An Examination of the Concept of Obligation as it Pertains to Socio-Economic Rights

Nsidibe Umoh*

Abstract

Concerted efforts and frantic attempts to categorise relation into rights and duties with the forlorn concession that such compartmentalistation is capable of providing remedy for an examination of the most timorous legal discourses have often inhibited a full comprehension of and panacea to legal issues. Correlative duties or obligation on the part of right holders enunciates human rights in the first cadre of jural relations. The tenor of this articles is "An Examination of the Concept of Obligation as it Pertains to Socio-economic Rights." This articles reveals that socio-economic rights do not have as their only or primary remedy, the provision of a commodity on demand. Rather, they require the creation of an environment and processes which enable individuals and communities to realise their rights. This article recommends that rights should be integratively construed because doing so will lead to a society where men and women are equally able to maximisetheir potentials because classifying States' obligation for instance into "negative" and "positive," is at most a difference devoid of distinction.

Keywords: Obligation, Socio-economic Rights, Minimum-Core, Protect, Promote

1. Introduction

The contention that all legal relations can be compartmentalised into "right" and "duties" and that such simple categorisations are sufficient to proffer solution for the analyses of even the most complex legal discourses has often impeded a clear understanding of and panacea to legal problems. It is in view of the foregoing that Hohfeld[1] sought to obliterate such pitfalls. That

* LL.B (Hons), BL, LL.M, Ph.D (in-view) Deputy Head of Chambers, Inter Associates, Uyo, AkwaIbom State. +234- 703-897-3365, tymberlooumoh@gmail.com

1 W Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) Yale Law journal 19

perhaps furnishes the explanation as to why he placed human rights in the first category of jural relations, which invariably means that they entail correlative duties orobligations towards right-holders[2]. This work periscope and/or interrogates the nature of such duties *cum* obligations as it pertains to and connects with socio-economic rights, as well as the bearer of theseduties. This is imperatively apt in the circumstance because as Shue[3] opines "a complete account of a human right must specify the correlative duties and the relevant agents: whatneeds to be done in order to fulfill the right and who ought to do it."

Human rights development has for many reasons, been primarily state-centric. First states, by themselves, possess the right to use force to uphold international law and, a *fortiori*, human right[4]. Secondly, the state stands as the *raisond etre* for and/or rationale behind the corpus of human rights, a vice with predatory instincts, that must be kept at bay to safe guard human freedom[5], rights and all forms of fundamental interests. It shall fall within the ambit and contemplation of this work to evaluate the traditional characteristics of obligations. It shall also fall within the purview of this work to analyses state obligations under treaty and constitutional law. This work shall also be concerned with the examination of the typology of obligations using the African Commission as the basis or analysis. The "minimum core" content of obligations on socio-economic rights and the drive towards their realisation shall also be examined herein.

2. Analysis of State Obligations *vis-a-vis* Socio-economic Rights

International law furnishes no differentiation with respect to the legal origin and antecedent of an international obligation; however, treaties rank as one of the well-known and principal

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2 E Brems, Human Rights: Universality and Diversity (MartinusNjihoff Publishers, Leiden 2001) 424

3 H Shue, "The interdependence of Duties" in P Alston and K Tomasevski (eds), The Right to Food (MartinusNijihoff Publishers, Dordrecht 1984) 84

4 H Bull, The Anarchical Society: A Study of Order in World Politics (Columbia university Press, New York 1977) 68

5 H Steiner, "The Youth of Right" (2001) 42 Harvard International Law 201-20

sources of such an obligation[6]. Multilateral treaties, for instance, and in particular, undeniably contribute to the formation of international human rights law. According to Henkin,[7]the purpose of international human rights law "is to influence states to recognize and accept human rights, to reflect those rights in their national constitutions and laws, to respect and ensure their enjoyment through national institutions and to incorporate them into national ways of life." These obligations hinge on the time-honoured principle of *pactasuntservanda*, which literally interprets to mean that agreements are binding on parties to it and they must honour and implement them in good faith[8].

By virtue of being a principle of customary international law and treaty law, *pactasuntservanda* as Starke[9] opines is "an absolute postulate of the international legal system and manifests itself in one way or another in all the rules belonging to international law." The principle is operational both within the domestic and international firmaments. Although the domestic attitudes of states concerning the status of international law varies, treaty laws, in particular, appears to be binding on parties on the international plane, irrespective of any internal law to the contrary.[10]This work shall now consider a graphic trajectory of the development of states' obligations under treaty law as well as under constitutional law, of course, within the purview of socio-economic rights.

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6 M Fitzmaurice, "The Identification and Character of Treaties and Treaty Obligations between States in International Law" (2003) 73 British Year book of International Law 141-44

7 L Henkin, "International Human Right and Right in the United State" in T Meron (ed) Human Rights in International Law: Legal and Policy Issues (Columbia University Press, New York 1984) 25

8 Article 26 of the Vienna Convention of the Law of Treaties 23 May 1969 UN Doc. A/Con/39/27 1155 UNTS 331. The Vienna Convention is largely a codification of customary law; M Shaw, International Law (5thedn Cambridge University Press, Cambridge 2003) 811; 1 Brownlie, Principles of Public International Law (5thednOxford University Press, Oxford 1998) 608 (which noting that many articles of the Vienna Convention are declaratory of existing law and that those which are not certainly constitute presumptive evidence of emergent rules of general international law);North Sea Continental Cases (1966) ICJ Reports 12.

9 J Starke, Starke's International Law (Butterworths, London 1994) 22.

10 Vienna Convention Article 27 which provides that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

3. Universal International Law on State Obligations

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[11] is fairly and squarely the template for the consideration of multilateral treaty obligation on socio-economic rights. This assertion is poignantly credible because it was the first treaty to specifically zoom its lens on this genre of rights. The ICESCR is particularly relevant to the understanding of the nature of obligations under regional and national human rights guarantees in Africa, with the Committee on Economic, Social and Cultural Rights.[12]General comments providing useful guidance as aids to interpretation. Though, the general comments are descriptive of how states comply with their obligations under the ICESCR, Craven notes that they serve "as a means of developing a common understanding of the norms by establishing a prescriptive definition."[13]It is a truism that the ICESCR guarantees certain rights but the covenant also creates several obligations in respect of those guarantees. Article2 of the ICESCR provides that:

> *Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.*[14]

Accordingly, when right entail positive duties, it may be preferably apt to specify those duties, which is more concrete than

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11 International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966 entry to force 23 March 1976 993 UNTS 3

12 The Committee on Economic, Social and Cultural Rights (CESCR) is the body of 18 independent experts that monitors implantation of the international Covenant on Economic, Social and Cultural Rights by its State Parties. The committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United nations Economic and Social Counsel (ECOSO) in Part IV of the Covenant.

13 M Craven, The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development (Clarendon Press, Oxford 1995)91

14 ICESCR (n11) Article 2 (1)

proclaiming rights[15]. Therefore, the undertaking "to take steps" in French's *engagea 'agir* (to act") and in Spanish; *aadoptarmedidas* ("to adopt measures"), is an alternative way of formulating rights. Such an undertaking is "not qualified or limited by other considerations"[16] and, though the steps include the adoption of legislative measures, it is by no means exhaustive of states' obligations[17].The general obligation in the ICESCR has a dynamic relationship with all of the other provisions of the covenant.[18] To give effect to its provisions in domestic law, the covenant norms must be recognised inappropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be readily available to any aggrieved individual or group and appropriate means of ensuring governmental accountability must be entrenched[19]. While each state party is at liberty to decide the most appropriate means with respect to each right, steps taken towards this goal should be "within a reasonably short time after the covenant's entry into force for the states concerned and should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the covenant."[20]

4. Regional (African) International Law on State Obligations

The brains behind the African Charter on Human and Peoples' Right were mindful of avoiding the irritating clause of "progressive realization" under the ICESCR. Their stance was underpinned by the reasoning that the satisfaction and/or advancement of socio-economic rights are tantamount to a guarantee to the enjoyment of

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15 ICESCR (n11) Article 3) "The State Parties to the present Covenant undertake to ensure…"); African charters on Human and People's Rights adopted 27 June 1981 entry into force 21 October 1986, Doc OAU/CAB/LEG/67/3/Rev 5 (1982) 21 International Legal materials, 59 Article 1 ("The Member State…shall recognize…") and Article 25 ("State Parties to the present Charter shall have the duty to promote and ensure…") and Article 26 ("States Parties to the present Charter shall have the duty to guarantee…")

16 CESR General Comment 3, "The Nature of State Parties Obligations (Article 2 (1) paragraph 2 of the Covenant") (5th Session 1990) UN Doc E/199/121 reprinted on Compilation of General Comments and General recommendations adopted by Human Rights Treaty Bodies at 18 UN Doc HRI/GEN/I/Rev 5 (20001)

17 CESCR General Comments 3 (n 16) paragraph 4

18 CESCR General Comments 3 (n 16 (paragraph 1

19 The Domestic Application of the Covenant" Committee on Economic, Social and cultural Rights (CESCR) General Comment of UN Doc E/c12/1998/24 3 December 1998 paragraph 2

20 CESCR General Comments 9 (n 19) paragraph 2

their civil and political counterparts.[21] Everyone is entitled to the enjoyment of the rights that are guaranteed by the Charter without distinction of any kind, whether on the grounds of race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.[22] The Charter, nevertheless, qualifies some socio-economic rights; for example, it provides for the right to enjoy the "best attainable" state of physical and mental health.[23]The grounds are supposedly in exhaustive, but are rather, listed as examples, which offers explanation as to why such other international instruments like the African Declaration adds "or any other factor."[24]

The African Charter on Human and Peoples' Right enjoins States Parties to alter their laws and practices that permit discrimination[25], though certain legal inequalities might be employed to correct factual inequalities. In the *Belgian Linguistic Case (No 2),*[26] the European Court stressed that in determining whether there has been discrimination, a court must not disregard the legal and factual features characterizing the life of the society in the state concerned.[27] The principle of non-discrimination is crucial to the spirit of the African Charter[28]. Furthermore, the Charter is unique in its inclusion of ethnicity among the prohibited grounds of differentiation, probably to underscore the central importance of ethnicity in Africa. There are, however, no equivalent provisions in the Universal Declaration of Human Rights, the Human Rights Covenants or the American Convention, with the closest approximation being the European Convention on Human Rights association with the national minority[29]. Ethnicity as a ground of

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21 General Comment No. 1 reporting by States Parties E/1989/22 (1989/22 (1989) Paragraph 1; P Alston "The Purposes of reporting' in Manual on Human Rights Reporting Under six Major International Human Rights Instruments

22 Ibid

23 UNDHR (N23) Article 2; Articles 2 (1) of ICSCR and ICCPR

24 Article 16 (1) African Charter

25 American Declaration, Article 11, African Charter in its Article 1 (1) omits "property" or "other status" from its catalogue and substitutes "economic state" and many other social condition")

26 Article 2 African Charter

27 Belgian Linguistc Case (no 2) A 6 (1968) IEHRR 252

28 Ibid paragraph 10 (Holding also that "the principle of equality of treatment is violated if the distinction has no objective and reasonable justification.)"

29 Purohitv The Gambia Comm. No. 24/2001 paragraph 64 2002-2003 African Annual Activity Report Annex VII, Paragraph 47

discrimination was canvassed before the African Commission in *Organisation Mondial Centre la Torture and Association International des juristes (CLJ) Union Inter africane des Drolts de l'Homme v Rwanda*[30]In that case, the government of Rwanda denied numerous rights to individuals on account of their nationality or membership of a particular ethnic group. The commission held that such denials were an infringement of Article 2 of the Charter.

The Charter places an obligation on states to recognize all rights, duties and freedoms that it enshrines and to adopt legislative or other measures to give effect to them.[31]Legislative measures apparently include enactments that bring domestic laws in conforming with the Charter. A ratifying state that is guilty of the failure of doing so defeats "the very object and spirit of the Charter" and is in infringement of Article 1.[32] The phrase "other measures" also provides state parties with a wide choice of measures, including budgetary measures, to use in dealing with human rights problems in Africa.[33] This work submits that by virtue of the indivisibility of human rights, socio-economies rights encapsulated under Chapter 2 of the Nigerian 1999 Constitution ought to be elevated to the status of legally enforceable human rights in Nigeria, just as fundamental rights under Chapter 4 of the same Constitution are. More so, given the fact that Nigeria is a signatory and has ratified the African Charter on Human and Peoples' Right.

5. Municipal (Constitutional) Law on State Obligation

Many national constitution's guarantee socio-economic rights, however, they also contain specific obligations in relation to these rights, with the rationale being that it is within national legal systems that people live their everyday lives. [34]Several constitutions on the one hand couch their obligations in general terms, the others on the

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30 European Convention on Human Rights, Article 14

31 Organization Mondiale Centre la Torture and Association International des jurists (CIJ) Union Interafriaine de Droooits de I'Homme v Rwanda CommNos 27/89 46/91 & 99/93 Article 1, African Charter

32 Article 1, African Charter

33 Lawyers for Human Rights v SwazilandComm No. 251/2002 2004 Annual Activity report of the African Commission Ex. Cl/199/VII/ Annex III (2005)

34 N Udombana, "So Far so Fair: The Local Remedies Rule in the Jurisprudence of the American Commission on Human and Peoples' Right" (2003) 97 American Journal of International Law 19

other hand, have their obligations embedded in specific rights. The Constitution of Nigeria for instance, represents the former while that of Angola, represents the later. The Nigerian 1999 Constitution embodies this general provision *viz:* "It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative or executive or judicial powers to conform to, observe and apply the provisions of Chapter II of the Constitution of the Federal Republic of Nigeria 1999.[35]

The Constitution of Ghana similarly provides thus:

> *The fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislative and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural persons in Ghana, and shall be enforceable by the courts as provided for in this Constitution*[36].

The Angolan Constitution commits the state, "with the collaboration of the family and society," to "promote the harmonious development of the personality of young people and create conditions for the fulfillment of the economic, social, and cultural rights of the youth. particularly in respect of education, vocational training, culture, access to a first job, social security, physical education, sport and the use of leisure time."[37] In relation to the right to work, the Constitution of Benin Republic commits the state to recognize such a right to all citizens and to "strive to create conditions which shall make the enjoyment of this right effective and to guarantee to the worker just compensation for his services or for his production."[38] With respect to the right to education, the Constitution of Sao Tome and Principe, for instance, couches the obligation thus: "it is the responsibility of the state to promote the elimination of illiteracy and permanent education, in accordance with a national system of instruction. The State ensures basic compulsory

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35 Section 13
36 Section 12 (1) of Constitution of Ghana
37 Section 31 of Constitution of Angola
38 Section 30 of Constitution of Benin Republic

and free education. The State gradually promotes the possibility of equal access to the other levels of education."[39]

Some constitutions commit the state to implement socio-economic rights [40]and to "respect, protect, promote and fulfill the rights in the Bill of Rights,"[41] a provision that according to Brand,[42] "is central to the transformative ethos of the constitution." Concerning some specific rights, the constitution commits the state to "take reasonable legislative and other measures" to make it possible for citizens to gain access to land,[43] to adequate housing[44]and to health care services.[45] It also obligates the state to take "reasonable legislative and other measures" to ensure that "everyone has the right to have the environment protected."[46] It directs the State to take "reasonable measures" to ensure that the right to education is "progressively available and accessible."[47] These provisions are intended to serve as "blueprints for the states' manifold activities that proactively guide and shape legislative action, policy formulation and executive and administrative decision making."[48]

This work submits that despite the aforementioned constitutional provisions, there is still a massive gulf between vision and reality. In Nigeria for instance, a privileged few continuously amass more than they need to maintain an adequate standard of living in the face of extreme poverty, unemployment and other pathological sub-human conditions that plague a vast majority of the populace. This work submits that Nigeria still lags behind in all indices of economic and human development as the misconception that socio-economic rights are non-justiciable still holds sway.

This work further submits that the rich and powerful can go on without the aid of Chapter 2 of the Nigerian 1999 Constitution and as

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39 Section 54 (of 2) - (3) of Constitution of Sao Tome and Principe
40 Section 2 of Constitution of South Africa
41 Ibid Section 7 (2)
42 D Brand, "Introduction to Socio-Economic Rights in the South Africa Constitution" in D Brand "and C Heyns (eds) Socio-Economic Rights in South Africa (Springlewood, Pretoria 2005) 19"
43 Section 25 (5) of the Constitution of South Africa
44 Ibid Section 26(2)
45 Ibid Section 27(2)
46 Ibid Section 24(b)
47 Ibid section 29(1) (b)
48 Brand (n42)

such, it is the poor and powerless that the Fundamental Objectives and Directive Principles of State Policy were mainly designed to assist. This is therefore, where the role of the judiciary in developing societies with written constitution becomes very vital and important. The judiciary has to admit that certain fundamental democratic values such as social and economic justice, in an organic and changing society, cannot remain static. It is therefore the duty of the judiciary in the exercise of its interpretative jurisdiction through the courts, to nurse, nourish and develop the principles and concepts aimed at engendering an egalitarian society.

6. The Typology of Obligations

The typology of human rights obligations is given a vibrancy of voice and buoyancy of spirit by contributions of human rights tribunals and writings of eminent scholars. Shue first came up with the suggestion that every basic right and most other moral rights, could be analysed *via* the use of a tripartite typology of interdependent duties of avoidance, protection and aid.[49] This typology mixes together in various proportions in the implementation of almost every right.[50]Other scholars have revised Shue's position and *ipso facto* categorized human rights obligations as involving the duty to respect, protect, ensure and promote human rights.[51]The African Commission adopted this stance in its analysis of human rights obligations in the well-known *SERAC Case*[52]as well as the Inter-American Court Human Rights in the *Velazquez Rodriguez Case*[53].This work, accordingly, shall leverage on the *SERAC Case* for the purposes of being a template for analysis because of its Africanist, nay Nigerianistic outlook.

The communication in the *SERAC Case* disclosed a concerted violation of several rights under the African Charter by the Nigerian

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49 H Shue, Basic Rights: Subsistence, Affluence and US Foreign Policy (Princeton University Press, New Jersey 1980)

50 Shue (n50) 84

51 G Van Hoof, "The Legal nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' (1987) 9 Human Rights Quarterly 156-229

52 Social & Economic Rights Action Centre &Anor v Nigeria Comm No. 155/96 2001-2002 African Annual Activity Report Annex; N Udombana, "Between Promise and Performance: Revisiting State" Obligation under the African Human Rights Charter" (2004) 40(1) Stanford Journal of International Law 105

53 Vevlazque Rodriguez Case Judgment of 29 July1988 Series C No 4

government and its multinational oil collaborators. The said violations were alleged to have caused environmental degradation and sundry health problems to the Ogoni people of South-South Nigeria.[54] The communication contended that Shell's oil exploitation activities in Ogoni land was a blatant disregard for the health and environmental concerns of the indigent communities thereto and that the regular and indiscriminate disposal of toxic and noxious wastes into the indigent communities' environment and local water bodies was not just a gross infringement of their rights to a healthy environment, but that same depleted and/or polluted their environment in monumental proportion.[55]

The communication further contended that the multinational oil corporation refused, ignored and/or neglected to maintain its facilities, resulting in "numerous avoidance spills in the proximity of villages" which caused the contamination of water, soil and air.[56] This contamination, in turn, allegedly created serious health problems, "including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers and neurological and reproductive problems."[57] The communication further petitioned that the Nigerian government "neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry."[58] It was further stated in the communication that "despite the obvious health and environmental crisis in Ogoni land, the Nigerian government did not require oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production."[59] It further stated that "the Nigerian Government did not require oil companies to consult oil bearing communities before commencing operations, withheld information from these communities on the dangers created by oil activities[60]and denied scientists and environmental organizations permission to enter Ogoni

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54 SERAC Case (n 53) Paragraph 1& 43
55 Ibid
56 Ibid
57 Ibid
58 Ibid Paragraph 4
59 Ibid paragraph 5
60 Ibid paragraph 4

land.[61] The communication further claimed that the government ignored concerns of Ogoni communities regarding oil development and responded to protests with massive violence.[62] The communication alleged that the government placed, "the legal and military powers of the State at the disposal of the oil companies" for "ruthless military operations" including "wasting operations coupled with psychological tactics of displacement."[63]

In October 2001, the African Commission made an announcement of its verdict in the SERAC Case. While deciding in favour of the plaintiff, it concluded that Nigeria had violated several provisions of the African Charter. By virtue of that, the commission gave an outline of its typology of human rights obligations *viz:*

> *Intentionally accepted ideas of the various obligations*
> *engendered by human rights indicate that all rights both civil and political rights and social and economic generate at least four levels of duties for a state that undertaken to adhere to a rights regime, namely; the duty to respect, protect and promote and fulfil these rights. These obligations universally apply to all rights and entail in combination of negative and positive duties[64].*

An examination of the above mentioned typology shall now suffice:

6.1 The Obligation to Respect Human Rights

The first level of obligation recognised in the *SERAC Case* is the obligation to respect human rights. This obligation which is analogous to the traditional obligation of non-interference,[65] forbids the State from acting in any way that would directly encroachupon recognized rights or fundamental freedoms. This obligation finds expression in the United Nations Charter, wherein member States

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61 Ibid Paragraph 5
62 Ibidparagraph 3 and 8
63 Ibid
64 Ibid Paragraph 44
65 Van Hoof (n52) 106

pledge themselves to promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction.[66]

This obligation entails that "the state should respect right-holders, the freedoms, autonomy, resources and liberty of their action,"[67] and a failure to ensure respect for human rights constitutes a violation of international law.[110]In considering whether a State has breached this obligation, it is of no moment that the State or its agents are not the violators. The obligation to respect human rights finds concrete expression in many aspects of socio-economic rights. The obligation involves, in relation to the right to food, recognising the needs and realities of food production and refraining from taking measures that undermine food security. It presents governments, in relation to housing, from engaging in any "practice, policy or legal measure" that infringes upon an individual's freedom to use resources in a way that is appropriate to the satisfaction of the individual or by extension, family, household, or community housing needs.[68]

It also forbids governments from carrying out forced evictions without due process of law or providing alternative accommodation. It implies that a government may not expropriate land from people for whom access to control over that land constitutes the only or main asset by which they satisfy their food needs, unless appropriate alternative measures are taken.[69]

In cases where limitation or deprivation of the right to access to housing is unavoidable, the State must take steps to litigate such interference by tending alternative accommodation for the evictees.[70] A government violates human rights if it adopts a law or policy that allows poor people's homes to be demolished and replaced by luxury housing that the original inhabitants could not afford without making

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66 United Nation Charter, Articles 55 and 56

67 Movement Barkinabe' des Droits de I'Homme et des people's v Burkina Faso Comm No 204/97 2000-2001 African Annual Activity Report Annex v Paragraph 42

68 SERAC Case (n53) paragraph 61; S Lecki, "The Right to Housing" in Y Ghai and J Cottrell Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights (University of Pennsylvania Press, Pennsylvania 2004) 107-13

69 Van Hoof (n 52) 107

70 Brand (n 42) 9-10

provisions for alternative housing for them on reasonable terms.[71]In the *SERAC Case***,** the African Commission similarly held that:

> *The State has a duty to respect the free use of resources owned or at the disposal of the individual alone or in any form of associating with others, including the household or the family, for the purpose of rights-related needs. And with regard to the collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.*[72]

Breaches of the right of access to housing are a recurring decimal in Nigeria. A case in point is the Maroko episode that took place in Lagos State on July 7, 1990. On July 7, 1990, the then Military Governor of Lagos State, Colonel Rasaki made an announcement through the media that the Maroko settlement in Lagos would be demolished in Seven (7) days. The government never issued nor served any notice to quit on the Maroko residents as required by law yet, between the 14th and 25th July of that year, bulldozers annihilated thousands of houses, bringing to ruins, properties estimated to have been worth millions of Naira. Armed soldiers protecting the demolition crew reportedly raped women who attempted to salvage the little they could from the rubles of the razed down properties.[73] The government provided grossly inadequate resettlement housing for the evacuees. Although, it paid some paltry sums of money as compensation to the landowners, the government made no transfer arrangements for the well over Ten Thousand (10,000) students whose education were scuttled on account of the demolition of their schools in Maroko.[74] Several years later, most of the evacuees were still displaced with Maroko itself becoming paradise regained and home to several affluential and highly placed Nigerians, no thanks to the same government that forcefully dispossessed the poor from their homes in favour of the rich and

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71 Van Hoof (n52) 107

72 SERAC Case (n52) Paragraph 45

73 A Report by Civil Liberties Organization (CLO) Nigeria and Executive Lawlessness in the Babangida Regime (1991) 13-14

74 Ibid

wealthy. The paradox of a set of people's agony and despair being the joy and happiness of another set was poignantly brought to bear in this instance.

The obligation to respect human rights entail, in relation to the right to health, refraining from denying or limiting equal access for all persons, including prisoners or detainers, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy and abstaining from imposing discrimination practices relating to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases[75].

This work submits that "to respect human rights" presupposes creating and sustaining an enabling environment where human rights and fundamental freedoms are accorded due recognition and regard.

6.2 The Obligation to Protect Human Rights

The obligation to protect is a positive duty that requires a state to "take measures to protect beneficiaries of the protected rights against all political, economic and social interferences."[76] This obligation is applicable to all human rights.[77] It is an obligation of due diligence. It entails taking "reasonable and appropriate measures,"[78] since human rights law must not command the carrying out of impossible acts or place a disproportionate burden on the authorities.[79] The prohibition of torture, for example, requires states

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75 Ibid paragraph 34

76 SERAC Case (n53) paragraph 46; ICPR (n22) Article 6 (1) (Providing that "the inherent right to life shall be protected by law")

77 CESCR General Comment 3 (n16) paragraph 8

78 William Eduardo Delgado Paez v Columbia Communication 195/85 UN GADR Human Rights Commission 39thSess No 40 at 43 Paragraph 5.6 UN Doc A/45/40 (1990) Annex IX Sect D 43-49 reprinted in 1990 HRLJ 313 Paragraph 5 (5): platform "Arztafiir da leben" Austria 139 EUr Ct HR (SerA) Paragraph 34 (1988); Joaquin David Herrera Rubio et al v Columbia Communication No 161/1983 2 November 1987 UN GAOR Human Rights Commission at 192 paragraph 10 (3) UN Doc CCPR/C/op/(1990) (requiring "effective measures").

79 Osman v UK 1998 – VII Eur Ct HR 3124.

to take preventive measures such as stopping secret incarcerations, the search for effective solutions in a transparent legal system and continuation of "investigations of allegations of torture."[80]Therefore, the obligation to protect demands "an aggregate pattern of social interaction in which all individuals and groups are protected in the utmost freedom of choice and subjected to the least possible coercion, governmental or private."[81]

The African Commission held that the obligation to protect human rights also requires a State to create and maintain an atmosphere or framework conducive to the effective interplay of laws and regulations, "so that individuals will be able to freely realise their rights and freedoms."[82] The rationale for this positive obligation is that human rights are better protected where appropriate laws and administrative policies are supported by equally appropriate governmental machinery - courts, police and penal institutions as well as a system of health, social and educational services.[83] Without the provision of these and other structures to enable individuals to redress violations, the state fails in its obligation to protect human rights[84].

An intriguing question is, namely, whether a States' obligation to protect human rights includes the duty to enact domestic laws to protect the human rights of individuals within the State's jurisdiction from all violations. Is a state obliged to provide effective remedy for human rights violations committed by private entities in addition to those committed by the State itself? Is it obliged to take steps to prevent others within its jurisdiction from violating human rights? Should a State enact a law to prevent employers from dismissing employees who engage in trade unionism simply because it is bound by treaty to respect "freedom of association?"[85]

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80 The Law Office of Ghazi suleman v Suleman v udanCommNos222/99 2002 2003 African Annual Activity Report Annex VII, Paragraph 46

81 M McDougal, H Lasswell and L Chen, Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity (Yale University Press, New Haven 1980) 7

82 SERAC Case (n53) paragraph 46

83 Z Stavrinides, "Human Rights Obligations under the United Nations Charter" (1999) 3 International Journal of Human Rights 45-46

84 Jawara v The Gambia CommNos 147/95 149/96 1999-2000 African Annual Activity Report Annex V Paragraph 74

85 Sieghart (n 27) 43

Publicists and international case law provide answers to these posers in the affirmative. According to Van Hoof "the obligation to protect goes further, in the sense that it forces the State to take steps - through legislation or otherwise - which prevent or prohibit others from violating recognised rights and freedoms."[86] This work submits that the basis for this position is that a State's human rights responsibility extends to everything within its jurisdiction and jurisdiction is the lynchpin of a State's "judicial, legislative and administrative competence" and extends, as a minimum, to the state territory.[87]

The African Commission takes a similar position as evident ***in*** *Commission Nationale des Droits de FHommeet des Libertes**v** Chad*[88]where several people were directly and indirectly harassed and arbitrarily arrested by members of the security services. It was the holding of the Commission that: "Even where it cannot be prove that violations were committee by government agent, the government has a responsibility to secure the safety and the liberty of its citizens and to conduct investigations into murders[89].In *Amnesty International v Sudan*, the petitioners alleged that "prisoners were executed after summary and arbitrary trials and that unarmed civilians were also victims of extra-judicial executions."[90]The African Commission stated: "Even if Sudan is going through a civil war, civilians in areas of strife are especially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law."[91]

The realm of socio-economic right to food, the obligation to protect includes preventing distortion and developing protective legislation.[92] For the right to health, it entails regulating private health care provisions to protect citizens against exploitation by

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86 Van Hoof (n52) 43

87 Brownlie(n8) 106

88 Commission Nationale de Droits de I'Homme et des Libertes v Chad Comm No 74/92 1992-1996 African Activity Report Annex VI

89 Ibid paragraph 22; SERAC Case (n53) paragraph 57

90 Amnesty International v Sudan CommNos 48/90 50/91 5291 89/93 1999-2000 African Annual Activity Report Annex Paragraph 48

91 Ibid Paragraph 50

92 J Cottrel and Y Ghai, "The Role of the Courts in the Protection of Economic, Social and Cultural Rights" in Economic, Social and Culktural Rights in Practice (Interights, London 2004) 58-64

private institutions and providing effective remedy where the exploitation occurs[93].For the right to work, it entails regulating and monitoring the treatment of workers by their employees. And for the right to environment, it involves taking measures that enable local populations confronted with harmful corporate activities to make informed decisions and to have their voices heard. The African Commission elaborates this "process rights" obligations thus (in the context of multinational oil activities).

