 18 of the Money Laundering (Prevention and Prohibition) Act, 2022
[36] H Duggan & P Drewery 'UK Part 1:UK Money Laundering-Typological Consideration' in A. Srivastava and others (eds) *'International Guide to Money Laundering Law and Practice'* (2013) 34
[37]Financial Action Task Force (FATF) Typologies-Trade-based money laundering p. 4 https://www.fatf-gafi.org/publications/methodsandtrends/documents/trade-basedmoneylaundering.html accessed 21 May 2024
[38]United Nations Convention against Transnational Organised Crime, 2000 https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf accessed 22 May 2024
[39] http://files.acams.org/pdfs/English_Study_Guide/Chapter_2.pdf, p.14-15 accessed 20 May 2024

cases that intent and knowledge required may be inferred from the 'objective factual circumstances'. That is, the intent and knowledge of the fact that the proceeds from crime(s) may be deduced from the surrounding circumstances of the case.[40]

In the cases of Appeal Committees in ***HKSAR v. Wong Ping Shui & Another***[41] and the court of Final Appeal in ***Oei Henghky Wiryp v. HKSAR,*** [42] the court held that the prosecution needs not to prove that the money is illicit money to secure conviction. It shows that a person will be liable if he or she fails to exercise reasonable level of due diligence to know whether or not the funds or property he or she is dealing with proceed from illicit funds.[43] Therefore, it will be safe to conclude that trade-based laundering is illegal both globally and nationally and the predicate offences of which illicit funds are obtained are stated under the laws both internationally and nationally. Money Laundering (Prevention and Prohibition) Act, 2022 is a good example. The question begging for an answer therefore is: what are the forms of trade-based money laundering known to law?

4.0 Forms of Trade-Based Money Laundering

The Nigeran Money Laundering (Prevention and Prohibition) Act, 2022 does not explicitly states the forms of trade-based money laundering. However, the FATF's best practices on trade-based money laundering states the forms. It is mind-blowing and surprising that the need to incorporate the forms was not considered during the amendment of the Act in 2011 and recently in 2022 bearing in mind that the FATF's Best practices on trade-based money laundering came out in 2006 and the legislature and the stakeholders involved in the campaign against money laundering do not deem it fit to lobby for same to be incorporated. This research work will consequently recommend the amendment of the Act to accommodate the forms in accordance with the FATF's soft law.

According to the best practices, there are (4) basic non-complex techniques of trade-based laundering of illicit funds and they are: over-and under-invoicing of goods and services, over-and under-shipment of goods and services, falsification of the descriptions of goods and services and the use of front companies. [44] The complex technique of trade-based money laundering is the Black-Market Peso Exchange. The above-mentioned shall be examined in seriatim.

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[40] http://files.acams.org/pdfs/English_Study_Guide/Chapter_2.pdf .p.14-15 accessed 20 May 2024
[41] (2001) 4 HKCFAR 29
[42] (No 2) (2007) 10 HKCFAR 98,
[43] http://csj.hkics.org.hk/site/2016/01/11/clarifying-hong-kongs-aml-regime/ accessed 20 May 2024
[44]Duggan (n 425) 34; see also: https://www.fatf-gafi.org/documents/documents/bestpracticesontradebasedmoneylaundering.html accessed 21 May 2024

4.1 Over and under-invoicing of goods and services

Over-and under-invoicing of goods and services involves misrepresentation of the prices of goods and services for the purpose of transferring value from an exporter to an importer.[45] This is the oldest method of fraudulently transferring value in the international trading system.[46] Through under-invoicing of goods and services, an exporter company reduces the price of a good lower than the fair market price and transfers value to the colluding affiliate importing company. The importing company in return sells the goods and services so transferred at the fair market value, thereby making more money than what she initially paid for the goods and services sent/invoiced by the exporter. It was discovered that about $53.1 billion is lost by the U.S government as tax revenue caused by the fraudulent transfer of prices of goods and service by colluding foreign exporters and local importers in 2001.[47]

It was also discovered that under and over-pricing of imports and exports allows for tax evasion, terrorist financing and money laundering.[48] The most common and popular pricing scheme is to under-value exports instead of over-pricing imports.[49] The most common activity that constitutes trade-based money laundering in Nigeria is smuggling. Different categories of goods are smuggled into Nigeria through the neighbouring smaller countries like Benin. More than 1 million tons of rice amounting to about 20million 50kg rice bags have been estimated to have been smuggled in to the country in the first quarter of this year.[50]

To protect local rice farmers and producers, the government of Nigeria banned the importation of rice into the country. However, due to the inability of the local farmers to meet up with the teeming demands for rice consumption, individuals and companies resort to illegal smuggling of rice through the neighbouring countries. This, creates a platform for fraudulent persons to launder their illicit funds through the misrepresentation of prices of rice bags and other goods cross-border upon engaging in nefarious activities and predicated offences such as peculiar to Nigeria such as bribery

[45] Financial Action Task Force (FATF) Typologies-Trade-based money laundering p. 4 https://www.fatf-gafi.org/publications/methodsandtrends/documents/trade-basedmoneylaundering.html accessed 21 May 2024
[46] Financial Action Task Force (FATF) Typologies-Trade-based money laundering p. 4 https://www.fatf-gafi.org/publications/methodsandtrends/documents/trade-basedmoneylaundering.html accessed 21 May 2024
[47] http://files.acams.org/pdfs/English_Study_Guide/Chapter_2.pdf, p.76 accessed 21 May 2024
[48] http://files.acams.org/pdfs/English_Study_Guide/Chapter_2.pdf, p.77 accessed 21 May 2024
[49] http://files.acams.org/pdfs/English_Study_Guide/Chapter_2.pdf, p.77 accessed 21 May 2024
[50] https://www.ft.com/content/c2636fca-86b0-11e9-97ea-05ac2431f453 accessed 21 May 2024

and corruption, kidnapping, embezzlement, fraud, drug trafficking, human trafficking, robbery or theft, murder, and piracy.[51]

Laundering of illicit funds by under and over-pricing through smuggling of goods and services has been a lingering issue of concerns in Nigeria.[52]

While over invoicing is when the Company G (a domestic exporter) ships about 1 billion cowries that worth $2 each, but invoices Company H (a colluding foreign importer) for 1 billion cowries at a price of $ 3each. Then Company H acting on the invoices so sent pays Company G for the goods through a wire transfer for $ 3 billion. Company G upon the receipt of the $ 3 billion pays $2 billion to the suppliers and remit the remaining $1 billion (the difference between the invoiced price and the actual fair market price) in the account to be agreed on by the two colluding parties.[53]

It must be noted, however, that for there to be an effective laundering of illicit funds through over and under invoicing, there must be a *consensus ad idem* (collusion) between two or more parties which maybe between an exporter and importer, both controlled by one money laundering network to carry out the illegal transaction.[54]

Furthermore, under and over-invoicing is possible in most cases because most African countries only set rules and restrictions on what could be imported into their respective countries by imposing tariff duties, customs duties, and other forms of tariff barriers because the revenue made therefrom serves as the major source of revenue for most African countries. Therefore, there is less attention to what happen at the exports level. Criminals exploit this neglect in perpetuating laundering.[55]

4.2. Multiple invoicing of goods and services

This is another basic method used to launder illicit fund through trade activities. This simply means the use of more than one invoice for the same trade transaction.[56] A launderer through TBML can easily justify this multiple of payments for the same goods and services to evade suspicion. It must be noted, however, that the launderers may have legitimate excuses for such transactions such as amendment of payment terms, the payment of late fees or corrections to previous payment

[51]https://www.cbn.gov.ng/out/2019/ccd/cbn%20anti-money%20laundering%20_combating%20the%20 financing%20of%20terrorism%20_manual%20(2).pdf accessed 21 May 2024
[52] https://www.ft.com/content/c2636fca-86b0-11e9-97ea-05ac2431f453 accessed 21 May 2024
[53] Financial Action Task Force (FATF) Typologies-Trade-based money laundering p.4 https://www.fatf-gafi.org/publications/methodsandtrends/documents/trade-basedmoneylaundering.html accessed 21 May 2024
[54] Duggan (n 425) 34
[55] http://files.acams.org/pdfs/English_Study_Guide/Chapter_2.pdf p.77 accessed 22 May 2024; see also: Financial Action Task Force (FATF) Typologies-Trade-based money laundering https://www.fatf-gafi.org/publications/ methods andtrends/documents/trade-basedmoneylaundering.html p. 5 accessed 22 May 2024
[56]Financial Action Task Force (FATF) Typologies-Trade-based money laundering https://www.fatf-gafi.org/publications/methodsandtrends/documents/trade-basedmoneylaundering.html p. 5 accessed 22 May 2024

instructions.[57] The launderer also needs not to misrepresent the price of the good and service on the invoice.[58]

4.3. Over and under-shipment of goods and services

This involves under-statement or over-statement of the quantity of goods shipped or services being supplied in addition to the manipulation of the prices of goods and services of both the imports and the exports.[59] Using this technique of trade-based laundering of illicit funds, a laundering exporter may not even export any goods or supply any services to the importer, but agree with the importer to furnish all necessary documents for the shipments of the goods are processed. [60]This form of technique is also known as 'phantom shipment'.

4.4. Falsification of the descriptions of goods and services.

This is a form of trade related laundering of illicit funds that deals with the misrepresentation of the quality of goods and services. An exporter who desires to transfer value using this technique may do so by depicting and shipping a less expensive item as an expensive one or can even ship a different item entirely. [61] There is therefore discrepancy in what is shown on the customs papers and what is shipped in the real sense. It must be re-iterated that this form of technique deals with misrepresentation that relates to the quality of goods shipped and services delivered. This may be illustrated as follows: Company A (a domestic exporter) ships 1 million gold chains worth $2 each to Company B (a colluding foreign importer), but on the paper invoices Company B for 1 million silver chains worth $1 each. Company B pays Company A for the supplied goods for $ 1 million. Company B then proceed to sell the gold chains at the fair market value for $2 million and sends the balance of $ 1 million to Company A's instructions.[62]

5.0. Conclusion

It will be safe to conclude that entities that are involved in laundering activities in the present dispensation generally and in particular in Nigeria do not only launder their dirty money solely with the intention of concealing and or disguising such dirty money only. They launder with a view to plunging the money into other nefarious activities other than the ones the laundered fund was obtained from to make more money. In other words, launderers are professional businessmen and

[57] Financial Action Task Force (FATF) Typologies-Trade-based money laundering https://www.fatf-gafi.org/publications/methodsandtrends/documents/trade-basedmoneylaundering.html p. 5 accessed 22 May 2024
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid p. 6.

women who engage in criminal activities with the sole aim of making more money by using the laundered money to engage in further businesses which maybe legitimate or illegitimate.

Furthermore, it was discovered there are several statutes both nationally and internationally have criminalised money laundering activity and therefore same known to the jurisprudence of most countries of the world. In addition, it was found out that having strong and coherent procedures/systems and or laws are not enough in curbing money laundering generally, and in particular trade related laundering where there is no strong political will on the part of the government in fighting same by making all necessary resources available.

6.0.Recommendations

The following recommendations are therefore suggested:

1. That the Money Laundering (Prevention and Prohibition) Act, 2022 should be further amended to incorporate predicate offences that are trade-based related which are (i) over-and under-invoicing of goods and services, (ii) over-and under-shipment of goods and services, (iii)falsification of the descriptions of goods and services, and (iv) the use of front companies. These suggested predicate offences are the FATF's best practices on trade-based money laundering forms which are yet to be included in the Act notwithstanding the fact that the FATF have recommended them to member states to adopt since 2006 but Nigerian legislature has failed, refused, or neglected to include them in the Act.

2. That the governments at all levels should see more to the full implementation of the provisions of the Act. It is not enough to have strong and coherent body of laws and or regulations in combating laundering activities and other ancillary matters such Money Laundering (Prevention and Prohibition) Act, 2022 if same is not fully implemented and enforced.

3. That all the agencies of government in Nigeria that involve in the campaign against money laundering and the ancillary matters should work together as a formidable and indivisible team by sharing necessary information and intelligence together in the fight against it.

A Critical Analysis of Consent Under Posthumous Conception: Comparative Legal and Institutional Lessons for Nigeria

Joel Drisu Umaru*

Abstract

Assisted reproductive technologies have been developed. These ARTs have implications for families, family relations and the existence of people. True, ARTs bring advantages to people. However, they are also changing society in significant ways such that traditional norms of conception and parenthood are affected. Meanwhile, in Nigeria, reproductive health ethics, guidelines, and law have not been keeping pace with these developments. The focus of this study is the examination of the role of consent in posthumous conception to ascertain the ethical and legal issues relating to it in comparative jurisdictions to derive useful lessons for Nigeria. Pursuant thereto, the doctrinal research methodology was adopted as the methodology of study. It was found that whereas, the practice of posthumous conception was developing in comparative jurisdictions, consent was not upheld in relevant and deserving cases. It was also found that Nigeria does not have legislation on assisted reproductive technology and the practice of posthumous conception. It was recommended that the legislation on assisted reproductive technologies and the practice of posthumous conception be made taking into consideration the role of consent. It was also recommended that an institutional mechanism be established to enforce the provisions of the legislation.

Keywords: Assisted Reproductive Technologies (ART), Posthumous Conception, Consent, Legislations, Nigeria.

1.0 Introduction

This study identifies and examines the legal and ethical challenges which surround the regulation of posthumous conception in Nigeria. Proposals for regulating posthumous conception have been outlined in the Nigerian National Assembly in the Assisted Reproductive Technologies Bill, 2015. However, there has been no indication to date on when this Bill will progress through the legislative process. Thus, posthumous conception remains unregulated in Nigeria, and this presents a clean slate upon which a scheme of regulation may be built. Against this backdrop, this study is based on answering three research questions regarding the regulation of posthumous conception

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in Nigeria. First, this study investigates whether posthumous conception ought to be regulated at first instance, or whether the practice should simply be banned in Nigeria. In addition, it considers whether a degree of consent should be used when regulating posthumous conception. Furthermore, this study critically examines the existing regulation of posthumous conception in various jurisdictions and identifies the primary issues which cases of posthumous conception pose for courts in practice. In doing so, this research identifies the gaps in current regulatory regimes, with a view to ascertaining what Nigeria can learn from these existing policies. Ultimately, this research reconsiders the proposals for regulating posthumous conception in Nigeria and makes several recommendations. This study concludes that posthumous conception should be regulated in Nigeria and should be permitted by law. In addition, it argues in favour of using a presumed consent model when regulating the practice in Nigeria, and further demonstrates how any potential harm caused by posthumous conception can be minimised through effective regulation.

2.0 The Concept of Posthumous Conception

A posthumous birth is the birth of a child after the death of a biological parent. According to Bahadur, posthumous birth occurs when a child is born after the death of a genetic parent.[1] Posthumous births have occurred since antiquity. This is often when a male partner died from illness, accident or at war after conception and pregnancy had been achieved but before the birth occurred.[2]

On the other hand, posthumous conception,[3] is a distinctly modern phenomenon which involves the intentional application of advanced medical technology to achieve conception, pregnancy, and childbirth in a situation where one or both biological parents are deceased.[4]Thus, historically, posthumous conception is the birth of a child after the death of one, or both of, the child's genetic parents using assisted reproductive technologies (ART).[5] Collins, expatiates that Posthumous conception may arise when a child's genetic father dies after the act of conceiving the child, but before the child is born.[6] According to Hashiloni-Dolev and Schicktanz, posthumous conception

[1]G, Bahadur, 'Death and Conception' [2002] (17) (10) *Human Reproduction*; 2769.
[2]*Ibid.*
[3]There are different terms used in the literature to refer to the idea of posthumous reproduction. These include phrases such as posthumous birth, posthumous reproduction, posthumous assisted reproduction and posthumous conception.
[4]Bahadur, n. 1.
[5]*Ibid.*
[6]R, Collins, 'Posthumous Reproduction and the Presumption Against Consent in the Cases of Death Caused by Sudden Trauma'[2005] (30)*Journal of Medicine and Philosophy*; 431.

may occur when a pregnant woman dies shortly before or during childbirth and the infant is delivered, usually by caesarean section, after the death of the gestating mother.[7]

Posthumous conception has been distinguished from posthumous birth. Aptly stated, 'Posthumous conception arises in cases where a child is both conceived and born after the death of a genetic parent.'[8]The practicalities are spelt out as follows, 'The practice of posthumous conception involves using cryopreserved sperm, eggs or embryos in assisted human reproduction, with conception occurring after the death of the person who is the source of the gamete.'[9] Hashiloni-Dolev and Schicktanz weigh in by submitting that 'Unlike posthumous birth, which is usually an unanticipated event, posthumous conception is a conscious attempt to conceive a child and procure a pregnancy after the death of one or perhaps both of the child's genetic parents.[10] Thus, in posthumous conception, conception and/or implantation occurs after the death of one or both progenitors of the embryo. Another way of putting it is that posthumous conception refers to factual scenarios where the father/sperm donor dies before the birth of the baby, or where a woman is kept medically alive in order to surgically deliver the baby.

Hyder-Rahman discusses the two-stage process of posthumous conception as follows:

> (1) the retrieval, preservation, and storage of reproductive material and (2) the use of reproductive material. This distinction is important as consent for each stage is typically required separately; importantly each stage can be temporally separated by days, months or even years. In scenarios 1-3 the first stage – retrieval, preservation, and storage – has been conducted and completed (during the progenitor/donor's lifetime and with his/her consent) and it is the second stage – posthumous use – that might pose a challenge. It is of course possible that the deceased left clear instructions and appropriate consents for the posthumous use of his/her reproductive material, but this is not always the case, as we will see in Part II. In scenario 4 both stages can be carried out after the pronouncement of death; in scenario 5, the first stage of eggs/ovarian tissue retrieval can be carried out during the dying process or after brain-death but prior to the withdrawal of life-support,

[7]Y, Hashiloni-Dolev, S, Schicktanz, 'A Cross Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins of Life Perspectives' [2017] (4) *Reproductive Medicine and Society Online*; 21.
[8]*Ibid.*
[9]*Ibid.*
[10]*Ibid.*

> and the second stage carried out after death. Thus, these scenarios present a more complex, and arguably more interesting, set of issues.[11]

However, Hyder-Rahman submits that the modern approach to posthumous conception takes into consideration the following scenarios:

> Where one or both embryonic progenitors dies before implantation of a frozen embryo; Where a man dies before his already frozen sperm can be used to fertilize an egg, and create an embryo which is implanted; Where a woman dies before her already frozen eggs (or eggs derived from frozen ovarian tissue) can be fertilized, an embryo created, and then implanted in a surrogate; Where sperm is retrieved and frozen immediately prior to or after death, for later use; Where eggs/ovarian tissue is retrieved and frozen immediately prior to or after death, for later use.[12]

This demonstrates the development in posthumous conception.

3.0 Problems Associated with Posthumous Conceptions

The idea and practice of posthumous conception is not without problems. First, according to Star, 'Posthumous conception has always raised ethical or legal questions posed by children who are born in this manner.[13] Maddox fills the context as follows, 'Posthumously born children are ordinarily accepted into society socially, and the law will usually provide for such children by recognizing the child as the legal offspring of the deceased parent, provided that the child is born within the normal period of gestation measured from the date of the parent's death.[14] Bahadur talks of the effects of posthumous conception on the welfare of the resulting child and submits that there are four common objections specifically raised when it comes to the welfare of posthumously conceived children. These include concerns regarding parental acknowledgement, rights of inheritance, family structure and identity harm.[15] According to Sabatello, 'A primary concern raised by courts and commentators against posthumous conception relates to the legal status of the resulting child. The issue is whether the posthumously born child can be regarded as the legal offspring of their deceased parent and the effect that a lack of parental acknowledgement might have on the child.'[16] According to Maddox, 'Although the dead cannot be classed as legal parents,

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[11]N, Hyder-Rahman, 'Consent and the protection of the deceased's interests in posthumous reproduction'<https://ssrn.com/abstract=3532696> Accessed 29/07/2023.
[12]*Ibid.*
[13]BM, Star, 'A Matter of Life and Death: Posthumous Conception' [2004] (64)(3) *Louisiana Law Review*; 613.
[14]N, Maddox, 'Inheritance and the Posthumously Conceived Child' [2017] (81) *Conveyancing and Property Lawyer;* 405.
[15] Bahadur, n. 1.
[16] Maddox, n. 14.

however, there is a common law presumption in favour of paternity in circumstances where the child has been born within the normal period of gestation measured from the date of the parent's death usually 300 days.[17]

A second problem of posthumous conception, according to Maddox, is that 'The resulting child will be disadvantaged by their inevitable family structure because the child will be born into a single parent household and they will not have the opportunity of being raised by both genetic parents.'[18] Thus, in *MAW v. Western Sydney Area Health Service,* O'Keefe J. put forward concerns regarding the family structure of posthumously born children stating that: 'Such a child would never have the prospect of knowing its father. Such a child would come to recognize that he or she was not sought to be procreated during the life of the father".[19]

In this regard, Landau is of the view that it is preferable for children to be raised by two parents rather than one parent,[20] and that 'The absence of a parental figure can negatively impact on the psychological wellbeing of the child because the absence of a genetic parent can result in the child having doubts regarding their origins and their position within society.'[21] This is why Pobjoy submits that 'The nature of the child's conception can lead to the child being socially ostracized by their peers.'[22] Thus, in *Re Gray*,[23] Chesterman J. stated: "The very nature of the conception may cause the child embarrassment or more serious emotional problems as it grows up. More significant, because the court can never know in what circumstances the child may be born and brought up, it is impossible to know what is in its best interests".[24]

A third problem of posthumous conception according to Maddox, is that 'The resulting child's identity will suffer due to the nature of its conception.'[25] Also, 'The child might consider themselves to be 'half orphaned' which can lead them to question their place within their family unit and/or society.'[26]

The fourth problem with posthumous conception according to Hanser, is that of 'The 'non-identity problem which is that our present choices and actions will affect the very existence, identity and

[17]*Ibid.*
[18]*Ibid.*
[19]MAW v. Western Sydney Area Health Service
[20]R, Landau, 'Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique' [2004] (19) (9) *Human Reproduction*; 1952.
[21]*Ibid.*
[22]J, Pobjoy, 'Medically Mediated Reproduction: Posthumous Conception and The Best Interests of the Child' [2007] (15) *Journal of Law and Medicine*; 450.
[23] In the Matter of Gray
[24]Supra.
[25]Maddox, n. 14.
[26]*Ibid.*

quality of life for future existing people.'[27] According to Boonin, 'The non-identity issue raises questions regarding the obligations that we owe to future people who, other than by our own actions, will otherwise not exist.'[28]

The sum total of the consequences of the preceding discussion has been captured by Hyder-Rahman as follows:

> Posthumous reproduction (PR) is radically challenging traditional notions of 'family': namely, the chronology, method, relational matrix, and narrative through which families are developed and extended. PR adds a further dimension to contemporary challenges in the field of assisted reproduction vis-à-vis what it is we mean by 'family' and 'family life'. For, it is no longer the case that the person(s) whose reproductive tissue created a child, and whose DNA is so intimately shared with the child, who is actively identified as the child's parent (in both a genetic and social sense), knows of or has had the opportunity to know of the child's existence in the physical world, let alone share that experience. It is the confluence of these factors that distinguishes PR from other areas of reproduction where a gamete provider is, for all intents and purposes, 'absent'. For instance, in anonymous donor conception or conventional conception where the father is unknown (e.g. an 'anonymous' one-night stand) the gamete providers consented to a course of activity that might result in the birth of a child – this is not necessarily so in PR where at least one gamete provider is deceased and did not necessarily give such consent.

This raises the question of the role of consent in posthumous conception.

4.0 Regulation of Posthumous Conception

The practice of posthumous conception is regulated in countries where such practice is permissible. However, the regulation varies from country to country including the extent to which consent is applied or not. The role of the European Court of Human Rights in this regard is of interest. For example, in *Petithory Lanzmann v. France*[29] the European Court of Human Rights ruled that a French court's refusal to allow a woman to export her deceased son's cryopreserved sperm to a fertility clinic in Israel in order to use it to conceive grandchildren (using a donor egg, and surrogate) was not incompatible with Article 8 (right to private and become a grandparent. Consequently, some European countries such as Germany, Sweden, Italy, France, Hungary,

[27]M, Hanser, 'Harming Future People' [1990] (19) (1) *Philosophy and Public Affairs*; 47.
[28] D, Boonin, 'How to Solve the Non-identity Problem' [2008] (22) (2) *Public Affairs Quarterly*; 129.

[29]Application No. 23038/19, judgment of 12 November 2019.

Slovenia and Norway have banned the practice of posthumous conception outright. According to Lewis, Malaysia and Taiwan governments have also banned the practice of posthumous conception in their countries.[30]The contrast is the case in the United Kingdom (UK), Netherlands and Greece where posthumous conception is legal under certain condition namely, the prior consent of the deceased.[31] According to Simana, 'Israel operates a particularly permissive framework, where consent for posthumous conception is presumed in certain circumstances.[32] According to Lewis,

> There is wide state by state variation in countries operating a federal system of governance, such as Australia, America and Canada – for example, some states regulate PR through the framework on assisted reproduction, others through the framework on organ donation, and the consent requirements vary accordingly.[33]

There are however some countries where the practice of posthumous conception is not regulated. According to Lanfang and Peng, 'China and India are examples of countries that are being forced to consider how to regulate PR in light of novel cases.'[34] The situation is the same in Nigeria.

4.1 Consent under Posthumous Conception

Consent, a legal expression of autonomy, which is fully informed and freely given by a person with capacity to do so is at the heart of good medical practice, and enshrined within many frameworks governing assisted reproduction, of which posthumous conception is one practice.[35]The preceding discussion discloses that there are associated problems with posthumous conception which implicate consent as a central theme. In this regard, this study is concerned with the importance of prior consent for posthumous conception practices, engaging particularly with the perspective of the deceased, and clarifying the functions of consent in the context of posthumous conception. This is because as at the time of treatment, the deceased cannot give his/her consent. Thus, questions such as do we need the prior consent of the deceased to use his/her gametes? What form must that consent take? Who can assert a claim to the deceased's gametes? Thus, the concern is whether the prior consent from the deceased is diminishing even when it is

[30]B, Lewis, *The Ethical and Legal Consequences of Posthumous Reproduction: Arrogance, Avarice and Anguish* (Routledge, 2016), p. 30.
[31]*Ibid.*
[32]S, Simana, 'Creating Life after Death: Should Posthumous Reproduction Be Legally Permissible without the Deceased's Prior Consent?' [2018] (5) *Journal of Law and the Biosciences*; 329.
[33] Lewis, n. 30.
[34]F, Lanfang, Z, Peng, 'The Law Itself is not Above Human Beings: Comments on China's First Case on Frozen Embryos' [2015] (29) *International Journal of Law, Policy and the Family*; 260.
[35]E, Jackson, *Medical Law: Text, Cases, and Materials* (Oxford University Press, 2013), Chapters 4 and 5; See also D, Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, (Cambridge University Press, 2008).

legally required or it is growing in favour of meeting the interests of surviving family and friends. In this regard, an analysis of case law jurisprudence of consent under posthumous conception is important.

