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EDITOR'S NOTE

In our ongoing commitment to enriching the knowledge base of African law students, the team is proud to present this carefully curated edition of the Lawrit Journal of Law. This journal has been put together, bearing in mind the current needs of an average African student in the legal landscape.

It is noteworthy that this is not just a result of the team's dedication to contributing to the current knowledge base, but also the painstaking efforts of our authors who have dexteriously come up with such didactic pieces for the benefit of the reader.

It is imperative to state that the collection of numerous efforts has helped bring this to fruition.

This edition of our the Lawrit Journal of Law, containing sixteen (16) thoroughly-reviewed articles have been sources within and beyond the Nigerian borders, to cater for our diverse audience.

As you delve into this edition, we hope you find it satisfactory for your research endeavors, informative for your educational journey, and engaging for your intellectual curiosity.

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THE POWER OF INTERNATIONAL TRIBUNALS: LIMITATIONS OF THE INTERNATIONAL CRIMINAL COURT

Emmanuella Akio^{*1}

ABSTRACT

The establishment and functioning of international tribunals have been crucial in addressing grave violations of international humanitarian law and promoting accountability for war crimes, genocide, and crimes against humanity.² These tribunals play a significant role in ensuring that perpetrators of these crimes are held accountable, and justice is served. Two prominent cases that have garnered international attention and raised questions about the power and effectiveness of international tribunals are the Russia-Ukraine conflict and the Israel-Palestine conflict. Therefore, this article examines the impact of the International Criminal Court (ICC) building efforts in post-conflict rule of law-based societies, with emphasis on the Russia-Ukraine conflict and the Israel-Palestine conflict.

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² Rita Mutayaba, 'The International Criminal Court - Its Impact and the Challenges It Faces in Fulfilling Its Mandate' SSRN (2013) <<https://ssrn.com/abstract=2295911>> accessed 24 February 2024.

INTRODUCTION

In recent years, the world has witnessed the devastating consequences of conflicts and atrocities, particularly in the cases of the Russia-Ukraine conflict and the Israel-Palestine conflict. These conflicts have resulted in numerous human right violations and raised questions about the role of international tribunals in promoting justice and accountability.³ The International Criminal Court (ICC), as a global institution, has the power to investigate and prosecute individuals responsible for grave international crimes. However, the effectiveness and impact of the International Criminal Court in these cases have been a subject of debate.

LIMITATIONS OF THE POWERS OF THE INTERNATIONAL CRIMINAL COURT: AN ANALYSIS

International tribunals, such as the International Criminal Court, hold significant power and authority in addressing grave violations of international humanitarian law. They can investigate, prosecute, and hold accountable individuals responsible for war crimes, genocide, and crimes against humanity.⁴ These tribunals serve as important mechanisms for promoting justice, ending cultures of impunity, and contributing to transitioning to societies based on the rule of law. In the aftermath of conflicts, national institutions may be weakened or corrupted, making it necessary for international tribunals to step in and ensure justice is served.

While the International Criminal Court has made significant contributions, shedding light on violations of international humanitarian law and human rights abuses in conflicts such as the Russia-Ukraine conflict and the Israel-Palestine conflict, the challenges faced in exerting its power and authority cannot be overlooked.

One of the primary challenges is the limited jurisdiction of the International Criminal Court. The Court's jurisdiction is restricted to crimes committed by individuals from states that have ratified

³ William W Burke-White, 'The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina' *University of Pennsylvania Carey Law School* (2008) 178 <https://scholarship.law.upenn.edu/faculty_scholarship/178/> accessed 10 February 2024.

⁴ 'International Criminal Court' <<https://www.icc-cpi.int/>> accessed 28 February 2024.

the Rome Statute⁵. This limitation becomes evident in conflicts where key perpetrators may not be from states that are signatories to the statute as the ICC's jurisdiction is limited to crimes committed within the territory of a state party or by nationals of a state party. As in the case of Russia's involvement in the Ukraine conflict, neither Ukraine nor Russia is party to the Rome Statute hence, the ICC's jurisdiction is not automatically triggered in this conflict. Additionally, the ICC's jurisdiction can also be authorized by the United Nations Security Council. However, the Security Council's veto power possessed by certain permanent members can hinder the court's ability to investigate and prosecute crimes in politically sensitive conflicts. This limitation has been evident in the case of the Ukraine-Russia conflict, where Russia has used its veto power to block efforts by the Security Council to refer the situation to the ICC.

Furthermore, even if the ICC were to obtain jurisdiction in the conflict, there are challenges in gathering evidence and ensuring cooperation from relevant parties. These challenges can include the reluctance of the parties involved to cooperate with the court's investigations, the destruction or concealment of evidence, and the difficulties in accessing the conflict zone safely. The reliance on state cooperation poses a significant challenge for the International Criminal Court. In both the Russia-Ukraine conflict and the Israel-Palestine conflict, obtaining cooperation from relevant states, particularly from those whose nations are implicated in the crimes, has proven to be a daunting task. The political influence of these states further complicates the court's ability to fully address the crimes committed in these conflicts.

Also, the International Criminal Court's effectiveness is hindered by the complexities of navigating its jurisdiction in politically sensitive and complex conflicts. The Israel-Palestine conflict, for example, involves ongoing disputes over the status of Palestine as a state, and the involvement of powerful political actors adds another layer of complexity to the court's efforts to hold key perpetrators accountable. Despite these challenges, the International Criminal Court's involvement has been crucial in drawing international attention to the atrocities committed and providing a platform for victims to seek justice. However, addressing the limitations and

⁵ United Nations, 'Rome Statute of the International Criminal Court' (*ohchr*) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court>> accessed 28 February 2024.

challenges faced by the court in exerting its power and authority in complex international conflicts remains a pressing issue.

CONCLUSION

In conclusion, the International Criminal Court plays a crucial role in shedding light on violations of international humanitarian law and human rights abuses in complex international conflicts such as the Russia-Ukraine conflict and the Israel-Palestine conflict. It has provided a platform for victims to seek justice and has drawn international attention to the atrocities committed. However, the court faces significant challenges in exerting its power and authority, including limited jurisdiction, complexities in politically sensitive conflicts, and reliance on state cooperation. Addressing these limitations and challenges will be essential for the International Criminal Court to effectively promote justice and accountability in post-conflict societies and contribute to the transitioning of societies into those operating by the principles of rule of law.

ADDRESSING LEGAL ISSUES IN THE USAGE OF BIOMETRIC DATA IN NIGERIA:
A COMPARATIVE REVIEW OF THE BIOMETRIC INFORMATION PROTECTION
ACT OF
THE UNITED STATES

Daniel S. Padonu⁶

ABSTRACT

Biometric data is frequently used to uniquely identify an individual. However, recent studies show that biometric data acquired for identification purposes when processed reveals sensitive information about data subjects rendering them vulnerable and infringing on their privacy rights. It is therefore argued that data protection framework in Nigeria is blatantly insufficient to effectively protect the vulnerabilities brought on data subjects by reason of the processing of their data. The perspective is founded on a careful examination of Nigeria's current legal framework vis-a-vis the privacy, security, human rights, ethics and socio-cultural implications associated with the processing of biometric data of data subjects. Through deliberate comparison with the Illinois' Biometric Information Act of the United States, this paper identifies challenges which impedes the protection of biometric data and proffers solutions.

Keywords: Data, Biometric Technology, Privacy, Data Protection

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INTRODUCTION

Data has become one of the most significant assets for both individuals and corporations in the current digital era. The 21st century, marked by rapid technological innovations/advancements and widespread internet usage, have made data collecting, processing, and storage less daunting. These technological advancements, particularly the usage of biometric systems and technology, have become an incredible tool in obtaining individual's personal data for the seamless performance of activities ranging from the personal use of smart devices to the performance of commercial transactions among private or legal entities, conduct of government surveillances, implementation of security measures, conduct of civil activities such as elections among numerous others.⁷ These set of personal data obtained via the use of biometric systems are regarded as **"biometric data"**. The interpretation section⁸ of the *Nigerian Data Protection Act 2023*⁹ explains biometric data as *"any personal data resulting from specific technical processing relating to their physical, psychological or behavioural characteristics of an individual, which allow or confirm the unique identification of that individual, including without limitation by physical measurements, facial images, blood typing, fingerprinting, retina scanning, voice recognition, DNA analysis."* According to a recent survey on consumer perception of biometrics, 82% of individuals who have access to devices equipped with fingerprint sensors utilizes them.¹⁰

With the proliferation in the usage of biometric technology in general course of dealings, the unequitable vulnerabilities on data subjects' security and privacy of their biometric information raises weighty concerns. The *Article 29 Working Group*¹¹ discovered that sensitive information such as health status, disease susceptibility, and racial or ethnic origin are contained in biometric

⁷ Samuel Uzoigwe, "Biometric Technology in Nigeria: Examining Data Privacy Concerns", <<https://aanoip.org/biometric-technology-in-nigeria-examining-data-privacy-concerns/>> accessed 27 February 2024.

⁸ Section 65 of the ACT.

⁹ The Nigeria Data Protection Act 2023 ("NDPA") is Nigeria's first major federal legislative instrument governing personal data processing and protection. The NDPA, along with its regulatory framework in Nigeria, provides a comprehensive approach to personal data protection. To a significant extent, the NDPA parallels the European Union ("EU") General Data Protection Regulation ("GDPR"), but adds a few new legal concepts.

¹⁰ Alžběta Krausová, Hananel Hazan, Ján Matejka, "Biometric Data Vulnerabilities: Privacy Implications", <<https://www.researchgate.net/publication/328392791>> accessed 27 February 2024.

¹¹ Working Party on the Protection of Individuals with regard to the Processing of Personal Data (Article 29 Working Group) was an independent European Union advisory body on data protection and privacy. It was composed of the European Commission, the European Data Protection Supervisor, and a delegate from each EU Member State's data protection body.

data¹² as it is considered the most personal information a person possesses because it is an unalterable link to their identity.

Consequently, there is a need to harmonize the legal, ethical, and technical frameworks in order to guarantee the privacy of people's biometric data and minimize inherent risks. This article aims to elucidate on the legal concerns arising from the processing of biometric data while exploring means to ensure adequate protection.

EMBRACE OF BIOMETRIC SYSTEM/TECHNOLOGY IN NIGERIA

Due to inadequate identity management systems, several forms of fraud were largely addressed in Nigeria with the advent of biometric identification. *A priori*, the country's poor identity management system allowed unscrupulous individuals to easily manipulate the system by creating bogus individual profiles for various objectives. Fake passports and driver's licenses, inactive bank accounts plundered by dishonest bank personnel, fraudsters diverting earnings to shareholders, and other widespread issues were all part of the problem. Notable and yet embarrassing is the escape of Diepreye Alamieyeseigha, a Nigerian state governor, who returned to his home village a folk hero after apparently escaping the UK's prison in a female dress and on a forged passport after being indicted of €1.8million charge.¹³ Hence, the need for a proper identity system for its citizens which would enhance access to social services and also aid in curbing crime. This paper aims to examine how different organizations in Nigeria are employing biometric technology and how same is advancing both national development and security.

a. Commercial Banks

There is a strong need for increased security for access to sensitive or personal information in the banking system due to the rising number of compromising incidents on traditional security systems (passwords and PINS). Recent advancements in real-time security procedures have led to the implementation of BVN and the analysis of human traits using biometric technology as an improved method of identification and authentication.¹⁴ The Central Bank of Nigeria (CBN)

¹² Ibid (n 2).

¹³ The Guardian, "Nigerian state governor dresses up to escape £1.8m charges in UK", <<https://www.theguardian.com/world/2005/nov/23/hearafrica05.development>> accessed 27 February 2024.

¹⁴ Ehiagwina Frederick, Afolabi L.O, "MANAGING INSECURITY WITH BIOMETRIC ENGINEERING: AN OVERVIEW OF THE NIGERIAN EXPERIENCE",

adopted the Bank Verification Number (BVN) in February 2014, which was one of the first biometric measures employed.¹⁵ It entails utilizing biometric technologies to register consumers in the banking system. This is accomplished by collecting and storing each customer's distinct physical characteristics, like their fingerprints and facial features. After then, this collected data is used for multiple transactions to accurately identify the customer. It will not be feasible to open and maintain a personal bank account in Nigeria without the BVN.¹⁶ The project's goal is to use biometric data to identify and validate every person who has an account at any Nigerian bank, and then to use that data to authenticate customers' identities during transactions.

b. Nigerian Communication Commission (NCC)

The Nigerian Communications Commission (NCC) used a fingerprint reader and facial biometric capture device to roll out a biometric SIM card registration system across the nation. In order to generate an accurate user database for tracking SIM card usage, prevent fraud, and discourage criminals from selling pre-activated SIM cards, the implemented biometric identification system requires civilians to register their biometric credentials for SIM card registration. This has made it easier for telecom providers and the NCC to trace and monitor mobile activity by enabling the creation of a centralized database containing over 140 million SIM card user fingerprint biometric templates.¹⁷ The primary goal of Nigeria's biometric-backed sim registration program is to help law enforcement agencies enhance their security protocols by minimizing robberies, kidnappings, cybercrime, and acts of terrorism.

c. National Identity Management Commission (NIMC)

The National Identity Management Commission (NIMC) is the body in charge of gathering citizen data. Their tasks include assigning unique serial keys with eleven (11) digits that serve as the citizen's identification number (also known as the NIN) and updating the current identity database. NIN is generated for individual records using a multimodal biometric recognition method that involves gathering ten fingerprints, head-to-neck facial and signature information,

<https://www.researchgate.net/publication/292367915_MANAGING_INSECURITY_WITH_BIOMETRIC_ENGINEERING_AN_OVERVIEW_OF_THE_NIGERIAN_EXPERIENCE> accessed 28 February 2024.

¹⁵ Central Bank of Nigeria (2019), 'Payment System: Bank Verification Number (BVN)',

<<https://www.cbn.gov.ng/Paymentsystem/BVN.asp>> accessed 28 February 2024.

¹⁶ Ibid (n 2)

¹⁷ Case Study on Biometric SIM Card Registration System in Nigeria, <<https://www.m2sys.com/blog/case-study-on-fingerprint-biometric-based-sim-card-registration-system/>> accessed 28 February 2024.

and demographic data.¹⁸ All Nigerian citizens and legal residents are required to enrol for the NIN, which necessitates the NIMC gathering and processing biometric data from citizens.

The NIN can be used to get a variety of services, including government social services such as loan applications, voter registration, the issuance and renewal of international passports, and bank account opening and reactivations. Most recently, the Joint Admissions and Matriculation Board (JAMB), which is in charge of administering admission exams and placing students in Nigerian higher institutions, made having a National Identification Number (NIN) a prerequisite for candidates wishing to register for the 2021 examination. This provision was designed to combat checkmate examination misconduct. Also in December 2020, the Federal Government of Nigeria ordered that all Nigerians link their National Identification Numbers (NINs) to their SIM cards or risk losing the ability to possess and operate the numbers given to such SIM cards.¹⁹

LEGAL ISSUES ASSOCIATED WITH THE USE OF BIOMETRIC TECHNOLOGY

The widespread adoption of sophisticated technologies such as biometric technology for the collection, storage and processing of confidential information raises concerns about the protection and security of individuals' data which underscores the very essence of privacy rights guaranteed not only in domestic legislations, but recognized internationally under various international instruments and treaties.²⁰ Without doubt, incredible advancements in electronic data processing systems and devices have enabled governments and large corporations to construct large data banks in order to better and expand the collection, processing, and interchange of personal data, with positive intent. However, this comes at a great cost to individuals' privacy and has raised concerns as to whether the private life of data subjects is, in truth, safeguarded. There are significant privacy arguments that personal data gathered by public and private entities may not be handled properly and wisely, as well as serious privacy issues about the proper protection of individuals' rights.

¹⁸ T. F. Sholanke, "Biometrics Application: A Critical Review", Journal of Technology and Systems, ISSN : 2788-6344 (Online), Vol.5, IssueNo.1, pp 22 –39, 2023, <<file:///C:/Users/USER/Downloads/1391-Article%20Text-4392-1-10-20230813.pdf>> accessed 28 February 2024.