This work submits that "to protect human rights" denotes all the paraphernalia available to ensure the continuance, preservation, maintenance and sustenance of human rights and fundamental freedoms.

6.3 The Obligation to Promote Human Rights

The obligation to promote human rights requires a State to ensure that individuals are able to exercise their rights and freedoms. Although Van Hoof is of the view that this obligation "concerns more or less vaguely formulated goals which can only be achieved progressively in the long-term,"[94] the African Commission, on its part, stresses that the obligation involves "promoting tolerance, raising awareness, and even building infrastructures."[95]This is sensible, particularly in Nigeria where the State controls, to a large extent, the means of internal communications. In the absence of such a positive obligation, the state might be unwilling to undertake the substantial investment involved in informing a predominantly illiterate population of human rights guarantees and obligations entailed therein. This obligation, accordingly, extends to administrative bodies, which must promote the advancement of socio-economic rights.[96]

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93 Brand (n42) 10; CESCR General Comment 14 paragraph 33 ("The obligation to protect requires states to take measures that prevent third parties from interfering with Article 12 guarantees")

94 Van Hoof (n52) 106

95 SERAC Case (n53) Paragraph 46

96 G Budlender, Justifiability of Socio-economic Rights. Some South African Experience Economic, Social and Cultural Rights in Practice (Interight, London 2004) 33-37

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[97] exhibits an obligation to promote that includes achieving a number of socioeconomic rights. It commands the State to modify or transform existing cultural patterns and underlying beliefs. It makes detailed prescription in fields like education, employment, rural life and family life. The African Commission, in its many resolutions and recommendations, has emphasised the importance of the promotional obligation and has encouraged States to take action accordingly. The Commission, while noting that "ignorance is the main obstacle to respect for human and peoples' rights" opines that State Parties should "introduce the teaching of human and people's rights at all levels of their educational systems... and should periodically broadcast, with the help of the African Commission...radio and television programmes on human rights in Africa."[98]

A State also promotes human rights through the reporting system, though many State Parties are unfaithful in fulfilling this obligation. This work submits that the African Commission is simply playing the ostrich by not frontally condemning the dispositions of governments for not respecting, protecting and promoting human rights with respect to socioeconomic rights and other generations of rights. Rather, the African Commission subtly shifted the blame to ignorance' of the people that would require further education, when indeed and infact, the people cannot exercise such rights without access to the courts.

6.4 The Obligation to Fulfill Human Rights

The Final lap of the SERAC obligations, namely, the obligation to fulfill is "a positive expectation" that the member State will "move its machinery towards the actual realisation of the rights.[99]" It requires the State according to a document[100]to take

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97 Convention on the Elimination of All Forms of Discrimination Against Women opened for signature 1 March 1980 27 UST 1909 TIAS NO 828912 49 UNTS 14

98 Resolution on Establishment of Committees on Human Rights (n64) 13

99 SERAC CASE (n53) Paragraph 47; CESCR General Comment 14 Paragraph 33 (stating. "The obligation to fulfill requires states to adopt appropriate legislative, administrative, budgetary, juridical, promotional and other measures towards the full realization of the right to health")

100 "The Maastricht Guidelines on Violations of Economic, Social and Cultural Right" (1998) 20 Human Rights Quarterly 693-94.

appropriate legislative, administrative, budgeting, judicial and other measures towards the full realization of such rights."[101] This obligation "is very much intertwined with the duty to promote" human rights,[102] requiring "more far-reaching measures on the part of the government in that it has to actively create conditions aimed at the achievement of a certain result in the form of a more effective realisation of recognised rights and freedoms."[103] In relation to the right to health, for example, the CESCR has held that fulfillment incorporates promotion given the critical importance of health promotion in the work of the World Health Organization (WHO) and others.[104] In relation to the right to food, this obligation entails incorporating aspects of food culture into development, establishing food control mechanism and formulating policies.

The obligation to fulfill human rights also incorporates the obligation to facilitate and provide resources and services necessary for human rights. In order to secure the right to a fair trial, a State must provide counsel for an impecunious individual who otherwise would not be able to retain counsel for his defence in a criminal trial. Shue posits that it is more fruitful to examine the relatively negative, positive and the intermediate elements that are mixed in various proportions in the implementation of just about every right, rather than engage in "the artificial, simplistic, and arid exercise of attempting to classify every right as flatly either negative or positive."[105]

In practice, the African Commission gives a broad interpretation to the African Charter *vis-a-vis*States' obligations to fulfill human rights. The Commission has found that the Charter's guarantee of the right to a healthy environment or "a general

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101 SERAC Case (n53) Paragraph 6

102 Van Hoof (n52) 106 ("The obligation to ensure and the obligation to promote together encompass, inter alia, What traditionally are called "programmatic" obligation within the framework of economic and cultural right.); Brand (n84) 10 ("The duty to promote is difficult to distinguish from the duty to fulfill.")

103 Van Hoof (n52)106

104 CESCR General Comment 14 (n109) Paragraph 23 and 33

105 Shue (n3) 84; Van Hoof (n52) 107 (arguing that "The Apology herein examined" stresses the unity between civil and political rights, and economic, social and cultural rights, as long as it is recognized that the various "layers" of obligations can be found in each separate right or freedom").

satisfactory environment"[106] imposes a number of "clear obligations upon a government."[107] It "requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation and secure an ecologically sustainable development and use of natural resources..."[108]Compliance with the spirit of their obligation, including the requirement to "take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick,"[109] demands that states periodically arrange for independent scientific monitoring of threatened environments. Government themselves must undertake environmental and social impact assessments prior to major industrial developments and must publicise such studies. In the case of projects undertaken by third parties, government must monitor and provide information to communities exposed to hazardous materials and activities, while also offering meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[110]

Municipal courts, however, have held that the fulfilment of certain human rights provision is contingent upon the availability of resources for such purposes, despite the sweeping extension of the fulfilment obligation. In Soopramoneyv Minister of Health, Kwazulu-Natal, the South African Constitutional Court considered Section 27(3) of the South African Constitution providing for the right to emergency medical treatment and maintained that the appellant's case must be analysed in the context of available resources to the health services and the needs the health services had to meet. In *Government of the Republic of South Africa v Grootboom & Ors*, the constitutional Court, relying on Soobramoney's Case, held that part of the State's positive obligations imposed by Section 26(2), relating to how sing, is to devise a comprehensive and workable plan for meeting them. This obligation is not absolute, rather, it involves taking "reasonable legislative and other measures...to achieve the progressive realization of the right...within

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106 African Charter, Article 24
107 SERAC Case (n53) Paragraph 52
108 Ibid
109 African Charter, Article 16
110 SERAC Case (n53) paragraph 54

available resources."[111] Progressive realisation means making housing accessible not only to a larger number of people over time, but to a wider range as well. Also, availability of resources is an important factor in determining reasonableness.

7 Minimum Core Obligations and the Drive Towards its Realisation

This work has already made the concession, which is namely, that every State Party to an international human rights treaty is expected to keep faith with the time-honoured principle of *pactasunctservanda*. Often times, States are willing to perform their human rights obligations, but they are unable; even in Christendom, the Biblical admonition of the "spirit" being "willing" but the "flesh" being weak is rife. Germane challenges sometimes bedevil States, making it difficult for them to implement socio-economic rights[112].This realism probably explains why architects of most instruments guaranteeing socio-economic rights scarcely intend their provisions to create individual rights on demand. During the elaboration of the South African Bill of Rights for instance, the Ad Hoc Committee for the campaign of Social and Economic Rights stressed the same point in its submission to the South African Constitutional Assembly (CA).

In Nigeria, for example, corruption and mismanagement of resources have been a major problem. The failure in leadership characterised by crass exploitation of resources and wanton embezzlement of the common wealth makes the inability to implement socio-economic rights more of a problem that thrives in nurture than in nature. The abuse of power by successive Nigeria leaders has been a significant factor in contributing to wide disparities in human living conditions and gross human rights violations. Corruption runs brazenly amok in Nigeria, permeating every facet of her national life. The Nigerian society has become a

[111] CESCR General Comment 14 (n109) Paragraph 5 (wherein the CESCR acknowledged "the formidable structural and other obstacles resulting from international and other factor beyond the control of states that impedes the full realization" of the health in Article 12 of the ICESCR)

[112] CESC General Comment 14, Paragraph 5 (wherein the CESCR acknowledge "the formidable structure and other obstacles resulting from international and other factor beyond the control of the state imedes the full realization of the right to health in Article 12 of the ICESCE)

symbol of materialism, with her leaders notorious for financial excesses. Both electronic and print media are awash with stories of looted funds stashed, stacked and laundered into foreign banks, lost through endemic corruption and abuse of office. The Nigerian culture of valourising wealth, however crooked and illicit the manner of its acumination and canonizing thieves exacerbates the aura of hopelessness in this regard.

Similarly, weak, inefficient and ineffective post-colonial institutions remain an identifiable problem. Advancing human rights is dependent on strong, efficient and effective institutions such as an independent judiciary, functional and effective ministries, departments, agencies and units for civil service delivery, good labour relations, functional units for health care deliveries and educational administrations. A vibrant, bold, and independent objective media is also necessary to promote human rights through public enlightenment and sensitization. The media also helps to expose abuse of office and power through objective reporting. In Nigeria, these institutions have been monumental failures due to institutional decay and structural weaknesses inherent in them.

Social and economic rights do not have as their only or primary remedy the provision of a commodity on demand. Rather, they require the creation of an environment and processes which enable individuals and communities to realise these rights...The experience of people working with poor communities, both here and in other jurisdictions, has been that these communities realise that the constitutional entrenchment of social and economic rights will not necessarily translate into the immediate provision of material goods.[175] This tension between desire and fulfillment led to the development of "minimum core" which is an imperative exercise and desideratum given that a violation may consist of acts of commission of human wrongs or the omission to fulfill the minimum essentials for the enjoyment of rights.

8. The Essence of the "Minimum Core"

Every State Party to human rights instruments guaranteeing socio-economic rights is bound to fulfill a minimum core obligation by ensuring the satisfaction of a minimum essential level of these

rights.[176] The essence of the minimum core is to bridge the gulf between fundamental entitlements and scarce resources.[113] The law does not expect a government to spend resources that it does not have or to spend all of its resources on satisfying only socio-economic rights, given other competing demands, resources are generally scarce whereas human needs are unlimited. A State, thus, has a margin of discretionin selecting what means to implement its human rights obligations. Nevertheless, such discretion does not extend to a refusal to fulfill these obligations, since that would undermine the driving force behind the treaty obligations altogether. The minimum core, therefore, is the barest minimum, the "Lowest Common Multiple (LCM)" as obtainable in mathematical parlance for instance, below which a State cannot descend, "the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligations."[178] Indeed Friedman notes *viz:*

> *States in which larger segments of the population are denied effective access to education, basic health services, nutrition, housing and safe drinking water are states in which not even the minimal essential levels of economic and social rights are satisfied. The states are not meeting their minimum core obligations under international law.*

Similarly, the CESCR explained the principle in its general comments thus:

> *On the basis of the extensive experience gained by the committee, as well as by the body that preceded it, over a period of more than a decade of examining state parties' reports the Committee is of the view that minimum core obligations to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of*

[113] S Russell, "Minimum State Obligation: International Dimensions in D Brand and S Russell (eds) Exploring the Core Content of Socio-economic Rights: South African and International Perspective (Interights, London 2002)11-14"

> *essential foodstuff, of essential primary health care, of basic shelter and housing or of the most basic forms of education, is prima facie, failing to discharge its obligations under the covenant. If the covenant were to be read in such a way as not to establish such a minimum core obligations, it would be largely deprived of its raison d'etre.By the same token, it must be noted that any assessment as to whether a state has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each stateparty to take the necessary steps "to the maximum of its available resources.*[180]

This research however, submits that it is not enough for a state to attribute its failure to meet its minimum core obligations to lack of resources. To canvass such an argument, a state must demonstrate that it has made every effort to use all its available resources to satisfy the minimum core of socio-economic rights.[181]

The Indian model becomes apposite at this juncture. India perhaps, more than any other jurisdiction, has through judicial intervention, developed the jurisprudence of the fundamental objectives and directive principles of state policy by justiciability and judicialisation of socio-economic rights. The development is stunning particularly with respect to the fact that the Indian Constitution[182] expressly states that directive principles are non-justiciable, although they are fundamental in the governance of the country and the state has a duty to apply them in making laws. This work submits that the judicial activism of the Indian Supreme Court has ridiculed the conservative toga of the Nigerian courts as far as the implementation of socio-economic rights is concerned.

This research further submits that the purpose of the Fundamental Objectives and Directive Principles of State Policy is to fix certain social and economic goals for immediate attainment, thus bringing about a non-violent social revolution. Through such social revolution, the constitution seeks to fulfill the basic needs of the

common man and the socially and/or economically weaker sections of the community. This work further submits that without faithfully implementing the Fundamental Objectives and Directive principles of State Policy, it will never be possible to achieve the welfare state contemplated by the Nigerian 1999 Constitution. Indeed, Nigeria can borrow a leaf from India.

9. Constituent Elements of the "Minimum Core"

Each socio-economic right has a "minimum essential level" which a state must satisfy, but the CESCR does not specify this minimum. The ICESCR spells out a mini programme and some elements of a time schedule. Article 13(2) and (14), for example, provide for the sequential realisation of free education in ways that establishes priorities such as free and compulsory primary education. The South African Constitution follows this pattern in its guarantee on education. It provides *inter alia,* "Everyone has the right - (a) to a basic education, including adult basic education and (d) to further education, which state through reasonable measures, must make progressively available and accessible."[114]

This also entails in the particular context and reference of South Africa, that children are not taught in a racist homophobic or otherwise discriminatory manner. The South African Constitutional Court answered the question as to whether or not courts are competent to determine the minimum core in the affirmative in the *Grootboom Case,* though it created some uncertainties in *Minister of Health v Treatment Action Campaign*[115]In the *Grootboom Case,* the Constitutional Court adopted the CESCR's position which is namely, that socioeconomic rights inherently include a preference for the poorest and most disadvantaged in society. It held that the minimum core obligation "is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question."[116] Using the right of access to adequate housing as a template for analysis, the court stated *inter alia* that the minimum:

[114] Section 29(1) of Constitution of South Africa
[115] Minister of Health v Treatment Action Campaign (2002) 5 SALR 721 (cc)
[116] Grootboom Case, Paragraph 31

> *Requires more than brick and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all those, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must services, there must be dwelling.*[188]

10. Conclusion

Socio-economic rights are both normative and obligatory, they are negative and positive, entailing duties of non-interference in certain contexts and active assistance by respondents in crucially important economic and social contexts. By virtue of the substantial benefits of recognising all human rights, there is no better alternative to protecting, respecting, promoting and fulfilling these rights than by tackling the extreme inequalities of wealth and power that characterise our societies. The protection of human rights depends on States' commitments and continued willingness to honouring their various obligations, their ratification of universal instruments and subsequent adoption of regional human rights treaties indicating formal commitments to finding bold solutions to human rights problems, but their reluctance to follow through on the implementation of these rights indicts and severely undermines their so-called commitments to human security. This reluctance is ill-founded nevertheless, given that the legitimate exercise of human rights does not pose dangers to a democratic State governed by the rule of law. Respect for human rights improves the conditions of those under a State's jurisdiction, engenders their confidence in governance and lightens the heavy burden of institution charged with the arduous task of implementing human rights norms.

11. Recommendations

This work hereby makes the following recommendations *viz;* International aid and/or assistance is a *desideratum* in order to fulfill the “minimum core” and as such, Nigeria should not shy away or be ashamed of seeking such assistance in the circumstance through development aids and grants. It is incontrovertible that no one lives

as an island of his/her oneself. No one can exist or survive solely on his/her own resources and Nigeria is no exception. Everyone, as indeed everything, is indebted to everyone and everything else.

Rights should be integratively construed because doing so will lead to a society where men and women are equally able to maximise their potentials. Classifying States' obligations, for instance, into negative and positive is at most a difference devoid of distinction. It is actually dishonest for a State to pick and choose among rights that it will honour and to interpret others as optional, dispensable, non-obligatory, or even unreal. Non-consequentialist libertarianism is patently problematic, since most human rights are interrelated and cover different aspects of the same basic concerns - integrity, freedom and equality of all human beings. Negative duties, which imply non-interference in the enjoyment of rights, are essential parts of freedom and non-infliction of suffering. Construing them as the sole conceptions of rights leads to a society consisting of a customised, mutually disregarding, alienated individuals with no positive consideration for cooperation in helping to fulfill one another's needs or interests or for rectifying the deprivations occasioned by the sirens of power and the influential in our society.

A Cursory Glance at the Rights and Status of an Illegitimate Child *Vis-À-Vis* the Effect of Section 42(2) of The 1999 Constitution of the Federal Republic of Nigeria as Amended

Egondu Grace Ikeatu* **and Alex Iloba Uwadinma****

Abstract

The concepts of legitimacy and illegitimacy are important as they determine the rights and status of a child in relation to the society and what he/she is entitled to. It considers children that are tagged illegitimate, the resultant social discrimination and ways of legitimizing them. The issue of legitimacy and illegitimacy alongside inheritance albeit sensitive issues, are issues that are of great concern in our laws and ones that need to be addressed firmly to prevent discrimination of any kind. The constitution of the Federal Republic of Nigeria in Section 42(2) has tried to resolve the issue of discrimination, but it has been asserted that the words of that provision is not only not firm but also not completely inclusive. These issues are that which this paper seeks to address and throw more light on.

Keywords*:* Legitimacy, Illegitimate, Rights, Constitution, Nigeria

Introduction

This provision of the Constitution is generally believed to be an attempt to remove any disability or deprivation attached to the circumstances of one's birth. In history and before the inception of the 1999 Constitution of the Federal Republic of Nigeria as amended, the rule propounded in the case of *Cole v Akinyele*[1] by the Supreme Court that a child born outside wedlock during the subsistence of a valid statutory marriage was illegitimate and could

* PhD, LLM, BL, LLB, Department of Public and Private Law, Faculty of Law, Admiralty University of Nigeria, Ibusa, Delta State, Telephone Number: 0803 407 5570, Email Address: egonduikeatu@gmail.com

** LLM, BL, LLB (Law), Department of Jurisprudence and International Law, Faculty of Law, Admiralty University of Nigeria, Ibusa, Delta State, Telephone Number: 0806 518 1046, Email Address: alle4smith@gmail.com

1 (1960) 5 FSC 84 at 101

not succeed to the estate of the deceased natural father was the law. Furthermore, it was trite then that an illegitimate child could not inherit his mother's property if the mother had other legitimate children and were in the distribution of property according to seniority, he ranks as if he had been born on the date he became legitimated. However, the law was given a human face on October 1975 when the original draft of the Constitution drafting committee specifically stated that 'no citizen of Nigeria shall be the subject of discrimination merely on the ground that he was born out of wedlock.' This was stipulated in section 35(3) of the draft Constitution. This provision indeed stirred the hornet's nest within the committee members and a demand was put out for its deletion from the draft. Women groups, religious bodies and individuals argued that such a provision would give a wrong impression to a non-Nigerian that illegitimacy was the order of the day in the country and it would equally aid promiscuity and a damning consequence on the marriage institution in Nigeria. Expectedly, this section was later set aside by the draft Constitution committee who replaced same with what became section 39(2) of the 1979 Constitution and presently section 42(2) of the 1999 Constitution which states thus:

> *No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth*.

The members of the constituent assembly who proposed the present provision of section 42(2) supported this proposal as follows:

> *There is no doubt that all of us have no choice nor were we given an option as to who would be our parents before we were born. If we were given the option, I am sure that there will be none of us who would prefer to be borne by wretched parents, to be born of slaves or even by prostitutes. We would prefer to be borne by people who are legally married. This amendment is saying that on no*

> *account should a person be discriminated against merely by reason of the circumstances of his birth.*[2]

Thus, while the Constitution Drafting Committee (CDC) draft was limited to the narrow ground of birth out of wedlock, the relevant section of the constitution, section 42(2) deals with a wider basis of circumstances of one's birth, even as it includes birth out of wedlock, it is not restricted to it. These are three major component phrases of this aforementioned subsection and they read in parts:

a. No citizen of Nigeria
b. Shall be subjected to any 'disability' or deprivation
c. Merely by reason of circumstance of his birth

The purport of this provision is that non-Nigerians are not entitled to benefit from this section of the grund-norm. The word disability here refers to the taking away from a person a power or right, that is, disqualification. Deprivation on the other hand refers to being stripped or disqualified from enjoyment or benefits. Flowing from the above, deprivation or disability cannot arise out of infancy, bankruptcy etc but strictly by the circumstance of one's birth and nothing else.

2. Status of Illegitimacy in Nigeria *vis-à-vis* the coming into force of Section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria as amended.

The interpretation of the above stated section will be of great concern to many people with regards to the position of an illegitimate child. The controversy generated is as to whether it has aided into extinction the status of illegitimacy and bringing into fore the treating of every child the same way no matter the circumstance of his birth or merely removed the disabilities and deprivation associated with the circumstance of one's birth.

Accordingly, the first view which is liberal in approach as clearly shown in *Olulode v Ovisou*[3] is that section 42(2) has totally

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[2] Aghiemien J O, Proceedings of the Constituent Assembly (Official Report) Volume 111, p. 2346, Columns 7664-7665; Federal Ministry of Information, Printing Division, Lagos

[3] *Suit No M/133/81 (Unreported) High Court of Lagos State, Ikeja Division; November 27, 1981*

abolished the status of illegitimacy in Nigeria in that the provision has eliminated all the disadvantages associated with illegitimacy and the circumstances of one's birth. The court in that case stated that section 42(2) abolished the status of illegitimacy by ensuring that no one was discriminated against in Nigeria merely by reason of the circumstances of his birth and that as such, illegitimacy as a status ceased to exist after the coming into effect of that section of the constitution. This rightfully means that the concept of discrimination that leads to illegitimacy has been scraped under the Nigerian law. If this is accepted as correct, the purport is that all our statutory and customary laws with respect to the status of an illegitimate child would become null and void and of no legal effect. Examples include the various legitimacy laws, succession laws, section 165 of the Evidence Act[4] which deals with the presumption of legitimacy and section 38(2) of the Matrimonial Causes Act[5]which deals with the effect of the decree of nullity on illegitimacy. Moreso, customary laws which distinguish between legitimate and illegitimate children would have no legal effect anymore because, section 1(3) of the Constitution makes all these laws void because the section proclaims the supremacy of the Constitution and had declared any law that is inconsistent to its provisions to be void to the extent of its inconsistency.

The second view seems more restrictive as expressed by Williams J in *Kehinde Da Costa & Ors v Juliana Fasehun & Ors* [6] that the provision of section 42(2) has no effect on the existing law in any manner and that this was a lost opportunity of an innovation in the law. The court relied on *Cole v Akinyele*[7] and refused to allow children born outside a monogamous wedlock any share in their father's estate on the ground that they were illegitimate by virtue of the circumstances of their birth and that it would be contrary to public policy to legitimize them and as such, section 42(2) did not give them any right of inheritance. This does not seem to be inferred as the right spirit of the provision of section 42(2). Writers believe

4 Laws of the Federation, 2010
5 Cap M7, Laws of the Federation, 2010
6 Suit No M/150/80 (Unreported) Lagos State High Court, 22 May, 1980
7 Ibid

that the modern provision of section 42(2) of the Constitution though not explicitly contained therein, has nonetheless given the so-called illegitimate child more rights as can be inferred therein. Nwogugu noted as follows that section 42(2) did not abolish the status of illegitimacy in Nigeria as it encapsulated it into 'the circumstances of one's birth.' Thus, it merely ameliorated that status by removing the disabilities and deprivations attached to the circumstances of one's birth while still remaining silent on the term 'illegitimacy' and drawing no distinctions therein.[8] The net effect of that provision is that all persons will henceforth enjoy the same rights regardless of how they were conceived or birthed. It may however be relevant to still determine whether a person is born legitimate or not even though in most cases, the status of illegitimacy succeeds more in punishing the innocent child than the father and mother since most times when such an issue comes up, the father might already be deceased. If the purpose of the law is initially to prevent promiscuity from the status of illegitimacy, it will only end up punishing a person who had no choice in being born under a particular circumstance and this should not be the case. Be that as it may, without prejudice to previous laws relating to the issue, section 42(2) was submitted to only have removed the disabilities and deprivations which a child born out of wedlock suffers and not to actually abolish the concept of illegitimacy and also, apart from the other disabilities and deprivations which the illegitimate children may suffer, the prohibition on the succession is removed.

Succession matters arising from this angle have been put to rest by the court decision in *Salubi v Nwariaku*[9] where Akintan JCA held thus:

> *Since the coming into force of the 1979 Constitution, the term illegitimate children used to describe children born out of wedlock has been rendered illegal and unconstitutional…..that children born out of wedlock are not entitled to benefit from the estate of their acknowledged father who died intestate amounts to subjecting them to a disability or*

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8 E N Nwogugu, *Family Law in Nigeria*, (3rd Ed. HEBN Publishers Nig) p 309

9 (1997) 5NWLR (Pt. 505) 442/(2003) 7NWLR (Pt.819) 426

> *deprivation merely by reason of the circumstances of their being born out of wedlock which is exactly what section of the constitution is aimed at preventing.*

This was a welcome development on the status of illegitimacy. Unfortunately, the Constitution did not render illegal and unconstitutional the term 'illegitimacy' as held by the court nor explicitly state anything as regards legitimation and the attendant succession issues, but merely prescribed that no person should be placed at a disadvantage by reason of the circumstances of their birth. The case however rightly decides that if an illegitimate child is not acknowledged by its natural father, he cannot claim to be entitled to share in his father's intestate estate. It has been inferred that on the basis of the provisions of the Constitution, there is nothing like the term 'illegitimacy'.

3. Constitutional Guarantee

That the Constitution of the Federal Republic of Nigeria guarantees that no person should be discriminated against by reason of the circumstances of their birth is no longer in doubt. Section 42(2) of the Constitution sets out in bold and clear terms that: No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstance of his birth. The effect of this provision is as Sagay puts it that 'once a child born out of wedlock is acknowledged by the father of the family, then he becomes a legitimate child from birth.[10] In my view, section 42(2) of the Constitution must always been seen and regarded as a guarantee that whatever the situation is that a Nigeria citizen finds himself, he must not be subjected to disabilities and deprivations and obviously this includes the denial of succession and inheritance rights, which other citizens do not experience and that he must find legitimacy somewhere in the society.[11] Much can be said about the vibrancy and

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[10] Sagay I, *Nigerian Law of Succession, Principles, Cases, Statutes and Commentaries* (Malthouse Law Books, 2006) p.16

[11] In a situation where such a person is unable to locate and establish his paternity and legitimacy, he will fall back to his mother's estate as in the case of *Ben Enwonwu v Spira* (1965) 2 All NLR 233

humanism of section 42(2) for to concern those who are not in any way responsible for their existence in this world to the garb of discrimination, deprivation or even tagged illegitimate for the rest of their lives speaks ill and wicked of humanity. Olagunu JCA in *Mojekwu v Ejikeme*[12] captured the position in the modern Nigerian society and its revulsion for illegitimate offspring when he said 'a person cannot be cast away from the society because he was born out of wedlock. A safety net assures the assimilation and ascription of the personal law of such person into that of the mother on the principle of the *Ben Enwonwu case*.' Earlier in the same judgment, Fabiyi JCA had expressed a similar view in the following words: 'the custody of any child born out of wedlock follows that of the mother in the absence of any person claiming custody of the child on the basis of being the natural father….. This must be so since the child must belong to a family and should not be rendered homeless for a situation he did not create.'