5.0 Case Law Jurisprudence of Consent under Posthumous Conception

The practice of posthumous conception and case law supporting same is well developed in the United Kingdom. Thus, reliance will be placed on the case law jurisprudence of consent under posthumous conception in the United Kingdom. In the United Kingdom (UK) the Human Fertilisation and Embryology (HFE) Act 1990 provides for the legal requirement of explicit and effective written prior consent of the deceased for posthumous conception.[36]The case law surrounding posthumous conception is traceable to the case of *R v Human Fertilisation and Embryology Authority, ex parte Blood.*[37] The facts of the case were that Mr Blood fell suddenly and gravely ill after contracting meningitis; whilst he was comatose, Mrs Blood had her husband's sperm surgically harvested and stored with the intention of using it later to impregnate herself. Her plan was frustrated by the Human Fertilisation and Embryology Authority (HFEA) who, having learned of the facts, sought to give effect to the HFE Act 1990. The Court acknowledged that the sperm retrieval, storage and continued storage was unlawful. It also acknowledged that use of the sperm in the UK for fertility treatment would be unlawful. However, the court allowed Mrs Blood to export the sperm overseas for use. The failure to obtain prior consent for posthumous conception was of limited consequence.

It is important to note here the different consents required by Mrs. Blood for storage and use ought to have been determined via consent forms provided by the clinic and/or storage facility. The consent process for retrieval, in the absence of appropriate advance directives and given by Mr. Blood was comatose, ought to have been governed by principles of common law that adults lacking capacity must be treated in their best interests. As it was evident that Mr. Blood would not recover it is unclear how sperm retrieval was in his best interests: the retrieval served no therapeutic purpose, nor was it entirely certain that he would have wished to procreate under these circumstances. At the time Mr. Blood was regarded as exceptional; Lord Woolf MR stated that 'there should be, after this judgment has been given, no further cases where sperm is preserved without consent.'

[36] Human Fertilisation and Embryology Act 1990, Schedule 3. See also the HFEA Code of Practice, 9th Edition (London, January 2019) https://www.hfea.gov.uk/media/2793/2019-01-03-code-of-practice-9th-edition-v2.pdf at pp 44-45.

[37](1997) 2 WLR 806 (CA) 17

The case of *L v Human Fertilisation and Embryology Authority*[38] also concerned consent in posthumous conception. The case followed a similar fact-pattern and outcome to the Blood case in that despite the absence of prior written consent for the posthumous retrieval, storage and use of the deceased's sperm, the High Court, following Blood allowed his widow, L, to export the gametes abroad for use. The Court ruled that HFEA was allowed to permit the export of gametes overseas under Article 49 of the (EC Treaty) which allows EU citizens to seek medical treatment within the Union. As to the matter of export, Charles J. ruled that the HFEA had wide discretion to permit export – which they ultimately did. Again, the legal requirements for consent were ignored and evaded. However, Charles J also acknowledged the areas of conflict and uncertainty in the law: first, the law is not entirely clear on the legal requirements for posthumous gamete retrieval (as opposed to retrieval prior to the withdrawal of life support), and secondly, the conundrum faced by the HFEA and courts is that once the gametes have been retrieved, the lawfulness or not of the retrieval is, 'water under the bridge'.

A number of cases have arisen following L. For example, in R (on the application of M) v Human Fertilisation and Embryology Authority[39] the deceased's (referred to as AM) parents applied to the court for use of her cryopreserved eggs. This case concerned the degree of detail required in consent forms for posthumous storage and use. The trial judge, Ousley J, pointing to the lack of precision and clarity of the consents that AM had indicated found for the HFEA. He was overturned on appeal by the Court of Appeal who ruled for AM's parents. The appeal turned on whether AM had been provided with the appropriate information to give her consent. Crucially, the court, decided that she had, stating, 'there is nothing in law to prevent it [the HFEA] from making appropriate inferences from the evidence or on the basis of the inherent possibilities of the case.'

Recently, the case of Y v A Healthcare NHS Trust & Others[40] was heard. It was a matter that concerned the fulfilling legal formalities. Z's wife, Y, sought to retrieve his sperm (to be used in fertility treatment) prior to the removal of life support via the Mental Capacity Act (MCA) 2005. Accordingly, the judge issued an order pursuant to s.16 MCA 2005 directing that a suitable person should sign the relevant consent forms on Z's behalf for the retrieval, storage, and use of his sperm. As was the case for Mr. Blood, and H, it is not necessarily clear that undergoing the posthumous

[38] (2008) EWHC 2149 (Fam); https://www.casemine.com>judge Accessed 29/07/2023.
[39] (1997) All E.R. pp. 687-704; See also http://www.globalhealthrights.org.
Accessed on 28/07/2023.
[40] (2018) EWCOP 18; (2019) 1 FLR 679; See also http://paramounstlegalcosts.co.uk> Accessed 18/02/2024.

conception procedures was in Z's best interests, medically or otherwise. According to Hyder-Rahman,

> The consent requirements were lawfully undermined. Here the distinction between different types of death is important: prior to a declaration of death, a patient must be treated in his/her best interests, thus the decision to retrieve gametes must be made in within this framework of common law principles. After the declaration of death the person is no longer a 'patient' and the rules governing care of the body (corpse) are less clear.[41]

Thus, according to Hyder-Rahman, 'From Blood to Y, the British courts have disregarded the legal requirement of written and effective consent. This series of cases constitute a masterclass in backwards reasoning: faced with a sympathetic applicant the courts have sought to alleviate the situation for the grieving applicant before them rather than give effect to the law.'[42] According to Brazier, 'Lord Woolf sought to do justice to Diane Blood…(the) solution does damage to the operation of a just law for all.'[43] The trend in the UK replicates elsewhere. For example, the Australian state of Queensland requires written consent for a man's sperm to be harvested, stored, transported, or used. Yet, in 2016, in a landmark ruling, Ayla Cresswell won the right to retrieve and store her deceased boyfriend's sperm. Two years later in 2018, she made legal history again by winning the right to use the stored sperm in fertility treatment. Another woman, Leith Patteson, has also won the right to retrieve and store her deceased fiancé's sperm – she has not yet sought an order for use.

There are other instances in Australia where consent requirements have been loosened: a woman in South Australia was granted permission to use her late husband's sperm (harvested and cryo-preserved after a fatal road accident) in fertility treatment, despite the absence of his consent to do so. This case followed the New South Wales Supreme Court decision in the case of Edwards,[44] where Jocelyn Edwards was granted ownership of her late husband's sperm, enabling her to transport it out of jurisdiction for use in IVF treatment. The outcome of these cases demonstrates that legal consent requirements are increasingly disregarded in posthumous conception.

Away from the United Kingdom is the development in Israel which operates a pro-natalist and permissive regime for regulating the use of assisted reproductive technologies whereby,

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[41]Hyder-Rahman,n. 11.
[42]*Ibid.*
[43]M, Brazier, 'Hard Cases Make Bad Law?' [1997] (23) *Journal of Medical Ethics*; 341.
[44]RE H, AE (No 3) [2013] SASC 196 (16 December 2013)

posthumous conception is regulated via a model of 'presumed consent'. According to Landau, 'In 2003 formal regulation was enacted allowing for: (1) the retrieval of gametes from a dying/deceased man at the request of his spouse/partner, and (2) the use of the sperm, to be assessed by the court on a case-by-case basis and taking into account the deceased's dignity and presumed wishes.'[45] According to Landau, 'The policy assumption underlying the 2003 regime is that a man in a loving relationship would want his partner to carry his child, even after death, underscoring the importance of leaving a genetic legacy.' In sum, Hyder-Rahman raises a pertinent question, which is, whether the law should demand (prior) consent from the deceased to retrieve and use his/her gametes after death? [46] This writer is of the humble view that the legislation that would be enacted for the practice of posthumous conception in Nigeria should be the model in Israel.

6.0 Comparative Legal and Institutional Lessons for Nigeria

The extent of the practice of posthumous conception in Nigeria is not known. However, the practice elsewhere will soon lead to demands in Nigeria. Unfortunately, Nigeria is ill prepared for the practice of posthumous conception because it has not put in place the legal regime for regulating assisted reproductive technologies of which posthumous conception is a part of it. Equally so, Nigeria has not established institutional mechanisms to enforce relevant laws. However, experience elsewhere shows that there are intricacies that Nigeria will grapple with when eventually the practice of posthumous conception is introduced in the country. Thus, it is pertinent that the country initiates legislation and puts in place an institutional mechanism to regulate assisted reproductive technologies and the practice of posthumous conception. The promulgation of law and putting in place an institutional framework for regulating assisted reproductive technologies should be under the Ministry of Health.

7.0 Conclusion and Recommendations

This study has critically analysed consent under posthumous conception. It has been demonstrated that in some comparative jurisdictions, the practice of posthumous conception is developed, and it is growing along with legislations and active court systems. Problems associated with the practice were discussed. It was demonstrated that consent was been undermined in case law jurisprudence of courts of comparative jurisdictions. This portends problems for jurisdictions such as Nigeria where there is no legislation to regulate the practice of assisted reproductive technologies.

[45] Landau, n. 20.
[46] Hyder-Rahman, n. 11.

In the main, it is recommended that Nigeria should enact legislation and establish an institutional framework for assisted reproductive technologies, which are carried out in the country without any legislation regulating its practice now.

It is recommended, that the Nigerian legislation should allow for the permissive regime where posthumous conception will be regulated through 'presumed consent' as in Israel, and not holding to the argument that such 'presumed consent' might infringe the right of the deceased. The legislation should provide clearly that if a man explicitly rejects the concept of posthumous conception while he is alive, his decision should be respected as he was an autonomous individual when he made that decision.

Analysis of the Jurisdiction and Inherent Challenges of the Federal High Court in Nigeria

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Abstract

This work explored the role and jurisdiction of the Federal High Court of Nigeria, highlighting its significant influence within the nation's judiciary. It provided a comprehensive overview of the court's establishment under the Federal Revenue Act of 1973 and its evolution as defined by the Constitution of the Federal Republic of Nigeria 1999 Cap. C 28, Laws of the Federation, 2004. The jurisdictional scope of the court was examined, focusing on its exclusive rights to handle cases involving federal interests such as taxation, banking, customs, and excise, as well as intellectual property and maritime law. Through detailed analysis of landmark cases, the essay illustrated the court's approach to applying federal laws and its impact on setting legal precedents. Challenges such as jurisdictional overlaps, case backlogs, and the need for technological adaptation were discussed, with recommendations for addressing these issues to enhance judicial efficiency and effectiveness. The essay concluded by affirming the Federal High Court's pivotal role in maintaining the rule of law and advocating for reforms to strengthen its capacity to address contemporary legal challenges.

Keywords: Federal High Court of Nigeria; Judicial reform; Jurisdiction; Legal challenges; Legal precedents; Nigerian judiciary.

1.0 Introduction

The Federal High Court holds a pivotal position in Nigeria's judiciary, established to address specific matters at the federal level. Originating from the Federal Revenue Act of 1973,[1] and later enshrined in the 1979 Constitution of the Federal Republic of Nigeria,[2] this court was designed to handle cases that involve the federal government, its departments, and interests that span across state lines. Currently, the Court's jurisdiction, derived from, and detailed in Section 251 of the 1999 Constitution,[3] encompasses a wide range of matters including, but not limited to, taxation, banking,

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[1] Constitution of the Federal Republic of Nigeria, 1973 No.13 (repealed)
[2] Constitution of the Federal Republic of Nigeria 1979 (repealed)
[3] Constitution of the Federal Republic of Nigeria 1999 No 68, Laws of the Federation, 2004

customs and excise, aviation, and maritime issues. As a court of first instance for federal civil matters, the Federal High Court's decisions often set significant legal precedents influencing the broader legal framework within which both public and private entities operate. This essay will explore the Court's role in upholding its designated jurisdictions, focusing on how it balances this responsibility with the challenges posed by federal-state interactions and the complexities of modern governance. Through an examination of landmark cases and the court's evolving interpretation of its constitutional mandate, this analysis will highlight the Court's impact on Nigeria's legal landscape.

This exploration is timely and relevant, especially considering the ongoing discussions about judicial reforms and the effectiveness of legal institutions in Nigeria. The thesis posits that the Federal High Court not only plays a crucial role in interpreting federal laws but also significantly influences administrative and executive decisions across the nation.

2.0 Historical Background and Jurisdiction of the Federal High Court

The Federal High Court of Nigeria, originally called the Federal Revenue Court, established under the Federal Revenue Act of 1973, was initially conceived to address, and adjudicate matters, related to the federal government's revenue. However, by virtue of section 228 (1) and 230 (2) of the 1979 Constitution, it was renamed the Federal High Court. Its inception marked a significant shift towards centralising authority over federal legal issues, previously scattered across various regional and state courts. With the promulgation of the 1979 Constitution, the jurisdiction of the Federal High Court was expanded, clearly delineating its scope to encompass a broader array of cases directly affecting the federal government and its enterprises.

The 1979 Constitution of the Federal Republic of Nigeria was a landmark document, pivotal in redefining the structure of Nigeria's judiciary. Section 230 (1) of that Constitution[4] formally established the Federal High Court, placing it as the third-highest court in the judicial hierarchy, below the Supreme Court and the Court of Appeal but above state high courts. This placement underlines the court's significant role in the federal judicial system. The jurisdiction and operational dynamics of the Federal High Court are prescribed not only by the Constitution but

[4] Constitution of the Federal Republic of Nigeria 1979 (repealed)

also replicated by supplementary acts such as the Federal High Court Act, which provides detailed guidelines on the court's function and administration.[5]

Significantly, the court's appointment process for judges, including the Chief Judge, involves the President of Nigeria, who acts on recommendations from the National Judicial Council, subject to confirmation by the Senate. This process ensures that appointees are both legally qualified and vetted, maintaining a high standard of judicial oversight. Judges of the Federal High Court must be qualified legal practitioners in Nigeria for not less than ten years, which is a testament to the high level of expertise expected in the court.[6]

The evolution of the Federal High Court reflects Nigeria's broader political and legal transformations, adapting over time to meet the demands of a complex federal system. This historical backdrop sets the stage for understanding the court's pivotal role in shaping legal outcomes that affect the national economy, political landscape, and societal norms.[7]

The jurisdiction of the Federal High Court of Nigeria is extensively defined under Section 251 of the 1999 Constitution. This section grants the court exclusive jurisdiction over a wide range of issues, notably those directly impacting federal governance and its associated agencies. These areas include, but are not limited to, revenue of the Government of the Federation, taxation of companies and bodies subject to federal taxation, customs and excise duties, and banking matters involving banks and other financial institutions. Such jurisdiction ensures that all matters of national significance are centrally adjudicated, maintaining consistency in the application of federal laws across the nation.[8]

One of the crucial aspects of the Federal High Court's jurisdiction is its exclusive authority over cases involving the administration or the management and control of the Federal Government or any of its agencies. This exclusivity plays a significant role in legal matters where federal laws might conflict with state laws or where federal agencies are involved in litigation. For instance, in the realm of admiralty jurisdiction, the court handles all shipping and navigation matters on Nigeria's international waterways, as well as any legal issues pertaining to the country's federal

[5] Idiaru W., 'Overview of the jurisdiction of the Federal High Court in Nigeria' (2021) Resolution Law Firm. https://www.resolutionlawng.com/overview-of-the-jurisdiction-of-the-federal-high-court-in-nigeria/ accessed on 7th August, 2024
[6] Ibid 5
[7] Suberu R. 'The Supreme Court and Federalism in Nigeria' (2008) 46(3) The Journal of Modern African Studies, 451-485 https://www.jstor.org/stable/30224892 accessed on 7th August, 2024
[8] Constitution of the Federal Republic of Nigeria 1999 No 28, Laws of the Federation, 2004

ports.[9] Bankruptcy, aviation safety, and issues concerning arms, ammunition, and explosives are also under the purview of the Federal High Court. This broad jurisdiction is crucial for maintaining national security, economic stability, and public safety. Furthermore, the court has jurisdiction over intellectual property rights, which includes copyright, patents, trademarks, industrial designs, and passing-off—areas increasingly significant in Nigeria's growing digital and global market presence.[10] Additionally, the Federal High Court plays a pivotal role in issues of citizenship, naturalisation, and aliens; these matters are critical in the context of Nigeria's complex demographic and migratory patterns. The court's jurisdiction extends to the deportation of non-citizens and extradition, reflecting its integral role in upholding Nigeria's immigration laws.

An illustrative case highlighting the Federal High Court's jurisdictional reach is the National Commission for Museums and Monuments v. Gayus Chidawa.[11] This case brought into focus the court's inability to hear cases related to land not expressly related to federal interests, as per the provisions of Section 251 of the Constitution. The court underscored its limitation by deferring land-related matters to state high courts unless the land in question involved federal government activities.

In the case of Isaac Obiuweubi v. Central Bank of Nigeria,[12] which involved a claim against the Central Bank of Nigeria regarding employment termination, the Federal High Court ruled that it had jurisdiction over the matter as it involved the administration and management of a federal government agency, thus further clarifying the court's role in adjudicating disputes involving federal entities, particularly in employment and administrative matters.

Contractual disputes involving federal government agencies also fall within the jurisdiction of the Federal High court, as was seen in the case of Honourable Minister for Works v. Tomas (Nig) Ltd,[13] where the Honourable Minister for Works sued Tomas (Nig.) Ltd over a breach of contract related to federal infrastructure projects. The Federal High Court upheld its jurisdiction, emphasising its authority in cases where federal interests are directly involved.

[9] Idiaru W., 'Overview of the jurisdiction of the Federal High Court in Nigeria' (2021) Resolution Law Firm. https://www.resolutionlawng.com/overview-of-the-jurisdiction-of-the-federal-high-court-in-nigeria/ accessed 7th August, 2024
[10] Constitution of the Federal Republic of Nigeria 1999 No 28, Laws of the Federation, 2004
[11] Suit No. FHC/J/CS/2011 (Unreported)
[12] (2011) 7 NWLR 1247, 465 (SC)
[13] (2002) 2 NWLR 752, 40 (CA)

The Federal High Court's extensive jurisdiction not only underscores its importance within the Nigerian judicial system but also exemplifies the complexities of legal jurisdiction in a federal structure where both state and federal laws intersect.

3.0 Clarification on Entities Bearing 'Federal' in Their Name

It is essential to clarify that the mere fact that an entity bears 'federal' in its name does not automatically mean it is an agency of the Federal Government or established as an agency of the Federal Government. This distinction was notably highlighted in the case of Federal Mortgage Bank of Nigeria v. Lagos State Government,[14] where the Court of Appeal ruled that the Federal Mortgage Bank of Nigeria, despite its name, was not an agency of the Federal Government. The Court determined that the Bank was a business establishment with functions not connected to the affairs or running of the Federal Government. This case exemplifies the necessity of looking beyond the nomenclature to the statutory functions and establishment of the entity to determine its status as a federal agency.

4.0 National Industrial Court of Nigeria (NICN) and the Third Alteration Act 2010

The Third Alteration Act of 2010 significantly expanded the jurisdiction of the National Industrial Court of Nigeria (NICN), particularly in labour disputes, employment matters, and industrial relations. Prior to this Act, the Federal High Court (FHC) handled many employment-related matters, especially those involving federal government agencies. However, the expanded jurisdiction of the NICN under Section 254C of the 1999 Constitution, as amended by the Third Alteration Act, has created overlaps in judicial authority, leading to conflicts between the NICN and the FHC.

A landmark case that addressed this conflict is *Skye Bank Plc v Iwu* [2017] 16 NWLR (Pt. 1590) 24 SC, where the Supreme Court ruled that the NICN has exclusive jurisdiction over all labour-related matters, including disputes involving workers in federal agencies. This decision reaffirmed the NICN's role as the court of first instance in employment disputes, marginalising the jurisdiction of the FHC in such matters. It also underscored the importance of clear jurisdictional boundaries to avoid unnecessary conflicts between the two courts. The NICN’s role in labour disputes has become increasingly important, with the court handling significant cases involving collective bargaining, trade union disputes, and employee rights. This shift represents a growing recognition of the need for specialised courts to handle specific areas of law efficiently.

[14] (2010) 5 NWLR 1188, 570

5.0 Judicial Precedent and the Evolving Role of the Federal High Court

Judicial precedent has long played a crucial role in shaping the interpretation of the Federal High Court's jurisdiction. Over the years, the court has made significant rulings that have not only resolved disputes but also influenced the development of legal doctrines in Nigeria. However, as federal and state interests increasingly intersect, the boundaries of the FHC's jurisdiction are often tested, requiring courts to interpret laws with greater nuance. A key example is the case of *Benjamin Onwughamba Ezenwa Vs Okpara Oko & 2 Ors* (2008) LCN/3633(SC), in which the Supreme Court held that while the FHC has jurisdiction over taxation matters involving the Federal Government, it must defer to state courts when no federal interest is at stake. This case illustrated the importance of judicial restraint and clarity in determining the scope of the FHC's jurisdiction, especially where federal and state laws intersect. The evolving nature of jurisprudence in Nigeria demands that the FHC continues to adapt to modern legal challenges. Its rulings set important precedents that guide the development of legal principles, not only for future cases but also for administrative and executive actions.

5.1 Case Studies Analysis

The Federal High Court of Nigeria, through its decisions, often sets legal precedents that have far-reaching implications on the interpretation and application of federal laws. To illustrate the court's jurisdictional reach and its impact, the study shall delve into a few significant case studies.

1. **National Commission for Museums and Monuments v. Gayus Chidawa**[15]

In this case, the Federal High Court faced a jurisdictional challenge when it was brought to determine a matter involving land. The plaintiff, National Commission for Museums and Monuments, sought injunctions and damages against the defendant for trespass and damage to land. The court, however, found that it did not have jurisdiction to hear the matter as it involved land not directly linked to federal activities or interests, thereby underscoring the limitations set forth under Section 251 of the 1999 Constitution, which does not confer jurisdiction over purely land-related disputes unless tied to federal operations. The judgment also referred to precedents such as Ikenne Local Government v. WAPC PLC[16] and Oladipo v. N.C.S.B.,[17] emphasizing that Federal High Court jurisdiction does not extend to land matters unless they involve federal government actions. This case illustrates the nuanced interpretation of Section 251, reinforcing

[15] Suit No. FHC/J/CS/2011 (Unreported)
[16] (2011) 12 NWLR 1261, 251 para A-C
[17] (2009) 12 NWLR 1156, 585 paras A-E

that the inclusion of a federal body as a party does not automatically confer jurisdiction unless the matter falls within the specific categories enumerated in the Constitution.

2. **NEPA v. Edegbero and 5 Ors**[18]

This case provides an example of the Federal High Court's jurisdiction in matters involving federal government agencies. The National Electric Power Authority (NEPA) was sued over an administrative decision related to its operations. The court held that it had exclusive jurisdiction given that the dispute arose from the administration and management of a federal government agency, as outlined in Section 230 (1) (q), (r), and (s) of the 1979 Constitution and reiterated by Section 251 of the 1999 Constitution. This ruling confirms the court's broad authority in matters directly connected to federal administrative actions.

3. **Central Bank of Nigeria v. SAP MG. Limited**[19]

In disputes involving banking and financial institutions, the Federal High Court again asserts its jurisdiction. The case between the Central Bank of Nigeria and SAP MG. Limited involved issues of banking regulations and fiscal measures, falling squarely within the jurisdiction conferred by Section 251(d) of the Constitution. The court's decision in this case influenced subsequent interpretations of federal jurisdiction over banking and financial disputes, providing clarity on the role of federal legislation in the sector (*Central Bank of Nigeria v. SAP MG. Limited*). Also, in the case of *Central Bank of Nigeria v. Rahamaniyya Global Resources*,[20] the decision of the Supreme Court reaffirmed the jurisdiction of the Federal High Court over disputes involving banking and financial regulations as conferred by Section 251 of the 1999 Constitution. These cases collectively highlight the critical role of the Federal High Court in interpreting and applying federal laws and regulations. The decisions made by the court in these scenarios not only resolve individual disputes but also contribute to the broader legal framework, influencing public policy and governance at the federal level.

6.0 Challenges and Critiques

While the Federal High Court of Nigeria plays a crucial role in adjudicating matters of national significance, it faces several challenges and critiques that can impact its effectiveness and public

[18] (2002) 18 NWLR 798,79 at 84
[19] (2005) 3 NWLR 911, 152
[20] (2020) 8 NWLR 1726, 314

perception. This section explores some of the principal issues encountered by the court and the critiques levied by legal scholars and practitioners.

1. Jurisdictional Overlaps and Conflicts

One of the most significant challenges is the jurisdictional overlap between the Federal High Court and State High Courts. This issue often leads to conflicts and confusion about which court is competent to hear particular cases. For example, as seen in the case of *National Commission for Museums and Monuments v. Gayus Chidawa*, the Federal High Court cannot adjudicate land matters unless they are directly connected to federal government activities, leading to jurisdictional disputes that can delay justice.

Critiques argue that these overlaps can undermine the efficiency of the judicial process, as parties may engage in "forum shopping" to find a court more likely to favour their position. This situation necessitates clear legislative definitions and potentially further constitutional amendments to delineate more clearly the respective jurisdictions of federal and state courts.

2. Conflict of Jurisdiction Between the Investment and Securities Tribunal (IST) and the Federal High Court

The Nigerian securities market faces significant challenges due to the jurisdictional conflict between the Investment and Securities Tribunal (IST) and the Federal High Court. This conflict arises because both institutions have been granted adjudicatory powers over securities disputes, leading to confusion and inconsistent decisions.

The Investment and Securities Tribunal (IST) was established by the Investment and Securities Act (ISA) 2007 to handle disputes related to securities. Simultaneously, the Federal High Court derives its authority over securities disputes from the Federal High Court Act 2004 and the 1999 Constitution, which grants it broad adjudicatory powers over federal matters, including securities disputes. This overlap has created legal ambiguities regarding which institution should handle securities disputes.[21]

The Investment and Securities Tribunal (IST) and the Federal High Court both claim exclusive jurisdiction over securities disputes, with Section 284 of the ISA granting this to the IST and Sections 6(5), 251, 252, and 272 of the 1999 Constitution doing the same for the Federal High Court, leading to legal ambiguity and confusion regarding the appropriate forum. This conflict

[21] *Mufutau Ajayi v. Securities and Exchange Commission* (2023) LPELR 59729 (SC)

encourages judicial forum shopping, where litigants select the court, they believe will be more favourable, undermining judicial integrity and causing inconsistencies in rulings. Furthermore, this ambiguity has led to conflicting decisions from superior courts, complicating the legal landscape for securities disputes, diminishing investor confidence, and affecting market stability. The resultant uncertainty about the appropriate judicial forum makes investors wary of engaging in the Nigerian securities market, while the conflicting jurisdictions and legal uncertainties destabilise the securities market and the broader economy. A clear and consistent legal framework is essential to maintain market stability and foster economic growth.[22]

3. Jurisdictional Conflicts Between the FHC and the NICN

The conflict between the Federal High Court and the National Industrial Court of Nigeria (NICN) over jurisdiction, particularly in employment-related matters, remains one of the most significant challenges facing Nigeria's judicial system. Since the enactment of the Third Alteration Act in 2010, both courts have claimed authority over cases involving labour disputes, leading to forum shopping and delays in justice delivery.

A clear example of this jurisdictional conflict can be seen in the case of *Skye Bank Plc v Iwu*, where the Supreme Court had to intervene to delineate the respective jurisdictions of the two courts. To resolve such conflicts, the National Assembly could introduce a judicial resolution mechanism that allows for the referral of cases between courts without delay. This would prevent conflicting judgments and ensure that justice is delivered more efficiently.

Moreover, further amendments to the Constitution and the Federal High Court Act could provide more detailed guidance on how to manage jurisdictional conflicts. A well-defined legal framework will enhance the smooth functioning of both the FHC and the NICN, promoting judicial cooperation and reducing procedural delays.