¹⁹ Ibid (n 2).

²⁰ The Universal Declaration of Human Rights (UDHR), which has now received the status of customary international law, is the foremost international treaty on the protection of human rights worldwide. Article 12 of the Declaration provides for the right to privacy of humans.

Biometric data systems pose a multitude of privacy issues, from fraud and social sorting to identity theft made feasible by unauthorized parties hacking biometric databases and subsequent data breaches.²¹ Data subjects become vulnerable when databases are hacked or used for purposes that differ from the basis on which it was collected. If stolen or copied, biometric data can provide access to that person's most sensitive secrets, data, bank accounts, and so forth. In July 2019, a profile data breach was revealed in the United Kingdom. Data from 339 million customers' personal records was taken in a cyberattack that began in 2014 against the Marriott Hotel network database. Passport numbers, credit card details, log-in credentials, and travel itinerary details were among the sensitive information taken. Further information from the Information Commissioner's Office (ICO) showed that over 400,000 consumers' data was compromised due to a data breach that also affected British Airways.²²

The concerns about access to biometric data emerge when the data controllers blatantly violate the principles of data protection which are embedded in various data protection laws locally and internationally.²³ As universally acknowledged, data protection principles include but not limited to transparency, fairness, integrity and accountability. Compliance with these principles will truncate the occurrence and reoccurrence of data breach on the part of data controllers. However, it has been the incessant habits of data controllers to allows access to multiple governments or private entities for a variety of reasons, such as third-party verification or security activities by security services. Data subjects may not be aware of all the true uses of biometric data or how much it is shared and transferred among corporate entities, making their lives and concerns less private than ideal. The purpose for which biometric data is collected may not be the only purpose for which it is used. Because of the nature of permission, such as the need for more information before giving consent or the serious consequences of withholding consent, data subjects' purported assent—whether express or implied—to the collection and processing of their data may be questioned.

²¹ Ibid (n 2)

²² “Biometric Data & Privacy Laws (GDPR, CCPA/CPRA)”, <<https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/biometrics/biometric-data>> accessed 28 February 2024.

²³ The OECD Privacy Framework, <https://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf> accessed 28 February 2024.

DATA PROTECTION FRAMEWORK FOR BIOMETRICS IN NIGERIA

It is noteworthy that there is no single legislation enacted specifically for the protection of biometric data in Nigeria. Rather, an array of regulations that deal with the regulation of the data of its citizens. They are best defined as a patchwork of regulations, as they serve distinct purposes for various industries. However, just the constitution and the Nigerian Data Protection Act 2023, which is presently the most comprehensive legislation on data protection, will be examined.

The *1999 Constitution of the Federal Republic of Nigeria* (as amended) is the most superior legislation in Nigeria and is the grundnorm for all privacy rights in Nigeria. *Section 37 of the 1999 Constitution* enshrines the inalienable privacy rights which repletes that **“The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected”**. It is based on this provision that all other privacy rights are structured in Nigeria.

The primary data protection legislation in Nigeria is the *Nigeria Data Protection Act 2023*²⁴. June 12, 2023, saw the enactment of the NDPA, which has since taken effect. Before the NDPA, the National Information Technology Development Agency (NITDA) published the Nigerian Data Protection Regulations 2019²⁵, which served as the de facto data protection regulations.²⁶ It is still ancillary legislation even though it is enforced. In addition to protecting the fundamental freedoms and rights of data subjects as stipulated by the Nigerian Constitution and data protection practices, the Act offers a thorough and extensive legal framework for the protection of personal information.²⁷

Holistically, the NDPA is made up of 66 sections divided into 12 parts and a schedule. These parts provides for the objectives and application of the Act; the establishment of the Commission and its Governing Council; the financing of the Commission; principles and lawful basis governing the processing of personal data; rights of a data subject; data security; cross-border transfer of

²⁴ Hereinafter referred to as ‘NDPA’.

²⁵ The NDPR

²⁶ Unveiling some salient features of Nigeria’s novel Nigeria Data Protection Act (NDPA) 2023, International Network of Privacy Professionals, <<https://inplp.com/latest-news/article/unveiling-some-salient-features-of-nigerias-novel-nigeria-data-protection-act-ndpa-2023/>> accessed 2 March 2024.

²⁷ Data Guidance, “Nigeria - Data Protection Overview”, <<https://www.dataguidance.com/notes/nigeria-data-protection-overview>> accessed 2 March 2024.

personal data; registration of controller/processors and penalties for violations of the Act; enforcement provisions of the Act; legal proceeding on matters covered by the Act; and Miscellaneous provisions.²⁸ More specifically, the NDPA, unlike the NDPR, makes provision for Biometric Data and recognizes its delicate nature. This indeed is a laudable step taken by the National Assembly in recognizing their obligation to secure and protect the privacy of Nigerians.

Notwithstanding the Act's undeniable contribution to the sector's expansion, there are certain drawbacks. Although the act provides for biometric data in its interpretation section, it does not provide for the implementation of any unique security measures when using biometric data. It just states that data controllers and processors have a "duty of care," but it offers no concrete means of accountability. More so, there has been little or no implementation measures to ensure that data controllers strictly adhere to the provisions of the NDPA as well as provision of stringent penalties for violation of same.

AN APPRAISAL OF THE BIOMETRIC INFORMATION PROTECTION ACT

The United States does not have a comprehensive data privacy regulation that applies to biometric data nationwide, in contrast to many other nations. However, in 2008, Illinois became the first state in the US to enact a regulation specifically for the protection of biometric data.²⁹ The Biometric Information Protection Act (BIPA) primarily governs the biometric data collection, processing, disclosure, and security of Illinois residents. Because biometric data cannot be easily altered, BIPA distinguishes it from other personally identifiable information. It delineates rigorous guidelines for the acquisition, transformation, retention, or dissemination of "biometric identifiers," which encompass scans of the retina or iris, fingerprints, voiceprints, or hand or facial geometry.³⁰ In order to conduct business in Illinois, private entities must abide by a number of requirements set forth by BIPA. The law ensures that individuals are in control of their own

²⁸ A REVIEW OF THE NIGERIAN DATA PROTECTION ACT 2023: HIGHLIGHTS AND LIMITATIONS INTRODUCTION, <<https://strenandblan.com/2023/07/26/a-review-of-the-nigerian-data-protection-act-2023-highlights-and-limitations-introduction/>> accessed 2 March 2024.

²⁹ Is Biometric Information Protected by Privacy Laws?, Bloomberg Law, <<https://pro.bloomberglaw.com/insights/privacy/biometric-data-privacy-laws/>> accessed 2 March 2024.

³⁰ Fredric Bellamy, "Looking To The Future of Biometric Data Privacy Laws", <<https://www.reuters.com/legal/legalindustry/looking-future-biometric-data-privacy-laws-2022-04-06/>> accessed 2 March 2024.

biometric data and prohibits private companies from collecting it unless they (a) inform the person in writing of what data is being collected or stored. (e.g. fingerprint is stored when using TouchID to log into bank account app on phone) (b) inform the person in writing of the specific purpose and length of time for which the data will be collected, stored and used. (e.g. fingerprint is stored for ease of logging into app and only for a duration of six months) (c) obtain the person's written consent. (e.g. user signs their name before sharing their fingerprint).³¹

The Act is considered the most comprehensive, stringent and litigated biometric privacy law in the United States and is the only one that creates a private right of action. To that end, over 400 BIPA class action lawsuits have been filed in the past five years. The majority of BIPA claims stem from issues related to work, including time clocks, corporate computer access, building security, safes and lockboxes, dual authentication, and facial temperature scanning. Several BIPA lawsuits centre on point-of-sale systems, lunch-paying students, and social media photo scanning features like Facebook's Tag Suggestions.³²

RECOMMENDATIONS

An intrinsic examination of legal and ethical frameworks created to protect biometric data and the frequent impediment to the effective protection of biometric data provides insights in striking a fair balance between supporting technological innovations and protecting the privacy rights of individuals. In a bid to reconcile technological advancement with legal framework, it is advised that the government should strike a proportionate measure to protect the biometric data of Nigerians specifically, considering the wide spread embrace and employment of biometric technology in Nigeria. Due to the delicate nature of biometric data, a specific legislation synonymous to the BIPA should be enacted and it should stipulate severe penalties for violating citizens' rights to data privacy.

Furthermore, the complex landscape of data protection, especially with regard to biometric data, requires cooperation between academic institutions, governmental bodies, and private sector businesses. The public sector provides the regulatory framework required to protect individual

³¹ Section 15 of the Act.

³² Maryam Rad, Tim Smit, Riley Brant, "Biometric Data: Privacy, Cybersecurity & Insurance Considerations", <https://assets.ctfassets.net/zr7mmeciv2ps/TZqEHSpZlenhS2WSClt87/648a2c8d99ccdb2eb5b942de31071b7c/20201001_WP_Biometric_Data.pdf> accessed 2 March 2024.

rights and maintain public trust, the private sector provides practical implementation, and academia contributes research and analysis expertise to provide insights into emerging technological trends and potential vulnerabilities. By fostering collaborations between academia, industry, and regulatory bodies, a comprehensive framework can be expanded to anticipate, prevent, and rectify potential vulnerabilities, thereby establishing a solid foundation for biometric data protection that conforms to ethical standards and regulatory mandates.

In addition, incorporating a rigorous informed consent procedure is critical. This point of view highlights the importance of striking a careful balance between technical advancement and individual rights, recognizing that collecting, storing, and exploiting biometric data requires individual's informed and express consent. From a legislative standpoint, this includes developing regulatory frameworks that require full disclosure of data usage purposes and associated risks, as well as establishing techniques that allow individuals to exercise control over their data. This point of view highlights the government's responsibility to ensure that informed-consent procedures are rigorously executed and matched with ethical standards, taking into account the nuances of biometric data collecting and processing. To further fully discourage data controllers from violating the law, an efficient regulatory agency that will enforce strict adherence to the regulations should be established. In the case that these laws are disregarded, a severe penalty should be stipulated.

CONCLUSION

In conclusion, data privacy has grown to be a major worry for people, companies, and the government in an era of quickly advancing technology, especially with regard to biometric data. Therefore, it is impossible to overstate the significance of data security and privacy. Over the years, a number of actions have been done to safeguard it. States must, however, exert unrelenting effort to guarantee the implementation of strict measures that would ensure the complete protection of personal data, including biometric data.

THE STATE'S RIGHT TO DEFEND ITS TERRITORIAL INTEGRITY AGAINST INCURSIONS BY NON-STATE ACTORS

*Oladoyin Ayodeji Victor*³³

ABSTRACT

History is replete with unprecedented waves of incursions by non-state actors into sovereign state and in the spirit of self-preservation and self-defence these aggrieved states have mounted peremptory campaigns into other neighbouring and distant states to rid the errant non-state actors of the capacity to carry out future attacks against them and to restore the reality of national security within their territorial boundaries.

This article seeks to analyse the extent of a states right to defend itself against non-state actor and in the course of this analysis issues like the threshold to justify the sovereign state offensive action and the necessity for self-defence will emerge. These issues will be analysed in line with the principles of international customary law, conventional law, opinion juris and recent state practices.

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INTRODUCTION

As prescribed by Article 2(4) and 51 of the UN charter a states' right to self-defence is inherent and unassailable and can be triggered in response to an armed attack. However, these provisions when interpreted in the narrow sense are not clear on whether the right of self-defence can be triggered when non-state actor operating from the territory of a sovereign mount an armed attack within the territory of another state

The 'attribution test' and the 'unable and unwilling test' are two major interpretations that have been employed in relation to a sovereign state right to self-defence against non-state actors. The application of these two interpretations has resulted in different controversies, the former (attribution test) relates to the failure to envisage a scenario where non-state actors are operating in connivance with a sovereign power or where the non-state actor is operating from a state with an ineffective state mechanism. On the other hand, the latter (unable and unwilling test) pitfalls lie in the difficulty of assessing whether or not a state could be deemed 'unable and unwilling' to deal with the threat posed by non-state actors, the difficulty of determining the very nature of the test, and the difficulty in adducing justifications for incursion into the territorial integrity of another state.

The attribution test was initially the traditional criterion for determining when an aggrieved state could resort to self-defence against non-state actors but the aftermath of the September 11, 2001 attacks on the World Trade Centre and the Pentagon resulted in a Grotian moment of law that led to an evolution of the formula for state involvement within non-state actors.

THE ATTRIBUTION TEST

Traditionally, the attribution test was the touchstone to determine when an attack by a non-state actor on a state would trigger the right to self-defence. However, state practices have led to the evolution of new tests to justify self-defence against non-state actors.

In considering the attribution test recourse will be taken to Article 2(4) and Article 51 of the UN charter which in an inter-state sense constricts the right to use force against non-state actors unless those attacks are attributable to a state. Therefore, attribution becomes an integral element to trigger the right of self-defence.

The attribution test is complete when the non-state actor is linked to a state. However, the interpretation of this right has often been construed as an exception prohibiting the use of force. Similarly, the Nicaraguan case reflects this when the ICJ established that an act of aggression by a non-state actor could only amount to an armed attack if the non-state actor was sent on or on behalf of a state. The ICJ decision on the construction of wall in the occupied Palestinian territory also informs this principle where it was opined that for an armed attack to trigger self-defence it is of necessity that the armed attack is 'imputable to a foreign state'.

Despite all these the application of the attribution test will result in challenges within a set of circumstance. Firstly, where a foreign state subtly pulls the strings of a non-state actor it becomes difficult for the attacks to meet the criterion of state responsibility. Secondly, another dilemma ensues when the non-state actor is operating from a state where the state machinery for control is dysfunctional and the armed attack cannot be attributable to the state.

However, it is noteworthy to establish that there have been attempts to extend and expand the application of this principle the case of Prosecutor v. Dusko Tadic is a vivid example of this expansion where the ICTY established the 'overall control test' to determine state responsibility. The 'overall control test' will only suffice when a state has an overall control of the military activities of the non-state actor. The requisite standard is not met where the state is only involved in equipping and financing the non-state actor. Another example of an expansion of this principle is also ingrained in the Bosnian genocide case where the court held that the 'overall control test' would not apply due to the peculiar nature of the case. There state complicity was the measure in determining state responsibility in this case.

THE UNWILLING AND UNABLE STANDARD

Ashley Deeks articulations is instructive when considering the application of the 'unwilling and unable standard'. The requisite standard to trigger self-defence is established when a foreign state is unwilling or unable to curtail the threat posed by non-state actors. The implication of the abovementioned situation is that the aggrieved states right to self-defence is triggered irrespective of the neutrality of the state where the non-state actors have operated. He goes further to espouse that the consent of the host nation is required, nation of the threat posed by these non-state actors,

a request to suppress the threat within a reasonable time, assessment of the territorial state capacity to suppress the threat and the interaction between the host nation and the victim state.

Dinstein also reinforced the unwilling and unable test when he stated that a state is entitled to enforce international law extra-territorially if another state is unable or unwilling to prevent an armed attack. He also enunciated some requirements for the test to suffice where he states that the use of force should be reactive and not anticipatory, there should be a tendency for future attacks, verification by the aggrieved state that the host state is unable and unwilling to suppress the threat posed by the non-state actor, consent of the host state, the use of force should only be resorted to in restoring the reality of national security when other measures have been unsuccessful.

A wide range of countries have validated or clarified this standard both implicitly and explicitly. Countries like the United States of America has in the wake of the growing threat of ISIL endorsed the principle in the US Article 51 letter, September 23, 2014 that 'where a state has lost or abandoned effective control over the portion of territory from which the non-state actor is operating' the test of 'inability' is satisfied.

Similarly, Harold Koh's *opinio juris* post also reflected this principle in its position that where the government of the state where the threat is located is unable or unwilling the right to self-defence in article 51 will be triggered.

A former United Kingdom Prime Minister David Cameron in his statement before the parliament also endorsed the principle when he stated that the 'Assad regime is unwilling and unable to take action necessary to prevent ISIL's continuing attack' which has triggered the right to self-defence and collective self-defence.