4. Attitude and Disposition of the Courts

What can be gleaned so far can be said to be enough to convince anyone that the Nigerian Judiciary is active and progressive in its approach to this issue. This is most encouraging. However, in order to fully appreciate the extent of the position of the courts here, the writers are of the opinion that two landmark decisions, one emanating from the Supreme Court and the other from the Court of Appeal must be given close scrutiny in this paper.

a. ***Salubi v Nwariaku:*** Hardly can issues bordering on succession and inheritance rights in Nigeria be discussed today without reference to this case. Before this there had been two conflicting decisions of the High Court, one firmly in favor of conferring legitimacy on an offspring born out of wedlock as seen in *Olulode v Oviosu*[13] and the other taking a contrary view as seen in the case of *Kehinde Da Costa & Ors v Juliana Fasehun & Ors*.[14] The view in the *Olulode case* was the one taken by the Court of Appeal in the *Salubi case* and accepted by the Supreme Court. Apart from

12 (2005) 5 NWLR (Pt 657) 400
13 Ibid
14 Ibid

exposing the misconception held in some judicial quarters concerning the law applicable to the distribution of estate upon intestacy, it settled, one would imagine, once and for all, the question of the inclusion of offspring born out of wedlock as beneficiaries in the distribution of the estate of the deceased upon intestacy. The trial court had earlier held that the two children begotten from irregular associations were not qualified to benefit from the estate since they were illegitimate. This was quickly rejected by the Court of Appeal while relying on section 39(2) of the 1979 Constitution now section 42(2) of the 1999 Constitution as amended. In the opinion of this court, to deny them the right of inheritance in the estate of their acknowledged father was tantamount to subjecting them to the very disability and deprivation frowned upon by the Constitution. The Supreme Court agreed with their conclusion. The court even went to the extent to hold that 'the decision in *Cole v Akinyele* is no longer law.' Ige JCA in his supporting judgment stated that 'one can take it that by implication, the rather obnoxious principle in *Cole v Akinyele* that a person cannot legitimize by acknowledgment an offspring born out of wedlock during the subsistence of a statutory marriage is now discredited and no longer applicable in view of section 42(2)…..' This has further been buttressed by the cases of *Okonkwo v Okonkwo*[15] and *Motoh v Motoh*[16] where it has been stated by the Court categorically that by virtue of the distinct provisions of the Constitution, children born out of wedlock but whose paternity was acknowledged by the putative father, have equal share with the children of the marriage and ought not to be discriminated against by virtue of the circumstances of their birth.

b. ***Mojekwu v Ejikeme:*** The decision of the Court of Appeal here which came before the *Salubi's case* is equally weighty and robust in its insistence and conclusion that legitimacy cannot be denied the appellants in the circumstances in which they found themselves. The court had simply reasoned that the appellants, who were by-products of a customary practice of *'Nrachi'*, could not be abandoned without legitimacy and also without rights of inheritance in their great grand

[15] (2014) 17 NWLR (Pt. 1435) 18 CA
[16] (2011) 16 NWLR (Pt. 1274) 474 CA

father's estate. Although the 1st and 2nd appellants were born out of wedlock by the deceased intestate's granddaughters, there was a blood relationship between them and their great grandfather. Based on the established fact that the said deceased intestate had during his lifetime acknowledged and accepted his grand daughters who were also born out of wedlock in the search for a male progeny to prevent the extinction of the deceased intestate's lineage, they acquired a right of succession and inheritance in his estate, a right which they are entitled to transmit to their offspring, the 1st and 2nd appellants. In conclusion, the court held that the fact of their being born out of wedlock is immaterial in view of section 39(2) of the 1979 constitution now section 42(2) of the 1999 constitution as amended. The reasoning of the court in this case it is submitted cannot be faulted. The conclusion in our view is right and accords with section 42(2) of the constitution. This is because the deceased intestate's granddaughters were legitimized by his acknowledgement following their birth out of wedlock. This act conferred on them legitimate status and a right of inheritance in their grandfather's estate which in turn can be transmitted or transferred to their offspring the 1st and 2nd appellants, notwithstanding the fact that they too were born out of wedlock. To deny both the granddaughters and their offspring, all conceived and born outside wedlock, would be unconstitutional as it would amount to subjecting them to disability or deprivation because of the circumstances of their birth. Again as was evident in the *Salubi's case*, there was also a blood relationship between the owner of the estate (deceased intestate) and the persons claiming a right of inheritance to it. It was noted that the blood relationship was a direct one between the deceased intestate and the two children sired by him outside marriage. *Mojekwu's case* however, presents an entirely different picture as it is a bit more complicated. The relationship there could be described as both direct and indirect. There was a direct relationship between the deceased intestate and his daughter who gave birth to his two granddaughters outside marriage. There was also an indirect blood relationship between the deceased intestate and the claimants to his estate, namely his granddaughters and their two sons, both born outside wedlock. In so far as the deceased intestate was not the natural father but only the grand and

great grandfather respectively, it is submitted that their blood relationship is indirect but that does not in any way diminish the status and capacity in the estate of the deceased intestate.

We have only gone to this extent in order to show that the absence of a blood relationship could be a bar to a claim of legitimacy in a family as strangers cannot be legitimated by acknowledgement as the law stands. However, we cannot rule out the possibility of this happening under customary law as some customary practices recognize that persons, though unrelated by blood can nevertheless, be assimilated into the family to prevent the extinction of a lineage. Such customs however, run the risk of being caught by the repugnancy test. It should therefore be clear that a guarantee of legitimacy come what may, even by the constitution, is not a license for one without any form of blood connection direct or indirect, to seek legitimacy and its attendant rights in a family estate. It is on this premise that our attention now shifts to the situation where for one reason or the other, a person is unable to establish a claim of legitimacy in a family. The factor of blood relationships more than anything else has made the question of legitimacy a recurring issue in our courts.

5. Bar to Claim of Legitimacy

i. Absence of Blood Relationship

Case law is clear that it is only the father of a person born out of wedlock who can perform the act of acknowledgement on him by accepting him into his family. In so doing, it confers legitimacy on the person concerned through legitimation. This process cures the defect which the person concerned had at birth, namely, the absence of a valid and lawful marriage between his parents. It therefore follows that an act of acknowledgement, in order to qualify as valid legitimation must be performed on a person having a blood relationship, direct or indirect with the other, namely the father. To drive home the position of the law here, reference must now be made to the Supreme Court case of *Chinweze v Masi*.[17] In that case the apex court held that the appellants who were born by the surviving

[17] (1989) 1 NWLR (Pt. 97) 254

spouse of the deceased intestate long after the death of the latter and not being his natural offspring nor legitimated by 'other means', were not his heirs and have no right of succession and inheritance to his estate. The argument that the appellants were all born in the deceased intestate's household and that they grew up to identify the deceased intestate's property as their own to the knowledge and consent of the only surviving child of the marriage between the deceased intestate and his wife, found no favor in the court. It must now be clear and well established in our law that absence of blood relationship between a person (owner and founder of an estate) and another seeking legitimacy and a right of succession and inheritance to the owner's estate constitutes a bar to such claim. It cannot be otherwise until there is recognition of such claims on other grounds.

In the case of *Emordi v Emordi*,[18] this issue as regards legitimacy was poignantly echoed where the respondents claimed as heirs to the deceased intestate's properties in the absence of any blood relationship whatsoever. Unlike the *Chinweze's case*, the respondents here were all born during the lifetime of the deceased intestate and also during the pendency of the marriage between the deceased intestate and their mother. But as their mother would later testify in an undefended divorce proceeding, the deceased intestate was not their natural father even though he provided for their upkeep until death. Based on this devastating piece of evidence, the Court of Appeal held that the respondents were not the legitimate offspring of the deceased intestate and as such, has no right of succession to his estate. In coming to its conclusion, the court had reasoned that the presumption of legitimacy that was in the respondents' favor at birth based on the existence of a valid marriage between their mother and the deceased intestate, was rebutted by the unchallenged evidence of childlessness in the marriage on account of the deceased intestate's impotence. Thus, is it not clear once again that in some instances like in the above judgment that the absence of a blood relationship between the deceased intestate and the respondents was the crucial factor that defeated the respondent's claim to legitimacy and with it a

[18] Unreported Appeal No CAF/1681/2007, Judgment delivered on 14th March 2013

right of inheritance in the deceased intestate's estate? The answer is surely in the affirmative, although this is not always the case.

ii. ***Invalid Adoption***

Adoption provides another means of legitimation and although it was not widely embraced in the past owing to varying levels of aversion to it by cultural beliefs and practices, it is now gaining ground. However, to think that the process simply involves picking up babies at the motherless homes or paying cash for an unwanted infant or toddler without more is sorely mistaken. Adoption involves stringent legal requirements which must be satisfied for it to be valid in law. It is not enough that the person sought to be adopted is accepted and recognized by the intending adopter. The adoption order must be registered under the Adoption Law applicable in that jurisdiction.[19] Failure to do so could have dire consequences on a claim of legitimacy and inheritance. This can be seen in the words of Uwaifo JSC in the case of *Olaiya v Olaiya*[20] where he said 'no one will lightly permit a stranger to claim his or her lineage and inheritance unless through entitlement by blood or genuine adoption.

From all that has been stated above in this paper, it is obviously evidently clear that other than legitimacy acquired at birth, and which is only a presumption,[21] legitimacy can be subsequently acquired through the process of legitimation by acts of acknowledgement or a valid adoption. The question which this paper further expounds is whether such acts can be performed on a person who do not have any blood ties with the other party (the owner of the estate) but seek or claim legitimacy in the estate relying on acts as estoppel. Put differently, can legitimacy be acquired through legitimation by the process of acknowledgement based on acts constituting estoppel? That this issue may continue to come before the Court for determination cannot be ruled out. It was heartedly argued in *Chinweze's case* that the sole surviving daughter of the deceased intestate was estopped from denying the rights of the

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[19] See Adoption Law, Cap 5, Laws of Lagos State; Adoption Law Cap 6, Laws of *Anambra* State, 1991

[20] (2002) 12 NWLR (Pt. 782) P. 676

[21] The presumption could be rebutted as seen in the *Emordi's Case* (*Ibid)*

appellants as co-beneficiaries of the estate. The short answer given in response to this argument by Oputa JSC was that even if she was estopped from denying the appellants rights to her father's estate, the appellants had not proved that they were legitimate heirs to the deceased intestate who never knew them.

It certainly will be interesting to see how the courts react and would continue to react to this poser. The writers are of the opinion that a line of argument showing that a person well aware of the fact that there is no blood connection between himself and another, but proceeds voluntarily to accept and assimilate that other person into his household and family during his lifetime by acts evidently and unequivocally pointing towards that direction, for example, upkeep and maintenance, to the extent that the person so accepted believes that he is a legitimate heir to the other party is indeed persuasive. Such being the case, the party would be estopped from denying contrary. The respondents in the *Emordi's case* could have done so but were rather fixated in their belief and insistence that they could bulldoze their way through what turned out to be an impossible route, namely legitimacy at birth. If this line of reasoning had been explored and properly pleaded, those pieces of evidence which included payment of school fees and provision for their welfare as well as participation in the funeral rites of the deceased intestate where they collected a purse for the deceased family, tending to show that the deceased intestate accepted them into his family in the absence of any blood relationship whatsoever could in our submission, have found some weight and credibility to support legitimation by acknowledgment founded or based on conscience. The deceased intestate or his estate would then be prevented from denying the claimants legitimacy. In effect a declaration by the Court conferring legitimacy on this untested ground would cure what a valid adoption would have done but failed to do so.

6. Conclusion

Much as one has tried in this paper to limit the discussion to the current position of the law on legitimacy in Nigeria, questions have continued and will continue to emerge on the circumstances in which legitimacy ought to be acquired or denied in our law.

Emordi's case as we have shown in this analysis has unwittingly opened the door for a debate on whether to accord or extend recognition to acquisition of legitimacy by estoppel in the absence of a blood relationship. This as the law stands today, it would appear to be a just solution in circumstances where although there are no blood ties between the parties and no prior established rights, but a compelling case can be made. Jurists may well argue that the issue is worth exploring and a decision in the affirmative returned given the position of section 42 of the amended Constitution. Others may equally retort that the Constitution and its guarantees against illegitimate status, never intended to impose someone on another and thus create a new class of beneficiaries against the will and desire of estate owners. For us here, will extending the frontiers of legitimacy to include acquisition by estoppel enhance justice in some cases or will it be a recipe for chaos in our succession and inheritance laws? Whatever may be the merits and demerits of the debate on this issue, we have not heard the last of it and our court rooms will continue to resonate with legitimacy disputes for some time to come. Where the pendulum of secession swings is anybody's guess.

7. Recommendation

It is recommended that when and where there is a further Constitutional amendment, section 42(2) should be made to state in clear terms its abolishment of the concept of illegitimacy and its appurtenances to avoid the diverging sides and opinions on this issue and the fact that people who do not see it as clear cut could infer that the Constitution did not make any clear-cut statement to that effect.

The Role of Artificial Intelligence in Revolutionising Criminal Justice: Opportunities and Challenges for Nigeria

Feranmi Adeoye*

Abstract

Artificial intelligence (AI), comprising machine learning and analytical algorithm-based systems, has emerged as a transformative force in the criminal justice sector across the world, revolutionising traditional practices and enhancing efficiency for all stakeholders, including law enforcement agencies, the judiciary, legal practitioners, correctional institutions, and policymakers. While criminals are deploying AI to actualize new possibilities in the commission of crimes, criminal justice stakeholders are also actively integrating AI into their crime control and prevention strategies. AI is increasingly being deployed to automate repetitive tasks, streamline processes, and handle vast amounts of data, resulting in more efficient case management and faster resolution of criminal cases. It makes data-driven decision-making possible through algorithms that can analyse large datasets, identify patterns, and provide insights for quick and quality decision-making by stakeholders. It has become important to amplify a conversation on the potential opportunities and challenges that Nigeria may face while adopting AI to revolutionise its criminal justice sector. This article explores these opportunities and finds that some of the challenges limiting the development include concerns about privacy and data security, a lack of requisite training and expertise in handling AI systems, scepticism from stakeholders, and potential biases in AI algorithms, among others. It argues that the technical and ethical concerns associated with AI should not be ignored in order to build public trust and confidence in its integration. Conclusively, it recommends that collaborative efforts among all stakeholders are indispensable in charting a sustainable path towards leveraging AI for a more efficient criminal justice system.

Keywords: Artificial Intelligence, Criminal Justice, Justice Stakeholders

* LL.B (Akungba), B.L (Lagos), MSc (University of Reading, in view) adejics@gmail.com (Co-founder, Briefed Legal Tech, Commonwealth Shared Scholar 2023)

1. Introduction

Artificial intelligence (AI), which was originally rooted in science fiction, is now an indispensible reality that has a remarkable impact on almost every facet of human activities. AI research over the past three decades has proliferated rapidly, such that AI now competes with human performance while superceding in some areas.[1] For instance, in 2016, AlphaGo became the first computer programme to defeat Lee Se-dol, the world's best player in the complex mental game of GO, which has been played for about three thousand years in China and is often considered difficult and beyond the capabilities of available technology.[2] AI represents an extensive domain of multifaceted endeavours focused on creating intelligent machines, or "cognitive technologies," that have practical benefits for several spheres of human activity.[3] Regardless of the nomenclature, the field encompasses numerous branches, each with notable interconnections and shared characteristics. AI is applicable to several sectors of society, ranging from criminal justice, public safety, manufacturing, industry, communications, government service, transportation, and medicine.

In terms of criminal justice, modern realities show that crime has gotten more complex as criminal entities now deploy high-tech strategies to perpetrate illegal activities and infuse the latest trends in technology, such as cryptocurrencies or virtual reality.[4] The apprehension regarding discrepancies between offenders and law enforcement has necessitated the readiness of criminal justice systems to harness cutting-edge technologies like AI to enhance crime prevention and management. Precisely, AI is utilised as an application in law enforcement and judicial systems, yielding

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1 Grace K, Salvatier J, Dafoe A, Zhang B, Evans O. 'Viewpoint: When Will AI Exceed Human Performance? Evidence from AI Experts' (2018) 62 Journal of Artificial Intelligence Research 729.

2 Borowiec S, 'Google's AlphaGo AI defeats human in first game of Go contest' (29 November 2017) The Guardian <https://www.theguardian.com/technology/2016/mar/09/google-deepmind-alphago-ai-defeats-human-lee-sedol-first-game-go-contest> accessed July 28, 2023.

3 Michael Mills 'Artificial Intelligence in Law: The State of Play 2016.' (2016, Thomson Reuters Institute) <https://www.thomsonreuters.com/en-us/posts/legal/artificial-intelligence-in-law-the-state-of-play-2016/> Accessed 29, July 2023.

4 Asma Idder & Stephane Coulax, 'Artificial Intelligence in Criminal Justice: Invasion or Revolution (2021, International Bar Association) <https://www.ibanet.org/dec-21-ai-criminal-justice#_edn3> accessed 29, July 2023.

improved and expedited outcomes with minimal room for error owing to its independence from human intervention.[5] This development is often backed by the pressure to address overwhelming criminal justice needs and the perception that technological solutions are cost-effective, reliable, and impartial.[6] Many countries are already deploying AI to improve their criminal justice system. For instance, the AI technology "Rosie" is being used in Brazil to find evidence of corruption and atypical spending by the nation's elected representatives. Law enforcement in the United Kingdom are already makes use of face recognition technology (FRT) and automated licence plate scanners (ALPR) to track suspects in real time.[7]Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), an AI-based predictive analytics tool, has been used by courts in the US to estimate the chance that a defendant would commit another crime after being released on bail.[8]

In an attempt to examine these positive outcomes, flowing from the integration of AI into some criminal justice systems in advanced climes, it is very important to also balance the discussion by identifying inherent threats or challenges posed by the application of AI to criminal justice. For instance, studies in jurisdictions like Europe present major evidence showing that AI and machine-learning systems exert a substantial negative influence on criminal justice as they directly produce or perpetrate unjust or discriminatory results that violate human rights and fail to enhance the quality of human decision-making.[9] Many AI systems used in criminal justice depend on statistical modes that consist of data that reflect structural biases and inequalities that are prevalent within the societies

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5 Ibid.

6 Fair Trails 'Regulating Artificial Intelligence for Use in Criminal Justice Systems in the EU Policy Paper' (2022) <https://www.fairtrials.org/app/uploads/2022/01/Regulating-Artificial-Intelligence-for-Use-in-Criminal-Justice-Systems-Fair-Trials.pdf> Accessed July 31, 2023.

7 Hersey F, 'British police deploy live facial recognition, license plate recognition to make 11 arrests' (2022) Biometric Update <https://www.biometricupdate.com/202207/british-police-deploy-live-facial-recognition-license-plate-recognition-to-make-11-arrests> accessed August 1, 2023.

8 Mahmud H, 'AI: The future of crime prevention?' (24, September 2022) The Business Standard News <https://www.tbsnews.net/tech/ai-future-crime-prevention-502290> accessed 31 July 2023

9 Ibid.

represented. Most of this data is gotten from criminal justice systems, including law enforcement or crime records, and is not an accurate representation of criminality but rather a record of law enforcement locations, activities, and targeted groups.[10] An instance was the attempt to create a Top 600 list in the Netherlands, which predicted the category of young people that could perpetrate high-impact offences. The predictive system was highly criticised, as one in three of the 'Top 600' are of Moroccan descent, and many of them have reported being harassed by police.[11]

While the foregoing holds true in jurisdictions that are quick to adopt AI to revolutionise their criminal justice systems, the uptake of AI integration in Nigerian criminal justice is still largely low, notwithstanding the increased rate of discussion of AI applications among young stakeholders. This research is structured to cover this subject matter to a great extent. The first part examines the definition of key terminologies, after which the various applications of AI to criminal justice are discussed with practical examples in different countries across the world. The third part considers the various opportunities that Nigeria can explore in the implementation of AI by its criminal justice stakeholders. Thereafter, an attempt is made to examine the challenges and concerns that should be addressed to avert the negative consequences of not properly integrating AI applications. Lastly, certain recommendations are made to ensure that AI is optimally deployed for positive criminal justice outcomes.

2. Definition of Terms

Artificial Intelligence (AI)

There have been diverse attempts to conceptualise AI by scientists and academic researchers. In the middle of the 20th century, British mathematician and logician Alan Turing, who is best known for decrypting the German Enigma machines' encryption during World War II, started the first substantial research into artificial intelligence.[12] Turing, who is credited as one of the creators

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10 Ibid.

11 Fair Trials, 'Artificial intelligence (AI), data and criminal justice' (2023) <https://www.fairtrials.org/campaigns/ai-algorithms-data/> accessed 31 July 2023.

12 Asma Idder & Stephane Coulax (n 4).

of computer science and artificial intelligence, was the first to consider the possibility that computers may use information to mimic human decision-making and problem-solving.[13] The phrase "artificial intelligence" was subsequently coined by renowned US researcher and math professor John McCarthy, who described it as the "science and engineering of creating intelligent machines."[14] Over the years, it has become apparent that a consensus definition of AI defies its multidisciplinary character, as it encompasses multiple methodologies from sociology, cognitive sciences, and mathematics.

Patrick and Gupta conceived of AI as "the ability of a system to identify, interpret, make inferences from, and learn from data to achieve predetermined organisational and societal goals."[15] According to this definition, any type of manufactured system that can independently produce insights and/or take action based on them in order to accomplish a set of goals qualifies as an AI application. However, a similar but more comprehensible and typical modern definition is the European Commission's 2018 definition,[16] which considers AI as systems that exhibit intelligent behaviour by assessing their surroundings and acting with some autonomy to accomplish predetermined goals. Expert systems, natural language processing, speech recognition, and machine vision are some examples of specific AI applications.[17] Meanwhile, greater accuracy is needed in order to have fruitful and productive discussions on AI because it encompasses so many different methodologies and

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13 A M Turing, 'Computing Machinery and Intelligence' (1950) Mind 49: 433-460. Computing Machinery and Intelligence, www.csee.umbc.edu/courses/471/papers/turing.pdf accessed August 1, 2023.

14 John McCarthy, 'What is Artificial Intelligence'. Society for the Study of Artificial Intelligence and Simulation of Behavior, Computer Science Department, Stanford University, 2007. <http://jmc.stanford.edu/articles/whatisai/whatisai.pdf> accessed August 2, 2023.

15 Mikalef P, Gupta M, 'Artificial intelligence capability: Conceptualization, measurement calibration, and empirical study on its impact on organizational creativity and firm performance' (2021) 58 Information & Management 103434 https://doi.org/10.1016/j.im.2021.103434.

16 Phillip Boucher 'Artificial intelligence: How does it work, why does it matter, and what can we do about it?' https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641547/EPRS_STU(2020)641547_EN.pdf

17 Abdoullaev A, 'On the EC's definition of AI, or How to define Artificial Intelligence as real and concerned with essence of Intelligence' (2019) FUTURIUM - European Commission https://ec.europa.eu/futurium/en/european-ai-alliance/ecs-definition-ai-or-how-define-artificial-intelligence-real-and-concerned.html

circumstances.[18] Arguments regarding straightforward "expert systems" that provide advising functions, for instance, must be separated from those about sophisticated data-driven algorithms that automatically draw conclusions about specific people.[19] Similar to this, it is crucial to differentiate arguments about hypothetical future advancements from those regarding actual AI that already has an impact on society today.[20] Notwithstanding all these differences, it is submitted that one essential characteristics of AI is the replication of human intellectual functions by machines, particularly computer systems.

Criminal Justice System

Criminal justice, as used in this research, is the term used to describe the process by which justice is administered to those who have committed crimes and those who are victims of crimes.[21] It covers the alleged offence a defendant committed, the law enforcement personnel who detained such an offender, the legal system that prosecutes and defends the individual, and the punishment the defendant would get if found guilty of a criminal offence. To uphold the rule of law in a society, legal practitioners, law enforcement agencies, the judicial system, and correctional services all collaborate at different stages of criminal justice.[22] Along this line, Crowder and Turvey considered the criminal justice system to be a collection of public and private organisations set up to handle criminal suspects and offenders who have been found guilty of criminal offences.[23] It consists of a set of government organisations that aim to "apprehend, prosecute, punish, and rehabilitate criminal offenders."[24] At a broader level, civil society organisations, academia, and even the entire public are also several interconnected

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18 Asma Idder & Stephane Coulax (n 4).
19 Ibid.
20 Ibid.
21 Stephanie Johnson, 'Criminal Justice & Criminology: What is criminal justice? and What is criminology?' (2023, Heinonline) https://libguides.heinonline.org/criminal-justice-and-criminology.
22 Ibid.
23 Stan Crowder, Brent E. Turvey, 'Chapter 1 - Ethics in the Criminal Justice Professions' in Brent E. Turvey, Stan Crowder (eds), Ethical Justice (Academic Press 2013) 1-19. ISBN 9780124045972. https://doi.org/10.1016/B978-0-12-404597-2.00001-2.
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pillars that make up the criminal justice system. These pillars are designed to uphold the principles of legal justice, which are based on the government's responsibility to uphold and safeguard the rights of every individual.

3. AI Applications in Criminal Justice

The field of criminal justice has increasingly adopted AI to enhance its results, combat crime, and expedite justice processes. AI applications are evident in law enforcement and court proceedings in many countries, serving as a means of prevention, prediction, crime resolution, and managing recidivism, which is the tendency of a convicted criminal to commit another offence. The applications are considered under each catergory criminal justice stakeholders.

A. Law Enforcement Agencies:

Law enforcement agencies, investigators, and prosecutors can utilise AI in diverse ways during investigation and prosecution or for crime prevention and control. Some of the areas include predictive policing, facial recognition, crime pattern analysis, victim identification, gunshot detection, forensic analysis, crowd monitoring, and emergent response for public safety and security.

Tools for predictive policing are developed by feeding data, such as arrest records, crime reports, and licence plate photos, to an algorithm that has been trained to look for trends in order to forecast where and when a specific kind of crime will take place in the future.[25] In predictive policing, AI can also be used to pinpoint high-crime regions and anticipate probable criminal activity so that resources may be allocated there for crime prevention and control. This is similar to crime pattern analysis, where AI is used to analyse crime patterns and trends for strategic decision-making.[26]

AI-powered facial recognition systems help identify suspects and missing people from surveillance footage.[27] AI facial recognition

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[25] Yang F, 'Predictive policing' in Oxford Research Encyclopedia of Criminology and Criminal Justice (2019) https://doi.org/10.1093/acrefore/9780190264079.013.508

[26] Ibid.

[27] Samuel D Hodge Jr, 'The Legal and Ethical Considerations of Facial Recognition Technology in the Business Sector' (2022) 71 DePaul L Rev 731 https://via.library.depaul.edu/law-review/vol71/iss3/2

analyses bodily motions, bone structure, clothes, and facial features to identify individuals who exhibit unusual or suspect behaviour, such as shoplifters or reckless drivers who violate the law.[28] AI programmes are trained to read licence plates even in low-light conditions or with poor resolution, which aids in vehicle identification. It is also useful for victim identification, such as in cases of human trafficking or other crimes. Several countries, like the Canadian police, have already approved these AI applications in law enforcement.[29] AI applications for analysing DNA, fingerprints, and other evidence are used to make forensic analyses for criminal investigations. When used for digital forensics, its major purpose is to extract and analyse digital evidence from electronic devices.[30]

Another extension of the use of AI for public safety and security is its ability to position law enforcement agencies for emergency response through accurate analysis of emergency calls and the dispatch of appropriate response units more efficiently. Through this, the police are using AI techniques to prevent crimes before they happen and to investigate them after they have occurred. Preventive methods entail the use of automated techniques to analyse enormous volumes of data and detect prospective offenders, either by focusing on specific people (heat lists) or dangerous areas (hot spot policing).[31] The International Child Sexual Exploitation Picture Database (ICSE DB), managed by Interpol in Europe, however, uses AI to identify victims and abusers using picture analysis, making it an effective application of AI in the fight against human trafficking.[32] Additionally, chatbots acting like real humans, such as the 'Sweetie' virtual character used by a Dutch children's rights organisation, have been used to combat webcam child sex tourism, and work is being done to create AI systems that can perform the same functions as

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28 Ibid.

29 Kenyon M, 'Algorithmic Policing in Canada Explained' (2021) The Citizen Lab https://citizenlab.ca/2020/09/algorithmic-policing-in-canada-explained/ accessed July 3, 2023.

