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Embracing Socio-Legal Methods: Lessons from an Empirical Study on Investigating and Prosecuting Corruption Cases in Nigeria

Olugbemisola T Odusote*

Abstract

This article focuses on legal research and describes the traditional approaches adopted in law-based researches while seeking to encourage researchers who are eager to explore the world of legal research. The article also seeks to encourage those who occupy supervisory roles in postgraduate research, to embrace non-doctrinal studies; especially where adopting the approach will enrich and answer the research questions formulated. The article directs appropriately how non-doctrinal (empirical) study is carried out by a legal scholar. Each of the steps, grouped under three broad categories- preliminary, field and post-field work is patently explicated. The article also presents how mixed methods approach was successfully adopted for a recent study. After discussing the advantages and disadvantages of conducting socio-legal research, the author concludes that though, non-doctrinal method of research is expensive, demanding and time consuming, it produces capacity in researcher and thus aids personal growth and development. The article recommends that in view of the advantages of empirical research, it is crucial that research methodology as a course is introduced and taught at both undergraduate and postgraduate programmes in Nigeria, especially now that Universities in Nigeria are migrating from Benchmark Minimum Academic Standards (BMAS) to Core Curriculum and Minimum Academic Standards (CCMAS) for Nigerian Universities. The article makes same recommendation for postgraduate programmes.

Keywords: Corruption, empirical study, investigation and prosecution, legal framework, legal study.

1. Introduction

The essence of research is to answer questions the researcher has formulated in pursuit of enquiries; and there are various approaches to conducting research. The objective of the research enquiry is a significant factor in determining the approach to be adopted. Research among law scholars can be classified as either doctrinal or non-doctrinal. Irrespective of the approach adopted, the researcher, is bound by the rules that govern how research is conducted and it is important the researcher follows recognised rules to avoid arbitrariness while engaging in research that cannot be generalised.

Research ought not be conducted haphazardly neither should it be conducted blindly with the aim of populating the journals with a paper that may not stand the test of time. It should evince much thought and deliberate steps aimed at achieving a worthwhile result. It is against backdrop that this paper explains the essential research procedures to follow in empirical research. These steps are broken into preliminary, field and post-field works.¹

Matters undertaken at the preliminary stage of a research are discussed in parts two and three of this paper. The preliminary stage is foundational and affects the outcome of the research. Furthermore, there are instruments through which research is conducted. The type of research and the aim to be achieved are some considerations to determine the instruments through which field work will be carried out. These are discussed in part four; while part five discusses how the researcher should handle the data collected while on the field. Considering the fact that this paper is written on the assumption that legal research is more doctrinal than non-doctrinal, the author outlines the advantages and disadvantages of conducting non-doctrinal research in part six and argues that the disadvantages should not deter a law researcher from conducting non-doctrinal research. The article concludes with appropriate recommendations in parts seven and eight respectively. In writing this article, the author draws from her research on investigating and prosecuting corruption in Nigeria by highlighting some steps taken while conducting the empirical study.²

2. Preliminary Stage

2.1 The Initial Steps

The steps undertaken during this stage include choosing a topic, literature review, problem formulation, raising research questions, and determining research design.³ Good research should fill a gap and contribute to the knowledge of literature on the subject. Embarking on a research usually starts with an idea, a question or a thought which arose

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¹ B M, 'Deshpande, Perspectives of Socio-Legal Research' (2018) (5) (6) *IJERCSE* 85; see also, V Sheppard, *Research Methods for the Social Sciences: An Introduction* (Vancouver, BC Campus 2020) 5.

² OT Odusote, *Investigating and Prosecuting Corruption in Nigeria: An Empirical Analysis of Institutional and Legal Frameworks* (PhD University of Surrey 2021).

³ Sheppard (n 1).

while observing an event, reading, or from a discussion. The researcher then seeks to answer the question(s) by investigating the theme further, and this task entails reading around the theme.

At this point, an overarching theme may have been formulated or may be formulated in the course of reading through the literature. The topic may be chosen at this point, but this is to put the research within its right context as the topic may change in the course of the research because it is important that the researcher maintains an open mind.

For the author, the issue of the endemic nature of corruption in Nigeria and anti-corruption strategies developed to combat this phenomenon necessitated much reading around the phenomenon. The literature on Nigeria's anti-corruption administration revealed that while the assertion is that Nigeria's anti-corruption administration was challenged, the findings were not based on empirical studies and the findings did not indicate the aspect of Nigeria's anti-corruption administration referred to.⁴ The study sought to fill the gap by determining empirically the problem with investigating and prosecuting corruption in Nigeria, being an aspect of the anti-corruption strategies. Five research questions were formulated to help address the underpinning question of the research.⁵

2.2 The Research Design

The research questions generated determines the approach to be adopted. Research may be classified broadly as doctrinal or non-doctrinal (empirical). Doctrinal research has been defined as 'research into legal doctrines through analysis of statutory provisions amid cases by the application of power of reasoning.'⁶ Doctrinal research (as it relates to a law-based research), involves an attempt by the researcher to understand ideas from legal materials.⁷ It does not involve going to the field as it is

⁴ Anti-corruption strategies include preventive, criminalisation, international cooperation and public enlightenment measures; see also OECD, 'Specialised Anti-Corruption Initiatives: A Review of Models' (OECD 2008) <<http://www.oecd.org/corruption/acn/39971975.pdf> > accessed 2 Feb 2015 21.

⁵ Odusote (n 2) 7.

⁶ S N Jain, 'Legal Research and Methodology' (1972) (17) (4), *Journal of the Indian Law Institute* 487, 491.

⁷ Reza Banakar, On Socio-Legal Design (Oct 2, 2019) 2 SSRN: <https://ssrn.com/abstract=3463028> or <http://dx.doi.org/10.2139/ssrn.3463028> accessed 16 July 2024; see also, JN Varuhas, *Mapping Doctrinal Methods in Researching Public Law in Common Law Systems* (Edward Elgar Publishing 2023) 70-103.

conducted in the library.⁸ The search for what the law is, is undertaken from within the law itself without considering the view point from other disciplines.⁹ Varuhas argues that the doctrinal approach has three objectives- facilitating access to law, enhancing understanding of the law and critiquing the law and decision making.¹⁰ These objectives are achieved by analysing data like statutes, court judgments, books and articles.¹¹

Next, is the non-doctrinal (empirical) approach. This is also referred to as the socio-legal approach by some scholars.¹² Non-doctrinal research is defined as 'research into relationship of law with other behavioural sciences.'¹³ It involves interrogating the application of legal provisions by engaging in fact finding procedures and examining the inter-play between law, the society, institutions and social values.¹⁴ It may be multi-disciplinary and involves the combination of both doctrinal and empirical methods.¹⁵ In fact, non-doctrinal methods should have its foundation in doctrinal methods.¹⁶ Socio-legal approach also helps the researcher contribute a new idea/method/theory to a subject matter.¹⁷ Where a researcher wants to know the impact of a law on a group of people or to determine the perception of a group of people to a law, non-doctrinal studies should be conducted. Cresswell discusses three research designs (modes) through which research is conducted. These are- the qualitative, quantitative and mixed methods.¹⁸ The research designs or the means by which the researcher seeks to answer the questions

⁸ Deshpande (n 1) 86.

⁹ Varuhas n 2.

¹⁰ *ibid*, 3.

¹¹ Jain (n 6) 491-2; see also Deshpande (n 1), 87

¹² M McConville and WH Chui, 'Introduction and Overview' in M McConville and W H Chui (eds) *Research Methods for Law* 5 (Edinburgh University Press 2007); Thomas Peck, 'Interdisciplinary Methodological Approaches to Desk-Based Socio-legal Human Rights Research', January 2023 *Law and Method* 3, DOI: 10.5553/REM/000069.

¹³ Jain (n 6) 491.

¹⁴ Jain, *ibid*; see also, Deshpande, (n 1) 87

¹⁵ S Blandy, 'Socio-Legal approaches to Property Law Research', (2016) *Researching Property Law* 24-42, 26; see also M D Pradeep, 'Legal Research- Descriptive Analysis on Doctrinal Methodology' (2019) (4) (2) *IJMTS* 95, 97.

¹⁶ Jain (n 6) 499.

¹⁷ Odusote (n 2) 275-6.

¹⁸ J W Cresswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (3rd edn, Sage Publication 2009) 3-4.

generated may be through quantitative or qualitative means or by a combination of these two.¹⁹

2.3 Quantitative Methods

Quantitative design involves numbers. Cresswell explains it as ‘a means for testing objective theories by examining the relationship among variables. These variables, in turn, can be measured, typically, on instruments, so that numbered data can be analysed using statistical procedures.’²⁰ Terms like hypothesis, independent and dependent variables, are commonly used in quantitative studies. Surveys (questionnaires) are a common tool in quantitative research. Both closed-ended and open-ended questions can be asked in the questionnaire; but these questions are statistically analysed using analytical tools like SPSS.²¹ Scholars in law may be reluctant to adopt this methodology because of aversion to figures. But this can be minimized, if collaborative studies are conducted with researchers in other disciplines or by engaging a statistician to analyse the data provided it does not compromise ethical approval.²²

2.4 Qualitative Methods

In contrast to quantitative methods, qualitative research deals with words.²³ It explores and seeks to understand the meaning given to a social or human problem.²⁴ The tools used include focus groups, observations, case studies and interviews.²⁵ While interview and focus groups are commonly used and similar, focus groups can be used to reach more participants at the same time.²⁶ Two or three or even more participants are present and any one of those present can answer the question posed by the researcher. The questioning technique usually includes open-ended questions. The data generated could also be analysed manually or

¹⁹ McConville, (n 12) 6.

²⁰ Cresswell (n 18) 3.

²¹ Statistically Package for Social Sciences.

²² Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012) 134-5.

²³ N Nakkeeran, ‘Is Sampling a Misnomer in Qualitative Research?’ (2016) 65 (1) *Sociological Bulletin* 40, 42. <http://www.jstor.org/stable/26368063>.

²⁴ Cresswell (n 18) 4.

²⁵ Joshua D Atkinson, ‘Qualitative Methods’ in *Journey into Social Activism: Qualitative Approaches*, 65–98. Fordham University Press, 2017, <http://www.jstor.org/stable/j.ctt1hfr0rk.6>, accessed 31 Aug 2024.

²⁶ *ibid*, 69.

with the aid of computer-assisted programmes like Nvivo.²⁷ The rules observed while conducting qualitative research are not as strict as those observed while conducting quantitative research. For example, sampling techniques are different and perhaps more flexible.²⁸

2.5 Mixed Methods

This is a combination of both the quantitative and qualitative methods, which is sometimes referred to as ‘triangulation’ by some authors.²⁹ Mixed methods are sometimes adopted in order to balance or confirm the findings of a qualitative or quantitative study.³⁰ Methods may be mixed at the point of data generation or analysis.³¹ These are considerations that the researcher ought to take carefully. In the researcher’s experience, the research questions to be answered greatly influence the use of mixed methods;³² and were adopted to ensure robust results in which the quantitative findings complemented the qualitative findings as far as practicable.³³ Mixed methods were adopted to aid the understanding of the challenges around investigating and prosecuting corruption better.³⁴ Considering that

²⁷ Nvivo 11 for Mac Copyright © 1999-2017 QSR International Pty Ltd <https://www.qsrinternational.com>.

²⁸ Bryman (n 22) 181.

²⁹ Uwe Flick, ‘Triangulation in Qualitative Research’, (2004) 3 *A Companion to Qualitative Research* 178-183; see also, Norman K Denzin, ‘Triangulation 2.0’ (2012) (6) (2), *Journal of Mixed Methods Research* 80-88.

³⁰ Anthony J Onwuegbuzie and Nancy L Leech, ‘On Becoming a Pragmatic Researcher: The Importance of Combining Quantitative and Qualitative Research Methodologies’ (2005) (8), *International Journal of Social Research Methodology* 375,384; Louise Doyle, Anne-Marie Brady and Gonnait Byrne, ‘An Overview of Mixed Methods Research–Revisited’ (2016) (21) (8), *Journal of Research in Nursing*, 623, 624; Udo Kelle, ‘Combining Qualitative and Quantitative Methods in Research Practice: Purposes and Advantages’ (2006) (3) *Qualitative Research in Psychology* 293, 301.

³¹ R Burke Johnson, Anthony J Onwuegbuzie and Lisa A Turner, ‘Toward a Definition of Mixed Methods Research’ (2007) (1), *Journal of Mixed Methods Research* 112, 113; see also, Bryman (n 22) 628; João Paulo Dias, Conceição Gomes, and Marina Henriques, ‘Conducting Socio-Legal Research in Portugal: From the Experience of the Permanent Observatory for Justice to the Study of Working Conditions in Courts.’ (2023) (13) *S1 Oñati Socio-Legal Series*. In S10, S18-9, the authors adopted seven methodologies including the collection and analysis of documents and reports from national and international institutions, analysis of legislation, nationwide questionnaire, exploratory semi-structured interviews and two case studies.

³² Bryman (n 22) 637; see also, Doyle, Brady and Byrne (n 30) 624.

³³ Johnson, Onwuegbuzie and Turner (n 31) 122.

³⁴ Jennifer C Greene, ‘Is Mixed Methods Social Inquiry a Distinctive Methodology?’ (2008) (2) (1), *Journal of Mixed Methods Research* 7, 17.

findings from literature were derived from doctrinal studies, mixed methods were adopted for the socio-legal study to further enrich the wealth of knowledge in the area of study. As would be discussed later, adopting mixed methods produced findings that can be generalised because the results from both the qualitative and quantitative studies were significantly consistent with each other.³⁵ Choosing the appropriate research design stems from the questions formulated.³⁶

There are differences between quantitative and qualitative research. One of such is that the qualitative research affords the researcher some level of flexibility as the researcher can ask open-ended questions. These, however, have challenges when coding.³⁷ Questions not included in the tool may be asked in an interview but this is not so when questionnaires are administered as the questions are pre-determined. Adopting the mixed-methods enables the researcher maximize the strengths of both approaches.³⁸

Once the 'research design' to be adopted is concluded, the researcher develops the instruments to be used. For example, designing the questionnaire for the quantitative method or the interview schedule for the qualitative method. There are rules governing designing each of these instruments.³⁹ Furthermore, it is important that the researcher conducts a pilot study for the instruments to be used, especially the one/s for the quantitative method to determine the suitability of the instrument.⁴⁰ The population size for the pilot study need not be large.⁴¹

³⁵ Odusote (n 2) 224-34, 262-66.

³⁶ Martina Yvonne Feilzer, 'Doing mixed methods research pragmatically: Implications for the rediscovery of pragmatism as a research paradigm' (2010) (4), *Journal of Mixed Methods Research* 6, 8.

³⁷ Bryman (n 22) 246.

³⁸ Anthony J Onwuegbuzie and Nancy L Leech, 'On Becoming a Pragmatic Researcher: The Importance of Combining Quantitative and Qualitative Research Methodologies' (2005) 8 *International Journal of Social Research Methodology* 375, 384.

³⁹ Bryman (n 22) 246

⁴⁰ Edwin R van Teijlingen and Vanora Hundley, 'The Importance of Pilot Study' (2001), *Social Research Update Sociology at Surrey* 1.

⁴¹ MA Hertzog, 'Considerations in Determining sample size for Pilot Studies' (2008) (31) (2), *Research in Nursing and Health* 180, 182, who argues that where the aim of the pilot study is to assess the suitability of the instrument, a population size of 10 may be sufficient.

2.6 Population of the Study and Sampling Technique

The population of study in any research refers to the pool from which those who are to participate in the research are to be drawn.⁴² For example, the population of a study that seeks to determine the effectiveness of long trial period in Nigeria would include individuals that have had cases in the courts. It may also include individuals who have not used the court system as that may provide information on why that is so.⁴³ These individuals constitute the population of study. Technically, all the individuals are eligible to participate in the study,⁴⁴ but it may be impracticable to recruit all of them considering the time frame for conducting the study and the associated cost.⁴⁵

The study site may be the whole country, a region or some states. The researcher has to determine and justify why the research is being conducted in the study site. For example, in the research on investigating and prosecuting corruption in Nigeria, although the research was on Nigeria, the entire country could not be used as the study site. The study site was narrowed down to Lagos State and the Federal Capital Territory and reasons were given for this.⁴⁶ The population of study consisted of judges, prosecutors, defence counsel, law officers, administrators, employees of the two AC organisations, particularly those in the Legal, Operations and Media (Publicity) Units and members of Civil Society Organisations (CSOs) across the 36 states of the federation.

Sampling techniques are adopted to determine those among the population of study to participate in the research and they relate to how participants are recruited for any study.⁴⁷ A critical factor in any research is to ensure that bias is minimized as far as practicable. The sampling technique is one way of achieving this. The sampling design may either be by adopting probability designs or non-probability designs.⁴⁸ Probability sampling is a technique where everyone within the sampling frame is given equal opportunity to be selected for the study. The

⁴² Cresswell, (n 18) 714; Russell A Jones, *Research Methods in the Social and Behavioural Sciences* (Sunderland, MA: Sinauer Associates 1985) 180.

⁴³ Gerald Shively, 'Sampling: Who, How and How Many?' in Arild Angelsen (eds) and others, *Measuring Livelihoods and Environmental Dependence: Methods for Research and Fieldwork* 53 (Center for International Forestry Research, 2011) <http://www.jstor.org/stable/resrep02120.11> accessed 31 Aug 2024.

⁴⁴ *ibid* 53,

⁴⁵ *ibid*.

⁴⁶ Odusote (n 2) 171.

⁴⁷ Frederick F Stephan, 'Sampling' (1950) 55 (4) *American Journal of Sociology* 371 <http://www.jstor.org/stable/2772298> accessed 8 Sept 2024.

⁴⁸ Shively (n 43) 57.

participants are selected randomly and systematically.⁴⁹ For example, in a population size of 2000, the researcher may randomly choose 1 out of every 10 at predetermined intervals until the appropriate sample size is achieved. Examples of sampling techniques adopted in a quantitative study are simple random sampling and systematic sampling.⁵⁰

Non probability sampling on the other hand is not as systematic as probability sampling. It is a sampling technique that is not done randomly. For example, in snowballing technique, the researcher identifies some people within the population size and depends on them to help recruit others to the study.⁵¹ This is often adopted when it is the most convenient or feasible for the researcher to adopt such.⁵² In addition to snowballing, other examples of non-probability sampling are judgmental and purposive samplings.⁵³

In the author's project, both purposive,⁵⁴ and snowball sampling techniques,⁵⁵ were deployed in the non-probability designs adopted when recruiting participants for both the qualitative and quantitative aspects of the study.⁵⁶ By the purposive approach, experts on the subject matter of the study were recruited.⁵⁷ Snowballing sampling was also used because of the possibility that there were persons that were involved in AC activities but unknown to the researcher.⁵⁸ The researcher relied on participants to provide more useful names of potential participants.⁵⁹ The sample sizes for the quantitative and qualitative aspects of the study were 250 and 25 respectively. Participants in the qualitative aspect of the research did not participate in the quantitative aspect and vice-versa. The research methodology and the time frame for conducting research contribute to the number of participants to be recruited. Generally, the number of participants in qualitative research are not as much as the number of participants in quantitative research.⁶⁰

⁴⁹ *ibid.*

⁵⁰ *ibid.*; see also Jain, (n 6) 681.

⁵¹ Shively (n 43) 59.

⁵² *ibid.*

⁵³ Shively (n 43) 61-3.

⁵⁴ Bryman (n 22) 418-9.

⁵⁵ *ibid.*; see also, PT Knight, *Small-Scale Research: Pragmatic Inquiry in Social Science and the Caring Professions*, (Pro Quest E Book Central, SAGE Publications 2001) 122.

⁵⁶ R Kumar, *Research Methodology: A Step-by-step Guide for Beginners* (Sage 2011) 206; Creswell (n 18) 205.

⁵⁷ Jupp, *The Sage Dictionary of Social Research Methods* (Sage 2006) 244.

⁵⁸ *ibid.*

⁵⁹ Kumar (n 56) 208; Creswell (n 18) 119, 205.

⁶⁰ N Nakkeeran (n 23) 42-3; see also Jana Bradley. 'Methodological Issues and Practices in Qualitative Research' (1993) (63) (4) *The Library Quarterly: Information*,

3. Ethical Clearance

In institution-based research, the researcher is expected to apply for ethical clearance. This is done after the research design has been chosen. Ethical clearance is necessary in social science research and gives credibility to the study. Ethics in research relate to these broad areas:

- i. The likelihood of harm to the participants;
- ii. Absence of informed consent;
- iii. Invasion of privacy; and
- iv. Deception.⁶¹

Each institution is expected to formulate its own rules on ethics around these four broad areas for its researchers who should apply for and obtain ethical clearance before commencing field work.⁶²

4. Field Work

4.1 Tools

It is crucial to reiterate that there are different tools used for each method in research. The common tool for the quantitative research is surveys (questionnaires) and interviews for the qualitative study. The survey may be administered by e-mail, post or personally on the respondents. The researcher should determine the most suited mode of administering the questionnaires and justify why one mode is preferred to the other. For example, the author while conducting the research on investigating and prosecuting corruption in Nigeria, administered the questionnaires personally on the respondents because of the challenges with postage and internet facilities in Nigeria, which may delay the time-frame for completing the field work. For the qualitative aspect of the research, semi-structured interviews were conducted on the participants.

4.1.1 Semi-Structured Interviews (SSI)

Interviews may be conducted on participants personally or through the phone. Phone interviews may be deployed in funded research considering the cost involved. Interviews could be semi-structured, structured etc. In a qualitative study, determining the number of interviews needed for a good study is a question of fact. The questions to

Community, Policy 431, 440 <http://www.jstor.org/stable/4308865> accessed 8 Sept 2024.

⁶¹ E Diener & R Crandall, *Ethics in Social and Behavioral Research* (U Chicago Press 1978), cited in Bryman (n 22) 135.

⁶² Odusote (n 2) 366.

be asked are contained in the interview schedule and this guides the researcher through the conduct of the interview. The schedule may be structured or semi-structured. With the former, the researcher follows the schedule strictly. However, with the latter, the researcher is not bound by the interview schedule. S/he can ask questions that flow from the questions answered by the participant that are not contained in the schedule.⁶³ Seidman argues that the essence of interviews in research is beyond questions and answers but to enable the researcher appreciate issues from the world view of the participants.⁶⁴ It is good to record the interview because it the researcher can pay attention to the participant and engage with the interviewing process. The recorded interview would be subsequently transcribed.

The author adopted the face-to-face interview instead of phone interviews notwithstanding the high cost of conducting the former because of the uncertainty of obtaining participants' closely guarded phone contacts in Nigeria.⁶⁵ Each group had an interview schedule framed specifically for members within the group to enable the participants to discuss matters within their sphere of competence or knowledge.⁶⁶

4.1.2 Self-completion questionnaires (SCQ)

The use of SCQs in quantitative research is common despite the possibility that the responses might not reflect the personal opinions of the participants, as the responses might be tilted towards meeting the objectives of the research.⁶⁷ Moreover, the identity of the participants who actually completed the SCQ cannot be verified.⁶⁸ The questionnaire may be administered in person, by post or by e-mail. Each has its own benefits and the researcher should consider the time, funds available and the peculiarities of his/her environment to decide which mode should be adopted to administer the questionnaire. Answering the SCQ is also considered convenient for the respondents, as it was completed without

⁶³ Atkinson (n 25) 70.

⁶⁴ Irving Seidman, 'Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences.' *Teachers College* (3rd edn, Columbia University) 9-10.

⁶⁵ Sarah Knox and Alan W Burkard, 'Qualitative research interviews' (2009) (19), *Psychotherapy Research* 566, 568.

⁶⁶ Odusote (n 2) Appendix C.

⁶⁷ Colin Robson, *Real World Research: A Resource for Social Scientists and Practitioner-Researchers* (2nd edn, Blackwell Publisher 2002) 233.

⁶⁸ Bryman (n 22) 234.

the subtle pressure that the researcher's presence might have brought.⁶⁹ Open ended questions may be included in the questionnaire to balance the strengths and weaknesses of a research method as there is no perfect research tool.⁷⁰ Answers in form of Likert scale are usually included in the questionnaire and the respondent is expected to choose one of the options. It is important that the questions are framed to avoid asking two or more questions at a time, as this may pose a challenge at the data analysis stage.⁷¹ For example, it may be difficult to ascertain the respondent's true perception on speaking the truth or lying where the respondent is asked a question on whether s/he says the truth, the whole truth and nothing but the truth at all times, because the question seeks information on at least, two issues- the truth and the whole truth.

In the research on investigating and prosecuting corruption conducted by the author, SCQs containing vignettes with a Likert scale and open-ended questions were administered to participants drawn from the same group as those for the interviews. Vignettes are 'short descriptions of a person or a social situation which contain precise references to what are thought to be the most important factors in the decision-making or judgment-making processes of respondents.'⁷² That is, in applying vignettes, the participant respond to questions on imaginary scenarios that describe individuals, situations or events.⁷³ The use of vignettes in the research placed the focus on the fictitious characters used and not on the participants who are stakeholders in the country's AC administration. Thus, the participants were asked to answer questions on hypothetical cases.⁷⁴ The questionnaire contained a

⁶⁹ *ibid.*

⁷⁰ Christine Barter and Emma Renold, 'I Wanna Tell You a Story': Exploring the Application of Vignettes in Qualitative Research with Children and Young People,' (2000) (3), *International Journal of Social Research Methodology* 307; see also, Christiane Atzmüller and Peter M Steiner, 'Experimental Vignette Studies in Survey Research Methodology' (2010) (6), *European Journal of Research Methods for the Behavioural and Social Sciences* 128.

⁷¹ Janet M Ruane, 'Essentials of Research Methods: A Guide to Social Science Research' (Blackwell 2005) 125-127.

⁷² Cheryl S Alexander and Henry Jay Becker, 'The Use of Vignettes in Survey Research' (1978) (42), *The Public Opinion Quarterly* 93, 94.

⁷³ Janet Finch, 'The Vignette Technique in Survey Research' (1987) (21), *Sociology* 105; see also, C Bradbury-Jones, J Taylor and OR Herber, 'Vignette Development and Administration: A Framework for Protecting Research Participants' (2014) (17), *International Journal of Social Research Methodology* 427, 429.

⁷⁴ Tom Wilks, 'The Use of Vignettes in Qualitative Research into Social Work Values' (2004) (3), *Qualitative Social Work* 78, 80.

total of 64 closed questions and 6 open-ended questions and was divided into six sections.⁷⁵

Furthermore, the questions in the questionnaire may be measured on a four-point or five-point Likert scale, with the five-point Likert scale is common in quantitative studies.⁷⁶ However, the author in the research adopted the four-point Likert scale by removing the neutral answer. This inevitably ensured that the respondents made a choice and they could not be non-committal. Despite these disadvantages, the SCQ was chosen for the study because it guaranteed the anonymity of the respondents and it afforded the opportunity to reach many respondents with as many questions as possible within the limited time frame.⁷⁷ This researcher thereby saved considerable time reaching several respondents but had to do frequent follow-ups with respondents who delayed completing the SCQ.

4.3 Activities on the field

The researcher goes to the field to administer the tools of the research, by conducting interviews or administering the questionnaire. This is one crucial activity that while on the field the tools of the research must be administered on the participants. This is time consuming because circumstances may arise that the researcher did not anticipate. The participants/respondents may be unavailable or inaccessible. The researcher should identify gatekeepers to facilitate access to the population of study.⁷⁸ The absence of gatekeepers to facilitate access will delay the timely corruption of the projects or abort the conclusion of the research.⁷⁹

The researcher may undergo the field work personally where confidentiality is fundamental or may recruit research assistants to undertake the entire or aspects of the field work on his/her behalf. Both have its own unique advantages. While the field work conducted by the researcher will consume more time, but the research becomes familiar

⁷⁵ Odusote (n 2) Appendix B.

⁷⁶ Dennis L Clason and Thomas J Dormody, 'Analyzing Data Measured by Individual Likert-Type Items' (35) (4), *Journal of Agricultural Education* 31.

⁷⁷ Pamela Munn and Eric Drever, 'Using Questionnaires in Small-Scale Research: A Teachers' Guide' (Scottish Council for Research in Education 1990) 32.

⁷⁸ Shively (n 43) 64; see also Greg A Sachs and others, 'Conducting Empirical Research on Informed Consent: Challenges and Questions' (2003) (25) (5) *IRB: Ethics & Human Research* S4, S5, <https://doi.org/10.2307/3564116> accessed 3 Sept 2024.

⁷⁹ Greg A Sachs and others, *ibid*; see also Robert S Broadhead and Ray C Rist, 'Gatekeepers and the Social Control of Social Research' (1976) (23) (3), *Social Problems* 325 <https://doi.org/10.2307/799778> accessed 3 Sept 2024.

with the data and this helps the researcher save time during data analysis. On the other hand, where a researcher engages the service of research assistants, the researcher needs to ensure that the data are not compromised at any stage. Considering that the researcher did not participate in the data collection, data analysis would be time consuming as the researcher would also spend some time getting familiar with the data.

In a mixed-methods study, data for the qualitative aspect, and quantitative aspect, for examples, the interview and the questionnaire respectively, are collected simultaneously.⁸⁰ They may also be done personally or through research assistants. Engaging research assistants is dependent on the ethical approval given before the field work commenced. Anonymity and confidentiality are crucial factors to be considered whether or not research assistants should be recruited.⁸¹ In the study, the researcher personally distributed and retrieved all materials used for the study.⁸²

In qualitative research, it may be difficult to determine the number of interviews to be conducted. How do you know that you have conducted enough interviews?⁸³ The researcher would answer the question when s/he discovers that the participants are not saying anything new. This is called saturation. While saturation is not easily defined,⁸⁴ it is described as a situation when sufficient data have been obtained for the qualitative research at hand and analysis of it would be generalisable by others.⁸⁵ Therefore, saturation has little to do with the length and extent of the interviews.⁸⁶ For example, researchers reached

⁸⁰ Doyle, Brady and Byrne (n 30) 625-626.

⁸¹ Bryman (n 22) 140.

⁸² Odusote (n 2) 182.

⁸³ Sarah Elsie Baker and Rosalind Edwards, 'How many qualitative interviews is enough' *National Centre for Research Methods Review Paper* (unpublished 2012). Authors in this work agree that there is no answer to how many interviews is enough and a few factors that include the type of research being done and 12 being the suggested number in an undergraduate work; the time frame and the extent of research being undertaken. In this regard, it could vary between 22 and 250.

⁸⁴ Patricia I Fusch and Lawrence R Ness, 'Are we there yet? Data Saturation in Qualitative Research' (2015) (20), *The Qualitative Report* 1408.

⁸⁵ *ibid*, 1409. However, see also, Benjamin Saunders and others, 'Saturation in Qualitative Research: Exploring its Conceptualization and Operationalization' *Quality and Quantity* (2017) <https://doi.org/10.1007/s1135-017-0574-8> accessed 27 Nov 2017, for the different meanings of saturation.

⁸⁶ Patricia I Fusch and Lawrence R Ness, 'Are we there yet? Data Saturation in Qualitative Research' (2015) (20) *The Qualitative Report* 1408, 1409.

saturation after conducting 12 interviews.⁸⁷ In this researcher's case, saturation was attained after conducting 25 interviews.

5. Post Field Work

5.1 Coding and data analysis

The data obtained from the field are subsequently coded after the completion of the field work. The researcher may decide to code the data after data collection or may choose to do both simultaneously. The mode of coding is also a function of the information gathering process. Where data were collected through interview, the interviews are transcribed. Transcription can be undertaken by a research assistant or by the researcher. Where the ethical clearance guaranteed anonymity and confidentiality, transcription should be undertaken by the researcher. Transcription is time consuming, but it affords the researcher opportunity to get familiar with the data. While the transcription is being done, the researcher is also engaged in early analysis of the data which comes with continuous reading of the interview transcript.⁸⁸

Computer-assisted analysis software exist to help the researcher code the data. For example, Nvivo,⁸⁹ is a common software for coding qualitative research while SPSS,⁹⁰ is commonly used for coding quantitative research. Once coding is completed, the next step is to analyse the data. There are a number of ways qualitative data may be analysed. They include, grounded theory, thematic analysis, content analysis, discourse analysis or narrative analysis.⁹¹ In the author's research, the transcribed interviews were analysed using thematic analysis because it assists the researcher to identify core themes related to the overarching question of research. Furthermore, thematic analysis seeks commonalities in the themes generated in the data.⁹²

With respect to quantitative research, data may be analysed adopting experimental, quasi-experimental, descriptive or correlational

⁸⁷ Hikari Ando, Rosanna Cousins and Carolyn Young, 'Achieving Saturation in Thematic Analysis: Development and Refinement of a Codebook' (2014) (3), *Comprehensive Psychology* 1, 6.

⁸⁸ M Bloor and F Wood, *Keywords in Qualitative Methods: A Vocabulary of Research Concepts* (Sage 2006) 167.

⁸⁹ Nvivo 11 for Mac Copyright © 1999-2017 QSR International Pty Ltd <https://www.qsrinternational.com>.

⁹⁰ For example, IBM® SPSS® Statistics Version 23 © IBM Corporation.

⁹¹ Atkinson (n 25) *ibid*.

⁹² Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) (3) (2), *Qualitative Research in Psychology* 77, 86.

methods.⁹³ Again, the questions to be answered will determine the analysis method to adopt. For the researcher, although the sample size for the quantitative study was 250, a total of 219 SCQs were retrieved out of the number distributed but 3 could not be analysed because they were not completed fully or in any meaningful manner. In the end, 216 SCQs representing 86.4% of the sample size of 250, were analysed. The questionnaire helped in determining the perception of participants, this being the aim of the research.⁹⁴

5.2 Findings and Recommendations

The findings should determine if, or the extent to which the research questions have been answered. Because the questions were generated following a gap the researcher discovered while reading the literature. The findings should not be generalised. Rather, the data should be analysed with the aim of answering each of the research questions. Where thematic analysis was adopted, the data should be analysed by looking for themes that are discovered when trying to answer the research questions. The findings need not agree with existing knowledge. The fact that the findings contradict the literature does not mean that the research is unsuccessful. The contradiction found is also a contribution to knowledge. With respect to the author's research on investigating and prosecuting corruption, the overarching finding was that investigation and prosecuting corruption in Nigeria was challenged because of the absence of political will.⁹⁵ However, with respect to each of the five research questions, there were findings specific to each question. The findings in some cases over-lapped. The findings may be presented by using graphs, tables and charts to aid easy appreciation/understanding of the results. Recommendations aimed at changing the *status quo* should be proffered. The recommendations are believable because they have empirical backing.

⁹³ D E McNabb, *Research Methods for Political Science: Quantitative and Qualitative Research* (M E Sharpe 2004) 100-3, cited in Wing Hong Chui, 'Quantitative legal research' (2007) *Research Methods for Law* 46, 50.

⁹⁴ This is the term used for all recruited for both the qualitative and quantitative field respondents and participants in this research.

⁹⁵ Odusote (n 2) 276.

6. Advantages and Disadvantages of Conducting Socio-Legal Research

6.1 Advantages

It is essential to state from the on-set that law is a social phenomenon; and for that reason it must be studied empirically and systematically.⁹⁶ Law is not an isolated phenomenon; it exists within the context of society; it regulates social behaviour. As such, it is expedient that law should be understood from the perspective of its role in shaping social life.⁹⁷ It is conceded that research should help advance policy formulation, but this paper argues that socio-legal research will better serve as an impetus in shaping policy. This is because, possible pitfalls and benefits would have been discovered from the research. This is critical to enforcement of laws. It is hoped that once the level of socio-legal research increase in the country, the level of compliance would also increase. That is, it is expected that the default rate will reduce once policies are founded on socio-legal research and not mere utopian concepts. In other words, socio-legal research entails examining law as a phenomenon from an external point of view of how the law is ‘de facto generated through social practices and how it operates as a social system.’⁹⁸ It therefore aids the understanding of both the law and the institutions established to enforce the law.⁹⁹

Considering the numerous approaches available to the researcher when conducting non-doctrinal study, adopting a non-doctrinal approach affords the opportunity of giving much thought to each step in the process. The researcher should justify why one step/option is being taken against the ones not adopted. In other words, non-doctrinal approach eliminates haphazardness. The research work paves the way the researcher’s personal development. Furthermore, where research is conducted among multiple fields, the research is broader and richer and ultimately improves the researcher’s network.

6.2 Disadvantages

There is no perfect research design and expectedly, the non-doctrinal research approach has its own limitations, some of which have been

⁹⁶ R Cotterrell, ‘Why Must Legal Ideas be Interpreted Sociologically?’ (1998) (25) (171), *Journal of Law and Society* 2, 183.

⁹⁷ *ibid*, 185

⁹⁸ Banakar (n 7) 2.

⁹⁹ R L Revesz, ‘A Defense of Empirical Legal Scholarship, (2002) (68) (1), *The University of Chicago Law Review* 169, 189.

identified by social scientists.¹⁰⁰ Notwithstanding the criticisms of empirical legal research,¹⁰¹ this author finds it difficult to jettison the prejudice for non-doctrinal research where it is the most appropriate in answering the research questions. Furthermore, this paper argues for increased non-doctrinal research among legal scholars. It should be appreciated that there is not perfect methodology neither is one methodology inferior to the other.¹⁰² Nevertheless, the disadvantages identified are therefore not peculiar to non-doctrinal research, but they are common to conducting empirical research in general. For example, researchers avoid conducting socio-research because it is time consuming and expensive.¹⁰³ This is because there are a number of stages in the research that are beyond the control of the researcher. For example, in institutional based research, the researcher must obtain ethical clearance. This can be greatly affected by the level of organisation within the institution. Researchers in institutions bedevilled by challenges like strike actions would be delayed as academic activities are stalled during the period.¹⁰⁴ Likewise, a lot of time is expended in qualitative approaches like interviewing, because the interview/s may be lengthy and transcribing such is also time consuming. Another reason why researchers do not conduct empirical research is because, a researcher in an economic challenged society may be unable to access funding which may deter the researcher from conducting empirical research as such may involve travels, experiments or engage research assistants.

7. Conclusion

This article has been written deliberately in a simplified manner to encourage a young career researcher embrace non-doctrinal approach for research. It is also hoped that mature researchers may willingly explore the world of non-doctrinal research. It has been established that non-doctrinal approaches rely heavily on doctrinal methods and it is a truism that there cannot be non-doctrinal research without an appreciation of the

¹⁰⁰ Lee Epstein and Gary King, 'The rules of inference' (2002), *The University of Chicago Law Review* 1.

¹⁰¹ *ibid.*

¹⁰² J Goldsmith and A Vermeule, 'Empirical Methodology and Legal Scholarship' (2002) (69) (1), *The University of Chicago Law Review*, 153, 154; see also, Revesz (n 99) 169.

¹⁰³ Goldsmith and Vermeule (n 102) 154; see also, Banakar, (n 7) 12.

¹⁰⁴ Joseph Erunke, 'At Last, ASUU Ends 8-Month Old Strike' *Vanguard* (Lagos, 14 Oct 2022) <https://www.vanguardngr.com/2022/10/breaking-asuu-finally-ends-8-month-old-strike/> accessed 2 Jan 2023.

doctrinal research. This paper does not present supremacy between the quantitative and qualitative methods. It has only presented the benefits of combining both methods. The author admits that non-doctrinal is expensive, demanding and time consuming, but it also produces capacity in the researcher and thus aids personal growth and development. Conducting non-doctrinal studies is not as convenient as engaging in doctrinal studies; but it produces results that are rich.

8. Recommendations

In view of the benefits of conducting socio-legal research despite its disadvantages, this article recommends that it is crucial that research methodology as a course is thought taught as a core course for law undergraduates in Nigeria. The right time is now that Universities are migrating from Benchmark Minimum Academic Standards (BMAS) to Core Curriculum and Minimum Academic Standards (CCMAS). To benefit from the extensive content of research methodology, the course should be introduced to students over a two-year period or more; and at the postgraduate studies.

Furthermore, it is recommended that Ethics Committees should be standardised across institutions in Nigeria. This should be institutionalised with members spanning across faculties. Academics that serve as supervisor should not participate in the ethical considerations of a research s/he is supervising. Although the Ethics Committee is expected to be thorough and impartial, these should not deter those embarking on research from engaging in non-doctrinal research.

In addition, it hoped that those conducting law-based research should step out of their comfort zones and not only embrace non-doctrinal research but actively seek collaboration among other disciplines with the aim of conducting multi-discipline research. Our nation would benefit from such and hopefully, policies formulation would be enriched.

Empowering Developing Countries: Unveiling Perspectives on the WTO Dispute Settlement Mechanism

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Abstract

The World Trade Organization's (WTO) Dispute Settlement Mechanism (DSM) stands as a pivotal instrument in international trade law. It crucially offers a platform for resolving disputes and shaping global economic relations. Despite its significance, however, the access and participation of developing countries in this mechanism have raised substantial concerns. This article endeavours to unravel the perspectives surrounding the empowerment of developing nations within the WTO's DSM framework. Through a comprehensive analysis, it examines the challenges faced by developing countries in utilising the DSM effectively, including the secrecy and absence of transparency characterizing dispute settlement; and explores potential avenues for enhancing their engagement. By scrutinising the existing landscape, the article identifies key barriers hindering the participation of developing countries- lack of effective access to legal representation, resource constraints, power dynamics and play, as well as political considerations. The article finds that developing countries have not adequately taken advantage of the dispute settlement mechanism of the WTO; and advocates for proactive measures, through fostering greater inclusivity and equity. This in turn will bolster the capacity of developing nations in navigating and leveraging the WTO's DSM, thereby advancing their interests and promoting a more balanced global trading system.

Keywords: World Trade Organization (WTO), Dispute Settlement Mechanism (DSU), Developing Countries.

1. Introduction

The dispute settlement mechanism of the World Trade Organization (WTO) has been regarded as one of the most effective dispute settlement

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mechanisms in the globe.¹ Without doubt, its effectiveness is underscored by the number of disputes which it resolves and case law that have arisen therefrom. The WTO system of dispute settlement relatively had tremendous success in its early years, as over 300 trade related disputes were referred to it;² highlighting how much influence it has on international law.³ The mechanism is also reputed for influencing world jurisprudence with particular regard to international trade.⁴ It is well documented that the General Agreement on Tariffs and Trade (GATT), which served as the precursor to the WTO equally had a dispute settlement mechanism;⁵ but same was rarely used by developing countries due to the fact that GATT reforms did not insulate developing countries from international law power-play which had come to the fore in the GATT system.⁶ The WTO and its Dispute Settlement Understanding (DSU), thus seemingly heralded the improvement in the use of multilateral dispute settlement by developing countries as it was believed that ‘underlying presumption, of course, is that developing countries were especially ill-served by GATT’S diplomacy, and are better poised to benefit from the WTO’s more legalistic architecture.’⁷

In reality, however, developing countries have been reluctant in their use of the dispute settlement mechanism of the WTO due to many factors, including the perception that politically weak countries would not likely be seen to file complaints against more politically powerful countries and the argument that the desired effects of the dispute settlement mechanism have been overestimated.⁸ Nigeria, has a matter of

¹ Ernst-Ulrich Petersmann, ‘The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948’ (1994) (31) (6) *Common Market Law Review* 1157

² L Mark Movsesian, ‘Enforcement of WTO Rulings: An Interest Group Analysis’ 2003 (32), *Hofstra Law Review*, available at <<http://scholarlycommons.law.hofstra.edu/hlr/vol32/iss1/1>> accessed on 20 July 2023.

³ Judith Goldstein and Richard H Steinberg, ‘Negotiate or Litigate? Effects of WTO Judicial Delegation on US Trade Politics, Law and Contemporary Problems,’ Vol, 71: 257, 257, ava<<http://www.law.duke.edu/journals/lcp>> accessed on 21 July 2023.

⁴ Naboth Van der Broek (2003), ‘Power Paradoxes in Enforcement and Implementation of World Trade Organization’ *Dispute Settlement Reports, J World Trade* 37, 127.

⁵ O Hinz, ‘The Paradigm of Human Rights and its Relevance for Africa’, <http://www.fb10.unibremen.de/inputs/pdf/universalitaet_kulturalitaet_menscherechte.pdf&sa>

⁶ Marc L Busch and Eric Reinhardt, ‘Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement’ (2003) (37) (4), *Journal of World Trade* 719.

⁷ Busch and Reinhardt (n 6) 719.

⁸ *ibid.*

fact, has been reluctant in using the mechanism of dispute settlement of the WTO, despite its status as a developing country. The implication of this is that overtime, what was supposed to be a beneficial relationship between developing countries and the dispute settlement mechanism of the WTO has been soured by different restrictions; limiting the access of developing countries to the dispute settlement mechanism, with criticisms trailing same. There is the need to evaluate this relationship and how it can be improved upon. It is against this backdrop that this article also seeks to evaluate prospects of empowering developing countries in their access of the dispute settlement mechanism of the WTO.

2. World Trade Organization and its Dispute Settlement Mechanism

The WTO has proven integral and fundamental to international trade as established overtime. As a matter of fact, its importance in trade affairs cannot be over-emphasized.⁹ The WTO operates as the primary instrument of neo liberal globalization seeking to deepen and further economic globalization in international trade.¹⁰ It intends to ensure that trade is liberalized via a range of actions including the removal of trade barriers and the provision of rules to bind all participants in trade.¹¹ It is important to note that prior to the coming into force of the WTO in 1995, 8 rounds of multilateral trade negotiations had preceded it, with the first 5 rounds being concerned with tariff reductions while the Kennedy Round (1963-1967) which was the 6th Round ensured deeper and wider tariff cuts with particular reference to industrial tariffs.¹² The 7th Round, the Tokyo Round (1973-1979) ensured that tariffs were cut substantially and equally ensured the introduction of different codes on non-tariff barriers.¹³ The WTO came as a result of the 8th Round (the Uruguay Round).¹⁴ It is important to note that the Doha Round is the latest round

⁹ J M Buchanan, *Alternative Perspectives on Economic and Public Policy Report* (Cato Industries, Vol 6, No1, 1984) 1-5.

¹⁰ Joshua O Olatoke and others, 'The World Trade Organization's Policy on Agriculture: Paraphernalia of Neo-Colonisation?' *Nigerian Journal of Food, Drug and Health Law*, 24-30, 2012; J M Finger; *The GATT as International Discipline Over Trade Restrictions, Policy, Research and External Affairs* (Working Papers, 1990) 123.

¹¹ Joshua O Olatoke and Oluwaseye T Adeboye, 'A Critical Appraisal of the World Trade Organization's Observance of Human Rights', *KIU Journal of Humanities* [2016] 317-233.

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

of trade negotiations in the WTO with the aim to ensure the achievement of major reform of the international trading system by introducing lower trade barriers and revised trade rules.

Different challenges had basseted the World trading system in the 1980s, including the exemption of agriculture from GATT, the exemption of trade in services, and intellectual property among others.¹⁵ The Uruguay Round of Negotiations which gave rise to the WTO had representatives of the 111 GATT member countries signing the Final Act incorporating all the agreements which took effect in January, 1995 and this signalled the launch of the WTO.¹⁶ It must therefore gratifying to note that the WTO Agreement is an umbrella agreement establishing the WTO structure and many other agreements to which all member states must subscribe and it spells out the rights and obligations of members in relation to the Agreement.¹⁷ The WTO is thus member-driven with all decisions reached by consensus.¹⁸ Another important feature of the WTO is that members undertake to open their markets and abide by the WTO Rules irrespective of their statuses.¹⁹

A major feature of the WTO is its dispute settlement mechanism, which without doubt, contributes uniquely and immensely to the stability of world trade as it resonates around the idea of having the WTO as a core pillar of the multilateral trading system. It also revolves around the aim of settling disputes based on rules that are clearly defined.²⁰ The Dispute Settlement Understanding of the WTO was aimed at correcting the shortcomings of the GATT system with the implication of having the

¹⁵ Joshua O Olatoke and Oluwaseye T Adeboye, 'The Impending Demise of the WTO Appellate Body: A Vestigial Remnant of a Body Awaiting Post-Mortem' *Contemporary Issues in Public, Human Rights and Islamic Law: Discussions and Perspectives* (Grosvenor House Publishing Ltd 2020) 12

¹⁶ Joshua O Olatoke and others, 'The Internal Tax Regime of the World Trade Organization: A Review of the New Proposals' Implications for African Development, in *Unresolved Issues in International Law, Administration, Politics and Diplomacy*, in EOC B P Ijeoma, Wanda and N Nwaodu (eds) (School of Government and Public Administration, University of Fort Hare, Bishops Campus) 123; see also Joshua O Olatoke, 'Economic Rationales for Anti-Dumping Laws of the World Trade Organization (WTO) Appraised,' 1 (2017), *Novena University Law Journal* 13.

¹⁷ C Lumina, 'Free Trade or Just Trade? The World Trade Organization, Human Rights and Development (Part 1)' <<http://www.safili.org/za/journals/LDD/2008/11.pdf&sa>> assessed on 6 April 2024.

¹⁸ Olatoke and Adeboye (n15).

¹⁹ *ibid.*

²⁰ World Trade Organization, 'Understanding the WTO: Settling Dispute', <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed on 6 April 2024

ability to issue mandatory rulings and have a permanent organizational structure.²¹ A classic case bringing to the fore the merits of the WTO dispute settlement mechanism is the US - Shrimp which arose as a result of a conflict between the United States and some shrimp-exporting countries, including Thailand, India and Pakistan.²² In the case, the Panel of the WTO dispute settlement body found the U.S to be in violation of WTO Rules and ordered that the US complied with the WTO Rules. An appeal by the US was dismissed by the Appellate Body which affirmed the findings and recommendations of the Panel affirming that the US measures were inconsistent with WTO obligations.²³

3. Developing Countries and the Dispute Settlement Mechanism of the World Trade Organization

The term ‘developing countries’ has proven to be an important yardstick in the assessment of the effectiveness of the dispute settlement mechanism of the WTO. It is not uncommon to see questions seeking to ascertain whether developing countries have been able to secure more concessions or far more favourable outcomes in relation to trade policy under the dispute settlement mechanism and whether in reality, there can be said to be discrepancies or unfairness when the outcomes gotten by developed countries are compared with the outcomes which developing countries get.²⁴ It is noteworthy that developing countries have participated under the dispute settlement mechanism of the WTO than under GATT’s possibility as a result of the reforms of the dispute settlement mechanism of the WTO²⁵ and its relative fastness.²⁶ It is indeed ironic that the dispute²⁷ settlement mechanism of the WTO, which itself was aimed at protecting the developing countries, have

²¹ Amin Alavi, ‘African Countries and the WTO’s Dispute Settlement Mechanism’, Development Policy Review 2007.