The Dutch government also endorsed this principle in the letter from the Dutch foreign Minister to the parliament conveying advice of an external international law advisor regarding the use of force against Isis in Syria where it succinctly stated that the mandate to act against a non-state actor will suffice when the following test has been satisfied: 'there is an armed group, the territory of that third state is used to carry out this attack and the third state is unable or unwilling to put an end to the activities of non-state entities in its territory.'

The application of this principle by the Czech ministry of defence is quite instructive where it adduced that if a territorial would be unwilling the consequences may differ as acts of such states could be interpreted as a certain degree of support to the non-state actor. It is acknowledged that state sovereignty should not serve as a protection of such state if such a state is unable or unwilling to exercise its sovereignty within its territory.

Australia's Article 51 letter also endorsed this principle where it held that Article 51 of the UN charter 'recognizes the inherent right of a state to act in individual or collective self-defence when an armed attack occurs against a member of the United Nation'. The state can act in self-defence when the government of the state where the threat is located is unable or unwilling to prevent the attacks.

Although Syria, Russia and its allies have viewed the collective self-defensive mounted by the coalition as a violation of Syria's sovereignty regardless of this there is still a wide acceptance of the coalition actions.

THE NEED FOR THE IMPOSITION OF THE UNWILLING AND UNABLE TEST

Firstly, the need for imposing the unwilling and unable test would suffice when there is a void created in the state administration and the state no longer has the machinery for control. For instance, in a scenario whereby the act of aggression carried out by a non-state actor doesn't qualify as an armed attack the unwilling and unable test will not suffice.

Secondly, another instance would be where the state machinery does not have the power to suppress the non-state actor the incursion of Israel into Lebanon to neutralize Hezbollah is illustrative in respect of this the Lebanese government could do little or nothing to thwart the activities of Hezbollah.

Thirdly, another instance would suffice when the territorial country loses part of its territory due to a wide range of factors and the non-state actors are operating from within those lost territories to instigate targeted attacks. This was the case with the ISIL in Syria where cities within the territory of Syria fell into the hand of ISIL.

However, it is noteworthy to establish that where the attack has not started and is not imminent consent is a precursor from the host government before the right of self-defence can be triggered

but in the light of an imminent attack by a non-state actor necessity would take pre-eminence to forestall the occurrence of such attack and it would be irrelevant whether consent has been given or not by the territorial state.

STATE PRACTICES IN RELATION TO THE RIGHT OF A STATE TO SELF-DEFENSE

The wake of the 9/11 terror attack on the Pentagon and World Trade Centre has resulted in a Grotian moment where the right to self-defence has evolved from the traditional interpretation and is now applicable against errant non-state actors operating from foreign states. The resultant effect of this is the evolution of states practices to justify the incursion of the victim state into the territory of foreign state where the errant non-state actor is situated. Similarly, the first principle of the Bethlehem principles also follows this evolution of states practices where it asserted that states have an immediate responsibility to thwart imminent and actual attacks by non-state actors.

Undoubtedly Kenyan's incursion into southern Somalia in a bid to secure the release of hostages detained by Al Shabab gained acceptability and was justified as self-defence due to the consent obtained from the transitional government of Somalia before the incursion.

The Institut de Droit International also established that in the course of an attack by a non-state actor where the territorial state does not cooperate the right of individual and collective self-defence could be triggered and the aim will be the neutralization of the non-state entity.

Additionally, the first principle of the 2017 Leiden Policy recommendations reflected that a state's right to collective and individual self-defence can be triggered against non-state actors irrespective of the fact that they are not acting on the behest of any state.

CONCLUSION

With regards to the right of a state to invoke self-defence against non-state actors it is evident that the ship has already sailed when we examine the evolution of state practices vis-à-vis the new trend of expansive interpretation of a state right to self-defence. Undoubtedly a state can invoke its right to self-defence where a non-state actor mounts an armed attack that erodes the reality of national security within its territorial borders. Additionally, consent of the host state is integral where an attack by a non-state actor is not imminent but, in a scenario, whereby an attack is imminent a state can exercise its right to self-defence without obtaining the consent of the host state.

AN ACADEMIC INQUIRY INTO THE CONTROVERSIAL TAXATION PARADIGM OF CHURCHES

Azanya Abraham Maslow³⁴

ABSTRACT

As churches play a pivotal role in shaping societal values and norms, the question of their fiscal contribution to the nation's development becomes crucial. The immunity granted to religious institutions has been open to questioning due to the present business orientations in churches featuring an unorthodox model of accumulating wealth. A painstaking look at the growing commercial activities and financial investments of churches, suggests that taxing these institutions aligns with the principles of fiscal equity and social responsibility.

This article delves into the contentious issue of taxing churches in Ghana, shedding light on the evolving economic landscape and the increasing reliance on capitalistic tendencies within religious institutions. It also examines the historical context of tax exemptions for religious entities and explores the changing dynamics that warrant a reconsideration of this traditional stance. The article also navigates the winding and serpentine intersection of faith and finance, aiming to unravel the discourse on whether churches should be subjected to taxation, particularly in light of their growing exploitative inclinations. Additionally, it discusses potential benefits such as increased government revenue and the promotion of transparency within religious organizations.

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INTRODUCTION

One of the cardinal principles of every tax system is equity.³⁵ By this it means the taxpayers, who are subject to the authorities of the state contribute to its upkeep in proportion to their income and ability. By extension, the principle of equity posits that taxpayers, depending on their level of income, are treated equally by the law without any preferential treatment granted to any category of people. In the heart of Ghana's vibrant cultural tapestry lies a complex debate surrounding the taxation of churches, institutions that not only serve as spiritual pillars but also increasingly exhibit characteristics reflective of capitalistic endeavours. The historical tradition of granting tax exemptions to religious entities, rooted in the respect for freedom of worship, is now facing scrutiny in the wake of evolving economic paradigms.

Ghana, like many other countries, has long upheld the principle of separating church and state, extending tax exemptions to religious organizations as a means of safeguarding religious freedom.³⁶ However, as the country witnesses a change in economic activities within churches and an embrace of capitalist principles, the need to reconsider these exemptions becomes evident.

TAXATION: EXPLORING ITS ESSENCE AND PURPOSE

More than two centuries ago, Benjamin Franklin, a distinguished Founding Father of the United States, astutely observed that amidst life's uncertainties, only death and taxes remain inevitable. Strikingly, this observation retains its relevance in our contemporary context, underscoring the enduring nature of these certainties across time.

³⁵ Taiwo Ojoye, 'Legal Perspectives on Taxing Churches, Mosques, NGOs' *Punch Newspaper* (Nigeria, 29th June 2017).

³⁶ Beni, Alphonsus, Juliet Banoeng-Yakubo, and Bernard Oduro-Amankwaah, 'Philosophy of Taxation and Tax Exemptions of the Churches in the Ejisu Municipality of Ghana' (2021) 10(2) *International Journal of Innovative Research and Development* 1-17.

A tax denotes a mandatory monetary imposition or an alternative form of assessment levied upon a taxpayer, whether an individual or a legal entity, by a governmental body. This imposition serves the collective purpose of financing government expenditures, public outlays, or functioning as a regulatory measure to mitigate and diminish adverse externalities.

One primary rationale for tax imposition is to fund government spending. Taxes serve as a vital revenue source for governments to finance essential functions such as public infrastructure, education, healthcare, and defence. According to renowned economist John Stuart Mill, in his seminal work said that, “*taxes are indispensable for maintaining public order and ensuring the provision of public goods.*”³⁷

Taxes play a crucial role in supporting public expenditures, and contributing to the welfare of society. In the work of Alan Bindler, Richard Abel Musgrave emphasizes the role of taxes in facilitating equitable distribution of resources for public services, thereby enhancing social well-being and reducing economic disparities.³⁸

Taxes are regulatory tools used to address negative externalities, as highlighted by Nobel laureate Arthur Pigou³⁹ Taxing activities that generate harmful externalities, such as pollution or overconsumption of certain goods, is a means to internalize the societal costs associated with these activities. Thus, taxes are essential instruments employed by governments to fulfil critical functions, ranging from funding public initiatives to regulating detrimental externalities.

³⁷ Mill, John. Stuart., Laughlin, Principles of Political Economy. (, J. L., ed.: (1884)

³⁸ BLINDER, A. N. S., SOLOW, R. M., BREAK, G. F., STEINER, P. O., & NETZER, “*The Economics of Public Finance*” D. (Brookings Institution Press. 1974). (pp. i–vi).

³⁹ Pigou Arthur Cecil, “*The Economics of Welfare*” (London: Macmillan 1877-1959. (1924).

GENESIS OF TAXATION

Taxation has its historical roots in the first years of record-keeping: the earliest signs are recorded on clay tablets found in Sumeria in southern Mesopotamia, part of modern-day Iraq. Tax records their date from around 3300 BC. Archaeology confirms that Egypt employed one of the first tax systems: between 3000 and 2800 BC, Egyptian pharaohs employed collectors or scribes to impose levies on a range of goods and produce, such as cooking oil. Tax was collected twice a year and provided revenue primarily to fund government activity, to support the head of state and to finance the conduct of wars.

Ancient Greece and Rome are often cited, too, among the earliest regimes attempting to raise taxes in an effort to generate funds for government expenditure. Greek city state-imposed taxes on commodities when wars were fought or when there was an emergency, but (where some form of democracy applied) usually direct taxation only applied to the part of the population entitled to vote. In times of peace, the state governors sometimes paid back revenue no longer required for military conflict

In the early 20th century, about one million people in Britain were subject to income tax. Lloyd George raised tax rates in the 1909 People's Budget, establishing Liberal social policies that laid the foundation for the Welfare State. Public expenditure increased significantly during the First World War, the Great Depression, and the Second World War. The burden on taxpayers was partly offset by the government taking out large loans but also by significantly raising taxes. In 1944, 'pay-as-you-earn' was introduced, allowing income tax to be deducted directly from wages, a legacy that remains from the Second World War.

TAX EXEMPTIONS FOR RELIGIOUS INSTITUTIONS AND OTHER ORGANIZATIONAL ENTITIES.

The importance of taxes in the functioning of society cannot be overstated. Taxes are essential for the provision of public goods and services, infrastructure development, and the overall welfare of the populace. Without the systematic imposition and collection of taxes, governments would struggle to meet their obligations to society, leading to deficiencies in public services and potentially hampering the development of a country.

Given this critical role, it is logical to assume that all institutions generating income should contribute to the tax pool. This would include businesses, non-profit organizations, and other entities that engage in economic activities yielding revenue. The rationale behind this is straightforward: every entity that benefits from the public infrastructure and services financed by taxes should, in principle, contribute to their maintenance and development. However, the tax codes of many countries carve out exceptions for certain types of institutions, rendering them exempt from paying income tax. One example of such institutions is churches. The exemption of churches and, by extension, other religious organizations from income tax obligations is rooted in various considerations. These can range from the recognition of the social and charitable contributions of religious institutions to historical precedents and the desire to maintain a separation between state and church. Churches often provide community support, social services, and charitable aid, activities that align with the public good and might otherwise require government funding.

This exemption, while practical in some respects, raises questions about fairness and the distribution of the tax burden among different sectors of society. The debate surrounding this

issue often hinges on the balance between acknowledging the unique contributions of religious and certain other non-profit organizations to society and the need for a broad and equitable tax base that does not disproportionately burden other institutions and individuals.

The church is seen as an avenue for believers to worship and praise God. Thus, it has become quite disconcerting that recent observations highlight a shift towards more capitalistic endeavours by some religious institutions which are supposed to be a place of worship. This evolution raises eyebrows among the general populace, particularly among those who diligently fulfil their tax obligations. The crux of the matter lies in the perception that churches, accumulating significant financial resources annually, should contribute to the national coffers, especially considering the developmental needs of a developing nation like Ghana.

Under the current legislative framework, specifically referencing *Section 97 of the Income Tax Act*, there exists a pathway for churches to be recognized as charitable organizations, thereby exempting them from tax obligations. This exemption is contingent upon the fulfilment of specific criteria, including the institution's commitment to charitable or religious activities of a public nature, adherence to a constitution that bars political affiliations or benefits, and the prohibition of private benefits outside their charitable purpose. This legislative provision ensures that churches, as long as they operate within the outlined charitable scope and do not engage in profit-driven business ventures, remain tax-exempt. The rationale behind this policy is ostensibly to encourage and support the philanthropic and societal contributions of religious organizations.

However, this stance becomes contentious when considering the substantial revenues some churches generate, which could arguably support national development through taxation.

In the past, churches were perceived as public institutions dedicated to promoting the welfare of society. The capitalist inclinations of churches have become increasingly evident, particularly in the opulent lifestyles of their leaders, often self-styled as prophets, bishops, archbishops, and various other titles to garner attention.

In a recent interview with DW, an international media group, Daniel Obinim, the founder of International God's Way Church, claimed that he received over 20 houses, eight Range Rovers, five SUVs, and three Chryslers from Jesus. This supports the conspicuous idea that taxing the churches will promote transparency and accountability in the conduct of these so-called shepherds.

The author's contention in this paper is not to scrutinize the church's income sources or pass judgment on its utilization. Instead, the focus is on establishing that churches in Ghana are amassing significant wealth, sometimes to the detriment of their congregants. In light of this, it appears illogical not to subject churches to taxation. Taxing churches could contribute to society's welfare, benefiting all citizens. The author advocates for a scenario where, even if individual congregants do not directly reap the rewards of their contributions to the church, they can indirectly benefit when the government taxes these churches and allocates the funds for societal improvement.

The concept of taxing churches is not entirely novel, as several jurisdictions across the length and breadth of the globe have implemented policies aimed at taxing the incomes generated by religious institutions. Notably, countries like Denmark, Switzerland Iceland and various European nations have set precedents in this regard. Considering this, it wouldn't be entirely alien for a country like Ghana to follow suit and implement taxation on churches, especially given recent trends

indicating that some religious institutions in Ghana are adapting capitalistic tendencies contrary to their altruistic fundamentals.

Drawing from the experiences of these developed countries, it becomes evident that taxing churches is not an unprecedented or radical idea. For Ghana, a country with a rich religious landscape, considering such a move might be a pragmatic step towards ensuring fiscal responsibility and promoting transparency within religious institutions.

Recognizing the potential implications of taxing churches, it is evident that various challenges could arise, with one prominent concern centring on the impact such taxation would have, particularly on smaller churches.

Smaller and non-profit religious organizations may encounter difficulties in fulfilling tax obligations, which could, in turn, restrict their capacity to engage in charitable activities. It is imperative for any taxation framework to take into account the varied characteristics of religious institutions and proactively address unintended consequences. Consequently, the author argues that, to safeguard smaller and non-profit churches from undue financial strain, the basis for taxing churches should be solely contingent on the total number of congregants a specific church has at a national level. The proposal suggests that only when a church's congregation surpasses the threshold of 8000 on a nationwide scale should it become subject to taxation. This approach aims to strike a balance by targeting larger congregations that may have the financial capacity to contribute while alleviating the burden on smaller religious entities focused on charitable endeavours.

It must be noted that the population of a church is not the determinant of taxation in churches, but the rate at which churches generate their wealth, what they acquire, and how well they manage their properties for the benefit of the people at a commendable level.

JUSTIFICATION FOR THE IMPOSITION OF TAXES ON CHURCHES

In Ghana, churches, typically known as charitable faith-based organizations, take on an interesting legal status. They are registered as limited companies by guarantee, a classification suggesting that their primary purpose is not profit-making. Consequently, these churches are exempted from paying income taxes on their core operations.

In the bureaucratic world of legal designations, churches in Ghana opt for the status of limited companies by guarantee, signalling a commitment to prioritize their charitable and community-oriented initiatives over financial gains. This classification allows them to operate without the burden of income taxes on their essential activities.