30 James Byrne and Gary Marx, 'Technological Innovations in Crime Prevention and Policing: A Review of the Research on Implementation and Impact' (2011) Cahiers Politiestudies Volume 2011-3, Issue 20, 17-40

31 Ibid.

32 Ibid.

Sweetie to discourage and detect offenders without human interaction.[33]

B. Courts of Criminal Jurisdiction:

Courts, in making decisions, also use AI algorithms to determine whether offenders who are awaiting trial or those who are out on bail and parole pose a flight risk or are likely to commit another crime. The majority of AI software in this field is now employed in the USA. For instance, the 1.5 million criminal cases used by the Arnold Foundation algorithm, which is now in use in 21 US jurisdictions, are used to forecast the behaviour of defendants before trials.[34] In Florida, bail amounts are determined using machine-learning algorithms.[35] Based on 1.36 million pre-trial detention cases, research showed that AI could predict flight risk and re-offending better than human judges.[36] Several European countries use automated decision-making systems to administer the judicial system, notably for allocating cases to judges and other authorities. Estonia is looking into the idea of a robot judge to handle minor claims cases where parties could upload pertinent evidence, and an AI would then issue a ruling that would be subject to review by a human court.[37]

AI is also often used in legal proceedings for other purposes. By processing low-level or degraded DNA evidence that was inadmissible several years ago, AI is advancing forensic laboratories and investigators in DNA testing and analysis via crime-solving and from a scientific perspective.[38] Additionally, decades-old cases, that were abandoned without justice served, have been revived in order to provide cold-case evidence for the identification of the perpetrators of homicide and sexual assault.[39] Such AI applications improve

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33 Van Der Hof S, Georgieva I, Schermer B, and Koops B, 'Sweetie 2.0' in Information Technology & Law Series (2019) https://doi.org/10.1007/978-94-6265-288-0

34 Završnik A, 'Criminal Justice, Artificial Intelligence Systems, and Human Rights' (2020) 20(4) ERA Forum 567–583 https://doi.org/10.1007/s12027-020-00602-0

35 Ibid.

36 Ibid.

37 Izdebski, K 'alGOVrithms—State of Play' (2019) ePaństwo Foundation <https://epf.org.pl/en/projects/algovrithms/> accessed July 30, 2023

38 Asma Idder & Stephane Coulax (n 4).

39 Ibid.

public confidence in justice by reducing unsolved crimes.[40] Predictive justice is another use of AI that involves statistically analysing a lot of case law data, mostly previously given court decisions, in order to forecast court outcomes. Through this, judges may be able to concentrate their efforts on situations where their knowledge is more useful. In the long-term, it can increase the predictability of court rulings, which will promote justice stability in various criminal jurisdictions across the world.[41]

AI-powered technologies aid judges and legal practitioners with case law analysis, precedent analysis, and legal research.[42] This is not just limited to the courts, as law enforcement and legal professionals are also able to better understand complicated information with the help of AI-driven data visualisation tools. AI-powered case management solutions streamline and automate administrative chores, resulting in less paperwork and more productivity.[43]

*C. **Corrections and Rehabilitation:***

New technologies are being employed more and more, in the post-conviction phases, notably in prisons, to enhance and automate security and support prisoner rehabilitation. An AI network is being placed in a well-known Chinese jail to identify inmates and monitor them around the clock, alerting guards to any questionable conduct.[44] AI-powered programmes may offer tailored instruction and training to prisoners, assisting them in learning new skills and becoming ready for life after incarceration, this is used in Finnish prisons.[45] AI may also be used to monitor an inmate's development and spot any areas that could require further help. Some academics even consider employing artificial intelligence (AI) smart assistants, like Alexa

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40 Ibid.
41 Ibid.
42 Faggella D, 'AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications' (2021) Emerj Artificial Intelligence Research https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/> accessed 4, August, 2023.
43 Ibid.
44 McKay C, 'The Carceral Automaton: Digital Prisons and Technologies of Detention' (2022) 11(1) International Journal for Crime, Justice and Social Democracy 100-119 https://doi.org/10.5204/ijcjsd.2137
45 Ibid.

from Amazon, to address the problem of solitary confinement in the USA.[46]

In correctional centres and rehabilitation homes, AI is used for risk assessment, such that the algorithms are deployed to assess the risk of recidivism among offenders and inform decision-making on pre-trial detention, sentencing, and rehabilitation programmes.[47] The criminal justice system employs a number of risk assessment techniques, each of which has strengths and weaknesses.[48] Concerns regarding bias and injustice have been expressed in relation to the contentious Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) system used in the USA, which was created without the public's input and the participation of the judiciary.[49] It was created by a private business (Northpointe Corporation), and has been found to be mostly unfavourable to African-Americans. However, Public Safety Assessment PSA) used in deciding whether a person should be released on bail or not, has been considered more reliable.[50] In Israel, the Intelligent Decision Support System (IDSS) is well-known for its use by judges in reaching sentencing decisions in traffic situations. It has been suggested that a Nigerian Risk Assessment System (NIRAS) be built openly, beginning by concentrating on small violations and employing data reduction to prevent biases.[51]

*D. **Legal Services and Defence:***

AI is assisting lawyers to make significant improvements in criminal law practise. AI-powered legal research tools make it

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46 Picott I, 'The Rise of AI-Run Prisons: A Look into the Future of Correctional Facilities' (2023) <https://medium.com/@ceoishhh/the-rise-of-ai-run-prisons-a-look-into-the-future-of-correctional-facilities-dd9b29b36aa0> accessed July 30, 2023

47 James Redden, Christopher Inkpen, and Matthew DeMichele, 'Artificial Intelligence in Corrections: An Overview of AI Applications and Considerations for Systems Administrators and Policy Makers' (2020) National Institute of Justice https://nij.ojp.gov/library/publications/artificial-intelligence-corrections-overview-ai-applications-and

48 Akin Agunbiade, 'How Artificial Intelligence Could Decongest Nigerian Prisons' (2022) Medium, DigiLaw https://medium.com/@DigiLawNG/how-artificial-intelligence-could-decongest-nigerian-prisons-4c33fec5c02d

49 Ibid. See also Andrew L.P, 'Injustice ex Machina: Predictive Algorithms in Criminal Sentencing' (2019) UCLA Law Review https://www.uclalawreview.org/injustice-ex-machina-predictive-algorithms-in-criminal-sentencing/

50 Ibid.

51 Ibid.

possible to quickly analyse a vast database of legal information and extract relevant statutes, case precedents, and legal opinions within seconds instead of spending countless hours poring over law books and case files.[52] These AI-powered tools streamline the cumbersome process of document review by sifting through large volumes of documents, identifying relevant information, and organising case files in a very short time, reducing the risk of overlooking crucial evidence.[53] Some of the most popular AI software assisting lawyers in this area include Definely, Gavel and Clio which are top legaltech companies operating across countries such as Canada, the United States of America and the United Kingdom. In Nigeia, Law Pavillion recently launched its first artificial intelligent lawyer bot, named Timi, which helps lawyers to quickly review procedural rules but does not capture criminal matters.[54] If there is one thing that the automation of routine tasks provides, it is allowing criminal defence lawyers to focus on more complex and high-value work in order to enhance productivity and efficiency in criminal law practise.

The ability to analyse vast amounts of data to identify patterns and trends also helps criminal defence lawyers and prosecution develop stronger case strategies, anticipate potential arguments from the opposing party, and better grasp the tendencies of judges, thereby shaping their arguments accordingly. AI predictive analytics enable lawyers to make more informed predictions about the potential outcome of a case by comparing past judgements with variables in current cases.[55] AI algorithms used to analyse factors such as the severity of the crime, the defendant's criminal history, and demographic information can assist lawyers in providing more accurate and fair sentencing recommendations to judges, who are

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52 Faggella D, 'AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications' (2021) Emerj Artificial Intelligence Research https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/

53 Ibid.

54 Ifeoma P, 'LawPavilion Unveils 'TIMI'; Nigeria's First Artificial Intelligence Legal Assistant' (2018) DNL Legal and Style https://dnllegalandstyle.com/2018/lawpavilion-unveils-timi-nigerias-first-artificial-intelligence-legal-assistant/ accessed 1 August 2023

55 Ibid.

then rightly positioned to select from data-driven sentencing options.[56]

E. Other applications of AI

There are other facets of the legal profession have been altered by Artificial intelligence (AI) including the use of chatbots (including generative AI like ChatGPT) used as virtual legal assistants provide advice and information on the law to people in need of legal representation.[57] Using chatbots or helplines, AI-Based Crisis Support can offer resources and quick aid to victims of crime. Also, AI analytics may be deployed to support data-driven policymaking by evaluating the efficacy of criminal justice policies, programmes and recommending evidence-based improvements.[58] At the level of governance, the use of AI also improves budget planning and resource allocation for criminal justice projects, thereby increasing the effectiveness of the legal system as a whole.[59]

4. Opportunities for AI Implementation in Nigeria

The criminal justice system in Nigeria faces numerous challenges that hinder its effectiveness. The Nigerian Police Force encounters difficulties such as inadequate resources, inadequate tools, bad reputation, a lack of respect, corruption, an insufficient number of police personnel, operational issues, and political issues.[60] Additionally, impersonation of police officers and excessive use of force contribute to the Nigerian law enforcement problem. The courts grapple with slow delivery of justice and inadequate funding, while correctional services also face issues such as overcrowding and other logistical problems.[61] All these factors combine to create

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56 Welty J, 'Artificial Intelligence and the Practice of Criminal Law – North Carolina Criminal Law' (2023) North Carolina Criminal Law https://nccriminallaw.sog.unc.edu/artificial-intelligence-and-the-practice-of-criminal-law/ accessed 31 July 2023.

57 Andrew P, 'The Implications of CHATGPT for Legal Services and Society' (2023) Harvard Law School Center on the Legal Profession https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/ accessed 2 August 2023.

58 Ibid.

59 Asma Idder & Stephane Coulax (n 4).

60 Nwafor NE, Aduma OC, 'Problems of the Administration of Criminal Justice System in Nigeria and the Applicability of Alternative Dispute Resolution' (2020) 7(2) Journal of Commercial and Property Law

61 Ibid.

obstacles for Nigeria's criminal justice system to function efficiently. Implementing AI in Nigeria's criminal justice system has the potential to bring about significant positive changes, improving access to justice, reducing inefficiencies, and enhancing overall security and fairness in the legal process. Some of the opportunities are considered below.

a. ***Improved Efficiency and Time-saving****:* As earlier discussed, the ability of AI to automate time-consuming tasks such as data analysis, document processing, and case management can result in faster and more efficient criminal justice processes in Nigeria when it is rightly deployed by courts, lawyers, and other criminal justice stakeholders[62]. Due to the nature of the process of criminal justice in Nigeria, stakeholders like lawyers and judges regularly interact with pertinent data from lots of paperwork. Recently, the Supreme Court of Nigeria, through its "legal mail" initiative, allowed registered lawyers to electronically serve court processes and legal documents instead of the traditional manual method.[63] This can be augmented to cover other manual procedures currently in place to address the problems of frivolous adjournments that pervade criminal cases in Nigeria. Furthermore, issues like legal document evaluation or review are still largely handled manually by lawyers and judges, and this, unfortunately, consumes time and is subject to human mistakes. Additionally, it wastes the time and effort required for important legal activities. In any case, AI-powered software can help Nigerian criminal justice stakeholders with document review, which is less susceptible to error. ROSS Intelligence, for instance, is an AI system that automates the evaluation of legal documents. The legal research platform offers cognitive computing that analyses legal documents using natural language processing.[64] This kind of technology can be deployed to assist lawyers and judges in processing and reviewing legal documents.

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62 Edlich A, Phalin G, Jogani R, Kaniyar S, 'Driving Impact at Scale from Automation and AI' (2019) McKinsey Global Institute 100

63 Olugasa O, Davies A, 'Remote Court Proceedings in Nigeria: Justice Online or Justice on the Line' (2022) 13(2) International Journal for Court Administration https://doi.org/10.36745/ijca.448

64 Farrands D, 'Artificial Intelligence and Litigation – Future Possibilities' (2020) 9(1) Journal of Civil Litigation and Practice 7-33.

b. ***Enhanced Data Analysis and Decision-making:*** AI algorithms can analyse vast amounts of data from various sources, enabling better-informed and data-driven decisions for law enforcement, prosecutors, and judges in Nigeria. Predictive justice is one example, which is the statistical study of a significant body of case law data, mostly previously given court decisions, in order to forecast the results of legal proceedings. AI's ability to recognise patterns in text documents and identify possible judgement directions can help predict recidivism in criminal cases, aiding judges in bail terms, pre-trial detention, sentencing, and parole decisions in line with the Administration of Criminal Justice Act 2015. In the long-term, it can increase the consistency of court rulings for better outcomes.[65]

c. ***Predictive Analytics:*** One critical problem in Nigerian courts is the issue of a backlog of cases, and this is sometimes due to prosecutors' inability to predict outcomes accurately or identify the most appropriate evidence, thereby posing a significant challenge to determining whether to prosecute or not. At the Federal High Court alone as of June 2021, there were over 30,197 criminal cases, 35,563 motions, and 20,258 applications for the enforcement of basic rights, among others.[66] Nonetheless, the integration of AI into the legal field offers a remedy for this problem, as AI's ability to analyse data allows it to forecast legal case resolutions more reliably than human litigators. Researchers at University College, London, and the University of Pennsylvania made the decision to test the aforementioned by using AI software algorithms on the 584 cases from the European Court of Human Rights. Surprisingly, the computers discovered a reoccurring pattern in these instances, and this resulted in 79% accuracy in predicting outcomes.[67] Nigerian litigators will be better prepared to accurately forecast the outcome

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65 Asma Idder & Stephane Coulax (n 4).

66 Sobowale R, '30,197 Criminal Cases Filed in Federal High Court in 10 Months, Says Chief Judge' (December 17, 2021) Vanguard News <https://www.vanguardngr.com/2021/12/30197-criminal-cases-filed-in-federal-high-court-in-10-months-says-chief-judge> accessed August 5, 2023.

67 Aletras N, Tsarapatsanis D, Preoţiuc-Pietro D, Lampos V, 'Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective' (2016) 2 PeerJ e93 https://doi.org/10.7717/peerj-cs.93.

of cases when AI software is deployed for swift analysis of case precedents.[68]

d. ***Investigative Support:*** Further, AI-powered crime prediction models can help law enforcement agencies in Nigeria identify potential crime hotspots and patterns, enabling proactive crime prevention strategies. AI tools can aid investigators in analysing digital evidence, identifying patterns, and connecting disparate pieces of information to solve complex cases. AI can streamline forensic analysis processes such as fingerprint and DNA matching, leading to more accurate and efficient investigations. AI can help investigators analyse case data and evidence early in the legal process, facilitating faster resolution and reducing the caseload backlog. This will greatly improve the efficiency of prosecutors and law enforcement agencies like the Nigerian Police Force.

e. ***Virtual Legal Assistants:*** AI-powered chatbots and virtual assistants can provide legal information, answer common questions, and offer support to millions of Nigerians seeking legal advice or help. For instance, according to the HiiL's 2023 findings, the second most prevalent legal problem category in Nigeria is domestic violence.[69] The research further states that 'beyond Nigerians' social network, the most frequent sources of help include the police (11%), community/traditional leaders (8%), religious authorities (6%), landlords (6%), local public authorities (5%), and lawyers (5%)'. In the majority of these cases, people are often unsure of the appropriate action to take to redress their grievances. Nigerian criminal justice stakeholders can also deploy AI to address these issues at the most basic level, as is currently being proposed in other countries. For instance, in Thailand, Police Lieutenant Colonel Peabrom Mekhiyanont was aware of the difficulties survivors of gender-based violence encounter in getting justice because of a lack of knowledge. To combat this, she used artificial intelligence (AI) to create the Sis

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68 Marr Bernard, 'How AI and Machine Learning Are Transforming Law Firms and The Legal Sector' (2018 Forbes) <https://bernardmarr.com/default.asp?contentID=1464> accessed August 5, 2023.

69 The Hague Institute for Innovation of Law (HiiL), 'Justice Needs and Satisfaction in Nigeria' (2023) HiiL https://www.hiil.org/research/justice-needs-and-satisfaction-in-nigeria/

Bot, a chatbot that offers survivors information and assistance around the clock through services like Facebook Messenger. From police reporting and evidence preservation to legal entitlements and support services, Sis. Bot provides thorough information to support the victims. A similar AI-powered application could be deployed in Nigeria to improve access to justice and lessen the stigma associated with gender-based violence by empowering survivors to make knowledgeable decisions and bridging the information gap.

f. ***Risk Assessment for Smart Sentencing and Parole Decisions:*** AI algorithms can assist judges in making fair and data-driven sentencing and parole decisions based on factors like past records and risk assessment. This will largely reduce the number of inmates in the currently overcrowded correctional facilities in Nigeria. As of July 2023, Nigeria had 79,076 inmates (in facilities originally built for 50,153 inmates),[70]which makes it the 27th country in the world with the highest number of prisoners, with over 68.5% of its prisoners being pre-trial detainees.[71] Several initiatives have been suggested to address this issue, especially as the abolition of holding charges by the Administration of Criminal Justice Act 2015 has not exactly achieved the level of reduction expected, even though it has brought about remarkable development. Along this line, risk assessment through AI is an innovation that could improve the Nigerian prison system.[72] For courts and corrections, by classifying people according to how likely they are to commit crimes, risk assessment systems help lower imprisonment rates and forecast recidivism. A risk assessment method is used to forecast recidivism, or the possibility that someone would resume a life of crime after being released from prison, and to lower the rate of incarceration. The various risks assessement AI systems in existence have several variations that carry out somewhat different functions. Some determine whether a person should be released on bail or not (PSA),

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70 Ibid.

71 Fatunmole M, 'Nigeria Ranks 27th Among Countries with Highest Number of Prisoners' (2023) The ICIR- Latest News, Politics, Governance, Elections, Investigation, Factcheck, Covid-19 https://www.icirnigeria.org/nigeria-ranks-27th-among-countries-with-the-highest-number-of-prisoners/

72 Akin Agunbiade, (n 48).

while others determine the likelihood that a person will commit a crime (COMPAS).[73] While another version (IDSS) aids judges in making choices on sentences in traffic matters, a third version (LSI-R and ORAS) suggests sentencing possibilities.[74] These programmes used in the USA and Israel use statistical data to estimate the likelihood of criminal activity and guide choices about bail, punishment, and release.[75] Due to previous discrepancies in police data, biases might nonetheless manifest in their suggestions, thereby impacting outcomes for marginalised populations. As an illustration, some of them have been charged with prejudice against black individuals in the USA for calling for their incarceration while calling for milder punishments for white people who commit the same act.[76]

For law enforcement agencies, research from the Centre for Economic Performance at LSE found that machine-learning approaches are more accurate than traditional risk assessments at predicting the likelihood of repeat domestic violence events.[77] Machine-learning algorithms are capable of making more precise predictions about the risk of repeat occurrences than conventional police force surveys by looking at data including criminal histories, police calls, and recorded violent activities.[78] Researchers looked at more than 165,000 complaints of domestic violence made to Greater Manchester Police and discovered that machine learning might lower the negative prediction rate from 11.5% to as low as 6.1%, potentially enhancing the police response to domestic abuse incidents.[79] These AI systems can also be deployed in Nigeria to empower the Nigerian Police Force and other law enforcement

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73 Mattu J, Larson L, Kirchner K, 'How We Analyzed the COMPAS Recidivism Algorithm' (2020) ProPublica https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm

74 Akin Agunbiade, (n 48).

75 Ibid.

76 Ibid.

77 Ivandic R, 'Artificial Intelligence Could Help Protect Victims of Domestic Violence' (2020) London School of Economics and Political Science https://www.lse.ac.uk/News/Latest-news-from-LSE/2020/b-Feb-20/Artificial-intelligence-could-help-protect-victims-of-domestic-violence accessed 31 July 2023

78 Ibid.

79 Barlow N, 'Study of Greater Manchester Police Calls About Domestic Abuse Suggest Artificial Intelligence Could Help Protect Victims of Domestic Violence' (2020) About Manchester https://aboutmanchester.co.uk/study-of-greater-manchester-police-calls-about-domestic-abuse-suggest-artificial-intelligence-could-help-protect-victims-of-domestic-violence/

agencies in understand the trends of criminal activities, mapping the high-risk crime-prone regions and preparing to respond effectively to criminal reports.

5. Challenges and Concerns

This section examines some of the challenges posed by AI-driven criminal justice systems.

a. ***Bias and Fairness****:* AI algorithms may inherit biases present in the training data, leading to potential discrimination against certain demographic groups and causing unfair outcomes in sentencing and other decisions.[80] The majority of AI systems utilised by criminal justice systems are statistical models that are based on data that reflects the underlying biases and disparities in the societies that the data represents and that makes the whole arrangement consistently deficient in the kind of detail required to make truly "accurate" predictions or decisions.[81] Most or all of the information needed to create and fill these systems comes from the criminal justice system, such as information from law enforcement or crime statistics. The data reflects societal inequality and biassed police behaviours, and its usage in these AI systems only serves to reinforce and deepen such disparities and prejudice in the outcomes of criminal justice. For instance, considering that the female prisoner percentage in Nigeria is a meagre 2.4%, a risk assessment system may award women a better score for bail even if a woman committed an offence with a higher level of seriousness than a male. This is why Agunbiade proposed a Nigerian Risk Assessment System (NIRAS), which he recommended be publicly developed, focusing on minor offences initially and with data minimization to prevent biases.[82] However, one issue with this proposal may be that where the AI algorithm is not built with sufficient data, it may further amplify the challenge of unreliability in its results. This is why it is important to carefully consider the specific goals of every AI application and the delicate balance between data minimization and data sufficiency.

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80 Heaven WD, 'Predictive Policing Algorithms Are Racist. They Need to Be Dismantled' (2023) MIT Technology Review https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/

81 Asma Idder & Stephane Coulax (n 4).

82 Akin Agunbiade, (n 48).

b. ***Lack of Legal Framework:*** The rapid advancement of AI technology has outpaced the development of comprehensive legal frameworks to regulate its use in the criminal justice system, creating uncertainty and challenges in its implementation across the world. The use of AI in law enforcement necessitates a high degree of accountability, justice, and openness in order to prevent discrimination and the violation of basic rights. Some countries are responding proactively to this development. The Artificial Intelligence Act was proposed by the European Commission on April 21, 2021, in order to codify the high standards of the EU's trustworthy AI paradigm and to ensure that AI is "legally, ethically, and technically robust while respecting democratic values, human rights, and the rule of law."[83] Essentially, the EU AI Act establishes a "product safety framework" based on four risk levels (minimum, limited, high, and unacceptable). Recently, the European Parliament voiced opposition to widespread surveillance and demanded that private face recognition AI databases like Clearview be outlawed considering the level of risk they pose. Meanwhile, Nigeria presently lacks a thorough regulatory or policy framework for AI.[84] To encourage the use of AI and handle any concerns related to the technology, certain measures have been taken in this regard in furtherance to the current policy efforts of the National Information Technology Development Agency.[85]

c. ***Cost and Resource Constraints:*** Adopting AI technology requires significant financial investments and skilled personnel, which might pose challenges for resource-constrained jurisdictions. For instance, companies using AI services offered by a third party on a unique platform created by a group of internal or external data scientists can spend anywhere from $4,000 to $300,000 in setting up

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83 Kop M, 'EU Artificial Intelligence Act: The European Approach to AI' (2021) Stanford - Vienna Transatlantic Technology Law Forum, Transatlantic Antitrust and IPR Developments, Stanford University, Issue No. 2/2021 https://law.stanford.edu/publications/euartificial-intelligence-act-the-european-approach-to-ai/

84 Asma Idder & Stephane Coulax (n 4).

85 Uba J, 'Artificial Intelligence (AI) And AI Attacks In Nigeria: A Call To Action For Nigerian Policymakers' (2023) New Technology - Nigeria https://www.mondaq.com/nigeria/new-technology/1309534/artificial-intelligence-ai-and-ai-attacks-in-nigeria-a-call-to-action-for-nigerian-policymaker accessed 8 August 2023.

and running the systems.[86] This may be a little challenging, especially in Nigeria, where the infrastructural condition of the judiciary is very poor. Judges and magistrates have to deal with subpar infrastructure, including leaky roofs and crowded courtrooms, which highlights the appalling condition of court facilities throughout Nigeria. The grave circumstance is highlighted by the delapidated court complex that collapsed on the chief judge of the state of Ekiti in July 2023.[87]

d. ***Lack of Technical Know-how and Overreliance on Technology****:* Over-reliance on AI systems without adequate human oversight can lead to the neglect of contextual factors and individual circumstances crucial for just and fair decision-making. When it comes to working with an AI system, there is a theoretical belief that the choices made by a person in collaboration with the AI system would be better than those made by either party individually. It has been observed that people often rely too heavily on the advice of AI systems, even when it is incorrect. This phenomenon is referred to as AI overreliance.[88] As a result, important real-world decisions such as setting bail or making medical diagnoses may be prone to errors when individuals place too much trust in AI systems.[89] The consequences of over-relying on AI-generated content has been made obvious in recent legal cases. Just recently, Judge Castel imposed a hefty fine of $5000 on two attorneys from New York. These lawyers were found guilty of presenting fabricated cases that were generated using ChatGPT, an AI chatbot.[90] It is interesting to note that this issue is not limited to one jurisdiction alone. The Johannesburg Regional Court also encountered and frowned at a

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86 Palokangas E, 'How Much Does AI Cost? What to Consider' (2023) Scribe https://scribehow.com/library/cost-of-ai

87 Bankole I, 'Slow Justice: How Infrastructure Decay Hampers Judicial System' (August 2023) Vanguard News https://www.vanguardngr.com/2023/08/slow-justice-how-infrastructure-decay-hampers-judicial-system/

88 Passi S, Vorvoreanu M, 'Aether Overreliance on AI Review' (2022) Microsoft https://www.microsoft.com/en-us/research/uploads/prod/2022/06/Aether-Overreliance-on-AI-Review-Final-6.21.22.pdf

89 Ibid.

90 Bohannon M, 'Judge Fines Two Lawyers For Using Fake Cases From ChatGPT' (22 June 2023) Forbes https://www.forbes.com/sites/mollybohannon/2023/06/22/judge-fines-two-lawyers-for-using-fake-cases-from-chatgpt/ accessed 6, August, 2023.

similar situation where South African lawyers relied on phoney cases, that never existed but created by ChatGPT to support their arguments.[91] This highlights the dangers of over-relying on AI tools and importance of training legal professionals how to appropriately use AI tools for their legal works.

e. ***Public Perception and Acceptance:*** Concerns about AI's potential impact on civil liberties and privacy can lead to public scepticism and resistance to its implementation in criminal justice practises. When it comes to incorporating AI into the field of criminal justice, it is crucial to have a comprehensive understanding of the technology and its various applications. In Nigeria, numerous parties, such as law enforcement agencies and policymakers, may not possess a complete awareness of the capabilities and advantages that AI can offer in this particular domain.[92] This may negatively influence perceptions of AI applications. Also, the use of AI algorithms in the criminal justice system has raised concerns due to the lack of transparency and understanding surrounding their decision-making process. These algorithms often operate as "black boxes," making it difficult to comprehend how they arrive at their conclusions.[93] This lack of transparency undermines trust and accountability in the system.

6. Future Prospects and Recommendations

a. Create an Enabling environment for Innovation and collaboration.

It is important to facilitate partnerships between the government, academia, the private sector, and civil society to co-create AI solutions for criminal justice by fostering an environment where expertise is shared and solutions are developed collaboratively. Impressively, some legal tech companies are already

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91 Fakiya V, 'South African Court Calls Out Lawyers for Using ChatGPT References' (2023) Techpoint Africa https://techpoint.africa/2023/07/10/techpoint-digest-622/

92 Elijah O, 'Artificial Intelligence Will Force Lawyers to Be Tech-Literate' (2023) Businessday NG https://businessday.ng/news/legal-business/article/artificial-intelligence-will-force-lawyers-to-be-tech-literate accessed 13 April 2023

93 Jagati S, 'AI's Black Box Problem: Challenges and Solutions for a Transparent Future' (May 32023) Cointelegraph https://cointelegraph.com/news/ai-s-black-box-problem-challenges-and-solutions-for-a-transparent-future accessed 5 August 2023

making use of artificial intelligence to create services that will make stakeholders more efficient, but adoption is still low. For instance, LawPavilion has been working on its Smart Justice Delivery to help judges speed up the review of written arguments, alert the judge to earlier decisions that are similar, and provide information on how likely ways appeals may turn out.[94] However, stakeholders will need to test these technologies to examine the possiblity of integrate them into their workflow. Also, justice innovators should be able to access funding, grants, and incentives for research and development in AI technologies for criminal justice. By making capital available in line with Section 27 of the Nigerian Startup Act, startups and local innovators will be encouraged to develop interest in legaltech and justice-tech, just as in the booming Nigerian fintech space, and to solve specific challenges within the legal system.

b. ***Policy Recommendations for Responsible AI Implementation***

It is recommended that the government should develop a comprehensive national AI policy that outlines the strategic goals, principles, and guidelines for AI integration in the criminal justice system. This policy should address transparency, accountability, ethical considerations, data privacy, and bias mitigation.[95] Undoubtedly, at the public service level, it is important that the journey towards digitization be hastened, as traditional paper work is known for slowing down the justice delivery process. Building a robust AI system for criminal justice may be an arduous task in a country where most of its criminal records are paper-based, and this means there is a need for digitization before the needed data collection and processing for training and building algorithms can be made possible.[96] Luckily, there is already activity in this regard, as some government agencies are being transformed by large-scale

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94 Olusoga O, 'Nigerian Judges Now Set to Use A.I (Artificial Intelligence) in Justice Delivery, With LawPavilion' (2021) LawPavilion Blog, LawPavilion https://lawpavilion.com/blog/nigerian-judges-now-set-to-use-a-i-artificial-intelligence-in-justice-delivery-with-lawpavilion/

95 https://www.mondaq.com/nigeria/new-technology/1309534/artificial-intelligence-ai-and-ai-attacks-in-nigeria-a-call-to-action-for-nigerian-policymakers#:~:text=Nigeria%20currently%20does%20not%20have,risks%20associated%20with%20the%20technology.