4. Interpretation of Section 251 of the Constitution

The interpretation of Section 251, which outlines the jurisdiction of the Federal High Court, has been a subject of intense debate and criticism. Critics point out that the extensive list of matters under this section can sometimes lead to an overly broad interpretation, potentially encroaching on the jurisdictions traditionally reserved for state courts. Legal scholars suggest that a more

[22] 'Critiquing jurisdiction disputes in Nigerian securities market' (2010) *UniLag Law Review* https://unilaglawreview.org/2019/08/26/critiquing-jurisdiction-disputes-in-nigerian-securities-market/ accessed on 8th August, 2024

nuanced interpretation, guided by precedents and judicial discretion, is necessary to prevent the federal judiciary from overreaching its constitutional mandate.[23]

5. Efficiency and Case Backlogs

Like many judicial systems globally, the Federal High Court often struggles with case backlogs and efficiency issues. The broad jurisdiction of the court, combined with the high volume of cases involving federal entities and laws, can lead to significant delays in case resolution. This inefficiency can deter investment and undermine public trust in the judicial system as a timely arbiter of disputes.

6. Adaptation to New Challenges

The Federal High Court also faces challenges in adapting to new legal issues, such as those arising from digital transactions, cybercrimes, and complex international trade agreements. The rapid evolution of technology and global commerce requires the court to continually update its expertise and approach to remain effective and relevant.

7. Critiques from Legal Practitioners and Academics

Legal practitioners and academics have critiqued the court for what some perceive as an inconsistency in rulings, particularly in cases where federal interests are heavily involved. There is a call for more transparency and consistency in the court's decisions to build a more robust legal precedent system and enhance the court's credibility.[24]

8. Technological Adaptation and the Federal High Court's Challenges

In today's digital age, the Federal High Court faces mounting pressure to adapt to the demands of emerging technology and new legal issues, such as cybercrime, digital transactions, and the use of forensic evidence. The rapid pace of technological advancements has exposed gaps in the court's capacity to efficiently manage cases involving complex digital crimes, necessitating a review of its technical infrastructure and expertise.

In the landmark case of *Attorney-General of Lagos State v. Attorney-General of the Federation & National Assembly (Suit No. SC/CV/260/2020)*, the Supreme Court of Nigeria affirmed that virtual

[23] Idiaru W., 'Overview of the jurisdiction of the Federal High Court in Nigeria' (2021) Resolution Law Firm. https://www.resolutionlawng.com/overview-of-the-jurisdiction-of-the-federal-high-court-in-nigeria/ accessed on 8th August 2024

[24] Azubuike S. 'Jurisdiction of the Federal High Court and State High Courts: Supreme Court recommends constitutional amendment' (2020) Stephen Legal. https://stephenlegal.ng/jurisdiction-of-the-federal-high-court-and-state-high-courts-supreme-court-recommends-constitutional-amendment/ accessed on 8th August 2024

court sittings are constitutional. This case involved a dispute over the constitutionality of virtual court sittings. The Supreme Court ruled that virtual sittings are not unconstitutional, thereby endorsing the use of technology in judicial proceedings. However, the case also highlighted challenges such as the lack of requisite knowledge among judicial officers to handle technological evidence, leading to delays and inconsistencies in judgments.[25] This lack of technological adaptation not only impedes the court's efficiency but also undermines public confidence in its ability to resolve contemporary legal challenges.

Addressing this issue requires a concerted effort to upgrade the court's digital infrastructure, including the adoption of electronic filing systems, virtual courtrooms, and continuous training for judges and court personnel in digital forensics, cyber law, and intellectual property rights.

7.0 Impact and Significance

The Federal High Court of Nigeria, as a pivotal entity within the nation's judiciary, wields significant influence over the federal legal system. Its decisions impact a wide array of sectors, including economic, social, and political domains. This section examines the broader implications of the court's role and its lasting influence on Nigeria's governance and legal frameworks.

1. Influencing National Legal Precedents

The Federal High Court is instrumental in setting legal precedents that influence the entire country. Through its interpretations of the Constitution and federal laws, the court contributes significantly to the evolving legal landscape of Nigeria. For example, its rulings on matters related to intellectual property, federal taxation, and maritime law not only resolve disputes but also shape the business environment and economic policies.[26]

2. Enforcing Federal Laws

By adjudicating cases that involve federal legislation and entities, the Federal High Court ensures that federal laws are uniformly applied across Nigeria's states, thereby maintaining a cohesive legal system. This role is particularly crucial in a country with diverse legal and cultural

[25] Kazeem A. (2020) 'Information technology and justice delivery in Nigeria' (2020) https://independent.academia.edu/AdenijiKazeem accessed on 8th August 2024

[26] Suit No. FHC/J/CS/2011 (Unreported)

backgrounds, where federal laws might intersect or even conflict with local customs and regulations.

3. Strengthening Federal Governance

The court's jurisdiction over matters involving federal agencies and their administration plays a critical role in the checks and balances system that underpins democratic governance. By reviewing administrative actions and decisions of federal agencies, the Federal High Court acts as a guardian of legality and is pivotal in holding these entities accountable. This function is crucial for upholding transparency and accountability in government operations.

4. Promoting Economic Stability and Growth

The Federal High Court also contributes to Nigeria's economic stability by providing a legal framework for resolving disputes in major economic sectors such as banking, oil and gas, and aviation. The certainty and predictability offered by its judgements are essential for attracting domestic and international investments, fostering an environment conducive to economic growth.

5. Addressing Contemporary Challenges

In an era marked by rapid technological advancements and globalization, the Federal High Court has adapted to address contemporary challenges such as cybercrime, international trade disputes, and issues arising from digital transactions. This adaptability not only enhances its relevance but also ensures that Nigeria's legal system remains robust in the face of global changes.

8.0 Recommendations

The Paper recommends the following.

- Clarification of Jurisdictional Boundaries

Legislative action is needed to clarify the jurisdictional boundaries between the Federal High Court and State High Courts. This would reduce conflicts and confusion about which court is competent to hear specific cases, thereby streamlining legal processes and reducing the incidence of "forum shopping."

- Amendments

The National Assembly should further amend the ISA to clearly define the jurisdictional boundaries between the IST and the Federal High Court, specifying that the IST handles initial disputes with appeals directed to the Federal High Court or vice versa. Legal reforms should

harmonise their jurisdictions by delineating specific types of cases for each institution, reducing overlap and conflict.[27] Ensuring the IST's independence from the Securities and Exchange Commission (SEC) is crucial, which could be achieved by placing it under the National Judicial Council's supervision, rather than the executive branch.

- Judicial Reform for Enhanced Efficiency

Implementing case management systems and digitalisation of court processes could significantly reduce the backlog of cases and improve the overall efficiency of the court. Modern technology such as online filing systems and virtual court sessions should be embraced to speed up case handling and resolution.[28]

- Continuous Legal Education for Judges

Judges and judicial staff should receive continuous legal education, particularly in areas of emerging technology and international law. This ongoing training will help the judiciary stay abreast of global and domestic changes that impact legal proceedings and decision-making.

- Strengthening Judicial Independence

Policies that further insulate the court from political interference should be reinforced. Ensuring the independence of the judiciary is paramount for maintaining public trust and the credibility of legal processes.[29] This can be achieved through reforms that safeguard the appointment and tenure of judges.[30]

- Expansion of Specialized Divisions

The Federal High Court could benefit from the establishment of specialised divisions focusing on areas like intellectual property, cyber law, and environmental law. Specialized divisions can offer more expert handling of complex cases, which requires specific technical knowledge.

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[27] Mufutau Ajayi V. Securities and Exchange Commission (2023) 59729 LPELR (SC)
[28] Kramer X.E. 'Digitising Access to Justice: The Next Steps in the Digitalisation of Judicial Cooperation in Europe' (2022) 56 Revista General de Derecho Europeo, 1-9 https://doi.org/10.2139/ssrn.4034962 accessed on 8th August, 2024
[29] Macdonald R. and Kong H. 'Judicial Independence as a Constitutional Virtue', in Michel Rosenfeld, and András Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (online edn, Oxford Academic (2012), https://doi.org/10.1093/oxfordhb/9780199578610.013.0041 accessed on 9th August, 2024
[30] Stacey R. and Choudhry S. 'International Standards for the Independence of the Judiciary' in Meyer-Resende M., Maib-Chatré E., Weichselbaum G. and Foudhaili M. (eds), Center for Constitutional Transitions at NYU Law and Democracy Reporting International http://www.democracy-reporting.org/files/essential_elements__of_democracy_2.pdf accessed on 9th August, 2024

- Public Sensitization and Legal Literacy Programs

Enhancing public understanding of the court's functions and judicial processes through sensitization programs can demystify legal proceedings and foster greater public trust in the judiciary. Legal literacy initiatives should be aimed at both the general populace and specific sectors prone to litigation.

- Framework for Handling Contemporary Challenges

Develop a robust framework for addressing contemporary issues such as digital crimes, data privacy, and international trade disputes. This includes not only judicial processes but also collaboration with other branches of government and international bodies to create comprehensive policies.

- Regular Review and Assessment

Regular reviews of the Federal High Court's performance and the impact of its decisions on national law and policy should be instituted. This assessment can help identify areas for improvement and guide the development of policies that support effective judicial functions.

- Judicial Reform and Modernisation

To address the inherent challenges faced by the Federal High Court, several reforms are recommended. First, the legislature must clarify the jurisdictional boundaries between the FHC and the NICN, particularly in employment and labour disputes. This can be achieved through amendments to the Federal High Court Act and the Constitution, ensuring that each court has clearly defined roles to avoid conflicts, such as those highlighted in *Skye Bank Plc v Iwu*.

Second, there is a pressing need for the FHC to adopt modern technological tools. The digitisation of court processes, such as the introduction of electronic case management systems and virtual hearings, will help alleviate the burden of case backlogs. Moreover, continuous professional development for judges, particularly in areas like cyber law and data privacy, is essential for keeping the judiciary abreast of emerging trends.

Lastly, the court should establish specialised divisions focusing on intellectual property law, environmental law, and digital crimes. These divisions would allow judges to develop expertise in complex legal areas, ensuring more efficient and consistent rulings.

9.0 Conclusion

Throughout this paper, the multifaceted role and extensive jurisdiction of the Federal High Court of Nigeria have been explored, highlighting its pivotal position within the national judiciary system. From its historical evolution to its current jurisdictional scope, the Federal High Court plays a crucial role in interpreting federal laws and ensuring their consistent application across Nigeria's diverse regions.

The paper examined various case studies that illustrate the court's approach to different legal matters, from administrative disputes involving federal agencies to complex commercial litigations. These cases not only showcase the court's legal reasoning but also highlight the significant impact of its rulings on the broader legal and regulatory environment.

The challenges faced by the Federal High Court, such as jurisdictional overlaps, efficiency issues, and adapting to new legal challenges, underscore the necessity for continuous reform and adaptation. The recommendations proposed aim to address these challenges by clarifying jurisdictional boundaries, enhancing judicial efficiency through technological integration, and ensuring continuous education for judicial officers. These measures are critical for maintaining the integrity and effectiveness of the court in a rapidly changing global landscape.

In conclusion, the Federal High Court remains a cornerstone of Nigeria's legal framework, integral to upholding the rule of law and fostering a stable and conducive environment for governance and development. The implementation of the suggested recommendations will not only improve the court's functionality but also strengthen public trust and confidence in the judicial system. As Nigeria continues to evolve, the role of the Federal High Court will undoubtedly become even more significant, necessitating ongoing assessment and responsive adjustments to meet the demands of justice and equity.

Admissibility and Importance of Fingerprint Evidence as A Source of Electronic Evidence.

Elijah Oluwakorede Adeyeye*

Abstract

It is a generally well-known principle of law that relevancy is the backbone of admissibility. Basically, whenever evidence is to be admitted in the court, it must be relevant and current. For evidence to be relevant, it must have some reasonable tendency to help prove or disprove some fact. The Evidence Act, 2011 by S.84 provides for the admissibility of documents generated from electronic sources such as computers and enumerates how such evidence is to be tendered. The impact of technology and technological advancements on our world today cannot be overestimated. By and large, events all over the world are shaped by the radical advancement of technology. The Nigerian laws have also evolved with the ever-changing dynamics of technology which is the permission of the admissibility of evidence generated from electronic sources. Despite its usefulness in criminal investigation, fingerprint analysis has been criticized for its likelihood to, sometimes, occasion avoidable miscarriages of justice. Fingerprint as one of the various types of evidence has it root meaning from biometric verification which is any means by which an individual or corporate entity can be uniquely identified by evaluating one or more distinguishing biological traits. The aim of this work is to explain the importance, impact and effect which fingerprint inscription has on the computerised generation. The doctrinal method is adopted in this research. This work shall use primary and secondary sources; these are Acts, Laws and by-laws for primary sources, and textbooks, journals, and conference proceedings as secondary sources. This paper discusses about the general introduction, the general operational framework, the concept of electronic evidence, fingerprint as a means of electronic signature and lastly the conclusion, recommendation, and contribution to knowledge.

Keynotes: Admissibility, Importance of fingerprint evidence, Electronic Evidence.

1.0 **Introduction**

Evidence is very important in adjudication, since it is used to prove or disprove what a man is and what he is not to the rest of humanity respectively. The term ‘evidence’ has numerous

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interpretations, depending on the circumstances or context. Evidence is said to be a relative concept which does not have a unified definition, but despite its relativeness, some legal dictionaries, legal journals, legislations, case law/ judicial precedent, professors of law have tried to give a suitable definition. According to Phipson, the word 'evidence' has two main meanings. In the first sense, it means the testimony, whether oral, documentary, or real, which may be legally received to prove or disprove some fact in dispute.[1] In the second sense, according to the learned author, the word 'evidence' means "the content of that testimony.'[2]

According to Cockle, the term 'evidence' as used in law, which is also called 'judicial evidence,' has the same meaning as is commonly used, to wit: the means by which facts are made evident or established to the satisfaction of persons enquiring into them, granted that such facts are credible and sufficient to satisfy or convince prudent minds, however, that there is a slight distinction between evidence in judicial proceedings and evidence in common parlance.[3] That facts which may not satisfy judicial minds.[4]

According to Michael Hirst, the law of evidence encompasses rather broader functions. It includes rules regulating the means and by which facts may be proved to the satisfaction methods of the court; it allocates burdens of proof as between the parties, and it prescribes the standard of proof which a court must require before it can make a finding on a given issues.[5] The law of evidence also included within its broader compass rules prescribing the relative functions of judge and jury in respect of the receipt and evaluation of evidence.[6] According to Professor Cross, Evidence is "the testimony, hearsay, documents, things and facts in issue in a particular case."[7] The Black's Law Dictionary defines evidence as "everything that tends to prove or deny the existence of an alleged fact, including testimony, papers, and tangible things".[8] The testimony, whether oral, documentary, or real, produced before a court or tribunal to some facts in dispute in defined by case law authorities as to how the court is informed about the issues of facts as established by the pleadings.[9] Thus, relevancy determines whether a particular piece of evidence be it documentary,

[1] S L Phipson 'On Evidence', (15thedn, Sweet & Maxwell Ltd, UK 1999), 2.
[2] ibid.
[3] E Cockle 'on Evidence', (3rdedn, Sweet & Maxwell, 1915), 1.
[4] C D Fields'Law of Evidence', (Vol. 1, Law Publishers, Allhabad 2100 1981), 207.
[5]J A Andrews, M Hirst 'on Criminal Evidence', (4thedn, Jordans Publisher, 2001 1.
[6] ibid.
[7] R. Cross 'on Evidence' (9thedn, Butter worth 1999), 1.
[8] Black's Law Dictionary 7thedn, 76
[9] See Fed. Milt Governor v Sani (No2) (1989) 4 NWLR (Pt. 117) 624, Lawal v Union Bank of Nigeria Plc (1995) 2 NWLR(Pt378)407. <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://core.ac.uk/download/pdf/334983759.pdf> accessed 10th June 2024.

hear say, oral, real, electronic evidence will be admissible in court. Admissibility is the concept in Law of Evidence that determines whether evidence can be received in court to prove or disprove a fact.[10] Prior to the enactment of the Evidence Act, 2011, Nigeria courts contended, strenuously, with how best to treat electronically generated documents. This was essentially because the old Evidence Act, now repealed, did not have clear provisions for their admissibility. Consequently, the ways to get about tendering and admitting such evidence became contentions and controversial in the face of a grossly inadequate and outdated legislation that the repealed Evidence Act had become.[11]

Electronically or computer-generated evidence has been variously defined. Stephen Mason proffered an all-embracing definition of electronic evidence as 'Data (comprising the output of analogue devices or data in digital format) that is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system, that has the potential to make the factual account or either party more probable or less probable than it would be without the evidence'.[12] Using the alternative description of 'digital evidence', another writer put it as information of probative value that is stored or transmitted in binary forms.[13]

Babalola in his book 'Law and Practice of Evidence in Nigeria' stated that a bill on information technology as well as the Evidence Bill 1998 which are still both before the National Assembly have hardly been attended to.[14] On the other hand, some countries such as United Kingdom and the United State of America have enacted statutes reforming their laws, particularly the law of Evidence to take benefit of the advances in information, technology.[15] It must be noted however that reform of the law of Evidence has been slow.[16] Osinbajo believes amongst other things that computer printouts are not original. He also dispute with some English decisions even based on statutory provisions that computer generated evidence is "real evidence".[17] The learned author also

[10] Oxford reference. Retrieved from: <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095352108> accessed 19th March, 2023.
[11] Note that the Repealed Evidence Act was an offshoot of the Evidence Act, 1943.
[12] P A Akhihiero, 'Admissibility of Electronic Evidence in Criminal Trials: How practicable?' (Being paper delivered at a General Meeting of the Magistrates Association of Nigeria, Edo state branch on 23rd of July, 2013).< https://www.collegesidekick.com/study-docs/5020648> accessed 10th June, 2024.
[13] V Dubey., 'Admissibility of Electronic Evidence: An Indian Perspective', (2017) 4(2) Forensic Res Criminal, Int. J <http://medcaveonline.com/FRCIJ/FRCIJ-04-00109.PDF>. accessed 19th March, 2023.
[14] A Babalola, 'Law and Practice Evidence in Nigeria' Ibadan, Nigeria: Sibon Books Limited, 2001.< https://lawcat.berkeley.edu/record/284002?ln=en> accessed 10th June, 2024.
[15] ibid.
[16] ibid.
[17] Y. Osinbajo 'Admissibility of Computer-Generated Evidence under Nigeria Law'. (1990) jus, vol. 1 no 1, p. 260< https://www.academia.edu/4186714/i_ADMISSIBILITY_OF_ELECTRONICALLY_GENERATED_EVIDENCE_IN_NIGERIADR_ABIODUN_ODUSOTE_DATE_SIGNATURE_PROJECT_SUPERVISOR_PROF_TAIWO_OSIPITAN_DATE_SIGNATURETABLE_OF_CONTENTS> accessed 10th June 2024.

argues that those computer printouts do not qualify as documentary evidence under section 91 (formerly section 90) of the Evidence Act.[18] He concludes that unless the Evidence Act is amended, it will be difficult for courts in Nigeria to admit computer and electronically generated evidence in Nigeria.[19] Amupitan in his article "Admissibility of Electronically Generated Evidence" stated that the Nigeria courts and the world should at least give liberal interpretation to the admissibility of electronic evidence if the law is to be relevant and useful at this computer age of information technology in order to enhance and strengthen judicial activism.[20] Also, Fidelis Nwadialo seeks to explain why he had decided not to treat computer generated evidence.[21] He says he deliberately did this because there is no Nigeria law yet on the subject to have it included in a book on Nigeria law of Evidence, firmly submitting that any pronouncement on it will either amount to a suggestion or an opinion more suited for more journals as opposed to formal textbooks on law of Evidence.[22] Yet, while commenting on the "Sources of Nigeria Law of Evidence," the learned author is of the view, having regard to the then section 5 (a) of the Evidence Act[23] and decision of the West African Court of Appeal, WACA[24] and the Federal Supreme Court[25] that "any Evidence which would have been admissible under the common law had the Act not been passed, will still be admissible". Ajileye says, prior to the enactment of the Evidence Act 2011, there was no precise clarification as to the status of electronic evidence owing to the diverse and discordant interpretations given by the courts on the subject. As such, it appears the enactment of the Evidence Act 2011 has attempted to correct some of the difficulties that the admissibility of electronically generated evidence previously encountered in Nigerian Courts.[26]

Although these writers have voiced the opinion on electronically generated evidence, they have not gone in depth on the topic. Admissibility of evidence is the eligibility of particular pieces of evidence for inception as part of the evidence in a case. Admissibility means the character or quality to be accepted and allowed to be presented or introduced as evidence in court. To be

[18] ibid at pages 253 – 255.
[19] ibid.
[20] J Amupitan lecture notes on Law of Evidence. A University of Jos Lecturer
[21] F Nwadialo, 'Modern Nigeria of Evidence' (2nd edn University of Lagos Press, Akoka, Lagos 1999).<https://search.worldcat.org/title/Modern-Nigerian-law-of-Evidence/oclc/1045482240> accessed 10th June, 2024.
[22] ibid.
[23] Ibid at page 17.
[24] *Onyeanwusi v Okpukpara* (1953) 14 WACA 311.
[25] *R v* Itule (1961) 1 ALL NLR 462.
[26] J Alaba Omolaye – Ajileye 'Electronic Evidence'(ed University of Lagos Press, Akoka, Lagos 2019), 697.< https://thenationonlineng.net/page/31269/?p=help&__cf_chl_rt_tk=isRKQ.g5uQ5jPOre2LDxAvK5dMsK9o6xe8YKpFi3Zjg-1718032546-0.0.1.1-3924> accessed on 10th June, 2024.

admissible means capable of being legally admitted or allowable or permissible as evidence or worthy of gaining entry or being admitted.[27]

The Evidence Act of 1945 was only amended in 2011 to accept electronic evidence. Although the appellate courts, on the other hand, have always taken a proactive position despite the law's constraints. In his article, he cited two cases that led to the development of electronically generated evidence under the Nigerian law of Evidence. The renowned case of *Esso West Africa Inc. v. T. Oyegbola,*[28] *were* referred to as the timeliest case to address the admissibility of electronic evidence in Nigeria, with the supreme court declaring that the law cannot be and must not be ignorant of current business processes and must not close its eyes to the mysteries of the computer.' More recently, in the case of *Federal Republic of Nigeria v Femi Fani-Kayode,*[29] at the respondent's trial for money laundering, a certified copy of the respondent's computer-generated statement of account was to be offered as evidence at the respondent's money-laundering trial. The respondent argued that the computer-generated statement of account was inadmissible under Section 97 of the Evidence Act and hence opposed the application. The objection was upheld, and the learned trial judge dismissed the statement of account. The court of appeals ruled that the word "banker's books" encompassed all other books used in the usual course of business in the bank, and other methods and devices used to keep records. Electronic evidence has been variously defined to include information of probative value that is stored or transmitted in binary form,[30] information stored or transmitted in binary form that may be relied on in court[31]and any data stored or transmitted using a computer that supports or refutes a theory of how an offence occurred or that addresses critical elements of the offence such an intent or alibi.[32] Electronic evidence has also been described as digital evidence, computer evidence or computer-generated evidence.[33] Due to

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[27] E O Edward and J Ojeniyi, 'A Systematic Literature Review on Digital Evidence Admissibility: Methodologies, Challenges and Research Direction' 15th International Conference on Electronic, Computer and Computation (ICECCO). Published 1st December 2019.< https://www.semanticscholar.org/paper/A-Systematic-Literature-Review-On-Digital-Evidence-Edward-Ojeniyi/44ff1e70997a3fdd4b8629a4a552e31cdd89dd37> accessed 10th June, 2024.

[28] (1969) 1 NMLR 194.

[29] (2009) CA/L/349.

[30] Scientific Working Groups on Digital Evidence and Imaging Technology, 'Best Practices for Digital Evidence Laboratory Programs Glossary: Version 2.7' January 15, 2010.< chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.crime-scene-investigator.net/swgde_swgit_training_document_v2-0.pdf> accessed 10th June, 2024.

[31] International Organization on Computer Evidence, G8 proposed principles for the procedure relating to digital evidence (IOCE 2000).< https://www.ojp.gov/ncjrs/virtual-library/abstracts/digital-evidence-standards-and-principles> accessed 10th June, 2024.

[32] E Casey, Digital Evidence and Computer Crime, (3rd Edition, Academic Press 2011) 7.< chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://rishikeshpansare.wordpress.com/wp-content/uploads/2016/02/digital-evidence-and-computer-crime-third-edition.pdf> accessed on 10th June, 2024.

[33] S Mason and D Seng, 'Electronic Evidence', (4th Edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library University of London 2017), 18. <chrome-extension://efaidnbmnnnibpcajpcglcle

its dynamic nature, having a concise definition has proven quite difficult because of the danger of obsoleteness that may soon befall such definition. However, it has been defined as data (comprising the output of analogue devices or data in digital format) that is manipulated, stored or communicated by any man-made devices, computer or computer system or transmitted over a communication system that has the potential to make the factual account of either party more probable or less probable than it would be without the evidence.[34] This definition attempts to be all encompassing to include every form of evidence in a computer or any technological device that can be said to be linked or connected to a computer and is relevant to any judicial proceedings.

The term 'evidence', in its ordinary sense, signifies that which makes apparent the truth of a matter in question. It is no doubt more frequently applied to proof by a judicial tribunal, but it is not necessarily confined to this sense.[35] The meaning of the word 'evidence' in a legal or judicial sense, however, has a slightly different meaning. Evidence in its legal or judicial sense was defined by the Court of Appeal, in *Onya v Ogbuji*,[36] per Salauwa, J.C.A., as follows:

> The term evidence has been aptly described as any specie of proof, or probative matter legally presented at the trial of any issue, by the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the mind of the court or jury as to their contentions.[37]

Also, in *Kolo v Lawan,*[38] the Court of Appeal defined evidence as any type of proof or probative matter legally presented at the trial of an issue, by the act of the parties, and through the medium of witnesses, records, documents, exhibits, concrete objects etc, for the purpose of inducing belief in the mind of the court or jury as to their contentions. Evidence in a judicial proceeding is either oral or documentary and includes formal admissions and matters that the court is bound to take judicial notice of.[39]

2.0 Statutory Definitions of Computer

findmkaj /https://library.oapen.org/bitstream/handle/20.500.12657/39391/9781911507079.pdf> accessed on 1oth June, 2024.

[34] B Schafer and S Mason, The characteristics of Electronic Evidence in S. Mason and D. Seng 17 supra p. 19. This definition was adopted by SDholam, Electronic Evidence and its challenges available at <http://www.research gate.net/publication/313649713> accessed 19th March 2023.

[35]*Ayyarga v Queen,* 1LR Mad. 393 at 395; See, also, *Okin Biscuits Limited v Oshe* (2004) All FWLR (Pt. 188) 1094 at 1109- 1110 C.A.

[36](2011) All FWLR (Pt. 556) 493 at 517 C.A.

[37] See, also, *Awuse v Odili* (2005) 16 NWLR (Pt. 952) 416 at 496 C.A.

[38](2011) All FWLR (Pt. 597) 725 C.A.

[39]*Ekanem-Ita v Fetuga* (1991) 7 NWLR (Pt. 204) 449 C.A.

Computer is defined by the Evidence Act to mean any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison, or any other process.[40] In the case of *Lanlehin v Akanbi&ors,*[41] the Court of Appeal held that Concise Oxford Dictionary[42] defined computer thus:

> An electronic device which is capable of receiving information (data) and performing a sequence of logical operations in accordance with a predetermined but variable set of procedural instructions (program) to produce a result in the form of information or signals.

In case of *Omisore v Aregbesola,*[43] the Supreme Court held that any device for storing and processing information formed part of the definition of computer within the contemplation of section 258 (1) of the Evidence Act. In *Davou v COP Plateau State Command*,[44] the Court of Appeal held that:

> Where if the photograph were taken with a digital camera or produced from a digital camera, that becomes a computer generated document by virtue of section 84 (5) (c) of the Evidence Act, 2011 which provide that; "a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment."