²² Jacques Sacchi, ‘Overview of Mitigation Measures to Reduce the Incidental Catch of Vulnerable Species in Fisheries’, (Studies and Reviews No 100 (General Fisheries Commission for the Mediterranean) Rome FAO, 2021).

²³ Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, adopted on 6 Nov 1998, WT/DS58/AB/R; see also generally Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures* (U Pa J Int’l Econ Law 22 2001) 739.

²⁴ Busch and Reinhardt (n 6) 719.

²⁵ *ibid*, 720.

²⁶ J H Jackson, *The Jurisprudence of GATT and the WTO, Insights on Treaty Law and Economic Relations*, (1st edn, Cambridge University Press 2000), 26.

²⁷ James Smith, ‘Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement’ (2004) *Review of International Policy Economy* 542.

suffered major criticisms from these developing countries, the presumed beneficiaries.

It might, however, not be a truism to conclude that the dispute settlement mechanism of the WTO is more effective and more favourable to developing countries due to the high level of participation of developing countries. This belief is underscored by the fact that 'early settlement' has been a norm in dispute settlement both under the GATT and WTO legal regimes.²⁸ It is not uncommon to see defendants make concessions at very early stages of consultation or at Panel stage before the delivery of rulings and as such, it is believed that 'it is thus the threat of legal condemnation, rather than a ruling *per se*, that induces settlement.'²⁹ Questions now arise as to the particular gain which developing countries make from the DSU of the WTO.³⁰

Quite a number of criticisms have trailed the relationship of developing countries with the dispute settlement mechanism of the WTO. Developing countries have decried the atmosphere of secrecy and lack of transparency that characterize its dispute settlement.³¹ It has also been suggested that dispute settlement could be seen to favour stronger countries in the WTO. It is also viewed as a resource-intensive process to commence and contest, and one capable of ensuring that the enforcement of a finding of violation relies on the penalty of sanctions on trade.³² It is no gainsaying the fact that the relationship between developing countries and the dispute settlement mechanism of the WTO is complex and multifaceted, influenced by a variety of economic, political, and social factors which would be considered in ensuing segments of this article.

²⁸ Marc L Busch and Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 *Fordham International Law Journal* ½, 60; Marc L Busch, *Democracy, Consultation, and the Panelling of Disputes under GATT* (2000), 44 *Journal of Conflict Resolution* 426.

²⁹ Busch and Reinhardt (n 6) 720.

³⁰ Alavi (n 21).

³¹ Howse and Mutua, 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization', <<http://www.d-d-rd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html>> assessed on 6 April 2024.

³² C Butler, 'Human Rights And The World Trade Organization: The Right To Essential Medicines And The Trips Agreement', <http://www.law.upenn.edu/journals/jil/jilp/articles/5-1_Butler_Christopher.pdf&sa> assessed on 6 April 2024.

3.1 Access to Legal Representation

One key aspect of the relationship is the ability of developing countries to effectively participate in the dispute settlement process.³³ Often, developing countries lack the legal expertise and resources to adequately represent their interests in WTO disputes. This puts them at a disadvantage compared to developed countries, which often have more resources to dedicate to legal representation. Access to legal representation can significantly impact the relationship of developing countries with the dispute settlement mechanism of the WTO. Without adequate legal representation, developing countries may struggle to navigate the complexities of WTO dispute settlement procedures, potentially leading to unfavorable outcomes or an inability to effectively defend their interests.³⁴

Conversely, improved access to legal representation can empower developing countries to better engage in the dispute settlement process, level the playing field with wealthier nations, and assert their rights more effectively.³⁵ This can ultimately contribute to a more equitable and balanced global trading system. Moreover, the costs associated with participating in WTO dispute settlement procedures, including legal fees and administrative expenses, can strain the limited resources of developing countries, diverting funds away from critical development initiatives.³⁶

³³ David Palmetier, Petros C Mavroidis and Niall Meagher, *Dispute Settlement in the World Trade Organization* (Cambridge University Press 2022) 142

³⁴ Hakan Nordstrom and Gregory Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure' (2008) *World Trade Review* 587

³⁵ James Smith, 'Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement' (2004) *Review of International Policy Economy* 542

³⁶ Christiana L Davis and Sarah Blodgett Bermeo, 'Who Files? Developing Country Participation in GATT/WTO Adjudication,' *The Journal of Politics*, (2009) (71) (3) 1033-1049.

3.2 Resource Constraint

Resource constraint remains a significant challenge for many developing countries. Legal proceedings within the WTO can be time-consuming and expensive, making it difficult for developing countries to fully participate in the dispute settlement process. Resource constraints can significantly impact the relationship of developing countries with the dispute settlement mechanism of the WTO.³⁷ Limited financial and human resources may hinder developing countries' ability to effectively engage in WTO dispute settlement proceedings. They may struggle to afford legal representation, conduct necessary research, or allocate time and personnel to navigate complex legal procedures. As a result, resource-constrained developing countries may face challenges in adequately presenting their cases, leading to potentially unfavorable outcomes or an inability to fully participate in the dispute settlement process *ceteris paribus*.³⁸ Addressing resource constraints through support mechanisms, such as technical assistance, capacity building initiatives, and financial assistance, can help mitigate these challenges and strengthen the ability of developing countries to engage meaningfully in WTO dispute settlement mechanisms.

3.3 Power Dynamics

The dispute settlement mechanism of the WTO is often criticized for favoring the interests of developed countries, which tend to have more influence and resources within the organization. As a result, developing countries may feel marginalized or disadvantaged in dispute resolution proceedings. Power dynamics play a significant role in shaping the relationship of developing countries with the dispute settlement mechanism of the WTO.³⁹ Wealthier and more powerful countries often possess greater resources, legal expertise, and influence within the WTO, which can create asymmetrical power dynamics in dispute resolution processes. This imbalance can disadvantage developing countries, making it more difficult for them to assert their interests and defend against disputes brought by more powerful nations. Moreover, power imbalances can affect the enforcement of WTO rulings. Wealthier

³⁷ Robert Hunter Wade, 'What Strategies are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of 'Development Space'', *Review of International Political Economy*, (2003) (10) 621.

³⁸ Chad P Bown, 'Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?' (2005) *Journal of Legal Studies* 515-555.

³⁹ Andrew T Guzman and Beth A Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes' (2005), *The Journal of Legal Studies* 557.

countries may have greater capacity to comply with adverse rulings or to retaliate if rulings are not in their favour, whereas developing countries may struggle to implement rulings or face significant economic repercussions if they retaliate.

Addressing power imbalances requires efforts to promote inclusivity, transparency, and fairness within the WTO's dispute settlement mechanism.⁴⁰ This includes measures to enhance the participation and representation of developing countries, provide them with technical assistance and capacity building support, and ensure that dispute resolution processes are conducted in a transparent and impartial manner. By addressing power imbalances, the WTO can work towards a more equitable and effective dispute settlement system that serves the interests of all its members.

3.4 Political Considerations

The relationship between developing countries and the dispute settlement mechanism is also influenced by broader political considerations. Developing countries may align themselves with other developing countries or form coalitions to strengthen their bargaining power within the WTO. Political considerations can significantly impact the relationship of developing countries with the dispute settlement mechanism of the WTO.⁴¹ Developing countries often face pressure from domestic political interests, regional blocs, or powerful trading partners when engaging in WTO dispute settlement proceedings. These political considerations can influence developing countries' decisions regarding whether to initiate disputes, how aggressively to pursue their cases, or whether to settle disputes out of court. Furthermore, political considerations may affect the willingness of other WTO members to support developing countries in disputes. Wealthier countries or major trading blocs may exert political pressure or offer incentives to sway the outcome of disputes in their favor, potentially disadvantaging developing countries. Additionally, political tensions between countries can spill over into WTO dispute settlement processes, complicating negotiations and potentially undermining the effectiveness of the mechanism.⁴²

Addressing political considerations requires efforts to promote transparency, fairness, and adherence to WTO rules and procedures. It also involves fostering an environment where all WTO members feel

⁴⁰ Smith (n 35) 542.

⁴¹ Christopher Arup, 'State of Play of Dispute Settlement Law at the World Trade Organization' *Journal of World Trade* 899.

⁴² *ibid.*

empowered to engage in dispute settlement without fear of political reprisal or coercion. By mitigating the influence of political considerations, the WTO can ensure that its dispute settlement mechanism operates impartially and effectively to resolve trade disputes in a manner that upholds the interests of all its members. The impact on development is a crucial aspect affecting the relationship of developing countries with the dispute settlement mechanism of the World Trade Organization (WTO). Developing countries often utilize the WTO dispute settlement mechanism to protect their economic interests, promote development, and ensure their integration into the global trading system.⁴³

However, the outcomes of WTO dispute settlement proceedings can have significant implications for the development prospects of developing countries. A favorable ruling can provide developing countries with increased market access, protection of their domestic industries, and opportunities for economic growth. Conversely, adverse rulings or prolonged disputes can hamper their development efforts, weaken their economic competitiveness, and undermine their ability to achieve sustainable development goals.⁴⁴

Political considerations can significantly impact the relationship of developing countries with the dispute settlement mechanism of the World Trade Organization (WTO). Developing countries often face pressure from domestic political interests, regional blocs, or powerful trading partners when engaging in WTO dispute settlement proceedings. These political considerations can influence developing countries' decisions regarding whether to initiate disputes, how aggressively to pursue their cases, or whether to settle disputes out of court. Furthermore, political considerations may affect the willingness of other WTO members to support developing countries in disputes. Wealthier countries or major trading blocs may exert political pressure or offer incentives to sway the outcome of disputes in their favor, potentially disadvantaging developing countries. Additionally, political tensions between countries can spill over into WTO dispute settlement processes, complicating negotiations and potentially undermining the effectiveness of the mechanism.⁴⁵

⁴³ Guzman and Simmons (n 39).

⁴⁴ *ibid.*

⁴⁵ *ibid.*

4. Prospects on Empowerment of Developing Countries

In recent years, there have been calls for reforming the dispute settlement mechanism to make it more accessible and responsive to the needs of developing countries. These calls include proposals to enhance transparency, improve procedural fairness, and address the resource constraints faced by developing countries. Furthermore, the WTO itself has express concerns and willingness to ensure that the dispute settlement mechanism of the WTO is well utilized by developing countries. Some of these efforts and prospects would be evaluated in ensuing segments.

4.1 Capacity Building

Recognizing this disparity, the WTO has various capacity-building programs aimed at assisting developing countries in understanding and engaging with the dispute settlement mechanism.⁴⁶ These programs provide technical assistance and training to help developing countries build their legal and institutional capacity. Capacity building plays a crucial role in shaping the relationship of developing countries with the dispute settlement mechanism of the WTO. By investing in capacity building initiatives, developing countries can enhance their understanding of WTO rules and procedures, improve their ability to formulate legal arguments, and strengthen their negotiation skills. This, in turn, enables them to more effectively participate in WTO dispute settlement proceedings and defend their interests against wealthier and more legally sophisticated countries. Capacity building efforts can help level the playing field, empower developing countries to assert their rights, and promote a fairer and more inclusive global trading system.⁴⁷

4.2 Strategic Use of the Mechanism

Developing countries may strategically use the dispute settlement mechanism to pursue their own interests and challenge unfair trade practices by other members, including developed countries. It has been argued that ‘the operation of the system could be improved from the perspective of developing countries, by reforms that provide more effective remedies for smaller countries and held to defray the cost of

⁴⁶ Maarten Smeets, ‘Trade Capacity Building in the WTO: Main Achievements since Doha and Key Challenges’ (2013) *Journal of World Trade* 1047.

⁴⁷ Wade (n 37).

WTO litigations and save more time and resources for these countries.⁴⁸ By bringing cases to the WTO, developing countries can seek to level the playing field and hold other members accountable for violations of WTO rules. To address these challenges, it is essential for the WTO to ensure that its dispute settlement mechanism takes into account the development needs and concerns of developing countries. This includes providing technical assistance and capacity building support to help developing countries effectively engage in dispute settlement proceedings, as well as considering the developmental implications of rulings and decisions. By promoting a fair and development-oriented approach to dispute settlement, the WTO can contribute to the economic advancement and prosperity of developing countries while fostering a more inclusive and equitable global trading system.

5. Collaboration with Regional Trade Dispute Bodies to Promote Mediation and Dialogue

Developing countries need to make good use of regional trade bodies to ensure the promotion of mediation and dialogue. This collaboration would no doubt ensure that developing countries are more suited to make use of the dispute settlement mechanism under the WTO and this would further ensure consistency in trade dispute outcomes and enhance the effectiveness of the overall dispute resolution system. Developing countries might need to look beyond the formal process of dispute settlement and make recourse to mediation and dialogues. This no doubt ensures that an alternative approach is utilized in resolving trade disputes in an amicable manner in order to ensure the existence of mutually beneficial solutions.

6. Conclusion

The World Trade Organization (WTO) stands as a cornerstone of the modern international trade system, playing a vital role in promoting economic globalization and facilitating trade liberalization. Since its inception in 1995, following the Uruguay Round of Negotiations, the WTO has been instrumental in addressing various challenges that plagued the world trading system, such as tariff reductions, non-tariff barriers, and the inclusion of previously exempted sectors like agriculture and intellectual property. One of the most significant features of the WTO is its dispute settlement mechanism, which serves as a

⁴⁸ El Otor, 'The World Trade Organization (WTO) Dispute Settlement Mechanism in Developing Countries' (2015), *Int'l Journal of Advanced Legal Studies and Governance* 1212.

cornerstone for ensuring stability and fairness in global trade. A notable example is the US - Shrimp case, which demonstrated the effectiveness of the mechanism in resolving disputes and upholding the principles of the WTO.

Furthermore, the WTO operates as a member-driven organization, with decisions made by consensus and all members obligated to abide by its rules and open their markets. This commitment to collective action and adherence to established rules underscores the importance of the WTO in maintaining a level playing field for international trade. It is however unfortunate that the relationship between developing countries and the dispute settlement mechanism of the WTO is characterized by challenges related to capacity-building, resource constraints, power dynamics, and broader political considerations. While the mechanism offers a means for developing countries to address unfair trade practices and enforce their rights, there is a need for ongoing efforts to ensure that it effectively serves the interests of all members, including those from the developing world.

As we move forward, it is imperative to recognize the continued relevance and significance of the WTO in the ever-evolving landscape of global trade. By addressing emerging challenges and fostering greater inclusivity and cooperation among member states, the WTO can continue to serve as a vital institution for promoting economic growth, development, and prosperity on a global scale.

7. Recommendations

From the foregoing, and in a concerted bid to ensure that developing countries are empowered more in order make use of the Dispute settlement mechanism of the WTO, the following are the recommendations of this paper:

There is a need to ensure capacity building and continuous legal training. By implication, there is a need for developing countries should prioritize building legal expertise in international law and dispute settlement. This includes training lawyers, diplomats, and trade negotiators in international arbitration and WTO dispute resolution especially in developing countries. The reason for this is not unconnected to the fact that many developing nations struggle with a lack of expertise and experience in handling complex legal disputes, leaving them at a disadvantage against more developed countries. Focused training will enable these countries to better defend their interests and assert their rights on the international stage.

There is equally the need for increased access to financial resources for dispute resolution. This can be achieved by establishing international or regional funds to support the legal costs associated with dispute resolution, particularly in cases involving smaller or less-resourced nations. The justification for this recommendation can be found in the fact that dispute resolution, whether through arbitration or the WTO, can be costly, preventing developing countries from fully pursuing their legal claims. Access to financial assistance will ensure that these countries can afford to engage in these mechanisms without facing prohibitive costs.

This article suggests the need for the creation of regional arbitration centres. Developing countries should be encouraged to establish and strengthen regional arbitration centres to handle disputes locally as many disputes can be settled through regional arbitration centers, which would reduce costs and allow for faster dispute resolution. It also fosters greater understanding of local contexts and challenges, ensuring more equitable outcomes.

It is also recommended that there should be increased strengthening of participation in the WTO Dispute Settlement Mechanism. There is the need to encourage more active participation in the WTO Dispute Settlement Body (DSB), both as individual states and through coalitions of developing countries as many developing countries underutilize the WTO's dispute resolution system due to lack of resources or political will. Collective action can provide greater leverage against more powerful nations and ensure that the needs of developing nations are adequately represented and defended.

There is the need to ensure the promotion of transparency and fair representation. This can be done by advocating for reforms within both international arbitration and the WTO dispute mechanisms that promote transparency, fairness, and equitable representation of developing countries. This recommendation is justified by the fact that power imbalances often exist between developed and developing countries in these systems. Promoting transparency and equitable representation will help to ensure that dispute resolution processes are unbiased and that developing nations have a fair chance at achieving justice.

There is a need to encourage Multilateral solutions by fostering multilateral approaches to dispute resolution, where developing countries can form alliances to resolve common issues or disputes with more powerful nations. It is no gainsaying that developing countries often face similar trade or legal issues. By forming alliances, they can pool resources, share knowledge, and negotiate from a stronger collective position.

Adopting Technology in Dispute Resolution is also another recommendation that would go a long way in ensuring the effectiveness of the participation of developing countries in the DSU of the WTO. This can be done by leveraging technology to streamline the arbitration and dispute settlement processes, making them more accessible and cost-effective for developing nations. It must be noted that technology can reduce the time and costs involved in dispute resolution. Virtual hearings, electronic submissions, and online dispute-resolution platforms can help make these processes more efficient and accessible to countries with limited resources.

Finally, there is also the need to foster private-sector engagement. This can be achieved by encouraging private sector involvement in dispute resolution by creating platforms where businesses from developing countries can resolve international trade disputes efficiently. The private sector often faces its own set of challenges in international trade. By empowering businesses with the tools and resources to handle disputes, countries can strengthen their overall economic position.

Eminent Domain for Mining Purpose under the Nigerian Minerals and Mining Act 2007: Justification for Protection of Indigenous Communities' Land Use Rights

Michael Attah* and Omorovbiye B Asuen**

Abstract

One of the purposes for which land may be requisitioned (in exercise of eminent domain) under the Land Use Act 1978, is by obtaining control over land required for or in connection with mining purposes or extraction of building materials. The Nigerian Minerals and Mining Act (MMA) 2007,¹ (which repealed the Minerals and Mining Act 1999) and the Nigerian Minerals and Mining Regulations (MMR) 2011, provide for six classes of leases and licences for exploration and exploitation of minerals. While giving eminence to mining operations, it also imposes strict and enormous obligations on mineral title holders (MTHs), with respect to payment of compensation/rents, preservation of customary land use rights and the environment, among others. This article appraises these mineral leasing and licensing regimes to underscore their impact on the access to land use by private right of occupancy holders—the host and indigenous individuals and communities. It argues that the contemporaneous land use rights reserved for indigenous land holders, and the biased/unilateral obligations imposed on MTHs are justifiable on the platform and trajectory of the right of access to land. Which itself can be founded on the right to housing and survival such that the statutory protections are beyond mere compensatory benefits and privileges.

Keywords: Eminent domain, indigenous, mineral title holders, land rights, access to land

1. Introduction

As an attribute of sovereignty, states are ordinarily empowered by their constitutions or other enabling legislation to compulsorily acquire land for public purposes, and for the efficient running of government and its affairs. Land may be required for the location of educational, health, utility institutions and other agencies and organisations of government. In Nigeria, apart from such direct government use, the Land Use Act

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¹ Cap N162 Laws of the Federation of Nigeria 2011.

1978,² provides the legal framework for the exercise of eminent domain for other uses which may entitle even private entities to exercise proprietary rights over other private land users. One of the purposes for which land may be requisitioned (in exercise of eminent domain) under the Land Use Act 1978, is obtaining control over land required for or in connection with mining purposes or extraction of building materials. The Nigerian Minerals and Mining Act 2007³ (MMA) was enacted to repeal the Minerals and Mining Act 1999. Under the MMA, the Nigerian Minerals and Mining Regulations 2011 was made. The MMA provides for six classes of leases and licences under its section 46, for exploration and exploitation of minerals. What the MMA endeavours to do is to balance the rights of mineral title holders and those of right of occupancy holders that host communities and individuals whose land may be affected by mining operations.

While giving eminence to mining processes (because they are seen as public good due to the fiscal dimensions of won minerals⁴), it imposes strict and enormous obligations on mineral title holders (MTHs) with respect to payment of compensation/rents, preservation of customary land use rights and the environment, restoration of mined areas and sanctity of Community Development Agreements. This article appraises these mineral leasing and licensing regimes to underscore their impact on the access to land use by private right of occupancy holders—the host and indigenous individuals and communities. It argues that the contemporaneous land use rights reserved for indigenous land holders, and the biased unilateral obligations imposed on MTHs, are justifiable on the platform and trajectory of the right of access to land, which itself can be founded on the right to housing and survival so that the statutory protections are beyond compensatory benefits and privileges.

The article is divided into six parts. Following the introduction, part two explains the meaning and implications of eminent domain and its constitutional underpinning generally. In part three, we outline the regimes of licenses and leases under the MMA and the impact of the rights accorded MTHs over mining areas. Part four explores the

² Cap L5 Laws of the Federation of Nigeria 2011.

³ Cap N162 Laws of the Federation of Nigeria 2011.

⁴ Interpreted under section 164 of the MMA to mean ‘any substance (that has been produced or extracted) whether in solid, liquid or gaseous form occurring in or on the earth, formed by or subjected to geological processes including occurrences or deposits of rocks, coal, coal bed gases, bituminous shales, tar sands, any substances that may be extracted from coal, shale or tar sands, mineral water and mineral components in tailings and waste piles, but with the exclusion of petroleum and waters without mineral content.’

contemporaneous land use rights reserved for indigenous land owners (including communities), and the mandatory unilateral obligations imposed on MTHs. While they are stringent and enormous under the MMA, they can be justified on the basis of a right of access to land – a vindication of the principle that eminent domain should not truncate the right of the individual to survival. In turn, the basis of a right of access to land is the recognised right to housing and its consequent right to survival. This is because there is no direct right of access to land recognised in the Constitution of Nigeria, 1999 or other international instruments. Yet the substance of the bases of the MMA obligations is to protect access to land and livelihoods. This is the thesis of part five. Part six of the article is the conclusion.

2. Understanding the power of Eminent Domain

The power of eminent domain is the legal capacity of the State to compulsorily acquire private property for a public purpose, public use, or overriding public interest, *inter alia*. It is an attribute of sovereignty. The origin of eminent domain is often traced back to 1625, in the work '*De Jure Belli ac Pacis*,' written by Hugo Grotius, and is now accepted as a fundamental principle in most modern constitutions around the world. Being an attribute of sovereignty, the power of eminent domain occurs even without any express constitutional provisions, but the constitution mainly stipulates the limits for the exercise of the power and the protections that accrue to private property owners in the event of the exercise of the power of eminent domain by the State.

The power of eminent domain could be expressed through various forms, including: compulsory purchase or compulsory acquisition, resumption, expropriation, and revocation. The power is mainly based on two maxims: (a) *salus populi est suprema lex*⁵ and (b) *necessitas publicae major est quam privata*.⁶ The power of eminent domain essentially extinguishes private property rights, and is therefore distinct from the police power of the State that imposes restrictions on private property to further public interest or public use generally.⁷

⁵ This means that the interest and claim of the whole community is always superior.

⁶ This means that public necessity is greater than any private interest and the claim of an individual cf. In Australia, the Lands Acquisition Act (Australia) 1998, particularly, section 43(1) empowers the Minister to acquire land 'for any purpose whatever', thereby removing the limitations imposed where the exercise of eminent domain is subject to public purpose.

⁷ *Bhimandas Ambwani, (Dead) Through Lrs v Delhi Power Company Limited* [2013] 14 SCC 195, SC India.

Public purpose and public interest often feature prominently in the legal framework for the exercise of the power of eminent domain. In the absence of an exhaustive statutory provision, there can be at least three approaches adopted in defining public purpose for the exercise of the power of eminent domain. One approach could be to define public purpose or public interest narrowly, applying the literal rule, as a purpose or direct use of land by the public generally rather than a private individual or class. Thus, the private property that has been compulsorily acquired remains under State control for the benefit of the public at large.⁸ A second approach is to broadly include any purpose or use which enhances the public welfare, as public use or purpose, even though it involves the transfer of the private property that has been acquired through the exercise of eminent domain to another private owner.⁹ This implies that the power of eminent domain can be exercised to divest private owners of their interests in land, in favour of private businesses or other economic developments that may be more profitable to the larger society. A third possible hybrid approach could be to allow the State to compulsorily acquire more land than is necessary for any given public purpose or use, and to transfer the remainder of the land after the public purpose or use has been satisfied to private owners.¹⁰ Nonetheless, the courts are generally often inclined to insist on compensation for private property owners, while elevating the community interest over the interest of individuals in connection to the revocation of private property rights in the exercise of the power of eminent domain.

However, it is not uncommon to find the meaning of public purpose or public interest requirements in the relevant statutory provisions. For instance, the Constitution of the Republic of South Africa 1996,¹¹

⁸ A narrow interpretation would for instance regard the expropriation of land for land reform purposes which ultimately involves the transfer to private individuals as amounting to a non-public purpose, which makes the exercise of the power of eminent domain unconstitutional; see also, AJ van der Walt, *Constitutional Property Law* (3rd edn, Juta Legal and Academic Publishers 2005) 244.

⁹ Black's Law Dictionary defines 'public interest' as: '(1) The general welfare of the public that warrants recognition and protection. (2) Something in which the public as a whole has a stake; esp, an interest that justifies governmental regulation.' Bryan A Garner (ed), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 1425.

¹⁰ William R Maurer, 'A False Sense of Security: The Potential for Eminent Domain Abuse in Washington' (2006) Washington Policy Center Policy Brief, 2 <<http://castlecoalition.com/pdf/WA-ED-policy-brief.pdf>> accessed 30 May 2018.

¹¹ The exercise of the power of eminent domain in South Africa was previously regulated by the Expropriation Act (South Africa) 1975, until the 1993 Interim Constitution came into operation. The Expropriation Act vested the power to

prohibits the arbitrary deprivation of property and specifies that the power of eminent domain may only be exercised ‘in terms of law of general application,’ ‘(a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court’. The Constitution of the Republic of South Africa further specifies that ‘the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.’¹²

3. Land Requisition: The Regimes of Licenses and Leases under the Nigerian Minerals and Minerals Act 2007

By section 1 of MMA, the entire property in and control of ‘all Mineral Resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and water’ courses throughout Nigeria, any area covered by its territorial waters or constituency and the Exclusive Economic Zone is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.

In furtherance of this, all lands in which minerals have been found in commercial quantities shall, from the commencement of the Act, be acquired by the Government of the Federation in accordance with the provisions of the Land Use Act—that is, section 28 of the LUA (eminent domain). A holder of a right of occupancy does not acquire any interest in the mineral won on or under his land. Instead, section 1(3) states that such property passes from the Government to the person by whom the mineral resources are lawfully won upon their recovery in accordance with the Act.

However, certain lands are excluded from minerals exploration and exploitation. By section 3 MMA, minerals exploration and exploitation cannot be carried on any land set apart for military purposes or within fifty metres of an oil pipeline licence area granted under Oil Pipeline

expropriate property or acquire a temporary right to use property in the Minister of Public Works; the power was however to be exercised subject to the existence of a legitimate statutory authority, the requirement of public purpose, compliance with procedural requirements for fairness, and the payment of compensation.

¹² Constitution of the Republic of South Africa 1996, s 25(4)(a). In the Interim Constitution (South Africa) 1993, land reform was not contained in the property clause and this raised the question of whether or not it fell under the ambit of public interest requirement for the expropriation of property, a very important question considering the history of apartheid in South Africa. The current section therefore settles the issue by explicitly including land reforms within the ambit of public interest.

Act, or land occupied by any town, village, market, burial ground or cemetery, ancestral, sacred or archeological site, appropriated for a railway or situated within fifty metres of a railway or which is the site of or within fifty metres of, any Government or public building, reservoir, dam or public road. Except these categories of lands, section 22 MMA, provides that the use of land for mining operations takes priority over other uses of land as they constitute overriding public interest within the meaning of the Land Use Act 1978. Where a mining lease, a small scale mining lease or a quarry lease is granted over land subject to an existing and valid statutory or customary right of occupancy, the Governor of the State within which such rights are granted is mandated to revoke the right of occupancy within sixty days of the grant.¹³

Apart from the minister, the Act established the Mining Cadastre Office (MCO)¹⁴ with the Central Mining Cadastre Office located in Abuja, to administer mineral titles and maintain cadastral registers.¹⁵ The MMA provides for six classes of leases and licences under section 46. These are important because they could affect land use by private right of occupancy holders. What the MMA endeavours to do is to balance the rights of mineral title holders, and those of right of occupancy holders, while giving priority to mining operations because this is seen as public good.

3.1 Reconnaissance Permit¹⁶

This is a non-transferable search permit usually issued for one year to carry out reconnaissance activities on a non-exclusive basis in an environmentally and socially responsible manner. The holder must be a citizen of Nigeria, a body corporate, or a mining co-operative.¹⁷ It does not involve any drilling, excavation or other sub-surface techniques. The holder is only permitted to obtain and remove surface samples in small quantities. For this purpose, the holder is permitted to obtain access into, enter on or fly over any land within the territory of Nigeria for mining purposes to search for mineral resources. Importantly, the reconnaissance activity does not constitute a land use right under the

¹³ MMA, s 22(1).

¹⁴ *ibid*, s 5.

¹⁵ *ibid*, ss 5 & 6. Under s 7, the Mining Cadastre Office is mandated to open a number of mining registers that captures the several leases, licenses and permits that are issued for mining operations. They are: the registers of Reconnaissance Permits, Exploration Licences, Mining Leases, Small-Scale Mining Leases, Water Use Permits and Quarry Leases.

¹⁶ MMA, ss 56-58.

¹⁷ *ibid*, s 47.

Land Use Act 1978. Therefore, the holder does not acquire interest in the land over which the licence is granted. Nonetheless, where any damage to land or property occurs as a result of the reconnaissance activity, the holder must pay compensation to the users of the land.

3.2 Exploration Licence¹⁸

The Exploration Licence (EL) is issued by the MCO. It is an exclusive permit granted to a qualified person (a body corporate, a mining cooperative or a holder of a reconnaissance permit¹⁹) within 30 days of a valid application to conduct exploration upon land within the area of his licence (not exceeding 200km²). Its duration is for an initial period of three years, renewable for two further periods of two years each. The condition for renewal is that the holder has complied with his minimum work obligation under the permit and the Act and its regulations.

However, the holder, for a good cause, is permitted to apply to the MCO to suspend his obligation to work some area covered by the licence so that the period of the suspension will not be reckoned with in the currency of the licence. Where he complies with his obligations, he enjoys an exclusive right to apply for one or more Small Scale Mining Leases, Mining Leases and Quarry Leases over parts of the exploration area. The licence entitles the holder to enter upon land with agents and workmen (any number of employees); erect machinery and plant; construct ways; cut and take timber other than protected trees and use water from any water course including sinking or drilling shaft, wells and holes; take, remove, and export specimens; conduct bulk sampling and trial processing of mineral resources; sell specimens and samples. Even though the EL indicates/specifies the particular mineral to be explored, the holder is permitted to explore on an exclusive basis for all minerals in the licence area, but he may be required to notify the MCO of the non-indicated minerals found therein.

These activities will affect the land rights and use within the area as well as the collective rights of host communities. Therefore, where the exploration activities will affect land in occupation of a right of occupancy holder, section 61 mandates the EL holder to give notice to the Chairman/Chairmen of the affected Local Government Area(s) and to the holder(s) of the right of occupancy or the users and actual occupiers of the lands affected. This is because he must pay compensation to users or occupiers of the land for damage to the land

¹⁸ *ibid*, ss 59-64.

¹⁹ *ibid*, 48. This means that an individual citizen cannot apply for this permit as a first application.

and property resulting from activities in the exploration area. However, the fact that he pays compensation does not entitle him to be reckless. Instead, he must conduct exploration activities in an environmentally and socially responsible, safe, friendly, skillful, efficient and workmanlike manner. For instance, he is prohibited from abstracting, diverting or discharging water or other effluents from any watercourse except in compliance with a water use permit and the regulations; and he cannot explore a forest reserve without appropriate approval.

Upon expiry of the licence, the EL holder is obligated to maintain and restore the area to a safe state from any disturbance resulting from the exploration activities including filling up any shafts, wells, holes, or trenches in compliance with applicable environmental laws and regulations.

3.3 Mining Lease (ML)/Small Scale Mining Lease²⁰

The Mining Lease (ML)/Small Scale Mining Lease (SSML), is an exclusive lease grantable by the Minister within 45 days of a valid application from a qualified person (a body corporate or other legal entity that has demonstrated that a commercial quantity of Mineral resources exists in the area in respect of which the application is made and had fulfilled the conditions attached to an EL in respect of the area.) Its duration is 25 years renewable every 24 years. The area over which it is grantable must not exceed 50km². A SSML is grantable over an area covering not less than 5 acres and not more than 3km². The ML may be an alluvial lease or a lode lease. A ML cannot be granted unless the prospective lessee employs a professional with adequate qualification and experience in mining, who must remain in the employment of the lessee throughout the duration of the lease. This is because he must personally supervise the operations during the currency of the lease.

The lease entitles the lessee to exclusively use, occupy and carry out mineral exploitation as well as exploration within the mining lease area; utilize the water and wood and other construction materials as necessary for mineral exploitation; store, remove, transport, submit for treatment, transform and process the Mineral Resources and dispose of any waste; market, export or otherwise dispose of the mineral products resulting from its operations. There are timelines given to the lessee. For instance, unless circumstances justify an extension of time, he must commence mine development for mineral resources within 18 months and

²⁰ *ibid*, ss 65-74, 90.

production within 36 months. As for mineral water, mine development and production must be commenced within twelve months.

Mining operations could have deleterious effects on land hitherto occupied by right of occupancy holders. Thus lessees are required to carry out their operations in a safe and socially acceptable manner. They are to compensate owners and lawful occupiers of land for revocation of their rights to use land. Furthermore, these erstwhile lawful occupiers who remain within the area over which a ML has been granted, retain the right to graze livestock upon or to cultivate the surface of the land so far as the mining operations are not interfered with. At the determination of the lease, the lessee who has satisfied all obligations of the lease including payment of rents and royalties, retains the right to remove all his fixtures including plants, building or other property within three months (if an alluvial lease) or six months (if a lode lease) of the expiry of the lease. He loses this right where he does not remove within the stipulated period or is in default of payments, arising under the lease and in this case the fixtures become the property of the Federal Government—the reversioner- who may dispose of them in lieu of the rent, royalty and other payments.

3.4 Quarrying Lease²¹

The Quarrying Lease (QL) relates to all naturally occurring quarriable minerals such as asbestos, china clay, fuller's earth, gypsum, marble, limestone, mica, pipe, clay, slate, sand, stone, laterite, gravel, among others. The Act provides that all such extraction of these materials must be conducted under a lease or licence grantable under the Act, otherwise it is unlawful. A QL is grantable over an area not exceeding 5km² for a period of 5 years or less. The lessee is entitled to enter on the land, carry out quarrying operations and remove and dispose of any quarriable materials specified in the lease. He could also erect, construct and maintain engines, machinery, buildings, workshops, electric transmission lines, tramways, railway, roads, landing grounds, communication and conveniences necessary for the operations; lay water pipes and make water courses and ponds, dams and reservoirs. He may also cut and use trees other than protected trees for the operations.

²¹ *ibid*, ss 77-78.

4. Specific Land Use Rights Reserved for Host/Indigenous Communities

Apart from the notices and general rights relating to individual land owners, the Act makes further specific provisions to protect certain lands and certain rights of persons and host communities. They are protected against the leases and licences granted under the Act.

4.1 Customary Mineral Rights/ Quarriable Materials for Personal Use

Where it has been the custom of members of a community (Nigerian citizens) to win salt, soda, potash or galena or any other mineral (to which the Minister declares that it should apply), they are to continue to do so from any land except from security land and land within the area of a mining lease. Where the minerals are in the mining lease area, the lessee will pay the member of the community sums during the continuance of the lease.²² This implication of this provision is that where the licence or lease is not a mining lease, the community could continue to access their customary minerals even in the area covered by the lease or licence. Finally, local inhabitants of a lease or licence area are, in accordance with their local custom, entitled to the extraction of sand, clay, laterite and stone for personal use.²³

4.2 Sacred Land

Section 98 of the MMA places an absolute prohibition to exploration or mining in or under any area held to be sacred. The licensee or lessee must not permit injury or destruction of any tree or other thing which is the object of veneration. Where such injury or destruction occurs, the licensee or lessee will pay a fair and adequate compensation to the persons or community affected thereby.

4.3 Notice of Application to Private Land Owners

An applicant for a mineral title in respect of an area which includes private land, or land occupied under a state lease or right of occupancy must give notice of the application to the owner or occupier and obtain his consent before the licence can be granted. Where the requisite consent is not obtained, the licence may be granted with exclusion of the private land.²⁴

²² *ibid*, 97.

²³ *ibid*, 99.

²⁴ *ibid*, 100.

4.4 Surface Rights and Rent

These include non-interfering grazing of livestock and cultivation (farming). A mining lessee is mandated to pay rent in advance without demand being made of it for all lands occupied or used for mining purposes. Before granting a mining lease, the Minister informs the owner and occupier of land of the intention to grant the lease and requires him to state in writing the rate of annual surface rent which he desires should be paid to him. Once the rent stated is fair and reasonable (considering the damage which may be done by the mining operations), the lessee is given notice of it. The rate of the rent is revisable at intervals of five years.²⁵

Furthermore, in addition to rent, a mining lessee may pay reasonable compensation for any disturbance of the surface rights of the owner or occupier and any damage done to the surface of the land. He may also pay for the damage, removal or destruction of any crop, economic tree, building or other work.²⁶ The payment of compensation is an implied term in the mining lease.²⁷

4.5 Community Development Agreement

Under section 116, holders of MLs, SSMLs, QLs, are mandated to conclude with host communities a CDA that will transfer social and economic benefits to the community. The Community Development Agreement (CDA), contains undertakings with respect to such benefits as educational scholarships, apprenticeship, technical training and employment opportunities for indigenes; financial and other forms of contributory support for infrastructural development and maintenance such as education, health, roads, water and power; assistance with the creation, development and support to small scale and micro enterprises; agricultural product marketing and methods and procedure of environmental and socio-economic management and local governance enhancement.²⁸

It may be argued that the regime of protection of indigenous land rights is too robust or overboard. This cannot be the case since the land holders are equally seen as rights holders; and if the benefits reserved for them are engaged on the platform of human rights. If the above were not

²⁵ *ibid*, 102.

²⁶ *ibid*, ss107 and 113.

²⁷ *ibid*, 110 and 125.

²⁸ The process of reaching the CDA with host communities and elaborations on their content are contained in section 193 of the Nigerian Minerals and Mining Regulations 2011.

true, then the position of indigenous communities that host mineral rights holders cannot be enforced as rights. What the MMA preserves for them would rather be in the form of compensatory benefits and 'privileges.' Yet, due to the priority of right in favour of MTHs, and the fact that land holders do not have proprietary in won mineral, they may be shortchanged of fair compensation. For instance, while rent may be paid to the communities (or the individual land owner), the quantum is a matter of contract (agreement between the land rights holder, the Minister and the lessee or licensee) and not a question to be determined by the real value of the land based on the minerals won from the land.

Nonetheless, the MMA seems to recognize that the indigenous land holders have a right of access to land. Thus, the tenor of the Act is that indigenous owners should be able to return and resume full use of land after the land has been worked for minerals or where such operations fail. This invariably should strengthen any provision on land restoration by mineral title holders to make access possible. The Act thus imposes a number of other obligations in mandatory terms on MTHs. The Nigerian Minerals and Mining Regulations 2011 (MMR - made under the MMA) elaborates and enhances the land use rights and benefits contained in the Act. These are highlighted below.

4.6 Compensation

Section 162 of the MMR provides for the payment of compensation in line with section 107 of the Act. Compensation is to be paid to the owner or occupier of the land (such as where it is occupied by a lessee, customary tenant or pledgee) for damage of the surface of the land. Where the land contains crops, economic trees, building and other work and they are damaged by the MTH in the course of mining operations, the MTH is to pay compensation (as assessed by the State Minerals and Environmental Management Committee in collaboration with the Mining Cadastral Office) to the owner of such improvements after due valuation by a government valuer. This must be done within six months and a failure could lead to the suspension of the mineral title.

4.7 Reclamation and Restoration of Mined Areas

Section 165 of the MMR requires MTHs to conduct a vegetation survey, prepare detailed contour maps (to permit restoration of disturbed areas) and take precautionary measures to prevent non-essential destruction of vegetation in the project area. Where mining operations require disturbance of vegetation, a MTH is mandated to restore mined areas in

line with section 115.²⁹ This entails storage of topsoil before operations, establishing a nursery for the supply of disturbed plants, rehabilitation and re-vegetation (by establishing and protecting –such as by fencing - appropriate cover plants). Again a MTH is to take precautions to avoid topsoil disturbance during land clearing that could trigger erosion.

Measures stipulated under section 166 include providing erosion control channels, drainages and using vegetation as wind breaks. Furthermore, conserved areas, sanctuaries and forest reserve areas are to be protected to preserve animals (particularly, endangered species), trees and flora and fauna generally and avoid wildfires.³⁰ Section 171 MMR also states the goal and standard of reclamation and restoration efforts: preventing unnecessary and undue degradation of land and water resources and returning same to a stable condition. “Stable condition” is defined to mean “a condition that can reasonably be expected to return waterborne soil erosion to pre-mining levels within one year...and that can reasonably be expected to achieve re-vegetation, where feasible, within five years after reclamation is completed without the need for fertilization or reseeding.”³¹ Section 174 further provides that reclamation to a stable condition could be achieved alongside with the mining through ‘mining by cell’. This means dividing the material site into separate units and mining them in an orderly sequence.

4.8 Environmental Protection and Rehabilitation Programme

Before commencing operations, a MTH is mandated to submit an Environmental Protection and Rehabilitation Programme(EPRP) in line with section 120 of the MMA³² The EPRP not only focuses on the physical environmental (soil, water and vegetation) but importantly, on human protection and rehabilitation. The EPRP captures the following people and plans.³³

4.8.1 Displaced Households

The guiding principle for rehabilitation of displaced households is that they will get ‘replacement value for [their] house and other structures over the homestead land’.³⁴ The EPRP provides for their compensation

²⁹ MMR, s 164.

³⁰ *ibid*, ss167-169.

³¹ *ibid*, s171(3).

³² *ibid*, s180. By sections 184 and 185 of the MMR, depending on the performance of each MTH, they contribute to the Environmental Protection and Rehabilitation Fund.

³³ *ibid*, s181.

³⁴ *ibid*, s181(1)(h).

(through the head of the household), rehabilitation and planned resettlement/relocation; compensation for affected undeveloped land in a new location; provision of additional land if displaced household's land needs is more than what was allotted in new location at prevailing market rate; provision of alternative land where allotted land is not suitable or cash equivalent compensation.

4.8.2 Social and Recreational Amenities in New Settlements

Where mining operations results in loss of homesteads of many households requiring relocation, the EPRP will include the provision of basic amenities and infrastructural facilities in the new location. This entails providing schools, bank, post office, community centre, shopping centre, hospital, playground, children park, water supply, sewage disposal and sanitation, road, culverts and drains and power supply.

4.8.3 Displacement Resulting in Loss of Occupation

In such situations, the EPRP is to financially assist all affected persons in such households to pick up a new trade or continue in the old trade even in the old places where possible. Where they are farmers, land is to be made available to them to continue their old trade. This is in addition to payment of 'shifting allowance' from their present living places to the resettlement sites. Shifting allowance is also payable to non-owner-occupiers such as tenants even though no compensation for loss of homestead is paid to them.³⁵

The MMA and MMR contain other procedural stipulations for the effective realization of these benefits to host communities and private land holders. As seen in the substance of these provisions, the legislation impliedly recognizes a right of access to land such that land holders may return to the use of their mined lands even after they have been compensated for interim deprivation of such use. The thesis of this paper is that this right provides good justification for the robust provisions of the MMA and the MMR. This right even though not directly provided for can be hinged on the right to housing and survival. This is discussed below.

5. Justification for Protecting Host Communities' Right of Access to Land Use—the Right to Housing and Survival

The 1999 Constitution recognizes as fundamental the right of every citizen of Nigeria to acquire and own immovable property anywhere in

³⁵ *ibid*, s181(2).

Nigeria (a liberty right).³⁶ Yet the enjoyment of land rights could be affected by a number of legal and non-legal factors, including, legislation, governments policies and actions and socio-cultural dynamics and structures under customary law (such as multiple marriage systems (and virilocality), caste, hierarchical/extended family structures, patriarchy, group property ownership and inheritance regimes). Access to land is economically, culturally and socially crucial in Nigeria, because it means meeting housing and survival (agriculture) needs. Disappointingly, there is no direct right of access to land in the 1999 Constitution (as a private right) which could be directed at and claimable from the state or government. None is also found in international human rights instruments.

Nonetheless, an appreciation of the importance of the access to land can be seen in the premium placed on related rights of housing, property and survival. For instance, section 16(2)(d) of the Constitution states that the state shall direct its policy towards ensuring ‘that *suitable and adequate shelter*, suitable and adequate *food*, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens’.³⁷ The right to housing (and survival) is thus provided only as one of the fundamental objectives and directive principles of state policy. Yet it is there, even though it is not an enforceable right in Nigeria. Again, except in certain specified circumstances, section 44 of the 1999 Constitution appears to protect the citizenry against forced eviction through expropriation. It provides:

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 prescribed by a 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.

While it may be contended that the right protected under this section is directed against the state and state institutions because of the language used, it is possible to argue that the tenor of the specified exceptions

³⁶ Constitution of Nigeria, 1999, s 43.

³⁷ Words in italics are for emphasis.

indicate that the right can be enforced against individuals both natural and corporate. The Constitution makes provisions for a number of exceptions to the right against compulsory eviction or acquisition.³⁸ Therefore compulsory possession or acquisition can be lawfully carried out under a general law in any those situations. Exception relating to leases and tenancies however shows that the right against compulsory possession or acquisition can be infringed upon by private actors where their action is not within the framework of the law providing the exception.

It is crucial to reiterate that the right to housing and survival provides a strong justification for the entrenchment of a right of access to land. Interestingly, international human rights instruments and official comments thereon explain its content.

5.1 Right to Housing in International Human Rights Instruments – Content of the Right

One of the first references to the right to housing is in article 25 (1) of the Universal Declaration of Human Rights.³⁹ The International Covenant on Economic, Social and Cultural Rights 1966, widely considered as the central instrument for the protection of the right to adequate housing, refers to *the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions* in its article 11.⁴⁰ Other international and regional Instruments also contain this right.⁴¹ With regards to the African Charter on Human and Peoples'

³⁸ These exceptions are provided in section 44(2)(a) - (m) of the Constitution of Nigeria, 1999 (as amended).

³⁹ For responses to argument against a right to housing see, Kristen David Adams 'Do we Need a Right to Housing?' *Nevada Law Journal* [2009] 9 275. Williams argues that human rights discourse alone provides limited analytical assistance in addressing the difficult economic and institutional questions that must be faced in order to make housing rights a reality. Lucy Williams 'The Right to Housing in South Africa: An Evolving Jurisprudence' *Columbia Human Rights Law Review* [2014] 45 816.

⁴⁰ Words in italics are for emphasis.

⁴¹ For example, the Convention on the Elimination of All Forms of Racial Discrimination 1965 (art 5(e)(iii)), the Convention on the Elimination of All Forms of Discrimination against Women 1979 (art 14(2)(h)), the Convention on the Rights of the Child 1989 (art 27(3)), the Convention Relating to the Status of Refugees 1952 (art 21), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (art 43(1)(d)), and the Convention on the Rights of Persons with Disabilities 2008 (arts 2, 5(3), 9(1)(a), 22(1), 28(1) & 28(2)(d)). With regard to other regions, in the European human rights system, the European Social Charter of 1961 was revised in 1996 to include the right to housing (art 31; see also arts

Rights 1981, in *the Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,⁴² the African Commission on Human and Peoples' Rights found that, while the right to adequate housing was not explicitly recognized in the Charter, it could be inferred from other rights:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health... the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18 (1) reads into the Charter a right to shelter or housing....⁴³

It has been opined that the implication of this judgment is that right to housing or shelter is linked to the rights to property, health, and protection of the family, read together, because property, health and family life are all adversely affected when housing is destroyed.⁴⁴

The characteristics of the right to adequate housing are clarified mainly in the Committee on Economic, Social and Cultural Rights' General Comments, 1991 on the Right to Adequate Housing and 1997 on Forced Evictions.⁴⁵ The Committee identified the following characteristics:

16 & 19(4) on housing for families & migrant workers, respectively); in the Inter-American human rights system, though the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (Protocol of San Salvador) is silent on this right, it however provides for the right of everyone to live in a healthy environment and to have access to basic public services (art 11(1)).

⁴² Communication No 155/96.

⁴³ Communication 155/96, 15th Annual Activity Report of the ACHPR (2002); 10 IHRR 282 (2003) at para 60. The case concerned alleged violations, by the Nigerian government, of various rights in the African Charter, through condoning and facilitating the operations of oil corporations in Ogoni land, giving rise to protests against the activities, with resulting deaths and burning and destruction of homes, crops and farms.

⁴⁴ Lilian Chenwi 'The right to adequate housing in the African Regional Human Rights System: Convergence or Divergence between the African Commission and South African Approaches' *Law Democracy and Development* [2013] [17] 342, 345.

⁴⁵ CESCR General Comment No 4: The Right to Adequate Housing (art 11 (1) of the Covenant) Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 Dec 1991 (Contained in Document E/1992/23); the Right to Adequate Housing (art 11 (1) of the Covenant): Forced evictions.

- a. The right to adequate housing contains freedoms. These *freedoms* include: Protection against forced evictions and the arbitrary destruction and demolition of one's home; The right to be free from arbitrary interference with one's home, privacy and family; and The right to choose one's residence, to determine where to live and to freedom of movement.
- b. The right to adequate housing contains entitlements. These *entitlements* include: Security of tenure; housing, land and property restitution; equal and non-discriminatory access to adequate housing; participation in housing-related decision-making at the national and community levels.