96 Akin Agunbiade, (n 48).

digitization.[97] However, as noted by Akingbade,[98] as these agencies digitise their workflow, any attempt towards AI systems such as risk assessment should flow from a partnership between all relevant stakeholders, including the Nigeria Police Force, the correctional service, and the judiciary.

c. Capacity Building

There is a need for stakeholders to engage in training programmes to equip legal professionals, judges, and law enforcement officers with the knowledge and skills to understand, evaluate, and work collaboratively with AI technologies. Building capacity is important since it will enable stakeholders to develop and manage AI systems without falling victim to overreliance or misuse. For instance, when it comes to utilising generative AI (such as ChatGPT) in legal tasks, it is crucial for lawyers to prioritise human review and verification of ChatGPT's drafted documents.[99] This ensures accuracy and compliance, avoiding any potential issues like citing non-existing cases as earlier discussed. This will also improve public acceptance and perception of AI. Lawyers should view ChatGPT as a supplementary tool for efficiency ather than a substitute for their expertise. Hence, a basic knowledge for criminal justice stakeholder would be to do a critical review of content gotten from generative AI.

d. Balancing Technological Advancements with Human Rights and Fairness

AI systems must be developed to ensure that they do not produce unfair results or threaten human's rights. In order to detect and remedy any discriminatory effects, AI systems should be put through the required testing both before and after deployment.[100] The criminal justice system should not use AI systems that are unable to

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97 Oladoun L, 'Nigerian Government Spends N152bn on Digitalisation in 2021' (January 14 2022) Businessday NG https://businessday.ng/news/article/nigerian-government-spends-n152bn-on-digitalisation-in-2021/ accessed 8 August 2023

98 Akin Agunbiade, (n 48).

99 Santiago P, 'Responsible Use of Chat GPT by Lawyers' (2023) Dentons https://www.dentons.com/en/insights/articles/2023/june/8/responsible-use-of-chat-gpt-by-lawyers

100 Asma Idder & Stephane Coulax (n 4).

satisfy the baseline requirements of protecting individual rights and freedoms.[101] For instance, defendants and suspects must not be adversely affected, either directly or indirectly, because of their protected characteristics, such as race, ethnicity, nationality, or socioeconomic background.

7. Conclusion

New applications of AI in criminal justice are constantly being developed across the world, opening up new opportunities to improve the criminal justice system. For Nigeria, it is remarkable that several developments have been initiated in the criminal justice space since the enactment of the ACJA 2015. However, the present challenges that bedevil the criminal justice sector reveal that there is still a lot of transfromation to take place. This article has examined some of the multifaceted roles of AI in transforming criminal justice processes for various stakeholders. It is argued that AI offers numerous promising prospects for improving justice sector outcomes, but the technical and ethical concerns associated with AI should not be ignored in order to build public trust and confidence in its integration. Conclusively, it is believed that if the recommendations are implemented, they will position Nigeria to appropriately leverage AI for a more efficient criminal justice system.

[101] Jones K, 'AI Governance and Human Rights' (2023) Chatham House https://www.chathamhouse.org/sites/default/files/2023-01/2023-01-10-AI-governance-human-rights-jones.pdf

Corporate Capital under the Nigerian Company Law: A Key to Corporate Success.

Imbwaseh, R.N.* Orhange, A.N. and Yagba, J.T.*****

Abstract

Capital is the driving force for corporate success. Nigerian corporate law has provided a base line of minimum issued share capital for both private and public companies and the maintenance of same to avoid lack, depletion of corporate capital, company failure and to ensure success of companies. This Article examined the provisions of Nigeria Law relating to corporate capital and its maintenance using doctrinal approach and concluded that, there is an improvement under the extant Law (Companies and Allied Matters Act (CAMA) 2020) over that of CAMA 2004 in terms of provision of minimum issued share capital of ₦100,000 and ₦2,000,000 for both private and public companies respectively, however, the provision emphasised for subscription of shares only and not actual payment. Therefore, the article suggested that the law should provide for a 100% paid up capital or at least 75% of the minimum issued share capital of companies should be paid up for all categories of companies. Companies are also to be given certificate to do business after incorporation and after ensuring that they have enough capital to start off business. This is to ensure that they achieve their respective objectives without running into undercapitalization problems. The provisions allowing private companies to give financial assistance unlike public companies to buy their shares or shares of other private companies and provision relating to payment of dividends out of distributable profits need to be revisited since the assistance and dividend should be given or declared from distributable profit which is only calculated from current profit of the accounting year without recourse to previous loses. This is because to continue to allow that would mean that companies would continue to operate at a loss which could lead to corporate failure. Government Provisions of conducive and friendly business environment by way of tax reliefs or free tax on indigenous privately owned companies, good roads and accessible markets to sell companies' products would lessen the burden on companies' capital, ensure expansion and corporate success.

* Department of commercial law, Faculty of law, Benue State University rachelimbwaseh@yahoo.com

** Department of Public Law, Faculty of Law, Benue State University, ayiageorge29@gmail.com

*** Department of Commercial Law, Faculty of Law, Benue State University, yagbajanefrances@gmail.com

1. Introduction

Capital is a factor of production and also very important for the success of any business. Corporate financial structure is, therefore, essential and of considerable value in the life of every company. Corporate capital mix which is the means by which a company is financed and how the capital is maintained[1] is equally of great significance under the Nigerian company law. This is because management of corporate capital by company managers and board of directors and financial decisions making by them will determine the sources of fund to finance their assets, the market value of companies is also affected by the operations and growth of the capital structure decisions[2]

Provisions are made for corporate capital at incorporation under the Companies and Allied Matters Act (CAMA) 2020 generally and other relevant provisions by other legislations depending on each particular sector for the takeoff, continuation and survival of companies. This article using a doctrinal approach of research seeks to examine the relevant provisions of Companies and Allied Matters Act and where necessary provisions of other corporate legislation in Nigeria concerning corporate capital. Recommendations are made where necessary.

2. Definition of Corporate Capital

Corporate capital has no single technical meaning to it in any statutory provisions, but is used to represent all funds subscribed or provided by members or creditors and assets in which such funds are invested. Capital is the foundation for taking off business, therefore, its sufficiency determines whether the business will or will not succeed[3]. Capital adequacy on the other hand essentially determines the soundness and aids economic performance of any organization. Capital adequacy is the sufficiency of capital for operational

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1 Biligees Ayoola Abdul Mumin 'Determinants of Dept financing in Nigeria' *Euroeconomica* (3) (39). 2020, P141 https://dj.Univ.danubius.ro>.PDF

2 AI Sani and IT Idris 'Moderating Effects of Cost of Capital and Dept Financing and Firm Value in Nigeria. *International Journal of Research and Scientific Innovation.* (IJRSI) (vii) (vi) 156-159 9th June 2020 www.rsisinternational.org

3 *Incorporated Interest Property Ltd. v. Federal Commissioner of taxation* (1943) 67 CHR 508 at 575

existence[4]. Capital is needed in sufficient levels to assist absorption of operational or unanticipated loses, preserve confidence in the continued existence of a business entity and thus forestalling insolvency[5]. This goes to show that an important area of any company is the availability and adequacy of capital to run its business. Therefore, companies may run out of business if they fail to manage their capital effectively.

The business operating environment is becoming extremely tasking compared to the past, this arouses the need for a robust management of corporate fund enough to ensure organizational and operational sustainability. Companies are expected to handle risks that are associated with inadequate capital to facilitate different stakeholders' confidence in the firms and consequently strengthen its balance sheet[6].

The first issue to handle is how to determine the adequacy of capital for a company to do business successfully in Nigeria. The Companies and Allied Matters Act 2020 has put up capital bench marks for incorporation of companies generally and in doing that, companies are divided into private and public companies.

3. Requirement for Minimum Issued Share Capital

As opposed to the ₦10,000 and ₦500,000 minimum authorized share capital for incorporation of companies under the CAMA 2004 for private and public companies respectively, under the 2020 CAMA, initial minimum issued share capital of ₦100,000 capital is required upon incorporation by private companies and the public companies are also mandated to have a minimum issued share capital of ₦2,000,000[7].

The minimum issued share capital is the minimum number of shares a company can be registered with and can issue to its

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4 D. AL-Najjar and H.F Asous 'Key Determinants of Deposits Volume using Camel Rating System'. The case of Saudi Banks. Plos One (16) (12) 2021, Co 261164. https://do.org/10/137/journal/one.0261184

5 Olubumi Adewole Ogunode and Olaolu Ayodeji Awoniyi and Ayodeji Jemitope Ajibade 'Capital Adequacy and Corporate Performance of Non-financial Firms: Empirical Evidence from Nigeria' Cogent Business and Management. https://www.formline.com/doi/full/101080/2311975. 2022 .2156089#:text=furthermore%2c%zothe%20/research%20showed%20that, effect%20their%20respective%20corporate

6 Ibid

7 Companies and Allied Matters Act 2020 S. 27 (2)

subscribers. This allows companies to keep their startup capital Costs Low by only creating shares that are needed at the time of incorporation. What this entails is that the relevant thing in incorporation is not the share capital of a company but the number of its shares issued at incorporation. The company might have more but the minimum to be issued is what is provided for under the law. It is equally not compulsory that all the issued capital must be paid up at incorporation, therefore, the subscribed capital is not really paid up but an agreement to pay and so cannot be termed as capital in the context as to be useful in the business expansion. This is because the subscribers are only called up to pay only in the event of winding up.

Considering the inflation and global modern technology development trend in the production sector, the amount provided as minimum issued share capital under the CAMA 2020 for both private and public companies though are improvements on the provisions of CAMA 2004 are still too small to provide the financial or adequate capital base needed to drive any meaningful business. The reason for the requirement of minimum issued share capital is to avoid undercapitalization and limit proliferation of small companies and incidents of irresponsible incorporations, it is, however, submitted that the minimum issued share capital requirement cannot equally stand the test of economic realities in Nigeria more so that subscription is only an undertaking to pay for the issued share and not actual payment per se[8].

CAMA[9] Provides that where after the commencement of the Act the Memorandum delivered to the CAC states that an association is to be registered with shares, the amount of the share capital stated in the memorandum to be registered shall not be less than the minimum issued share capital and no company having a share capital after the commencement of the Act be registered with a share capital less than the minimum issued share capital. Where, at the commencement of CAMA, the issued share capital of an existing company is less than the minimum issued share capital, the company shall, not later than six mouths after the commencement of CAMA,

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8 TAT Yagba, and B.B Kanyip and SA. Ekwo, *Elements of Commercial Law* (Tamenza Publishing Company Limited, 1994) 249.

9 CAMA S. 124 (1) and (2)

issue shares to an amount not less than the minimum issued share capital[10], where a company is registered with shares, its issued capital shall not at any time be less than the minimum issued share capital[11] and where a company allows its share capital to be less than the minimum issued share capital, the company is liable to such fine as the CAC may prescribe by regulation and in addition liable to daily default fine as the commission shall specify by regulation for everyday during which the default continues[12].

CAMA permits companies in general meeting to increase share capital by allotment of new shares of such amount as it considers expedient and notify the Corporate Affairs Commission within 15 days[13]. This increase should be by ordinary resolution and the memorandum of the company and its articles of association shall reflect the new issued share capital[14], any default in complying with this section is liable to such fine as the commission may prescribe by regulation for every day during which the default continues[15]. Where a company allots new shares, thereby increasing its issued share capital, the increase shall not take effect unless at least 25% of the share capital including the increase has been paid up and the directors have delivered to the commission a statutory declaration verifying that fact[16], failure will attract a fine as the CAC may prescribe by regulation[17]. If an unlimited company wants to be re-registered as a limited company, it may increase its nominal amount of issued share capital by increasing the nominal amount of each of its shares, this is however subject to the conditions that no part of the increased issued capital shall be capable of being called up except in the event and for the purpose of the company being wound up[18]. These are to avoid proliferation of capital and encourage business success.

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10 Ibid S. 124 (3)
11 Ibid S. 124 (4)
12 Ibid S. 124 (5) (a) and (b)
13 Ibid S. 127
14 Ibid S. 127 (8) (1) and (2)
15 Ibid S. 128 (2)
16 Ibid section 128 (1) (a) and (b)
17 Ibid S. 128 (2)
18 Ibid S 129 (a) and (b)

CAMA does not allow private companies to create capital by issuing their shares to the public[19] and most of these private companies do not even have enough assets to put up as securities to secure loan from credit houses, whose credit periods are usually short term with high and unended interest rates. Heavy and multiple taxes are also levied on companies which affect their capital negatively and make it even more difficult for expansion or success of their businesses.

In financial sector, even as traditional commercial banks and other financial institutions, maintenance of adequate capital levels is fundamental for the safety of depositors' funds and sustainability of the business operations, this position is always influenced through regulatory actions and pressures[20]. This situation is however, less clear for non-financial firms like manufacturing, hospitality, oil and gas, telecommunications and agricultural sectors[21]. In Nigeria, Banks are expected to maintain adequate capital to protect their financial obligations, operate profitably and contribute to promoting a social financial system. It is for this reason that the CBN prescribes minimum capital requirement for banks. A component of a banks' capital shall comprise paid up capital and reserves[22].

Inadequate capital is a significant determinant of failure of microfinance banks in Nigeria. This implies that the policy of the Central Bank of Nigeria (CBN) that mandated the microfinance banks to soar up their capital base by meeting their peculiar capital requirements by April 2021, and April 2022 was in the right direction[23].The minimum paid up share capital to be maintained for a national level banking license is ₦25 Billion Naira or any such amount that may be prescribed by the CBN. While for Regional

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19 Ibid S. 22 (5)

20 BJJ DAO and DD Nguyen: 'Determinants of profitability in commercial Banks in Vietnam, Malaysia and Thailand. *Journal of Asian finance economics and Business'.* (17) (4) 2020. 133-143. https://doi.org/10./31/06/jafeb.

21 Olubuni Adewole Ogunode and Olaolu Ayodeji; Awoniyi and Ayodeji Timitope Ajibade. 'Capital Adequacy and Corporate Performance of Non-Financial Firms: Empirical Evidence from Nigeria. *Cogent Business and management (*n5)

22 Mansur Lubabah Kwanbo and others 'Determinant of Corporate Failure in Nigeria': An Examination of Micro Finance Banks Using a Pragmatic Approach. https://www.researchgate.net/publication/362593270-Determinants-of-corporate-failure-in-Nigeria-an-examination-of-microfinance-banks-using-a-pragmatic-approach:PG2/link/62f3DC3fC6+6732999bf56b0/download. (3) (1) 2023 5-6.

23 Ibid

Banking license is N10billion Naira and international commercial Banking License is ₦50 billion[24].

Under the insurance Act[25] carrying on of insurance business in Nigeria unless the insurer has and maintains a paid up share capital of not less than the following amounts in respect of the categories of insurance businesses named here under are prohibited;

a. Life insurance - N 2 billon
b. General insurance - N 3 billion
c. Marine and Aviation insurance business other than goods in transit insurance business by road, water, air and rail, an additional paid up capital of not less than N 5 billion.
d. Re-insurance - N 10 billion.

However, by a circular dated 20th May, 2019 National Insurance Commission (NICON) in exercise of its power under Section 10 (4) of NICON Act 2004 increased the paid up capital of insurance companies to:

i. Life insurance from N2 billion to N5 billion Naira.
ii. General insurance from N3 billion to N10 billion Naira
iii. Composite insurance from N5 billion to N18 billion Naira
iv. Re-insurance from N10 billion to N20 billion Naira.

All existing companies were given up to 30th June of 2020 to comply with the new paid up capital review.

In the Banking Business, the Banks and other Financial Institutions Act[26] provides that the Central Bank of Nigeria shall from time to time determine the minimum paid up capital requirement of each category of bank licensed under the Act.

It, therefore, follows that, the minimum share capital for bank does not depend on the provisions of the companies and Allied Matters Act but also on guidelines issued by Central Bank of Nigeria from time to time in exercise of its regulatory powers, and so the capital base of banks are subjected to changes. The current paid up

[24] 'An Overview of Types of Banking License in Nigeria' 23 Jan 2023 https://trusted advioslaw.com>an...
[25] CAP 102 LFN, 2004. S.10.
[26] CAP 3 (2) LFN, 2004, S 9(1)

capital for banks in Nigeria is still 25 billion naira. The rationale behind the idea that the share capital be paid up is to ensure that undercapitalization problems in bank are avoided.

It is important to note that, the failure to comply with the provisions of the Act (within which period) as may be determined by the Central Bank of Nigeria from time to time shall be a ground for the revocation of any license issued pursuant to the Act. The shareholders of a proposed bank that apply for a license to operate shall deposit with the bank a sum equal to the minimum paid up capital that may be applicable under section 9 of the Act, before license is issued[27]. The Act further provides that every bank shall maintain with the CBN cash reserve and special deposit and hold specified liquid assets or stabilization security, as the case may be not less in amount than as may from time be prescribed by the Central bank of Nigeria by virtue of section 45 of the Central Bank of Nigeria Establishment Act 2004[28].

In the aviation industry, the authorized paid up share capital are as follows;

a. Five hundred million naira for domestic operators
b. One billion Naira for regional operators.
c. Two billion naira for international operators.

The Nigerian Civil Aviation Authority (NCAA) monitors the financial position of an air career by regular screening of up to date monthly management accounts, quarterly balance sheets and annual profit and loss account and cash flow projection. These are efforts made to minimize undercapitalization in companies and to avoid failure[29].

It is submitted that the requirement of paid up share capital in case of banks, insurance and Aviation industries should be emulated and extended to other sectors by CAMA, though it may Obviate the hope of creditors that the unissued and unpaid portion of the share

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27 Ibid.

28 Ibid Cap 3 (3) S 3 (2)

29 George Etomi & Partners https://www.sskohn.com/article/?content ref=29&categoryID=5./2/ 30/2010, 'Doing Business in Nigeria-Aviation Sector May 1 2019. Lexology.com/library/… Nigerian Civil Aviation authority Guidelines and Requirement for Grant of air Transport License (ATL) https://www.old.ncaa.gov.ng/direc...

capital is a emergency fund to be called up and shareholders expect to pay at the time of winding up.

Under the Companies Act of 1968 [30] as contrasted to the private company, which could commence its business as soon as the certificate of incorporation was issued, the public companies were required to await another certificate declaring that the company was entitled to commence business. This requirement was designed to ensure that the company had sufficient funds before commencing business therefore stemming undercapitalization of such companies. It is therefore submitted that all companies in Nigeria including private companies should require a certificate to do business before commencing operations; at least 70% if not all of a minimum issued share capital should be paid up by the subscribers before a certificate for commencing of business is issued to companies. This will help to check undercapitalization in companies and avoid company collapse. CAMA should revive the provision for certificate to do business as this will assist in tackling undercapitalization and ensure corporate survival.

4. The Corporate Capital Maintenance Rules

The provision of capital would be pointless if the companies raise capital and are at liberty to deplete it. It is, therefore, fundamental that company capital unless extenuated by expenditure on its business must be preserved for the discharge of its liabilities[31]. The rules relating to share capital, its maintenance and dealings, minimum issued capital, paid up share capital and ultra vires doctrine are to safeguard companies' capital as they ensure great measure of financial viability of companies and prevent corporate failure. The capital maintenance rules prevent companies from wasting shareholders' funds for unauthorized purposes, while the ultra vires doctrine prevents them from going outside their objects.

CAMA provides that share capital shall not be reduced unless in accordance with the provisions of the Act[32], however, if authorized by the Articles of Association of a company, the company

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30 Section 107 (1)
31 EO Akanki 'Company Capital and Protection' *Nigeria's Bar Journal* (16) 1980 9 at 15
32 CAMA 2020 section 130 (1)

can by special resolution reduce its capital and this is also subject to confirmation by, the court[33] and this is done by;

a. Extinction or reduction of liability on shares not fully paid up;
b. Cancelling paid up shares lost or not represented by available assets;
c. Cancel any paid up share capital which is in excess of any of the company's wants.

The resolution to reduce the share capital is subject to courts confirmation and a copy of the resolution is to be filed with the Corporate Affairs Commission (CAC)[34]. The creditors are also entitled to make objections which are considered by the court[35]. This is to safeguard the rights and interests of creditors, the just and equitable treatment of shareholders and the interest of the investing public.

The main rule relating to the raising of capital is that, shares shall not be issued at a discount[36]. *In the case of Ooregun Gold Mining Co. Of India Ltd. v Roper*[37] a company needed money and its ordinary shares stood at a discount. It purported to issue its preference shares with on credit with shillings paid up leaving 5 shillings to be paid on allotment. The House of Lords held that there was no power under the companies Act to do this and therefore, it was held ultra vires and the allottees were liable to pay the full amount on their shares. CAMA provides that it is unlawful to issue shares at a discount[38]. A Public Company shall not accept as payment or part payment for its shares consideration other than cash unless the cash value of the consideration as determined by a valuer is worth at least as much as maybe credited as paid up in respect of the shares allotted to the proposed purchaser[39].

CAMA also makes it clear that shares of a company and any premium on them shall be paid up in cash or by a valuable consideration other than cash if the Article of Association of the

33 Ibid S. 131 (1)
34 Ibid S 132 and 134
35 Ibid 132 (3)
36 Ibid S. 155
37 1892 (AC) 125 (HL)
38 CAMA 2020 S. 146.
39 Ibid S. 162 (4)

company permits, or partly by cash and partly by a valuable consideration other than cash[40] but this is subject to determination of the value by an independent valuer[41]. The above provisions are important because they seek to prevent watering down share capital in companies through the inflation of non-cash consideration. CAMA[42] makes it unlawful for a company or its subsidiary to give financial assistance to a person to purchase its shares, however, a company can lend money in the ordinary course of its business where the lending of money is part of the ordinary business of the company. A company can also grant loan to its employees other than directors in good faith to enable them to acquire fully paid shares in the company to be held by themselves by way of beneficial ownership, also in accordance with any scheme for the time being in force of its holding company, being a purchase or subscription by trustees or for shares to be held by or for the benefit of employees of the company, including directors holding a salaried employment or office in the company[43].

It is important to note that CAMA[44] did not limit or prohibit private companies from giving financial assistance in a case where the acquisition of shares in question is or was an acquisition of shares in the company or if it is a subsidiary of another private company, provided that the financial assistance may only be given if the company has net assets which are not thereby reduced or to the extent that they are reduced, if the assistance is provided out of distributable profit[45] and the giving of assistance must be approved by special resolution of the company in general meeting and the directors of the company proposing to give financial assistance shall before the assistance is given make a statutory declaration in a form prescribed by the commission (CAC) and this is; if the shares to be acquired are shares in its holding company[46].

It is also important to state that the rule that dividends must be paid out of distributable profits is also rationalized on the ground that

40 Ibid S. 160.
41 Ibid S. 162.
42 Ibid S 183 (1) (a)
43 Ibid S 183 (3) (a-c)
44 Ibid S 183 (4)
45 Ibid S 183 (4) (a)
46 Ibid S. 183 (4) (b and c)

if it is permitted to be paid from capital a company might run down its capital assets because until there is nothing left for the company. CAMA provides that a company may pay dividend only out of profits available for the purpose[47]. A dividend is the share received by a shareholder of the company's profits which is legally available for distribution. The dividend reflects the shareholders' expectations of reward for their capital contributed to the enterprise and in economic terms, dividends are the cost of capital just like wages are cost of labour[48].

In Lee v Neuchatel Asphalt Company[49], it was held that dividends could be paid out of current trading profit without making provisions for the depreciation of fixed assets or making good earlier losses in capital. This means that previous losses are not considered but current year profits and loss is considered when declaring dividend. It is submitted that not reckoning with previous losses in this instance is not in keeping with maintenance of capital principle, because, without addition of previous losses or making provisions for depreciation of fixed assets, the principle is made mockery of. There is a difference between the previous year and current year in terms of success therefore, it is diligent commercially to first of all deal with the previous losses before talking about current profit to know if the company is actually making profit or not. The profits of a company available for payment of dividends are its accumulated, realised profit (so far as not previously utilised by distribution or capitalisation), less it's accumulated, realised losses. (So far as not previously written off in a "lawfully made reduction or reorganisation of capital)[50].

Public companies have greater opportunities to acquire investment capital and expend their business as the law does not restrict them from soliciting for investment from the public. However, this freedom to solicit for fund is not without control. Rules relating to the statements made in connection with the advertisement for purchase and sale of securities are aimed at

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47 Ibid S 427 (1)

48 TAT Yagba, and BB Kanyip and S. Okwor *'Elements of Commercial Law'* (Tamaza Publishing Company Limited 1994)

49 (1889) 41 ChD 1.

50 Ibid S. 427 (2)

ensuring that full disclosure of companies' affairs are made known to the investing public. The public offer and sale of securities are regulated by the investment and securities Act 2007 which makes it unlawful to issue any form of application for securities which includes shares, debentures, in a public company unless the form is issued with a prospectus which complies, with the Act[51] and includes among others, the promoters' interest, the property and profits of companies, the minimum subscription, the purchase price of any property purchased or to be purchased from the proceeds of the issue, the expenses of the issue including commission payable to any person for agreeing to subscribe for or procuring subscriptions or any shares of the company, the repayment of any money borrowed by the company, the number, description and amount of shares or debenture of a company a person has taken or is entitled to be given, price to be paid on shares or debentures. In respect of any property, the names and addresses of the vendors (if more than one), the amount payable to each of them, the consideration and particulars of interest therein in the preceding two years; the auditors' and account reports as to the profit and losses, assets and liabilities of the company among others must be stated in the prospectus in each of the last five years immediately preceding the issue of the prospectus and the assets and liability of the company as at the last date to which the accounts were made up.

The rationale for these reports is for the offer to warrant a down to earth revelation of the companies' affairs and their subsidiaries to enable prospective investors and lenders to have a good idea of the interests involved and the performance of the company over a period of time so as to be able to make decision in respect of the invitations.

The rules also help to prevent fraudulent market practices in public companies as the security dealings to beef up companies' capital are regulated by the Securities and Exchange Commission (SEC). Capital Trade Points are registered by the Securities and Exchange Commission (SEC)[52]. SEC also deals with registration of capital market operators and intermediaries associated with security

[51] Investment and Securities Act, No 29, 2007 S. 56.
[52] Ibid S. 28

industries. Disciplinary powers are also conferred to it under the Act[53].

The above discussions on provisions of law on raising corporate capital and its maintenance are to ensure sufficient capital for Nigerian companies to carry out their businesses and expand without collapse. Despite the rules, low capital frustrates companies, forcing them to collapse and thereby creating negative consequences on corporate stakeholders. Muhammad Kai Aliba, the Managing Director of Intercontinental Bank in 2010 confirmed that about 1,346 staff of the bank were sacked because of poor financial position of the Bank[54].

5. Conclusion

Corporate capital provisions and its maintenance rules under the Nigerian corporate statutes are lead ways to business successes as benchmarks such as minimum issued share capital are provided for registration of companies generally and in some particular sectors minimum paid up capital are to be met for a company to be registered and start off business, however, the provisions for minimum issued share capital especially under the CAMA are not enough, and even the issued share capital must not be all paid before the company is registered with the corporate affairs commission therefore, right from the foundation of a company there is no way of confirming if a company has enough capital at hand to execute its objects. This means that the corporate capital provisions under the CAMA is shaky and to strengthen the law, and to ensure corporate survival or at least to minimise failure of companies, CAMA should consider providing a 100% paid up capital or at least 75% of the minimum issued share capital of companies be paid up.

There is also need to issue certificate to do business to companies by CAC after incorporation and after showing evidence that they have enough capital to start the kind of businesses they intend to do or to carry out in their various companies. Secondly, the provision under CAMA that dividends must be paid out of distributed profits, though extenuated on ground that if paid out of

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53 Ibid SS. 33 and 34

54 Daily Truth Vol. 23 No.33 Wednesday January 6, 2010 P7

any other source of capital might lead to running down the capital of the company which will also lead to failure of the company, the fact that previous losses are not put in to consideration when calculating distributed profit is challengeable because, for one to know if a company is doing well, proper account is needed and a correlation between the previous loss and current profit is necessary to enable a deep perception into real profit of a company at a particular current year. Therefore, there should be a legal regime to include previous losses in calculating distributable profit for purposes of declaration and payment of dividend, otherwise, companies might be operating at a loss and at same time declaring and paying dividend which will lead to collapse.

Thirdly, the rule that public companies are not to give financial assistance to purchase their share does not extend to private companies which may give financial assistance to purchase their shares or shares of another private company provided that the assistance is from a distributable profit, as provided under section 183 of CAMA. This provision should also be revisited so that previous loses are considered in calculating distributable profit and to enable companies determine their real profit to see if they really have enough to give assistance or they are operating at a loss.

Under section 22 of CAMA 2020, private companies are not allowed to issue their shares to the public. It is submitted that since most of the companies do not even have assets to put up as securities for loan from credit houses and the credit periods of these financial credit houses are usually short-term with high interest which most at times lead the companies into difficulties and do not allow them to expand their business, Government should encourage indigenous companies by way of providing a tax reliefs or tax free business environment and good access roads and markets to sell their products and services to raise more capital from the sales. These will lessen the burden on the companies' capital.

Though the provisions of section 27 of CAMA 2020 on minimum issued share capital of ₦100,000 and ₦2,000,000 for both private and public companies respectively have improved more than that under the previous CAMA 2004 which was ₦10,000 for private companies and ₦500,000 for public companies, there is still room for

an increase in the minimum issued share capital as the amounts are too small considering the global inflation and cost of living in the business market environment. If companies must succeed, there must be an increment of at least ₦2 million for private companies and ₦50, million naira for Public Companies as minimum issued share capital and paid up capital base.

