NILDS
NATIONAL INSTITUTE FOR LEGISLATIVE AND DEMOCRATIC STUDIES

JOURNAL OF LAW REVIEW

NILDS-JLR (2022-2023) Vol. 5 &6

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***Maimuna Izah and Bethel Uzoma* Ihugba**

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Published 2023

A Publication of the Department of Legislative Support Services,
National Institute for Legislative and Democratic Studies,
National Assembly,
Abuja

ISSN: 2659-0565

TO BE CITED AS

NILDS-JLR (2022-2023) VOL 5 & 6

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EDITORIAL COMMENT

This is the fifth and sixth volumes of the NILDS - Journal of Law Review, comprising thirteen articles on different areas of law and policy.

The paper by Ariyoosu, Dauda Adeyemi entitled 'The States/Local Governments' relations: Ways towards effectiveness' examines the nature of states/local governments relations and the challenges affecting its effectiveness, with a view to proffering solutions towards effective relations between the two tiers of government.

The paper by Bethel Uzoma Ihugba entitled 'Reconciling Constitution Alteration Themes and Federalism in Nigeria: an analysis' is an analysis of the key proposals in response to the 9th National Assembly themes for Constitution alteration using the Progressive Governors Forum (PGF) submissions as a case study. The paper finds that many of the proposals are placed on wrong normative frameworks but if properly articulated some may assist in resolving key national issues. The findings disclose an overwhelming desire for a federal system where the central government has less powers and the states are constitutionally empowered to deliver public goods to the citizens.

The paper by Israel N.E. Worugji, Rose O. Ugbe and Nheoma Eme Worugji entitled 'Repositioning Pregnancy and Maternity Rights for sustainable balance between Work and Childbearing Role of Women in Nigeria' evaluates the Nigerian law on the protection of pregnancy and maternity rights of women in employment relations and the extent to which the law is in cooperation with the international standards and international best practices.

The paper by Abdullahi Yunusa entitled 'Insecurity and Law Enforcement in Forest Reserves: An Appraisal of the National Park Service Act 2006' appraises the National Park Service (Amendment) Act 2006 in light of the rising insecurity in Nigeria.

The paper by Abdullahi Saliu Ishola, Ridwan I. O Olagunju and Khalid Ishola Bello entitled 'Insurable interest in the life of another person under the Nigeria Insurance Act, 2003: An Islamic Law Interpretation' critically analyses the Islamic law provisions on the relationship creating maintenance duties, for the understanding of the insurable interest in the life of another under the Nigeria Insurance Act.

The paper by Shamsu Yahaya, Bilkis Lawal-Gambari, Aisha Usman, Zainab Akinde and Nansat Omoarebu entitled 'A Review of the Students Loans (Access to Higher Education) Act, 2023' through cross-country analysis draws lessons from the United Kingdom, Australia and Germany, among others. The paper also finds that the eligibility criteria to

access the loan are based on current realities without anticipating future improvements in standards of living. The paper finds that the coverage of student loan is restrictive.

The paper by Abdulraheem-Mustapha Mariam A., entitled 'An Empirical Assessment of the extent of compliance with the Composition of Family Court under the Nigerian Child Rights Act, 2003' assesses the level of implementation of the mixed tribunal in the administration of juvenile justice and analyzes the inherent problems and challenges faced by juvenile offenders in the procedural process of their trials in Nigeria.

The paper by Maimuna Izah and Bethel Uzoma Ihugba entitled 'Preference and Utilization of Law Library Resources: A study of Department of Legislative Support Services, National Institute for Legislative and Democratic Studies, Abuja' examines the preference and use of hardcopy and electronic library resources, using the Nigerian Weekly Law Reports and Law Pavilion as examples, by the Department of Legislative Support Services researchers in the National Institute for Legislative and Democratic Studies. The paper proposes that as a guiding principle the provision of library resources, hardcopy and electronic resources, should be tailored to meet the need of the end users who should be made aware of the various benefits of each resource and regularly updated on new developments.

The paper by Edoba B. Omoregie entitled 'Translating Policy to Law: Basic Guide in Legislative Drafting' is an effort to give an insight into this exciting but little explored area of legal practice which has very decisive impact on the effective governance of any country. It provides a broad discussion on the distinction between policy and law, and the stages of the legislative process, and examines the role of the legislative drafter in the effort to transform policy into law.

The paper by U.E Okolocha, Shamsu Yahaya and Chimezie Chikere entitled 'Gender-neutral Language in Legislative Drafting in Nigeria' appraises gender-neutrality as an innovative legislative language technique in Nigeria and identifies techniques to achieve it.

The paper by Sarah Hope Tebira entitled 'Basic Principles in Legislative Drafting: An Analysis of some Acts of the National Assembly of Nigeria' examines plain language legislative drafting in Nigeria by testing the application of plain language techniques in the Companies and Allied Matters Act, Cap.C20 Laws of the Federation of Nigeria, 2004 and the Companies and Allied Matters Act, (No.3)2020.

The paper by Samuel Oguche, Ganiyu, L. Ejalonibu and Kolapo Q. Abayomi entitled 'Political Litigations and Conflicting Court Orders: Imperative of the Doctrine of Full Faith and Credit in Nigeria' examines the effect of conflicting court orders on both the integrity of Nigerian electoral process and judiciary. It argues that to stop issuance of conflicting orders by Nigerian courts, adoption of "Doctrine of Full Faith and Credit" is imperative.

The paper by Jacob O. Garuba entitled 'Integrating Anti-Corruption Principles into Public Procurement in the Security Sector' examines the Public Procurement Act of 2007 and other regime regulating defence procurement in Nigeria. It argues that notwithstanding the procurement regime, there has been lack of transparency in defence procurement in the country leading to misappropriation or diversion of public funds through fraudulent procurement deals by procuring entities or officers, and proposes statutory amendments.

CONSTITUTIONALISM

1

THE STATES/LOCAL GOVERNMENTS RELATIONS: WAYS TOWARDS EFFECTIVENESS

Dauda Adeyemi Ayiroosu*

ABSTRACT

In a true federalism, the value of local government is immeasurable; being the grassroots government. On the other hand, a state cannot properly function as a tier of government without recourse to the local government for its sustainable development. Hence, the intergovernmental relations between the state and local government cannot be over-emphasised. Despite the states/local governments' relations, there are challenges militating against their effective relations such as the cumbersome provisions of the Constitution of the Federal Republic of Nigeria 1999 (as altered), want of financial autonomy, corruption and proliferation of Local Government Development Areas to mention but a few. This paper, therefore, examined the nature of states/local governments' relations and the challenges affecting their effectiveness, with a view to proffering solutions towards effective relations between the two tiers of government. The paper employed doctrinal research methodology with the use of both primary and secondary sources of law. It was found that there are copious provisions in the Constitution of the Federal Republic of Nigeria 1999 (as altered) and other statutes which provide for states/local governments relations but the provisions are not efficient to engender effective intergovernmental relations between them. The paper concluded that effective states/local governments' relations are indispensible of a true democracy. It is, therefore, recommended that for effective state/local government relations, the Constitution needs to be amended to reflect the true federalism in the division of powers between the state and local government.

Key Words: Effectiveness, Intergovernmental, Local Government, Relations, States

* Lecturer, Department of Business Law, Faculty of Law, University of Ilorin, Ilorin, Nigeria ariyoosu4law@yahoo.com ariyoosu.da@unilorin.edu.ng ariyoosu@nigerianbar.ng +2348066497298 +2348185356311

I. INTRODUCTION

Effective intergovernmental relations between the tiers of government cannot be over-emphasised. This is because of the relations of the tiers of government as donated by Constitutional provisions. However, the resultant effect of one tier of government controlling and usurping the powers and responsibilities of another tier is alarming. This has generally and adversely affected the effectiveness of the interrelations among the tiers of government, especially the states/local government relations. It is in the light of this that this paper is set to examine the ways towards the effectiveness of states/local government relations with a view to proffering workable suggestions towards effective states/local government relations. The state government cannot effectively function in a true federalism without the establishment of a robust and efficient system of local government while the local government can also not exist as a tier of government without the involvement of the state government. Unfortunately, series of challenges, ranging from cumbersome provisions of the Constitution of the Federal Republic of Nigeria 1999 (as altered), want of financial autonomy, corruption to proliferation of Local Government Development Areas, have bedeviled the peaceful co-existence between the two tiers of government.

II. NATURE OF STATE/LOCAL GOVENEMNTS' RELATIONS

The nature of relationship between state and local governments in Nigeria is manifold. It cuts across constitutional, political, financial, administrative and judicial relationships.[1]

a. Constitutional Relations

Constitutionally, the local government is not totally autonomous. It is part of the interdependent structures of the state government. Thus, section 7 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as altered) guarantees the system of local government by democratically elected local government councils. For instance, while the Federal Government is constitutionally empowered to control both the state and local government

[1] Ijimakinwa, S. P. 'Local Government and Intergovernmental Relations in Nigeria Fourth Republic (1999 to Date)' (2015) (10) *International Journal of Development and Management Review (INJODEMAR);* 150.

councils in terms of allocation of revenue, the state also has the power to distribute the allocation so made to the local government.[2]

b. Political Relations

Politically, the state is duty bound to ensure the existence of local government council under a law which provides for the establishment, structure, composition finance and functions of such council.[3] Thus, it is not only the National Assembly that has power to make laws for peace, order and good government. The House of Assembly of a state also has power to make law for the peace, order and good government of the state or any part thereof with respect to the matters within its legislature competence.[4] It is, therefore, the House of Assembly of a state[5] that has the power to make laws with respect to matters connected with elections to the office of Chairman or Vice-chairman of Local Government Councils in the state or to the office of Councilors.[6]

c. Financial Relations

With regard to financial relationship, the fiscal and monetary powers of both the state and local governments have been donated by law. Thus, Section 162 (3) of the Constitution provides for the distribution of any amount standing to the credit of the Federation Account among the federal, state governments and the local government council in each state on such terms and in such manner as may be prescribed by the National Assembly while Section 162 (4) of the same Constitution further provides that any amount standing to the credit of the states in the Federation Account shall be distributed among the states on such terms and in such manner as may be prescribed by the National Assembly. In order to ensure the interrelationship between the state and local government on one hand, and to curtail the autonomy of the local government on the other hand, the Constitution provides that the amount standing to the credit of local government councils in the Federation Account shall also be

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2 See generally Section 162 of the Constitution of the Federal Republic of Nigeria, 1999 (as altered) (Hereinafter referred to as the *CFRN 1999*).

3 Section 7 (1) of the *CFRN 1999*.

4 Section 4 (7) of the *CFRN 1999*.

5 And not the National Assembly.

6 See *Attorney- General of Abia State & 35 Others v Attorney-General of the Federation* (2002) 3 SCNJ, 158 at 186.

allocated to the states for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.[7] It is intriguing that despite the constitutional recognition of division of powers among the tiers of government,[8] each state of the Federation is still mandated to maintain special account as "State Joint Local Government Account" into which all allocations to the local government councils of the state from the Federation Account and from the state Government shall be paid.[9] This implies that as far as financial status of the local government is concerned, the local government is at the mercy of the state government. This is glaring even from the succeeding section 162 (7) of the *CFRN 1999* under which the state is mandated to pay to local government councils such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly, the implication of which is that not only is the state government having control over the revenue allocation to the local government councils, the federal government is still exercising some level of control over the finance of the local government in as much as the amount or proportion of the revenue payable or paid to the local government is still subject to the terms and in the manner prescribed by the National Assembly.

Further to the above, the amount standing to the credit of local government council of the state is distributable among the local government councils of the state on such terms and in such manner as may be prescribed by the House of Assembly of the state.[10] While section 7 (6) (a) of the Constitution[11] envisages allocation of public revenue to the Local Government Councils within the provision of section 3 (6) of the same Constitution,[12] and as enumerated in part I of the First Schedule to the Constitution, section 7 (6) (b)

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7 Section 162 (5) of the *CFRN 1999*.

8 The Federal, State and Local Governments.

9 This is the effect of Section 162 (6) of the *CFRN 1999*. Note that Section 7 of the Allocation of Revenue (Federation Account e.t.c.) Act *Cap A15, LFN 2004* established Joint Local Government Account Allocation Committee for each state.

10 Section 162 (8) of the *CFRN 1999*.

11 Section 7 (6) (a) of the *CFRN 1999* provides that subject to the provisions of the constitution, the National Assembly shall make provisions for statutory allocation of public revenue to local government councils in the Federation.

12 Section 3 (6) of the *CFRN 1999* provides that there shall be seven hundred and sixty-eight local government areas in Nigeria and six area councils.

empowers the House of Assembly of a state to make such allocation to the council within the state.[13] The combined effect of the provisions of the Constitution examined above is that there are some fiscal affinity in the relationship between the state and local government. While section 162 (5) of the Constitution talks about 'allocation', section 162 (8) talks about distribution. Accordingly, the only constitutional function of the National Assembly under Section 162 (5) is to allocate to the states the amount standing to the credit of local government councils while the constitutional function of the House of Assembly of the state is to distribute the amount.[14]

d. Administrative Relations

With regard to administrative relationship, the Ministry for Local Government and Chieftaincy Affairs, Local Government Service Commission of a State, State Universal Basic Education Board amongst others usually have the power to regulate and supervise the local government councils in their respective administrative capacity to ensure that their administrative duties and responsibilities are in accordance with laid down rules and regulations.[15] Other administrative relations between the state and local government occur among officials between the two tiers of government during meetings and conferences.[16] Thus, it is part of the functions of the local government council to consider and make recommendations to the state commissions on economic planning and development of the state and proposals made by such commissions or other similar body.[17]

The functions of the local government council also include participation in the government of the state with regard to the provision and maintenance of

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13 See *Attorney- General of Abia State & 2 Others v Attorney- General of the Federation & 33 Others* (2006) 7 SC (Pt I) 51 at 81.

14 See also *Attorney-General of Abia State & 2 Others v Attorney-General of the Federation & 33 Others* (Supra) at 83-84. It should also be noted that apart from the constitutional provisions relating to the allocation and distribution of the amount standing to be allocated and distributed to the local government councils, the Allocation of Revenue (Federation Account etc) Act, *Cap A15 LFN 2004* prescribes the basis for distribution of revenue accruing to the state government and the local government councils in the state and the formula for distribution, while the Monitoring of Revenue Allocation to Local Government Act *Cap M26 LFN 2004* provides for the Monitoring of Revenue Allocation to Local Government Councils.

15 Ijimakinwa S. O. (n 1) 151.

16 Ibid.

17 Paragraph 1 (a) of the Fourth Schedule to the *CFRN 1999*.

primary, adult and vocational education; the development of agriculture and natural resources; and the provision and maintenance of health services.[18]

e. Judicial Relations

In the Nigerian Judicial System, Local Governments do not have power to create or establish a court; rather, the power to establish a court is vested in the National Assembly or House of Assembly of the state, regard being had to the relevant constitutional and statutory provisions.[19] Thus, there is no constitutional provision vesting the power to create a court in the local government. However, through its power of review,[20] the judiciary can declare any law made by the state government or Local Government or both which is contrary to the constitutional provisions as it affects local government a nullity. In *Attorney-General of Cross River State & Anor. v Mathew Ojua Esq,*[21] the plaintiff/respondent, a legal practitioner and property owner in Ikom, Cross River State of Nigeria, was served with assessment notices for the payment of urban development tax, tenement rate, sanitation levy and refuse collection charges in respect of his properties located in Ikom. By an originating summons, he challenged the constitutionality of the Urban Development Tax Law, 2004 upon which assessment was predicated since he was paying similar taxes to the local government. He, therefore, sought a declaration that by virtue of Taxes and Levies (Approved List for Collection) Act *Cap. T2 LFN 2004* and the doctrine of covering the field,[22] the Cross River State Urban Development Tax Law, 2004 is unconstitutional, illegal, null and void. The trial court granted his claim and appeal to the Court of Appeal was dismissed while declaring some provisions of the Urban Development Tax Law of Cross River State, 2004 as being inconsistent with section 7 (5) of the Constitution and therefore unconstitutional, null and void.

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18 Paragraph 2 of the Fourth Schedule to the *CFRN 1999.*

19 By the community reading of Section 6 (1), (2), (3) and (4) of the *CFRN 1999*, the judicial powers of the Federation and the state shall be vested in the courts being courts established for the federation or the state as the case may be and nothing shall preclude the National Assembly or any House of Assembly of the state from establishing courts, other than those specifically mentioned in the constitution as Superior Courts, with subordinate jurisdiction to that of a High Court.

20 Such as order of certiorari, prohibition and injunction.

21 (2011) All FWLR (Pt 594) 151.

22 The doctrine of covering the field renders the paramount legislation predominant and the subordinate legislation gives into abeyance and remains inoperative so long as the paramount legislation remains operative. Where there is obvious inconsistency, the subordinate legislation becomes void. See *Attorney-General of Abia State & 35 Others v Attorney-General of the Federation* (Supra) at 247.

Recently, in the *Incorporated Trustees of Elites Network for Sustainable Development (ENETSUD) v Kwara State Government & 2 Ors,*[23] the Kwara State High Court declared Section 29 (1) to (5) of the Kwara State Local Government Law, 2006 as unconstitutional, null, void and of no effect whatsoever to the extent that it empowered Governor of Kwara State to dissolve democratically elected local government councils and replace them with Transition Implementation Committees.[24]

III. THE ROLE AND FUNCTIONS OF LOCAL GOVERNMENT AS A TIER OF GOVERNEMNT

Three-level government - federal, state and local government - is common to all federal system of government.[25] In all emerging states, local government has become the main fundamental instrument for the sustenance of development.[26] It is widely acknowledged as a viable instrument for development and delivery of social services to the people.[27] The local government serves as a form of political and administrative structure facilitating decentralisation, national integration, efficiency in governance and a sense of belonging at the grassroots.[28] Unfortunately, despite the fact that the local government is the closest tier of government to the people, the resident population in it is denied the benefits of its existence.[29] The functions of the local government council include those set out in the Fourth Schedule to the Constitution. The main functions of a local government council under the said Fourth Schedule are the consideration and the making of recommendations to a state commission on economic planning or any similar body on the economic development of the state, particularly in so far as the areas of authority of the council and the state are affected, and proposals made by the said commission or body.[30] Other functions include:

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23 (Unreported) Suit No. KWS/117/2021. Judgment delivered on 08 October, 2021, Per H. A. Gegele J.

24 See also *Governor, Ekiti State & Others v Prince Sanmi Olubunmi & Others* (2017) All FWLR (Pt 873) 1592.

25 Nico Steytler, Introduction. In *The Place and Role of Local Government in Federal Systems*, Nico Steyler (ed) 1, Published by Konrad-Adenauer-Stiftung, Johannesburg, South Africa.

26 Aderonke Majekodunmi, 'The State of Local Government and Service Delivery in Nigeria: Challenges and Prospects' <https://www.researchgate.net> accessed 04 November 2021.

27 Ibid.

28 Ibid.

29 Ibid.

30 See generally paragraph 1 (a) (i) and (ii) of the Fourth Schedule to the *CFRN* 1999.

(a) collection of rates, radio and television licences;
(b) establishment and maintenance of cemeteries, burial ground and homes for the destitute or infirm;
(c) licensing of bicycles, trucks (other than mechanically propelled trucks), canoes, wheel barrows and carts;
(d) establishment, maintenance and regulation of slaughter houses, slaughter slabs, markets, motor parks and public conveniences;
(e) constructing and maintenance of roads, street, street lightings, drains and other public highways, parks, gardens, open spaces, or such public facilities as may be prescribed form time to time by the House of Assembly of a state;
(f) naming of roads and streets and numbering of houses;
(g) provision and maintenance of public conveniences, sewage and refuse disposal;
(h) registration of all births, death and marriages;
(i) assessment of privately owned houses or tenements for the purpose of levying such rates as may be prescribed by the Houses of Assembly of a state; and
(j) control and regulation of:
    i. out-door advertising and hoarding;
    ii. movement and keeping of pets of all description;
    iii. shops and kiosks;
    iv. restaurants, bakeries and other places for sale of food to the public;
    v. laundries; and
    vi. licensing, regulation and control of the sale of liquor.[31]

The functions of a local government council shall also include participation of such council in the Government of a state as respect of:

a. the provision and maintenance of primary adult and vocational education;
b. the development of agriculture and natural resources, other than the exploitation of minerals;
c. the provision and maintenance of health services; and
d. such other functions as may be conferred on a local government council by the House of Assembly of the state.[32]

[31] See generally paragraph 1 (b) – (k) of the Fourth Schedule to the *CFRN* 1999.

Unfortunately, the local government has not been able to meet up with its expectations in carrying out these functions to the letter because most of these functions have been taken over by the state government, thus rendering the revenue generation from these functions by the local government a mere mirage. This has eventually endangered robust and effective states/local governments' relations.

IV. CHALLENGES MILITATING AGAINST EFFECTIVENESS OF STATES/LOCAL GOVERNMENT RELATIONS

Effective and efficient intergovernmental relations between the state and local government councils are not only necessary but fundamental to the entrenchment of a true federalism. Unfortunately, the banes confronting the intergovernmental relations are too enormous, considering the constitutional structures and responsibilities of each tier of government. This has ultimately affected and hindered the smooth running and operations of local governments. Thus, improving the lives of the local people and communities has been bedeviled by inadequate service delivery form the grassroots local government councils. The challenges or factors militating against the effectiveness of states/local governments relations range from the wording of the Constitution itself, the system of local government and its legality to financing interference from the state government, to mention but a few. Some of these challenges are discussed below.

a. Cumbersome Provisions of the Constitution

The Nigerian Constitution has undergone series of reviews. However, it has not really adequately addressed the major problems of the local government because of its cumbersome nature. Such major problems include issues of qualification and tenure of office of chairman of local government, removal process and processes for creation of local government.[33] For instance, there is no clear distinction of the constitutional powers and functions of the state and federal government as it affects the establishment and operations of local governments. This is

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[32] Paragraph 2 of the Fourth Schedule to the *CFRN* 1999.

[33] Valentine Ogaga, '10 Problems of Local Government in Nigeria and Solutions' <https:infoguidenigeria.com/problems-local-government> accessed 27 October 2021.

glaring from the relevant provisions of the constitution. By section 7 (1) of the *CFRN 1999*, the system of local government by democratically elected local government councils is guaranteed and every state shall ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils. This provision presupposes that it is the state law that will provide for the establishment, structure, composition, finance and functions of such councils and this probably accounts for why there are laws made by the respective Houses of Assembly for the states providing for Local Government Economic Planning and Development;[34] Local Government Law on the structure, composition, function and finance of Local Government Councils,[35] Local Government Law on the structure, composition, function and finance of Local Government Councils,[36] among many other provisions of the state laws. However, the same constitution provides in section 7 (6) (a) and (b) that the National Assembly shall make provisions for statutory allocation of public revenue to local government councils in the federation[37] and the House of Assembly of a state shall also make provisions for statutory allocation of public revenue to local government councils within the state.[38] The Supreme Court had cause to interpret section 7 (6) (a) and (b) of the Constitution in *Attorney-General of Abia State & 2 Others v Attorney-General of the Federation & 33 Others*[39] and held that while section 7 (6) (a) anticipates allocation of public revenue to the Local Government Councils within the provision of section 3 (6) and the local government councils enumerated in Part 1, First Schedule to the Constitution, section 7 (6) (b) enjoins or empowers the House of Assembly of a state to make allocation to the councils within the state.

The above provisions interpreted by the Supreme Court have whittled down the effect of section 7 (1) of the Constitution which intends that

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34 Such as Kwara State Local Government Economic Planning and Development Board Law, *Cap E31, Law of Kwara State 2006*.

35 Such as Kwara State Local Government Electoral Law, *Cap K32 Laws of Kwara State 2006.*

36 Such as the Kwara State Local Government Law, *Cap K. 33 Laws of Kwara State 2006.*

37 Section 7 (6) (a) of the CFRN 1999

38 Section 7 (6) (b) of the CFRN 1999.

39 (2006) 7 SC (Pt 1) 51 at 80 – 81.

everything relating to local government be in the province of the state government.

Items 11 and 12 Part II of the Second Schedule to the Constitution also empower both the National Assembly and House of Assembly of the state to make laws with regard to election to local government councils. Thus, both the National Assembly and the House of Assembly of the State have concurrent legislative power in that regard.[40] It suffices to say that contrary to the intendment of section 7 (1) of the Constitution, the National Assembly also makes laws affecting the local government. It is humbly submitted that this current position does not engender a true federalism. The legislative power to make laws with regard to election to local government councils should be within the legislate power of the state government alone.

b. Want of Financial Autonomy

Creation of State Joint Local Government Account as enshrined in Section 162 (6) of the Constitution has made the search for financial autonomy for the local government almost impossible as the local government depends on the state for funds. The local government depends heavily on statutory monthly allocation from the federal government and Internally Generated Revenue (IGR). Unfortunately, the local governments do not get what is due to them from the state governments as most of the funds meant for the local government are diverted, and in some cases the chairmen of the local governments are made to sign documents agreeing that they have received funds from the state government, when this is not so, thereby hindering the effectiveness of the work of the local government.[41] This has made the local governments to be perpetually broke, thereby making it difficult to pay their workers and embark on provision of basic social amenities.

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[40] See also *Attorney-General of Abia State v Attorney-General of the Federation* (2002) 6 NWLR (Pt 763) 264 at 422.

[41] Valantine Ogaga (n 33).

c. Control and Usurpation of the Functions of Local Government by State Government

The functions of a local government council are clearly delineated in the Constitution.[42] Unfortunately, the state government has taken over some of the functions of the local government and this has resulted in the local government perpetually financially handicapped, always finding it difficult to carry out their constitutional duties and responsibilities, especially in the provisions of basic social amenities and payment of their staff salaries and allowances. The control of local government by the state is defective in all ramifications.[43] Some governments have enacted laws tending to take over the functions of the local government, especially those functions that have to do with revenue generation. For instance, the Lagos State made the Lagos State Signage and Advertisement Agency Law, 2006 which established the Lagos State Signage and Advertisement Agency with the function of controlling the structures for signage and advertisement.[44] This apparently is in gross inconsistence with the provision of Section 7 (5) of the Constitution[45] read together with paragraph 1(k) (i) of the Fourth Schedule to the Constitution which provides for the control and regulation of outdoor advertising and hoarding as part of the functions of local government councils. The Court of Appeal in *UAC of Nigeria Plc & Others v Attorney-General of Lagos State & Others,*[46] did not hesitate to hold that paragraph 1 (k) (i) of the Fourth Schedule to the Constitution gives control and regulation of outdoor advertisement and hoarding to local government. Similarly, in *Attorney – General of Cross River State & Anor v Mathew Ojua Esq,*[47] the Court held that the House of Assembly of

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42 See the Fourth Schedule to the *CFRN* 1999.

43 Yusuf Garba Manjo, *Comparative Local Government Administrations* (Gmaji-LRN Research Centre for Policy, Governance and Development, Ilorin) 44.

44 Similar Law was made by the Kwara State Government as Kwara State Structures for Signage and Advertisement Agency Law 2010.

45 Which provides that the "functions to be conferred by law upon local government councils shall include those set out in the fourth Schedule to this Constitution'.

46 (2011) All FWLR (Pt 591) 1540.

47 (2011) All FWLR (Pt 594) 151.

a state cannot lawfully legislate and deprive any local government council the function assigned to it under the Constitution.[48]

d. Corruption

This is a virus that has eaten deep into the fabrics of the Nigerian democratic setting, and it has cut across virtually every aspect of the polity. It is believed in some quarters that the local government is the most corrupt of all the three tiers of government.[49] For instance, in the local government elections, most of the seats are won by the political party in power in the respective states. This is clearly unheard of in a true democracy. The state governor, through the instrumentality of the state government, successfully put their allies in power and the right of the people to really decide their fate through vote is totally jettisoned.[50] Monies meant for payment of staff salary are already embezzled by the state government and ghost workers are in the payrolls.[51]

e. Proliferation of Local Government Areas/Creation of Local Council Development Areas

There are 774 Local Government areas in Nigeria as enshrined in the Constitution, including Federal Capital Territory, Abuja Area Councils.[52] This is quite a number and the larger the local government areas the wider the scope of their administration[53] and the more likely there is to be a desire to promote unnecessary control over them by the state government. Some state governments have embarked on creating more local governments outside those specifically mentioned in the constitution

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48 See also *Knight Frank & Rutley (Nigeria) & Anor v Attorney-General of Kano State* (1998) 7 NWLR (Pt 556) 1 where the Supreme Court considered the functions of local government as enshrined in the Fourth Schedule to the 1979 Constitution (which is in pari material with the Fourth Schedule to the *CFRN 1999*) *vis-a-vis* whether the state government was competent to enter into contract for valuation and collection of tenement rates with the local government. The Supreme Court held that the intendment of the constitution is that only Local Government Councils have the power to assess and impose rates in privately owned property. See also generally Olatoke J. O. and Ariyoosu D. A., 'Regulation of Taxing Powers of Local Government Councils by State Governments in Nigeria: Legislative Approach and Judicial Responses' (2014) (1) (1) *Joseph Ayo Babalola University Law Journal.*

49 Valentine Ogaga (n 33).

50 Ibid.

51 Ibid.

52 See Section 3 (6) and Parts I and II of the First Schedule to the *CFRN* 1999.

53 Keith Davies, *Local Government Law* (Butterworth & Co Publishers Ltd. 1983) 141.

without following the procedure for their creation[54] and without constitutional amendment.[55] Thus, Ebonyi, Kastina, Lagos, Nasarrawa and Niger States, among other states of the Federation, created new Local Government Areas without following the procedure laid down in the constitution and conducted local government elections in the new Local Government Areas so created.[56] The Federal Government withheld the statutory allocations from the Federation Accounts to the states and the issue arose whether it was constitutional for the Federal Government to withhold such allocation. In *Attorney-General of Lagos State v Attorney-General of the Federation*,[57] the Supreme Court held that a state government has power to create new local government areas but the new local government so created will not take effect until the National Assembly passes an Act to amend the constitution accordingly and that the Federal Government has no power to withhold the statutory allocation due to state government in respect of the local governments areas recognised by the constitution and therefore the new Local Government Areas so created are inchoate and not entitled to receive fund from the Federation Account.

In view of the cumbersome procedure for the creation of new local governments, some states of the Federation have embarked upon new Nigerian Local Government system. This is done by naming them Local Council Development Areas by virtue of a state law.[58]

f. Illegal and Unconstitutional Creation of Transition Implementation Committee in Place of Democratically Elected Local Government Council

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54 For instance, the Lagos State Government created additional 37 Local Government Areas pending the consequential Act of the National Assembly to operate as Local Council Development Areas, the funding of which shall be borne by the State Government pursuant to the Lagos State Creation of Local Government Areas Law, 2002.

55 In order to sideline the constitutional provisions on procedure for creation of new local governments, some states call the local government so created Local Council Development Areas.

56 Okechukwu M. I, Patrick C. CC. and Jide I, 'Model and Determinants of State-Local Governments' Relations in Nigeria' https://www.redalyc.org/journal/2410/241062400004/html/. Accessed on 15 August 2023.

57 (2004) 11-12 SC 85.

58 Examples of this are Lagos State Creation of Local Government Areas Law, 2002 and Osun State Local Government Administration (Amendment Law) 2016.

The Constitution guarantees the system of local government by democratically elected local government councils.[59] However, the speed with which elected councils are being dissolved and replaced by caretaker committees appointed by the state governors is in gross conflict with the constitutional provisions. The constitutionality of the dissolution has been confused with the constitutionality of further local government reforms.[60]

In *Hon. Chigozie Eze & 147 Others v Governor of Abia State & 2 Others,*[61] one of the issues that called for the determination of the court is whether the Governor of a state has the legal competence to dissolve the constitutionally elected local government councils and appoint caretaker committees to replace them. The Supreme Court considered the provision of section 7(1) of the Constitution and held that dissolving Local Government Councils and replacing them with caretaker committees amounts to Governor acting on his whims and fancies, unknown to laws and therefore clearly illegal. It was further held that it amounts to executive recklessness for the Governor of a state to remove from office democratically elected chairman and councilors and replace them with unelected chairmen and councilors under whatever guise.[62]

V. WAYS TOWARDS EFFECTIVE STATES/LOCAL GOVERNMENTS RELATIONS

Effective States/Local Governments relations is a sin qua non to a true democratic set up, and without such relations, the whole polity would be a systemic failure. Despite the many challenges facing States/Local Government relations, which have hindered developments in the affairs of local governments, a lot can still be done towards effective intergovernmental relations between the state and local government and these shall be discussed hereunder.

a. Proper Accountability and Transparency

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59 Section 7 (1) of the *CFRN* 1999.

60 Smith B. C. and Owojaiye G. S., 'Constitutional, Legal and Political of Local Government in Nigeria' <onlinelibrary.wiley.com/doi/pdf/10/1002/pad.423001030> accessed 20 October 2021.

61 (2015) All FWLR (Pt 791) 1399

62 Similar issue arose and it was held in *Hon. Wunuken Atoshi & 3 Others v Attorney-General of Taraba State & 3 Others* (2012) All FWLR (Pt 635) 352; *Governor, Ekiti State & Ors v Prince Sanmi Olubunmo & 13 Oors* (2017) All FWLR (Pt 873) 1592; *The Incorporated Trustees of Elites Network for Sustainable Development v Kwara State Government & 2 Ors* (supra).

In order to ensure that corruption is deterred in the local government system to enhance effective and efficient states/local government relations, accountability and transparency in the affairs of local government must be encouraged and promoted. There is need for a change of political values by the respective state governments. There should be a way by which proper accountability of funds for the local government should be obtained. This will discourage the state government/governor from unnecessarily interfering in the affairs of the local government with respect to local government elections. The finances of the local government should not be mismanaged while standards of integrity maintained.[63] This can be achieved through organization of workshops, seminars and conferences involving both the stakeholders in the state and local government councils. These training and re-training will serve as enlightenment opportunity of the danger in want of transparency and accountability which will ultimately bring gross cases of fraud and embezzlement of funds to a barest minimum.[64]

b. Local Government Autonomy

Local Government Autonomy as provided in the constitution, especially as it relates to finances of the Local Government autonomy should be activated and respected to forestall undue state government's interference in the affairs and management of local government. Thus, internal sources of revenue generation in local government areas as enshrined in the constitution should be tapped.[65] This will ensure both political and economic autonomy necessary for the development[66] of the grassroots local government. Even though local government authorities are subject to central control[67] as a result of the powers of the Federal Government, the state should ensure that the local government is accorded with financial and administrative autonomy.

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63 Aderonke Majekodunmi (n 26).

64 Chukwurah D. C., Johnpaul O. N. and Akam B. E., 'Nigerian Local Government System: Issues, Challenges and Prospects' 4 (8), *International Journal of Academic Management Science Research (IJAMSR)* 127 www.ijeais.org/ijamsr accessed 18 October, 2021.

65 Agbochike F. C., Igbokwe-Ibeto C. J. and Nkah B. C. 'Local Government Administration and the Challenges of Sustainable Development in Nigeria' (3) (6) *Review of Public Administration and Management* 103 https://www.arabianjbmr.com accessed 18 October 2021.

66 Ibid

67 Bailey S. H., *Cross on Principles of Local Government Law* (3rd Edn, Sweet & Maxwell Ltd. 2004) 387.

c. Constitutional Amendment

There is a need to amend the constitution to clearly define the intergovernmental relations and limitations between the states and local government councils. There should be clear distinction of the constitutional powers and functions of the Federal and State governments as they affect the local government councils; and this can only be done through the amendment of the constitution. The functions of each tier of the government must be unequivocally delineated. That part of the constitution creating joint account for both the state and local government should be amended to allow the local government to have its own separate account to avoid the state tampering with what the local government is entitled to as far as federal allocation of revenue is concerned.

d. Amendment of other Statutory Provisions Bothering on States/Local Governments Intergovernmental Relations

In order to ameliorate the alarming effects of the challenges facing states/local government relations, measures should be put in place to ensure that the tenure of local government officers, and their qualifications, provisions relating to local government creation, and operations of the local government service commission as enshrined in the various laws are reviewed and this can only be done through amendment of the various laws. For instance, laws such as the Allocation of Revenue (Federation Account etc) Act; and other various states laws relating to Local Government such as Creation of Local Government Areas Law and Local Government Administration Law need to be amended. This will make the local government to be self-sufficient without relying constantly and perpetually on the other two tiers of government for funds. It will also force the state government to always remit all the funds meant for and due to the local government and desist from encroaching on the functions of the local government.

e. Enlightenment Progammes Involving Stakeholders in the Intergovernmental Relations between the Tiers of Government

Enlightenment programmes at the local, state and federal levels of the government should be organised at all times to educate and enlighten stakeholders in all the tiers of government on the respective functions and

responsibilities of each tier to properly understand and appreciate the delineation of functions and responsibilities of each tier of government as enshrined in the constitution and other relevant laws. This can be achieved through public advertisement on both print and electronic media and organizing seminars, workshops and conferences. This will go a long way to make people actively participate in politics at all levels and will also engender a formidable antidote to the bane of inadequate trained personnel in the state/local government intergovernmental relations. In as much as local government councils are abstractions, and therefore cannot themselves carry out physical actions of any kind whatever except through their officials, the officials should have periodic trainings and re-trainings.[68]

f. Attitudinal Changes/Community Participation

There should be voluntary renaissance of interest by the people at both the state and local government levels. This, of course, will involve both the masses and government officials. The problem of nepotism, corruption and god-fatherism cannot totally be eradicated by any action of the government without the people also seeing reason to stop them and this can only be done if the people's attitudes towards these vices are changed. People must be patriotic and work towards peace and development in their local areas and the state in general. Grassroots developments should emanate from a process in which the people at the local government are made to participate in all critical stages of decision making in the states/local government relations from identification of problems being faced by the people and implementation and monitoring of governmental projects.[69] Change must also come within the framework of federalism and intergovernmental relations as one of the most important areas of governance for the states and local government councils.[70]

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[68] Keith Davies, *Local Government Law* (1st edn, Butterworth & Co Publishers Ltd. 1983) 209.

[69] Odo L. U., 'Local Government and the Challenges of Grassroots Development in Nigeria' (3) (6) *Review of Public Administration and Management*, 211 <https://www.arabianjbonor.com/pdfs/RPAM-VOL3_6/18.pdf> accessed pm 30 October 2021.

[70] Bruce J. Perlman, 'Governance Challenges and Options for States and Local Governments. <httpsjournals.sagepub.comdoitpdf10.11770160323X10390050> accessed 30 October 2021.

VI. CONCLUSION AND RECOMMENDATIONS

While the constitution and other relevant statutes make copious provisions for states/local government intergovernmental relations, a lot is needed to be done to ensure effective relations between the states and local governments. Even though certain constitutional provisions make autonomy as part of the allocated powers to the local government, the autonomy bestowed on the local government is questionable because of the ambiguity in the provisions relating thereto in the constitution, which has apparently made local government an appendage of the state government. This also accounts for some strained relationship between the state and local government, and this has hindered developments in various local governments.

In order to engender robust and effective states/local government relations, therefore, the need to encourage cordial relations between the two tiers of government cannot be over-emphasized. Local government needs to be financially autonomous while undue interference by the state on the local government affairs must be properly addressed through constitutional and statutory amendments.

Having joint state local government account should be discarded while direct disbursement of federal allocation should be encouraged. The system of local government electioneering processes should also be looked into and the state governors should abide by the law and not illegally and unconstitutionally appoint caretaker committees to direct the affairs of local governments rather than democratically elected local government councils. In as much as the functions of each tiers of the government have been enshrined in the constitution, the state government should respect the tenure of the constitution, rather than continue usurping the functions of the local government.

2

RECONCILING CONSTITUTION ALTERATION THEMES AND FEDERALISM IN NIGERIA

Bethel Uzoma Ihugba*

ABSTRACT

This paper is an analysis of the key proposal in response to the 9th National Assembly themes for Constitution alteration using the Progressive Governors Forum (PGF) submissions as a case study. The PGF proposal is used as a study of public understanding on the issues of constitution alteration in a federation, the functionality of the proposals and suggested legal frameworks. The analysis adopts a doctrinal approach to set a tone for the concepts being advocated and normatively examines their coherence with constitutionalism, constitutional democracy and federalism principles. The paper relies on normative and doctrinal understanding of the concepts and does not delve into political questions. The paper finds that many of the proposals are placed on wrong normative frameworks but if properly articulated, some may assist in resolving key national issues. The findings disclose an overwhelming desire for a federalism where the central government has less powers and the states are constitutionally empowered to deliver public goods to the citizens. The articulation of how this may be achieved, within recognised legal framework was however unclear. This work accordingly, proffers a workable and realistic constitutional understanding and framework for realizing some of the objectives. The paper confirms that a federalism where individual states are empowered to govern and provide public goods for citizens with the centre empowered to set standards, coordinate intergovernmental relationships (domestic and international), may be the best for Nigeria.

KEYWORDS: Constitution Alteration, Decentralisation, Devolution, Federalism, Restructuring

* PhD, BL, Deputy Director, Head, Legal Research Division, National Institute for Legislative and Democratic Studies, Abuja, bethelihugba@gmail.com 09037074135

1. INTRODUCTION

The Nigeria National Assembly in late 2020 issued a Call for Memorandum to all stakeholders to assist its Joint Committee on Constitutional Review.[1] The Call for Memorandum covers 13 themes namely: Gender Equality; Federal Structure and Power Devolution; Local Government/Local Autonomy; Public Revenue, Fiscal Federalism and Revenue Allocation; Police and Security Architecture; Comprehensive Judicial Reforms; Electoral Reforms; Social-Economic and Cultural Rights; Strengthening Independence of Oversight Institutions; Residency and Indigene Provisions; Immunity; the National Assembly and State Creation. The call also requested for memorandum on any other matter which will promote good governance and the welfare of all persons in Nigeria on the principle of freedom, equality and justice.[2] In response to this call, the Progressive Governors' Forum (PGF) forwarded their considered position to the House of Representatives. The PGF submission touched on most of the themes selected by the National Assembly but summarised its submission into 9 areas. What is interesting in the issues covered by the PGF memorandum is that they are issues of national debate and mostly fall within concepts of federalism and nationhood. The PGF is a key stakeholder and significantly represents the views and opinion of a large segment of the Nigeria populace and a very vocal stakeholder group. For purposes of context, the PGF is a group of 21 governors (out of 36 governors in Nigeria) from the political party, All Progress Congress Party (APC). Incidentally, membership of the PGF is spread across the country. It must however be noted that a number of these governors were elected under other parties, notably the PDP. These include Governors Ben Ayade (Cross River), Matawalle Bello (Zamfara) and David Umahi (Ebonyi).[3] It should also be noted that unlike all other members of this forum, the Imo State Governor ascended the position through a court decision and not by popular mandate after a PDP candidate had earlier been declared winner by Independent National Electoral

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1 Henry Umoru 'Constitution Review: Senate commences process, calls for memoranda' *The Vanguard*, (Nigeria, August 25, 2020) <https://www.vanguardngr.com/2020/08/constitution-review-senate-commences-process-calls-for-memoranda/ > accessed 11 August 2021; News Agency of Nigeria 'Senate to hold national public hearing June 3 on Constitutional Review' *The Guardian* (Nigeria, 01 June 2021 | 2:44 pm) <https://guardian.ng/news/senate-to-hold-national-public-hearing-june-3-on-constitutional-review/ > accessed 11 August 2021;

2 Ibid Henry Umoru

3 Ignatius Igwe, 'PDP Crisis: Decamping Is a Very Ugly, Nigerian Political Culture – Seriake Dickson' Updated August 4, 2021, Channelstv < https://www.channelstv.com/2021/08/04/pdp-crisis-decamping-is-a-very-ugly-nigerian-political-culture-seriake-dickson/ > accessed 11 August 2021.

Commission (INEC).[4] It is thus safe to say that while other members may be attributed to representing popular mandate, it is doubtful if the Imo State Governor will be attributed with same status. Also, although there are 21 APC governors, only 17 were elected by popular mandate in the APC, although the APC controls the federal government. This therefore imply that the spread of the opinion of the PGF to all APC governed states may not be sacrosanct amongst the states and particularly, the citizens of these states. However, irrespective of this fact, these opinions represent that of a significant number of Nigerians. More importantly, it represents their understanding of some concepts upon which these opinions are held. It seems therefore that this submission of the PGF is a good case study of how a good number of Nigerians understand the debate on Nigerian constitutionalism and federalism and how they impact on the constitution review process. Against this background, this paper examines the recurring issues on constitution alteration in Nigeria and their implication on Nigeria constitutional development using the PGF submission as a case study. To meet this purpose, the remaining part of this paper is structured as follows. The next section, provides a brief literature review and conceptual clarification of the key concepts that are recurrent in the debate and which formulates the key themes of the current constitution alteration debate. This is followed by a presentation of the background to the discourse. Next is a summary of the proposal of the PGF. This is followed by analysis of each of the proposals in the PGF submission and their implication on the Nigeria constitutionalism, federalism and constitutional development. The paper ends with a conclusion.

2. LITERATURE REVIEW AND CONCEPTUAL CLARIFICATION

Constitution alteration is a necessary process in national development as it ensures continuous accommodation of the aspirations and realities of the people.[5] This

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[4] Halimah Yahaya, 'Supreme Court sacks Imo governor, declares APC winner' *Premium Times* (Nigeria, January 14, 2020) < https://www.premiumtimesng.com/news/headlines/372609-breaking-supreme-court-sacks-imo-governor-declares-apc-winner.html > accessed 11 August 2021

[5] Markus Böckenförde 'Constitutional Amendment Procedures: International IDEA Constitution-Building Primer 10' *2017 International Institute for Democracy and Electoral Assistance (International IDEA)*, 1. Available online at: < https://www.idea.int/publications/catalogue/constitutional-amendment-procedures> accessed 4th April 2023; Oserheimen A. Osunbor 'Constitution Amendment In Nigeria: Concepts And Misconceptions' 5, being a Presentation by Sen. (Prof.) Oserheimen A. Osunbor to Students of the Faculty of Law, Ajayi Crowther University, Oyo, 31 January 2017; Nigeria Bar Association, 'Constitutional Amendment - The Way To Go Being The Position Of The Nigerian Bar Association (NBA) On The Proposed Constitutional Review By The National Assembly' NBA, at 1.

necessity for a regular reform of the Constitution through alteration does not negate the requirement for stability. Rather it is one of the tools used to ensure stability of the law. This is achieved by ensuring that the alteration suggested and carried out actually aligns with normative constitutional principles and the contemporary cum aspirational wishes of the people.[6] It is in line with this principle that the Nigeria Constitution, and most other constitutions, contain elaborate provisions for its alteration.[7] A key requirement of such provisions, especially in written constitution is to ensure public participation in the process and not to allow the process to be captured by a minority.[8] The direct implication of ensuring public participation is to take into consideration the views of all, whether the elite, political office holders or the poor. The opportunity to participate and the participation of all that gives the Constitution its legitimacy and feature of being made by 'we the people'.[9] It is on the premise of this universal right to participate in the constitution alteration process that the PGF submission is analysed. This is important because, participation in constitution alteration process gives voice to the views of citizens on proposed alterations and allows others to question or support such proposals.[10] This approach is in consonance with constitutionalism and alteration of the constitution is one of the best opportunities to demonstrate constitutionalism. Constitutionalism is "a system of government based on the supremacy of the constitution, democratic government, separation of powers, checks and balances, judicial independence and protection of individual rights…"[11] It is thus recognised that contrary to colonial imposition or military dictatorship, constitutional alteration which is in consonance with constitutionalism requires informed participation, consensus and compromise

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Available online at: < eie.ng/wp-content/uploads/2014/03/ConstitutionalAmendmentNBA.pdf > accessed 4th April 2023.

6 Ibid Markus Böckenförde (2017), 4,

7 See Constitution of the Federal Republic of Nigeria 1999 ss. 8 and 9.

8 Baber, James Julius 'An Analysis of Different Constitutional Amendment Models' (2014). *Law School Student Scholarship.* Paper 435, 6, Available online at: <http://scholarship.shu.edu/student_scholarship/435> accessed 22nd March 2022); See for examples sections 8 and 9 of Constitution of the Federal Republic of Nigeria 1999, Article 255 to 257 Constitution of Kenyan 2010 and Articles 290 to 291 Ghana's Constitution 1992;

9 See the Preamble to Constitution of the Federal Republic of Nigeria 1999, Preamble and Article 1(1) Ghana's Constitution 1992 and the Constitution of Kenyan 2010

10 Note 5 Markus Böckenförde (2017) 7.

11 Chhachhar, Varun and Negi, Arun Singh, 'Constitutionalism - A Perspective' (December 24, 2009) 1. Available at SSRN < https://ssrn.com/abstract=1527888 or http://dx.doi.org/10.2139/ssrn.1527888> accessed 23rd March 2022)

and not imposition or arbitrariness.[12] It is such freedom and informed participation that helps to ensure that the will of the people is considered and gives the document the status of constitution made by the people.[13] In constitutionalism, governmental powers must be limited and the exercise of such power subjected to critique by the people and not promote despotism.[14] Based on these principles, scholars have debated approaches for Nigeria constitution alteration. Most favour a constitutional alteration in line with federalism, specifically one which promotes state/regional autonomy over centralization. They argue that the current approach still subjugates some sections of the country to others thus undermining federalism principles upon which the Constitution is based.[15] Others still recognise the issues being raised but are advocating for an incremental approach to constitutional alteration.[16] The problem with these positions however, is that there is no agreed approach at setting the priority for themes to de dealt with now and those to be left to later. Perhaps this is why some commentators have argued for a holistic alteration or a brand new Constitution and others, while advocating for a decentralized government, also make arguments for a parliamentary system.[17] This seeming discordance raises the

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[12] See Ogugua V. C. Ikpeze, 'Constitutionalism and Development In Nigeria: The 1999 Constitution and Role Of Lawyers' (*2010) JILJ;* L.A Ogboye and A.O Yekini *'*Constitutionalism and Good Governance in Nigeria:1999-2014' [2016] Volume 5, Nnamdi Azikiwe University Journal of International Law and Jurisprudence,

[13] See for example the preamble of the Constitution of the Federal Republic of Nigeria 1999 Constitution: *We the people of the Federal Republic of Nigeria*…. Emphasis added.

[14] Nwabueze, B.O., '*Constitutionalism in the Emergent States'* (London, Hurst & Co (Publishers) Ltd. 1973), 1.; Oyewo O., 'Constitutionalism and the Oversight Functions of the Legislature In Nigeria'**,** Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa Nairobi, April 2007.

[15] Emmanuel Ibiam Amah, 'Federalism, Nigerian Federal Constitution and the Practice of Federalism: An Appraisal' (2017) Vol.8 No.3 *Beijing Law Review* < https://www.scirp.org/journal/paperinformation.aspx?paperid=78734 > or <https://core.ac.uk/download/pdf/234650754.pdf > accessed 6 September 2021

[16] Rotimi Suberu, 'Managing Constitutional Change in the Nigerian Federation' (Fall 2015) Vol. 45, No. 4 Publius, 552-579 < https://www.jstor.org/stable/24734693 > accessed 6 September 2021

[17] Dele Adesina, 'Constitution Review Must be Holistic and Unfettered' Thisday, (Nigeria, September 29, 2020 12:17 am), <https://www.thisdaylive.com/index.php/2020/09/29/constitution-review-must-be-holistic-and-unfettered/ > accessed 6 September 2021; Malachy Ugwummadu 'A brand new Constitution needed: Stop the amendment charade now! ' The Guardian (Nigeria, 20 July 2021 | 4:12 am) < https://guardian.ng/features/a-brand-new-constitution-needed-stop-the-amendment-charade-now/ > accessed 6 September 2021; Sebastine Hon, 'Agenda for Constitutional Amendment in Nigeria'The Guardian (Nigeria, 20 July 2021 | 4:12 am) < https://guardian.ng/features/a-brand-new-constitution-needed-stop-the-amendment-charade-now/ > accessed 6 September 2021.

question of the extent there is an understanding of constitution alteration in a federation and how best such alteration may be successfully achieved.

To assist us in articulating this discourse we clarify the recurrent concepts alluded to or stated in PGF submission. The concepts are: Devolution of powers, Decentralisation of powers, Federal Government, State Government, Local Government, and Federalism. This is necessary because a misunderstanding of the concepts impacts on the interpretation of the submissions of the PGF. Accordingly, the following clarifications are provided:

Devolution of Powers: This is the donation of power, in a federal system, from the federal government to federating units.[18] Such donation of power is however not arbitrary, it must be done by law and this is usually through statutory laws enacted by the legislature. It does not require constitutional alteration, except perhaps to give the federal government the capacity to devolve its powers, where such power is absent. In devolution, the centre has the power but is allowed by law to donate such or some of the power. It can also reclaim the power following the same legislature approach for donation of the power.[19]

Decentralisation of powers: This is a constitutional donation of power by the people through the constitution to federating units in a federal system of government. In this scenario, the power resides in the people although previously exercised by the federal government. Such donation thus requires constitutional alteration.[20] Decentralisation may also apply where by constitutional alteration some powers are ceded to an international or supranational body.[21]

Federal Government: The Nigeria Constitution properly defines federal government and here it is that that tier of government empowered by the Constitution to make laws, adjudicate over and administer laws made pursuant to the Constitution and within the Exclusive and Concurrent Legislative lists of the Constitution of the Federal Republic of Nigeria 1999.[22]

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18 Elliot Bulmer, 'Federalism: International IDEA Constitution-Building Primer 12' *2017 International Institute for Democracy and Electoral Assistance (International IDEA) Second edition*, 40; Markus Böckenförde (2011) 20;

19 Elliot Bulmer (2017) 40

20 Markus Böckenförde (2011) 4

21 Ibid 4

22 Constitution of the Federal Republic of Nigeria 1999 as altered, sections 4 and 5

State Government: State Government is the second tier of government and consisting of the unit of governments listed in section 3(1) of the Constitution and empowered to make laws, adjudicate over and administer laws made under the power of the Constitution within any of the Concurrent legislative lists and section 7 of the Constitution.[23]

Local Government: This is the third tier of government listed in section 3(6) of the Constitution which are empowered to carry out economic planning and development of designated areas, adjudicate over and administer laws made by the state, local government of the federation under section 7 of the Constitution of the Federal Republic of Nigeria 1999.[24]

Federalism: This is a system of government which operates when the powers of government and various functions are shared constitutionally between tiers of government consisting of the centre and federating units on the basis of mutual respect, autonomy and cooperation.[25] Examples of countries practicing federalism include Nigeria and USA with different nomenclature for its federating units including local governments or counties.[26]

These concepts will be recurrent in the discourse that follows, and would guide the submissions made herein.

3. BACKGROUND/PROPOSAL OF THE PROGRESSIVE GOVERNORS' FORUM

The call for memoranda issued by the National Assembly is in response to calls for the alteration of the Constitution by various stakeholders. While some call for restructuring of the extant Constitution others call for secession.[27] The fact however, remains that most of these calls appear to not have been properly articulated. For example, the calls by some seem to be contrary to what they state on paper as the

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[23] These include the residual powers under section 4(7) a and power to make laws for local governments under section 7 of the Constitution of the Federal Republic of Nigeria 1999

[24] ibid

[25] See Elliot Bulmer (2017) 1; Markus Böckenförde (2011) 8;

[26] The White Hoiuse, 'Our Government: State and Local Governments' The White House, <https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government/> accessed 26 July 2021

[27] Oliver Owen 'Introduction: The Devolved Policing Debate – The Need for Evidence', 13 – 21 in Oliver Owen (ed) 'Police Reform in Nigeria: The Devolution Debate' CLEEN Foundation 2018; Nanji Umoh and Ezekiel Major Adeyi 'Social Integration: A Nation-Building Strategy for Nigeria's Federalism' (2019) Volume 6, Issue 3. *Review Pub Administration and Management*.

objectives of their call for a change in the Constitution. This is demonstrated by the wide conflation of contradictory concepts. These contradictions if not properly articulated and resolved will impact negatively on any attempt to develop a legal framework. The PGF submission is a good reflection of these contradictions. It thus serves as the background upon which this discourse is conducted. To demonstrate this, the PGF submission is herein summarised. The PGF submission requests for alteration of the Constitution under the following subthemes and along specific lines. They are:

Citizenship and Indigeneship: The PGF proposes that citizenship should be by birth, marriage and naturalization. It also proposed that if a person has lived in a State for over 10 years, the person should automatically become an indigene of the State irrespective of ethnic origin and ancestry.

Devolution of Powers: The PGF proposes a reduction in the powers of the Federal Government in favour of more powers to the States. It also specifically proposes transfer of some items from the Exclusive Legislative List to the Concurrent Legislative List. The PGF further seeks the abolition of onshore/offshore dichotomy. Others are that Food and Drug Administration, Mining, Oil Mining, State Police, State Prisons, and State Railways should be placed in the Concurrent Legislative List.

Fiscal Federalism/Revenue Allocation: The PGF proposes that the State should control all natural resources in their domain and be required to pay taxes and royalties to the Federal Government. The PGF also propose the upward review of 13% derivation for oil producing states and the introduction of derivation policy for solid minerals and hydro power producing states.

State Creation: The PGF does not support State creation. However, it made case for one more state for a geopolitical zone which has only five (5) states as against six (6) states to make it equal with the 5 other geopolitical zones.

Judiciary: The PGF proposes the creation of State Judicial Council similar to State Independent Electoral Commission. The proposed State Judicial Council shall perform similar functions as the National Judicial Council (NJC) including appointments and disciplining of judges at the state level.

Local Government Administration: The PGF proposes the removal of local government areas completely from the Constitution. They also propose constitutional

powers to allow states set up their own administrative areas, and be in charge of funding them directly.