Apart from these, a number of conditions must be met before particular forms of shelter can be considered to constitute 'adequate housing'. These elements are just as fundamental as the basic supply and availability of housing. For housing to be adequate, it must, *at a minimum*, meet the following criteria: Security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location (proximate to health and educational facilities, cultural adequacy).

Nonetheless, the Office of the High Commissioner for Human Rights has explained the scope of the right to adequate housing.⁴⁶ It explains what the right is not. For instance, it stated that the right to adequate housing does not require the State to build housing for the entire population. Rather, the right to adequate housing covers measures that are needed to prevent homelessness, prohibit forced evictions, address discrimination, focus on the most vulnerable and marginalized groups, ensure security of tenure to all, and guarantee that everyone's housing is adequate. It does not prohibit development projects which could displace people. It is not the same as the right to property which is enshrined in the in human rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁷ and the Convention on the Elimination of All Forms of Discrimination against Women 1979.⁴⁸

The right to adequate housing is broader than the right to own property as it addresses rights not related to ownership and is intended to ensure that *everyone* has a safe and secure place to live in peace and dignity, including non-owners of property. Security of tenure, the

⁴⁶ Office of the United Nations High Commissioner on Human Rights: *The Right to Adequate Housing, Fact Sheet* No 21/Rev1.

⁴⁷ art 5 (d)(v).

⁴⁸ art 16 (h).

cornerstone of the right to adequate housing, can take a variety of forms, including rental accommodation, cooperative housing, lease, owner-occupation, emergency housing or informal settlements. As such, it is not limited to the conferral of formal legal titles. Finally, the right to adequate housing is not the same as the right to land, even though access to land can constitute a fundamental element of the realization of the right to adequate housing, notably in rural areas or for indigenous peoples. Inadequate housing or the practice of forced evictions can be the consequence of being denied access to land and common property resources. As such, the enjoyment of the right to adequate housing might require, in certain cases, securing access to and control over land. Nevertheless, international human rights law does not, currently, recognize a self-standing right to land.⁴⁹

In many customary settings, forced eviction and deprivation of housing entitlements is a major issue. In the *SERAC* case, the African Commission held that ‘the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions.’⁵⁰ Furthermore, Otubu notes that house ownership is one of the first priorities for most households and it represents the largest single investment for most families.⁵¹ He shows that despite the enormous housing policy reforms in Nigeria such as the National Housing Policy 1991 which was reviewed in 2004 with the aim ‘to ensure that all Nigerians own or at least have decent, safe and sanitary housing at an affordable cost’⁵² housing deficit continues to be a dilemma in Nigeria.⁵³ The missing link according to Otubu is the failure at land reform. According to him:

The nature of land holding, tenure and titling operating in the country is directly proportional to the output in the housing sector of the economy. Thus Land accessibility, security, transferability and registration of interest in land and their interrelationship are fundamental subject of study in the quest to provide decent housing for the mass population of Nigerians. The extant land use

⁴⁹ Fact Sheet 21, 6-8.

⁵⁰ *SERAC’s Case* (n 42), Para 63.

⁵¹ Akintunde Otubu, ‘The Missing Link in Housing Sector Reforms in Nigeria’ [2012] (4) (1), *Acta Universitatis Danubius* 116.

⁵² This was addition to the promulgation of the National Housing Fund Act 1992.

⁵³ Country Programme Document 2008 – 2009 Nigeria: United Nations Human Settlements Programme publication (UN-HABITAT), 2008. For some discourse on the weaknesses of the use of non-legal measures to achieve socio-economic welfare, see Kehinde Anifalaje ‘Implementation of the Right to Social Security in Nigeria’ [2017] (17), *African Human Rights Law Journal* 413.

law and administration as espoused under the Land Use Act 1978 have serious consequences on the housing supply in the country. The current dualist tenorial system under the Act adds to transaction cost and further engenders insecurity of title to land which is a disincentive to property investment and the cause of high property prices across the country. The insecurity of title to land under the Act ...and the incongruous status of the certificate of occupancy... issued under it are restraints to housing mortgage development and the growth of a vibrant housing market in the country The Act also admits of multiple incidence of title to land as seen in the recognition of customary title, existing registered title documents and the certificate of occupancy issued under the Act. This system encourages corrupt practices and fraud on the public with adverse results on the psyche of investors in public housing.⁵⁴

The purpose of the foregoing exegesis on the right to housing is to underscore the significance of land to developmental benefits. There is no gainsaying the fact that in most developing countries land continues to play an important role in the lives of many people because subsistence agriculture is widely practiced.⁵⁵ Hence, whether developed or undeveloped, land is economically prized in Nigeria as a most important element of both group and individual ownership. This may be because, apart from being an important means of securing shelter and livelihood (primarily through farming),⁵⁶ it has been central to trade and commerce as a means of securing credit from the colonial period onwards.⁵⁷ As mentioned, from the human rights perspective, there is no direct or specifically enforceable right of access to land in any of the international human rights instruments nor is there any in the 1999 Constitution except as discussed above, as it provides only for a right to acquire

⁵⁴ Akintunde Otubu, 'The Missing Link in Housing Sector Reforms in Nigeria' [2012] (4) (1) *Acta Universitatis Danubius* 116, 128.

⁵⁵ K Frimpong, 'The Administration of Tribal Lands in Botswana' [1998] *Journal of African Law* 29, 51

⁵⁶ Eghosa O Eghator and Kenneth I Ajibo, 'Legal and Theoretical Assessment of the Right to Food in Nigeria,' in Rhuks T Akoh and Damilola S Olawuyi (eds), *Food and Agricultural Law: Readings in Sustainable Agriculture and the Law in Nigeria* (Afe-Babalola University 2015) 122-139.

⁵⁷ K Mann, 'Women, Landed Property, and the Accumulation of Wealth in Early Colonial Lagos' *Signs* [1991] 16(4) 682. Thus the views expressed by Ike as late as the 1980s that property rights to land in Nigerian agriculture are not specific, or that individualized allotments are absent or that land markets are non-existent, cannot be supported; see also, DN Ike, 'The system of Land Rights in Nigerian Agriculture,' [1984] (43) (4) *The American Journal of Economics and Sociology* 469.

immovable property in any part of the country.⁵⁸ Yet, without land the vast majority of persons who live in rural zones of the country would not be able to feed their families. It may even be said that without land the right to life itself and to human dignity⁵⁹ would be meaningless. Equally supportive of a right of access to land is the right to development, which is stated to be the ability to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁶⁰

It can be submitted that these statements from the international community require states to carry out land reforms that lead to adequate access to land for their citizenry to ensure a decent existence. It has been suggested that at a minimum, all people have a moral right to have enough land to enable them survive or lead a dignified existence. If they do not have, the society via the state should provide it. In other words, a right of access to land should be regarded as a second-generation right or a socio-economic right. It is submitted that for property-less dwellers, the right of access to sufficient land for a decent existence ought to be guaranteed by the state, which should use resources at its disposal to fulfill this right. Interestingly, while the South African 1996 Constitution guarantees the right to property generally, it specifically provides in section 25(5) that ‘the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.’ For us, this is the strength of the MMA and MMR in terms of protection of access to land rights of land holders and indigenous communities in mining areas.

6. Conclusion

This paper juxtaposed the mineral title regimes under the Nigerian Minerals and Mining Act 2007 and its 2011 Regulations with the land use protections accorded the original land holders including indigenous/host communities. There is no doubt that mining operations could have deleterious effects on land and the environment. It was seen that a chief underpinning of the MMA is economic: giving access to the nation’s mineral resources as a public good. Yet, it preserves the

⁵⁸ Constitution of Nigeria 1999, s 43.

⁵⁹ *ibid*, ss 33 & 34.

⁶⁰ Declaration on the Right to Development, adopted by the United Nations General Assembly in Resolution 41/128 of 4 Dec 1986, article 1(1); see also, DA Dakas and IH Chiroma, ‘Right to Development: Has it any Significance of its Own’ [1994] (4) *Review of the African Commission on Human and Peoples’ Rights* 68 for a discussion of this right.

customary land rights of land holders and indeed strengthens them by not only insisting on best practices by MTHs but also by entrenching the principles of contemporaneity and shared use. Where this is not possible, it has imposed stringent and unilateral obligations that assure absolute restoration and reclamation of mined areas (for the use of the original land holders) and rehabilitation of affected/displaced households. One significant contention of this paper is that since the rights of MTHs to the land are not absolute, it is an admission of the existence of a right of access to land (for the host communities) even though there is no express constitutional recognition of same. This right of access to land justifies MTHs obligations. One other contention is that the rights to housing and survival, which combine to provide a juridical justification for the right of access to land, pervade the MMA and the MMR.

Given the significance and the central role a right of access to land plays in the realization of other fundamental rights, it is implausible that such a right is not provided in the 1999 Constitution's bill of rights. Therefore, our most important recommendation is that Nigeria should provide for the right of access to land as a fundamental human right. This is reasonable because Nigeria has abundant land space from which such a right can be practicably realized. Secondly, if the protections accorded original land users of mineral areas are to be real rights, the institutions established under the MMA ought to put in place strong enforcement structures for practical, functional and effective realization of these rights. This is imperative to avoid conflicts in the relationship between MTHs and host communities.

Examining the Opportunities, Incentives and Limitations to Investment in Renewable Energy under Extant Legal Frameworks in Nigeria

Bethel Uzoma Ihugba *

Abstract

This article critically reviews the extant laws on renewable energy, particularly the Electricity Act 2023 and the Constitution of the Federal Republic of Nigeria 1999 (as amended), for the purpose of determining the extent the legal and institutional framework therein promotes investment in renewable energy in Nigeria. The article is occasioned by the recent developments in the fifth constitution alteration and the enactment of the Electricity Act 2023; as well as the proposal that decentralisation of electricity generation and distribution, and prioritisation of renewable energy would boost access to electricity in Nigeria. Considering the fact that the success of these proposals depends largely on investment in the sector, the article examines how this framework promotes investments, while pursuing renewable energy and energy decentralization objectives. In addressing these issues, the article adopts a doctrinal approach by majorly collecting data from the Law, specifically the Constitution and Electricity Act. To give context in the analysis, the article also draws from extant literature on renewable energy generally and particularly in Nigeria. The article finds that the extant legal and institutional framework portends quite a lot of positives for investment in renewable energy, ranging from assuring renewable energy market to providing financial incentives. The article, however, identifies some challenges in terms of institutional framework which manifests itself in lack of implementation, exclusion of the vulnerable and non-inclusion of the promotion of domestic manufacturing of renewable energy appliances domestic in Nigeria. The article recommends domestication of the Electricity Act in states and active implementation of the laws so as to encourage and sustain investment in renewable energy.

Keywords: Electricity, Energy Decentralisation, Investment Incentive, Nigeria, Renewable Energy Investment.

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1. Introduction

The movement for promotion of investment in renewable energy has been on for a while. This however required an improvement in the law to ensure that the movement was realistic and sustainable. Recently Nigeria improved its laws to enhance investment in renewable energy. The extent of the opportunities and effectiveness of the provisions of the new laws are yet to be properly explored. The purpose of this article therefore is to conduct a critical review of the extant laws, particularly the Electricity Act 2023 and the Constitution of the Federal Republic of Nigeria 1999 in relation to promotion of investment in renewable energy. This is important as it will show the opportunities available and how investors may take advantage of the laws. It is also expected that the review should expose any extant or potential challenges with the frameworks and propose solutions.

To meet this purpose, the next section of the article provides a background on the movement for investment in renewable energy in Nigeria. This is followed by conceptual clarification and literature review discussing extant and relevant discourse on the subject matter. This is to lay foundation and justification for the discourse that follows. Next is the description and justification of the methodology adopted for the research. This is followed by a step-by-step presentation and analysis of the provisions of the Constitution and Electricity Act 2023 as they promote or hinder investment in renewable energy in Nigeria. Next is a distillation of the key findings from the review and their implications and recommendations. The article ends with a conclusion.

The issue of access to electricity has always been a serious challenge for Nigeria for a long time. From the administration of President Olusegun Obasanjo huge sums of money were expended to improve access to electricity in Nigeria. A new Electricity Act, the ESPRA was enacted with the hope that it will transform the electricity sector and improve access to electricity. However, since the enactment of the Act there was no significant improvement. Statistical data on access to electricity over this period did not show any significant improvement despite the amount of money spent on the electricity sector. These raised several concerns and accusations of mismanagement of public funds.¹ There are however opinions to the contrary suggesting

¹ Premium Times Press Release, Authorise probe of Obasanjo's \$16 billion power spending, SERAP tells CJN, Premium Times online, Press Release Nov 24, 2016 <<https://www.premiumtimesng.com/news/top-news/216194-authorise-probe->

that there was investment by President Obasanjo which laid positive foundations for improvement in access to electricity.² Many perspectives on how this challenge could be resolved have been proffered. There were suggestions that a decentralized electricity sector with more powers granted to State governments would be more appropriate and more productive for Nigeria.³ Apparently, following this suggestion, the Constitution was eventually altered to grant States powers to make laws on electricity matters within the States. Consequent upon the Constitution alteration the Electricity Act 2023 was enacted, further liberalizing the regulation of electricity and investment in electricity sector between the Federal Government, State Government and Local Government Councils. Both statutes promise a lot of positive changes for the Nigerian electricity sector. One of the key areas that is adjudged as holding a lot of promise is the renewable energy sector.⁴ This is because through the Constitution alteration, states can now make laws for standalone electricity generation. A practical example of standalone electricity generation is renewable energy. It is against this background that this study is conducted.

2. Conceptual Clarification and Literature Review

In the course of this paper some concepts are repeatedly used. To avoid or at least reduce ambiguity, clarifications are provided. This is necessary because some of the concepts have several meanings depending on the context of discussion and even within this discourse.

obasanjos-16-billion-power-spending-serap-tells-cjn.html?tztc=1>accessed 18th March 2024.

² Dare O, Obasanjo's \$8bn power plants helping Nigeria – Minister The Punch Newspapers online, 21st Feb 2024 < <https://punchng.com/obasanjos-8bn-power-plants-helping-nigeria-minister/> > accessed 18th March 2024

³ Samuel E. Nwosu C and Dike S C. Decentralization of Electricity Generation and Distribution In Nigeria: Revisiting the Legal and Policy Reforms (2020) (4) (4), *African Journal of International Energy and Environmental Law* < https://www.researchgate.net/publication/345813352_decentralization_of_electricity_generation_and_distribution_in_nigeria_revisiting_the_legal_and_policy_reforms > accessed 18th March 2024; Sunday Olayinka Oyedepo and Others, Towards a Sustainable Electricity Supply in Nigeria: The Role of Decentralized Renewable Energy System (2)(4)(2018), *EUR J, SUSTAIN DEV RES*, art No: 40 <https://doi.org/10.20897/ejosdr/3908><<https://www.ejosdr.com/article/towards-a-sustainable-electricity-supply-in-nigeria-the-role-of-decentralized-renewable-energy-3908>> accessed 18th March 2024.

⁴ BU Ihugba, 'Critical Review of the Legal Framework on Electricity for Promotion of Sustainable Renewable Energy in Nigeria, (2024) (21) (1), *Journal of Private and Property Law, Rivers State University* 199- 213.

The concepts are: Legal Framework; Institutional Framework and Renewable Energy.

2.1 Legal Framework

The concept here refers to the constitutional and statutory provisions on electricity and renewable energy in Nigeria. Its use here is restricted to laws made by the National Assembly or State Houses of Assembly. Accordingly, examples of legal framework for purposes of our discourse include the Constitution and the Electricity Act 2023. The Legal Framework also creates some institutions and practices or at least lays foundations for the workings of an institutions. While those formal or regulatory provisions form part of the legal framework, for purposes of our discourse, the actual implementation forms part of the Institutional framework.

2.2 Institutional Framework

In this work, institutional framework refers to the organisations, bodies and agencies established by law for the implementation of a law, the practices and procedures adopted for the implementation of the law and the organizational structure and officers involved in this implementation. Institutional framework usually finds foundation within the legal framework. However, not all practices and conventions of an institutions can find legal backing in the legal framework. Irrespective of presence or absence of legal backing, all actual happenings towards the implementation of extant law form the institutional framework. For purposes of this paper, institutional framework here does not include state of federal government policies on renewable energy which are not made pursuant to the Electricity Act.

2.3 Renewable Energy

Renewable energy here is limited to statutory definition. This is important given that this paper is a review of extant laws. Accordingly, renewable energy for purposes of our discussion are any energy generated from renewable energy sources. Renewable energy sources on the other hand, are those natural sources such as sunlight, wind, rain, tides and geothermal heat which are renewable and naturally renewed.⁵ The above list is just indicative of what are renewable and may be updated as new sources are discovered. It is important to note that this includes all natural sources of energy which can be naturally replenished

⁵ Electricity Act 2023, s 232.

without external intervention. It is this the ability to be replenished without external intervention that qualifies any source or energy as renewable.⁶ The availability and degree of renewability may however differ due to climatic conditions and geographical features. This is general for all renewable energy sources including wind, solar, geothermal, wave, tidal, hydropower, and biomass and landfill gas.⁷

Understanding the Discourse on Investment in Renewable Energy

Quite a number of scholarships have examined the potentials of renewable energy as tool for promotion of investment. Following this line, a Ghanaian scholarly work examined the impact of renewable energy policies on the promotion of investment in agriculture in Ghana. The paper examined this from the perspective in use of solar powered energy sources and conversion of agricultural waste to renewable energy source. It argued that whereas there are renewable energy policies and laws in Ghana, none of these directly targeted agricultural development. The paper conceded that although some of the incentives could be directed towards agricultural, there needs to be a national objective of agricultural development and full implementation of renewable energy incentives towards agricultural development.⁸ This paper is a confirmation of the potentials of well-targeted renewable law and policy towards investment promotion. For African countries, one of the key areas that this can be deployed in in agricultural development. An earlier paper of 2010 had confirmed the positive relationship between agriculture and renewable energy. The paper from Malaysia explored the potential input of waste agricultural materials to renewable energy generation. This paper found that the agricultural sector can both provide and benefit from renewable energy.⁹ In other words a proactive legal framework would be established to exploit these opportunities. Seven years later, a group of Nigerian scholars examined opportunities for

⁶ International Energy Agency (IEA) and the World Bank (2015), 'Sustainable Energy for All 2015—Progress Toward Sustainable Energy' 3.

⁷ Electricity Act 2023, s 232.

⁸ RT Karbo and Others, 'Using renewable energy to meet the energy needs of smallholder farmers: Are there policies to promote adoption in Ghana?' *Ghana Journal of Agric Science* (2022) Vol 57 No 1 < <https://dx.doi.org/10.4314/gjas.v57i1.2> > accessed 7th June 2024.

⁹ Hossain A B M S and others. Biodiesel production from waste soybean oil biomass as renewable energy and environmental recycled process, *African Journal of Biotechnology* 2010 Vol 9(27) 4233-4240, 5 July, 2010 < <http://www.academicjournals.org/AJB> > accessed 7th June 2024.

renewable energy in Nigeria, with particular reference to wind energy. The study used Asaba, Benin, Calabar, Port Harcourt, Uyo, and Warri as case studies.¹⁰ It found that although these areas were some of the least suitable areas for massive windmill farms, the wind speed in these areas were sufficient to generate electricity for small scale farming especially for irrigation and powering of other small farming machines.

This research confirms that no matter how small the power is generated from varied sources of renewable energy, they could be put to good use in agriculture and other investment opportunities. More importantly, with improved technology, the energy generation from wind power in these areas could be optimized. This thus confirms the necessity for government to explore these opportunities. This necessity for government intervention through laws were also re-echoed by another 2017 paper. The research found that as 2017 over 75 million Nigerians were without electricity. To resolve this challenge, the paper suggested a decentralisation of electricity and the exploitation of alternative energy sources. It found that decentralized energy could help boost investment in the manufacturing sector, improve economic activity and growth and enhance job creation.¹¹ In other words, decentralized energy which is most feasible through renewable energy has massive positive impact for economic growth.

The previous paper appears to be a re-echo of African wide research which confirmed renewable energy as the cheapest alternative for resolving the electricity deficit in Africa. It found that with renewable energy African can transform its economic outlook. It found that this is achievable through targeted policies which offers incentives to renewable energy generators, announces renewable energy targets to stimulate production of renewable energy and provides a financing strategy for the promotion of renewable energy. It found that against fossil fuel, renewable energy holds that most promising potentials for Africa.¹² What these studies for over two decades have shown is that

¹⁰ EBOIBI, B and others, Evaluation of wind energy potential in the south-south geopolitical zone of Nigeria, *J Appl Sci Environ. Manage* 2017 Vol. 21 (7) 1301-1306 < DOI: 10.4314/jasem.v21i7.14 > accessed 7th June 2024.

¹¹ Ify Malo, Distributed Renewable Energy: Answer to Nigeria's Energy Access Challenge, (2017) *Economic and Policy Review* Vol 16 No 1 23-29 < <https://www.ajol.info/index.php/epr/article/view/155865/145492> > accessed 7th June 2024.

¹² Kirchner R and Adeleke S 'Promoting a low cost energy future in Africa' *African Journal of Environmental Science and Technology* Vol. 8(2), pp. 91-98, February 2014 DOI: 10.5897/AJEST2013.1619 < <https://academicjournals.org/journal/AJEST/article-abstract/D89328643080> > accessed 7th June 2024.

there are serious necessity for the promotion of investment in renewable energy. These include through government incentives strengthened by policy directions and legal frameworks. The confirmed that renewable energy is a worthy option for Africa. These earlier scholarships have been carefully selected to demonstrate that the punch and recognition of the value of renewable energy in the promotion of economic growth and investment in Africa in general and Nigeria in particular is not a new movement. The studies have been concluded long before the new electricity Act was enacted. The question therefore is given this long opportunity to understand the potential of renewable evidenced by over two decades of research, to what extent does the Nigeria legal framework provide opportunities for the exploitation of renewable energy for investment promotion.

3. Methodology

The paper adopts doctrinal method. This is the reliance on legal jurisprudence, legal and statutory provisions as data and analytical approach of the subject of the research.¹³ Thus in line with doctrinal research approach, the paper relies majorly on constitutional and statutory provisions of the CFRN 1999 and the Electricity Act 2023 as primary data. These are then subjected to normative critical analysis.¹⁴ This analytical approach informs the examination of the constitutional and statutory provisions against their stated purpose, the coherence of the provisions to these purpose, external and internal coherence and its consistency in meeting the stated purpose of promoting investment in renewable energy in Nigeria. The analysis also explores other potentials extant in the laws which can be positively deployed for the promotion of investment in renewable energy and sustainable economic development in Nigeria.

4. Legal and Institutional Framework Analysis

4.1 Legal Framework

Nigeria is a constitutional democracy and this means that all governance initiative and projects in Nigeria must be in accordance with and sanction by the Constitution and extant laws. More importantly, the strength of any initiative depends largely on the effectiveness, efficiency and sustainability of the legal provisions. Accordingly, to assess the

¹³ BU Ihugba, *Introduction to Legal Research Method and Legal Writing* (Malthouse Law Books 2020) 5.

¹⁴ *ibid*, 167.

strength of any government project or policy requires examining the laws that are supposedly enacted to implement such initiatives. In this case, the relevant laws are the Constitution of the Federal Republic of Nigeria 1999 and the Electricity Act 2023. These laws are examined below:

4.1.1 The Constitution of the Federal Republic of Nigeria (as amended)
In a Constitutional Democracy, laws are written down to ensure certainty, clarity, accountability and objectivity. This ensures that arbitrariness and abuse of discretion are avoided. This is the same with the Nigerian legal system. Also being a federal system¹⁵, the legislative competence of the three tiers of government are shared.¹⁶ The primacy of this system is contained in section 1 of the Constitution to the effect that the Constitution is supreme and that all powers must be exercised in accordance with the Constitution.

The Constitution then sets the framework for the enactment of laws for the social, economic and political development of Nigeria. These are captured under Chapter II and labelled as fundamental objectives and directive principles.¹⁷ With specific reference to economic investments, under which this paper falls, the Constitution empowers governments¹⁸ – Federal State and Local Government, in the exercise of their legislative competence to make laws on the promotion of investment in Nigeria.¹⁹ Access to energy can effectively and efficiently be achieved in Nigeria through the promotion and protection of investment in that sector.²⁰ This can be achieved through enactment of laws at the three levels of government which provides enabling environment for investment in renewable energy.²¹

In recognition of the role all governments must play in expanding investment opportunities, especially in the renewable energy the

¹⁵ CFRN 1999, s 2(2).

¹⁶ *ibid*, s 4.

¹⁷ *ibid*, 1999 s 13.

¹⁸ *ibid*, 1999 s 318.

¹⁹ *ibid*, s 16.

²⁰ O I Okoro and Madueme T C, 'Solar Energy: A Necessary Investment in a Developing Economy' (2004) (23) (1), *Nigerian Journal of Technology* 62 < <https://www.ajol.info/index.php/njt/article/view/123333/112876> > accessed 18th March 2024.

²¹ Malo I 'Distributed Renewable energy: The answer to Nigeria's Access challenge' (2017)(16)(1), *Economic and Policy Review*, 26 < <https://www.ajol.info/index.php/epr/article/view/155865/145492> > accessed 18th March 2024.

Constitution was altered by the fifth Constitution Alteration to remove the erstwhile restriction on State government involvement in electricity. This now creates opportunity for state government involvement in all types of electricity generation and distribution, especially the type of electricity sourced from renewable energy sources. This is the type of energy that can be generated as standalone grid and may also be integrated into the national grid. The details of how this may be achieved is contained in the Electricity Act 2023. States also now have the legislative competence to enact their own state laws. For this paper however, we shall only discuss the Electricity Act 2023.

4.1.2 Electricity Act 2023

From the long title of the Electricity Act, its interest in renewable energy is disclosed. It is clear that the law intends to capture every available opportunity to promote renewable energy use and investment in Nigeria. Thus, according to the long title, the Act is to:

Provide a Comprehensive Legal and Institutional Framework for the Power Sector in Nigeria in the Areas of Electricity Generation, Transmission, System Operation, Distribution, Supply, Trading, Enforcement of Consumer Rights and Obligations, provide for a Holistic Integrated Resource Plan and Policy that Recognizes all Sources for the Generation, Transmission and Distribution of Electricity, Including the Integration of Renewable Energy to Nigeria's Energy Mix and Attract Investments...

This shows that the Act has a positive disposition to renewable energy. This disposition is further captured in the Act from different perspectives including Legal Framework; Institutional structures; Incentives; Energy Generation; Promotion strategies; and Renewable Energy Funds. These aspects of the law as it relates to renewable energy are discussed below:

The first section of the Act, recognises the value of renewable energy and declares that the Act seeks to provide legal and institutional framework for investment in renewable energy. It then in paragraphs LMN and O sets out its objectives as it relates to renewable energy investment. These are that: provide a framework and environment to stimulate the development and utilization of renewable energy; provide a framework for improvement of access to electricity from renewable energy through off-grid and mini-grid solutions; promote capacity in technology for renewable energy sources; and promote public awareness on renewable energy. To lay a legal framework for States to establish their own regulatory framework for the promotion of investment in renewable energy, the Act further states that states also have the power,

as provided under the Constitution to enact their own laws on electricity.²² This includes laws relating to renewable energy generation, transmission and distribution within the State. This provision in the Electricity Act is an affirmation, albeit superfluous of the Constitutional right granted to States by virtue of the fifth Constitution Alteration.

4.2. Institutional Structures

To promote investment in renewable energy, having laid down some legal framework, the Electricity Act establishes some institutional framework. The first institutional framework is the provision establishing and granting supervisory powers to the Minister responsible for Power. The provision specifically empowers the Minister to provide advice on all matters pertaining to conventional and renewable energy development and utilization.²³ Thus, the Federal Government cannot claim it has no capacity to advise on renewable energy. It rather imposes on the ministry the duty of getting itself and staff informed and educated on matters relating to renewable energy.

For clarity, the Act in subsequent subclasses listed all the areas that the Ministry need to have capacity so that it can properly advise the government or establish implementation framework. These include exemption on levies and duties; financial incentives for development of renewable energy; conducting studies and providing and maintaining data for development of renewable energy; collaborate in research and development on renewable energy; conduct physical planning on the sustainability and utilisation of all alternative sources of energy; engage in collaboration for development of local capacities in the development of alternative energy; collaborate with relevant ministries and agencies in the development of mechanism for carbon credit trading, renewable energy certificates to promote the development and exploitation of conventional and renewable energy sources.²⁴

Having set out these advisory roles of the Ministry, the Act then establishes a specialised agency, the Nigerian Electricity Regulatory Commission and outlines its direct practical functions and powers that would assist in the regulation and promotion of the electricity sector towards ensuring sustainability of investment in the renewable energy sector. These functions are about 11 in number and all are towards promotion of sustainable energy and investment in same. To buttress the importance of renewable energy, the section specifically provides that

²² Electricity Act 2023, s 1(2).

²³ *ibid*, s 5(2)(e).

²⁴ *ibid*, s 5(2).

the Commission shall have the function of promoting the development and utilization of renewable energy services and increasing the contribution of renewable energy to Nigeria's energy mix.²⁵ This is a clear provision that demonstrates the prioritisation of renewable energy under the Electricity Act 2023.

Another great demonstration of the prioritisation of renewable energy is the power granted to the Commission to grant multiple generation licenses to independent power producers for generation of electricity from renewable and non-renewable sources subject to such terms and conditions as may be stipulated by the Commission under such licenses. This power can only be exercised in favour or renewable end alternate energy sources.²⁶ This should encourage all investors, domestic and foreign investors, in renewable energy into investing in the sector.

5. Benefits of Investment in Renewable Energy

5.1 Investment Incentives

The Act also, aside its provisions on advisory role and encouragement through licenses makes provisions to ensure that the energy generated or activities engaged in generation of renewable energy are marketed and rewarding to investors. This required looking at some key factors that would encourage investment in the sector. These include market, provision of supply network, and making it affordable for direct off takers or end-users of electricity generated through renewable energy sources to purchase from renewable energy producers. On production of renewable energy, the Act empowers the Commission to impose obligations to purchase renewable energy or obligations to generate from renewable energy sources in order to promote consumption of energy from renewable sources.²⁷ This obligation to generate from renewable energy sources is further aided by the expanse of renewable energy sources from which an energy producer may source energy. It includes solar energy, wind, small hydro, biomass and such other renewable sources as may be developed from time to time. In other words, investors are encouraged to develop and explore new renewable energy sources.

The Act also encourages collaboration and co-generation using different sources.²⁸ Having put these in place, the Act makes it a

²⁵ *ibid*, s 34 (1) (j).

²⁶ *ibid*, s 65 (3).

²⁷ *ibid*, s 72 (2) (d).

²⁸ *ibid*, s 80 (1) (2).

continuing obligation for energy producers to source energy from renewable energy sources.²⁹ To reduce the possibility of producers reverting to non-renewable energy sources, the Commission is required to review compliance standard every two years.³⁰ These are some of the sure ways of encouraging investment in renewable energy. It assures investors that the market is available and encourages investors to remain consistent. It also assures off-takers and end-users of electricity generated from renewable energy sources to patronise renewable energy producers. To further buttress the prioritisation of renewable energy investment, the Act makes it a priority to maintain market value for the price per unit of energy. For renewable energy, the Act institutes incentives to encourage generation from renewable energy. This includes the promotion of co-generation of renewable energy.³¹ This means that there is no restriction to generate from only one source at a time or produce different types of energy from one generation activity.

5.2 Rural Electrification

The prioritisation of renewable energy development and investment is not only for urban areas. It is also promoted and required in the Act for rural areas. This is an interesting prospect as it assures and opens up the market for renewable energy in rural areas. It also creates the opportunity for States and Local governments to fulfil their inclusion in energy generation and distribution provided by the fifth Constitution Alteration.³² The Constitution Alteration now allows States to generate and distribute electricity in all areas within the states. The restriction of exempting national grid areas is removed. The best energy source for meeting this constitutional opportunity is through renewable energy. This is because renewable energy generation can stand alone and do not necessarily need to connect to the national grid. The Act recognises this opportunity and to promote investment in renewable energy in rural areas, establishes and requires the Rural Electrification Agency (REA)³³ to promote off-grid electricity generation and distribution, and to prioritise renewable energy.³⁴ As a follow-up to this recognition the Act specifically mandates the REA to promote the exploitation, utilization

²⁹ *ibid*, s 113 (1).

³⁰ *ibid*, s 113 (2).

³¹ *ibid*, s 112 (2) (g); see also Electricity Act 2023, s 233 for definition of ‘co-generation’ as ‘a process which simultaneously produces two or more forms of useful energy including electricity.’

³² CFRN 1999, 2nd Sch Para 14 (a).

³³ Electricity Act 2023, s 127.

³⁴ *ibid*, ss 127 and 128 (d) (e) and (f).

and development of renewable energy sources towards the provision of energy in the rural areas, especially in rural, unserved and underserved electrification projects.³⁵

The Act recognises that this approach would contribute towards the development of rural areas. It accordingly integrates development objective into the functions of the REA. The REA is thus required to embark on renewable energy development projects in such a way that it encourages the economic growth of rural, unserved and underserved communities.³⁶ This includes the facilitation and promotion of incentives, especially financial incentives in form of tax reliefs, investment capital allowance and low interest loans that would attract and retain renewable energy producers to rural and unserved or underserved areas.³⁷ The Act goes further to establish a Directorate on Rural Electrification and Renewable Energy Fund Division with specific mandates of ensuring the fund is properly and adequately deployed towards rural electrification including to develop infrastructure for renewable energy for electrification and renewable energy projects.³⁸

To promote these objectives within rural areas, the Agency is encouraged to liaise with State Rural Electricity Boards and Local Governments Rural Electrification Implementation Committees.³⁹ This is to ensure that there is a coordinated project implementation between these three tiers of government in the exploitation of the opportunities in generation and distribution of energy sourced from renewable energy sources.⁴⁰ To ensure sustainability and consistency in the rural electrification projects using renewable energy, the Act imposes a duty of periodic progress report indicating activities and milestones achieved in the implementation of the Rural Electrification Strategy and Implementation Plans and specifically disclosing renewable energy power generation.⁴¹

5.3 Renewable Energy Efficiency

One of the ways of assuring the profitability of a service or good is to ensure that they remain relevant, accessible and needed by customers. The Act creates this opportunity through the renewable energy efficiency

³⁵ *ibid*, s 129 (d) (f).

³⁶ *ibid*, s 129 (h).

³⁷ *ibid*, s 129 (g).

³⁸ *ibid*, ss 141 and 143.

³⁹ *ibid*, s 153.

⁴⁰ *ibid*, s 153 (1) (c).

⁴¹ *ibid*, s 154 (c).

provisions in Part XVIII of the Act. For example, the Part mandates the Commission to promote the development and utilization of renewable energy. To achieve this, it outlines 21 measures which the Commission may take. These range from simplified licensing and fees regime; commercial and technical regulations for connectivity of renewable energy distribution to the grid; standards for Power Purchase Agreements to guidelines on net-metering for roof-top solar PV systems and wind sourced energy.⁴² The expanse of the measures are quite reassuring and ensures that at any one time, the Commission will not be lacking in initiatives to promote renewable energy generation and off-take. In the same principle, to ensure that all activities related to or that promotes renewable energy investment are covered by the Act, the next section in the Act lists commercial activities to include: (a) generation (b) distribution; (c) sales and (d) installation. This means that any commercial activity in any of these subsectors will benefit from the incentives provided for the renewable energy sector. Thus, businesses involved in the sale of renewable energy or appliances connected with renewable energy; businesses engaged in the installation of renewable energy appliances and machines like solar panels, wind turbines, biomass gas tanks; businesses which distribute these renewable energy sources either through pipelines or via transportation, among others, all have the opportunity to access any incentive available.

The Commission is empowered to through regulatory instrument expand the list of eligible commercial activities.⁴³ This is in consideration of the potential impact of new technology on renewable energy investment, and particularly the fact that new developments may expand the scope of subsectors or businesses involved in the generation, sale, distribution and installation of renewable energy in Nigeria.

Other renewable energy efficiency initiatives include the requirement for the Commission to introduce such tax incentives as are necessary to promote and facilitate the generation and consumption of energy from renewable energy sources.⁴⁴ This is in line with the Industrial Development (Income Tax Relief) Act and any relevant policy framework that may promote tax relief incentives. The Act also imposes some deterrence against persons, especially bulk electricity purchasers. The intent is to ensure that such bulk purchasers are discouraged from purchasing from non-renewable energy sources.⁴⁵ This is a form of

⁴² *ibid*, s 164.

⁴³ *ibid*, s 166 (1) and (2).

⁴⁴ *ibid*, s 167 (2).

⁴⁵ *ibid*, s 168 (1) and (2).

reassurance to renewable energy generators. Other incentives for purchasers and generators is the requirement for electricity generators to only generate and distribute electricity at feed - in - tariff rates approved by the Commission. This reduces malpractices, monopolies and makes the industry both competitive and attractive to purchasers of energy sourced from renewable energy and renewable energy generators. In fact, the entirety of Part xvii of the Act all aim to promote and sustain renewable energy generation and off take.

There are many other sections of the Act that are not mentioned in the foregoing paragraphs; directly or indirectly demonstrate the prioritisation of renewable energy and also promotes its generation, distribution and off-take. The cumulative efficiency of these provisions is however, yet to be properly tested. Many of these tests will only occur when States have enacted their own electricity laws and when renewable energy generation and distribution takes effect in Nigeria.

6. Challenges and Limitations

As demonstrated by the literature review, legal and institutional framework for promotion of renewable energy should promote certain practices and opportunities. A further examination of the legal and institutional framework for the promotion of investment in renewable energy in Nigeria, discloses the following:

6.1 Effect on access to electricity

To improve access to electricity, there needs to be generation of electricity in the first place. The CFRN and EA appear to have laid foundations for meeting this requirement. These opportunities are available in sections that impose the obligation for purchase of renewable energy. More effective, if fully implemented are the provisions on rural electrification. Most rural communities in Nigeria do not have access to electricity. By increasing access through renewable energy, particularly off-grid energy, the prospects of increasing access are higher. The provisions can be leveraged by renewable energy generators and producers to expand their market. This is further encouraged by the off-grid access that renewable energy can provide for the rural areas and particularly communities that are far away from the national grid. This means that investors who are interested in investing in renewable energy from solar to wind powered energy sources can leverage both the legal and institutional framework to achieve expansion of access.

6.2 Effect on promotion of economic Development in Renewable Energy Sector

Some of the tools for economic development include assurance of markets both domestic and international, provisions of financial incentives, sustainability infrastructures like improved road network and related public infrastructures. As demonstrated in the literature review, several scholarly works have confirmed that access to finance and assurance of market are critical factors to investment. The EA appears to have recognised the value these variables have to the development of the renewable energy sectors. This appears to have been factored into the Act.⁴⁶ The challenge however, remains in the extent to which these are implemented and the buy in of States in domesticating these initiatives through State Electricity Laws and establishment of implementing Agencies.

6.3 Effect on Renewable Energy Off-Grid Businesses and Standalone Appliances

There are no provisions to encourage use of renewable energy other than in electricity for industrial and home usage. One may however, argue that the Act is generally about electricity usage for industrial and home usage. While this is true, there are some forms of renewable energy that can only or best be sustained by access to electricity, including from renewable energy sources. For instance, electricity or solar powered vehicles and appliances could be encouraged in Nigeria by giving investors incentives to establish businesses to provide electricity e.g. charging stations for such vehicles. Such incentives will trigger increase in number of vehicles using solar or are battery powered. While the Act alludes to these opportunities, it is not clearly stated.⁴⁷

6.4 Exclusion of women and the vulnerable minorities

The Act does not specifically mention women or vulnerable people. Women and vulnerable people need access to electricity probably the most. This includes establishments that provides services to this minority group. Such establishments include hospitals, markets, farmlands, small scale industries and artisanal factories. It may be argued that off-grid solutions can be leveraged by every group, however, a few incentives or institutional structures to improve access for this group of minorities will go a long way in enlarging access to electricity and combating the challenges occasioned by lack of access.

⁴⁶ Electricity Act 2023, s 164.

⁴⁷ *ibid.*

7. Conclusion

The opportunities and incentives to investment in renewable energy in Nigeria are quite much. A full utilisation or exploitation of the opportunities created by the Fifth Constitution Alteration and the Electricity Act 2023 are yet to be fully exploited or in fact examined. This does not mean that the opportunities or incentives are not there. They are present however; most States are yet to leverage this Constitution alteration through enactment of State Electricity Laws. The incentives are quite much running from financial incentives to enabling legal environment. Renewable energy investors can take advantage of these opportunities to widen access to electricity in Nigeria.

It is also true that limitations exist. Some of these limitations are issues of lack of implementation since the enactment of the Acts, poor advocacy and seeming lack of clarity or exactitude in the provisions of the laws in relation to bringing renewable energy closer to women and vulnerable members of society and expanding opportunity for businesses that manufacture renewable energy dependent or powered appliances in Nigeria. In other words, these are more of institutional framework challenges than legal framework challenges. They are easy to resolve. This paper therefore is a reassurance of the opportunities abundant in the new legal and institutional framework on renewable energy investment in Nigeria. We will however, continue to explore this framework so as to ensure that it moves along with the times. Energy, particularly renewable energy is a dynamic subject and many at times affected by both local and international realities, environmental and climatic consideration, and developments in technology. Given these realities, the assessment and reassessment of the laws must continue.

8. Recommendations

Having identified some of these limitations and challenges of the renewable energy legal and institutional framework towards improving investment, the following are recommended:

First, it is pivotal to commence Implementation of the requirement for purchase of electricity from renewable energy sources. These provisions should not be allowed to lie fallow in the laws. The NERC and equivalent State agencies should commence implementation. A particular percentage of renewable energy should be required of investors and purchasers of electricity especially in areas where off-grid electricity is viable. This will encourage higher investment in renewable energy.

Second, there is need to mandate Public Establishments and Institutions in off-grid areas to utilise renewable energy sources. In almost all sectors, government has the highest purchasing power and need. This need and purchasing power can be channelled positively to promote investment in renewable energy by requiring all government establishments in off-grid areas to source energy from renewable sources. Grid electricity can then be dedicated to high industrial areas and manufacturing activities.

Third, it is also pivotal to encourage investment (especially, the manufacturing of these appliance in Nigeria) in appliances and devices that run on renewable energy. There are currently a number of companies in Nigeria interested in such products like solar panels, electric cars, solar powered cars, battery powered motorcycles, solar powered grinding machines and similar products. Most of these machines and products are currently imported. Most are not manufactured in Nigeria while a few are just assembled. To improve investment in renewable energy, incentives should also be extended to these set of manufacturers and investors. Their presence will help make renewable energy attractive, increase the off-take of energy generated from renewable sources and encourage investment in renewable energy. The Act already laid the legal framework, what is required is the institutional framework to implement these opportunities, especially across States and Local Government Areas.

Climate War and the Forestry Act of Nigeria: A Critique

Enyinnaya Nkama Oboh*

Abstract

Nigeria is part of the global climate war-having ratified the UN Framework Convention on Climate Change in 1994, Paris Agreement in 2017 and enacted the Climate Change Act in 2021. The Act stressed on the need for nature-based solutions for climate change mitigation through forestry as a veritable strategy to achieve the legal and regulatory framework of Nigeria's long-term net-zero carbon emission target, climate financing, among others; and prioritising climate change actions. This article is a critique of the relevant provisions of the Forestry Act 1990, which operates side by side with Climate Change Act, 2021. The article reveals the flaws with respect to conservation, preservation, protection of wildlife as complementary to nature-based solution to global climate change mitigation. The article shows that the Forestry Act, enacted in 1938 is obsolete and cannot sustain conservation. The article argues that the current operational status of the Act is unclear, having been removed from the editions of the Laws of the Federation of Nigeria, 2004 and 2010 without more. The provisions of the Act as observed is clearly intended to enhance commercial timber production for export as government revenue base and not also to conserve the forest estate and wildlife of Nigeria as a medium to averting the adverse impact of climate change while still providing for the socio-economic needs of the citizenry. This article takes the positions that this is in contrast to the intendment of the Climate Change Act, 2021 among others. The article recommends that it is imperative for the Forestry Act of Nigeria to be repealed, in order to allow the forest fight environmental carnage, preserve and protect wildlife, while involving communities, individuals and public participation in forest management.

Keywords: Climate War, Forestry, Carbon Sequestration, Anthropogenic Activities, Carbon stock.

1. Introduction

The plan that climate war¹ to achieve a net zero-emission of green-house gases (GHGs) including carbon-dioxide from 2030 onwards, cannot be feasible without channelling much energy towards revamping the forest

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¹The phrase 'Climate War,' is an informal way of expressing the battle to mitigate the negative impacts of climate change or figuratively referring to mitigating the negative effects of climate change as a war, fight or battle.

estate of the world, including Nigeria.² Achieving a net-zero emission goals of GHGs into the atmosphere is by reducing the same quantity of GHGs emitted into the atmosphere.³ This is a major strategy of mitigating the adverse effect of climate change. The Climate Change Act of Nigeria, 2021, is the domestication of some major international legal instruments on climate change which Nigeria had participated and ratified. Some of such instruments are the United Nations Framework Convention on Climate Change, 1992, the United Nations Convention on Biodiversity (UNCBD) 1992, the Paris Agreement, 2015, among others. The Act lays emphasis on the need to develop a nature-based solution as a war head to the climate war,⁴ through Reducing Emissions from Deforestation and Forest Degradation and the role of conservation, sustainable management of forests and the enhancement of forest carbon stock (REDD+).⁵ To effectively implement the REDD+ initiative under the Act an imposed obligation to encourage low carbon economy and sustainable livelihood, an obligation was imposed on public and private entities in communities dependent on forests with incentives.⁶

This article is divided into seven segments. Segment one is the introduction which gives the background to the study. The second segment discusses climate change, causes and impacts. Forestry as nature-based climate change war agent and the imperative of an effective and bipartisan national legislation is discussed in part three. The relevant sections of the Forestry Act under review are x-rayed in segment four. While part five considers community engagement and stakeholder participation, part six, in lieu of conclusion, reveals the synergy with the climate change policies and Forestry Act and draws inferences from the discourse. The last part provides for a way forward.

²United Nations, 'COP26: Together for our Planet' <<https://www.un.org/en/climatechange/cop26> > accessed on 29 Aug 2024.

³JS Olayande, 'Energy Transition for Achieving net-zero Emission by 2026,' a paper presented at the National Energy Summit 2022, held at Fraser Suits, plot 24 Leventis Close, Central Business district, Abuja, 5th -6th July 2022.

⁴Climate Change Act of Nigeria, 2021, s 27.

⁵ibid, s 28 (1) (2) (3).

⁶Christopher Hia and Tarfa David Achinge, 'A Review of the Nature Based Solutions Mechanism to Climate Change in Nigeria, under the Climate Change Act 2021,' (2023) (3) (1), *International journal of Criminal Common and Statutory Law* 47-53.

2. Causes and Impacts of Climate Change

The documented and noticeable variations on the climate arising from natural forcing⁷ and anthropogenic activities that alter the atmosphere or the use of land over a long period of time is referred to as Climate Change.⁸ Climate Change today, is seen as a major fall out of mans' direct and indirect activities, complemented by natural distortions of the atmospheric composition over decades.⁹ The significantly noticeable change in the atmosphere, when measured over a long time, manifests in increasing global temperature, precipitation or wind patterns.¹⁰ The phenomenal nightmare of climate change has manifested in public life and on issues of global poverty, human rights, air, and water pollution.¹¹ Therefore, the anthropogenic activities that distort the make-up of the global atmosphere over a long period of time is known as climate change.¹²

The terms climate change and global warming may be used interchangeably to mean a statistical change in the blend of the climate which is noticeable over a long period, despite the causes.¹³ Global warming is more of the effect of climate change. Global warming is simply an increase in the average temperature of the earth as a result of human activities, such as the burning of fossil fuels while climate change refers to a shift in the Earth's weather pattern over a long period of time which affects temperature, humidity, wind, cloud cover and precipitation.¹⁴ Suffice it to say that climate change encapsulates global warming.

⁷Natural forcings refer to change in climate resulting from a balance in global energy through the make-up of the atmosphere, the circulation of the ocean and the unsteady nature of the earth's orbit.

⁸ International Panel on Climate Change, *Climate Change 2001: The Scientific Basis Contribution of WG1 to the IPCC Third Assessment* (Cambridge University Press 2001) 788.

⁹The United Nations Framework Convention on Climate Change <http://www.unfccc.int/files/essential_background_publications_htm/pdf/application/pdf/coveng.pdf,> accessed 3 Dec, 2018.

¹⁰United States Environmental Protection, 'Climate Change: Basic Information' <[https:// www.epa.gov](https://www.epa.gov)> accessed 2 Sept 2024.

¹¹ibid

¹²Climate Change Act (n 4) s 35, art 1 UNFCCC.

¹³ S Solomon and others, *Understanding and Attributing Climate Change*, Contribution of Working Group 1 to the forth Assessment Report of the Intergovernmental Panel on Climate Change. (Intergovernmental Panel on Climate Change (IPCC), 2007).

¹⁴IPCC, 'Climate Change 2023: Synthesis Report' <<https://www.ipcc.ch/report/sixt-assessment-report-cycle>> accessed on 6 Sept 2024.

The causes of climate change are traceable to the long-time emission and concentration of greenhouse gases (GHGs) into the atmosphere by man and nature. This concern led to the convergence of the United Nations Convention on Climate Change (UNFCCC) 1992, which Nigeria Ratified in 1994. Article 2 of the UNFCCC stresses the import of reducing greenhouse gas emissions to a minimal level by parties to the Convention. An amendment Treaty to the UNFCCC known as the Kyoto Protocol came into force on 16 February 2005. Special emphasis at the protocol was on the reduction of Carbon dioxide (Co₂), Methane (CH₄), Nitrous Oxide (N₂O), Hydrofluorocarbon (HFCC), Perfluorocarbons (PFCs), and Sulphur Hexafluoride (SFC), which negatively affect the Ozone layer.¹⁵ These GHGs are listed in Annexure 'A' of the Kyoto Protocol. The Paris Agreement is also a significant offshoot of the UNFCCC.¹⁶ The Paris agreement remains the first comprehensive climate deal ever brokered in the world. It brought into focus, energy and climate policy to reduce global emission of greenhouse gases. Nigeria ratified the Paris Agreement in March 2017¹⁷ and has since then shown enormous interest in global climate war.