Analysis of the Legal Framework on Corporate Insolvency in Nigeria Under CAMA 2020 and Companies Winding up Rules 2001

Okwudiri Nwosu*

Abstract

This article examined some aspects of the Companies and Allied Matters Act 2020 which is the principal legislation regulating corporate insolvency matters in Nigeria. The Act made some provisions that relates to the activities of actors and officers like Official Receiver, Special Manager and Liquidator who participates during winding up proceedings of an insolvent corporate entity. The paper also highlighted the appointment of these officers, restructuring mechanisms of ailing companies under CAMA and winding up procedures, which seems very technical in its operation. It discovered that there are challenges created by some of the CAMA provisions, in dealing with corporate Insolvency. Again, the Companies Winding up Rules (CWR) 2001 which complements the provisions of CAMA, provided enormous technicalities which obviously affects the early rescue of corporate entities undergoing insolvency. Doctrinal research method was adopted in this work. Having analysed the relevant statutory provisions under CAMA and CWR as it relates to corporate insolvency, recommendations were made to amend some of the provisions which would ultimately save businesses instead of extinction of corporate entities arising from insolvency. Court proceedings should not be involved in the cumbersome procedure for effecting arrangement and compromise under CAMA in order to rapidly revive financially distressed insolvent company.

Keywords: Legal framework, CAMA, Jurisdiction, Arrangement and Compromise, Companies Winding up Rules.

Introduction

In any nation, corporate entities constitute one of the Pillars on which the economy can be created. It is a way important vehicle for economic growth. Thus when there is corporate collapse, the economy is worst of. Quite often mismanagement of corporations put shareholders,

* Okwudiri Nwosu, B.L, Ph.D (Legal Practitioner/Notary Public) nwosu.okwudiri@yahoo.com 08035860587

investors and creditors funds into jeopardy requiring legislative intervention.

The objective of this paper is to analyse the relevant provisions of the Companies and Allied Matters Acts 2020 (CAMA) and the companies winding up rules 2001 in dealing with the challenge of Corporate Insolvency in Nigeria.

The basic and principal legislation in Nigeria that regulates corporate insolvency proceedings is the Companies and Allied Matters Act, 2020.[1] Thus, it is important to state here that all legal framework should be focused towards reviving a corporate entity in distress and possible extinction. However, it is not every ailing company that can be rescued. Companies that are economically unviable should be allowed to collapse and be liquidated. A company which is financially distressed is one which has a potentially valuable business concept but unable to generate adequate returns to meet its expenditures and make profits. The issue of rescue versus extinction of companies has been the theme of various discuss by insolvency practitioners. Financially distressed companies are the proper candidates for rescue because they have potential business ideas.[2]

The paper will expose some of the relevant provisions and the principal actors in corporate insolvency under Companies and Allied Matters Act. Those principal actors in the corporate insolvency are the officers of court vested with investigative and information gathering powers at the commencement of Insolvency in a winding up by the court. The legislation and actors in corporate insolvency proceeding highlighted in this work includes Companies and Allied Matters Act (CAMA) which its provisions are not mostly corporate rescue friendly. The CAMA aims at liquidation of companies in financial distress. Jurisdiction of courts in Insolvency proceedings is very paramount as where proceedings are being undertaken in a court other than Federal High Court, the proceedings would be struck out. Receivers and Liquidators are two important officers that play prominent roles in winding up proceedings. While the Official Receiver commences his role from the commencement of proceedings, the Liquidator is

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1 CAMA 2020

2 Idornigie, P. *Roundtable on Reform of Insolvency Laws in Nigeria* at http://www.nials-nigeria.org//roundable. (Accessed on 18th June 2014)1

appointed upon making of winding up order or presentation of petition for winding up if there is a provisional Liquidator.

Arrangement and compromise are forms of Corporate restructuring which may lead to rescue. The Companies winding up Rules regulate the proceedings in winding of a company in Nigeria, while the winding up procedure is the process that leads to liquidation of the company in distress.

Companies and Allied Matters Act (CAMA) 2020

The Legal frameworks are the laws that regulate the activities in corporate insolvency in Nigeria. One of such laws is the Companies and Allied Matters Act 2020. Historically, the Companies and Allied Matters Act was a product of several debates and consultations by the Nigerian Law Reform Commission. Thus, in March 1987, the then Attorney General of the Federation and Minister for Justice directed the Nigerian Law Reform Commission to review the Nigerian Company Law.[3] The Commission was expected to discover and eliminate loopholes in the existing company law, streamline all procedures and design Nigerian Company Law for the benefit and protection of all stakeholders.[4] The Law reform Committee eventually came out with a comprehensive Nigerian Company Law that was designed to facilitate business activities in the Country and to protect the interests of investors, the public and the country as a whole.[5] The Companies and Allied Matters Decree 1990 is described as a landmark Company Legislation in Nigeria.[6] It was subsequently designated as an Act which was later modified in 2004 and known as Companies and Allied Matters Act 2004.

The Companies and Allied Matters Act 2004 is divided into three parts. Part 'A' deals with Incorporation of Companies, Part 'B' covers registration of Business Names while Part 'C' deals with Incorporated Trustees. The Act is the most comprehensive and was able to address

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3 Adebola, B. *The Nigerian Business Rescue Model* (NIAL International Journal of Legal Studies) 35, 43

4 Idigbe, A. Using existing Insolvency Framework to drive business recovery in Nigeria: The Rule of judges. Being Paper Presented at the Federal High Court Judges Conference held at Senkuyu, Sokoto on the 11th day of October, 2015. 39

5 Akanki, *Company Law Development through the 1990 Legislation* in Obilade. "A Blue print for Nigeria Law: A Collection of Critical Essays written in commemoration of the thirteenth anniversary of the establishment of Faculty of Law, University of Law" (Faculty of Law University of Lagos. 1995)

6 Akanki (n5)

some of the problems noticed in the repealed Companies Decree of 1968. For instance, the Act codified most of the principles of Association, Common law on Company law as well as many of the general principles hitherto left in the Articles of Association and thus ensures greater certainty of the law.[7] New concepts and procedures were introduced, while existing procedures were streamlined.[8] Among other innovations introduced by the Act is the establishment of a regulatory body known as the Corporate Affairs Commission. The Commission is a body corporate with a perpetual succession and capable of suing and being sued in its corporate name. The headquarters of the Commission is situated in the Federal Capital Territory Abuja with establishments of state offices to facilitate the ease of doing business in Nigeria. The CAMA, being the principal legislation that regulates corporate insolvency in Nigeria, is a work in progress as it will continue to undergo amendments to accommodate changes that may arise as a result of circumstances of today in Corporate Insolvency proceedings.

Flowing from the issue of CAMA being a work in progress, the CAMA 2004 was repealed and new CAMA enacted in what is now known as Companies and Allied Matters Act 2020. The current CAMA is divided into Seven parts, which are Part A dealing with Corporate Affairs Commission (CAC), Part B deals with Incorporation of Companies and Incidental matters, Part C deals with the Limited Liability Partnership, Part D deals with the Limited Partnership, Part E addresses Business Names, Part F deals with Incorporated Trustees, while Part G is General Provisions. Thus, Companies and Allied Matters Act 2020 is the extant legislation that repealed CAMA 2004 as amended.

The major gap noticed in CAMA is that under section 564 of CAMA, a company incorporated in Nigeria can be wound up or liquidated. This is clearly not in tune with the current trend of business rescue of ailing or distressed companies which is a global practice aimed at preventing job losses. It is therefore pertinent to introduce corporate entity rescue and insolvency legal regime that is not focused on a company's extinction, but on rescuing companies from Insolvency through viable insolvency legal framework. An effective legal regime or framework in Nigeria must be one that is designed to save viable

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7 Amupitan, J. O. *Principles of Company Law in Nigeria.* (Jos University Press Ltd, 2013) 29

8 For example, new provisions on Unit Trusts, Mergers, Take-overs and Insider Trading were introduced to the Nigerian Company Law.

businesses and to ensure that non-viable businesses can quickly disappear from market, in order to allow deployment of resources and to more productive ventures.

Jurisdiction of Court

Black's Law Dictionary defines jurisdiction as court's power to decide a case or issue a decree.[9] Thus in the context of this work, jurisdiction of court is used to show the court that has the power or competence in deciding issues emanating from the legislations governing corporate insolvency matters. It is without doubt that the existence of an efficient court system or judicial machinery is essential to the success of any legal regime. In Nigeria, corporate insolvency cases are first handled by the Federal High Court which is by virtue of the provision of Section 251(1) of the Constitution of the Federal Republic of Nigeria, 1999. The Federal High Court is vested with the exclusive jurisdiction to handle insolvency matters. Appeals may be made to the Court of Appeal and thereafter to the Supreme Court of Nigeria.

Regrettably, our courts have not thrived so much in terms of judicial experience in this area of practice and this is evidenced by the dearth of local case law(s) on receivership in Nigeria decided upon by the Supreme Court. Since most insolvency cases arise from the issue of unpaid debts, both our legal practitioners and our courts treat them as being akin to debt recovery cases. This position has made Akinwunmi & Busari[10] to state thus:

This is no doubt consequent upon a paucity of knowledge on the part of our practitioners and judicial officers on technical issues relating to insolvency as they do not have access to regular international insolvency publications (there are quite a few of them) and sources of information such as the J-Base which is an electronic database of International insolvency material.

With regard to winding up of Companies under CAMA, it is imperative to note that the Federal High Courts exercise jurisdiction in this aspect of insolvency proceedings where the courts have shown considerable experience. The Federal High Court that would exercise

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9 Bryan, A.G. *Black's Law Dictionary.* (Ninth Edition) 927

10 Akinwunmi & Busari *Insolvency Practice in Africa–The Nigerian Experience.* http://akinwunmibusari.com. Accessed on 12th January, 2014.

jurisdiction in winding up, should be situated within the judicial division of the registered office or head office of the company. For the purpose of winding up proceedings, registered office or head office means the place which has longest been the registered office or head office of the company during the six (6) months immediately preceding the presentation of the petition for winding up.[11]

The issue of jurisdiction came up in the case of *Medicore (Nigeria) Ltd v Labwares (Nigeria) Ltd*[12] where a company's registered office was located at Ilorin but the winding up proceeding was brought at Federal High Court Lagos. It was held that on the basis of Section 407 (1) of CAMA 2004, the court that had jurisdiction to wind up the company is the court within whose area of jurisdiction the registered office or head office of the company is situated; in this case Ilorin, Kwara State. Also *in IMB Nigeria Ltd v Lomay Nigeria Ltd*,[13] a winding up petition was brought in Lagos in respect of a company with registered office or head office of the company in Jos, Plateau State. The Petition was struck out on the same ground of lack of jurisdiction.

Under the Investment and Securities Act, 2007 the Federal High Court also exercises jurisdiction to wind up the business of capital market operators upon an Order of Securities and Exchange Commission revoking the registration of a capital market operator and requiring the business of that Capital market operator to be wound up.[14] Having stated that both CAMA and Investment and Securities Act confers jurisdiction on the Federal High Courts to wind up corporate entities and business of capital market operators. It is the view of this researcher that limiting jurisdiction of Federal High Courts in insolvency proceedings to only where the registered office or head office of the ailing company is situate is inappropriate as the company may have subsidiaries in other major cities in Nigeria. The company, for instance may have its head office in Jos, Plateau State, but has many other states in Nigeria where it has more of its operations than Jos Plateau State. In that case, it will be appropriate to institute proceedings in any of the states where its major business concern could be located and more convenient for the conduct of the proceedings. From the

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11 See section 570 (1) (2) CAMA 2020 and s.7(1) (C) (G) Federal High Court Act.

12 (1985) FHCR 240 cited in Amupitan, J.O. (n7) 376

13 (1986) FHCR 28 cited in Amupitan, J.O (n12) 377

14 See S. 53(1) Investment and Securities (ISA) Act.

foregoing, it is obvious that Federal High Courts exercises jurisdiction over companies and businesses established under a Federal Legislation.

Appointment of Official Receivers and Liquidators

The three important officers and Corporate Insolvency Practitioners who play major roles in winding up of a Company are the Official Receivers, Provisional Liquidators and Liquidators. It is now settled that where corporate insolvency does not lead to rescue of a company, it will ultimately result to winding up of the company.

By section 704 of CAMA 2020, a person acts as an Insolvency Practitioner in relation to a company by acting as its-

a.) Liquidator, Provisional Liquidator or Official Receiver
b.) Administrator or Administrative Receiver; or
c.) Receiver and manager, or as nominee or supervisor of a company's voluntary arrangement.

An official receiver is an officer of the Federal High Court. According to Section 582 of CAMA,[15] and so far as it relates to the winding up of Companies by the court "Official Receiver" means the deputy Chief Registrar of the Federal High Court or an officer designated for the purpose by the Chief Judge of the Court. The CAMA, under section 583 further provides that where the court has made a winding up order or appointed a provisional Liquidator, there shall, unless the court thinks fit to order otherwise and so orders, be made out and submitted to the official receiver a statement as to the affairs of the company in the prescribed form, verified by affidavit, and showing the particulars of its assets, debts and liabilities, the names, residences and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given, the list of members and the list of charges and such further or other information as may be prescribed or as the official receiver may require.

Furthermore, the statement shall be submitted and verified by one or more of the person who are at the relevant date the directors and the person who is at that date the Secretary of the company or by such of the persons mentioned in this subsection as the Official Receiver, subject to the direction of the court, may require to submit and verify the statement, that is to say persons who –

[15] CAMA 2020.

a.) Are or have been officers of the company;
b.) Have taken part in the formation of the company at any time within one year before the relevant date;
c.) Have been or are in the employment of the company within the said year, and are in the opinion of the official receiver capable of giving the information required;
d.) Are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

The statement shall be submitted within 14 days from the relevant date or within such extended time as the official receiver or the court may for special reasons appoint.

As regards a Liquidator, in the context of winding up by the court, a Liquidator is a person who is appointed by the court to wind up the affairs of a company and to distribute its assets, if any, among creditors and contributories in accordance with the articles.[16] By section 557(1) of the Act,[17] a receiver or manager of any property or undertaking of a company is personally liable on any contract entered into by him except in so far as the contract otherwise expressly provides. If it is a contract entered into by a receiver or manager in the proper performance of his functions, such Receiver or Manager is subject to the rights of any prior encumbrance, entitled to an indemnity in respect of liability thereon out of the property over which he has been appointed to act as a receiver or manager.

Under section 585 of CAMA,[18] the court may appoint a Liquidator or Liquidators for the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose and where there is a vacancy, the official receiver shall by virtue of his office, act as Liquidator until such time as the vacancy is filled. At any time after the presentation of a petition and before the making of a winding up Order, the appointment shall be provisional and the court making the appointment may limit and restrict the powers of the Liquidator by the order appointing him. If a provisional Liquidator is to be appointed before the making of a winding

16 Idigbe, A. (n14)18
17 CAMA 2020
18 CAMA 2020.

up Order, the official receiver or any other fit person, may be so appointed. On the making of a winding-up Order, if no Liquidator is appointed, the official receiver shall by virtue of his office become the Liquidator. The Official Receiver in his capacity as provisional Liquidator shall, and in any other case may, summon meetings of creditors and contributories of the company to be held separately for the purpose of determining whether or not an application is to be made to the court for appointing a Liquidator in place of the Official Receiver. If a person other than the Official Receiver is appointed Liquidator, he shall not be capable of acting in that capacity until he has notified his appointment to the Commission and given security in the prescribed manner to the satisfaction of the court.

According to section 585(4) and (5) of CAMA, if more than one Liquidator of a company is appointed by the court, the court shall declare whether anything by the Act required or authorized to be done by a Liquidator is to be done by all or anyone or more of them. A Liquidator appointed by the court may resign, or, on cause shown, be removed by the court; and any vacancy in the office of a Liquidator so appointed shall be filled by the court. From the foregoing, it is evidently clear that by the provisions of sections 582, 583 and 585 of CAMA, it is the court that appoints both an Official Receiver and a Liquidator in winding up of a company. The Official Receiver is a "provisional" Liquidator where appointed by the court before an order of winding up is made. Where no specific order of court was made by the Court for the appointment of a provisional Liquidator, the Official Receiver of the Federal High Court by virtue of his office is statutorily deemed to be the Liquidator and thus can exercise the powers available to a Liquidator under CAMA.

Beyond the appointment of official receivers and Liquidators by the court, the CAMA empowers the Corporate Affairs Commission to regulate practice of Insolvency Practitioners. Section 705(1) of CAMA provides the qualification to be met before a person can be appointed as official receiver, provisional Liquidator or Liquidator. By the provision of section 705(1), A person is only qualified to act as Insolvency Practitioner where he-

a. Has obtained a degree in law, accountancy or such other relevant discipline from any recognized university or polytechnic;
b. Has a minimum of five years post qualification experience in matters relating to Insolvency;

c. Is authorized to so act by virtue of a certificate of membership issued by Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), or his membership of any other professional body recognized by the commission, being permitted to act by or under the rules of that body; and
d. Holds an authorization granted by the Commission

(2) The Commission may prescribe in its regulations such other additional qualifications as may be considered necessary.

However, by Section 676 of CAMA,[19] there are categories of persons disqualified for appointment as Liquidators. They include:

a.) Infant;
b.) Anyone found by the court to be of unsound mind;
c.) A body Corporate
d.) An undischarged Bankrupt
e.) Any director of company under liquidation
f.) Any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and in respect of whom there is a subsisting order under section 672 and 280 of CAMA.

Any appointment made in contravention of the provisions of subsection (1) above shall be void and if any of the persons named in paragraphs (c), (d), (e) and (f) above, shall act as a Liquidator of the company, he shall be guilty of an offence and liable to a fine as prescribed by the Commission in the Regulations in the case of a body corporate, or in the case of an individual, to imprisonment for a term not exceeding six months or to a fine as the court deems fit or both such imprisonment and fine. It is the opinion of this researcher that Official Receivers and Liquidators should have a certain degree of knowledge and experience to effectively discharge the functions inherent in winding up proceedings which is of technical nature. The degree of knowledge and experience required for a person to be appointed as official Receiver or Liquidator is such that should have been derived from evidence of doing similar assignments for a certain statutory period or that such appointee must belong to a professional body known to be Insolvency Practitioners.

[19] CAMA 2020

However, the provision of section 705(1)(b) as regards post qualification experience in matters relating to insolvency appears to be nebulous, as it did not address those who may have less than 5years experience but are qualified under section 705(a)(c)(d) and (2) in addition to being in active practice more than a person who may have above 5 years' experience but redundant in practice and thus lacking current experience in practice and procedures of Insolvency matters. Also, the Act limits the qualification body of Insolvency Practitioners to the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), although certain other professional bodies may be recognized by the CAC. The particular mention of BRIPAN in the provision may be seen as an attempt to usurp the legislative power which may lead to unhealthy rivalry between BRIPAN and other bodies not mentioned in the legislation.

Arrangement and Compromise

Arrangements and Compromise are forms of corporate restructuring. Where a company is undergoing financial difficulties that may lead to its winding up, it may resort to restructure its outlook as a way of rescuing the company from extinction. Economic realities have always impacted on the growth and ability of a company to honour its obligations to creditors. In the midst of such difficulties, a company which opts to stay afloat must design and embark on legally acceptable survival options, many of which are available under the Nigerian Corporate and Investment Law and Practice.[20] Arrangements and Compromise are used interchangeably. It can be arrangement on sale of company's property under section 714 of CAMA 2020 or power to compromise with creditor and member under section 715 of CAMA 2020. Thus, under section 710 of CAMA,[21] the expression "arrangement" means any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of CAMA or by the unanimous agreement of all parties affected thereby.

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20 Ogbuanya, N.C.S. *Essentials of Corporate Law Practice in Nigeria.* (Novena Publishers Limited 2013) 579.

21 CAMA 2020

A company, that intends to effect any arrangement may by special resolution resolve that the company be put into members' voluntary winding up and that the Liquidators be authorized to sell the whole or part of its undertaking or assets to another body corporate in consideration or part consideration of fully paid shares, and distribute the same in specie among the members of the company in accordance with the rights in the liquidation. Any sale or distribution in pursuance of a special resolution under this section shall be binding on the company and all members thereof and each member shall be deemed to have agreed with the transferee company to accept the fully paid shares, debentures, policies, cash or other like interests to which he is entitled under such distribution.[22]

Under section 715 of CAMA,[23] which boarders on power of a company to compromise with creditors and members, where a compromise or arrangement is proposed between a company and its creditors or any class of them, court may, on the application, in a summary way, of the company or any of its creditors or members or, in the case of a company being wound up, of the Liquidator, order a meeting of the creditors or class of creditors, or of the members of the company, or class of members, as the case may be, to be summoned in such a manner as the court directs. If a majority representing not less than three-quarters in value of the shares of members or class of members, or of the interest of creditors or class of creditors, as the case may be, being present and voting, either in person or by proxy at the meeting in support of the compromise or arrangement, the compromise or arrangement may be referred by the court to the Securities and Exchange Commission which shall appoint one or more inspectors to investigate the fairness of the said compromise or arrangement and to make a written report thereon to the court within a time specified by the court. If the court is satisfied as to the fairness of the compromise or arrangement it will be sanctioned and shall thereafter be binding on all the creditors or class of creditors or on the members.

A distinction can be drawn in respect of Arrangements and Compromise under sections 714 and 715 of CAMA. While Arrangements and Compromise under section 714 of CAMA portends sale of company's property during winding up, thereby bringing an end

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22 Section 714 (1) CAMA 2020

23 CAMA 2020.

to the existence of the company, Arrangement and Compromise under section 715 of CAMA is a corporate restructuring which will ordinarily result in the rescue of the company from extinction as the restructured company will bounce back to life in form of a new company. Winding up for liquidation of the company under section 714 of CAMA brings an end to the company since the assets are distributed to those entitled under the rules of assets distribution when a company is dissolved.

It appears to this researcher that procedures for Arrangements and Compromise under sections 714 and 715 of CAMA are cumbersome and complex to apply for ailing company that requires restructuring to rescue it to continue doing business. There are three different procedures to follow, the convening of the meetings, the approval or investigation by the Securities and Exchange Commission and the petition to the court for the sanctioning of the scheme as approved by majorities during their meetings. The CAMA provisions is similar to part 26 of Companies Act of England which requires a majority in number representing 75 percent in value of each class of creditors and each class of members present and voting either in person or by proxy,[24] for a scheme of arrangement. The said Companies Act provision also involves obtaining the sanction of the court to the scheme approved by the requisite majority of creditors of each class at separately convened meetings ordered by the court.[25]

However, the English Insolvency Act 1986 introduced a much simpler procedure known as the Company Voluntary Arrangement (CVA) by which distressed companies could negotiate simple compromises or schemes of arrangements with their creditors.[26]

Under section 434 (1) of the Act[27] a company's Board of Directors is empowered to arrange a composition of a company's debts with its creditors to enable it to vary the terms of its loans and enable the company pay over an extended period to ensure its survival. The Act refers to this as voluntary arrangement. It can also be called Company Voluntary arrangement which is similar to the practice in England under the English Insolvency Act 1986. This rescue mechanism enables an Insolvent corporate entity to continue to carry on its business.

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24 Companies Act 2006, S.899 13

25 Goode, R. *Principles of Corporate Insolvency Law* (Sweet & Maxwell 1997)2

26 Adebola, B. (n3) 54

27 CAMA 2020

While commending the intention of Arrangement and Compromise as a form of restructuring corporate entities in financial distress, this researcher has observed that the procedures for effecting such Arrangement and Compromise under sections 714 and 715 of CAMA are cumbersome and complex to apply for ailing company that requires restructuring for rescue in order to continue doing business. The above mentioned provisions of CAMA involves petition to court to sanction the scheme. This may cause delay in effecting the Arrangement and Compromise.

The Companies Winding Up Rules 2001 (CWR)

The Companies Winding up Rules 2001 governs the proceedings in winding up of a company in Nigeria. The Companies Winding up Rules 2001 replaced that of 1983. The 2001 rules applies to all proceedings in every winding-up under the CAMA and the forms in the appendix, where applicable shall be used,[28] provided that the Chief Judge of the Court may from time to time, alter any forms specified in the appendix hereto or substitute new forms in lieu thereof. Where the Chief Judge alters any form or substitutes any new form in lieu of a form prescribed by these Rules, such altered or substituted form shall be published in the Gazette. It is imperative to state here that where no provision is made in the Companies Winding Up Rules, the Federal High Court (Civil Procedure) Rules, 2009 becomes applicable by virtue of Rule 183 of Companies Winding Up Rules, 2001 which provides that in any proceedings in or before the court, where no provision is made by these Rules, the Court's (Civil Procedure) Rules shall apply.[29] Interestingly, there are three insolvency office holders who have duty to render account of their activities during winding up proceedings.

There are several rules provided by the Companies Winding up Rules 2001, aimed at checking insolvency office holders where winding up is by the court. The insolvency office holders include Special Manager, Official Receiver and Liquidators. The duty to render account of stewardship is very vital in insolvency proceedings. Thus, Rule 33[30] empowers the official receiver to bring application to the Federal High Court for the appointment of a Special Manager. Such an application

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28 Rule 2 of Companies Winding up Rules 2001

29 Rule 183 of Companies Winding Up Rules 2001

30 Companies Winding up Rules 2001

shall be supported by an affidavit and a report by the Official Receiver which report shall either recommend amount of remuneration payable to special manager or request the court to fix one. Every special manager shall submit accounts to the Official Receiver and the Special Manager's account shall be verified by affidavit, in form 18 in the Appendix with such variation as circumstances may require and when approved by the Official Receiver, the total of the receipts and payments shall be added by the official receiver to his accounts. Liquidators and Special Managers shall give security upon appointment other than Official Receiver.[31] If a Liquidator or Special Manager fails to give the required security within the time stated for that purpose in the order appointing him, or any extension thereof, the Official Receiver shall report such failure to the court who may thereupon rescind the order appointing the Liquidator or Special Manager.[32] A Liquidator is obliged to have given the security upon appointment before all property is handed over by the Official Receiver.[33]

A critical look at applications to be filed by the Official Receiver or even verification of account requires an affidavit. It can be argued that where an application for verification is not supported by the affidavit as required by the Companies Winding up Rules 2001, such application becomes incompetent and will be struck out. However, by Rule 182 of the Rules,[34] no proceedings under the Act and these Rules shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding, is of the opinion that injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court. This provision gives the Court discretionary power to form an opinion as to when an injustice has been occasioned in the event of any defects or irregularity, in that case the court may remedy the defect or irregularity in the interest of justice. Rule 182 of the Rules which reserves to the court the right to form an opinion as to when injustice has been occasioned by an irregularity is inappropriate. This provision may turn out to be a clog in the wheel of justice. There are no criteria to follow by the court in determining whether injustice has been done by the irregularity of an application not supported by an affidavit filed by the

31 Rule 42 of Companies Winding up Rules 2001
32 Rule 43 Companies Winding Up Rules 2001
33 Rule 149 Companies Winding Up Rules 2001
34 Companies Winding up Rules 2001

Official Receiver. The defect created in the rules by allowing the court to form an opinion as to when injustice has been occasioned by the irregularity is that the court might exercise the discretion wrongly and only according to his sense of what amounts to justice. There is no standard provision to follow by the court in determining whether injustice has been done by the irregularity of an application not supported by affidavit filed by the Official Receiver.

Winding up Procedures

A Company's life time can be brought to an end through this process known as winding up. Unlike other business and non-business organizations, only companies undergo both winding up and dissolution processes, others such as partnership, Business Name and Incorporated Trustees only get dissolved. A statutory corporation is not subject to winding up except as provided by the statute creating it or be dissolved by a statute.[35] In Kwara Investments Co. Ltd v Garuba,[36] the Court held that where a corporation is a creation of statute, only a statute can bring to an end its existence.

Black's Law Dictionary[37] defines Winding up as: "Process of settling the accounts and liquidating the assets of a partnership or corporation, for the purpose of making distribution of net assets to shareholders or partners and dissolving the concern."

Winding up does not mean the end of a company but a process of bringing the life span of the company to an end. The Company would remain a corporate entity; but the running of the company will be bestowed on the Liquidator who manages and administers the company pending the ultimate dissolution of the company, by which time it will no more be in existence. Therefore, winding up is merely a process to end the company. In Tate Industries Plc v Devcom M.B Ltd,[38] it was stated that: "A winding up proceeding is signing the death warrant of a company or pronouncement of the death of the company. It is very serious matter"

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35 Ogbuanya, N.C.S. *Essentials of Corporate Law Practice in Nigeria* (Noverna Publishers Limited 2013)661

36 (2000) 10 NWLR (Pt. 674) CA 25-40 cited in Ogbuanya N.C.S

37 *Black's Law Dictionary.* 6th Ed. 1601

38 (2004) 17 NWLR (Pt. 901) CA 182 @ 225, paras E-G

Ogbuanya[39] defines winding up as: "The process by which a company is liquidated and dissolved (dead) and its assets (if any) distributed in accordance with certain rules of priority, for the benefit of its creditors, members and the employees"

Apart from winding up as a process through which a company's life can be brought to an end, by the provision of section 8(a) (i) of CAMA,[40] the life of a company incorporated under the Act can also be brought to an end by its name being struck off the register of Companies and the Company shall be dissolved. A company can also be wound up in accordance with the provisions of CAMA. Under CAMA,[41] the winding up of a company may be carried out through three methods to wit – by the court; or voluntarily; or subject to the supervision of the court. It has been held that by virtue of section 401 (1) of repealed CAMA, Companies in Nigeria can only be wound up through those three above mentioned ways.[42] A company dies once the court orders the dissolution of the company and not when it is being wound up or the company can also die as provided under sections 8 (a) (i) and 692 of CAMA 2020.[43]

The question that arises here is what are the statutorily required winding up procedures which can bring the company's life to an end? By the provision of section 573 (1) of the Act,[44] a winding up Petition may be presented to the court for the winding up of a company either by any of the following:

a.) The Company or a director;
b.) A Creditor, including a contingent or prospective creditor of the Company;
c.) The Official Receiver;
d.) A Contributory;
e.) A trustee in Bankruptcy to, or a personal representative of a creditor or contributory;
f.) The Commission under section 366 of this Act;

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39 Ogbuanya, N.C.S. (n35)
40 See section 8 (a) (i) of CAMA 2020.
41 See section 564 of CAMA 2020.
42 See repealed CAMA, CAP C20 LFN 2004, decided in the case of Corporate Affairs Commission v Davies (2000) 3 NWLR (Pt.647) 65
43 The Corporate Affairs Commission may strike off the name of a company from the register of Companies.
44 CAMA 2020

g.) A Receiver if authorized by the instrument under which he was appointed; or
h.) By all or any of those parties, together or separately.