Independent Candidacy: The PGF proposes right of independent candidates but with stringent conditions including the resignation of the candidate, if from a political party at least six (6) months to elections, payment of a hefty non-refundable deposit to INEC to contest elections so that INEC is not inundated and overwhelmed by a large number of non-serious candidates.

4. RESOLVING THE CONSTITUTIONAL ALTERATION AND FEDERALISM DILEMMA

These proposals are quite interesting and reflect the aspirations of many in Nigeria. The proposals arise because of different shades of inequity perceived or real and inefficiencies in the management of national affairs. We now address these points one after the other as representative of similar aspirations by other pressure groups in the Country. We seek to resolve the gap between the proposals and normative principles and thus answer the question which this paper addresses. We start with citizenship and indigeneship.

Citizenship* and *Indigeneship: The PGF's phrasing of the proposal on citizenship discloses some conflation of issues and thus a confusion as to the intent of the proposal. Firstly, the call for Memorandum of the National Assembly did not include the issue of citizenship only that of residency and indigeneship.[28] The provisions of the Constitution on citizenship of Nigeria appears to be non-controversial as they are. Secondly, indigeneship and citizenship are two different concepts. While citizenship is granted under the constitution, indigeneship is ancestral.[29] It is the discriminatory value of this citizenship with respect to access to public goods and enjoyment of certain political and economic rights from government that brings the question of indigeneship into public discourse.[30] The Call for Memorandum captures this discourse as "Residency and Indigene Provisions". The position of the law is that citizenship is by birth, registration (which includes by marriage) and naturalisation.[31] There is no citizenship by indigeneship. Rather indigeneship is used to prove

[28] See Henry Umoru note 1

[29] David Ehrhardt 'Indigeneship, Bureaucratic Discretion, And Institutional Change In Northern Nigeria' (July 2017, Volume 116, Issue 464) *African Affairs,* 462–483, 470-471, <https://academic.oup.com/afraf/article/116/464/462/3769252> accessed 31 August 2021

[30] ibid

[31] See the Constitution of the Federal Republic of Nigeria 1999, sections 25, 26 and 27

evidence of ancestry of a person i.e. that any of the person's parents or grandparents belong(s) or belonged to a community indigenous to Nigeria.[32] This proof of indigeneship may thus be used as evidence of birth in Nigeria in fulfillment of the requirements for obtaining Nigeria citizenship, especially when applying for Nigeria international passport.[33] It is not equivalent to citizenship. The issue of indigeneship is also indirectly recognised by the Constitution in relation to compliance with the Federal Character principles.[34] According to sections 14(3) and 171(3) of the Constitution of the Federal Republic of Nigeria (CFRN), in accordance with Federal Character all appointments should be inclusive enough to represent the various ethnic and cultural groups in Nigeria. This inclusiveness can only be feasible when people are identified by their ancestry and indigeneship. The value that Nigerians ascribe to this is demonstrated by the contention that the Buhari administration has failed in this regard and is perhaps a key cause for conflict and disunity in the country, including nationalist calls for secession.[35] On the other hand, the use of indigeneship in allocation of public goods has unfortunately created ground for discrimination against resident non-indigenes in a state. For instance, persons who may not have ancestral affiliation with the state where they are resident but have lived long and contributed to its development are not recognized as indigenes. This effectively deprives them of the opportunity to benefit from public goods in such states irrespective of how long they have lived or contributed to the state.[36] It may also

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[32] Constitution of the Federal Republic of Nigeria 1999 s 25(1)

[33] Nigerian Immigration Service 'Standard Passport: Requirements for obtaining Standard Passport' Nigerian Immigration Service, < https://immigration.gov.ng/standard-passport/ > accessed 31st August 2021

[34] See for example Constitution of the Federal Republic of Nigeria 1999, sections 14(3); 171(5); 217(3); 219(b) and 221(b)

[35] Louis Achi 'The Rise of Ethnic Nationalism' Thisday newspaper online (Nigeria, June 20, 2021 4:01 am) <https://www.thisdaylive.com/index.php/2021/06/20/the-rise-of-ethnic-nationalism/ > accessed 31st August 2021; Diarist Yakubu **'**Buhari's lack of capacity to govern fueling ethnic, religious tensions — PDP governors' Vangaurd April 11 2021 <https://www.vanguardngr.com/2021/04/buharis-lack-of-capacity-to-govern-fueling-ethnic-religious-tensions-%E2%80%95-pdp-governors/ > accessed 31 August 2021**;** Abdul Raufu Mustapha 'Ethnic Structure, Inequality and Governance of the Public Sector in Nigeria' *Centre for Research on Inequality, Human Security and Ethnicity [CRISE] (Crise) Working Paper* No. 18 May 2005 <https://assets.publishing.service.gov.uk/media/57a08c97ed915d3cfd0014aa/wp18.pdf> or <https://doi.org/10.1093/afraf/adx016 > accessed 31 August 2021

[36] See for example David Ehrhardt 'Indigeneship, Bureaucratic Discretion, And Institutional Change In Northern Nigeria' (2017) Volume 116, Issue 464, *African Affairs*, 462–483 <https://academic.oup.com/afraf/article/116/464/462/3769252> accessed 31 August 2021

discourage such persons from embarking on developmental projects in such communities. This is exactly not a uniting factor either for the country.

Accordingly, the focus of the PGF proposal is on how to accommodate longtime residents of a state as indigenes of the state where they are residents and encourage community building without undermining the rights of the original inhabitants. This proposal however, raises questions like whether such persons lose their ethnic identity or indigeneship in their ethnic origin and its implication to cultural identity. This is because indigeneship helps cultural identity.[37] Indigeneship is also useful in tracing ancestral roots for purposes of acquiring citizenship by birth. This is not peculiar to Nigeria. Countries that confer citizenship by birth require that the applicant demonstrate a degree of ancestry and knowledge of local language.[38] In such cases, evidence of the parents' citizenship may be sufficient.[39] The question becomes how to manage these two concepts without undermining the other.

The existence of these two concepts or enjoyment of these rights by one person or two classes of persons – persons with ancestral heritage and persons of long residence - seems capable of accommodation in a new definition of who an indigene is in the Constitution. Such definition may ensure that those who do not belong to any ethnic group within a state but who have been resident for a long time equally enjoy similar rights as those with ancestral or ethnic connection to the state. In this regard, the proposal of the PGF for a ten (10) year residency in order to acquire indigeneship appears appropriate.

This however leaves out two unresolved issues. First, is citizenship by marriage for men and second, is the manner for the enjoyment of multiple indigeneship. For citizenship by marriage for men, the Constitution only makes provision for acquisition of citizenship through marriage for females married to male citizens.[40] The access to this right is seen as discriminatory against females.[41] The contention is that same right is not accorded to males married to Nigerian female citizens. In effect

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37 See the Constitution of the Federal Republic of Nigeria 1999, section 21.

38 UK Government "Apply for citizenship if you have a British parent" GOV.UK < https://www.gov.uk/apply-citizenship-british-parent > accessed 23rd November 2020

39 ibid

40 Constitution of the Federal Republic of Nigeria 1999 s 26(2) (a)

41 Bronwen Manby and Solomon Momoh, 'Report on Citizenship Law: Nigeria' RSCAS/GLOBALCIT-CR 2020/12 July 2020, 8 <https://cadmus.eui.eu/bitstream/handle/1814/67855/RSCAS_2020_12.pdf?sequence=1&isAllowed=y> accessed 31 August 2021

females are disadvantaged before their male counterparts. This seeming discriminatory provision was not addressed by the PGF recommendation. It may however be suggested that Constitutions are a reflection of the traditions and customs of a people. None of the traditions or customs of the tribes in Nigeria, at least to the knowledge of this author, envisages men residing in their wives' ethnic homes and seeking to take indigeneship or citizenship. Since this is not within the contemplation of any indigenous culture, it is therefore not surprising that the PGF proposal did not also contemplate it. This gap could however, be resolved through the provision on citizenship by naturalisation. On the question of dual indigeneship, this may be better resolved by statutory enactment than Constitutional alteration.[42]

Devolution of Powers (Decentralization of Powers): Devolution of powers, although a contested concept,[43] generally relates to donation, delegation or lending of power by a higher hierarchy to a lower authority. Such delegation can be retrieved at any time by the donor.[44] The proposals made by the PGF actually relates to decentralization of powers not devolution of powers since Nigeria operates a federal system. In other words, going by the content of the proposals, the term devolution is misunderstood and what was intended is decentralisation. This is because the proposal is for constitutional distribution of powers which are currently being exercised by the central or federal government to its federating units by constitutional empowerment. Decentralization is thus a more appropriate description. Decentralization ensures that the subnational government (State) are empowered by the Constitution to exercise powers which are within their efficiency capacity to achieve results better than the national (Federal) government.[45] This power was decentralized cannot be assumed again by the federal government without Constitution alteration. The concept of decentralisation of items within state efficiency capacity is best describe by the principle of subsidiarity. The principle of subsidiarity is the basis for determining what powers are within the efficiency

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[42] An individual may acquire dual indigeneship if after qualifying for indigeneship of a place of residence the persons retain place of origin. There may also be need to clarify whether one can hold more than one acquired place of indigeneship, other than place of origin, at any one time.

[43] Juma, Dan, 'Devolution of Power as Constitutionalism: The Constitutional Debate in Kenya and Beyond (August 15, 2008). Ethnicity, Human Rights and Constitutionalism in Africa, International Commission of Jurists, eds., 36-58, Nairobi, Kenya, 2008, Available at SSRN: <https://ssrn.com/abstract=1382821> accessed 26 November 2020. The term contested concept is used here to indicate that it is not yet settled as to how best to achieve devolution. Individual states may have to craft their models.

[44] Elliot Bulmer (2017) 40

[45] Markus Böckenförde (2011) 4

capacity of states and the federal government. Principle of subsidiarity posits that powers should be exercised by the least centralized unit of government with the best competence to deliver public goods and enjoyment of fundamental rights to the citizens.[46] Usually, it is the tier of government which is closest to the people and which is in a better position to understand the challenges faced by the people in many aspects of government that meets the subsidiarity principle requirement.[47] The fact that States in in position to understanding these challenges better, give state governments the information with which to provide public goods efficiently to its people.

Flowing from the above, it is correct to say that the proposal made by the PGF cannot be effectively carried out through mere transfer of items from the Exclusive Legislative List to the Concurrent Legislative List. The Concurrent Legislative List is not exclusive to State governments. Such transfers will still leave the power open to appropriation by the federal government because of the powers to exercise primacy over any matter in the Concurrent Legislative List. This is referred to as the principle of covering the field.[48] This principle has been applied in several cases to overrule or void state laws that regulate items already being regulated by Federal Acts.[49] The proposal to transfer items from the Exclusive List to Concurrent List also raises question of allocation of resources for implementation of laws made pursuant to such transfer. In other words, the Federal Government and State Governments will still fight over the issue of funding for the items shared between them. To avoid these conflicts and inherent ambiguity, the best option is to remove those items proposed to be allocated entirely to state governments from the Exclusive and Concurrent

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[46] Steven G. Calabresi and Lucy D. Bickford 'Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law' (2011). *Faculty Working Papers*. Paper 215. < https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1214&context=facultyworkingpapers > or <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/215 > accessed 6 September 2021

[47] Development and Peace, Caritas Canada 'Subsidiarity and the Role of Government' *Development and Peace, Caritas Canada* <https://www.devp.org/en/cst/subsidiarity> accessed 30 November 2020.

[48] Principle of covering the field elevates laws made by the National Assembly to an exclusive position for matters on the Concurrent Legislative List once an Act of the National Assembly is made on the subject matter. In this scenario, a law made by the State House of Assembly becomes void if it is in conflict with an Act of the National Assembly [Constitution of the Federal Republic of Nigeria 1999 s 4(5)] or goes into abeyance if there is no conflict, AG. Lagos State v. Eko Hotels, (2017) LPELR – 43713 (SC).

[49] See A.G. Ondo State v. A.G. Federation (2002) 9 NWLR (Pt. 772) 222 and Olafisoye vs FRN (2004) 4 NWLR (Pt. 864) 580 at 656 -658

Legislative Lists. These become residual matters for which only state governments can make laws and implement.[50] The other option, if they must be transferred to Concurrent Legislative list is to clearly and specifically limit the power of the Federal government on those items to setting policy standards while States are to legislate on them and exercise regulatory powers over them. Under this arrangement the principle of covering the field will not apply. The field for each unit will already be clear and exclusive to each, albeit concurrent. The advantage of this second option over the residual matters approach is that it announces to the whole world and more importantly to citizens and governments alike what is expected of government.

Fiscal Federalism/Revenue Allocation: There are two conflicting recommendations in the proposal from PGF. First, if States are to control the resources within them, then they cannot also receive the 13% derivation. It is either one or the other. The more equitable option is for States to be constitutionally empowered to retain control and exploitation of the mineral resources in their respective domains, while the federal government should impose direct tax on the revenue states make from those resources. This will mean for instance, that the Constitution should set a clear guideline for collection of revenue in the mineral sector of the country since there are mineral resources in every part of the country. This way each state is encouraged to exploit its resources to the fullest. To ensure that all States exploit and benefit from these resources, each State should retain 50% or more of the revenue in respect of minerals in their domain while the federal government may retain 30% or less from such revenue. The remaining 20% or less may be pooled together in a distributable pool for redistribution to the various states. This may be achieved through constitutional provisions similar to sections 139 to 145 of the 1963 Constitution of Nigeria.[51]

State Creation: The question of State creation arises for two major reasons: inadequate representation and reliance on allocation of funds from the Federal Government. In other words, if the quest for full representation is resolved and constitutional framework is improved to ensure opportunity for equal economic

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[50] Constitution of the Federal Republic of Nigeria 1999 s 4(7); AG Federation v ag Lagos State (2013) 16 NWLR (Pt. 1380) psge 249 SC

[51] I must however, confess that this will require a more in-depth econometric and empirical analysis than this paper can muster or allow. The recommendations above are however, indications of the mind of the author towards putting States in priority over federal government. This is on the basis that the more responsibilities that are allocated to States the more resources should be provided to States too.

growth, the clamour for state creation may stop. The recommendation made on fiscal federalism and decentralization above is relevant in resolving these challenges. However, the current demand for state creation in the southeast is more about political representation than economic. It is more of perceived inequality. The southeast is currently the only region with 5 states while others have more. Against this background the PGF proposal should be approved. However, going forward, the recommendations on fiscal federalism and decentralization of powers would resolve any further request for state creation. More importantly, communities seeking for State status will understand that their will be no reliance on federal allocation for sustenance of the state but on internally generated revenue of such communities.

Judiciary: Independent judiciary is a hallmark of rule of law and constitutional democracy. Establishing constitutional framework that confer States with powers to create their own independent judiciary will aid quick dispensation of justice, enhance judicial independence and eliminate Federal Government interference in judicial matters in whatever guise.[52] Accordingly, to guarantee independent state judiciary, it would be helpful to alter the Constitution to grant individual states the power to establish State Courts of Appeal and Supreme Courts. These courts will have appellate jurisdiction on matters upon which a state has powers to make laws. States will also have the power to create as many courts as they can afford. Each state should have the power to manage its own judiciary as far as some basic and minimum standards are met. These may include issues like criteria for appointment and discipline of judges and the minimum population for judicial districts etc. This suggestion is in line with the previous constitutional order in Nigeria under the 1960/1963 Constitutions and the 1979 Constitution which permitted States to have Courts of Appeal and State Judicial Service Commission with the powers now being exercised by the National Judicial Council (NJC).

Local Government Administration: The importance of local government administration is demonstrated by three key constitutional provisions. First according

[52] See Ibrahim Tama Gambo 'Financial Independence of The Judiciaries: A Mirage Or A Reality' *Being a Paper Presented at the National Workshop for Chief Registrars, Deputy Chief Registrars, Directors and Secretaries of Judicial Service Commissions/Committee*, Held at National Judicial Institute on Wednesday, 4th September, 2019 <https://nji.gov.ng/wp-content/uploads/2020/11/Financial-Independence-of-the-Judiciaries.pdf > accessed 2 September 2021; United Nations 'Human Right: Judicial independence under threat in Nigeria, warns UN rights expert' 11 February 2019, United Nations UN News, Global perspective Human stories <https://news.un.org/en/story/2019/02/1032391 > accessed 2 September 2021

to section 7 of the Constitution local governments are to be administered in accordance with the laws made by the Houses of Assembly of the States and such laws must provide for democratically elected administration. Secondly, the Constitution guarantees local government councils a share of Federation Account Allocation, but through the States. Third is that local government councils are empowered by the Constitution to deliver certain public goods directly to the people. The real challenge of local government administration has been the recent failures on the part of States to comply with these constitutional requirements. It should be noted that the governors, some of whom have failed to comply with these constitutional requirements are the ones advocating for scrapping of local governments as presently constituted in the Constitution.[53] This is without prejudice to some arguments by commentators that local governments should be scrapped.[54] Against this backdrop and in compliance with the principle of subsidiarity, it is suggested that it may be necessary to empower local governments to receive their allocations directly and also be directly accountable for its disbursement and prudent management. This will take State governments out of the equation. Scrapping of local government councils will not serve Nigeria better. Local government councils as have been demonstrated in democracies including unitary systems[55] have very important roles to play, more so in Nigeria with its huge population and diverse ethnic and cultural units even within a state.[56]

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[53] Editorial, Govs use assemblies to fight LG autonomy – SANs, PUNCH Online 28th January 2023 < https://punchng.com/govs-use-assemblies-to-fight-lg-autonomy-sans/> accessed 13th July 2023; Editorial, Labour knocks govs as states reject LG autonomy, PUNCH Online 25th January 2023 < https://punchng.com/labour-knocks-govs-as-states-reject-lg-autonomy/ > accessed 13th July 2023; Editorial, Governors frustrate local govt autonomy, The SUN Online, 24th January 2023 < https://sunnewsonline.com/governors-frustrate-local-govt-autonomy/ > accessed 13th July 2023

[54] This Day, Should the Local Govts be scrapped? This Day Online - < https://www.thisdaylive.com/index.php/2017/04/13/should-the-local-govts-be-scrapped > accessed 12th July 2023

[55] Britannica, Local Government, Britannica < https://www.britannica.com/place/United-Kingdom/Local-government > accessed 13th July 2023; GOV.UK, Local government structure and elections, < https://www.gov.uk/guidance/local-government-structure-and-elections > accessed 13th July 2023; About Switzerland: Political System, Federalism <https://www.eda.admin.ch/aboutswitzerland/en/home/politik-geschichte/politisches-system.html#:~:text=Switzerland%20is%20governed%20under%20a,decisions%20at%20all%20political%20levels. and https://www.eda.admin.ch/aboutswitzerland/en/home/politik-geschichte/politisches-system/foederalismus.html > accessed 13th July 2023

[56] E.g. in Bauchi State alone there are at least 4 ethnic groups, including the Tangale, Waja (Wajawa), Fulani, and Hausa. The state also contains a number of traditional Muslim emirates. See

Independent Candidacy: One of the challenges of party politics in Nigeria is the problem of godfatherism.[57] This is perhaps a major justification for the call for independent candidacy. While this may appear attractive in solving the problem of godfatherism,[58] it brings with it very serious challenges. First is that it undermines one of the key benefits of party democracy. Party democracy allows candidates to identify their political ideology and also test their popularity within groups of similar ideology while playing by laid down rules. Without belonging to a particular party, it will be difficult to identify individual ideologies and show that it is genuinely representative of a group. Also, candidates will not have a ground to test their level of acceptance and voters may not have opportunity to evaluate candidates' capacity. Secondly, it undermines opportunities for consensus and representative compromise. This is because candidates will effectively be playing by their own rules instead of that set by a group. Democracy presupposes informed and engaged consensus or at least popular agreement. Independent candidacy effectively undermines this key benefit of democracy.[59] It may rather entrench fringe ideologies (including those inimical to society) especially in young democracies where other temporal consideration may influence unsustainable political choices.[60] Incidentally, there is

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Britannica (online) Bauchi state, Nigeria < https://www.britannica.com/place/Bauchi-state-Nigeria > accessed 31 August 2021

57 Fatima Ahmed and Mustapha Alhaji Ali "Politics of Godfatherism and its Implication on Socio-Economic and Political Development of Nigeria" (20190 Vol. 4, No. 1; American International Journal of Social Science Research ; 18 < https://www.cribfb.com/journal/index.php/aijssr/article/view/243/302> accessed 23rd November 2020

58 Oxford Dictionary of African Politics, godfatherism < https://www.oxfordreference.com/display/10.1093/acref/9780191828836.001.0001/acref-9780191828836-e-156;jsessionid=2B96D8C71044B7514D7CCC22D27A8CAB > accessed 14th July 2023 defines Godfatherism as "A term used primarily in Nigeria to refer to wealthy and powerful figures who exert political influence behind the scenes while often remaining out of the limelight. A classic 'godfather' will have earned their money through government contracts or access to the country's oil wealth and will have used their largesse to establish a network through which they can influence political developments. A successful godfather, for example, will be able to shape not only who is nominated to contest elections but also who wins. "

59 Gary Ahrens and Nancy Hauserman, Fundamental Election Rights: Association, Voting, and Candidacy, (1980). 14 *Val. U. L. Rev*. 463, 478, available at: <https://scholar.valpo.edu/vulr/vol14/iss3/3> accessed 23rd November 2020

60 For instance, Nigeria is yet to effectively combat voter's fraud, electoral malpractices etc. It will be devastating when an individual with economic resources but unfriendly or unsocial ideology gets hold of power through electoral fraud etc. There will be no political party to either help weed such persons or control them. The recent US experience with Donald Trump, despite being elected under a political

not yet heartwarming evidence of successful independent candidates even in very liberal democracies at presidential election levels.[61] In the USA, there have been quite a number of successful independent candidates at governorship level though.[62] And most times as a result of voters' revolt against established political parties.[63] Also, the proposal of the PGF for independent candidacy upon payment of a certain amount may have a paradoxical and negative effect on democratic process. It may effectively be to the advantage of only those who have the financial power or end up being a roundabout way of retaining godfatherism in our political space. This is because, hinging nomination of financial strength may effectively limit the political space and give room to godfathers. The country ought to discourage such divisive and exclusionary rent-seeking politics which this particular proposal may contribute to its entrenchment.

CONCLUSION

A careful analysis of the proposals reveal that simple and careful alteration of the Constitution can resolve most of the issues raised. On indigeneship question, the National Assembly may consider a constitutional definition of indigeneship to include persons of indigenous ancestry and persons who have lived at least ten years in a particular State and have contributed meaningfully to society. For devolution and decentralization of power, the best options are to either take those proposed items out of the Exclusive and Concurrent Legislative Lists or to specifically limit the legislative competence of the Federal Government on those items to only the setting of policy standards. On Fiscal Federalism/Revenue Allocation, the Constitution should set a clear guideline for collection of revenue, for example, in the mineral sector and an equitable sharing formula e.g. 50% to States, 30% to Federal Government and 20% for distributable pool to cover funding gaps, should be adopted. On State creation, one more State for the south east geopolitical zone is

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party but effectively independently sponsoring himself, is a taste of what may happen with an exclusively independent candidate. The demigod complex may be very negative. Hitler's Germany is not too far a history.

[61] Cristen Conger, 10 Most Successful Third-party Presidential Candidate, Howstuffsworks, 31st August 2020 < https://people.howstuffworks.com/10-third-party-presidential-candidates.htm > accessed 13th July 2023.

[62] National Governors Association, Governors Historical Roster < https://www.nga.org/wp-content/uploads/2019/03/Governors-Historical-Rosters.pdf > accessed 13th July 2023

[63] Emily Schultheis, 2010: The year of the independent? *Politico,* 07/15/2010 04:34 AM EDT < https://www.politico.com/story/2010/07/2010-the-year-of-the-independent-039758 > accessed 13th July 2023

agreeable. On judicial independence, it would be more practicable and in line with federalism principles for individual states to control their courts, including power to create High and Appellate court divisions with jurisdiction on some Constitutional matters, fundamental rights and disputes between governments or government agencies, should be shared or left for the Federal Appellate Courts. Local government administration, on the other hand, should be strengthened and made more independent and accountable. States should be required to implement the democratic election of local government council administrations. Finally, independent candidacy should be rejected as it would not help in deepening democratic practice but may lead to exclusionary practices and creation of demigods.

The fact is that constitutions are recognised as living and organic documents upon which the development trajectory of every political entity is based. It is however, more or less a framework and not expected to contain tiny details of governance structures and processes. These are to be fine-tuned in statutes and regulations. While, however, it may not be necessary to continue to extend constitutional provisions, it is acceptable to alter some fundamental provisions to accommodate changing circumstances, popularly expressed concerns and prepare the State for future democratic growth and economic development. The proposals suggested by the PGF, as a representative of other calls for constitutional alteration, is assessed in this light and the opinions given herein also recognise this reality and are accordingly made on the premise of the sustainability and growth of the Nigerian constitutional democracy.

3

REPOSITIONING PREGNANCY AND MATERNITY RIGHTS FOR SUSTAINABLE BALANCE BETWEEN WORK AND CHILDBEARING ROLE OF WOMEN IN NIGERIA

By

Israel N. E. Worugji*, Rose O. Ugbe** and Nheoma Eme Worugji***

Abstract

Engagement of women in employment relationships has changed the traditional view that women are house-keepers and baby makers and therefore not suitable for employment relationships. But women in employment relationships still desire to maintain their traditional roles including childbearing, nursing their children and other childcare responsibilities while engaged in their employment relationships. The combination of work and reproductive roles has created the need for a balance between work and the reproductive role of women generally to make sure that work does not become a fetter or clog on their reproductive roles, health, incomes and job security. It is in response to this that national laws and policies are made to create a fair balance between work and motherhood in employments relations. The ILO has also set standards for sustainable maternity rights of women in employment relations, all aimed at creating a fair and sustainable balance their work and reproductive roles of women in employment relations. This contribution, therefore, evaluates the Nigerian law on the protection of pregnancy and maternity rights of women in employment relations and the extent to which the law is in cooperation with the international standards and international best practices. It adopted a content qualitative descriptive analysis approach, relying on information from primary and secondary sources. The study reveals that the Nigerian law is not in cooperation with international standards and international best practices, and therefore, calls for a maternity law that will create a fair and sustainable balance between work and the reproductive role of women in employment relations in cooperation with international standards and international best practices.

Keywords: Balancing work and reproductive role, Law. Maternity Rights, Pregnancy, Women, Work

1. Introduction

The issue of the legal protection of pregnancy and maternity rights of working women has become a necessary part of employment relations globally.[1] This has become particularly necessary with the increasing engagement of women in productive employments, dependent labour relationships in particular; and the increasing need for job security and social protection for women in subordinate labour relationships. The engagement of women in productive employment relationships has changed the traditional view of women as full-time housewives, only good as home care-takers, and baby-makers and child care responsibilities. Most women in employment relationships desire to have babies, nurse, and look after the babies, as well as retain their employment relationships.[2] These have made the issue of the legal protection of pregnancy and maternity rights for a sustainable balance between work and childbearing responsibilities of women major concern in employment relations.[3]

It is undisputed that during pregnancy and maternity, women would require special protection to prevent harm to them and their infants' health; and need adequate time to attend to antenatal needs, give birth, recover, and nurse their children, including breastfeeding and other childcare responsibilities.[4] Besides, these women would desire to return to their employments after delivery and continue to nurse their children naturally and do other childcare responsibilities as well as build their careers in employment. Thus, achieving genuine employment opportunities and fair

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* LLM (Essex), PhD (Ibadan), BL. Professor of Law, Faculty of Law, Rivers State University, Nkpolu-Oroworukwo, Port Harcourt. Nigeria. Email: ineme2003@yahoo.co.uk.

** LLM, PhD, BL. Associate Professor of Law, University of Calabar, Calabar-Nigeria. Email: ohiama@yahoo.com; rougbe@gmail.com.

*** LLM, BL. Law Lecturer, Faculty of Law, Rivers State University, Nkpolu-Oroworukwo, Port Harcourt. Nigeria. Email: nheomaworugji@yahoo.com & nheoma.worugji@ust.edu.ng.

1 International Labour Organization (ILO) C131-Maternity Protection Convention, 2000 (No.183) and R191-Maternity Protection Recommendation, 2000 (No.191).

2 CK Agomo, *Nigerian Employment and Labour Relations Law and Practice* (Concept Publication, 2011) 86; AA Adejugbe & AN Adejugbe, *Women and Discrimination in the workplace: A Nigerian perspective,* 6-7 <https://papers.ssrn.com.delivery.cfm> accessed 16 May 2021.

3 ILO, '107th Session 2018: Report V (1) Ending Violence and Harassment against Women and Men in the World of Work' (ILO Office, 2018) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf> accessed 11 August 2021.

4 ILO Convention and Recommendation (n1); ILO, 'International Labour Standards on Maternity Protection' <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/maternity-protection/lang--en/index.htm> accessed 10 August 2021.

treatment for women at work and enabling working mothers to raise families in conditions of security and sustainable childcare, must be safeguarded at the workplace.[5] Maternity protection is necessary for sustainable reproduction and economic production. It is essential in ensuring the women's reproductive roles do not jeopardize their economic security, their health, and that of their children.[6] This has become particularly important with the prevailing demands of exclusive breastfeeding of the infants for at least six months and continued breastfeeding of the infant for up to two and a half years of age and other childcare responsibilities that require balancing work and motherhood.[7] Thus, the aims of protection of pregnancy and maternity rights cannot be overemphasized.

Pregnancy and Maternity rights are designed to protect the health of pregnant mothers and their unborn babies, nursing mothers, and their babies; and to minimize and ultimately eliminate the challenges and disadvantages that women face because of pregnancy, childbearing, and child care responsibilities.[8] The success of workplace strategies to promote gender equality at work is dependent on adequate and accessible pregnancy and maternity rights as well as family-friendly working conditions, benefits, and services.[9] This is, where the issue of the protection of pregnancy and maternity rights for working mothers has become an issue of a general concern in employment relations calling for sustainable legislative and policy intervention.[10]

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5 *Ibid.*

6 Adrienne Cruz, 'Good Practices and Challenges on the Maternity Protection Convention, 2000 (No.183) and the Workers with Family Responsibilities Convention 1981 (No. 156): A Comparative Study Working Paper, 2/2012' (ILO, 2012) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_192554.pdf> accesed 10 August 2021.

7 UNICEF and others, 'Facts for Life' (United Nations Children's Fund, New York, 2010) 11-27 <https://factsforlife.org/pdf/factsforlife-en-full.pdf> accessed 10 August 2021; World Health Organisation (WHO), 'World Breastfeeding Week 2020 Message', 31st July 2020 < https://www.who.int/news/item/31-07-2020-world-breastfeeding-week-2020 message#:~:text=The%20theme%20of%20World%20Breastfeeding,critical%20component%20of%20breastfeeding%20support. > 11 October 2021.

8 Suzan Lewis and ohters, *Maternity Protection in SMEs, An International Review* (ILO, 2014) <https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_312783.pdf> accessed 11 October 2022.

9 *Ibid.*

10 ILO (n3) 5-16; Laura Addati, Naomi Cassirer and Katherine Gilchrist, 'Maternity and Paternity at Work, Law and Practice Across the World' (ILO Geneva, 2014)

It is within this context that this article examines the maternity rights of women under the Nigerian labour law and policy; and the extent to the Nigerian law is in tandem with international standards and international best practices. This has become particularly important considering the engagement of women in employment relations; and the need create a fair balance between work and the reproductive role of women in employment relations. Before delving into the focus of this work, the conceptual framework upon which the work anchors is clarified as this serves as the functional basis for the work. This centred on maternity rights at work; and the international standards, and international best practices relating to the protection of pregnancy and maternity rights.

2. Pregnancy and Maternity Rights at Work

Pregnancy and maternity rights are essentially those rights of women in employment which are aimed at protection of pregnant women, their unborn children, and the infant children; and to provide some measures of income and guarantee job security for the working mothers during pregnancy, maternity, and after maternity.[11] The protection of the mother and child and the social protection of the working mother raise the issues of the legal protection of pregnancy, maternity rights, and childcare generally. It is upon these issues that the right to time-off for prenatal (antenatal) care, maternity leave and maternity pay, the right to return to work after childbirth, and not to suffer any detriment or any form of discrimination on grounds of pregnancy and maternity rights in employment relationships anchor. Thus, these rights must be protected if work and family must be balanced for the working mother for sustainable protection of work, pregnancy, and maternity in employment relations. These pregnancy and maternity rights are highlighted in this part.

2.1 Time-off for Prenatal Care

Prenatal health care with a doctor is vital in the life of a pregnant woman. It is in this process that complications in pregnancy and delivery are usually detected and

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<https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf > accessed 11 October 2022.

[11] ILO Convention and Recommendation (n1); International Labour Standards on Maternity Protection; ILO: Maternity Protection in SMEs, An International Review (ILO Office, 2014) <https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_242615.pdf> accessed 11 August 2021.

necessary precautions are taken to prevent such complications and guarantee safe delivery and good health for the mother and the child. It is within this context that the WHO has insisted on regular prenatal visits by pregnant women as one of the ways to guarantee maternal and child health.[12]

A pregnant woman would as of necessity require some time off work to attend prenatal appointments with her doctor.[13] An employer is naturally expected to cooperate with the expectant mother in this regard. This has in recent times become part of the emerging duty of cooperation in employment relations. An employer is not expected to unreasonably refuse time-off for prenatal purposes for the expectant woman. It is also of note that for health and safety reasons, in addition to permitting time-off for prenatal care, an employer upon being notified of the pregnancy is expected to make sure that the expectant mother is not unduly exposed to work that will put her and her unborn child to an avoidable risk. This may require adjusting her conditions of work for the time being as the case may be.

2.2 Maternity Leave

Maternity leave is a crucial component of the maternity rights of an expectant and a nursing mother. This is a time for which the woman is usually off work on pregnancy and maternity grounds. This is necessary to enable the working woman to cope with the exigencies of pregnancy, delivery, and childbirth.[14] It is acknowledged that pregnancy is such a sensitive time in a woman's life, and if not properly handled, the outcome can be disastrous, which may include maternal mortality, infant mortality, and life-changing health complications for the mother and child in some cases. These risks which may be associated with poorly managed pregnancy, delivery, and postnatal care also raise significant social, emotional, physical, and familial challenges, hence the need for prenatal and postnatal care and leave as the case may be.[15] The length of leave is critical in enabling mothers to recover from childbirth and return to work at the same time having enough time having adequate time to meet

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12 UNICEF (n7).

13 *Ibid;* UNICEF Innocenti Research Centre, 1990 - 2005 Celebrating the Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding Past Achievements, Present Challenges and the Way Forward for Infant andYoung Child Feeding (UNICEF, 2005) at <https://www.unicef-irc.org/publications/pdf/1990-2005-gb.pdf> accessed 15 August 2021.

14 Addati (n10).

15 WHO (n7).

the child care needs of the children. When the leave period is too short, mothers may not feel ready to return to work and may drop out of the workforce, hence the need for an adequate period of maternity leave for a fair balance in this regard.[16]

Maternity leave has also become part of the critical components of global demands for breastfeeding support. The health and well-being of the baby are guaranteed through breastfeeding.[17] It is acknowledged that breastfeeding provides every child with the best possible start in life. It delivers health, nutritional and emotional benefits to both children and mothers. It forms part of a sustainable food system and a fundamental step in seeking the reduction of child mortality and improvement of the health of mothers.[18] Though breastfeeding is a natural process, it is not always easy for working mothers in particular. They need support both to get started and to sustain the breastfeeding for a reasonable period, hence, the need for maternity leave and other time-off work to support breastfeeding.[19]

2.3 Maternity Leave with Pay

Maternity leave with pay, as noted, is also a crucial component of maternity rights. Maternity leave affects the income of the worker during the maternity leave period, hence the need for maternity leave with pay. It is argued on health and safety grounds that women could endanger their health and that of the child through continuing to work because of anxiety over keeping their jobs if they did not have the right to maternity leave with pay. Any maternity leave would be useless if the woman could not afford to use it because of the non-payment of wages and other benefits during the period of the leave.[20] The overall guiding principle is that the level of benefits should ensure that the woman can maintain herself and her child in proper conditions of health with a suitable standard of living.[21]

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16 Addati (n10).

17 Extracts from SCN News, 6-9 <https://www.unscn.org/files/Publications/SCN_News/extractscnnews.pdf> accesssed 11 August 2021; James Akré (ed), 'Infant Feeding : The Physiological Basis' *Bulletin of the World Health Organization (Suppl)* [1989](67) 1-108; SCN News Number 06, 56-57 <https://www.unscn.org/layout/modules/resources/files/scnnews6.pdf> accessed 10 August 2021.

18 WHO (n7).

19 *Ibid.*

20 Pregnant Workers' Directive 92/85 EC of 19 October 2002 <https://www.legislation.gov.uk/eudr/1992/85> accessed 11 August 2021.

21 ILO Convention No. 183, art 6(3) ; Addati (n10).

However, maternity pay is usually subject to certain variants, most especially the length of time of employment before the maternity leave period, and the provisions in the contract of employment. In some countries, maternity allowance is payable by the government under the social security framework.[22] The most common types of funding for maternity leave cash benefits are the employment-related social insurance (contributory scheme); the employers' direct payment of maternity benefits (employers' liability system) and some a mixture of the two types.[23]

It has been noted that the employers' liability system works against the interests of women workers as it places the financial burden on employers, thus creating a possible source of discrimination against women in employment generally. Employers may be reluctant to engage, retain or promote the pregnant woman or women with family responsibilities or find reasons to discharge such women to avoid maternity responsibilities.[24] However, the ILO has been on the drive for a general shift away from the employers' liability system towards collective systems in which social insurance or public funds alone or in conjunction with employers, provide maternity leave benefits. It is also noted that the employers' liability system is common in Africa but some African countries like Ghana, Zambia, Lesotho, Rwanda, and Mozambique have joined in the progressive shift initiated by the ILO.[25]

2.4 Right to Return to Her Work After Maternity Leave

Furthermore, an equally critical area of focus is the protection of a woman from dismissal from work or suffering any form of detriment on the grounds of pregnancy and maternity. This demands that the woman should without any inhibition return to her job and employment after her maternity leave. This includes protection of her earnings and employment status in the employment. Pregnancy and maternity should not be a source of discrimination in any form. This is necessary for a sustainable job and employment security for women who may wish to combine work and reproduction.

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[22] According to the ILO, 58% (98 Countries) now finance maternity leave cash benefits through social security. For further details, see ILO publication, 'Maternity Protection Makes Headway Amid Vast Global Gaps' <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_242325/lang--en/index.html> accessed 7 August 2021.

[23] Addati (n10).

[24] *Ibid.*

[25] *Ibid.*

3. International Standards and Policy

The legal protection of pregnancy and maternity has become central to decent work and productivity for and gender equality at work, hence a fundamental labour right enshrined in the major universal human rights declarations and conventions. The ILO has made the legal protection of pregnancy and maternity core issues in the various conventions and recommendations, particularly Maternity Protection Convention, 2000 (No.183) and Maternity Protection Recommendation, 2000 (No.191).[26] The conventions and recommendations progressively expanded the scope of the legal protection of pregnancy and maternity rights for working women and provided guidelines for sustainable National policies and actions.[27] The core concerns of these conventions and recommendations have been to ensure that work does not pose risks to the health of the woman and her child and that the woman's reproductive roles do not compromise the economic and employment security.[28]

The ILO Maternity Protection Convention No.183 of 2000 as reinforced by R191 specifically provides for at least 18 weeks of maternity leave, including 6 weeks of compulsory postnatal leave, and provision for extension in the event of multiple births; paid maternity leave of the full amount of the woman's previous earnings; access to medical care, including antenatal and postnatal care as well as hospitalization where necessary, and exemption from night work if such work is incompatible with pregnancy or nursing; non-discrimination on pregnancy grounds and the right to return to work after childbirth,[29] and right to breastfeed at the workplace.[30]

Besides the ILO standards and guidelines for sustainable national policies and activities, the World Health Organization (WHO) has propagated and promoted

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[26] ILO C3-Maternity Protection Convention, 1919 (No.3) and the International Labour Organisation (ILO) C103-Maternity Protection Convention (Revised), 1952 (No.103).

[27] ILO (n10).

[28] ILO Maternity Protection Convention, 2000 (No. 183) and the associated Recommendation No. 191.

[29] Under the ILO Convention, in case of any termination during pregnancy or maternity, the burden of proof that the reason or reasons for such termination are not connected with the pregnancy or maternity is on the employer. This is a welcomed innovation reversing the burden of proof which was usually on the worker. This no doubt has strengthened the employment security of the working mother in case of pregnancy and maternity (art.8 of Convention 2000 No.183).

[30] ILO (n1), art 1-11.

pregnancy and maternity protection through researches and studies on the issues concerning women and maternity health. Based on the results of these studies, the organization makes recommendations that often go to shape international legislation on such subject matter. For instance, the WHO recommends exclusive breastfeeding by the mother for at least six (6) months and sustained breastfeeding for upward of two (2) years, where possible.[31] These recommendations have provided further impetus in support of the extension of the maternity leave period to support the mother during the exclusive breastfeeding period.[32] This has also provided the impetus for the demand for crèche facilities in the workplace.

The International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States Parties to adopt special measures, including those measures contained in the Convention, aimed at protecting pregnancy and maternity.[33] The Convention, in particular, provides as follows:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.[34]

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31 UNICEF (n13).
32 INE Worugji and SJ Etuk, 'The National Breastfeeding Policy in Nigeria: The Working Mother and the Law' [2005] (26)(7) *Health Care for Women International*, 534.
33 Convention on the Elimination of All Forms of Discrimination Against Women, 1981(CEDAW), art 4(2).
34 CEDAW, art 11(2)(a-d).

The Protocol to the African Charter on the Rights of Women (Maputo Protocol),[35] also provides that States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall guarantee adequate and paid pre-and post-natal maternity leave in both the private and public sectors.

The Convention on the Rights of the Child (CRC)[36] provides that States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health. And that States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. It further provides that States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures to ensure appropriate pre-natal and post-natal health care for mothers. The African Charter on the Right and Welfare of the Child (ACRWC) also provides that every child shall have the right to enjoy the best attainable state of physical, mental, and spiritual health; and that State parties to the Charter shall undertake to pursue the full implementation of this right and in particular… 'shall take measures to ensure appropriate health care for expectant and nursing mother…'[37]

These global and regional instruments, as noted, respectively provide that motherhood and childhood are entitled to special care and assistance, and for non-discrimination of women in employment relations generally. They also collectively provide sustainable guides to balance work and childbearing responsibilities of women dependent labour relations to ensure that women's reproductive roles do not jeopardize their income and job security, amongst other rights for the women and their children as the case may be.

4. Protection of Pregnancy and Maternity Rights in Nigeria

Apart from the fundamental rights provision which prohibits discrimination on grounds of sex generally[38] and the contract of employment, the law that provides for

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35 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005 (Maputo Protocol), art 13(1).

36 Convention on the Rights of the Child, 1989 (CRC), art 24(1)(2)(d).

37 African Charter on the Rights and Welfare of the Child, 1990 (ACRWC), art 14(2)(e).

38 Constitution of the Federal Republic of Nigeria (as amended) 1999 (CFRN), s42(1).

the protection of pregnancy and maternity rights are found in the Labour Act and Public Service Rules and Practices. This brings to focus the provisions of the Labour Act and the Public Service Rules and Practices on the protection of pregnancy and maternity rights at work.[39]

4.1 Pregnancy and Maternity Rights under the Labour Act

4.1.1 Prenatal (antenatal) Rights

Section 54(1) of the Labour Act provides that in any public or private industrial or commercial undertaking or in any branch thereof, or any agricultural undertaking or any branch thereof, a woman shall have the right to leave her work if she produces a medical certificate given by a registered medical practitioner stating that her confinement will probably take place within six weeks. The employer shall also not permit her to work during the six weeks following the confinement.[40]

The implication of this is that an expectant woman has the right to proceed on her prenatal (antenatal) leave within six weeks from her expected date of delivery, upon her production of a medical certificate. In the absence of such a certificate, the pregnant woman may not proceed on maternity leave until her actual confinement. The maternity leave would, therefore, start and last for twelve (12) weeks upon the delivery confirmed by a certificate from a medical doctor. This is, however, independent of the time-off required by a pregnant woman to see her doctor within the period of pregnancy before the time for maternity leave. Even though some employers, as part of good employment relations, allow time-off in this regard, it must also be noted that some employers also use the time-off needs of pregnant women as a basis for discrimination against women in some cases.

The Labour Act provision under reference falls short of the 18 weeks ILO minimum standard recommended for maternity leave. It is also not in flow with the international best practices as noted above-the UK 52 weeks, Chile 30 weeks, India

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[39] E Chianu, *Law Relating to Maternity Leave* (ERNSLEE, 1997); Emeka Chianu, 'Security of Tenure for Employees who Proceed on Maternity Leave in Nigeria' [1999] (11)(2) *African Journal of International and Comparative Law*, 285 and Worugji and Etuk (n32), 534; Agomo (n2) 87-94.

[40] Labour Act, Cap L1 LFN 2004, s54(1)(a)(b).

6 months, and Sweden 480 days. The provision does not also address the need for time-off for prenatal care for pregnant women as it is omitted in the Act.

Further still, section 54(1)(c) of the Act provides that upon such confinement, the nursing mother will be entitled to at least 50% of her wages if she has been continuously employed by her employer for six months or more immediately before the confinement. This, in effect, means that where she has not been employed for at least 6 months, she may not be entitled to any wages as this is left to the vagaries of the contract of employment. This, on the whole, constitutes a serious threat to her income security, particularly at a time when she would need more money and other material resources for self-maintenance and the child's upkeep including breastfeeding needs for the child. This would discourage many women from staying out of work for childcare responsibilities generally. This is also not in tandem with the ILO standard which recommends the full amount of the woman's previous earnings, nor is it in cooperation with the prevailing international best practices. For example, India has since 2017 granted 6 months of maternity leave with full pay. Chile also has 30 weeks of maternity week with full pay.

Furthermore, section 54(3) of the Act provides that no employer shall be liable, in his capacity as an employer, to pay any medical expenses incurred by a woman during, or on account of, her pregnancy or confinement. This is discriminatory and a denial of the right to free medical services to pregnant and nursing mothers which are usually enjoyed by all workers in employment relationships in most cases. This is also curious particularly in the era of National Health Insurance Scheme (NHIS) for all workers. This is also not in keeping the international standard, the ILO Recommendation No.191 which, among other rights, emphasizes access to free medical care, including antenatal and postnatal care as well as hospitalization where necessary. The threat to, and denial of wages in some cases; and abdication of responsibility for medical expenses incurred by women during pregnancy and maternity in a system where there is no unemployment and social welfare benefits relating to childbirth leaves a gap in the legal system in the protection of pregnancy and maternity rights of the women.[41] As noted, some African countries like Ghana, Zambia, Lesotho, Rwanda, and Mozambique have moved away from the employer

[41] Chianu (n39) 14-34.

liability system to secure the income of women during pregnancy and maternity through social insurance. Nigeria is long overdue for this transition and need not wait any longer.

4.1.2 Postnatal Rights

Section 54(1)(d) of the Act provides that upon resumption of duty after the maternity leave if she is nursing her child, she is entitled to a break of half an hour twice a day during her working hours for such nursing purposes. This is provided to ensure that the mother's return to work does not interfere with the health and welfare of the child, including the programme for breastfeeding. But the extent to which this can support and sustain the postnatal responsibilities of the nursing mother remains in doubt, particularly with the contemporary global campaign for at least two years breastfeeding for the development of the child.[42]

4.1.3 Right to Resume Work after the Birth

The law also guarantees the rights of women to return to their works after maternity leave. Section 54(4) of the Act, in particular, prohibits the employer from dismissing a woman from work on maternity grounds or related causes. Thus, no notice of dismissal can be served on a woman during her absence on maternity ground even if the notice will expire after maternity leave. Similarly, no such notice can be served on her before she proceeds on maternity leave if such notice is to expire while she is already on maternity leave.[43]But how this right is protected in practice has remained an issue in most cases.

To protect the rights guaranteed under the Act, the Act makes a breach of the provisions on maternity leave, apart from the civil liability, a criminal offence for which the offender is liable, on conviction, to a fine not exceeding N800 or to imprisonment for a period not exceeding three months or both.[44]There is no evidence of any prosecution arising from any breach of the maternity law provisions under the Labour Act. Moreover, maternity harassment in employment relations is becoming a

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[42] Worugji & Etuk (n32); UNICEF (n13).

[43] *Mrs Okunbowa v. Group Consultants Nigeria Projects Advisers Nig. Ltd & Ors.*(1974) 3CCHCJ 159; The section 145 of the prevailing Labour Code under which the case was decided is in *pari materia* with section 54 of the present Labour Act in this respect.

[44] Labour Act, s58(1).

serious threat to job and employment security in recent times. In any case, the penalty provided in case of a breach is not even such that could deter any breach or even compel compliance.

Furthermore, considering the limited scope of the Labour Act,[45] it is doubtful the extent to which the provisions on the protection of pregnancy and maternity rights under the Labour Act will cover women in offices and other establishments as they are not covered by the definition of workers under the Act.[46] Moreover, with the developments in the protection of pregnancy and maternity rights globally, it is clear that the provisions under the Labour Act are no more in consonance with the global innovations in the protection of pregnancy and maternity rights. As noted, the ILO Maternity Protection Convention No.183 of 2000 as reinforced by R191 provides for at least 18 weeks of maternity leave, including 6 weeks of compulsory postnatal leave, and provision for extension in the event of multiple births; paid maternity leave of the full amount of the woman's previous earnings; access to medical care, including antenatal and postnatal care as well as hospitalization where necessary, and exemption from night work if such work is incompatible with pregnancy and nursing of the baby, non-discrimination on pregnancy grounds generally and the right to return to work after childbirth,[47] and right to breastfeed at the workplace. The scope of the maternity rights guaranteed under the Labour Act falls short of the international standards and international best practices as noted.

This, therefore, calls the need for a reassessment of the provisions of the Labour Act relating to maternity protection in employment relations. This is particularly important as the Labour Act is the law that regulates employment relationships generally, besides the contract of employment and the Public Service Rules, and the States' Civil Service Rules. However, it must be noted that the NICN has in recent

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[45] By virtue of sec 91(1) of the Labour Act, the Act does not cover persons performing administrative, executive, technical or professional functions; *Julius O Mbilitem v Unity Kapital Assurance Plc* (2013) 32 NLLR (Pt.92) 196 at 231-232 where the Court affirmed the limited scope of the Labour Act.

[46] EE Uvieghara, *Labour Law in Nigeria* (Ethiope Press, 2001) 128.

[47] Under the ILO Convention, in case of any termination during pregnancy or maternity, the burden of proof that the reason or reasons for such termination are not connected with the pregnancy or maternity is on the employer. This is a welcomed innovation reversing the burden of proof which was usually on the worker. This, no doubt, has further strengthened the job security of women in cases proof of termination on pregnancy and maternity (art.8 of C 2000 No.183).

times used the constitutional provisions and international standards to protect women against pregnancy and maternity harassment in some cases.[48]But it must also be emphasized that the judicial activism from the NICN in these regards may not be an effective substitute to sustainable legislative and policy responses in line with the current global demands on the protection of pregnancy and maternity rights.

4.2 Pregnancy and Maternity Rights under the Public Sector Employment Relations

4.2.1 Maternity Leave and Pay

Under the Public Service Rules, expectant women in the public service of the federation are entitled to sixteen (16) weeks maternity leave beginning not less than four weeks from the expected date of delivery with full pay.[49] This is two (2) weeks short of the international standard of 18 weeks minimum. A medical certificate confirming the expected date of confinement must be presented not less than two months before that date.[50] And the annual leave for that year is taken as part of the maternity leave. Where the annual leave has already been taken before the maternity leave, that part of the maternity leave equivalent to the annual leave will be without pay.[51] There is no acceptable explanation for this merger of annual leave with maternity leave. The denial of the general right to annual leave is discriminatory and not in cooperation with international standards and international best practices, thus leaving a gap in pregnancy and maternity laws in Nigeria. It must also be noted that there is no express rule guaranteeing pregnant women the right to time-off for prenatal visits to their doctors during pregnancy, even though it is usually allowed on grounds of good industrial relations in some cases. This also leaves a gap in pregnancy and maternity laws in Nigeria.

It must also be acknowledged that the Federal Government has recently announced 14days of paternity leave for fathers to support nursing mothers and their infants within the periods. The policy, in particular, is to enable proper bonding between the

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48 *Mrs Folarin Oreka Maiya v. The Incorporated Trustees of Clinton Health Access Initiative Nig. & ors.* (2012) 27 NLLR (Pt.76) 110; *Mrs Amaechi Lauretta Onyebuchi v. Stanqueen Investment,* Suit No. NICN/LA/271/2014, judgment delivered 4th December 2015 (unreported); *Standard Chartered Bank Nigeria Ltd v. Ndidi Adegbite* (2019) 1 NWLR (Pt.1653) 348.

49 Public Service Rules 2009, rule 100218.

50 *Ibid.*

51 *Ibid.*

father and infant. But it is not clear the extent to which this paternity leave will enhance the maternity needs of the nursing mothers without a sustainable duration of maternity leave and flexible working arrangements for the nursing mothers to meet up with the childcare responsibilities.

4.2.2 Right to Return to Work after Maternity Leave

The Public Service Rules also guarantee women the right to return to work after maternity leave and also secures two hours off-duty every day to nursing mothers. The two hours off-duty for nursing purposes lasts for six months from the date of her return to work after childbirth.[52] The two hours off-duty is to support childcare and breastfeeding, in particular. It has been argued that the extent to which the breastfeeding objective is being achieved has remained an issue in this regard, hence the need for a sustainable support system for childcare and breastfeeding at work. It is in this regard that the call for the provision of Creche facilities in the workplace and environment is advocated for under the Nigerian labour law.[53]

Besides the Public Service Rules, some States have also adopted varying innovative rules to protect pregnancy and maternity in employment relations, including paternity leave in some cases. For example, the government of Lagos State approved an increased maternity leave totalling six months for expectant and nursing mothers in the State Civil Service.[54] However, this is limited to the two pregnancies and childbirths as third and subsequent deliveries remain the twelve weeks of maternity leave for expectant and nursing mothers.[55] The reduction in weeks is aimed at encouraging family planning. Lagos state also has provisions for twelve-week adoption leave.[56] Similarly, the Enugu State Civil Service Rules provide for twenty-four weeks maternity leave and paternity leave of three weeks for male civil servants, whose wives give birth. This is to strengthen the family as a social unit and also

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52 Public Service Rules 2009, Rule 100219.

53 Worugji and Etuk (n32); Some States in Nigeria have adopted and implemented the Creche facilities policy in some workplaces, even though the implementation remains be given any legal backing for sustainability.

54 Kazeem Ugbodaga, *6 Months Maternity Leave for Female Civil Servants*, July 17, 2014 <https://www.pmnewsnigeria.com/2014/07/1/6-months-maternity-leave-for-female-civil-servants/> accessed 14 August 2017.

55 Lagos State Government Public Service Rules, Rule 120235 .

56 *Ibid.*

promote mother and child welfare. The Rules also made provision for the nursing mothers to breastfeed their babies in the workplace during working time. But the maternity leave will revert to twelve weeks on the third and subsequent deliveries. Ekiti State has a sixteen-week maternity leave period for women in its public service. This increase was said to be aimed at encouraging exclusive breastfeeding for a newborn child during the first six months, as well as promoting good nutrition for mother and child.[57]

5. Some International Best Practices

Apart from the international and regional standards, there are international best practices that guarantee adequate time and practices for a sustainable balance between economic production and reproduction and childcare. For this purpose, some of the international best practices in some countries are highlighted in this part.

In the United Kingdom, pregnancy and maternity legislation have greatly metamorphosed since the Employment Protection Act 1975, through the Employment Relations Act 1996 (as amended), the Employment Act 2002, Equality Act 2010, and the associated statutory instruments (SI). These laws and the emanating statutory instruments introduced some innovations in the protection of pregnancy and maternity for women in employment relations. Presently, women have four basic rights in connection with pregnancy and childbirth. These include the right to time-off for antenatal care, the right to maternity pay, and the right not to suffer detriment or dismissal on grounds of pregnancy and childbirth (the right to return to her work after maternity leave). The details of these rights under the English law are highlighted hereunder.[58]

5.1 Time-off for Antenatal Care

The right to time-off for antenatal care is secured under the Employment Relations Act, as amended.[59] The Act guarantees a woman the right to time-off to attend an

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[57] Ekiti Increases Maternity Leave Period in Public Service by 4 Weeks, (Vanguard, April 17, 2017) <https://www.vanguardngr.com/2017/04/ekiti-increases-materinty-leave-period-public-service-4-weeks/> accessed 7 August 2021.

[58] Honeyball and Bower, *Textbook on Employment Law* (Oxford University Press, 2016) 314-322; Pitt Gwyneth, *Employment Law* (Sweet and Maxwell, 2016) 45-46; 195-206 and J Wright, *Maternity Rights Law* (London 2015).

[59] Employment Relations Act (ERA), ss55-57.

antenatal appointment with her doctor. There is no qualifying period of service for this right and an employer is not to unreasonably refuse the time-off. Where the time-off is refused unreasonably, the woman has the right to apply to the court for a declaration to that effect. The tribunal can also make an award which is usually a sum equal to what she would have been paid for the time-off.