The question of whether churches should be subject to taxation has been a topic of ongoing debate, with prevailing exemptions based on the assumption that religious institutions do not engage in profit-oriented ventures. The prevailing contention suggests that churches are exempt from taxes as long as they refrain from engaging in businesses that generate income or profit. This exemption, however, merits a closer examination when considering the diverse commercial activities churches are involved in. Contrary to the notion of complete exemption, it becomes evident that certain church practices, such as the sale of paraphernalia, consultation fees, and the marketing of religious items like holy water, anointing oil, charms, talismans, rings, handkerchiefs, DVDs, holy stickers, and even Bibles, can be construed as commercial transactions that bring direct financial benefit to the church.

Central to the argument is the ambiguity surrounding the definition of "business" within the religious context. While the traditional view holds that non-profit activities should be exempt from taxation; the multifaceted nature of contemporary church activities challenges this perspective. Selling religious items and charging fees for pastoral consultations may not align with the traditional understanding of a church's philanthropic role. The need for a refined definition of business activities becomes apparent as these practices contribute directly to the financial coffers of the church.

The legal landscape further complicates the matter. Though churches are generally perceived as non-profit entities, the definition of business activities may vary. This situation prompts a consideration of legal scholar HLA Hart's perspective, which posits that “*taxes can serve not only revenue purposes but also act as a deterrent against certain activities*”. In this context, taxing churches engaged in profit-oriented ventures could be seen as a means to discourage the exploitation of religious sentiments for personal financial gain, aligning with broader legal principles.

The financial model where churches pay their pastors directly from their earnings raises pertinent questions about the essence of church operations. This point focuses on the paradox inherent in churches being seen as beacons of hope and philanthropy, yet their leaders are compensated from the financial contributions of the congregation, if churches are indeed altruistic entities existing solely to aid society, the practice of paying pastors from congregation contributions challenges this fundamental assumption. This is prevalent among Nigerian churches whereby pastors acquire edifices for their living and for business purposes to their benefit, and also build institutions that seven percent of the members of the church cannot afford to attend.

Additionally, by imposing taxes, authorities may discourage individuals from founding churches solely for personal enrichment. This aligns with HLA Hart's perspective on the purpose of taxes, emphasizing that they can be imposed not only for revenue purposes but also to deter specific activities. Taxation serves as a safeguard, preventing the exploitation of religious sentiments for personal gain without explicitly criminalizing such activities.

Drawing on HLA Hart's "The Concept of Law," this point provides a legal foundation for the use of taxation as a means of deterrence. It expands on the idea that taxes can discourage certain activities even without express indications that these acts are to be abandoned as criminal offenses. HLA Hart's concept posits that taxes can act as a deterrent, discouraging activities without explicitly deeming them criminal. Taxing churches engaged in potentially exploitative practices aligns with this legal principle, providing a justification for using taxes as a preventive measure to maintain the integrity of religious institutions and curb financial exploitation.

Taxing churches in the Ghanaian landscape can play a pivotal role in economic redistribution and social development. As tax revenues are collected from churches engaging in commercial activities, these funds can be strategically reinvested by the government to address critical societal needs. This includes funding education, healthcare, infrastructure projects, and poverty alleviation programs.

By implementing a fair and transparent tax system for churches, the government can enhance its capacity to address pressing issues such as inadequate healthcare facilities, underfunded schools, and insufficient infrastructure. This, in turn, fosters a more equitable distribution of resources and promotes social development across various sectors.

CONCLUSION

The contention that churches are entirely tax-free may require reconsideration in light of the diverse commercial activities in which they engage. The sale of religious items and charging fees for services, while aligned with their spiritual mission, also raises questions about financial practices and transparency. As debates on church taxation persist, there is a pressing need for a nuanced approach that considers both the philanthropic and commercial aspects of contemporary church operations, ensuring that tax policies align with the evolving nature of religious practices in Ghana.

CHILD RIGHTS LAWS GLOBALLY: A TRAJECTORY FROM CRADLE TO CIVILIZATION

Oghenefejiro Praise Ogheneare⁴⁰, Benedicta Ikwuegbu⁴¹

"There can be no keener revelation of a society's soul than the way in which it treats its children."

~ Nelson Mandela.

ABSTRACT

For a considerable length of time, the concept of child rights was alien to many jurisdictions. Children were mainly regarded as chattels and factors to bolster economic production. On that premise, child labour was rampant and child exploitation was the norm. Over time, the conceptualization of children evolved and children were gradually accorded human status. This evolution began under the guise of the child labour reform movement, and through more aggressive and radical activism emerged into the corpus of charters, treaties, and domestic legislation ensuring and safeguarding the rights of children. The compelling tale of the trajectory of child rights laws is the pith of this article, as it seeks to travel down history lane, noting the struggles, the impediments to, and the eventual protection of child rights laws. The author's viewpoint is that of enamoured yet critical observers thus this article winds down with a succinct examination of the consequential impacts of child rights laws in selected facets of life. In the end, this article hopes to serve as a clarion call for the recognition and full-fledged enforcement of child rights laws considering the onerous hurdles it has surpassed and the transitional development it has undergone.

Keywords: human rights, child rights, liberty, freedoms, international law, history.

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INTRODUCTION

Hitherto, child rights were a foreign and almost ignoble concept, the concept of child rights gained widespread support only in the last few decades.⁴² A more pecuniary approach was resorted to in relation with children. They were often used for mercantile purposes till they attained maturity, and the conscience of the man seemed to be the only guiding principle as far as children were concerned.

With the advent of civilization, reforms were undertaken to reposition children in the social strata. Across the continent of Europe and America, laws were passed to regulate, albeit not entirely prohibit, child labour. This progressive trend towards the recognition of the rights of a child was heavily punctured during the era of the Trans-Atlantic slave trade (1526 to 1867). This era often referred to as the triangular trade, witnessed the most disheartening violations of what is now known as the rights of a child. Infant children were separated from their slave mothers at childbirth, others were brutally murdered by dashing their heads on trees, yet others were thrown away to rot. Those who were spared were enslaved from childbirth and were forced to undertake labour unsuited to their age and developmental stage. With time, the rights of children became an absolute mirage, when viewed from the angle-point of slave children.

Ironically, slavery and white supremacy helped to shape or redefine the societal perspective of children. With the abolition of the Trans-Atlantic slave trade in 1807, and the promulgation of the 13th amendment to the US Constitution, the rights of children began to gain prominence, as the class distinctions on the grounds of race and ethnicity were officially abrogated.⁴³ Frankly speaking, there was no lesser human being anymore, and the contemplation shifted to what status will be accorded children who were the erstwhile occupiers of that class before the emergence of the slave trade. Thus, child rights became the recognition of the humanity of children and much more, the

⁴² S. N. Hart, 'From property to person status: Historical perspective on children's rights' [1991] *American Psychologist* 46(1), 53.

⁴³ The 13th Amendment to the U.S. Constitution provides that: 'Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction'.

dignity, liberty, and respect they were entitled to as a result of that humanity. Child's Right advocate and Co-chair of the Jolie-Pitt Foundation, Angelina Jolie had this to say: 'No young boy and no young girl deserves to be treated less than a human being'. And they are all equally entitled to justice⁴⁴.

Simplistically, child rights are the benefits that accrue to children firstly as human beings, and as a specific consequence of their childhood, predicated on their vulnerability within this age bracket, which was not premeditated or predetermined. Legally speaking, child rights are the compendium of entitlements owed to children by law. They are the fundamental normative rules that govern the treatment of children, the relationship of minors amongst themselves, with adults, and institutional structures such as the school, hospital, and overwhelmingly the State. Simply put, the law has a controlling interest over a child with regard to formal matters, without prejudice to whatever degree of control or authority the parents or guardians of the child may exercise. This creates the need for a holistic study of child rights laws, cascading down from antiquated legal rules to more modern regulatory frameworks, in a bid to understand and fully appreciate the development that child rights laws have undergone, and are yet still undergoing.

Responding to the clarion call for global reformation of child rights laws, many jurisdictions have begun to incorporate elaborate legal provisions upholding the rights of a child into their legal system. Others have been content to ratify and domesticate those made by international organizations, and in bilateral treaties, of which they were signatories. With time, however, and owing to a lackadaisical approach to enforcement, prior traditions have encroached on the legal provisions guaranteeing and protecting the rights of a child, making them moribund. And if this nonchalance is not meted the appropriate diligence, the rate of violation of child rights promises to escalate. In recent times, we have seen egregious breaches of the rights of a child, from child soldiering – equipping children with firearms and assigning them to undertake militant

⁴⁴ Angelina Jolie, United Nations High Commission for Refugees (UNHCR) Special Envoy, speaking to the Council on Foreign Relations on November 12, 2008 <<https://m.youtube.com/watch?v=psghKmKHlKk>> accessed 23 September 2022.

assignments – to bush wives i.e enslaving female children and forcing them to marry boys and men who are engaged in militant activities.⁴⁵

The preoccupation of this paper is to render a critical analysis of the rights of a child, internationally noting the effects of the trajectory of developments that child rights have undergone in these cultures, in a bid to inspire the continuous development of child right laws globally.

CONCEPTUAL CLARIFICATION

Who is a Child?

The Merriam-Webster's Dictionary defines a child as a human being who is between the developmental stages of infancy and puberty(adolescence).⁴⁶ Legally speaking, a child is a human being who is classified as a minor and is younger than the legally stipulated age of majority. For example, in Nigeria, the law stipulates that the age of majority is 18 years old and thus a person younger than the age of 18 years old is deemed a child and a minor in the eyes of the law.⁴⁷

The Child's Right Act 2003 defines a child as "a person under the age of 18."⁴⁸ The United Nations Convention on the Rights of the Child 1989 defines a child as "a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier (or later)."⁴⁹

There are major discrepancies and contradictions in the legally stipulated age of majority of most countries. The resultant effect is that a child in country A might already be an adult in country B and vice versa. While this is largely due in part to diverse cultural, religious, and social views about children, one cannot also ignore the major role that other factors like colonialism, poverty, and the state of the nation play in determining the legally acceptable age of majority in a jurisdiction.

⁴⁵ C.C. Jalloh, 'Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone [2004] 21(8) *American Society of International Law*.

⁴⁶ Merriam-Webster, *Merriam-Webster.com Dictionary* <<https://www.merriam-webster.com/dictionary/child>> accessed 23 September 2022.

⁴⁷ Child Right's Act 2003, s 277.

⁴⁸ Ibid.

⁴⁹ UNCRC, art 2.

What Are Rights?

Rights are legal, social, or ethical principles of freedom or entitlement; that is, rights are the fundamental normative values about what is allowed of people or owed to people according to some legal system, social convention, or ethical theory.⁵⁰ Human rights are those rights that belong to all just because we are human.⁵¹ This is based on the understanding that all people are inherently and naturally equal and deserve fundamental rights, such as social and civil rights.⁵² Rights may be based on humanity (human rights), or society's laws, customs, statutes, or legislative actions. Human rights, which is the specific focus of this article are those inalienable fundamental rights to which a person is inherently entitled simply because he or she is a human being.

What Are Child Rights?

Juxtaposing the two previous expositions, Child rights are a class of human rights with a specific focus on the rights of protection and care afforded to minors. Child rights are a specific consequence of the vulnerability of children, and their significance as the future generation. The rights afforded to a child are not substantially different from the rights and privileges that adults enjoy. Although, some human rights such as the right to marry are inoperative for a child until they attain a specific age. Notwithstanding, children also have special rights that are necessary to protect their minority. Some of these rights include the Right to special protection during childhood; the right to education regardless of race, gender, identity, national origin, religion, disability, colour, sexual orientation, ethnicity, or any other characteristic, etc.⁵³

LEGAL FRAMEWORK OF CHILD RIGHTS

International Legal Framework

The first attempt to recognize and protect the rights of children was made by the League of Nations after World War I in 1924 by adopting the Geneva Declaration on the Rights of the Child,

⁵⁰ O. P. Ogheneare and C. M. Nduka, 'The Rights of Prisoners in Nigeria: A Constructive Criticism' [2022] 1(1) *DELSAN Law Journal*, 17-30

⁵¹ L.M. Healy, 'Exploring the History of Social Work as a Human Rights Profession' [2008] 51(6) *International Social Work*, 735-748.

⁵² J. Ife, *Human Rights and Social Work* (3rd edn, Cambridge University Press 2012).

⁵³ *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483.

a simple document drafted by Eglantyne Jebb, the founder of ‘Save the Children’.⁵⁴ This piece of document presented by Eglantyne Jebb contained rights that she believed were for all children including those children that were ‘forgotten’⁵⁵ Upon its disbandment and replacement with the United Nations in 1945, the declaration was carried over to the new organization.⁵⁶ By 11 December 1946, the United Nations General Assembly took another step towards the protection of the rights of children by establishing the International Children’s Emergency Fund (now known as United Nations Children’s Fund-UNICEF) to help to mitigate the devastating effects of the World War II by providing emergency food and healthcare to children and women in areas affected by the war. UNICEF would later go on to become a permanent body in the United Nations in 1953.⁵⁷

Subsequently, by 20th November 1959, the United Nations General Assembly through resolution 1386 (xiv) moved to adopt another Declaration of the Rights of the Child to replace the Geneva Declaration on the Rights of the Child. This DRC was adopted to cure the shortcomings of the Geneva Declaration. It contained eleven principles and emphasized the duty of mankind to give the best to children.⁵⁸ 20 years later, the United Nations in commemoration of the 20th anniversary of the Declaration of the Rights of the Child, marked the year 1979 as the International Year of the Child. It was during this period that the thought of having a Convention on the Rights of the Child came up. By 1978, the first draft of the convention was presented to the Commission on Human Rights and subsequently, a revised draft was presented in 1979. This led to the adoption of the Convention on the Rights of the Child in 1989 by General Assembly Resolution 44/25.⁵⁹

⁵⁴ ‘History of Child Rights’ (UNICEF) <<https://www.unicef.org/child-rights-convention/history-child-rights>> accessed 30 December 2022.

⁵⁵ ‘Our Founder: Eglantyne Jebb’ (Save the Children) <<https://www.savethechildren.org/us/about-us/why-save-the-children/eglantyne-jebb>> accessed 31 December 2022.

⁵⁶ ‘Declaration of the Rights of the Child, 1959’ (Humanium) <<https://www.humanium.org/en/declaration-rights-child-2/>> accessed 31 December 2022.

⁵⁷ UN-CCOI, ‘UNICEF’ (un.org) <<https://www.un.org/en/ccoi/unicef-united-nations-childrens-fund>> accessed 31st December 2022.

⁵⁸ ‘Declaration of the Rights of the Child, 1959’ (Humanium) <<https://www.humanium.org/en/declaration-rights-child-2/>> accessed 31 December 2022.

⁵⁹ International Committee of the Red Cross, ‘Convention on the Rights of the Child, 20 November 1989’ (ICRC) <<https://ihl-databases.icrc.org/en/ihl-treaties/crc-1989?activeTab=undefined>> accessed 31 December 2022.

The United Nations Convention on the Rights of the Child (UNCRC) is one of the nine core human rights treaties.⁶⁰ It is the primary convention protecting the rights of children. It was adopted in 1989 and came into force on 2 September 1990. The CRC is the most ratified convention in the world, having been ratified by 197 countries.⁶¹ Unlike the previous international instruments on child right, the UNCRC is a legally binding document, making it the first legally binding international instrument on Child Rights.⁶² The adoption of the UNCRC was a great milestone for the protection of the rights of a child. Nelson Mandela described it as “*that luminous, living, document that enshrines the rights of every child without exception, to a life of dignity and self-fulfilment*”.⁶³ It is made up of three (3) parts containing fifty-four (54) articles. The convention mandates state parties to protect the rights of the children and make known/publicize the rights in this convention to children and adults.⁶⁴

A child under the Convention is defined as any person below the age of eighteen (18) years, except majority is attained earlier under the national law applicable to the child.⁶⁵ The convention sets out guiding principles for the child. The first Part of the Convention (articles 1 - 41) guarantees every child the right to life, protection from discrimination, expression of their views, and access to education, healthcare, and a supportive environment. It also addresses issues such as adoption, protection from abuse and exploitation, and legal assistance, prioritizing the child's best interests in all matters.