The popular notion is that computer consists of devices such as desktop, laptop, and iPad and no more. The meaning of the word 'computer', however, goes beyond this popular notion as it encompasses many other devices,[45] as could be seen from the definition assigned to it by the Evidence Act[46] and the cases of *Lanlehin v Akanbi&Ors*,[47] *Omisore v Aregbesola* and *Davou v COP Plateau State Command*. Three statutes define computer in Nigeria. The first definition (not in any particular order of legislation) is contained in the Evidence Act, 2011. The Act defines computer in general terms as "a device for storing and processing information and any reference

[40] Section 258 (1) of Evidence Act 2011.
[41](2015) LPELR – 42147 (CA).
[42] Concise Oxford Dictionary 10th edn.
[43](2015) 15 NWLR (pt. 1482) 205.
[44](2019) LPELR – 47034 (CA).
[45] J Alaba Omolaye Ajileye, Electronic Evidence Revised Edition (Jurist Publication Series 2019) 57< chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://oer.biu.edu.ng/wp-content/uploads/2020/02/ADMISSIBILITY_OF_ELECTRONIC_EVIDENCE_IN_NIGERIA_-_-1.pdf> accessed 10th June 2024.
[46] Section 258 of the Evidence Act, 2011
[47] ibid.

to information being derived from other information is a reference to its being derived from it by calculation, typewriters and typesetters."[48]

The second definition can be found in the National Information Technology Development Agency (NITDA) Act, 2007. The definition of a computer in the National Information Technology Development Agency Act[49] as well Cybercrimes (Prohibition Prevention etc.) Act[50] is more technically detailed. Section 34 of the NITDA Act defines a computer thus:

> "Computer means any electronic device or computational machinery using programmed instructions which has one or more of the capabilities of storage, retrieval, memory, logic, arithmetic or communication and includes all input, output, processing, storage, software, or communication facilities which are connected or related to such a device in a system or network or control functions by the manipulation of signals, including any input, output, data storage, processing or communication facilities directly related to or operating in conjunction with any such device or system or computer network."

The definition of computer, in cybercrime (Prohibition Prevention etc.) Act, 2015 is more descriptive. Under the said Act, computer means:

> "An electronic, magnetic, optical electrochemical or the other high speed data processing device, performing logical, arithmetic, or storage functions and includes any data storage facility and all communication device that can directly interface with a computer through communication protocols, but it excludes portable handheld calculator, typewriters and typesetters or similar devices."[51]

Interestingly, the above definition of computer includes all communication devices that can directly interface with a computer through communication protocols. This leaves room for open ended ambiguity. The fact that a communication device interfaces with a computer should not

[48] ibid.
[49] NITDA Act 2007 published in the Federal Republic of Nigeria Official Gazette No. 99 Vol. 94 0f 5th October 2007.
[50] Cybercrimes Act 2015 available online at <http://www.lawpadi.com/wp-content/uploads/2015/08/Cybercrime_Prohibition_Act_2015.pdf> accessed 27th February 2023.
[51] Section 58 of the Cybercrimes (Prohibition, Prevention etc.) Act 2015.

automatically translate it to a computer.[52] The above statutory definitions in the NITDA Act and Cybercrimes Act have basically widened the scope of a computer with the exception of hand-held calculators, typewriters and typesetters. It is noteworthy that although our courts have adjudicated on several matters involving the application of computers, they are yet to undertake the task of offering a judicial definition or interpretation of the statutory definition of a computer. This may be borne out of the seeming understanding in the mind of the courts as to what qualifies as a computer. From the perspective of evidence, a computer contains digital evidence such as files[53] and logs, documents, networks, and data that can greatly assist in the resolution of any facts in issue. Information can be retrieved from the computer storage which may be used to arrive at a conclusion in proof or disproof of facts to be adjudicated upon.

The Evidence Act, 2011 gives a brief and terse definition of the word 'computer', yet the words "any device" admits of a wide range of devices both analogue and electronic. It seems any device will qualify as a computer within the context as section 285 of the Evidence Act, 2011 provided it can be used "for storing and processing information." Conceptually, this is about the widest definition of computer that can be contemplated.

The National Information Technology Development Agency Act's definition is more elaborate. It embodies the nature, basic characteristics of a computer and the functions it performs. First, it identifies computer as "any electronic device or computational machinery." It necessarily follows therefore, that computer is not just 'any device' as section 258 of the Evidence Act suggests but must either be electronic or computational in nature. Second, such a device, according to NITDA Act's definition, must have the capacity of using "programmed instructions" and capable of storing, retrieving, processing and communicating information. Other capabilities of such a device include memory, logic, and arithmetic. Significantly, the definition of a computer, under the cybercrime Act, excludes portable handheld calculator, typewriters and typesetters or similar devices.

3.0 Meaning of Electronic Evidence

Electronically generated evidence, or in fact what is electronic, is nowhere defined in the Evidence Act 2011 even though the word electronic is used about ten times in the Evidence Act. Similarly, while 'computer generated evidence' is not stated in the Evidence Act, a computer is stated in the

[52] For instance, a handheld Bluetooth device or earpiece cannot rightly be regarded as a Computer.
[53] For example, System Files, Program Files, Temporary Files, Cache Files, Deleted Files.

Act to mean 'any device for storing and processing information'.[54] Electronically or computer-generated evidence has been variously defined. Stephen Mason proffered an all-embracing definition of electronic evidence as 'Data (comprising the output of analogue devices or data in digital format) that is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system, that has the potential to make the factual account of either party more probable or less probable than it would be without the evidence'.[55] Using the alternative description of 'digital evidence', another writer put it as information of probative value that is stored or transmitted in binary form.[56] The word 'digital' is commonly used in computing and electronics, especially where physical-world information is converted to binary numeric form as in digital audio and digital photography.

Based on the above, evidence is not only limited to that found on the ubiquitous computers but may also extend to include evidence on digital devices such as telecommunications or electronic multimedia devices. The e-evidence can be found in e-mails, digital photographs, ATM transaction logs, word processing documents, instant message histories, files saved from accounting programme, spreadsheets, internet browser histories databases, Contents of computer memory, Computer backups, Computer printouts, Global Positioning System tracks, Logs from a hotel's electronic door locks, Digital video, or audio files. Digital Evidence tends to be more voluminous, more difficult to destroy but easily modified, easily duplicated, potentially more expressive and more readily available.[57] The takeaway is that, so as to avoid difficulty imposed by semantics, whether described as computer generated or electronically generated or e-evidence or document or digital evidence, the purport is to cover specie of evidence of forensic value tied to technology in their creation, storage, use and retrieval etc.

4.0 Fingerprint as a means of Electronic Signature

An electronic signature, colloquially referred to as an e-signature, denotes any electronic means that indicates that a person has accepted the contents of any electronic message, or is making a confirmation that he/she is the person who gave his/her consent by affixing his/her finger which

[54] Section 258 of Evidence Act, 2011.
[55] Cited by P.A., Akhihiero 'Admissibility of Electronic Evidence in Criminal Trials: How Practicable'? Being Paper delivered at a General Meeting of the Association of Nigeria, Edo State Branch on 23rd of July 2013. < https://journals.ezenwaohaetorc.org/index.php/ULJ/article/download/1212/1213> accessed on 11th June 2024.
[56] Vivek Dubet, 'Admissibility of Electronic Evidence: An Indian Perspective', (2017) 4 (2) Forensic Res. Criminol. Int. J <http://medcraveonline.com/FRCIJ/FRCIL-04-00109.pdf> accessed 2nd March 2023.
[57] ibid.

thereby creates a fingerprint attesting to anything he/she is been asked.[58] Although electronic evidence presents many possibilities, while contracting online, parties to an e-transaction need to know that the person sitting at a keyboard transacting with them is whom they say they are and has authority to act.[59] A party's ability to assent to contracts though electronic means constitutes one of the main concerns in e-transactions so that the parties know they have reached a binding agreement.[60] The term Electronic Signature is otherwise known as an E-signature. The term can be generally defined as the distinct mark of a person affixed to document with the aid of an electronic device such as a computer.[61]

It is noteworthy that the term "electronic signatures" or "E-Signatures" has not been defined by any statute or in the judgement of any superior courts in Nigeria. However, the United Nations' UNCITRAL Model Law on (the "UN Model Law") defines E-signature as "data in electronic form in, affixed to or logically associated with a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message"[62] The UN Model Law further defines a signatory as "a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents"[63]

4.1 Format of E-Signatures/Digital Signatures

There is no specified format for e-signatures under Nigerian law. However, under section 93(3) of the Evidence Act, an e-signature is defined as being used when the person has executed a symbol or security procedure to verify the authorship of an electronic record.[64]

Considering the above, E-Signatures comes in various forms however, their association with a message or document should identify the signatory and indicate the signatory's approval of the contents of the signed message or document. The definition indicated in the USA'S Electronic

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[58] O. M., Atoyebi, 'The Validity and Limitation of Electronic Signature Under the Nigerian Law' < https://omaplex.com.ng/the-validity-and-limitation-of-electronic-signatures-under-the-nigerian-law/> accessed 28 September 2024.

[59] M H M Schellekens, 'Electronic Signatures: Authentication Technology from a Legal Perspective' (2004) 5.< https://research.tilburguniversity.edu/en/publications/electronic-signatures-authentication-technology-from-a-legal-pers> accessed 11th June, 2024.

[60] C W Pappas 'Comparative US and EU approaches to e-commerce regulation: Jurisdiction, electronic contracts, electronic signatures and taxation' Devener Journal of International Law and Policy (2002-2003) 325 at 340. < https://digitalcommons.du.edu/djilp/vol31/iss2/8/> accessed 11th June 2024.

[61] O MAtoyebi "The Validity and Limitation of Electronic Signatures under the Nigerian Law" <https://www.gelias.com/images/Newsletter/Electronic_Signature_in_Capital_Market_Transactions-_Moving_Forward.pdf> accessed 17th 2023.

[62] Ibid.

[63] ibid.

[64] Section 93(3) Evidence Act

Signatures in Global and National Commerce ("E-Sign") Act (2000) S. 106 (5) also reiterates the emphasis as follows: 'Electronic sound, symbol, or process, attached to or logically associated with a record created, generated, sent, communicated, received or stored electronically and adopted by a person with the intent to sign that record.' The distinguishing feature of an electronic signature is that it is used to execute a contract. In a contract, for example, two people usually agree to perform certain obligations. If both parties sign the agreement, it becomes legally binding.[65]

The form of E-Signatures includes copying and passing an electronic image of the signature on the signature block, signing an electronic document on a computer touchscreen with a stylus or finger, emailing a scanned copy of the signed executed page of the document, typing out the name of the signatory on the signature block, or using web-based platforms like DocuSign.[66]

6.0. Fingerprint Evidence under the Nigerian Law

Fingerprint analysis is an integral element of Nigeria's civil and criminal justice system. In the sphere of criminal justice, the Nigeria Police, the Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and Other Offences Commission (ICPC), National Drug Law Enforcement Agency (NDLEA), and the Nigeria Customs Service among others collect, store, and employ fingerprints in discharging their law enforcement duties.[67] While the admissibility of fingerprint evidence in criminal trials in Nigeria is not in doubt, the weight to be attached to fingerprint analysis in convicting an accused person is less settled.[68] The guilt of an accused person must be proven 'beyond reasonable doubt' to secure a conviction, whereas fingerprint analysis could be vitiated by cognitive bias, ethical failures, and uneven standards, rules and practices.It is not clear that the margin of error tolerable to forensic scientists is shaped by the standard of proof in criminal trials, but courts across common law and continental European jurisdictions have demonstrated significant creativity and pragmatism in employing forensic analysis in criminal trials. It is not every error that will affect the probative value of forensic reports tendered in evidence. In the case *of Miller v. Minister of Pensions*,[69]Denning J. (as he then was)

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[65] O M Atoyebi "The Validity and Limitation of Electronic Signatures under the Nigerian Law" <https://www. agrello.io/ digital-signing/electronic-signing-of-documents> accessed on 11th June 2024.

[66] ibid.<https://www.gelias.com/com/images/Newsletter/Electronic_Signature_in_Capital_Market_Transactions_-Moving_Forward.pd> accessed on 11th June 2024.

[67] Section 30 Police Act; Section 6 Prevention of Crimes (Amendment) Act, 2016; Section 5 Customs and Excise Management Act, Section14 National Identity Management Commission Act, LFN 2004; Section 250 Evidence Act 2011.

[68]*Okoh v State* (2008) LPELR-8352 (CA); *Bakare v State* (1987) LPELR-714 At 10 – 11 Paragraphs D – D; *Uche v The State* (2015) LPELR- 2463 At 25 – 26 Paragraphs A – A*; Jua v State (*2010) LPELR – 1637 At 20 – 21 Paragraphs E – A; *Mbachu v State* (2018) LPELR- 45163.

[69](1947) 2All ER 372.

observed that: 'The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If evidence is as strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt but nothing short of that will suffice.' Sections 52 and 55 of the Nigerian Evidence Act 2011 presumes the accuracy of fingerprint evidence, and recognition that 'proof beyond reasonable doubt' is not 'proof beyond any shadow of doubt' bolsters the probative value of fingerprint evidence despite the potential errors highlighted above. Section 68 of the Evidence Act, 2011, which deals inter alia with the evidence of a science expert accommodates expert evidence on the identity of finger impression and DNA analysis of the blood of a human being. Section 149 of the Evidence Act further presumes the genuineness of forensic reports generated by foreign officials if the same would be admissible by the courts in that country. This provision is especially relevant in that forensic analyses in Nigeria, given deficits in expertise and facilities, typically involve collaboration with foreign law enforcement bodies. As aptly stated in the English case of *R. v. Buckley*,[70]per Rose, L.J., fingerprint evidence, like any other evidence, is admissible as a matter of law if it tends to prove the guilt of the defendant.

Sections 39, 40–50 of the Evidence Act 2011 provides that where the investigating police officer is unable to attend court proceedings in person or their attendance will cause unreasonable delay or expense, the forensic report can be tendered through any expert familiar with the investigation in the absence of any objections from the defence and if the court consents to the admission of the statement. Thus, a combined reading of Sections 39(d), 42, 52, 55, and 68 of the Evidence Act 2011 allows this evidence and cures any defect therein if any.

7.0 Challenges of Fingerprint Analysis

In this context, errors refer to mistakes or deviations from truth or accuracy. Measurements are seldom perfect and are characterized by varying degrees of inaccuracy. As a result of this, scientific measurements are usually accompanied by uncertainty measurements which determine the allowable error limit for the given measurement[71]. The margin for error depends on the sensitivity of the data produced, analytical instruments/techniques used and the available knowledge in the field at the time of measurement. For measurements to be acceptable by the scientific community, they must give room for error and uncertainty considerations. Uncertainties are unavoidable and

[70](1999) 13 JP 561.

[71] H Bereden 'A Student's guide to data and error analysis' New York, NY: Cambridge University Press; 2011.< chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://assets.cambridge.org/97805211/19405/frontmatter/9780521119405_frontmatter.pdf> accessed 11th June, 2024.

constitute the omnipresent noise that causes measurements to be imprecise[72]. Courts require expert evidence to be impartial, reliable, clear, and relevant to command credence and respect[73]. Where experts are for hire or public sector experts are tainted with corruption, dishonesty and incompetence, forensic evidence could easily become duplicitous. Courts in Nigeria have acknowledged the relative novelty of fingerprint evidence in criminal justice *practice*, even as its theoretical premise is now dogma and trite principle since the mid- 1980s.[74] Advances in forensic science mean that the margin of error is at its narrowest in historical terms[75], but in developing countries, courts remain cautious in basing conviction solely on forensic evidence, preferring, often to take refuge in the 'totality of evidence' adduced by the prosecution. In *Shonubi v People of Lagos*,[76] the court noted, per Obaseki-Adejumo, JCA. thus**:** 'I must state that the use of forensic analysis has not really taken firm ground in Nigeria especially in proof of murder cases, except for drug and fingerprints in fraud and election malpractices. The reasons for this attitude include.

a. The dearth of expertise in forensic science within the country and the complexity it presents for judging.

b. Inadequate facilities for the conduct of forensic investigation in Nigeria[77];

c. The ubiquitous practice of effecting the arrest of suspects often before an investigation has commenced and the resultant incentive to ratify such arbitrary arrest by securing a 'false' conviction[78];

d. The low level of trust in the core institutions of criminal justice in Nigeria[79]; and

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[72] D V Lindley 'Understanding uncertainty' (2nd edn. New Jersey: John Wiley & Sons); 2006. < https://www.wiley.com/en-ie/Understanding+Uncertainty%2C+Revised+Edition-p-9781118650127> accessed 11th June 2024.

[73] H J Walls 'Forensic Science: an introduction to scientific crime detection.'(2nd ed. London: Sweet and Maxwell); 1974.< https://wellcomecollection.org/works/e2f3svmf> accessed 11th June, 2024.

[74] ibid.

[75] G Edmond 'Fingerprint evidence in New Zealand's Courts: the oversight of overstatement.' NZ University Rev. 2020; 29:1-20; PCAST. Report to the President – forensic Science in criminal courts: ensuring scientific validity of feature comparison methods. Executive Office of the President President's Council of Advisors of Science and Technology. 2016;1 (September): 1-160. < https://www.researchgate.net/publication/360315016_The_ admissibility _of_ fingerprint_evidence_An_African_perspective> accessed 11th June 2024.

[76] (2015) JELR 40559 (CA).

[77] O J Alisigwe and O M Oluwafemi 'The state of Forensic science in crime investigation and administration of justice in Nigeria'. *Int L Sci Eng Res.* 2019; 10(7):1720-1725. <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/ https://www.ijser.org/researchpaper/The-State-of-Forensic-Science-in-Crime-Investigation-and-Administration-of-Justice-in-Nigeria.pdf> accessed 11th June 2024.

[78]T SAkinyetun "Reign of terror: a review of police brutality of Nigerian youth by the Special Anti-Robbery Squad (SARS)." *Afr Security Rev.* 2021; 30(3): 368-318.<https://www.researchgate.net/publication/353198428_Reign _of_terror_A_review_of_police_brutality_on_Nigerian_youth_by_the_Special_Anti-Robbery_Squad_SARS> accessed 11th June, 2024.

[79] T J Ike et al. 'Public perspectives of interventions aimed at building confidence in the Nigeria Police: a systematic review'. J Policing Intell Counter Terror." 2021;17(1)95-22. <https://www.researchgate.net/publication/351174360_Public_perspectives_of_interventions_aimed_at_building_confidence_in_the_Nigerian_police_a_systematic_review> accessed 11th June 2024.

e. A pattern of late arrival of law enforcement officers to crime scenes mean that innocent bystanders and civil volunteers/rescuers may contaminate the scene. Consequently, judges seldom convict on forensic evidence alone in the same manner that they convict exclusively on eye-witness accounts.

8.0 Conclusion

The length of electronic evidence that may be presented in court proceedings is endless, now that it is apparent that we live in the computer and information technology generation. It includes everything from essential electronic records and papers stored in digital devices combine with internet-connected computer behaviour, among other things. It is laudable that the Evidence Act of 2011 in Nigeria, finally, included provisions for the admissibility of electronic evidence. There is no doubt that the Evidence Act, 2011 has fully recognized the admissibility of electronic of electronic and computer-generated evidence. Thus, Nigeria has moved close to global best practice. The new Act no doubt partly resolves reliability and admissibility of computer records, reliability, and admissibility of forensically analysed and located data.[80] However, this paper has raised some issues which need more responses to ensure smooth practice of the new regime.

Accordingly, reliance must be placed on persuasive decisions from other jurisdictions to make Nigeria law of evidence to grow as the admissibility in evidence and computer-generated evidence is yet to be fully mastered in Nigeria.[81] Nevertheless, it is safe to conclude this analysis by saying that the Evidence Act of 2011 requirements regarding the admissibility of electronic evidence is insufficient. It differs significantly from the global model legislation on electronically generated evidence. The Model Law contains definitions for key fundamental terms absent from the Evidence Act of 2011. They consist of terms like "Originator" and "Addressee" of data messages, "Intermediary" about a particular data message, "Information system," etc. In addition, phrases like "certificate," "electronic communication," "digital signature," and "electronic records" need to be defined legally.[82] These phrases are so widely used in the electronic world that not defining them has resulted in definitional issues and could do so shortly. The definition of computers also, according to the Evidence Act 2011 is limited and need to be reviewed.

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[80] B., Owasanye, 'Admissibility of Electronic Evidence in Nigeria', being a paper presented at the Ogun State Bar and Bench Forum, Abeokuta, 2015, p.78. <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://core.ac.uk/download/pdf/276531446.pdf> accessed 11th June 2024.

[81] ibid.

[82] A.Omolaye-Ajileye, 'Admissibility of Electronic Evidence in Civil and Criminal Proceeding' Jurist Publication Series 2019, p. 25. <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://oer.biu.edu.ng/wp-content/uploads/2020/02/ADMISSIBILITY_OF_ELECTRONIC_EVIDENCE_IN_NIGERIA_-_-1.pdf> accessed 11th June, 2024.

9.0 Recommendations

This work has demonstrated that the 2011 Evidence Act most significant accomplishment and a step in the right direction is the evidentiary rule on the admissibility of computer-generated evidence. Regardless of what is been said above, there is still work to be done on its regulations regarding the admissibility of computer-generated evidence. For instance, the Act did not allow for the testimony of the data entry operators who entered the information to be received about the integrity and confidentiality of computer-generated evidence. Some other recommendations to be made are.

a) That the definition of computers should be reviewed to entail the current scope and new development of computers as the definition given by the Evidence Act is quite outdated.[83]
b) The Evidence Act of 2011 should be reviewed, and an enquiry should be made to look into other laws, international laws and laws of other countries on the admissibility of electronically generated evidence. An example is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce and the Indian Information Technology Act 2000.[84]
c) The Evidence Act of 2011 should be reviewed, and a sufficient reform which should be made to focus more on fingerprint evidence as a means of electronically generated evidence.[85]
d) Computer-generated evidence should not only be categorized as a form of documentary but as a type of evidence on its own. Not all forms of computer-generated evidence fit into the categorization of documents.[86]
e) Under the 2011 Evidence Act, there are no specific guidelines for presenting electronically created evidence. The legislation on the admissibility of electronic evidence will only be applied with some degree of assurance once such regulations are in place.[87]

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[83]J. Smith, 'Advancements in Computer Technology and the Need for Legal Modernization.' Journal of Legal Technology, 2023 10(2), 45-58. <https://www.researchgate.net/publication/379181469_Journal_of_Digital_Technologies_and_Law_2024_21_eISSN_2949-2483> accessed 11th June 2024.
[84] UNCITRAL Model Law on Electronic Commerce
[85] M Johnson, 'The Role of Fingerprint Evidence in Modern Legal Proceedings.' Legal Studies Review, 2022 28(4), 112-125. < https://www.researchgate.net/publication/369901081_Advantages_of_Modern_Fingerprint_Techniques_in_Crime_Investigation> accessed 11th June 2024.
[86]A Brown, 'Distinctive Nature of Computer-Generated Evidence: A Legal Perspective." International Journal of Law and Technology, 2021, 15(3), 201-215. <https://www.researchgate.net/publication/359313090_A_Legal_Evaluation_of_Computer-Generated_Evidence_Lessons_from_Nigeria_and_the_United_Kingdom>accessed 11th June 2024.
[87]ibid.

f) To eliminate all ambiguity, the status of printouts should henceforth be statutorily specified.[88]

All these and more are adjustments that can be made to solve the challenges facing the admissibility of computer-generated evidence under the Nigerian Law of Evidence. As a matter of fact, the National Assembly must demonstrate an adequate interest in these matters. The National Assembly needs to understand that the world we live in is changing, thereby necessitating new laws. The law cannot afford to be static in a world that is advancing.

[88]ibid.

The Effect of Internal Displacement on the Economy and the Mitigating Impact of International Humanitarian Law in Nigeria

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Abstract

One of the key development concerns of the twenty-first century is humanitarian emergencies. The international humanitarian NGOs, the UN, its agencies, and member states until recently seemed to pay little attention to the adverse effects of internally displaced persons on the global economy. The paper examines the mitigating impact of International Humanitarian Law on internally displaced persons as component of vulnerable persons worthy of response in humanitarian emergencies in Nigeria. The paper adopts doctrinal method of legal research to achieve its objectives. The paper finds that the financial resources required in situations of internal displacement represent a cost that adversely impacts on the economy. The paper concludes that deploying International Humanitarian Law in humanitarian emergencies can adequately decrease the negative effects of internal displacement of persons in Nigeria.

Key words: Internally Displaced Persons, International Humanitarian Law, Economy, Nigeria.

1.0 Introduction

Lives are turned upside down in numerous challenging and frequently tragic ways when people are forced to escape their homes due to conflict, violence, or disasters. As a result, millions of people have been displaced by the escalation of the conflict adding to the many millions of people who are already displaced globally. Internally Displaced Persons[1] are within the vulnerable categories of people who are left stranded and living in appalling circumstances prone to disease outbreaks. These vulnerable categories also include children who are severely impacted by the

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[1] Internally Displaced Persons (hereinafter referred to as IDPs)

displacement, as they are subjected to an alarming number of grave rights breaches. The significant effect also bears on the economy at an individual, community.

and national level due to the harm it causes to individual health, psychological well-being, and environment, as well as the ability to secure a livelihood and the access to security, education, housing, basic infrastructure, and social life.

International Humanitarian Law[2] plays a critical role in providing a framework to protect these vulnerable populations. In the context of IHL, IDPs are people who have been forced to migrate from their homes and have not crossed an internationally recognized State border but were forced to flee their homes due to conflict, violence, or natural catastrophes and making these individuals among the most vulnerable in the world. Put another way, displacement is the usual threat to pressing need for a secure environment. This further alludes to some degree of forced migration or coercion and applies to both individuals who are forced to leave their countries. Thus, refugees and asylum seekers may become IDPs after returning to their country if they are forced to flee internally for safety reasons.[3] Their status however remains if they are displaced in the country of refuge. They may become displaced within their country of refuge during a disaster, but this does not alter their status or their rights as refugees.

Although the justification for international legal protection for IDPs as a special concern is a jurisprudential problem. It has been acknowledged that internally displaced persons need to be handled like any other war victim. The perspective believes that the result of a war is always displacement as can be seen in natural disasters or other events leading to internal displacement.[4] Therefore, this paper explores the effects of internal displacement on the economy and the mitigating impacts of IHL on IDPs in Nigeria by examining both the legal provisions and their practical implications. The paper is divided into 5 parts. The first part is the introduction. The second part generally examines the pre-disposing factors to internal displacement. The third part explores the multi-dimensional effects of internal displacement on the economy. The fourth part appraises the impact of international humanitarian law in ameliorating the plight of internally displaced persons in Nigeria. The fifth and final part is the conclusion and recommendations.

2.0 Pre-Disposing Factors to Internal Displacement

[2] International Humanitarian Law (hereinafter referred to as IHL)

[3] O. A. Adeleye, 'Internal Displacement in Nigeria: Causes, Effects and Prevention', (2023) *Budapest International Research and Critics Institute-Journal (BIRCI-Journal)* 6 (2), 649. <www.bircujournal.com/index.php/birci> accessed 15 June 2024.

[4] E. Mooney, 'The notion Regarding internal displacement and the case for internally displaced individuals as a group that needs attention,' (2005) 24 (3) *Quarterly Refugees Survey,* 10.