Furthermore, once an employer is notified of pregnancy, such employer is under obligation to carry out a risk assessment of the work concerning the particular woman, if the assessment reveals any risk to the woman or her unborn child, the employer's duty of care arises. The employer becomes duty-bound to take reasonable care/steps to avoid the risk by altering her working conditions or hours of work or suspending her work with full pay if no other means of avoiding the risk is possible.[60]

5.2 Maternity Leave

A woman is entitled to 52 weeks of maternity leave, consisting of two parts, Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML).[61] A woman is first entitled to 26 weeks of OML regardless of the length of service with the employer. The woman is to notify the employer at least by the end of the length of the 15th week before the expected week of childbirth of her pregnancy and the date on which she intends to take the leave. At the expiration of the OML, the woman is entitled to 26 weeks AML. Thus, a woman can take 52 weeks of maternity leave.

If an employer subjects a woman to a detriment or dismisses her for exercising her right to paid antenatal leave, she will have a remedy for any detriment or dismissal connected with the pregnancy or childbirth. Such detrimental action or dismissal would also constitute discrimination on grounds of pregnancy or maternity under the Equality Act (EqA) 2010.[62] Section 18 of the Act, in particular, provides that a person discriminates against a woman if, in the protected period covering her pregnancy, the person treats her unfavourably because of the pregnancy or because:

(i) of illness suffered by her as a result of her pregnancy;
(ii) she is on compulsory maternity leave;

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[60] Management of Health and Safety at Work Regulation 1999, S1 1999/3242.
[61] ERA, s79.
[62] Employment Equality (Sex Discrimination) Regulation 2005 (SI 2005 No. 2467) and Equality Act, s4.

(iii) she is exercising or seeking to exercise or has exercised or sought to exercise, the right to maternity leave in any form.

Suspension from work on maternity grounds is prohibited and entitles the woman to compensation as may be directed by the Employment Tribunal.[63]

A further area of innovation in securing a sustainable balance between work and family life is the introduction of flexible working rights granted under the Employment Act 2002. This entitles the employee to apply to the employer for changes in terms and conditions relating to hours, time, and place of work.[64]

Similarly, under the Children and Families Act 2014 all employees have the right to request flexible working. The employer has to deal with the requests in a reasonable manner. Any detrimental act of the employer in respect of this would be regarded as automatic unfair dismissal under the ERA 1996.[65]

5.3 Maternity Pay

Apart from contractual entitlements to maternity pay which are usually defined under the contract of employment, maternity pay is secured through either the Statutory Maternity Pay (SMP) or Maternity Allowance.

5.3.1 Statutory Maternity Pay (SMP)

Women who have been continuously employed for 26 weeks by the fifteenth week before the expected week of childbirth and whose average earning are above the lower earnings limit for the payment of National Insurance is entitled to Statutory Maternity Pay from their employer for 39 weeks. The right to the SMP is independent of whether or not the employee has a statutory right to maternity leave and is payable even if she has no intention of returning to the job. But the payment is usually not the full earnings of the woman in most cases. However, some employers may accept to pay 100% of earnings and for a longer period on the condition that the employee returns to work for a certain time after the leave period.

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63 ERA, ss66-68.
64 Employment Act 2002, s47.
65 ERA, ss104C.

5.3.2 Maternity Allowance (MA)

Women who do not qualify for maternity pay from their employer may yet qualify for the allowance as a State contributory benefit. They have worked and contributed to the National Insurance Fund for a period before the expected week of birth. The payment is usually at the same rate as the SMP and for 39 weeks. This maternity allowance is dependent on contribution to the National Insurance fund thus the woman need not have been continuously employed by the same employer or employed at all.

5.4 The Right to Return to Work after Maternity Leave

The employee is entitled to return to the job that she had before the absence due to the maternity leave. However, where this is not reasonably practicable, she is entitled to another job that is suitable for her and appropriate in the circumstances.[66] The essence is to make sure that her job and employment are secured. As noted, her right to seniority, pension, and other rights remain as they would have been but for the absence remain unfettered.

These are clear indications that apart from the international standards and the EC Directives in respect of the protection of pregnancy and maternity for women in employment relations, the English law has come to recognize the need for providing legal rights in these respects.

Besides the English models, other international best practices in cooperation with international standards abound for emulation. For example, in Chile, the woman is entitled to 30 weeks of paid maternity leave, divided by 6 weeks before birth and 24 weeks after, and is paid by health insurance to which the employee is affiliated. During pregnancy, a woman is not required to participate in activities that would endanger her health. If this is a requirement of the job, the employer must reassign her to a different position during the pregnancy without any reduction in pay or status. It is also against the law for an employer to refuse to allow the woman to return to work after maternity leave.[67]

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[66] ERA 1996 (as amended), s71; MPLR reg. 18

[67] Lidia Casas and Tonia Henena, 'Maternity Protection vs Maternity Rights for Working Women in Chile: A Historical Review' [2012] (20)(40)*Reproductive Health Matters*, 139-147.

Similarly, in India under the Federal Government Maternity Benefits (Amendment) Act 2017, a woman in employment relationship is entitled to six months paid maternity leave on full pay. This is a remarkable increase from the previous three months under the law. However, this change only applies to those in organized labour, and for companies that employ 10 or more workers. The new Act also has a provision for mandatory crèche facility for establishments employing 500 or more workers.

Still more, in Sweden parents are entitled to 480 days of paid parental leave when a child is born. Each parent is entitled to 240 days or as they may agree. A single mother takes 480 days of maternity leave.

From these highlights, there is no doubt that there have been considerable innovative changes in the legal protection of pregnancy and maternity rights in employment relations globally for sustainable work and family responsibilities for women in employment relationships.[68] It is within these contexts that this work examines the Nigerian labour law on the protection of pregnancy and maternity rights at work and the extent to which the law is in cooperation with the international standards and some of the international best practices for a sustainable balance between work and the reproductive role of women in employment relationships. As noted, the has become necessary considering the need to ensure that women's reproductive roles do not jeopardize their work and employment security, their health, or that of their children. The essence is to create a fair and sustainable balance between work and childcare responsibilities of women in employment relations in keeping with the global demands and drive.

6. Comparative Analysis

As noted, it is evident that the Nigerian law on maternity rights and protection falls short of the international standards and international best practices. Under the Labour Act women are entitled to 12 weeks maternity leave with half pay. The Public Service Rules provides for 16 weeks maternity leave with full pay. These provisions are not in tandem with the minimum of 18 weeks for maternity leave recommended globally

[68] ILO (n10); ILO 'Maternity Protection Makes Headway Amid Vast Global Gaps' at <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS 242325> accessed 12th August 2021.

by the ILO.[69] In the same vein, the 12 weeks and 16 weeks respectively under the Labour Act and the Public Service Rules are also deficient when compared with some international best practices. Chile has 30 weeks, Britain has 52 weeks, India has 6 months, while Sweden has 480 days of maternity leave. These are with full pay or sources of income guaranteed as the case may be.

We also noted the law on the protection of pregnancy and maternity rights in Nigeria is not uniform. The law varies depending on whether it is federal, state, or private employment relations. The situation in some States as noted are encouraging as the States' Civil Service Rules are in cooperation with the international standards. The provisions in the Labour Act, which is the legislation guiding private employment relations in the private sector and the Public Service Rules are not in tandem with the international standards and international best practices as noted. This has left the protection of pregnancy and maternity rights of the women in a precarious state and need of innovative laws and policy for a sustainable balance between work and childcare responsibilities for sustainable development.

7. Conclusion

The need for sustainable maternity rights in employment relations which is in cooperation with the international standards and international best practices remains in Nigerian labour law. There are a lot of women in employment relations that combine work and family responsibilities. The maternity rights under the present legal regime are not in tandem with the international standards, hence the law does not provide for a fair balance between work and family responsibilities for women in subordinate employment relationships.

This is where the call for the domestication of the ILO Conventions and the recommendations on the protection of pregnancy and maternity rights in employment relations, taking into consideration the international best practices anchors. The new law should provide for not less than 6 months maternity leave with full pay; restore annual leave for nursing mothers independent of maternity leave; health and hospital bills associated with pregnancy and childbearing to be paid by the employer in line with health insurance programmes; adjustment in working hours after maternity

[69] Section 4.2 as above.

leave to last for another 6 months for sustainable childcare, and creche facilities in the workplace for childcare and breastfeeding in line with global demands. The law should also prohibit discrimination against or unfair treatment of women on pregnancy and maternity grounds, with specific legal sanctions. This would require not only sanctions against the erring employer but should also incorporate some monetary compensation in favour of the woman. The English law and Indian law models are quite specific and instructive in these regards.[70]The need for a new horizon in pregnancy and maternity law in the law of work in Nigeria is long overdue.

This new horizon has become imminently necessary considering the increasing number of women in employment relations who desire to combine work and reproductive responsibilities. It is acknowledged that adequate and accessible maternity protection and family-friendly work conditions, benefits, services, and measures are good indices of successful national and workplace strategies to promote women's equal opportunities and treatment in labour market and gender equality at work. These are necessary for achieving a decent work agenda. The Nigerian labour law, therefore, must incorporate these features if it must remain relevant in the global drive for gender equality at work and decent work agenda for sustainable development.

[70] EQA 2010, ss4&18.

LAW REVIEW

4

INSECURITY AND LAW ENFORCEMENT IN FOREST RESERVES: AN APPRAISAL OF THE NATIONAL PARK SERVICE ACT 2006

Abdullahi Yunusa*

Abstract

The Nigeria National Park Service is mandated to protect wildlife and plants and also provide law enforcement services in forest reserves and natural areas. However, rising insecurity in Nigeria has left wildlife park rangers and other field officers of the National Park Service at the mercy of terrorists and kidnappers. Records indicate that about 120 rangers were killed on duty globally between August 2020 and July 2021, with Nigeria accounting for 17 of the deaths. In addition, there is evidence that the Nigeria National Park Service is finding it difficult to achieve its primary objective of protecting wildlife and plants, and providing law enforcement in forest reserves. This paper appraised the National Park Service (Amendment) Act 2006 in light of the rising insecurity in Nigeria. The study is a desk research that used secondary sources to achieve the objective of the study. The study finds that poaching has reduced the populations of some of Nigeria's priced species like elephants, lions, gorillas, and chimpanzees, while the forest reserves have become operational bases for criminals. Consequently, this paper recommends the need to review the existing National Park Service (Amendment) Act, 2006, to enhance the para-military status of employees of the Service so that they can effectively police and secure the forest reserves and natural areas.

Keywords: Banditry, Forest Reserves, Insecurity, Law Enforcement, Park Rangers and Ungoverned Spaces,

* B.Sc. Political Science (Zaria), MPA (Zaria), M.Sc. Political Science (Keffi), PhD Political Science (Keffi), Department of Democracy and Governance, NILDS, Abuja. Email: yunusaabdullahi@Ymail.com

1. INTRODUCTION

Nigeria has a large land area in the form of forest reserves and natural areas. These natural areas cover a total land area of 20,156 sq. km which is three percent of Nigeria's total land area.[1] These natural areas have a rich collection of plants, animals, streams, river tributaries, and waterfalls, while the forest reserves crisscross rural communities and towns. Nigeria is divided into units, divisions, and zones for administrative purposes and effective policing. In addition, all the land areas in Nigeria are structured into local government areas, which are under state governments.[2] Although these forest reserves and natural areas are located in one State or the other, they are not adequately covered by security forces or monitored. Consequently, they have become hideouts for kidnappers, bandits, militants, and other criminal elements to perpetrate activities that affect national security[3]. This makes the country's forest reserves and natural areas to be qualified to be regarded as ungoverned spaces, which are construed as territories, physical or non-physical, where the control and effective state sovereignty are non-existent; where rule of law and state institutions perform insignificant functions or no function at all.[4] This is in spite of the fact that the country has a National Park Service, established to monitor and maintain the presence of government in the forests reserves and natural areas, based on Part II Section 6 (h), Section 7 (e) (m) and (n), and Section 8 (c) of the enabling Act, 2006.

Besides, based on Part II Section 7 (a) of the enabling Act of 2006, the Nigerian National Park Service is mandated to preserve, enhance, and protect wild animals, plants, and other vegetation in the country's forests and areas designated as national parks. These forests are to serve as conservation, preservation, and protection of wildlife and habitat. They are also utilized for educational, inspirational research,

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1 National Park Services, 'Evolution of National Parks in Nigeria' (2021), <http://nigeriaparkservice.org/?page_id=55 > accessed 24 October 2021.

2 Henry Chima Ukwuoma, Muritala Oke, & Cirman Elisha Nimfel, 'Harnessing Information and Communication Technology (ICT) for the Management of Ungoverned Spaces in Nigeria: Policy and Strategic Way Out (2020) 15 (1) *International Journal of Development and Management Review*, 17-31.

3 O. Ajayi, 'Banditry: Secure your forest reserves, FG charges states' *Vanguard* (2021, March 19) <https://www.vanguardngr.com/2021/03/banditry-secure-your-forest-reserves-fg-charges-states/ > accessed 20 August 2021.

4 Foreign and Commonwealth Office, 'the link between ungoverned spaces and terrorism: Myth or Reality?' (2015), available at <https://www.gov.uk/government/publications/the-link-between-ungoverned-spaces-and-terrorism-myth-or-reality > accessed 9 August 2021.

cultural, and recreational purposes.[5] Unfortunately, criminal elements have turned the national parks into operational bases and hideouts from which most of their activities are launched and sustained.[6] Thus, these forest reserves now partly contribute to the rising insecurity in Nigeria.

The focus of this paper is on the Nigerian National Park Service and its authorization to bear firearm and defensive weapons in line with the need to enhance its para-military status and practices of national park management in other jurisdictions. The paper is divided into the following sections, which include introduction; challenges faced by the Nigerian National Park Service; existing legal framework governing the Nigerian National Park Service; cross country comparison; ongoing attempt to repeal and reenact the National Park Service Act; conclusion and recommendations.

2. CHALLENGES FACED BY THE NIGERIAN NATIONAL PARK SERVICE

Increased Poaching and Logging

The Nigeria National Park Service is finding it difficult to achieve its primary objective of protecting wildlife and plants. Statistics show that poaching has reduced populations of some of Nigeria's priced species like elephants, lions, gorillas, and chimpanzees[7]. The Service has also failed in promoting the national parks as a tourist destination and a veritable source of foreign exchange. Instead, they have become an operational base for criminals. Wildlife park rangers in Nigeria contend with poachers, loggers, illegal miners, and grazers. For example, in July 2019, nine rangers at Gashaka Gumti National Park in Taraba State were killed by illegal loggers.[8]

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5 National Park Service (Amendment) Bill, 2006, Part II, Section 6, <https://lawsofnigeria.placng.org/laws/N65.pdf> accessed 9 August 2021.

6 O. Ajayi, 'Banditry: Secure your forest reserves, FG charges states' *Vanguard* (2021, March 19) <https://www.vanguardngr.com/2021/03/banditry-secure-your-forest-reserves-fg-charges-states/ > accessed 20 August 2021.

7 G. Olawale, 'Nigeria has fewer than 50 lions, 100 gorillas, 500 elephants – WildAid' *Vanguard* (2021, February 9) <https://www.vanguardngr.com/2021/02/nigeria-has-fewer-than-50-lions-100-gorillas-500-elephants-wildaid/> accessed 15 September 2021.

8 Editor, 'Illegal loggers murder 9 workers in Taraba' *Newspad* (31 July 2019), <*https://thenewspad.com/2019/07/31/illegal-loggers-murder-9-workers-in-taraba/* > accessed 13 August 2021

Inadequate and Poor Equipment

Nigeria National Park Service Rangers have inadequate patrol vehicles and thus trek long distances. In addition, the few of them that are authorized to bear arms use obsolete firearms and lack other modern safety equipment.[9] Consequently, they find it difficult to achieve the objectives set out for them in the enabling Act of 2006. Also, they face threats posed by criminals that have turned the national parks into hideouts, training grounds, and operation bases. It is, therefore, not a coincidence that some of the states that host these national parks, like Borno, Yobe, Adamawa, Taraba, Kaduna, Cross River, Niger, and Edo, are on the do-not-travel-to list of the U.S. Government travel advisory on Nigeria.[10]

Rising Insecurity

Nigeria's national parks are now hideouts where criminals recruit, train, and launch attacks on security personnel, road users, government institutions, and vulnerable communities. These national parks have become centers for kidnapping, armed banditry, cattle rustling, ritual killings, and terrorism, among other related criminal activities.[11] In anticipation of the likelihood of illegal activities within the national parks, the National Park Service (Amendment) Act, 2006, empowers the Service to appoint employees to assist it in discharging its functions.[12] Part of its functions is to preserve, enhance, protect, and manage vegetation and wild animals in the National Parks, among others. Consequently, the National Park Service has wildlife park rangers among its employees.

Generally speaking, the job of wildlife park rangers involves patrolling, managing wildlife, combating poaching (stealing of wildlife or plants), engaging local communities, managing fires, protecting national park employees and visitors, and assisting with tourism, among others.[13] However, wildlife park rangers in Nigeria

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9 F. Aigbogun, 'Wildlife park rangers now at mercy of terrorists, kidnappers – minister' *BusinessDay* (2 August 2021) 31.

10 Travel.State.Gov, 'Nigeria Travel Advisory' (2021, June 16), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/nigeria-travel-advisory.html> accessed 15 September 2021.

11 Usman A Tar, and Yusuf Ibrahim Safana 'Forests, Ungoverned Spaces and the Challenge of Small Arms and Light Weapons Proliferation in Africa' in: U. A. Tar and C. P. Onwurah (eds), *The Palgrave Handbook of Small Arms and Conflicts in Africa* (Palgrave Macmillan, Cham, 2021) 223.

12 National Park Service (Amendment) Bill, 2006, Part III, Section 10(2) <https://lawsofnigeria.placng.org/laws/N65.pdf > accessed 9 August 2021.

13 World Wildlife Fund, 'What is a ranger?' (2020), <https://tigers.panda.org/news_and_stories/stories/what_is_a_ranger_/ > accessed 20 November 2021.

now battle with terrorists, kidnappers, cattle rustlers, and bandits in their line of duty.[14] Records indicate that about 120 rangers were killed on duty globally between August 2020 and July 30, 2021, and Nigeria accounted for 17 deaths out of this figure[15].

In 2020, a survey of rangers' opinions on their working condition showed that four out of five rangers faced a life-threatening situation. Two out of five saw their family for less than five days in a month. And a majority of rangers do not feel adequately equipped or trained to discharge their duties as a ranger. The majority of the rangers believe that dangerous working conditions are the worst aspect of being a ranger.[16] Also, statistics from the United States Department of Justice revealed that globally, National Park Service Law Enforcement Rangers suffer the highest number of felonious assaults (assault with a dangerous weapon, like a gun, knife, and arrow, among others); they also suffer the highest number of homicide (murder) cases of all the federal law enforcement officers.[17] It is, therefore, necessary to enhance and formalize the para-military status of the National Park Service of Nigeria.

3. THE LEGAL STATUS OF NATIONAL PARK SERVICE IN NIGERIA

The Nigerian National Park Service is on the exclusive legislative list of the Constitution, managed and controlled by the federal government. It is, therefore, a federal agency under the supervision of the Federal Ministry of Environment.

The concept of National Parks in Nigeria was first introduced in 1979 through Decree No. 46 of 1979, which approved the establishment of Kainji Lake as the nation's premier national park. About a decade later, Decree No. 36 of 1991 established the National Parks Governing Board and five new national parks.[18]

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[14] F. Aigbogun, 'Wildlife Park Rangers Now at Mercy of Terrorists, Kidnappers – Minister' *BusinessDay* (2 August 2021) 31.

[15] Ibid

[16] Singh S and others, 'What do rangers feel? Perceptions from Asia, Africa and Latin America' (2020) 26 (1) *PARKS*. <https://parksjournal.com/wp-content/uploads/2020/06/Singh-et-al-10.2305-IUCN.CH_.2020.PARKS-26-1RS.en_.pdf > accessed 20 September 2021.

[17] "16 USC § 1a–6 – Law enforcement personnel within National Park System | Title 16 – Conservation | U.S. Code | LII / Legal Information Institute". Law.cornell.edu. accessed 13 August 2021.

[18] National Park Services, 'Evolution of National Parks in Nigeria' (2021), <http://nigeriaparkservice.org/?page_id=55 > accessed 20 October 2021.

In 1992, Yankari Game Reserve became a National Park, which increased the number of national parks on the exclusive legislative list to six. With the promulgation of Act 46 of 1999, two Parks, Kamuku and Okomu, were established, increasing the national parks to eight.[19] However, Yankari was later handed over to the Bauchi State Government at its instance in June 2006, through the National Park Service (Amendment) Bill, 2006[20], leaving seven national parks under the management and control of the federal government.

On 30th June 2021, the Conservator-General of the Nigeria Park Service revealed that the federal government has established ten more national parks across the country. Therefore, the total number of national parks in Nigeria today is seventeen[21]. Table 1 below is a list of the national parks, their location, and their date of establishment.

Table 1: National Parks in Nigeria, their location and date of establishment

S/N	Name	Location(s)	Date of Establishment
1	Kainji Lake National Park	Niger and Kwara States	1979
2	Chad Basin National Park	Borno and Yobe States	1991
3	Cross River National Park	Cross River State	1991
4	Gashaka Gumti National Park	Adamawa and Taraba States	1991
5	Old Oyo National Park	Oyo and Kwara States	1991
6	Kamuku National Park	Kaduna State	1999
7	Okomu National Park	Edo State	1999
8	Alawa Game Reserve	Niger State	2021
9	Apoi Forest Reserve	Bayelsa State	2021
10	Edumenum Forest Reserve	Bayelsa State	2021
11	Falgore Game Reserve	Kano State	2021
12	HadejiaWetlands Games Reserve	Nasarawa State	2021
13	Kampe Forest Reserve	Kwara State	2021
14	Kogo Forest Reserve	Katsina State	2021
15	Marai Forest Reserve	Jigawa State	2021
16	Oba Hill Forest Reserve	Osun State	2021
17	Pandam Forest Reserve	Plateau State	2021

Sources: S/N 1-7 National Park Service (2021).[22] And S/N 8-17 Awofeso (2021, June 30)[23]

[19] Ibid

[20] National Park Service (Amendment) Bill, 2006, < https://lawsofnigeria.placng.org/laws/N65.pdf > accessed 9 August 2021.

[21] P. Awofeso, 'Nigeria now has 17 national parks' *NaijaTimes* (30 June 2021), <https://www.naijatimes.ng/nigeria-now-has-17-national-parks/ > accessed 10 September 2021.

[22] National Park Services, 'Evolution of National Parks in Nigeria' (2021), <http://nigeriaparkservice.org/?page_id=55 > accessed 20 October 2021.

[23] P. Awofeso, 'Nigeria now has 17 national parks' *NaijaTimes* (30 June 2021), <https://www.naijatimes.ng/nigeria-now-has-17-national-parks/ > accessed 10 September 2021.

4. EXISTING LEGAL FRAMEWORK GOVERNING THE NIGERIAN NATIONAL PARK SERVICE

The National Park Service was established by Decree 36 in 1991 and later Decree 46 of 1999; which became Act 46 of 1999 then became National Parks Service Act – CAP. N65 L.F.N. 2004 and now the National Park Service (Amendment) Act, 2006. In 2006 the Act was amended purposely to handover the Yankari Game Reserve to the Bauchi State Government; through the National Park Service (Amendment) Act, 2006. Thus, this amended Act of 2006 is the legal instrument under which the National Parks operate. The amended Act established the National Park Service to be responsible for the preservation, enhancement, and protection of wild animals and plants and other vegetation in National Parks; and for matters connected.[24]

The existing Act of 2006 under which the National Parks operate, Part III Section 9 (1) to (6), detailed the appointment of the Conservator-General, the qualifications required for his/her appointment, responsibilities, remuneration, tenure and removal from office. The strength of this Act is that there is no ambiguity surrounding the Conservator-General of the National Park Service. Similarly, Part III Section 10 (1) of the 2006 Act also detailed the appointment of the Secretary to the Governing Board of the National Park Service, criteria for employment, supervision and schedule of duties. In addition, Part III Section 10 (2) of the 2006 Act empowers the governing Board to appoint employees for the National Park Service to assist it in discharging any of its functions.

An important strength of the existing Act under which the National Park Service operates is the recognition of the para-military status of the National Park Service. Part VII Section 42 (1) of the 2006 Act empowers the Chief Park Officer to have firearm and ammunition in his/her possession or under his/her control. Part VII Section 42 (3) further extended this authorization to possess and control arms and ammunition to Park Officer acting under the personal supervision of a Senior Officer that is not below the rank of Chief Park Officer.

Notwithstanding the strength of the existing Act of 2006, which sought to confer para-military status on the National Park Service, there is a need to enhance the para-military status of the National Park Service to address the rising insecurity and

[24] National Park Service (Amendment) Bill, 2006. < https://lawsofnigeria.placng.org/laws/N65.pdf > accessed 9 August 2021.

emerging challenges of law enforcement in forest reserves. There are some weaknesses in the National Park Service (Amendment) Act 2006, which has made it difficult for the National Park Service to effectively secure Nigeria's forest reserves and natural areas.

The weaknesses of the existing legal instrument under which the Nigerian National Park Service operate include:

i. The National Park Service (Amendment) Act 2006, is not clear on the appointment of other staff and their schedule of duties as it did for the Conservator-General and Secretary to the Governing Board. Although the Governing Board can make subsidiary legislation to this effect, it is the practice to state clearly in the Act the law enforcement personnel within the Service, their powers and duties, and in some cases the special police officers in the Service, among others, in other jurisdictions. The next section on cross country comparison shed more light on this.

ii. The National Park Service (Amendment) Act 2006, Part VII Section 42 (1), empowers an officer not below the rank of Chief Park Officer to have a firearm and ammunition in his/her possession or under his/her control. Part VII Section 42 (3) of the Act extended the authorization to possess and control arms and ammunition to other officers of the National Park Service not below the rank of Park Officer when they are acting under the personal supervision of an officer, not below Chief Park Officer. This has limited the para-military status of National Park Service and its ability to enforce law in the forest reserves[25]. Basically, majority of the Park Rangers are junior officers, thus, the majority are not authorized to bear firearm and ammunition. Most often, it is these junior officers that patrol in remote places of the forest reserves, and nearly everyone they come in contact with is armed[26]. Besides, study have shown that they are most likely to be assaulted with guns or dangerous weapons in the line of duty

[25] Editor, 'FG upgrade park service to paramilitary status' *The Nation* < https://thenationonlineng.net/fg-upgrades-park-service-to-paramilitary-status/ > accessed 16 June 2023.

[26] Tejiri Digun-Aweto, Oluyemisi Fawole, and M. Saayman, "Constraints to conservation at Okomu National Park: a ranger's perspective" (2018) 43 International Journal of Comparative and Applied Criminal Justice 173

up to seven times more often than other kinds of law enforcement officers and are injured twice as often.[27][28]

5. CROSS COUNTRY COMPARISON

In the Act governing National Park Service in the United States of America, some officers or employees of the National Park Service are designated as law enforcement personnel within the Service and are authorized to carry firearms, execute any warrant or other process issued by a court, and conduct investigations of offenses.[29] In addition, the Act clearly states the law enforcement personnel within the Service, their powers and duties, and in some cases the special police officers in the Service, among others.[30] In contrast, the National Park Service (Amendment) Act 2006, Part VII Section 42 (1) (2), empowers an officer not below the rank of Chief Park Officer to have a firearm and ammunition and did not have designated as law enforcement personnel within the Service.

In Uganda, the Uganda Wildlife Act 2019 empowers the Board to appoint other staff of the National Park Service. The Act also authorize the Board to determine the terms and condition of service of staff members and can authorize them to possess a firearm in the course of their duties. Thus, the bearing of firearms is on authorization of the Board based on the enabling Act of 2019. However, the Act subjected these powers granted the National Park Board to the regulations made by the Minister in consultation with the Inspector-General of Police regarding – powers of search and arrest, training, discipline, and use of firearm.[31]

The Canada National Parks Act empowers the Minister to designate persons appointed under the Act as Park Wardens for the enforcement of the Act. These enforcement officers are authorized to bear firearms in the performance of their duties in the park. They are to enforce the provisions of the Act and have powers of

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[27] Ibid

[28] Kenneth J Peak, 'Enforcing the law of wildlife and recreation (part one)' (27 September 2017), <https://leb.fbi.gov/articles/featured-articles/enforcing-the-laws-of-wildlife-and-recreation-part-one > accessed 24 October 2021.

[29] 54 U.S. Code Section 102701 – Law enforcement personnel within System, <https://www.law.cornell.edu/uscode/text/54/102701 > accessed 17 August 2021.

[30] Ibid

[31] The Uganda Wildlife Act 2019. <https://www.informea.org/sites/default/files/legislation/Wildlife%20Act%2C%202019%20-Gazetted%20Version.pdf > accessed 22 October 2021.

regulations with respect to offences that have been designated as contraventions under the Contraventions Act of Canada. In addition, the Act clearly state that enforcement officers (Park Wardens) have the same powers, protections and entitlements provided by Canada law to peace officers within the meaning of the Criminal Code of Canada. This the power to bear arms, arrest and prosecute.[32]

6. ONGOING ATTEMPT TO REPEAL AND REENACT THE NATIONAL PARK SERVICE ACT

There is currently a Bill that seeks to repeal and reenact the National Park Service Act, before the 9th House of Representatives. The First Reading of the Bill took place on 29 October 2019, while the Second Reading was on 23 July 2020. The Bill was subsequently referred to the House Committee on Culture and Tourism and is awaiting committee report.[33] The Bill seeks to repeal the National Park Service (Amendment) Act, 2006 CAP. N65 VOL. 9 LFN, 2010, to enact the National Park Service Act, 2019. The objective is to provide an enabling environment to promote eco-tourism through public-private sector partnership and formalize the para-military status conferred on the National Park Service.[34]

However, the proposed National Park Service Bill, 2019, has a number of defects. The first is that it is not clear on the appointment of other employees of the Service, and their schedule of duties, as it did for the Conservator-General, the three proposed Deputy Conservators-General, and Secretary to the Governing Board. However, while Part IV Section 13 to 15 only mentioned other staff, Part XII Section 65(1) list these other employees to include park rangers, wildlife officers, and field workers. Experience from other countries, such as the United States of America, shows that the National Park Service law clearly states the law enforcement personnel within the system, their powers and duties, and in some cases, the special police officers in the system.[35]

In addition, Part II Section 2(a) of the Bill states that the National Park Service shall be a para-military service, and Part XII Section 65(1) to (4) states the conditions for

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[32] Canada National Park Act (S. C. 2000, c. 32). < https://laws-lois.justice.gc.ca/eng/acts/n-14.01/ > accessed 29 October 2021.

[33] Policy and Legislative Advocacy Center, 'BILLSTRACK: HB 394: National Park Service Bill, 2019' (2021), < https://placbillstrack.org/search.php >accessed 15 October 2021.

[34] National Park Bill, 2019. < https://placbillstrack.org/upload/HB394.pdf > accessed 10 September 2021.

[35] 54 U.S. Code Section 102701 – Law enforcement personnel within System, <https://www.law.cornell.edu/uscode/text/54/102701 > accessed 17 August 2021.

possession of arms by officers of the National Park Service. However, the officers that the Bill authorized to bear arms are the park rangers, wildlife officers, and other field officers that are not below the rank of Chief Park Officer. As such, park rangers, wildlife officers, and other field officers below Grade Level 14 are not authorized to bear arms[36]. This section may weaken the para-military status of the National Park Service, which the Bill seeks to enhance[37]. It may also affect the National Park Service's objective of protecting its forest reserves and natural areas against criminal elements. It is worth noting that In April 2013, the Federal Government of Nigeria upgraded the park rangers to a paramilitary status and militarization of the National Parks[38]. The objective was to enable park rangers cope with the daunting task of park protection and conservation. It was believed that the paramilitary status of the park rangers will enable the National Park Service check illegal activities in the parks and enforce relevant laws, international treaties and conventions to which Nigeria is a signatory[39].

Recent evidence reveals that park rangers, wildlife officers, and other field workers of national parks regularly face high levels of danger, isolation, and risks when performing their duties[40]. They often work alone in remote places, and nearly everyone they come in contact with is armed. They are most likely to be assaulted with guns or dangerous weapons in the line of duty up to seven times more often than other kinds of law enforcement officers and are injured twice as often[41]. Hence the need to extend the authorization to bear arms to all law enforcement officers of National Park Service.

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[36] National Park Bill, 2019. Available at < https://placbillstrack.org/upload/HB394.pdf > accessed 10 September 2021.

[37] Tejiri Digun-Aweto, Oluyemisi Fawole, and M. Saayman, "Constraints to conservation at Okomu National Park: a ranger's perspective" (2018) 43 International Journal of Comparative and Applied Criminal Justice 173

[38] Editor, 'FG upgrade national park rangers to paramilitary status' *BusinessDay* < https://businessday.ng/africa/article/fg-upgrades-national-park-rangers-to-paramilitary-status/ > accessed 16 June 2023.

[39] Editor, 'FG upgrade park service to paramilitary status' *The Nation* < https://thenationonlineng.net/fg-upgrades-park-service-to-paramilitary-status/ > accessed 16 June 2023.

[40] Tejiri Digun-Aweto, Oluyemisi Fawole, and M. Saayman, "Constraints to conservation at Okomu National Park: a ranger's perspective" (2018) 43 International Journal of Comparative and Applied Criminal Justice 173

[41] Kenneth J Peak, 'Enforcing the law of wildlife and recreation (part one)' (27 September 2017), <https://leb.fbi.gov/articles/featured-articles/enforcing-the-laws-of-wildlife-and-recreation-part-one> accessed 24 October 2021.

7. CONCLUSION AND RECOMMENDATIONS

The effort to repeal the National Park Service (Amendment) Act, 2006 CAP. N65 VOL. 9 LFN, 2010, to enact the National Park Service Act, 2019 to provide an enabling environment to promote eco-tourism through public-private sector partnership and formalize the para-military status conferred on the Service in 2014 by the Federal Government of Nigeria is awaiting committee report. This presents opportunity to engage the issues observed in this paper for a robust National Park Service Act that enhance the para-military status of park rangers.

In the light of the above, the following recommendations are presented for consideration:

1. The National Park Service (Amendment) Act, 2006 should be further amended to designate park rangers, wildlife officers, and field officers as law enforcement personnel within the National Park Service employees.
2. Upon amendment of the enabling Act of 2006, the designated law enforcement personnel of the National Park Service should be authorize to possess and control arms and ammunition in respective of rank.
3. The National Park Service (Amendment) Act, 2006, should be amended to make it mandatory for all law enforcement personnel of the National Park Service to receive mandatory police and firearms training at the Nigeria Police College or other training institution so mandated.

5

INSURABLE INTEREST IN THE LIFE OF ANOTHER PERSON UNDER THE NIGERIA INSURANCE ACT, 2003: AN ISLAMIC LAW INTERPRETATION

Abdullahi Saliu Ishola[*], Ridwan I. O. Olagunju[**] and Khalid Ishola Bello[***]

ABSTRACT

By section 56 of the Nigeria *Insurance Act*, 2003, when there is a legal relationship making a person responsible for the "maintenance and care" of another under Islamic law, a person would have insurable interest in the life of the other. For the section to be properly understood, it is imperative to delineate the scope of the relationship that may make one responsible for the "maintenance and care" of another under Islamic law. Islamic law is explicit on such relationship as discussed under the subject of *Nafaqah* (maintenance). This paper thus critically analyses the Islamic law provisions on the relationship creating maintenance duties, for the understanding of the insurable interest in the life of another under the Nigeria *Insurance Act*. Such understanding can also be good precepts for developing the Islamic Life Insurance Product (ILIP) or *Takaful* Product of Insurable Life Interest (TPILI) through the concept of *Nafaqah* at the domestic and global level.

[*] PhD, Research Fellow (Post Doc), Centre for Islamic Economics and Finance (IKAM), Istanbul University, Turkey; Adjunct Professor (*pro bono*), Department of Islamic Law, Faculty of Law, Pen Resource University, Gombe, Gombe State – Nigeria; Senior Lecturer, Department of Islamic Law, Faculty of Law, Kwara State University, Malete – Nigeria (KWASU). Email: asishola1@gmail.com. Mobile: +2347038998357

[**] PhD, Senior Lecturer, Department of Islamic Law, Faculty of Law, University of Ilorin, Ilorin – Nigeria (UNILORIN). Email: ridwanolagunju@gmail.com Mobile: +2348038262823

[***] PhD, Senior Lecturer, Department of Islamic, Christian and Comparative Religious Studies, Faculty of Humanities, Management and Social Sciences, Kwara State University, Malete – Nigeria (KWASU). Email: khalid.bello@kwasu.edu.ng or saifullah1426@gmail.com

Key Words: Insurable Life Interest, Insurance Act, Islamic Law, Nafaqah, Nigeria and Takaful

I. INTRODUCTION

The general principle of the insurance law in Nigeria is that no one has insurable interest in the life of another person.[1] Insurable interest is a fundamental condition for creating any valid contract of insurance[2] and "insurable interest must be present in all contracts of insurance".[3] For this reason, the attitude of courts in the country is to refuse to enforce any such contract that is devoid of insurable interest by the insured in the subject of insurance.[4] Naturally, an individual may be attracted or attached to an object or a fellow human being and wishes that same is well protected. To achieve the wish, he may be prompted to insure such object or person. While such gesture may be highly laudable, the law insists that such a person must be legally connected to such object or person[5] for him to be justified in insuring it. Whether a person would be adjudged as having or lacking insurable interest in the subject of insurance depends on the legal system in each country.[6] To this end, exceptions have been created to the principles of lack of insurable interest in the life of another person under the Nigeria insurance law.[7]

Accordingly, to reflect the societal reality in its insurance law and practices, Nigeria now recognises the legal relationship that makes a person responsible for the "maintenance and care" of another person under Islamic law as one of the bases

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1 See section 56, *Insurance Act 2003, CAP I-17, Laws of the Federation of Nigeria (LFN) 2004*

2 H. R. Light, *The Legal Aspects of Business* (London: Sir Isaac Pitman & Sons, Ltd: Fifth Edition, 1958) pp. 264 - 265

3 Keith Abbot and Norman Pendlebury, *Business Law* (London and New York: Continuum, 1996) p. 200

4 For general attitude of courts to enforcement of insurance claim in the country, see A. L. A. L. Balogun, "The Role of Courts in the Settlement of (Insurance) Claims: Is there Need for a Small Claims Courts and Arbitration Clause", *Law Reform Journal,* Issue No. 5, July 1986, pp. 129 – 144.

5 In law, for someone to be legally connected to any person or object, he must have rights to claim from or have duties towards the object or person.

6 H. A. Umezurike, "Insurable Interest in Four Commonwealth Countries: Nigeria, Australia, Canada and New-Zealand", *Nigerian Journal of Public Law* Vol. 2, No. 1, 2009, pp. 326 – 337 at p.328. For a study on the subject in Ethiopia, see Ezra L. Desalegne, "Some Issues Relating to Life Insurance under the Ethiopian Commercial Law", *Journal of African Law, Volume 52, Number 2, 2008,* pp. 190 - 217

7 Thus, circumstances when a person would be able to insure the life of another are now well spelt out. One of such circumstances is indeed the focus of this study.

for insurable interest in the life of another.[8] This is enacted as section 56 of its extant 2003 *Insurance Act*[9]. Due to the general term in which "the legal relationship" has however been expressed under the section, it has become imperative for the scope of the relationship that may make one responsible for the "maintenance and care" of another under Islamic law to be delineated, for proper interpretation of the section. For lack of such clear guide, the section is already being interpreted as ambiguous and as merely relying on less legal basis to ground non-personal life insurable interest because "maintaining the less fortunate ones under the Islamic or Customary Law is assumed by moral persuasion only".[10]

Islamic law is very clear on the relationship that would make a person responsible for the "maintenance and care" (*Nafaqah*) of another and the responsibility is rather assumed on legal grounds than mere "moral persuasion".[11] This paper thus undertakes the task of analysing the Islamic law provisions on the forms of relationship creating maintenance duties, for the understanding of insurable interest in the life of another under the Nigerian *Insurance Act*. Such understanding can also be good precepts for developing the Islamic Life Insurance Product (ILIP) or *Takaful* Product of Insurable Life Interest (TPILI) through the concept of *Nafaqah* at the global level.

II. CONCEPT OF INSURABLE INTEREST

Given the comparative approach of this study, the concept of insurable interest is examined from the perspectives of the conventional Insurance Law and the Islamic Insurance Law (*Takaful*) respectively.

1. *Insurable Interest in the Conventional Insurance Law*

In its simplest term, insurable interest connotes that the insured must stand to lose something if the risk envisages against the subject of insurance occurs just as he

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8 As at 1986 when the 1976 Insurance Act was still in existence, such exceptions were not yet recognised. For this reason, an affirmative call was made during a National Seminar organized by the Nigerian Law Reform Commission in 1986 to the effect that "there is an urgent need to redefine insurable interest to take into account the African extended family situation. It is suggested that insurable interest should be satisfied by natural affection, blood ties and affinity". See M. G. Yakubu and G. T. Mukubwa, "The Need for A Comprehensive Reformation of Insurance Law and Practice in Nigeria", *Law Reform Journal,* Issue No. 5, July 1986, pp. 9 – 22 at p.18.

9 *CAP I-17, Laws of the Federation of Nigeria (LFN) 2004*

10 H. A. Umezurike, p.330.

11 The discussions below clarify this very well.

must stand to benefit if such risk does not occur.[12] Accordingly, it is opined that, "you are not entitled to insure another man's property, or another man's life, unless you have some definite financial interest in it".[13] Insurable interest is generally defined as follows:

> Insurable interest constitutes the legal right insure arising out of a financial relationship recognised at law between the insured and the subject matter of insurance in such a way that insured stands to benefit from the continued existence of the subject matter of insurance or be prejudiced by its damages, loss or destruction.[14]

The essence of insurable interest therefore is that, as much as it may be good for one to be one's brothers' keeper, one should not legally be allowed to protect what is not of concern to him. It should be mentioned that under the Common Law, as also applicable in Nigeria, lack of insurable interest cannot invalidate or nullify a contract of insurance.[15] Thus, at Common Law, insurable interest is generally not required for the validity of the contract of insurance except in circumstances where exceptions have been created to it.[16] It is thus necessary to clarify the position of Islamic law.

2. *Insurable Interest Under Islamic Law*

An understanding of the concept of insurable interest under the conventional insurance law should only leave one with the further inquiry of knowing whether insurable interest is required under the Islamic Insurance (*Takaful*) or not. In essence, the connotation of the insurable interest in *Takaful* may not be interpreted differently, but the position of Islamic law on it should be clarified.[17] Islamic law frowns at the habit and attitude of getting oneself involved in matters that do not concern one. Such a habit has even been relegated to the point of constituting a

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[12] Okore C. J., *Business Law for ICAN and CITN Examinations* (Lagos: Foursquare Press, First Edition, 2012) p. 290.

[13] H. R. Light, p. 265

[14] P. O Akinjobi, *Fundamentals of Insurance* (Ilorin: SMS Publishers, 2002) p. 133 cited in Muftau Abdulrauph, *A Study of Islamic Windows in Conventional Insurance Companies in Nigeria* (Masters Dissertation Submitted to the Department of Religions, Faculty of Arts, University of Ilorin, Ilorin – Nigeria, July 2014) p. 26

[15] A. L. A. L. Balogun, p.134; Keith Abbot and Norman Pendlebury, p. 200

[16] Keith Abbot and Norman Pendlebury, p. 200

[17] This becomes imperative in view of the general position of the Common Law earlier noted by which insurable interest is not required for validity of the contract of insurance.

flaw to the religious standing of a Muslim. On this, Prophet Muhammad sounded a warning as related as follows:

> On the authority of Abu Hurayrah (may Allah be pleased with him) who said: the Messenger of Allah (may the blessings and peace of Allah be upon him) said: 'Part of someone's being a good Muslim is his leaving alone that which does not concern him'.[18]

Since the essence of insurable interest is for one not to be allowed to get involved in what one has no interest in, the above *Hadith* can be relied upon as founding a basis for insurable interest for a valid Islamic Insurance contract. Thus, it has been opined that,

> The *Hadith* can also imply that we should not force ourselves to assist or help others. At times, we try to intervene into other's affairs under the pretext of helping them. If people do not express or show any need for our help, we should not render it or force it on them, for there are many other people outside there who need our help and beg for it. Those are the ones who deserve our assistance".[19]

Similarly, it is not legally permitted for one to carry the burden of another person. The Qur'an is very explicit on this. The concept of *Walā Taziru Wāziratun Wizra Ukhrā* (ولاتزر وازرة وزر أخرى) very well supports the requirement for insurable interest under the *Takaful.*[20] Very instructively, the Qur'an declares thus:

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[18] Hadith 12 of the *Forty Hadths of An-Nawawi Collections*. For this translation, see Yushau Sodiq, *40 Hadith: An Explanation* (Houston, TX: J. S. Printing, 2001) p. 95

[19] Yushau Sodiq, p. 97

[20] On this, see Q23: 62; 7: 42; 6: 164; 17: 15; 35: 17; 39: 7; 53: 38. In some quarters, it is believed that this principle substantially relates to crimes and not contractual transactions. However, its application to contractual transactions can be seen in the contract of agency (wakālah). While providing exegesis of Chapter 6: Verse 164, Imam Al-Qurtabi noted this principle is a subject of controversy among the jurists with regards to whether the Principal is bound by acts of the Agent carried out outside the terms of his agency. According to Imam Maliki and his disciples, the Principal is bound by all done by the Agent thereby rejecting application of this principle to such contractual transaction. This view is also held by Abu Yusuf and Muhammad Bin Hassan of the Hanafi School. But, Abu Haneefah, applying this principle, posits that steps taken beyond the terms of the agency would be binding on the agent and not the principal. With this, one cannot validly claim that the principle is not applicable in contractual transactions. Al-Qurtabi A.A., *Tafsir Al-Qurtabi Al-Jamiᶜ Li Ahkām Al-Qurᶜān* (3rd ed., Dar At-taqwah, Cairo-Egypt, 2008).

> "If one heavily laden should call to bear his load, not the least portion of it can be carried, though he is nearly related".[21]

Strictly again, it is prohibited for a Muslim to share the religious practices of non-Muslims in exchange for their observance of the religious rites of the Muslim. This is because the Muslim has no insurable interest in matters of religion of the non-Muslim and vice-versa.[22] It is thus deducible that without insurable interest, no *Takaful* contract would be valid. How such insurable interest can be assessed to exist has been analysed in another study.[23] As it appears in this study, one of such likely circumstances is what the Nigerian law has recognised. Thus, with *Nafaqah* relationship, the Nigerian law recognises insurable interest in the life of another, as explained below. But, before then, it is necessary for the nature of life insurable interest in the country to be examined.

III. LIFE INSURABLE INTEREST IN THE NIGERIA INSURANCE LAW

Life insurable interest is the insurable interest that will legally justifies insuring the life of any person. It is the insurable interest necessary for any contract of life insurance to be valid. Generally, a person can only have life insurable interest in his own life alone. This is also the general statutory position of the law in Nigeria.[24] To this end, the *Insurance Act* declares thus:

> A policy of insurance made by a person on the life of any other person or on any other event whatsoever shall be null and void where the person for whose benefit, or on whose account the policy of insurance is made has no insurable interest in the policy of insurance or where it is made by way of gaming or wagering.[25]

As the law stands in Nigeria, life insurable interest may be classified into two, "personal life insurable interest" and "non-personal life insurable interest".[26] While the former is the general rule, the latter is the exception. For the exceptional

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[21] Q35: 18

[22] See Q109

[23] See Yusuf Abdul Azeez and Abdullahi Saliu Ishola, 'Insurable Interest in Takaful: A Theoretical Contrivance for Islamic Insurers' (2016) 6 *International Journal of Economics and Financial Issues*.

[24] It should be remembered that insurable interest is not relevant under the Common Law of Insurance as applicable in Nigeria like in other Common Law jurisdictions.

[25] Section 56 (1), *Insurance Act*

[26] The "personal life insurable interest" connotes the right of an individual to insure his own life while the "non-personal life insurable interest" implies the right to insure the life of another person.

circumstances under which non-personal life insurable interest applies, the Act provides further:

> A person shall be deemed to have an insurable interest in the life of any other person or in any other event where he still stands in any legal relationship to that person or other event in consequence of which he may benefit by the safety of that person or event or be prejudiced by the death of that person or the loss from the occurrence of the event.

To bring the legal relationship mentioned in the above section in tune with the local reality in the country, the section further declares that:

> In this section, "legal relationship" includes the relationship which exists between persons under customary law or Islamic law whereby one person assumes responsibility for the maintenance and care of the other.[27]

In interpreting the consequence of making "the relationship which exists between persons under customary law or Islamic law whereby one person assumes responsibility for the maintenance and care of the other" to include the legal relationship that would justify non-personal insurable interest, Umezurike expresses the view that,

> This section would appear to give legal significance to the moral obligation under the Nigerian Customary and Islamic Laws where an affluent member of the society assumes the responsibility of maintaining the less fortunate ones especially in the extended family system. It means that once you assume the responsibility of maintaining a relation, however distant the relationship is, the relation acquires an insurable interest on your life since your existence would benefit, and your death, prejudice him. It is however difficult, to quantify in monetary terms the nature and extent of insurable interest where one, as in the customary and Islamic set up assumes the maintenance of another, in the absence of enforceable legal or contractual obligation. Maintaining the less

[27] Section 56 (2) and (3), *Insurance Act*

fortunate ones under the Islamic or Customary Law is assumed by moral persuasion only.[28]

The long submissions of Umezurike quoted above bring the significance of this study into the fore. His concern represents the average constraint to be expected from those who are not learned in Islamic law. He might have been influenced by his feeling that Islamic Law is merely morally based as Customary Law is believed to be.[29] Again, what section 56 has provided is easy to be interpreted from Islamic law perspective. No difficulty therefore arises in assessing the insurable interest which one may claim in the life of another if one is in the position to maintain another person as stipulated under Islamic law. As it pertains to Islamic law, the section cannot be correctly interpreted to mean that what it has done is merely "to give legal significance to the moral obligation under the Nigerian Customary and Islamic Laws where an affluent member of the society assumes the responsibility of maintaining the less fortunate ones especially in the extended family system".[30] A look at the maintenance relationship in Islamic law that could justify non-personal life insurable interest thus becomes apt to be examined at this stage. Such obligation is however a legal responsibility with enforceable set ups rather than being assumed by "moral persuasion only" as erroneously postulated by Umezurike.

IV. MAINTENANCE RELATIONSHIP IN ISLAMIC LAW JUSTIFYING NON-PERSONAL LIFE INSURABLE INTEREST IN NIGERIA

From the preceding analyses, for section 56 of the Nigeria *Insurance Act* to be correctly interpreted from the Islamic law perspective, the various forms of relationship that would make a person to assume maintenance of the other must be

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[28] Umezuruke, p.330

[29] Until recently, it was erroneously conceived that Islamic law is Customary law. This has made many legal writers to approach Islamic law issues in the same or similar manners as Customary Law. This might have influenced Umezurike in arriving at his wrong conclusions on the nature of maintenance obligation under Islamic law, equating it with the position under customary law. The error of perceiving Islamic law as customary law is indeed changing in the country, and it is no longer excusable for anyone to still treat Islamic law as customary law. On this, see A A Oba, "Islamic Law as Customary Law: The Changing Perspective in Nigeria," *The International and Comparative Law Quarterly* 51, no. 4 (2002): 817–50, http://www.jstor.org/stable/3663189.

[30] Umezuruke, p.330.

clarified. This is what is examined under this segment of the study. Such forms of relationship are therefore expounded one after the other.

1. *Maintenance of Wife by Husband*

In virtually all legal systems the world over, some rights and duties do arise because of marriage between a man and a woman.[31] In Islamic law, rights of the wife to maintenance by the husband is well established. As such, it may require no further exposition when compared with the provisions on the issue in other legal systems.[32] Maintenance of the wife by the husband is a legal right of the wife and not a mere moral responsibility of the husband and neither is it a matter of moral persuasion. The Qur'an dwells so much on this in so many of its verses.[33] For instance, Allah says:

> Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means. Therefore, the righteous women are *Qānitat*, and guard in the husband's absence what Allah orders them to guard. As to those women on whose part you see ill conduct, admonish them, and abandon them in their beds, and beat them, but if they return to obedience, do not seek a means against them. Surely, Allah is Ever Most High, Most Great.[34]

In Islamic jurisprudence, the assertive control and benefit a husband enjoys over and from his wife respectively have been explained to be hinged on the discharge of his own marital duties which include maintenance of the wife.[35] Maintenance of the wife by the husband covers provisions of necessaries such as food, wears, shelter and medical bills.[36] In all these, Islamic law enjoins the husband to be

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[31] See the dictum of Scrutton L.J in the case of *Palace v. Searle (1932)2 K.B, 297*

[32] For instance, while Islamic law allows an unmaintained wife to take from her husband's money what she reasonably needs for her sustenance at any particular time without having to satisfy a pre-condition of not having money herself, a similar position in common law, i.e. allowing such a wife to ask for supply of necessaries on the pledge of her husband's credit, is unacceptable unless it can be proved that she has no enough money herself. See *Bibiefield v. Berens (1952)2, Q.B, 770, A.C*

[33] Such as; Q2:233-236

[34] Q4: 34

[35] Ridwan I. O, "Concept of Maintenance: A Legal Analysis on Tripartite Comparison", *Kogi State University Bi-Annual Journal of Public Law*, *Vol. 3, No. 2, 2010* p. 313

[36] Ismail M.B., *Al-Fiqh Al-Wãdhih Min Al-Kitãb Wa As-Sunnah ᶜala Al-Madhãhib Al-arbaᶜh* Vol.2 (Cairo-Egypt, 1997) p.61

responsible in accordance to his capacity.[37] This implies that there is no uniform quantum of maintenance by all husbands. The golden rule therefore is for the affluent to be magnanimous in spending while the average husband does as he can.

The right of maintenance of the wife by the husband is so sacrosanct that the Maliki School insists on its discharge regardless of the wife's state of wealth. Where a husband refuses to discharge this duty, an Islamic court has the power to force him to do so. Where he disregards the court's order, the wife is entitled to dissolution of marriage (*Khulʿu*) on account of lack of maintenance. The Nigerian case of *Abba Musa v Jungunduin*[38] demonstrates this position of the law. Also, Islamic law allows an unmaintained wife to satisfy her needs from her husband's wealth even without his consent.[39] However, a wife's right to maintenance is forfeited when she becomes recalcitrant or disserts her husband. This position is supported by the *Ijmaʿ* (consensus) of the entire Muslim Jurists.[40]

What can be inferred generally from the foregoing is that the husband has insurable interest in the life of his wife under the Nigeria Insurance Act and vice-versa. However, if we are to go by the standard of having something to gain or lose required for possession of insurable interest in terms of the maintenance duty, one may be more inclined to posit that it is the wife alone, rather than the husband as well, that has insurable interest in the life of the husband based on the maintenance relationship between them. For this reason, given the financial status or the receiving position of the wife in that legal relationship, the wife has an insurable interest in the life of her husband and is thereby entitled to insure the life of the husband.

2. *Maintenance of Child by Parents and Vice-Versa*

A couple is responsible for the procreation in their matrimony. This, first and foremost, presupposes parents' duty to take care of the wards. A legal provision in the Qur'an calling for the need to discharge this duty always can be gleaned from many verses. One of these is where Allah commands thus:

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37 Q65:7

38 (1961). This case, among others, establishes the right of an unmaintained wife to petition a court of law for dissolution of marriage and that the maintenance should be in line with the capacity of the husband.

39 Al-Asqalani I. H., *Fath Al-Basri: Sharh Sahih Al-Bukhari,* Hadith No. 5359 (Dar Al-Bayan Al-Arabi, Cairo-Egypt) p.579

40 Ismail M. B., p.61

> Mothers should breastfeed their children for two complete years before weaning.[41]

Here, though the direct command from Allah appears to have bearing only on the breastfeeding, but, as pointed out by Imam Qurtabi in his book[42] on the exegesis of the Glorious Qur'an, this is to emphasise a part out of the whole for the importance of the part mentioned, i.e., the early years of the existence of a newborn baby on earth. As such, the parents are still under obligation to fend for their wards continuously till they can fend for themselves. This is the time one is said to reach "*ashuddah"* i.e., age of maturity[43] in the language of the Qur'an.[44]

Express mention of the mother alone in the preceding verse on the need to breastfeed wards for two years does not charge her solely with the responsibility of child maintenance. The obligation is heavily that of the father who should make adequate provisions for his wife for her to do well in the nourishment of the baby being breastfed. The famous saying of the Prophet Muhammad (SAW) narrated by Aishah, May Allah be pleased with her, on the encounter of the Hind, the wife of Abu-Sufyan with the Prophet (SAW) is very apposite on the parents' obligation to maintain their wards before they become mature people of means. Hind reported her husband's failure to maintain her and her child to the Prophet who then allowed her to take from the husband's wealth, even without the husband's knowledge, what would be reasonably sufficient for her and the child.[45]

On the other hand, however, the parents too are to be maintained in turn by their wards later in life. This duty is even more obligatory for the children when their parents advance in age or become so senile that they can no longer engage in any activity for their sustenance. Jurists have often referred to provisions of the Qur'an[46] on the need for man to obey Allah's commandment on nicety to his parents coming second after the obligation of man to worship Allah alone. In this regard, a child enjoys insurable interest in the life of his father when he still bears

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41 Q2:233

42 Al-Qurtabi A.A., *Tafsir Al-Qurtabi Al-Jamiᶜ Li Ahkām Al-Qurᶜān* (3rd ed., Vol. 2, Dar At-taqwah, Cairo-Egypt, 2008) pp. 118-123

43 Studies and Research Office, *The Dictionary: Arabic-English* (2nd ed., Dar Al-Kutub Al-ilmiyyah, Beirut, Lebanon, 2005) p.75

44 Q46:15

45 Al-Asqalani I.H., (Hadith No. 5364.) p. 583

46 Such as Q17:13 and Q31:15

the *Nafaqah* obligations to maintain the child. Similarly on the other hand, when parents (either or both) have come under the maintenance of the child due to some circumstances, the parents also assume the right to insure the life of the child and thereby bearing insurable interest in the life of the child at that moment.