Part II (articles 42-45) of the convention provides for the Treaty Monitoring Body – the Committee on the Rights of the Child, which is to be made up of 10 experts acting and serving in a personal capacity.⁶⁶ State parties are to submit two reports to the Committee; an initial report to be submitted 2 years after ratification and a periodic report to be submitted every 5 years.⁶⁷ The

⁶⁰ OHCHR, ‘The Core International Human Rights Instruments and their Monitoring Bodies’ (United Nations) <<https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>> accessed 31 December 2022.

⁶¹ Only the United States is yet to ratify it.

⁶² ‘History of the UNCRC’ (Child and Youth Advocate) <<https://www.childandyouthadvocatepei.ca/history-of-the-uncrc>> accessed 30 December 2022.

⁶³ Nelson Mandela, ‘Statement on Building a Global Partnership for Children’ (One World One People, 6 May 2000) <https://www.oneworldonepeople.org/articles/mandela_children.htm> accessed 31 December 2022.

⁶⁴ Arts 14 and 42.

⁶⁵ Art 1.

⁶⁶ Art 43.

⁶⁷ Art 44.

convention allows expert advice from certain agencies to aid the implementation of the Convention and gives the committee the power to make suggestions and give recommendations for the implementation of the convention.⁶⁸ The last part of the convention (part III, articles 46 – 54) is the miscellaneous provisions which contain the procedures and processes for signatures, dispute resolution, ratification and accession, amendments, and reservations.

The convention has three optional protocols; two were adopted on 25th May 2000 and the last was adopted on 19th December 2011. The first protocol is the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, the second is the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (raising the age for direct participation in hostilities to 18 years), and the last is the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (allowing children to report directly to the Committee on violation of their rights).

As earlier stated, the Convention is a major milestone in the advancement and protection of the rights of children worldwide. However, it failed to take cognizance of the peculiarities and cultures of certain countries which are detrimental to the rights of children. For example, it did not recognize the issue of child marriage which is in vogue in some countries.⁶⁹ In addition, the joining clause under the definition of a child (unless majority is attained earlier under the national law applicable to the child) is counterproductive because it gives state parties leeway to set an unreasonable age which would invariably defeat the very essence of the convention. Countries have adopted ages lower than 18 even though the Committee has urged state parties to raise the majority to 18.⁷⁰

⁶⁸ Art 45.

⁶⁹ Statista, ‘Countries with the highest child marriage rate as of 2021’ (Statista, April 2021) <<https://www.statista.com/statistics/1226532/countries-with-the-highest-child-marriage-rate/>> accessed 2 January 2023.

⁷⁰ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, ‘All Persons Below the Age of 18 Years are Children: Upholding All the Rights of All Children, Everywhere, at All Times’ (United Nations, 6 October 2022) <<https://childrenandarmedconflict.un.org/2022/10/all-persons-below-the-age-of-18-years-are-children-upholding-all-the-rights-of-all-children-everywhere-at-all-times/>> accessed 2 January 2023.

Regional Legal Framework

The African Charter on the Rights and Welfare of the Child (ACRWC) is the only specific regional treaty on children's rights.⁷¹ It was adopted by the Member States of the Organization of African Unity in 1990 and entered into force in 1999. It has been ratified by 53 member states of the African Union. The ACRWC contains similar provisions to the United Nations Convention on the Rights of the Child (UNCRC) with modifications that reflect the cultural heritage, historical background, and values of Africa.⁷² In addition, the ACRWC provides for other rights which are important in protecting the dignity and right of the child based on the peculiarities of the African culture and practices.⁷³

Some of the notable distinctions and additions of the Charter include recognizing the rights of unborn children,⁷⁴ prohibiting harmful cultural practices like Female Genital Mutilation,⁷⁵ setting a minimum age for marriage at 18,⁷⁶ and prohibiting children's involvement in direct hostilities.⁷⁷ It also emphasizes parental and community responsibilities towards children, reflecting African cultural values and addressing unique regional challenges.⁷⁸

The ACRWC is a great improvement as it recognizes the existing culture and practices and peculiarities (both prejudicial and integral cultures and practices) of Africa. However, despite these provisions, there has not been an optimum success in its adherence and implementation amongst member states. Child labour, child marriage, child trafficking and exploitation, malnutrition, and out-of-school children are still the order of the day in member states.⁷⁹ It is recommended that these laws take full effect in member states, otherwise the purpose of the ACRWC will be defeated.

⁷¹ Benyam Dawit Mezmur, 'The African Children's Charter @ 30: A distinction without a difference?' [2020] 28 *The International Journal of Children's Rights* 693, 694.

⁷² ACRWC, preamble.

⁷³ Ibid.

⁷⁴ Ibid, para 10.

⁷⁵ ACRWC, art 21(1).

⁷⁶ Ibid, art 21(2); It also makes registration of marriages compulsory.

⁷⁷ Ibid, art 22.

⁷⁸ Ibid, art 31.

⁷⁹ International Labour Office and United Nations Children's Fund, *Child Labour: Global estimates 2020, Trends and the Road Forward* (New York: ILO and UNICEF, 2021); ANPPCAN News, 'The African Charter on The Rights and Welfare of the Child (ACRWC)' (ANPPCAN, 15 June 2021) <<http://www.anppcan.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acrwc/>> accessed 1 January 2023.

THE EFFECT OF CHILD RIGHTS IN OUR WORLD TODAY

- I. The recognition of Child Rights and adoption of legislation of same changed the narrative of children as mere assets or properties in the family and as victims or objects of charity. It recognized and protected the child as a significant entity in the family and community with rights, one that possess the attribute of being rational, and has the capacity to make decisions and choices distinct from the parents and legal guardians.⁸⁰
- II. It recognized the vulnerabilities of children, thus needing special forms of protection, prohibition from certain activities and practices, and prioritization during crisis.⁸¹
- III. The recognition and protection of Child Rights ensures that state policies and laws accommodate children especially as they have limited participation in government affairs and overall decision making.⁸²
- IV. It also ensured that children are not left in the background at the peril or dictates of their parents and legal guardians but are well catered for in a manner suitable and essential for their growth and development.

CONCLUSION

The world over, child rights protection and realization has become a legal norm, pervading even the most obstinate nations and reforming the global conceptualization of children. Cascading down from antiquated times when the rights of children were non-existent and obsolete, this article has trailed the herculean task to rubber-stamp child rights with the apposite legislative and judicial imprimatur. Hitherto, cases of child right violations and infractions did abound, and was greatly exacerbated by the Trans-Atlantic slave trade, the Industrial Revolution, and the upsurge in the demand for labour.

Following radical reforms in the 16th Century, the malevolence against children was decried and this continued unabated, garnering support from movements, sectoral associations, organizations, and institutions of government till it gained international recognition in the late Twentieth

⁸⁰ History of the UNCRC' (Child and Youth Advocate) <<https://www.childandyouthadvocatepei.ca/history-of-the-uncrc>> accessed 30 December 2022.

⁸¹ Philip Alston, 'Children's Rights in International Law' (Cultural Survival, 19 February 2010) <<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/childrens-rights-international-law>> accessed 31 December 2022.

⁸² Ibid.

Century. Thereafter, a spree of legal positivism ensued with legislation being enacted to protect the rights of children. Much of the extant legal framework governing child rights internationally and regionally has been reviewed, and the resultant effects have been succinctly examined.

In conclusion, this paper recommends swift ratification of the existing international legal framework for child rights by the state-parties. Furthermore, it is recommended that each jurisdiction should bolster the implementation of their child rights protection laws so as not to be covertly aiding the perpetration of child rights offences, thus impugning their character and credibility internationally.

DOMICILE AND JURISDICTION OF COMPANIES:

DRAWING THE LINE- THE CASE OF SANYO ELECTRIC TRADING V QUARCOOPOME

Anardy Nyarko Asare

ABSTRACT

One of the most unexplored areas of Ghanaian jurisprudence is the law on domicile and jurisdiction of companies, and essentially legal persons. The Court of Appeal in *Sanyo Electric Trading v Quarcoopome*⁸³ was given the opportunity to state what the law is in relation to these matters. While the court may have seized this opportunity, the decision of the court still leaves important questions unanswered as well as issues that teases the mind of the reader. This paper argues that the court in the Quarcoopome case in setting out the factors for determining whether it had jurisdiction over the defendant focused solely on the domicile of the defendant company thereby ignoring other factors relevant for determining whether the defendant was subject to the court's jurisdiction. The article further argues that the domicile test set out by the court should be used for determining jurisdiction and not applied as a choice of law rule. In doing this, the paper explains that the domicile test set by the court in addition to other factors are relevant for determining the jurisdiction of companies and that the test, however is not to be applied as a choice of law rule.

INTRODUCTION

It has been universally recognized that questions affecting the personal status of a person whether natural or artificial should be governed by one and the same law.⁸⁴ This is referred to as personal law. In England and more importantly in Ghana, this law is determined by the domicile of a person. Domicile is a part of a family of connecting factors including presence and residence.

Domicile is easier to illustrate than to define however, the underlying meaning is a permanent home.⁸⁵ As defined by Lord Cranworth in *Whicker v Hume*⁸⁶ “by domicile we mean home, the

⁸³ [2001-2002] GLR 205

⁸⁴ Cheshire, North and Fawcett Private International Law 14th Edition Oxford University Press, 2008 p154

⁸⁵ Dicey, Morris and Collins, The Conflict of Laws Sweet and Maxwell 2006 p123

⁸⁶ 11 E.R. 50

permanent home...and if you do not understand your permanent home I'm afraid that no illustration drawn from foreign writers or foreign languages will help".⁸⁷ Domicile is therefore used to determine the law which a person has a substantial connection with by reason of the person having a permanent home in the country whose law is in question. As domicile is used to determine the personal law of a person, domicile is a choice of law rule. The question of domicile only rears its head after the court has determined that it has jurisdiction over the parties or the matter in question.

Jurisdiction for the purposes of Conflict of laws refers to the question of whether or not the court will hear and determine an issue upon which its decision is sought.⁸⁸ In a conflict of laws matter, the court first has to determine whether it has jurisdiction, then determine the appropriate choice of law then finally recognize and enforce any foreign judgments when there is the need for the same. The central question here is whether the courts can and will hear the case. Three questions arise in the court's endeavour to determine whether it has jurisdiction viz, a) Whether the court have power to hear the case b) Whether the court will decline jurisdiction or stay proceedings c) Whether there is limitation on the exercise of jurisdiction.⁸⁹ For the purpose of this paper however, jurisdiction is limited to the first question for the court i.e. the determination of whether the court has power to hear the case. The power of the court to hear the case will be predicated on several factors including nationality, presence, submission and domicile.⁹⁰

Effectively, while domicile is a choice of law rule, domicile may be used in some situations to determine whether the court has jurisdiction over a party. This is especially so with companies. In *Sanyo Electric Trading v Quarcoopome*,⁹¹ the court had to determine whether or not it had jurisdiction over Sanyo Electric Trading, a company incorporated in Japan but a joint holder of share with the Government of Ghana Sanyo Co. Ltd.⁹² The court in determining this question based its decision on the grounds that the defendant company, Sanyo Electric Trading was not domiciled in Ghana. This paper seeks to argue that while domicile was relevant in the court's

⁸⁷ Whicker v Hume (1858) 7H.L.C 124,160

⁸⁸ Tehrani v Secretary of State for the Home Department [2006] UKHL 47 at 66

⁸⁹ Cheshire supra note 1 p202

⁹⁰ Edward Sykes and Michael Pryles, Australian Private International Law The Law Book Company Limited p21

⁹¹ [2001-2002] GLR 205

⁹² Sanyo Electric Trading v Quarcoopome [2001-2002] GLR 205

consideration of whether it had power to hear the case involving the defendant, the main consideration for the court was not whether the defendant was domiciled in Ghana. For the purpose of determining whether it had jurisdiction, if Sanyo Electric trading was domiciled; had a definite or more permanent form of doing business or if they merely conducted business in Ghana, the court could assume jurisdiction. In the light of the above, while the conclusion reached by the court was right, by narrowing its focus to whether the defendant was domiciled in Ghana, the court ignored other factors relevant for its determination of whether it has jurisdiction over the defendant. The paper then argues that the test for determining the domicile of companies set by the court in the case should only apply to determine the jurisdiction of the court on companies

This paper will therefore begin with a discussion of the Court's decision in *Sanyo Electric Trading v Quarcoopome*. The next part of this paper will elucidate the law on jurisdiction for the purpose of legal the law on jurisdiction of legal persons particularly companies and then how domicile of companies is determined as rightly laid out in the above case. The paper will then conclude by showing that, even if the other factors necessary for determining the court's jurisdiction had been considered, the same conclusion would have been reached by the court.

CASE SUMMARY

Facts of the Case

The plaintiff instituted the action against the defendant, a company incorporated in Japan for damages for the breach of an oral contract appointing the plaintiff director of the defendant company, under and by virtue of which the plaintiff has worked and rendered services as director for the defendant company, for which the defendant has failed or refused both to pay the plaintiff's reasonable director's fees and the lump sum of remuneration as agreed. The defendant entered appearance under protest, challenging the jurisdiction of the court on grounds that the defendant company is not registered in Ghana and does not do any business here.

The High Court refused to strike out the writ for want of jurisdiction. The court based its decision on the fact that Sanyo Electric Trading was carrying on business Ghana Sanyo Co. Ltd. In which the defendant together with the Government of Ghana were joint shareholders.

Decision of the Court

First, the Court determined that while the defendant may hold shares in the company incorporated in Ghana, the defendant's rights as shareholder was limited to the right to vote, attend meetings and receive dividends and that did not make him part owner of the assets of Sanyo Electric Trading so as to make the defendant carry business through Ghana Sanyo Limited.

The Court, then speaking through Asiamah Justice of the Court of Appeal reasoned that, the defendant must be actually domiciled in the state or country, in this case Ghana for any legal action to be maintained against the defendant jurisdictionally. In the view of the lordships therefore, the defendant not being a company incorporated and domiciled in Ghana it would be a scandal to the justice of administration of justice if the plaintiff were to be permitted to have his case entertained in our courts.⁹³

The court in determining whether the defendant was domiciled in Ghana set the test for determining whether a company was domiciled in Ghana as 1) It was incorporated in Ghana or has its registered office in Ghana 2) Its central management or control is in Ghana. The court held it did not have jurisdiction over the defendant as the defendant did not satisfy any of the above tests.

Jurisdiction of companies

As stated early on, jurisdiction is the power of the court to hear and determine a case upon which its decision is sought. While jurisdiction for the purpose of natural persons is determined by factors such as presence, submission and in some cases nationality jurisdiction for the purpose of companies is somewhat different.⁹⁴ The court will have jurisdiction over a company if the company is resident or doing business in Ghana.⁹⁵

Residence: A company is resident in a country if it does business of some definite and more or less permanent place in Ghana.⁹⁶ Thus, although a company may be wholly incorporated by a law other than under Ghanaian law, if the company carries a definite business or has an established place of

⁹³ Asiamah J.A supra note 7 p205

⁹⁴ Sykes supra note 6

⁹⁵ Richard Oppong and Kissi Agyebeng, Conflict of Laws in Ghana Sedco Publishing Limited 2021 p39

⁹⁶ Ibid.

business in the country, the company is subject to the jurisdiction of the Ghanaian Courts. The High Court speaking through Edusei J in *Ackerman v Societe General de Compensation*⁹⁷ said the following on the court assuming jurisdiction based on the residence of the defendant in Ghana

Whether a corporation aggregate, like the applicants, is resident in Ghana for the exercise of the court's jurisdiction, *will be dependent on the fact that, at the commencement of the action, business is being carried on at some definite and more or less permanent place in the country that arrogates to itself, the right to adjudicate*⁹⁸ [emphasis mine]

A company carrying on business of some definite form is therefore subject to the jurisdiction of the Ghanaian courts. Whether or not a company has an established place of business in the Republic is determined by the Companies Act, 2019 (ACT 992). Under the Act, The expression “established place of business” means a branch, management, share, transfer, or registration office, factory, mine, or any other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of the body corporate or maintains a stock of merchandise belonging to that body corporate from which the agent regularly fills orders on behalf of the body corporate.⁹⁹ This definition only applies to an external company ie. A company formed outside the Republic (under a law other than that of the Republic) and has an established place of business in the country.