Over 76 million people worldwide have lost their homes, livelihoods, their communities, and in some cases, their legal identities as a result of wars, natural disasters including earthquakes floods, and other weather-related catastrophes which have ravaged countries around the world.[5] The most recent figures gathered by the UN refugee agency (UNHCR) revealed that 68.3 million people remained internally displaced due to conflict and violence.[6] For instance, there were a record 68.3 million people living in displacement due to conflict and violence, a dramatic increase from 2022 and 2023.[7] The crisis has become more severe as a result of the restricted humanitarian access to individuals who are in dire need.

Nature typically wreaks havoc on the environment, resulting in the loss of life, property, and human displacement. Natural disasters do not actually pose a threat to Nigeria's climate. While the nation has fewer natural catastrophes than certain other nations, such as the United States of America, China, Japan, and Indonesia, this does not indicate that the nation is immune to them.[8] One of the greatest causes of displacement is still natural disasters. In Nigeria, flooding is the most frequent natural disaster. In addition to inadequate drainage systems, improper waste management, and poor waterways, the main cause of rivers and other water bodies overflowing their banks is typically significant rainfall. Storms and erosion are two other examples of natural risks.

3.0 Causes of Internal Displacement

Asplet[9] identified the major factors that lead to displacement:

a. Armed Conflict

When disagreements between two or more governments or non-state actors result in the deployment of military forces, it is referred to as an armed conflict. People are typically left with little choice but to flee during armed conflict due to a breakdown of the socioeconomic structures and a fear of attacks.

b. Generalised Violence

There is an unchecked spread of violence in this circumstance. This does not have a designated goal. Non-recognized parties to the dispute may launch the attack or be targeted

[5] Robert Piper, 'Record levels of displacement amid global conflict and environmental disasters. *UN News* (21 June 2024). <https://news.un.org/en/story/2024/06/1151361> accessed 13 May 2024.

[6] UN refugee agency (UNHCR), Global Trends report 2024. <https://www.unhcr.org/globaltrends#:~:text=At%20the%20end%20of%202023%2C%2068.3%20million%20people%20remained%20internally,the%20Congo%20(6.7%20million).> accessed 20 May 2024.

[7] IDMC, 'Global Report on Internal Displacement', (Norwegian Refugee Council, 2024) P.35 and 49.

[8] Adeleye (n. 3).

[9] M. Asplet, 'Internal Displacement: Responsibility and Action'. UNCHR 2013. <http://archive.ipu.org/ PDF/ publications/Displacement-e.pdf> accessed 24 April 2024.

by it. Usually, the populace is left defenceless and exposed during this type of turmoil. Generally, there is no other option except to flee to safety.

c. Natural and Man-Made Disasters

A disaster is referred to either natural or man-made depending on whether it results from natural causes or human activity. Natural catastrophes include things like earthquakes, tsunamis, and droughts. Man-made disasters include phenomena events linked to climate change and so on. Usually, it results in a large-scale population shift.

d. Human Rights Violations

Infringements on the fundamental rights of certain individuals by state or non-state entities constitute violations of human rights. Human rights violations typically result in victims running away in search of safety and relief. The grounds for targeting could include race, religion, politics, economic rights, etc.

e. Development Projects or Environmental Protection

Environmental protection or development projects arise when large-scale development projects force people from their homes. The main causes of it include forestry and conservation efforts, as well as the building of roads, railroads, dams, and hydroelectric generating projects. The local populace is typically required to take a holiday due to these kinds of projects or legislation, which exposes the affected individuals to various vulnerabilities.

3.0 Incidences of Internal Displacement in Nigeria

The major causes of internal displacement in Nigeria are civil war, insurgency and counterinsurgency, communal violence, religious violence, political violence, and conflict over resources.[10] As a result, the number of IDPs has alarmingly increased with the scale of the displacement depending on the context. For instance, there are record of displacement of people in Kaduna, Zamfara, Katsina, Borno, Yobe, Adamawa, Benue, Niger, Gombe, Taraba, Niger and Plateau State due to Boko Haram's violent insurgency and banditry etc.[11] Also, there are incidences of internal displacement of persons in Akwa Ibom, Imo, Enugu, Bauchi, Sokoto, Jigawa, and Kano

[10] O. A. Adeleye, & O. S. Osadola, 'International Aid in Managing IDPs: The Case of United Nations in Nigeria', (2022) *SIASAT* 7(3), 235.
[11] Adeleye (n. 3).

by flooding and Electoral violence etc.[12] The following are the incidences of internal displacement in Nigeria:

a. There are 3.646 million internally displaced persons (IDPs) in North-eastern Nigeria as a result of the non-international armed struggle between the Nigerian government and the Islamic State West African Province group/Jama'atu Ahlu s-Sunnatilil-Da'wawal-jihad. of the Boko Haram insurgency. More than 1.8 million people who were forced from their homes due to fighting with jihadist extremists have already relocated, but 2.5 million people are still without a place to live.[13]
b. There are over two million internally displaced persons in North Central of Nigeria as a result of herdsmen-farmers conflict. In Benue State, Nigeria, according to government officials. People who have been internally displaced (IDPs) have lost their farms, personal belongings, livelihoods, and communal infrastructure.[14] This makes Benue State the epicentre in the North Central of displacement due to this conflict.
c. Between year 2000 and 2018, additional two million Nigerians including slum-dwellers and other marginalised individuals were forcibly removed from their homes in Port Harcourt, Lagos, and Abuja under the guise of security measures and urban renewal programmes.[15] For instance, thousands of people were forcefully evicted in Abonnema and Makoko slums in Rivers and Lagos States respectively.[16] People are being forced to leave their customary places of habitation by armed militants and insurgents, who have both generated and contributed to the level of insecurity. This is particularly prevalent in remote areas where government security agencies are unable to effectively combat it.[17]
d. One of the tragic incidents of displacement occurred in Lagos when explosives and artillery shells were detonated at the Ikeja cantonment armoury on January 27, 2002. Many residents who fled in search of safety fell into the canal that runs parallel to the Isolo-Oshodi motorway. At least 600 individuals lost their lives as a result of the rush at the canal.[18] Over a thousand people lost their lives as a result of the bombing, which had a

[12] C Onuegbu, 'Insecurity in Akwa Ibom LG displaces 5000 person – Council chair'. *Vanguard* (11th April 2021) <https://www.vanguardngr.com/2021/04/insecurity-in-akwa-ibom-lg-displaces-5000-persons-council-chair/> accessed 11 May 2024.
[13] R. Iorbo, S. P. Sahni, T. Bhatnagar & D. T. Andzenge, 'Social Inclusion and Justice for the Internally Displaced by the Herdsmen-Farmers Conflict in Benue State, Nigeria', (2024) *Journal on Migration and Human Security,* 96. <https://doi.org/10.1177/23315024241239585> accessed 17 June 2024.
[14] Ibid.
[15] E. O. Okon, 'Internally displaced persons in Nigeria: Review of empirical studies,' (2018) 2 (1) *American International Journal of Social Science Research,* 28.
[16] Ibid.
[17] Ibid.
[18] Adeleye (n. 3).

greater impact on civilians than on military personnel.[19] Over 5,000 people were injured, almost 12,000 were left homeless, and 20,000 fled the city as a result of it. The displaced people received assistance from relief organisations. The Ikeja Police College and the Albati Barracks in Ojuelegba served as camp sites for the internally displaced people from this tragedy.[20]

e. The North-South conflict is a contemporary development. Ethnocentric rhetoric and irresponsible statements driven by arrogance, intolerance and fanaticism have incited mob action and civil unrest resulting in internal displacement. These ethnic conflicts often began from small argument. Along the ethnic divides, many were killed. Numerous homes and public buildings caught fire, injuring over a hundred people. An instance was when a group of Yoruba and Hausa-Fulani clashed in October 2000, forcing about 3,000 Hausa to flee. Another instance was when over seventy people lost their lives in a Hausa-Yoruba fight that occurred in Idi-Araba and the adjacent suburbs of Mushin, Lagos, between February 2 and February 4, 2002. The conflict in Idi-Araba caused thousands of residents to flee. In the overall fear, many more departed on their own, and the Red Cross evacuated some 2,500 individuals. These conflicts are perceived as assaults on Hausas or northerners in the southwest, and Yoruba in the north typically suffer retaliatory attacks as a result.[21]

f. A further experience of displacement was the Bakkasi peninsula issue. Bakassi was one of the 774 local government units in Nigeria until October ,2002 when the International Court of Justice (ICJ) in The Hague ruled that Bakassi belonged to Cameroon.[22] It is estimated that 90 percent of the inhabitants of Bakassi are Nigerians of Efik extraction. Most Nigerians in Peninsula are either traders or fishermen. At the risk of becoming stateless, over 100,000 displaced Bakassi people migrated to Nigeria, with the majority settling in Cross River State.

g. The main causes of the Tiv-Jukun wars are land disputes, struggles for political dominance, and environmental stress brought on by population expansion. The history of the two communities is laced with aggressions and grievances at various times. In Nassarawa state, violence broke out after Tivs were held responsible for the passing of a Hausa traditional ruler. Following the sequence of violent clashes that transpired in Nassarawa and Taraba states between June and July of 2001, around 25,000 individuals were compelled to flee to

[19] Ibid.
[20] Okon (n. 15).
[21] Ibid.
[22] H. M. Yerima and D. S Ranjit Singh, 'The Bakassi Dispute: People's Dynamics and the rise of Militancy', (2017) 22 (1), Ver. 6, *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*, 69.

Benue State.[23] The last one, from January to July 2019, witnessed massive deaths, destruction of lives and property and led to forced displacement of persons.[24]

h. Violence that marred a march led by the Christian Association of Nigeria (CAN) to oppose the planned implementation of Islamic law (Sharia) in the state resulted in displacement in Kaduna in 2000.[25] Those who had previously resided next door became fearful as a result of the fighting in the state capital, which left at least 400 people dead.[26] Following these clashes, the city's physical segregation expanded, further polarising the populace along religious and ethnic lines. Among other effects of ethno-religious conflicts on development of Kaduna State, lands, religious supremacy, and hate speeches are some of the major causes of the Kaduna crisis.[27]

i. The confrontations in Jos in September 2001 between the Hausa-Fulani Muslims and the predominantly Christian indigenous Berom, Anaguta, and Afizere communities resulted in significant displacement. Along the split between indigenous and settlers, violent confrontations erupted for natural resources and political power.[28] 60,000 people were displaced in Plateau State because of the violence that spread to areas including Langtang, Kuru, and Pankshin.[29] The Fulani herders and elements from nearby Niger and Chad launched reprisal attacks and bandit raids on the majority farming communities in 2002, resulting in additional migration.[30]

These incidences of internal displacement highlighted above summarily often arise from ethnic, religious, political, and economic factors.[31]

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[23] S. Bamidele, 'A tale of two communities: Who owns the land? community safety, peace process and land ownership in tiv/jukun communities of Taraba State, Nigeria', (2022) 87 *GeoJournal*, 1709. <https://doi.org/10.1007/s10708-020-10339-5> accessed 17 June 2024.

[24] Ibid.

[25] A. Olajide, 'Sharia Law in Nigeria: Challenges and Strategies for Effective implementation,' (2023) *Researchgate*. <https://www.researchgate.net/publication/373158903_Sharia_Law_in_Nigeria_Challenges_and_Strategies_for_Effective_implementation/citation/download> accessed 15 June 2024.

[26] M. Duku, 'The Aftermath of 21st Century Sharia Implementation in Northern Nigeria,' (2022) 3 *Media of Law and Sharia*, 98. <https://www.researchgate.net/publication/360592367_The_Aftermath_of_21st_Century_Sharia_Implementation_in_Northern_Nigeria> accessed 20 June 2024.

[27] F. C. Uroko, 'The ethno-religious conflicts in Southern Kaduna of Nigeria: Causes and Implications for National Development,' (2018) 9 (2) *Afro Asian Journal of Social Sciences*, 2.

[28] E. A. Babagario, 'Religion as a Catalyst for Peacebuilding in Jos, Plateau State North Central Nigeria' In: D. Irvin-Erickson, P. Phan, (eds) *Violence, Religion, Peacemaking. Interreligious Studies in Theory and Practice*. (Palgrave Macmillan, New York, 2016). <https://doi.org/10.1057/978-1-137-56851-9_10> accessed 23 June 2024.

[29] Ibid.

[30] Ibid.

[31] L. N. Smart, D. Amaratunga, and R. Haigh, 'Internal Displacement in Nigeria: What Are the Preventive Measures?'. In Hamza, M., Amaratunga, D., Haigh, R., Malalgoda, C., Jayakody, C., Senanayake, A. (eds) Rebuilding Communities After Displacement. (Springer, Cham. 2023). <https://doi.org/10.1007/978-3-031-21414-1_8> accessed 23 June 2024.

4.0 Multi-Dimensional Effects of Internal Displacement on The Economy

A diverse spectrum of people is impacted by forced displacement in various facets of their lives. Internal displacement produces unique requirements and vulnerabilities, which makes internally displaced people poor and robs them of the means to support themselves. However, it is insufficient to state that only the internally displaced persons bear the burden of internal displacement. Communities that bear the burden of internal displacement include the host communities, communities in return areas, and those into which IDPs chose to settle in and integrate. A situation involving forced displacement usually produces two kinds of shocks. The first is a population shock, which is characterised by an abrupt rise in population brought on by immigration to a specific region. The second is a shock to public spending, which is brought on by the higher financial flows that a crisis involving forced migration may generate, such as aid from foreign donors and/or higher public spending by the host government.[32]

At an average cost of $390 per person, it is estimated that the total global economy impact of internal displacement has reached $20 billion for each year of displacement.[33] The financial resources needed to support those affected and the reduction in production and consumption that a displacement crisis can cause represent a cost that has yet to be estimated. These repercussions, which have a direct influence on the economic standing and capacity of internally displaced people to lead dignified lives, are all well documented and have an associated human cost.[34]

The host countries' per capita income levels will primarily determine how this plays out. International help often floods low-income nations during displacement crises, almost at the same time.[35] In middle-income nations, foreign aid is typically matched by an increase in the host government's public spending.[36] International aid is largely missing from high-income nations, but public spending increases would be expected (social transfers to refugees or asylum seekers and subsidies to access housing, health care, education, and other public services).[37] In each of these

[32] P. Verme, and K. Schuettler, The impact of forced displacement on host communities: A review of the empirical literature in economics, (2021) 150 *Journal of Development Economics,* 102606, 3. <https://doi.org/10.1016/j.jdeveco.2020.102606.> accessed 10 June 2024.

[33] Christelle Cazabat, The Ripple Effect: Multidimensional Impacts of Internal Displacement Full Report 2018 (Jeremy Lennard, ed.). <https://api.internal-displacement.org/sites/default/files/inline-files/201810-literature-review-economic-impacts.pdf> accessed 15 June 2024.

[34] M. Cernea, 'The Risks and Reconstruction Model for Resettling Displaced Populations', (2021) *Researchgate*. <https://www.researchgate.net/publication/351092202_The_Risks_and_Reconstruction_Model_for_Resettling_Displaced_Populations> accessed 12 June 2024.

[35] Verme, and Schuettler (n. 31).

[36] Ibid.

[37] Ibid.

situations, public spending that is filtered through an expansion of welfare programmes and the delivery of public services to communities that host displaced people.

Hammar[38] presents "displacement economies," a multifaceted, relational approach that goes beyond operational approaches to displacement. In various settings of displacement, he acknowledges the simultaneity and articulation of physical, social, economic, and political locations, interactions, systems, and practices as well as their consequences. The following indices have been identified in Nigeria:

a) Internal displacement can have significant adverse effects on the economy, at an individual, community, or even at national level as well as the ability to secure a livelihood and the access to security, education, housing, basic infrastructure, and social life. People who are internally displaced are cut off from their homes, businesses, investments, personal belongings, social networks, and service providers. In addition to competing with local workers for jobs in their host communities, IDPs' entry also raises demand for products and services, which could result in price rises.

b) There are stories of increased violence against women as a result of internal displacement. Internally displaced women are at a heightened risk for sexual and gender-based violence and have specific health needs that often go unmet. This could be the outcome of the terrible poverty that displaced women frequently find themselves in, in addition to the increased stress and financial strain that families experience.[39] Men, women, and children who have been displaced could also be forced to engage in risky jobs to make ends meet. Increased violence against women has strong connection with rape and forced prostitution. Sexual exploitation of internally displaced women includes the misuse of a position of trust, and unequal authority in exchange for deceptive promises of marriage, financial help, or material support.[40] This increases unemployment, dwindles income, reproductive and sexual health challenges which include neonatal and maternity care, as well as a range of other programs ranging from treatment for sexual violence and HIV/AIDS to more routine feminine hygiene/sanitary needs.

[38] A. Hammar, 'Displacement Economies: A Relational Approach to Displacement', In: Adey, P., et al. *The Handbook of Displacement,* (Palgrave Macmillan, Cham. 2020). <https://doi.org/10.1007/978-3-030-47178-1_4> accessed 3 June 2024.

[39] Adeleye (n. 3).

[40] Dogara Bitrus, 'Humanitarian worker lures Borno 14-year-old IDP, rapes girl, victim stabs self, dies. *Punch* (20th January 2022). <https://punchng.com/humanitarian-worker-lures-borno-14-year-old-idp-rapes-girl-victims-stabs-self-dies/> accessed 3 June 2024.

c) Statistics has shown that the North-eastern states are far behind in terms of development compared to other regions in the country.[41] The continuous act of terrorism and armed conflict has led to the Closure of many businesses in the north-eastern region and as also serve as a discouragement to investors to invest in the economy. Massive damage of infrastructure worth billions of naira, as well as public and private assets, have also occurred. These resources could have been used to boost investment and create revenue for the economy.

d) The insurgency of Boko Haram, a primary factor in internal displacement of people, has adversely impacted on Agricultural sector of Nigerian business environment.[42] The relocation of non-indigenes to other states due to insurgency had a negative effect on the state's economic wellbeing. There was also a noticeable decrease in the in the flow of grain. The local markets in Borno State experienced brisk commercial activity in 2008 before Boko Haram's actions became more intense. Approximately 294,940 tonnes of grain were traded, compared to just 148,700 tonnes in 2013.[43]

e) Over 90% of the country's livestock population, or one-third of its agricultural GDP and 3.2% of its total GDP, is owned by the Fulani.[44] Unquestionably, the Fulani tribes play a vital role in the Nigerian economy because they are the primary breeders of cattle and the primary supplier of inexpensive animal protein for Nigerians to eat.[45] Many deaths and internal displacements have also been attributed to the recent rise of the Fulani herdsmen problem. The Fulani tribe, known for being nomadic, has been raising cattle for a very long time without any records of killing people or damaging property. However, stories have changed over time, with the name "Fulani herdsmen" now connoting terror and sending shivers down people's spines, particularly in those who have lived in unstable areas.

f) There has also been a significant economic cost. Research carried out by the group in 2015 found that herder-farmer disputes in Benue, Kaduna, Nasarawa, and Plateau states were costing the federal government $13.7 billion in revenue yearly.[46] These four States lost

[41] O. V. Sadibo, 'Effect of Internally Displaced Persons on the Nigerian Economy (2015 - 2018)', (2020) 8 (1) *International Journal of Advanced Studies in Economics and Public Sector Management IJASEPSM,* 11.
[42] Ibid, 14.
[43] Ibid.
[44] O. K. Iloanya and E. O. Chukwuemeka, 'Effect of Open Grazing on Sustainable Development of Nigeria (2005-2019)', (2020) 4 (2) *International Journal of Academic Accounting, Finance & Management Research (IJAAFMR)*, 18.
[45] Sadibo (n. 34), 11.
[46] International Crisis Group, Herders against Farmers: Nigeria's Expanding Deadly Conflicts'. African Report, No 252 (2017). <https://www.crisisgroup.org/africa/west-africa/nigeria/252-herders-against-farmers-nigerias-expanding - deadly-conflict> accessed 11 June 2024.

47% of their internally generated revenue on average. Communities and households also pay a heavy price. For instance, the ethnic Nzor-Tiv Global Association estimated that its Agatu communities in Benue State lost N65 billion in properties ($204 million) during the early 2016 herdsmen attacks.[47] Large cattle herd losses, crop losses (from population displacement and damage to irrigation infrastructure), rising labour and transportation costs in post-conflict settings, and other factors all contribute to increased poverty and food insecurity both within and outside the impacted areas.[48]

It was reported that over $20.5 billion was spent on housing, education, health care, security, and income support for the internally displaced people in 2020.[49] While these are massive costs of assistance and protective supports geared towards addressing the needs of the displaced, it appears not to be sustainable.

5.0 The Impact of International Humanitarian Law in Ameliorating the Plight of Internally Displaced Persons in Nigeria

There is no universal legally binding instrument that specifically addresses the plight of IDPs.[50] However, a body of regulations known as IHL is created to lessen the negative impacts of armed conflict for humanitarian purposes. It limits the weapons and strategies of hostilities while safeguarding those who opt out of conflict. When there is an armed conflict, violations of IHL usually result in internal displacement. It is imperative that every attempt should be made to avoid such displacement, as is expected. It's a good sign that the fighting parties don't care about civilian safety or, worse, are specifically targeting them when civilians leave a battle zone. IDPs are entitled to all the protections granted to that group of people under IHL, regardless of where they are or why they were displaced. IDPs are covered by a number of legal frameworks, such as national law, human rights legislation.[51] Numerous States have included them into their domestic laws, and they enjoy widespread support from the international community.

IHL is based on four fundamental principles: the difference between civilians and combatants; the prohibition of attacking those in fight; the prohibition of causing needless suffering; and the proportionality principle.[52] The IDPs come under the legal realm of IHL when they are in a state where there is an armed conflict. In situation of armed conflict, the UN Charter is pertinent to

[47] Iloanya and Chukwuemeka (n. 37).
[48] Ibid.
[49] Smart, Amaratunga and Haigh (n. 31).
[50] B. Abegunde and J. Omidoyin, 'Humanitarian Law and Internal Displacement in Nigeria: An Urgent Need for Legal Framework,' (2020) 4 (3) *International Journal of Law and Legal Jurisprudence Studies*, 53.
[51] Ibid.
[52] Ibid.

IDPs, particularly the provisions regarding the use of force.[53] The UN Guiding Principles on Internal Displacement offer helpful directions on issues unique to internal displacement. A significant portion of international humanitarian law and international human rights law are incorporated into the Guiding Principles. The principles now have more credibility and power. The UN has acknowledged them, and the main international development and humanitarian organisations have endorsed them.[54] The guiding principles, for instance, clearly state that States are required to offer displaced people long-term return, resettlement, and reintegration alternatives, and that displaced people must participate in the formulation and administration of policies that affect them. In the field, NGOs, regional organisations, and international organisations have started to use them as an advocacy tool.[55]

The Convention for the Protection and Assistance of Internally Displaced Persons was adopted by the Heads of State and Government of the African Union in October 2009 during a Special Summit on Refugees, Returnees, and Internally Displaced Persons held in Kampala, Uganda. The Kampala Convention, named after the city in which it was adopted, was created with the primary goal of offering long-term solutions to the problem of internal displacement in Africa. In the processes leading up to the development and adoption, a central resonant theme was the need for the Kampala Convention to serve as a normative framework for countries in Africa in the protection of internally displaced persons and in providing humanitarian assistance to them. At the Special Summit, African leaders recognised the plight of the internally displaced persons in Africa and the dire situation that these persons are often thrust into, largely because they remain within the borders of their own countries. The necessity for the Kampala Convention to provide as a normative framework for African nations in protecting internally displaced people and offering them humanitarian assistance was a recurring topic in the events leading up to its creation and approval. African leaders acknowledged the suffering of internally displaced people across the continent during the Special Summit, as well as the difficult circumstances that these people frequently find themselves in since they continue to live inside their own nations' borders.

Nigeria was one of the original 17 nations, along with Burundi, Congo, Djibouti, Equatorial Guinea, Ethiopia, Liberia, Namibia, Rwanda, and others, to sign the Kampala Convention during the Special Summit.[56] However, it should be noted that a treaty does not automatically become enforceable just because a country has been ratified and for countries that practice dualist system

[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] B. Abegunde, *Public International Law* (Petoa Educational Publishers, Ado-Ekiti, 2009), 74.

like Nigeria, such treaty must be domesticated. For example, in Nigeria, international treaties are only incorporated into the law when they are domesticated by the National Assembly, as stated in Section 12 of the Constitution. This constitutional provision was upheld in *Abacha v. Fawehinmi*,[57] where the Supreme Court stressed the importance of domesticating international treaties and conventions for them to be applicable and operative within the Nigerian legal system.

The protection of internally displaced people in Nigeria is greatly impacted by the Kampala Convention. Unlike the United Nations Guiding Principles on Internal Displacement that primarily focus on humanitarianism, the Kampala Convention provides legally binding guidelines for the protection and aid of internally displaced individuals. The question of accountability is highly relevant because the Kampala Convention brings the subject of internal displacement under the purview of legally enforceable duties. Another persuasive aspect of the Kampala Convention is that it provides internally displaced people with a normative framework to establish a rightful claim to protection and aid, which national courts have the authority to uphold if key institutions fail to comply or perform.

Human rights and humanitarian law are two overlapping international legal systems with similar goals: to protect people's lives and dignity from the abuse of power.[58] The fundamental idea that every person has a right to a basic set of rights, regardless of whether they are in a state of peace or conflict, is the foundation of international humanitarian law. The person has a right to respect, safety, and protection. This has been the United Nations' policy position on international humanitarian law. It contrasts national sovereignty with humanitarian considerations.[59] The Nigerian Constitution is the grundnorm in the Nigerian legal order. The constitution is significant in that, among other things, it sets policy objectives for the state and makes provision for inalienable human rights It becomes imperative that there be constitutional protection for displaced persons in order not to erode sovereignty of Nigeria.

Nigeria's constitution needs to be urgently amended to specifically safeguard the rights of internally displaced people in situation of the severe crisis. This is particularly more important because the political and economic stability of Nigeria is significantly impacted by the growing wave of displacement. Constitutional protection for internally displaced people is crucial and vital because it will turn the conversation around internal displacement from one of humanitarianism and altruism to one of constitutional importance. Thus, an institutional systemic response will be

[57] (2001) 51 WRN 29.
[58] Abegunde and Omidoyin (n. 50).
[59] A. Popoola, 'The International Criminal Court Regime and Crimes Against Humanity'. In D. A. Guobadia and P. T. Akpor (ed.), *An Introduction to the Rome Statutes of the International Criminal Court* (NIALS, Lagos, 2005), 123.

required. The provisions of the constitution will provide a solid foundation for the various state organs to act pro-actively since it is essential to the establishment and operation of government, including the protection of internally displaced people.

Considering that the welfare of Nigerians is the responsibility government in achieving this principal objective, the constitution highlights strategic policy areas that the government must give priority. As a result, the Nigerian government was prompted to consider a National Policy on internally displaced persons in early 2006, after the number of people displaced internally due to conflict increased. [60]A draft of the policy was presented for consideration in 2007 but was not adopted by the Federal Executive Council. Between 2009 and 2012, the proposal underwent two revisions to consider the current circumstances and the framework that the Kampala Convention had to offer.[61] This policy has adopted the human rights-based approach and its principles. The intention is to accommodate as much as possible the provisions of existing international conventions, treaties, and protocols on internal displacement, and guided by the dictates of international humanitarian and human rights laws. This policy therefore draws extensively from the guidance of international and national frameworks on the prevention of internal displacement, as well as those on protection and assistance of internally displaced persons.

6.0 Conclusion and Recommendations

Internal displacement is a significant barrier to economic growth. Insurgency and other pre-disposing factors to internal displacement can hinder foreign direct investment. For this reason, the government must act swiftly and strictly to combat these indices. It is imperative that the government review the existing legal frameworks to address specific challenges of IDPs through collaborations with regional organizations and the international community may be beneficial to ensuring efficient solutions to the issue that the Nigerian government cannot shy away from its responsibility to its citizenry.