3. *Maintenance of Subjects by Leaders*

In Islam, the welfare and maintenance of the subjects on the leaders is one of the core functions of those in the position of authority. This explains why occupying such position implies an expression of willingness to serve rather than to be served. A popular saying of the Prophet (SAW) narrated by ᶜUmar, capturing the obligatory nature of this responsibility goes thus:

> Each and every one of you is in the image of a shepherd, rearing animals, and you are going to be queried on the welfare of the subjects under you; the *Imām* (leader of a community) is a shepherd and shall be queried about the welfare of his people, man is a shepherd over his household and shall be queried about their welfare, a woman is a shepherd in her husband's home and shall be asked how she goes about her roles thereat and a servant is a shepherd over the property of his master and he shall be queried on how he manages such.[47]

The above prophetic saying makes it mandatory on the rulers to make welfare of their subjects take position of primacy in mind. Caliph ᶜUmar b. Al-Khattab, in his characteristic show of exemplary leadership, had the habit of directing distribution and circulation of national wealth to all and sundry during his entire blessed days in office. For instance, he was reported[48] to have one day sent an emissary to deliver the sum of four hundred Dinars to Abu-ᶜUbaydah, the son of Jarrah. The money was the latter's portion out of a colossal sum from ᶜUmar under the national wealth distribution scheme. The emissary delivered the message and waited for a while

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[47] Sahaih Bukhari (vol. 9/2) Hadith No.2751, Sahih Muslim, (Vol.8/6) Hadith No.4755 or in Musnad Al-imam Ahmad, (Vol. 121/2) hadithy No. 6026

[48] Zaky A.S., Rajab A., Naᶜ nau A. and Sanbaty A.M., *Al-Mutalaᶜat Al-Azhariyyah Lis-Saff Al-Awwal Ath-Thanawi* (Qitau Al-Maᶜahid Al Azhariyyah, Cairo-Egypt, 2007-2008) pp.12-13

with Abu-ᶜUbaydah to watch, as already instructed by ᶜUmar, how the said amount of money was going to be expended by the recipient.[49]

Abu-ᶜUbaydah collected the money and, after paying for Allah's further blessings on the Caliph, called on a girl in his house whom he sent in turn to distribute some portions of his share such as five and seven Dinars to other deserving persons. Abu-ᶜUbaydah disbursed the money in this manner till the entire sum, meant for his own upkeep with his family, almost exhausted. Caliph ᶜUmar's emissary returned home and gave full report. He was further sent to Muadh, the son of Jabal, to give him similar amount of money for his own upkeep too. The emissary delivered the second message and came back home after having watched and noted that Muadh too circulated the money to others around him as Abu-ᶜUbaydah had earlier done.[50] Caliph ᶜUmar was informed of this and the instant reaction from him went thus:

> They are very cooperative among themselves as brothers. May Allah be pleased with them all.[51]

It must be emphasised that even though the above are duties upon the leaders for which they are answerable before Allah and liable for their failures to discharge the responsibilities as required of them, those duties do not however confer corresponding rights on the subjects which they can enforce. In other words, such rights are not justiciable. They therefore do not confer insurable rights on the citizens in the life of the subject.

4. *Maintenance of Poor Members of the Society by the Rich Ones*

Under normal circumstances, a mature man in Islam is ordained to work to earn for his livelihood by himself.[52] It is for this reason that importance is attached to every lawful[53] and productive work i.e., *ʿamal ṣāliḥ*'. To this extent, no one is permitted, all things being equal, to become a parasite on relatives or even the state.[54] The express permission of business activities which Islam grants even during the

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[49] Al-Qurashi G.A., *Awwaliyyat Al-Faruq As-Siyasiyyat* (1st ed., maktabah Al-Haramain, Riyadh, 1983) pp.355-364

[50] Ibid

[51] Zaky A.S., Rajab A., Naᶜnam A. and Sombaty A.M., pp. 12013

[52] See Q62:10, Q19:93, Q94:7 and Q9:105 among others.

[53] Q4:12

[54] Al-Faruqi I.R., "Is the Muslims Definable in Terms of His Economic Pursuits?" in Khurshid Ahmad and Zafar Ishaq Ansari (eds.) *Islamic Perspectives* (Islamic Foundation, Leicester, 1979) p.155

pilgrimage,[55] a period of extreme religious devotion to the Creator, is to underscore the importance of one's engagement in any lawful and productive activity for the purpose of livelihood. In fact, it has been said that the abrogation by a Qur'anic provision[56] that the obligatory status of the late-night worship (*Ṣalāh At-Tahajjud*) is for man to have conserved energy and vigour to go about his business engagements, among others.[57]

The inequality in terms of wealth is a natural fact of life and something in accord with the wisdom of Allah[58] without fostering any envy, grudge, or jealousy towards those who have more of it. The responsibility of taking good care of the poor members of the society in Islamic law is placed on both the government and the rich in the society.[59] On this, Akhtar observes: "The economic welfare of the masses depends vitally upon the way the total national income is distributed among people".[60]

Money taken from the few wealthy members of the society constitutes part of what makes up the national income distributable to all. Relating with the wealthy in this form does not in any way amount to usurping or expropriating their lawfully earned riches.[61] It is rather a form of complementary and mutual assistance[62] which Allah, the Divine-Law Giver, enjoins in several verses of the Qur'an.[63] The rationale behind the spirit of wealth circulation is to eliminate poverty in the society. Poverty can only be eliminated when the welfare of the poor is given regular and adequate concentration by the ruling class.

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55 Q2:198

56 Q73:20: The *Tahajjud* or the late-night prayer was obligatory in the early Islamic period, but its obligatory status was later abrogated. See Al-Baidhawi A.U., *Anwar Al-Tahzil Wa Asrar Al-Ta'awil* (Al-Matbaᶜah Al-Maymiyyah, 1902).

57 Ibid

58 See Q4:7, Q43:32, Q16:17, Q6:165 and Q4:3

59 Q2:254 and Q59:7

60 Akhtar W., *Economics in Islamic Law* (1st Edition, Kitab Bahrain, New Delhi-India, 1992) p.4

61 Famjari M.S., *Al-Islam Wa Tawziᶜ Ath-Tharwah Wad-Dakhul*' (Kitab Al-Buhuth Al-Islamiyyah-Hadha Huwa Al-Islam, Vol.2, Al Idarah Al-ᶜAmmah Li Shuhun Majlis Al-Mujammaᶜi Wa Lijanihi, 2002). P 1214

62 Ibid

63 Such as Q2:254, Q3:180, Q24:33 and Q70:24-25

To a great extent, one may say that prescription of some money generating policies and institutions in Islam such as *zakah*,[64] *Khums*,[65] *Ushr*[66], *Kharaj*[67], *Jizyah*[68] and *Ushur*[69] among others, is there majorly to constitute a sure source for creating a pool of wealth to be conveniently distributed to all indigent members of the society. Whenever the money collated from *zakah* or any other source is insufficient to satisfy the reasonable needs of the needy, Islam encourages and even mandates the very wealthy members in the community to voluntarily make handsome donations to save the situation.[70] In fact, this requirement is so emphatic that rulers in Islamic states are mandated to employ force when some members refuse to donate in this wise.[71] It is on record that Caliph ᶜUmar bn Al-Khattab employed similar force on some of the affluent when famine raged at a particular period during his tenure.[72] According to Ismail Abubakar,[73] this mandatory duty of the affluent is informed by a saying of the Prophet (SAW)[74] that "Muslims are brothers among themselves; none of them should let down or abandon another". The author's conclusion thus suggests that a wealthy man who refuses to make this voluntary donation in the circumstance would be said to have handed over the indigent to poverty, hunger, disdain, and desertion.[75]

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64 *Zakah* is one of the five pillars of Islam, and it is an obligation attached to wealth in possession of a Muslim. It is majorly to take care of the less privileged. See: Abu Aziz S.Y., *Al-Fiqh Al-Muyassar Wa Adillatuhu Min Al-Qurᶜān Wa-Sunnah* (Dar At-Tawfiqiyyah Li-Turath, Cairo, 2009) pp. 175-176

65 This is the one-fifth or 20% of the wealth accruing from war booty. See Q8:41. The same percentage from *Rikaz* i.e. property found hidden or buried underneath the surface of the earth, whether in the shape of treasure or a mine.

66 *Ushr* stands for one –tenth of the agricultural products which shall be paid by foreigner-owner to the collective treasury of the community upon harvesting.

67 *Kharaj* is a tax on lands conquered by Muslims and left with the native owners.`

68 For *Jizyah*, it is a tax imposed on the person of a '*dhimmi'* i.e. non-Muslim citizens of an Islamic state. *Jizyah* is also payable by non-Muslim States with whom truce is made on the condition that they will pay same.

69 *Ushur* refers to the percentage which merchants are required to pay off their merchandise when it exceeds a prescribed limit. An appointed officer called ᶜ*Ashir* collects this every time a merchant enters or exists at the border check-post. It is 2 ½% for a Muslim merchant, while 5% and 10% are collected respectively from a non-Muslim in an Islamic State and a non-Muslim affiliated to a belligerent state (*harbi*)

70 Ismail M.B., (Vol. 1) P.517

71 Ibid

72 Ibid

73 ibid

74 Transmitted by Bukhari

75 Ismail M.B., p.517

To encourage the affluent towards virtuous spending, the Islamic theory of ownership makes the rich realise that they are not the ultimate owners. Rather, the ultimate ownership of money and all other things resides in the Almighty Allah who creates man,[76] provides for him[77] and nourishes him.[78] According to the Quran, Allah alone, and no one else, is the real owner of all that is in the universe.[79]

The Qur'an thus declares expressly that:

> And to Allah belongs all that is in the heavens and that is in the earth, that He may require those who do evil with that which they have done (i.e., punish them in Hell) and reward those who do good, with what is best (i.e. paradise)[80]

When one therefore stands in the relationship of the rich and the poor, responsibility of maintenance becomes possible under Islamic law. In interpreting the insurable interest in the life of another person under the Nigerian *Insurance Act*, from the Islamic law purview, the poor Muslim culd validly claim insurable interest in the life of his rich Muslim brother. This would be in tune with the goal of collective duty of care in Islamic law. A look at the various circumstances where Islamic law has institutionalised collective duty of maintenance towards one and another is therefore also relevant to this study, notwithstanding that the duty is ordinarily a benevolent one.

5. *Sundry Maintenance Relationship Measures in Islamic Law*

At times, a capable labour force may fall victim of predestined unemployment, which may either be due to lack of work at all or that the available work is not befitting his skill and strength, or he is short paid for the available one. There are some other people who are weak or physically challenged and thus become perpetually incapable to undertake any income generating venture. Hence, Islam makes it a duty on the community to cater for the economic and financial needs of such persons. As for the capable ones, the community must provide empowerment through job creations that befit different categories of unemployed human resources

[76] Q96: 2
[77] Q67:20
[78] Q67:15
[79] Q5:52:2, Q63:7, Q65:12 and Q78: 37
[80] Q53:31

among her citizens. They are to be properly trained and supported with needed material resources.[81]

However, if this is invisible, the community is to provide for their basic needs like food, shelter, cloth, and health services. This is pointed out in the verse: وَالَّذِينَ فِي أَمْوَالِهِمْ حَقٌّ مَعْلُومٌ. لِلسَّائِلِ وَالْمَحْرُوم (And those in whose wealth there is a known right, for the beggar who asks, and for the unlucky who has lost his property and wealth, (and his means of living has been straitened).[82]

As proposed by Shafi[c] scholars, a Muslim community must provide for its poor person, each, through Zakah fund. Those who have skills in certain profession must be provided with modern equipment, such as modern agriculture machinery for the farmer and merchant with sufficient capital to grow his business. This would consequently uplift the status of those people and elevate them from being dependant to become financially buoyant to support other people in the subsequent years. People with pressing challenges such as victims of natural disaster that require emergent attention should have their problem solved from public treasury. They are to be treated under the share of *Al-Gharimin* from Zakah fund.[83]

Good examples were recorded for Umar bn Abdul-Aziz when he ordered his governors to pay off debts incurred by every Muslim, dead or living, and to aid poor bachelors that intended marriage, from the public account.[84] This is in line with what was reported from the Prophet who said:

أنا أولى بكل مؤمن من نفسه فمن ترك مالا فلورثته ومن ترك دينا أو ضياعا فإلي وعلي

> I am more dutiful to every Muslim than himself; whoever (at point of death) left property in for his heirs and whoever left debt and dependants; they are to be brought to me and levied against me.[85]

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[81] Y.A. Al- Qaradawi, *Dawru-l-Qiyam,* pp.380 and *Mushkilatu-l-Faqr* 5th edition Wahbah Publication, pp.35-49

[82] (Q70:24–25, 9:103).

[83] Y.A Al-Qaradawi, *Fiqhu-z-Zakat*, 21st Edition Vol. 2, pp. 603-619

[84] Y.A. Al- Qaradawi, *Dawru-l-Qiyam,* p.383

[85] Reported by Bukhari and Muslim on the authority of Abu Hurayrah

Umar bn Khattab was also reported by Ibn Sa^{c}d to have created a special store to cater for poor travellers.[86] To ensure that every member of the Islamic state is maintained in all conditions, Islamic law has institutionalised some sources of funding for insuring the life of every citizen. An understanding of these sources is very relevant in appreciating the collective maintenance duty in Islamic law. Some of the sources are discussed below.

a. **Zakah: -** This is a very significant source of funding in Islamic insurance. It is a financial obligatory due based on certain amount called *nasab*[87] as a means to purify them and their wealth. This is taken from the wealth of the rich and disbursed to one of the eight people mentioned in the verse below:

إِنَّمَا الصَّدَقَاتُ لِلْفُقَرَاءِ وَالْمَسَاكِينِ وَالْعَامِلِينَ عَلَيْهَا وَالْمُؤَلَّفَةِ قُلُوبُهُمْ وَفِي الرِّقَابِ وَالْغَارِمِينَ وَفِي سَبِيلِ اللَّهِ وَابْنِ السَّبِيلِ فَرِيضَةً مِنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَكِيم

> As-Sadaqât (here it means Zakât) are Only for the Fuqarâ' (poor), and Al-Masâkin (the poor) and those employed to collect (the funds); and for to attract the hearts of those who have been inclined (towards Islâm); and to free the captives; and for those In debt; and for Allâh's Cause (i.e. for Mujâhidûn - those fighting In the Holy wars), and for the wayfarer (a traveller who is cut off from everything); a duty imposed by Allâh. And Allâh is All-Knower, All-Wise. (Q9:60).

The amount to be paid from agricultural products is one-tenth (1/10) or one-twentieth (1/20) based on method of water supplying. This is mentioned in this verse:

ِيَا أَيُّهَا الَّذِينَ آمَنُوا أَنْفِقُوا مِنْ طَيِّبَاتِ مَا كَسَبْتُمْ وَمِمَّا أَخْرَجْنَا لَكُمْ مِنَ الْأَرْض

> (O You who believe! spend of the good things which You have (legally) earned, and of that which we have produced from the earth for you,… (Q2:267).

Drawing an analogy from the above, it can be opined that the same amount is to be paid from proceeds of factory, institutions, naval, land and air traffic establishments. In addition, one-fortieth (1/40) is to be paid from capital of a business and its equivalent from animal products. This is an annual obligatory due

[86] Ibn Sa^{c}d, *Tabaqat*, Beirut, Vol.3 p.283

[87] Nisab is the minimum of wealth on which zakah is due/obligatory

based on lunar calendar from cash fund or based on the period of harvest on farm product with fulfilment of *nasab* requirement.[88]

Zakah, as a maintenance scheme, is not based on personal moral disposition or persuasion and it is not a voluntary almsgiving; rather it is a legal obligation, specifications of which have been determined, such as amount to be paid, time of payment as well as the beneficiaries. It is ranked next after the testimony and five daily prayers. The required amount is made affordable such as 2.5% from wealth and revenue of business, 5% from farm products through irrigation system and 10% of farm products watered by rain and 20% from the natural resources.[89]

There is another annual obligatory due made on festival day after Ramadan fasting. This does not require any *nasab* requirement as in other Zakah mentioned earlier. This is made from common food of each community at quantity of *Sa^{c}* or two and half kilograms.[90] It Is called *Zakah al-Fitr*. It is another maintenance arrangement in Islamic law which is equally not premised on a moral persuasion but legal stipulations.

b. **Other Public Revenue**

Apart from Zakah, the state must have other income generating sources. This may include establishment and promotion of manufacturing companies, agricultural investment, and good use of natural resources. This would enable the state to make provisions for the poor and the less privileged among the people coupled with the provision of formidable defence fṢrom external forces and maintenance of peace and order within her territory. Such provisions must not be limited to Muslims alone but must also extend to non-Muslim citizens and residents under the Islamic authority. According to Abu Yusuf, the great disciple of Abu Haneefah, ʿUmar bn Khattab was reported to have included a Jew resident of Madinah in the monthly payroll from the public treasury to prevent him from habitual begging for survival.[91] In the report of Al-Baladhiry, Umar also ordered that some leprous Christians/Christian lepers be given a proportion from Zakah revenue.[92] Relying on

[88] Y.A. Al- Qaradawi, *Dawru-l-Qiyam,* p.385-386
[89] Y.A. Al- Qaradawi, *Dawru-l-Qiyam,* pp.387-388
[90] Y.A. Al- Qaradawi, *Dawru-l-Qiyam,* p.386
[91] Abu Yusuf, *Al-Kharaj*, 2nd edition, As-Salafiyyah print, p. 126
[92] Ta'rikh Al-Baladhiri p.177

this precedence, ʿUmar bn AbdulAziz was said to have included the following in his presidential letter to his governor of Basra:

> وانظر من قبلك من أهل الذمة قد كبرت سنه ، وضعفت قوته ، وولت عنه المكاسب ، فأجر عليه من بيت مال المسلمين ما يصلحه[93]
>
> Look for non-Muslim resident among you, who has grown old, become week and has no sources income; pay him from Muslim public purse what could be enough for him.

In a letter to Iraq, Khālid bn Walīd wrote:

> وجعلت لهم أيما شيخ ضعف عن العمل، أو أصابته آفة من الآفات أو كان غنيًا فافتقر، وصار أهل دينه يتصدقون عليه طرحت عنه جزيته، وعيل من بيت مال المسلمين ما أقام بدار الهجرة ودار الإسلام[94]
>
> Every old man who could not work, or disaster has infected him or rich who suddenly become poor, and his people do aid him, relieve him of tax and pay him and his family from public treasury so long they stay under the Islamic state.

c. **Philanthropy/ Charity:** –

Perhaps, the above two services may be insufficient as of increase in the number of the needy and poor. Islam calls on individuals who have enough resources to come to the aid of the poor and the needy as reported in the case of Al-Ashᶜariyun. However, if negligence is noticed in the part of the rich towards assisting the poor, Islam further makes it mandatory on the government to enforce/task the rich among its subjects with philanthropical services/ commodity development services, with special focus on the welfare of the poor in the community. This is what was reported from the Prophet who declared that: أن في المال حقا سوى الزكاة[95] (Verily, there is other due in the wealth other than zakah). This is like what is contained in the verse below:

> وَآتَى الْمَالَ عَلَى حُبِّهِ ذَوِي الْقُرْبَى وَالْيَتَامَى وَالْمَسَاكِينَ وَابْنَ السَّبِيلِ وَالسَّائِلِينَ وَفِي الرِّقَابِ وَأَقَامَ الصَّلَاةَ وَآتَى الزَّكَاة
>
> … and gives his wealth, In spite of love for it, to the kinsfolk, to the orphans, and to *Al-Masākīn* (the poor), and to the wayfarer,

[93] Abu Ubayd, *Al-Amwal*, A-s-Sunnatu-l-Muhammadiyyah Publication, p.47

[94] Abu Yusuf, *Al-Kharaj*, 2nd edition, As-Salafiyyah print, p. 126

[95] Reported by At-Tirimidhi on the authority of Fatimah bnt Qays, see Fiqhu-z-Zakat 21st edition, 2/1020

> and to those who ask, and to set slaves free, performs As-Salāh (*Iqāmah-aṣ-Ṣalāh*), and gives the *Zakāh*,.. (Q2:177)

In the above verse, zakāh and philanthropical charity are mentioned separately. Another approach introduced by Islam to eradicate poverty is seen in the various forms of expiation levied against certain crimes such as: *Yamin* (oath), *Ẓihār* (likening/equating one's wife to one's mother), sexual intercourse during the day of Ramadan, ransom as alternative to fasting and sacrifice in the Hajj operation. In addition, the Qur'an and the Sunnah call for voluntary almsgiving and promises compensations in this world and the world to come.[96] On this note, Qur'an praises Madinah Muslims for their hospitality for Meccan immigrants.[97] For instance, Al-Bukhari reported the care of Sa^{c}d bn ar Rabi^{c} and Abdul-Rahman bn Awf as follows:

> لما قدموا المدينة آخى رسول الله صلى الله عليه وسلم بين عبد الرحمن وسعد بن الربيع قال لعبد الرحمن إني أكثر الأنصار مالا فأقسم مالي نصفين ولي امرأتان فانظر أعجبهما إليك فسمها لي أطلقها فإذا انقضت عدتها فتزوجها قال بارك الله لك في أهلك ومالك أين سوقكم فدلوه على سوق بني قينقاع[98]

> Abdur Rahman bin `Auf said, "When we came to Medina as emigrants, Allah's Apostle established a bond of brotherhood between me and Sa^{c}d bin Ar-Rabi^{c}. Sa^{c}d bin Ar- Rabi^{c} said (to me), 'I am the richest among the Ansar, so I will give you half of my wealth and you may look at my two wives and whichever of the two you may choose I will divorce her, and when she has completed the prescribed period (before marriage) you may marry her'. Abdur-Rahman replied: 'May Allah bless you, your family'. 'Is there any marketplace where trade is practiced?' He replied: 'The market of Qainuqah'.

Islam also establishes endowment (al-Waqf) as another means to alleviate poverty and as a channel for unending compensation from Allah. It is reported in the *hadith* that:

[96] Among such verses are: Q 2:274, 2: 268, 3:133-134, 34:39, 90:11-16, 76: 8-9, 3:92.
[97] Q59:9
[98] Bukhari, kitabu-l-Bay^{c}

إذا مات الإنسان انقطع عنه عمله إلا من ثلاثة إلا من صدقة جارية أو علم ينتفع به أو ولد صالح يدعو له[99]

When a man dies, his record of good deeds ceases except in any one of the three: continuous charity, knowledge that benefits others, and righteous child who prays for him (parent).

On this note, Islam encourages the Muslim community to embark on traditional insurance among her people. This can be done through special donations or reservation of some items or money as jointly owned/community property or fund to cater for any eventuality that may occur to an individual member or the community at large. For instance, the needs of the poor, debtors, orphans, widows, and others could be attended to from that account. This can be achieved through the institution of a contingency Waqf.[100]

The above does not imply that selected people would continue to be rich while some are inherently poor. However, different approaches are made to reduce exorbitant gap that could exist in socio-economic status of people of the same community.[101]

The rich are also charged to aid the less privileged in the community. This was exemplified by the Prophet upon the distribution of booties of war among his followers where he considered the poor to be more important and qualified to the resources than the well-to-do among Al- Ansar. He said:

فقال رسول الله صلى الله عليه وسلم للأنصار: "إن إخوانكم من المهاجرين ليست لهم أموال، فإن شئتم قسمت هذه وأموالكم بينكم وبينهم جميعا، وإن شئتم أمسكتم أموالكم , وقسمت هذه فيهم خاصة " قال: فقالوا: لا، بل تقسم هذه فيهم، واقسم لهم من أموالنا ما شئت،[102]

Verily, your brothers among the immigrants have no wealth; if you wish, I share this (booty) and your wealth

[99] Reported by Muslim on the authority of Abu Hurayrah.

[100] Nor Asiah Mohamad, Muhammad Laeba, Hisham Zaki El Tibli, "The Prospect of *Waqf Al 'Awaridh* in the Contemporary Waqf Eco-System: A case of Malaysia", *Journal of Economics and Business Aseanomics 7(2) 2022 047-057.*

[101] Y.A. Al- Qaradawi, *Dawru-l-Qiyam,* p.411.

[102] Yahya bn Adam, *Al-Kharaj*, 2nd edition, As-Salafiyyah print, p. 35, 1347 AH

among you all together, or you hold your wealth and share this among them alone. The Ansar replied: ‘no but share this among them and give them from our wealth as you wish’’.

This position of the Prophet is in line with the verse below:

مَا أَفَاءَ اللَّهُ عَلَى رَسُولِهِ مِنْ أَهْلِ الْقُرَى فَلِلَّهِ وَلِلرَّسُولِ وَلِذِي الْقُرْبَى وَالْيَتَامَى وَالْمَسَاكِينِ وَابْنِ السَّبِيلِ كَيْ لَا يَكُونَ دُولَةً بَيْنَ الْأَغْنِيَاءِ مِنْكُمْ

What Allah gave as booty (*Fai'*) to his Messenger from the people of the townships, - it is for Allah, his Messenger, the kindred, the orphans, Al-Masākin (the poor), and the wayfarer, In order that it may not become a fortune used by the rich among you.

Therefore, the state ought to take it as obligations to design a measure through which the economic gap among her citizens is brought to a minimum level. This would indeed reduce poverty and curb crimes. Apart from the institution of zakah, Islam also levies Muslims with other financial responsibilities at different degrees of obligation. These are to be taken from excess of resources called *ᶜafwu* in the Qur’an. Degree of obligation and quantity to be taken depend on the nature of prevailing situations. Individual and government should make regular awareness to that effect without any enforcement or punishment attached to it. The Prophet, while commending Al-Ashᶜari tribe/clan tribe said:

إن الأشعريين إذا أرملوا في الغزو ، أو قل طعام عيالهم بالمدينة جمعوا ما كان عندهم في ثوب واحد ثم اقتسموه بينهم في إناء واحد بالسوية فهم مني وأنا منهم.[103]

When Ash-Sharites have widows resulting from war or they experience shortage of food for their household in Madinah, each will donate what he has into the same container and re-share it on equal bases. They are with me and I am with them.

This was done on mutual understanding and as a communal responsibility among them without any law enforcement agent. The same understanding was preached by

[103] Reported by Bukhari and Muslim on the authority of Abu Musa

the Prophet which was exemplified in the distribution of meat of sacrifice animal. He said:

كنت نهيتكم عن لحوم الأضاحي فوق ثلاث ليتسع ذو الطول على من لا طول له فكلوا ما بدا لكم وأطعموا وأدخروا[104]

> I have once forbidden you from (keeping) meat of sacrificial animal beyond three days for those who have should share with those who do not have. Hence, consume what you have and preserve some.

In an Islamic community, the needy and the poor must have access to the following necessities of life: proper feeding, clothing, and medical treatment to be voluntarily made available by the well-to-do individuals in the community. Awareness campaigns must be frequently carried out by individuals, organisations, and government in that regard as mentioned in the Qur'an:

أَرَأَيْتَ الَّذِي يُكَذِّبُ بِالدِّينِ . فَذَلِكَ الَّذِي يَدُعُّ الْيَتِيمَ .وَلا يَحُضُّ عَلَى طَعَامِ الْمِسْكِينِ .

> Have you seen Him who denies the Recompense? 2. that is He who repulses the orphan (harshly), and urges not the feeding of Al-Miskīn (the poor),[105]

V. CONCLUSION

In allowing a person to insure the life of another, the Nigerian *Insurance Act* adopts the "legal relationship" theory in determining who can insure the life of another. To be sure that the "legal relationship" is not interpreted without reference to some common societal relationship, the Act goes further to recognise any relationship placing one in the position of maintaining and caring for the other under either Customary law or Islamic law as a legal relationship justifying insurable interest in the life of the other. For the intention of the lawmaker to be properly interpreted from the Islamic law perspective, there is need for the various forms of relationship that put a person in the position of maintaining another person in Islamic law to be clearly spelt out.

Against the above backdrops, this study has explored the principles of maintenance in Islamic law (*Nafaqah)* towards interpreting the section. Through this, it has been revealed that, in many circumstances, every person would find himself in the

[104] Reported by At-Tirmidhi on the authority of Buraydah and verified it to be *hasan sahih*
[105] Q107: 1-3, 89:17-18, 74:44 and 69:33-34

position of maintaining some other persons. Despite this, Islamic law is still very clear on circumstances when it would become legally mandatory for one to maintain another other than on moral grounds. Such circumstances, as disclosed in this work include: (1) the relationships of husband and wife; (2) parents and children; (3) the rich and the poor; and (4) the collective maintenance relationship that may exist between members of the society at large. While both relationships (1) and (2) do in clearcut impose legal duties and thereby confer insurable interest, other relationships do not ordinarily command legal duties which can thereby confer insurable interest. Therefore, such latter relationships would have to be critically examined on a case-by-case bases to determine if they can truly confer insurable interest.

From the study, it has become manifest that for section 56 to be properly appreciated from Islamic law perspective, the Islamic legal provisions on the duty of maintenance must be adopted. Again, the paper has also demonstrated that the maintenance relationship in Islamic law is a legal matter that can give rise to enforceable rights. Therefore, it would not serve the proper interest of section 56 of the Nigeria *Insurance Act* for relationship justifying maintenance duty in Islamic law to just be glossed over or be interpreted on mere assumptions lacking in sound legal knowledge. Further still, the Nigeria *Insurance Act* has *given statutory flavour* to the propriety of approaching assessment of insurable interest generally and non-personal life insurable interest from the perspective of *Nafaqah* principles. Further research exertion in this regard may therefore be a worthwhile great service to the Islamic Insurance Industry (*Takāful*). This study has also demonstrated that, under the Nigerian law, Islamic law can be invoked in aid for a proper legislative interpretation.

6

A REVIEW OF THE STUDENTS LOANS (ACCESS TO HIGHER EDUCATION) ACT, 2023

Shamsu Yahaya* Bilkis Lawal-Gambari** Aisha Usman*** Zainab Akinde**** and Nansat Omoarebu*****

The importance of education in any society cannot be overemphasised. Nigerian tertiary institutions have been embarking on one industrial action or the other and the reasons for these industrial actions revolve around funding. This has created financial crises in public universities in Nigeria with damaging consequences ranging from strikes, student riots and closure of universities in some cases. The Students Loans (Access to Higher Education) Act, 2023 was signed into law, as part of measures towards addressing the funding gaps in the country's tertiary education subsector, and to make higher education more accessible to Nigerians through student loans. However, several criticisms have trailed the passage of the Act. The paper, therefore, focuses on a review of the provisions of the Act. This paper is based on the doctrinal method, which is library-oriented. The paper utilised primary sources of materials and secondary materials such as textbooks, journals, articles, newspapers and internet sources. The paper through cross-country analysis has drawn lessons from the United Kingdom, Australia and Germany, among others. The paper also finds that the eligibility criteria to access the loan are based on current realities without anticipating future improvements in standards of living. The paper finds that the coverage of student loan is restrictive. Hence, the paper recommends an amendment to the Act to increase the financial threshold for qualification. The paper further recommends the need to amend the Act to expand the coverage of the student loan to include feeding, accommodation, books and living expenses for the access to education by the indigent student.

Keywords: Access to Education, Student Loan, Nigeria, Tertiary Institutions

* LLB, BL, LL.M, MLD (Masters in Legislative Drafting), PhD, ChMC, Research Fellow, National Institute for Legislative and Democratic Studies (National Assembly). Email: sudeen09@yahoo.com.

** LLB, BL, LL.M, Senior Research Officer, National Institute for Legislative and Democratic Studies (National Assembly). Email: balkisahoefa@yahoo.com

*** LLB, BL, MPA, MCIA, Sabbatical, National Institute for Legislative and Democratic Studies (National Assembly). Email: aishatq@gmail.com

**** LLB, BL, Research Officer, National Institute for Legislative and Democratic Studies (National Assembly). Email: zakinde016@gmail.com

***** LLB, BL, Research Officer, National Institute for Legislative and Democratic Studies (National Assembly). Email: gunatnansat@gmail.com

1. INTRODUCTION

Over the years, the allocation by federal and state governments for public universities in Nigeria has declined even as enrolment continues to grow. Indeed, Nigerian tertiary institutions have been embarking on one industrial action or the other and the reasons for these industrial actions revolve around funding. Universities are either complaining about not being properly funded or that facilities and structures for learning are obsolete or non-existent.[1] This has created financial crises in public Universities in Nigeria with damaging consequences ranging from strikes, student riots and closure of universities in some cases. The perennial demand for additional funding of universities by stakeholders attests to the challenges of funding.

In an attempt to address the problem of funding and access to tertiary education, on June 12, 2023, Nigeria's President, Bola Ahmed Tinubu, signed the Student Loan Bill into law, to enhance higher education for indigent students in Nigeria. The bill was introduced as part of measures towards addressing the funding gaps in the country's tertiary education subsector.[2] The Students Loans (Access to Higher Education) Act, 2023 (SLA 2023) offers interest-free loans to indigent students, to alleviate the financial burden that often prevents students from pursuing higher education.[3] The Act establishes the Nigerian Education Loan Fund which will manage and disburse the funds to qualified students.[4] The Act further seeks to promote equal opportunity and social mobility by providing financial support to students who need it. The Act also repeals the Nigerian Education Bank Act and enacts the Student Loan (Access to Higher Education) Act.[5] The sources of funding for the student loan include education bonds, a percentage of taxes, levies, and duties collected by the Government, profits from natural resource exploitation, donations and other contributions.[6]

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1 See Ayeni, A.O. and Babalola, J.B., *Funding Options for Educating Inventions in the Educational Sector*, Ibadan, (Lineage Publishing House, 2009).

2 Qosim Suleiman and Mariam Ileyemi, 'Nigerian President Signs Student Loan bill into Law' <https://www.premiumtimesng.com/news/top-news/604094-nigerian-president-signs-student-loan-bill-into-law.html> accessed 20 June 2023.

3 Section 13, Student Loan (Access to Higher Education) Act, 2023.

4 Section 5, Student Loan (Access to Higher Education) Act, 2023.

5 Section 21, Student Loan (Access to Higher Education) Act, 2023.

6 Section 12, Student Loan (Access to Higher Education) Act, 2023.

2. AIM OF THE ACT

The primary objective of the Act is to make higher education more accessible to Nigerians through student loans and to provide quality education to all Nigerians especially, the less privileged students who are unable to pursue higher education due to financial constraints in order to lessen the financial burden.

3 CROSS-COUNTRY ANALYSIS

3.1 UNITED KINGDOM

The Education (Student Loans) Regulations, 1998

Two Regulations govern Student loans in the United Kingdom, The Education (Student Loans) Regulations, 1998 and the Education (Student Loans) (Repayment) Regulations 2009. It should be noted that Education (Student Loans) (Repayment) Regulations 2023[7] amends a provision of the 2009 Regulation. The Education (Student Loans) (Repayment) Regulations 2009 applies to repayments of student loans made under the 1998 Regulation.

In the UK, student loans are mainly issued by Student Loans Company. Interest is calculated on each loan payment after the student receives it. But it is not required until the beginning of the next tax year after the student had graduated.[8] If the borrower dies or becomes disabled, the loan is terminated. Termination could also take pla-ce after a certain period, usually after 30 years or when the borrower reaches a certain age.[9] The Education (Student Loans) Regulations, 1998 is very comprehensive in its provision on the eligibility status of students. Section 4(1) of the Act provides that students who can apply shall be on a full-time course or a part-time course for the initial training of teachers which is for the time being designated by or under regulations made under section 1(2)(b) and (3)(c) of the Education Act. The student must have agreed to the loan before the 1st of August immediately following the beginning of the academic year. Schedule 2 of the Education (Student Loans) Regulations, 1998 provides for the terms of the loan. It defines the concepts

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7 Legislation.uk.gov, ' Education (Student Loans) (Repayment) Regulations 2023' Available at <https://www.legislation.gov.uk/uksi/2023/129/made#top > accessed on the 13th June 2023

8 Radio Nigeria, 'Students Loan: Revolutionizing access to Higher Education in Nigeria' Available at < https://radionigeria.gov.ng/2023/06/18/students-loan-revolutionizing-access-to-higher-education-in-nigeria/> accessed 13th June 2023

9 *Ibid*

commonly used in a term of the loan agreement and generally states the principles that should regulate a term of the loan agreement.

In the UK, a student is required to pay once they earn over a certain amount.[10] The size of their monthly repayments will depend on how much they earn, not what they owe.[11]

Lessons for Nigeria:

a) Student Loan Act, 2023 does not make provision for a deceased student or a student who gets a disability and because of his disability is permanently unfit for work. Schedule 2(12) of the Education (Student Loans) Regulations, 1998 provides for this situation as stated above. If the borrower dies or becomes permanently disabled, the loan is terminated. Termination could also take place after a certain period, usually after 30 years or when the borrower reaches a certain age[12]. Therefore, it is recommended that the Student Loan Act, 2023 should make a provision that provides for cancellation of loan of a deceased student or a student who gets a disability and because of his disability is permanently unfit for work and is unable to pay his debt.

b) There is Section 4(2) of the Education (Student Loans) Regulations, 1998 provides that persons who have attained the age of 50 years before the first day of the course cannot apply. There is an age qualification in the U.K law because if the age qualification is left open, people of older age may apply and may not be able to work to pay back. This is not contemplated in the Student Loan Act, 2023 where the age qualification is left open. It is recommended that an age limit should be set in place for students eligible to apply. Another way out is that students of older age should submit collateral such as land or any valuable item before accessing the loan in case they are not able to pay back.

c) No provision to curb abuse in the Student Loan Act, 2023. Section 4(2) of the Education (Student Loans) Regulations, 1998 provides that persons who have received another loan concerning the same academic year or are in breach of any obligation contained in any agreement for a loan cannot apply. This will curb abuse of the loan, especially in a situation where a student applies for

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10 Gov.Uk, "Student Finance for undergraduates" Available at https://www.gov.uk/student-finance accessed 13th June 2023

11 *Ibid*

12 Schedule 2(12) of the Education (Student Loans) Regulations, 1998

multiple loans using different institutions. There should be provisions to curb such abuses in the Student Loan Act, 2023.

d) The Student Loan Act, 2023 is not clear whether it applies to masters and doctorate programmes. In the United Kingdom, there are separate laws regulating student loans for undergraduate, master's and doctorate programmes. To avoid any confusion in the future, it is recommended that the Student Loan Act, 2023 be clear on the level of education it applies to.

3.2 *UNITED STATES OF AMERICA*

The Higher Education Act, 1965 (HEA)

In the United States, the student loan system has been in place since 1958. Students in the US have the option to choose between federal loans and private student loans.[13] Federal loans are sponsored by the US government, and they make up the majority of student loans in the U.S. [14] The loan could be either subsidized or unsubsidized. Subsidized loans do not accrue interest while students are in school, during grace periods, or deferment periods. Unsubsidized loans, on the other hand, start accruing interest as soon as they are disbursed. The Private student loans on the other hand are typically provided by state-affiliated non-profits or institutional loans offered by schools themselves[15].

The Higher Education Act (HEA) is a federal law that governs the administration of federal higher education programs in the U.S.A. Its purpose is to strengthen the educational resources of colleges and universities and to provide financial assistance for students in postsecondary and higher education. It was first passed in 1965 to ensure that every individual has access to higher education, regardless of income or zip code. The HEA governs student-aid programs, federal aid to colleges, and oversight of teacher preparation programs. It is generally scheduled for reauthorization by Congress every five years to encourage growth and change.

The HEA has been reauthorized in 1968, 1972, 1976, 1980, 1986, 1992, 1998, and 2008. The current authorization for the programs in the Higher Education Act expired

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13 Radio Nigeria, 'Students Loan: Revolutionizing access to Higher Education in Nigeria' Available at < https://radionigeria.gov.ng/2023/06/18/students-loan-revolutionizing-access-to-higher-education-in-nigeria/> accessed 13th June 2023

14 *Ibid*

15 *Ibid*

at the end of 2013 but has been extended while Congress prepares changes and amendments.

Lessons for Nigeria:

a) Section 131 (3) of the Higher Education Act, 1965[16] provides that the Commissioner of Education Statistics shall provide a database of students who receive government assistance, aid or loans. Section 131(1) of the Act also provides that the Commissioner of Education Statistics shall conduct a national study of expenditures at institutions of higher education. The Secretary shall continue to make the availability of the information on the Federal student financial aid website of the Department widely known, through a major media campaign and other forms of communication. There is no similar provisions in the Student Loan Act, of 2023. Hence, the Student Loan Act, 2023 should provide for a comprehensive database.

b) Section 151(9) Higher Education Act, of 1965 provides for Private Education loans. Private student loans, like federal student loans, can be used to pay for college costs, but they originate with a commercial bank, credit union or online lender rather than the federal government. Section 151 of the Act provides for lender and institution requirements relating to Education loans. This implies that there are certain requirements to be met to be a private lender. The Student Loan Act, of 2023 applicable in Nigeria can also provide for private Education loans with requirements to be met by these private lenders and institutions.

c) Higher Education Act, of 1965 is very detailed on the implementation strategies of Student loans in the U.S. This is unlike the Student Loan Act, 2023 where the implementation strategies are unclear.

3.3 SOUTH AFRICA

National Student Financial Aid Scheme Act 1999 (NSFAS)

The NSFAS Act establishes the National Student Financial Aid Scheme (NSFAS) to provide for the management, governance and administration of the NSFAS; the granting of loans and bursaries to eligible students at public higher education institutions and for the administration of such loans and bursaries; to provide for the

[16] Higher Education Act, 1965 Available at https://www.govinfo.gov/content/pkg/COMPS-765/pdf/COMPS-765.pdf accessed 12th June 2023

recovery of loans and the repeal of the Provision of Special Funds for Tertiary Education and Training Act, 1993[17]. The funds of the NSFAS consist of money appropriated by Parliament, donations or contributions, interest, money repaid or repayable by borrowers and any other income received by the NSFAS[18]. The loans and bursaries cover tuition fees, accommodation, food, and travel allowance where the beneficiary is a full-time student, and it covers only tuition fees where the beneficiary is a part-time student[19].

Any student in South Africa may apply in writing to NSFAS for a loan or bursary on an application form determined by the board[20]. A loan or bursary is granted in respect of a particular course of study, which must be specified in the loan or bursary agreement in question and may not be used for any other purpose[21] and there must be a written agreement between the NSFAS and every borrower or bursar[22]. The agreement usually includes a provision that if the borrower or bursar does not perform satisfactorily in his or her studies, the board may terminate the granting of finance in terms of the agreement[23]. The amount of the loan or bursary is paid by the NSFAS to the designated higher education institution concerned by way of allocations in respect of amounts payable to the institution by the borrower or bursar[24].

The board may enter an agreement with a designated higher institution to administer loans and bursaries granted to students of the institution, to receive loans and bursary applications from students, to consider and assess the applications in the light of the criteria for the granting of loans and bursaries determined by the NSFAS, to grant loans and bursaries if the criteria are met after ascertaining that funds are available, and to enter into a written agreement with a borrower or bursar in accordance with

17 The long title of the National Student Financial Aid Scheme Act, 1999

18 NSFAS Act 1999, sec 14

19 National Student Financial Aid Scheme Policy Standard, 'NSFAS Eligibility Criteria and Conditions for Financial Aid (2023)' available at < https://www.nsfas.org.za/content/downloads/Final%20NSFAS%20Eligibility%20Criteria%20and%20Conditions%20for%20Financial%20Aid_2023.pdf> accessed on 23rd June 2023

20 NSFAS Act 1999, sec 18

21 *Ibid, sec 19(2)*

22 *Ibid, sec 19(3)*

23 *Ibid, sec 19(4)*

24 *Ibid, sec 19(5)*

the provisions of the Act and on the terms and conditions determined by the NSFAS[25].

The written agreement must state the due date for the repayment of the loan and the loan may be paid wholly or in part before the due date[26]. Where a borrower fails to make repayments, his or her name may be placed by the board on any list of defaulting debtors published by any person or body whose business it is to compile and publish such lists[27] unless such a borrower has not been notified by the board by registered letter addressed to his or her address of the failure to make repayments and of the intention of the board to take subsequent measures and the borrower has not been afforded a reasonable opportunity to pay the arrear amount[28].

The board may also notify the employer of the borrower of his/her indebtedness and order the employer to make deductions from the borrower's remuneration based on the scales prescribed by regulation.[29] The amount deducted by an employer concerning the indebtedness of the borrower must be paid over to NSFAS and failure of the employer to make deductions and payment as ordered is guilty of an offence and on conviction may, in addition to a fine, be ordered to make such deduction and payment to the NSFAS[30].

For the students to apply for a loan with NSFAS, they must satisfy the NSFAS that his/her combined household income does not exceed R350,000 per annum[31], although such students can still apply for scholarships and bursaries from NSFAS if they do not qualify for the loan[32]. Also, the loan repayment begins once the student has found employment and earns R80,000 or more annually[33].

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25 *Ibid, sec 20*
26 *Ibid, sec 21(2)*
27 *Ibid, sec 21(3)*
28 *Ibid, sec 21(4)*
29 *Ibid , sec 23*
30 *Ibid, sec 23*
31 National Student Financial Aid Scheme Policy Standard, 'NSFAS Eligibility Criteria and Conditions for Financial Aid, (n3)
32 *Ibid*
33 *Ibid* `

Lessons for Nigeria:

a) In the NSFAS. Act, the composition of the NSFAS board includes three members who represent students[34]. This is missing in the Students Loans (Access to Higher Education) Act, 2023 (SLA) which establishes a special committee for the Nigerian Education Loan Fund[35]. The composition of the committee has failed to take into consideration students. The committee should have included a student representative who would be able to convey to the committee the reality of operations as regards the entire process.

b) In South Africa, the education loan includes tuition fees, accommodation, food, and travel expenses[36]. This is absent in the SLA, 2023. The Act provides that the loan shall apply to tuition fees only[37]. It is recommended that the Loan should not only be limited to tuition but should cover other important areas like feeding, accommodation, and books for the access to education by the indigent student to be fully maximized.

c) In South Africa, the borrower begins to repay the loan once he gets a job where he earns up to R80,000 or more yearly[38]. The Students Loans Act, 2023, on the other hand, does not specify the amount of money the borrower is to earn before he/she starts paying the debt back, all it provides is that 10% of the borrower's salary shall be deducted by the employer and credited to the fund[39]. This supposes that no matter how low the borrower earns after getting a job, he/she will still have 10% deducted from his monthly salary. Due to the difficulties that this may bring, it is suggested that a particular amount should be stated as the minimum that the borrower has to be earning before deductions can be made to his salary.

34 NSFAS Act 1999, sec 5(1)(a)(iv)

35 Students Loans (Access To Higher Education) Act, 2023, sec 7

36 National Student Financial Aid Scheme Policy Standard, 'NSFAS Eligibility Criteria and Conditions for Financial Aid, (n3)

37 SLA 2023, sec 3

38 National Student Financial Aid Scheme Policy Standard, 'NSFAS Eligibility Criteria and Conditions for Financial Aid, (n3)

39 SLA 2023, sec 18

3.4 GHANA

Student Loan Trust Fund Act, 2011 (SLTF)

The Student Loan Trust Fund (SLTF), which replaced the Social Security and National Insurance Trust (SSNIT) loans scheme was established in December 2005 by the Government of Ghana and became operational in the 2006/2007 academic year, under the Trustee Incorporation Act 1962, Act 106 referred to as the Trust Deed[40]. However, in June 2011 the Student Loan Trust Fund Act 2011, Act 820 was passed by parliament to replace the Trust Deed[41]. The main objective of the scheme is to provide financial resources and the sound management of the Fund for the benefit of students of accredited tertiary institutions pursuing accredited tertiary programs and to promote and facilitate the national ideals enshrined in articles 25 and 38 of the Ghanaian 1992 Constitution[42].

The Trust Fund is governed by a 13-member Board of Trustees comprised of distinguished individuals of various backgrounds relevant to the business of SLTF[43]. The members of the board are appointed by the President of the Republic of Ghana[44]. The day-to-day administration of the SLTF is headed by a CEO, assisted by a team of dedicated professionals[45].

Due to financial constraints, the Trust Fund awards loans to needy Ghanaian students admitted to attend and pursue accredited tertiary programs in accredited tertiary institutions in Ghana. The Trust Fund used to advance loans to postgraduate students but due to the same financial constraints the focus has now shifted only to undergraduate students[46]. Unlike previous loan schemes that focused only on students in public institutions, SLTF gives loans to students in both public and private tertiary institutions[47]. The loan helps the borrower to defray personal expenses

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40 Student Loan Trust Fund, 'History' available at https://www.sltf.gov.gh/about-us/history/ accessed on 23rd June 2023

41 Tonyi M. Yao, 'The Effectiveness of Students Loan Trust Fund In Financing Higher Education In Ghana'

42 Students Loan Trust Fund Act 2011, sec 2

43 *Ibid, sec 5*

44 *Ibid*

45 *Ibid, sec 14*

46 Tonyi M. Yao (n25)

47 *Ibid*

including fees, the cost of boarding, lodging, books, equipment and for other purposes that may be necessary for the borrower's course of studies[48].

Also, a borrower is required to provide at least one guarantor acceptable to the board before the disbursement of the loan[49]. Since the establishment of the Fund, there has been only one form of guarantor required to guarantee the loan which is an SSNIT[50] guarantor. However, as a result of the challenges students faced in obtaining an SSNIT contributor as a guarantor, the board in consultation with stakeholders expanded the base of the acceptable guarantors to include recognized Religious bodies, Metropolitan, Municipal and District Assemblies and Corporate Bodies[51].

Furthermore, the Act provides that every borrower of the Fund shall subscribe to a Students' Loan Protection Scheme (SLPS) that shall indemnify the borrower against payment of outstanding debt to the Fund as a result of death or permanent disability and such Scheme covers the duration of the loan till the time when full repayment is done[52]. To ensure that the borrowers can pay back easily, the loans attract interest at a highly subsidized rate although this interest rate is determined by the Board[53]. The interest charged takes into consideration inflation over the period of the loan and is charged annually[54]. When the loan repayment is due, the borrower has three (3) options to consider: monthly deduction from the borrower's salary by his employer paid to SLTF; direct periodic payment to SLTF by the borrower; or outright payment of the total amount due[55].

Finally, the Act puts a legal obligation on all employers who have beneficiaries of the loan scheme in their employment to inform the Board upon employment of the borrower, in writing[56]. Where an employee has not fully repaid the loan, the employer is legally bound to deduct from the wages of the employee monthly, the agreed monthly repayments between the Fund and the borrower and shall pay the deduction into the Fund within fifteen days after the deduction[57].

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48 *Ibid*
49 Students Loan Trust Fund Act 2011, sec 19
50 Social Security and National Insurance Trust
51 Tonyi M. Yao (n25)
52 Students Loan Trust Fund Act 2011, sec 22(1)(2)
53 Tonyi M. Yao (n25)
54 *Ibid*
55 *Ibid*
56 Students Loan Trust Fund Act 2011, sec 24(1)
57 *Ibid, sec 24(3)*

Lessons for Nigeria:

a) The board of trustees of the Student Loan Trust Fund includes a representative of a recognized student's association of an accredited tertiary institution[58]. As stated earlier, there is no provision for the representation of students in the special committee for the Nigerian Education Loan Fund. There is a crucial need for a student representative who can express the feelings of the students who apply for education loans and can convey to the committee the reality of operations as regards the entire process.

b) The board of trustees are empowered to enter into contract, acquire, purchase and hold movable and immovable property, and convey, assign and transfer movable and immovable property or an interest in property vested in it, on behalf of the fund[59]. This is a provision that should be included in the Students Loans (Access to Higher Education) Act, 2023 to internally generate revenue for the fund and as such, be able to disburse loans to more indigent Nigerian students.

c) The borrower is to provide at least one guarantor and due to several factors, the qualification of the guarantor has been increased to include Religious bodies, Metropolitan, Municipal and District Assemblies and Corporate Bodies. In the SLA 2023, it provides for at least two guarantors who must be a civil servant of at least level 12 in the service, a lawyer with at least 10 years post-call experience, a judicial officer, or a justice of the peace[60]. These conditions are quite stringent and it is recommended that the requirement for the guarantors should include lecturers, village chiefs, religious bodies, etc to accommodate applicants that cannot gain access to the civil servant, lawyer, judicial officer or justice of the peace.

d) The SLATF provides that all borrowers are to subscribe to the Student's Loan Protection Scheme which is to indemnify the borrower against payment of outstanding debt to the fund as a result of death or permanent disability[61]. This is missing in the SLA 2023 and should be included so as not to put the

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58 *Ibid, sec 5(1)(d)*

59 *Ibid, sec 6(2)*

60 SLA 2023, sec 14(c)

61 Students Loan Trust Fund Act 2011, sec 22(1)

family of the borrower into debt as a result of the borrower's death or permanent disability.

3.5 AUSTRALIA

The Higher Education Support Act 2003 (HESA)

The Higher Education Support Act 2003 (HESA2003) is the mother legislation for the student loaning system in Australia. The Higher Education Loan Program is the channel used in accessing the different types of loan arrangements available to students. Chapter 3 of HESA2003 provides for different categories of assistance to students which range from assistance for student contribution amount (HECS-HELP) to assistance for tuition fees (FEE-HELP) to assistance for study overseas (OS-HELP) to assistance for meeting student services and amenities fees imposed by higher education providers (SA-HELP)[62]. A condition precedent for any student to receive any form of assistance is that the body that the student belongs to must be approved as a higher education provider. Higher Education Providers are listed in the Act and consist mostly of accredited universities.

Several requirements are listed in the Act for eligibility to access any of the HELP arrangements in the country. They include:

1. The student trying to access the loan system must be studying in a Commonwealth Supported Place.
2. Must be an Australian citizen or hold a New Zealand Special Category Visa, or be a Permanent Humanitarian visa holder.
3. Must submit a request for Commonwealth Support
4. Must be enrolled in each unit/subject at your Higher Education Provider by the census date
5. Must have available HELP balance
6. Must provide your Higher Provider with your Unique Student Identifier
7. Must have sufficient student learning entitlement
8. Must meet the completion rate requirements.

[62] Higher Education Support Act 2003, No. 149, 2003.

9. Must also have a Tax File Number.

Applications are made through the online HELP IT system. Once lodged, an applicant will pay an application fee to the Department of Education and the application should be assessed within 90 days of the receipt of the application fee.

For Non-Australian citizens, eligibility to access a Commonwealth Supported Place and HELP loan SYSTEM will depend on their visa and residency status[63]. For 2023, the HELP system loan limits are $113,028 for most students and $162,336 for students studying Medicine, Dentistry or Veterinary science[64].

To pay back the loans, you can either make compulsory or voluntary repayments. The student begins to pay back through the tax system once the individual earns above the compulsory repayment threshold. The compulsory repayments are calculated based on the individual's income. If the person is working, the employer must be notified so he can use the Pay as you go withholding system to withhold amounts from the salary throughout the year. For voluntary payments, direct payment of the debt can be made to the Australian Taxation Office at any time[65].

Lessons for Nigeria:

a) The HELP offers various categories of loans to students. There is a category for tuition fees, studying abroad, basic amenities etc. This form of categorisation seems to be missing in the Students Loans Act for Nigeria as it strictly provides that the loan is for the payment of tuition fees only. If the students can get their fees paid but still cannot access good hostel facilities, internet services etc. the attempt to provide education to all might still be a futility.

b) Application for the loans is made through the online HELP IT system, this to a reasonable extent will curb the effect of attending to only known applicants and cumbersome processes. The system provided for by the Act which stipulates that applications should be submitted through the applicant's bank to the Chairman of the Committee accompanied by a cover letter signed by the Vice Chancellor and the students' affairs officer is somewhat cumbersome

63 Loan Repayment: Australian Government <https://www.studyassist.gov.au/help-loans/non-australian-citizens accessed 23 June 2023.

64 Higher Education Loan Program https://www.education.gov.au/higher-education-loan-program accessed 22 June 2023.

65 Loan Repayment, *Ibid*.

bearing the complications of getting letters from the Vice Chancellor's office in Nigeria. An online portal can be utilised instead and when the loan is granted, it can be paid directly to the student's school account.

c) The HELP system makes provision for foreign students to access the scheme although with extra criteria. The Student Loan Act could also give this allowance to some indignant African countries too to be able to access this scheme with more requirements which may include being domiciled in Nigeria for a certain number of years.

d) Finally, the repayment system under HELP is to commence once the individual starts earning above a particular threshold. The Student Loan Act provides for repayment two years upon the completion of the mandatory youth service, this might not be practicable as the individual might not yet be gainfully employed.

3.6 GERMANY

Federal Training Assistance Act

The Federal Training Assistance Act is the mother legislation for the student loaning system in Germany. The Federal Education Funding Act provides a state fund arrangement to assist students financially. The aid provided is called BAföG. BAföG is provided to all students at all levels of education including High school students and second-path education students i.e. those starting to study after having been in the workforce.

The income of the parent is the major criterion for eligibility to the BAföG. Students from low-income earning families can access the scheme successfully. High school students get the full amount as grant money while University students get half of the money as a grant and the other half as a zero-interest loan to be repaid after the receiver attains a certain income after graduation. For the first two years of getting the BAföG, the student’s academic performance is not considered however for a student to continue enjoying the scheme, a certain minimum grade level is expected to be met in their academic performance.