A body corporate does not have an established place of business in the Republic merely because the body corporate carries on business dealings in the Republic through a genuine broker or general commission agent acting in the ordinary course of business as a broker or general commission agent. Again, the fact that a body corporate has a subsidiary which is incorporated, resident, or carrying on business in the Republic, whether through an established place of business or otherwise, does not of itself constitute the place of business of that subsidiary, an established place of business of that body corporate.¹⁰⁰

⁹⁷ (1967) GLR 212-218

⁹⁸ *Ackerman v Societe Generale de Compensation* (1967) GLR 212-218

⁹⁹ Companies Act 2019, (ACT 992) Section 329(3)

¹⁰⁰ *Ibid* 329(4)

The question of residence is determined by the facts as they existence at the time of the commencement of the action¹⁰¹

Doing Business: A company conducting business in Ghana is subject to the jurisdiction of the courts. The company does not have to satisfy a definite or permanent form of business in Ghana. The company does not also have to satisfy that there is an established place of business in the Republic. Doing business or carrying on business presupposes some degree of continuance or repetition therefore engagement in one isolated transaction will not suffice.¹⁰² It follows that while the maintenance of a definite or established place of business is not essential, there must be an established pattern of doing business. It may carry on business through an agent unless the agent acts on his own behalf or does not have authority to make such contracts.¹⁰³

Edusei J in *Tafa & Co. v Tafa & Co. Ltd*¹⁰⁴ commenting on the matter stated as follows:

The presence of a foreigner within the court's jurisdiction was sufficient for service of a writ of summons on him. *In the case of an artificial person such as the defendant company, a foreign company, the fact that it has been carrying on business in the country, gave the court jurisdiction over it.* And since the president-director of the defendant-company had been carrying on business in the country on behalf of the company, it being under his complete control, service of the writ of summons on him within the jurisdiction was proper. [emphasis mine]

From the foregoing instances, a court in its effort to determine whether or not it has jurisdiction over a defendant company does not only have to determine whether a company is domiciled in the Republic. The Court in the Quarcoopome case could assume jurisdiction if Sanyo Electric Trading was doing business in Ghana or carried on business of some permanent or definite form or had an established business in the Republic. The court however only discussed the effect of the domicile of the defendant on its jurisdiction thereby ignoring the above-mentioned factors. The court in the above case merely mentioned by way of obiter that the defendant was not carrying on business in Ghana without first, discussing the other factors apart from domicile that would have affected the jurisdiction of the court and more importantly without elucidating on the effect of “carrying

¹⁰¹ Ackerman supra note 11

¹⁰² Sykes supra note 6 p 353

¹⁰³ *Tafa & Co v Tafa & Co. Ltd* (1977) 1 GLR 422; See also *Vogel v R & A Kohnstamm Ltd* (1973) 1 QB 133

¹⁰⁴ (1977) 1 GLR 422

on business” on the jurisdiction of the court i.e. whether the court would have assumed jurisdiction if the defendant was carrying on business in the Republic or whether the court will still refuse to exercise jurisdiction.

DOMICILE

The Court of Appeal in the Quarcoopome case set the test for determining whether a company is domiciled in Ghana as

A legal person [company] is domiciled in a state if it has its seat in that state or country that is to say, if either a) it was incorporated in that state or country or has its registered office therein; or b) its central management or control is exercised there.¹⁰⁵ [emphasis mine]

It is submitted that the test for domicile set out by the court should be limited to domicile for the purpose of determining the jurisdiction of a company.

This is not without authority.¹⁰⁶ Indeed, Paul Collier commenting on Article 60 of the Brussels I Regulation Rules which applies to member countries of the European Union, drew the distinction between domicile as a choice of law rule and the domicile test set out in the Regulation. Under the Regulation, a legal person is domiciled where it has its a) statutory seat b) central administration c) principal place of business.¹⁰⁷ It is further noted that although this does not apply to the United Kingdom and Ireland, the test for domicile for the countries mentioned renders the same result.¹⁰⁸ By the test, a company may be domiciled in two or more states.

By this, and consequently, by the test set out by the court in the Quarcoopome case, it is possible for a company to be domiciled in more than one state and therefore subject to the jurisdiction of all those states. A company could therefore be domiciled in two states either simultaneously or on a peripatetic basis.¹⁰⁹ By this if X co Ltd is incorporated under the laws of Ghana, and X co. Ltd has

¹⁰⁵ Quarcoopome supra note 7 p204

¹⁰⁶ Gasque v Inland Revenue Commissioners [1940] KB 80

¹⁰⁷ Article 60, Brussels I Regulations

¹⁰⁸ ibid ‘the registered office of the corporation or, where there is no such place anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place’

¹⁰⁹ Sykes supra note 6 p355

its central management in Togo. X co. Ltd is domiciled in Togo and Ghana. The effect of this is that X co. Ltd is subject to the jurisdiction of the courts in Ghana as well as Togo.

In contrast, domicile as a choice of law rule for the purpose of companies is the law under which the company is incorporated. In countries like the United Kingdom and Australia, the distinction is clearly made.¹¹⁰ The result of this is that, a company is domiciled in just one state for the purpose of determining the choice of law rule although this is not always the case.¹¹¹

The application of the of the above test of domicile set out by the court in the Quarcoopome case as choice of law rule will lead to the application of two or more laws to determine issues concerning a company. As issues governing a person whether natural or legal must be governed by one and the same law this result will be wrong. It is admitted that, while this result by analogy with the law applicable to natural persons is wrong, It is entirely possible in cases of multiple incorporations.¹¹² Since the situation of multiple incorporations is very rare in Ghana, it is submitted that to save the court from the dilemma of choosing which law to apply as the personal law of a company, domicile of companies should be limited to the law under which the company is incorporated and not the test set by the court in the Quarcoopome case.

CONCLUSION

This article has sought to demystify the law on jurisdiction and domicile of companies. This article achieved this in the light of the Court of Appeal's decision of Sanyo Electric Trading v Quarcoopome. In doing this the paper argued that the court in the case ignored other factors relevant to determining whether it had jurisdiction over the defendant in the case. Again, the article argued that the domicile criteria set by the court in the case should be limited to domicile for determining the jurisdiction of the court such that accompany may be domiciled in two or more states. The writer acknowledges here that there are other relevant connecting factors such as the nationality of a company which is determined usually by the statute.

¹¹⁰ Paul Collier, 'Conflict of Laws' Cambridge University Press 4th Edition p37; *ibid*

¹¹¹ In countries like the USA, multiple incorporations are common.

¹¹² Fansworth, Residence and Domicile of Corporations (1939) pp79-200

THE INTRODUCTION OF TECHNOLOGY IN THE CONDUCT OF ELECTIONS IN NIGERIA: A BLESSING OR A CURSE?

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ABSTRACT

Electoral democracy in most post-colonial countries such as Nigeria has not been successful in terms of reducing the incidence of electoral malfeasance. Thus, electoral democracy in these countries is inseparable from monumental and brazen electoral manipulations. To surmount these challenges successive governments in Nigeria have launched various innovative ideas and most recently is the introduction of information communication technology (ICT) in the conduct of elections in Nigeria. This paper examines the relevancy of the integration of ICT in the conduct of elections in Nigeria. The paper finds that the integration of ICT in the conduct of elections in Nigeria, instead of rekindling the confidence of most Nigerian voters and international partners in Nigerian democracy, has rather dwindled their confidence, as electoral stakeholders now use ICT as a new tool in perpetrating electoral fraud. The paper therefore recommends that the scope of utility of ICT in the conduct of elections in Nigeria should be clearly defined in the electoral laws, INEC officials adequately trained on the use of these modern technologies and electoral stakeholders should avoid sabotaging the technologies.

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1.0 Introduction

In today's globalization, ICT has taken the centre stage as nothing can be organized and executed with greater success without its use. The use of ICT in election management has witnessed an upsurge in the last two decades. Countries are adopting electronic voting (e-voting) in a bid to address electoral malfeasance and improve efficiency and credibility in the administration of the electoral process. One of the advantages of the use of ICT in the conduct of elections is that "e-voting lessens the chances of electoral officials changing the votes count, thus reducing election officials' direct interaction with ballots or counts and other forms of voter fraud". It also allows "larger voter participation especially as the process is faster, less cumbersome, reliable and promotes more trust in the system among others".

In the 2015 general elections, the Nigerian government introduced the use of ICT in its election management system. The 2015 general election marked a new era in the deployment of sophisticated Information Communication technologies in the history of Nigeria elections. The "Improved Automated Fingerprints Identification System (AFIS) was introduced to identify similar fingerprints on the register used for the 2011 election". Temporary voter cards (TVC) which were used for the 2011 elections were replaced with permanent voter cards (PVC). For the first time, the Independent National Electoral Commission (INEC) adopted technology for the accreditation of voters with the aid of the INEC Voters Identification System (IVAS) popularly called the Smart Card Reader (SCR). The card reader keeps a "tally of all cards read, comprising the details of all voters verified as well as those not verified, and transmits the collected information to a central INEC server via GSM data service". Information transmitted to the server enabled INEC to "audit results from polling units, as well as do a range of statistical analysis of the demographics of voting". Furthermore, collation officers were "able to use information

transmitted by the card reader to audit polling unit result sheets and determine whether accreditation figures have been altered.”

In the 2019 general elections, the use of permanent voter’s card and smart card reader readers were retained. Ahead of the 2023 general election, the Electoral Act 2010 was repealed by the Electoral Act 2022, the Electoral Act 2022 and the Regulations and Guidelines for the Conduct of Elections 2022 introduced the INEC Result viewing Portal (IREV) in addition to the smart carder readers. Sections 47 and 50(2) of the Electoral Act 2022 legalised the use of smart card readers, electronic accreditation of voters and any other voter accreditation technology that the INEC may deploy. Also, the Act empowers the INEC to determine the manner(s) of transmission of results. Relying on this section, the INEC in its Regulation created room for the electronic accreditation of voters and electronic transmission of the result. The Act also made provisions for the use of either electronic voting machines or any other voting device for the conduct of elections. Section 62(2) of the Act empowered the commission to maintain a centralised electronic register of elections for e-collation. The introduction of electronic voting devices has been seen as one of the innovative provisions of the Electoral Act 2022 and also one of the most contentious issues arising from the just conducted 2023 general election, particularly, the February 2023 Presidential Election. IReV was first used in the conduct of the Osun State Governorship election in 2022 and thereafter in the conduct of the general elections in 2023.

It is pertinent to note that despite the copious provisions of the laws and the promises of INEC to utilise ICT in conducting the 2023 general election, there were still widespread electoral malpractices and ineffective utilisation of ICT in the conduct of the election.

This paper examines the impact of technology on the electoral system, the outcomes of elections and the issues associated with the use of ICT in the conduct of elections in Nigeria. It concludes by proffering salient recommendations that will help foster democratic government in Nigeria.

2.0 Issues arising from the Application of ICT in the Conduct of Elections in Nigeria

The introduction of ICT in the conduct of elections in Nigeria has been seen as a “game changer”. However, this innovative step in our electoral system has been bedevilled by some challenges which has made it a curse rather than a blessing.

2.1 Technical Issues

The adoption of ICT in the conduct of elections in Nigeria is laced with a lot of technical issues. Despite the guarantees by INEC that the BVAS and the IReV will be applied in such a manner that will eliminate or even significantly limit human interference in the electoral process and reduce the rate of electoral malpractices in the 2023 general elections, the actual implementation/use of these electoral devices on election day was “grossly ineffective and greatly undermined the credibility of the electoral process and its outcome”. A good number of BVAS devices broke down or outright malfunctioned across different polling units in the country. The IReV which was designed to kick into action immediately after voting ends was, however, marred by a lot of challenges that tainted the result transmission process. At the end of the voting, many INEC officials claimed not to remember their passwords to the IReV portal. For those who could recollect theirs, many complained the passwords were wrong and that they could consequently not upload the polling unit results in real-time. Those that could transmit the results of elections, delayed in transmitting the results to the INEC’s portal, even 24 hours after voting had ended results from several polling units were yet to be uploaded to the INEC portal. INEC attributed this “time-lapse to the routine glitches common to technical platforms like the IReV”. At the close of

polls, therefore, the INEC portal “failed to disclose the results obtained from all of the country’s total 176,000 polling units as expected” due to the various technical issues that bedevilled the use of IReV. While these technical issues might be genuinely born out of a lack of proper training for the ad hoc staff responsible for operating the BVAS, or technical failure, the possibility that these tactics were implored by INEC officials to deliberately sabotage the elections’ outcome cannot be ruled out as they provided the opportunity for the manipulation of the elections.

2.2 Ambiguous Provisions of the Law

The adoption of ICT in the electoral management system raises a lot of legal issues and there is a need for clear entrancement in the relevant legislative instruments such as the Constitution, Electoral Act and INEC Guidelines and Regulations, detailed procedures to be followed at each stage of adoption of ICT in the electoral process and remove ambiguities that can constitute legal landmines.

It is no doubt that technology offers great opportunities for strengthening the transparency, credibility and integrity of elections, however, its adoption must be based on well-defined policies and appropriate implementation. Such policies would have to be designed with appropriate safeguards and governed by appropriate legislation to promote the opportunities and address the challenges. Otherwise, the use and deployment of technological applications in elections can lead to an exponential increase in the cost of elections and even erosion of public confidence in electoral processes, contrary to what the use of technology is supposed to bring to the electoral process.

In Nigeria, the provisions of the law on the adoption of ICT in the conduct of elections in Nigeria are quite ambiguous and perpetrators of electoral fraud are hiding under this ambiguity in committing electoral fraud and circumventing the use of ICT in the conduct of elections.

The introduction of electronic voting devices has been seen as one of the innovative provisions of the Electoral Act 2022, however, due to the ambiguity in the law, the adoption of ICT has become one of the most contentious issues arising from the just conducted 2023 general election, particularly, the February 2023 Presidential Election.

Notably, one of the grounds relied on in challenging the result of the 2023 presidential election in the case of *Mr Peter Gregory Obi & Anor v. Independent National Electoral Commission & 30rs* was the issue of the INEC not transmitting the election results in real-time via INEC Result viewing Portal (IReV). In delivering the judgement of the Tribunal, Justice Tsammani **held that “there is no provision for the electronic transmission of election results in the Electoral Act 2022, it is at best, optional.” He continued that the only technological device** that is mandatory for the INEC to use for the election is the Bimodal Voters Accreditation System (BVAS) and nothing in the INEC regulation shows that the Bimodal Voters Accreditation System (BVAS) must be used to electronically transmit polling unit results. The decision of the court has been adjudged by commentators as being unjust, given the circumstances surrounding the case and the conduct of the election.

It is therefore imperative to review the Electoral Act 2022 to remove the deliberate loopholes inserted by INEC to evade the absolute use of technology to conduct and declare election results in Nigeria. The use of technology should ensure not just the accreditation of voters and the transmission of results to the IReV portal but also eliminate all forms of overvoting. The ballot papers should also be made electronic so the votes are cast electronically and the collation is done via electronic devices.

2.3 Corruption and Electoral Malpractice

To a very large extent, technology has eliminated the incidence of electoral malpractice. Despite the benefits associated with the introduction of ICT into the conduct of elections in Nigeria, these technologies have also been used for negative political purposes. Fundamentally, Nigeria's political culture is embellished with political corruption which manifests itself in the use of and negative influence of money in politics, election rigging and thuggery. Electoral corruption is embedded in Nigeria's electoral processes, not just a "feature of the voting process on election day but also of other pre-election day processes and activities, such as party primary and election nomination processes". Before the 2023 elections, INEC announced comprehensive measures to enhance its integrity and consequently restore popular confidence in the electoral process. One of such measures was the substantial investment in digital technology. However, technology is a tool and not an end in itself. The extent to which "technology is deployed in an electoral process in a given country at a given time is perhaps directly related to the perceived level of trust and independence enjoyed by the Electoral Management Body". It is this level of trust and independence that in the end determines the acceptance of electoral outcome by the various stakeholders and the general public.