Based on the findings of this paper, the following recommendations were made:

1. The government should take action to prevent the resurgence of Boko-haram and similar notorious extremist group in Nigeria. This will help to end the group's occupation and forestall internal displacement in the north-eastern region of the country by protecting lives and property of Nigerians through significant security measures.

[60] Abegunde and Omidoyin (n. 50).
[61] See the Preamble of the National Policy on Internally Displaced Persons in Nigeria, 2012.

2. The recently established Federal Ministry of Livestock Development should put in place policies for the implementation of cattle grazing and the adoption of ranching, a contemporary method of raising livestock that is used in all civilized nations. This will lessen, if not eliminate internal displacement arising from conflicts between farmers and herders. Alternatively, the government ought to review the 1960s grazing reserve and stock route policies and ensure that they are appropriately implemented. This will lessen the constant infringement on one another's means of subsistence by crop growers or herders.
3. The government should set up early warning mechanisms and be prepared to use its security apparatuses in a way that enables the prevention of other highlighted pre-disposing factors to internal displacement through crises that could put people's livelihoods at risk or result in fatalities. This will make space for companies and other profitable economic endeavours to flourish throughout the nation.
4. The government should promote the ratification and implementation of IDP-related conventions and other instruments, at the regional, national and local levels, as the basic platform for ensuring the protection of the IDP population and ensure adherence to international obligations and standards for the protection and assistance of internally displaced persons.

Analysis of the Legal Framework for Alternative Sources of Energy in Nigeria

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Abstract

There is no overarching legal framework on renewable sources of energy as alternatives to conventional sources of energy in Nigeria. However, there is in existence disparate policies and guidelines that promote the use of renewable energy in the Nigeria energy sector at the International and National level. This article analysed the laws and policies on renewable energy and discovered their inadequacy in promoting the development of renewable energy in the National energy sector. Similarly, the passage of the Petroleum Industry Act 2021 which made negligible reference to renewable energy in its provisions, the substantial flow of resources and policy attention to the fossil fuel sector further showed fossil fuel as Nigeria's future pathway. The work found that Nigeria is endowed with abundant renewable energy resources like solar, wind, biomass, hydropower, hydrogen, geothermal etc which have minimal supply logistic problems, clean and are environmentally friendly and should join its counterparts like the United Kingdom who have adopted the new energy policy which encourages a fundamental and drastic departure from fossil fuel to these renewable energy sources. The implication of the findings is that Nigeria needs to develop a bespoke legislation on renewable energy development, promotion and utilization in Nigeria that reduces emphasis on over-dependence on fossil fuels. The research adopted a doctrinal methodology which is based on the analysis of literatures and various laws. It concluded that the development and utilisation of renewable energy sources in Nigeria can reduce poverty, sustain development of the country, mitigate climate change, and provide energy security as its benefits are obvious and more compared to its shortcomings. It therefore recommended that there should be an enactment of a comprehensive law which will provide a legal framework for renewable energy in Nigeria, the harmonisation of the existing policies, the need for energy diversification, the provision of incentives for transitioning to renewables, the need to build capacity and understand the energy market, the need for financial investments in the sector as well as education of the public on the potentials that renewable energy offers.

Keywords: Legal Framework, Fossil Fuel; Energy; Alternative and Renewable Energy

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1.0 Introduction

Energy[1] is very fundamental to economic development and sustenance of life, it is often stated that the amount of energy available and utilized in a country is strongly related to the rate of its industrial growth and economic development in such country.[2] Non-renewable fuel has been the primary source of power supply, and since non-renewable fuel discharge greenhouse gases[3] it has become untenable generally[4]. It can be said that the ecosystem is under threat from crude oil exploration, production and the use of oil, and there is continual global warming and exhaustion of the ozone layer which is amplified by the discharged greenhouse gases. Human, vegetation's and animals have also been adversely affected owing to economic deterioration and dilapidation from the occurrence of oil exploration in the Niger Delta areas of Nigeria[5]. These environmental issues and many other anthropogenic activities have consequently, geared the attention for the need of energy transition.[6]

Fossil fuel has played a critical role in socioeconomic development and international relations of many countries. It can be said that that the major factors that supports the demand for oil are demographic changes (population and urbanization) and economic growth[7]. Nigeria is arguably known as the giant of Africa with a population of over 200 million people, has the fastest striving population in Africa with an annual growth rate of 2.6%, contribute 0.5 metric tons per capital of

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[1]'Energy is grouped into two categories, Primary and Secondary. Primary energy source of energy is renewable and non-renewable. Non-renewables sources include fossil fuels (petroleum, natural gas, and coal), and renewable energy sources includes (solar, wind, biomass, wave tide, hydro energy). Secondary source includes electricity that is generated from primary sources. Available at <eia.gov>, Accessed on 25th January 2022.
[2] U. C. Nwankwo and Others, 'Economic Implications of Renewable Energy Transition in Nigeria. (Research Gate Publication, August 2018).
[3] K. O. Yoro and M. O. Daramola. "Advances in Carbon Capture". [2020], Available at <sciencedirect.com>. Defines Greenhouse gases (GHG) as gaseous compounds that can emit ultraviolent radiation within a certain thermal infrared range and include chloroflurocarbons (CFCs), hydroflurocarbons (HFCs), carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), and ozone (O3).
[4] P. Oniemola, and G. Sanusi, 'The Nigerian Bio-Fuel Policy and Incentives, a Need to Follow the Brazilian Pathway', [2007], available at <www.igee.org/en/publication/newsletter> accessed on 20th December 2021.
[5] O. Olujobi, J. Oyewunmi and A.E Onyewunmi, 'Oil Spillage in Nigeria's Upstream Petroleum Sector: Beyond the Legal Frameworks', [2018], 8 (1*) Int. Journal Energy Econs Policy,* 220-226.
[6]ibid.
[7]M. Kah, 'Electric Vehicles and their Impact on Oil Demand, Why Forecast Differ'. [2018]. *Centre on Global Energy Policy, Columbia SIPA,* 1-15.

carbon dioxide (C02) emissions to the global emissions in 2014.[8] Even though Nigeria's contribution to CO2 emissions is below the sub-Saharan average of 0.8 metric tons per capita, the Country's fast population growth is accompanied by an equal growth in its CO2 emission rate. It has been asserted that the lack of access to clean energy continues to be a significant challenge to Nigeria and this is because the Country's socio-political development is greatly influenced by power i.e. energy[9]. Energy Information Administration[10] asserted that about 39% of the Nigerian population lacks access to electricity. Hence, most of the Country's energy comes from coal, natural gas and oil, which are fossil fuel sources of energy. This suggests that over 74 million people which is more than one-third of the Nigerian population is a victim of no access to electricity.[11] This is consistent with the Nigerian Power Baseline Report claim that oil accounts for almost 57% of the Nigerian energy mix, followed by 36% of natural gas and 7% from hydroelectricity.[12] From the statistics provided, it can be inferred that there is an over dependence on fossil fuel in the Nigerian Energy sector, which gives rise to negative health and environmental impacts. It should further be noted that while nuclear power might theoretically provide a cleaner potion, Nigeria does not at present have capacity for a nuclear plant.[13]

In accordance with environmental objectives, most of the developed countries such as Germany, China, Japan, have established legal structures to strengthen the use of renewable energy (RE) sources. Another factor that has encouraged increasing use of RE is the insecurity associated with fossil energy supply and demand[14]. Decreasing cost of renewable-generated power, market penetration of electric vehicles (EVs), numerous technological innovations, issue of energy security and oil price volatility, limited nature of fossil-fuel supplies are the other factors supporting the present energy transitions[15]. The time frame for the transition is largely dependent on the Country's socio-economic and technological capacity. For example, it took Great Britain

[8] G.C Adeyanju and Others, "Exploring the Potentials, Barriers and Options for Support in the Nigeria Renewable Energy Industry', [2020] 1:7 *Discover Sustainability Publication*. Available at <https://doi-org/10.1007/s4361-020-00008-5> Accessed on 20th December 2021.
[9] S.O Oyedepo, 'Energy and Sustainable Development in Nigeria: The Way Forward' [2012] 2(1): 15 Energy Sustainainability and Society 2
[10] Energy Information Administration (EIA). Nigeria's Key Energy Statistics [2017]. Available at <https://www.eia.gov/beta/international/country.cfm?iso=NGA> Accessed on 20th December 2021.
[11] ibid.
[12] ibid (n-9).
[13] Nigerian Tribune, 'We Have No Capacit6y for Nuclear Power Plant Now- Federal Government' [23 August 2018], Nigerian Electricity Hub, Online: <https://www.nigeriaelectricityhub.com/2018/08/23/we-have-no-capacity-for-nuclear-power-plant-now-fg/> .
[14] I.K Maji, 'Does Clean Energy Contribute to Economic Growth? Evidence from Nigeria [2015] 1 Energy Rep 1145-150.
[15] Ibid (n-6).

more than 200 years to transition from wood to coal in heating their homes, whereas France transited from oil to nuclear in about 15 years.[16]

Energy transition is not a new phenomenon, fuel wood used to be the major source of energy across the globe, until development of steam engines. The U.S and most Western (developed) Countries transited from wood to coal between the late 19th to early 20th century. The transitions were encouraged by market disruption and technological developments. The oil stock of 1973-74 made France to shift the bulk of their electricity generation from oil to nuclear power.[17] The same scenario presents itself today. However, the major factor supporting the current energy transition is environmental concerns.

Securing energy supply and curbing energy contribution to climate change are the two over-riding challenges of energy sector leading to a sustainable future.[18] Sustainable development has become the centre of recent national policies, strategies and development plans of many countries. Sustainable development was defined adequately as 'any action that helps to satisfy the present needs, across all the regions of the world, without compromising the future of our globe'.[19] It is evident that replacing fossil fuel-based energy sources with renewable energy sources which includes bioenergy, direct solar, geothermal energy, hydropower, wind and ocean energy (tide and wave), would gradually help the world achieve the idea of sustainability. Steps have been taken by the Nigeria Federal Government in readiness to adopt RE and leverage on it to engender sustainable development through the Energy Commission of Nigeria (ECN) working in conjunction with the United Nations Development Program (UNDP), in 2005 released the Renewable Energy Master Plan (REMP)[20]. The REMP articulates Nigeria's vision and road maps to provide an increasing role for RE in attaining sustainable development based on the convergence of values, principles and targets as ingrained in the National Economic Empowerment and Development Strategy (NEEDS), National Energy Policy on Integrated Rural Development, the Millennium Development Goals (MDGs) and the International Conventions to reduce poverty and halt global environmental change[21]. In another report produced in 2012, FGN seeks to increase the

[16] R. Fouquet, 'Historical Energy Transitions: Speed, Prices and System Transformation'. [2016] 22 Energy Res Soc Sci 7-12.
[17] Ibid (n-6).
[18] T. Abbasi and S. Abbasi. 'Renewable Energy Sources: Their Impact on Global Warming and Pollution' [2010], PHI Learning.
[19] M. Ozturk, Y. E Yuksel, 'Energy Structure of Turkey for Suatainable Development', [2016], *Renew Sustain Energy Rev* 53: 1259-1272. Available at <https://dx.doi.org/10.1016/j.rser.2015.09.087> .
[20] United Nations Development Programme and Energy Commission of Nigeria, 'Renewable Energy Master Plan', [November 2005]. Federal Republic of Nigeria.
[21] U.B Akuru and O.I Okoro, 'Renewable Energy Investments in Nigeria: A Review of the Renewable Energy Master Plan', [2010], in *IEEE International Energy Conference, Manama.* 166-171.

share of renewables in electricity generation from 13% in 2015 to 23% in 2025 and 36% by 2030[22]. It can be said that the advancement of RE development and its pursuit has been very slow. This is based on the weak political will, poor legislative framework, and socio-economic support towards the development.

Two recent developments have firmly established Nigeria's future as a fossil fuel economy. One is the newly passed Petroleum Industry Act 2021(PIA) and the other is the Federal Government's decision to acquire through NNPC, 20% equity, costing over $4 billion in Dangote Refinery[23]. While Nigeria is excited about deepening the role of hydrocarbons in its economy, virtually all the developed Nations and a growing number of developing countries are moving in the opposite direction. They are accelerating progress towards renewable energy generation and net zero carbon while gas flaring continues almost unabated and solar, or any other renewable source is hardly in use. Nigeria is hooked on fossil fuel with an estimated 5.3 trillion cubic meters of natural gas reserves, an estimated 37 billion barrels of untapped crude oil reserves and an estimated 379 million short tonnes of coal reserves, Nigeria refuses to wear itself off dependence on hydrocarbons[24]. Thus, every effort is made to incentivize and subsidize fossil fuel production and use. But hardly any effort is made to encourage renewable energy generations.

Nigerian cannot solve its twin problems of acute electricity shortage and vulnerability to climate change by burning fossil fuels but must align with energy policy aimed at guaranteeing energy security through renewable and other low carbon sources. Developed countries as part of the developed World's net zero agenda is geared towards defunding hydrocarbon projects overseas and shifts are being made to electric cars and other clean-energy products[25]. As such, renewable energy has come to constitute a panacea of different sorts, offering solution to most problems posed by conventional energy sources. These sources are clean, safe, and inexhaustible, less damaging and even satisfy the criteria for sustainability prescribed by the United Nations that is, the ability to meet the energy needs of the present generation without compromising the ability to meet the needs of the future generation.

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[22] The Nigerian Energy Sector: An Overview with a Special Emphasis on Renewable Energy, Energy Efficiency and Rural Electrification, [June 2015]. Available at <https://www.giz.de/en/downloads/giz2015-en-nigerian-energy-sector.pdf> .

[23] O. Fasan, 'Nigeria Faces a Dire Future as a Fossil Fuel Economy', *Vanguard Newspaper*, [July 8, 2021]. Available at <https://vanguardngr.com/2021/07/Nigeria-faces-a-dire-future-as-a-fossil-fue-economy> Accessed on 21st December 2021 .

[24] Ibid.

[25]Global EV Outlook: Understanding the Electric Vehicle Landscape to 2020. [2013], Clean Energy Ministerial Electric Vehicles Initiatives and International Energy Agency.

Nigeria needs a legislative framework capable of addressing the Country's energy insecurity issues, its inadequate environmental standards and its inadequate quality of supply and energy conservation standards with a view to integrating Renewable Energy into the wider Nigerian Energy Value Chain, enhancing Energy Efficiency (EE) and entrenching Nigeria as a Renewable Energy (RE) Hub Centre in Africa.[26] More so, Nigeria has International obligations through its ratification of treaties such as the Amendment to the Montreal Protocol on Substance that Depletes the Ozone Layer,[27] the International Convention on Oil Pollution Preparedness Response and Cooperation[28], the United Nations Framework Convention on Climate Change[29], the United Nations Convention on the Law of the Sea[30], the Convention for the Protection of the Ozone Layer (Vienna Convention)[31], the International Convention for the Prevention of Pollution of the Sea by Oil[32], the Constitution of the World Health Organization[33], and the Charter of the United Nations[34]. All these impose standards pertaining to the pollution of the environment and healthy living in the Nation.

A vivid example of Nigeria's non-compliance with both its domestic and international obligations is the "Port Har-Court incidence", there have been reports of illicit refining activities leading to black smoke being pumped out by the refineries and resulting to very low quality of air in the city and residents inhaling black soot, this led to a media rage[35]. The World Bank in its report also stated that it estimated all Nigerians to be exposed to polluted air at a level of four times above the global health limits for safe air[36]

In the light of the above background information, this work introduces the concept of Renewable Energy, analyses and reviews the extent legislative framework for the deployment and development of renewable energy projects in Nigeria, also analyses the challenges and prospects

[26] The problem is that there are no comprehensive laws in support of Renewable Energy Transition in Nigeria and the existing legal framework does not sufficiently encourage RE generation. For a proper understanding of the problem, a division of the problem into various aspects would be pertinent. These includes: the problem in the legal framework, inadequate implementation strategies, environmental problems and investment barriers.
[27] Montreal Protocol on Substances that Deplete the Ozone Layer 1522 UNTS3; 26 ILM 1550 (1987), online: <https://www.unep.org/OZONE/pdfs/Montreal-Protocol2000.pdf>.
[28] International Convention on Oil Pollution Preparedness, Response and Cooperation 30 ILM 733 (1991).
[29] United Nations Framework Convention on Climate Change 1771 UNTS 107.
[30] United Nations Convention on the Law of the Sea 1833 UNTS 397.
[31] United Nations Vienna Convention for the Protection of the Ozone Layer 26 ILM 1516 (1987).
[32] 1954 as amended in 1962 and 1969 International Convention for the Prevention of Pollution from Ships 327 UNTS 3; 1962 ATA 7; 9 ILM I (1970).
[33] Constitution of the World Health Organization 14 UNTS 185.
[34] "Centre for Laws of Nigeria", online < https:// wwwtreatieslawnigeria.com/treaties/Enviromental-Law-Regulaions-Treaties. Php>.
[35] Anna Cunningham, "Nigeria has some of the World's most Polluted Cities and that isn't About to Change" Quartz Africa, [October 23, 2018].
[36] Ibid.

of the renewable energy sources and how the shift from fossil to renewable energy is a sure way to mitigating climate change, the phases of renewable energy, also an analysis of the economic implications of RE transition by considering macro-economic factors such as investment costs. Energy costs, industrial competitiveness, GDP changes, employment, income level and standard of living, the financial implications of infrastructures for RE transition, the socio-economic impacts of RE-transition. Finally draws a conclusion and a proposed draft of a comprehensive law on RE as well as recommendations for the development of RE.

2.0 The Legal Framework for Alternative Source of Energy in Nigeria

2.1 International Laws

Nation States, Nigeria inclusive in a bid to tackle and combat the impact of climate change and protect the global environment, came together to enter into multilateral environmental agreements (MEAs) which will have impact through implementation at regional and national levels. They formulate objectives, principles, and standards. The term multilateral environmental agreement relates to a number of legally binding international instruments that are used by states to commit to the achievements of specific environmental goals and these agreements can have different names such as conventions, treaty, agreement and protocols[37]. The **Vienna Convention**[38] **and the Montreal Protocol**[39] **of 1985 and 1987** respectively became the first multilateral environmental agreements in the history of the United Nations to achieve universal ratification[40] and provides for the framework for international efforts to protect the ozone layer from depleting substances and setting out mandatory phase out schedules.[41] These Conventions aims to protect human health and the environment against adverse effects resulting from human activities which modify the ozone layer. There have been regular amendments, the last being the **Kigali Amendment 2016** which provides for the inclusion of new ozone depleting substances and determines the timeline for a phase down of the production and consumption of Hydrofluorocarbons (HCFs) until 2045 as they are powerful greenhouse gases that have significant global warming potentials. It is no doubt that the use and burning of fossil fuels can be said to be one of the activities that have adverse effect

[37] International Environmental Law-Multilateral Environmental Agreements [Hanoi-May 2017], Ministry of Natural Resources and Environmental Department of Legal Affairs. 1-96.
[38] The Vienna Convention for the Protection of the Ozone Layer, United Nations Environment Programme, Convention Handbook [Nov, 2001], http://ozone.unep.org/en/treaties-and-decisions/vienna-convention-protection-ozone-layer .
[39] Montreal Protocol on Substances that Deplete the Ozone Layer 1987. Available at http://ozone. unep.org/ en/treaties-decisions/montreal-protocol-substances-deplete-ozone-layer UNEP, 2016, Montreal Protocol Handbook.
[40] Ibid (n-151).
[41] Ibid.

on the ozone layer and the earth needs to be protected from its use by opting for renewable energy options.

The umbrella for a global climate change response is provided by the **United Nations Framework Convention on Climate Change**[42]. The Convention was adopted during the Rio Conference in 1992 and addresses the reduction of greenhouse gases that are not controlled by the Montreal Protocol. The goal is to stabilize the greenhouse gas concentration at the level that prevents dangerous anthropogenic interference with the climate system with the criteria of allowing ecosystems to adapt naturally to climate change, ensure that food production is not threatened and enable economic development to proceed in a sustainable manner[43] and imposes an obligation on state parties to promote the principle of sustainable development[44]. While the **Kyoto Protocol** 1997[45] determined specific emission reduction targets for developed countries, the **Paris Agreement of 2015**[46] goes beyond that and establishes specific mandatory and voluntary commitments for the mitigation of greenhouse gas emissions, the adaptation to the adverse impacts of climate change, support provided from developed countries and the reporting of implementation activities. The Paris Agreement differentiates between commitments that all parties have to comply with and commitment that either only developed country parties or only developing country parties have to comply with. For Nigeria as a developing country party, the agreement formulates commitments related to the following topics: Mitigation[47], Support[48], Transparency[49] and Adaptation.[50] To reduce greenhouse gases, Article 4 formulates planning and implementation commitments for all parties. Central to the obligation to pledge targets for greenhouse gas emissions reduction in the form of nationally determined contributions, this provides for a country driven approach towards climate change mitigation. To increase ambition, Article 6 provides the basis for cooperation between parties in the achievement of their mitigation targets which are planning, implementation and cooperation.

[42] United Nations Framework Convention on Climate Change 1992. http://unfcc.int/essential/ background/ convention/items/6036.php UNFCC Secretariat, 2006, UNFCC Handbook.
[43] Ibid Article 2 UNFCCC.
[44] Ibid Article 3(4) UNFCCC.
[45] Kyoto Protocol 1997. http://unfccc.int/kyoto/protocol/items/2830.php UNFCCC, 2008, Kyoto Protocol Reference Manual.
[46] Paris Agreement 2015 http://unfccc.int/paris_agreement/items/9485.php WRI, 2016 Staying on Track from Paris. http://www.wri.org/publication/staying-on-track-paris ECBI, 2016, Pocket Guide, http://www.eurocapacity.org/ downloads/pocketGuide-Digital.pdf. .
[47] Ibid Article 4.
[48] Ibid Article 9.
[49] Ibid Article 13.
[50] Ibid Article 7.

In line with protecting the environment, we need to discuss conventions protecting the marine environment which is not left out from the adverse use of fossil fuel sources of energy. The key instrument is the **UN Convention on the law of the Sea 1982 (UNCLOS)**[51] considered the "constitution of the oceans". It provides an overarching legal framework for all activities in the oceans governing all aspects of ocean space, such as delimitation, environmental control, marine scientific research, economic and commercial activities, transfer of technology and the settlement of disputes relating to ocean matters. It aims to facilitate international communication, promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the protection and preservation of the marine environment. Article 194 which provides that there must be measures to prevent, reduce and control pollution of the marine environment and Article 195 which imposes duties not to transfer damage or hazards or transform one type of pollution into another. It also provides for different sources of pollution which are: seabed activities[52], land pollution[53], dumping[54], air pollution[55], vessels[56] .

The general duties provide the umbrella for the obligations regarding the different sources of pollution. Article 192 provides for the protection and the need to preserve the marine environment, Article 194 provides for the prevention, reduction, and control of pollution of the marine environment from any source, ensure activities within the territory do not cause damage by pollution, and minimize pollution from dumping, vessels, and installations. Article 195 provides that parties are to refrain from the transfer of damage or hazardous substances from one area to another and Article 196 provides for the prevention, reduction, and control of pollution from use of technologies.

Besides UNCLOS, there are plenty of other instruments that address marine environment pollution and among these conventions the 1973 Convention for the Prevention of Pollution from Ships as modified and the 1978 Protocol (MARPOL 73/78)[57] prevails. It sets up an international regime for the prevention of pollution from ships because of routine operational discharges and accidental pollution incidents. Its six annexes regulate the discharge from ships, the convention is regularly updated to specify requirements to improve the control of marine pollution from ship. The

[51] United Nation Convention on the Law of the Sea 1982, http://www.un.org/Depts/Los .
[52] Ibid Article 208-209, 204-215.
[53] Ibid Article 207-213.
[54] Ibid Article 210,216.
[55] Ibid Article 212,222.
[56] Ibid Article 211,221.
[57] International Convention for the Prevention of Pollution from Ships, Practical Guide, https://maddenmaritime.files.wordpress.com/2015/08/marpol_practical_guide.pdf .

objective aims to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances. The convention is mainly based on the principle of prevention, it also encourages cooperation between the parties. The convention and its annexes establish various mandatory commitments for its parties and there is no differentiation between developed and developing country parties. The parties must comply with the commitments of the convention itself and the annexes they acceded to. Among the six annexes, annex 1 which provides for pollution by oil (effective since 02/10/1983) provides for measures to prevent pollution by oil from operational measures and from accidental discharges. Annex IV provides for air pollution from ships (effective 19/05/2005) sets limits on sulphur oxide and nitrogen oxide emissions from ships exhausts and prohibit deliberate emissions of ozone depleting substances.

2.2 National Laws for Renewable Energy in Nigeria

Nigeria does not have an overarching legal or regulatory framework on renewable energy as alternative sources of energy and its utilization. This has hampered the development and consequent deployment of renewable energy in the provision of energy services in the country. In existence are disparate policies and guidelines that promote renewable energy. Relevant portions of these policies will be examined in this part of the research with a view to exposing their weaknesses.

2.3. Petroleum Industry Act 2021[58]

The PIA by its very essence is hydrocarbon-centred, it has been described as a watershed, which is expected to reposition the oil and gas industry in a way that entrenches sanity, attracts investments into the sector, increases exploration and production activities, and boost hydrocarbon resources utilisation[59]. The PIA is geared at promoting petroleum and petroleum products and referred to renewable energy sources only in in section 64(f) out of its 319 sections of the Act[60]where it provided that one of the objectives of NNPC Limited shall include engaging in the business of renewables and other energy investments. Firstly, the PIA in none of its sections stated the renewable sources of energy and since its sections bothers on the promotion of petroleum and petroleum products, it begs the question how renewable energy sources can come into the sector.

[58] Petroleum Industry Act, 2021 A121-370 Vol.108, No 142. Federal Republic of Nigeria Official Gazette.
[59] Abiola Soremeku, "Beyond the Petroleum Industry Act and Energy Transition", *The Guardian Newspaper*, [2022], Available at https://guardian.ng/opinion/beyond-the-petroleum-industry-act-and-energy-transition Accessed on 8th December, 2022.
[60] Ibid (n-171).

The provision of section 64(f) is a very weak one in a time when countries across the globe are navigating the journey to DE carbonization "Net Zero" and pledging to slash greenhouse gas emissions including some of the biggest buyers of Nigeria's crude oil, had pledged to cut carbon emissions by at least 55% by 2030.[61] The United Kingdom (UK) had also pledged to cut carbon emissions by 78% in 2035, Canada had also pledged to cut carbon emission by 40-45% by 2030, countries like Ukraine and China have unveiled plans to achieve net-zero emission by 2060.[62]The Nigeria oil and gas industry is now facing one of its worst challenges as stakeholders from the developed and industrialized nations are shifting their financial assistance and commitments from fossil fuels towards renewable energy projects, with developing countries being their target beneficiaries.[63]Nigeria needs to do more in providing the enabling infrastructure, regulatory framework and the right level of investment for the energy transition to renewables which is most definitely inevitable.