To apply for BAföG, applications can be made online where several forms are to be completed. One can also download and fill out the relevant forms and submit them

by post to the BAföG office closest[66]. Proof of health insurance, enrolment certificate, passport documents, proof of income and assets and possibly information about parental income must be completed online or submitted as hardcopy[67]. The BAföG was initially intended for German students alone, it has however been extended to cover international students but accessing it is limited to exceptional cases. The scheme can only be applied for after you have successfully enrolled at the university. If a student's application for BAföG is rejected, a law firm specializing in social law can be contacted to help object to the rejection and invariably go to court[68].

The repayment of the BAföG usually begins five years after the end of the study in school. Before the five years grace ends, a repayment notification from the Federal Office of Administration is sent to the student's current address. The repayment can be made in instalments or at once. If the student fails to complete the instalment payment within 20 years, the remaining can be waived. When a repayment exemption is made because of low income after graduation, the repayment period will be extended to 30 years[69].

Lessons for Nigeria:

a) The BAföG arrangement is made available to students on all levels of education, from High School up to Postgraduate and even those that used to be in the workforce but have now returned to their studies. The Student Loan Act seem to be focused only on University, Polytechnics, Colleges of Education or any vocational school established by the Federal or State Government. If people cannot access government loans or grants to pull through Secondary Schools, thinking of Tertiary institutes might not be sustainable.

b) Two years into the BAföG scheme, the student is expected to attain minimum academic performance to continue enjoying the scheme. This would ensure the students are accountable both to themselves and the government that is giving out these loans and concentrate on their academics in school. The

66 https://www.expatrio.com/studying-germany/financing-your-studies-germany/bafog-and-other-student-loans-germany

67 ibid

68 https://handbookgermany.de/en/bafoeg

69 ibid

Student Loan Act might be more robust if an accountability clause like this was included.

c) In the case of a rejected application for the scheme after having fulfilled all the criteria can be objected to in Germany. The Students Loan might be better if there is a form of Appeal Committee that can look into an unjust rejection of applications for the loan.

d) Finally, the repayment procedure under BAföG is five years after completion of studies and debt should be spread through twenty to thirty years in special cases to make the interest-free loan easy to pay off. The Student loan can also draw this lesson to make the students more confident and at ease with the arrangement.

3.7 CANADA

Canada Student Loans Act, 1985

Student loans in Canada are loans offered to those pursuing post–secondary education at either college or university. These types of loans are meant to assist students with the financial burdens of higher education and are often used to cover the cost of tuition, books and other expenses while in school. Student Loans in Canada are supported by a legislation[70] and regulated by the Canada students loans Regulations Act.[71]

Certain requirements have to be met for students to access the loans in line with the provisions of the Act. One of such conditions is that certificate of eligibility must be obtained [72] and the student must be a Canadian citizen or a permanent resident within the meaning of the Immigration and Refugee Protection Act.

It is also a requirement that student who can access the loan must be qualified for enrolment or is enrolled at a specified educational institution as a full-time or part-time student for a period of studies at a post-secondary level[73].

The maximum amount of loan students can access is one hundred dollars per week in the case of full-time students and in the case of part-time students, it is the

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70 Canada Student Loans Act (R.S.C., 1985, c. S-23), available at < https://laws-lois.justice.gc.ca/eng/acts/s-23/> accessed on 11th July, 2023

71 Loanscanada, 'Laons Canada' available at <https://loanscanada.ca/> accessed on 11th July 2023

72 Sec. 14 Canada Students Loan Act (R.S.C,) 1985

73 Sec.4 Canada Students Loan Act (R.S.C,) 1985

aggregate of the outstanding principal of the loans[74]. It is however subject to adjustment by the Minister

Students Loans in Canada attract interest, however, on the 31st of March it was announced by the government of Canada that starting from 1st April 2023, no interest is expected to be paid on students loans provided that students will continue to be responsible to pay any interests that may have accrued on their loans before April 1, 2023[75].

It is important to note the provisions of the Act regarding the elimination of interest concerning Federal loans as each province has its laws on student loans. The laws vary from one province to the other. For instance, if a student secured a loan under the Canada student loan scheme and also under a province, interest will not be charged on the Canada loan, however, whether interest will be paid on the provincial loan depends on the state in question.[76]

Under section 7 of the Act, it is the Minister who is liable for any loss sustained by a lender as a result of a loan made to a qualifying student.

It is further provided in the Act that full-time students are expected to repay the loans and any interest seven months after the student ceases to be a full-time student.[77]

Another source of Student loans in Canada is banks. Banks provide a variety of loans for students, e.g., car loans, home loans, and personal loans. Similarly, students can get bank loans to pay for their college or university tuition with strict requirements which may be very difficult for students to qualify for them.

In light of the above, one can say that students' loans in Canada, just as in Nigeria are loans offered by the federal government with assistance offered by provincial governments. Student loans in Canada, differ from regular personal loans given by commercial banks or private lenders, with the difference being the repayment terms and interest rates.

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74 Sec 3 (1)(a) and (b) Canada Students Loan Act (R.S.C,) 1985

75 Loanscanada, (n71)

76 *Ibid*

77 Sec. 5 Canada Students Loan Act (R.S.C,) 1985

Lesson for Nigeria:

The education loan in Canada includes tuition fees, accommodation, books, etc. As stated previously, this provision is absent in the SLA, 2023. It is recommended that the loan should not only be limited to tuition but should cover other important areas like feeding, accommodation, and books for the access to education by the indigent student to be fully maximized.

3.8 INDIA

Credit Guarantee Fund Scheme for Education Loan, 2009 (CGFSEL)

Student Loans in India is in the form of Education loan and the government of India assist its students through a special scheme in the Department of Higher Education in the Ministry of Education, known as the Central Sector Interest Subsidy Scheme (CSIS) and Credit Guarantee Fund Scheme for Education Loan (CGFSEL) which has been in place since 2009. Under this scheme, the interest subsidy is given to students who take loans from the designated banks under the Model Education Loan Scheme of Indian Banks during the period the students are in school plus one year of grace. The loan is only accessible by students who belong to economically weaker backgrounds whose annual parental income is not up to Rs.10 Lakh from all sources to assist them pursue their higher education either locally or overseas[78]

Under the Guarantee Fund Scheme for Education Loan (CGFSEL), the Central Government gives a guarantee for education loans accessed by students without any collateral, security and third-party guarantee for a maximum loan limit of Rs.7.5Lakh.The Fund provides a guarantee to cover 75% of the amount in default[79].

However, various Education Loans are available in India for students who need financial assistance to pay for their higher education. Education loans can be taken from banks, financial institutions and other lending agencies to cover the cost of tuition fees, accommodation, travel and other expenses related to pursuing a course of study.

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78 Jandhyala Tilak, 'Student Loans in Financing Higher Education in India' (June 1992), available at <https://www.researchgate.net/publication/226744948_Student_loans_in_financing_higher_education_in_India> accessed on 11th July 2023

79 Ravi Shankar, 'What is Credit Guarantee Fund Scheme for Education Loans?' (19th October 2022), available at <https://timesofindia.indiatimes.com/business/faqs/educational-loan/what-is-credit-guarantee-fund-scheme-for-education-loans/articleshow/94960658.cms> accessed on 11 July 2023

To apply for an education loan in India, a student must meet specific eligibility criteria, such as being an Indian national, having an excellent academic record and demonstrating the need for financial assistance, in addition, there might be a need to provide collateral or a co-signer, depending on the lender and the loan amount.

There are certain features of Education loans in India which have made them attractive for students, regardless of the Bank:

Affordable interest rates: Interest rates on Education loans are more affordable than other types of loans.[80]

Long repayment tenure: Education loans generally have longer repayment tenures allowing borrowers to repay the loans in small instalments over a more extended period.

Students who take Education loans in India can avail of tax benefits under the Income Tax Act. This can held to reduce the overall cost of the loan and make it affordable for students.

Absence of collaterals: Many Education loans in India do not require collateral up to a decided amount making them easier to access.

Education loans can cover the entire cost of education, including tuition fees, accommodation and other expenses related to studying overseas.

Repaying a study loan in India can discipline students to build a good credit score as this will be beneficial when applying for other loans or financial products[81].

Lesson for Nigeria:

There is a lack of presentation of collateral in the education loan in India. This is to make it easier for indigent students to be able to apply for loans as they might not have any collateral to present for the loan. This provision can be adopted by Nigeria as it will make obtaining loans by students easier.

4. GAPS IN THE ACT/RECOMMENDATIONS

1. The Act appears to have set out criteria for eligibility based on current realities without anticipating a future improvement in standards of living. The

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80 Groww, 'Banking' available at <https://www.groww.in>Blog>Banking> accessed on 11th July, 2023

81 *Ibid*

threshold for financial qualification is that applicant and their families who earn less than five hundred thousand Naira annually may make the majority of the vulnerable unqualified. Whenever the minimum wage is reviewed for an increase, most students would be ineligible to apply for a loan because they would no longer qualify due to the increase in the minimum wage.[82]

2. The Act does not take into account parents who have many children attending higher institutions and are making more than Five Hundred Thousand Naira a year. The fundamental objective of the Act is to assist parents and students to access higher education and ease financial constraints. Parents who earn above five hundred thousand Naira per annum with more than one child in higher institutions may be unable to take advantage of the law. Hence, provisions should be made for those who fall into this category so that they can all take advantage of the student loan initiative. Therefore, there is a need to reconsider the financial threshold for qualification.[83]

3. A condition in the Act limits the loan to payment of tuition fees[84] which is presently non-existent in the tertiary institutions owned by the federal government. So, there is a need to review the provision to align with the practice of charging fees in universities.

4. Section 22 of the Act which provides for repeal and savings provisions does not save the contractual rights and liabilities of the Nigerian Education Bank, which are to be inherited by the Fund.

5. The stipulation of students to provide specific guarantors should also be reconsidered as it will be very difficult for students to meet.

6. The Act should be expanded to cover the vulnerable in the country, especially, people living with disabilities.

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82 Omolola Ajibola and Babatunde Lot Ogungbamila- Olisa Agbakoba Legal (OAL),' Nigeria: The Student Loan Act: Need For A Review' <https://www.mondaq.com/nigeria/education/1331532/the-student-loan-act-need-for-a-review> accessed 22 June 2023.

83 *Ibid*.

84 Section 3 of the Act provides that 'The loans referred to in this Act shall be granted to students only for the payment of tuition fees'. Section 13 of the Act also provides that the aims and objectives of the Fund are to facilitate the mobilisation of funds to provide interest-free loans to students of institutions of higher learning in Nigeria for the payment of tuition fees.

7. Additionally, the Students' Unions, such as the National Association of Nigerian Students (NANS) and Association of the Disabled, Joint National Association of Persons with Disabilities (JONAPWD) should be on the Committee to oversee the activities of the Fund.

8. Equally, provision should be made for Insurance Policies to cover students in case of any unforeseen circumstances.

5. CONCLUSION

The Students Loans Act is a laudable step towards the provision of quality education to the vulnerable in society. The Students Loans (access to higher education) Act, 2023 is aimed at promoting accessibility to quality higher education to all persons in Nigeria by providing accessible loans to indigents in Nigeria. However, the financial threshold of less than Five Hundred Thousand Naira earning per annum to be eligible for the loan may be detrimental to its objective of easy accessibility to education as many will be left out of the coverage of the Act. To understand the gaps in the Students Loans Act, 2023, cross-country analysis of other Countries were carried out so as provide credible recommendations to better the SLA, 2023. From the cross-country analysis, the main recommendations to further improve the SLA, 2023 includes providing for loan cancellation for borrowers who die before repaying the loan or who becomes permanently disabled; providing an age limit to persons who can apply for students loan due to the difficulty of aged persons to fully repay their loans; providing for clauses which cures abuses in the Act so as to prevent students from applying for multiple loans in a year and such other abuses; providing for clear implementation strategies of the Student loans in the SLA, 2023; providing loans not only for tuition fees but also for important aspects like feeding, accommodation, books,etc.

The lessons from other jurisdictions discussed above should be utilized to make amendments to the Act. Hence, there is a need to review the Act to take care of these gaps.

7

AN EMPIRICAL ASSESSMENT OF THE EXTENT OF COMPLIANCE WITH THE COMPOSITION OF FAMILY COURT UNDER THE NIGERIAN CHILD RIGHTS ACT, 2003

Mariam A. Abdulraheem-Mustapha*

Abstract

Juvenile justice administration is an important component of social and distributive justice that focused on the well-being and welfare of children. Ordinarily in Nigeria, a child below the age of eighteen who is in conflict with the law or beyond parental control/in need of care and protection may have his/her case determined in the Family/Juvenile court. However, such a child may not get justice because of the absence of experienced hands in the mater. It is in the light of this that the major legal frameworks that regulate the administration of juvenile justice in Nigeria advance/promote mixed tribunal in the Family/Juvenile courts. However, in practice, the practice and procedure vary in the Family/Juvenile courts, resulting to injustice to a lot of juveniles as large number of them technically fall outside the scope and protection of these laws. Against this background, this paper assesses the level of implementation of the mixed tribunal in the administration of juvenile justice and analyzes the inherent problems and challenges faced by juvenile offenders in the procedural process of their trials in Nigeria. With the aid of a qualitative research methodology, the paper finds that the level of compliance with mixed tribunal is very low. It therefore recommends the reform of the regulatory frameworks on mixed tribunals in order to state the roles of assessors/lay judges and benchmarks for their compositions and sizes in the administration of juvenile justice in Nigeria.

Keywords: Corrective Institution, Family/Juvenile Court, Juvenile Justice Administration,
Juvenile Offenders, Mixed Tribunal

* PhD, BL, Professor of Law, Department of Public Law, Faculty of Law, University of Ilorin, Nigeria. E-mail: mariamadepeju78@gmail.com

Introduction

Administration of juvenile justice is designated for children and youth and focuses on offences committed by children under the age of eighteen[1]. Globally, the administration of juvenile justice is underpinned by the philosophy that every child offender is correctible, and that judicial intervention will result in juvenile positive behavioral changes[2]. Adjudication is therefore one of the important processes in the administration of juvenile justice in Nigeria which a child offender may navigate[3]. Due to the global increase in child delinquency[4] and lack of definite provisions dealing with "children who are in conflict with the law" or "in need of care and protection" in the Constitution of the Federal Republic of Nigeria, 1999, the concept of juvenile justice administration in Nigeria was given a legal backing with the enactment of the Children and Young Persons Act (CYPA), 1943[5]. However, due to its inadequacies and the fact that it was uncoordinated as large number of children technically fell outside its scope and protection[6] the Child Rights Act (CRA) was enacted in 2003.

Interestingly, the provisions in CYPA and CRA employ mixed tribunal in the composition of Family/Juvenile courts in all civil and criminal matters. But in practice, the practice and procedure vary in the Family and Juvenile courts resulting to in-justice to a lot of juvenile offenders as large number of them technically falling outside the scope and protection of these laws. Thus, there has been a significant increase in the number of children in corrective institutions to the extent that these corrective institutions are now overstretched[7]. This paper, therefore, argues that the non-uniformity, non-implementation and lack of coordination in the laws on the composition of mixed tribunal in the trial of juvenile offenders by the thirty-six States of the federation results in the differences in adjudication and treatments of juveniles in Family/Juvenile courts.

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1 Akinseye-George. Y 'Juvenile Justice Administration: Practices and Problems: Reports from the Field', in Centre for Socio-Legal Studies, (ed), Juvenile justice system in Nigeria (Centre for Socio-Legal Studies, 2009) pg. 81

2 C.O Okonkwo, Clement Nwanko & Bonny, 'Administration of Juvenile Justice in Nigeria' 1st ed 1997 (Constitutional Rights Project, 1997)

3 E. O. Alemika & I.C Chukwuma, 'Law and Practice of Juvenile Justice Administration' Juvenile Justice Administration In Nigeria: Philosophy and Practice (Centre for Law Enforcement Education (CLEEN) 2001)

4 Juvenile Justice Report, 2013

5 as repealed by the Children and Young Persons Act of 1958

6 Ibid

7 UNICEF, 'Annual Report 2013', available at < https://www.unicef.org/media/92791/file/UNICEF-annual-report-2013.pdf> accessed on 26th May, 2023

The research questions that guide this paper are:

(i) What is the level of compliance with the law in the composition and size of mixed tribunal in the Family/Juvenile court? and

(ii) what is the level of implementation of the law by the Family/Juvenile court in protecting juvenile offenders considering the differences in adjudication by the Family/Juvenile court?

In answering these questions, the researcher carries out an empirical assessment of the extent of compliance with the requirement of mixed tribunal in the administration of juvenile justice in Nigeria. It also analyzes the inherent problems and challenges faced by juvenile offenders in the procedural process of their trials in Nigeria. The paper proffers recommendations for enhancing the system of mixed tribunal under the administration of juvenile justice in Nigeria.

Conceptual Framework: A Comparative Perspectives of Juvenile Justice System and Mixed Tribunal

The term juvenile justice system has gained wide usage across the world. Generally, it is usually used to denote every process designed to ensure a special treatment for a child who has violated certain laws or moral code)[8]. However, the concept of juvenile justice system is not as simple as it looks; for it has some deeper conceptual connotations. In this regard, scholars have viewed the concept from various perspective which correspond with the main objective which juvenile justice system seeks to achieve in any society[9]. From this perspective, there are classical and neo-classical schools of thought[10]. Scholars from the classical school of thought are of the view that "every human being has some levels of freewill to act and therefore, they should be strictly punished for whatever wrong they have committed[11]". This is without prejudice to their age or extent of criminal responsibility. The leading voice under this school is Cesare Beccaria[12] who contends that "human beings are naturally pleasure-loving animals that use their freewill to choose acts from which they derive pleasure as against those that will cause them pain and suf-

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8 Maharukh Adenwalla, 'Who is a Juvenile: Who is a Juvenile in Conflict with Law: Retrospective Legislation: Age of Criminal Responsibility' Child Protection and Juvenile Justice System (Childline India Foundation 2006) pg. 17

9 Freda Adler, Gerhard O. Mueller and William. S. Laufer, 'Criminology' (3rd ed) (McGraw-Hill Education 1997)

10 Ibid

11 Ibid

12 Cesare Bonesana di Beccaria and Voltaire, 'Of the Origin of Punishment' An Essay on Crimes and Punishments (W.C. Little and Company, 1764)

fering". To this school therefore, the act of law breaking is a deliberate and conscious decision in pursuit of pleasure. Thus, the school advocates severe punishment to make criminal acts unattractive regardless of the identity and personality of the offender.

Some other schools of thought differ largely with the classical idea. Their views are grounded in the need for the support of a child who is considered to be a special being in the society[13]. The neo-classical scholars fall into this category. Their idea is that "a child who has committed a crime should be supported to grow into a better individual rather than being punished". Among the neo-classical scholars are Wilson, Van den Haag, and Fogel[14] who advocated for "correctional methods". They argued that "if young offenders cannot be improved through rehabilitative programs, they can at least be confined so that potential lawbreakers, especially

young offenders, are deterred". However, this approach has been historically described as a "hardline approach in the child justice system". The hardline approach sees punishment as an effective deterrent against delinquent behavior and it is opposed to the "welfare-based approach" because it claims that youthful offenders do not take the justice process seriously.

The second perspective of the neo-classical school of thought, which also originated from Roman law; is "supportive and caring of child offenders"[15]. This theory was promoted by a segment of the classical school known as the neo-classical which disagreed with the earlier philosophy developed by Cesare Beccaria[16]. The disagreement is on the grounds that "children, the insane, imbeciles and morons cannot be said to possess the ability to exercise free will rationally because of their underdeveloped or defective mental state". The position is obvious in the concept of *parens patriae* where the king or queen could exercise "parental power" in *loco parentis*. This doctrine is a legal philosophy and it was established in the case of *Ex parte Crouse*[17]. The supportive view has some key ideas toward achieving effective juvenile justice system globally. Some of these ideas include the requirement of mixed tribunal, special policing units, different custodial institutions and their approach to juvenile offenders wherein they are regarded as delinquents and not criminals. Among

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13 Chinwe R. Nwanna and Naomi Akpan, 'Research Findings of Juvenile Justice Administration in Nigeria' (Constitutional Rights Project, 2003)

14 Ibid

15 Ibid

16 Cesare Bonesana di Beccaria and Voltaire (n10)

17 4 Wharton, Pa., 9 (1838)

all these ideas, the most important and controversial is the requirement of mixed tribunal. This is therefore the reason why this paper focuses on this requirement and the extent of compliance with the extant laws in Nigeria.

Mixed tribunal which is also referred to as "lay participation" in the criminal justice system is a "group of professional judges and lay judges who try and make legal decisions in criminal cases"[18]. The concept of a mixed tribunal according to Machura[19] anticipates a system/procedure where "a professional judge presides over the hearing and deliberation. Side judges, usually the lay assessors, sometimes supplemented by further professional judges, have equal rights when it comes to selecting the legal rules to be applied, making procedural decisions during the hearing, and deciding on the case outcome." According to Kutnjak[20] the approach of mixed tribunal "gives professional judges an opportunity to explain the law and 'correct' the lay judges' views, while opportunity to bring fresh approach of an average citizen and 'correct' the professional judges' routinized view is accorded to the lay judges".

Lay judges are a common feature of many justice systems in advanced democracies especially in juvenile justice system and commercial practice. Practically, mixed tribunals have been effectively adopted in some jurisdictions such as France, Croatia; Germany and Norway, Finland, Sweden, Denmark and so on. In these countries, different sizes of the mixed tribunals are integrated into their legal systems[21]. For example, in Germany and Croatia, small mixed tribunal of one professional judge and two lay judges are assigned with minor cases while mixed tribunals are assigned with serious cases in France[22]. In any case, the requirements for small or large numbers of professional and lay judges varies significantly across countries and all depend on the seriousness of the cases[23] ranging from 2 to 9 Lay judges in a sitting[24]. Mixed tribunals have been successful both at trial and appellate stages of cases in the above-mentioned countries and both professional and Lay judges met punishment and sentence that most of times exceeded 15

[18] Sanja Kutnjak Ivkovic, 'Studying Police Integrity' in Sanja Kutnaj Ivkovic, M.R. Haberfeld (eds), Measuring Police Intgrity Across the World (Springer New York, NY 2015)

[19] Stefan Machura, 'Understanding the German Mixed Tribunal' (2016) 36(2) The German Journal of Law and Society 273, 274

[20] Sanja Kutnjak Ivkovic (n16)

[21] Ibid

[22] Ibid

[23] Ibid

[24] Heikki Pihlajamaki, 'On the Verge of Modern law: Mitigation of Sentence in Nineteenth-Century Finland' Zeitschrift für europäische Rechtsgeschichte. 2001

years of imprisonment[25] In Denmark for instance, it has been reported that Mixed tribunals "decide 11,000 criminal cases every year"[26] while 14% of criminal cases were reported to have been decided by mixed tribunals in Germany[27]

Instructively, the adjudication of juvenile offenders warrants the involvement of lay judges due to the special treatment accorded to them. Thus, mixed tribunal is a distinctive approach of adjudication in juvenile justice system where legal decision making is pronounced jointly by both professional and lay judges. The realization that children should be treated specially which is postulated by the neo-classical school of thought has over time led to a new approach towards administration of juvenile justice. This is borne out of the special nature of children which requires some level of expertise in other field which may not necessarily be legal fields. There is the need for the interactions of law with other fields in the social sciences such as psychology and sociology. Indeed, according to Kutnjak[28] "knowledge of law is particularly important for mixed tribunals, but knowledge of other fields or extensive life experience may be important for resolution of cases as well."

Therefore, some jurisdictions have introduced a system wherein judges (otherwise known as professional judges) will hear cases on juveniles with either sociologist or psychologist who are usually referred to as assessors or lay judges. This is not a new practice in juvenile justice administration where mixed tribunals are adopted. For instance, studies have shown that some countries such as Croatia and Germany allowed people with degrees in "educational studies and parenting experience to sit as lay judges in cases involving juvenile defendants"[29] In the context of juvenile justice, mixed tribunal have been particularly helpful. Lay judges from other fields have been really impactful. In some jurisdictions, their role in juvenile justice has been unequivocally noted. For example, in Croatia, it is required that "in criminal cases concerning juveniles that lay judges be selected from the ranks of professors, teachers, and other persons with experience in juvenile education"[30] The rationale for this requirement has been postulated by Perron[31] when he noted that

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25 Sanja Kutnjak Ivkovic (n16)

26 Sanja Kutnjak Ivkovic, 'Ears of the Deaf: The Theory and Reality of Lay Judges in Mixed Tribunals' 2015 90(3) Chicago-Kent Law Review

27 Walter Perron, 'Lay Participation in Germany', (2001) 72 Revue Internationale De Droit Penal

28 Sanja Kutnjak Ivkovic (n16)

29 Ibid

30 Ibid

31 Walter Perron (n25)

"educative skills and practical experiences in upbringing are considered as necessary in juvenile affairs".

In Africa, Mixed tribunal has recently been associated with the South African justice system[32] while the approach is only adopted in juvenile justice system in Nigeria[33]. Mixed tribunal has a lot of advantages when considered within the context of advancing the needs of special class of people. According to Kutnjak[34], some of the benefits of introducing "Mixed tribunals" into the legal system is that:

> lay participation will democratize the criminal justice process and enhance its legitimacy. It is also said to promote justice and equity. Mixed tribunal also promotes community values and social justice and gives room for citizens to participate in justice administration. Finally, it also prevents tyranny.

Overall, the application of the concept of Mixed tribunals in other fields have been hailed as bringing in a new experience in justice administration[35]. In aligning with this position, Pomorski[36] reiterated that "lay participation aligned the verdict with public opinion, contributed toward professional judges' better performance and enhanced the court's independence". It therefore cannot be gainsaid that mixed tribunals bring positive features to legal system of any country.

Methodology and Design of the Study

The two major methodological approaches for research in law were adopted for this research. The author followed the analytical and qualitative methods. The analytical method adopted involves content analysis of the existing legal framework to assess the extent of compliance with the requirement of mixed tribunal in the administration of juvenile

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[32] Milton Seligson, 'Lay Participation in South Africa from Apartheid to Majority Rule', (2001) 72 Revue Internationale de Droit Penal 273-284

[33] Abdulraheem-Mustapha, M.A. Child Justice Administration in Africa (Palgrave Macmillan, Springer Nature 2019) 1-280, Etannibi E. Alemika and Innocent C. Chukwuma, 'Crime Statistics and Information Management in Nigerian Justice and Security Systems' in Etannibi E.O. Alemika & Innocent C. Chukwuma (eds), Crime and Policing in Nigeria: Challenges and Options (Cleen Foundation 2005)

[34] Sanja Kutnjak Ivkovic (n16)

[35] Stefan Machura, Stephanie Jones, and Alannah Hemmings, 'National Identity and Distrust in the Police: The Case of North West Wales' (2018) 16(1) European Journal of Criminology

[36] Stanislaw Pomorski, 'Lay Judges in the Polish Criminal Courts: A Legal and Empirical Description' (1975) 7(2) Case Western Reserve University

justice in Nigeria. The qualitative method involved both doctrinal and non-doctrinal approaches.

The sample

The study cuts across the six geo-political zones of Nigeria and the cities in which the samplings were drawn include Bauchi, Adamawa, Ilorin, Gombe, Lagos and Port Harcourt respectively. The criterion for the selection was based on the fact that they are cosmopolitan and industrial cities compared to other States in each of the zones. The cities selected represent the three-major socio-ethnic groups in Nigeria. Besides, the reason for choosing the six States has to do with the domestication of CRA in three of the States (Kwara, Lagos and Rivers States). The remaining three States (Bauchi, Adamawa and Gombe States) still apply the old CYPA. The selection is to show the flaws in the non-uniformity of the trial of juvenile offenders under both legal regimes of CYPA and CRA.
The research further used multi-stage purposive sampling and simple random sampling techniques in the administration of the survey instrument. Purposive sampling technique was adopted primarily because the research centered on the stakeholders who are directly involved in the navigation of juvenile justice system. While the simple random sampling technique was used to select the respondents because of the non-availability of a sampling frame for the target population.

The Instrument and Administration

The doctrinal approach employed in this research is through reliance on materials in the libraries and other existing databases sourced from primary and secondary materials including provisions in the relevant laws governing the juvenile justice administration. Other sources are scholarly books and articles including research reports, reports of judicial and investigative panels and reports by human rights. The non-doctrinal approach adopted was descriptive survey administered through questionnaire and in-depth interviews. This design has been acclaimed as one of the best whenever studies intend to describe existing current situations. According to Hassan[37], survey research involves direct contact with a population or sample that has characteristics, personality qualities or attributes which are relevant to a specific investigation. Also, Babbie[38] contended that "survey is an excellent method for measuring the attitude and opinions of people within a

[37] Hassan T, 'Understanding Research in Education' (Merrifield Publishing Company, 1995).

[38] E. R. Babbie 'The practice of social research' in C. A. Belmont (ed), (Wadsworth Publishing Company 2010)

large population". The rationale for employing these methods was informed by the study's interest in an encounter between a juvenile delinquency and the juvenile justice administration. These tools are used to investigate the extent of compliance with the existing legal framework in the process of adjudication of the juvenile offenders by the mixed tribunal in the Nigerian Family/Juvenile court.

Analysis methods

The target population of 216 respondents (36 in each of the cities) was therefore randomly selected and sampled as shown in table 1 below. Out of 216 copies of the questionnaire distributed, 180 copies representing 83.33% response rate were returned and this is shown in table 1 below. Simple percentage and frequency tables were used to present and analyze the data in addition to the in-depth interviews in order to determine the impact of mixed tribunal on the administration of juvenile justice in Nigeria and the potential effects on subsequent attempts at reformation, rehabilitation and reintegration of juveniles into the society.

Table 1: Background Information of Sampled Population and Analysis of Data Collection

Participants	Unit of Analysis	Occupation	Location	Age	Return of Questionnaire	Percentage
Stakeholders 1-180	Judiciary, Custodial institutions, Prisons/Correctional centres, Legal practitioners, Ministry of Social Welfare and Development	Judges, Magistrates, Borstal staff, Remand homes staff, Staff of Reformatory schools, Staff of Approved schools, Staff of Prisons/Correctional centres and Social workers	Ilorin (Kwara State), (36), Lagos (Lagos State), (36), Port Hacourt (Rivers State), (36), Bauchi (Bauchi State), (36), Adamawa (Adamawa State), (36) and Gombe (Gombe State), (36) Total 216	20≤65	Ilorin, (34), Lagos, (31), Port hacourt, (27), Bauch, (30) Adamawa, (28), Gombe, (30) Total 180	Ilorin 18.9, Lagos 17.2 Porthacourt 15 Bauchi 16.7 Adamawa 15.5 Gombe 16.7

Research Ethics

The investigation was carried out with a very careful consideration of the ethical issues involved. First, respondents were carefully selected using well-defined criteria. Secondly, respondents were made to understand several times that taking part in the study was strictly optional and they are free to opt out at any point or refuse to answer any question they are not comfortable with. Privacy issues were also taken into consideration in that all these disclosures made by respondents were held on a strictly confidential basis. Finally, the researcher made significant effort to ensure that consent received from respondent were strictly informed consent. Also, the researcher sought and obtained ethical approval from the University of Ilorin Research Ethical Review's Board.

A Critique of the Legal Framework Governing Mixed Tribunal in the Administration of Juvenile Justice in Nigeria

Juvenile delinquency has been explained as an anti-social behavior that is beyond parental control and therefore subject to legal adjudication[39]. Society takes this behavior as an indication that the person is out of control and must be controlled through the legal system. The Nigerian's juvenile justice system was established in 1914 and modelled after the British model[40] with juvenile court proceedings in two courts - a higher court consisting of a single judge and a magistrate court consisting of a magistrate and two laypersons, including a woman. Proceedings were formal and intended to protect the juvenile's rights. As a sign of commitment to reduce juvenile delinquency, Nigeria signed both the United Nations Convention on the Rights of the Child (UNCRC) (1989) and the African Charter on the Rights and Welfare of Child (Children's Charter) 1990 in order to reform and strengthen its child justice laws with the enactment of CRA. The UNCRC and the African Children's Charter affords the juvenile offender accused of having infringed penal law the opportunity of having the right to "special treatment in a manner consistent with the child's dignity and worth". They both put in place "a child-friendly approach in the adjudication and disposition of matters in his/her best interest"[41].

It is pertinent to note that the earliest law on the administration of juvenile justice before the enactment of CRA is the CYPA. It came into being in 1943 to guide the administration of juvenile justice system which in turn constitutes part of the pillars of the Nigerian criminal justice system with corresponding laws in various States of the federation. The CYPA was enacted to make provision for the welfare of young persons, the treatment of young offenders and the establishment of juvenile courts. Apart from the CYPA, other complementary statutes applicable to juvenile justice administration in Nigeria include the Criminal Procedure Act,[42] the Criminal Procedure Code,[43] 1960; the Criminal Code and Penal Codes1965 and the Sharī'a Penal and Criminal Procedure Code Law[44].

In proceedings against a juvenile, the law under section 6 of CYPA deals with the issue of mixed tribunal in the trial of juvenile offenders. Section 6(1) of the Act states that, the

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39 A. Ayua & I. Okagbue, 'The Treatment of Juvenile Offenders and the Rights of the Child' in I. A. Ayua and I.E. Okagbue (eds), The Rights of the Child in Nigeria (Nig. Inst. of Advanced Legal studies, 1996) p. 240

40 Alemika E.E.O, 'Socio-Economic and Criminology Attributes of Convicts in Two Nigerian Prisons' (1988) 16(3) Journal of Criminal Justice 197-207

41 See Article 3, UNCRC and Article 17, African Children's Charter.

42 Cap C41, Laws of the Federation of Nigeria, 2004

43 the Criminal Procedure Code Cap C46

44 Zamfara State Court Law, 1999 and 2000. Zamfara State Criminal Procedure Code Law 2000, No. 1 vol. 4

Juvenile court for the purpose of "hearing and determination of cases relating to children or young person shall be constituted by a Magistrate sitting with such other persons, if any". "Such other persons" as indicated in the above section connoted laypersons or assessors who are not learned in law.

Instructively, the rationale for the provision of section 6 of CYPA on the composition of the mixed tribunal is to ensure that law and fact are the yardstick of determining the guilt of the juvenile. According to Osinbajo[45], he argued that:

> the essential perspective of the rules is to perceive juveniles as requiring both an interventionist and preventive action based on the recognition that the young owing to the early stage of their development require particular care and assistance with regard to their physical, mental and social development and legal protection in conditions of peace, freedom, dignity and security.

Further, Sections 6(2), 6(4) and 12(3) of the CYPA provide that a court when hearing charges against children or young persons-

> shall, unless the child or young person is charged jointly with any person not being a child or young person, sit either in a different building or room from that in which the ordinary sittings of the court are held, or on different days or at different times from those at which the ordinary sittings are held.

The rationale is ostensibly to prevent contamination of juveniles by adult offenders and possibly ensuring that a juvenile court maintains its peculiar character and tenor[46]. The provision of section 6 for instance further "guarantees the right of the child to be tried in a separate court and to the exclusion of the public". The purpose of this provision is to protect the privacy of the young offenders and also to protect him/her from the effects of stigmatization that may result from public trial. Surprisingly, in practice, there is no adoption of mixed tribunal in the Juvenile court of the States that apply CYPA[47]. Thus, non-compliance and violation of the law on the mixed tribunal had an adverse effect on the rehabilitation of juvenile offenders. Studies have shown that as at 2013, juvenile offenders occupied more than half of the capacity of custodial institutions for offences ranging

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[45] Okoro H. C. 'Juvenile Justice Administration in Nigeria and International Standards on the Rights of the Child' in Okoro H. C (ed) Issues in Justice Administration in Nigeria, 2003

[46] Y. Osinbajo , 'Juvenile Justice Administration in Nigeria', (1991) 6 *Journal of Law and Criminal Justice*

[47] M. Abdulraheem-Mustapha, 'Child Justice Administration in Africa' (Palgrave Macmillian 2019)

from "property offences at 30,72 per cent; offences against the person; offences against the state; moral and victimless offences[48]".

The adverse effect of non-compliance with the law leads to remand of the juvenile offenders or children in need of care and protection at "squalid Correctional centres and they are [being] deprived of salutary impact of reformative and rehabilitative custodial environment"[49]. The non-compliance with the provision dealing with mixed tribunal under the CYPA also denies juvenile offenders the advantage of the provision of diversion (Section 15) which is an alternative treatment of juvenile confinement in custody at the pre-trial stage as well as a means of disposition after determination of guilt of juvenile offender. This is evidenced by the population of juveniles in remand homes, approved schools and Borstal institutions as indicated above.

Despite the laudable provisions of CYPA, it falls short of the provisions of the UNCRC (Articles 2, 3, 6, 37 and 40); and the African Children's Charter (Article 17). For instance, Section 27 "gives the court powers to make direction in respect of a child whose parent or guardian prove that he/she is beyond parental control" and this provision creates hardship for juvenile rather than correcting him/her. This is because the section portrays the juvenile who is merely beyond parental control as a criminal or a person who has committed a crime. By section 27 thereof, the CYPA fails to articulate the principle of the best interest of the child because it is capable of criminalizing, stigmatizing and having recidivistic consequences on the child.

Based on the foregoing, in 2003; the "Child Rights Act" (CRA) was enacted to replace the existing legislation on the administration of child justice. The objective of the CRA is to remedy the inadequacies in the CYPA and other associated laws. It has been argued that the CRA seeks to harmonize several existing laws regulating the administration of juvenile justice in Nigeria. It allows all persons and authorities handling cases involving children "the use of discretionary powers at all levels of the child justice system"[50]. By

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[48] A. Idyotough 'Operational Research Report on Challenges of Borstal Institutions, Remand Homes, Reformatories and Approved Schools in Nigeria'. (Federal Department of Social Welfare, Federal Ministry of Women Affairs and Social Development, Abuja, Nigeria, 2013)

[49] R. Chinwe and Naomi Akpan, 'Research Findings of Juvenile Justice Administration in Nigeria', (Constitutional Right Project, (CRP), Lagos, 2003)

[50] Section 208 CRA
Owasanoye and Wernham Owasanoye , 'Street Children and Juvenile Justice System in Lagos State of Nigeria', in B. Owasanoye, Marie Wernham (eds), (Human Development Initiative 2004)

this, the Act[51] empowers "the police, prosecutors or any other person dealing with a case involving a child offender to dispose of cases without resorting to formal trial by using other means of settlement including supervision, guidance, restitution and compensation of victims especially in non-serious offences"[52].

However, in a situation where formal trial is necessary, the Act also recognized mixed tribunal in the composition of the judges by establishing "Family Courts"[53]. These Courts operate at the High Court and Magistrate Court levels and they have been vested with the jurisdiction to hear all civil and criminal cases[54] The composition of the High Court level by virtue of section 152(1) shall consist of such member of: "(a) Judges of the High Court of the State and Federal Capital Territory, Abuja; and (b) Assessors, who shall be officers not below the rank of Chief Child Development Officers".
By section 152(3) of the Act, "the High Court shall be duly constituted if it consists of a Judge and two assessors, one of whom has experience in dealing with children and matters relating to children preferably in the areas of child psychology education". At the Magistrate levels, the composition shall include "a Magistrate and two assessors who shall be a woman and other person who has attributes of dealing with children, preferably in the area of child psychology education"[55]. The reason behind the establishment of mixed court/tribunal for children under the CRA is to achieve a practical way of ensuring that children are protected during the criminal trial process.

The idea of Family Court for juvenile justice by the Act is commendable. However, the practice of having only one assessor or no assessor by some Family/Juvenile courts as well as having a judge determine both adult and juvenile cases make the existing law to be inadequate. Thus, children's right may not be properly protected where the same judges who sit over adult cases in regular courts are saddled with the responsibility of hearing juvenile cases. This has been pointed out by Owasanoye & Wernham[56] that there is no separation or demarcation of the Court by specialized Family/Juvenile Courts or judges. The fact remains that Section 152 of the CRA that allows Magistrates who sit at regular Courts to be designated as juvenile judges, jeopardizes the requirement of specially-trained personnel and also affects the judgment of the judges as there is the strong likeli-

51 Section 209 CRA
52 Ibid
53 Section 149 CRA
54 Section 150 CRA
55 Section 153(1)(2)(3)
56 Owasanoye and Wernham Owasanoye (n44)

hood that when they are appointed Family/Juvenile courts' judges, they tend to focus more on the crime and less on the status of the offender and are unable to distinguish between the adult and the juvenile offender.

The use of existing court structures for juvenile trial as discussed above derogates from the international standards and exposes the juveniles to the formal criminal process. This diminishes the right of the child to separate legal treatment in accordance with international standards which stipulate the separation of juvenile offenders from adult criminals at all stages of the process. In addition, since the Family/Juvenile Courts are located within the regular Court premises, it defeats the objective of the UNCRC and African Children's Charter of preventing mingling of juvenile with adult criminals[57], unlike the adult courts, is supposed to always aim at providing the child/juvenile with the same care and protection that the juvenile would have been given by the juvenile parents under the doctrine of *'parens patrae'* (the natural responsibility of parents to take care of their children). Accordingly, mixed tribunal in Family/Juvenile court should have special training in child development and must be acquainted with contemporary social problems, especially as they affect children and young persons.

Challenges of Non-Compliance/Implementation of the Legal Framework on Mixed Tribunal under the Nigerian Child Rights Act/Law

The starting point in the examination of the challenges of administration of juvenile justice in Nigeria is the assessment of the extent of compliance with the provisions relating to mixed tribunal as same is cardinal in determining whether or not children in conflict with the law are adequately protected. Unlike the processes under the general criminal justice system, trial under the administration of juvenile justice is part of the criminal process that is heavily regulated by special laws. Much like other jurisdictions, laws governing juvenile justice system must prescribe what the mixed tribunal is expected to do, its composition and requirement. However, the most challenging aspect of the extant laws especially the CYPA and CRA with respect to mixed tribunals in the administration of juvenile justice in Nigeria remains a mirage. For instance, the provisions of CRA (Part XIII) have not explicitly details the roles of assessors when dealing with matter relating to children. Also, unconcerned and apathetic attitudes of the officials associated with

[57] Report of the seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders: CA/Conf.121/22/Rev., 1.

these Acts which result from the lack of adequate training have been documented in many literatures[58].

Secondly, there are considerable failures in implementing the laws regulating Family Court. Arguably, the challenges may be associated with the financial crunch in the institutions involved in the progress of implementation of this law[59]. As a result, Family Court thrives under the shadow of the adult criminal justice agencies. Moreover, the Family Court adjudicatory cadres are drawn from the pool of the magistrates who handle adult cases. The requirement of composition of Family Court largely remains unfulfilled resulting in the delay in the disposal of cases and committal of juvenile offenders into custodial institutions without considering divisionary measures as an alternative measure of disposing the case.

More importantly, the CYPA and CRA are inadequate as they placed relatively greater emphasis on institutional set-up as compared to non-institutional services. The facilities and services in the juvenile institutions in different States are found to be grossly inadequate and there is no positive effort by the government to standardize them. There is also a dearth of services and programs for the children in conflict with the law or children who are beyond parental control. There is no index of performance measurement of the institutions in the area of juvenile justice. Therefore, there is no way of knowing the quality of performance of these custodial institutions[60].

In addition, the CRA has not repealed other existing legislation on the administration of juvenile justice in Nigeria, particularly the CYPA. Some States in the country are still making use of the CYPA; the Criminal and Penal Codes in dealing with issues of juvenile justice administration[61]. The applicability of the CRA also depends on its domestication by States in Nigeria in order to bring uniformity to the treatment of juveniles, as it is a federal Act on a subject which is not within the exclusive legislative competence of the federal government which needs to be domesticated by all the thirty-six States of the federation[62]. In other words, non-domestication of the CRA by thirteen States out of the thirty-six States of the federation hinders the uniformity of its application and results in the

58 M. Abdulraheem-Mustapha (n41)

59 Ibid

60 Ibid

61 Unicef, 'Nigeria: Several Nigerian States Urged to Adopt Federal Child Protection Law', available at <http:// www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf> , accessed on 30th May, 2023

62 Owasanoye and Wernham Owasanoye (n44)

adverse effect on the rehabilitation and reintegration of the juvenile offenders into the society[63].

Arguably, the practice of mixed tribunal under the juvenile justice system has not been coordinated as participation of assessors or lay judges in those States that operate mixed tribunal is very weak. The reason may be attributable to the size and composition of mixed tribunals which at the end has adverse effect on the juveniles' reintegration into the society. This is a situation where the Magistrate judges outnumbered the assessors at trial of juvenile offenders or having no assessor as shown in table 2. Similar perception also resonates in other countries as expressed by Perron[64] and Kutnjak[65] that mixed tribunals in Danish, Germany and Croatia "range from two to nine lay judges whose contributions may vary due to size and composition". Therefore, in a situation where professional judges outnumbered the assessor, only laws will be applicable against facts which should also be considered before arriving at any conclusive judgement on the juvenile offender as the assessor lacks legal knowledge or lacks understanding of the legal norms. In most cases, the assessor either remains passive or makes minor contribution to the resolution of cases at the trial. The above perception resonates across other jurisdictions that operate mixed tribunal. Examples of those jurisdictions include China where the study of Yue (2001) shows that "the lay judges' contributions to the Chinese trials is very weak". Empirical survey carried out by Kubicki and Zawadzki[66] in Poland also confirmed this perception when their study shows that "presiding professional judge dominates and that lay judges are perceived as not being very active during trials and their contributions are evaluated as not important". Casper and Zeisel[67] have made an overall summary of the lay judges/assessors' contributions in their study as "minor contribution to resolution of cases".

Similarly, it can further be argued that inadequate preparation for trials of juveniles by the lay judges hinders compliance with the extant law. This is due to the fact that case dossiers are either locked at the professional judges' chambers or in the court's admin-

63 M. Abdulraheem-Mustapha (n41)

64 Walter Perron (n25)

65 Sanja Kutnjak Ivkovic (n16)

66 Kubicki L. and S. Zawadzki, 'Lay Assessors Judges in Penal Proceedings in the Light of Empirical Research', in Udzial Lawnikow .W. Postepowaniu Karnym, Leszek Kubicki & Sylwester Zawadzki (eds), Poland 1970 P. 97-111

67 Casper, Gerhard, and Zeisel, 'Lay Judges in the German Criminal Courts' (1972) 1(1) The Journal of Legal Studies p.135

istration offices where lay judges/assessors have no access to before the date fix for the trial. Practically, cases on juveniles are filed in court under the supervision of the presiding magistrate who in turn notify the assessors of the date of hearing the case without giving the assessors the case file to study prior to the hearing date. This practice is also not uncommon with some jurisdictions like Germany, Croatia; Poland, etc. For instance, in Germany, the study of Machura[68] shows that "German lay judges have no opportunity to read the case dossiers in preparation for the trials".

Although, in Danish, the study of Garde (2001) shows that "in really big cases involving economic crime, it is customary for assessors to have a copy of the dossier themselves". Arguably, lack of full preparation for the trial by the assessors/lay judges in practice due to inaccessibility of the case dossiers creates obstacles for their full and active participation. Compliance with the law will allow the mixed tribunal to apply an alternative measure for dealing with the juvenile offender adjudged delinquents such as diversionary measures provided in the extant laws. The provision of at least two assessors who are laypersons will holistically look at the facts surrounding each of the juvenile case than strictly adhering to law by both Family and Juvenile Courts in Nigeria.

Results

This section examines the empirical data gathered in respect of the extent of compliance of the laws on mixed tribunal in the administration of juvenile justice in Nigeria. This is for the purpose of determining the effectiveness or otherwise of the existing legal framework in addressing the challenges faced by juveniles in their trials by the mixed tribunal. Report has shown that some States in Nigeria, comprising Adamawa, Bauchi; Borno; Enugu; Gombe; Kano; Katsina; Kebbi; Niger; Sokoto; Taraba; Yola and Zamfara have neither assessor nor lay judges in the adjudication of juvenile offenders[69]. Only a Magistrate/Judge sits alone without any assessor[70]. It has also been shown from the report that some States with assessors are in the field of Social Work instead of child psychology education as stipulated by the law (Sections 152 and 153, CRA)[71].

The implication of the above position has been revealed in Table 2 of the author's fieldwork where majority representing 88.9% (160) out of the 180 respondents strongly agreed with the author that "trial of juvenile offenders by Magistrate with one assessor adversely affects juvenile offenders". In another phase of the questionnaire, the findings

[68] S. Machura, 'Understanding the German Mixed Tribunal' (2016) 36(2) Prifysgol Bangor University

[69] See Judicial Newsletter Survey, 2021

[70] Ibid

[71] Ibid

as shown in table 2 below revealed the responses of 83.3% (150) of the respondents who hold the view that "non-compliance with existing laws on mixed tribunal adversely affects the trial of juvenile offenders". Table 2 also shows the effect of having a single assessor as against the provisions of the laws where 88.9% (160) of the respondents in a fieldwork survey by the author hold the view that trial of juvenile offenders by Magistrate and one assessor adversely affects the rights of the juvenile offenders.

It was also revealed from the fieldwork survey conducted by the author where 88.9% (160) of the respondents expressed their views that juvenile offenders committal to custodial institutions by the Family/Juvenile court were tried for status offences.
Table 2 further revealed the inadequacy in the provision of Family court when the responses of 52.8% (95) of the respondents in the author's fieldwork revealed that "inadequate Family/Juvenile courts' facilities adversely affect the trial of juvenile offenders". The above perception corresponds with the view expressed by the Presiding Magistrate of the Kwara State Family Court in an interview that:

> they sit in Chambers to hear and determine juvenile cases, yet
> these sittings are still within the conventional Court environment.
> This is against the provision of the Child Right Law in Kwara State
> which requires a separate Court environment for the trial of juvenile
> offenders. It also exposes the juvenile to adult criminals.

In another interval, some of the respondents interviewed at Port Harcourt on the rights of child offenders to separate court and to the exclusion of the public during trials under the Nigerian juvenile justice system have this to observe: "Children are not protected under the Nigerian juvenile justice system because there are no separate courts to try their offences". In addition, more than half of the respondents in Table 2 supports the above interviews where 52.8% (95) of them hold the views that the rights of child offenders to separate Court and to the exclusion of public during trials are not adequately protected under Nigerian juvenile justice system.
In table 2 below, the respondents were required to express their opinions on a 5-point Likert type scale (5= Strongly Agree (SA), 4 = Agree (A), 3 = Disagree (D), 2 = Strongly Disagree (SD) and 1 = Undecided (UD)).

Table 2: The Effectiveness of the Extant Laws on the Mixed Tribunal in the Administration of Juvenile Justice in Nigeria

S/NO	ITEMS	SA	A	SD	D	UD	TOTAL
1	Respondents' views on whether the enactment of Child Right Act is Adequate for the trial of juvenile offenders	11 6.1%	14 7.8%	90 50%	60 33.3%	05 2.8%	180 100%
2	Respondents' views on whether the Refusal to Enact Child Right Law by some States adversely affect the performance of the mixed tribunal in the trial of juvenile offenders	80 44.4%	65 36.1%	10 5.6%	18 10%	07 3.9%	180 100%
3	Respondents' views on whether the Family/Juvenile Courts indulge in requesting for social inquiry report of the juvenile as provided under the law	11 6.1%	14 7.8%	90 50%	60 33.3%	05 2.8%	180 100%
4	Respondents' views on whether the mixed tribunal adhere to the existing legal measures that regulate juvenile custodial institutions in Nigeria	10 5.6%	18 10%	80 44.4%	65 36.1%	07 3.9%	180 100%
5	Respondents' views on whether the Juveniles Institutions are adequately funded	10 5.6%	18 10%	80 44.4%	65 36.1%	07 3.9%	180 100%
6	Respondents' views on whether inadequate Family/Juvenile Courts facilities adversely affect the trial of juvenile offenders	50 27.8%	45 25%	35 19.4%	45 25%	05 2.8%	180 100%
7	Respondents' views on whether the rights of child offenders to separate Court and to the exclusion of public during trials are adequately protected under Nigerian juvenile justice system	10 5.6%	18 10%	80 44.4%	65 36.1%	07 3.9%	180 100%
8	Respondents' views on whether juvenile offenders' committal to custodial institutions by the Family/Juvenile Courts were tried for status offences	100 55.6%	60 33.3%	05 2.8%	13 7.2%	02 1.1%	180 100%
9	Respondents' views on whether trial of juvenile offenders by Magistrate with one assessor adversely affects juvenile offenders	100 55.6%	60 33.3%	05 2.8%	13 7.2%	02 1.1%	180 100%
10	Respondents' views on whether Juve-	10	18	80	65	07	180

	nile Custodial Institutions Achieve the Desire Objectives	5.6%	10%	44.4%	36.1%	3.9%	100%
11	Respondents' views on whether there are Adequate Functional Programs in Nigerian Custodial Institutions	05 2.8%	13 7.2%	100 55.6%	60 33.3%	02 1.1%	180 100%
12	Respondents' views on whether juvenile offenders should be given diversionary measures for treatment instead of committal to custodial institutions by the mixed tribunal	100 55.6%	60 33.3%	05 2.8%	13 7.2%	02 1.1%	180 100%
13	Respondents' views on whether committal of juvenile offender to custodial institutions should be a measure of last resort.	50 27.8%	45 25%	35 19.4%	45 25%	05 2.8%	180 100%
14	Respondents' views on whether facts surrounding juvenile offence should be the basis of determining the best interest of the juvenile and not law	100 55.6%	60 33.3%	05 2.8%	13 7.2%	02 1.1%	180 100%
15	Respondents' views on whether non-compliance with the existing laws on mixed tribunal adversely affects the trial of juvenile offenders	90 50%	60 33.3%	14 7.8%	11 6.1%	05 2.8%	180 100%

Source: Field Survey, 2021

The result also covers the effectiveness of custodial institutions in figure 1 below. It has been established that Borstal institution was ranked first in the achievement to its set objectives of rehabilitation and reformation of the juvenile offenders. It is therefore very surprising that there are only three Borstal institutions in Nigeria. Considering the major perception that Borstal institutions are effective; there is a need for more of Borstal institutions in Nigeria to reduce congestion and address juvenile delinquency. In an interview with a presiding Magistrate of juvenile court at Kaduna State, she said:

> the corrective institutions set up to reform young offenders are now overstretched and there is need for a critical examination of the existing framework for redress as well as embarking on a pragmatic program of action to achieve desired changes is long overdue.

This confirms the position of the social worker interviewed at Lagos State Remand homes that "about 70% children are in detention and each day, more children were brought into the home by the order of the court." As it can be seen in Table 2, majority of

respondents representing 80.5% (145) strongly disagree that government has provided enough funding. It is interesting to listen to the concurrent statements made by some respondents about government commitment to juvenile justice administration. A Welfare officer and Correctional officer in an interview at Port Harcourt and Adamawa said, "the government is not committed to juvenile justice administration in Nigeria as this can be seen from inadequate funding and personnel in the institutions of juvenile justice". From the respondents examined, 88.9% (160) of them strongly agreed that "there are inadequate functional programs in Nigerian custodial institutions". The above finding is also buttressed with responses garnered from some respondents interviewed particularly Remand Home, Approved School and Reformatory Schools' officials in Kwara, Lagos and Adamawa States to the extent that, "the institutions suffered from lack of adequate facilities, funding, personnel, etc." This confirms the interviews conducted in Borstal Institutions in Kaduna and Kwara States where some officers noted that:

> one of the reasons for congestion in the Borstal institution is that the Courts do not presume juveniles to be innocent since many of the juveniles were taken to court by their parents and adjudged to be beyond parental control.

When some of the respondents were interviewed on the rate of juvenile justice administration in Nigeria, one of the respondents interviewed expressed that: "the level of juvenile justice administration in Nigeria is still not encouraging due to many abuses". Below are some comments from the respondents on the rating of juvenile justice administration in Nigeria.

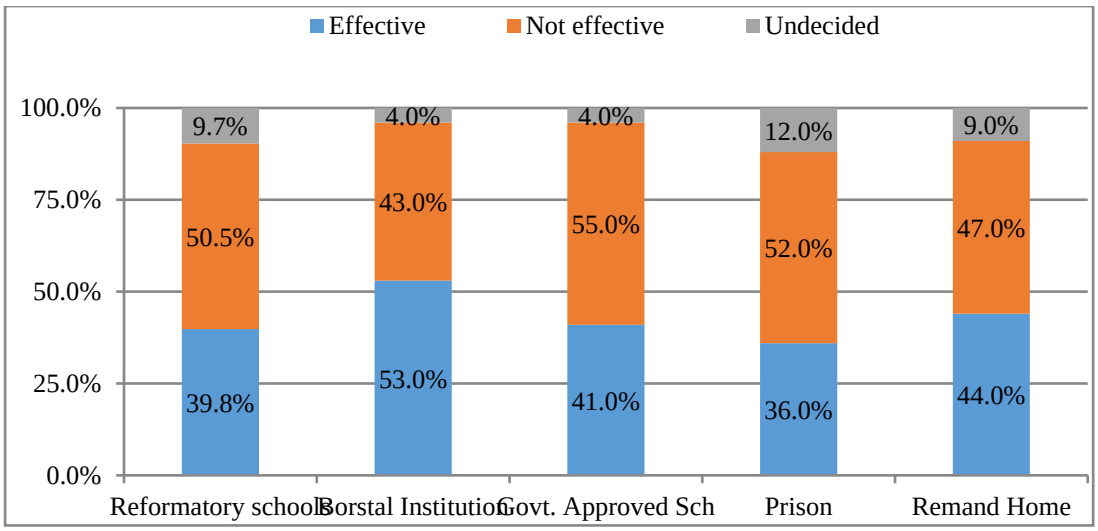
> Children were tried like adults; they were jailed and incarcerated with adults instead of being given more reform-oriented, non-custodial forms of sentencing, thus making children who should have been reformed or rehabilitated either traumatized or hardened by crime.