On the day of the 2023 general election, just like the previous general elections, political thugs disrupted the election process across the country. From Borno, Kebbi, Sokoto, Kano, Kaduna, Nasarawa, and Kogi to Rivers, Enugu, Abia, Edo, Delta, Ogun and Lagos States among others, the story is the same. There was widespread electoral violence ranging from voter intimidation, and suppression to physical attacks, carting away ballot boxes and electoral materials, disruption of the voting process, as well as holding hostage electoral officers. Furthermore, there were several cases

of manipulation of the BVAS and IReV by INEC officials to deliberately sabotage the electoral process. Also, INEC failed to deliver on their promises and changed the rules in the middle of the exercise.

2.4 Inefficiency of Some Electoral Officials

Before the conduct of the 2023 general election, INEC trained some of its officials on the use of the BVAS and the IReV, and “conducted mock voter-accreditation exercises at designated polling units across the country’s 36 states using the BVAS”, as well as assured the citizens of the effective utilization of these technologies in the general elections. However, “despite these assurances, actual implementation on election day was ineffective” as it did not take long after the opening of some polling units on election day for observers to spot difficulties with the BVAS. In some polling units, it was reported that some INEC officials struggled with the voter-accreditation process based on using the BVAS. The training given to the INEC officials and ad-hoc staff was inadequate. A good percentage of the “Presiding Officers and Assistant President Officers I in the polling units were not intensively trained on the proper use and handling of these new technologies”. During the election, some officials claimed they could not remember the password to the IREV portal. Perhaps well-trained persons were sabotaging the elections this way.

3.0 Conclusion/Recommendations

There is no doubt that ICT may ensure greater efficiency in the management of elections and enhance overall popular trust in the electoral process, however, it is susceptible to newer forms of vulnerabilities and disruptive attacks too. Additionally, technical hitches do arise and equally, compromise the credibility of the electoral process and undermine public confidence in democracy. This was exactly the case in the just conducted 2023 general elections in Nigeria.

For effective utilisation of ICT in the conduct of elections in Nigeria, it is recommended that INEC should undergo restructuring, especially in areas such as staffing and staff development. Also, INEC should provide adequate training for its staff on how to use these new technologies in the conduct of elections in Nigeria and these technologies should be made available during the training session. Each of the trainees should undergo a mock test during the training.

Furthermore, the Electoral Act 2022 should be amended to properly provide for the scope and limit of the use of ICT in the conduct of elections in Nigeria, and lastly, all the electoral actors/stakeholders should allow the electoral process to naturally run its course to bring about free and credible elections in Nigeria that will reflect the actual choice of the citizens, who are the ultimate determinant of electoral outcomes.

CONTEMPORARY ISSUES OF LAW. SEPARATION OF POWERS: JUDICIAL INDEPENDENCE IN KENYA.

Gladwel M. Wawira¹¹⁴

ABSTRACT

According to Montesquieu, there would be an end of everything if the same person exercised the powers of implementing public decisions, enacting laws, and deciding cases. For this reason, democratic countries have incorporated the doctrine of separation of powers in their jurisdictions. Kenya, being one of the democratic countries, has incorporated in its Constitution the separation of powers by creating three arms of the government which are to work independently, and interdependently in exercising checks and balances.

However, since independence (1963), the Judiciary (one of the three arms of government) has been prone to control and attacks from the other arms (Executive and the Legislature) and this has undermined its independence.

The health of judicial independence has come under scrutiny since the start of this year, 2024. It has been so sad to see the head of the Executive threatening to ignore the Court orders (Contempt of Court) that he feels they are delaying his planned public developments. This has therefore interfered with the independence of the judiciary.

This research paper aims at recognizing the doctrine of Separation of powers and the Constitutional provisions of the Independence of the judiciary. It discusses the challenges that the judiciary is likely to encounter when its independence is interfered with. This paper finds the need to uphold the rule of law and respect the Judiciary and other arms of government.

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INTRODUCTION

Constitutionalism and rule of law are the key factors to a political democracy that respects human rights. As it turns out to be, Judiciary is the custodian of the rule of law and is the linchpin of the scheme of checks and balances through which the separation of powers is assured. The Executive and the Legislature are very powerful arms of government and in order to ensure that they do not misuse their powers, the Judiciary comes in to play. The Judiciary comes in to guarantee that the Executive-the government- will respect the rule of law and act within the established legal norms, processes and institutions. For this reason, the judiciary has to be independent and be free from interference by the executive.

During the pre-2010 Constitutional era, the independence of the judiciary was only found in writings but in reality, no such a thing existed. That era was characterized by the Executive controlling the judiciary; the rulings and judgments were made in favour of the government, as a ruling made against it would cost one's job. There were so many political murders, detention without trial, arbitrary arrests and detentions, false and politically motivated charges of opponents of the government, both real and imagined, became the business of the state. State and KANU officials committed crimes with impunity. When all those were happening, the judiciary was quiet and took no action to respond. There were also laws passed by the parliament against the interest of the public, for instance, the amendment of Section 2A which turned Kenya into a one-party State. During that era, the people had no freedom of expression and their rights were violated by the government as Judiciary could not even guarantee a protection of the same.

The 2010 Constitution is the *crème` dela` crème`* constitutions that Kenya has ever had. Under this constitution, the freedom of the media is guaranteed and free from State control as it used to

be during the era of president Moi. Also, there was protection of human rights, guaranteed by the judiciary-it gives remedies to one whose rights have been violated or even threatened. This constitution also set out the role of each arm of government, separately, hence the doctrine of Separation of powers. Since 2010, we have had a better judiciary that is more independent compared to the pre-2010 judiciary. The current judiciary is free to make judgments and rulings against the Executive. An example of this is the ruling against the Building Bridges Initiative (BBI) report which had emanated from the then Head of State. Sadly, the independence of the judiciary has currently been challenged by the Head of State by threatening to defy Court orders that have been issued against his development plans. He feels that those projects should be implemented even after the Courts decision that they are against the interests of the people. This has left the country worried about going back to the Independence Constitution's era.

SEPARATION OF POWERS

John Locke argues that man is weak by nature, therefore, if all the power is left in one man or a few hands, such power will be abused. He then concludes that power should be divided into three branches, namely: the executive, the legislature and the federative. This is to avoid a situation where the same persons who have law-making power have also in their hands the power to execute or adjudicate laws. He further illustrates that separating the functions of the creators of the law from those of the executors of the law would lessen the temptation to abuse power. Similarly, in Kenya power is divided into three arms, namely; the executive, legislative and the judiciary, which are meant to ensure that the law makers do not implement the law and interpret the law too.

Baron de La Montesquieu envisions a government made up of the executive, legislature and the judiciary and a pure separation of powers of these three bodies aimed to protect fundamental

human rights and liberties. However, in an ideal democratic system, pure separation of powers does not exist as there exists a system of checks and balances which hinder the pure separation of powers. No democratic system exists with an absolute separation of powers or an absolute lack of separation of powers. Governmental powers and responsibilities intentionally overlap; they are too complex and interrelated to be neatly compartmentalized. As a result, there is an inherent measure of competition and conflict among the branches of government. As a democratic country, Kenya in its constitution has provided for the separation of powers under Article 1(3). The Constitution delegates power to parliament and legislative structures at the counties, national executive, executives at the counties, and the judiciary. However, this separation of powers is not absolute as there is an element of checks and balances among the three arms of government.

The role of the three arms of government is provided for in Chapter 8, 9 and 10 of the Constitution. The key role of the Legislature as stipulated in Chapter 8 is to enact and amend laws, with the role of the Executive in Chapter 9 being to implement the laws made and that of the Judiciary being to interpret the laws made by the legislature. The doctrine of separation of powers, according to Montesquieu is necessary, according to his research, “every man invested with power is apt to abuse it, and to carry his authority as far as it will go.” Van der Vyver simplifies the doctrine of separation of powers into certain principles, which are as follows:

- i) distinction between the three branches of government, to avoid the same people serving in more than one arm of government at a time;
- ii) the three arms should have separate and independent functions in order to avoid interference from other branches; and
- iii) the principle of checks and balances.

The judiciary exercises check and balances in the following ways; checking and ensuring that the laws passed by the government are constitutional or rather they comply with the law and that the interests of the people are considered before enacting the laws. It also checks on the policies formulated by the Executive; whether they are in compliance with law, and that the interests of the people are considered first before the implementation. When the government fails to obey Orders made by the Judiciary, it amounts to it undermining the role of the Judiciary, and not adhering to one of the principles of separation of powers as expressed by Van der Vyver. The Executive should therefore avoid “killing” the doctrine of Separation of powers in the country.

INDEPENDENCE OF THE JUDICIARY

In adhering to the doctrine of separation of powers, the Kenyan constitution has created three arms of government (Legislature, Executive and Judiciary) in which each of the arm has a role to play, free from interference from the others, for effective performance of its roles. In as much as each arm of the government is to be independent and free from interferences from the other arms, there is need for checks and balances. The justification for the exercise of checks and balances among the three arms of the government is to avoid what Montesquieu calls “Pure Separation of powers” which according to Ambani and Mbondenyei would result to collapse of a democratic government. According to Ambani and Mbondenyei, rigid separation of powers would be ‘subversive of the efficiency of government’ and as a result would lead to its collapse.

In an ideal democracy, the Judiciary must be independent and allowed to decide matters before them without any restrictions, improper influences, pressures, threats or interference, direct or indirect, from any quarter or for any reason. Article 160(1) states, “in exercise of judicial authority, the judiciary, as constituted by Article 161, shall be subject to this Constitution and the law and

shall not be subject to the control of any person or authority.” This is where the judiciary draws its independence from. Judicial authority is exercised by the Courts and the Tribunals in Kenya. The role of the judiciary is to interpret the law. In carrying out its role, the judiciary promotes Constitutionalism and protects the rule of law.

The Courts have the role to determine the question as to whether any law is inconsistent or in contravention of the constitution, matters relating to the powers of State organs, also determine the question of whether anything said to be done under the authority of the constitution or any other law is inconsistent or in contravention of the Constitution.

In the words of Justice Gicheru, “it would seem therefore that the legislature’s power to make laws and the executive’s power to implement them does not entitle these two institutions of government to usurp judicial power of the judicature.”

CHALLENGES FACED BY THE KENYAN JUDICIARY

The current judiciary is facing a number of challenges inter alia; financial challenges, political interference, attacks on judicial officers and attempts to undermine court decisions. For instance, in November, 28, 2023, Peter Salasya, Mumias East Member of Parliament, was accused of threatening to kill a Magistrate who failed to rule in his favour- ordered him to pay Kshs 500,000. Despite the constitutional provisions aimed at protecting the Judiciary and its independence, the current judiciary continues to face political interference and threats to defy court orders. Early this year (at the beginning of January, 2024), the Head of State threatened to defy Court orders. This came after the Courts ruled against his policies-Housing levy and the Universal health project. The High Court in November 28, 2023 declared the Housing Levy, which was set to be 1.5 % per month for both the employers and employees, unconstitutional. The government, however appealed this decision, and the Court of Appeal held the High Court’s decision saying

that, “the question that begs an answer is whether in the circumstances of the case it would be in the public interest to grant a stay whose effect is to allow a statute that is unconstitutional to continue being in the law books pending the hearing of an appeal.” On January 4, 2024, President William Ruto complained that his plans were being sabotaged through Court orders. He vowed to disobey the orders and implement the projects. The President’s threats to defy court orders currently remains the biggest challenge to the Judiciary that is undermining its independence. He also expressed his decision for not respecting the judiciary by saying that, “it is not possible that we respect the judiciary yet a few individuals who are beneficiaries of corruption are blocking our development agenda through court cases.” “We have said we will change the laws. We will change the way NHIF operates so that we stop public funds from being stolen through digital systems that protect resources that are meant to help Kenyans.” The Kenya Magistrates and Judges Association on January 3, 2024 noted that Ruto’s remarks are unfortunate and are aimed at ridiculing and painting the judiciary negatively hence interfering with judicial independence. The utterances of the Head of State have left the judiciary in trouble and at risk of losing public confidence since the person who is supposed to be protecting the Rule of Law and the Independence of the Judiciary is expressing the need to disrespect it and act in Contempt of Court. The President’s accusation that corruption exists in the Judiciary has a negative impact on the Judiciary as it is robbing it off its public confidence. With this we are left wondering whether the provision of the Constitution on equality before the law, the doctrine of Separation of powers and the independence of the Judiciary are just mere provisions that should only remain in writings or should be practical.

CONCLUSION

Despite facing the above-named challenges, the judiciary has maintained resilience in fighting against them. For instance, despite the Executive asking for a meeting with the Chief Justice, the Courts have maintained their independent decisions on ruling against some of the governmental policies, the case of deploying Kenya Police to Haiti to tackle gang violence, contrary to what the people expected to happen after the talks.

This paper finds the need to respect the judiciary and that the Executive and the legislature should not interfere with the independence of the Judiciary and its acts of exercising checks and balances. When an one's rights are infringed or threatened to be infringed, one runs to the Judiciary to seek remedies, when there is a question of interpretation of a law, and a question of public interest, the decisions of the Courts are sought. This therefore shows how the Judiciary is an important arm of the government that does not deserve to be trolled or even threatened especially by the Head of State who is supposed to be a model to the citizens. The Kenya Magistrates and Judges Association on January 3, 2024 observed that, “where the decisions of the court are not respected, the rule of law is betrayed and anarchy prevails. Judges and Judicial officers cannot work freely with such threats especially when made by no other than the President himself.”

In conclusion, the doctrine of separation of powers is essential in running a democratic State, although there should be an element of checks and balances to avoid what Ambani and Mbondenyi call “rigid separation of powers” which they argue would be ‘subversive of the efficiency of government’ and as a result would lead to its collapse. Come to think of it, what would happen if the power of the Judiciary would be vested in the Legislature? Montesquieu thinks that if the judicial power was to be delegated to the Legislature there would be arbitrary control, and, if entrusted in the executive only, there would be oppression.

THE JUDICIARY: THE CATALYST FOR DEMOCRATIC PRINCIPLES IN NIGERIA

Ishola Qudus Olayiwola¹¹⁵

ABSTRACT

"Justice delayed is justice denied" as rightly said by Williams E. Gladstone, Justice is paramount and must be seen to thrive for orderliness, equity, and peace to reign. Whose responsibility is it to dispense justice, and encourage equality? The Judiciary is the organ that interprets the law, guards the constitution, defends rights, punishes law breakers, and settles disputes among the state and its citizens, or citizens and other citizens. When a dispute arises or human rights infringement occurs, citizens approach the court because the court is considered the holy sanctuary of justice. The judiciary connotes justice, fairness, and equality.

However, this paper seeks to evaluate the roles of the judiciary arm of government in the conservation of democratic principles in Nigeria, commencing with a brief history of the judiciary in Nigeria, and the judicial roles in promoting democratization which include but are not limited to justice dispensation, protection of rights, and dispute resolution. This paper furtherly recommends some measures that will facilitate the promotion of democratic principles.

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INTRODUCTION

The judiciary, being the third arm of government, is as crucial as other arms without which the laws made by the legislature and implemented by the executives would not be interpreted nor will its offender be punished. The history of the Nigerian Judiciary can be traced back to the period before 1842 when solutions to disputes are sought from the traditional institutions. The pre-colonial Yoruba and Ibo traditional dispute resolution mechanisms resolved around their traditional rulers starting from the head of a family, head of the community, up to the Obas. While the pre-colonial Hausa/Fulani was a bit structured, disputes were resolved through the Alkali system with the Emir as the ultimate appellate judge.