Generally, the impact of climate change is noticeable through increasing atmospheric temperature that manifest in droughts, heavy rains, floods and erosion. Others are severe heat waves, changes in pattern of rainfall, melting of ice caps and rising sea levels including warming and acidic oceans.¹⁸ It also affects global food supply and imposes difficult economic inequalities and security breaches. For instance, the desertification of an area due to scanty, prolonged rainfall may cause the inhabitants of the affected area to massively migrate to a better place. This unplanned migration would place a burden on the unwilling recipient community and may result in armed conflicts. These impacts are noticeable in Nigeria, where declining rainfalls negatively affect agricultural productivity and drought in the desert susceptible area of the Northern region of Nigeria. The Central region of Nigeria known for its food boost is now empty; while those sojourning in the coastal

¹⁵Report of the Conference of the Parties on Its Third Session, held at Kyoto from 1-11 Dec 1997, <<http://www.unfccc.int/resource/docs/caps/07a01.pdf#page=28>> accessed 29 Sept 2019.

¹⁶ The Paris Agreement was adopted on the 22 April, 2016 and came into force on 4 Nov, 2016.

¹⁷ Yerima P Tarfa, 'Climate Change in Nigeria' Department of Climate Change, Federal Ministry of Environment, Abuja <<http://www.climatechange.gov.ng/>> accessed 20 Dec 2023.

¹⁸US EPA, 'Causes of Climate Change' <<https://www.epa.org/climatechange-science/causes-climate-change>> accessed on 6 Aug 2024.

areas of Nigeria and dependent on sea food have lost their means of livelihood due to devastating floods¹⁹ and pollution.

However, the impacts of climate change may not be the end of life as there are mitigation strategies available. The Intergovernmental Panel on Climate Change²⁰ posits that the impacts of climate change and indeed, global warming could be mitigated by discouraging the burning of fossil fuels and deforestation while encouraging reforestation and afforestation. Other strategies include reducing the emission of GHGs into the atmosphere and stored carbon in the soil through modifying agricultural and land use practices and improved technology to clean up the GHGs in the atmosphere to achieve a cooling effect.

3. Forests as Nature-Based Climate Change War Agent and the Imperative of an Effective and Bipartisan National Forestry Legislation

3.1 Forests as Nature-based Climate Change War Agent

Forests are essential components of the global Carbon cycle, and play important role in regulating atmospheric concentrations of CO² through the process of photosynthesis.²¹ Trees in forests provide the bulk of the energy used in Africa and are, therefore, at the centre of socio-economic development and environmental protection of the continent. Forests and trees outside forests are in many ways impacted by climate change, and they in turn influence the climate. That is why forests, roll into one, is placed in a strategic position in addressing climate change, as captured in African countries' Nationally Determined Contributions (NDCs).²²

The United Nations Framework Convention on Climate Change (UNFCCC)²³ recognizes the importance of the forests and requires state

¹⁹OA Olaniyi, ZO Ojekunle and BT Amijo, 'Reviews of Climate Change and its effect on Nigeria Ecosystem,' *International Journal of African and Asian Studies* (2013) (1) 57-69.

²⁰IPCC, *Climate Change 2021: The Physical Science Basis*. Working Group 1 to the fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press 2021).

²¹WA Kurz and Others, 'Carbon in Canada's boreal Forest: A synthesis. *Environmental Reviews* (2013) (21). 260-292. <<https://doi.org/10.1139/er-2013-0041>> accessed 12 May 2024

²²African Forest Forum 2022, 'Forest and Climate Change Mitigation: A Compendium for Professional Training in African Forestry. <<https://afforum.org/publication.org/forest-and-climate-change-mitigation-a-compendium-for-professional-training-in-african-forestry>> accessed 9 June 2024.

²³UNFCCC, 'Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable

parties, especially in developing countries, to improve upon their REDD+²⁴ and Monitoring, Reporting, Verification (MRV). This involves forest monitoring, reporting and verifying REDD+ impacts, including establishing National Forest Monitoring Systems (NFMS) to perform MR.²⁵ In the light of the foregoing, Mohren and others explained that monitoring NFMS bothers on assessment of timber stock while MRV involves assessment of forest carbon stocks and their subsequent changes on forest variability.²⁶ The importance of this is well captured in the Climate Change Act, 2021²⁷ as a platform for the REDD+ activities in Nigeria in compliance with the UNFCCC requirement, including ‘updates on Forest Reference Emission Level (FREL)’. The provision under the Act makes implementation feasible by encouraging public and private participation in the programme with incentives.

The UNFCCC REDD+ initiative requires participating countries to involve indigenous local communities and other state agencies using both remote sensing and ground-based methods to achieve a need for other non-forestry agencies to get involved in forest monitoring, and to provide transparent forest carbon estimates and accounts. According to Kishor and Rosenbaum,²⁸ forest monitoring should involve participation, transparency and accountability as key principles of good governance in national forest monitoring and Carbon accounting for REDD+ initiative.

The climate affects the forests and the forests in turn affect the climate through carbon sequestration which increases in growing forests. Carbon Sequestration positively influences the reduction in the level of greenhouse gases in the atmosphere. It also reduces global warming. In

management of forests and Enhancement of forest carbon stocks in developing countries, Decision COP 15/4 2009.

²⁴ REDD means Reducing Emissions from Deforestation and Forest Degradation.

²⁵ UNFCCC, 2010 Outcome of the work of the Ad Hoc Working Group on long-term cooperative action under the Convention - policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest Carbon stocks in Developing countries. UNFCCC COP 16 Cancun 2010.

²⁶ GMJ Mohren and Others, ‘Forest Inventories for Carbon Change Assessments’ *Current Opinion in Environmental Sustainability* (2012) (4) 686-695.

²⁷ Climate Change Act, 2021, s 28.

²⁸ N Kishor and K Rosenbaum, *Assessing and Monitoring Forest Governance: A User’s Guide to a Diagnostic Tool Programme on Forests* (PROFOR), (Washington DC, 2012); see also L Secco, R Da Re, D M Pettenella and P Gatto, ‘Why and How to Measure Forest Governance at Local Level: A Set of Indicators,’ *Forest Policy and Economics* <<http://dx.doi.org/10.1016/j.forpol>> accessed on 15 May 2024.

other words, the forests, by regulating the carbon cycle, play vital roles in climatic change and variability. For example, in the Intergovernmental Panel on Climate Change (IPCC) special Report of 2018, on the impacts of global warming of 1.5 °C above pre-industrial levels, emphasizes the significance of afforestation and reforestation, land restoration and soil carbon sequestration in carbon dioxide removal.²⁹

It is trite to state that the forest estate provides unequalled defence mechanism against global climate change by absorbing and largely reducing atmospheric carbon dioxide. According to Harris and Gibbs,³⁰ rainforests absorb as much as twice the amount of anthropogenic carbon dioxide released into the atmosphere annually, thereby serving as a cooling band of the equator. Suffice it to say, therefore, that deforestation or the wanton destruction of forests means the release of more carbon dioxide into the atmosphere and greater contribution to climate change.

Furthermore, it is estimated that trees stomach about 20 percent of carbon by weight and the forest biomass acts as a carbon sink to the extent that the world's forests and forest soil can store more than one trillion tons of carbon found in the atmosphere. That is twice the amount found floating free in the atmosphere. It is stored in the tree as part of wood and vegetation,³¹ through a process known as carbon sequestration.³²

3.2 The Imperative of an Effective and Bipartisan National Forestry Legislation

Following from the discourse on the forests as nature-based climate change war agent, it is convincing; and indeed imperative to have an effective bipartisan national forestry legislation to serve as a veritable framework for mitigating climate change through public organizations

²⁹JBR Matthews, *An IPCC Special Report: Global Warming of 1.5°C – Annex 1: Glossary* (Intergovernmental Panel on Climate Change, 2018) <<https://www.ccardesa.org/knowledge-product/ipcc-special-report-global-warming-15-c-annex-i-glossary>> accessed on 8 Aug 2024.

³⁰Nancy Harris and David Gibbs, 'Forests Absorb Twice as Much Carbon as they Emit each year' <<http://www.wri.org/insights/forests-absorb-twice-as-much-carbon-as-they-emit-each-year>> accessed 1Feb, 2023.

³¹Mizanur Rahman, 'What is Climate Change' <http://www.climatechangechallenge.org/resourcecenter/climatechange/1_what_is_climate_change_htm> accessed 20 Aug 2018.

³²The US Code - 22 USC 7901- defines the carbon sequestration as the capture of carbon dioxide through terrestrial, geological, biological, or other means, which prevents the release of carbon dioxide into the atmosphere.

like the governments, companies, individuals and groups.³³ With global concern on climate change mitigation through nature-based resources like the forests, the use of bipartisan legislation is an effective technique and platform to naturally mitigate climate change. It also offers the opportunities for increase in climate litigation and a developed international law interfacing climate action to legal challenges as it relates to constitutional law, administrative law, private law, human rights, or consumer protection law.³⁴

It is exhilarating to note that fighting the climate war through sustainable forest development and the protection of wild flora and fauna, naturally would raise questions, not only of its implementation; but of laws and other legal techniques that would give effect to it in a global field. The reason is that short-term political and economic goals weaken extant laws that strive to protect and conserve biodiversity. It weakens the regulatory effect of the anthropogenic activities on the environment across the globe. The weakening is achieved by using cunning ways to alter the terms and subtly introducing and encouraging environmentally harmful projects that deny certain classes of person's access to courts and/or refusing to ratify protocols already agreed upon on political grounds. They also refuse appointed authorities from enforcing biodiversity laws.³⁵

It is crucial to deduce from the foregoing discourse that the escalating threat posed to the global environment by the harmful anthropogenic activities require a binding and enforceable legislation and other legal means that may forcefully control those activities and their perpetrators. A binding and enforceable legislation would be an instrument to crown all efforts to keep humanity's impact on the planet from transgressing critical thresholds.³⁶ Forestry laws protect the natural environment by controlling the indiscriminate exploitation of the forest estate and other wildlife species.

To this end, there is a dire need to safeguard the forest estate of Nigeria through a formidable legislation which offer opportunities for citizen's collaboration and a framework for regulatory and enforcement agencies such as National Environmental Standards Regulatory and

³³Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation* (Cambridge University Press 2015) 1- 9.

³⁴M King and W Mallesons-Daisy and S Nagro, 'Climate Change litigation: What it is and what to expect <<http://www.lexology.com>> accessed 19 Jan 2021.

³⁵A Trouwborst, 'Laws Crucial to Preserve Biodiversity Threatened' <<http://www.phys.org/retvs/2017-02>> accessed 12 Aug 2018.

³⁶*ibid.*

Enforcement Agency (NESREA) to operate on. The critique of the Forestry Act, 1990,³⁷ is inevitable to enable Nigeria law and policy makers, amend or rather repeal the Act and enact a new one that will give rise to other legislation respecting specific uses of the forest resources, while giving support to the Climate Change Act, 2021 to achieve a sustainable environment. Nigeria's National Forest Programme 2004 and the National Forestry Policy 2010, which are not codified, has the content to cure the defects of the Forestry Act under review.

4. The Forestry Act, 1990

The Forestry Act, 1990, is the most comprehensive legislation in Nigeria bothering on forest preservation and control. It provides in specified terms what constitutes a forest and the appointment of Forestry Officers in Part I. Part II of the Act and particularly section 4 empowers the President to constitute government forest reserves and government protected forests. The Act further provides in sections 5 to 46, preliminary and special procedures for constituting government protected forest reserves and local authority forest reserves including power of the Minister³⁸ to make regulations. Section 47 to 58 provides for offences against the forests and legal procedure thereto. Unfortunately, it does not meet the current forestry requirements paramount to support adverse climate change mitigation.

A plausible national legislation on forestry intended to serve as adverse climate change mitigation strategies shall have provisions that unequivocally promote forest conservation and carbon sequestration, forest management sustainability and community engagement.³⁹ Others include un-conflicting enforcement and compliance mechanisms and a proper integration with climate change policies and Act.⁴⁰ One major issue to note is that, forests remain the core nature-based solution to curbing adverse climate change impacts. Its micro-climatological effect brings local temperature to its lowest ebb.⁴¹

³⁷CAP 507 LFN, 1990.

³⁸The Minister so referred to is the Minister responsible for forestry at the time.

³⁹CIFOR, 'Justice in the Forest: Rural Livelihoods and Forest Law Enforcement' (2003) (5) (3), *Centre for International Forestry Research (CIFOR)*.

⁴⁰D Kaimowitz, 'Forest Law Enforcement and rural Livelihoods' *International Forestry Reviews* 199-210.

⁴¹Adesina Adejuwon, 'Climate Change and Potential Impact on Business Energy Production in Nigeria: A Preliminary Assessment' in *Global Climate Change, Impacts on Energy Development* (Damatech Nig Ltd, 2000).

4.1 Intendment of the Forestry Act and Forest Management Sustainability.

The Act styled ‘an Act for the Preservation and Control of Forests’⁴² enacted in 1937 came into force on the 1st day of February, 1938. The Act is made for the protection and exploitation of the forest trees for commercial timber exports exclusively for the colonial government’s use and revenue base, with the exclusion of local forest owners. The provision of the Act, therefore, is largely regulatory in nature and based on a short term gain derivable from timber production and sales as a major forest resource output. The target of the forestry is afforestation for a stipulated time of harvest. This is in contrast with the current global trend in forestry usages which has gone beyond protecting forest trees for commercial timber purposes to accommodating the potentials of forest sustainability and sequestration.

Forest legislation have gone beyond protecting designated tress in government forest reserves to entrenching viable public forest management policies aimed at achieving a multiple use and sustained yield in both government and privately owned forest estates.⁴³ For instance, the new Forest Code of Brazil requires all land owners to preserve 50 percent of their land as tropical forest for biodiversity conservation and provision of basic forestry needs.⁴⁴ The Australian 1992 National Forestry Policy Statement signed by the Federal, State and Territorial governments is backed up by over 24 effective legislation on specific areas of forestry to ensure that the forest policies and conservation drive of the country are achieved under the ambits of the law. There is a cooperative effort at forest conservation between the three tiers of government that make up Australia.⁴⁵ The same is the case with the United States of America that has legislation on specific uses of their forest. The legislative provisions ensure that the US National Forests are utilized in a renewable manner and in ways that all yields arising from the diverse uses are sustained.⁴⁶ In these countries, forest offences are not just listed against trees for commerce but for the safeguard of the environment and livelihood. Therefore, an all-inclusive National Forestry Policy and other policies on the environmental should

⁴² Forestry Act (n37), Short Title.

⁴³ CIFOR (n 39).

⁴⁴ Law NR 12.651, s 12(5).

⁴⁵ Department of Agriculture, Fisheries and Forestry, ‘Australia’s Forest Policies’, <<https://www.agriculture.gov.au/agriculture-land/forestry/policies>> accessed on 6 June 2024.

⁴⁶ Multiple Use-Sustained Yield Act (MUYA) 1960, s 2.

be articulated to guide the formulation of a new Forestry Act for the country to accommodate the global trend in forest conservation.

It is a great relief, however, to see federating states of Nigeria enact functional and dynamic forest laws that are in time and embraces the facets of conservation. For instance, The Ekiti State of Nigeria Forestry Law, 2016, provides for a Forestry Trust Fund and Timber Development Levy Fund;⁴⁷ encourages private sector participation in forest reserve and management through the establishment of a private land forest plantation on a community or private land. It also includes free forest and Government Development areas.⁴⁸ The Ekiti State of Nigeria Forestry law also provides avenues for giving assistance to private forest owners⁴⁹ and the preservation, conservation and protection of wild animals, birds and fishes.⁵⁰ The said law further laid a good foundation for the prevention of offences by a Forestry Officer or Police Officer including the Commissioner or Permanent Secretary of the Ministry of Environment.

Most interestingly, the Ekiti State of Nigeria Forestry Law provides that any forestry concession agreement under the Ekiti State Forestry Law shall be subject to Environmental Impact Assessment (EIA). It should also be noted that the Cross River State Forestry Commission Law 2010 enacted ‘...for the purpose of providing sustainable management of the forest and wildlife reserves, preservation and protection of the ecosystem in Cross River State ...’ has similar features. However, the Cross River State Forestry Commission Law 2010 further provided for the ‘Green Sheriff’ formerly ‘Green Police’ as guards to the environment.⁵¹

It is important that national forest legislation succinctly provide for sustainable forest management for the present and future uses. While providing timber for construction purposes, firewood and agricultural needs for the enjoyment of the host communities, it should ensure that non-wood products are available for local and industrial uses. Moreover, the provisions of the law should accommodate wildlife protection and preservation in line with other related laws. Matters relating to natural disasters and other recreational purposes for tourism and urban

⁴⁷Ekiti State Forestry Law 2016, s 39.

⁴⁸ibid, ss 4, 42 and 43.

⁴⁹ibid, s 45.

⁵⁰ibid, s 80–92.

⁵¹Anietie Akpan, ‘Cross River Renames Green Police, set to Prosecute Environmental Offenders,’ *The Guardian*, 29 May 2017 <<http://www.guardian.ng/property>>.

development must be considered. It should also make provisions for easy reviews, amendments and repeals with current trend of events.

4.2 Offences under the Act

Under the Act, section 45 (a-y) gives power to the Minister to make regulations with the approval of the President regarding the exploitation of forest resources. Such regulations revolve around prohibiting the taking of forest produce or of any specified kind of forest produce on land protected by government or local authority or on communal lands. Section 46 permits the local authority to make rules for the same purpose stated in section 45 of the Act for the overall management and preservation of forests and forest produce while excluding those forest produce in government reserves within its jurisdiction. However, these rules must be given consent to by the Minister.

What constitutes forest offences are marshalled out under section 47 of the Act to forbid persons without a written authority of the authorized prescribed officer not to:

- a) Takes a produce;
- b) Uproots or damages any part of a tree;
- c) Sets ablaze grasses around the reserve without adequate caution to contain the spread of fire into the reserves,
- d) Smokes or lights a fire in any part of a forest reserve within which, or at a time when smoking or lighting of fires is prohibited by an order of the Minister or local authority;
- e) Takes cattle or other herbivorous animals into the forest reserve to graze;
- f) Uses any part of the forest reserve for farming and other like purposes;
- g) Trespasses in any part of the reserve by way of building or other construction including fishing in rivers or streams therein
- h) Causes the destruction of any forestry property;

Any unauthorized persons who defaults in complying with foregoing provisions shall be deemed guilty of an offence; which if summarily convicted shall be punished by way of payment of a fine of two hundred naira (₦200.00) or imprisonment for twelve months or both. It is evident that all these offences listed what ordinarily would have been detrimental or harmful to trees and their concentration as forests.

Also, it is an offence in section 51 to forge, fraudulently use or aid and abate a person in forging or illegally using a hammer or hammer mark registered to the forestry department as forestry ownership mark

used in identifying a forest produce. This includes those used by the Forest Department of the Ministry and Local Authority in the administration of the provisions of the Act. The penalty is a fine of two hundred naira (₦200.00) only or imprisonment for two years or both on summary conviction.

It is trite to state that the foregoing mentioned offences and the punishment thereto cannot serve as deterrent to the commission of those offences. This is because the liability or punishment on conviction is too paltry. A convict may easily pay the fine without difficulty and walk away a free man looking forward to another good day to succeed in his illegal quest. The same goes with the terms of imprisonment even when combined with the fine. The provision of penalties under this law, meant to deter offenders from re-committing the offence, should be strict enough, like other criminal offences, to achieve the desired goal.

The forestry offences listed are directly on trees and no consideration was made of the effects on the environment as to duly quantify an adequate punishment for offenders. If consideration should be given in future forestry legislation, the cost of degradation arising from the destruction of the forest estate should be articulated in order to accommodate an adequate punishment. Such costs include; erosion, desertification, oxygen deprivation, loss of habitat and a host of other environmental degradations arising from destruction of trees in forests. It is noteworthy that the liability for forest and wildlife offences under the Ekiti State Forestry Law ranges from ₦30, 000.00 to ₦300, 000.00 and terms of imprisonment or both as the case may be,⁵² is a better term to be emulated.

Furthermore, section 56 of the Forestry Act⁵³ invokes an omnibus provision that allows for general penalties. It states to the effect that if any person contravenes a regulation or conditions of a license issued to him under the Act of which there are no penalties prescribed, the person is liable to a fine of one hundred naira (₦100.00); or to imprisonment of six months; or both. This provision is inconsistent with the provisions of section 36(12) of the Constitution of the Federal Republic of Nigeria (CFRN), 1999⁵⁴ as amended. The section provides that no person is to be convicted of any offence in Nigeria, if such an offence is not defined and the punishment specifically written down in a law. It is, therefore, germane that section 56 of the Forestry Act should be amended and specific penalties provided for any listed offenses. This is pivotal

⁵²Ekiti State Forestry Law, 2016, ss 73, 82, 93, 95, 97 and 98.

⁵³ Forestry Act, s 56.

⁵⁴ CFRN s 36 (12).

because specificity is one of the attributes of a good law. If there is any specified contravention of the regulations or conditions of a license issued to a person, there should also be a specified penalty and not a general penalty for contraventions for which penalties were not prescribed. The emphasis is on ‘defined offences and prescribed penalty in a written law.’⁵⁵

4.3 Compounding Offences

Section 55 (1) of the Forestry Act⁵⁶ empowers a Forestry Officer, not below the rank of Director, to compound offences. It is gratifying to observe that section 127 of the Criminal Code Act,⁵⁷ makes it unlawful to compound criminal offences especially where it is a felony. This leaves section 55 (1) of the Forestry Act contentious and amenable for review.⁵⁸ There is no way the enforcement of the provisions of the Act can be achieved to favour conservation efforts when punishment for the forest offenders is settled in terms of financial bargain. If forestry offences are compounded, it becomes a financial crime which negates the essence of the conservation law meant to deter illegal forest activities in designated forest reserves. The reason being that what cost that may be compounded may never, in the real sense of it, be commensurate to the cost of the environmental damage arising from illegal forestry activity complained of. It takes several years for a tree to grow to maturity and the illegal felling of such a tree has some cost implications in terms of erosion, desertification, carbon emission and such like negative effects. What, therefore, may be achievable by compounding forest offences is a heightened illegal forest activity involving the complicity of the forest officers in charge? This section should be amended or repealed. Forest offences should not in any way be considered as a financial crime. It should not be compounded rather the offenders should face the full criminal charge to serve as a deterrent to other prospective offenders.

4.4 Enforcement and Compliance

It is important for the enforcement provisions to capture the essence of forestry regulations. The enforcement mechanisms entrenched in the Act under review is bleak and unguaranteed. They are shallow, ambiguous,

⁵⁵ *ibid*, s 36(12).

⁵⁶ Forestry Act (n 37), s 55(1).

⁵⁷ Criminal Code Act, CAP C38 LFN 2010, s 127.

⁵⁸ Forestry Act (n 37) s 55(1).

conflicting and cannot sustain enforcement of forest conservation, preservation, protection of wildlife and future development.

Section 8 of the Forestry Act, confers on the Reserve Settlement Officer the powers of a District Court Judge which enable him determine all claims and give judgement accordingly. Under section 11 (1), (2), (3) of the Act, there is room for appeal against the judgement of the Reserve Settlement Officer. Appeal lie from the Reserve Settlement Officer to the District Court Judge within three months of the Reserve Settlement Officer's judgement. Further appeal lies from the District Court to the High Court within 30 days and the decision of the High Court is final.

The enforcement details of the Act are contained in sections 50, 52 and 54. Section 50 of the Act empowers a Forest Officer, Local Government Officer or Police Officer of the rank of Assistant Superintendent of Police and above or any authorized employee of government representing him to confiscate any produce of the forest which is suspected reasonably to have been illegally taken. Such officers are permitted by the law to dispose such a produce on the order of a Magistrate and pay the accruing proceeds into the Federal Government treasury or Local Authority treasury as the case may be. Remittance of the proceeds is done after deducting the expenses incurred before the sales or destroying or allocating the forest produce either to the use of government or local authority.

In terms of arrest, as provided in section 52 of the Act, it is expected that any Forest Officer should without any delay arrest without warrant, any person who is reasonably suspected to have contravened the Act. The arrested offender is to be handed over to a Magistrate or Police at the nearest Police Station without unnecessary delay. On the other hand, a local authority guard is empowered to act in like manner as the forest officer within his jurisdiction. The provision of the Act in section 54 is to the effect that the onus of proof lies on the suspect to convince the authorities that the produce found in his possession was not taken illegally.

The analysis of section 50 of the Forestry Act empowers a Forestry Officer, Local Government Officer or a Police Officer, not below the rank of Assistant Superintendent of Police, to merely seize a forest produce reasonably suspected of having been unlawfully obtained or being unlawfully removed. The officers are only duty bound to seize items on suspicion; and by section 52, it is only the Forestry Officer that has authority to arrest. The extent the Police is expected to act is not clear. The intention of the Act in this instance is to recover revenue for government which is not the duty of the Police. This poses a problem on

enforcement of the Forestry Act because the local government officer and the Police officer cannot maintain action in court over the seizures as it is only the Forestry officer, not below the rank of a Director or an authorized representative that can maintain action in court in the name of the Minister. These specific provisions in section 50 and 52 (1) seem to exclude the Police from prosecuting forestry offences. The Police are only expected to receive into custody the arrested offenders without more. The provisions of these sections tend to dwarf the wide powers of the police in law enforcement. Section 66 of the Police Act clearly states that a police officer who is a legal practitioner, may personally prosecute offences in any court even though the complaint or information is not in his name.

Also, a Police officer, who is not a legal practitioner, may also prosecute before the courts, such offences which non-qualified legal practitioners can prosecute. This, however, depends on the provisions of relevant criminal procedure laws in operation at the Federal or State levels. Meanwhile, section 66 of the Police Act only survives at the mercy of the Attorney General under sections 174 and 211 of the CFRN 1999 as amended and section 106 of the Administration of Criminal Justice Act, 2015, which empowers the Attorney General of the Federation and of a State to take over or discontinue any criminal case in any competent court of law in Nigeria. It follows, therefore, that the powers of the Police to prosecute any criminal matter before any court of law in Nigeria cannot be wished away, even in consideration of the fact that forestry offences are mostly tried in the lower courts. In other words, the powers of the Police to prosecute at all material times should be made manifest because the Police Act is a Federal Statute.

In the light of the foregoing, the provision under section 52 (1) of the Forestry Act to the effect that the forestry officer shall arrest an offender and hand over to the Police should be amplified to give a Police officer the express right to arrest and also prosecute any forest offender in their custody. This also will strengthen and clarify the provision of section 58 of the Forestry Act, which empowers the forest officer to institute and conduct legal proceedings in the name of the Minister. This provision tends to exclude the Police from prosecuting a forest offender. The law should be reviewed and amended to expressly accommodate the Police powers in clear terms to prosecute forest offenders as provided by the Constitution of the Federal Republic of Nigeria and the Police Act.

Also noteworthy is the powers conferred on the Attorney General to take over, continue or discontinue any prosecution in respect of any offence in sections 174 and 211 of the CFRN 1999 as amended and

section 106 of the Administration of Criminal Justice Act, 2015. It makes it clear that the Attorney General can prosecute forestry offences. It is submitted, therefore, that the provisions relating to proceedings of an offence against the provision of this Act be prosecuted through the office of the Attorney General of the Federation or by a Law officer so authorized by the Attorney General of the Federation of Nigeria for clarity of purpose.

It becomes incumbent also to consider the purpose of establishing National Environmental Standards Regulation and Enforcement Agency (NESREA). The NESREA Establishment Act, 2007⁵⁹(as amended) created the Agency to serve as environmental watchdog, setting standards and regulations and enforcing the provisions of extant Nigeria's environmental laws in collaboration with other agencies concerned with environmental matters. The function of the Agency includes enforcing compliance with the provisions of international environmental treaties to which Nigeria is party. NESREA enforces the provisions of the Environmental Impact Assessment Act (EIA) and other environmental related statutes except those associated with the Oil and Gas sector.⁶⁰ It becomes practically impossible for NESREA to perform its regulatory and enforcement functions on an extant law that does not support its mandate of preservation, conservation, protection and environmental development of Nigeria's biodiversity including natural resources sustainability and maintaining international treaties on forestry. NESREA may never regulate and enforce it.

In the United States of America, for example, the United States Environmental Protection Agency (EPA), like NESREA, is adorned with statutory powers to protect, preserve, conserve, set standards and regulations on the US environment and enforce all environmental laws. EPA, therefore, derives its powers from US Environmental Statutes and can only operate within the ambit of such statutory provisions.⁶¹ There is a well enacted legislation on all facets of the environment; including the forests in the United States of America. These statutes donated enforcement and regulatory powers to EPA in order to avoid conflicts of

⁵⁹ Cap N164, LFN 2010.

⁶⁰ *ibid*, s 7 (g) (h), (j), (K).

⁶¹W Kenton, 'Environmental Protection Agency EPA <http://www.investopedia.com/terms/environmental-protection_agency.asp> accessed on 5 May 2023.

purpose especially on setting standards, regulation and enforcement. It is suggested therefore that Nigeria emulates same.⁶²

5. Community Engagement and Stakeholder Participation

The current global trend in forest conservation is beyond protecting forest trees for commercial timber sales. Rather, forest conservation also protects the forests for ecological and social balance. It is now fashionable to include the native communities in the scheme of protection, maintenance and management of the forest estate for sustainability. It is crucial to understand that the management of forests should not be the sole responsibility of government. Provisions should be made in the Forestry Act to involve the local community and stakeholders in the management of forests within their communities.⁶³ This will effectively aid the achievement of conservation and enforcement laws, while giving support to local ownership of forest resources. It is evident that the provisions of the Forestry Act restrict the locals from having free access, free exploitation and enjoyment of the forest resources within their domain with a view to preserving such forests for government's economic purposes of trade in timber. In as much as the regulatory measures are important ingredients of the legislation, it does not comprehensively guarantee efforts at conserving forests in Nigeria for sustainability, climate change resilience and adaptability.

Governments' vested interest towards the money spinning oil sector is to the detriment of the rest sector of the Nigerian economy. As a result, the enforcement of the forestry Act is not strict due to the dearth of forest officers and flexible provisions. The usual forest officers in special uniforms, often seen of old, parading the length and breadth of government forest estate, with their hammer hung on their belt are no more seen anywhere. This has accounted to a heavy loss of Nigerian forest estate to illegal and unchecked logging and unplanned development not only by individuals but also by governments without recourse to the laws it has made. With economic emphasis of Nigeria leaning on oil, illegal and uncontrolled felling of trees, even in government forest reserves and protected forests goes unchecked. That is why most of the so-called forest reserves have private or government buildings erected thereon or are bare without trees and every one stands

⁶² Clean Air Act (CAA), s 30 (All United States Environmental Statute made specific provisions for EPA to regulate and enforce them).

⁶³Kaimowitz (n 40).

aloof. The makers of the laws, the enforcers of the laws and the masses are offenders of the laws.

6. In Lieu of Conclusion: Synergy with the Climate Change Policies and the Climate Change Act

National forestry legislation is expected to have provisions that integrate it with the Climate Change Act in order to be in tandem with national and international best practices. This offer opportunity to access expertise and resource to support forest conservation and climate change mitigation efforts. The synergy is totally lacking in the provisions of the Forestry Act under review. The Climate Change Act 2021 made wide provisions for nature-based solutions at fighting the climate war through forestry in order to accommodate an integration of national forestry legislation; but the forestry Act, is so incurably obsolete that it cannot fit in. This calls for a new national forestry legislation to complement the provisions of the Climate Change Act in line with global best practices.

It is expected that any national legislation on forestry should have plausible provisions to ensure the maintenance and regulation of the country's forest estate. Such provisions are to ensure the management and sustainability of the forest resources, its conservation and safeguard. This is achievable through entrenching enforcement and implementation mechanisms, which complement the climate change adaptation, resilience and mitigation strategies. These qualities are lacking in the Forestry Act of Nigeria. A new Forestry Act with provision that imposes stricter sanctions on forest offences, a nature-based solution to adverse climate change through the REDD+ initiative, monitoring, evaluation and a consistent updating based on emerging challenges of adverse climate change and international best practices at fighting the climate war is a decision to be urgently taken, including community and stakeholder participation in forest management.

7. Recommendations

It is imperative from the foregoing, that Nigeria should make a considered review of her national forestry legislation in line with sustainable strides in order to be properly poised to fight the climate change war in collaboration with parties to the UNFCCC. In view of this, this article proffers some useful recommendations, which are summarised as follows:

The National Assembly should enact a new Forestry Act for Nigeria based on the current global realities of forest sustainability aimed at

fighting the climate war and in complement to the Climate Change Act. Emphasis should be on the UNFCCC requirements tailored to suit the local needs.

The proposed new Act should provide for community, private and public sector participation in forest management to integrate with the Climate Change Act for ease of implementing the nature-based solutions on climate change mitigation through the REDD+ initiative. Incentives should also be built in for the participants

Enforcement and compliance under the new legislation should be through NESREA in collaboration with the Federal Department of Forestry, Federal Ministry of Environment and other relevant environmental bodies. Liability to forest offences should be weighty to serve as deterrent to other prospective offenders. Compounding forest offences should be abolished. The omnibus provision of the Act under review should be repealed.

The proposed new Act should be a bed-rock for other legislation on diverse uses of the forest resources without conflicting provisions.

Dissecting the Anatomy of the Constitution Alteration Procedures for Improved Legislative Governance: A Comparison of Nigeria and Ghana

Samuel Oguche*

Abstract

This article explores the distinct mechanisms through which constitutional alterations are carried out in Nigeria and Ghana. The article examines the procedural frameworks, institutional involvement, and levels of public participation in the alteration processes of both countries. The article also highlights the strengths and weaknesses of each system, with a focus on the implications of their respective processes for democratic governance and constitutional stability. The article offers critical insights into how each country balances the need for constitutional flexibility with the imperative of safeguarding fundamental constitutional principles. The article observes that while Nigeria's amendment process is characterized by a legislative-centric approach, requiring approval from both federal and state levels, Ghana's procedure is notably more complex, particularly for entrenched provisions, requiring not only legislative approval; but also advice from the Council of State and, in some cases, a nationwide referendum. The article concludes by assessing the broader lessons that can be drawn from the comparative analysis, offering recommendations for enhancing the alteration processes in both Nigeria and Ghana to better reflect democratic ideals and ensure constitutional resilience. It recommends a further alteration to the Constitution of the Federal Republic of Nigeria to provide for direct involvement of the populace in the constitution alteration process.

Keywords: Constitution Alteration, Bill, Referendum, Public Hearing, Assent.

1. Introduction

Constitutions are the foundational legal documents that establish the framework of governance, delineating the powers and responsibilities of various branches of government and enshrining the rights of citizens. However, as societies evolve and new challenges emerge, the need to amend these constitutions becomes inevitable. Constitutional alterations play a critical role in ensuring that a nation's legal framework evolves to meet changing political, social, and economic needs. In democratic

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systems, such alterations are typically governed by established procedures, designed to balance the need for flexibility with the protection of foundational legal principles. This balance is particularly important in countries like Nigeria and Ghana, where historical, cultural, and political factors have shaped the evolution of their respective constitutions.

The process of constitution alteration is thus a crucial aspect of constitutional law, as it ensures that the supreme law of the land remains relevant and responsive to the changing needs of the nation. In West Africa, Nigeria and Ghana stand out as two of the most significant countries, both politically and economically. Despite their geographical proximity and shared colonial history, the constitutional amendment procedures in these two countries exhibit notable differences, reflecting their unique political systems, historical experiences, and governance structures. Nigeria, with its federal system, and Ghana, operating under a unitary state framework, approach the task of constitutional amendment with distinct philosophies and methodologies.

This article provides a comparative analysis of the constitutional amendment procedures in Nigeria and Ghana, two prominent West African countries with distinct political histories and legal traditions, exploring the intricacies of their respective processes and the underlying principles that guide them. By examining the similarities and differences between the two, the article sheds light on how each country balances the need for constitutional stability with the necessity for change. Understanding these procedures is not only vital for scholars and practitioners of constitutional law but also for citizens who play a role in shaping the future of their nations through these amendments.

The analysis begins with a historical overview of the constitutional developments in both countries, setting the stage for a detailed examination of the amendment processes. It then delves into the procedural steps required to amend the constitutions, the roles of various governmental and non-governmental actors, and the challenges and opportunities inherent in these processes. Through this comparative lens, the article seeks to contribute to the broader discourse on constitutionalism and governance in Africa, offering insights into how legal frameworks can adapt to the evolving demands of democratic governance.

2. Background to the Constitution of the Federal Fourth Republic of Nigeria, 1999

The transition process under General Abubakar culminated in the adoption of the Constitution of the Federal Republic of Nigeria, 1999 (CFRN), which came into effect on May 29, 1999, marking the beginning of the Fourth Republic. The constitution was largely based on the 1979 constitution, with some modifications to address the issues that had plagued previous attempts at democratic governance. The CFRN re-established a presidential system of government, with an executive President¹, a federal structure², and a bicameral National Assembly consisting of the Senate and the House of Representatives.³ It also enshrined fundamental rights⁴ and established independent institutions such as the judiciary and the Independent National Electoral Commission⁵ (INEC) to oversee elections.

One of the key features of the CFRN is its emphasis on federalism, with powers divided between the federal government and the 36 states. This was intended to accommodate Nigeria's diverse ethnic groups and prevent the centralization of power that had contributed to past political instability.⁶ Despite its significance, the CFRN has been criticized for being a product of the military, with little input from the Nigerian people.⁷ Calls for constitutional reform have persisted, with critics arguing that the document needs to be more inclusive and reflective of the aspirations of all Nigerians.⁸

Against the backdrop of the foregoing, it can be safely said that the CFRN is a product of a complex and turbulent history, shaped by colonialism, ethnic divisions, military rule, and the struggle for democracy. It represents both the challenges and aspirations of a nation striving to build a stable and inclusive democratic system. As Nigeria continues to evolve, CFRN remains a foundational document, but one

¹ CFRN, s 5.

² *ibid*, s 2.

³ *ibid*, s 4.

⁴ *ibid*, Chapter IV.

⁵ *ibid*, Third Schedule Part I.

⁶ UC Okolie, 'Empirical Study of Federalism and Political Stability in Nigeria', [2019] (6) (2), *International Journal of Legal Studies* 177-196.

⁷ L Ogboye and A Yekini, 'Constitutionalism and Good Governance in Nigeria (1999-2014)' [2014] *NAUJILJ* 118-130.

⁸ D Adeshina, 'The 1999 Constitution of Nigeria: From Hypothesis to Reality' *ThisDay online*, < <https://www.thisdaylive.com/index.php/2020/09/29/constitution-review-must-be-holistic-and-unfettered/>> accessed 28 July 2024.

that is subject to ongoing debate and calls for reform to better address the needs of its diverse population.

3. Constitution Alteration Procedure in Nigeria

Section 9(1) of the CFRN vests the National Assembly with the power to alter the Constitution, stating that ‘the National Assembly may, subject to the provisions of this section, alter any of the provisions of this constitution.’ However, the specific process for amending the constitution varies depending on the subject matter of the amendment. The process outlined in section 9(2) has been the most commonly used. Given the relatively recent experience with democratic constitutional amendments in Nigeria, there are strong and divergent opinions regarding the interpretation of this subsection, which will be addressed later in this paper. Another provision on the process for the amendment of the constitution is as follows:

An Act of the National Assembly for the purpose of altering the provisions of this section, section 8 or Chapter IV of this constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by resolution of the House of Assembly of not less than two-third of all States.⁹

The provision in question effectively reinforces the protections established by sections 8 and 9, as well as Chapter IV of the CFRN, by making amendments to these sections more challenging compared to other parts of the constitution. Section 8 of the CFRN is particularly relevant when considering amendments, as it addresses the creation of new states,¹⁰ adjustments of boundaries between states,¹¹ the establishment of new local government areas within a state, and boundary adjustments between local government areas within a state¹². If any enactments under this section are successfully implemented, they would necessitate alterations to relevant portions of section 3 and Parts I and II of the First Schedule of the CFRN. However, a close examination of section 8 reveals that it has significant potential to generate

⁹ CFRN, s 9(3).

¹⁰ *ibid*, 8(1).

¹¹ *ibid*, 8(3).

¹² *ibid*, s 8(4).

constitutional disputes, as its provisions are inelegantly drafted, leading to a lack of necessary clarity.¹³

For the purpose of alteration, the Constitution of the Federal Republic of Nigeria, 1999 is categorised into two: entrenched or special provisions and non-entrenched or general provisions. Entrenched or general provisions for the purpose of alteration procedure are sections 8, 9 and Chapter IV, and the procedure for their alteration is contained in section 9(3). By this provision, sections 8 and 9 and Chapter IV which provide for creation of new states and boundary adjustment, mode of altering provisions of the constitution and fundamental rights respectively, are entrenched or special provisions. The implication is that the alteration procedure is more cumbersome than that of general/non-entrenched provisions.

Under the alterations procedure of entrenched provisions, four-fifth majority of members of the relevant house of the National Assembly is required, compared to non-entrenched or general provisions which require only two-thirds majority to successfully pass an alteration bill. It should be noted however, that the four-fifth majority provided in section 9(3) is that of the entire members of the House, and not those present at the relevant time. Consequently, for the purposes of section 8 of the constitution and of subsections (2) and (3) of section 9, the number of members of each House of the National Assembly shall, notwithstanding any vacancy, be deemed to be the number of members specified in sections 48 and 49 of this constitution.

On the other hand, alteration of general or non-entrenched provisions is anchored on section 9 (2) of the constitution which provides that 'An Act of the National Assembly for the alteration of this constitution, not being an Act to which section 8 of this constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.'¹⁴ A fundamental feature of general amendment under section 9(2) is the requirement of two-thirds majority. It should be noted that two-thirds majority here is that of the entire house, not those present. This is the

¹³ J N Aduba and S Oguche, *Key Issues in Nigerian Constitutional Law* (NIALS 2014) 216.

¹⁴ CFRN, s 9(2).

same requirement when it comes to removal of President and Governor under sections 143 and 188 respectively.¹⁵

In the case of the amendment of entrenched provisions, the legislative proposal has to be first tabled in the different houses of the National Assembly where, by virtue of section 9(3), each of the Houses, acting separately, must approve the amendments by four-fifths majority of all the members of the House concerned.¹⁶ That is to say, at least 88 members of the Senate and 288 members of the House of Representatives.¹⁷ Thereafter, the proposed amendment is sent to the Houses of Assembly of the States for approval. The amendment proposal is deemed to have been passed (that is to say, become an Act of the National Assembly) if it is approved by resolution of not less than two-thirds of the Houses of Assembly of the States. That is to say, 24 States.¹⁸ No further act is required to transform the approved bill to an Act of the National Assembly. The reason for this is that immediately the proposal is passed by the National Assembly and in the required number of states' Houses of Assembly is met, the proposal translates into an integral part of the subsisting constitution.¹⁹

Section 9(1) of the CFRN, which confers on the National Assembly the power to alter the constitution, subjects such power of the National Assembly to section 9, not any other section of the constitution. In respect of the amendment of any other section of the constitution, the position as highlighted above is applicable except that the majority required in each House of the National Assembly is a two-thirds majority.²⁰ That is to say, at least 73 members of the Senate and 240 members of the House of Representatives. It is obvious from section 9(1) of the constitution that no part of the said constitution is beyond amendment. What is important is that the right procedure is followed in every amendment as stipulated in section 9 of the constitution.

¹⁵ *Awolowo v Shagari* (1979) ALL NLR 1201; see also *Dapianlong v Dariye* (No2) (2007) 8 NWLR (Pt 1036) 332; see also, *Adeleke v Oyo State House of Assembly* (2007) ALL FWLR (Pt 345) 211.

¹⁶ CFRN, 1999, s 9(4).

¹⁷ By virtue of section 48 of the CFRN 1999, the total membership of the Senate is 109; see also, s 49, which provides to the effect that the House of Representatives shall consist of 360 members.

¹⁸ As provided under section 3(1) of the CFRN 1999, there are 36 States in Nigeria.

¹⁹ EN Nnamani, 'A Comparative Analysis of the Procedure for Alteration of Federal Constitutions: Nigeria and the United States in Perspective' (2010) (1) *EBSU Journal of International Law and Juridical Review* 264, 268.

²⁰ CFRN, s 9(2).

Upon a close examination of the explicit provisions of section 9 regarding the alteration of both entrenched and non-entrenched provisions, it becomes evident that the number of legislators involved is crucial, particularly those who approve the proposed amendments. This means that legislators must cast their votes to indicate who is in favor and who is against the amendment, and such determinations cannot be made through a voice vote. One of the reasons President Goodluck Ebele Jonathan exercised his veto over the 2015 Fourth Alteration Bill was the National Assembly's failure to demonstrate compliance with the stringent requirements of section 9(3) of the CFRN.²¹ Specifically, the National Assembly did not provide the necessary votes and proceedings of both Houses along with the Fourth Alteration Bill when it was transmitted to him. This documentation was essential to prove that the alterations had been supported by at least a four-fifths majority of all members of the Senate and the House of Representatives, as required by the constitution.

In addition, the President expressed concern that the legislators had resorted to a voice vote during the process, which is not a constitutionally acceptable method for determining such critical decisions.²² To buttress the allegation of non-compliance with section 9(3) of the constitution, the National Assembly failed to accompany the Fourth Alteration Bill with the Votes and Proceedings of the House as evidence of compliance.²³ Another legislative disaster was resort to voice vote by the National Assembly, which could not have determined the number of legislators in favour of the proposals for the purpose of the two-thirds and four-fifth thresholds provided by the constitution. This, surely, is an affront to the legislative process.

The stringent requirements set forth in section 9 serve as a safeguard, making it difficult to amend the constitution without widespread agreement across both federal and state legislatures which is a testament to the rigid nature of the constitution. This ensures stability and continuity in the constitutional framework, preventing frequent or arbitrary changes that could undermine the legal and political order in Nigeria.

²¹ S Ogwemoh, 'Did President Jonathan Veto the 4th Alteration to the Constitution of the Federal Republic of Nigeria, 1999?' *The Guardian*, 21 Apr 2015 <<https://guardian.ng/features/law/did-president-goodluck-jonathan-veto-4th-alteration-to-the-constitution-of-the-federal-republic-of-nigeria-1999/>> accessed 24 Jul 2024.

²² S Oguche, 'Constitution Amendment Stalemate in Nigeria: The Constitution (Fourth Alteration) Bill 2015 in Perspective' [2015] (7)(2), *NJLA*, 37.

²³ Suit NSC/214/2015.

4. The Role of the Houses of Assembly of States in the Alteration Process

One of the key requirements for altering the constitution, whether it involves entrenched or non-entrenched provisions, is the participation of the states in the process. A bill for altering the constitution, even if passed by both Houses of the National Assembly, does not gain constitutional validity unless it is supported by at least two-thirds of all states. It is important to note that the involvement of the states occurs through their respective Houses of Assembly. These Houses of Assembly are not required to pass the Constitution Alteration Bill using the regular legislative procedure. Instead, they simply need to approve the bill through a resolution. This means that each House of Assembly must either approve or disapprove the bill as passed by the National Assembly by a simple majority of all its members. As a result, once an alteration bill is passed by the National Assembly and forwarded to a House of Assembly, it does not need to undergo any further legislative process.

The only requirement is a straightforward approval or disapproval. Thus, for an amendment bill to take effect, a two-thirds majority of all the states must support it. To clarify, the favourable resolution from the Houses of Assembly of the required number of states is essential. This favourable resolution is what confers authority and validity on the constitution amendment passed by the National Assembly. If the two-thirds threshold is not met, the alteration bill fails.

5. Presidential Assent

The issue of presidential assent to constitution alteration bills in Nigeria has been a subject of considerable legal and political controversy. This controversy stems from differing interpretations of the Nigerian Constitution, particularly concerning whether the President must assent to constitutional amendment bills passed by the National Assembly for them to become law. Section 9 which deals with the procedure for the alteration of the constitution is silent on the role of the President in this process. The constitution does not explicitly state whether the President's assent is required before a constitution alteration bill becomes law. This has led to debates and conflicting interpretations.

Legal and political controversies surround the role of the president in the alteration process. This is anchored on an interface of sections 9 and 58 of the constitution which carry different implications. Section 58 which covers mode of exercising federal legislative powers provides that

‘the power of the National Assembly to make laws shall be exercised by bills passed by both the Senate and the House of Representatives and, except as otherwise provided by subsection (5) of this section, assented to by the President.’²⁴ By the bill process in section 58, a bill passed by both houses of the National Assembly is mandatorily required to be transmitted to the President for assent²⁵ who is at liberty to either assent or withhold assent within 30 days.²⁶ The implication of this provision is that the President does not have powers to adopt a pocket veto, and the National Assembly reserves the powers to override the President’s veto by virtue of subsection (5) of section 58. On the role of the President in the alteration process, a school of thought argues that section 58 of the constitution, which deals with the procedure for enacting ordinary legislation, should apply to constitution alterations, thereby rendering the President’s assent a mandatory requirement.²⁷

On the other hand, there are opposing viewpoints to the effect that the absence of any mention of presidential assent in Section 9 implies that it is not required. They contend that the framers of the Constitution intentionally excluded the President from the process to prevent the executive branch from having undue influence over constitution alterations, which are meant to reflect the will of the people through their representatives.²⁸ The controversy has significant implications for the stability of Nigeria’s constitutional framework. If the President’s assent is deemed necessary, it grants the executive branch a potential veto power over constitutional amendments, which could be seen as undermining the principle of checks and balances. On the other hand, if the President’s assent is not required, it could lead to situations where amendments are made without adequate consideration of their broader implications, especially as the process is dominated by the National Assembly and Houses of Assembly of states.

²⁴ CFRN, s 58(1).

²⁵ *ibid*, s 58(3).

²⁶ *ibid*, 58(4).

²⁷ Ben Nwabueze, ‘Why President must sign constitutional amendment into law’, *The Guardian* (Lagos, Nigeria, 27 July 2010) 9; A Izinyon, ‘President assent mandatory in Constitution amendment’, *The Guardian* (Lagos, Nigeria, 24 Aug 2010) 79; see also, L Ughogbe, D Oladimeji and A Amzat, ‘Constitutional review invalid without President’s assent, says SANs’, *The Guardian* (Lagos, Nigeria, 27 July 2010) 5; D I, ‘Nwabueze: President Must Sign New Constitution,’ *ThisDay* (Lagos, Nigeria 22 July 2010) 10.

²⁸ B Nwannekanma, ‘Presidential assent on amended constitution? No!’, *The Guardian* (Lagos, Nigeria, 24 Aug 2010) 77; A Alemma-Ozioruva, ‘New constitution doesn’t need President’s assent, says ex-Senator’, *The Guardian* (Lagos, Nigeria 18 Aug 2010) 5.