2.4 Climate Change Act 2021[64]

The Act provides a framework for achieving low greenhouse gas emission (GHG), inclusive green growth and sustainable economic development.[65] It sets a target for year 2050-2070 for the attainment of a net-zero GHG emission, in line with Nigeria's International climate change obligations[66]. The Act further sets a carbon budget for Nigeria, to keep average increases in global temperature within 2 degree Celsius and pursue efforts to limit the temperature increase to 1.5 degree Celsius above pre-industrial levels.[67] One of the measures and mechanisms prescribed for the formulated Action Plan includes enhancing energy conservation, efficiency and use of renewable energy.[68] The Act encouraged the use of renewable energy sources to help curb and reduce GHG emission in the Country. However, it did not stipulate measures for its development. Also, section 24(2) of the Act provides that private entity which fails to meet its target shall be liable to a fine to be determined by the council. This provision to the researcher gives a room for laxity by these entities and the fine ought to be expressly stated to act as a deterrent. Furthermore,

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[61] Taiwo Oyedele, Abimbola Banjo and Rotimi Teteye, "The Petroleum Industry Act: Redefining the Nigerian Oil and Gas Landscape", [2021], Available at www.pwcnigeria.typepad.com Accessed on 27th November 2022.
[62] Ibid.
[63] Peter Uzoho, "Energy Transition: What Impact can PIA Make", *This Day Online Newspaper*, Available at https://www.thisdaylive.com/index.php/2021/11/23/energy-transition-what-impact-can-pia-make/ [2022], Accessed on the 8th December, 2022.
[64] Climate Change Act 2021, Available at www.extwprlegs1.fao.org Accessed on 1st December 2022.
[65]ibid.
[66] Femi Awofala, "Key Features of the Nigeria's New Climate Change Law", *Brickstone*, 2022, Available at https://brickstone.africa/climate-change-act/ Accessed on the 8th of December, 2022.
[67] Ibid (n-177) Section 19.
[68] Ibid Section 20(b) vii.

the above provision does not apply to public entities that fail to meet their target as no such provision was stated in the act. This begs to ask the question if the law applies differently to both public and private sector.

2.5 The National Climate Change Policy 2021[69]

The vision of the policy is a low-carbon, climate-resilient Nigeria. The policy is aligned largely with sectors identified as the main contributors to the country's GHG emissions.[70] The sectors are energy, oil and gas, agriculture and land use, industry, and transport. The energy sector was identified as the second major contributor of GHG in Nigeria and producing adequate energy will require improved investment, regulatory control, and critical review of existing approaches, as well as the adoption of low-cost but efficient energy generation technologies[71]. The options will also require rapid and extensive transitions in energy sector and overall lifestyle changes. The policy measures include[72]; to expand the production and use of renewable energy, to promote energy efficiency and management activities that include new and innovative energy efficiency methodologies and techniques in power generation, facilitate full transition to clean cooking fuel, provide sustainable incentives and financial mechanisms to encourage and support the use of renewable sources of energy. The policy pledged to embark on unconditional 20 percent GHG emissions reduction by 2030[73] which can be achieved through expansion of energy supply based on renewable and other low carbon technology alternatives. In the oil and gas sector, the target is to reduce flaring down to less than 10% by the year 2020 and or end it completely by 2030[74]. This target is achievable if the right legislation and strategies are implemented as this policy is a step in the right direction and the realization of the need to cut down GHG emissions in the country due to its resultant impact of causing climate change[75]. However, the policy advocated for the use of renewable energy sources without going into details of listing them or stating polices and strategies for its development in the selected sector. This is a downside to the policy, and this is because if

[69] National Climate Change Policy for Nigeria 2021-2030, Federal Ministry of Environment, Department of Climate Change. Available at www.climatechange.gov.ng Accessed on 1st December 2023.
[70]Ibid.
[71] Muhammed Tawfiq Ladan, Maria Antonia Tigre, "A Review of the Nigeria's Climate Change Act: Potential for Increased Climate Litigation", IUCN 2022, Available at https://iucn.org/news/commission-environmental-economic-and-social-policy/202203/a-review-nigerias-2021-climate-change-act-potential-increased-climate-litigation . Accessed on the 8th of December, 2023.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] William Ukpe, "FEC Approves Revised National Climate Change Policy", Available at https://nairametrics.com/2021/06/03/fec-approves-revised-national-climate-change-policy [2020], Accessed on the 8th December, 2022.

the use of these renewable energy sources had been made priority, the measures and strategies ought to be stated and implemented immediately.

2.6 National Energy Policy (Nep) 2003[76]2013[77]:

This policy was enacted to serve as a blueprint for sustainable development with the main goal of creating energy security through a robust energy supply mix by diversifying the energy supply and energy carriers based on the principle of "an energy economy in which modern renewable energy increases its share of energy consumed and provides affordable access to energy throughout Nigeria"[78]. Energy sources include solar, wind, biomass, hydropower, and other renewable energy sources[79].

a. Solar

In discussing solar as a renewable energy option, the policy pointed out that Nigeria lies within a high sunshine belt and the solar radiation is fairly well distributed and vary from about 12.6 MJ/m2 -day in the coastal latitudes to about 25.2 MJ/m2 -day in the far North[80]. It noted that solar energy is renewable, and its utilization is environmentally friendly and very suitable for application in remote areas not connected to the national grid[81]. Some of the application of solar technologies includes crop drying, house heating, heating of process water for industries, hospitals, air-conditioning, preservation of foods and drugs, power generation.

b. Wind

The policy provides that wind is a natural phenomenon and identifies the annual average wind speed at 10m heights varies from about 2 m/s in the coastal areas to about 4 m/s in the far north[82]. Wind energy was shown to have different forms of utilization which includes water pumping, milling of grains, wind electricity generation and there is a need for the development of wind energy programme.[83] The objectives set out for wind sources include[84]; to develop wind energy as an alternative energy resource, to develop local capability in wind energy technology, to use wind

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[76] National Energy Policy 2003, Energy Commission of Nigeria. Online www.rea.gov.ng 8th August 2024.
[77] National Energy Policy; Draft Revised Edition 2013. Energy Commission of Nigeria. Abuja: Federal Republic of Nigeria, online www.energy.gov.org 8th August 2024.
[78] Oluwaseun Viyon Ojo, "An Overview of the Legal and Regulatory Framework for Renewable Energy Projects in Nigeria: Challenges and Prospects", [2017], UNILAG Law Review, 1/1, 1. 22-47.
[79] Ibid
[80] Ibid.
[81]Nnaemeka Vincent Emodi, Nebedum Ekene Ebele. Policies Enhancing Renewable Energy Development and Implications for Nigeria. *Sustainable Energy*. 2016; 4(1):7-16. <doi: 10.12691/rse-4-1-2.>
[82] A. O. Odukwe, and S.O Enibe. "Energy Resources and Reserves in Nigeria." Solar & Wind Technology [2016] 5 (3): 335–38.
[83] D.A. Fadare, "The Application of Artificial Neural Networks to Mapping of Wind Speed Profile for Energy Application in Nigeria." Applied Energy [2010], 87 (3): 934–42, < doi: 10.1016/j.apenergy.2009.09.005.>.
[84] ibid.

energy for provision of power to rural areas and remote communities far removed from the national grid.

c. Biomass

The policy termed biomasses organic, non-fossil material of biological origin and identifying biomass resources as wood, forage grasses and shrubs, animal wastes and wastes arising from forestry, agricultural, municipal, and industrial activities, as well as aquatic biomass[85]. It pointed out that biomass energy resources of the nation have been estimated to be significant and plant biomass can be used as fuel in thermal power plants or converted to produce solid briquettes, which can then be utilized as fuel for small-scale industries[86]. Biogas digesters was stated to be capable of sustaining household, industrial and institutional energy needs and fertilizers is another use of biomass[87]. The abundant energy available from biomass can be meaningfully introduced into the nation's energy mix through the development of a comprehensive development programme[88]. This programme is to encompass fully supported research, development, demonstration, and manpower training components for the nation to effectively harness non-fuelwood biomass energy resources and integrate them with other energy resources. Some of the objectives[89] for its use include promoting biomass as an alternative energy resource especially in the rural areas, promoting efficient use of agricultural residues, animal, and human wastes as energy sources and to reduce health hazards arising from combustion of biomass fuel.

d. Hydropower

The policy stated that Hydropower is one of the major sources of base load electricity generation and despite its high initial capital cost, hydropower provides one of the cheapest and cleanest sources of electricity[90]. It pointed out that the country is well endowed with large rivers and some few natural falls which are together responsible for the high hydropower potential of the country[91]. The Rivers Niger and Benue and their several tributaries constitute the core of the Nigerian river

[85]K.J Simonyan, and O Fasina. "Biomass Resources and Bioenergy Potentials in Nigeria." *African Journal of Agricultural Research* [2013], 8 (40): 4975–89.
[86] B.A Edirin & A.O Nosa, "A Comprehensive Review of Biomass Resources and Biofuel Production Potential in Nigeria, *Research Journal in Engineering and Applied Sciences*, Emerging Academy Resources, [2012] 1:3, 149.
[87] Ibid (n-188).
[88] Ibid.
[89] Ibid.
[90] Anon, "The World's Water Battery: Pumped Hydropower Storage and the Clean Energy Transition". *International Hydropower Association, IHA*, [2018], Available at <https: //www.hydropower.org/sites/default/files/publications-docs/the_worlds_ water_battery_-_pumped_storage_and_the_clean_energy_transition_2.pdf>.
[91] Prince Okedinachi, "Nigeria: ECN sees Hydropower as Crucial for Current Energy Transition", *WorldStage News*, [2022], Available at,<https://www.worldstagenews.com/2022/10/24/nigeria-ecn-sees-hydropower-generation -as-crucial-for-current-energy-transition/> Accessed on 8th December, 2022.

system, which offers a renewable source of energy for large scale (greater than 100 MW)[92] hydropower development. In addition, several scores of small rivers and streams do exist and can be harnessed for small scale (less than 10MW) hydropower projects. The total technically exploitable large scale hydropower potential of the country is estimated at over 10,000 MW, capable of producing 36,000 GWh of electricity annually and for small scale hydropower, the potential is estimated at 734 MW[93]. The Policies set out for hydropower includes[94]; harnessing the hydropower potential available in the country for electricity generation, paying particular attention to the development of the mini and micro hydropower schemes. The objectives as set out in the policy includes[95]; to increase the percentage contribution of hydroelectricity to the total energy mix, to extend electricity to rural and remote areas using mini and micro hydro power schemes.

The policy did a good job in identifying the potential of the above discussed renewable energy sources as an alternative source of energy as well as its utilization to help curb the energy insufficiency in the country. The policy in while discussing energy issues stated that the combustion of fossil fuels, especially in the transport and industrial sectors, contribute greatly to air pollution in major cities and these greenhouse gases lead to global warming with negative consequences to the environment[96]. The adverse impact on fisheries and marine life in the oil producing areas due to water and soil pollution caused by oil spillage during oil production and transportation was not left out and the need to incorporate environmental considerations into the nation's energy development and utilization[97]. In 2013, NEP was reviewed to reflect recent developments in the energy sector with emphasis on Renewable Energy and Energy Efficiency[98]. The question that comes to mind is whether any of the stated policies, objectives and strategies have been implemented or achieved so far although clearly stating the potentials and impact of the continuous use of fossil fuels as against the renewable energy source. The answer is negative as not much has been done in harnessing the use of these renewable energy resources to the extent that it can be relied upon for national utilisation, and this has led to the policy being referred to as a toothless bulldog as it lacks the capacity to enforce and ensure total compliance for the objectives

[92] Ibid (n-188).
[93] Ibid.
[94] Olawale Ajimotokan, "Hydro-Power Projects Can Solve National Energy Challenges says UNIDO", *This Day Newspaper* [2022], Available at https://www.thisdaylive.com/index.php/2021/06/02/524340/ Accessed on 8th December, 2022.
[95] Ibid.
[96] Maren, I, M Mangai, and J Golkus, "Energy Exploitation and Environmental Impact in Nigeria: The Way Forward." Energy [2013] 3 (13), 35-93.
[97] Ibid.
[98] Karsten Ley, Dr. Jeremy Gaines and Anil Ghatikar, "An Overview with a Special Emphasis on Renewable Energy, Energy Efficiency and Rural Electrification", *GIZ,* 67-152.

to be attained[99]. As it appears, the policy lacks neither legislative backing nor force of law and does not impose statutory obligations on either the government or the investors, private or institutional[100]. To the researcher, this will not augur well with the development of the renewable energy sub-sector which requires consistent, committed, unrelenting and pragmatic efforts towards its implementation which is why we are where we are today in terms of energy instability.

e. Renewable Electricity Policy Guidelines (Repg) 2006[101]

The document issued by the Federal Ministry of Power and Steel is the government's overarching policy on all electricity derived from renewable energy sources. The Policy Guidelines sets out the Federal Government's vision, policies, and objectives for promoting renewable energy in the power sector. It defined "Renewable electricity"[102] to be electric power obtained from energy sources whose utilization does not result in the depletion of the earth's resources and includes energy sources and technologies that have minimal environmental impacts. These sources of electricity normally include solar, wind, although with a poor – moderate potential, hydropower, biomass and presents unique opportunities to scale up access to electricity services nationwide. The policy identifies that renewable electricity provides more diversity and improves the reliability of electricity supply through the grid and could potentially be important in ensuring the stability of grid electricity supply, especially in times of localized disruption of sources of power supply[103]. The policy in discussing the electricity situation of the country stated that the country is exposed to a high solar radiation level with an annual average of 3.5 – 7.0kWh/m2/day[104]. However, access to electricity services is low as about 60 percent of the population which is over 80 million people are not served with electricity[105].

The policy did a good job in identifying that achieving increased power generation and electricity expansions which will in turn ensure stability cannot be through conventional sources alone but by an aggressive deployment of renewable energy sources. However, the policy is geared towards

[99] S.O. Daudy and S.O. Idehen, "An Examination of the Implementation of Existing Policies on Renewable Energy in Nigeria" [2017], Available at, https://doi:10.4236/jpee.2021.95007 . Accessed on 8th August 2024.
[100] Ibid (n-189).
[101] Renewable Electricity Policy Guidelines 2006, available online at www.energy.gov.ng . Accessed on 8th August 2024.
[102] A. Wayemi, C. Diji , B. Awotide, A. Adenikinju, P. Obute, "Towards Sustainable Universal Electricity Access in Nigeria. *CPEEL;* [2015]. Available at www.cpeel.ui.edu.ng/sites/default/files/monograph-2.pdf Accessed on 8th August 2024.
[103] Nnaemeka Vincent Emodi and Nebedum Ekene Ebele, "Policies Promoting Renewable Energy Development and Implications for Nigeria", *British Journal of Environment & Climate Change* [2016], 6(1): 1-17, Article no. BJECC.2016.001 ISSN: 2231–4784.
[104] Ibid.
[105] Kenneth E. Okedu et al. Renewable Energy in Nigeria: The Challenges and Opportunities in Mountainous and Riverine Regions, *international journal of renewable energy research* [2015] 5/1, 1-8.

ensuring the mix of both fossil fuel sources and renewables despite pointing out the environmental impact of the use of these fossil fuel sources and how its use has failed to achieve the expected result of ensuring energy stability in the country. This policy asides from replicating the objectives and strategies of the various renewable sources of energy as stated in the NEP, it does not seek to transition from the use of fossil fuel options to renewable sources. Also, the policy is limited in the sense that it bothers on the power sector alone leaving out the fact that the use of renewable energy option has a ripple effect on all the sectors of the country. The vision to expand the energy market for renewable energy to at least 5% and a minimum of 5TWh of electric power generation[106] to the researcher is low and was never even achieved as the target year of 2016 has long come and gone without any significant improvement in the sector.

f. Renewable Electricity Action Programme (REAP) 2006[107]

The action programme was issued to aid the actualization of the REPG as well as set out a road map to implement the policy guidelines. It pointed out that poor services have forced most industrial customers to install their own power generators, at high costs to themselves and the Nigerian economy[108]. The transmission network is overloaded with a wheeling capacity less than 4,000 MW, has a poor voltage profile in most parts of the network, especially in the North, inadequate dispatch and control infrastructure, radial and fragile grid network, frequent system collapse, exceedingly high transmission losses[109]. In discussing the resource situation in Nigeria, the policy identified that Nigeria has an estimated average of 6,372,613 PJ/year (≈1,770 thousand TWh/year) of solar energy which falls on the entire land area of Nigeria and this is about 120 thousand times the total electrical energy generated by the National Electric Power Authority for the whole country for the year 2002[110]. It pointed out that these renewable resources are available and needs to be harnessed.

There is no gain saying the fact that if the REPG failed to meet its targets, this action programme which was issued to aid the actualization of the REPG has also failed. The programme also encouraged the use of renewable energy sources as a backup plan when the conventional fossil

[106] Ibid.
[107] Renewable Electricity Action Programme (REAP), Federal Ministry of Power and Steel (2006). Federal Republic of Nigeria, online at www.iceednigeria.org/backup/workplace/uploads/dec-2006-2.pdf. . Accessed 8th December 2022.
[108] Ighodaro, Clement. "Co-Integration and Causality Relationship between Energy Consumption and Economic Growth: Further Empirical Evidence for Nigeria." *Journal of Business Economics and Management*, [2010], 1: 97–111.
[109] T. Winkel, M. Rathmann, M. Ragwitz,S. Steinhilber, G. Resch, C. Panzer, I. Konstantinaviciute, "Renewable energy policy country profiles. Prepared within the Intelligent Energy Europe project RE-Shaping (Contract no.: EIE/08/517/SI2. 529243); [2011] Available at www.reshaping-res-policy.eu Accessed on the 8th of December, 2022.
[110] ibid.

fuel sources fail to achieve the desired purpose. It does not expressly push for the need to transition from the use of fossil fuel sources. However, this programme seems to be abandoned with the restructuring of the Ministry of Power and Steel to the new Ministry of Power.[111]

g.Renewable Energy Master Plan (REMP) 2005 And 2012[112]

It expresses Nigeria's vision and sets out a roadmap for increasing the role of renewable energy in achieving sustainable development. The research agreed with the master plan that Nigeria's fossil-led economy is under severe pressure and in decades to come, the sun will slowly but certainly set on crude oil production. The plan provided Nigeria with medium and long term envisions of a country that will significantly be less dependent on hydrocarbons. The plan pointed out that solar photovoltaic technologies are gaining an increasing acceptance in Nigeria and increasing promise in terms of efficiency improvements and costs. However, despite improvements in local R&D efforts, the body of knowledge on these technologies and their market potentials is considerably inadequate. The estimated lifetime of PV modules is 25 and 30 years[113] which makes them exceptionally attractive for investors. Solar PV systems are being extensively used for a wide range of electrical energy requirements, including solar home systems, water pumping, refrigeration, and telecommunications. These applications have positive social and economic impact on the lives of individual users, businesses, and communities. An estimated 40,000, 400,000 and 4,000,000 solar home systems will be achieved within the target periods of 2007, 2015 and 2025[114]. Solar cookers will increase from 1,500 to, 50,000 and 150,000 in 2025[115]. Solar water heaters and chick brooders are expected to experience significant increases within the same period. In stating its activities and milestones, the master plan provided for the Framework Program for Renewable Energy Promotion[116] which will address a range of crosscutting issues, including policy, regulatory and institutional framework; pricing and financing issues; product standards and quality control;

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[111] Nigerian Energy Support Programme (NESP), "An Overview with a special Emphasis on Renewable Energy, Energy Efficiency and Rural Electrification" *GIZ*. [2015].

[112] Renewable Energy Master Plan (REMP) 2005 and 2012, online at www.energy.gov.ng . Accessed on 20th July 2024.

[113] O. Ogunmodimu , E. C. Okoroigwe "Solar Thermal Electricity in Nigeria: Prospects and Challenges". *Energy Policy*. [2019]; 128:440–80.

[114]O.S.Ohunakin, M.S.Adaramola, O.M Oyewola, R.O Fagbenle, "Solar Energy Applications and Development in Nigeria: Drivers and Barriers. *Renew Sustain Energy Rev*. [2014]; 1(32):294–301.

[115] ibid.

[116] C. Kost , J.N Mayer, J. Thomsen, N. Hartmann, C. Senkpiel, S. Philipps, S. Nold, S. Lude, N. Saad, T. Schlegl "Levelized Cost of Electricity Renewable Energy Technologies". *Fraunhofer Institute for Solar Energy Systems ISE;* [2013]. Available at https://www.ise.fraunhofer.de/content/dam/ise/en/docum ents/publications/ studies/EN2013_Fraunhofer-ISE_LCOE_Renewable_Energy_Technologies_version%20Nov 2013_EN_Stand_ 13-04- 16_v02.pdf Accessed 8th December 2022.

capacity-building, research, and development as well as public awareness. The programs will address R&D, database, market as well as capacity issues in realizing the targets of the REMP.[117]

The plan stated that wind speeds in Nigeria range from a low 1.4 to 3.0m/s in the southern areas and 4.0 to 5.12m/s in the extreme North[118]. Pointing out that wind speeds in Nigeria are generally weak in the South except for the coastal regions and offshore locations, while peak wind speeds generally occur between April and August for most sites[119]. Initial study provided for in the plan shows that total actual exploitable wind energy reserve at 10m height, may vary from 8 MWh/yr in Yola to 51 MWh/yr in the mountain areas of Jos Plateau and it is as highs as 97 MWh/yr in Sokoto[120]. Hence, Nigeria falls into the poor/moderate wind regime and wind energy utilization in Nigeria is practically minimal. It further stated that the hundreds of wind pumps scattered all over the country are ill maintained and some have been abandoned but some state governments, like Jigawa and Kano, are making efforts to install new wind pumps[121]. Also, there is a pilot wind electricity project in existence which is the 5 kWpSayyaGidanGada wind electricity project at Sokoto, and in addition, a 0.75 kWp wind electricity project in the centre of the town is being run on an experimental basis to prove the viability of wind farming in the area[122]. The plan clearly pointed out that wind energy is one of the lowest-priced renewable energy technologies available today, the construction time of wind energy technology is less than other energy technologies, it uses cost-free fuel, the operation and maintenance (O & M) cost is very low, and capacity addition can be in modular form, making it adaptable to increasing demand. The plan activity and milestone of the plan proposed the establishment of a Nigerian Wind Programme[123] and the implication of these targets is a rapid scale up of most of the renewable energy technology applications. Some of the highlights include a combined increase in wind power generation to 1MW, 19MW and 38MW in 2007, 2015 and 2025 respectively.[124]

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[117] Ibid.
[118] O. Adedipe, M.S. Abolarin, R.O Mamman. "A Review of Onshore and Offshore Wind Energy Potential in. *IOP Conf Ser Earth Environ Sci.* [2018]; 413:012039.
[119] M.Z. Jacobson, M.A. Delucchi, G. Bazouin, Z.A.F. Bauer, C.C. Heavey, E. Fisher, S.B. Morris, D.J.Y. Piekutowski, T.A. Vencilla, T.W. Y eskoo. "100% Clean and Renewable Wind, Water, and Sunlight (WWS) All-sector Energy Roadmaps for the 50 United States". *Energy Environment Science* [2015] 8(7), pp. 2093-2117.
[120] U. B. Akuru and O. I. Okoro, "Renewable Energy Investment in Nigeria: A Review of the Renewable Energy Master Plan," *in IEEE International Energy Conference, Manama*, [2010], 166-171.
[121]C.E. Nnaji, C.C. Uzoma and J.O. Chukwu. The role of renewable energy resources in poverty alleviation and sustainable development in Nigeria. Continental Journal of Social Sciences,[2010] 3(31), 31-37.
[122] Ibid.
[123]E.P Agbo, C.O. Edet, T.O Magu, A.O. Njoku, C.M. Ekpo, and H. Louis Solar energy: A panacea for the electricity generation crisis in Nigeria. Heliyon,[2021] 7(5), p.e07016.
[124] Ibid.

The master plan stated that biomass remains a leading source of energy for Nigeria contributing 37% of total energy demand, and the energy of choice for the vast majority of rural dwellers and the urban poor[125]. The biomass energy resources of the nation have been estimated to be 144 million tonnes/year and Nigeria is presently consuming about 43.4 x 109 Kg of fuelwood annually and the average daily consumption is about 0.5 to 1.0 kg of dry fuel wood per person[126]. It pointed out that Nigeria's total area is 92.4 million hectares out of which 79.4 million and 13.0 million hectares are occupied by land and water bodies respectively[127]. Agricultural land occupies 71.9 million hectares, and the foregoing shows that there is a huge potential for production of agricultural biomass in Nigeria[128]. 94% and 68% of Nigerian households are engaged in crop farming and livestock farming respectively and these further underscores Nigeria's potential for the production of manure, which is a key component of agricultural biomass[129]. Some of the methods for biomass conversion to biogas was listed to include physical, biological, pyrolysis, gasification, burning, anaerobic digestion or biodegradation processes. Its ubiquitous availability and simple conversion technologies make biomass resources the most widely used source of energy in the country. Briquettes production which is another utilization of biomass source was stated. There are, however, only two small-scale companies in Nigeria situated in Ogun and Kaduna states which produce and market sawdust briquettes[130]. Biogas on the other hand has three biogas designs presently available. These include the fixed dome, the floating cover and the bag digester[131].

The master plan stated that hydropower is derived from the potential energy available from water due to the height difference between its storage level and the tail water to which it is discharged[132]. Power is therefore generated by mechanical conversion of the energy into electricity through a turbine, at a usually high efficiency rate. Pointing out that depending on the volume of water

[125] Abayomi S. Oyekale, "Assessment of Households' Access to Electricity and Modern Cooking Fuels in Rural and Urban Nigeria: Insights from DHS Data." *Life Science Journal* [2012] 9 (4): 1564–70.
[126] Kehinde Oluoti, Godswill Megwai, Anita Pettersson, and Tobias Richards, "Nigerian Wood Waste: A Dependable and Renewable Fuel Option for Power Production." *World Journal of Engineering and Technology* [2014] 2 (03): 234.
[127] Aliyu Abubakar Sadiq, Joseph O. Dada, and Ibrahim Khalil Adam, "Current Status and Future Prospects of Renewable Energy in Nigeria." *Renewable and Sustainable Energy Reviews* [2015] 48: 336–46.
[128] Ibid.
[129] US Energy Information Administration, Biomass Explained: Waste-to-Energy (Municipal solid waste), [2019], Available on: https://www.eia.gov/energyexplained/biomass/waste-to-energy.php> Accessed on 8th December, 2022.
[130] Ibid. (n-238).
[131] J.F.K. Akinbami, M.O. Ilori, T.O Oyebisi, I.O Akinwumi, O. Adeoti, "Biogas Energy use in Nigeria: Current Status, Future Prospects and Policy Implications". *Renewable and Sustainable Energy Review* [2001], 5:97–112.
[132] W.S Ebhota, P.Y Tabakov,"The Place of Small Hydropower Electrification Scheme in Socioeconomic Stimulation of Nigeria", *International Journal of Low-Carbon Technologies*, [2018],13/4, 2018 311-319, https://doi.org/10.1093/ijlct/cty038

discharged hydropower can be large or small. An upper limit of 30 MW[133] has been considered for definition of small-scale hydro power and small hydro can further be sub-divided into mini hydro (<1MW) and macro hydro (<100KW)[134]. It further stated that the country is blessed with a huge hydropower potential and the most attractive areas would be the southern, Plateau and South-eastern regions of the country, where rainfall is highest and of long duration and local topography provides appropriate drops and necessary hydraulic heads[135]. The lifetime of small hydro facilities is estimated to be 20 – 30 years, compared with 8 – 10 years for diesel engine generators and long service life is an important attraction of the small hydro system[136]. In Nigeria, some NESCO SHP projects, which were completed between 1923 and 1964[137], have continued to provide virtually uninterrupted power to not only supply the Jos metropolis and meet local consumption, but have also continued to feed surplus energy into the national power grid. Although, small hydropower may require a moderately high capital cost, its low operation and maintenance (O & M) requirements coupled with long life span are its major advantage over other prospective sources of power. In 2025, the plan posits that aggregate electricity demand will increase to 29000MW with new renewable energy making up 10% of the total energy demand of the country and small hydro plants will represent over 66% of the entire new renewable energy contribution[138]. Also, expected contribution of non-electricity renewable energy sources to the overall projected energy demand, small-scale hydro plants will contribute 56MW, 600MW and 2,000MW in 2007, 2015 and 2025[139] respectively.

h. Hydrogen, Ocean/Marine and Geothermal Energy

The master plan provided that hydrogen, marine, ocean and geothermal energy are important in the long-term vision of providing secure, abundant, cost effective and clean sources of energy for Nigeria[140]. Their impacts might not be felt in the next decades to come, but these emerging energy sources will be key to meeting future challenges when the country is weaned off its dependence

[133] Collins O. Ugwu, Paul A. Ozor and C. Mbohwa, "Small Hydropower as a Source of Clean and Local Energy in Nigeria: Challenges and Prospects", *Science Direct* [2021] 2666-0520 https://doi.org/10.1016/j.jfueco .2021. 100046.
[134] Ibid.
[135] S.O Ohunakin, S.J Ojolo, O.O. Ajayi, "Small Hydropower (SHP) Development in Nigeria: An Assessment", *Renew Sustain Energy Rev* [2011]; 15 https://doi.org/ 10.1016/j.rser.2011.01.003 .
[136]Ibid.
[137] M.E. Emetere, O. Bello, S.A. Afolalu, A.O Mamudu, L.M. Amusan, C.O. Iroham, I. OdunAyo, "Parametric Study of a Proposed Small Hydropower Project at Gurara-Nigeria". *Cogent Eng* [2021]; 8:1877-868. https://doi. org/10.1080/23311916.2021.1877868 .
[138] S. Wash," Hydropower Potential Study", *Hydrovision international,* [2021] Available on: https://www. hydro review.com/world-regions/study-hydropower-potential , Accessed on 8th December 2022.
[139] Ibid.
[140] Mohammed Dahiru Aminu, "Nigeria's Prospect in the Hydrogen Economy", *Premium Times Newspaper*,[2022], Available at https://www.premiumtimesng.com/opinion/548948-nigerias-prospects-in-the-hydrogen-economy-by-mohammed-dahiru-aminu.html Accessed on 8th December, 2022.

on hydrocarbons. It sated that hydrogen provides a solution to the energy needs of Nigerians at a future point but there is presently a lack of know-how to deliver clean, affordable, safe and convenient energy for transportation, electricity or stationary uses from hydrogen[141]. However, to ensure the security of energy supplies in a post-fossil economy, the process of Nigeria's transition to a hydrogen economy must be planned and should start immediately. It further pointed out that hydrogen can be produced from water using various forms. It can also be extracted from anything that contains hydrocarbons, including gasoline, natural gas, biomass, landfill gas, methanol, which goes to say the resources base is therefore limitless[142].