The above position is in tandem with the observation of UNICEF[72] that Correctional centres are so congested that juveniles are usually not separated from adults and hardened criminals contrary to the provisions of the law. They also faced all the hazards and dehumanizing conditions of incarceration, including poor feeding and clothing, exposure to

[72] Unicef (n55)

diseases, and the risk of physical and sexual abuse. UNICEF[73] also observed that Remand homes, Approved schools, Borstal institutions or Correctional centres "are not equipped to serve their statutory functions and that most of the juvenile institutions were "merely custodial rather than treatment-oriented".

Fig. 1: Respondents' views on the Effectiveness of the following Custodial Institutions in Juvenile Justice Administration



Source: Field Survey, 2021

The author's fieldwork as shown in table 2 above confirms the above position where 80.5% (145) and 88.9% (160) at different intervals of the questionnaire expressed that "juvenile custodial institutions do not achieve the desire objectives due to the fact that there are no adequate functional programs in the Nigerian custodial institutions". This may also be connected with the challenge of funding of the custodial institutions which has been confirmed by 80.5% (145) of the respondents in the fieldwork survey by the author as shown in table 2 above that "juvenile institutions are not adequately funded."

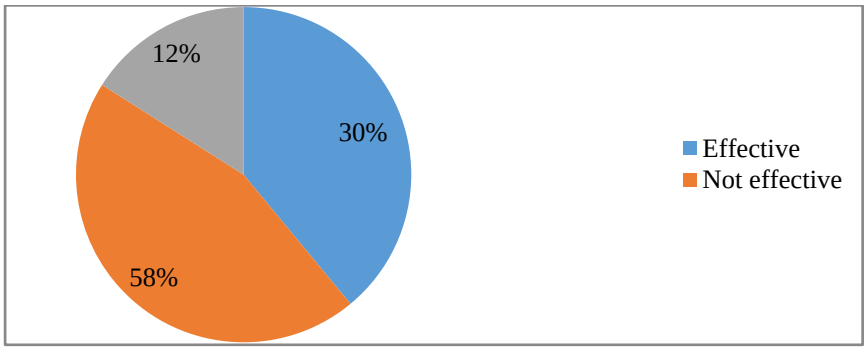
It will therefore be interesting to reveal the findings of the author's fieldwork survey where 83.3% (150) and 80.5% (145) of the respondents at different phases of the questionnaire as shown in table 2 above hold the views that the enactment of Child Rights Act is inadequate for the trial of juvenile offenders and refusal by some States to domesticate Child Rights Act adversely affect the performance of the mixed tribunals in the trial of juvenile offenders.

[73] Ibid

In addition to the questionnaire phases in this study are interviews conducted by the author on the adequacy of Child Rights Act in Nigeria. One of the respondents in an interview expressed that: "the Child Right Act is not sufficient to address the inherent problems in the juvenile justice administration in Nigeria especially those provisions relating to custodial institutions". The respondent went further to express thus "the Act is not explicit in determining the best interest of the child". Furthermore, when some of the respondents were told to freely comment on their responses in an interview, one of them, a presiding Magistrate in Bauchi State contends that: "the inability to implement the Child Right Law by some States in the federation affects juvenile justice administration".

This argument is in line with the view expressed by 58% of the respondents in a fieldwork survey carried out by the author as shown in figure 2 below that "mixed tribunal in the administration of juvenile justice in Nigeria is ineffective". To buttress the above assertions is the fieldwork survey conducted by the author as shown in Table 2 above where 83.3% (150) of the respondents strongly disagreed with the author that "Family/Juvenile courts indulge in requesting for social inquiry report of the juvenile as provided under the law". This may not be unconnected with the responses of the respondents in another interval of the questionnaire in Table 2 above where 80.5% (145) of them hold the view that mixed tribunals do not adhere to the existing legal measures that regulate juvenile custodial institutions in Nigeria.

Fig. 2: Respondents' views on the Effectiveness of Mixed Tribunal in the Administration of Justice Administration



Source: Researcher's Field Survey, 2021

Discussion

In practice, the Family Court at Magistrate levels has at least three Magistrates and an assessor from the Ministry of Women Affairs and Social Development whose role is merely to conduct social investigation and the submission of a report with recommenda-

tion to the Magistrate. The decision is normally reached by the Presiding Magistrate after considering the rules of court and the Child Right Law of the respective State. This argument has been buttressed in an interview conducted by the author where one of the respondents expressed that "there is need to repeal the Nigerian law on juvenile justice as the fact surrounding each case of the juvenile should be the basis for his/her treatment and not law". The respondent went further to say that "reliance on facts and not law will reduce juvenile recidivism and committal of juveniles to custodial institutions."

It is therefore argued that the views of the respondents can only be achieved if the composition of mixed tribunal is strictly adhered to. Arguably, multiple number of Magistrate judges or single assessor for the trial of juvenile offender will result into institutionalization of juvenile offender in the custodial institutions. This practice is against the rationale behind the provision of the law which adversely affects the rehabilitation of juvenile offenders[74]. They are being incarcerated in custodial institutions without the usage of diversionary measures as an alternative to institutionalization. It has been identified in this study that many jurisdictions including Nigeria have mixed tribunals as part of juvenile justice system but have been faced with a lot of challenges. The analysis of the author's fieldwork and review of literature from other jurisdictions show that compliance with the requirement of mixed tribunal is very low in Nigeria and the practice of mixed tribunals in other jurisdiction under study were also weak. The overall implication of the statistical analysis in Nigeria shows that juvenile justice system does not really factor in the best interest of the child.

Some of the findings from the empirical data are consistent with the existing body of knowledge which validates the results[75]. The findings do not claim to have all the answers to the many complex questions and challenges that face the trial of juvenile offenders by the mixed tribunal in the Family/Juvenile Courts in Nigeria but have the potential to open up possibilities to start, as well as reinforce further research on mixed tribunals in the administration of juvenile justice. The study emphasizes a position that juvenile offenders should be treated with care, a position where he/she, victims and communities can unite in combating the negative consequences of crime. Arguably the system which does not recognize the need for mixed tribunal only exposes the child to some form of injustice.

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[74] M. Abdulraheem-Mustapha (n41)

[75] Ibid

The findings also emphasize a position of hope for juvenile offenders to start over, hope for victims after being heard and vindicated and hope for communities that they are not losing the fight against crime, repeat offending and moral degeneration.

Similarly, as observed, some States have not enacted the Childs Right Law. This has the implication of absence of uniformity or lack of universal application of the law in Nigeria. Furthermore, the limited number of Borstal institutions in Nigeria is also a huge challenge which significantly impacts negatively on the incarceration of juvenile offenders in squalid Correctional centres. Indeed, one of the reasons for this unfortunate trend is lack of funding. Inadequate trained personnel and paucity of infrastructure are also other challenges. For example, the absence of skilled assessor is a huge challenge to juvenile justice in Nigeria.

Conclusion

Conclusively, the study analysis the extent of compliance with the requirement of mixed tribunal in the administration of juvenile justice in Nigeria. This study is important considering the involvement of lay persons in adjudication of juvenile offences. This is show that Nigerian laws acknowledged the vulnerabilities of offenders who are minors. In the course of this empirical assessment, attempts were made to show that the Nigerian laws are ineffective at all stages of the proceedings of juvenile justice administration due to lack of implementation. In practice, the Family/Juvenile courts do commit juvenile offenders into custodial institutions when placement of child offender in an institution should be a disposition of last resort and should not be ordered unless there is no other way of dealing with the child. Another very critical finding is that the diversionary measures which the CRA provides for is not being complied with. This exposes children to more delinquent behaviors. This study therefore concludes that the law regulating mixed tribunals should be reformed in order to state categorically the roles of assessors/lay judges in the administration of juvenile justice. The laws must establish adequate benchmarks for the scope, composition and contributions of the assessors. It is also recommended that there should be frequency of assessment of assessors/lay judges' participation in a given case in order to determine their activeness. Political will is also recommended in order to have more positive environment for assessors' participation. To this end, there is need for capacity building for juvenile justice institutions as well as overhauling the existing legal framework to ensure effective adherence to the international standards.

LEGAL RESEARCH

8

PREFERENCE AND UTILIZATION OF LAW LIBRARY RESOURCES: A STUDY OF DEPARTMENT OF LEGISLATIVE SUPPORT SERVICES, NATIONAL INSTITUTE FOR LEGISLATIVE AND DEMOCRATIC STUDIES, ABUJA

Maimuna Izah* and
Bethel Uzoma Ihugba**

Abstract

The study examines the preference and use of hardcopy and electronic library resources, using the Nigerian Weekly Law Reports (NWLR) and Law Pavilion as examples, by the Department of Legislative Support Services researchers in National Institute for Legislative and Democratic Studies (NILDS). A purposive sampling method was used, and all 10 researchers in the Department were selected as participants in the study. The semi-structured interview method was used to collect the data. The semi-structured interviews consisted of open-ended questions, which guided the interview process. The study revealed that the researchers are aware of the two law resources, electronic and hardcopy available in the Institute Library. However, the usage, of the electronic, represented by the Law Pavilion, is reported as high and beneficial to their work compared to the hardcopy, represented by the NWLR. Researchers believe that postgraduate students and interns may find it more useful than the researchers do. Based on the findings, it is recommended, among others, that the Library should continue subscription for the Law Pavilion and other electronic resources. Also the Institute Library should create more awareness of the two resources, especially during orientations and should also organize special in-house training for new staff, interns and postgraduate students on the benefits of using these resources and how to use the resources to maximize benefits and value. Also the Institute should prioritise subscription renewal of the Law Pavilion for the DLSS and conduct regular training for staff on the value and use of electronic resources beyond access to case laws. That as a guiding principle the provision of library resources, hardcopy and electronic resources, should be tailored to meet the need of the end users and who should be made aware of the various benefits of each resources and regularly updated on new developments.

Keywords: Electronic Law Resources, Law Reports, Library, Library Service Utilization

* PhD, Director, Institute Library, National Institute for Legislative and Democratic Studies, Abuja
** PhD, BL, Deputy Director, Head, Legal Research Division, National Institute for Legislative and Democratic Studies, Abuja, bethelihugba@gmail.com 09037074135

Introduction

The Department of Legislative Support Services (DLSS) is one of the academic Departments in the National Institute for Legislative and Democratic Studies, Abuja. The Department has two (2) Divisions: Bills and Legislative Drafting and Legal Research Divisions The researchers in the Department, who are all lawyers, are engaged in drafting and analyzing of Bills and assisting in providing research support, motions, and law and policy analysis in support of legislative activities. They also teach postgraduate students of the Institute.

Information is a critical factor in the field of legal research and education; that is why the legal academic community is more dependent on current information than most other professionals.[1]

Students and academic lawyers' search for law information is traceable to the dynamic nature of the legal discipline, which principally demands they keep abreast of the newly enacted legislations and judicial pronouncements in academic legal materials in different aspects of Law.[2]

Law resources are undoubtedly the raw materials with which the legal framework is made. They are to the legal professionals what the stethoscope is to the doctors and laboratories to scientists. They point to what has been accepted and what is acceptable. They are crucial in the basic process of researching the Law. Among the various professions, the legal profession requires the use of relevant, timely and current legal information resources to carry out legal research successfully.[3] This is particularly relevant for a society with a very active legislature and judiciary where new laws are enacted every day and new judicial pronouncement reached. In Nigeria, there are 36 State Houses of Assembly[4] each enacting

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1 Owushi, E. and Emasealu, H. (2016) 'An evaluation of legal information resources and services in academic law libraries of selected Universities in Edo state, Nigeria', Library Progress (International). Vol. 3, No. 3 (1) 1 – 10, DOI : 10.5958/2320-317X.2016.00001.5 < https://www.indianjournals.com/ijor.aspx?target=ijor:bpaslp&volume=36&issue=1&article=001 > accessed 2nd August 2023

2 Olorunfemi, D. Y., 'The Use of Law Information Sources in Legal Research by Nigerian Universities Law Students. (2015.) Journal of Balkin Libraries Union. Vol. 3, No. 1 pp. 15 - 23 < http://balkanlibraries.org/frontend/Journal/pdf/2-%20The%20Use%20of%20Law.pdf > accessed 2nd August 2023

3 Robert J. Desiderio, 'The Law School Library: Its Function, Structure, and Management', (1982) 73 Special Libraries 292 < https://digitalrepository.unm.edu/law_facultyscholarship/727 > accessed 3rd August 2023

4 See Constitution of the Federal Republic of Nigeria (CFRN) 1999 s 3(1), 4(6)

at least a hundred laws per year. There is also the National Assembly[5], where the Senate in four years passed 500 Bills out of the over 1,129 Bills presented to the Senate. From this 500 Bills, 131 were assented to by the President as at June 2023.[6] These new laws and decisions often times adjust the extant legal principles and require researchers to keep abreast with these changes to be able to provide relevant, consistent and accurate information and advice to legislators.

There is also the matter of effective and comprehensive literature review. For a legal research to be worthwhile, innovative and contribute new ideas, it is necessary to have conducted an effective and comprehensive research. This cannot be effected without literature review. Literature review means a summary and synthesis of extant literature on the subject matter.[7] Unlike litigation lawyers who may only be interested in the position of the law at each time and are therefore satisfied with the NWLR, academic legal researchers, like the researchers in DLSS require more. They need to advise legislators on more effective and innovative approaches at resolving legal issues, why a particular legislation or set of legislation is not working, how laws may be developed and drafted to resolve and regulate emerging relationships and challenges. Also philosophical and theoretical justification for legislative options and proposals.[8] These types of issues can only be best resolved through comprehensive research which is incomplete without a literature review. A good literature review will confirm whether there is even a need for further research, confirm the viability of proposed options or give guidelines for implementing suggested options.[9] It may even assess the viability of a research methodology.[10] These cannot be achieved by a reliance on the NWLR alone. This is where the Law Pavilion comes to play. The Law Pavilion contains law reports known as the Law Pavilion Electronic Law Report (LPELR) and other law resources. Thus in addition to the LPELR, the Law Pavilion

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5 See CFRN 1999 s 4(1) (2)

6 Editorial, '9th Senate Valedictory: We passed 500 Bills in 4 years – Lawan' Vanguard News Online June 10, 2023 < https://www.vanguardngr.com/2023/06/9th-senate-valedictory-we-passed-500-bills-in-4-years-lawan/#:~:text=The%209th%20Senate%20had%20passed,senators%20of%20the%209th%20Assembly. > accessed 3rd August 2023

7 Ihugba B. U. 'Introduction to Legal Research Method and Legal Writing' (Malthouse Law Press 2020) 136

8 National Institute for Legislative and Democratic Studies Department of Legislative Support Services, < https://www.nilds.gov.ng/departments/legislative-support-services/ > accessed 5th August 2023.

9 Ihugba B. U. (n 7), 138; IHUGBA B.U. (2021) 'An Examination of Literature Review in Legal Research: Guidelines for Early Career Scholars' Rivers State University Journal of Public Law Vol 8 Is. 1 16- 36.

10 Ibid

provides access to law journals, scholarly legal write-ups, Acts of the National Assembly, Laws of State Houses of Assembly and other legal resources.[11] It is therefore necessary to provide access to such resource to all legal researchers.

This is where the Institute Library comes to play in providing resources to assist researchers keep abreast with the latest and most accurate information on emerging laws and issues. As has been confirmed by research, behind the success of every academic institution, there is a functional and dynamic library that strongly supports the institution's goals.[12] The importance of law libraries to effective teaching, learning and practice of Law has been universally acknowledged by legal scholars.[13] The importance of law libraries to the legal education/profession is ever critical. Law libraries provide legal information sources to judicial officers, legal practitioners, law lecturers, researchers and students in academic institutions and other bodies. Hence, the importance of law libraries could be said to be a necessity to the survival of the legal profession and education.[14] Library here include both physical and electronic resources housed in the library and may be accessed remotely by users.

It appears however that not many law researchers in the Institute are seen to physically patronise the library. Rather, there is regular demand from the DLSS staff for access to some electronic resources and databases. One of such frequent demand is for access to the Law Pavilion. It appears that one of the services provided by the Law Pavilion, the LPELR was already being provided by the NWLR and other law resources which are all up-to-date and available in the Institute Library. Given the amount of financial resources expended by the Institute in purchasing these, in both hardcopies and electronic resources, the quality and quantity of legal research conducted in the Department, there is need to properly measure preference and usage in order to maximize value of resources. Against this background, this study *examines the preference and use of Nigerian Weekly Law Reports (NWLR) and Law Pavilion by the Department of Legislative Support Services* and rationale for the choices made to aid optimizing resource value.

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[11] Law Pavilion < https://www.lawpavilion.com/ > accessed 3rd August 2023

[12] Ukpanah, M., and Ebong., E. M. (2011.). The extent of availability and utilization of law reports by Law students in the University of Uyo and Calabar Law libraries. Impact: Journal of Information and Knowledge Management. Vol. 2,

[13] Owushi, E. (2021). Evaluation of legal information sources in law libraries of federal universities in south-south Nigeria. Journal of applied information science and technology, 14(2)

[14] ibid

To examine this question, the remaining parts of this study is structured as follows. The next section provides a problem statement, conceptual clarification and theoretical framework of the study. This is followed by a brief literature review to situate the research within extant discuss and also drawn principles. Next is a presentation of the research methodology adopted. This is followed by presentation of findings and analysis. The work ends with conclusion and recommendation.

Problem Statement, Conceptual clarification and Theoretical Framework

Researchers in the Department of Legislative Support Services in NILDS need current legal information sources such as Nigerian Weekly Law Reports (NWLR) and Law Pavilion. These resources are beneficial for their research, learning and teaching. However, for these resources to be current, they must be subscribed to or purchased regularly.

NILDS management spends considerable money on purchasing and subscribing to Law Pavilion and NWLR. The NWLR contains primary sources of law while the Law Pavilion contains both primary (LPELR and Acts/Laws) and secondary sources for legal research.

The sources that contain original information and observations are known as primary sources of information. These sources include cases, statutes, administrative regulations, local ordinances, state and federal constitutions, etc., According to Kutigi[15], looking at primary sources is the quickest way to get the most up-to-date information. Examples of primary sources of information are Law Pavilion and Nigerian Weekly Law Reports.

However, despite the immense benefits of these resources to researchers, our observations have shown that these resources seem to be underutilized by the researchers. The quest to find out the reason behind this underutilization and how it can be resolved necessitates the study.

[15] Kutigi, H.D. 'Researching Statutory/ Case Law: Practical Hints. A Paper presented at the National Workshop for Legal and Research Assistants by and at the National Judicial Institute on Tuesday, 15th September 2020.

Conceptual Clarification

Law Pavilion

Issa and Adeyemi[16] pointed out that it has been observed that the most common electronic law report among lawyers in Nigeria is the Law Pavilion Electronic Law Report (LPELR) provided by Law Pavilion.

Law pavilion is a Nigerian electronic law report and research software used by judges, magistrates and other lawyers. Law pavilion makes conducting legal research easier than ever before. It helps legal practitioners search for authorities on any subject and get results in seconds rather than the traditional manual search. Olubiyi[17] stated that the law pavilion is developed to suit the needs of Nigerian lawyers, law teachers and students.

It is an e-library of over 90,000 e-books of law reports (both Supreme Court and Court of appeal from 1970 till date) and 43 years consolidated index and law-digest of over 70,000 issues covering all areas of Law, selected laws of the federation, an industry-leading search engine, a 48-hours reporting system with automatic updates, among other features. It is also the largest collection of the judgments of the Supreme Court from 1970 until date.[18]

Nigerian Weekly Law Reports (NWLR).

According to Ukpanah and Ebong[19], law reports are publications containing collections of judicial decisions. He further stated that Law reports, as well as an efficient law reporting system, are essential for a smooth system of judicial administration. This, according to him, is because, in any nation where the principle of judicial precedent is operational like Nigeria, it is only by references to reported cases that courts and lawyers would be able to ascertain the position of the Law in their area inquiry.

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16 Issa, A. O. and Adeyemi, I.O. 'Perceived Usefulness and Ease of Use as Predictors of Early Year Lawyers Satisfaction Law Pavilion Electronic Law Report'. (2020) Bulletin Al- Turas. Vol. 26, No. 2, July, pp 239-252 < https://journal.uinjkt.ac.id/index.php/al-turats/article/view/15548 > accessed 3rd August 2023

17 Olubiyi et al, 'The Role of Technology in the Advancement of Legal Education and Practice in Nigeria'. , (2015) being paper presented at Nigerian Association of Law Teachers (NALT) Conference at Afe Babalola University, Ado- Ekiti, Nigeria < http://eprints.abuad.edu.ng/639/1/Olubiyietal_Paper.pdf > accessed 2nd August 2023

18 Law Pavilion n. 11

19 Ukpanah M. and Ebong E. M. 'The extent of availability and utilization of law reports by Law students in the University of Uyo and Calabar Law libraries' (2011.) Impact: Journal of Information and Knowledge Management. Vol. 2, No 1, < https://www.ajol.info/index.php/iijikm/article/view/144580 > accessed 2nd August 2023

In the same vein, G. N. Okeke[20] pointed out that lawyers usually use law reports because they search for support for a legal proposition, whether positive or negative, directly on the point or just peripheral. Lawyers also read law reports when a specific authority or decision has been brought to their attention, and the same is needed to support their case and or impair their opponent's case.

NWLR is very well laid out. Every copy contains the list of Justices of the Supreme Court and Court of Appeal. In addition, the Report constantly includes practice directions, postings, and news of appointments and retirements of Justices of the Court of Appeal and Supreme Court.

The Report also contains an index of cases reported, subject matter, Cases referred to, Statutes referred to, and Rules of Courts referred to in the Report. The main body of the reports contain the subject matter arising from every case reported, the issues arising, facts of the case and ratio or reasons for the decision which come before cases and statutes referred to in the Report and finally, the full Report of the cases. The Report is of a peculiar mass appeal to lawyers despite the birth of several other hardcopy Law Reports.

Literature review

According to Olorunfemi[21] in Nigerian universities, primary law sources consist of the records of Nigerian case laws, judgments and reports used for legal research in law libraries. The work explained that primary law sources are the initial law source, the undiluted, unabridged and un-magnified Law consisting of the basic body of Law that makes specific provisions on specific legal issue or question of Law. The work goes on to identify the primary law sources as Nigerian Legislation, English laws and Subsidiary instruments, Nigerian judicial precedents or case law and customary rules, which include Islamic Law. Nigerian Legislation is the product of an official legislative process that produces valid and enforceable laws prepared by conferred authorities. The English laws and the local enactments from the British changed the socio-political and economic terrain of the country due to the instrumentality of Statutes of General Application (SOGA), which incorporated the English laws into Nigerian laws through section 14 of the Supreme Court Ordinance in 1914.

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[20] G. N. Okeke 'Judicial Precedent in the Nigerian Legal System and A Case for its Application under International Law' 2010 JILI Vol. 1 < https://www.ajol.info/index.php/naujilj/article/view/138183 > accessed 2nd August 2023

[21] Olorunfemi, D. Y. (2015.) n. 2, 15 - 23

Deakin University Australia[22], following on the same perspective went on to explain that law sources are generally of two types: primary and secondary. The primary sources are the actual text of the Law, that is, legislation and case law, as created by the parliaments and the courts. Thus all provisions of law as enacted by the legislature, from Constitution Alteration Bills to regulations made under the power of statute are primary sources of law. This perspective is confirmed by Dina et al[23] to the effect that the Constitution, statute and case law are the primary law sources while secondary law sources where the law is explained or opinions provided on the law are secondary law sources. These include law books, encyclopedia, dictionaries and law reform commission publications.

Ihugba B.U[24] in his seminal work on legal research methodology however further clarified these classification of the types of sources required in legal research. He noted that the types of research being conducted by a legal research will determine which source of data is primary or secondary.[25] For a doctrinal research, all direct sources of law, starting with the Constitution to government circulars are all primary sources of law. Any other source, documentary or otherwise that seeks to explain the law, express opinion about the law or direct a researcher to were to find the law are secondary sources. These include journal articles, reports, indexes and law digest. For non-doctrinal research, an example being empirical research, primary sources are the direct sources of the information sought, usually the experiences and opinions of the respondents –natural and corporate persons or things. For such data collection could be through interviews, documented reports, focus groups etc. In this instance Constitution, statutes etc., becomes secondary legal research sources. These sources as identified by Ihugba B.U.[26] could be sourced directly including in hardcopies or electronically.

This is in consonance with Akpoghome et al's 2010[27] research that found digital library are growing in demand and becoming indispensable in legal research. The research as early

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[22] Deakin University Australia, 'Library: Legal Research Basics' Deakin University Australia, < https://deakin.libguides.com/legal-research-basics > accessed 3rd August 2023

[23] Dina, Y., Akintayo, J. O., and Ekundayo, F. (2013). Hauser Global Law School Programme: Globalex-update- Guide to Nigerian Legal Information. < https://www.nyulawglobal.org/globalex/Nigeria1.html#PrimarySources > accessed 3rd August 2023

[24] Ihugba B. U. 2020 (n. 7) 73-74

[25] Ibid 73

[26] Ibid 74

[27] Akpoghome U. Theresa and idiegbeyan Ose Jerome, 'The role of digital library in law research' International Journal of Library and Information Science Vol. 2(6), pp. 108-113, August 2010 <

as 2010 had recommended that legal researchers should subscribe to legal databases, conduct regular trainings on its use and were necessary the legal research curricula should be improved to include digital library skills. This work confirms the fact the exact materials that are available in hardcopies may also be accessed as electronic materials. This assists in bringing the library closer to the end users.

Oluocha and Mabawonku[28] in Owushi[29] conducted a study on the legal information resources availability and utilization as determinants of law lecturers' research productivity in Nigerian Universities, and the study revealed that the number of available legal information resources was considered adequate except E-resources and online legal databases.

Olorunfemi[30] in Owushi[31] researched the available legal information sources frequently used by law students for legal research in Nigerian university law libraries. The study's findings revealed that inadequate legal information sources, such as electronic and print sources, present law students' with problems when conducting legal research. The research argued that these challenges impacts negatively on the research output and quality from Universities in Nigeria. Given that the Institute appears to have overcame to a large extent the problem of availability of resources, it is necessary to examine the extent researchers avail themselves of these resources and the rationale for their choices.

Methodology

The researcher adopted a qualitative research methodology. A case study research design was used for the study. A case study research method allows for an in-depth examination of the study. The study population consists of all 10 researchers in the Department of

http://eprints.lmu.edu.ng/1831/1/The%20role%20of%20digital%20library%20in%20law%20research.pdf > accessed 3rd August 2023

[28] Uluocha, A. and Mabawonku, I. 'Legal Information Resources Availability and Utilisation as Determinants of Law Lecturers Research Productivity in Nigerian universities' (2014) Information and Knowledge Management, Vol.4, No.9, , 50-58 < https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=aa90be7618d6382dbf8c2adfc37e4723737a1a15 > accessed 2nd August 2023

[29] Owushi, E. 'Evaluation of legal information services in the law libraries of federal universities in South-South, Nigeria' (2022) Journal of Library Services and Technologies, 4(1), 54 – 70 < https://credencepressltd.com/journal/uploads/archive/20221662586495403656859 5.pdf > accessed 4th August 2023

[30] Olorunfemi, D. Y. (2015.) n. 2, 15 - 23

[31] Owushi, E. (2022) n29

Legislative Support Services, NILDS, Abuja. A purposive sampling method was used, and all the researchers in the Department were selected as participants in the study. The semi-structured interview method was used to collect the data in order to provide an understanding of the participants' experiences and opinions. The semi-structured interviews consisted of open-ended questions, which guided the process of the interview in order to generate in-depth information.

Notes were taken during the interview. The researchers of this study asked to visit the NILDS researchers in their offices, but they preferred to come to the researchers' offices. Therefore, a face-to-face interview was conducted with them. The data obtained was transcribed manually. To get the context and meaning of the responses, the transcribed interview reports were subjected to content analysis. These meant that the responses were checked the frequency and context of responses as to why and how the research staff made use of the available hardcopy and electronic resources in the Institute Library. This required the deployment of both qualitative and quantitative content analysis. Quantitative content analysis was used to extract the frequency of preference or usage of resources why qualitative was used to extract the rationale for the choices.[32] This approach was used so as to provide a more holistic analysis.

Objectives of questions asked during the interview.

The study questions asked during the interview were guided by the following objectives:

1. To find out the level of the researcher's awareness of the law resources at the National Institute for Legislative and Democratic Studies, Abuja.
2. To find out how frequently researchers use the law resources available at the National Institute for Legislative and Democratic Studies, Abuja.
3. To identify the benefits of using the law resources at the National Institute for Legislative and Democratic Studies, Abuja.

Findings

Data in phrases and sentences about the awareness, preference and utilization of Law Resources were collected through interviews with 10 researchers from the Department of Legislative Support Services (DLSS). The responses gave the researchers multiple views and insight regarding the research topic. While reading the transcribed interviews, the researchers adopted content analysis. This involved underlining the sentences, phrases and words that best described the awareness, preference and utilization of Law Resources. The

[32] Ihugba B.U 2020 (n.7) 164

emergent topics are presented as follows in the data presentation according to the raised questions under the two law resources: NWLR and Law Pavilion.

Q1: Are you aware of Nigerian Weekly Law Reports and Law Pavilion subscribed to and purchased by the Institute?

This study's researchers asked DLSS researchers about their awareness of Nigerian Weekly Law Reports (NWLR) and Law Pavilion. Although the DLSS researchers are aware of the law resources, only one is unaware of the NWLR.

Closely related to this is another interesting finding. Although the finding revealed that the researchers are aware of other scholarly law resources to which the Institute does not subscribe for them, these include LexisNexis, West Law, Heins Online, and Legislative Law Reports; they further elucidated that they engage in using these resources for their researches while they were pursuing their postgraduate programs in other institutions.

Q2: How often do you use the two law resources?

a) NWLR:

As detailed by a researcher, "I have never used it. I only used it when I was in the Legal Unit. We hardly use it because it is mainly for Lawyers. We can get what we want from Law Pavilion. I rarely use it. I use it only when the need arises, especially when a particular matter arises". This researcher captured that "I do not use it, I do not remember the last time I used it. It is not convenient to use; you have to borrow it. Legislative Law Reports is more important and relevant to me". Additionally, a researcher pointed out that" Frequency of use depends on the urgency of an issue or work to be done. I use it, especially when a particular matter comes up when you want to refer to the previous Judgment of Court on a subject matter". A researcher testified that "Laziness on the part of researchers, instead of consulting the NWLR, they want to refer to previous laws, they just copy what others have done".

Another researcher sheds more light on this: "I have never used it. Litigation lawyers use it and carry it to courts for citing cases; they require it to cite. Since we do not have Litigation Department, it is not too relevant, and it is more useful in Government offices that go to Court. It is not as effective as Law Pavilion. I prefer the Legislative Law Report of Nigeria. It is more relevant to me, though they have stopped publishing it".

Accordingly, a researcher disclosed that "I do not use it. It is only when I have problem with accessing Law Pavilion that I use it. I cannot remember the last time I use it; we do not go to courts here (NILDS)".

Furthermore, a researcher said, "I use it only when the need arises. I used other resources. I have never used it; I only used it when I was in the Legal Unit; it was more useful than for cases in that we needed additional information, especially the higher court decisions. Except for case review, but we hardly do that now".

A researcher explained, "We can get what we want from Law Pavilion."
We hardly use it because it is mainly for lawyers. You spend more time and energy to get what you want. So I do not use it regularly. E-copy would have been better".

b) Law Pavilion:

Most of the researchers indicated that they use it more than NWLR. This finding is not surprising as Issa and Adeyemi[33] noted that the most common electronic law report among lawyers in Nigeria is the LPELR provided by Law Pavilion. They also pointed out that their usage of Law Pavilion depends on "when an issue comes up". "If there is a need, I can use it very often until I am through with the subject matter". On the other hand, "If I do not have any work or research that will require the need for using Law Pavilion, I can stay for up to 6 months without using it."

Q3: What are the Benefits of Using the Law Resources?

a) Hard Copies (E.g, NWLR):

One researcher testifies this**: "**There are no Law resources that are consulted or patronized like NWLR that is a recognition of the fact that NWLR is one of such reports that contain best judgments of courts of Appeal and Supreme Court of Nigeria. It is the most frequently cited case by lawyers in Courts or Legal Advisers. They are engaged in conducting technical activities; these are activities that require information from time to time in literature, such as NWLR, which is the most updated Law report in Nigeria. I include it as part of

[33] Issa, A. O. and Adeyemi, I.O. (2020) n 16

the reading materials for my master's students to enrich their academic and research. In addition, it is useful to drafters".

Some researchers stated that: "LLM students use it as reference materials". "I have been sending LLM students to use it". "New staff and interns use them for their assignments". "I guess Masters Students in Constitutional Law may need it.

Accordingly, a researcher expressed that "it is the highest Law Report. It is an important research tool. It has a high reputation in the legal community. One of the older, traditional law reporting. It is the oldest surviving law report in the country."

Another researcher further said that it is beneficial when doing "Bill analysis, Bill scrutiny and thematic issues. It is an important research tool. It is the oldest surviving law report in Nigeria".

Some researchers explained, "It is a Lawyers handbook, it is better to cite than Law Pavilion, you can beat NWLR. I prefer it when I cite; it is more authoritative and purely academic."

Another responded, "It is good for accreditation of the Institute. To compare the previous and the recent judgments. When a particular matter arises, you want to refer to a previous judgment of Court on a subject matter."

b) Law Pavilion (e.g. LPELR):

Responses from the researchers on the benefits of using Law Pavilion as expressed by the following responses: "It works very well, really helping us, very handy, type something and everything comes up". "It has laws of Federation, other materials, articles, opinions, notable pronouncements, decision upheld and overturned. It is used for policy brief because it is updated". "Click on a particular issue, and I get what I want". It has cases, materials, articles, and summaries". "I use it for Bill analysis to see decided cases that have to bear with the subject of the Bill, for writing article for my research, for legal issue brief". Similarly, a researcher voiced out that "it is user friendly, it cannot be mutilated from librarian's point of view, and it is user friendly."

The researcher further mentioned that “You can copy and download and expand the size and share it to your email, you can cut and paste to get exactly what you want, you can use it to prepare legislative motions to support your argument” Another researcher stated, "It is richer than NWLR, I use it for Bill review, Bill analysis, for my research, writing journal articles, you can copy and paste and do not make a mistake”.

Furthermore, the researchers detailed that “Law Pavilion is wider because of articles, regulations, laws, Constitution, it is handy, accessible anywhere easily. Versatile, very rich, extremely good, record every recent case and it is a newer platform”.

Suggestions on how to improve preference and use of law resources

This section provides some quotes from the researchers' responses to their suggestions on how to improve awareness and use of the law resources as follows:

a) NWLR

1. There is a need for the Institute Library to organize a one-day sensitization workshop to make a technical presentation on the use of NWLR.
2. To increase awareness and usage of the NWLR and Law Pavilion.
3. Refer the law students to the use of the Library.
4. Encourage lecturers to set assignment on subject matter of whatever they are being taught and encourage students to cite recent Judgments on all aspects of the subjects.
5. Snap and send the front page of the newly acquired NWLR and share it with staff and students to encourage visits and use of the resources.
6. Subscribe to the soft copy of NWLR; they should have current cases.
7. E-copy would have been better.
8. Have a complete package, complete set from inception.
9. If they are not complete, the Institute should purchase the complete issues.

b) **Law Pavilion**

1. Recommend it to students.
2. Inform research staff, postgraduate law students and legislative drafting interns.
3. Need to continually update subscriptions.

4. Encourage students to use the Law Pavilion.
5. There are other features (modules) 3 of them; we can access one but do not have access to the other 2; we need the other modules too.

Discussion of Findings

Awareness of the existence of the two law resources subscribed and purchased by the Institute

The findings revealed that they law researchers are all aware of the two law resources, except one of the researchers who said he is unaware of the Law Pavilion but will find out whether it has been installed in his system. All the researchers in the DLSS and NILDS have Law Pavilion installed on their computers. This is in contrast to Oluocha and Mabawonku's[34] in Owushi's[35] study, where the findings revealed that the number of available legal information resources was considered adequate except for E-resources and online legal databases.

Frequency of using the law resources

The study discovered that the Frequency of using NWLR among the researchers is very low. One researcher has never used it at all. Their major reason for not using it is that legal practitioners mostly use it. At the same time, the Frequency of using Law Pavilion is very high among the researchers, although all of them said that the Frequency of usage depends on when the needs arise. As observed by Ayorinde (2018), Lawyers read law reports when a specific or particular authority or decision has been brought to their attention, and it is needed to support their case and or impair their opponents' case. This analysis and response of the respondents however discloses lack of appreciation of the value of each of these resources. Their value does not lie on who uses them but in what it contains. The NWLR contains extant judicial precedents. This is a key tool in the work of litigation lawyers. Legal Researchers also need it to be abreast with the extant judicial decision on legal issues. However, unlike litigation practitioners, legal researchers often go beyond judicial precedents to understand and question legal provisions, practices and decisions. This therefore calls for more references to sources that can provide all these information at the same time. The Law Pavilion provides this expanded service.

[34] Uluocha, A. and Mabawonku, I. (2014) n 28
[35] Owushi, E. (2021) n 29

The Benefits of Using the Law Resources

The study revealed that the benefit of using NWLR lies more in its familiarity with litigation lawyers and specialization to case law principles. It is better to cite it for case laws especially in courts cases as judges are more familiar with its layout. The Law Pavilion however contains the same information and more. It has also been known to be used in courts cases. . Moreover, one researcher stated that on the part of the Institute, it is good for accreditation. On the benefits of using Law Pavilion, according to the researchers, it is more user-friendly and easy to access wherever one is. Some noted that apart from the appellate court judicial decisions, laws of the federation, it has articles, regulations, opinions, notable pronouncements. They also use it for policy brief, Bill analysis, Bill scrutiny, research, day to day work, etc. This confirms the extensive resources available in the Law Pavilion. The Law Pavilion was developed to suit the needs of all legal researchers, law teachers and students. The respondents of this study fall into this category as some are teachers and others are postgraduate law candidates. This research thus confirms that while the Law Pavilion contains similar information as contained in the NWLR, its accessibility remotely makes it more attractive. It also contains more resources beyond the case laws. Legal research is beyond reliance on doctrinal law sources like case laws, an aspect fully covered by NWLR. Legal research to be up to date and relevant must also resource scholarly articles, legislations and opinions. This is well covered by the Law Pavilion and other electronic sources. This is thus a confirmation of the value of electronic library resources to legal research students.

Conclusion

Primary sources of information are the actual text of the Law, that is, legislation and case law. They are used by lawyers, lecturers, researchers and students while conducting doctrinal legal research. However, when the research is non doctrinal, more resources other than direct sources of law became primary sources. Direct sources of laws become secondary sources. Examples of these sources include scholarly treatise on legal questions. This aspect is covered by most electronic library resource like the Law Pavilion. The study revealed that the researchers are aware of the two law resources; the usage, especially of Law Pavilion, is high, and it is beneficial to their work. NWLR is also relevant to their work especially when the research is limited to case reviews. Case reviews is incidentally one of the key activities carried out by staff of DLSS and most legal researchers. This therefore confirms the continued value of NWLR and other hard copy law reports.

This findings confirm the necessity for the Institute to continue and expand its subscription of electronic sources. It gives the researchers an expanded source and they can access electronic library sources remotely.

Recommendation

Arising from the findings of the study, it is recommended that:

1. The Library should create more awareness of the hardcopy and electronic law resources for postgraduate law students legislative drafting interns especially during orientations
2. The Library should also organize special in-house training for new staff, interns and Postgraduate students on the benefits of using these resources and how to use them.
3. As suggested by the researchers, the Institute should also subscribe to other relevant law resources such as Lexis Nexus, Legislative Law Reports, West Law and Hens Online. Therefore, the Library should subscribe to the suggested resources to enhance the quality of their research and daily routine work.

That as a general principle, the provision of library resources, hardcopy and electronic resources should be tailored to meet the need of the end users and the end users should be aware of the various benefits of each resource and be regularly updated on developments on any of the resources.

LEGISLATIVE DRAFTING

9

TRANSLATING POLICY TO LAW: BASIC GUIDE IN LEGISLATIVE DRAFTING

Edoba B. Omoregie*

Abstract

The role of the legislative drafter in translating policy into legislation has received limited attention in Nigeria. To fill this gap, this paper gives an insight into the role of the legislative drafter in the legislative process. The paper finds that there is shortage of trained legislative drafters in Nigeria. This has negative effect on legislative drafting in the country. It recommends that more lawyers should be recruited and trained as legislative drafters in order to strengthen legislative governance in Nigeria.

Keywords: Bill Process, Drafting Instructions, Legislative Drafting, Legislative Process, Policy

* SAN, PhD, BL, Professor of Comparative Constitutional Law and Governance, Director of Legislative Support Services, National Institute for Legislative and Democratic Studies, National Assembly, Abuja – Nigeria edobaomoregie@yahoo.com

Introduction

One area of the legal profession which has received limited attention in Nigeria is the role of the legislative drafter in the legislative governance arena, especially in drafting Bills and other legislative instruments. This contribution is an effort to give an insight into this exciting but little explored area of legal practice which has very decisive impact on the effective governance of any country. Next, after this introduction, I broadly discuss the distinction between policy and law, and the stages of the legislative process. I then examine the role of the legislative drafter in the effort to transform a policy into law. The contribution is concluded with a summary of how legislative drafting as a discipline may be strengthened for improved legislative governance.

Policy, Law and Stages in the Legislative Process

There is an inextricable connection between policy and law in the legislative governance arena. Whereas as a distinct, stand-alone category, policy is an aspirational goal of government to achieve a stated objective, law is a culmination of the regulatory framework to give legalistic cover to a stated policy goal or objective. Thus, while a policy is non-regulatory, law is regulatory. Hence, it is said that each law has policy goal, but policy is not law. While law is required to be obeyed and therefore enforceable, policy is non-obligatory and unenforceable. Quite often, the decision to transform policy into law is inspired or necessitated by the inability of a public goal to be achieved through policy alone. Where this is the case, government would take the extra measure of transforming the public goal enunciated in the policy to law or legislation. The process of achieving this transformation is through presentation of a legislative proposal either by way of an executive Bill initiated, prepared and sponsored by the executive branch of government after an internal policy design and review exercise by the administration; or the legislative proposal or Bill may be sponsored through a private member Bill or one initiated at the instance of the leadership of the legislature after due consultation with stakeholders within and outside the legislature[1].

The effort to turn policy into legislation undergoes a process. Nigeria's legislative branch at federal and state levels adopts the British tradition of legislative process. In particular, in the National Assembly, this is undertaken by the *First Reading* of the Bill at plenary session (where the title of the Bill is read out on the floor of the Senate or House of Representatives, without more). This is followed by the *Second Reading* of the Bill at plenary session, when the general principle of the Bill is disclosed and explained by its

[1] Constitution of the Federal Republic of Nigeria, 1999. Section 58.

sponsor (if the Bill is a Private Member Bill), or by the majority leader (if the Bill is an Executive Bill). Members are given the right to comment on the Bill either for or against it. A vote is then taken whether or not to commit the Bill to *Committee Stage*. If the vote is positive, the Bill is subjected to all the processes of committee consideration including public hearing. The Bill is thereafter presented for *Third Reading* at plenary session, with the Committee to which it was assigned reporting on its deliberations and findings together with its recommendations. Members are yet again availed the right to comment on the Report of the Committee and to express their support for or against passing the Bill. If the prescribed majority of legislators decides to pass the Bill, it goes for Concurrence in the other chamber of the National Assembly, after which it is prepared in the usual form and presented to President for Assent. If the President Assents to the Bill, it becomes an Act and is gazetted in the manner prescribed by the Acts Authentication Act[2]. However, if the President declines Assent, the veto may be overridden by the National Assembly through the votes of two third majority of members of each chamber, and the Bill shall become an Act of the National Assembly[3].

Role of the Legislative Drafter

It is instructive to emphasize that the Bill which has been transformed from policy to legislation was drafted not by the legislators, but by legal experts working behind the scene. These are legislative drafters who are lawyers with specialised training to draft legislative proposals or Bills and other legislative instruments such as motions, briefs of debate among many others deployed in the legislative governance arena. With particular regard to Bills, the legislative drafter plays particular roles which are undertaken systematically in five stages; namely by*: understanding* the instruction, *analysing* the instruction, *designing* a draft, *composing* the draft, and *scrutinizing* the final output. This systematic approach to legislative drafting was first popularized by Garth Thornton.[4] The stages are as follows:

a. *Understanding the instruction* – This stage commences with receipt of the instruction by the legislative drafter. The instruction may come through a senior responsible officer in the executive branch to a legislative drafter in the Ministry of Justice, or from a legislator to a legislative drafter in the legislative bureaucracy or drafting institution, as the case may be; or it may

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2 Acts Authentication Act, Cap. A2 LFN 2004.

3 Constitution of the Federal Republic of Nigeria, 1999. Section 58

4 Reproduced in Helen Xanthaki, Thornton's *Legislative Drafting*, 5th edn. Bloomsbury 2013, pp. 145-162).

be passed to an independent consulting legislative drafter by the sponsor of the legislative proposal. Whoever receives the instruction among any of these experts must exhibit the highest level of professional capacity to understand the proposal. Where there is any doubt, this must be cleared promptly with the sponsor. This clarification must continue throughout the various stages of drafting whenever it becomes necessary. It should not end only at this first stage of receiving the instruction.

b. *Analysis* – This is the stage when the legislative drafter undertakes extensive research of the subject matter of the proposal. If, for instance, the sponsor is a member of the National Assembly of Nigeria or the executive branch at the federal level, the legislative drafter must determine if the proposal is within the legislative powers of the federal government, or within the broad constitutional powers conferred on the National Assembly to make laws other than those in the lists of powers. In this regard, the legislative drafter must scrutinize the Exclusive and Concurrent Legislative Lists in the relevant schedules to Constitution where the powers of the federal government are well stated. The legislative drafter must also look within the body of the Constitution to know if such power has been conferred on the federal government, assuming the lists do not specifically provide for the power. For instance, the Constitution of Nigeria[5] implicitly confers concurrent powers on the federal and state governments to make laws to adumbrate any of the fundamental rights contained therein or derogate from it. Yet, such powers are not contained within the framework of the exclusive and concurrent lists. If satisfied that the federal government can legislate on the subject matter, the legislative drafter must extend the research inquiry into many other issues such as whether there is an existing legislation on the subject matter or an existing legislation closely related to it; whether only an amendment of the existing legislation is needed instead of a fresh legislation; whether Nigeria is under a treaty obligation not to pass such legislation as proposed; and whether the superior courts, especially the Supreme Court, has made a final pronouncement on the subject matter of the proposal, one way or the other. The cost/benefit implication of the proposal should also feature in the research analysis, among many other consideration, to expertly actualise the instruction.

[5] Constitution of the Federal Republic of Nigeria, 1999, Chapter IV.

c. *Design* – This is when the legislative drafter begins to put down the framework of the draft Bill. Attention must be paid to the specific instruction of the sponsor. Cognize must also be taken of the constitutional limits of the power conferred on the federal government to make law on the subject matter. According to Lord Thring, the foremost authority on the appropriate way to design a legislative draft, a legislative draft must state the law, then state the authority to administer the law; and then state the manner in which the law is to be administered.[6] In practical terms, the structure of a draft Bill or legislative proposal may take the following shape – long title, preamble, enacting clause, short title, commencement, duration/expiry, application, purpose clause, definition/interpretation, substantive provisions, administrative provisions, miscellaneous provisions, and final provisions. This structure is not cast in iron. It may be subject to variation, depending on the subject matter of the legislative proposal.

d. *Composition* – This is the stage where, depending on the subject matter, the legislative drafter must take care to include the appropriate legislative language which must be plain, clear and regulatory, among other considerations. Unnecessary words must be avoided. Words used must mean the same throughout the draft. Present tense must be used throughout. The text of the draft must not be densely packed. Short sentences, paragraphs to indicate component parts, etc are to be preferred, among other considerations.

e. *Scrutiny* – This is the final stage in legislative drafting. Here, the legislative drafter verifies the composition for quality assurance. This should cover the entire issues related to the proposal, from the instruction to whether constitutional and existing legislation have been considered, to the clarity, plainness of language and structure of the draft text; and to compliance with rules of punctuations, among many other issues of accuracy. The best practice is for the scrutiny to be undertaken by a different legislative drafter than who prepared the draft. At the end of the scrutiny and correction of any identified error, the legislative drafter who received the instruction and prepared the draft must have a sense of satisfaction with the draft text before transmitting it to the sponsor.

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6 V.C. Crabbe. *Legislative Drafting,* Cavenish Publishing, 1998, pp. 148-150.

Conclusion

In this brief contribution, I have discussed the role of the legislative drafter, which is a rather obscure yet important aspect of legal practice. The obscurity of legislative drafting as a legal discipline may be the result of the behind-the-scene nature of the role of the legislative drafter compared with other forms of legal practice such as advocacy and solicitor's work both of which expose the lawyer to a good measure of public visibility. In the Nigerian legal system, the obscurity seems to be compounded by the lack of systematic attention paid by the body of lawyers to the work of the legislative drafter and to legislative governance as a whole. This is particularly true as the Nigerian Bar Association (NBA), the Body of Benchers (BoB) and the Nigerian Association of Law Teachers (NALT), which are the core stakeholders in the legal profession, and others associated with legal education and practice, have demonstrated aloofness to this very decisive area of democratic governance where members of the legal profession are expected to play leading roles.

Going forward, there is urgent need for more attention to be paid to the role of the legislative drafter in order to guarantee better quality of legislation. This can be achieved through frequent interface between the stakeholders in the legal profession and the legislature using different open platforms such as conferences, roundtables, symposia, training workshops and publications on legislative drafting practice and procedure. In addition, legislative drafting ought to be included as a compulsory course in the undergraduate legal education curriculum in Nigeria because of the increasingly pervasive nature of legislation in the public and private lives of the people.

10

GENDER-NEUTRAL LANGUAGE IN LEGISLATIVE DRAFTING IN NIGERIA

U.E Okolocha* Shamsu Yahaya** and Chimezie Chikere ***

Abstract

Legislative drafting as a discipline of law has its unique principles and techniques. One of such principles which has emerged under the plain language movement is gender-neutral language in drafting legislation. This paper appraises gender-neutrality as an innovative legislative language technique in Nigeria. The paper discusses gender-neutrality in drafting legislation in Nigeria and identifies techniques to achieve it. The research adopts the doctrinal methodology and relies on primary sources which include the Constitution and legislations; and secondary sources which include text books, journals and internet materials, amongst others. The paper finds that using gender-neutral language in legislative drafting has been adopted by many jurisdictions. It also finds that most legislations in Nigeria do not reflect gender-neutral drafting language; also, there appears to be little or no awareness of the advantages and benefits of using gender-neutral language in drafting legislations in Nigeria. In this regard, the paper recommends that legislations in Nigeria be expressed in gender-neutral language to align with the growing practice of gender neutrality and equality. The paper also recommends that Nigeria should adopt some of the practice in various countries that have embraced gender-neutral language in drafting legislation.

Keywords: Challenges, Gender-Neutrality, Legislation, Legislative Drafting

* Ph.D, B.L., Senior Lecturer, Department of Public Law, University of Abuja**.** Email: eugene.okolocha@unibuja.edu.ng and eugene.okolocha@gmail.com.

** LLB, LL.M, MLD, Ph.D, BL, ChMC, Research Fellow, National Institute for Legislative and Democratic Studies (National Assembly). Email: sudeen09@yahoo.com.

*** LLB, MLD, BL, Deputy Director, Senate Chamber, National Assembly. Email: meziechikere@yahoo.com.

Introduction

Legislative drafting simply means the drafting of laws. More appropriately, it means the drafting of bills that become laws.[1] The primary aim of a drafter is to express the provisions of proposed legislations unambiguously and very clearly to reflect the intention of the policymaker or legislature in the proposed law.[2] Longjohn aptly states that the object of drafting is "to set forth ideas clearly, succinctly and consistently."[3] Society is dynamic, so also is the law and legal system. Thus, there is a constant need for continuous development in the field of legislative drafting, to draft laws that meet the increasing demands of an ever-changing society.

Legislative drafting was hitherto an area that neither attracted nor received serious academic and professional attention. However, it has experienced remarkable development in recent years. It has now been recognised as a discipline of law, having its own distinct rules, fundamental norms and values. Thus, there has been a move away from the traditional drafting style to the plain language style of drafting in many jurisdictions. One such modern technique that has emerged under the plain language principle is the gender-neutral drafting technique. This technique advocates using gender-neutral terms in drafting to achieve gender neutrality.[4] In this regard, it has been argued that there is increasing awareness of the desirability of using language that does not portray discrimination based on gender. Indeed, discrimination based on gender had been prohibited in some jurisdictions, including Nigeria.[5] It however depends on the grammatical peculiarities of the language in question and the evolution of the language and its culture.[6] According to Adem:

> After the Beijing Conference of September 1995, the issue of gender neutral language was brought into focus as a mark of respect for both sexes and for the sake of clarity. It is also argued that the women have a right for the legislation to be drafted using pronouns relating to them.[7]

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1 G. C. Thornton, *Legislative Drafting* (4th edn, Butterworths, 1996).

2 T.C. Jaja, *Legislative Drafting - An Introduction to Theories and Principles* (Wolf Legal Publishers, 2012).

3 C. Longjohn Gender Neutral Legislative Drafting in Nigeria,' International, *Journal of Humanities and Social Sciences* [2015] (4) (3) 67 – 84.

4 *Ibid.*

5 See s. 42 of the Constitution of the Federal Republic of Nigeria, 1999.

6 V. Thuronyi, 'Drafting Tax Legislation' in Victor Thuronyi (eds) *Tax Law Design and Drafting* (International Monetary Fund, 1996).

7 D.T. Adem, *Legislative Drafting: Making A Case for Audiences* (LexisNexis, 2018), 187.

In Nigeria, Section 14(a) of the Interpretation Act[8] expressly provides that in an enactment, "words importing the masculine gender include females." This appears to be the basis for the failure of many Nigerian drafters to use gender-neutral language in drafting legislation in Nigeria. This provision means that where statutes are drafted in the masculine, as is traditionally the case in Nigeria, the use of the masculine gender also refers to the feminine gender. An exception to this provision would be where the provision of the law specifically and exclusively deals with the masculine gender. The need to deal equally with men and women underscores the desirability of drafting in gender-neutral language. However, in the English language, it is common to avoid the exclusive use of the masculine gender to refer to an antecedent of indefinite gender and avoid nouns indicating a particular gender where an indefinite gender is intended. Therefore, based on the language and culture of the country in question, the drafter should take care that the usage of words is precise and non-discriminatory.[9] Therefore, drafters must be clear, unambiguous and precise to ensure that the meaning intended by the language is accurately conveyed, particularly in modern times when legislation is no longer considered to be written only for judges and lawyers; but should be comprehensible to the legislature; those persons whose duty it is to administer the law; members of that section of society that are to be regulated by the law.[10] To this end, drafters have, in recent times, utilised several methods to ensure that laws are clear, precise and free from ambiguity. One aspect of this modern style adopted by drafters is gender-neutral language. Consequently, gender neutral legislation should become the norm.[11] Against this backdrop, this paper discusses gender-neutral language in drafting legislation, the challenges of gender-neutral legislative drafting in Nigeria and identifies techniques to be adopted in achieving gender neutrality in drafting legislation.

Gender-Neutral Drafting

Gender-neutral language refers to language which includes both sexes and treats both women and men equally.[12] It is also called non-sexist, non-gender specific or inclusive language. Gender-neutral language avoids using male terms to represent women and vice versa. It is a language that uses various techniques, including repetition of the relevant noun, omission of redundant or superfluous phrases, and reorganisation of words or

8 CAP 123, LFN, 2004.
9 See s. 42 of the 1999 Constitution.
10 Thornton (n1).
11 Adem (n7), 188.
12 National Institute for Legislative Studies, Abuja *Revised Practical Guide on Legislative Drafting*, (2014).

phrases from the active to the passive voice provided it does not create ambiguity.[13] Gender-neutral legislation is drafted in universal terms, ignoring gender-specific situations and power relations between women and men that underpin sex and gender-based discrimination, including gender-based violence against women.

Gender-neutral language refers to language which includes both sexes and treats both women and men equally.[14] Gender-neutral language or gender-inclusive language is the language that avoids bias toward a particular sex or social gender. Karen[15] defines gender-neutral language as the type of language that aims to do away with references to gender when using terms that describe people.[16] Interpretation provisions usually contained in the Interpretation Act or equivalent statutes, state that the use of the masculine gender in legislation includes the feminine.[17]

Proponents of the use of the masculine gender in legislation argue that the masculine rule does not discriminate against women because the term "he" is accepted as encompassing both genders and that Interpretation Acts in the jurisdictions that use masculine pronouns invariably provide that a reference to a man includes a woman so that in practice women are not being ignored.[18] Indeed, William Blackstone had written that:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything; and is therefore called in our law-*French a feme-covert, foemina viro cooperta*….[19]

Furthermore, it is a matter of convenience for drafters to draft by reference to one gender only and the established drafting practice or the established canons of drafting require drafting in terms of the male.[20] Furthermore, the issue of male terms is trivial, and its usage merely reflects a defect in the English Language, which exists in all English speech

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13 *Ibid*.

14 *Ibid*.

15 B. Karen, 'The Maleness of Legal Language' *Manitoba Law Journal* [1989] (18) (2) 191-212.

16 *Ibid,* 211.