It is the view of the present writer that the placement of presidential assent provided in section 58 in the procedure for alteration of the constitution contained in section 9 is improper. Apart from the fact that it is not mentioned in section 9, the general mode of exercising federal legislative powers contained in section 58 does not require input from the states is the case with section 9. If a legislative proposal duly passed by at least two-thirds or four-fifths of both houses of the National Assembly is approved by two-thirds of all the States through their various Houses of Assembly, it looks absurd to subject such a bill to the assent or veto of the President. If at all the President's assent is required, he should be mandated to assent as is the case in Ghana which will be considered presently. The controversy over presidential assent to constitution alteration bills in Nigeria highlights the complexities of constitutional interpretation and the delicate balance of power between the different branches of government. Resolving this issue may require either a definitive ruling by the Supreme Court or a further amendment to the constitution to clarify the process explicitly. Until then, the debate is likely to continue, with significant implications for Nigeria's legal and political landscape.

6. Background to the Ghanaian Constitution, 1992

The Ghanaian Constitution of 1992 stands as a significant milestone in the country's political evolution, marking the transition from decades of military rule to a stable democratic governance framework, following Ghana's complex constitutional history, which is characterized by colonial influences, post-independence political turmoil, multiple military coups, and efforts to build a resilient democratic state. The 1980s and early 1990s were a period of economic hardship and political repression under the Provisional National Defence Council (PNDC), but they also saw significant economic reforms, often under pressure from international financial institutions like the IMF and World Bank.²⁹ By the late 1980s, there was growing domestic and international pressure on the PNDC to transition to democratic governance. In response to this pressure, President Rawlings initiated a process of political reform, including the formation of a Consultative Assembly in 1991 to draft a new constitution. This assembly was tasked with creating a constitution that would facilitate a return to civilian rule while ensuring political

²⁹ D Green, 'Ghana's Adjusted Democracy' *Review of African Political Economy*, [1995] 22(66) 577-585.

stability and economic development.³⁰ The result was the 1992 Constitution, which was approved by a national referendum on April 28, 1992, and came into force on January 7, 1993. This Constitution established the Fourth Republic of Ghana, which continues to this day.

The 1992 Constitution introduced a hybrid system of government, combining elements of both presidential and parliamentary systems. It provided for an executive President,³¹ a unicameral Parliament,³² an independent judiciary,³³ and various checks and balances to prevent the abuse of power. Significantly, the 1992 Constitution enshrined fundamental rights,³⁴ established an independent Electoral Commission to oversee free and fair elections,³⁵ and included provisions to decentralize governance through local government structures.³⁶ The Constitution also emphasized the importance of maintaining a multi-party democratic system and sought to create an environment that would prevent the recurrence of military coups.

The 1992 Constitution of Ghana represents the culmination of decades of political struggle, constitutional experimentation, and efforts to build a stable and democratic state. Emerging from a history marked by colonial rule, post-independence political instability, and prolonged periods of military dictatorship, the 1992 Constitution has been instrumental in establishing a framework for democratic governance in Ghana. It has provided the foundation for the Fourth Republic, which has become one of the most stable and enduring democratic systems in Africa. While the 1992 Constitution has faced its challenges and criticisms, it remains a critical document in Ghana's ongoing journey towards democratic consolidation and development. The 1992 Constitution established the Fourth Republic and has since been the bedrock of Ghanaian democracy. Similar to Nigeria, Ghana's legal system bears the imprint of British colonialism, but it has also been shaped by a strong tradition of customary law.³⁷

³⁰ J Hatchard, 'Perfecting Imperfections': Developing Procedures for Amending Constitutions in

Commonwealth Africa' [1998], *The Journal of Modern African Studies*, 36(3) 384.

³¹ 1992 Constitution, art 57.

³² *ibid*, art 93.

³³ *ibid*, art 127.

³⁴ *ibid*, Chap Five.

³⁵ *ibid*, art 43.

³⁶ *ibid*, Chap Twenty.

³⁷ I Owusu-Mensah, 'Politics, Chieftaincy and Customary Law in Ghana,' Konrad Adeneuer Stiftung, 2013, <<https://www.jstor.org/stable/pdf/resrep10120.5.pdf?refreqid=fastlydefault%3A000607>

7. Constitution Amendment Procedure in Ghana

The procedure for amending Ghana's Constitution is provided for under Chapter 25 of the 1992 Constitution. Chapter 25 of the Ghanaian Constitution outlines the process for amending the constitution, with Parliament holding the authority to make such amendments, similar to other constitutional democracies like Nigeria. The amendment procedure is divided into entrenched and non-entrenched provisions. For entrenched provisions, before a bill can be passed, it must first be referred by the Speaker of Parliament to the Council of State for advice, which must be given within thirty days.³⁸ The bill is then published in the Gazette and can only be introduced in Parliament six months after this publication.³⁹ After the bill's first reading in Parliament, it must be submitted to a nationwide referendum. For the bill to succeed, at least 40 percent of eligible voters must participate in the referendum, and 75 percent of those must vote in favor.⁴⁰ Upon a successful referendum, Parliament passes the bill, and the President's assent finalizes the process. Under article 290 (4) and (5) both the Parliament and the President are under an obligation to pass and assent respectively if a bill is approved by the people in a referendum. Consequently, it is the people that actually determine failure or otherwise on a bill to amend an entrenched provision.

The procedure for amending non-entrenched provisions is slightly different. Such a bill must be published twice in the Gazette, with the second publication occurring at least three months after the first, and at least ten days have passed after the second publication.⁴¹ Once the bill has been read for the first time in Parliament, the Speaker refers it to the Council of State, which has thirty days to offer its advice.⁴² If the bill passes with a two-thirds majority at the second and third readings in Parliament, it is then presented to the President for assent.⁴³ The manner of passage by the Parliament differs in both entrenched and non-entrenched provisions. Under article 290 (5), the Parliament does not admit any opposition to passage once the bill has been approved in a referendum. However, amendment of non-entrenched provisions in

cd599d4724840cd7d2b5273f88&ab_segments=0%2Fbasic_search_gsv%2Fcontrol&origin=&initiator=&acceptTC=1> accessed 20 Jul 2024.

³⁸ 1992 Constitution, art 290(2).

³⁹ *ibid*, art 290(3).

⁴⁰ *ibid*, art 290(4).

⁴¹ *ibid*, 291(1)(a) (b).

⁴² *ibid*, art 291(2).

⁴³ *ibid*, art 291(3).

section 291 requires voting by members of Parliament as the Constitution pegs the threshold for passage at two-thirds majority of Members of parliament. The implication is that members of Parliament, as representatives of the people, are required to vote since the people are not involved in the amendment of non-entrenched provisions.

The final step in the amendment process requires the Speaker to certify that all constitutional requirements have been met before presenting the bill to the President.⁴⁴ If the amendment concerns an entrenched provision, the certification must include a statement from the Chairman of the Electoral Commission, with the Commission's seal, confirming that the referendum was conducted in accordance with Chapter 25 of the Constitution.⁴⁵ From the foregoing, it is evident that the key players in the amendment process of the Ghanaian Constitution are Parliament, the Council of State, the people of Ghana (through a referendum), the Electoral Commission, and the President. The roles and responsibilities of these institutions and individuals are well-defined.

The Speaker of Parliament has the critical task of referring proposed bills to the Council of State for advice, which must be provided within a 30-day timeframe. This time frame suggests that the framers of the Constitution believed it to be sufficient for the Council of State to consider an amendment proposal, regardless of its complexity or the depth of expertise and consultation required to form an informed opinion. Given the foundational importance of constitutional amendments, it is essential that all relevant factors be carefully considered to avoid significant errors. The procedure also includes specific timelines for publication, thresholds for valid referendums, and the role of the Electoral Commission in validating the process. Although referendums can be costly, they give the people a direct voice in the constitutional amendment process, reinforcing the principles of constitutionalism. This aspect of the Ghanaian amendment procedure could serve as a valuable model for Nigeria in its constitutional amendment process.

8. Comparative Analysis

The procedures for altering the constitutions of Nigeria and Ghana reflect the complexities and importance both countries place on their respective fundamental laws. While both nations recognize the necessity of constitutional amendments as a mechanism for political and legal evolution, their processes for altering the constitution vary significantly

⁴⁴ *ibid*, art 292(a).

⁴⁵ *ibid*, art 292(b).

in terms of institutional involvement, procedural rigour, and the role of the populace. The significant areas of comparison are discussed hereunder.

8.1 Institutional Involvement

In Nigeria, the process of altering the Constitution is primarily vested in the National Assembly, which consists of the Senate and the House of Representatives. To initiate an amendment, a bill must be passed by a two-thirds majority in each house of the National Assembly. Following this, the bill must be approved by a resolution of the Houses of Assembly of at least two-thirds of Nigeria's 36 states before it can be presented to the President for assent. The President's assent, while traditionally required, has been subject to constitutional debate regarding its necessity. In Ghana, the process involves a broader array of institutions. The Ghanaian Parliament initiates the amendment process, but the procedure differs depending on whether the amendment pertains to an entrenched or non-entrenched provision. For entrenched provisions, the bill is first referred to the Council of State for advice, published in the Gazette, and then subjected to a nationwide referendum.

The Electoral Commission plays a pivotal role in this process, particularly in certifying the results of the referendum. Non-entrenched provisions follow a less rigorous procedure, but still require consultation with the Council of State and must pass through multiple readings in Parliament before receiving presidential assent. Unlike in Nigeria where the role of the President in terms of assent is unclear, the provisions of articles 290 and 291 of the Ghanaian Constitution are clear and unambiguous to the effect that the assent of the President is mandatory but the president has no powers to withhold it. In the amendment of both entrenched and non-entrenched provisions, the Ghanaian President has no input other than to assent. This is a useful lesson in Nigeria's alteration process especially against the backdrop of the huge resources put into alteration exercises due to the size of the country.

8.2 Procedural Rigour

The procedural rigour in amending the constitution is more stringent in Ghana, particularly for entrenched provisions. The requirement for a referendum in which at least 40 percent of eligible voters participate, and 75 percent of them approve the amendment, introduces a direct democratic element that is absent in Nigeria's process. This ensures that significant changes to the constitution are only made with substantial public support. In contrast, Nigeria's process, while requiring significant

legislative approval both at the federal and state levels, does not involve a direct referendum. The closest approximation to public participation in Nigeria is the involvement of state legislatures, but the process remains largely within the domain of elected representatives rather than the electorate directly. Even in cases where public hearings are held, there is no legal framework to compel the legislature to adopt the views expressed by the people. This presents a situation of exclusion of the people from the alteration process in Nigeria as there is no provision for their direct involvement coupled with the highly restricted access to the legislative houses and venues of public hearings, where they are held.

8.3 Role of the Populace

In Ghana, the populace has a more direct role in the amendment process, particularly for entrenched provisions. The referendum requirement ensures that the people have the final say in whether certain fundamental aspects of the Constitution are altered. This direct involvement is a hallmark of Ghana's constitutional democracy and emphasizes the sovereignty of the people in determining the nation's constitutional framework. In Nigeria, the people's role is more indirect, exercised through their elected representatives at both the federal and state levels. While this representative approach is common in many democracies, it can sometimes lead to a disconnect between public opinion and legislative action, especially in cases where there is widespread public support or opposition to a particular amendment.

8.4 Complexity and Flexibility

The Ghanaian Constitution's dual-track system, directly distinguishing between entrenched and non-entrenched provisions, adds complexity but also flexibility to the amendment process. It allows for a more straightforward process for less critical amendments while ensuring rigorous scrutiny for more fundamental changes. This bifurcation ensures that essential aspects of the constitution are not easily altered without broad consensus. This direct provision is lacking in Nigeria, although section 9(2) and (3) contain two amendment procedures. In Ghana, only amendments of non-entrenched provisions require voting by members of Parliament to determine two-thirds. While amendment of entrenched or special provisions of the Nigerian Constitution requires four-fifth majority of legislators of both houses of the National Assembly, the position in Ghana is more stringent on the amendment of entrenched provisions, which requires the Parliament to pass the bill

once approved in a referendum. This puts all members of Parliament under a constitutional obligation to support the bill.

8.5 Constitutional Safeguards

Both countries have incorporated constitutional safeguards to prevent hasty or ill-considered amendments. In Nigeria, the requirement for two-thirds approval at both federal and state levels serves as a significant check, ensuring that amendments are broadly supported across the country's diverse regions. Ghana's safeguards are even more pronounced for entrenched provisions, with the multi-stage process involving the Council of State, public gazetting, and a mandatory referendum, conducted by the Electoral Commission. These steps ensure that any significant constitutional changes undergo thorough deliberation and public scrutiny before being enacted.

9. Conclusion

In conclusion, while both Nigeria and Ghana have established procedures that reflect their commitment to constitutional democracy, the differences in their approaches highlight varying priorities and conceptions of constitutional governance. Ghana's emphasis on public participation and differentiation between types of provisions adds a layer of democratic legitimacy to its amendments. In contrast, Nigeria's uniform and representative-driven approach emphasizes broad legislative consensus across its federated states. Both systems have their strengths and weaknesses, and each reflects the unique historical, political, and social contexts of the two nations. The constitutional amendment procedures in Nigeria and Ghana are shaped by their unique historical, political, and social contexts. Nigeria's process reflects its federal structure and the need for widespread consensus, making it more rigid and complex. Ghana's process, while also safeguarding key provisions, allows for greater public participation and flexibility, particularly through the use of referendums and citizen initiatives. Both systems have their strengths and challenges, and they underscore the importance of a carefully balanced approach to constitutional change in maintaining stability and democracy.

On this note, both countries have a lot to learn from each other towards enhancing their constitution amendment procedures. The comparative analysis underscores the importance of striking a balance between protecting the foundational principles of a constitution and allowing room for necessary amendments that reflect evolving societal values. As Nigeria and Ghana continue to mature democratically,

understanding these dynamics will be crucial for ensuring that their constitutions remain relevant and responsive to the needs of their citizens. Ultimately, the experiences of both countries offer valuable lessons for other nations grappling with the challenge of constitutional reform in diverse and evolving political landscapes.

10. Recommendations

From the foregoing analysis, the following comparative observations and recommendations are made:

Ghana's constitutional amendment process, with its dual-track system and referendum requirement, exemplifies a robust approach to safeguarding the Constitution's foundational principles while still allowing for necessary legal and political evolution. This approach underscores the importance of public participation in constitutional changes, reinforcing the legitimacy and acceptance of such amendments.

Nigeria's process, while also rigorous, places greater emphasis on representative democracy through its reliance on legislative approval at multiple levels. While this ensures that amendments reflect a broad consensus among the country's political elites, it may sometimes limit direct public involvement in constitutional decision-making. On this note, the Ghanaian model is recommended to get the populace involved in the constitution alteration process. This requires a further constitutional role for the Independent National Electoral Commission to ensure a robust constitution alteration procedure, especially with regards to special provisions.

While entrenched or special provisions of the Constitution of the Federal Republic of Nigeria that require four-fifths majority are only sections 8,9 and Chapter IV of the Constitution, section 290 of the Ghanaian Constitution provides a list of nineteen (19) issues categorised as entrenched provisions. This underscores the need for Nigeria to revisit the constitution, with attention on security and local government among others.

In Ghana, the Council of State determines whether the Parliament can proceed with consideration of a constitution amendment bill, whether it is for entrenched or non-entrenched provisions. This requirement in articles 290(2) and 291(2) of the Constitution is a legislative keg of gunpowder in view of its ambiguity which is capable of generating a constitutional quagmire. First, the nature of advice required from the Council of State is not provided. This leaves the provisions susceptible to manipulation and consequent possible judicial interpretation when a dispute arises. Furthermore, the constitution does

not provide for a situation where the Council of State advises against passage of an amendment bill. Under that circumstance, what is the next option for the Parliament? What are the next steps? These vital issues are missing in the Ghanaian Constitution, thereby creating a serious vacuum that must be filled by a further amendment of the constitution. On this note, it is recommended that a process of amending the constitution be immediately activated to address these challenges in the interest of constitutional order in Ghana.

The Ghanaian Parliament should also reconsider the role of the Council of State in the amendment process. The Parliament, being the symbol of democracy, should not depend on advice of an external body to proceed with the performance of its parliamentary functions. The Nigerian case is quite exemplary in this regard, as there is no other requirement to be met before the National Assembly can consider a constitution alteration bill.

Legal Perspective of Insecurity Manifestations and the Future of Nigeria

Benjamin Ogwo*

Abstract

The prevailing insecurity situation in Nigeria gradually started in 2009 and it seems the end is not in sight. This article examines the manifestations of insecurity situation in Nigeria which has increased immensely in diverse complexities to the extent that it has defiled all security measures. The article analyses the legal identity of Nigeria; how Nigeria got to where we are in terms of security challenges unabated; some instances of challenge of security, among others. The article finds that the deteriorating insecurity situation is attributed to lack of implementation of Federal Character Principle; violation of the rule of law; weak judiciary; unemployment, poverty; lack of acknowledgement of Nigeria as a secular state; corruption, among others. The concludes that there is lack of political will on the part of our political leaders to terminate the insecurity situation that has bedeviled the nation; and they should be held responsible for the incidence. The article recommends that for Government to tackle the unspeakable challenge, it should, as a matter of utmost urgency and concern; and for the future of Nigeria, embark on full implementation of the federal character principle; allow the rule of law to prevail by ensuring that people enjoy their fundamental rights; extend the frontiers of security beyond the police and other security agents by legalising the institution of community policing; creating jobs; providing employment opportunities in order to drastically reduced or eradicate poverty, among others.

Keywords: Government, insecurity, people, rule of law, welfare

1. Introduction

A research on the legal perspective on the challenge of insecurity and the future of Nigeria, is apt considering the security manifestations ravaging the nooks and cranny of our beloved nation in the globe in general and Nigeria in specific. There is no better time in the history of Nigeria than now that considering the future of Nigeria would have been more relevant in the face of the reality of the insecurity situation that gradually

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started in 2009 and for which the end is not in sight.¹ The insecurity situation in Nigeria has increased immensely in diverse complexities; to the extent that it has defied all security measures. It worth pointing out from the outset that insecurity challenges is not unique to Nigeria,² for reason that many countries of the world have tasted the menace of insecurity in one form or the other; but security manifestations in Nigeria has consistently been on the increase in a complicated dimensions unabated.

Incidentally, while other countries experienced specific form of insecurity for a short period and quickly brought same under control, Nigeria has continually been under the attack of legions of different form of insecurity. These ranges from militancy, kidnapping, violence, *boko haram* insurgency, armed robbery, hired assassination, herdsmen/farmers conflict, hoodlums, criminals, ethnic militia group, among others.³ Insecurity is an antithesis of security. Insecurity is the state of being open to danger or threat; lack of protection. It is lack of confidence or assurance; self-doubt. Nigeria is in a state of helplessness physically, economically, politically or otherwise, to the extent that it generally experiences criminal activities routinely. Embarrassingly, youths in particular have found in these crimes, alluring and profitable enterprise.⁴

There are literatures on the causes of insecurity in Nigeria ranging from unemployment, poverty, religious and ethnics conflicts,⁵ feeble security system, porosity of Nigerian border, inherent corruption, proliferation of small arms, abuse of human right with impunity,⁶ among others. Some of these causes of insecurity are in this paper.

In achieving the main aim of this research, this article is divided into four main parts. Having considered the introductory aspects in this part, the second part x-rays the legal identity of Nigeria. The third section

¹Emmanuel Imuetinyan Obarisiagbon & Emily Obaide Akintoye, 'Insecurity Crisis in Nigeria: The Law Enforcement Agents a Panacea' [2019] [7] [1], *Journal of Sociology and Social Work*, 1-8.

² *ibid.*

³ Onifade Comfort Imhonopi David & Urim Ugochukwu Moses, 'Addressing the Insecurity Challenge in Nigeria: The Imperative of Moral Values and Virtue Ethics' (2013) (3) (2), *Global Journal of Human Social Science* 1-12.

⁴ BO Omoloye & AO Filani, 'Law, Security and Development: A Legal Perspective' [2019] [vii] [2], *International Journal of Economic, Commerce and Management United Kingdom* 7.

⁵ MM Adagbiri & Ugo Chuks Okorie, 'Corruption and the Challenges of Insecurity in Nigeria's Fourth Republic' [2018] [4] [3] *Journal of Political Science and Leadership Research* 41-56.

⁶ *ibid.*

pauses with a concrete question of: ‘how did we get to where we are’; The author beams his search light into the future of Nigeria in part four of this paper and then the recommendations.

2. The Legal Identity of Nigeria

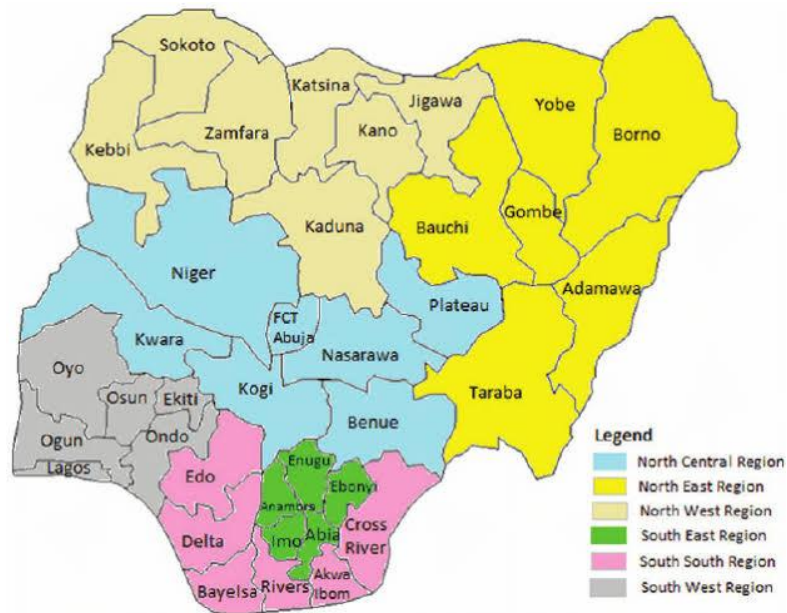
The entity called Nigeria has been legally and/or constitutionally identified as one indivisible and indissoluble sovereign state to be known by the name of the ‘Federal Republic of Nigeria and shall be a Federation consisting of thirty six (36) States.’⁷ Being a sovereign state, it possesses an independent existence, being complete in itself without being merely part of a larger whole to whose it is subject.⁸ Nigeria by its legal entity as a nation is answerable to its own domestic order and it is not accountable to a larger international community except only to the extent it consented to do so. To this end, the government of Nigeria owes a duty to provide answers to the burning issues of insecurity challenges confronting the people of Nigeria.

Nigeria also has seven hundred and seventy-four Local Government Areas.⁹ Geographically, Nigeria, is an African state on the Gulf of Guinea, has many natural landmarks and wildlife reserves which might have been an envy of other nations of the world. There are interested and protected areas such as Cross River National Park, and Yankari National Park, which have waterfalls, dense rainforest, savannah and rare primate habitats. Some of the most recognizable sites in Nigeria are Zuma Rock of 725m tall, Mount Patti in Lokoja of Kogi State, among others. The map of Nigeria is as shown below:

⁷ CFRN 1999 (as amended), ss (1) (2) & 3 (1).

⁸ Bryan A Garner, *Black’s Law Dictionary 11th edn*, (West Publishing Co 2009) 1680.

⁹ There are 774 Local Government Authorities in Nigeria <<https://www.clgf.org.uk>> accessed on 29/04/2024.



Nigeria’s population is currently about 226.5 million¹⁰ and is expected to reach 450 million by mid-century. Although, English Language is the only official language of the Nigeria, there are some 350 indigenous languages that most Nigerians use most of the time.¹¹ It boggles the mind whether this could be as a result of the diverse complex nature of Nigeria, its languages and the population that the insecurity challenges have defied all security control.

It is worrisome that the question whether Nigeria is a safe state has been answered in the negative to the effect that there ‘is a high level of crime throughout Nigeria, including armed robbery, kidnapping for ransom, home invasions, carjacking and violent assault,’¹² adding that ‘[c]riminal activities is high in urban areas including the city of Lagos, as well as on the northern border with Niger and Chad.’¹³ The question is how did we get to where we are? What is the future of Nigeria by the time the Nigerian population ascends to 450 million by mid-century?

¹⁰ Nigeria Population 2024 <https://datareportal.com> reports accessed on 29/4/2024.

¹¹ Nigeria Languages: 525 Native Languages <<https://www.linkedin.com>> pulsed accessed on 29/04/2024; see also, Nigeria is one of the most linguistically diverse countries in the world with over 500 Languages spoken language data for Nigeria Translators without Borders<<https://translatorswithoutborders.org>> accessed on 09/09/2021.

¹²Travel Advice and Advisories for Nigeria <<https://travel.gc.ca/destinations/Nigeria>> accessed on 09/09/2021.

¹³ *ibid.*

3. How Did We Get to Where We Are?

In order to answer this poser, it is pertinent to know where we are, the present insecurity situation in Nigeria has reached an alarming stage that citizens are afraid of embarking on pleasurable trip except unavoidable journey that is meant for economic survival. A critical analysis of how Nigeria found itself in this mess and menace of insecurity is necessary in order to titrate the insecurity phenomenon plaguing the peace and unity of Nigeria.

Generally, this article examines both human and national insecurity. It is worthy of note that national insecurity encompasses socio-economic and political insecurity. The insecurity challenge could also be internal or external.¹⁴ The external insecurity which are supposed to be coming from outside the nation is not necessarily part of the focus of this article. It is crucial to reiterate an earlier statement made that insecurity is the antithesis of security and especially human insecurity has manifested in various forms such as want of safety, danger, hazard, uncertainty, want of confidence, state of doubt, inadequately guarded or protested, instability, trouble, and others.¹⁵ Unfortunately, this is where we are in Nigeria today.

A situation where the state apparatus has failed to protect its citizens and other inhabitants from danger, loss of life, loss of property or livelihood. Lives are destroyed virtually on daily basis with impunities across the cities and villages in Nigeria, people live in great fear and without assurance or confidence of being a life the next day. With respect to national security, it is fascinating to recast that Government of the day is under a constitutional responsibility to protect the lives and property of its citizens in that ‘the security and welfare of the people shall be the primary purpose of Government.’¹⁶ In order to appreciate the enormity of the word ‘Government’ in the foregoing provision, it is expedient to make recourse to section of the same constitution which provides:

It shall be the duty and responsibility of all organs of Government, and of all authorities and persons exercising

¹⁴ Isaac Olawale Albert, ‘Nigeria’s Security Challenges in Historical Perspective’ in Ayodeji Olukoju, and others (eds), *Security Challenges and Management in Modern Nigeria* (Cambridge Scholars Publishing 2018), 1.

¹⁵ IC Achumba, OS Igbomereho and MOM Akpor-Robaro, ‘Security Challenges in Nigeria and the Implications for Business Activities and Sustainable Development,’ (2013) (4) (2), *Journal of Economics and Sustainable Development* 79-99.

¹⁶ CFRN 1999 (as amended) s14 (2) (b).

legislative, executive or judicial powers, to conform to, observe and apply the provision of this chapter of this constitution.¹⁷

A cursory examination of the foregoing provision reveals first that government comprises these organs that are vested with legislative, executive and judicial powers and it is not limited to the executive, as erroneously imagined by some holders of executive power.

Second, the phrase, ‘it shall be the duty and responsibility...’ ordinarily suggests an act of compulsion or mandatory upon the occupiers or holders of the said power to discharge the duty or responsibility of the office. It presents an absence of choice. The word duty means ‘a legal obligation that is owed or due to another and that needs to be satisfied; that which one is bound to do, and for which somebody else has a corresponding right.’¹⁸ Despite the enticing and heart-warming constitutional provisions, there are two schools of thought on the legal implication of Chapter II titled: ‘Fundamental Objectives and Directive Principles of State Policy’ which encompasses the foregoing provisions.¹⁹

The first school of thought maintains that being a constitutional provision and with the clarity of the phrase ‘shall be the duty and responsibility’, the Government of the day should be compelled to perform their duties provided for in Chapter II of the Constitution which translates into rights of the people. In pursuance of the position of this school of thought, cases have been instituted in courts for eventual determination. In *Badejo v Federal Ministry of Education*,²⁰ the court was called upon to determine the claim of right to education and right against discrimination on ground of sex based on the provisions of the constitution. Kutigi, JSC (as he then was), maintained that ‘[a] Fundamental right is certainly a right which stands above the ordinary laws of the land. However, no fundamental right should stand above the country, state or the people’.²¹ Even before the Supreme Court of Nigeria laid down its decision in *Badejo*’s case,²² the court in *Ransome Kuti v Attorney General of the Federation*,²³ in determining whether the plaintiff’s constitutional right has been violated and whether such constitutional rights is justiciable for legal enforcement by the court,

¹⁷ *ibid*, s 13.

¹⁸ Garner (n 8) 615.

¹⁹ CFRN 1999 (as amended), 13 & 14 (2) (b).

²⁰ (1996) 8 NWLR (Pt 464) 15 SC.

²¹ *ibid*, 41.

²² *ibid*.

²³ [1985] 2 NWLR (Pt 6) 21.1

stated that the court needed to determine the nature of the fundamental right. Kayode Eso, JSC, therefore, posited

But what is the nature of fundamental right? It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence.²⁴

To this end, this article strongly agrees with the contention of the first school of thought that those rights having been enshrined in the constitution of the Federal Republic of Nigeria as *ground norm* are meant to be enforced at the instance of the victim as against the government of the day as violators.

The second school of thought maintains that the same constitution provides as follows:

The judicial powers vested in accordance with the foregoing provisions of this Section- Shall not except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of State policy set out in Chapter II of this Constitution.²⁵

The apostles of the second school of thought consistently maintains that the rights enshrined in Chapter II of the Constitution which includes ‘the security and welfare of the people’²⁶ cannot be judicially enforced against the government of the day for the benefits of the people. For instance, in the case of *Archbishop Okogie and 6 Others v The Attorney-General of Lagos State*,²⁷ the court was called upon to determine the status of the provisions of Chapter II (Fundamental Objectives and Directive Principles of State Policy) under the Constitution of the Federal Republic of Nigeria, 1979 which is similar with Chapter II of the Constitution of the Federal Republic of Nigeria, 1999 as amended. The Court of Appeal held, among others, while Section 13 of the Constitution makes it a duty and responsibility of the judiciary, among other organs of government, to conform to and apply the provisions of Chapter II, Section 6 (6) (c) of the same constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any

²⁴ *ibid*, 229-230.

²⁵ *ibid*, ss 6 (6) (c).

²⁶ *ibid*, s 14 (2) (b).

²⁷ [1981]2 NCLR 337 CA.

organ of government has acted or is acting in conformity with the fundamental objectives and directive principles of state policy. It is clear therefore that Section 13 has not made Chapter II of the Constitution justiciable.

The Court further held that the obligation of the judiciary to observe the provisions of Chapter II is limited to interpreting the general provisions of the constitution or any other statute in such a way that the provisions of the chapter are observed but this is subject to the express provisions of the constitution.

A decade after the decision of the Court of Appeal in *Archbishop Okogie and 6 Ors v The Attorney-General of Lagos State*,²⁸ the same Court of Appeal per Nasir PCA, revisited the constitutional provisions with respect to Chapter II in the popular case of *Uzoukwu v Ezeonu II*²⁹ and maintained:

It is a common ground that citizens and aliens alike enjoy legal rights, popularly called civil rights which are ordinary enforceable by and justiciable in our court. Out of the civil rights, some have been chosen and elevated to the level of fundamental rights and are protected and enforced under the constitution. Other legal rights are themselves protected by law and many of them are justiciable. Such rights as the right to own property, the right to form clubs, the right to build houses, and so on are legal rights which are justiciable and enforceable in the courts. There are other rights which may pertain in a person which are either fundamental nor justiciable in the court given by the constitution as under the fundamental objectives and directive principles of State policy under Chapter II of the constitution.³⁰

Yakubu in x-raying Chapter II of the Constitution of the Federal Republic of Nigeria, asked the lingering question whether the relevant issues in this regard are no more than moral adjurations.³¹ He answer this crucial question in the positive.³² This article tends to agree with Yakubu,³³ to the extent that the provisions of Chapter II are more than moral adjurations because the performance of any government may be measured by how well it conforms in dealing with issues (rights) enshrined in the Fundamental Objective and Directive Principles of State

²⁸ *ibid.*

²⁹ (1991) 6 NWLR [Pt 200] 708 at 760 -761.

³⁰ *ibid.*

³¹ John Ademola Yakubu, *Constitutional Law in Nigeria* (Demyax Law Book 2003) 350.

³² *ibid.*

³³ *ibid.*

Policy. This article further maintains that even if the people are not able to enforce their right to ‘security and welfare’ in the court of law, for the inescapable fact that security and welfare of the people, roll into one, is the primary purpose of government, the government must have failed, if it fails to discharge its primary purpose.

Furthermore, the provisions of Chapter II could guide the legislature in making laws and the executive in formulating issues concerning the provisions of Chapter II.³⁴ It is not in doubt whatsoever that the present insecurity situation in Nigeria has indeed caused some Governors (Executives) and Members of House of Assembly to adjust their dispositions to the insecurity challenge. For instance, Governor Haruna Masari of Katsina State was reported to have said:

My administration should never have negotiated with Bandits. I do not regret but with the benefit of hindsight, we wouldn’t have done that, they are not pushing for any ideological view; they are not pushing for any religious view. They are simply bandits, criminals and thieves. Any person in the forest is a potential criminal and should be dealt with as such.³⁵

The Governor rolled out various policies, among others, shuts various phone charging centers in Katsina, closed up some roads, stopped movements of people between certain hours of the night and others.³⁶ In order to checkmate the negative activities of the bandits that are still being exerted on some communities, hoodlums, carjackers and other criminal activities within the state. Corollary, on 12th September, 2021 it was sadly reported again that bandits did not only capture the Nigerian Military base in Zamfara State and succeeded in killing 12 officers; but also seized their weapons and left some officers injured.³⁷

The obvious facts of intensive insecurity challenge speak for itself in resolving the issue as to where we are. The next imperative issue is how did we get to where we are. This issue is tackled under the various sub-head below:

³⁴ CFRN 1999 (as amended), Chapter II, 14 (2) (b).

³⁵ Segun Adewale Nigeria’s Security Undermined by Buhari’s Sentimental Attachment to Open Grazing says Morghalu <<https://punch.ng.com>> accessed on 11/09/2021.

³⁶ *ibid.*

³⁷ Oyindamola Olubayo, ‘Bandits Capture Nigeria Military Base in Zamfara’ <<https://gazellen.gr.com>> accessed on 12/09/2021.

3.1 Lack of Implementation of Federal Character Principle

A proper understanding of this challenge requires an understanding of Federal Character Principle. The Constitution of the Federal Republic of Nigeria provides:

The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few States or from a few ethnic or sectional groups in that Government or in any of its agencies.³⁸

A critical appraisal of the foregoing constitutional provision attest to the fact that the constitution being the *grundnorm* has made provisions for some tenets which, if applied, would ensure equal treatment and smooth running of governance. The wisdom of federal character principle being enshrined in the constitution is to seriously guide holders of legislative, executive and judicial powers in the performance of their duties, ranging from appointments of persons up to distribution of resources and execution of policies.

The spirit of federal character principle demands that there shall be no predominance of persons from few states or from few ethnic or other sectional groups in that government or its agencies.³⁹ The violations of this constitutional provision by the government has been rightly identified as one of the major issues that triggered hatred and rancor that culminated in the undesired criminality that pervaded every region in Nigeria for the past decades.

Lack of implementation of the federal character principle resulted in lopsided development, marginalization and inequalities in the country.⁴⁰ It has been reiterated in various quarters that the manner of distribution of basic infrastructure and appointment into key political offices have contributed to the insecurity challenges. As some commentators pointed out:

The present government of Nigeria has severally been accused of ethnic bias and the marginalization of some sections of the country in the distribution of basic infrastructure and these have greatly compounded the security of Nigeria. Key political appointments presently have been given to people of Northern extraction while

³⁸ CFRN 1999 (as amended), s 14 (3).

³⁹ Fedelis O Akpata and Tiben Benz Nwali, 'Security and the Rule of Law in Nigeria' (2013) (2) (3), *Review of Public Administration and Management* 158-171.

⁴⁰ Obarisiagbon & Akintoye (n 1) 47.

the South-East has been left in the cold. This perhaps explains the agitation for the Republic of Biafra and several security breaches that have accompanied the agitation. Besides, it is glaring that there is great disparity in life chances in Nigeria.⁴¹

This article agrees with the foregoing commentary to the extent that it epitomizes the violation of constitutional provisions in relation to the Federal Character Principle.

Corollary, the constitution of the Federal Republic of Nigeria is very mindful of the Federal Character Principle and provided for its application both at the State and Local Government levels in asserting:

The composition of the Government of a State, a Local Government Council, or any of the agencies of such Government or Council and the conduct of the affairs of the Government or Council or such agencies shall be carried out in such manner as to recognize the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation.⁴²

There are some criminal activities, for instance: kidnapping, carjackers, community clashes, among others, ravaging our cities, communities or villages today that are direct or indirect consequences of outright neglect of the foregoing constitutional provision. governors of states, chairmen of local government areas and even traditional rulers, are enjoined to be conscious of the diversity of the people within their domain. Some of these people are rich, while others are poor, some are well educated, others are uneducated. The spirit of the foregoing constitutional provisions,⁴³ demands that all categories of persons should be carried along in the day-to-day administration thereby creating and promoting a sense of belonging and loyalty among them. For instance, the incessant security crisis in Jos, Plateau State, Niger Delta Militants Groups, among others, have been traced in one way or the other to the inability of their governors and local government chairmen to properly address the diversity needs of the people.

3.2 Violation of the Rule of Law

The concept of Rule of Law has been identified from time immemorial by the early legal and political philosophers as the best form of rule that could guarantee stability, peace and unity of the people in any political entity. That

⁴¹ *ibid*; see also, E Nwadior, *Nigeria and Security Challenges' Vanguard Newspaper* (Benin City June 20 2011) 4-9.

⁴² CFRN 1999 (as amended), s 14 (4).

⁴³ *ibid*

is the reason Aristotle, the Greek philosopher, as far back as 2,000 BC maintained that the rule of law was preferable to that of any individual.⁴⁴

The concept of rule of law is devoid of exact and definite meaning to the extent that different writers over the years have ascribed varying meanings to it. Various ancient and modern jurists and philosophers such as Aristotle, Justice Scalia, Hayek, Joseph Raz, Fletcher, Bracton, Coke, Dicey, Wade, Locke, Nwabueze,⁴⁵ among others, have written on the concept of rule of law. The concept has been examined by these various jurists and philosophers based on the happenings and their experiences at different epoch. Wade⁴⁶ in his write up attributed five different meanings to the concept of the rule of law in the following context:

First, that everything must be done according to law. Secondly, government should be conducted within a framework of recognized rules and principles which restrict discretionary power. Thirdly, that disputes as to the legality of governmental actions are to be decided by judges who are wholly independent of the executive. Fourthly, law should be even-handed between the government and the citizens such that there would be no unnecessary privileges and exemption from law and; Fifthly, no one should be punished except for a legally defined crime or offence.⁴⁷

Wade, on his own part x-rayed the concept of rule of law to mean that governmental decisions and/or actions must not be in accordance with the personal discretions of men; but according to the dictates of rules of law. In other words, every action of the government on daily basis must be supported or be in tune with the prescription of the rules of law, which could be either substantive or procedural in nature. The meaning of rule of law as proposed by Professor Wade, extends to cover the actions of the judiciary. Wade contended that disputes as to the legality of government actions are also to be decided by judges who are independent of the executive. To this end, such judges must not be under the influence or control of the executive. Even punishments meted out by judges must not be according to the personal wishes of the judges; but in accordance with the law-that is clearly defined crime or offence. It is submitted that 'legally defined' means that such offence or crime must have been prescribed by a law and the punishment also stated by law.

⁴⁴ Aristotle *Politics*, Vol 111 in Davids (ed), *Transl Jowett*) 16, cited in Yakubu [n 31] 117.

⁴⁵ Garner, [n8] 1531-1532; see also, Yakubu (n 31) 74-75.

⁴⁶ Wade *Administrative Law* in Yakubu, *ibid*, 117.

⁴⁷ *ibid*, 117-118.

On his part, AV Dicey in his writing in 1885, articulated, expounded and popularized the concept of the rule of law in his publication on: *Law of the Constitution*.⁴⁸ This, Dicey did by considering the expression ‘rule of Law’ from three independent perspectives, namely:

a. Supremacy of the Law

To Dicey rule of law means the absolute supremacy or predominance of the ordinary law of the land, as opposed to the control of arbitrary power. The arbitrary exercise of power should not be accommodated and must not find its relevance in the scheme of daily governance. Therefore, no one should be punished except for a distinct breach of law, which must be proved in the ordinary legal parlance before a court of law.⁴⁹

It is in line with this principle of the rule of law that Justice Anwuli Chikere of the Federal High Court in Abuja has declared as illegal, unlawful and unconstitutional, the banishment of the deposed Emir of Kano, Sanusi Lamido Sanusi to Awe, a remote community in Nassarawa State. The court, in its judgment, delivered held that the restrictions placed on Sanusi, after his deposition on March 9, 2020, on allegations of insubordination, are a clear arbitrary violation of his right to freedom of movement and personal liberty granted by the Nigerian Constitution.⁵⁰

b. Equality of all Men before the Law

According to Dicey, the second independent meaning of the rule of law is equality of all men before the law. To Dicey, the rule of law means the equal subjection of all classes of persons to the ordinary law of the land and administered by the ordinary courts. The purport of Dicey’s contention is that everyone whatsoever may be the rank or condition should be subject to ordinary law and the jurisdiction of the ordinary court of the land.⁵¹

⁴⁸ AV Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan & Co Ltd 1959), <https://www.wildy.com/isbn/004324/an-introduction-to-the-study-of-the-law-of-the-constitution-10th-ed-paperback-hardback-in-1959-macmillan-co-ltd>, last accessed, 13/ 06/ 2024.

⁴⁹ *ibid.*

⁵⁰ Fadehan Oyeyemi, News Breaking: Court declares deposed Kano Emir Sanusi’s Banishment as Unlawful published on line on Nov, 30, 2021 <dailypost.ng-> accessed 30/11/2021.

⁵¹ *ibid.*

c. The Right of Man

In his consideration of the third meaning and implication of the rule of law, Dicey contended that the right of man is inherent and inalienable and that these rights of man, which includes right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to private and family life, right to freedom of thought, conscience and religion, right to freedom of expression and press, right to peaceful assembly, right to freedom of movement and right to freedom from discrimination are superior to any other law of the land except as otherwise stated by law.⁵² Cumulatively, this article agrees with both Wade⁵³ and Dicey,⁵⁴ to the extent that the rule of law does not give room for the violation of rights of man except as dictated by the rule of law itself.

However, it is contended that the idea of the rule of law on equality of men can only be jurisprudentially apposite to the extent that the men concerned are equal. This presupposes that where unequal men are treated equally, it amounts to inequality of treatment and becomes injustice. For instance, the immunity constitutionally granted to certain public officers such as the President, Vice President of the Federal Republic of Nigeria, the Governor and his Deputy,⁵⁵ at the state level are germane exceptions. Can it be said that the rule of law has been given its place of pride in the governance of Nigeria for the past decades? Has law been allowed to rule and reign supreme in the socio-political, economic, educational and cultural governance in this country? Or, has the fear of Karl Marx in his theory of state and law actually manifested? Karl Marx in his theory, otherwise called Marxist theory contended that law is an expression of the Will of the ruling class who uses law as an instrument of domination.

That law and its institution are part of the superstructure of society; and that law epitomizes the general economic relations within the society at any given stage of development. Put differently, law is no more than an institutional weapon forged and wielded by those who own the instruments of production.

Finally, that law provides the ruling class and owners of the instruments of production with the coercive power in a continuing class

⁵² *ibid.*

⁵³ Wade (n 46).

⁵⁴ Akpata & Nwali (n 39).

⁵⁵ CFRN 1999 (as amended), s 308 (3).

conflict between them and the proletariat.⁵⁶ Friedman,⁵⁷ expounding the Marxist theory of law propounded by Karl Marx and his ally, Engels postulated that ‘the conception of law as a superstructure seemed to deprive it of any autonomy.’ On the other hand, the conception of law as an instrument of suppression barred the way for a socialist ideal of law’.⁵⁸ This articles is of the opinion that the concept of rule of law as developed by Dicey,⁵⁹ projected the rule as a catalyst against the oppression and suppression of the bourgeoisie over the proletariat. To this end, the rule of law greatly ameliorated the negative influence of impersonal discretion of the legislative, executive and judicial power holders. On the other hand, the Marxist theory of law projected law as an instrument of suppression and agents of manipulation by the bourgeoisie (political power holders) against the proletariat.

The increase in insecurity syndrome in Nigeria unabated tends to confirm the reality of Marxist theory of law in the socio-economic, political governance in this country. Consequently, there is a clarion call upon the occupiers or holders of political powers in Nigeria to look inward in order to resist further violations of the tenets of the rule of law at the altar of personal and selfish interest.

3.3 Weak Judiciary

It has been observed in this article that the word ‘government’ is not limited to the ‘executive’, as there are three arms of government-the legislature, the executive and the judiciary.⁶⁰ Part II of the constitution,⁶¹ titled: Powers of the Federal Republic of Nigeria,’ provides for the ‘legislative powers,’⁶² ‘executive powers’,⁶³ and the ‘judicial powers.’⁶⁴ It is the combination of these three arms that form the ‘government’ both at the federal and state levels in the Federal Republic of Nigeria. The judicial powers of the federation is vested in the courts established for

⁵⁶ Ifedayo Akomolede, *Introduction to Jurisprudence and Legal Theory* (Niyak Print & Law Publications 2008) 81.

⁵⁷ W Friedman, *Legal Theory* (5th edn, Universal Law Publishing Co PRT Ltd 2011) 368.

⁵⁸ *ibid.*

⁵⁹ Dicey (n 48).

⁶⁰ CFRN 1999 (as amended), ss 4, 5 & 6.

⁶¹ *ibid.*

⁶² *ibid.*, s 4.

⁶³ *ibid.*, s 5.

⁶⁴ *ibid.*, s 6.

the federation; while the judicial powers of the state is vested in the courts established subject as provided by the constitution for the State.⁶⁵

Judicial power is the authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it.⁶⁶ It also covers a power conferred on a public officer involving the exercise of judgment and discretion in deciding questions of right in specific cases affecting personal and proprietary interests.⁶⁷ It simply means, the power conferred upon a court, tribunal or an independent body to interpret the constitution, laws made by the legislature or an instruments affecting rights, obligations and proprietary interests.⁶⁸ With this power, the judiciary is expected to perform its pivotal role. The role of the judiciary has been aptly stated by a renowned scholar as:

The judiciary, as the guardian of the law, is in a unique position to create among the people, the rulers and the ruled, an attitude of respect for the Constitution and for human rights, a habit of order and regularity in the conduct of public affairs, and a commitment to legality and stability generally.⁶⁹

It is incumbent to note at this point that before the upsurge of all manners of irresponsible behavior of certain political power holders that culminated in the emergence of insecurity challenges in Nigeria, the judiciary had lived up to expectation in the discharge of its duties and responsibilities as enshrined in the constitution.⁷⁰ For instance, in the case of *Eshugbayi Eleko v Government of Nigeria*,⁷¹ where the colonial governor claimed to possess an inherent executive power to have deported the traditional ruler of Lagos, the Judicial Committee of the Privy Council rejected in its landmark judgment the claim of the executive and stated that the executive:

⁶⁵ *ibid*, ss 6 (1) ([2]).

⁶⁶ Garner (n 8) 1012.

⁶⁷ *ibid*.

⁶⁸ Benjamin Ogwo *Impact of the Judiciary in Enhancing National Security* in Law, Security and National Development being proceedings of the 50th Conference of the Nigerian Association of Law Teachers (NALT) held at the Nnamdi Azikiwe University, Awka Anambra State between 11th– 6th June, 2017, 160-172.

⁶⁹ Ben Nwabueze, *The Judiciary as the Third Estate of the Realm* (11th edn Gold Press Limited 2007) 3.

⁷⁰ CFRN 1999 (as amended), s 13 (1).

⁷¹ [1931] A C 62 (PC).

[C]an only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.⁷²

History always repeats itself and consequently many years after the foregoing experience in the popular case of *Shugaba Darman v Federal Minister of Internal Affairs and Others*.⁷³ When the federal government of Nigeria deported Alhaji Shugaba Darman, who was the majority leader of the Borno State House of Assembly, on the allegation that he was a national of the Republic of Chad. The Borno State High Court of Justice found, as a fact, that the deportation was a product of political imbroglia between the Great Nigerian People's Party (GNPP), which was in power of the government in Borno State and the ruling party of the federal government, the National Party of Nigeria (NPN). The Court of Appeal, affirming the decision of the High Court, held the deportation unlawful and ordered the federal government not to enforce or to continue to enforce the deportation order, and to return Shugaba's Nigerian passport unlawfully impounded by the Authority to him forthwith. The federal government was also ordered to pay to Shugaba the sum of ₦50,000.00.⁷⁴

There are instances where the judiciary had also intervened to check the violations of constitutional provisions by the exercise of legislative power. The supreme court of Nigeria in the case of *Attorney-General, Bendel State v Attorney-General of Federation and Others*,⁷⁵ declared null and void, the Revenue Allocation Act, 1981, for non-compliance with the procedure laid down in the constitution for the making of law relating to money and other revenue matters. The court maintained that under a written constitution which prescribed a procedure for law-making, the courts are not only entitled to go outside the official copy of an Act in order to ascertain whether the prescribed procedure was followed or complied with, but had a duty to declare the Act null and void if it is passed without due form.⁷⁶

⁷² *ibid.*

⁷³ [1981] 1 NCLR 1; [1981] 2 NCLR 459 [HC].

⁷⁴ *Federal Ministry of Internal Affairs v Shugaba Darman* [1982] 3 NCLR 915 [CA].

⁷⁵ [1982] 10 SC 1.

⁷⁶ Privy Council in the *Bribery Commissioner v Ranasinghe* [1965] AC 172; *Attorney-General Abia State & Ors v Attorney-General of the Federation & Ors* [2006] 34 NSCQR 220, SC.