As regards ocean/marine energy source**,** the plan stated that the idea of producing useful energy from the world's oceans has existed over several centuries and with Nigeria geographical location, power from the ocean to be part of the long-term vision for a secure, cost effective and clean energy future should not be ignored[143]. Oceans and seas cover more than two-thirds of the earth's surface and are therefore the world's largest solar collectors. Nigeria has an Atlantic Ocean coastline stretching over a distance of about 800 km – from Badagry to Bakassi[144], tides in the coastal areas have a height range of 100 – 300 cm and an incursion length of 30 – 40 km on the average[145]. Nigeria has a good number of institutions with the capacity to carry out research and development activities on ocean energy and this should definitely be exploited by the government.

As regards geothermal energy, the master plan states that it comes from heat that originates from the Earth[146]. It has two sources: initial heat produced from the formation of the Earth and heat produced from radioactive decay of various isotopes[147]. It pointed out that in 2004 over 9,000 megawatts of electricity were produced from some 250 geothermal power plants in 22 countries around the world and these plants provide reliable base-load power for well over 60 million people[148]. Two known geothermal resources exist in Nigeria, and they are: the Ikogosi Warm

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[141] Ibid.
[142] Ibid.
[143] C.N Nwaokocha and A.T Layeni, "Ocean Wave Energy- An Option for Nigerian Power Situation" *Scientific Research & Essays Academic Journals*, [2013] 8:25 1547, Available at https://www.academicjournals.org/SRE Accessed on 8th December, 2022.
[144] R.M Young, "Requirements for a Tidal Power Demonstration Scheme", *Journal of Power & Energy* [1995],209 at 215, cited in Collins Nwaokocha and Abayomi Layeni, "Estimation of Tidal Power Potential of Nigeria Coastal Area" *Journal of Power & Energy,* [2015],163 at 164.
[145] Ibid.
[146] G.M Ngala, M.B Oumarpu & F.A Oluwole, "Review of Geothermal Energy Technology and its Potential for Power Generation in Borno Basin, Nigeria" [2015] 14 Annals of Borno, 91 at 95-96.
[147] E.E Abraham & E.E Nkitnam, "Review of Geothermal Energy Research in Nigeria: The Geo-science Front" *Int. J Earth Sci Geophys* [2017], 3:015 1 at 7.
[148] Ibid.

Springs in Ondo State and the Wikki Warm Springs in Bauchi[149]. The resource potentials for geothermal energy entrapped in the Earth crust are almost limitless. Beyond the two known geothermal resource areas in Nigeria, high geothermal gradient trends have been identified in the Lagos sub-basin, the Okitipupa ridge, the Auchi-Agbede within the Benin flank/hinge line as well as the Abakaliki anticlinorium[150]. However, there is no consistently developed and maintained database on geothermal energy in Nigeria.

The master plan itself identified that Nigeria lacks a strong institutional leadership for renewable energy and there is a need for a redesign of the institutional framework leading to an actor or set of actors that will champion the development of renewable energy. This proposed Legal framework will in turn encourage efficiency in the provision and use of all types of energy; raise the quality of management and training in energy provision and use; heighten public awareness of energy-related issues; encourage local institutional reforms to help meet policy goals; and reduce environmental risks. Also, the proposed estimate for the implementation of the REMP was an investment portfolio of 4 billion, 178 billion and 610 billion Naira, in the short (2005 – 2007), medium (2008 – 2015) and long term (2016 – 2025)[151], respectively which has unfortunately led to the lack of its commencement as it is seen as ambitious. The lack of political will of the government to sign off the REMP shows how hooked on fossil fuel the country is and is still not ready for the transition. Its approval to the researcher should not continue to linger because of the continuing depletion of conventional energy resources which makes its adoption urgent and indispensable.

i. National Biofuel Policy and Incentives 2007[152]

The policy defined bio-fuels to mean fuel ethanol and bio-diesel and other fuels made from biomass and primarily used for automotive, thermal and power generation[153]. It also defined biomass to mean agriculturally produced raw materials which are available on a renewable or recurring basis, including trees, crops, plant fibre, cellulose based materials, industrial wastes, and

[149] N. K Grant, D. C Rex, S. J Freeth, "Potassium- Argon Ages and Strontium Isotope Ratio Measurements from Volcanic Rocks in Northern Nigeria" 35 *Contr. Mineral and Petrol,* 277 and 292; Turner D.C Volcanoes of the Biu Basalt Plateau, Northeastern Nigeria 15:2 J Mining and Geology, 49-63 cited in S. Dorcas et al "An Overview of Geothermal Energy Resources in Nigeria" (2016) 12:13 *Environtropica* 61-71 at 65-66.

[150] Ibid.

[151] L. Rybach, "Geothermal Sustainability", Proceedings European Geothermal Congress, Unterhaching Germany, [2007] 5 cited in S. Dorcas et al Ibid (n- 260) at 64.

[152] National Biofuel and Incentives 2007, online at https://www.community.irena.org/rbsvc25562/attachments/rbsv25562/News/97/2/NationalBiofuelspolicy.pdf. . Accessed on 20th November, 2022.

[153] P.K. Oniemola, and G. Sanusi, G, "The Nigerian bio-fuel policy and incentives: A need to follow the Brazilian pathway". In Energy, Economy, and Environment: The Global View: Proceedings of the 32nd *IAEE International Conference. [2009]*

the biodegradable component of municipal solid waste[154]. The policy stated that its aim is to gradually reduce the nation's dependence on imported gasoline, reduce environmental pollution while at the same time creating a commercially viable industry that can precipitate sustainable domestic jobs. The Nigerian National Petroleum Corporation (NNPC) now Limited was mandated to create an environment for the take-off of the ethanol industry. The benefits of the policy were to create additional tax revenue, provision of jobs to reduce poverty, boost economic development and empower those in the rural area, improve agricultural activities, energy, and environmental benefits through the reduction of fossil fuel related GHGs in the transport sector[155]. The input of the policy to the renewable energy regulatory environment includes[156] the establishment of a Biofuel Commission, issuance of a biofuel regulation by the Ministry of Petroleum Resources, establishment of a biofuel research agency, funding of research and development in biofuels development and incentives scheme for participants in the biofuels development subsector.

The policy did a good job in encompassing different sectors for the application of these biomass resource products. However, from its provision one could tell that the renewable sources are used to complement the petroleum products which is derived from fossil fuel sources due to its limitation of not keeping pace with environmentally friendly fuel and not to prohibit its use completely. Also, the policy mandated the NNPC to create an environment for the take-off of the ethanol industry. To the researcher, this would amount to conflict of interest as the corporation has over the years been invested in petroleum and petroleum products. The research sees this as a reason for the need for a legal framework which will be all encompassing for all alternatives sources of energy. Although, the policy seems to be in force, no information is available as to the extent to which it has been implemented[157].

j. Feed-In Tariff Regulation 2016[158]

The government approved the feed-in tariff regulation in November 2015. The regulation entered into force in February 2016 and supersedes the MYTO II (2012-2017)[159]. The regulation provided

[154] N. Abila, "Biofuels adoption in Nigeria: A Preliminary Review of Feedstock and Fuel Production Potentials" *Manag Environ Qual*. [2010]; 21(6):785–95.
[155] A.O. Yusuf, "The Nigerian Fuel Ethanol Industry, Presentation at the International Conference on Bio-Fuel Markets in Africa held in Cape Town, South Africa on [November 30 to December 1, 2006]. Available at: www.greenpowerconferences.com/biofuelsmarket/documents , Accessed 8th December, 2022.
[156] B. Piters, "How Sustainable are Biofuels? Between Common Curiosity and Confronting Interests". Available: at: http://knowledge.cta.int/en/dossiers/s-tissue-in perspective/biofuels/articles/how-sustainable-are-biofuels-between-common-curiorsity-and-confronting-interests Accessed 8th December, 2022.
[157] Ibid (n- 222) GIZ 2015.
[158] Nigeria Feed-in Tariff for Renewable Energy Sourced Electricity 2016, IEA/IRENA Renewables Policies Database, [August 23, 2017} online at www.iea.org .
[159] International Energy Agency. Multi-Year Tariff Order (MYTO) II (2012–2017). Available at https://www.iea.org/policies/5648-multi-year-tarif f-order-myto-ii-2012-2017 Accessed 8th December 2022.

that the feed-in wholesale prices shall be calculated through the LRMC of Wind, small hydro plants, PV solar power plants and biomass power plants for each year of the tariff period[160]. It also provided that to enhance the attainment of the national targets on renewable energy sourced electricity, the regulation would encourage greater private sector participation in power generation from renewable energy technologies by providing investment security and market stability for investors[161]. Develop, promote, and harness the Renewable Energy (RE) resources of the country and incorporate all viable ones into the national energy mix, establish a guaranteed price for electricity generated from renewables for a fixed period that provides a stable income stream and an adequate return on investment. Also, provide priority access to the grid for renewable energy-based electricity, establish a level playing field for renewable and conventional electricity generation; attract private sector investment to support the establishment of a self-sustaining renewable market[162]. The regulation stated that a total of 2,000 MW of RE power shall be admissible into the grid (1,000 MW by the end of 2018 and 2,000 MW by the end of 2020)[163], while the total grid capacity is anticipated to be within 10,000 MW to 20000 MW by 2020[164], as well as envisaged that by the end of the 2020, 10% of the national energy supply shall be from renewables[165]. The regulation did well in its provision where it stated that it will be reviewed every three years and even earlier in exceptional cases to account for changes in technology from the date of publication. The regulation asides from its objectives, did not provide strategies for its implementation and how to achieve its set target which is a limitation to the regulation. Also, the regulation is limited in the sense that it bothers more on the electricity sector as against other sectors where the use of renewable energy can be applied.

k. Vision 20:2020, 2010[166]

The vision 20:2020 as released at the end of 2010 and identifies the barriers to the country's development as unreliable power, supply, poor and decaying infrastructure, and inordinate dependence on the oil sector for government revenue[167]. It was designed to propel the country to

[160] M. Fulton, German Feed-in Tariff: Recent Policy Changes, [2012], Available at https://www.db.com/cr/en/docs/german_fit_update_2012.pdf Accessed 8th December, 2022.
[161] Ibid.
[162] MichealDugeri, Promotion of Renewable Energy in Nigeria through Feed-In Tariff Schemes: A Legal Analysis *SSRN*, [2019]. Available at : <https://ssrn.com/abstract=3509510> or < http://dx.doi.org/10.2139/ssrn. 3509510>
[163] David Jacobs, "Introduction to feed-in tariffs" [2010] Available at http://www.renewableenergyfocus.com/view/13313/introduction-to-feed-in-tariffs/ Accessed 5th December 2022.
[164] Ibid.
[165] Ibid.
[166] Nigeria Vision 20: 2020, 2010, Available at http://www.nationalplanning.gov.ng/index.php/national-plans/nv20-2020 . Accessed 7th July, 2022.
[167] A. Adedokun, "Nigeria Electricity Forecast and Vision 20: 2020: Evidence from Arima Model*". Energy Sources B Econ. Plan. Policy* [2018] 11 (11), 1027–1034. Available at http://dx.doi.org/10.1080/15567 249.2014.912697 .

the league of the top 20 economies of the world by 2020. One of the strategic objectives of the vision is to improve power supply and ensure it is able to efficiently deliver sustainable, adequate, qualitative, reliable and affordable power in a deregulated market[168]. The vision estimates that Nigeria will need to generate electricity in the range of about 35,000MW by 2020, to grow installed power generation capacity from 6,000MW in 2009 to 20,000MW by 2015 and 35,000MW by 2020[169]. It also encouraged IPPs in the medium-term to increase capacity while NIPP Projects will be speeded up to achieve the target of 20,000MW by 2015[170]. Incentives would also be granted to new entrants, especially for renewable power generation. The vision acknowledged the use of hydro, solar and biomass to increase power generation to 35,000MW but would rely heavily on private sector to take the lead[171]. The vision to the researcher can be termed as ambitious and lacks focus. The same vision which provides for the encouragement of the use of renewable sources also provides for the continued development of the oil and gas sector due to the nation's huge reserve. It went further to aim the increase of crude oil production and refining capacity and this conflict shows the lack of direction of the vision and why it failed as the target year of 2020 has elapsed without any significant improvement.

l. National Renewable Energy and Energy Efficiency Policy (NREEEP) 2015[172]

It outlines a blueprint for the development, supply, and utilization of renewable energy resources within the economy and comprising of both on-grid and off-grid energy solutions[173]. The policy identified that energy constraints are limiting the economic growth of the country, and the application of renewable energy has the potential not only to raise Nigeria's growth rate, but also to deepen its effect on real sectors of the economy[174]. It agreed that more adequate, reliable, and affordable power supply will for instance enhance the modernization of agriculture and in turn support the increasing quality of life. It will create jobs, support productive use and business development as well as improved social service delivery[175].

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[168] Ibid.
[169] Ebuka Onyeji, "Analysis Why Nigeria's Vision 2020 was bound to Fail", *Premium Times Newspaper*, [2020], Available at https://www.premiumtimesng.com/news/top-news/373321-analysis-why-nigerias-vision-202020-was-bound-to-fail.html Accessed on 8th December, 2022.
[170] Ibid.
[171] Ibid.
[172] National Renewable Energy and Energy Efficiency Policy (NREEEP) 2015, online at www.energy.gov.ng .
[173] Tade Onyewunmi, "Nigeria: Energy Policy", *Centre for Climate Change, Energy and Environmental Law*, University of Eastern Finland, Joensuu, Finland <doi:10.1007/978-3-642-40871-7_158-1 [2021] 1-9.
[174] R.U Ayres, H. Turton, T. Casten, "Energy Efficiency, Sustainability and Economic Growth. Energy", [2007], 32:634–648.
[175]Iyke, Bernard Njindan, "Electricity Consumption and Economic Growth in Nigeria: A Revisit of the Energy-Growth Debate." *Energy Economics* [2015], 51: 166–76.

It noted that solar energy resource intensity is generally high in the country and widely used for drying, most especially for agricultural products. Also pointing out that solar as a source of energy is largely non-existent, except for its use in street lighting, in some homes, in some parks[176], etc. Nevertheless, the capture of solar energy for electricity has great potential for the provision of power for rural development. The policy reiterated that over-dependence on subsidized oil and gas as primary energy sources has slowed down the development of renewable energy in Nigeria and diversification to achieve a wider energy supply sector[177]. It is no doubt that a national strategy that ties the future of energy supply to sources that may likely become too expensive or eventually run out is neither sustainable nor wise as such strategy will certainly not enhance energy security. It provided as one of its objectives to increase the percentage contribution of solar energy to the total energy mix and to ensure a minimum electricity contribution of 3% by 2020 and 6% by 2030[178].

The policy stated that wind is a natural phenomenon related to the movement of air masses caused primarily by the differential solar heating of the earth's surface[179]. Seasonal and locational variations in the energy received from the sun affect the strength and direction of the wind. It pointed out that the annual average wind speed is at 10m heights varies from about 2 m/s in the coastal areas to about 4 m/s in the far north. And at 50m, the range is 2m/s to 8m/s[180]. Also, as regards the utilization of wind energy, it stated that it is possible to convert wind energy to rotary mechanical energy and electrical energy for a variety of uses. The policy further stated that for meaningful exploitation of wind energy, a necessary prerequisite is the optimisation of the components of wind water pumping and wind electricity generation[181]. In view of the energy available in the wind, there is a need to embark on a wind energy development programme[182] as wind energy is the energy contained in the movement of air in form of wind, which can be used to turn the blades of windmills or wind turbines, which in turn could drive electrical generators to

[176]T.C. Chineke, E.C. Igwiro, "Urban and Rural Electrification: Enhancing the Energy Sector in Nigeria Using Photovoltaic Technology". *African Journal Science and Tech,* [2008], 9(1):102–108

[177]O.B. Adewuyi, M.E. Lotfy, B.O. Akinloye, H.O.R.Howlader, T. Senjyu, K. Narayanan, "A Security-Constrained Optimal Utility-Scale Solar PV Investment Planning for Weak Grids: Short Reviews and Techno-Economic Analysis", *Appl. Energy* [2019], 245, 16–30. Available at http://dx.doi.org/10.1016/j.apenergy .2019.04.008 or http://www.sciencedirect.com/science/article/pii/S0306 261919306336 .

[178] Ibid.

[179] O.A. Oluseyi, R.O. Fagbenle, et al. "Wind Energy Study and Energy Cost of Wind Electricity Generation in Nigeria: Past and Recent Results and a Case Study for South-West. *Nigeria, Energies* ,[2014] 7, 8512.

[180] G.M Ngala, B. Alkali, M.A Aji, "Viability of wind energy as a power generation source in Maiduguri, Borno state, Nigeria*". Renewable energy* [2007] 32 (13):2242–2246.

[181] L.O. Adekoya, A.A Adewale, Wind energy potential of Nigeria". *Renewable Energy* [1998] 2(1):35–39.

[182] S.D. Kareem, F. Kari, G.M. Alam, et al. Foreign direct investment into oil sector and economic growth in Nigeria. Int J Appl Econ Finance [2012] 6: 127–135.

produce electricity[183]. Large modern wind turbines operate together in "wind farms" to produce electricity for utilities, while small ones can meet localized and small energy needs.

The policy defined biomass to be organic, non-fossil material of biological origin[184] and stated the biomass resources include wood fuels and by-products from crops such as forage grasses and shrubs, rice husks, animal wastes and wastes arising from forestry, agricultural, municipal, and industrial activities, such as saw-dust, as well as aquatic biomass[185]. It pointed out that biomass can be converted into electric power through several methods and the most common is direct combustion of biomass material, such as agricultural waste or woody materials. Other options include gasification, pyrolysis, and anaerobic digestion. Gasification produces a synthesis gas with usable energy content by heating the biomass with less oxygen than needed for complete combustion[186]. It pointed out that pyrolysis yields bio-oil by rapidly heating the biomass in the absence of oxygen while anaerobic digestion produces a renewable natural gas when organic matter is decomposed by bacteria in the absence of oxygen stating the fact that different methods work with different types of biomasses[187]. For example, woody biomass such as wood chips, pellets, and sawdust are combusted or gasified to generate electricity, Corn Stover and wheat straw residues are baled for combustion or converted into a gas using an anaerobic digester[188]. Very wet wastes, like animal and human wastes, are converted into a medium-energy content gas in an anaerobic digester, it can also be converted into bio-oil through pyrolysis, which can then be used in boilers and furnaces[189]. The policies set out for biomass includes[190]; to effectively harness biomass resources and integrate them with other energy resources for electricity generation, to promote the use of efficient biomass conversion technologies, the use of waste wood as a source of electricity shall be encouraged in the nation's energy mix, the nation shall intensify efforts to increase the percentage of land mass covered by forests in the country. The objectives of the policy for biomass includes[191]; to promote non-wood fuel biomass as an alternative energy resource,

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[183] S.O. Oyedepo. Energy and sustainable development in Nigeria: The way forward. Energy Sustainability and Society, [2012] 2(15), 1–17.

[184]Ibid.

[185] A. Giwa, A. Alabi, A. Yusuf, T. Olukan,, "A Comprehensive Review on Biomass and Solar Energy for Sustainable Energy Generation in Nigeria*". Renew. Sustain. Energy Rev.* [2016] 69, 620–641. Available at http://dx.doi.org/ 10.1016/j.rser.2016.11.160 or, http://www.sciencedirect.com/science/article/pii/ S13640321163 09108 .

[186] Ibid.

[187] Ernst & Young et Associés, "Macro-economic impacts of the low carbon transition," 2014. Available: https:// europeanclimate.org/wpcontent/uploads/2014/06/EY_ECF_Macro-economic-impacts-of-thelow-carbon-transition_Report_2014-06-05.pdf .

[188] C. Opara-Ndudu, "The case for a Nigerian renewable energy development fund," *This Day, Nigeria*, June 25, 2016. Available: http://www.thisdaylive.com/index.php/2016/06/25/the-case-for-a-nigerian-renewable-energy-development-fund/ .

[189] Ibid.

[190] E. Adhekpukoli. The democratization of electricity in Nigeria. The Electricity Journal, [2018] 31(2), 1–6.

[191] Ibid.

especially in the rural areas, and promote its usage for remote and off-grid power generation, to promote efficient use of agricultural residues, municipal wastes, animal and human wastes and energy crops as bioenergy sources.

The policy replicated the provisions of the NEP while adding that several scores of small rivers and streams do exist and can be harnessed for medium scale hydropower projects (between 30MW and 100MW) and small hydropower (less than 30MW)[192]. It pointed out that only about 15% of this potential had been developed as of 2012[193]. The small and medium scale hydropower potential is estimated to be greater than 3,500 MW of which less than 2% had been harnessed as of 2012[194]. There is the urgent need to develop small and medium hydropower plants for the provision of electricity for the rural areas and remote settlements. The policy also replicated the policies, objectives and strategies of NEP with the addition of developing a socially acceptable and equitable hydro power and ensuring the safety and security of large and small hydro generating facilities.[195]The policy suggest for an overall national renewable energy and energy efficiency policy as existing policies lack a coherent and all-encompassing framework that drives the sector. Also, it directs the Minister of Power to implement the development of a National Renewable Energy Action Plan (NREAP)[196] to be completed within 6 to 12 months of the adoption of this document, the development of a National Energy Efficiency Action Plan (NEEAP)[197] to be completed within 6 to 12 months of the adoption of this document, the Preparation of a 15-20 year integrated energy resource plan (IRP)[198] that will include NREAP and NEEAP components, the creation and empanelling of a Monitoring and Evaluation watch dog group[199] from a consortium of stakeholders, facilitate the establishment of framework for sustainable financing of renewable energy and energy efficiency projects and programmes in Nigeria[200].

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[192] E.I. Igweonu, R.B.Joshua, "Small Hydropower (SHP) Development in Nigeria: Issues, Challenges and Prospects", *Global J Pure Appl Sci* [2012] ;18:53–8.

[193] M. Stephen, "Alternative Energy Solutions in Order to Address the Energy Demands of the World: Hydro-Electric and Tidal Energy" *American University*; [2012]. Available at https://auislandora.wrlc.org/island ora/object/1213capstones%3A7/datastream/PDF/view Accessed on 5th Dec. 2022.

[194] M.M. Muhammadu, J. Usman "Small hydropower development" Available at http://refhub.elsevier.com/ S2666 - 0520(21)00039-X/sbref0030 Accessed 5th Dec. 2022.

[195] N.I. Faruqui, "Small Hydro for Rural Development". *Can Water Res J* [1994];19:227–35. Available at https:// doi.org/10.4296/cwrj1903227 Accessed 8th Dec. 2022.

[196] Ibid.

[197] U. B. Akuru, O. I. Okoro. (2011). A prediction on Nigeria's oil depletion based on Hubbert's model and the need for renewable energy. ISRN Renewable Energy Journal, 1-6.

[198] Ibid.

[199] U. B. Akuru and O. I. Okoro (2010), "Renewable energy investment in Nigeria: A review of the renewable energy master plan," in IEEE International Energy Conference, Manama, 2010, 166-171.

[200] Ibid.

3.0 Conclusion and Recommendations

The article analyses existing legal framework that could be interpreted to providing for alternative sources of energy and has found out that they are not robust enough. Presently there is no over-arching legal framework in Nigeria, making the disparate pieces of laws discussed in the previous chapter on alternative energy inefficient. It has been observed that there is an absence of a clear institutional framework for renewable energy projects and an overlapping duplication of the roles and functions of the various regulatory bodies and institutions in charge of the energy sector in Nigeria.[201] This calls for the need for creation of a legal framework which will incorporate all of this and not create multiple sub-sectors. The non-existence of a legal and regulatory framework on alternative sources of energy has been identified as a challenge.

It is therefore recommended that, to effectively harness the many potentials afforded by renewable energy, Nigeria needs to have a robust legal regime that promotes and regulates the development and utilisation of renewable energy.[202]

Absence of clearly distinct and separate roles amongst the regulators inevitably portends that the investors and active players in this industry would have to deal with a host of governmental institutions and agencies which will undoubtedly create ambiguity and misconception in the eyes of the investors. Justice is not served when there are many regulators[203]. It is better to have a single regulator which is up and doing in its grandiose and categorical responsibility of overseeing the affairs of the subsector than have many regulatory bodies having their different pie of regulatory roles with its attendant regulatory duplications.

Similarly, the absence of a clear co-ordination of the institutions for the development of renewable energy in Nigeria has negatively impacted on its growth.[204] Thus, clear rules, legislation, roles and responsibilities of various stakeholders along every stage of the energy flow from supply to end-use are key elements of the overall policy framework needed to promote renewable energy technologies so that potential investors are not confused in any way.

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[201] S.0 Oyedepo "Towards achieving Energy for Sustainable Development in Nigeria" *Renewable and Sustainable Energy Review* [2014] 34, 255, 269.

[202]Chitzi C. Ogbumgbada, "Developing an effective legal framework for renewable energy utilization in Nigeria", *Renewable Energy Law and Policy Review* [2018] 8/ 3. 45-52.

[203] Ibid.

[204] E.I. Efurumibe "Barriers to the Development of Renewable Energy in Nigeria" *Scholarly Journal of Biotechnology* [2013] 2(1) ,11- 13.