17 Interpretation Act, CAP 123, LFN, 2004, S.14(a).

18 P. Solembier, *Legal and Legislative Drafting* (Lexis Nexis, 2005).

19 W. Blackstone, *Commentaries on the Law of England* (William E. Dean Publishers, 1853).

20 M.E. Ritchie Q.C, 'Alice through the Statutes' <http://165.22.229.17/wpcontent/uploads/pdf/6093764ritchie.pdf> accessed 28 March 2022.

or writing and is not confined to legislation. According to Strunk and White "the use of HE is a simple practical convention rooted in the beginnings of Enlglish language. HE has lost all suggestions of maleness (using HE instead of HE or SHE) has no pejorative connotation; it is never incorrect."[21]

Many writers have also counteracted the argument by feminists to show that sexist language does not favour any gender. Animasahun pointed out that sexism in language is a bias, not only against women but also against men. The expressions "gunmen" and "men of the underworld" are just two examples of bias against men. Even when women do such acts, the perpetrators would still be referred to as men of the underworld or gunmen, as gunwomen or women of the underworld would sound unconventional. Since language influences how we think and view the world, such expressions may connote that only men are criminals, even when some women could be criminals.[22] Similarly, "sportsmanship" or "sportsmanly" does not mean that women are bereft of fairness or grace, nor does "men of faith" mean that women are faithless or without faith. Gender neutral words would not require explanations in these circumstances. Such gender-neutral words and phrases as "chair" or "chairperson" instead of chairman, "fire-fighter" instead of "fireman", "police officer" instead of policemen", "flight attendant" instead of "stewardess, among others, are now employed in many jurisdictions in the wake of the gender-neutral movement.[23]

Another instance that could also be cited to buttress the fact that no gender benefits from gender-specific language is the word mastermind, which, though semantically does not always connote a negative act, is used more often in referring to crime and other forms of anti-social behaviour. Again, this word is usually associated with the male, probably owing to its root, "master". However, it has been pointed out that traditionally, men have been the dominant force, and the English language has developed in ways that reflect male dominance, sometimes to the total exclusion of women. For these reasons, the increase in the use of gender-neutral language has mainly been attributed to the gripe of gender equality in various societies though it is not the only reason.[24]

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21 W. Strunk an E.B. White, *The Elements of Style* (3rd edn., Musaicum Books, 2018), 60.

22 O. Animasahun, 'Sexist Language in Nigerian Newspapers: A Case Study of the Punch and the Guardian Newspapers' *IOSR Journal of Humanities* [2015] (20) (1) 65-75.

23 *Canadian Desk Book*, 1990 Statute, Province of Ontario (unpublished).

24 Animasahun (n22).

Cross-Country Experiences

Many jurisdictions have legislative drafting manuals that set out a regulatory framework for drafting legislation. In addition, in some jurisdictions, primary legislation sets out rules for legislative drafting, thus establishing a legal framework for the drafting of legislation.

The United Kingdom (UK)

In the United Kingdom shortly before the passage of the 1850 Interpretation Act, the traditional approach was modified to the extent that it became common for individual Acts to include a specific interpretation provision of the kind that was eventually codified in the 1850 Interpretation Act. From 1850 until 2007, Acts of the Westminster Parliament habitually relied on the general interpretation provision and used 'he', 'him' and 'his' to include references to males and females (and, often, bodies corporate or corporate or unincorporated). This practice was challenged from time to time, and with increasing frequency, in both Houses of Parliament, not on legal efficacy but grounds of taste, propriety and social policy. The Government consistently resisted these challenges for many years.[25] The policy underlying this resistance was explained in a 'Written Answer' given to the House of Commons by the Prime Minister in 1998 in the following terms: "The most important objectives in the language used in legislation are clarity and legal certainty.[26]

In general, gender-specific language is not necessary to meet these objectives. However, there are occasions when, for example, gender-specific pronouns make it possible for legislation to be expressed more simply and so more clearly than it otherwise could be. In these cases, Section 6 of the Interpretation Act applies. It provides that, unless the contrary intention applies, words importing the masculine gender include the feminine and vice versa.[27] That remained the Government's policy until a change in 2007, announced in a Written Ministerial Statement made by the Leader of the House of Commons.[28] There were doubtless several reasons that brought about this change of

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[25] See, for example, HC Deb 14 July 1995 WA 833.

[26] Ibid.

[27] Section 6 of the Interpretation Act of the United Kingdom.

[28] For many years, the drafting of primary legislation has relied on section 6 of the Interpretation Act 1978, under which words referring to the masculine gender include the feminine. In practice, this means that male pronouns are used on their own in contexts where a reference to women and men is intended, and also that words such as chairman are used for offices capable of being held by either gender. Many believe this practice reinforces historical gender stereotypes and impedes a more precise understanding for those unfamiliar with the convention.

policy. Presumably, very few English language jurisdictions were still drafting in gender-specific terms, and the Westminster Parliament appeared to be increasingly out of step not only with foreign Governments but even with other sources of legislation within the British Commonwealth countries and particularly the United Kingdom.[29]

Drafting Techniques Group of the Office of the Parliamentary Counsel, United Kingdom, noted that it is government policy that primary legislation should be drafted in a gender-neutral way, so far as it is practicable to do so. Gender neutrality applies when drafting free-standing text in a Bill and when inserting text into older Acts that are not gender-neutral. The Interpretation and Legislative Reform (Scotland) Act 2010 (ILRA) does not make the masculine or feminine cover the other, unlike the Interpretation Act 1978. The Drafting Manual of Scotland provides that drafters always affect the Scottish Government's policy on gender-neutrality. It states: avoid gender-specific pronouns such as 'he/she is except where essential for sense; for example, where the sheriff has misdirected 'himself or herself); use an alternative word in place of a gender-specific noun (for example, 'convener' or 'chairing member' for 'chairman'); treat labels such as 'ombudsman', 'landlord', 'executor' and 'manager' as gender-neutral.[30]

The Presiding Officer's Determination on Proper Form for Public Bills for Acts of the Assembly in Welsh states that the text of a Bill "must not use gender-specific language unless the meaning of the provision cannot be expressed in any other way (e.g. the provision relates only to persons of a particular gender)"[31] The use of gender-specific language is also one of the grounds for which the Constitutional and Legislative Affairs Committee of the National Assembly for Wales may report to the Assembly on a statutory instrument under Standing Order 21.2.[32] The Legislative Drafting Guidelines of the Welsh Government notes that gender-neutral drafting means that, where there are suitable alternatives available, the constructions drafters use should not imply that only men do certain things, such as hold office. It is noteworthy that the British Office of Parliamentary Counsel has clearly stated that “It is government policy that primary legislation should be drafted in a gender-neutral way, so far it is practical to do so” adding

[29] It already applies to tax law rewrite bills and is consistent with the practice in many other jurisdictions in the English-speaking world. Nevertheless, the Government recognises that, in practice, Parliamentary Counsel will need to adopt a flexible approach to this change.

[30] Drafting Matters Guidance <https://www.gov.scot/publications/drafting-matters/pages/6/> accessed 18 May 2022.

[31] Legislative Drafting Guidelines, Office of the Legislative Counsel Welsh, Welsh Government, 2012.

[32] National Assembly for Wales – Information Guide <http://www.assemblywales.org/bus-home/bus-assembly-guidance.htm> accessed 18 May 2022.

that gender neutrality could also be affected when inserting texts into older Acts which may otherwise not be drafted in gender-neutral language.[33]

United States of America

In the United States, forty two of the fifty states officially use a gender-neutral style when drafting bills and two or more unofficially encourage gender-neutral language. However, nine states still adhere to a policy in which the masculine "he" includes all other genders, although seven of these states either officially or unofficially require the use of other gender-neutral methods.[34] The United States House of Representatives, on January 5, 2009, updated its standing rules to reflect gender neutrality.[35] For example, references to the word "chairman" have been changed to "chair", and male-gendered pronouns have been replaced by articles or by repetition of the antecedent noun.[36] Legislative Drafting Manual from Colorado on Gender-Neutral Drafting also states that the Executive Committee of the Legislative Council has also directed that gender-neutral language be used for all legislative measures.[37] The Committee on Legal Services has approved guidelines for using gender-neutral language. The directive provides that "All bills, amendments, resolutions, memorials, and proposals for legislation to be introduced in the General Assembly shall use gender-neutral style, avoiding male or female gender terms except in those instances in which a gender-specific term applies only to members of one sex or in instances where an exemption is provided for in guidelines or standards."[38]

Utah Code 68-3-12 provides that words in one gender comprehend the other gender. In addition, the Drafting Manual of Utah states that a drafter should draft using gender-neutral language unless only one gender is intended (such as in a statute relating to abortion, adoption, or parental rights). This policy fulfils the goal of clearly expressing the Legislature's intent accurately, in a non-discriminatory manner.[39] A drafter should remove

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33 Drafting Guidance 7, British Parliamentary Counsel, 2018.

34 D.L. Rovell and J. Vapnek "Gender-Silent Legislative Drafting in a Non-Binary World' *Capital University Law Review* (2020) 119.

35 Excerpt from Gender-Neutral Drafting from Colorado Legislative Drafting Manual <http://www.ncsl.org/Portals/1/Documents/lsss/ExcerptGender-NeutralDraftingCO.pdf > accessed March 08, 2022.

36 H.R. Res. 5, 111th Cong. (2009).

37 http://www.state.co.us/gov_dir/ leg_dir/olls/LDM/OLLS_Drafting_Manual.pdf; accessed March 08, 2022.

38 *Ibid*.

39 Legislative Drafting Style Manual - Utah Legislature <https://le.utah.gov/documents/LDM/draftingManual.html> accessed 18 May 2022.

improper uses of gender-specific terms in existing code or change the terms to gender-neutral terms. The ultimate goal is to produce a clear, well-drafted statute.

For many years, the Office of the Parliamentary Counsel has drafted bills using gender-neutral language. The OPC Drafting Manual, first issued in 1984, states that Gender-neutral language should be used to make the language of legislation more inclusive.[40] This approach makes provisions less cumbersome and reduces the proliferation of “his and hers" throughout new legislation as drafters tend to use the description of the relevant person (e.g. "the taxpayer") instead. In many cases, this makes the provision clearer than if just "his" was used and may also avoid ambiguity where more than one person is referred to in the provision.[41] The State of Washington has concluded a six-year onerous task of rewriting state laws to achieve gender neutrality; this initiative replaced, among other things, words such as "fisherman" and "freshman" with "fisher" and "first-year student" respectively.[42]

Canada

The Uniform Law Conference of Canada’s Drafting Conventions states that sex-specific references should be avoided. Ontario's Revised Statutes for 1990 changed all the Province's Statutes to gender neutrality. Most if not all other legislative bodies in Canada have done likewise.[43] Gender neutrality is essential when writing about people because it is more accurate. It is also mandated by the *Federal Plan for Gender Equality*, which was approved by the Cabinet and presented to the Fourth United Nations World Conference on Women in 1995.[44] The Drafting section of the Canadian Uniform Law Conference sets out five basic principles of gender-neutral drafting, viz:

1. Drafters have an obligation to use plain language.

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[40] OPC Drafting Manual, edition 3.1, February 2016. <https://www.opc.gov.au/sites/default/files/drafting_manual_1.pdf?acsf_files_redirect> accessed May 18 2022.

[41] *Ibid.*

[42] Washington State Now Has Gender-Neutral Laws <https://www.npr.org/2013/04/24/178759739/washington-state-now-has-gender-neutral-laws> accessed May 18 2022.

[43] KD Binaries, ‘Triplets and the Use of Gender Neutral Language’ <http://www.slaw.ca/2013/01/30/binaries-triplets-and-the-use-of-gender-neutral-language/> accessed March 08 2022.

[44] Legistics Gender-neutral Language <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p15.html> accessed March 08, 2022.

2. Legislation should address all users equally.
3. The language of the law should not offend any of its readers.
4. The legislation should be drafted with language that is accurate and up to date without being either faddish or stodgy.
5. Drafters should use a style that is consistent with political reality.[45]

According to Elliot, several Canadian jurisdictions are now committed to gender-neutral drafting in legislation. For example, the general revision of the Statutes of Ontario in 1991 purged all Canadian Statutes of masculine gender references. A significant impetus for gender-neutral drafting in legislation came with the recommendation from the Uniform Law Conference of Canada Drafting Section. It recommended that the Conference adopt a non-sexist legislative drafting style, opining that there is an increased sensitivity to the images of men and women that our languages create; and that linguistic changes initially thought extreme have become current usages and adopted as Government policy.[46] As the Government of Ontario put it in 1985, it is committed to a legislative drafting style that "fully expresses and enhances the equality of the sexes"; legislation should address its readers equally.[47] Also, the Canadian Senate recently passed a bill (Bill C-210) to make the lyrics of the English-language version of its national anthem gender-neutral. As a result, the song's second line, "In all thy sons command," changed to "In all of us command."[48]

Rwanda

Rwanda has taken steps to comply with the legislative drafting principle of gender neutrality.[49] Rwanda is an example of an inclusive society that promotes gender equality

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45 Rovell and Vapneck n(34) 106.

46 D.C. Elliot, *Legal Drafting: Language and the Law* (Canadian Institute for the Administration of Justice, 1999). <http://www.clarity-international.net/journals/16.pdf> accessed on 3rd January 2022.

47 Robert Dick, a well-known Canadian commentator on legal drafting in English, recommended a sex-neutral style in the 1985 edition of his text "Legal Drafting" (Carswell, Toronto) and provided recommendations (on pages 167 to 189) for reducing, if not eliminating, sex-specific references.

48 R. Sabur, *The Telegraph News*, Washington, 1 February 2018. <https://www.telegraph.co.uk/news/2018/02/01/canada-votes-make-national-anthem-genderneutral/> Accessed 18 February 2022.

49 R. Kayibanda, 'Gender Inclusive Legislative Drafting in Rwanda: Which Approach?' *International Journal of Law, Humanities & Social Science* [2017] (2) (1) 1-10.

and women empowerment.[50] For instance, as of June 2016, Rwanda topped the world's ranking as the country with the highest percentage of female parliamentarians. [51] Several achievements have been made in the country regarding promoting gender equality. A gender-sensitive constitutional framework was enacted, and gender-sensitive laws were enacted (the Republic of Rwanda, Ministry of Gender and Family Promotion, 2010).[52] Indeed, it has been noted that legislation should not be discriminatory and should not be gender-biased. In this way, one of the principles of legislative drafting requires the use of gender-neutral language.[53] Therefore, the drafters should make a careful choice and use of words to ensure the legal text is free from any bias.[54] Thus, it was recommended in Rwanda that gender equality dimensions be systematically mainstreamed in different accountability mechanisms to ensure that different sectors pay attention to the gender responsiveness of planned interventions[55]

Criticisms and Challenges of Adopting the Use of Gender-Neutral Language in Legislative Drafting

Despite the extensive use of arguments favouring gender-neutral legislative drafting, the approach has attracted several criticisms. It may be argued that gender neutrality should be sacrificed if the result is awkward or distracting.

The major challenge faced by gender-neutral language in Nigeria include:

a) Customs and traditions

In Nigeria, the traditional practice has been to use male-oriented terminology in legal texts. This may derive from traditional views and cultures concerning legal personality. Nigeria is a highly patriarchal society where men dominate all spheres of women's lives. Gender inequality has saturated the Nigerian legal system, and it is erroneous to take gender-neutral drafting as a panacea for patriarchy.[56] This

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50 E. Kwibuka, 'Women Leaders Push for Gender Equality in Africa. *The New Times*, July 09 2016. <https://www.newtimes.co.rw/section/read/201529> accessed 18 February 2022.

51 A. Tashobya 'Africa: Officials-AU Gender Scorecard Award Boosts Fight for Equality, Africa' <http://allafrica.com/stories/201607250907.html > accessed 11 February 2022.

52 The Republic of Rwanda, Ministry of Gender and Family Promotion 'National Gender Policy' <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/94009/110188/F-1576743982/RWA-94009.pdf > accessed 18 January 18 2022.

54 Kayibanda (n49).

55 Gender Monitoring Office, "The State of Gender Equality in Rwanda: From Transition to Transformation" (2019), 68.

56 G.A. Makama, 'Patriarchy and Gender Inequality in Nigeria: The Way Forward' *European Scientific Journal* [2013] (9) (17) 115-144.

practice is found in existing laws. For instance, in the Constitution, the word 'he' is used 269 times, whereas the word 'she' is not used at all. However, the word 'person' is used in several sections of the constitution to refer to both the male and female gander; hence, the Constitution may be said to have used gender neutral drafting in some instances. In another instance, in the Federal Inland Revenue Service (Establishment) Act, 2007 the word 'he' is used 28 times, while the word 'she' does not appear in the Act.

b) Interpretation Act

Another challenge faced by gender-neutral drafting in Nigeria is the practice solicited by gender-neutral drafting for drafters to depart from the interpretive rule within the Interpretation Act to ensure gender neutrality. In addition, gender-neutral drafting is too trivial to warrant the effort required to change writing habits rooted in tradition. Additionally, a new law has to fit into the existing body of law. This invariably places restrictions on the drafter because the drafter is not drafting in a legal vacuum. For instance, the Interpretation Act[57] has given specific definitions to specific terms which may not be expressed in gender-neutral language. For instance, Section 14(a) of the Interpretation Act[58] expressly provides that in an enactment, "words importing the masculine gender include females. Invariably, the drafter is constrained by this fact. It can also be argued that many words and phrases that appear in legislation have judicially defined meanings, and using a new word or phrase may lead to the loss of judicial definition or consistency.

c) Effective communication

It is also a fallacy to think that legislation in Nigeria can be drafted in a gender-neutral language such that all literate adults can easily read and understand them. Every user and reader of legislation may not necessarily understand the statutes. This is because the level of understanding of written legal texts cannot be readily determined and differs from person to person. Gender-neutral drafting has also been criticised because it is too repetitive, too long, unnecessarily complicated or artificial, and may annoy readers who do not support it. Also, gender-neutral drafting creates a form of awkwardness that detracts from effective communication. For example, alternating between the masculine pronouns *he*, *him*, and *himself* and the feminine pronouns *she*, *her*, and *herself* can seem contrived and may raise

[57] Interpretation Act, 2011. Cap 123 LFN.

[58] CAP 123, LFN, 2004.

confusion about whether the writer has begun referring to a new actor of the other gender.[59] Shavell listed three objections to the gender-neutral language he considered "obvious", which include: the writing would be “stilted and unnatural, upsetting to our aesthetic sensibilities (which have been moulded by the use of the male pronoun forms in our language and literature)"; the writer might not want to "be associated with" the "particular political connotation" that the use of gender-neutral language carries; and, most importantly, freedom of expression would be compromised, resulting in "a flow of work that is reduced and distorted in content, and a situation rife with opportunity for abuse by those with censorial authority."[60]

Overcoming the Challenges of Adopting Gender Natural Legislative Drafting

Changes in legislation are difficult to introduce and require a strong commitment from policymakers towards the decision. To correct gender specificity, some jurisdictions are redrafting legislation. Other jurisdictions are empowering legislative institutions to carry out technical revisions. Nigeria can adopt some of the practices of the various countries that have embraced gender-neutral style in drafting legislation to resolve specific problems caused by discriminatory gender-biased language.

When faced with the dilemma of adopting gender neutrality in legislation, the challenge usually is how to depart from the masculine rule. Consequently, there must be guides to facilitate this task. Therefore, there should be a drafting manual in Nigeria to guide drafters on the drafting techniques of gender-neutral language in drafting. For example, Legislative Drafting Manual from Colorado on Gender-Neutral Drafting states that the Executive Committee of the Legislative Council has directed that gender-neutral language be used for all legislative measures.[61]

Nigeria should also pursue a policy of gender-neutral drafting. As indicated in the paper, the United Kingdom, which colonised Nigeria, has developed some policies on gender-neutral language and has embraced gender-neutral language in legislation. The United States of America has also enacted legislation on gender-neutral language. The reason for this, according to lawmakers, is because words matter, and they are essential in changing hearts and minds.[62] The National Assembly can also update its standing rules to reflect

[59] Richard C. Wydick, *Plain English for Lawyers* (5th edn, Carolina Academic Press 2005).

[60] Steven Shavell, ‘Economic Analysis of Law’ *Georgetown Law Journal* [1994] 1777–1778.

[61] Colorado Legislative Drafting Manual <http://www.state.co.us/gov_dir/leg_dir/olls/LDM/OLLS_Drafting_Manual.pdf> accessed on 08 March 2022.

[62] Animasahun (n23).

gender neutrality. For example, the United States House of Representatives, on January 5, 2009, updated its standing rules to reflect gender neutrality.[63] For example, references to the word "chairman" have been changed to "chair", and male-gendered pronouns have been replaced by articles or by repetition of the antecedent noun.[64]

Drafters in Nigeria can also use several available techniques and approaches to achieve gender-neutral drafting; though it demands much effort, it is a worthwhile effort. Each technique and approach to achieving gender-neutral drafting has advantages and disadvantages. Also, regarding specific gender-neutral drafting techniques and guidelines, it is helpful that drafters in Nigeria be aware of all the possible alternatives to select the one that best fits the overall goal of effectiveness.[65] In addition, the drafter should never fear to repeat the noun as many times as necessary if that serves to achieve clarity, precision or unambiguity. Although critics of gender-neutral drafting say that it defeats simplicity, where pronouns lead to ambiguity, the drafter is free to repeat the noun until the provision is reasonably straightforward, precise and unambiguous. If any potential ambiguity is caused by using a pronoun, 'he', 'him', or 'his', the noun to which it refers should be repeated.

In Nigeria, it has been observed that there does not appear to exist any policy on the use of gender-neutral language in legislative drafting in Nigeria. To ensure gender-biased free legal texts, several techniques are used. However, each of these rules has got advantages and disadvantages. Therefore, drafters should always strive to use the technique that best fits the specific case. Gender-neutrality can also be discussed within the context of gender equality. Section 42 of the Constitution of the Federal Republic of Nigeria, as altered (the Constitution) prohibits discrimination on the basis of gender. On the global plane, it stretches to the health sector as is regarded thereof as a human right.[66]

Recommendations

Gender-neutral drafting has been the norm for years in many jurisdictions. Likewise, given the prevalence of English as a *lingua franca*, international organisations such as the

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63 Excerpt on Gender-Neutral Drafting from Colorado Legislative Drafting Manual <http://www.ncsl.org/Portals/1/Documents/lsss/ExcerptGender-NeutralDraftingCO.pdf> accessed on 03 March 2022.

64 *Ibid*.

65 LongJohn (n3).

66 World Health Organisation, 'Human Rights and Health' <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> accessed July 5 2022.

European Union and the United Nations have recently shown some instances of a drafting style much more inclined to gender neutrality. There is, therefore, a need to draft laws in Nigeria that are devoid of gender bias. There is also a need to adopt such gender-neutral policies in line with the practice in many common law jurisdictions. Therefore, it is recommended as follows:

1. Legislation and the Constitution of the Federal Republic of Nigeria should be expressed in gender-neutral language. This will entail changing the masculine gender of "He", which is patriarchal, to "person(s)" to accommodate the female gender.
2. To correct gender specificity, some jurisdictions are redrafting obsolete legislations. It is recommended that Nigeria adopt some of the practices of the various countries that have embraced gender-neutral style in drafting legislations to resolve specific problems caused by discriminatory gender-biased language, through Consolidation and Revision of laws.
3. Other jurisdictions are empowering legislative institutions to carry out technical revisions. The National Assembly should pass a law requiring all laws presented to the legislature to be drafted in gender-neutral language.
4. A gender-neutral language drafting manual should also be adopted as a standard guide for all bills presented to the National Assembly. The National Assembly can also update its standing rules to reflect gender neutrality.
5. Drafters in Nigeria can also use several available techniques and approaches to achieve gender-neutral drafting in legislation; though it demands a high effort, it is a worthwhile endeavour. However, it must be pointed out that most of the critics of gender-neutral language in legislative drafting are not totally against its use in legislation but are merely pointing out the need for caution in its use. Therefore, drafters should always strive to use the technique that best fits the specific case.
6. Gender sensitivity demands that care must be taken in the drafter's choice of words. Although some provisions may be gender specific, for example a bill regarding prostate cancer, may necessarily include 'he' or his'. Similarly, a bill dealing with overian cancer or cancer of the comb may necessarily include the words 'she' or 'her'. However, it is advised that whenever reasonable, nouns maybe used in place of pronouns, to avoid gender identification.[67]

[67] D.T. Adem, *Legislative Drafting Manual* (LexisNexis, 2014), 183.

Conclusion

This paper examined the application of Gender Neutral language in drafting legislation in Nigeria. The principles of legislative drafting are fundamentally geared toward producing effective laws. Laws in themselves are made generally to regulate the lives of members of society irrespective of gender. Over the last decades, several changes have occurred in legislative drafting, mainly based on the suggestions given by the plain language movement. Proposals to modernise legislative drafting have been growing in many jurisdictions and among the specific causes generally mentioned are the overuse of archaic expressions that lack gender neutrality. The gains of the plain language movement are epitomised by the global wave of gender neutral drafting. It is further buoyed by the fast-emerging field of gender equity or gender neutrality in the academic arena. It is thus predictable that the vestiges of gender bias together with the broader problem of the 'dialect of the lawyers and judges' and the incongruity created thereby, will dither and wither into extinction.

11

PLAIN LANGUAGE LEGISLATIVE DRAFTING IN NIGERIA: A COMPARATIVE STUDY OF TWO COMPANIES AND ALLIED MATTERS ACTS

Sarah Hope-Tebira*

Abstract

There is a paradigm shift from the traditional language and style of legislative drafting because of its anachronistic and esoteric nature that served to impede intelligibility of legislative texts. The convoluted nature and verbosity of traditional legislation birthed a clamour for reform in favour of audience-based and user-friendly legislation. This resulted in the Plain language movement that swept across jurisdictions like wild fire leaving in its wake, the phenomenon now referred to as plain language legislative drafting. Plain language legislative drafting incorporates language and style, design and structure to uniquely convey the regulatory message in the legislative text. This paper examined Plain language legislative drafting in Nigeria by testing the application of plain language techniques in the Companies and Allied Matters Act, Cap.C20 Laws of the Federation of Nigeria, 2004 and the Companies and Allied Matters Act, (No.3)2020. This paper also determined whether it is imperative to establish a Plain language policy or framework for legislative drafting in Nigeria to set a standard for effectiveness in legislation. This paper used the doctrinal research methodology which is one of the research methodologies used in legal research and is premised on analysis of legal provisions with minimal need for empirical input. The paper also used comparative research methodology. The paper examined primary and secondary sources and found that plain language techniques are applied moderately in the Acts under review. The paper also found that there is no policy or legal framework for Plain language legislative drafting in Nigeria. The paper recommended that drafters apply the Plain language technique in drafting legislation while taking cognizance of the drafting instructions. The paper also recommended that Nigeria establish a Plain language framework for legislative drafting to move in the trajectory of effectiveness in legislation as the global paradigm.

Key words*:* Effectiveness, Legislative Drafting, Legislation, Plain Language, Statute

* Deputy Director, Directorate of Legal Services, National Assembly and Ph.D. candidate, University of Abuja. sarahhopebaribefi@gmail.com, hopenwala@yahoo.com 08033407762

1. Introduction

Medieval times in British fashion history saw men wear a formal clothing that consists of an over-gown with full upper sleeves, a loose doublet with seam at the waist and skirts, breeches (upper socks), hose, padded cod piece, embroidered shirt, soft but wide caps and shoes not as broad in the toe as the early years of Henry VIII.[1] The ladies on the other hand wore a formal dress that consists of very long bodice, pointed, stiff and wide skirt supported by hip boulsters of the 'drum farthingale'.[2] The sleeves were wide and the neckline low, with a ruff that framed the face. These historic pieces have evolved from the Middle Ages, Tudor times, Victorian era and beyond for more practicable pieces as fashion changes through centuries although history continues to influence future trends.[3]

The flash back into the timeline of British fashion history is an allegory for the language and style of legislation under traditional legislative drafting. The language and style of legislation under traditional legislative drafting era is both obscure, antiquated with an anachronistic ring that served to defy understanding.[4] The history of England left an indelible mark on the language and style of the law making it complex, conservative and excessively entrenched in the past, in a form of legalese that attracted wide spread criticisms against the traditional language of statutes.[5] Notably, the language of legislation under traditional legislative drafting was criticized for its verbosity, turgidity and legalese. The traditional style of legislation was equally rejected for being complex, ridden with jargon and legal constructs.[6] The complexity in both language and style of legislation under traditional legislative drafting era complicated comprehension and interpretation of legislation.[7] Its complexity also created additional burden because of the increased need for legal and administrative explanation, irritated the legislative audience and

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1 B Johnson, 'Tudor and Stewart Fashion and Clothing'<https:// www.historic-uk.com/CultureUK/Tudor-Stuart-Fashion/> accessed 24 September 2023

2 ibid

3 B Johnson, ' Costume and Fashion in Britain through the Ages- Historic UK'<https:// www.historic-uk.com/CultureUK/Fashionthroughtheages/> accessed 28 September 2023

4 C Williams,' Changing with the Times: the evolution of Plain Language in the Legal Sphere' Alicante Journal of English Studies [2015] (28) 184

5 C Rierra,'Plain English in Legal Language: A Comparative Study of Two UK Acts of Parliament' Alicante Journal of English Studies [2015] (28) 147

6 ibid 146; W.Voermans, ' Styles of legislation and Their Effect' *Statute Law Review*[2011] 32(1) 40-41

7 ibid(n6) 41

generally served to undermine its authority.[8]The excessive detail and the unnecessary specialist language made it expensive to use and denied people access to the law because the language and style of traditional legislation hampered the capacity of the legislative audience to comprehend statutes of that era.[9] This and more led to a clamour for reform and a more accessible form of legislation. This clamour birthed the Plain Language Movement and a paradigm shift from the language and style of legislation under the traditional legislative drafting era. Thus, Plain language legislative drafting strips legislation of its pomposity, esotericism, intricacy, verbosity and lack of colour for the benefit of the legislative audience.[10] This paradigm shift also emphasizes effectiveness in legislation as the modern goal in legislative drafting because it produces legislation that is audience-based and user friendly that passes the regulatory message seamlessly.[11]

According to Zanthaki's theory of *Phronetic* legislative drafting, effectiveness in legislation can be achieved through two basic elements: gender-neutral drafting and plain language drafting.[12] She posits that these elements can help the modern drafter achieve clarity, precision and unambiguity, which are key features of effective legislation. Scholars such as Hunt, Williams, Rierra, Adem and more also favour plain language giving it a global appeal.

Advocates of Plain language have pushed the boundaries beyond canvassing for the words in legal documents and legislation to be as plain and clear as possible. They have established series of linguistic techniques to apply to legislative texts in an effort to avoid complex and obscure statutes and enhance clarity and accessibility for the benefit of the legislative audience.[13]

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8 ibid

9 ibid

10 Y.Maley, ' The Language of Legislation on JSTOR'<,https://www.jstor.org/stable/4167814>accessed 29 September 2023

11 DT Adem, *Making a Case for Audiences* (LexisNexis 2018) x; H Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing 2014)5

12 H.Xanthaki, 'Legislative Drafting: a new sub-discipline of law is born IALS Student Law Review' <https://journals.sas.ac.uk/lawreview/article/view/1706 > accessed 29 September 2023

13 ibid (n5)149-150; B. Hunt, 'Plain Language in Legislative Drafting: Is it really the answer?' *Statute Law Review* [2002] 23(1) 28

These linguistic techniques have gained global appeal especially with the status of English as a global language.[14] Although some countries have also passed legislation to legalize writing in Plain language like the Plain Writing Act of America.[15] It is noteworthy to observe that these linguistic techniques are applicable in Commonwealth countries including Nigeria and can be observed as a departure from the traditional language and style of legislative drafting that was complex, conservative and technically referred to as legalese.[16] Moreover, since English is the *lingua franca* in Nigeria and the language of the law, it is imperative for legislation in Nigeria to ascribe to the ideals of the Plain language movement and set deliberate mile stones in that direction in the manner that takes cognizance of her national ethos.

2. Methodology

This paper uses the doctrinal and comparative analysis legal research methodology and identifies then compares two Acts of the National Assembly using the plain language techniques to measure the extent of their growth and development in this regard to underscore their effectiveness. Both Acts are the Companies and Allied Matters Act (CAMA)[17] which are elected for the study because they are premised on the same subject matter. Also, CAMA, 2020 repeals CAMA, 2004 and as a later version, it leaves room to measure the growth of the later version. The two Acts are suited for the test because they were both enacted at a time in legislative drafting history when various jurisdictions in the Commonwealth apply plain language techniques to improve effectiveness in legislation.

The objectives of the paper are to test the degree to which the plain language techniques are incorporated in the two Acts and highlight the necessity for a plain language reform agenda that will culminate in a policy framework or guide for legislative drafting in Nigeria that will take cognizance of the peculiar jurisdictional needs of Nigeria. The premise is that despite the sketchy history of plain language drafting in Nigeria, the global trajectory is effectiveness in legislation and since legislative drafting is multidisciplinary, its principles have no jurisdictional

[14] ibid(n4)183

[15] Act of 2010 which was signed into law by President Barrack Obama

[16] Williams, [2015] (n427)184

[17] Companies and Allied Matters Act, Cap C20 LFN 2004; 2020 (Act No.3)

boundaries. Since the aspirations of in modern legislative drafting and jurisdictions is effectiveness, it a valid aspiration for legislative drafting in Nigeria.

2. Conceptual Framework

2.1 Plain language

Plain language in legislative drafting is influenced by the advent of the Plain Language Movement.[18] Plain language drafting is a movement against the stiff and incomprehensible form in which legal documents were drafted in the past and a move towards a more accessible form of drafting legal documents without tedious jargons and legalese.[19] The idea behind this movement is to make legal documents more accessible to laypersons who read the law and not just members of the legal profession.

Historically, the Plain language movement began sometime in 1963 in the United States of America when the *Language of the Law* was published. The *Language of the Law* is a book that was written by David Mellinkoff. David Mellinkoff is a professor of law who is reputed for his fierce and clever battle against what he describes as "contagious verbosity" in the language of the law.[20] Although Mellinkoff died at 85, he waged a literary war against what he fondly referred to as "the junk antiques" of the vocabulary of the law particularly the flow of " heretofores" and "whereases" that drowned the writings of lawyers at that time.[21] David Mellinkoff was also described as the dean of legal writing specialists and notably, his campaign in favour of brevity and clarity to become the hallmark of the law began with the publication of his most influential book, *Language of the Law*.[22]

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18 A Sobata, 'The Plain Language Movement and Modern Legal Drafting' <https://www.researchgate.net/publication/314246942_THE_PLAIN_LANGUAGE_MOVEMENT_AND_MODERN_LEGAL_DRAFTING> accessed 3 October 2023; ibid (n4)184-185

19 M Rajkumar, and K Agarwal, 'Plain Language Drafting Movement: Time For Revival in India' <https://rsrr.in/2020/04/28/ >accessed 28 February 2023

20 D Martin, ' David Mellinkoff, 85, Enemy of Legalese' The New York Times[16 January 2000] Section 1, Page 37< www.nytimes.com/2000/01/16/us/david-mellinkoff-85-enemy-of-legalese,html> accessed 28 February 2023.

21 ibid

22 ibid

After Mellinkoff, other proponents of the movement also emerged on the scene one of whom is Richard Wydick. Richard Wydick published a book titled *Plain English for Lawyers* in 1979. Richard Wydick is a Professor of Law emeritus of the University of California who was inspired by the work of Mellinkof.[23] Both men saw the uselessness in the way lawyers wrote at the time and did not accept that the language of the law should have a different standard to perform legal magic. Waydick acknowledges that Mellinkof's premise that legal writing should not differ from good writing without good reason is also the premise on which he built his work.

Interestingly, two notably interventions in the history of the Plain language movement are the promissory notes issued nationwide by Mutual Insurance and Citibank in the 1970s.[24] These promissory notes are remarkable because they are written in a manner that makes it easy for laymen to understand.[25] And the second is the intervention by President Richard Nixon who issued a presidential directive in 1972 that "the Federal Register be written in layman's terms."[26]

These similar events may have created a rippling effect around the United States of America and other parts of the world as a result of which in 1978, the State of New York passed a bold legislation on Plain language into law (famously described as the Sullivan Law).[27] This action was replicated by 10 other States of the United States and in 1980, the Federal Legislature of the United States, following the enactment of the Paperwork Reduction Act, 1980 to demand for government forms to be written in plain language to enhance public discourse. In 2010 the United States further enacted the Plain Language Act[28] to enhance citizens' access to Government information and services as it establishes that the documents of the Government that are issued to the public must be written clearly.

The Plain language movement has gained prominence since Mellinkof first challenged the traditional style and of the language of the law. Since then, different

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23 Transcend(R) Library, 'Justifying Plain Legal Language: An Interview with Richard Wydick' <www.transcend.net/library/html/wydickinterview.html> accessed 28 February 2023

24 ibid (n19)

25 ibid

26 ibid

27 The title was given in honour of the politician that introduced the law.

28 Public Law 111-274-OCT 13, 2010

nations have taken positive steps to ensure that statutes as well as other documents that require public attention are drafted intelligibly and as clearly as possible. For instance, the United Kingdom has kept faith with the spirit of the Plain language movement and embarked on a project called the Tax Law Rewrite Project with the objective to redraft tax legislation of the UK in a simple and accessible form through the use of more modern English language and a user-friendlier structure like shorter sentences.[29] In New Zealand, the Law Commission of New Zealand has issued a manual that prescribes ways to make legislation accessible and understandable as practicable. And in 2022, the Parliament of New Zealand passed a Plain Language Act to improve accessibility of certain documents and make them available to the public.[30] Not all countries have actively joined in this movement but baby steps have been taken by countries like India (and Nigeria) in a painstaking effort to join in the movement and rip the benefits in return.[31]

Since its inception, Plain language legislative drafting has evolved from the language of the law to encompass the style, design and structure in a manner that seeks to make legislation clear, intelligible, visually appealing and more comprehensible. Some scholars argue that Plain language may not be the answer to comprehensibility of the law. This argument is only mentioned in part 4 of this paper. However, a careful analysis of the language of traditional legislation and modern legislation would reveal that there is a conscious attempt by modern drafters in various jurisdictions to rid legislation of the clutter of legalese, jargons and verbosity. This modern form is indeed more desirable and drafters are encouraged to use Plain language as a tool to achieve effectiveness in legislation where possible.

2.2.2 Legislative drafting

Legislative drafting is viewed by scholars as a discipline of constitutional significance because, through its practice, statutes are produced. The modern world has been described as the 'Age of Statutes' and legal sphere is predominated by

[29] Tax Law Rewrite Project 1995 < https://library.croneri.co.uk/cch_uk/btl/taxbull-it-taxbull-tb10-98-6> accessed 26 March 2023

[30] Plain Language Act 2022 No.54, Public Act- New Zealand Legislation <www.legislation.govt.nz/act/public/2022/0054/latest/whole.html> accessed 26 March 2023

[31] ibid (n19)

legislation.[32] Legislative drafting is the means through which the consistent supply of legislation is sustained. Legislative drafting also plays a fundamental role in preserving the rule of law because of the obligation on drafters to draft clear, precise law that reflects the intention of the legislator and conveys the message to the audience of the law effectively.[33] Legislative drafting provides the opportunity to interrogate policy issues beginning from the drafting instruction to determine its full legal implications and the limitations of the proposed legislation.[34] One can assume that legislative drafting is also a school in legal education of instructing officers either as government departments or private members on the basic background assumptions and limitations that may qualify as a proposed legislative text.[35]

Crabbe considers legislative drafting as a game of skill that started out of necessity.[36] As a result of this necessity, Common law has retreated while statutes have risen to prominence.[37] According to Hon. Justice Kirby, the world of law circles in the orbit of statutes. The demand for statute gave rise to the necessity to learn how to draft legislation to meet the objectives of the modern State.[38] Early drafters considered legislative drafting as the skill of crafting a proposed legislative text and this informed how the skill was acquired. Legislative drafting is now considered as a discipline, which is that branch of knowledge that can be studied as a higher form of learning.[39] It encompasses art, science and discipline and this holistic view represents the work which modern drafters actually engage in.[40] It is imperative to view legislative drafting as such to be able to appreciate the concept

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[32] G Calabresi, A Common Law for the Age of Statutes (Cambridge, MA 1982) in P Sales, 'The Contribution of Legislative Drafting to the Rule of Law' *Cambridge Law Journal* [2018] 77 (3)631

[33] ibid 632

[34] ibid

[35] ibid

[36] V Crabbe, *Crabbe on Legislative Drafting* (LexisNexis 2008) xvii

[37] A.Z. Borda (ed), *Legislative Drafting* (Routledge Abingdon Oxon 2011) being a reproduction of the *Commonwealth Law Bulletin* vol. 36 (1) x

[38] ibid (n36)1

[39] SC Markman, 'Legislative Drafting: Art, Science or Discipline?' <https://studylib.netdoc/8032507/legislative-drafting-art-science-or-discipline%3f >accessed 17 November 2021

[40] ibid

and develop a holistic efficient training programme to be able to meet the evolving demands of legislative drafting.[41]

The demand for legislation by modern governments and the complexities faced by the modern drafter makes it imperative to apply drafting tools such as plain language technique to produce effective legislation.[42]

3. Comparative study of CAMA, Cap. C 20 and 2020 and the need for Plain language reform in Nigeria

Plain language requires the drafter to write in a clear, concise and organized form that is appropriate for the intended audience.[43]This implies that, the drafter needs to master the rules governing grammar and how to use such grammatical rules to construct the language of the legislative text and design a structure that will result in an effective legislation. For example, pronouns can be used when necessary and the major points must be stated before delving into the details.[44] In the same vein, the drafter should stick to a topic per time and use active voice more and passive voice, less.[45] Also, each paragraph should contain an idea and it requires the use of short sentences as much as possible.[46] In addition, plain language principles require the use of every day words and where technical words are used, they must be explained on first reference.[47] Also, the drafter must keep subject and verb close and omit words that are not necessary.[48] Tools like headings, lists, and tables are encouraged because they make writing easier.[49]

Advocates of Plain language have established series of linguistic techniques to apply to legislative texts in an effort to avoid complex and obscure statutes and enhance clarity and accessibility for the benefit of the legislative audience.[50]

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41 ibid; M. Sarda, 'Principles of Legislative Drafting: A Study' *Orient Journal of Law & Science*; [2011](2)26<https://papers,ssm.com> accessed 30 December 2021

42 ibid(n11)5

43 The National Archives and Records Administration, 'Top 10 Principles for Plain Language' < www.archives.gov/open/plain-writing/10-principles.html > accessed 1 March 2022

44 ibid

45 ibid(n43)

46 ibid

47 ibid

48 ibid

49 ibid

50 ibid (n5)149-150

These linguistic techniques have gained global appeal especially with the status of English as a global language.[51] Also, some countries have also passed legislation to legalize writing in Plain language.[52]It is noteworthy to observe that these linguistic techniques are applicable in Commonwealth countries and can be observed as a departure from the traditional language and style of legislative drafting that was complex, conservative and technically referred to as legalese.[53]

The established principles and guidelines for modern language and style of legislation may be divided into two broad categories: language and grammar, and design and structure.[54]

The yardstick for the examination is the linguistic principles established by the Plain language movement which also reflects or reiterates some of the principles of clarity, simplicity and precision[55] as a contrast from traditional language and style of legislative drafting. Thus, this paper examines the degree to which the established principles are incorporated in the Acts under review as a measurement of the quality of style.[56]

Specifically, the Acts are examined on the basis of proper usage of verbs as against nominalization, active sentence form, complex prepositional phrases, prepositional adverbs, modal auxiliaries, design and structure and the subject-verb-object syntax.

a) Proper usage of verbs, not nominalization

Plain language advocates encourage proper use of verbs in legislative texts instead of nominalization. This is because it reduces number of words in the sentence.[57] Again, nominalization when combined with passive voice is a technique that favours impersonality.[58]Nominalization is not encouraged as a modern language technique because it results in increased use of words and needlessly long sentences.[59] Some scholars refer to nominalization as 'buried verbs.'[60] Both Acts

51 ibid(n4)183
52 Plain Writing Act of America, 2010 which was signed into law by President Barrack Obama
53 ibid (n4)184
54 ibid (n5)149-150
55 H.Xanthaki, (ed*) Thornton's Legislative Drafting* (5th edn Bloomsbury Professional Limited 2013)55-80
56 ibid 50-52
57 R,Haigh, *Legal English* (Abingdon: Routledge, Taylor and Francis Group 2015) in ibid (n5)160
58 ibid
59 ibid(n55)70

reveal a blend of active verbs and nominalization. For example, section 64(5)(a), (b) and (6)[61] provides:

"The Court order may, if the Court deems fit-

(a) provide for the purchase by the company of the shares of any of its members and for the reduction accordingly of the company's capital; and

(b) make such alteration in the company's memorandum articles as may be required in consequence of the provision.

(6) The Court order may, if the Court deems fit, require the company not to make amendment to its articles without the leave of the Court.

Subsection (5) is clearly nominalized as shown by the buried verbs in "reduction" and "alteration" supported by excessive use of the preposition "of" and the article "the".

The defect in subsection (6) may be cured if the legal subject performs the action directly: "…require the company not to amend its articles…"

The major reason to avoid nominalization is because it creates extra nouns which are always accompanied by extra article and preposition for support, these extra words get in the way of the readers as the sentence becomes decidedly wordy.[62] A computer search for the use of the preposition "of" and the article "the" shows a reduced use in CAMA, 2020. It is arguable for the paper to observe that table 1 reveals reduced incidence of nominalization in the 2020 Act.

Table 1: Preposition and article and number of occurrences

PREPOSITION/ARTICLE	**CAMA CAP. C20 (no. of times)**	**CAMA 2020 (no. of times)**
Of	15,295	13,651
The	21,000	20,264

Source: CAMA, Cap. C20, LFN, 2004 and CAMA, 2020

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60 Bryan Garner, *A Dictionary of Modern Legal Usage* (New York: Oxford University Press 1995) in ibid (n5)160

61 CAMA, 2020

62 S. Galat, 'Writing Tips: What are Nominalizations and How to Avoid Them?'<www.linkedin.com/pulse/writing-tips-what-nominalizations-how-avoid-them-samantha-galat > accessed 25 September 2023; M Billig, 'The language of critical discourse analysis: the case of nominalization on JSTOR<'https://www.jstor.org/stable/42889231?seq=3>accessed 1 October 2023

The preposition, "of" sounds pompous and old fashioned when used in excess.[63] Nominalization buries verbs and makes the sentences sound lifeless and forces the drafter to resort to passive construction.[64] The prescription for nominalization is to identify the noun phrase and the verb equivalent then conjugate the verb while paying attention to the type of verb and its tense, and finally replace the noun phrase.[65]

This prescription may easily apply to a prose narrative but the drafter must exercise caution because the language of the law is unique, it binds the future in the present and all facts including the legal subject may not be known at the time the legislative text is being drafted.[66] However, drafters can improve on their grammatical skills, resort to intelligent tools, invite experts in grammar to scrutinize their drafts while paying attention at all times to the exact intention of the drafting instruction to avoid ambiguity or vagueness.

b) Active Sentence Form

Plain language advocates argue in favour of active voice in sentences and explain active voice makes sentences shorter, more direct and is more appropriate in a legislative sentence.[67] Traditional language style of legislative drafting is characterized by passive sentence forms and is sometimes criticized because it is used to avoid the need to attribute responsibility.[68]

A manual examination of the Acts under review show that the sentences in CAMA, 2020 are drafted predominantly in active voice compared to CAMA, 2004 although there still exists cases where the sentences are constructed in passive voice with a by-phrase that identifies the agent of the action. Consequently, if the sentence is rearranged, the legal subject could be moved in front to make the sentence active. In addition, the phrase, "it shall be the duty of "occur 29 times in CAMA, 2004 and only twice in CAMA, 2020.

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63 ibid

64 ibid

65 ibid

66 Stanford Encyclopedia of Philosophy, 'Law and Language' < https://plato.stanford.edu/entries/law-language/> accessed 3 October 2023; Nominalization is useful where it is necessary for impersonal presentation of a legislative text.

67 DT Adem, Legislative *Drafting in Plain English* (LexisNexis 2010)38

68 ibid

c) Complex prepositional phrases and content analysis

Advocates of plain language legislative drafting condemn complex prepositional phrases because they introduce more words than necessary in a legislative text. A complex preposition is a preposition that consists of more than one word such as the phrase, "in light of", "in accordance with", "on behalf of", etc.[69] The pattern of these complex prepositional phrases comprise a preposition plus noun then preposition structure.[70]The view canvassed by Plain language advocates is that complex prepositional phrases make comprehension of the legislative text slow.[71] They prefer economy of words to enhance intelligibility of the legislative text by the legislative audience.

The Acts under review are examined to determine the number of occurrences of the complex prepositional phrases: "in accordance with", "with respect to", "for the purpose of ", "by virtue of ", "in respect of", "in relation to" and "in pursuance of".

Table 2. Complex prepositional phrases and number of occurrences

No.	Complex prepositional Phrase	CAMA C20,LFN, 2004 (no. of times)		CAMA, 2020 No. of times
1.	In accordance with	127		185
2.	With respect to	117		121
3.	For the purpose of	141		138
4.	By virtue of	63		86
5.	In respect of	364		376
6.	In relation to	139		188
7.	In pursuance of	58		33

Source: CAMA C 20, LFN 2004 and CAMA, 2020

Interestingly, table 2 shows increased occurrence in the use of complex prepositional phrases in CAMA, 2020 except the reduced use of "for the purpose of" and "in pursuance of". This creates the need to explore ways to use improved grammatical constructions to convey the regulatory message in the legislative text with less brevity. It may be argued that the number of occurrences of the complex prepositional phrases compared with the entire Act is not as voluminous but there is

[69] ibid (n5)158-159

[70] ibid

[71] Complex Preposition-Grammar-Ultius <www.ultius.com/glossary/grammar/prepositions/complex-preposition-html >accessed 16 June 2023

room for improvement. Drafters need to replace the string of words with one word that conveys the same meaning. For example, instead of "for the purpose of", "for" will suffice provided the context and drafting instruction is considered.

d) Modal auxiliary "shall"

Table 3 Modal Auxiliary "shall" and number of occurrences

CAMA C20, LFN, 2004 (No. of times)	CAMA, 2020 (No. of times)
2,863	2,224

Source: CAMA C.20 and CAMA, 2020

Table 3 reflects a moderate decline in the use of the modal auxiliary "shall" in CAMA, 2020. Interestingly, one defining feature of the language of traditional legislative drafting is the use of the modal auxiliary "shall". Plain language proponents do not support its use in modern legislation especially because "shall" now has several meanings attributed to it resulting in ambiguity and the loss of precision.[72] Some of several meanings of "shall" include to express a future event, negate or impose a duty, grant a right or give a direction, create a precedent or subsequent condition, state a circumstance, express an intention and more.[73]

Plain language proponents oppose the excessive use of the modal auxiliary "shall" because its use in general English to express the future tense has greatly diminished and will not resonate with the legislative audience.[74] In the same vein, modern drafters advocate the complete obliteration of the word in favour of the "everyday auxiliaries of obligation such as "must" and "to be."[75]

Despite the criticisms against the use of the modal auxiliary "shall", the language of Nigerian legislation reflects an ardent posture in its favour specifically to impose of a duty or an obligation to act, to express a future event, grant a right or give a direction, negate an action, state a circumstance etc.[76]

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[72] ibid(n5)153

[73] ibid (n5)153

[74] ibid

[75] ibid

[76] B Ibrahim, et al 'Modal Verbs Hedging: The Uses and Functions of "Will" and "Shall" in Nigerian Legal Discourse' <https://www.researchgate.net

e) Prepositional adverbs

Haigh argues that "the most emblematic archaic lexical items of legalese are prepositional adverbs or 'semi-archaic formations' for instance "thereafter", "hereby", "thereon", "therein", "thereunder", etc."[77] Traditional legislation is inundated with the archaic words which constitute a trait of legalese. Plain language proponents advocate that they have no place in the language and style of modern legislation and proffer useful tips or suggestions for their replacement.[78]

Table 4: Prepositional adverbs and number of occurrences

CAMA C20, LFN, 2004 (no. of times)		CAMA, 2020 (no. of times)
1.Thereto	**45**	**28**
2.thereby	**25**	**18**
3.thereon	**31**	**16**
4.thereunder	**10**	**3**

Source: CAMA C 20, LFN 2004 and CAMA, 2020

Table 4 shows that a negligible use of the prepositional adverbs in CAMA, 2004 which is further reduced in CAMA, 2020 and this is commendable as an evidence of a modern form instead of archaic style.

f) Design and structure

Enthusiastic proponents of the Plain language technique advocate to apply it in legislative drafting because they believe it will make the law more accessible to the public.[79]They reject the traditional style of legislative drafting because it uses specialized language and style that render legislation difficult to access amongst other reasons.[80]The features of traditional legislative drafting enunciated in Coode's approach is a sentence structure that forces the reader of the legislation to confront cases and conditions that apply to legal action before the reader identifies the legal subject or the legal action.[81] This creates an abstract condition where the reader of

/publication/329244322_Modal_Verbs_Hedging_The_Uses_and_Functions_of_Will_and_Shall_in_Nigerian_Legal_Discourse> accessed 3 October 2023

77 R Haigh, *Legal English* in ibid(n5)155

78 ibid(n67) 30-31

79 ibid(n13) 24

80 ibid 25

81 George Coode recorded a formula for a typical legislative drafting sentence thus: every law when expressed should consist of the description of the subject; (b) the enunciation of the legal action; and

the legislation is forced to remember the cases and conditions "until the actor and action are identified."[82] The results in very lengthy chunk of sentences that make assimilation of the message behind the legislative text almost impossible. Thus, the modern approach inherent in Plain language technique seeks to obliterate the difficulties that the cases and conditions sentence approach from the Coode era impose on communicating legislation.

Aside from the proposition to embrace the modern approach typified by the Plain language technique, Plain language legislative drafting involves more than the use of plainer words to draft legislation to ease communication.[83] The demand from the Plain language school is threefold although other scholars categorize it as twofold.[84] Both schools agree that one category reflects the language technique, while the other emphasizes design and structure.[85] The argument is that the design and structure of the legislation must change in a manner that makes it more visually accessible and reader friendly.[86] To achieve this, they suggest that the provisions of a legislative text be arranged in temporary sequence or schematic technique.[87] They also advocate that provisions that have a common subject be grouped together, that drafters use enhanced side notes, running heads and full stops after each subsection.[88] They also opine that drafters avoid extremely long sentences that have several qualifications and generally solid blocks of texts because they make legislation complex and really difficult to understand.[89] Thus, they urge drafters to adopt a design and structural style that is arranged in a schematized structure, where legislative texts are arranged with the use of lists, sections, subsections,

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when the law will not apply universally, add the description of the case to which the legal action is confined; and the conditions on performance of which the legal action operates. Coode further explains that the case to mean that where the law is required to operate only on a given circumstance, the circumstance must be described before expressing any other part of the law. Finally, the conditions must be expressed before the legal subject. Coode's legislative sentences were frontloaded with cases and conditions that made comprehension a herculean task; in A Watson-Brown, 'In search of Plain English- the Holy Grail or Mythical Excalibur of legislative Drafting?' *Statute Law Review* (Oxford University Press) [2011]33(1) 17 - 18

82 ibid (n81)18

83 ibid

84 ibid(n13)24-25; (n5)149-150

85 ibid

86 ibid(n13) 25

87 ibid 23 ;(n5)152

88 ibid

89 ibid

paragraphs and subparagraphs.[90] They also propose the use of short sentences with an average of 15 – 20 words as the appropriate length of sentence to enhance accessibility and reader friendliness of the legislative text.[91]

Interestingly, both Acts under review show textual schematization. Accordingly, the provisions within the Acts are arranged in a schematized structure and use lists, sections, subsections, paragraphs and sub paragraphs. However, there is still evidence of solid blocks of sentences that exceed an average of 15 – 20 words. For example, section 197(1)[92] has 139 words while section 301(1)[93] has 124 words. This negates the design and structural element of the general technique of Plain language. Although some jurisdictions have established plain language guide and regulatory framework to improve intelligibility and effectiveness of legislation, it may be instructive for Nigeria to consider establishing a framework with elements that benchmark word limits in provisions amongst other features and enhance the effectiveness of Nigerian legislation in this regard.[94]

g) Subject-Verb- Object-Syntax

A simple sentence is divided into a subject, verb and the object. Essentially, a sentence expresses a thought and as such should consist of a subject and a predicate which Coode refers to as the legal subject and legal action.[95] Although legislation is

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[90] ibid (n5)152

[91] ibid

[92] Companies and Allied Matters Act cap. C20 LFN, 2004

[93] Companies and Allied Matters Act, 2020(No.3)

[94] Australia supports the use of plain language drafting in legislation. Notably, the Office of the Parliamentary Counsel (OPC) has published two useful guides with the objective to reduce complications in legislation. These guides are titled "Reducing Complexity in Legislation" and "Plain English Manual" ; Australian Government Office of the Parliamentary Counsel, 'Plain Language' < https://opc.gov.au/drafting-resources/plian-language> accessed 18 May 2023.
In New Zealand, the Parliamentary Counsel Office (PCO) has published part of its in-house Manual on its website to assist and provide insight on the approach and practices of the PCO regarding how to use plain language tools in legislation; K.Buchanan, 'Writing Laws in Plain English in New Zealand' <https://blogs.loc.gov/law/2011/10/writing-laws-in-plain-english-in-new-zealand/> accessed 17 May 2023
The United States of America published the Plain Writing Act in 2010. It has influenced the recognition of the Plain Language Day which is celebrated 13 October each year beginning from the anniversary of the Act in 2011; International Plain Language Day-October 13-National Day Calendar, <https://nationaldaycalendar.com/international-plan-language-day-october-13/> accessed 12 May 2023

[95] ibid (n36)63

peculiar, it is not so peculiar to the extent that it has its own rules on grammar or syntax, hence the rules that apply to grammar also apply to legislation.[96] Suffice it to iterate that a section in an Act is basically a sentence.[97] In which case, the rules that apply to the grammatical construction of a sentence apply to a legislative sentence. Proponents of Plain language legislative drafting opine that a legislative sentence should follow the subject, verb and object syntax as much as possible, to make legislation accessible.[98] Unfortunately, a legislative sentence often contains frequent interruptions in the sentence structure because of the need to introduce several qualifications (which Coode describes as cases and conditions) that must exist before the legal subject performs the legal action.[99] This is particularly so because legislation, most often than not, is not of universal application.[100] The insertions or intrusions usually disrupt the subject-verb-object syntax and where they are too many or too frequent, they negate ease of communicating the legislative message.[101]

Both Acts under review combine a blend of short and long sentences as a result of several qualifications (or cases and conditions) that are embedded within them. The result is the frequent disruption of the subject-verb-object syntax structure in cases where the legislative sentences are very long. Where the sentences are short, the qualifying insertions are minimal and the subject-verb-object syntax structure is retained. It may be difficult to use a plain language guide to specify the limit of subject-verb-object syntax interruption given the unique nature of legislation which does not have universal application, but it can be explored.