It is not in doubt, that by the pragmatic posture and some elements of judicial activism, the judiciary had hitherto protected the country from unnecessary break down of law and order, insecurity challenges of all forms which may have arisen as a result of clashes between the legislature and the Executive, among others. For instance, the crisis between the National Assembly and the Executive during the Presidency of Chief Obasanjo, and that between Chief Obasanjo the President and his Vice, Atiku were redeemed by the intervention of the judiciary⁷⁷.

However, the judiciary that is expected to be the watch dog over the legislature and the executive, seems to have been reduced to puppet by the power drunk executive in violating the principles of separation of powers.

It is glaring that since the unexpected unlawful and/or illegal removal of the Hon. Justice Walter Samuel Nkanu Onnoghen, the Chief Justice of Nigeria (CJN), by the Executive (Presidency), the judiciary was weakened. This ugly event in no doubt had its negative effect on the pragmatic posture and judicial activism of our judiciary. And since then the upsurge in the insecurity challenges in this country has been unabated.

3.4 Unemployment and Poverty

Unemployment is the quality, state, or condition of not having a job even though available for work and perhaps seeking it.⁷⁸ On the other hand, poverty is the condition of being indigent, the scarcity of the means of subsistence. It is also dearth of something desirable. It is equally a level of income below the threshold considered necessary to achieve a sufficient standard of living.⁷⁹ It is a fact that speaks for itself that for the past two decades, Nigeria has been ravaged with high level of unemployment and poverty leading to hunger pervading every segment of our society. The constitution of the Federal Republic of Nigeria in its Economic Objective provision states:

⁷⁷ Benjamin Ogwo, *Impact of the Judiciary in Enhancing National Security* (n 58) 163, where it was stated ‘...the judiciary has succeeded in a number of cases in Nigeria where there would have been a breakdown of law and order either as a result of political conflict or disputes between individuals themselves and between individual and one of the arms of the Government or between the arms of the Government themselves’. The effort of the judiciary in settling this upright was really acknowledged as the country was delivered from the imminent danger of internal security by properly interpreting the provisions of the Constitution, s 239 (1) 11.

⁷⁸ Garner (n 8) 1838.

⁷⁹ *ibid*, 1414.

The state shall, within the context of the ideals and Objectives for which provisions are made in this Constitution,⁸⁰ among others:

- (a) harness the resources of the nation and promote national prosperity and an efficient, a dynamic and self-reliant economy
- (b). Without prejudice to the right of any person to participate in areas of the economy within the major sectors of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.

Sub-section 2 of section 16 provides that ‘[t]he State shall direct its policy towards among others, ensuring that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and persons, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.’⁸¹

The Government of the Federation and that of some States have failed and/or neglected to harness the resources of this nation or their States in order to promote national and State prosperity and to protect the right of the citizens to engage in economic activities as prescribed by both the letter and the spirit of the constitution. Corollary, the Government of the day has obviously failed and/or neglected to direct its policy to ensure that suitable and adequate shelter, suitable and adequate food, reasonable national and State minimum living wage, old age care, and pension, among others, are provided for all citizens.⁸² Nigerians does not need a prophet or a soothsayer, to attest to the fact that, the increased rate of insecurity situation in Nigeria today is largely attributed to the failure and/or neglect of the Government in living up to expectations by providing the basic necessities of life such as shelter, food, clothing, etc. It is on this basis that this paper agrees with the submission:

A poor economy with high poverty and unemployment rate appears to have been the bane of the Nigerian society. Every year institutions of higher learning produce many graduates who regrettably, are thrown into the labour market with no hope in sight for jobs. In an effort to keep the body and soul together, some become frustrated and go into violent and criminal acts such as the “lucrative” kidnapping, militancy and armed robbery.⁸³

⁸⁰ CFRN 1999 (as amended) SS 16 (1) (a) (d).

⁸¹ *ibid*, s16 (2)(d).

⁸² *ibid*; see also generally s16 (1) (a-d).

⁸³ Obarisagbon & Akintoye (n 1) 47.

There is no doubt that the foregoing statement is the fulfillment of the common saying that an idle mind and/or hand is the Devil's workshop.

3.5 Lack of Acknowledgement of Nigeria as a Secular State

The constitution of the Federal Republic of Nigeria in its chapter iv titled 'Fundamental Rights'⁸⁴ made an elaborate provision for various rights, freedoms and privileges, which, among others, provides:

Every person shall be entitled to freedom of thought, conscience and religion including freedom to change his religion or belief and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.⁸⁵

The Constitution further provides:

No person attending any place of education shall be required to receive religious instruction to or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parent or guardian.⁸⁶

Again, '[n]o religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.'⁸⁷

The wisdom of the founders of this nation acknowledges the fact that Nigeria was and still a conglomeration of many different religious adherents and consequently made provisions for each individuals or community to voluntarily accept any religious belief of his or their choice including the right to voluntarily change such a religious belief. The above constitutional provisions with respect to freedom of thought, conscience and religion happens to be one of the best virtues bequeathed upon the future generation of this country. Eventually, the subsequent Nigerian *grundnorm* incorporated this right in its provisions.⁸⁸ It is more interesting to note that the current constitution provides that 'The

⁸⁴ CFRN 1999 (as amended), s33– 45.

⁸⁵ *ibid*, s 38 (1).

⁸⁶ *ibid*, s 38 (2).

⁸⁷ *ibid*, s 38 (3).

⁸⁸ Right from the Colonial Constitutions of Clifford Richard Macpherson Lyttelton and Independent (1960) up to the 1963 Republican 1979 1989 and 1999 acknowledged the wisdom to the extent that none of these constitutions ever attempted imposition of a particular religion or belief

[G]overnment of the Federation or of a State shall not adopt any religion as State Religion.⁸⁹

It is the view of this paper that from history as long as citizens were allowed to practice their religious belief without the government giving priority to any religion over the others, there has been stability, peace and unity in Nigeria. However, when suspicion and mutual distrust entered the body politic with reference to the alleged preference of some religious adherents over the others being manifested even in the political appointments, promotion etc., insecurity challenges became the order of the day all over the country.⁹⁰

It is not in doubt that there are two dominant religions (Islam and Christianity) in Nigeria. Therefore, it is high time the political leaders of this Nation-Nigeria, whether at the Federal, State or Local Government levels acknowledged and practiced the wisdom of the early founders of this country in ensuring that Nigeria is governed as a secular State in every facet of the governmental actions, without prejudice to any religious adherents.

3.6 Corruption

The word ‘corruption’ has become a household name in every nook and cranny of this country, yet, it is not amenable to generally acceptable definition. It has a myriad of meanings as a result of its appearance in many colours. It has been defined as a ‘depravity, perversion, or taint; an impairment of integrity, virtue or moral principle and especially the impairment of a public officials duties by bribery’.⁹¹ It has been stated that ‘the word corruption indicates impurity or debasement and when found in the criminal law it means depravity or gross impropriety’.⁹² It also means a fiduciary’s or official’s use of a station or office to procure some benefits either personally or for someone else, contrary to the rights of others; an act carried out with the intent of giving some advantage inconsistent with official duty or the rights of others.

⁸⁹ CFRN 1999 (as amended), s10.

⁹⁰ Obarisagbon & Akintoye [n1] 47; see also Nudubusi Okolo Purity and Theresa Aniguogu, *Insecurity in Nigeria: the Implication for Industrialization and Sustainable Development* (2019) (6) (5), *International Journal of Research in Business Studies and Management* 7-16, where the author stated: ‘...identified ethno-religious conflict as a major source of insecurity in Nigeria...Frequent and persistent ethnic conflicts and religious clashes between the two dominant religions (Islam and Christianity), present the country with a major security challenge...’.

⁹¹ Garner (n 8) 435.

⁹² Rollin M Perkins & Ronald N Boyce, *Criminal Law* (3rd edn, E Bay 1982) 855.

Corruption is a cankerworm that bedeviled the body politic as well as socio-economic life of Nigerian and has been identified as the bane of Nigeria problem having pervaded the fabric of every Nigerian society. Hence, it is defined to include bribery, fraud and other related offences, including any action or commission initiated by any member of an organization against the rules, regulations, norms and ethics of organization, the purpose of which is to meet the selfish ends of such a member.⁹³

According to International Monetary Fund and World Bank, it is the abuse of public office for private gains; and anti-social behavior condemning improper benefits, contrary to legal and normal norms undermining capacity of constituted authority to secure the welfare of her citizens.⁹⁴

There are various legislations in Nigeria providing for different forms of punishments for corrupt practices with an aim of ameliorating the urge for corruption. These includes the Economic and Financial Crimes Act, Money Laundering Act, Code of Conduct Tribunal Act, Advanced Fees Fraud and Other Related Offences Act; Independent Corrupt Practices and Other Related Offences Act; the Criminal Code, the Penal Code, the Constitution of the Federal Republic of Nigeria (as amended) etc.

It is discouraging that despite the existence of these legislations to combat corruption, it has remained a menace in Nigerian body-politic. Corruption manifest in different dimensions as a human right violation which according to Igonoh it does not require much effort to identify, at least in its vicious circle. For instance, where it is common in Nigeria, genuine drug purchased is corruptly compromised the right to life or good health of members of the public is threatened or violated; right to education is violated where funds meant for education are embezzled, right to work is violated where nepotism, tribalism, sectionalism and bribery displace qualification, right to adequate standard of living is compromised etc.⁹⁵ The end result of people being denied of their legitimate rights, entitlements and privileges as a result of corruption is to resort to committing all forms of criminality.

⁹³ Corrupt Practice and other Related Act, 2000, s 2.

⁹⁴ Osoba S *Corruption in Nigeria Historical Perspective* cited in 'Interrogating State of Nigerian Sovereignty from the Spectacle of Marxian Dialectics: Search for Philosophical Antidote to Contemporary Socio-Political-Challenges in Nigeria' a paper presented by Joshua A Igonoh at the University of Jos Alumni Conference held in Kogi State University, Anyigba on the 10th Sept, 2021, 9.

⁹⁵ *ibid*, 10.

4. Some Instances of Challenge of Insecurity in Nigeria

In the last decade, we have witnessed challenges of Insecurity by domestic terror and insurrectionist groups. In the Northern part of the country, there have been Islamic State and *El-Shabab Islamic* terrorist and *Boko Haram* terrorist that have been fighting the Government throughout the North East and North West of the country. In the Eastern part, the Indigenous People of Biafra (IPOB) terrorizing innocent people and destroying the properties of the Federal Government of Nigeria while in the Western part of the country various groups of Odua Yoruba Nation movements who have reconvened their campaigns to secede from Nigeria.⁹⁶

The impasse of Nigerian Civil War between 1967–1970 is another instance of insecurity that engulfed the nation's resources especially the human resources to the extent that an estimated loss of two (2) million persons.⁹⁷ In the same vein, between 2011 and 2021, the *Boko Haram* terrorists have killed over 27,000 persons with an estimate of two (2) million displaced in Nigeria.⁹⁸ The herders-farmers attacks culminating in loss of several lives in Nigeria is not left out at all. In the first six (6) months of 2018, over 1,300 Nigerian were killed while an estimated 300,000 people were displaced in the said violence.⁹⁹

It is evident from practical experience that greeted Nigeria since 2009 till date, there is no territorial area of this country that has been spared of one form of insecurity or the other. The armed conflict situations and other security challenges in the North East, some parts of the North-Central States such as Plateau, Benue, Kogi States, including the Federal Capital Territory, Abuja, has indeed posed a fundamental challenge to the country's security for several years. During Buhari's administration, despite the several official pledges and declarations of being in charge and in control of the insecurity challenges, efforts largely failed to yield desired outcome. It was as a result of the several acts of security insurgences and armed banditry bomb explosions that pervaded many States such as Gombe, Borno, Katsina, Benue, Plateau, Niger, Kano and Kaduna which raised the questions about the effectiveness of

⁹⁶ Sam Amadi, 'Managing Ethnic and Religious Agitations in Nigeria through Rule of Law' in Chijioke Chris Ohuruogu, *and others* (eds), *Oriented Strategies in Emerging Legal Frontiers in Nigeria Cross Cutting Issues on Governance, Security and Politics* (Malthouse Law Books Vol 1 2023) 47-48.

⁹⁷ Adeniyi Olatunbosun, *International Law Dimensions to the Security Challenges in Nigeria*, in Chijioke Chris Ohuruogu and others (eds) *ibid* 284, 287.

⁹⁸ *ibid*.

⁹⁹ *ibid*.

security apparatus and intelligence agencies, that made some senior citizens of the country to call for a re-examination of the nation's security policies. For instance, Professor Iste-Sagay SAN,¹⁰⁰ advised President Muhammed Buhari:

To allow ordinary citizens to bear fire arms in order to protect themselves arguing that the state of insecurity in the country has assumed a huge dimension and communities and individuals need to defend themselves against attacks. Reacting to state of security challenges in Nigeria, Sagay remarked; we should all be armed so that anybody coming to attack you will know that he too has no chance of surviving, communities should be armed, individuals should be armed and that is the balance of terror.¹⁰¹

The current threat of insecurity in Nigeria is terrorism. The primary terrorist threat in Nigeria comes from *Islamic State West Africa (ISWA)* and *Boko Haram*. These groups are mainly based in North East Nigeria in Borno, Yobe and Adamawa States.¹⁰² Depending on where one lives, the activities of *Boko Haram*, Communal clashes, religious riot, the Niger Delta, etc are threats to life, destruction of lives and properties, productive assets, can have negative impact on both social and economic lives of the society – which constitute different types of insecurity in Nigeria. The South West is plagued by a surge in cybercrime, armed robbery, kidnapping, domestic crimes, extrajudicial killings, herder-farmer crisis.¹⁰³

The growing helplessness of Nigerians over insecurity has continued to present symptoms of State Security apparatus proving incompetent or over powered by some vested interest. The world report of 2023 is to the effect that over 95 million Nigerians are living in poverty on about US\$1.90 a day according to estimates by the World Bank Human Rights Watch Research in 2021.¹⁰⁴ Food insecurity is another area of concern in Nigeria. Over 25 million Nigerians at high risk of food insecurity in 2023. An estimated 2.9 million people are currently critically food insecure (Cadre Harmonized Phase 3 or Worse). This figure is projected to increase to 4.3 million.¹⁰⁵

¹⁰⁰ Chairman, Presidential Advisory Committee Against Corruption (PACAC).

¹⁰¹ Olatubosun (n 97) 293

¹⁰² Current Threat of Insecurity <https://www.gov.uk/safety-and-security> accessed on 30/4/2024.

¹⁰³ Insecurity: A Norm in Nigeria <the cable www.thecable.ng> accessed on 30/4/2024.

¹⁰⁴ Human Rights Watch www.hrw.org accessed on 30/4/2025.

¹⁰⁵ UNICEF <https://www.unicef.org>> 25 million accessed on 30/4/2024.

The Activities of the *Boko Haram* and the Terrorist including other forms of insecurity indeed culminated in the enactment of ‘The (Prevention) of Terrorism Act, 2011’ by Goodluck Ebele Jonathan, Former President of the Federal Republic of Nigeria. Between then (2011) and now, the insecurity situation in Nigeria had increase in a more complex and dangerous manner. Could it be lack of political will on the path of the leaders or they (leadership) are incapacitated in terminating the insecurity challenges? The bombardment of the Nigerian Defence Academy (NDA) Kaduna and the capture of Nigeria Military Based (NMB) in Zamfara by the terrorist wherein twelve (12) officers were reported to have been killed and other wounded,¹⁰⁶ is a pointer to the fact that the future of Nigeria, security wise is bleak

It is of interest to note that other serious meaningful Nigerian lent their voices to the call for liberalization of security policies to allow every average Nigerians access to arms without restrictions.¹⁰⁷ The doctrines of self-defence largely support the call of these notable Nigerians to allow every average Nigerians to access arms. On the other hand, it may be argued that, allowing that would amount to going back to the dark age (state of nature)¹⁰⁸ of the survival of the fittest.

5. Conclusion

This article has amply discussed the challenges of insecurity manifestations and the future of Nigeria; with particular emphasis on the legal perspective. It is the finding of this research that there is enough legislation, especially the provisions of the constitution as well as other criminal legislations which if genuinely implemented would bring an end to the criminal activities in this country. The existence of legislation is one thing and the execution or implementation of it to achieve the desired intention is another issue entirely. Having x-rayed the socio-political cum economic situation *vis-à-vis* the available legislation in our legal jurisprudence, it is the finding of this research, that what is expected of us as a nation in order to terminate or at least ameliorate the insecurity challenge is the political will of the political power holders in

¹⁰⁶ Olubayo (n 37).

¹⁰⁷ Olatubosun (n 97) 292, referring to where General Y Danjuma, former Chief of Army Staff and Minister of Defence has on March 24, 2018 called on Nigerians to rise up and arm themselves against the murderous attacks by the fulanis herdsmen. In the same vein, Prof B Nwabueze and Governor Samuel Ortom of Benue State supported the call for Nigerians to arm themselves in the face of killing across the country.

¹⁰⁸ Ese Malami, *The Nigerian Constitutional Law* (Princeton Publishing Co 2006) 10.

Nigeria. Once there is a will there must be a way out and consequently there would be a solution.

6. Recommendations

Consequent upon the conclusion drawn in this article, the following recommendations are pivotal, if not imperative:

First, Government should as a matter of utmost urgency and concern; and for the future of this country embark on full implementation of the Federal Character Principle whereby it takes into consideration the diversities of the people of Nigeria in the political appointments, promotions and provisions of infrastructure.

Second, Government should deliberately and consciously allow the rule of law to prevail by ensuring that the fundamental rights of the people are giving place of pride in governance and not to use legal institutions such as Economic and Financial Crime Commission (EFCC), the police and other security agents as instruments of oppression of political opponents; and for selfish ends.

Third, considering the fact that the security and welfare of the people is the primary purpose of the government, it should extend the frontiers of security beyond the police and other security agents by legalizing the institution of Community Policing whereby the traditional rulers and community leaders be made accountable for the security of their communities.

Fourth, the Government should improve on the welfare of the people by creating jobs and providing employment opportunities in order to drastically reduced or eradicate poverty.

Fifth, Government should look inward with intention to assert the necessary Political Will and determination to deal decisively with the cankerworm of corruption in order to salvage the future of this country.

Last, but not the least, government should acknowledge the constitutional provision that Nigeria is a secular State and be resolute to abide by it and not to directly or indirectly support or prefer a particular religion above the other.

Preserving National Security through the Rule of Law: An Appraisal of Nigeria's Approach under Buhari's Administration

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Omotayo Blessing Nwune*** and Connie J Kurah****

Abstract

National security and the rule of law are essential to the well-being and existence of any state and its citizens. The foundation of democracy is the rule of law, and the application of national security must be through the instrumentality of the rule of law. Neglecting the rule of law purportedly for the protection and maintenance of national security is to destroy the state gradually but persistently. National security must be protected and its principles applied within the ambit of the law. It is against this backdrop that this article examines both the concepts of national security and the rule of law, their characteristics, and the legal basis for their application in Nigeria. The article focuses on Buhari administration's approach to resolving potential and actual conflict in the application of both concepts.¹ The article finds that in situations where there are conflicts between the two, the Buhari administration preferred national security on considerations that completely emasculate the more profound and self-sustaining principles of democracy and good governance. The article concludes that national security principles and policy implementation must only be done through the rule of law; and recommends, among other things, that the protection of national security requires a broader interpretation and definition of the scope of its application that preserves and enforces the rule of law.

Keywords: Buhari administration, National security, rule of law, democracy

1. Introduction

Security has been one of the issues on the front burner of Nigerian Politics in recent years. This is more so with the escalation in crimes such as kidnapping, bombing, mass shooting, terrorism, robbery, and

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¹ This covers the period from his assumption of office in 2015 to 2023.

destruction of property.² The farmer-herder clashes have also resulted in the loss of several lives, properties, and increased food prices.³ These security issues raise national security concerns from a broad spectrum of the idea of national security. It is therefore deducible that some contributory problems militating against the attainment of national security in Nigeria include non-adherence to the rule of law, governance issues, religious extremism, corruption, nepotism, and unemployment.⁴ While the government claims to be working tirelessly to curb these problems, the menace has significantly escalated.

The connection between national security and the rule of law is symbiotic. There is a mutual dependency of both concepts on each other, such that a disregard or abandonment of one, will lead to the weakness or legal and actual invisibility of the other. It is necessary to point out here that upholding national security within the boundaries of the rule of law is of great significance. This is because there is no gainsaying that the degradation of Nigeria's national security will pose severe threats to the unity and development of the Nigerian nation.⁵ Secondly, ensuring the implementation of the principles of national security within the boundaries of the rule of law will guarantee the overall stability and well-being of the nation. When national security measures are implemented in accordance with the rule of law, it fosters a sense of trust

² Adejuwon Soyinka, 'Nigeria's Spiralling Insecurity: Five Essential Reads' *The Conversation*, 17 July 2022 <<http://theconversation.com/nigerias-spiralling-insecurity-five-essential-reads-186696>> accessed 11 June 2024.

³ International Crisis Group, 'Stopping Nigeria's Spiralling Farmer-Herder Violence | Crisis Group' (26 July 2018) <<https://www.crisisgroup.org/africa/west-africa/nigeria/262-stopping-nigerias-spiralling-farmer-herder-violence>> accessed 11 June 2024.

⁴ 'Nigeria's Security Crises - Five Different Threats' (18 July 2021) <<https://www.bbc.com/news/world-africa-57860993>> accessed 13 June 2024; M Ozonnia Ojielo, 'A Critique of the Nigeria National Security Strategy 2019' in Emeka Duruigbo, Remigius Chibueze and Sunday Gozie Ogbodo (eds), *International Law and Development in the Global South* (Springer International Publishing 2023) <https://doi.org/10.1007/978-3-031-13741-9_18> accessed 13 June 2024; Chris I Nwagboso, 'Nigeria and the Challenges of Internal Security in the 21st Century' *European Journal of Interdisciplinary Studies* (2018) 4 <https://revistia.org/files/articles/ejis_v4_i2_18/Chris.pdf> accessed 15th June 2021

⁵ JI Ebeh, 'National Security and National Development: A Critique' *AFRREV IJAH: An International Journal of Arts and Humanities* [2015] (4) 11; Seseer P Mou and Dan Mou, 'Peace, Security and Sustainable National Development in Nigeria: Problems and Prospects' *International Journal of Peace and Conflict Studies* 4 <https://www.academia.edu/42181093/peace_security_and_sustainable_national_development_in_nigeria_problems_and_prospects> accessed 13 June 2024.

in government institutions and promote a stable and secure environment for all citizens.

However, there have been instances where the Nigerian government prioritised national security over the rule of law, especially during the Buhari administration, where the government's handling of certain security challenges led to actions that arguably infringed on the rule of law. One such instance is the prolonged detention of individuals with or without trial under the guise of national security threats. This approach raised concerns about the government's actions which affected the rule of law in Nigeria. Glaringly, when national security takes precedence over the rule of law, it can lead to the erosion of civil liberties and a breakdown of trust in the government's commitment to upholding citizens' rights.

There may exist certain exceptional circumstances, where prioritising national security over the rule of law is necessary to protect citizens from imminent threats. However, it is crucial to emphasise that while national security is paramount, it should not come at the cost of undermining the fundamental principles of justice, fairness, and the rule of law. Thus, there is a need to strike a balance with the rule of law in protecting national security. This paper seeks to interrogate the extent of the balance of implementation of national security and the rule of law during the Buhari administration. The paper is divided into five major parts which include the introduction, clarification of relevant concepts, the legal basis of national security in Nigeria, an overview of the Muhammadu Buhari administration and the conclusion.

It is worthy of note to mention that the overview of the Buhari administration will be subdivided into two parts. The first is the rule of law under his administration and critical issues such as disobedience to court orders, harassment of the judiciary, clamp down on social media, disregard for federal character principle, and appointment of dead persons into political offices will be discussed. The second subdivision will be an analysis of the extent to which the Buhari administration balanced the implementation of the principles of national security and the rule of law.

2. Clarification of Concepts

2.1 National Security

Security is an essential component of national security, and as its scope continues to expand daily, its definition becomes more complex. Security is a concept that can be applied to various fields, resulting in a wide range of interpretations and perspectives. Therefore, any process

involving allaying any threat to people and their valuable possessions may be referred to as security.⁶

Traditionally, national security can be described as a nation's ability to preserve its internal values from external threats. It relates to maintaining foreign relations and its impact on a state's internal security per se. It is used to justify the maintenance of armies, the development of new weapons and systems, and the manufacture of armaments. Thus, Anton Grizold⁷ asserts that national security at the present level of social development is linked almost exclusively with the need for a sovereign nation-state to protect its physical integrity. This perspective looks at the events that necessitate the use of force, how it impacts individuals, states, and society, and the precise strategies states adopt to avert or engage in war.

However, since the end of the Cold War, the definition of national security has been broadened beyond the narrow military conception to include human security, which combines elements of defence, economic and fundamental human rights.⁸ It also incorporates other issues such as environment, politics, economic and social threats that endanger the lives and properties of individuals rather than the concentration on the state's survival.⁹ This means that a purely military definition does not recognise that the greatest threat to a state's survival may be environmental, health, political, social, and economic concerns rather than military threats.

Instructively, section 1, part 1 of the Latvian National Security Law refers to national security as 'a state attained as a result of joint, purposeful measures implemented by the state and society, in which the independence of the state, its constitutional structure, and territorial integrity, the prospect of free development of society, welfare and stability are guaranteed.'¹⁰ Thus, security is development, and without

⁶ Muyiwa Afolabi, 'Concept of Security' *Readings in Intelligence & Security Studies* (2015) <<https://www.researchgate.net/publication/303899299>> accessed 15th June 2021.

⁷ Anton Grizold, 'The Concept of National Security in the Contemporary World' *International Journal on World Peace* [1994] (11) (3) 37-53.

⁸ Muyiwa Afolabi (n 6).

⁹ *ibid.*

¹⁰ National Security Law of the Republic of Latvia (2015) <https://www.google.com/ur?sa=t&source=web&rct=j&url=https://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/National_Security_Law.doc&ved... GLbk2F> accessed 5th July 2021.

development, there can be no security.¹¹ However, it must be noted that National security may, in appropriate situations, incorporate traditional military activity. This implies that national security, as a concept, should be construed broadly to include economic, social, environmental, food, quality of life, and technical securities. Therefore, national security can be described as the whole of a nation's effort to safeguard and preserve the state, its institutions, people, and assets, as well as the well-being of its entire citizenry. The decisions and activities necessary to protect domestic core values from external threats and the core values that ensure citizens' general well-being delineate national security policy.

2.2 Rule of Law

As a concept, the rule of law means that states must act in accordance with the laws. These laws must meet specific minimum criteria of fairness and justice. Plato and other early philosophers argued that if the law is subservient to another authority and has none of its own, the state is on the verge of collapse.¹² In his work 'The Politics' edited in 'The Politics of Aristotle,'¹³ Aristotle agrees with Plato and insists that governments must be bound by the law as an ultimate end to prevent arbitrary rule and the abuse of power.¹⁴ Montesquieu popularised the principle of the Rule of Law with his work on the doctrine of separation of powers. He propounded that the effective practice of the rule of law is the separation of powers between the arms of government – particularly, the separation of judicial power from executive and legislative authority.¹⁵ He emphasised the importance of separating and balancing powers between the legislative, the executive, and the judiciary.

The nineteenth-century British jurist AV Dicey propounded three critical features of the rule of law.¹⁶ First, it refers to the absolute

¹¹ Robert McNamara, Address to the Board of Governors by Robert McNamara (1968) available at <<https://documents.worldbank.org/curated/en/651921468163164101/>> accessed 12 June 2021.

¹² Anthony Valcke, 'The Rule of Law: Its Origins and Meanings (A Short Guide for Practitioners)' (March, 1 2012) SSRN <<http://ssrn.com/abstract=2042336>> accessed 21st June 2021.

¹³ WL Aristotle and Newman, *The Politics of Aristotle* (William Lambert Newman ed, Arno Press 1887) <<https://philpapers.org/rec/ARITPO-13>> accessed 11 June 2024.

¹⁴ Other legal philosophers, such as John Locke, and Jean-Jacques Rousseau, lend great support for the idea of the rule of law which will be too voluminous to consider here.

¹⁵ Montesquieu, Charles De Secondat, Baron De, 'The Spirit of Laws' (1748) <<https://www.loc.gov/item/2021667563/>> accessed 11 June 2024.

¹⁶ Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan and Company 1885).

supremacy or superiority of regular law over the impact of arbitrary power, implying the exclusion of arbitrariness.¹⁷ Second, the rule of law ensures ‘equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts’.¹⁸ Third, Individual rights are protected under the rule of law, not by statutory guarantees, but by traditional private law remedies accessible against those who unjustly interfere with them, regardless of whether they are private citizens or state authorities.¹⁹

The United Nations defines the rule of law as ‘a principle of governance in which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards’.²⁰ Therefore, the rule of law necessitates that, within the boundaries of the law-making power granted by the higher law of the Constitution, the law must limit the discretion granted to the government in subjects affecting the individual interests of citizens, to limit the scope and breadth of governmental arbitrariness.²¹ This means that governance should be conducted within the framework of recognised rules and principles which restrict discretionary power.²² As a constitutional concept, it is the cornerstone of governance in any given polity.²³ It depends, in principle, not only on the existence of proper protections against executive abuse of power but also on the existence of a functional government capable of maintaining peace and order as well as

<http://books.google.ie/books?id=af92IaApWo8C&printsec=frontcover&dq=AV+DICEY&hl=&cd=3&source=gbs_api> accessed 11 June 2024.

¹⁷ Ricardo Gosalbo-Bono, 'The Significance of the Rule of Law and its Implications for the European Union and the United States' *University of Pittsburgh Law Review* [2010] (72) 230.

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ United Nations Security Council, 'The rule of law and transitional justice in conflict and post-conflict societies' (Report of the Secretary-General, 23 August 2004) <https://www.un.org/ruleoflaw/blog/document/>> accessed 3rd July 2021.

²¹ Ben O Nwabueze, *Constitutional Democracy in Africa*, (C Hurst & Co London, Vol 3) 20.

²² Nnamdi J Aduba and Sam Oguiche, *Key Issues on Constitutional Law*, (Nigerian Institute of Advanced Legal Studies 2014).

²³ Mary-Imelda Obianuju Nwogu, 'The Rule of Law in Governance in Nigeria' (2010), *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 218-235.

ensuring adequate economic and social conditions for societal living.²⁴ The Rule of Law is a dynamic concept employed to safeguard and advance the will of the people and the political rights of individuals. It aims to create social, economic, educational, and cultural conditions that allow individuals, whether dependent or independent, to realise their dignity and achieve their legitimate aspirations.

A cursory look at the above definitions will reveal some fundamental characteristics of the rule of law that require consideration. Darragh K Connell²⁵ elaborately explained the formalistic requirements of the rule of law. His first postulation is that law must be accessible and in so far as possible, intelligible, clear, and predictable. The European Court of Human Rights puts the point explicitly when it stated, ‘the law must be adequately accessible, a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen regulate his conduct.’²⁶ Access to justice is unquestionably an essential yardstick for judging the rule of law and the quality of government in every society.²⁷

Second, laws should be applied in accordance with legal principles rather than arbitrary discretion so that questions of legal rights and liability are typically addressed by applying the law rather than exercising discretion. These laws should apply universally save where exceptions are justified to the extent that objective differences justify differentiation. Third, the law must incorporate adequate protection of human rights. The preamble to the Universal Declaration of Human Rights, 1948 amplifies this when it states that ‘it is essential if a man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that the rule of law should protect human rights.’

Fourth, justice should be administered promptly. This element provides for resolving *bona fide* civil disputes, which the parties themselves cannot resolve without prohibitive cost or inordinate delay. Fifth, government officials must execute their authority within the confines of the law. Therefore, public officials at all levels must use the

²⁴ International Commission of Jurists, ‘African Conference on the Rule of Law’ Lagos, Nigeria (Jan 3-7 1961) *A Report on the proceedings of the Conference* <<https://www.icj.org>> Accessed 3rd July 2021.

²⁵ Darragh K Connell ‘Defending the Rule of Law in Challenging Times: A Legal & Philosophical Discourse’, (2016) 1 *Cambridge Law Review* 14.

²⁶ *Silver & Others v the United Kingdom* (Application No 5947/72).

²⁷ Nlerum S Okogbule, ‘Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects’ [2005] [3] [2], *Sur - International Journal on Human Rights*.

powers entrusted to them reasonably, honestly, and for the purpose for which they were vested without exceeding its bounds. Fairness and justice should be at the heart of the rule of law's administration. The state's adjudicative procedures must be fair and equitable.

Lastly, domestic practices should respect international law obligations. Thus, the rule of law principle requires States to comply with their international law obligations, whether deriving from a treaty or international custom and the practices governing a nation's conduct. In any democratic nation, the doctrine of the rule of law is the foundation of the legal system. In Nigeria, the Constitution, like any other democratic constitution, embodies and symbolises the rule of law.²⁸ Section 1 of the 1999 Constitution²⁹ provides:

- (1). This Constitution is supreme, and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria;
- (2). The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution;
- (3). If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and the other law shall, to the extent of the inconsistency, be void.

It could be deduced from the foregoing that the Constitution is the barometer by which the constitutionality or otherwise of a statute is measured.³⁰ Also, the Constitution boldly states in section 14(1)³¹ that 'The Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice.' Accordingly, the Nigerian Constitution is the foundation and basis for the rule of law in Nigeria. In *Governor of Lagos State v Ojukwu*,³² the Supreme Court held that the Nigerian Constitution is based on the rule of law, by which it is meant that everything must be done in accordance with the law. Thus, the supremacy of the law is established by the Constitution. This presupposes the principle of equality before the law by which individuals in society are treated equally without discrimination.

²⁸ Duru Onyekachi and Wisdom Ceazar, 'Justifying the Assertion That 'In Nigeria, The Function of the Rule of Law is Performed by a Supreme Constitution,' <<http://ssrn.com/abstract=2147375>> accessed 10th July 2021.

²⁹ Constitution of the Federal Republic of Nigeria 1999 (as amended).

³⁰ *AG Lagos State v AG Federation* (2003) 12 NWLR 244.

³¹ Constitution of Nigeria, 1999.

³² (1986) 1 NWLR (Pt 18) 621, 638.

3. Legal Basis of National Security in Nigeria

3.1 Constitution of the Federal Republic of Nigeria, 1999 (as amended)
Section 14(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended),³³ provides that ‘The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.’ Sub-section (2) (b) of the same section provides that ‘the security and welfare of the people shall be the primary purpose of government’.³⁴ Thus, the Constitution places the security of Nigerians at all levels as a critical aspect of governance. Accordingly, the Nigerian government is directed to ensure the security and protection of its citizens through its policies and practices. It is to consider it a primary purpose, demonstrating the critical nature of national security without jeopardising the nation’s statehood status. In furtherance of this fundamental constitutional responsibility of national security, section 214 of the Constitution provides for the Nigerian Police.³⁵ Similarly, section 217 provides for the Armed Forces for the Federation, consisting of the Army, the Navy, and the Air Force.³⁶ The Armed Forces’ responsibility is to defend Nigeria from external aggression, maintain its territorial integrity, suppress insurrection, and restore order.

3.2 National Security Agencies Act, 2004³⁷

Section 1 of the National Security Agencies Act establishes three significant agencies for National Security - The Defence Intelligence Agency, the National Intelligence Agency, and the State Security Service. The Defence Intelligence Agency is tasked with identifying and preventing military-related crimes against Nigeria’s security. The agency is responsible for retaining and safeguarding all classified military information on Nigeria’s security, both within and beyond.³⁸

The National Intelligence Agency is tasked with the duty of the general preservation of the security of Nigeria outside Nigeria on non-military concerns.³⁹ The Nigerian State Security Service is in charge of detecting and preventing crimes against the country’s internal security. It is to protect and preserve all non-military classified matters concerning

³³ Constitution of the Federal Republic of Nigeria 1999 (as amended).

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ Cap N74 LFN 2004.

³⁸ National Security Agencies Act, s 2(1).

³⁹ *ibid.*, 2(2).

the internal security of Nigeria.⁴⁰ It should be noted that the National Security Agencies Act did not prescribe the specific powers of the Agencies it established. This lacuna manifests itself in the vast array of discretion these agencies exercise, leading to human rights abuses and breaches of the rule of law.

Other laws containing complimentary national security provisions are the laws establishing the agencies that provide national security. These include the Nigerian Armed Forces, the Nigerian Police, Nigerian Securities and Civil Defence Corps, and National Drug Law Enforcement Agency. These agencies are established to deal with many security issues – from violent extremism and insurgency to piracy, kidnapping for ransom, attacks on oil infrastructure, drug trafficking, and organised crime. These challenges are mostly societally based and thus, require handling internally. Therefore, most agencies established to ensure national security function internally to guarantee law and order within the nation.

4. Overview of the Buhari Administration

Nigerians voiced their frustrations by voting for Muhammadu Buhari of the All Progressive Congress (APC) as President following allegations of massive corruption in the Jonathan-led PDP administration.⁴¹ President Jonathan thus became Nigeria's first incumbent President to lose an election. APC's success at the 2015 polls broke the PDP's 16-year rule in Nigeria.⁴² President Buhari assumed office on May 29, 2015, riding on the goodwill of Nigerians.⁴³ On assumption of office, the President made mouth-watering promises to fight corruption aggressively, ensure the rule of law, defeat terrorism and fix the economy.⁴⁴ Eight years passed, and the country's situation worsened at

⁴⁰ *ibid*, s 2(3).

⁴¹ Oludayo Tade, Why Buhari is Losing the Anti-Corruption War (March 7, 2021) <<https://theconversation.com/why-buharis-government-is-losing-the-anti-corruption-war-155488>> accessed 25 June 2021.

⁴² Oludayo Tade, 'Nigeria: The Buhari Administration's Failed Anti-Corruption Crusade' *The Africa Report.com* (2021) <<https://www.theafricareport.com/70730/nigeria-the-buhari-administrations-failed-anti-corruption-crusade/>> accessed 12 June 2024.

⁴³ Lauren Ploch Blanchard and Tomas F Husted, 'Nigeria: Current Issues and U.S. Policy' *Congressional Research Service* (2019) <<https://crsreports.congress.gov/product/pdf/RL/RL33964/43>> accessed 25 June 2021.

⁴⁴ Bankole ABE, 'Key Issues on Insecurity in Buhari's Eight Years of Administration' *The ICIR- Latest News, Politics, Governance, Elections, Investigation, Factcheck*,

an unprecedented rate. Boko Haram terrorists wreaked havoc with impunity; armed herders unleashed, and ravaged communities with violence that consistently threatened food and national security; kidnapers and abductors boldly broke into schools and homes of Nigerians to whisk away their victims and place demands for ransom; several cases of disobedience to court orders; selective arrests and prosecution of citizens; politicising the anti-corruption fight by looking the other way to investigate defecting politicians to the APC suspected of committing grievous economic and other offences; increased corruption;⁴⁵ high inflation; lopsided appointments to favour the northern Muslims and the Fulani tribe; and the removal of petrol subsidy without a thought out plan to cushion the harsh effect of such removal on the middle class and poor citizens of the country.⁴⁶

Perhaps the only noticeable achievements of the Buhari administration seem to be the recovery of looted funds, minimising leakages through the Treasury Single Account (TSA), and jailing some corrupt State Governors.⁴⁷ However, the events that unfolded in his seventh and eighth years in office weakened his anti-corruption credentials. Since he assumed office, he did little to assuage bitter public feelings against elite corruption. He did nothing to reform the abysmal performing public sector or hold his top officials accountable for their business-as-usual approach to work.⁴⁸ His 2016 promise to “demonstrate

Covid-19 (21 May 2023) <<https://www.icirnigeria.org/key-issues-on-insecurity-in-buharis-eight-years-of-administration/>> accessed 12 June 2024.

⁴⁵ By the end of 2019 when President Buhari commenced his second term, Nigeria had dropped to 146 and by 2020 ranked 149 in the Corruption Perception Index according to Transparency International, 2020 Report, <<https://www.transparency.org/en/cpi/2020/index/nga>> accessed 25 June 2021.

⁴⁶ Seun Opejobi, ‘How Buhari’s Lopsided Appointments to Northern Muslims Causing Disunity in Nigeria - HURIWA’ (*Daily Post Nigeria*, 31 Dec 2019) <<https://dailypost.ng/2019/12/31/how-buharis-lopsided-appointments-to-northern-muslims-causing-disunity-in-nigeria-huriwa/>> accessed 12 June 2024; Nasir Ayitogo, ‘ANALYSIS: Six Years after, Buhari Has Failed to Keep Promise of Securing Nigeria’ (*Premium Times Nigeria*, 31 May 2021) <<https://www.premiumtimesng.com/news/headlines/464754-analysis-six-years-after-buhari-has-failed-to-keep-promise-of-securing-nigeria.html>> accessed 12 June 2024.

⁴⁷ Oludayo Tade (n 41); Among the convictions were those of former Adamawa State Governor, Bala Ngilari, former Plateau State Governor, Joshua Dariye, and former governor of Taraba State, Jolly Nyame.

⁴⁸ Centre for Democracy and Development, *Buhari’s Anti-corruption Record at Six years: An Assessment*, <<https://www.cddwestafrica.org/wp-content/uploads/2021/06/Buhari-Anticorruption-record-at-6years.pdf>> accessed 25 June 2021.

zero tolerance for corrupt practices”⁴⁹ remained largely unmet. Other significant shortcomings of Buhari’s fight against corruption were his willingness to appoint individuals of questionable integrity to key positions; paying no heed to how the APC funded its election campaigns; and his corruption-prone economic and fiscal policies.⁵⁰ One key issue that marred his administration was the sharp deterioration in security conditions nationwide. In the first half of 2021, 2,371 persons were reportedly kidnapped, and ₦10 billion was demanded in ransoms.⁵¹ Between 2021 and 2022, the prices of major food items rose rapidly on average. This data seems to be modest when compared to the statistics in 2023. According to the National Bureau of Statistics, the gap between food and non-food inflation widened by 10.28% despite overall double-digit inflation. The increase in food prices coupled with a high unemployment rate spoke of the growing misery index of Nigerians and the declining ability to purchase food.⁵² This increase in food prices and high inflation was heightened by the removal of fuel subsidy from the 2023 budget without a workable plan to cushion the effect on the economy and the purchasing power of Nigerians.

4.1 Rule of Law in the Buhari Administration

Shortly after assuming office, the Muhammadu Buhari-led administration reiterated its commitment to ensure compliance with the rule of law by all government agencies under his watch. In response to reports of security operatives abusing human rights, the former President stated that his administration would not accept any arm of government undermining the rule of law.⁵³ Similarly, in an address delivered at the Commonwealth meeting in May 2016, Buhari restated his administration’s commitment to comply with the rule of law and respect

⁴⁹ ‘Full Text of Buhari’s Speech At The Anti-Corruption Summit In London’, *Open Government Partnership*, May 11, 2016, <<https://www.opengovpartnership.org/stories/full-text-of-buharis-speech-at-the-anti-corruption-summit-in-london/>> accessed 25 June 2021.

⁵⁰ Centre for Democracy and Development (n 48)

⁵¹SBM Intelligence, ‘Chart of the week: Nigeria 2021 half-year kidnap report’, <<https://www.sbmintel.com/2021/07/chart-of-the-week-nigeria-2021-half-year-kidnap-report/>> accessed 15 July 2021.

⁵² *ibid.*

⁵³ Evelyn Okakwu, ‘Special Report: How Buhari Administration Serially Disobeys Court Orders’ *Premium Times* (June 11, 2017) <<https://www.premiumtimesng.com/news/headlines/233665-special-report-how-buhariadministration-serially-disobeys-court-orders.html>> accessed 26th June 2021.

for human rights.⁵⁴ However, despite these positive statements, his administration's unapologetic violation of court orders, harassment of high-ranking judicial staff, and clear non-adherence to the provisions of the law show disregard for the rule of law.⁵⁵ In fact, Ozekhome graphically encapsulated Buhari's flagrant disregard for the rule of law when he commented as follows:

The rule of law so far has been traumatised and put into perpetual retreat. Nigeria has never had it so bad, not in the last 16 years of the new democratic experimentation... Even if Nigerians were hungry, Nigerians enjoyed one thing in the last administration⁵⁶ which was respect for fundamental human rights. I am afraid that under the present government of President Buhari, the rule of law is being observed more in breach than in compliance.⁵⁷

To buttress this sharp contrast between the former President's public statements of commitment to rule of law and his actual disregard for same while administering the Nigerian State, a brief discussion on the listed areas is given below.

4.1.1 Disobedience to Court Orders

One key area of disregard for the rule of law is the executive's disobedience to court orders under his administration. In 2021, 'the Socio-Economic Rights and Accountability Project (SERAP) urged former President Buhari to use the sixth anniversary of his administration to end the worsening rule of law crisis...'⁵⁸ SERAP maintained that the persistent disobedience of court judgments is a systemic threat to the rule of law and an infringement on judicial independence. This is because it impedes citizens' access to justice and destroys the assurance of effective remedies.⁵⁹

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ 'The administration' as used here refers to the Goodluck Jonathan Administration.

⁵⁷ Mike Ozekhome, SAN, quoted by Adamu Abuh 'Why Buhari must respect rule of law, by Ozekhome' *The Guardian* (January 13, 2016), <https://guardian.ng/features/why-buhari-must-respect-rule-of-law-by-ozekhome/> accessed 26th June 2021.

⁵⁸ Olaniranmi Akoni, 'SERAP to Buhari: End worsening rule of law, security crisis, violations of right to life,' *Vanguard* (May 30, 2021) <<https://www.vanguardngr.com/2021/05/serap-to-buhari-end-worsening-rule-of-lawsecurity-crisis-violations-of-right-to-life/?amp=1>> accessed 26 June 2021.

⁵⁹ *ibid.*

As of 2021, SERAP stated that the Buhari administration had not obeyed or had refused to obey at least seven judgements it obtained against the government.⁶⁰ The first was a court ruling requiring the Buhari administration to make public to Nigerians any stolen assets and the sums it claims to have recovered.⁶¹ The second was a court ruling requiring the Buhari administration to provide information on the spending of stolen cash collected since the country's restoration to democracy in 1999.⁶² The third judgment ordered his government to publish details of payments of billions of naira, allegedly made to corrupt electricity contractors and companies since 1999.⁶³ The fourth court order directed the Buhari administration to urgently institute appropriate legal action to challenge the legitimacy of state life pension legislation for ex-governors who are now senators and ministers and recover such pensions previously paid to them.⁶⁴ The fifth judgment ordered the Buhari government to prosecute principal officials and lawmakers allegedly responsible for padding and stealing ₦481bn from the 2016 budget and publish the report on the alleged 2016 budget padding.⁶⁵ The sixth was the ECOWAS Court judgement, which ordered the Federal Government to provide free and quality education to all Nigerian children without discrimination.⁶⁶ The ECOWAS Court also ordered the Federal Government to undertake effective measures within the shortest possible time to restore the Niger Delta environment, while also preventing environmental damage and ensuring accountability for those responsible.⁶⁷

Other notable instances of disobedience of court orders by the Buhari administration include the cases of Omoyele Sowore,⁶⁸ Ibraheem El-Zakzaky, Sambo Dasuki,⁶⁹ Navy Captain Dada Labinjo, an order on

⁶⁰ *ibid.*

⁶¹ *SERAP v The Accountant General of the Federation and the Attorney General of the Federation* (FHC/IKJ/CS/248/11, Federal High Court Lagos Judicial division, 26 Feb 2016) <<https://serap-nigeria.org/2020/10/04/list-and-summary-of-resolved-cases/>> accessed 12 June 2024.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *Federal Republic of Nigeria v Omoyele Stephen Sowore and another* (FHC/ABJ/CR/235/2019, Abuja Judicial division,)

⁶⁹ *Sambo Dasuki v FRN* (ECW/CCJ/JUD/23/16, ECOWAS Court, Abuja, per Justice Friday Nwoke) <<https://thenews-chronicle.com/sambo-dasukis-case-against-nigerian-government-dismissed-by-ecowas-court/>> accessed 12 June 2024.

debt limit, and an order on recovered loot.⁷⁰ These situations and instances are hereunder summarily stated. Omoyele Sowore, the publisher of Sahara Reporters and a former presidential candidate, was arrested by the DSS in Lagos on August 3, 2019, and transferred to Abuja, where he was held in custody for 45 days on an *ex parte* order obtained by the DSS. However, less than 24 hours before the 45-day detention order was set to expire, the Attorney-General filed before the Abuja Federal High Court charges of treasonable felony, cyber offences, and money laundering against him to re-arrest him.⁷¹ Upon an application, Sowore was granted bail. Still, the DSS refused to release him despite his meeting the stringent conditions subsequently imposed. When he was released, it was short-lived as the DSS re-arrested him in the court on December 6 upon adjourning his case. It took an international outcry for Mr Sowore to be released from the DSS custody on the orders of the AGF on December 24, 2019.⁷²

Ibrahim El-Zakzaky, the leader of the Islamic Movement of Nigeria, was injured and arrested along with his wife, Zeenah Ibrahim, during the 2015 Zaria Massacre. The IMN leader was standing trial over allegations, among other things, of culpable homicide, unlawful assembly, and disruption of public peace. On December 2, 2016, the Federal High Court in Abuja, per Justice Gabriel Kolawole, ordered the release of the Islamic Movement leader and his wife from the custody of the Department of State Services. They had been in custody since December 2015. In addition to the release order, the court ordered that the DSS pay ₦50m compensation to the couple.⁷³ Both court orders were disobeyed, and despite repeated protests that turned violent and claimed several lives, the Buhari administration refused to obey the orders. On August 5, 2019, the Kaduna State High Court, per Justice Darius Khobo, granted El-Zakzaky leave to seek medical attention in New Delhi, India. El-Zakzaky and his wife returned to Nigeria after a week's stay in India without receiving medical treatment and were again taken into DSS

⁷⁰ Oluwakemi Abimbola, 'Six-times Buhari has Disobeyed Court Orders' Punch Online (29 September 2019) <<https://punchng.com/six-times-buhari-has-disobeyed-court-orders/>> accessed 16 July 2021.

⁷¹ *ibid.*

⁷² Robert F Kennedy Human Rights, 'The Case of Omoyele Sowore The Nigerian Authorities Have Subjected Journalist and Human Rights Defender to Multiple Human Rights Violations' <<https://rfkhumanrights.org/news/thecase-of-omoyele-sowore>> accessed 16 July 2021.