In Nigeria, the Federal High Court is vested with the jurisdiction to hear and determine every winding up Petition. Therefore, a petition can only be validly presented when same is filed at the registry of the Federal High Court located within the area of jurisdiction of the registered office or head office of the company. Under Rule 18 of Companies Winding Up Rules 2001, it is mandatory that every petition must be verified by an affidavit referring to the petition and such affidavit shall be made by the Petitioner, or by one of the petitioners, if more than one or, in case the petition is presented by a company by some director, secretary, or other principal officer thereof, and shall be sworn and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition.

A critical look at the provision of Rule 18 of Companies Winding up Rules, shows that there must be a verifying affidavit in support of the petition. However, the verifying affidavit which shall be deposed to by either the petitioner or specific principal officers of the company, shall be sworn to, and filed within four days after the petition is presented. Thus, it means that the affidavit should not necessarily accompany the petition but must be filed within four days after the petition had been presented in court. It is submitted here that where the verifying affidavit is filed with the petition at the same time, it will make the petition incompetent, and this will result to striking out of the petition.

The verifying affidavit must also verify the petition, otherwise, the petition will be struck out. In Farmat Shipping Line Ltd v Establishment De Commerce General,[45] notwithstanding the fact that verifying affidavit was filed, the Supreme Court held that the verifying affidavit did not refer to the petition but contains generally paragraphs of an affidavit and the Supreme Court struck out the petition on that basis.

Upon the presentation of the petition and verifying affidavit, same is to be served on the company, unless presented by the company, at the company's registered office, if any and if there is no registered office

[45] (1971) A.N.L.R 250 cited in Amupitan, J.O. (n13). 18

thereat, the principal or last known principal place of business of the company, if such cannot be found, by leaving a copy with any member, officer, servant of the company or in case no such member, officer or servant can be found there, then by leaving a copy at such registered office or registered place of business or by serving it on such member, officer or servant of the company as the court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the Liquidator (if any), appointed for the purpose of winding-up the affairs of the company.[46] There shall be affidavit of service of any of such petition as stated in form 5 and 6 in the Appendix. Service of process in any winding-up matters shall be in accordance with the procedure laid down for the service of civil processes in the court under the Court's (Civil Procedure) Rules.[47]

After the petition has been filed at the court, a court order is required for the advertisement of the petition. The petition shall be advertised fifteen clear days before the hearing. The advertisement of the petition shall be once or as many times as the court may direct, in the Gazette and in one National Daily Newspaper and one other newspaper circulating in the state where the registered office, or principal or last known principal place of business, as the case may be, of such company is or was situate, or in such other newspaper as shall be directed by the court.[48] The advertisement shall also state the day and date on which the petition was presented; the name and address of the petitioner; the name and address of the petitioner's solicitor; and a note at the foot thereof stating that any person who intends to appear at the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner, or to his solicitor, within the time and manner prescribed by the Rules and any advertisement of a petition for winding up of a company by the court which does not contain such note shall be deemed irregular. The advertisement of the petition shall be in form 9 or 10 as prescribed by the Companies winding-up Rules 2001 with variations as circumstances may require.[49]

It is important to state that though, by rule 19(2) (c), any advertisement of a petition for winding up of a company by the court not in compliance with provisions of the said Rule shall be deemed

[46] Rule 17 Companies Winding Up Rules 2001
[47] Rule 12 Companies Winding Up Rules 2001
[48] Rule 19 (2) (b) of the Companies Winding Up Rules 2001
[49] Rule 17 (2) (c) and Rule 19 (4) of the CWR 2001

irregular. Rule 182(1) of the Rules, however is to the effect that not every irregularity or defect will invalidate a winding up proceeding particularly where no injustice has been occasioned thereby. The court has the discretion to determine whether injustice has been occasioned by such defect or irregularity and where such injustice cannot be remedied by an order of court, then such irregularity may invalidate the proceedings. After the advertisement of the petition for winding up of a company by the court, upon the application of a creditor, or of a contributory or of the company, and upon proof by affidavit of sufficient ground for the appointment of a provisional Liquidator, the court may appoint a provisional Liquidator upon such terms as in the opinion of the court shall be just and necessary.[50] Basically, the purpose of appointing a provisional Liquidator is to preserve the assets of the company pending the determination of the winding up proceedings, especially where the assets of the company could easily be tampered or wasted by the principal officers of the company. The powers of the directors of a company also cease to exist even with the appointment of the provisional Liquidator.[51]

Under Rule 22 of Companies Winding Up Rules, after the hearing at which the order to advertise the petition was made by the court, the petitioner or his solicitor must on the next adjourned date satisfy the court that the petition has been duly advertised, and affidavit verifying the petition and affidavit of service if any are duly filed. Every person who intends to appear on the hearing of a petition must give to the petitioner notice of his intention to appear which must contain his address and be signed by him or his solicitor.[52] Prior to the date fixed by the court for hearing of the petition, the petitioner or his solicitor must prepare and file in the court's registry, list of the names and addresses of persons who intends to appear on the hearing of the petition and of their respective solicitors,[53] and the petitioner or his solicitor shall file the list in the court registry prior to the hearing of the petition on the day appointed for hearing.[54]

Upon the service of the petition, the respondent is required to file an affidavit in opposition to the petition within ten days of the service of

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50 Rule 21 (1) of the Companies Winding Up Rules 2001
51 Section 585 (9) of CAMA 2020
52 Rule 23 of the Companies Winding Up Rules 2001
53 Rule 24 (1) of the Companies Winding Up Rules 2001
54 Rule 24 (2) of the Companies Winding Up Rules 2001

the petition, or in the case of any other party within fifteen (15) days of the date of advertisement of the petition and notice of filing of the affidavit must be given to the petitioner or his solicitor on the day on which the affidavit is filed.[55] The Petitioner has five (5) days within which to file his reply to the affidavit in opposition to the petition from the date of receipt of such affidavit in opposition.[56] After hearing the petition for winding up of a company, the court may either by its order, dismiss the petition or order that the company be wound up. Where the court makes an order for the winding up of a company, a copy of the winding up order is forwarded to the Corporate Affairs Commission by the company or as may be prescribed by the court and the Corporate Affairs Commission shall make a minute thereof in its books relating to the company.[57]

Winding up is a collective proceeding. There are also non-collective proceedings. The two terms are normally used to differentiate corporate insolvency procedures internationally. While collective proceedings deals with formal reorganizations of companies, like Mergers & Acquisitions, Winding up and Arrangement & Compromises which are procedures available to creditors and stakeholders in the company, non-collective proceedings involves informal reorganizations, like private arrangements and compromises with creditors. The Companies and Allied Matters Act does not have provision for private arrangements and compromises, but provides for receivership as a non-collective proceeding. The court takes total control of all the assets of the company in collective proceedings,[58] as seen in receivership.

It is very imperative to state here that the procedures of winding up of a company as stated above only brings the operational activities of the company to an end, after which liquidation of the company follows with the appointment of a Liquidator who will collect the assets of the company for distribution to creditors in order of priority. Any surplus funds shall be distributed to shareholders before the company will finally and formally be dissolved. A copy of the order of dissolution made by the court will then be forwarded by the Liquidator to the Corporate Affairs Commission within fourteen (14) days of making of

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55 Rule 25 (1) of Companies Winding Up Rules 2001
56 Rule 25 (2) of Companies Winding Up Rules 2001
57 Section 579 of CAMA 2020.
58 Idigbe, A. (n16) 8

the order.[59] The process of winding up a company in the opinion of this researcher is very technical and cumbersome. Thus, it appears that if half of the efforts put in winding up a company are deployed to rescue the business of the company by way of restructuring through arrangement and compromise, the interest and wellbeing of the company, creditors, contributories and shareholders of the company will be better served. This will be in line with the international best practices aimed at reviving ailing business of corporate entities instead of liquidation of the companies.

This researcher has observed the unnecessary technicalities in the rules which makes winding up proceedings difficult. For instance, it is required under Rule 18 of Companies Winding up Rules that the verifying affidavit in support of the petition must be filed within four days after presentation of the petition, otherwise the petition becomes incompetent if filed the same time with the petition. There is nothing wrong in filing the petition with verifying affidavit the same time as both are processes that should go together in the proceedings. Again, the requirement by rules that an order of court is required for the advertisement of the petition after it has been filed is unnecessary. It means that the petition must have been filed before another application is made to the court for an order for advertisement of the petition. This will definitely occasion unnecessary delay in the proceedings, having regards to the snail pace nature of judicial proceedings in Nigeria. While this researcher is not averse to publication or advertisement of the petition as required by the Rules, it would be better to include the application for order of court for the advertisement of the petition, the same time with filing of the petition.

Conclusion and Recommendations

The adverse impact of insolvency on corporate entities cannot be overestimated. The increase incidence of corporate collapse is majorly attributed to it. Thus, these challenges requires legislative intervention. Companies must rise up to the challenges posed by corporate insolvency. It is therefore recommended that:

1. Section 564 of CAMA which expressly provides for winding up of company, be amended to reflect or look rescue friendly for companies undergoing insolvency. Except in extreme cases where

[59] Section 617 (2) CAMA 2020.

a corporate entity cannot be salvaged, legislation should encourage saving of viable business.

2. The exercise of jurisdiction of Federal High Court under S. 570 of CAMA in winding up of corporate entities, should be amended to include where the company has subsidiary or operational activities being carried out, as against only the head or registered office or the company.
3. Amendment of Section 705(1)(b) for a person to be qualified to act as insolvency practitioner, to include five years post qualification experience with ascertainment of being in active practice in matters relating to insolvency. A person may have five years post qualification experience but redundant for years. In that case, his experience may not be in tune with current practice and procedures in insolvency matters.
4. Elimination of courts involvement in the cumbersome procedure for effecting arrangement and compromise under sections 714 and 715 of CAMA. This will hasten the procedure if court proceedings is not involved.
5. There should be amendment of section 182 of the winding up rules which allow a court to exercise discretion to form an opinion as to when injustice has been occasioned in application before the court; to provide a standard or criteria in determination of whether injustice has been done by the irregularity of such application not supported by an affidavit filed by the official receiver. A criteria to be followed up by a judge is necessary in the proceedings.
6. It is also recommended that the unnecessary technicality under section 18 of the winding up Rules filing of verifying affidavit within four days after presentation of the petition, otherwise the application becomes incompetent; be amended to read that both the verifying affidavit and petition can be filed concurrently, as both are processes in the winding up proceedings.

Is Justice Ever Truly Served? The Nigerian Judiciary and Oil Pollution and Environmental Cases in Nigeria

Ayodele Morocco-Clarke*

Abstract

Over the years, there have been a plethora of cases instituted by disgruntled and aggrieved litigants against petroleum companies in Nigeria. The common thread of these suits relates to liability for pollution alongside consequential compensation, and the courts are called upon to adjudicate over such disputes. The gravamen of litigants is that when it comes to legal actions against oil companies in the country, justice is slow in coming, if it comes at all or that justice is for sale to the highest bidder. This paper takes an in-depth look at the decisions of the courts in numerous cases involving oil companies, delays within the justice system and also the reputation the judiciary has garnered whilst dispensing justice. It also deals with issues of the enforcement of judgments/rulings and the non-compliance with such judgments by government and powerful State actors. It culminates by proffering recommendations and solutions to ensure that justice is not truncated, and litigants are not left feeling powerless and cheated or robbed.

KEYWORDS: Oil and Gas Cases, Petroleum, the Judiciary, Pollution, Justice, Corruption, Nigeria.

1. Introduction

The judicial interpretation of legislation governing the oil industry and the legality of these laws as well as the actions of the oil companies operating in Nigeria have been of keen interest to industry watchers for many decades. Over the years, litigants have called on the courts in Nigeria to either grant reliefs in respect of aggrievements suffered due to actions of oil companies or to give an interpretation of the provisions of certain statutes with regards to their rights thereunder.

* Ayodele Morocco-Clarke, LL.B. (Hons), B.L., LL.M. (Dundee). Ph.D. (Aberdeen), Legal Practitioner and Associate Professor at the Faculty of Law of Nile University of Nigeria, Abuja, Nigeria. The author can be contacted via e-mail at ayomorocco@hotmail.com or ayomorocconileuniversity.edu.ng. ORCID ID: https://orcid.org/0000-0002-3226-783X.

For almost forty years, it appeared that the attitude of the courts leaned heavily in favour of the oil companies as many of the cases brought by individuals and communities were adjudged in favour of the oil companies. Furthermore, legal justice took so long that a good number of times, the individuals could not afford to pay for the services of a legal counsel and were forced to either discontinue the suit or settle the matter with the oil company for an amount of compensation that usually was originally unacceptable to them. The oil companies on the other hand have appeared to have bottomless reserves and access to the best counsels and legal experts in the business.

This work shall take an in-depth look at various cases which have been filed in Nigerian courts and analyse the manner in which the Nigerian judiciary has interpreted the laws governing the oil industry and decided on the legality or otherwise of the actions of the oil companies and the Nigerian government. It shall culminate in a look at the role of the Nigerian judiciary as an effective arm of government and whether it succeeds in its role as the true and impartial arbiter of justice in the country.

2. Cases Brought Against Oil Companies by Individuals and/or Communities in Nigeria

The is a raft of lawsuits filed in courts in Nigeria by numerous disgruntled parties regarding complaints relating to the oil and gas industry and these have resulted in the development of case law which shows how the judiciary interprets the statutory provisions governing the oil industry.

There are instances in which some courts have issued judgments which have been at variance with the judgements of other courts. In addition to this, courts have been known to dismiss cases on technicalities and appeared unwilling to invoke their powers of equity. In *J. Chinda & Ors v. Shell B.P. Petroleum Company of Nigeria Limited*,[1] the court acknowledged that the plaintiff had suffered damage to their property as a result of the defendant's flare set, but since the claim was brought under the head of nuisance, the court did not find in favour of the plaintiff as it was of the view that the Defendants could not

[1] (1974) 2 R.S.L.R. 1.

prove that the defendant had been negligent in the management and control of the flare set.[2]

In some instances when the courts entered judgment in favour of the aggrieved individuals and/or communities, the compensation awarded was paltry and the plaintiffs ended up feeling like losers anyway. In *R. Mon and B. Igara v. Shell B.P. Petroleum Company of Nigeria Limited*,[3] the plaintiffs brought an action claiming that the defendant caused damage to their fishpond. They asked the court for Two Hundred Thousand Naira compensation. The court acknowledged that the defendants were liable for the damage caused to the plaintiffs' pond, but only awarded the plaintiffs Two Hundred Naira. The fishpond was a source of livelihood for the plaintiffs and the amount awarded was measly. However, the quantum of compensation awarded may be justified by some on the ground that the defendant had paid compensation previously to the plaintiffs' community.

In practice, oil companies prefer to pay compensation to community heads who in turn will distribute the said compensation amongst those people who have suffered some form of damage due to the oil company's actions. While this is convenient for the oil companies, it does not always work to the benefit of the victims as they usually have to contend with corrupt leaders who end up embezzling the funds. Even in those situations where the compensation is not mismanaged, what each victim ends up with is a negligible sum which does little or nothing to restore the victims to their original status quo. Also, in reality, the victims have no say over the manner the compensation is paid, as once compensation is paid to the community via the leader, it usually has the effect of extinguishing what rights to damages such victims might have. Moreover, in instances of oil pollution which affects numerous people, oil companies have been known to refuse to deal with various individual cases stating that the village or community heads would be in a better position to distinguish between genuine and fake claims.

The courts have also been known to uphold the victim's claim but only award a sum exactly the same as the sum the oil company had previously offered the victim as compensation in a bid to settle the claim

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2 O. Adewale, 'Judicial Attitude to Environmental Hazards in the Nigerian Oil Industry', in *The Petroleum Industry and the Nigerian Environment*, Proceedings of the 1985 Seminar, Department of Petroleum Resources (Environmental Planning and Protection Division).

3 (1970-1972) 1 R.S.L.R. 71.

prior to it being brought to court. This happened in the case of *Godspower Nweke & Ors v. Nigerian Agip Oil Company Ltd.*[4]

The poor rates of success recorded by aggrieved communities and individuals who have braved the odds to institute their actions in court have had the effect of eroding the confidence of most victims in the justice system of the country. Some of them view the courts as cohorts of the oil companies and deem it a waste of time and resources to attempt to take on the oil companies in court, especially as they lack the financial wherewithal and clout that the oil companies readily wield.

In *Allar Irou v. Shell BP Petroleum Development Company*,[5] the plaintiff brought a suit against Shell BP praying the court (amongst other reliefs) for an injunction to stop the defendant from further carrying out the acts which was causing pollution to his land and fish pond. The judge decided not to grant the injunction sought, holding that the refusal was not expedient on socio-economic grounds.[6] The court stated that *"to grant the injunction would amount to asking the defendant to stop operating in the area… and cause the stoppage of a trade… mineral which is the main source of the country's revenue"*.[7] Thus, the judge placed more weight on the financial profits of the defendants business to the detriment of the plaintiff, his livelihood, other people who might have become affected by the pollution and ultimately to the detriment of the environment. Decisions like these served only to reinforce the beliefs of natives that the courts were certainly weighted in favour of the oil companies.[8]

Furthermore, aggrieved individuals who institute legal suits against oil companies have been known to have to contend with incessant and unreasonable delays which are a result of tactics employed by defendant oil companies. Going by some cases in the past years, Shell Petroleum Development Company Limited (Shell) has been known to adopt a system in which its counsels (in suits where it is a

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4 (1976) 10 SC. 101. The award was predicated on the defendant's claim that the plaintiffs had **agreed** to accept that sum before instituting the action.

5 Unreported. Suit No. W/89/71 of the High Court holden in Warri, 26th of November 1973.

6 T.O. Ilegbune, 'Environmental Regulation and Enforcement', in O.A. Osunbor, S. Simpson and O. Fagbohun (eds.) *Environmental Law and Policy*, (Lagos: Lagos Law Centre of the Lagos State University, 1998). Pg. 221.

7 Emphasis supplied. M.T. Ladan, 'A Critical Appraisal of Judicial Attitude Towards Environmental Litigation and Access to Environmental Justice in Nigeria', [A Paper Presented at the 5th IUCN Academy Global Symposium] (Rio De Janeiro: 31st May – 6th June, 2007) at Pg. 33.

8 Though it should be borne in mind that the decision in that case was made almost 40 years ago.

defendant) raise preliminary objections and bring interlocutory applications which often have the effect of delaying the hearing of the substantive suit.[9] Where the ruling in those preliminary objections and applications go against Shell, it often decides to appeal such rulings,[10] leading to a system where the case drags on possibly for years and often leaving the plaintiff frustrated and sometimes abandoning the whole suit. The case of *Shell Petroleum Dev. Co. Nig. Ltd & Anor v. X. M. Federal Limited & Anor*.,[11] is particularly instructive in this regard. This was a case initially filed in the Lagos Judicial Division of the Federal High Court on the 26th July 1995, Shell brought an application which was dismissed in June 1996. Shell brought another application in January 1997 which was also dismissed and it appealed this ruling to the Court of Appeal, which also dismissed it in 2003. A further appeal was made to the Supreme Court and the decision of the Supreme Court was delivered on the 14th of July 2006 (This was approximately 11 years after the substantive suit was originally instituted, yet, the substantive matter had not been heard/tried). The Supreme Court referred to Shell's appeal as "frivolous"[12] and stated, "it is very clear... that this is a very needless appeal."[13] The Court of Appeal had previously stated that "...the defendants are merely chasing shadows here rather than substance. They appear to be clinging to technicality at the expense of justice."[14]

This system is often a lengthy[15] and expensive one and many plaintiffs do not have the financial resources available to Shell. It has therefore proven effective for Shell in some instances as the suits are either discontinued[16] or abandoned.

In *Chief Peter Onyoh v. Shell Petroleum Development Company of Nigeria Limited*,[17] the plaintiffs brought an action against the defendant for fair and adequate compensation for the damages they had

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9 As was done in the case of *Shell Petroleum Dev.Co. Nig Ltd & Anor v X. M. Federal Limited & Anor.* [2006] 7 S.C (Pt II) 27; or [2006] 16 NWLR (Pt.1004) 189. See also *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151. *Ikechukwu Opara v Shell Petroleum Development Company Nigeria Limited and Others* [2005] (Unreported) Suit No. FHC/PH/CS/518/05.

10 See *Shell Petroleum Dev.Co. Nig Ltd & Anor v X. M. Federal Limited & Anor* (Supra).

11 (Supra).

12 Per Ikechi Francis Ogbuagu, J.S.C.

13 Per Walter Samuel Nkanu Onnoghen, J.S.C.

14 (Per Oguntade, JCA (as he then was).

15 *Shell Petroleum Dev.Co. Nig Ltd & Anor v X. M. Federal Limited & Anor* (Supra).

16 E.g. *Ikechukwu Opara v Shell Petroleum Development Company Nigeria Limited and Others* [2005] Suit No. FHC/PH/CS/518/05.

17 (1982) 12 C.A. at Pg.144.

suffered as a result of oil and gas escaping from the defendant's pipeline and polluting the plaintiffs' lakes, ponds, economic trees, farmlands and causing the water used for drinking and agricultural purposes to be unsuitable for their purposes. The court of first instance dismissed the plaintiffs' suit stating that the plaintiffs had not proved the defendant was negligent.[18] The plaintiff appealed the decision. The appeal succeeded. The appellate court held that on a proper evaluation of the evidence that had been put before him, the trial judge "…should have held that there was oil spillage and that the oil had escaped from the defendant's location on to the plaintiff(s) property…. On the Rule in *Rylands v. Fletcher*, the plaintiff do not have to prove negligence…"[19]

In *Machine Umudje v. Shell British Petroleum Development Company of Nigeria Limited*,[20] the plaintiffs brought an action for "fair and reasonable compensation" in the sum of £50,000.00 (fifty thousand Pounds) for "injurious affection" to their farmland, fishing ponds and fishing lakes as a result of an oil pollution which had been caused from an oil pit under the control of the defendant. The claim seeking fair and reasonable compensation had been made in line with the provisions of **Paragraph 37** to the **First Schedule** of the then **Petroleum Act** which provided that, "The holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay **fair and adequate compensation** for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands."[21] In stating the plaintiffs' case, counsel to the plaintiff had laid reliance on the rule in *Rylands V. Fletcher*[22] as well as the provisions of **Regulation 25** of the **Petroleum (Drilling and Production) Regulations**,[23] which pertain to the adoption of practicable precautions by a petroleum licensee or lessee to prevent pollution. The trial judge awarded the plaintiffs the sum of £7,200.00 as fair and adequate compensation for the damage they had suffered. Of this amount, the sum of £400.00 was awarded for "injurious affection" to the plaintiff's farmland. An appeal was lodged against this

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18 The trial judge seemed to be of the view that the plaintiffs had to prove that the defendant had been negligent before their action could succeed.
19 Per Okagbue, J.C.A. at P.155
20 (1975) 9-11 S.C. 155.
21 Emphasis added.
22 (1868), L.R. 3 H.L. 330
23 No. 69 of 1969.

decision. When the matter eventually came before the Nigerian Supreme Court, the court was of the opinion that the suit fell under the rule in *Rylands v. Fletcher*[24] and it set aside the award of £400.00 which the trial court had made for "injurious affection" to the plaintiffs land stating that the phrase was a "most curious expression."[25] In addition, the Supreme Court stated that "a claim which asks for a 'fair and reasonable compensation' due to the plaintiffs for damages done to the plaintiffs is most inappropriate in an action for damages in tort." The court however still ruled that the plaintiff were entitled to compensation, though in a lesser sum than had been awarded by the trial court.

The decision of the Supreme Court in the *Machine Umudje* case may lead one to conclude that a victim may only bring his claim under a head of tort for his suit to be successful. It will never be known if the Supreme Court took this stance mainly on the pleadings and submissions of the plaintiffs' counsel who weighted their case in favour of the common law remedies whilst still applying for reliefs in statutory wordings. Nevertheless, it is a fact that **Paragraph 36** to the **First Schedule** of the erstwhile **Petroleum Act** conferred a right on any person whose rights had been disturbed as described, to fair and adequate compensation. Furthermore, Section 11(5)(a) of the **Oil Pipelines Act**,[26] states that "the holder of a license shall pay compensation to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is **injuriously affected** by the exercise of the rights conferred by the licence, for any such **injurious affection** not otherwise made good."[27] Thus, whether or not the expression is curious, it is one which was adopted by the trial judge from the statute books. In addition to this, the same Supreme Court barely a year after delivering its judgment in the *Machine Umudge* case, laid down the rules and principles in the case of *National Electric Power Authority (NEPA) V. Amusa*,[28] upon which a claim for compensation for "**injurious affection**" may be made. Thus, a thumbs up was given by the same Supreme Court to future and potential

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24 The court also considered the claims under the torts of negligence and nuisance.

25 (1975) 9-11 S.C. 155 at Pg. 175.

26 Chapter 338 Laws of the Federation of Nigeria 1990.

27 Emphasis added. See also Section 20(2)(a)-(e) which provides the circumstances and conditions a court shall take into consideration when making an award of compensation to an aggrieved person/party who has been adjudged to suffer damage(s) in accordance with the provisions of Section 11(5) of the Oil Pipelines Act.

28 (1976) 12 SC 99 at Pgs. 113-120.

plaintiffs who might want to bring an action claiming damages under the head of "injurious affection", that it was an actionable head recognised by the apex court in Nigeria. The decision of the Supreme Court in the *NEPA v. Amusa* case remains good law and is the guiding position and binding on lower courts regarding the award of damages regarding injurious affection suffered by a person.

It can be gleamed from the two cases of *Onyoh* and *Machine Umudge* that it is fairly easy for a judge/court to be misdirected as to legal issues as well as procedurally.

In *Oronto Douglas v Shell Petroleum Development Company Ltd & 5 Ors*,,[29] the plaintiff filed a suit at the Federal High Court, asking the court to compel the defendants to comply with with the provisions of the Environmental Impact Assessment Act. The court held that the plaintiff had no *locus standi* to institute the action since he had not shown evidence of any direct injury caused to him or failed to show that his right was affected or that he suffered injury over the generality of the people. The court stated as follows, "The action is frivolous and the plaintiff a busy body should not be allowed to bring the court into contempt and ridicule." The court refused to avert its mind to the justice of the case or the fact that the defendants had refused to adhere to and breached the provisions of a valid subsisting law.[30] Decisions like this have had the effect of deterring litigants from bringing actions against oil companies. On the other hand, in *Centre for Oil Pollution Watch v. NNPC*,[31] the Nigerian Supreme Court did away with the locus standi requirement for public interest litigation and allowed the plaintiff to successfully bring its claim which was based on pollution and the protection of the environment. The court ruled in the plaintiff's favour and elevated the right to a clean and healthy environment to a constitutional right, aligning it with the fundamental right to life protected under Section 33 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

With regards to compensation in oil pollution cases, 1995 was the initial year that saw a marked departure in what had hitherto been regarded as the insensitivity displayed by the courts to the plights of the victims. In the case of *Shell Petroleum Development Company of*

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29 Unreported Suit No. FHC/2CS/573/93. Ruling was delivered on the 17th February 1997.

30 Ayodele Morocco-Clarke, 'The Errant Child: Liability of Parent Companies for the Infractions of their Subsidiaries in Nigeria' (2023) *Law and Social Justice Review*, Vol.4 Issue 1, at 9.

31 [2019] 5 NWLR (Pt. 1666) 518.

Nigeria Limited v. Farah,[32] a blow-out of the defendant's oil well caused extensive damage to the plaintiff's adjoining land. The plaintiff had prior to instituting the action in court received compensation from the defendant for the crops and economic trees which had been destroyed, but the defendant had not paid the plaintiff any compensation for the damage which was done to the land itself. The High Court awarded the plaintiffs a little more than 4.6 million Naira. This was unprecedented in Nigeria up to that time and although at the time, the sum awarded only amounted to roughly forty-five thousand Dollars, it was higher than any court had awarded as compensation before.