The drafters of the Acts under review also utilize schematization technique in place of solid blocks of sentences in certain instances where the legislative sentence is long, to separate the legal subject from the qualifications (cases and conditions) to enhance understanding.[102]

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96 ibid

97 ibid

98 ibid (n55)65

99 ibid67

100 ibid 65

101 ibid(n5) 157-158

102 Crabbe notes that when cases and conditions are properly expressed, they help to make the legislation clear and precise in ibid(n36)67; Companies and Allied Matters Act, 2020 (No.3) s.158 is an example of a schematized textual structure.

4. Brief Analysis

The seven Plain language technique tests applied on the two Acts under review, provide interesting revelations. The overarching revelations from the tests show that both Acts incorporate a mixture of the traditional language and style of legislative drafting and the plain language techniques, in varying degrees.

Specifically, the nominalized forms of expressions still appear in both Acts although in CAMA, 2020 they also have their accompanying verbs such as "on the recommendation of the Minister" instead of "as the Minister recommends". This style is frequently used in both Acts although the frequency of nominalized forms has reduced considerably in CAMA 2020 compared to CAMA 2004 as table 1 reveals.

Passive constructions are abhorred by plain language proponents for several reasons one of which is the failure to attribute responsibility. CAMA, 2020 is drafted predominantly in active voice when compared to CAMA, 2004. However, incidences of passive construction accompanied by a by-phrase that identifies the agent in the sentence are used. This makes room for a redraft to cure the impersonality in the text.

Complex prepositional phrases, though a feature under traditional legislative drafting, have not been obliterated from both Acts as table 2 reveals. The onus is on the drafters to acquire grammatical skills, use intelligent tools, consult thesaurus and rely on experts where necessary to replace the string of words with single words that have the same meaning within the legislative context.

The modal auxiliary "shall "is a relic from the traditional style of legislative drafting that has been transported in time into modern legislative drafting as shown in its use in both Acts. Although its use is reduced in CAMA, 2020 compared to CAMA, 2004, "shall" remains a permanent fixture in Nigerian legislation for some of the reasons adduced in this paper. Modern drafters have made a significant shift in favor of "must", to impose obligation but this is not the case in Nigeria where "shall" has gained judicial recognition.[103] Only a deliberate reform either as a policy statement, guide or regulatory framework that brings the

[103] *Umeakuana vUmeakuana* (2019)14NWLR(Pt.1691) 61SC; *Ecobank (Nig.) LTD v Honeywell Flour Mills PLC* (2019) 2 NWLR(Pt.1655) 55 SC; *Umah v.APC*.(2019)5 NWLR(Pt.1666)427 SC

attention of all stakeholders in the discipline, beginning with the legal profession, can end the reign of the modal auxiliary "shall" in Nigerian legislation.

Traditional legislation bears prepositional adverbs as emblems of archaism and legalese. The stuffiness and pomposity of prepositional adverbs is offensive and shrouds the meaning of legislation. Notably, there is a significant reduction in their use in both Acts and more improvement in that regard in CAMA, 2020.

The design and structure of both Acts reveal increased use of visual tools that enhance intelligibility especially in CAMA, 2020. Design and structural elements such as white spaces, schematized texts, division into chapters, parts, sections, subsections, paragraphs, lists, headings, etc. are also incorporated as visual elements that aid understanding. However, solid block of sentences with average word count that range from 20 to above 100 are also used in both Acts. This may require a deliberate framework to limit the word count in provisions to a certain minimum and maximum just as other jurisdictions have done to ultimately improve effectiveness of the legislative text.

The subject-verb-object syntax structure may work perfectly in simple sentences but become difficult to sustain when the sentences become complex as the two Acts reveal. Moreover, since legislation is not of universal application, frequent interruptions are necessary to modify legislative texts to meet legislative intentions. It is difficult to sustain this structure but drafters are encouraged identify these elements in the legislative sentences and must not to split verb forms needlessly.[104]

The plain language technique has its critics that believe legislation is addressed to lawyers, judges, enforcers, interest groups, etc. If this view is accepted as fact, perhaps, there may not be any need to make the language as plain.[105] Also, Bennion believes that law cannot be comprehended by non-experts because it is an expertise that needs to be explained to lay persons just as medicine is only practiced by medical experts. For Bennion, lay persons do not need to understand a piece of legislation but require explanations and summaries.[106] Another strong voice in this regard is Professor Sullivan who concedes that the public is not keenly interested in the letters of the statutes and it is unfair to ask the drafter to play for an audience

[104] ibid(n55)65
[105] ibid(n13) 28
[106] ibid

that is not in the auditorium.[107] In the same vein, Hunt argues that the purpose of legislation is to make policies effective and not to entertain the legislative audience. As a result, drafting certain legal concepts in plain language will increase vagueness and ambiguity.

The existence of opposing views regarding the incorporation of plain language drafting places a burden on jurisdictions to set standards to draft legislation effectively and how to adopt techniques such as plain language. In jurisdictions where there is no formal policy or guide, the drafters must adopt plain language techniques and other modern drafting tools as they see fit to achieve effectiveness in legislation and the style will vary every time as shown in the two Acts under review.

5. Findings, recommendations and conclusion

5.1 Findings

This paper found that:

(a) both Acts under review moderately apply the plain language technique especially CAMA, 2020 which shows diminished use of prepositional adverbs, increased use of active voice and a preference for the modal auxiliary, "shall";

(b) CAMA, 2020 exhibits more growth and development in its compliance with the plain language technique compared to CAMA,2004 except in the use of complex prepositional phrases;

(c) some jurisdictions have established plain language frameworks to reduce the complexities in their legislation and improve its effectiveness; and

(d) Nigeria has not established a plain language policy or framework for plain language drafting.

5.2 Recommendations

Based on the findings, it is recommended that:

(a) drafters continue to explore ways to improve on the use of plain language technique through the use of intelligent tools and technology, reliance on experts in grammar for scrutiny of legislative texts as a tool for effectiveness;

[107] ibid 29

(b) drafters identify the legal subject in legislative texts through information from the instructing officer to minimize nominalization; and
(c) Nigeria establish a Plain language framework that will guide drafters in the application of plain language techniques in drafting legislation in Nigeria.

5.3 Conclusion

Effectiveness in legislation has become the new goal of modern legislative drafting. Scholars such as Xanthaki have identified Plain language as one of the tools the to achieve clarity, precision and unambiguity which are doors to effectiveness. Plain language drafting represents a paradigm shift from the traditional style of drafting legislation that was turgid and hindered intelligibility.

This paper examined CAMA, 2004 and CAMA, 2020 to measure the extent to which plain language techniques are incorporated. It found moderate compliance iterates that it is important for jurisdictions to set their plain language standards to enhance effectiveness in legislation since there are exists proponents and opponents of the Plain Language technique.

CASE REVIEW

12

POLITICAL LITIGATIONS AND CONFLICTING COURT ORDERS: IMPERATIVE FOR THE DOCTRINE OF FULL FAITH AND CREDIT IN NIGERIA

Samuel Oguche[*]
Ganiyu, l. Ejalonibu[**]
Kolapo Q. Abayomi[***]

Abstract

This policy paper examines the impacts of conflicting court orders on both the integrity of Nigerian electoral process and judiciary. It argues that to stop issuance of conflicting orders by Nigerian courts, adoption of "Doctrine of Full Faith and Credit" is imperative. It also illustrates that although the grant of ex-parte or interim orders is necessary and relevant to judicial system, it needs to follow the principle of stare decisis. The paper, therefore, recommends that to eliminate the occurrence of conflicting court orders in Nigeria, National Assembly may amend the 1999 Constitution to reflect "Doctrine of Full Faith and Credit,". It further recommends that the National Judicial Council (NJC) should start disciplinary actions against erring judges.

Keywords: Court Orders, Doctrine of Full Faith and Credit, Political Litigations

[***] PhD, Research Fellow, Department of Democracy and Governance, NILDS Abuja

I. Introduction

The recent incidence of Nigeria's courts of coordinate jurisdiction making cross-orders among themselves over political disputes has generated public criticism against the judiciary in Nigeria. These conflicting orders especially the ones emanating from courts of coordinate jurisdiction are mostly on issues relating to political/electoral litigations.

With this situation, there are two major concerns: it is "antithetical" to the actualization of democratic consolidation as the practice is meddling with the work of the Independent National Electoral Commission (INEC) and the smooth running of electoral administration; it poses serious challenges to the integrity of judicial officers and process. It is now a national debate whether the judiciary has seemingly joined the fray of political crisis rocking some political parties in the country by indiscriminately granting orders and counter-orders as requested by the different warring sides.[1]

paper, therefore, examines the impact of conflicting court orders on the integrity of electoral and judicial processes. It argues that to stop issuance of conflicting order by Nigerian courts, adoption of *Doctrine of Full Faith and Credit* is imperative. It also illustrates that although the grant of *ex-parte* or interim orders is necessary and relevant to judicial system, it needs to follow the *principle of stare decisis*. The paper concludes by drawing broad policy lessons from other jurisdictions to eliminate conflicting judicial decisions in order to facilitate smooth running of the electoral process.

II. Overview of Political Litigations and Conflicting Court Orders in Nigeria

Political litigations have made the judiciary in Nigeria over-busy more than ever. It has been discovered that more than 80 percent of the cases, either at the Supreme Court, Court of Appeal or the High Court were election or political matters, therefore denying the courts the privilege of doing other matters.[2] INEC was joined in over 1,689 court cases arising from the 2019 general election.[3] This state of affairs may have impacted on the attention paid to other cases including criminal, matrimonial, admiralty and other matters. etc So, one issue in Nigeria today, which this paper looks into, is how to curb the potential and real negative impacts of conflicting court orders on judicial integrity.

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1 Onyekwere, J. (2020). Political matters have made Nigerian judiciary one of the worst in the world. Available <https://guardian.ng/features/law/political-matters-have-made-nigerian-judiciary-one-of-the-worst-in-the-world/> accessed 10 Nov 2021

2 Ibid

3 NAN, "INEC records over 1, 689 litigations from the 2019 general elections", < https://www.premiumtimesng.com/news/more-news/334893-inec-records-over-1689-litigations-from-the-2019-general-elections.html> accessed 11 Nov 2021

Though, the grant of *ex-parte* or interim orders is necessary and relevant to the judicial system as it is usually granted to protect the *res* of litigation in cases of extreme urgency or where there's serious danger or triable issues that may likely be destroyed. In the last couple of weeks, courts of coordinate jurisdiction, have, in a number of political cases, been issuing a number of conflicting and counteracting interim orders directing political party officers either to vacate, or resume office and also ordering the Independent National Electoral Commission (INEC) to recognize one political aspirant or the other as a party's flag bearer.[4] These conflicting orders granted to political parties and their candidates have for sometimes now been a source of major concern to INEC.[5]

Thus, the spate of conflicting orders by courts of coordinate jurisdiction has attracted public criticism in the country.

The latest conflicting orders emanated from Rivers, Kebbi, Cross River, Anambra, Jigawa and Imo states, where injunctions on political matters were made by various courts (and countered by coordinate courts) in August, 2021.[6] This is not the first-time conflicting orders would be witnessed in the Nigerian judiciary, especially in political cases, neither is it the first time public would severely frown at issuance of such orders. Expressing concern on the issue, Okolie had this to say:

> The conflicting judgments of courts even in election matters can in effect destroy the very foundation of the Rule of law, democracy and any decent society. It erodes the confidence of people in the judiciary especially when judgments are alleged to emanate under very questionable circumstance. This as a matter of fact hinges on judicial precedents. Rather than our courts providing solutions to conflicts, they are now embroiled and enmeshed in confusions and conflicts emanating from contradictory and/or conflicting decisions of the appellant courts especially Court of Appeal where we have a notorious fact of an avalanche of conflicting judgments by different Divisions or Panels on election matters.[7]

It can be said that conflicting orders raise two critical issues: one, the antithetical implication of the orders to the actualisation of the democratic consolidation in the

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4 "CJN meets six chief judges on conflicting judgments today" in Punch, 24th August, 2021 https://punchng.com/nba-faults-contradictory-court-orders-knocks-lawyers-used-by-politicians/

5 Onyekwere (n1). See also "Again, INEC expresses displeasure over conflicting court orders." INEC National Chairman, Prof. Mahmoud Yakubu, in the Vanguard, Sept. 7, 2021 https://www.vanguardngr.com/2021/09/again-inec-expresses-displeasure-over-conflicting-court-orders/

6 Azu, J. C., Ibrahim, H. & Balarabe, A. (2021). How Courts Keep Issuing Conflicting Orders Despite Criticism.

7 Okolie, E.Q. Okolie, "A Critical Review of Conflicting Judgments of Appellate Courts in Election Matters" <https://www.globalacademicgroup.com/journals/knowledge%20review/A%20CRITICAL%20REVIEW%20OF%20CONFLICTING%20JUDGEMENTS.pdf> accessed 12 Nov 2021

country, and two, seeming undermining of independence of the judiciary to which the country aspires, and it runs contrary to the integrity of judicial officers and court process.[8]

Indeed, this recurring trend of absolutely ridiculous conflict in rulings and judgments of courts of coordinate jurisdiction tarnishes the image of the judiciary. Unfortunately, some senior members of the Bar have continued to yield themselves to be used as willing tools by politicians to wantonly abuse the judicial process.[9] In fact, it has been argued that, "these actions contravene the Rules of Professional Conduct for Legal Practitioners 2007 ("RPC") especially the cardinal Rule 1 of the RPC which requires a lawyer to uphold and observe the rule of law, promote and foster the cause of justice, maintain a high standard of professional conduct, and not engage in any conduct which is unbecoming of a legal practitioner."[10]

III. The Doctrine of "Full Faith and Credit," Cross-Country Experiences and its Imperative for Nigeria

When a valid judgment is rendered by a court that has jurisdiction over the parties, and the parties receive proper notice of the action and a reasonable opportunity to be heard, the *Doctrine of Full Faith and Credit* requires that the judgment receive the same effect in other courts of coordinate jurisdiction even from other states as in the state where it is entered.[11] It is defined as the obligation that every state has to recognize and accept other states' public records, judicial proceedings, and legislative acts.[12] Thus, the doctrine ensures that courts of coordinate jurisdiction respect each other's actions between the states. Conflicting orders/judgements are eliminated by adopting the judgements made by other courts of coordinate jurisdiction in other climes; and it is the contention of this paper that to put a stop to conflicting court orders, Nigeria would do well by adoption of Doctrine of "Full Faith and Credit" from other climes. The cross-country experiences of where Doctrine of "Full Faith and Credit" are used can be found in the following countries:

USA- The Full Faith and Credit Clause can be found in Article IV, Section 1 of the United States Constitution. The clause directs states to acknowledge and enforce court

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8 Ibid.

9 Ibid.

10 Ibid.

11 Ashley Dugger, (2021). Full Faith & Credit Clause: Definition & Examples. Available at https://study.com/academy/lesson/full-faith-credit-clause-definition-examples.html

12 "Full Faith and Credit Definition: Everything You Need to Know"<https://www.upcounsel.com/full-faith-and-credit-definition> accessed 10 Nov 2021

judgments from other states. By an Act of Congress of May 26, 1790, it is provided that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." For example, in March 2016, the Supreme Court ruled in V.L. v. E.L. that under the Full Faith and Credit Clause, the State of Alabama must recognize the adoption decree granted to a same-sex couple by a Georgia state court in 2007, regardless of how that court came to its conclusion granting the decree.[13]

India- The doctrine of "full faith and credit"- Article 261 in the Constitution of India, 1949 also recognises the principle of full faith and credit to judicial proceedings of the Union and of every State.[14] The Constitution states that Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State. Thus, final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory.[15]

Mexico - The Mexican Constitution however contains a conditional principle of "Full Faith and Credit Clause." For instance, article 121 of the constitution provides that "Full faith and credit shall be given in each state of the federation…," and proceedings, and the effect thereof, abiding by the following conditions: "...Judgments relating to personal rights shall only be binding in another state provided the person shall have expressly, or impliedly by reason of domicile, submitted to the jurisdiction of the court rendering such judgment, and provided said person was summoned to attend the trial.[16]

IV. Factors Exacerbating Conflicting Court Orders in Nigeria.

1. ***Lack of Respect for Territorial Jurisdiction*** **-** Most of the courts issuing interim orders are quite remote, geographically, to the places where the disputes arose. It would be discovered that all the conflicting orders were issued ex-parte with little regard for principles of territorial jurisdiction, caution expected of a judge in the handing of an ex-parte hearing, and the need for a court to stay clear of a matter whose subject matter is already pending before a court of coordinate jurisdiction.

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[13] Johnson, C. (2016). "Supreme Court rules for Ala. lesbian seeking adoption rights," available at https://www.washingtonblade.com/2016/03/07/supreme-court-rules-for-ala-lesbian-seeking-adoption-rights/?__cf_chl_managed_tk__=pmd_LujUusMM4suE5ldk7Dco.N066sa4FkNQwy_9l6VvU3E-1633174708-0-gqNtZGzNA1CjcnBszRO9 accessed 12 Nov 2021

[14] https://www.casemine.com/search/in/full%2Bfaith%2Band%2Bcredit%2Bdoctrine

[15] https://indiankanoon.org/doc/358206/?__cf_chl_jschl_tk__=pmd_P8Bg2cy0p1BZXhAzzq9H7S9BNG4TUfCYTZh_rd4B0ns-1633175344-0-gqNtZGzNAhCjcnBszQh9

[16] Castel, J.G. (1969). Reviewed Work(s): Conflict of Laws, Mexico and the United States: A Bilateral Study by S. A. Bayitch and José Luis Siqueiros. The University of Toronto Law Journal, Vol. 19, No. 3, pp. 449-451.

2. ***Lack of disciplinary actions against erring judges*** - While it is understood that disciplinary proceedings against judges must be based on the rule of law and carried out in accordance with certain basic principles aimed at safeguarding judicial independence, it is also surprising that most Nigerian judges alleged to have committed misconduct in the exercise of their functions are not facing prosecution.[17]
3. ***Corruption –*** According to Civil Society Network Against Corruption (CSNAC), corruption and impunity is endemic in Nigeria's judicial system. They argue that, the outright failure of the judiciary to purge the Nigerian judicial system of corrupt practices has eroded public confidence in the judiciary. Indeed, the disciplinary measures meted out to some erring judges has cast serious doubt on the expressed commitment of the NJC to restore public confidence in the country's judiciary.[18]

V. Areas for Legislative Consideration/ Recommendations

a) ***Like in American, India, etc. Nigeria National Assembly may need to alter the 1999 Constitution to reflect the Doctrine of Full Faith and Credit*** - To stop the issuance of conflicting court orders, the country may take cue from other climes such as the United States of America where decisions of courts of coordinate jurisdiction are entitled to ***Full Faith and Credit*** as embedded in the US Constitution. This means that the judgment of another court of coordinate jurisdiction which exercised proper jurisdiction over a case, is entitled to have that judgment upheld in other courts.

b) ***NJC should start disciplinary actions against erring judges*** - The National Judicial Council, NJC, is the constitutional body responsible for the exercise of disciplinary powers over judicial officers and setting down and being responsible for policy issues and justice administration in micro and macro terms. They are to make sure that all politically motivated cases are brought to their attention before being assigned to a Judge. That way, they will know cases that are not within their territorial jurisdiction, hence, there will be no need to hear such matters in the state.

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[17] "How Judges frustrate fight against Corruption – Report" http://pmnewsnigeria.com/2016/10/18/how-judges-frustrate-fight-against-corruption-report/ accessed 10 Nov 2021

[18] Editorial, **How judges frustrate fight against corruption- Report, 18th October, 2016 PM News** <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiUnfiw9KvzAhVWAmMBHSFSAxAQFnoECCkQAQ&url=http%3A%2F%2Fpmnewsnigeria.com%2F2016%2F10%2F18%2Fhow-judges-frustrate-fight-against-corruption-report%2F&usg=AOvVaw0wrCl0RrEYF94lLieZANRY> accessed 12 November 2021

VI. Conclusion

This paper has analyzed the recurring trend of conflict in rulings and judgments of courts of coordinate jurisdiction especially in relation to political/electoral litigations. It finds that the causes and rationales behind the incessant granting of conflicting ex-parte applications by judges in their divisions especially on suits instituted by candidates and members of various political parties are numerous, viz; lack of disciplinary actions against erring judges, lack of respect for territorial jurisdiction, and absolute incompetence, etc. This trend tarnishes the image of the judiciary. The strongest possible measures and sanctions must be applied to any judicial officer who violates the Code of Conduct for Judicial officers of the Federal Republic of Nigeria.

13

INTEGRATING ANTI-CORRUPTION PRINCIPLES INTO PUBLIC PROCUREMENT IN THE SECURITY SECTOR: A CRITIQUE OF SECTION 15 (2) OF THE PUBLIC PROCUREMENT ACT 2007

Jacob O. Garuba*

Abstract

The scourge of corruption has negatively impacted particularly the third world countries. The incidence of corrupt practices is dominant in public procurement sector, as corrupt regimes or corrupt public officials have exploited public procurement to their benefit. Integrating anti-corruption principles in public procurement particularly defence procurement will ultimately eliminate or reduce the prevalence of corrupt practices from the nation's procurement sector. Implementing an effective procurement regime to defence procurement in Nigeria will drastically reduce waste of public funds associated with corrupt practices, and bring about transparency in the defence sector. This paper adopts the doctrinal method of research by examining relevant procurement legal framework which introduced transparency and integrity into public procurement. These include the United Nations Commission on International Trade Law of 1994 (UNCITRAL) revised in 2011, World Trade Organisation Agreement on Government Procurement of 1996 revised in 2012 and Article 9 of United Nations Convention Against Corruption 2003. The paper further examined Public Procurement Act of 2007 and other regime regulating defence procurement in Nigeria. Literature in different fields of studies which cut across law, finance and management etc. were equally examined. Notwithstanding the procurement regime, there has been lack of transparency in defence procurement in the country leading to misappropriation or diversion of public funds, through fraudulent procurement deals by procuring entities or officers. The legal regime of section 15(2) of the Procurement Act restricted the application of the Act to defence and national security procurement until the approval of the President is first sought and obtained. This practice has exposed defence procurements to corrupt practices, by not fully complying with the procurement regime and other regulation applicable to it. The paper concludes by noting that proper implementation of the procurement regime and its application to defence procurement will curb corrupt practices associated in this sector. It finally concluded by recommending that, the provision of section 15(2) of Public Procurement Act be amended, to ensure transparency and integrity in defence procurement, and bring its operation within the Act and other legal regimes or policy framework regulating defence procurement in the country to achieve its objectives.

Keywords: Anti-Corruption, Public Procurement, Public Procurement Act, Security Sector

* PhD BL, Department of Private and Property Law, Faculty of Law, University of Benin, Benin City Email: osamagiagiemwen.garuba@uniben.edu

1. Introduction

In order to achieve the objective of public procurement to the overall benefits of the populace of any nation and to maximise public resources and more particularly the peculiarity of public procurement processes, the global community considered it imperative to have a legal framework to regulate public procurement and ensure that its proceedings meets up with the minimum standard of transparency and integrity test. This is so as to avoid any form of corrupt practices being associated with public procurement by government or public officials. The legal framework is intended to integrate anti-corruption principles into public procurement processes or proceedings. In Nigeria like any other nations of the world, government or public institutions engage in public procurement in order to carry out one of its major responsibilities of providing social amenities for the benefits of the populace. This has been succinctly expressed by Dagbanja to the effect that "public procurement is primarily a public sector oriented activity aimed at meeting public needs or the public interest."[1] Anderson remarked that:

> Procurement typically involves goods, services which have particular economic, social and development significant, for example; transportation and other physical infrastructure that is vital to the competitiveness of business users and the mobility of citizens, hospitals and other public facilities; schools and universities; and defence and policing.[2]

As important as public procurement is, in the realisation of government's responsibilities to the populace, it has been abused by government institutions and its officials by corruptly influencing public procurement processes for their personal and individual gains or benefits.[3] This has been clearly noted by Owusu and Chan that "one of the public sector institutions reported to be severely vulnerable to

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1 Dominic N. Dagbanja, 'Promoting a Competitive Local Business Community in Ghana: The Role of the Legal Framework for Public Procurement.' *Journal of African Law* [2014] (58)(2) 351.

2 Robert D. Anderson, 'International Procurement: Development in 2008 and the Road Ahead,' in West Government Contracts Year in Review Conference (Covering 2008). The George Washington University Law School Public Law and Legal Theory Working Paper No. 458, Legal Studies Research No. 458. 1.

3 Thato Toeba, 'Corruption in Public Procurement in Lesotho,' *Law and Development Review* [2018] (11)423. (the process of public procurement involves the administration of large volumes of money and becomes an obvious breeding ground for potential corruption. The impacts of the prevalence of corruption in public procurement are corrosive to national economies and to the proper distribution of social welfare.)

corruption is the public procurement sector."[4] In Nigeria as in other nations of the world, public procurement has been infested with corruption as the procuring entities or officers responsible for negotiating and concluding government contracts or projects with the prospecting supplier(s) or contractor(s) often seek or demand for bribes, from the prospecting supplier(s) or contractor(s) in order to subvert the process in favour of such suppliers or contractors.[5] The implication of such corrupt tendencies in public procurement negates the very essence of achieving the right quality services for the benefit of the people and nation's economy. This has been succinctly expressed by Graycar to the effect that, "corruption in procurement usually means purchases are made from the best briber, rather than the best quality."[6]

2. Integrating Anti-Corruption Principles into Public Procurement Processes

The incidence of corruption in public procurement has negatively impacted on public procurement proceedings the world over leading to waste of public funds and a disservice to the public. It is a common practice that in third world countries, most corrupt regimes or corrupt public officials introduce corrupt practices into public procurement processes to enrich themselves through receipt or demand for bribes from suppliers or contractors.[7] It is noteworthy, that, when public procurement is

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4 Emmanuel Kingsford Owusu and Albert P. C. Chan, *Corruption in Infrastructure Procurement: Addressing the Dynamic Criticalities,* (Routledge, 2021), 1.

5 Hatchard, *Combating Money Laundering in Africa Dealing with the Problems of PEPs,* 12. (Between 2009 and 2010 Mahmoud Thiam was the Minister of Mines and Geology in Guinea. He was primarily responsible for negotiating directly with a Chinese conglomerate named CIF over the award of an important mining contract…Thiam's position as Minister of Mines provided him with the power and influence to tout the benefits of such a deal with CIF. As the chief government negotiator, he oversaw the signing of a 'Shareholder's Agreement' with the conglomerate, which was given the right to be the 'first and strategic shareholder' in a national mining company. The effect of the deal was that CIF would possess practically all of Guinea's mining sector and the whole agreement was highly disadvantageous to the Republic of Guinea. Shortly before the signing of the Shareholder's Agreement, the Chief Executive Officer of CIF, one Sam Pa, transferred US$3 million into a Hong Kong bank account in Thiam's name which Thiam had opened the day before. A further $US5.5 million was later transferred to the same account via three executives of CIF.)

6 Adam Graycar, 'Mapping Corruption in Procurement,' *Journal of Financial Crime* [2019] (26) 163; Susan Rose-Ackerman, 'International Actors and the Promise and Pitfalls of Anti-Corruption Reform,' *University of Pennsylvania Journal of International Law* [2013] (34) (3) 455. (…in general, corrupt public officials and their business firm counterparts can exclude competitors and can influence the content of contracts, not just the price. They have incentives to distort public choices in order to increase the rents available to share and in order to design projects where bribes are easy to hide – for example, one-of-a-kind capital-intensive project that are poorly adopted to the local conditions.)

7 John Hatchard, 'Combating Transnational Crime in Africa: Problems and Perspectives,' *Journal of African Law* [2006] (50) (2) 147 (Concern over the running of the LHDA led to an audit in 1994 which

tainted with corruption, the whole exercise of public administration will seriously be undermined.[8]

It is, therefore, imperative to introduce a legal framework that will integrate anti-corruption principles into public procurement proceedings as a check on the activities of procuring entities or officers. To this end, therefore, the United Nations Commission on International Trade Law of 1994 (UNCITRAL) reviewed in 2011[9] was adopted, particularly Article 21 which, created a legal regime to exclude any contractor that attempts to corrupt any bidding process for contracts from the process. Further, the World Trade Organisation Agreement on Government Procurement 1996 reviewed in 2012[10] was also adopted, particularly Article 4(4) which provided for procurement procedures to be carried out transparently without any corrupt practices by the parties to the transaction. Lastly, is the United Nations Convention Against Corruption, particularly Article 9[11] which addresses issues of public procurement and management of public finance, was negotiated and adopted by world leaders. The legal regime of Article 9 of UNCAC adopted a preventive measure that introduces integrity and transparency into public procurement, and enjoin State parties to internalise this legal regime into their respective domestic laws.

For several decades, Nigeria has continued to engage in government business or contract with contractors or suppliers without any legal framework regulating this important aspect of government's activities.[12] The absence of this legal regime has

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uncovered serious financial irregularities on the part of Sole. Despite his claim to the contrary, with the assistance of the Swiss authorities it was found that Sole had several bank accounts in Switzerland totaling well over US$1 million.)

8 Graycar, (note 6) 162.

9 United Nations Commission on International Trade Law (UNCITRAL) Module on Public Procurement General Assembly Resolution 66/95 of 9 December 2011. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2011-model-law-on-public-procurement-e.pdf> accessed 15 March 2023.

10 Agreement on Government Procurement (as amended 30 March 2012) <https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm> accessed 15 March 2023.

11 United Nations Convention Against Corruption, U.N. Doc. A/58/422 (Oct. 7, 2003). <http:www.undoc.org/pdf/crime/convention_orruption/signing/Convention-e-pdf> accessed 15 March 2023.

12 Alero T. Akujobi, 'Integrating Integrity in Procurement: A Review of the Implementation of Public Procurement Act in Nigeria,' *KNUST Law Journal* [2019] (8) 150. (Between 1960 and 2006, there were a plethora of guidelines by various government establishments for purchase of public goods and

resulted in the nation losing huge sum of money to the corrupt and fraudulent activities of procuring entities or officer(s) through inflation of contract sums, bribery, substandard materials, abandonment of government contracts or projects and failed projects across the country.[13] The emergence of public procurement legal regime can be attributable to the World Bank push for public procurement reform in Nigeria.[14]

It is noteworthy that Nigeria in 2007 enacted a procurement legal regime aimed to tackle the incidence of corrupt practices in public procurement processes.[15] This legal regime is considered to be the nation's first ever holistic public procurement legal framework,[16] which introduces transparency, integrity and credibility to public procurement processes. The major reason for this important legal framework was to integrate anti-corruption principles into public procurement processes and to ensure that government's contracts or projects are negotiated and concluded without any incidence of corruption. The Public Procurement Act internalises the legal regimes of UNCAC, UNCITRAL and WTO GAP,[17] thereby bringing the nation's public procurement processes in conformity to international best practices. Besides, providing for open bidding from public, the legal regime provided for a regime which excludes bidders who engage in corrupt practices by attempting to offer or offered bribes to procuring entities or officers in order to induce or influence their decision making in their favour.[18]

It is noteworthy that, this legal framework applies to procurement of goods and services carried out by the Federal Government and its relevant procurement entities.[19] The enactment of the Public Procurement Act is a welcome development, and it is seen as a veritable tool that would help to bring integrity and transparency

services. Nigeria passed through military and civilian governments and there was no legislation on public procurement).

13 Sope Williams-Egbe, 'A Comparative Analysis of the Nigerian Public Procurement Act Against International Best Practices,' *Journal of African Law* [2015] (59)(1) 97.

14 Ibid 85; Kingsley Tochi Udeh and M. L. Ahmadu, 'The Regulatory Framework for Public Procurement in Nigeria,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013) 141.

15 Public Procurement Act 2007 Cap 44 Laws of the Federation of Nigeria 2010.

16 Akujobi, (note 12) 151.

17 Sections 16(8)(a) and 24-27.

18 PPA 2007, ss. 16(8), 24, 25.

19 PPA 2007 s. 15(1) (a).

into the nation's public procurement processes. It is therefore expected to eliminate or reduce the incidence of corrupt practices in public procurement processes in the country. Consequently, a proper implementation of the legal framework and unrestrained application will no doubt help in curbing the prevalence of corrupt practices in government business and arrest waste of public resources.[20]

It is imperative to note that, as impressive as the legal framework seems to be, much has not been achieved in curbing corrupt practices in public procurement due to non-implementation or compliance with the legal regime. A typical example of this is, the action of Ngilari, a former governor of Adamawa State who awarded a contract of over N160 millions for the purchase Toyota saloon cars without obtaining certificate of 'No-Objection' from the Adamawa State Bureau of Public Procurement.[21] The government has not demonstrated the political will to ensure that the legal regime is given the much expected attention to result in full implementation of the law to the letter for the overall good of the State. The whole essence of the legislation seems to be somewhat defeated noting that corrupt practices is still prevalent in public procurement in the country.[22] This is as a result of the failure on the part of government to constitute the National Council on Procurement, a Council established under the Act pursuant to section 1 of the Act. The functions of the Council which is expected to bring transparency and integrity into public procurement thereby checking incidence of corruption from public procurement processes has been circumvented by the politicians.[23] Jacob noted that, "…the

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[20] O. S. Aigheyisi and O. J. Edore, 'Public Procurement, Governance and Economic Growth: Some Policy Recommendations for Africa's Growth and Development,' *International Journal of Development and Management Review* [2016] (10) 120. (Sound public procurement practice is a panacea to the ailing economies of developing countries. It will help curb corruption, reduce wastage, enhance the welfare of the people, increase the attractiveness of a country to foreign aid and loans, and ultimately result in higher growth and development levels.)

[21] Economic and Financial Crimes Commission, Ngilari, Ex-Adamawa Governor Bags 5 Years Jail Term for Procurement Fraud.; Media and Publicity. <https://www.efccnigeria.org/efcc/news/2371-ngilari-ex-adamawa-governor-bags-5-years-jail-term-for-procurement-fraud> accessed 6 June 2023)

[22] Akujobi, (note 12) 152. (…governments using procurement to settle domestic political pressures or compensate party donors. Suffice to say in Nigeria, that public procurement is circumvented or compromised to give contracts to certain ethnic group, militants or business donors to political parties rather than follow the normal process.)

[23] Samuel Ekung, Adeniran Lashinde and Ogochukwu Amuda, 'Assessment of Procedural Parameters for Improving Public Procurement Practice in Nigeria,' *International Journal of Construction Engineering and Management* [2015] (4)(5) 204. (In Nigeria, the contract awarding body remains Federal Executive

greatest challenge to the Act is the reluctance on the path of government to embrace in totality the full implementation of the Act. Public contract is seen as a tool to reward political loyalists and to amass wealth."[24] Jacob conclusively stated that:

> The power to award contract is a prestigious one which the government does not want to lose and we profess that to be the reason why the federal government in Nigeria has not constituted the right body to approve contract. Till today the Federal Executive Council is responsible for approval of contracts while the ministers and other government functionaries play a greater role in procuring contracts.[25]

Williams-Elegbe posited that, "…the involvement of politicians in the procurement process was a criticism of the CPAR, which recommended that politicians should be prevented from exercising any involvement in the procurement function except their constitutionally required oversight functions."[26] The non-constitution of the Council has opened the floodgates for politicians to hijack the public procurement process to benefit their political cronies. This has been succinctly expressed by Williams-Elegbe to the effect that:

> Interviews with procurement officials in some federal ministries revealed that, in many cases, the officials were forced to manipulate the procurement process in order to comply with illegitimate demands from ministers, members of parliament, senior civil servants such as the permanent secretary. Procurement personnel also stated that undue pressure from such politicians and officials was one of the most challenging aspects of conducting the procurement functions.[27]

The attitude of the government not to fully implement the intendment of the legal framework seems to encourage and breed corruption in public procurement, negating

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Council. This is in deviant to the requirement of PPA. PPA stipulates the constitution of National Council for Public Contracts.)

[24] O. A. Jacob, 'Procurement Law in Nigeria: Challenge for Attainment of its Objectives,' *University of Botswana Law Journal* [2010] (11) 133, 146.

[25] Ibid.

[26] Sope Williams-Elegbe, 'The Reform and Regulation of Public Procurement in Nigeria,' *Public Contract Law Journal* [2012] (41)(2) 354.

[27] Ibid.

the very essence of enacting this laudable and very important legislation to regulate and control government contracts where several billions of naira or dollars are expended and the larger chunk of the nation's resources are channeled, basically through inflation of contract sums by procuring entities or officers.[28] This has been clearly noted by Udeh who remarked that:

> the refusal impugns the commitment of the Federal Government to the integrity of the procurement system, considering that the action frustrates the regulatory functions that the law intended the Council to perform. Not constituting the Council may suggest that the government is not keen or sincere about following through with its touted legal and practical reforms in the procurement system.[29]

3. Defence Procurement and Public Procurement Legal Regime

Like other sectors, the security or defence sector is a very important sector to any nation in the world, Nigeria inclusive. The defence sector is saddled with the constitutional duty of defending the territorial integrity of the nation against any form of external aggression/invasion or threat to common peace. To achieve this, the defence sector is expected to engage in procurement activities in order to acquire relevant military hardware, machinery/equipment, arms, ammunition, explosive and to carry out any other projects that would enhance its performance. Defence procurement accounts for a large sum of the public's resources as the nations' national budget usually allocates a larger amount of money during each fiscal year budget to national defence or national security. By virtue of the provisions of items 2 and 17 of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) matter of defence, arms, ammunition and explosive falls within the legislative competence of the Federal Government.[30] By the foregoing provisions, security or defence procurement ordinarily would fall within

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[28] Akujobi, (note 12) 151. (In Nigeria today, most government projects are awarded at four or five times the real cost when compared to similar projects globally or in private establishments. Reason behind this is the inherent institutionalised corruption in executing the Act's provisions.) Megan A. Kinsey, 'Transparency in Government Procurement: An International Consensus?' *Public Contract Law Journal* [2004] (34) (1) 156. (Procurement of products and services by government agencies for their own purposes represents an important share of total government expenditures and thus has a significant role in domestic economics).

[29] Kingsley Tochi Udeh, 'Nigerian National Council on Public Procurement: Addressing the Unresolved Legal Issues,' *African Public Procurement Law Journal* [2015] (2) 20.

[30] Second Schedule, Part 1 of the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

the legal regime of the Public Procurement Act and should be regulated by the provisions of the Act.[31]

It is interesting to note that the procurement regime application to procurement involving national defence or national security is conditional, as it is subject to the approval of the President, first sought and obtained.[32] Such practice is capable of exposing defence procurement like procurements in other sectors to corrupt practices by the procuring entity or officer. This was revealed by the audit reports of 2016 carried out by the Auditor-General of Federation into certain defence procurements within the period.[33] In the said audit report, it was observed that the regime of Treasury Circular of March 4, 2009, a policy statement, which was meant to regulate some aspects of defence procurements were not complied with.[34] It implicates therefore, that the intention of integrating anti-corruption legal regime into the nation's public procurement sector to which defence procurement forms a part may be seriously undermined by the legal regime of section 15 (2) of the Act.[35]

It is pertinent to note, that corrupt regimes and corrupt public officials in most developing countries more particularly in third world countries like Nigeria and countries in the Sub-Sahara Africa have continued to exploit the procurement sector to corruptly enrich themselves to the detriment of the State. Arrieta remarked that:

> Corruption in public procurement results in mismanagement of public funds rather facilitating access to public goods. It undermines public confidence in governments, raising skepticism over public spending. Overbilling and the procurement of low-quality goods and services at prices exceeding the market rate are common symptoms."[36]

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31 PPA 2007 s. 15 (1).

32 PPA 2007 s. 15 (2).

33 Amaka Okafor, 'Ministry of Defence Fails to Explain Questionable Spending of N261.5 Million.' <https://www.dataphyte.com/latest-reports/governance/ministry-of-defence-fails-to-explain-questionable-spending-of-n261-5-million/> accessed 9 June 2023

34 Ibid.

35 John Alechenu and others, 'Controversy: NSA Claims Arms Funds Missing, Recants Under Pressure,' Punch (Lagos, 13 March 2021) 3. (…Monguno, in an interview with the Hausa Service of the British Broadcasting Corporation early Friday, alleged that neither the funds nor the weapons the ex-service chiefs were meant to buy could be traced.)

36 Lindsay B. Arrieta, 'Taking the "Jeitinho" out of Brazilian Procurement: The Impact of Brazil's Anti-Bribery Law,' *Public Contract Law Journal* [2014] (44)(1) 161.

Corrupt public officials in Nigeria and other developing economies have always exploited defence procurement to corruptly enrich themselves through the demand and collection of bribes by such procuring entities or officers from defence contractors or suppliers. Typical of this is the case of a Dominican Republic army general who allegedly received a bribe of $3.5 for negotiating the contract for the purchase of military planes for drug trafficking surveillance worth $92 million from Embraer S. A.[37] The said general in this case allegedly used a portion of the bribe funds received from the suppliers to bribe a Dominican Senator whose duty it was to facilitate the deal's approval.[38] Defence procurement enmeshed in corrupt practices have resulted in procuring country spending huge sum of money to procure weapons that is not needed, whereas such amount of money would have been deployed into more profitable public projects. Willett remarked that:

> The payment of large 'commissions' by arms companies to individual officials in defence procurement deals can provide an incentive for the recipient to increase the technical specification of the weapons and even to persuade governments of the need to purchase entire systems, often entirely unnecessarily. The helicopter scandal in Uganda is a case in point.
>
> In 1998 the Uganda Government purchased four second-hand Mi-24 helicopters from the Republic of Belarus at an inflated price of US$12.3 million. The helicopters were not airworthy. Reportedly, Museveni's brother, Major General Salim Saleh, received an US$800,000 'incentive' to seal the deal.[39]

The lack of effective implementation of procurement regime can only be the reason such incidence of corrupt practices exists in public procurement sector in any nation of the world, such as the non-compliance with Treasury Circular of March 4, 2009 and the Adamawa State Procurement Law in the procurement of vehicles by the State Government.[40] In the most recent past, the nation's budget has been seen to have

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37 Lindsay B. Arrieta, 'Attacking Bribery at its Core,' *Public Contract Law Journal* [2016] (45)(4) 588.

38 Ibid.

39 Susan Willett, 'Defence Expenditures, Arms Procurement and Corruption in Sub-Saharan African,' *Review of African Political Economy* [2009] (36)(121) 346.

40 Economic and Financial Crimes Commission, Ngilari, Ex-Adamawa Governor Bags 5 Years (note 20). (The accused here was charged and convicted on a 17 count charge bordering on awarding contract without following due process, in the contract to El- Yard Motors Company to supply 25 units of Toyota Corolla saloon cars (1.8) 2015 model to the tune of N167,812,500.00 without following the

allocated huge billions of naira to the defence sector, as evident in the defence budget for the 2021 fiscal year, where the Defence Minister defended the ministry's budget to the tune of 340,315,359,255.95 for the 2021 fiscal year before House of Representatives Committee on Defence.[41]

It is imperative to note that more of the nation's yearly defence budget is expended on procuring military equipment and other defence projects with some of such procurements not complying with the relevant procurement legal regime. There is no gainsaying the fact that such defence contracts or projects having been excluded from the nation's procurement legal regime, could not be said to have meant the required minimum standard of transparency and integrity such contract(s) or projects ordinarily would have been expected to. Such practices could pave way for corrupt practices in defence procurement, thereby allowing corruption to flourish in defence procurement notwithstanding the nation's effort to tackle corrupt practices in public procurement. It is common knowledge that defence procurement is laden with corrupt practices by those individual(s) who negotiate such contracts or projects on behalf of the procuring entity or nation. According to Willett, "the arms industry is 'hard-wired for corruption,' mainly because of both the special treatment it receives from governments and the secrecy that sanctions every aspect of its transactions."[42] Where the process is not subjected to appropriate procurement legal regime, it would be subject to abuse, thereby allowing the procuring entities or officer(s) to collude with the arms contractors or suppliers to defraud the State to the point of inflating the contract price or buying substandard equipment or those not even needed. This was succinctly expressed by Willett to the effect that, "arms companies from the rich West bribe the political and military elites of poor countries to purchase weapons they cannot afford, and often do not need."[43] It is pertinent to note that, apart from the extant public procurement regime, there are a few policy statement or financial regulations to regulate defence procurement in Nigeria. One of such, is the Treasury

procurement process, that is without obtaining "no objection" certificate from the Adamawa State Bureau of Public Procurement and no competitive bidding among others in the procurement process.). The conviction was however, quashed by the Court of Appeal on technical ground.

41 Mohammad Abdulkadri, 'Defence Minister Proposes Budget of N340 billion for 2021 Fiscal Year,' <https//prnigeria.com/2020/11/03/defence-minister-budget-2021.> last visited 1 September 2021.

42 Willett, (note 39) 347.

43 Ibid.

Circular of March 4, 2009 meant to regulate defence procurements in Nigeria, as revealed by the audit report of 2016 of defence procurement.[44]

The exclusion of defence procurement from the nation's procurement legal regime may lead to the prevalence of corrupt practices in that sector, just as the case in other sectors of the nation, where procurement proceedings are carried out without due observance or compliance of the extant procurement regime.[45] The emphasis here is that, corruption has seriously depleted the resources of the nation particularly, through public procurement proceedings, and this need to be addressed. It may be argued that the exclusion of such procurement process is based chiefly on emergency or the intricate nature of the sector, that is national security matter,[46] thereby mismanaging scarce public funds that could be deployed to meet other basic public needs for the benefit of the populace.

The effect of the exclusion clause contained in section 15(2) of the Public Procurement Act can be seen manifested in the way and manner defence budget is being expended in Nigeria as it promotes corrupt practices in defence procurement. There are cases where funds meant for the procurement of military equipment and arms have been diverted into private use and/or to pursue political agenda of the politicians, as evident in the case of a former National Security Adviser Colonel Sambo Dasuki alleged to have diverted billions of dollars meant for the procurement of military equipment and arms to fight insecurity in the country.[47] Incidence of

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44 Okafor, (note 32).

45 Ibid; Out Offiong Duke and Okon Bassey, 'Enthroning the Tenets of Accountability and Transparency in Defence Spending – the Security Votes Brouhala and the Recklessness of State Governors in Nigeria,' *Journal of International Relations, Security and Economic Studies* [2021] (1) (2) 11. (The defence and security spending, has been a burning issue and continuously receiving its share of public outcry. This is based on the level of security, non-accountability/secrecy and lack of transparency in the whole scheme.)

46 Public Procurement Act section 43; Anne Janet DeAses, 'Developing Countries: Increasing Transparency and other Methods of Eliminating Corruption in the Public Procurement Process,' *Public Contract Law Journal* [2005] (34)(3) 555. (…government may claim that the procurement is necessary due to an emergency and that there is not enough time for competitive procedures to take place.)

47 Wale Odunsi, 'How Former Nigeria Military Chiefs Stole $15 Billion,' < https://dailypost.ng/2017/05/19/former-nigerian-military-chiefs-stole-15billion-report/> accessed 13 June 2023. (The report jointly presented by Auwal Musa Rafsanjani Executive Director of Civil Society Legslative Advocacy Centre and Eva Marie Anderson, Senior Legal Researcher of Transparency International (UK) stated that, former Nigeria military chiefs stole as much as $15 Billion through fraudulent arms procurement deals.); Felix E. Eboibi, 'Concerns of Cyber Criminality in South Africa,

corrupt practices in defence procurement was also observed in audit report of defence procurement of 2016, which revealed that the Ministry of Defence could not explain the spending of N261 million for procurements that did not meet up with procurement regime.[48] In the same report, it was observed that the procurement of Mikano Generator was brought under the emergency procurement clause of the Public Procurement Act, in order to avoid the application of the procurement regime. This was queried by the said audit report noting that, that item was outside of such items to be treated under the emergency procurement clause of the Act.[49] It was further revealed in the same report that, the purported certificate of No-Objection claimed to have been issued by the Bureau of Public Procurement, for the generator was not made available for verification.[50] It was further revealed that one of the procurements ought to have been made through award of contract as stipulated by Treasury Circular. This was not followed as the money was paid directly to the personnel who were the beneficiaries.[51] The outcome of the audit report of 2016 which revealed corrupt practices in this particular defence procurement, justifies, the reason why defence procurement should be subjected to the most strident procurement legal regime.

Another avoidable corrupt practices in defence procurement was recently observed where, the country's National Security Adviser, allegedly decried no evidence of weapons purportedly procured by the nation's former Service Chiefs or the whereabouts of such funds.[52] In another development, the nation's National Assembly members were heard to be taking steps to intervene in order to resolve the purportedly supposed stoppage by the United States Senate of weapons deal of over $875m between the United States Government and Nigeria. However, the Federal Government through the Minister of Information and Culture had publicly denounced the existence of any such contract between the country and the United

Ghana, Ethiopia and Nigeria: Rethinking Cybercrime Policy Implementation and Institutional Accountability,' *Commonwealth Law Bulletin* [2020] (46)(1) 98.

48 Okafor, (note 32).

49 Ibid.

50 Ibid.

51 Ibid.

52 Alechenu and others, (note 35) (…Monguno, in an interview with the Hausa Service of the British Broadcasting Corporation early Friday, alleged that neither the funds nor the weapons the ex-service chiefs were meant to buy could be traced...I'm not saying that former service chiefs diverted the money, but the money is missing. We don't know how, and nobody knows for now…)

States.[53] Situations like this and many more can be avoided if the appropriate procurement regime are fully complied with by procuring entities or officers, be it defence procurement or procurement in other sectors of the nation's economy.

4. Call for a Review of Section 15(2) of the Public Procurement Act Section

Integrating anti-corruption legal regime into public procurement is a global effort that was meant to ensure that public procurement process is transparently carried out by conforming to the relevant procurement procedures basing procurement decisions in accordance with laid down criteria.[54] In the United States of America for example, the defence and security procurements are regulated by Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS), and they are conducted based on the value of the products to be procured.[55] Therefore, any procurements below the threshold of $250,000.00 would apply only the FAR.[56] The highest dollar-value procurements with the Department of Defense (DoD) are conducted in accordance with the FAR, DFARS and other procedures, including DoD Instruction 5000.2.[57] In curbing corruption in public procurement in the United States, FAR 52.203-13 imposes an obligation on the contractors to be transparent in their dealings, while the Foreign Corrupt Practices Act 1977, which addresses foreign public corruption equally applies to defense and security procurements.[58]

The nation's extant legal regime on public procurement has sufficiently internalised global practices on public procurement which is seen as a resounding development to government contracts or projects the world over. This has succinctly been expressed by Kinsey that, 'the Agreement on Government Procurement (GPA) seeks to ensure the best value for money through an open and non-discriminatory procurement regime...'[59] The existence of the subsection (2) of section 15 of the Act

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53 Leke Baiyewu and Jesusegun Alagbe, 'N' Assembly plans to meet US Congress over $875m Weapons Deal Stoppage,' Punch (Lagos, 31 July 2021) 3.

54 Megan A. Kinsey, 'Transparency in Government: An International Consensus,' *Public Contract Law Journal* [2004] (34) (1) 159.

55 Jenner & Block LLP, 'Defence and Security Procurement in the USA.' <https://www.lexology.com/library/detail.aspx?g=e439b3ca-f400-40c9-abf7-64611796aa97> accessed 9 June 2023.

56 Ibid.

57 Jenner & Block LLP, (note 55)

58 Ibid.

59 Kinsey, (Note 54) 156.

which subjects the application of the nation's public procurement legal regime to the approval of the President with respect to defence and national security procurements seems to negates the intendment of the Act. It is pertinent to note that subjecting the application of a procurement regime to the whims and caprices of the President, would no doubt open the floodgate of corruption in the defence procurement. It seems inconceivable to subject the application of a legal regime intended to curb corrupt practices, to the powers of a President in view of the fact that, such an individual could have the tendency to be corrupt in the discharge of his official duties. The issue of subjecting the application of the procurement regime with particular respect to defence and security procurement to the approval of the President is critical, due to the peculiar state of corruption in the country, where it has become a norm. The country's ranking of 150 out of 180 countries with an abysmal score of 24 percent in the most recent Transparency International Corruptions Perception Index[60] and previous rankings, attest to this. It is also true that the National Assembly usually carry out oversight functions through its Standing Committees on Defence and Public Finance, as a way of curbing abuse of powers and corrupt practices. It is noteworthy that members of the National Assembly are not absolved of corrupt practices, as some members in the past have been alleged to be involved in corrupt practices in the discharge of their functions.[61] It is also noteworthy that a number of the National Assembly members notably former State governors and Ministers are have been alleged of corrupt practices, while some are being investigated by anti-corruption agency others are undergoing trials and/or convicted in the court of law.[62]

It is imperative, therefore, that the country needs to take proactive and holistic legal regime to tackle the incident of public corruption, particularly in public procurement sector. This is so, as incidence of public corruption is essentially related to public procurement or government contracts. The current state of the law undermines the essence of subjecting defence procurement which form part government's contracts

[60] Transparency International Corruptions Perception Index 2022. <https://images.transparencycdn.org/images/Report_CPI2022_English.pdf> accessed 9 June 2023.

[61] *Federal Republic of Nigeria v. Senator Adolphus N. Wabara* (2014) Vol. 2 ICPCLR 1.

[62] Orji Uzor Kalu former governor of Abia State, Ibrahim Shekarau, Godswill Akpabio the current Senate President, Stella Oduah, Danjuma Goje, Rochas Okorocha former governor of Imo State, Joshua Dariye former governor of Plateau State who was convicted and sentenced nor pardoned by the State are examples of members of the National Assembly.

to public procurement legal regime to make the process transparent and credible and reduce the incidence of corrupt practices by procuring entities or officers.[63]

The legal regime of the section 15(2) would open the door for defence procuring officers who negotiate and conclude defence contracts or projects on behalf the government to be influenced or induced by defence contractors or suppliers in order to secure such contracts or projects. Kinsey remarked that "in the absence of transparency, the market is only open to those suppliers that have connections or agreements with the Government."[64] The non-application of the legal regime to such defence contracts or projects leaves such procuring officers the opportunity to divert such funds meant for the procurement of defence equipment and other materials into private or personal accounts. Defence procurement in the country may be more transparent and credible if the nation's procurement legal regime notwithstanding the provision of other procurement regime applicable to defence procurement, is ordinarily allowed to apply to defence procurement without subjecting it to the approval of the President. The idea that, defence procurement is made subject to the nation's procurement regime and any other procurement regulation available in the country, will ensure that the Services Chiefs, National Security Advisers or procuring officers play by the rules in defence procurement to be transparent and more accountable.

In order to realise the objectives of the Public Procurement Act, therefore, and to avoid waste of public funds, defence procurement should without restrain be subject to the extant procurement regime, policy statement and /or more effective financial regulation. This should be followed up by ensuring that procuring entities or officers, comply with the relevant procurement legal regimes. The existence or retention of the subsection (2) of section 15 in the circumstances would not serve the purpose or intent of the legal regime in the procurement sector.

5. Recommendations

It is noteworthy that Nigeria has joined the league of nations by enacting the Public Procurement Act which introduce transparency and integrity into public procurement by internalising relevant anti-corruption principles aimed at preventing the incidence of corrupt practices from the public procurement sector. The hard path is that the

[63] Kinsey, (Note 54) 159.

[64] Kinsey, (Note 54) 159.

supposedly corruption preventive measure has been whittled down by the exclusion provision which have subjected the application of the nation's public procurement legal regime conditional for procurement involving national defence or national security. Incidence of corrupt activities have been witnessed in the defence sector involving huge amount of money and more will occur, due to lack of transparency in defence procurement. All of these can be avoided by ensuring that procurement regime is properly applied to defence procurement in the country to avoid waste of public funds, which can be deployed for infrastructural development.

In order for Nigeria to effectively curb the incidence of corrupt practices from defence procurement where huge sum of the nation's national budget is allocated, there is an urgent need for the legislation to be amended with a view to expunging the regime of section 15(2) from the Act and to bring defence procurement within the legal regime of the Act. This is so, in order to avoid the re-occurrence where defence funds are diverted to service the political interests of the politicians or the personal needs of defence officers or service chiefs.

6. Conclusion

A proper application of the public procurement legal regime will help to curb corruption in the nation's defence procurement, so that scarce resources of the country can be well utilised for the benefit of the State and the people in general. This will prevent waste of public resources that has hitherto be witnessed in the defence procurement occasioned by corrupt practices in that sector.