⁷³ Abimbola (n 70).

custody. However, on July 28, 2021, the Kaduna State High Court acquitted them of all charges, and they were finally released.

The former National Security Adviser, Col Sambo Dasuki, was arrested and detained by operatives of the State Security Service in December 2015 on allegations of diverting \$2.1 billion from the arms deal contract.⁷⁴ The DSS refused to release him despite being granted bail by four different high court judges.⁷⁵ The DSS, under the watch of the Buhari administration, also disobeyed the order of the ECOWAS Court of Justice made on October 4, 2016, which ordered his release from illegal custody. He was only released on the order of the Court of Appeal in July 2019, which also imposed a fine of ₦5 million on the DSS for Dasuki's unconstitutional detention. This was done about four years in unlawful detention, and the Attorney General of the Federation had to order the DSS to comply with the various court orders granting Dasuki bail.⁷⁶

Similarly, the Federal Government under Buhari disobeyed the Court order on the debt limit made by the Federal High Court, Abuja. The court directed the Federal Government to set the overall limits for the consolidated debts of the nation's federal, state, and local governments. The order was given on February 20, 2018, in a suit filed by the Centre for Social Justice. The court held that by the provision of section 42(1) of the Fiscal Responsibility Act, 2007, the government must set debt limits. Therefore, the court ordered the Federal Government to set debt limits, which the Senate and the House of Representatives would approve within 90 days of the judgment. The judgment was not obeyed.⁷⁷

March 2016, Justice Mohammed Idris of the Federal High Court in Abuja delivered a ruling ordering the federal government to disclose information on how successive administrations spent recovered loots in Nigeria since 1999.⁷⁸ This order was not obeyed. Navy Captain Dada Labinjo was reportedly held in the Defence Intelligence Agency's subterranean prison facility in Abuja on September 12, 2018. Labinjo is one of 67 people, including foreigners, who were detained without being

⁷⁴ Channels Television, 'UPDATED: Sambo Dasuki Released After Over Four Years In Detention' *Channels TV Online* (Updated December 24, 2019) <<https://www.channelstv.com/2019/12/24/breaking-sambo-dasuki-releasedafter-over-four-years-in-detention/>> accessed 16 July 2021.

⁷⁵ Wikipedia, 'Sambo Dasuki' https://en.wikipedia.org/wiki/Sambo_Dasuki accessed 16 July 2021.

⁷⁶ Channels Television (n 74).

⁷⁷ Abimbola (n 70).

⁷⁸ *ibid*; see also *SERAP*' case (n 61)

charged to court by the navy. Despite an order of the Federal High Court granting him bail, he was detained for about 15 months before he was released on December 1, 2019.

The most recent in the series of disobedience of court orders was the refusal of the Buhari administration to enforce the 2023 decision of the Supreme Court on naira redesign. The Central Bank of Nigeria implemented and launched the Naira redesign of ₦200, ₦500, and ₦1000 notes on November 23, 2022. This policy was greatly criticised because its implementation caused a lot of hardship, and it disrupted everyday life and the day-to-day running of activities, resulting in widespread anger and protest across the country.⁷⁹ This situation led to an extension of the implementation deadline from December 31, 2022, to February 10 2023. However, two days before the deadline, El Rufai led some governors to file a suit at the Supreme Court challenging the policy in furtherance of which the Apex Court restrained the CBN from implementing the policy, and later the apex court ruled that the new naira notes should exist side-by-side with the old ones till December 31, 2023.⁸⁰ In a blatant and deliberate spite of this ruling by the revered Apex Court, Buhari, in a nationwide broadcast on February 15, 2023, declared that only the old ₦200 note would remain legal tender and that it would be so until April 10, 2023, while the ₦500 and ₦1000 notes remained invalid.

4.1.2 Harassment of the Judiciary

In October 2016, the Buhari-led administration investigated high-ranking judicial officers through the Department of State Service (DSS).⁸¹ The nature of the investigations revealed the administration's disrespect for the rule of law and attracted severe criticism from Nigerians. The DSS raided the homes of some judges and arrested, along with other judges, two Supreme Court justices allegedly linked with electoral judgment fraud in Akwa Ibom and Rivers States.⁸² These raids were done late at night without regard to the requisite legal processes. January 25, 2019,

⁷⁹ Onozure Dania, 'Buhari years revive ghost of military dictatorship, disobedience to court orders' Punch, 29th May 2023, <https://punchng.com/buhari-years-revive-ghost-of-military-dictatorship-disobedience-to-court-orders/> accessed 26 Aug 2023.

⁸⁰ *AG Kaduna & Ors v AG Federation & Ors* SC/CV/162/2023.

⁸¹ Sahara Reporters, 'Names of Nigerian Judges Under Investigation Revealed', *Sahara Reporters* (New York Oct 16, 2016), <<http://saharareporters.com/2016/10/16/names-nigerian-judges-under-investigationrevealed>> accessed 26 June 2021.

⁸² *ibid.*

witnessed the climax of denigrating the judiciary with the suspension of the Chief Justice of Nigeria, Justice Walter Onnoghen.

Although the suspended CJN subsequently voluntarily resigned on April 4, 2019, after admitting part of the allegations against him,⁸³ the investigation and suspension did not demonstrate the requisite respect for the rule of law. The process required to remove the CJN lawfully involves the participation of both the legislative and the executive arms of government - a two-thirds majority is needed in the Senate.⁸⁴ Apparently, this was not followed because, at the material time, the President's All Progressives Congress (APC) did not have the numbers needed in the Senate.⁸⁵

4.1.3 Clamp Down on Social Media

Under the Buhari administration, the Federal Government indefinitely suspended Twitter two days after the social media giant deleted the President's tweet. The tweet warned the south-easterners, predominantly Igbos, of a potential repeat of the 1967 Biafran Civil War. The warning was in response to the ongoing insurgency in South-eastern Nigeria. According to Twitter, Buhari's tweet violated its 'abusive behaviour' policy.⁸⁶ The company thus removed the post and suspended his account for 12 hours. The tweet read, 'Many of those misbehaving today are too young to be aware of the destruction and loss of lives that occurred during the Nigerian civil war. Those of us in the fields for 30 months, who went through the war, will treat them in the language they understand.'⁸⁷ The announcement of Twitter's suspension on June 5, 2021, sparked virulent outrage in the country partly because of the vague

⁸³ Samson Toromade, 'Suspended Onnoghen Finally Resigns as Chief Justice of Nigeria', *Pulse.ng* (4th April, 2019), <<https://www.google.com/amp/s/www.pulse.ng/news/local/walter-onnoghen-resigns-as-chief-justice-ofnigeria/qktgebl.amp>> accessed 26 June 2021.

⁸⁴ Constitution of Nigeria, 1999 (as amended), s292 (1)(a).

⁸⁵ Toromade (n 83).

⁸⁶ Emmanuel Akinwotu, 'Twitter Deletes Nigerian President's "Abusive" Biafra Tweet' (*the Guardian*, 2 June 2021) <<http://www.theguardian.com/world/2021/jun/02/twitter-deletes-nigerian-presidents-abusive-biafra-tweet>> accessed 12 June 2024.

⁸⁷ David Royal, 'Many misbehaving today not aware of loss of lives during Civil War, we'll treat them in Language they understand—Buhari' Menu *Vanguard News* (June 1, 2021) <<https://www.vanguardngr.com/2021/06/manymisbehaving-today-not-aware-of-loss-of-lives-during-civil-war/>> accessed 19 June 2021.

safety concerns cited for the ban.⁸⁸ The government argued that Twitter is used to undermine Nigeria's corporate existence. Human rights organisations such as Amnesty International condemned the ban because Nigerians use social media platforms to exercise their human rights. SERAP also criticised the ban by urging the government to reverse its decision or face a lawsuit.⁸⁹

Media organisations in Nigeria also voiced their concern over the government's plan to follow its controversial Twitter ban with broader regulations on press and social media companies.⁹⁰ As a matter of fact, the APC lawmakers proposed an amendment allowing the government to determine a code of conduct for Nigerian media agencies and journalists. Those found wanting could be prosecuted and made liable to pay fines for fake news and other code breaches. The ban 'coincided with a ruling by West African regional bloc ECOWAS barring the Nigerian government from arresting and prosecuting Nigerians and corporate bodies for circumventing the Twitter ban.'⁹¹ The Nigerian government followed its announcement on the ban with an order to prosecute violators of the ban, a decision which SERAP swiftly challenged in court.⁹²

4.1.4 Disregard for Federal Character Principle

Nigeria's federal character is a constitutional principle that requires balance in representation in the nation's governance. It is primarily designed to prevent the dominance of persons from a few states or ethnic groups in the country's governance. Section 14(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides:

⁸⁸ Danielle Paquette, Nigeria suspends Twitter after the social media platform freezes president's account (June 4th, 2021) <<https://www.washingtonpost.com/world/2021/06/04/nigeria-suspends-twitter-buhari/>> accessed 16 June 2021.

⁸⁹ *ibid.*

⁹⁰ Emmanuel Akinwotu 'Nigerian government threatens to rein in press after Twitter' (29 June 2021) <<https://www.google.com/amp/s/amp.theguardian.com/world/2021/jun/29/nigerian-government-threatens-to-reinin-press-after-twitter-ban>> accessed 1 July 2021.

⁹¹ Nimi Princewill, 'Nigeria announces talks with Twitter after ban, as ECOWAS court bars government crackdown on users', CNN, (June 23, 2021) <<https://www.google.com/amp/s/amp.cnn.com/cnn/2021/06/23/africa/nigerianegotiate-twitter-ban-intl/index.html>> accessed 29 June 2021.

⁹² *ibid.*

The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that government or in any of its agencies.

The foregoing provision regulates the government's composition at the federal level and the conduct of its affairs. However, the Buhari-led administration conducted governance in breach and with a detached temperament.⁹³ For instance, from 2015, top appointments into the country's Security service favoured officers from the northern part of Nigeria. 'Between 2015 and 2020, only two of the eight security chiefs were from the South: the chief of defence staff (South West) and the chief of naval staff (South-South)'. 'The remaining six, including the Army heads, Air Force, Police, the National Intelligence Agency and the State Security Service were all Northerners'.⁹⁴

Similarly, the International Centre for Investigative Reporting analysis revealed that, as of April 6, 2021, 12 out of 16 security agency heads, including paramilitary and anti-graft agencies based on their state of origin, were from the northern part of the country. This data represented 75 per cent for the North, while the remaining four, representing 25 per cent, were from the southern part of the country.⁹⁵ These agencies are Defence, Nigerian Army, Nigerian Airforce, Nigerian Navy, Nigeria Police Force, Department of State Security (DSS), National Intelligence Agency (NIA), Nigeria Correctional Service, Nigeria Immigration Service, and Nigeria Customs Service. Others are the Nigeria Security and Civil Defence Corps (NSCDC), Federal Road Safety Commission (FRSC), Federal Fire Service, Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and Other Related Offences Commission (ICPC), and the National Drug Law Enforcement Agency (NDLEA).

The judiciary is not left out of this quagmire. Buhari approved the appointment of justices to the Court of Appeal in a list released in March 2021. This list reflected a staggering inequality, with 61 per cent coming

⁹³ Olayinka Shehu and Blessing Otoibhi, 'Buhari's Lopsided Appointments in Six Years Continue to Generate Controversy' *International Centre for Investigative Reporting* (May 29, 2021) <<https://www.icirnigeria.org/buharislopsided-appointments-in-six-years-continue-to-generate-controversy/>> accessed 16 July 2021.

⁹⁴ *ibid.*

⁹⁵ *ibid.*

from the North while 39 per cent from the South.⁹⁶ Buhari's appointment of senior management personnel of the Nigerian National Petroleum Corporation (NNPC) and its subsidiaries is another example of disregard for the federal character. While Nigerians from the North held 24 of the NNPC's 40 senior management posts, ranging from chief operating officers, managing directors, and general managerial responsibilities of the company and its subsidiaries, Nigerians from the South held 16 of the positions. What was even more saddening is that the South-East, which has two oil-producing States – Imo and Abia had no representation in the internal board of the NNPC. The internal board of the corporation is responsible for the day-to-day activities of the corporation.

4.1.5 Appointment of Dead Persons into Political Offices The (Buhari) administration made controversial and illegal appointments, sometimes due to the vetting authorities' carelessness, or sheer disregard for the rules and regulations.⁹⁷ Within three years, the President had appointed nine dead persons into political offices.⁹⁸ On December 30, 2017, of the 209 nominees for chairpersons and 1,258 nominees for board memberships of federal government agencies and parastatals sent by the President, eight were dead persons.⁹⁹ In 2020, the President again repeated the same action by appointing the Late Tobias Chukwemeka Okwuru, a lawmaker representing Ezza South/Ikwo federal constituency of Ebonyi State, into the Board of the Federal Character Commission (FCC).¹⁰⁰

4.2 National Security Versus Rule of Law in the Buhari Administration
There is no doubt that the rule of law is the foundation of democracy, and the head of any constitutional democracy is elected to uphold it. National security is and must be rule of law dependent. Therefore, a breach of the rule of law is necessarily a breach of national security. So,

⁹⁶ *ibid.*

⁹⁷ Lukman Abolade, 'Major Controversial, Illegal Appointments by Buhari since 2015' *International Centre for Investigative Reporting* (Feb 9, 2021) <<https://www.icirnigeria.org/major-controversial-illegal-appointmentsby-buhari-since-2015/>> accessed 16 July 2021.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ Nwafor Sunday, 'Shocker! Again Buhari Appoints Dead Person into Office' *Vanguard* (April 30, 2020) <<https://www.vanguardngr.com/2020/04/shocker-again-buhari-appoints-dead-person-into-office/>> accessed 16 July 2020.

the authority to ensure national security is expressly a provision of the rule of law. It is difficult to conceive how national security can be upheld in breach of the rule of law. A conflict between the rule of law and national security must be resolved by recourse to the statutes. Where such a dispute remains unresolved, recourse must be had to judicial interpretations to resolve the conflict. It is common knowledge that under the separation of powers, the legislature makes the law, the executive implements it, and the judiciary interprets it.

One issue that begs the question is, what has been the approach of the Buhari administration in balancing the issues of the rule of law and national security since his assumption of office? In 2018, President Buhari made a strong statement at the annual conference of the Nigerian Bar Association that encapsulated his ideology on national security. He maintained that ‘where the rule of law and national security imperatives collide, the arc of supremacy would bend in favour of national security’.¹⁰¹ The President seemingly adopted the position of his appointed Attorney General, Malami, in justifying the continued detention of Sheikh El Zakzakky, the Shiite leader, and Sambo Dasuki, the former National Security Adviser. They had been detained by the Department of State Services (DSS) allegedly for national security offences since 2015. The attempt at justifying these detentions is in persistent violation of an avalanche of court orders releasing the duo on bail. The cases of some journalists and activists, including the case of Sowore of Sahara Reporters, have been added to the list of breaches of law on the grounds of protecting national security.¹⁰²

The statements of Mr President and the AG were concerted efforts at reconciling conflicts between national security and the rule of law. They both seem to be relying on the Supreme Court’s decision in *Dokubo Asari v The Federal Republic of Nigeria*,¹⁰³ where the court held:

The pronouncement by the court below is that where National Security is threatened or there is the real likelihood of it being threatened, human rights or the individual right of those responsible take second place. Human rights or individual rights must be suspended until the National Security can be protected or

¹⁰¹ Chidi Amuta, ‘Rule of Law and National Security’ *THISDAYLIVE* (Sept 5, 2018) <<https://www.thisdaylive.com/index.php/2018/09/05/rule-of-law-and-national-security/>> accessed 16 July 2021.

¹⁰² Segun Gbadegesin, ‘Reconciling National Security and Rule of Law’ *The Nation* (Nov 15, 2019) <<https://thenationonline.net/reconciling-national-security-and-rule-of-law/>> accessed 16 July 2021.

¹⁰³ (2007) All FWLR (Pt 375) 588.

well taken care of. The corporate existence of Nigeria as a united, harmonious, indivisible, and indissoluble sovereign nation is certainly greater than any citizen's liberty or right. Once the security of this nation is in jeopardy and it survives in pieces rather than in peace, the individual's liberty or right may not even exist.

While the President's reference to the above dictum is valid, its application to the cases of El Zakzakky, Dasuki, and Sowore is, with the greatest respect, misconceived. In *Dokubo's* case, the Supreme Court upheld the position of the DSS and denied the appellant bail. Thus, the continued detention of Dukobo was in tandem with the rule of law. However, in El Zakzakky, Dasuki, and Sowore's cases, the courts granted bail to the applicants while the DSS persistently refused to release them in disregard to the court orders. This disobedience to the court order being a flagrant disregard for the rule of law, was nothing more than pretentiously 'done to protect national security'.

It is instructive to note that Olabode Rhodes-Vivour JCA (as he then was), who delivered the lead ruling in 'the court below',¹⁰⁴ had modified his position on his retirement as Justice of the Supreme Court, albeit late. The retired justice now insists that no one's right should be denied unless national security 'is visibly threatened'. This is a radical departure from his previous position that such rights can be denied if there is a 'real likelihood' of a threat to national security.¹⁰⁵

Apparently, President Buhari's approach to national security is traditional. While this is surprising to the practice of modern-day constitutional democracy, our laws may justify this position. Both the laws providing for national security and those establishing agencies and institutions for the protection of national security adopt the traditional approach of preservation from violent internal and external aggressions. The adoption and practice of this traditional approach to national security may be primarily responsible for disregarding the rule of law. Many instances of disregard for the rule of law and due process by the Buhari administration have been acclaimed to protect and maintain national security.

However, they have often resulted in further breakdown of law and order. While President Buhari seemed to have a 'crush' on national

¹⁰⁴ *Dokubo-Asari v Federal Republic of Nigeria* (2006) 11 NWLR (Pt 991) 324.

¹⁰⁵ Ade Adesomoju, 'Retired Supreme Court judge amends previous pronouncement on national security' *Premium Times* (March 22, 2021) <<https://www.premiumtimesng.com/news/top-news/450539-retired-supreme-court-judgeamends-previous-pronouncement-on-national-security.html>> accessed June 16 2021.

security, he did so by utterly crushing the rule of law. Indeed, from 2015, some of the critical factors responsible for national insecurity under the Buhari administration include the lack of adherence to the rule of law, increased corruption, poor governance, weakening of institutions, destructive allegiance to ethnicity, the proliferation of arms and ammunition, lack of patriotism, ineffective accountability measures, the proliferation of religious sects that promote intolerance; poverty, unemployment, and election violence.¹⁰⁶ These factors appear not to be within the contemplation of the Nigerian statutes regarding national security and the laws establishing agencies for the protection and maintenance of national security. These laws provide for national security in its traditional context.

Neglecting these natural causes of national insecurity has manifested in widespread armed banditry and kidnappings, increased Boko Haram and violent herder attacks, increased inflation and high cost of food, lack of public confidence in governance, lack of patriotism, protests across the country, notable amongst which are the #EndSARS protests and protests by the Islamic Movement of Nigeria (IMN) for the release of their leader.

5. Conclusion

The effects of the absence or downplay of the rule of law in a democratic state undermine national development and deny citizens the enjoyment of democratic dividends. This is notwithstanding any claims of doing so for the protection of national security. Of course, an essential factor in maintaining national security is the dogmatic application and observance of the rule of law. This paper has carefully discussed the untrammelled trespassing of the rule of law and judicial processes by the Buhari administration, 2015 - 2023. It has also presented this phenomenon as a serious issue that a nation seeking its citizens' well-being will not trivialise.

National security covers a broader spectrum of the welfare of a nation than its traditional approach of the use of military force to prevent internal or external aggressions. It covers issues relating to the security of lives and properties, education, employment, environment, health, politics, social, and economics. However, in protecting national security, it is highly recommended that it be done according to the law.

¹⁰⁶ Insights from Etannibi E O Alemika, *Security Challenges and University System in Nigeria*, (2016) <<http://www.university-of-jos-institutional-repository.org>> accessed 16 June 2021.

6. Recommendations

This article argues the need to balance the need for national security and the rule of law. To effectively do this, the following recommendations are made in succinct paragraphs.

The need to uphold and promote judicial independence can never be overemphasized. Independence of the judiciary encompass matters that relate to appointment and tenure of judicial staff, discipline and general finances of the judiciary, and none interferences paper with the functions and exercise of its powers under the principle of separation of powers. Particularly relevant to this paper is the need for the government to demonstrate unwavering respect for court orders, ensure that the judiciary operates without interference. This includes the prompt release of individuals granted bail and a firm commitment to refraining from the harassment of judicial officers. A judiciary that functions independently is essential for maintaining public trust and upholding the principles of justice.

Alongside judicial independence, it is crucial that national security measures are implemented within the framework of the law. The government must ensure that any actions taken under national security are legally justified and respect individual rights. Adhering to legal and constitutional standards will not only protect civil liberties but also reinforce the legitimacy of the government's security efforts, making them more effective and less prone to abuse.

Similarly, addressing the root causes of insecurity is another vital step in achieving a balanced approach. The government should focus on alleviating poverty, reducing unemployment, combating corruption, and improving governance. By tackling these underlying issues, the need for repressive measures that often violate the rule of law will diminish. This is critical because a comprehensive approach to security will lead to more sustainable peace and stability in the long term.

Moreover, there is the need to reform Nigeria's national security laws to better align with modern-day challenges. These reforms must ensure that national security is protected without compromising civil liberties and human rights. A reform of this nature will necessitate updating the legal framework to provide a clearer guideline for security operations and prevent the misuse of power under the guise of maintaining national security.

By focusing on these interconnected areas—judicial independence, legal adherence, root cause mitigation, and law reform, Nigeria can create a more balanced approach to national security. This

approach ensures that both security and the rule of law are upheld, leading to greater stability and development in the country.

Promoting Sound Corporate Governance *Via* Notable Innovations in the CAMA, 2020 for Ease of Business in Nigeria

Femi Z Ogunlade *

Abstract

This article mainly aims at evaluating how the innovations brought by the Companies and Allied Matters Act (CAMA), 2020 would likely promote sound corporate governance practices and have positive impact on doing business in Nigeria. In achieving this lofty objectives, the article identifies salient innovative provisions introduced by the CAMA 2020 in relation to corporate governance in Nigeria; noting that the new Act has also been amended by the Business Facilitation (Miscellaneous Provisions) Act, 2022. Employing the doctrinal legal approach *via* a descriptive and analytical review of the new Act as well as a comparative approach, the article infers that the newly introduced amendments will serve as impetus to promote sound corporate practice. Undoubtedly, as the extant provisions of the Act are the governance framework being employed by stakeholders in the corporate world to manage and direct the affairs of corporate entities in Nigeria, recommendations are made on how to close the gaps identified in the new legal framework.

Keywords: Corporate governance, ease of business, CAMA, notable innovations.

1. Introduction

This title of this articles underscores and makes emphasis on two fundamental assumptions. First, how the enactment of the Companies and Allied Matters Act, 2020 will enhance sound corporate governance practices through salient innovations introduced to promote commerce and serve as impetus to boost the Nigeria's economy after several decades of CAMA, 1990, which stunted ease of doing business in Nigeria. Second, how the contemporary innovations in the new legal regime will promote the ease of doing business in Nigeria better than it was prior to the enactment of the new Act.

The first assumption mirrors accurately the generally accepted belief that law as an instrument of social and political change must be developed in the service of man to create happiness and secure the general welfare of the totality of persons who come under its influence. As the sociological school insists, it must enhance the process of social

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engineering. As the society is never static, law itself can never remain static. Law, being an enterprise of subjecting human conduct to the governance of rules, must be seen simply as a means to an end and must adapt or be adapted to accommodate changing circumstances.¹

The second assumption is that law must be used to promote the good of the people for the greatest number. Based on these assumptions, it is posited that the enactment of the new Act is to promote efficiency, due process, good governance and transparency in the affairs of business entities. The extant Companies and Allied Matters Act 2020 (CAMA) was enacted into law to the ease of doing business and corporate development in Nigeria; and engender adherence to the ethos of good governance. Whilst empirical studies show that many innovations have been introduced in the new Act, as would later be enunciated in this paper, it is considered imperative to examine the impacts that such new initiatives could have on corporate governance and overall company performance. Thus, based on this observed relationship between corporate governance and macroeconomic development, this paper is considered necessary to examining the elements characterizing such relationship.² It is imperative, therefore, to state that Companies and Allied Matters Act (CAMA) represents one of the pieces of legislation which enhances better business climate and promotes Micro, Small and Medium Scale Enterprises (MSMEs) in Nigeria. The Act of 870 sections provides a regulatory framework for how businesses should be carried out in the country better than the old Act.

The CAMA 1990 Act, which repealed the Companies Act of 1968 reshaped the business environment of Nigeria in the 90's. CAMA 1990 was passed into law to establish the Corporate Affairs Commission (CAC), providing for the incorporation of companies and incidental matters, registration of business names and the incorporation of Trustees of certain Communities, bodies and Associations. The Act was promulgated to repeal the Companies Act of 1968. However, in the last 30 years of promulgation into law, the Nigerian corporate landscape has transformed with global and regional demands for business integration.

¹ Bola Ajibola, 'Law Reform in a Military Era,' TO Elias & M I Jegede (ed), *Nigerian in Jurisprudence* (MIJ Publishers Limited 1993) 389; see also Akin Oyeboode, 'Role of Lawyers in the Society', *Law and Nation- building in Nigeria: Selected Essays* (Centre for Political and Administrative Research 2005) 43.

² Lady Championz, 'An Evaluation of The Companies and Allied Matters Act (CAMA) 2020 and its Impacts on Corporate Governance' *paper On Law Project Topics and Materials online publication* (<https://www.google.com/search> An Evaluation of the Companies and Allied Matters Act (CAMA)2020 and its impacts on Corporate Governance).Accessed 9th Nov,2023.

Hence, the CAMA 1990 Act was heavily hamstrung by several provisions of the Act which limits modern business practices in the light of national and global reforms. Due to complexity of commerce and developments in other sectors of the economy the CAMA ,1990 became inadequate to expectations and yearnings of the business community and hence the innovations introduced in the new Act.³

2. Perspectives of Sound Corporate Governance in Nigeria

The concept of corporate Governance hinges on total transparency, integrity and accountability of the Board of directors, management and other stakeholders of company⁴ It further relates to how the affairs of company is being managed and controlled to meet the interest of various stakeholders. The importance of corporate governance lies in its contributions to both to business prosperity and accountability. While it is considered that corporate governance establishes a system whereby directors are entrusted with duties and responsibilities in relation to direction of the company's affairs, strict adherence to its principles as can be inferred from the Companies and Allied Matters Act will set such a company on the path of profitability to engender socio-economic growth and development. As well all know, the Company is the most efficient wealth creation device known to man. It enables collaborative economic activity to occur so that capital can be pooled for investment purposes while limiting risk exposure⁵

In order to enhance sound corporate governance in Nigeria, the Federal Government in 2018, through the Financial Reporting Council of Nigeria introduced the Code of Corporate Governance. The Financial Reporting Council of Nigeria Act which established the Council, empowers it to enforce and approve enforcement of compliance with accounting, auditing, corporate governance and financial reporting standards in Nigeria.⁶ The principal functions of the council include

³ The Companies and Allied Matters Act, 2020, signed by President Muhammadu Buhari on 7th August, 2020; see also Nigerian Law Reform Commission, 2009 Report on the Review of the Companies and Allied Matters Act, Cap C20, Laws of the Federation, 2004.

⁴ Azuka Azinge, 'The Chartered Secretary and Administrators as an Agent of Governance Transformation in Nigeria' (2018) *Journal of Corporate Governance and Administration* (1)(1) 4.

⁵ Tunde I Ogowewo, 'Metric of Functionality: Nigerian Corporate Law and Wealth Creation' Law and Justice in Emerging Democracies: The Challenges Before the Legal Profession in Africa, (Nigeria Bar Association's Annual Conference 26th August–1st Sept 2006) 55.

⁶ Financial Reporting Council Act, 2011(Cap F42. LFN Rev'd edn 2017, s7.

monitoring compliance with the reporting requirements specified in the adopted code of corporate governance. This is the first Act in the history of Nigeria that specifically incorporates issues of corporate governance and set up an agency of government to monitor compliance with the financial reporting aspect of corporate governance. Essentially, this Code and other previous Codes of corporate governance⁷ emerged in response to corporate failures and challenges which occurred in the quoted companies and most especially in the banking sector. These Codes have been established to salvage institutions and corporations from the deficit state of corporate governance.⁸

In Nigeria, over the years there have been reported cases of gross mismanagement of companies. In the early 1990s, and in the early 2000s, there were cases of Lever Brothers, and Cadbury Nigeria Plc where there were allegations of insider dealings levelled against the management of these companies. In the Case of Cadbury, fines were imposed on the company by the Securities and Exchange Commission (SEC) for several breaches of Code of Corporate Governance. The prevalence of corporate scandal and failures that were witnessed had their roots in dishonest management decisions and in some cases outright cover-ups of illicit activities. These had wrecked many companies and consequently the lives of millions of innocent citizens who were stakeholders in those corporate entities.⁹

The primary principle of corporate governance can be summarised in the expected outcomes of the recent Nigerian Code of Corporate Governance which includes: enhancing business integrity, building public trust and confidence, facilitating trade and investment and driving business sustainability. While corporate governance structure may vary, most organizations incorporate the following key elements such as: legal shareholders should be treated equally and fairly, the board of directors must maintain a commitment to ensure accountability, fairness, diversity and transparency within corporate governance, the Board of directors must maintain a commitment to ensure accountability, fairness, diversity and transparency within corporate governance, organization should define a code of conduct for Board members and executives, only appointing new individuals if they meet that standard.

⁷ *ibid*, s 8.

⁸ There are Code of Corporate Governance for Public Companies, 2003 and Code of Corporate Governance for Banks Post Consolidation, 2006.

⁹ JO Sanusi, 'Enhancing Good Governance Practices in Nigeria' a key note address at the 19th Annual Bank Directors Seminar organized by the Financial Institute Training Centre, Abuja, 19th June 2003) 5.

Also, all corporate governance policies and procedure should be transparent and disclosed to relevant stakeholders.

In order to achieve sound corporate governance, there is need for effective and efficient control measure in dealing with ownership structure and management of companies as well as issues of accountability, transparency and reporting to ensure shareholder and stakeholder value maximization. Since corporate governance also provides the framework for attaining a company's objectives, it encompasses practically every sphere of management, from action plans and internal control to performance measurement and corporate disclosure.¹⁰ Therefore, the objective of good corporate governance is to put an end to the problem and concerns about ownership structure of companies, mode of corporate management, control and accuracy of financial reports, accounting figure and disclosure requirements for the purpose of shareholders and stakeholder's maximization.

Good corporate governance plays a very significant role in attracting investment, establishing a very healthy private and public sectors and building good democratic society.¹¹ There is no substitute for good corporate governance. Good corporate governance makes board members to proactively develop the strategy and long term direction of a firm. A country's corporate governance system is thus vital to the health of her companies, their capital and ultimately the wealth created and retained in the country.¹² Consequently, good corporate governance will enhance the performance of corporation, by creating an environment that motivates managers to maximize returns on investment, enhance operational efficiency and ensure long term productivity and growth. No doubt, good corporate structure will also encourage companies to create value through entrepreneurial activities, continuous innovation and development while providing robust accountability and control system that are commensurate with the risk involved.¹³

The perspective of corporate governance in Nigeria is that there seems to be a growing concern on the need to adhere to the principles of corporate governance and also to enforce those principles already

¹⁰ Oscar Nilam, 'Achieving Good Corporate Governance in the Nigerian Banking Sector: The Importance of External Control Measures', (2013) (5)(2), *Journal of Corporate Governance* 821.

¹¹ Victor Odiase, 'National Code of Corporate Governance: A New Regulatory Benchmark for Nigeria' (2014) (5) (2), *Journal of Corporate Governance* 821.

¹² ZF Ogunlade, 'Legal Regime of Corporate Governance as a Tool for Sustainable Development' *Unpublished PhD Thesis* (Ekiti State University 2015) 46.

¹³ NNR Murthy, 'Good Corporate Governance: A checklist or A Mind Set?' *Robert P Maxon Lecture George* (Washington University 2006) 67.

incorporated into the various Acts of National Assembly. This is because inability to abide by these principles will automatically translate into corporate failure and have spiral effect on the national economy. Since laws and regulations form important part of external corporate governance control measures, it is observed that in order to promote good investment in Nigeria, either foreign direct investment or portfolio investment, the Government would always enact corporate laws to cater for the needs of the business community in order to meet the reality of time to enhance ease of doing business.

3. Companies and Allied Matters Act, 1990 and its Challenges

The Companies and Allied Matters Act, 1990 was enacted to resolve the problems associated with the Companies Act, 1968. The Act brought about a significant reform which hitherto impacted positively on the registration and management of companies in Nigeria. Without significant amendment, the CAMA 1990 had endured for about 3 decades which affected ease of doing business in Nigeria in view of complexity of commerce and technology. Increasing competition among countries for foreign investments through legal and institutional reforms on ease of doing business forced the application of the Act to be inadequate to address the need of stakeholders in the corporate world. Admittedly, the 1990 Act was relatively comprehensive as it brought together statutory rules, principles of common law and equity under the same Act. It also addressed the observed inadequacies of the Companies Act. In order to curb the pitfalls in the Companies Act, the 1990 introduced enormous and far reaching innovations which turnaround the corporate environment. Some of the innovations are:

3.1 Creation of different Business entities and Corporate Affairs Commission

Unlike the Companies Act, promoters of business entities could register companies,¹⁴ business name¹⁵ and incorporated trustees¹⁶ under parts A, B and C of the Act respectively.

Also significance is the creation of Corporate Affairs Commission

¹⁴ Registration and Requirements for registration of companies are provided for in CAMA, 1990, ss 18- 35.

¹⁵ Requirements for the registration of Business name under Part B are incorporated in CAMA, 1990, ss 569- 589.

¹⁶ Part C of the Act Contains provisions relating to incorporation of trustees of certain communities, method of application, registration and the effect of incorporation, exercise of powers of trustees, dissolution of corporate bodies formed under the Act, among others; CAMA, 1990, ss 590- 610.

The Commission was inaugurated on 11th February 1991 and officially commenced business on 18 February, 1991. The CAMA which established comprises Board also known as the Commission which shall be responsible for making policies for Commission. The functions of the Commission shall include the regulation and supervision of the formation, in corporation, registration, management, and winding up of companies among others.¹⁷ Membership of the Commission which includes Securities and Exchange Commission, representatives of Nigeria Bar Association and Accounting profession, Ministries of Justice, Commerce among others.¹⁸

3.2 Appointment of Registrar - General and Tenure of Office

The Act provides for appointment of Registrar- General who shall be a legal practitioner of not less than 10 years at the Bar and with 8 years of company law practice experience or administration.¹⁹ The Registrar-General shall hold office on such terms and conditions as may be specified in his letter of appointment and on such terms as ay be determined from timed to time by the Commission with the approval of the Commission. He shall also be the accounting officer for the purpose of controlling and disbursing amounts from the fund established under the Act.²⁰

3.3 Authorization of the Attorney –General of the Federation to register Company Limited by Guarantee

Section 26 of the Act allows for registration of Company Limited by Guarantee subject to the authorization of the Memorandum of Association by the Attorney General of the Federation. The section provides that the memorandum of a company limited by guarantee shall not be registered without the authority of the Attorney-General of the Federation.²¹

3.4 Share Capital requirement

The CAMA,1990 mandates every company other than companies limited by guarantee to have share capital. In case of private company, it

¹⁷ CAMA, 1990, s 7.

¹⁸ *ibid*, s 2. It also includes Manufacturers Association of Nigeria, Nigeria Chambers of Commerce, Industries, Mines and Agriculture and the Registrar-General as ex-officio member.

¹⁹ *ibid*, s 8.

²⁰ *ibid*, s 8 (3).

²¹ *ibid*, s 26(5).

must have a minimum of 10,000 share capital while public company has a minimum of ₦500,000 share capital.²² Section 27((2)(b) of the Act further requires the subscribers of the memorandum shall take among them a total number of shares of the value of not less than 25 percent of the authorized share capital.

3.5 Audit Committee

The Act provides for the objectives and functions of Audit Committee which includes ascertaining whether the accounting and reporting policies of the company are in accordance with legal requirements and agreed ethical practices.²³

3.6 Corporate Accountability

The Act provides for holding of meetings and compulsory holding of statutory meetings²⁴ and minimum of two directors to manage and direct the affairs of companies unlike the Companies Act.²⁵ The section provides as follows: (1) Every company registered on or after the commencement of this Act shall have at least two directors and every company registered before that date shall before the expiration of six months from the commencement of this Act have at least two directors. Subsection 2 states that any company whose number of directors falls below two, shall within one month of its so falling appoint new directors and shall not carry on business after the expiration of one month, unless such new directors are appointed. Where there is a default of this section, there is a penalty provided thereunder.

Apart from the foregoing salient reforms, other provisions introduced by the 1990 Act include receivership, functions and qualifications of secretary, provision on minority rights and so on and so forth. It is noted however that despite the reforms introduced in the new Act to enhance business environment and ease of doing business, the Act was inadequate to meet the needs and yearnings of the corporate entities in view of complexity of commerce and development in different areas of human endeavours since when the Act was not reviewed for over three decades, which caused various stakeholders and government to push for a complete repeal of the Act and enactment of the Companies

²² *ibid*, s 27 (2)(a).

²³ *ibid*, s 359 (6).

²⁴ *ibid*, s 235 (1) which provides thus ‘Every public company shall, within a period of six months from the date of its incorporation, hold a general meeting of the members of the company (in this Act referred to as ‘the statutory meeting’).

²⁵ *ibid*, s 346 (3).

and Allied Matters Act, 2020.²⁶ Another major obstacle is that it became difficult for the Commission and other stakeholders to implement obsolete provisions of the Act, thereby making it difficult to conclude registration of business entities timely. Other challenges include enforcement of merge fines and penalties, lack of provisions on quasi-judicial panel to deal with matters arising from the operations of the Act to the decongest court and many others.

4. Specific Salient Innovations in the Companies and Allied Matters Act, 2020

Nigeria is in dire need of development revolution which may occur through innovation and reform of legal system appropriate to such revolution. This implies that all Nigerians should respond to the campaign for essential change in the human and societal elements. Essentially, law has a vantage influence in every society. It should, therefore, travel in the highway of our nation's consciousness.²⁷ This can be achieved when law is understood as a functional instrument for positive change. The realities of our nation- state spur the need for increased innovation and information. It can hardly be doubted that when legal education is sufficiently strengthened by innovation, law can possess a great capacity for harnessing the minds of our population and leaders. The aim is to redefine and recreate Nigeria's legal, social and philosophical ethos which can be laid out as the principles and strengthen of a re-discovered nation.

Although, the key role play by law and legal institutions in fostering economic growth cannot be overemphasized,²⁸ laws do not operate in isolation; economic growth must be multisector driven with a focus on strong reforms and innovations. Admittedly, the inadequacies noticeable in the repealed CAMA led to the enactment of CAMA, 2020.²⁹ Undoubtedly, Nigeria has made serious efforts to modernize and reform corporate law through the various innovations introduced in the new Act. As noted earlier, the Companies and Allied Matters Decree No 1, 1990

²⁶ The major challenges with the old CAMA were quite significant.

²⁷ Taiwo Kupolati, *Channels of Renaissance in Verses for Legal Revolution* (Renaissance Law Publications Ltd 2006) 2.

²⁸ Folake K Olaoye, 'Legal Innovation, Harmonization and Regionalization of Business Law in Africa: An Examination of OHADA Business Law and its implication for Nigerian Businesses' (2017) (1) *JBL*14.

²⁹ The Act is the most comprehensive piece of legislation in Nigeria that governs management and administration of companies; see also J B Onivehu, 'An Appraisal of the Impact of Companies and Allied Matters Act 2020 on the Nigerian Business Community' (2022) 9 (1), *NAU, JCPL* 15.

was the first major amendment that nullified the then Companies Act of 1968. Then it became the Companies and Allied Matters Act (CAMA) 2004.

However, since CAMA 2004, no major amendment was incorporated into the Companies Act for thirty years. Yet, England, the originator of our laws had over the years amended its company laws. The major flaws with the old CAMA were quite significant. There were gaps in doing business in Nigeria. The old CAMA created bottlenecks in the free flow of performing businesses in Nigeria. For example, the cost of registration was high, fillings of incorporation documents required physical appearance at CAC. Furthermore, it took time to get the incorporation certificate. In short, it was quite cumbersome to incorporate a company with the old Act because there were a lot of technicalities involved. Thus, the Act was obsolete and affected the development of the Nigerian corporate world. The Act has been depicted as obstructing current strategic policies in the light of public and worldwide changes. An inadequate or obsolete legal system can hinder efficiency and development and sabotage business growth.

It is for this reason that a strong legal structure is key to an enabling business environment. It hence became apparent that the provisions of the CAMA 2004 needed to meet up with international business standards; consequently, it became necessary to make the Act more contemporary and important. The Nigerian business community is characterized by the activities of small and medium sized enterprises (SMEs) or small and medium sized businesses (SMBs).¹The SMEs have proven to enhance the economic growth of any country. The various reforms which were introduced to the Act were to promote ease of doing business and for effective corporate governance of companies. The reforms are therefore examined in this paper.

4.1 Expansion of Board Composition

Under the 1990 Act, there were only nine members of the Board of the Commission which has now been expanded to include a member each from the Institute of Chartered Secretaries and Administrators of Nigeria (ICSAN), Nigerian Association of Small and Medium Enterprises, and member from the Ministry of Finance.³⁰ The essence of the expansion is to allow inclusiveness of the stakeholders in the private sector, allow institution that is fully committed to Corporate governance matters and also a key relevant government department.

³⁰ CAMA, 2020, s 2.

4.2 Clear Enumeration of the Functions of the Board

Under the Act, the Board provides general oversight on the administration of the Commission. Under the 1990 Act, there is no provision on the functions of the Board, although, the Commission relies on the general provision to allow the Board to provides oversight on the administration of the Commission without any statutory provision to that effect. Other functions of the Board include;) review and approve the strategic plans of the Commission; receive and consider management reports and advise the Minister on the reports; determine the terms and conditions of service of employees of the Commission; fix the remuneration, allowances and benefits of employees of the Commission, the Commission; fix the remuneration the Commission; fix the remuneration the Commission; fix the remuneration, allowances and benefits of employees of the Commission, in consultation with the National Salaries, Income and Wages Commission; ensure compliance with the provisions of this Act; and do such other things as are necessary to ensure the effective and efficient performance of the functions of the Commission.³¹

4.3 Expansion of Functions of the Commission

In the repealed Act, the functions of the Commission are to administer this Act including the regulation and supervision of the formation, incorporation, registration, management, and winding-up of companies under or pursuant to this Act.³² However, the new Act incorporates as part of the functions striking out of companies, removal of business names from the Register, formation and dissolution of incorporated trustees. While it is noted that though the Commission has been carrying on the functions even where there is no statutory provision, a clear provision on it functions has provided the Commission the impetus to deliver on its mandates.

4.5 Action Notice and Restriction on Levy of Execution

This is a new innovation in the Act which allows the Commission to be notified before an action is filed against it. From a dispute resolution point of view, this section is very crucial as the Act now requires that before a suit can be commenced against the Corporate Affairs Commission ('the Commission'), a pre-action notice must be issued and served on it. The Act proceeds in subsection (2) to outline the details

³¹ *ibid*, s 4.

³² *ibid*, s 8.

which the notice must contain³³. Where an intending plaintiff is in default of this section, the suit may be struck out where the Defendant raises a preliminary objection.

4.6 Provision for Incorporation of a Private Company by a Single Member/Shareholder³⁴

The Act provides that any two or more persons may form and incorporate a company by complying with the requirements of this Act in respect of registration of the company. However, one person may form and incorporate a private company by complying with the requirements of this Act in respect of private companies. This is totally different from the repealed Act which prescribed the registration of company by a minimum of two persons.

4.7 Replacement of Authorized Share Capital with Minimum Issued Share Capital for Incorporation of Companies

The Act also increased the minimum share capital of companies registered under the Act. It provides that the memorandum of association shall also state the amount of the minimum issued share capital which shall not be less than ₦100,000.00 in the case of a private company and ~~₦2~~ ₦2,000,000.00, in the case of a public company, with which the company proposes to be registered, and the division thereof into shares of a fixed amount; and Section 27(2)

4.8 Powers of the Commission to Withdraw or Cancel Approval for Reservation of Name and Withdraw, Revoke or Cancel certificate of Registration

Under section the new Act the Commission can cancel a reserved name where it is discovered that the approval was fraudulently, unlawfully or

³³ The notice referred to in subsection (1) shall clearly state: (a) the cause of action; (b) particulars of the claim; (c) name and place of abode of the intending plaintiff; and (d) relief sought. In the case of *Nigeria Ports Plc v Songhai Energy Services Limited* (2016) 17 NWLR 154, 191, 212, the apex court held that '[a] pre-action notice is a notice by the plaintiff to the opponent of the reason why the plaintiff is instituting a legal action against the opponent and the purport of it is to intimate the opponent of what to expect or to be confronted within the course of the legal proceedings. The law requires that a plaintiff must meet the requirement contained in the relevant statute, for it is by so doing that the defendant will be seized of the action contemplated against the defendant, so that the defendant can give the claim a proper consideration on the step to take; for example, whether to contest the action or settle out of court.

³⁴ CAMA 2020, s 18(2).

improperly procured.³⁵ Further to the above, the Commission may withdraw, cancel or revoke a certificate of incorporation issued under the Act where it is discovered that the certificate was fraudulently, unlawfully or improperly procured.³⁶

4.9 Modification of Provision on *Ultra Vires* acts

Under the new Act,³⁷ a company shall not carry on any business expressly prohibited by its memorandum and shall not exceed the powers conferred upon it by its memorandum or the Act. Unlike the repealed Act,³⁸ the provision on *ultra vires* is not the same, as a company is not allowed to carry on business not authorized by its memorandum and shall not exceed the power conferred upon it by its memorandum or under the Act. The distinction between the provisions is that under the new Act, for an act of a company to be *ultra vires*, such an act must be expressly prohibited in its memorandum. Whereas, in the repealed Act, only acts not listed in the Memorandum are *ultra vires* the memorandum of the company. In other words, a company cannot engage in business expressly prohibited in its Memorandum.

This provision no doubt gives a company wide latitude to engage in many businesses, even though they are not listed in the memorandum of association of the company unless the objects are expressly prohibited in the memorandum of association.

4.10 Expansion of the Power of the Attorney-General of the Federation on the Registration of the Company Limited by Guarantee³⁹

The existing provision is that memorandum of a company limited by guarantee shall not be registered without the authority of the Attorney – General of the Federation. This provision has been expanded to include a provision the Attorney-General of the Federation shall, within 30 days, grant authority to the promoters of a company limited by guarantee where there are no objections to the memorandum or other cogent reason for not granting approval to register the company as one limited by guarantee⁴⁰. The import of the provision is that the period within which to exercise the power of the attorney general to grant authority to register

³⁵ *ibid*, 31(5).

³⁶ *ibid*, s 41(7). Under subsection 8, the Commission may cause the publication of the withdrawal, cancellation or revocation of certificates of incorporation periodically in the Federal Government Gazette.

³⁷ *ibid*, ss 44 and 45.

³⁸ *ibid*, s 39.

³⁹ *ibid*, s 26(4).

⁴⁰ *ibid*, s 26(5).

a memorandum of association of a company limited by guarantee has been curtailed as it cannot be *ad infinitum*.

4.11 Requirement of Common Seal for Companies is no Longer Mandatory

Section 98 of the Act provides that a company may have a common seal but need not have one, and where a company has a common seal, the design and use of that seal shall be regulated by the company's articles and it shall have its name engraved in legible characters on the seal. The repealed Act provides that a company shall have a common seal, the use of which shall be regulated by the articles.⁴¹

4.12 Introduction of Electronic Signature

This is permissible for the authentication of companies' documents and proceedings. This unique innovation is in line with modern reality as document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorized officer of the company, and need not be signed as a deed unless otherwise so required and that an electronic signature is deemed to satisfy the requirement for signing under the section⁴². Evidence (Amendment) Act, 2023 amended section 258 of the principal Act and defines digital signature to mean an electronically generated signature which is attached to an electronically transmitted documents to verify its contents and the sender identity. It also defines electronic signature to mean authentication of any electronic records by a subscriber by means of the electronic technique specified in the second schedule and include digital signature. The implication of this recent amendment is that both electronic signature and digital signature mean the same thing

4.13 Recognition of Electronic Transfer of Shares as an Instrument of Transfer of Shares

This is a new innovation in the Act. Transfer of a company's shares under the new Act is now by instrument of transfer and except as expressly provided in the articles, transfer of shares shall be without restrictions, and instruments of transfer shall include electronic instrument of transfer. This position is different from manual transfer of shares under the Old Act.⁴³

⁴¹ *ibid*, s 74.

⁴² *ibid*, s 101.

⁴³ *ibid*, ss 40(1) and (2).

4.14 Introduction of Virtual General Meetings for Companies

Since companies are driven by decisions taken at corporate meetings⁴⁴, companies are required to adhere to the provisions regarding the conduct of such meetings, default of which could attract penalty. Due to complexity of commerce and the latest impact of covid-19 pandemic which automatically lockdown the world economy for several months, the introduction of virtual meeting becomes imperative and a veritable platform for shareholders to converge. The Act recognizes different type of meetings such as statutory meeting⁴⁵, annual general meeting⁴⁶ and extra ordinary general meeting.⁴⁷ Section 12 of the Business Facilitation (Miscellaneous Provision) Act has allowed public companies to have virtual meetings. Section 240 of the CAMA has been amended to delete the word private.

4.15 Requirement for Public companies to Serve Notice of Annual General Meetings on the Corporate Affairs Commission

The Commission (CAC) is a regulatory body saddled with the responsibility of registration and management of companies in Nigeria⁴⁸. In the repealed Act, there is no provision which mandates public companies registered under the Act to give notice of annual general meetings to the Commission unlike this new Act which makes it compulsory. The essence of this provision in my view is to promote compliance with the principles of corporate governance which include accountability, transparency, full disclosure and so son and so forth.

4.16 Exemption of small company from appointing Secretary,⁴⁹ Auditor⁵⁰ and Holding of Annual General meeting⁵¹

Under the New Act, a small company⁵² is defined as a private company having an annual turnover and net asset value of not more than ₦120,000,000 and ₦60,000,000 respectively, it has no foreigner as its member and where the company has a share capital, the directors hold at least 51% of the share capital. This definition is at variance with the

⁴⁴ Bamidele Adebayo 'The Law of Company Meetings in Nigeria,' (2019) (2), *Journal of Corporate Governance and Administration* 39.