Shell appealed the court's decision in the Farah case. In what appeared at the time to be the dawn of a new era in pollution litigation, the Court of Appeal upheld the judgment of the High Court. Confirming in the process the principle guiding the award of damages for injury to land, the court stated –

That principle is to restore the person suffering the damnum as far as money can do that to the position he was before the damnum or would have been but for the damnum. Consistent with this, and as stated in Mayne and McGregor on Damages 12th Edition, Articles 739-749 p635-642, the measure of damages for injury affecting land is as follows:

1. Normal Measure - The normal measure of damages is the amount of diminution of the value of the land. This will be the cost of replacement or repair, or in the case of nuisance, the cost of abatement.
2. Consequential Losses - that is the loss of user profits.
3. Prospective Loss – Damages for prospective loss are in general recoverable. The rule is that damages for loss resulting from a single cause of action will include compensation not only for damage accruing between the time the cause of action arose and the time the action was commenced, but also for the future or prospective damages reasonably anticipated as a result of the defendant's wrong, whether such future damage is certain or contingent."[33]

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32 (1995) 3 N.W.L.R. Pt. 382 at pg. 148.

33 Per Edozie, J.C.A. at pgs. 192 and 193.

The court went further by making an award in respect of discomfort, illness etc. to the plaintiff, stating that beyond damages to the land, a nuisance may cause annoyance, inconvenience, discomfort or even illness to the plaintiff and recovery in respect of such principally non-pecuniary losses is allowable and may be regarded as part of the normal measure of damages.

At the time the Court of Appeal confirmed the decision in the *Farah* case in 1995, the decision was hailed as marking a new beginning in the attitude of the courts in cases involving damages caused by the activities of oil companies. It was hoped that the decision would have the effect of instilling some confidence in the judicial process. There was some anticipation that the decision in that case would have the effect of opening the floodgates of litigation regarding oil pollution claims. However, despite evidence of numerous oil spills within the years following the judgment (e.g. the Mobil oil spill off the Idoho production platform in 1998 which resulted in about forty thousand barrels of light crude oil being spilled), victims of oil pollution have often chosen to shun the litigation route and settle for out-of-court compensation. Many victims have indeed been denied any form of compensation by the oil companies on the ground that the pollution which had occurred was due to "sabotage". This refusal to pay compensation sometimes takes place even though it can be proved that the pipelines which have burst and been responsible for the spillage of oil are several decades old and have been long due for an overhaul.[34] Furthermore, there have been incidents where oil companies have been accused of leaving burst pipelines to continue discharging oil into the environment without acting promptly to stop the leakage and effectively clean the up the spill.[35]

The decision in the case of *Shell Petroleum Development Company of Nigeria Limited V. Chief G.B. Tiebo VII*,[36] followed the Farah case. In this case, the plaintiff brought an action against the defendant seeking compensation in the sum of ₦64,146,000.00 for damages caused in January 1987, when the defendant's pipelines

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34 A. Quarto, Third 'World Traveller – "In a Land of Oil and Agony"', *Earth Island Institute*, (Summer 2000) <http://www.thirdworldtraveler.com/Africa/Nigeria_Land_Oil_Agony.html> Accessed 28/03/2023.

35 An example is the situation that occurred in the Ebubu Ochani spill.

36 (1996) 4 N.W.L.R. (Part 445) at Pg. 657.

carrying oil from its Diebu Creek Flow Station caused a leakage of oil[37] into the environment causing extensive damage to economic trees and marine life. The leak was caused by a corrosion of the pipeline carrying the oil. Before the plaintiff instituted the action, the defendant had offered to pay compensation in the sum of ₦50,000.00, an offer which was turned down by the plaintiff as not reflective of a fair and adequate compensation for the damage that had been suffered. Ensuring that all likely loopholes were covered, the plaintiff in bringing their suit sued the defendant under the Rule in *Rylands V. Fletcher* as well as in negligence and the provisions of the Oil Pipelines Act, of which Section 11(5) states as follows –

The holder of a license shall pay compensation -

(a) to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is i(njuriously affected by the exercise of the rights conferred by the licence, for any such injurious affection not otherwise made good; and

(b) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain, or repair any work, structure or thing executed under the licence, for any such damage not otherwise made good; and

(c) to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of the breakage or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.

If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act.

Section 20(2) goes further to provide that if a claim is made under subsection (5) of Section 11, the court shall award such compensation as it considers just having regard to -

(a) any damage done to any buildings, crops or profitable trees by the holder of the licence in the exercise of the rights conferred by the licence; and

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[37] According to the plaintiff, there was a spill of about six hundred barrels of oil into the environment. This figure was contested by the defendant who claimed that there was only a spill of around forty barrels of oil.

(b) any disturbance caused by the holder in the exercise of such rights; and
(c) any damage suffered by any person by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, **maintain or repair any work, structure or thing executed under the licence**; and
(d) any damage suffered by any person (other than as stated in such subsection (5) of this section) **as a consequence of any breakage of or leakage from the pipeline or an ancillary installation**[38]; and
(e) loss (if any) in value of the land or interests in land by reason of the exercise of the rights as aforesaid.

In this case,[39] the plaintiffs alleged that the defendant had been negligent in the transportation of its crude oil leading to the spill. The defendant vehemently denied this and gave evidence through one of its witnesses that the spillage had been as a result of a corrosion leak. Whilst maintaining that it was not negligent, as the spill had been purely an accident, the defendant also gave evidence that it had cleaned up the spilled oil as quickly as possible. In finding for the plaintiff, the trial judge stated that "…DW1 gave evidence that the spillage was caused by corrosion leak and that in my view, was the proximate cause of the damage complained of by the plaintiffs…. It was not the act of a reasonable man for the defendant to carry crude oil in a corroded pipeline as the evidence of DW1 showed. The plaintiffs are claiming damages for negligence and in my finding, they are entitled to it…."[40] The court awarded the plaintiff compensation in the total sum of ₦6,000,000.00 (Six Million Naira),[41] roughly a tenth of the compensation sought by the plaintiff. In addition to this, the court also ordered the defendants to pay the sum of ₦1,000,000.00 as costs. The

38 Emphasis supplied.
39 i.e. *Shell Petroleum Development Company of Nigeria Limited v. Chief G.B. Tiebo VII* (1996) 4 N.W.L.R. (Part 445) at Pg. 657.
40 See the original case of *Chief G.B. Tiebo VII v. Shell Petroleum Development Company of Nigeria Limited* - Suit No. YHC/14/88 of 27th of February 1992 (Unreported), which was instituted by the plaintiff in the Rivers State High Court holden in Yenagoa (please note that due to the creation of more states, Yenagoa no longer falls within the boundaries of Rivers State, as it is now in Bayelsa State).
41 ₦400,000.00 was awarded as special damages while ₦5,600,000.00 was awarded as general damages.

defendant appealed against the decision and the Court of Appeal upheld the trial courts judgment and award.

The confirmation by the Court of Appeal in the Tiebo case came roughly a year after the Farah judgment showing the award of large compensation was not a fluke, and bringing to bear that a pattern was slowly emerging in which the courts were increasingly leaning towards holding oil companies responsible for pollution which occurs as a result of their activities.

3. The Nigerian Judiciary

3.1 Attitudes to Judicial Decisions in Cases Involving the Oil Industry in Nigeria

Section 6 of the Nigerian Constitution states that the judicial powers of the Federation[42] shall be vested in the courts.[43] Section 6(6)(b) of the Constitution states that the judicial powers of the courts "shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person." Thus, courts have exercised these powers[44] in administering justice in cases brought before them.

The cases discussed in the preceding section above have shown the manner in which the courts have adjudicated over matters brought before them. However, it is a well-known fact that justice does not end or is not served at the point of the delivery of a judgement, but [save for declaratory judgements] when that judgement is actually enforced and its fruits recovered by the victorious litigant. An unenforceable judgement is a bad judgement and in Nigeria, judgements and orders made by courts are often ignored, not because they are incapable of being enforced,[45] but because the courts often lack the clout to follow up such orders and judgements[46] and also because there is no effective

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42 i.e the Federal Republic of Nigeria.

43 Section 6(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Reference in this section is to superior courts of record (which according to Sections 6(5) include *interalia*, the Supreme Court, the Court of Appeal, the Federal High Courts, the High Court of the Federal Capital Territory, Abuja and the State High Courts).

44 These include powers granted by virtue of various statutes as well as the Rules of court.

45 i.e. in any lawful or law abiding society.

46 The Nigerian police which should be the ones who enforce court orders and judgements fail to do so and are regarded as an even more corrupt institution than the judiciary. According to the Human Rights Watch, "Extortion, embezzlement, and other corrupt practices by Nigeria's police undermine the fundamental human rights of Nigerians in two key ways. First, the most direct effect of police corruption on ordinary

independent mechanism or follow-up process to ensure that the court orders are obeyed.[47] In a speech delivered on the 20th of November 2010, Nigeria's Nobel Laureate, Professor Wole Soyinka stated that the years that have gone by since the end of the Abacha dictatorship in Nigeria have been marked by a "gradual descent to lawlessness."[48] He further stated that the "Law was bastardized. The judiciary was handled with contempt."[49] According to Soyinka, "the judiciary had become so relegated that former president Olusegun Obasanjo subverted the law when the Federal Government ignored the Supreme Court's ruling in the case brought by Lagos State on the issue of revenue allocation."[50] On the 7th of April 2011, it was reported that the then Akwa Ibom State governor (Godswill Akpabio) and the then Inspector General of Police (Mr. Hafiz Ringim) disobeyed a Federal High Court order.[51] The flagrant disregard towards the orders made by courts is one issue that has become well known in Nigeria, leaving the judiciary with the image of a toothless bulldog which is all bark and no bite. According to the former Secretary-General of the Nigerian Bar Association (NBA), Mr. Rafiu A. Lawal-Rabana, in an address –

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citizens stems from the myriad human rights abuses committed by police officers in the process of extorting money. These abuses range from arbitrary arrest and unlawful detention to threats and acts of violence, including physical and sexual assault, torture, and even extrajudicial killings.... Second, these criminal acts by the police, coupled with their failure to perform many of their most basic functions, severely undermine the rule of law in Nigeria. The police routinely extort money from victims to investigate a given criminal case, which leaves those who refuse or are unable to pay without access to justice." See Human Rights Watch, Everyone's in on the Game: Corruption and Human Rights Abuses by the Nigeria Police Force (Human Rights Watch: New York, 2010) at Pgs. 2 & 3. Also, Sahara Reporters, 'Nigeria: Corruption Fuelling Police Abuses' (17 August 2010) <http://www.hrw.org/news/2010/08/17/nigeria-corruption-fueling-police-abuses> Accessed 03/10/2023. Also, M. Ihonde, 'Corruption and the Nigerian Police' *The [Nigerian] Guardian Newspaper* (09 August 2006) <http://www.dawodu.com/ihonde1.htm> Accessed 03/10/2023.

47 This again is an issue that deals with the enforcement of judgements and court orders and thus has to do with the enforcement arm of governments i.e. the police (as well as bailiffs).

48 The Nigerian Punch Newspaper, 'Soyinka Decries Disregard for Rule Of Law' (23 November 2010) <http://www.punchng.com/Articl.aspx?theartic=Art20101123473956> Accessed 04/10/2023.

49 Sahara Reporters, ''Reform Nigeria's Judiciary Or Else…" Says Soyinka, As He Receives A Lifetime Achievement Award' (22 November 2010) <http://saharareporters.com/news-page/%E2%80%9Creform-nigeria%E2%80%99s-judiciary-or-else%E2%80%A6%E2%80%9D-says-soyinka-he-receives-lifetime-achievement-award> Accessed 04/10/2023.

50 The Nigerian Voice, 'Soyinka Blames Judiciary, Former Govts for Lawlessness' (23 November 2010) <http://www.thenigerianvoice.com/nvnews/39059/1/soyinka-blames-judiciary-former-govts-for-lawlessn.html> Accessed 04/10/2023. The revenue allocation case brought before the Supreme Court has to do with the revenue accrued to the Federal Republic of Nigeria, which predominantly is derived from oil. See further Sub-Chapter 3.3 above on the issue of resource control, derivation and revenue allocation.

51 Although the order related to the release of a detained political candidate, it shows the impunity with which court orders are treated. Sahara Reporters, '"Reign of terror: Akpabio And IG Ringim Disobey Federal Court Order To Release Akpanudoedehe"', *Sahara Reporters* (07 April 2011) <http://saharareporters.com/news-page/reign-terror-akpabio-and-ig-ringim-disobey-federal-court-order-release-akpanudoedehe> Accessed 04/10/2023.

> *The re-occurring decimal since our return to democracy in Nigeria is the problem of the tendency of Government agencies to disobey Court Orders. This attitude accounts for their selective tendency as regards which court judgement to obey and the ones not to. It also accounts for the disregard for due process in certain activities of the government. However, one major area of concern for the NBA has been the disregard of court judgements by Government agencies. This trend threatens the integrity of the judiciary and the protection of individual rights in the country. The executive controls the police and it is the police that enforce court judgement in Nigeria. The dependence of the judiciary on the executive for the enforcement of judgement allows the executive a leeway to flout court rulings. The public and interest groups do not have a powerful and coordinated voice that can compel adherence to court rulings by the executive.*
>
> *Sadly, these gaps in the political system have been exploited by government in the last 7 years of our democracy. Requirements of due process are not adhered to and the courts are not in a position to enforce its [sic] judgement assuming such a case comes before the court. The complexities of Nigerian political environment have made it difficult to ensure the protection of rule of law.*
>
> *In the last seven years we have recorded a number of instances where the executive have disregarded court orders. From the local government to the Federal Government and its Agencies, the story has always been the same.*[52]

There has been a long catalogue of the Nigerian government[53] and its agencies, disobeying the orders and judgements of the Nigerian courts. These encompass "extra-judicial killings, arbitrary arrest, torture,

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52 R.A. Lawal-Rabana, 'The Nigerian Bar Association and the Protection of Rule of Law in Nigeria'http://www.google.co.uk/url?sa=t&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D36600e1c-9c7b-468a-a5e4-200948a446c2&ei=KoKXTs3XLMqVswb3l_mcBA&usg=AFQjCNG3pfHX9LDZC9wpciLQbHYI-I415w&sig2=fu7kHICE9KiYjbRF8aN8jw> Pgs. 1 and 2. Accessed 04/03/2023).

53 i.e. the legislative and particularly the executive arm of government.

and other human rights violations, actions which contravene the United Nations Universal Declaration of Human Rights, the African Charter on Human and People's Rights and the 1999 Constitution of the Federal Republic of Nigeria."[54] The recurring issue of the disobedience by the Nigerian government and government agencies of court orders and judgements and the contempt with which the judicial arm of government is treated caused such a furore that the Nigerian Bar Association decided to embark on a two day strike in 2006[55] which "crippled the courts throughout the country, demonstrating that the lawyers were one in their resolve to oppose what is clearly government's unacceptable contempt for the rule of law."[56]

In *Gbemre v Shell Petroleum Development Company Nig. Ltd & Ors*,, [57] the court delivered a judgement in which it ordered that all routine flaring of gas in Nigeria must stop. The oil company, the regulator and the Federal Government, which were all defendants in the suit ignored the judgement, and routine gas flaring continues in Nigeria to this day. After the Gbemre judgment, the weak political will of the Nigerian Government with regards to stopping routine flaring could be discerned from the statement of Mr. Emmanuel Agbegir who was a spokesman for the Nigerian Minister for Petroleum.[58] Speaking about the court order, he said, "Certain situations are just impossible. To immediately stop flaring would mean a complete shut down of oil production and I don't think that would be in Nigeria's interest."[59]

The disregard for and disobedience of court orders is not restricted to the government, as companies (which include oil companies) and occasionally, rich and powerful individuals are also known to flout court orders.[60] A case which shows that court orders can be treated with levity by non-government actors is the case of *Ijaw*

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54 P. Nkanga, 'Making the Police Obey Court Judgements' (01 August 2010) <http://234next.com/csp/cms/sites/Next/News/Metro/Crime/5600316-146/story.csp> Accessed 04/10/2023.

55 R.A. Lawal-Rabana, *ibid* at Pgs. 2 and 3. It was a two day boycott which took place on the 13th and 14th of March 2006. According to Lawal-Rabana, the boycott made it impossible for all courts to sit and "was a huge success in that it awakened the slumbering populace and effectively embarrassed the government." See Pg. 3.

56 See All Africa.Com, 'Nigeria: The Lawyers' Court Boycott' (23 March 2006) <http://allafrica.com/stories/200603230195.html> Acccessed 04/10/2023).

57 (2005) AHRLR 151.

58 A. Morocco-Clarke, 'Holding operators in the Nigerian petroleum Industry to a Higher Environmental Standard' (2021) *Global Energy Law and Sustainability*, 2(2). 202 at 207. DOI: 10.3366/gels.2021.0056.

59 Petroleum Africa, ibid.

60 See the Shell cases in Section 2 above.

Aborigines of Bayelsa State v. Shell I,[61] wherein the Federal High Court holden in Port Harcourt on the 24th of February 2006, ordered Shell Petroleum Development Company to pay the sum of $1.5 billion to the Ijaw people in the Delta region of Nigeria. These people make up many communities which have been affected by pollution which has occurred as a result of the activities of Shell and the compensation was for the environmental degradation of their communities since 1956. Shell refused to pay and instead appealed the decision. It must be born in mind that the order that Shell pays the above stated damages was initially made by the Nigerian House of Representatives after Shell and the Ijaw community had submitted themselves for the settlement of the dispute before the House. Shell refused to abide by the decision of the House of Representatives and subsequently the Nigerian Senate after looking into the matter re-affirmed the decision that Shell should pay the $1.5 billion damages to the Ijaw people. Shell still refused to pay and the Ijaw feeling frustrated filed an action against Shell at the Federal High Court which also decided that Shell should pay the damages. Shell did not obey the judgement but decided to appeal and applied for a stay of execution of the judgement. In addressing this application, the court ordered Shell to pay the $1.5 billion to the Central Bank of Nigeria (which was a neutral party) until the determination of the appeal, but Shell still refused to obey the order of court.[62]

It is clear that within Nigeria, litigants face issues and problems relating to access to justice, delay in obtaining justice, and exorbitant costs to the attainment of justice, enforcement of judgements and compliance with the law and rulings/judgment of court.

3.2 The Perception of the Judiciary

In addition to the issue of the flagrant disregard of court orders and judgements, the Nigerian judiciary has over the years and increasingly in recent times been rocked by scandals relating to corruption.[63] It has become common for the Nigerian courts to be

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61 Unreported. Suit No. FHC/YNG/CS/3/05. Judgment delivered by Justice Okechukwu Okeke, Federal High Court Port Harcourt, Rivers State on 24 February 2006.

62 Morocco-Clarke, 'The Errant Child…', ibid at 10.

63 Sahara Reporters, '"*Reform Nigeria's Judiciary Or Else…" Says Soyinka, As He Receives A Lifetime Achievement Award*' (22 November 2010) <http://saharareporters.com/news-page/%E2%80%9Creform-nigeria%E2%80%99s-judiciary-or-else%E2%80%A6%E2%80%9D-says-soyinka-he-receives-lifetime-achievement-award> Accessed 04/10/2023.

referred to as giving "cash and carry judgements".[64] The perception of the Nigerian judiciary as inherently corrupt is one which goes back several years. It has been reported that "Allegations of corruption in the judiciary were so rife that, as far back as 2005, the then Chief Justice of Nigeria (CJN), Justice Mohammed Uwais, cautioned judges against corrupt practices. "These are not the best of times for the judiciary. The moral uprightness of members of the judiciary is being queried on a regular basis."[65]

Over the years, people have seen the Nigerian judiciary which had hitherto been the most reliable arm of government (especially in a nation which has been beset by many years of government under military rule) and regarded as the last bastion of the common man, beset by wide-spread corruption. It should be stated at this point that according to a report released in December 2009 by the Nigerian National Bureau of Statistics (NBS),[66] the Nigerian judiciary was one of the least corrupt institutions in Nigeria when viewing the "request" for the payment of a bribe by public officials.[67] However, the same report went on to provide that the Nigerian courts were the institutions in which the highest sums (in bribe) were paid.[68] The NBS survey found that 5% of interviewed business declared they should have filed a claim in courts in 2006, but they preferred not to do so.[69]

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64 I. Nnochiri, 'Corruption in the Judiciary: CJN, NBA to the Rescue?' *The Nigerian Vanguard Newspaper*, (29 September 2011) <http://www.vanguardngr.com/2011/09/corruption-in-judiciary-cjn-nba-to-the-rescue/> Accessed 04/10/2023. Also, The Sun Newspaper, 'Tackling Corruption in the Judiciary' (Editorial of 28 September 2011) <http://sunnewsonline.com/webpages/opinion/editorial/2011/sept/28/editorial-28-09-2011-001.html>Accessed 04/10/2023.

65 L. Obijiofor, 'Nigeria: Groping for Light in Corrupt Judiciary', *All Africa.Com* (27 September 2011) <http://allafrica.com/stories/201109270353.html> Accessed 04/10/2023.

66 This was a report on a business survey on crime and corruption conducted in conjunction with the Nigerian Economic and Financial Crimes Commission (EFCC) and with the support of funding from the European Union and the United Nations Office on Drugs and Crime (UNODC). See National Bureau of Statistics and Economic and Financial Crimes Commission, *NBS/EFCC Business Survey on Crime & Corruption and Awareness of EFCC in Nigeria, 2007: Summary Report* (December 2009) <http://www.nigerianstat.gov.ng/ext/latest_release/NBS_EFCC%20Survey.pdf> Accessed 04/10/2023.

67 See National Bureau of Statistics and Economic and Financial Crimes Commission, 'NBS/EFCC Business Survey on Crime & Corruption and Awareness of EFCC in Nigeria, 2007: Summary Report', at Pg. 3. Also, C. Onwualu, 'Judiciary is Nigeria's Least Corrupt Institution' *234 Next Newspaper* (09 July 2010).

68 National Bureau of Statistics and Economic and Financial Crimes Commission, *NBS/EFCC Business Survey on Crime & Corruption and Awareness of EFCC in Nigeria, 2007: Summary Report*, at Pg. 4.

69 ibid at Pg. 8.

According to the Nigerian Voice in a feature article –

> ...it is taken for granted that in a society buffeted by corruption such as ours, a courageous, independent, unbiased and financially autonomous judiciary is a most needed bulwark against the continued reign of the monster of corruption and graft in the country. An indispensable tool in any meaningful anti-graft war! Nigeria, sadly, has not been particularly fortunate in its drive to evolve a functional democratic governance since 1999, which could deliver the oft-mentioned but elusive dividends to the people, principally because of the unspeakable greed of its political class, and the attendant impunity accentuated by a seemingly compromised and disabled judiciary. The effects are everywhere for anyone to see.[70]

As might be expected, the widespread corruption within the judiciary and the very perception of the masses, businesses and even people and institutions abroad, have had the effect of eroding the confidence of the populace in the impartiality of the judiciary and the ability of the courts to fairly dispense justice.[71]

4. Recommendations

In light of:

(a) the delay to attaining justice suffered by litigants;
(b) the unpredictability and lopsidedness of judicial decisions;
(c) the fact that some judges have shown a lack of knowledge of some legislation; and
(d) the issue of corruption within the judiciary,

It is imperative that new pathways must be taken to buck the trend that the Nigerian judiciary is nothing but an incompetent and corrupt bulldog which is not fit for purpose and incapable of dispensing justice

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[70] Emphasis supplied. The Nigerian Voice, 'Nigerian Judiciary as Temple of Corruption' (Feature Article, 26 July 2010) <http://www.thenigerianvoice.com/nvnewsp/31100/1/pagenum/nigerian-judiciary-as-temple-of-corruption.html#continue> Accessed 04/10/2023.

[71] It goes without saying that these include potential litigants in oil pollution and environmental cases.

and providing succour to the downtrodden or the aggrieved within the country.

As a way forward, the following paths may be taken in a bid to restore the confidence in the judiciary by the masses:

(i) *Training and Continuous Legal Education of judges and Judicial Officers:* As can be seen from the Machine Umudje case covered above, there are instances when judges are either unaware of extant laws or might have forgotten relevant provisions of relevant laws when deciding cases before them. It is therefore imperative that judges periodically go through training and continuous legal education to keep them abreast of modern trends and legislation. Former governor of Delta State, Dr. Ifeanyi Okowa aptly stated that, "…judicial education and constant training of critical workers was imperative in enhancing the quality of justice delivery and performance of courts…"[72]

(ii) *Addressing Nigeria's Weak Political Will:* As has been shown in the preceding parts of this work, "[W]hen it comes to the strict enforcement of laws by regulators and the enforcement of and compliance with court orders/judgments, Nigeria's past record is unimpressive as strict adherence to laws/orders and the enforcement thereof is a lottery that is dependent on which influential or powerful interest is vested and at stake."[73]

If the judiciary is to be succeed in its role as the independent arbiter and dispenser of justice, the Nigerian State and government has to develop a strong political will and an unwavering respect for the rule of law. The government has to place more weight on respecting, enforcing and complying with the laid down laws, regulations and court judgments, instead of placing a premium on the pecuniary gains it stands to make from the petroleum industry to the detriment of the environment and its citizens/residents.

(iii) *Timely and Appropriate Prosecution of Corrupt Judicial Officers:* The reputation of the Nigerian Judiciary has taken a battering

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72 Vanguard Newspaper, 'Regular training for judiciary workers imperative says Okowa' (29 June 2021) <https://www.vanguardngr.com/2021/06/regular-training-for-judiciary-workers-imperative-says-okowa/> Accessed 13/10/2023.

73 A. Morocco-Clarke, 'In the Midst of So Much Injustice, Can There be a Seat for Energy Justice at the Nigerian Table?', (2023) *Journal of World Energy Law and Business*, 16(3). 251 at 265. <https://doi.org/10.1093/jwelb/jwad003> Accessed 13/10/2023.

over several years. In order to restore the confidence of the masses and indeed the international community in the judicial arm of government, it is necessary that any judicial officer found to have taken a bribe or to have engaged in corrupt practices must be brought to book and stripped of her/his elevated position as a officer in the temple of justice. Where there is a systemic and regular weeding out of corrupt judicial officers, others will be reluctant to follow in such ignoble steps and the public will be aware that justice in the country is no longer mainly available to the highest bidder or to litigants who can buy a judgment for the highest fee. Once the clean-up of the judiciary is achieved, confidence will be restored that the courts are the last bastion of the common man.

(iv) *Awarding Appropriate and True Costs for Frivolous Applications and Delaying Tactics:* Over the past decades, the Nigerian courts have often failed to award appropriate costs to failing parties in a suit. Costs in the past were often awarded as a symbolic gesture and never reflected the real financial expenses borne by the winning party in a suit. The courts have slowly increased the amounts they award as costs, but till date such sums do not often cover the actual expense incurred. It is necessary that the courts award appropriate costs especially for frivolous and time-wasting applications and law suits. These costs should reflect the financial input of the winning party and the length of time such frivolous applications/suits took. This will undoubtedly have the effect of causing litigants and their counsels to re-consider the exigency of filing an application or indeed a case.

(v) As a last resort, potential litigants affected by the actions of multinational petroleum companies and who do not have confidence in the Nigerian judiciary can, as a last resort, decide to institute their legal actions in the jurisdictions of the parent companies of such multinational companies operating in Nigeria. This has been done by some litigants, e.g. the case of *Okpabi & Ors. v. Royal Dutch Shell Plc & Anor*,[74] where the plaintiffs filed their lawsuit against the defendants in the United Kingdom.

[74] [2021] UKSC 3.

5. Conclusion

This work has traced a plethora of cases adjudicated by the Nigerian courts which dealt with various complaints instituted by individuals, communities, states and groups who felt aggrieved in one form or the other by the acts and/or omissions of oil companies operating in Nigeria or who have called into dispute the legality of the current ownership of Natural resources. The cases covered above show a steady – if slow – development of case law. However, as can also be seen above, there appears to be no uniformity in the decisions handed down by the courts. Furthermore, litigation is often lengthy and expensive for the litigants with no certainty as to what the outcome could be. Moreover, individuals and communities do not have access to the vast financial reserves that the oil companies have and the delaying tactics adopted by some counsel by filing numerous interlocutory applications in a suit, as happened in cases like *Gbemre v. Shell Petroleum Development Company of Nigeria Limited & Others*,[75] mean that justice can be very slow in coming, if it does come at all.[76] To cap all these is the fact of the disregard for court judgements and orders and the corruption within the Nigerian judiciary, which have resulted in a lack of confidence in the very judicial process which should ordinarily serve as a shelter (and provide succour) for those whose rights have been trampled upon.

The glaring problems shown in the regulation of the oil industry and the enforcement of laid down rules and legislation as well as the numerous difficulties encountered by litigants when trying to have access to justice via the law courts (as covered in this work) have led some litigants to try to seek redress through other means. There needs to be a paradigm shift if the judiciary is going to take its rightful place as the true and respected 3rd arm of government in Nigeria and the recommendations proffered above will be a good step in the right direction.

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75 (Supra).

76 And where justice does indeed finally come to the aggrieved parties, the legal maxim 'Justice delayed is justice denied' becomes applicable and it cannot be over-emphasised that (apart from individual losses or inconveniences) where the environment is negatively impacted by the actions or omissions of any party, it is always best to act in an expedited manner to mitigate whatever damage might be the resultant effect.