⁴⁵ CAMA 2020, s 235.

⁴⁶ *ibid*, s 237.

⁴⁷ *ibid*, s 239.

⁴⁸ *ibid*, s 243(1).

⁴⁹ *ibid*, 330.

⁵⁰ *ibid*, s 402.

⁵¹ *ibid*, s 237.

⁵² *ibid*, 394(2).

definition provided in the Finance Act 2019. Consequently, the FA 2020 has now provided amendments to resolve the controversy that arose with CAMA 2020 as small and medium size companies are now required to submit a special type of account along with their tax returns.⁵³ The CAMA 2020 threshold for small and medium scale companies will also cover some companies classified as medium size companies (whose annual gross turnover does not exceed ₦100 million) based on CITA. However, for medium scale companies whose annual gross turnover falls between ₦100 million and ₦120 million, it is not yet clear the form of accounts that will be submitted along with their tax returns.

A company is exempt from the requirements of this Act relating to the audit of accounts in respect of a financial year if it has not carried on any business since its incorporation⁵⁴. Small company is also exempted from holding annual general meeting under the new Act. The essence of these provisions is to promote ease of doing business especially for the startup business in Nigeria. A new subsection (2) has been introduced to section 394 in the Business Facilitation (Miscellaneous Provision) Act. It provides that 'a company qualifies as a small company in relation to a subsequent financial year if the conditions qualifying it as a small company are met in that year and the preceding financial year'.

4.17 Provision on Beneficial Ownership

The new Act requires that every person with significant control over a company shall within seven days of becoming such a person, indicate to the company in writing the particulars of such control.⁵⁵ Also, a person who is a substantial shareholder in a public company shall give notice in writing to the company stating his name, address and full particulars of the shares held by him or his nominee (naming the nominee) by virtue of which he is a substantial shareholder⁵⁶. This is to unveil the true beneficial owners of interest in the shares held in the company and also expose corrupt practices.

4.18 Prohibition of a person from being a director in more than five public companies, simultaneously⁵⁷

This provision is to the extent that any person who is a director in more than five public companies shall, at the next annual general meeting of

⁵³ For more and further details; see also the Finance Act, 2021.

⁵⁴ CAMA, s 402(2).

⁵⁵ *ibid*, s119.

⁵⁶ *ibid*, s 120.

⁵⁷ *ibid*, s 307(2).

the companies after the expiration of two years from the commencement of this Act, resign from being a director from all but five of the companies. Penalty is prescribed in the subsection 4 for contravening the provision. It provides as follows:

Any person who acts as a director of a public company in contravention of the provisions of this section is liable to a daily penalty in such amount as the Commission shall specify in its regulations and shall refund to each of the companies every remuneration and allowances paid to him as a director in each of the companies.

This provision was introduced to preclude the directors from having dominance in many companies and also prevent conflict of interests.

4.19 Requirement of Independent Directors for Public Companies

Unlike the repealed Act, this new law provides that in a public company, any person who nominates candidates for the board who would comprise a majority of the members of the board shall nominate at least three persons who would be independent directors. An independent Director is defined in the Act to mean a director of the company who, or whose relatives either separately or together with him or each other, during the two years preceding the time in question- (a) was not an employee of the company; (b) did not-(i) make to or receive from the company payments of more than ₦20,000,000, or (ii) own more than a 30% share or other ownership interest, directly or indirectly, in an entity that made to or received from the company payments of more than the amount stated in subparagraph (i) or act as a partner, director or officer of a partnership or company that made to or received from the company payments of more than such amount;(c) did not own directly or indirectly more than 30% of the shares of any type or class of the company, and (d) was not engaged directly or indirectly as an auditor for the company⁵⁸ This provision has also been amended by section 14 of the Business Facilitation (Miscellaneous Provisions) Act, that ‘a public company shall have at least one-third of the total number of its directors as independent directors’.

The provision is very unique in the sense that despite lack of any specific legal framework on whistleblowing protection in Nigeria, this Act seeks to protect provider of the information.

⁵⁸ *ibid*, s 275(1).

4.20 Introduction of Share Buyback Options for Limited Liability Companies⁵⁹

The law now allows a limited liability company to buy back its shares provided that such provision is embedded in the articles of association of the company. A resolution of the company is expected to be passed and two newspapers publication is made within 7days of passing the resolution with a notice of the proposed purchase by the company of its own shares. A company may buy back its shares-(a) from the existing shareholders or security holders on a proportionate basis;(b) from the existing shareholders in a manner permitted pursuant to a scheme of arrangement sanctioned by the court;(c) from the open market; and (d) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or any other similar scheme ⁶⁰. In addition, where a company buys back its shares, payment for the shares buyback shall be made from the distributable profits of the company. ⁶¹

4.21 Introduction of a Maximum Amount of 0.35% of the Value of a Charge, as the Total Fees Payable to the Commission in Connection with the Registration or Release of Charge

Like the repealed Act, every charge created by a company, being a charge to which this section applies, shall, so far as any security on the company's property or undertaking is conferred, be void against the liquidator and any creditor of the company. The Act introduced a specific percentage for registrable charges under the Act.⁶² The Act provides that the total fees payable to the Commission in connection with the filing, registration or release of a charge with the Commission shall not exceed 0.35% of the value of the charge or such other amount as the Minister may specify in the Federal Government Gazette. The provision allows the Commission through the Minister to vary the percentage payable provided it is not above the percentage specified in the Act. This provision allows for flexibility in the percentage payable through the Minister instead of passing through legislative amendment. Under the Companies Regulation 2021, the prescribed amount payable on charge for companies is ₦25,000.00 or 0.35 % of the amount secured by the charge whichever is higher.

⁵⁹ *ibid*, s 184.

⁶⁰ *ibid*, s 185.

⁶¹ *ibid*, s 186.

⁶² *ibid*, s 222(12).

4.22 Other Notable Innovations

There are still other innovations brought into CAMA, 2020. These include: Introduction of Statement of Compliance by an Applicant or his Agent for Registration of Companies, as an Alternative to Statutory Declaration by a Legal practitioner. This provision is novel in the sense that it allows a promoter of a company to apply for registration without passing through a legal practitioner who was only allowed to register a company under the old repealed Act.⁶³

There also provisions on electronic filing of documents and admissibility of certified true copies of electronically. The new Act allows documents required to be filed with the Commission for registration to be filed electronically. The is to enhance ease of doing business and seamless registration of business entities.⁶⁴ The section further provides that a copy or extract from any document electronically filed with the Commission or issued by the Commission and certified to be a true copy or extract shall in any proceedings be admissible in evidence as of equal validity with the original documents. The advantage of this provision is that for the purpose of tendering documents for court use, documents filed electronically with the Commission can be obtained and tendered before the court for that purpose rather than relying on those manually filed.

Also innovative is that Chairman of a public company is prohibited from Acting as the Chief Executive Officer of the same company⁶⁵ This provision prohibits the same person from holding the position of Chief executive officer of a company (usually a Managing Director) to act as the chairman of the same company. This is to forestall conflict of interest and abuse of power which may lead to corporate failure. Yet, it is mandatory requirement for a Director in a public company to disclose directorship held in other public companies,⁶⁶ and for public companies to display audited accounts on their websites.⁶⁷ While the former provision is to promote transparency and accountability in corporate governance since companies are now required to make full disclosure of their audited accounts to the public. The latter is to serve the purpose of preventing conflict of interest and engender sound corporate practice.

The provision of whistle blowing protection and or compensation for employees who provide information in the course of an investigation

⁶³ *ibid*, s 40.

⁶⁴ *ibid*, ss 860(1&2).

⁶⁵ *ibid*, s 265(6).

⁶⁶ *ibid*, s 278(2).

⁶⁷ *ibid*, s 374(6).

into a company's affairs⁶⁸ is very unique in the sense that despite lack of any specific legal framework on whistleblowing protection in Nigeria, this Act seeks to protect provider of the information. Also under the new Act, there is an increase in the Liability of Members of a Company Limited by Guarantee to a Minimum amount of ₦100,000.00 (One Hundred Thousand Naira)⁶⁹ It was a paltry sum of ₦10,000 in the repealed Act. This was increased due to the value of our currency and the exchange rate in order to make it be in tune with modern reality. Another reason for this hike, is to increase the liability of shareholders or contribution of members of the in the event of winding up. Still, the Commission can now strike out a company where the Company has not commenced business and has no undischarged obligation. The Company is required to pass a resolution for striking off and make an application to the Commission while same is advertised in three daily newspapers⁷⁰.

5. Impact of Companies and Allied Matters Act, 2020 on Ease of Doing Business in Nigeria

The World Bank's Doing Business survey involves ranking countries according to the ease of doing business as potential hosts for Foreign Direct Investment. The Ease of Doing Business index provides quantitative measure of regulations affecting various stages of the life of a business. Small and medium enterprises compose the bulk of these businesses.⁷¹ Economies are ranked on their ease of doing business from 1–190 determined by 10 subsidiaries. Put simply, an accumulation of all the activities that affects business outcomes can be summed in what is known as Ease of Doing Business.

A country's position on the ease of doing business ranking can fluctuate depending on the regulations and framework that govern the process of starting and running a business within the country. While some nations may have a more favorable business climate, others may have more obstacles, which can impact the development of entrepreneurship in those countries. In general, fewer or less complex regulations tend to result in a higher ranking, but this can come at a cost based on the country's regulatory environment. Protecting the rights of

⁶⁸ *ibid*, ss 357 (4) and (5).

⁶⁹ *ibid*, s 26(12).

⁷⁰ *ibid*, s 692.

⁷¹ Silva Opuala-Charles, Oshilike I Victoria, 'Impact of Ease of Doing Business on Foreign Direct Investment in Nigeria' (2023) (4) (2), *Journal of Economics & Management Research* 4.

creditors and investors, as well as setting up or improving property and credit registries, may require additional regulations.⁷²

It is important to note that the Ease of Doing Business Index is not a measure of a country's overall economic performance, but rather a measure of the regulatory environment for businesses. Nigeria appears to be one of the good locations for business on paper. But it is blatantly clear how unfounded this is. Given her abundance of natural, mineral, and human resources, Nigeria has the potential to become the most developed and eminent nation in Africa—the next Silicon Valley. Such advancement has been thwarted by a litany of persistently bad policies and egregious Medium and Small-Scale Enterprises are the engine of growth for most developing nations. As can be expected, without reforms for enabling business environments to sync with global business evolution, most businesses may shut down due to economic and environmental shocks. It follows logically that without reforms in a rapidly changing global market, most firms- MSMEs especially may not survive beyond the unanticipated COVID-19 pandemic. A nation's ranking on the index was based on an average of 10 sub-indices such as; starting a business, dealing with construction permit, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts, resolving insolvency.

Specifically, the reformed CAMA 2020 Act among other things, made the starting and running of business more seamless and less expensive by operationalizing electronic platforms that integrate the tax authority and the Corporate Affairs Commission (CAC). Considering that Nigeria is largely dominated by Medium and Small-Scale Enterprises (MSMEs), making business registration or company incorporation easier will bring in more businesses into the formal space. This also will enhance tax revenue for the government. It is clear that the objectives of the Act were intended to further provide an enabling business environment for small and medium scale companies and also cushion the effect of business disruptions caused by the COVID-19 pandemic on SMEs. These amendments as they relate to SMEs are expected to improve the ease of doing business and illustrate the government's drive to ensure SMEs are able to scale through the challenges usually faced during the startup period of their business lifecycle.

⁷² Wikipedia contributors, *Ease of doing business index* (Wikipedia, The Free Encyclopedia 2023), https://en.wikipedia.org/w/index.php?title=Ease_of_doing_businessindex&ol...

With the enactment of the new Act, the following are the immediate impacts of the Act on the ease of doing business: ease of both pre- and post –registration applications, holding of virtual meeting of companies without shareholders physical meeting thereby reducing cost, application of business rescue through administration and netting procedures to rescue distressed company, increased in the number of medium and small scale businesses, seamless procedure for striking off of companies, easy procedure for merger and dissolution of non-for profit organizations, flexibility in the operations of SMEs in Nigeria since they are no longer required by law to have two directors and shareholders, appoint secretary, auditor and even hold annual general meeting and so on and so forth.

With specific reference to the Business Facilitation (Miscellaneous Provisions) Act, 2022⁷³ as an Amendment to CAMA, 2020, it is fascinating to note that the enactment of CAMA, 2020 brought significant improvement to the procedure for registration and management of companies and other business entities in Nigeria. Recognizing the gap in the implementation and enforcement of the Act, the National Assembly in 2022 enacted the Business Facilitation (Miscellaneous Provisions) Act to provide for the ease of doing business, ensure transparency, efficiency and productivity in Nigeria. The objectives of the Act are to promote the ease of doing business in Nigeria and eliminate bottlenecks, amend relevant legislation to promote the ease of doing business and institutionalize all the reforms to ease implementation⁷⁴.

The Act introduced a unique provision on service delivery by mandating all departments and agencies of government providing products and services to publish a complete list of requirements to obtain their products and services which include permits, licenses, waivers, tax related processes, filings, approvals, registration, certification, and other products and services.⁷⁵ Where the relevant MDA fails to communicate approval or rejection of an application within the time stipulated in the published list, all applications for products and services not concluded within the stipulated timeline shall be deemed approved and granted.⁷⁶

In the amendment, the Registrar-General of the Corporate Affairs Commission (CAC) shall, within 14 days of the commencement of this Act, ensure that all application processes at the CAC are fully automated

⁷³ BFA, No 15,2022. This Act applies throughout the Federal Republic of Nigeria.

⁷⁴ *ibid*, s 1.

⁷⁵ *ibid*, s 3.

⁷⁶ *ibid*, s 4.

from the start to completion. This is to facilitate ease of registration and doing business.⁷⁷ Section 78 has also been amended which now allows for an Act of National Assembly to exempt a foreign company from registration, which is only limited to a treaty to which Nigeria is a party under CAMA, 2020⁷⁸

The Act now allows company to increase issue its share capital through a resolution by the Board rather than at the general meeting alone. Also, section 240 of CAMA has been amended to allow public companies hold virtual meetings while under 149 of CAMA the powers to allot the shares of a company cannot be exercised by the directors of a company unless express authority to do so has been vested in the board of directors by company at the general meeting and in the articles. The pre-emptive right of existing shareholder is now applicable only to private companies as the word private has been introduced into the amended section to exclude public companies.⁷⁹ The Business Facilitation (Miscellaneous Provisions) Act has further amended the qualifications of a small company under CAMA, 2020. By the amendment, a company qualifies as a small company in relation to a subsequent financial year, if the conditions qualifying it as a small company are met in that year and the preceding financial year.⁸⁰

6. Noticeable Lacuna in the Companies and Allied Matters Act, 2020

The seriousness of challenges associated with the repealed Act prompted the Nigerian Government to enact the new Act 2020 in order to resolve challenges in the Old Act. While Government's effort is applauded in this regard in view of the defects in the old Act that have been cured, it is however submitted that the gaps in the new Act can make its implementation very cumbersome if not impossible. Granted that there is no perfect law anywhere that can completely resolve human problems and corporate failures, it is posited that there are significant provisions in the new Act which make the implementation of the new Act very ineffective. Few of the defects identified in the Act are as follows:

- a. Appointment of members of Administrative Proceeding Committee from the Commission whereby the Registrar-General

⁷⁷ *ibid*, s 78 (3).

⁷⁸ *ibid*, s 127(1).

⁷⁹ *ibid*, s 394

⁸⁰ Business Facilitation (Miscellaneous Provisions) Act, 2022, s 9; see also for detailed provision section 18 of the Schedule to the Act made pursuant to section 9 of the same Act.

is the Chairman. This will make the Registrar to be a judge in his own cause, since issues to be addressed by the Committee are matters the Registrar-General must have acted upon and now being asked to sit in judgment to review.⁸¹

- b. Ratification of the decision of the Administrative Proceeding Committee by the Board of the Commission instead of Court makes it political.⁸²
- c. Power of the Commission to suspend members of trustees of association for impropriety subject to the approval of the Minister is too wide. It ought to be subjected to court approval instead of the Minister of Industry, Trade and Investment.⁸³
- d. Subjection of the registration of company limited by guarantee to the authority and approval of the Attorney –General of the Federation who has no role to play in the registration procedure will hamper ease of doing business.⁸⁴
- e. The provision of the Act which mandates a non-for-profit organization to file bi-annual report and at the same time annual return not earlier than 30th June and 31st December of each year except the year of registration amounts to double returns since both serve the same purpose.⁸⁵
- f. The provision on minimum share capital of ₦1,000,000 and ₦20,000,000 for private and public companies respectively is still inadequate. This is because the exchange rate of Nigeria naira to other currency like dollar is wide.⁸⁶
- g. Provision on the amount of money a company can owe in the sum of ₦200, 000.00 to be regarded as unable to pay its debt is also abysmally low⁸⁷. Luckily his section 572 of the Act has recently been amended by section 14 of the Business Facilitation (Miscellaneous Provisions) Act which removes the threshold of ₦200,000 and allow the CAC to determine by regulation the amount a company can owe to be classified as being unable to pay its debt.
- h. While the Act recognizes the formation of a private company with a single shareholder and small company with single director,

⁸¹ CAMA 2020, section 851(1)(a).

⁸² *ibid*, s 852(11).

⁸³ *ibid*, s 839 (11).

⁸⁴ *ibid*, s 26.

⁸⁵ *ibid*, s 845.

⁸⁶ *ibid*, s 27(2)(a).

⁸⁷ *ibid*, s 572(a).

it fails to make provision on how an existing company with many shareholders and directors can be converted to a company with a status of a single shareholder or director when it is necessary⁸⁸.

The expiration of the appointment of the administrator after one year may be too short to completely rescue the company.

7. Conclusion

While this paper examines the shortcomings in the repealed enactment before Companies and Allied Matters Act was enacted in 2020, it also highlights the major reforms and innovations contained in the new Act, objectives of which are to promote accountability and transparency, full disclosure that will enhance good business environment in Nigeria and ultimately serve as impetus to promoting good corporate governance. The new Act will positively impact the EoDB in Nigeria if it is vigorously implemented. Although, the Act factors in new methods while embracing technological changes in the business world, it is expected that without practical implementation of the CAMA 2020 by the CAC, the country's business landscape would not catch up with international business practices. It is hoped that the practical administration of the new CAMA will help ease the strain of doing business, and will enhance productivity and promote ease of doing business in Nigeria.

8. Recommendations

The findings in this paper, therefore, shows that although the Act introduced major reforms to enhance business administration in general, however, the recent amendments of the Act by the Business Facilitation (Miscellaneous Provisions) Act, 2022 is commendable. There are still yet some aspects of the company administration procedures that need further developments. It is therefore suggested that the highlighted lacuna should be considered by the National Assembly by way of amendment so that the major objective of the Act can be achieved. This work recommends that:

- a. The provision of the Act which makes Appointment of members of Administrative Proceeding Committee to be from the Commission whereby the Registrar-General is the Chairman need to be reviewed as a matter of urgency in its amendment as

⁸⁸ *ibid*, s 18(2).

this will obviously make the Registrar to be a judge in his own cause.

- b. Ratification of the decision of the Administrative Proceeding Committee should rather be by the Court instead of the Board of the Commission.⁸⁹
- c. Power of the Commission to suspend members of trustees of association for impropriety subject to the approval of the Minister is too wide; the Act in its amendment should rather seek the court's approval in that regard, instead of the Minister of Industry, Trade and Investment.⁹⁰
- d. Registration of company limited by guarantee should rather be subjected to the authority and approval of designated officials of Corporate Affairs Commission rather than to the authority and approval of the Attorney –General of the Federation who has no role to play in the registration procedure; as this will hamper ease of doing business.⁹¹
- e. The provision of the Act which mandates a non-for-profit organization to file bi-annual report and at the same time annual return not earlier than 30th June and 31st December of each year except the year of registration amounts to double returns since both serve the same purpose.⁹² The Act may wish to adopt an annual report alone which will be comprehensive enough in its amendment.
- f. The provision on minimum share capital of ₦1,000,000 and ₦20,000,000 for private and public companies respectively, which is obviously inadequate need to be jerked up in the amendment; considering the fact that exchange rate of Nigeria naira to other currency like dollar is wide.⁹³
- g. Provision on the amount of money a company can owe, in the sum of ₦200, 000.00 to be regarded as unable to pay its debt is abysmally low⁹⁴ and should be jerked up in the amendment
- h. The Act in addition to recognizing the formation of a private company with a single shareholder and small company with single director; should in its amendment make provision on how an existing company with many shareholders and directors can

⁸⁹ *ibid*, s 852(11).

⁹⁰ *ibid*, s 839 (11).

⁹¹ *ibid*, s 26.

⁹² *ibid*, s 845.

⁹³ *ibid*, s 27(2)(a).

⁹⁴ *ibid*, s 572(a).

be converted to a company with a status of a single shareholder or director when it is necessary⁹⁵.

The expiration of the appointment of the administrator after one year is too short to completely rescue the company and as such his tenure should be increased to at least 2 years in the amendment of the Act.

⁹⁵ *ibid*, s 18(2).

Making a Case for the Resuscitation of Capital Gains Taxation in Nigeria

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Abstract

From time immemorial, taxes have served as a veritable source of revenue for governments all over the world. The Nigerian tax system comprises several taxes including Personal Income Tax, Companies Income Tax, Petroleum Profits Tax, Value Added Tax and Capital Gains Tax. However, whereas the other taxes are well-recognised and avidly collected by the relevant tax authorities, Capital Gains Tax is often ignored. To compound the problem, it is often difficult to distinguish between a capital gain and an income gain with the concomitant result that capital gains are often not taxed at all. It is this incongruous situation that gave rise to this research. In this era where the government wants to raise taxes at all cost, it is pertinent to underscore that rather than introduce new taxes or raise tax rates, it would be better and more sustainable to fine-tune the extant taxes and improve their collection and overall administration. It is against this background that this article attempts a succinct; but purposeful examination of the regime for taxation of capital gains in Nigeria. The identifies the problems stultifying same such as insufficient capturing of the informal sector and inadequate utilization of the Tax Identification Number (TIN) and proceeds to advance helpful recommendations to reposition this issue including creation of awareness among taxpayers and periodic review of the Capital Gains Tax Act. It is hoped that this article will contribute to the legal literature on this issue and hearkening to the recommendations herein articulated will significantly improve the system for the taxation of capital gains in Nigeria which will culminate in more revenue for the Nigeria.

Keywords: Tax, Taxation, Capital Gains, Tax Administration, Tax Agencies

1. Introduction

Since the beginning of time, taxes have been levied on individuals and properties to raise revenues for the supply of social services.¹ Taxation is

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¹ DC Nwuzor and AC Onah, 'Interpretation of Tax Statutes in Nigeria: Unveiling Scholarly and Judicial Insights for Guided Implementation', (2023) 13(1) *Nigerian Bar Journal* 167.

the most consistent and reliable means of generating revenue for the government² and the tax system is one of the strongest means available to the government for stimulating the economic and social development of the country.³ The goal of the Capital Gains Tax just like other taxes is essentially to generate revenue⁴ but unlike the other taxes in Nigeria, it appears to be largely forgotten. It is seldom mentioned and many people appear oblivious to its existence. This is the main reason for delving into this article in order to undertake a succinct but purposeful analysis of capital gains taxation in Nigeria. Since the prime aim of tax reform is to generate more revenue,⁵ it goes without saying that the tax agencies must optimize the collection of the extant taxes in Nigeria, amongst which is capital gains tax. In Nigeria, there is a different tax on gains derived from the disposal of capital assets.⁶ It is regulated by the Capital Gains Tax Act.⁷ The tax is on the Exclusive Legislative List so it can only be imposed by the National Assembly.⁸ However, it is collected both by the Federal and State Governments as the former collects from corporate bodies while the latter collects from individuals and unincorporated bodies.⁹ Capital gains have been defined as gains arising from increases in the market value of assets to a person who does not regularly offer them for sale and in whose hands they do not form part of stock-in-trade.¹⁰ While it is difficult to ascribe a flawless distinction between

² O Olaniyi, 'Mismatch between Tax Yield and Revenue Requirement for Financing Social Overhead Capital in Nigeria: Imperatives for an Alternative Revenue Framework' in JAA Agbonika (ed) *Topical Issues on Nigerian Tax Laws and Related Areas* (Ababa Press Ltd, 2015), 400; see also, SK Ngu, 'Effects of Capital Gains Tax on Total Tax Revenue and Economic Growth in Nigeria', (2020) 6(4) *IJAAR-SMS* 108.

³ IA Ayua, *The Nigerian Tax Law* (Spectrum Law Publishing 1996) 1.

⁴ CO Nwabachili, 'Re-examining the Chargeable Gains on Capital Gains Tax in Nigeria: Finance Act 2021 in Perspective' (2022) 3(2) *LASJURE* 80.

⁵ MN Umenweke, *Tax Law and its Implications for Foreign Investments in Nigeria* (Nolix Educational Publications Nig 2008) 6.

⁶ A Ipaye, *Nigerian Tax Law and Administration: A Critical Review* (London: ASCO Prime Publishers 2014) 249.

⁷ Cap C1 Laws of the Federation of Nigeria 2004, hereinafter simply called 'the CGTA'; see also, JAM Agbonika and JAA Agbonika, 'An Overview of the Personal Income Tax and Capital Gains Tax Regime in Nigeria' (2021) 3(1) *American Journal of Law* 22.

⁸ Ipaye (n 6) 249.

⁹ *ibid.*

¹⁰ AL Suleman, 'Taxation Regime in Nigeria: Critical Analysis of Basic Principles' in JAA Agbonika (ed) *Topical Issues on Nigerian Tax Laws and Related Areas* (Ababa Press Ltd, 2015) 363.

‘income gains’ and ‘capital gains’,¹¹ the CGTA, as shall be shown states what ‘capital gains’ means for the purpose of the CGTA.

The CGTA was borrowed from England. The rationale for the imposition of capital gains tax in England was elucidated by the then Chancellor of the Exchequer, James Callaghan in his Budget Speech of 6th April, 1965 as follows:

First I begin with tax reform. The failure to tax capital gains is widely regarded... as the greatest blot on our existing system of direct taxation. There is little dispute nowadays that capital gains confer much the same kind of benefit on the recipient as taxed earnings more hardly won. Yet earnings pay tax in full while capital gains go free. This is unfair to the wage and salary earner. It has in the past been one of the barriers to the progress of an effective income policy.... This new tax will provide a background of equity and fair play for his work. Moreover, there is no doubt that the present immunity from tax of capital gains has given a powerful incentive to the skillful manipulator of which he has taken full advantage to avoid tax by various devices which turn what is really taxable income to tax free capital gains. We shall only make a headway against avoidance of this sort when capital gains are also taxed.¹²

In Nigeria, Ola has argued against the retention of capital gains tax in Nigeria on the basis that it is unjust, does not yield much and costs a lot.¹³

The question that boggles the mind is whether the synthesis of the foregoing views possible. This author submits that the answer is in the positive. Clearly, there is no reason why capital gains should not be taxed while other types of income are taxed. Nevertheless, steps should be taken to streamline the process and regime for the taxation of capital gains to ensure administrative efficiency. After all, one should not throw away the proverbial baby with the bath water. It is in the light of the above that this article sets out to analyze capital gains taxation in Nigeria.

¹¹AK Ibigbami, ‘An Assessment of Capital Gains Tax in Nigeria’, in O Akanle (ed) *Tax Law and Tax Administration in Nigeria*, (Nigeria Institute of Advanced Legal Studies 1991), 205, quoted in Ipaye, (n 6) 249; see also, Ayua, (n 3) 211.

¹² HC Hansard, *Debates*, Vol 710, Col 245.

¹³ CS Ola, ‘The Suggested Obituary of Capital Gains Tax Law in Nigeria’, (1989) 2(5) *GRBPL* 81.

2. Literature Survey

It is appropriate to start by reiterating the view of the revered tax scholar, Ola who expressed the view that capital gains tax should be jettisoned in Nigeria on the grounds that it is unjust, does not yield much and costs a lot.¹⁴ With the greatest respect, this view is misconceived. There is nothing unjust about taxing capital gains. This is a tax on disposition of assets in requisite circumstances. If VAT, income taxes and other taxes are not unjust, why should capital gains tax be? As to the purported low yield, that should be the incentive to entrench a better system to realize more from it which is why this work advocates for education of taxpayers and the leveraging of technology. The costs of administering this tax should also be brought down by putting in place a more efficient system. It is hoped and expected that the tax agencies will rise to the occasion.

Elsewhere, it has been suggested that capital gains tax when levied alongside income tax amounts to double taxation.¹⁵ It is submitted that this position is not correct because the two types of taxes are on different things. While income tax is a tax on income, capital gains tax is a tax on the disposition of assets in certain defined circumstances. They are therefore like oil and water and do not mix. In fact, one can go far as stating that capital gains taxation has never been as important as it is today because of the recent avalanche of digital assets such as non-fungible tokens (NFTs) which are transacted on daily. The FIRS must keep up to tabs and find a way to bring all these within the tax bracket.

Furthermore, the CGTA has been criticized by on the grounds of lack of clarity and non-implementation.¹⁶ Assuming without conceding that non-implementation of the CGTA is a problem, should that not be a reason to galvanize its administration and entrench modalities to improve same. In looking at this, it must further be borne in mind that tax administration in Nigeria is generally lagging behind even regarding the more 'established' taxes like income taxes and VAT yet no one has criticized the CITA or PITA on those grounds. What is good for the goose is good for the gander and as recommended hereunder, more needs to be done to realize the gains inherent in capital gains tax.

¹⁴ *ibid.*

¹⁵ O Enemaku, 'Capital Gains Tax in Nigeria', (2012) 8(3) *Canadian Social Science*, 92.

¹⁶ Ipaye (n 6) 267.

It has also been stated that more money is being spent on administering the tax than is realized therefrom.¹⁷ Even if this is correct, should the proverbial bathing water be thrown away with the baby? It would rather seem that this ought to encourage tax administrators to leverage on technology to turn this around after all administrative efficiency is one of the hallmarks of a good tax system.¹⁸ With regards to taxation generally, Nlerum, in criticizing the tax system in Nigeria, quipped that the ‘institutional capacity to administer taxes effectively is lacking in the country.’¹⁹ While the foregoing assessment is quite correct, it is observed that the author ignored to provide solutions. This article tries to do so in the final section of the work.

On his part, Humes,²⁰ while discussing the difficulty in collecting tax in Nigeria pointed out:

The problems of assessment are matched by difficulties of collection. Those who have suffered a poor year economically, and who believe the assessment was too high (at least in comparison with their neighbours), those who believe there is no need for fear, those who believe the taxes are being mis-spent, those who generally resent government and especially those who belong to two or more of these groups will delay paying taxes as long as possible. Frequently they succeed in avoiding paying at all, either by moving away or otherwise successfully avoiding the tax collector...

While the above passage offers an invaluable insight into why people fail to pay tax, it neglects to prescribe a remedy for it. This is an obvious gap which this work sets out to fill.

Besley and Person,²¹ while analysing the issue of tax payment in poor countries, aired the view that the governments of poor countries should raise taxes to generate more revenue. This article respectfully disagrees with the above view. Merely raising taxes without more will not automatically result in the generation of more revenue. Rather, what is needed is a comprehensive restructuring and fine-tuning of the regime for tax administration to ensure it is fair, transparent, efficient and

¹⁷ JU Upaa, EA Agule and BG Adeniran, ‘Impact of Capital Gains Tax on Nigeria Economy’, (2016) 9(6) *NIRA-IJEFE*, 32.

¹⁸ G Etomi, *An Introduction to Commercial Law in Nigeria: Text, Cases and Materials* (MIJ Professional Publishers 2014) 300.

¹⁹ FE Nlerum ‘Reflections on the Attitude of the Courts to Tax Incentive Mechanism in Nigeria’ (2012) *NIALS JBL* 123.

²⁰ HS Humes, *A Study of the Development and Administration of Local Governments in Nigeria* (1991) 330-340.

²¹ T Besley & T Persson, ‘Taxation and Development’ in A Auerbach, R Chetty, M Feldstein & E Saez (eds) *Handbook of Public Economics* (JEL Final Draft 2013) 3.

effective. Fine tuning the administration of taxes in general and capital gains tax in particular is certainly preferable to raising taxes.

It is in the light of the foregoing that this work sets out to analyse pertinent provisions of the CGTA as well as to address important issues relating to the taxation of capital gains with the ultimate aim of awakening this sleeping giant of taxation.

3. Important Provisions of the Capital Gains Tax Act

Under the CGTA, capital gains accruing to any person upon the disposal of assets in a year of assessment shall be charged to capital gains tax.²² Except as otherwise expressly stated, such a gain shall be a chargeable gain.²³ It is important to note here that there is a difference between income gain and capital gain. To illustrate the difference, consider the following scenario: if Mr A, a car seller whose ordinary business is the selling of cars, buys a car for ₦5,000,000 and sells same for ₦10,000,000; thereby making a gain after expenses, such a gain amounts to a gain on income because it does not represent the disposition of a capital asset. This may be juxtaposed with a situation where Mr B sells his house which he lives in. If he bought the house for ₦ 25,000,000 and sells same for ₦85,000,000, the gain amounts to capital gain and will be taxable under capital gains tax.

The rate of capital gains tax is 10%.²⁴ When compared to the rates of other countries, this rate appears fair; the United Kingdom charges between 10-24 percent on gains from business assets, shares and non-primary homes; France charges between 30-34 percent; Germany charges 25 percent plus a 5.5 percent solidarity surcharge on the tax paid while Ireland charges 33 percent²⁵. The aforesaid rate is chargeable on the total amount of chargeable gains accruing to any person in a year of assessment after making the deductions allowed under the CGTA,²⁶ The amount charged under the CGTA as chargeable gain is the difference between the consideration accruing to any person on a disposal of assets and any sum to be excluded from that consideration, and there shall be added to that sum, the amount of the value of any expenditure allowable to such person on such disposal pursuant to the CGTA.²⁷

²² The CGTA, s1 (1).

²³ *ibid*, s1 (2).

²⁴ *ibid*, s 2 (1).

²⁵ E Agyemang, 'Capital Gains Tax: How Does the UK Compare with Other Countries?' <<https://www.ft.com/content/0ebe0194-1298-42c5-8079-fcf3db4a83e8>>; accessed on 4th Sept 2024.

²⁶ CGTA, s 2 (2).

²⁷ *ibid*, s 11.

For the purpose of considering the disposal of assets taken into account in the computation of gain accruing on such disposal, any money or money's worth charged to income tax as income of or taken into account as a receipt in computing income or profits or gains or losses of the person making the disposal for the purposes of PITA, CITA or PPTA, shall be excluded.²⁸ This provision is laudable because it prevents double taxation as income emanating from the disposal of an asset, already taxed under another statute shall not be taxed again under the CGTA.

In computing the amount of capital gains to be charged upon the disposal of an asset, the following shall be deducted:

- a. The amount or value of the consideration, in money or money's worth given by a person or on his behalf wholly, exclusively and necessarily for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly, exclusively and necessarily incurred by him in providing the asset;
- b. Any amount of an expenditure wholly, exclusively and necessarily incurred on the asset by him or on his behalf for the purposes of enhancing the value of the asset being expenditure reflected in the state or nature of the asset at the time of the disposal;
- c. The amount of any expenditure wholly, exclusively and necessarily incurred on the asset by him or on his behalf in establishing, preserving or defending his title to, or a right over, the asset; and
- d. The incidental costs to him of making the disposal.²⁹

It is submitted that the foregoing provision is comprehensive. For the purposes of the CGTA, the incidental costs to the person making the disposal of the acquisition of the assets or its disposal shall consist of expenditure wholly, exclusively and necessarily incurred by him for the purposes of the acquisition or, as the case may be, the disposal, being fees, commission or remuneration paid for the professional services of any surveyor or valuer, auctioneer, accountant, agent or legal adviser

²⁸ *ibid*, s 12 (1).

²⁹ *ibid*, s 13 (1). Note that under section 15, in calculating the amount allowable as deduction, any premiums or other payments made under a policy of insurance shall be excluded. Note also that under section 14, in calculating the amount allowable as deduction, any expenditure allowable as a deduction in computing the profits or gains or losses of a business, trade, profession or vocation shall be excluded. This is laudable as it prevents double deduction of chargeable tax on the same assets.

and costs of transfer or conveyance (including stamp duties) as well as the cost of advertising.³⁰

Assets are the subject matter of capital gains tax and all forms of property, except those excluded under the CGTA, are deemed to be assets.³¹ These include options, debts, incorporeal property, foreign currency and any form of property created by the person disposing of it, or otherwise coming to him without being acquired.³² It bears mentioning that in this modern era, digital assets are among the assets whose disposition are taxable under Capital gains including non-fungible tokens, crypto currencies and similar assets. It is therefore submitted that the Act be amended to expressly incorporate these.

The next issue is to ascertain what disposal of assets means. Subject to any exceptions under the CGTA, there is disposal of assets by a person where any capital sum is derived from a sale, lease, transfer, assignment, compulsory acquisition or any other disposition of assets, notwithstanding that no asset is acquired by the person paying the capital sum, and in particular:

- a. Where any capital sum is derived by way of compensation for any loss of office or employment;
- b. Where any capital sum is received under a policy of insurance and the risk of any kind of damage or injury to, or the loss or depreciation of assets;
- c. Where any capital sum is received in return for forfeiture or surrender of rights, or for refraining from exercising rights;
- d. Where any capital sum is received as consideration for use or exploitation of any asset; and
- e. Without prejudice to paragraph (i) above, where any capital sum is received in connection with or arises by virtue of any trade, business, profession or vocation.³³

The phrase 'notwithstanding that no asset is acquired by the person paying the capital sum' has been construed to be words of extension, whose purpose is to apply the subsection to cases where it would not ordinarily apply.³⁴ It is submitted that the above view is correct.

³⁰ *ibid*, s13 (2).

³¹ *ibid*, s 3.

³² *ibid*.

³³ *ibid*, s 6 (1).

³⁴ *Marren v Ingles* (1980) 1 WLR 983.

For disposal of assets to arise, the capital sum must be derived from the assets.³⁵ Generally, references to disposal of assets include part disposal of assets.³⁶ For the avoidance of doubt, part disposal of assets arises:

- a) Where an interest or right in or over the assets is created by the disposal, as well as where it subsists before the disposal; and where, on a person making a disposal, any description of property derived from the assets remains undisposed of.³⁷

The CGTA also provides for artificial or fictitious transactions.³⁸ Accordingly, the CGTA provides as follows:

Subject to the provisions of this Act, where the Board is of the opinion that any disposition is an artificial or fictitious transaction or where any transaction which reduces or would reduce the amount of any capital gains tax is artificial or fictitious the Board shall disregard such disposition and may direct that such adjustments shall be made with respect to the liability of any person for the payment of capital gains tax as it considers appropriate so as to counteract the reduction of liability to capital gains tax effected or reduction which would otherwise be effected, by the transaction and any person concerned with such transaction shall be assessable accordingly.³⁹

This provision is praise-worthy since it provides a detailed manner for preventing tax evasion. Under the above provision, ‘disposition’ is stated to include any trust, grant, covenant, agreement or arrangement.⁴⁰ What does it mean for a transaction to be fictitious? A transaction is said to be fictitious where it is a sham, that is, where it is not intended to be acted upon and is only used as a cloak to conceal a different transaction.⁴¹

³⁵ CGTA, s 6; see also Ipaye, (n 6) 259. For the exact purport of ‘derived from’, see *IRC v Montgomery* where Walton, J said it means to trace or show the origin of something; see also P Sparkes, ‘The Derivation of Capital Sums’ (1957) BTR 323; G Richards, ‘Revenue Concession on Zim’ (1989) 86(15) *L S Gaz* 28; for similar views. It is submitted that the definition is correct.

³⁶ CGTA, s 6 (2).

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*, s 20 (1). This is similar to the anti –tax evasion provisions in other statutes such as CITA, s 22 (1) and PPTA, s 15 (1).

⁴⁰ CGTA, s 20 (3) (a).

⁴¹ *Johnson v Jewitt* (1961) 4 T C 231. See also MT Abdulrazaq, ‘Legislation against Tax Avoidance: The Nigerian Experience’, in MT Abdulrazaq (ed) *Taxation System in Nigeria*, (Gravitas Legal & Business Resources Ltd 2016) 212.

As to what the term, ‘artificial’ means, it has been suggested that there are two perspectives from which one can discern whether or not a transaction is artificial. The first is by looking at the object of the transaction.⁴² Thus, a transaction will not be perceived to be artificial if the taxpayer can show that it was carried out for genuine commercial purposes and not just to obtain tax advantages.⁴³ The other is by looking at the form.⁴⁴ For instance, where unusual features have been included in an otherwise simple transaction in order to provide a particular result, it may thereby be perceived that the transaction is artificial.⁴⁵ The foregoing view is commendable. It is however submitted that a combination of the above perspectives would prove more potent in identifying artificial transactions and in fighting tax evasion rather than just one of them.

The CGTA went on to list transactions which will be deemed artificial or fictitious. They are transactions between persons one of whom either has control over the other or in case of individuals who are related to each other or between persons both of whom are controlled by some other persons.⁴⁶ These would be deemed artificial or fictitious except, in the opinion of the tax authority, they have been made on terms which might fairly have been expected to have been made by independent persons engaged in similar activities dealing with each other at arm’s length.⁴⁷ It is suggested that the above categories are not exhaustive.

In addition, the CGTA also makes provisions for transactions between connected persons.⁴⁸ For the purpose of the CGTA, a person is deemed to be a connected person in the following circumstances:

- i) A person is connected with an individual if that person is the individual’s husband or wife, relative, husband or wife of a relative, of the individual or of the individual’s husband or wife;
- ii) A person, in his capacity as trustee of a settlement, is connected with any individual who in relation to the settlement is a settlor, and with any person who is connected with such an individual;

⁴² Umenweke (n 5) 192.

⁴³ *IRC v Brebner* (1976) AC 18.

⁴⁴ Umenweke, (n 5) 192.

⁴⁵ *Read v Nova Securities Ltd* (1982) ST 1724.

⁴⁶ CGTA, s 20 (3) (b).

⁴⁷ *ibid.*

⁴⁸ *ibid.*, s 22.

- iii) A person is connected with any person with whom he is in partnership, and with the husband or wife or a relative of any individual with whom he is in partnership;
- iv) A company is connected with another company-
 - a) where the same person has control of both, or a person has control of one and persons connected with him, or he and persons connected with him, have control of the other; or
 - b) where a group of two or more persons has control of each company, and the group either consists of the same persons or could be regarded as consisting of the same persons by treating a member of either group as replaced by a person with whom he is connected;
- v) A company is connected with another person, if that person has control of it or if that person and persons connected with him together have control of it; or

Any two or more persons acting together to secure or exercise control of a company shall be treated in relation to that company as connected with one another and with any person acting on the directions of any of them to secure or exercise control of the company.⁴⁹ Where there is a transaction between connected persons, there shall be restrictions.⁵⁰ The aforesaid provisions also serve to curtail incidents of tax evasion where people attempt to subvert the tax provisions by purporting to carry on transactions not at arm's length. Certain transactions are exempted from tax under the CGTA. They include:

- i) Capital gains accruing to:
 - a) ecclesiastical, charitable or educational institution of a public character;
 - b) any statutory or registered friendly society;
 - c) any co-operative society registered under the Corporative Societies law of any state; or
 - d) any trade union registered under the Trade Union Act; provided the gain derived is purely for the purpose of the institution or society;⁵¹
- ii) Where trustees transfer assets to beneficiaries;⁵²
- iii) Any gains accruing to any local government council;⁵³

⁴⁹ *ibid*, s 23

⁵⁰ *ibid*, s 22.

⁵¹ *ibid*, s 26 (1).

⁵² *ibid*, s 7 (3).

- iv) Gains which are also liable to be taxed abroad, as double taxation relief;⁵⁴
- v) Disposal of business assets where the proceeds are spent in acquiring new business assets;⁵⁵
- vi) Gains derived from the disposal of assurance policies;⁵⁶
- vii) Sums obtained via compensation or damages for any wrong or injury suffered by an individual;⁵⁷
- viii) Gains made from the disposal of principal private residences;⁵⁸
- ix) Gains from Retirement Benefit Schemes;⁵⁹
- x) Gains from decorations awarded for valour;⁶⁰ and
- xi) Gains from stocks and shares.⁶¹

It must be noted here that gains made upon the disposal of assets in respect of which qualifying expenditure had been incurred under the Income Tax Acts (PITA, CITA, & PPTA) are not chargeable to capital gains tax.⁶² Instead, they are subjected to a balancing charge.⁶³

4. Challenges Facing Capital Gains Taxation in Nigeria

In a study carried out using questionnaires in the Enugu Senatorial Zone of Enugu State, the researchers discovered as follows:

The tax inspectors and accountants unanimously accepted that lack of data or record keeping; health savings account; difficult to identifying (sic) the subject matter of the tax; inflation; lack of reliable and genuine data; primary residence exclusion; bureaucratic laziness and selling when income is low were current challenges to capital gains taxation.⁶⁴

The scholars further advance the solutions to the forgoing challenges where they asseverated:

⁵³ *ibid*, s 27 (1). It is submitted that this provision is to aid the local government councils generate more revenue, regard being had to the historical financial woes suffered by them.

⁵⁴ *ibid*, s 41.

⁵⁵ *ibid*, s 31.

⁵⁶ *ibid*, s 34.

⁵⁷ *ibid*, s 36.

⁵⁸ *ibid*, s 37.

⁵⁹ *Ipaye* (n 6) 265.

⁶⁰ *ibid*, s 29.

⁶¹ *ibid*, s 30.

⁶² *ibid*, s 28.

⁶³ PITA, Fifth Schedule; CITA, Second Schedule.

⁶⁴ JC Ezemma and K Mohammed, 'The Challenges of Capital Gains Tax in Nigeria', (2017) 21(1) *International Journal of Communication* 81.

Tax Inspectors and Accountants accepted that maintenance of good data of the transaction on the asset; rejection of assessment that is contrary to the provision of law; maintaining good management capacity; engaging in aggressive enlightenment campaign and proper utilization of tax proceeds by the government were mechanisms that should ameliorate the administrative challenges of capital gains tax.⁶⁵

In view of the foregoing, the researchers concluded that the Federal Inland Revenue Service (FIRS) and States Board of Internal Revenue (SBIR) should not only ensure owners of assets maintain good data of their transaction on the assets; but also fill tax returns faithfully; adding that this measure would ensure owners of assets pay tax. It would also enable the owners of the assets challenge any assessment that is not in accordance with what the law provides.⁶⁶

The profound observations advanced above are enthusiastically accepted. It is submitted that the tax agencies should take note of them and do the needful. In addition to the above, there are other issues facing the effectiveness of capital gains taxation in Nigeria. One is that most taxpayers have not been captured particularly those in the informal sector. The consequence of this is that most people eligible to pay capital gains tax here evade same. The general ignorance relating to this tax is another issue. It appears that most tax officials and tax payers are unaware of this tax and even those who know of it may seem unable to distinguish between it and personal income tax so that many people believe that having paid personal income tax, there is no need to pay capital gains tax.

The ineffectiveness of the Tax Identification Number is another albatross. Years after its introduction, its effects are yet to be seen. This is a technological innovation meant to capture the details of all eligible taxpayers so they will be brought into the tax net so more needs to be done by the tax agencies in this regard. Another area is to systematically capture transactions of digital assets such as non-fungible tokens, crypto etc. These challenges must be resolved if the quest for a successful regime for capital gains taxation in Nigeria is to be realized.

5. Conclusion

In conclusion, while the CGTA has been criticised by certain authors on the grounds of lack of clarity and non-implementation⁶⁷ as well as the

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *Ipaye (n 6).*

fact that more money is being spent on administering the tax than is realized therefrom,⁶⁸ it is submitted that the CGTA is a solid and very comprehensive legislation and the tax has a lot of potential. It is for the relevant authorities to implement the CGTA effectively, review it periodically and administer the tax properly. It goes without saying that in this era where the government is looking for every sustainable means of generating revenue, taxation serves as a veritable channel of realizing same. The taxation of capital gains must therefore be resuscitated and carefully orchestrated. The gains to be realized from same are unquantifiable.

Furthermore, these researchers are of the view that the FIRS and other tax authorities in Nigeria do not need to start introducing new taxes while extant taxes remain unappreciated and inoperative. With the effective utilization of technology and leveraging on Tax Identification Number, among others, the taxation of capital gains can be seriously improved with the concomitant rewards. Educating both tax officials and taxpayers about this tax as well as entrenching accountability and probity *vis-a-vis* the revenue generated from this tax should galvanize the effective administration of same. Contrary to the postulation of the eminent tax scholar, Ola that this tax is unjust, there is nothing inherently unjust about it. The low yield realized from same in Nigeria and the high cost of administering it are issues which the tax agencies are more than capable of resolving. It is hoped and expected that they prove themselves equal to the task.

6. Recommendations

For the potentials to be realized, this article recommends that the relevant authorities must implement the CGTA effectively and administer the tax efficiently; and Technology and the Tax Identification Number must be leveraged on in order to improve and scale up the taxation of capital gains. Further, training and re-training tax officials about this tax and taxation in general must be done regularly through various avenues including workshops, conferences and exchange programmes, in addition to entrenching accountability and probity *vis-a-vis* the revenue generated from this tax should galvanize the effective administration of same.

In addition, wide dissemination of information to the populace on issues relating to this tax should be carried out by tax officials. They

⁶⁸ Upaa, Agule and Adeniran (n 17).

should be informed of this tax and told why they should pay it, when and to whom. This should be carried out using both old and new media.

It is also important for tax officials to know the distinction between income and capital gains so that they will know when to charge a person for income tax and when to charge for capital gains tax.

The CGTA must be reviewed frequently to be up to date and in line with international best standards, in addition to the implementation of anti- evasion provisions in the CGTA to punish tax offenders and deter others from toeing such path. The informal sector must also be properly captured in tax generally and in capital gains tax in particular. Disposition of assets, whether real estate, non-fungible tokens, crypto, and others, must be identified and taxed among all eligible taxpayers.

It is hoped and expected that systematically carrying out the aforesaid recommendations will extirpate the impediments weighing down capital gains taxation in Nigeria and significantly reposition same so that it will contribute a fair share in realizing revenue for the country.

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