The advent of colonial rule in 1861, through the *Foreign Jurisdiction Act* of 1843 and 1893, brought about the establishment of native courts, with the establishment of the Courts of Equity as the earliest court in 1854 established in the Southern part of Nigeria. In 1863, through *Supreme Court Ordinance No. 11 of 1863*, the Supreme Court of Lagos State was established to resolve criminal and civil disputes. In 1900, a Supreme Court for the Southern protectorate through the *Supreme Court Proclamation Order No. 6* was established alongside the reformation of the Native Courts system in the Northern protectorate via the *Native Courts Proclamation Order of 1900*. Presently, the Nigerian judicial power is vested in the courts, which according to the 1999 Constitution consist of the Supreme Court, the Court of Appeal, Federal High Court, High Court of FCT and States, Sharia Court of Appeal for FCT and States, Customary Court of Appeal of FCT and State, and such other courts.

THE ROLE OF JUDICIARY IN UPHOLDING DEMOCRATIC VALUES AND PRINCIPLES IN NIGERIA

The judiciary performs crucial roles in upholding democratic values and principles in Nigeria. Respect for the constitution is a major principle of democracy, which is upheld by the judiciary. The judiciary is the guardian of the constitution, it is the arm that ensures strict compliance with the Constitution. The rule of law is a major democratic value, which signifies the superiority of law over the government and the govern. Rule of law, in democratic states, is enforced by the judiciary. With the aid of the judiciary, the superiority of the constitution as stated in the 1999 Constitution of the Federal Republic of Nigeria is enforced and complied with. The judiciary ensures that acts, laws, regulations, and policies are made pursuant to the provision of the Constitution, whenever laws are inconsistent with the Constitution the judiciary nullifies such laws. *Re Emmanuel Ekpenyong V. National Assembly & 2 Ors*, per Justice Omotosho, sections 839, 842, 843, 844, 845, 846, 847, 848, and 851 of the CAMA 2020 are inconsistent with sections 38 and 40 of the Constitution and therefore nullified.

Although, men are political animals as postulated by *Aristotle* connoting the socializing trait of men, yet, disputes occur among men which must be settled by a disinterested and unbiased third party. The judiciary function as arbitrators and mediators among disputing parties to promote equality. Disputes arising between the government and the governed, a citizen and an organization, or other citizens must be resolved amicably in a bid to promote equality and fair hearing. The 1999 Constitution of the Federal Republic of Nigeria has empowered the judiciary to entertain and resolve disputes between the governments, the government and other bodies, the government and citizens, citizens and other citizens, etc. The judiciary being an impartial body resolve dispute and provide remedies for injured parties without preferential treatment or

favouritism to promote equality and justice in the state. Such as *Re Ogwuche V. Federal Republic of Nigeria* in which the Community Court of Justice of the Economic Community of West African States held that a new regulation imposed by the Nigerian Government against a human rights group was tantamount to censorship and violated their freedom of expression.

Furthermore, the judiciary is the body through which justice is served and remedy is provided. Law through the judiciary grants remedies and justice to those who have been wronged. Provision of justice and remedy for the injured party is a major function of the judiciary which cannot be carried out by any other arm of government. With justice served and remedy provided by the judiciary, stability of government is maintained, riots are curbed and peace is promoted. As stated earlier, rule of law is a concept that is the bedrock of our justice system and symbolizes the most important features of democratic governance, which cannot be enforced without justice in society. The law would not be seen to be superior over the government and the govern if there is a damage suffered by any party without remedy. It is said that justice delayed is justice denied, the court is the only body saddled with the responsibility of providing justice without which democratic values such as the rule of law could not be enforced or demonstrated.

In addition, wherever the judiciary is absent or inactive, the fundamental human rights of the people tend to be unsafeguarded and unprotected. The judiciary is a major element that realizes and enforces the constitutional rights of citizens. In the celebrated case of *Ransome Kuti V. Attorney General of the Federation*, the Supreme Court of Nigeria per Kayode Eso, JSC defines fundamental human rights as '*the rights which stand above the ordinary laws of the political society itself, which is a primary condition to a civilized existence.*' Whenever these rights are infringed upon, the citizens have the right to seek redress in court against such actions that may amount to infringement of their fundamental rights. Human rights are rights and privileges that

are inherent to humans and provided for by the constitution, infringement of which cannot be curbed or sanctioned without the judiciary. It is the solemn function of the judiciary to uphold the fundamental human rights as provided for by the 1999 Constitution of the Federal Republic of Nigeria, as a democratic principle.

Moreover, the institution capable of checkmating the government over corruption and ensuring government's accountability to the people is the judiciary. The judiciary's central role in the administration of justice and fight against corruption is based on the provision of the Constitution of the Federal Republic of Nigeria, by the virtue of which the judiciary is the only body vested with the power to adjudicate between the state (prosecutor) and individuals (accused).

CONCLUSION AND RECOMMENDATION

In a nutshell, the judiciary as seen from the foregoing is tremendously important for its role in the interpretation of law, guardianship of constitution, settlement of dispute, justice dispensation and remedy provision, human right protection, and maintenance of check and balance all which shape public policy. Therefore, it is pertinent to preserve these crucial roles of the judiciary, by facilitating its independence from other arms of government, upholding diligence in handling of cases, and championing exemplary conduct among judicial officers.

This paper, having revealed the important role of the judiciary in upholding democratic values and principles in Nigeria, recommends the appointment of persons with accurate skill, wit, intellect, diligence, and integrity into the judicial arm of government alongside provision of necessary facilities for effective administration of justice so as to produce an outstanding judicial system that will strictly uphold democratic values and principles in contemporary Nigeria.

In conclusion, Hon Justice Dahiru Mustapha CJN once said, while advocating for the betterment of the judiciary, *'I have a vision of a justice system which is simple, fast, efficient, effective and*

responsive to the needs and yearnings of the citizenry. Nigerian Judges and the Judiciary as a whole must endeavour to advance the frontiers of adjudication to include the advancement of political and social justice in the country. This is what we hope to have in Nigeria.

UNVEILING INJUSTICES IN EASTERN AFRICA: ADDRESSING THE HUMAN RIGHTS STRUGGLES FACED BY INTERSEX INDIVIDUALS IN UGANDA.

Mwangolo Kombo Shaibu¹¹⁶

ABSTRACT

Implementing the rights of intersex individuals poses a significant challenge in Eastern Africa, primarily due to contentions rooted in morality, religious beliefs, and cultural norms. Gender recognition in the region is currently limited to binary classifications of male or female, resulting in a marginalized status for intersex persons within African communities. This marginalization, in turn, subjects intersex individuals to profound suffering as their rights and fundamental freedoms are systematically violated. Key areas of infringement include the right to life, access to health and education, personal liberty, protection of personal dignity, safeguards against torture, discrimination, and prevention of inhumane treatment.

Despite the existence of international human rights laws and standards that affirm the inherent and equal applicability of human rights to all individuals, Eastern Africa has yet to fully integrate these principles into societal norms. The Universal Declaration of Human Rights emphasizes the equality of all individuals before the law and the entitlement to equal legal protection.

Recognizing the shared humanity of intersex individuals and their right to equitable treatment, this paper critically analyses the challenges faced by intersex persons in Uganda. Employing a doctrinal and normative approach, the research analyses the international human rights laws and standards. Additionally, the paper proposes potential solutions to address the perceived threat of human rights violations in Uganda and the broader Eastern African context. Also, through a

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comprehensive exploration of the legal frameworks and normative principles, this paper aims to contribute to the ongoing discourse on human rights, fostering an environment where the rights of intersex individuals are acknowledged, protected, and upheld in line with universal human rights standards.

Key Phrases: Intersex persons; Mental health; Physical violence; Stigmatization; Harsh penal laws; Right to self-determination.

INTRODUCTION

Addressing the rights of intersex individuals is the most significant challenge in Eastern Africa. This is because of the perception and expression of inter-sexuality as part of the LGBTQIA+ community, which is often criticized for allegedly contradicting the customs and morality of African societies. Morality claims against this community are exploited to shield human rights violators in the East African region. Once an individual is identified as intersex, it is like they automatically relinquish all their rights, including those deemed non-derogable, to the State. This long-standing practice has been used to rationalize inhumane treatment endured by intersex individuals, yet their voices have not reached the ears of State legislators.

Regrettably, the East African countries are gradually enacting legislations that may ultimately result in a complete prohibition of the existence of intersex persons. Being intersex is an intrinsic variation within the human population; hence, criminalizing it represents a distinct error. East African countries, in defiance of this fact, indirectly incriminate intersex individuals by enacting laws with severe punishment, addressed to the LGBTQIA+ community in general, rather than addressing the status of each group separately. These laws serve as the basis of dehumanization, hate, discrimination and infringement of human rights and fundamental freedoms in Eastern Africa. The civic-space is also shrinking in East Africa, as politicians in countries like Tanzania call for harsher punishment for those found within or championing for the rainbow community, which then intensifies the predicaments of the intersex people as they are expressed within the LGBTQIA+ flag. Symbols associated with this community can result in severe penalties, including lengthy imprisonment, castration, and death. Books featuring these symbols have been prohibited from importation in some East African countries. During such occurrences, intersex

individuals bear the brunt without any culpability, given that their condition is a natural occurrence unrelated to their lifestyle choices or desires.

Undoubtedly, intersex individuals continue to live in perpetual fear to this day, particularly in light of the myriad unjust human rights violations they face. These violations stem from misconceptions, stigmatization, and widespread misunderstanding about their condition. Their access to justice and activism is restricted, compelling them to endure their struggles in silence.

Below are some of the most distressing circumstances documented within Uganda;

Realities of the Critical Situation in Uganda

Being an intersex is deemed as an abnormal condition in Uganda. More often this serves as the basis for the pervasive prejudices, gender inequalities, and human rights issues that result in double marginalization for numerous children. These children must contend with both stigmatization and poverty simultaneously. This underscores a legal deficiency concerning the protection of intersex individuals, even in the face of the international imperative for equal legal protection for all individuals. Intersex children encounter obstacles in obtaining education in Uganda, further amplified by discrimination and bullying within the school environment.

A poignant illustration involves a child compelled to discontinue education due to discrimination. The child, whose name is withheld, revealed during an interview that they left school while in fourth grade. This decision followed an incident where the headmaster embarrassed the child by removing their clothes in a room full of parents and other pupils to expose their physical appearance. Subsequently, the headmaster sent the child home with instructions to find another school. According to the child, it was difficult for the parents to secure another school because once teachers learned of the child's intersex status, they would compel the

child to return home and search for another school. This created an endless cycle that ultimately terminated the child's educational journey.

On numerous occasions, it has become evident that individuals who are intersex face significant challenges in accessing healthcare facilities. This difficulty stems from the pervasive fear of encountering discrimination or being subjected to mental and physical violence within such settings. Similarly, intersex children in Uganda continue to undergo surgeries without their consent. These procedures are performed at a very young age, with consent granted by their parents, leaving the children to endure the lifelong consequences of these surgeries. This directly hinders their right to health, and the child's inability to participate in decision-making further infringes upon their inherent dignity. Additionally, genital mutilation often occurs during these surgeries, compounding the challenges already faced by intersex individuals.

Moreover, intersex individuals in Uganda live in constant fear of persecution or the threat of violence, this directly violates their right to mental and physical security. Notably, in Uganda, any activities related to intersex sexual orientation are punishable by death, representing a blatant violation of international human rights laws and standards. The following discussion outlines these human rights and standards;

International Human Rights Law and the Protection of the Intersex Persons

First, it must be noted that the rights of the intersex persons, like of other individuals, are God given and are immutable. These rights are universal and all States are obliged to respect and promote these rights without discrimination. The Universal Declaration of Human Rights postulates that all human beings are equal in dignity and rights, thus, no person should be discriminated on grounds of race, colour, sex, language, religion, political or other opinion,

national or social origin, property, birth or other status. These sentiments directly incriminate all forms of discrimination endured by the intersex persons in Uganda.

The UDHR further asserts that every person has the right to life, liberty, and security. It also calls for the recognition of every person by the law and prohibits the subjection of any person to torture, cruelty, inhuman treatment, or degrading punishment. This aligns directly with the principle of the rule of law, which posits that every individual is equal before the law and is entitled to equal protection under the law. This legal principle emphasizes on the importance of treating intersex individuals as equal to other human beings, condemn any forms of discrimination against them, and affirm their entitlement to access justice.

Regionally, the African (Banjul) Charter on Human and Peoples' Rights is instrumental in condemning all forms of discrimination. It grants all persons the right to assert their unquestionable and inalienable right to self-determination. These assertions directly safeguard the status of intersex individuals in Uganda and in Africa. The Charter further stipulates that all persons are equal and deserve equal respect, as well as equal protection before the law. This also safeguards the access to justice and inherent dignity of intersex individuals in the African region.

FINAL THOUGHTS

Intersex individuals constitute a vulnerable segment within the East African population, as they often face infringements on their rights to physical and mental integrity, limited liberty, compelled medication and experimentation, insecurity, workplace and educational stigmatization, restricted access to information, fundamental freedom of association, and challenges in obtaining accurate gender identification at birth. All of these instances run counter to the international human rights law standards outlined earlier.

Moving forward, states within the East African region and on a global scale, should prioritize safeguarding the autonomy of intersex individuals, particularly concerning the protection of their integrity, health, and defence against various forms of violence, torture, and inhumane treatment. Furthermore, it is imperative to ensure freedom from forced experiments and medical interventions while upholding the right to self-determination for intersex persons.

There is also an imperative to expand the civic space, fostering avenues for activism and media freedom to confront the profound challenges faced by intersex individuals in Uganda and across the whole continent. Such an expansion will not only provide intersex persons with increased access to information and freedom of expression but also bolster outreach programs. Human rights defenders, with the tranquillity and freedom to enlighten citizens, can effectively communicate the significance of safeguarding the rights of intersex individuals.

Furthermore, states must, urgently and as a matter of priority, revise existing laws to acknowledge the intersex condition as naturally occurring and institute protective measures against societal abuse and stigmatization. Also, clearly defined avenues at the state level, particularly in East Africa, should be established to enable intersex individuals to report any instances of violence or violations of their rights and fundamental freedoms. This initiative is essential for enhancing access to justice for intersex persons in East Africa, as well as an insight on the infringement of human and fundamental freedoms of the intersex community in Uganda, Eastern Africa and Africa in general.

‘WHY SECULARISM HASN'T BEEN ATTAINED’- UNVEILING THE NEXUS: EXAMINING THE INTERSECTION OF RELIGION, VIOLENCE, AND STATE IN KENYA

Uday Makokha Keya

This article looks at religion as a major cause of violence and as the main motivation of violence in the community. It also examines the hits and misses by the state in respecting the right to religion, belief and opinion. A general argument emerges based on decided cases, constitutional provisions and, the state and church activities in Kenya as to whether there exists a clear separation between the church and the state in Kenya, and whether Article 8 of the 2010 constitution has been fully actualized.

The relationship between church and state, and the need to separate them is something of concern to the present generation. In the past, there have been a struggle between secular and religious power in many states, until the fourteenth (14) century when countries in the world began to expressly state in their constitutions that, ‘the state is secular.’

There wasn't a clear separation between the church and state as they seemed to exist as one entity. The church had overwhelming power over the state and could command armies to start war. In Africa, religion is always attributed to a wide range of violence due to the nature of Africans, their strong belief system, and the need to practice and live in accordance with those religious beliefs. This led to the strengthening of religious ideologies, increasing inter-communal conflicts which were majorly motivated by religious texts. A study conducted by Internal Religion Freedom in 2021 indicated that the Al-Shabaab, a terrorist group, targeted non-Muslims in the North Eastern part of Kenya due to their faith. The International Christian advocacy also noted the violence meted against Christians due to their religious affiliation. Religious activities could therefore be termed as the major cause of communal clashes in the past and there was a need for the state to

intervene and create peace. Communal clashes due to differences in religious faith is one of the reasons for a proposal to separate religious power and state power.

An in-depth examination of the relationship between the church and the state in Kenya, indicates lack of clear separation between the two despite constitutional provisions on the secularity of the state. This is because, religious leaders are usually present during state functions, public ceremonies are presided over by religious leaders, religious organizations manage institutions which perform public functions such as schools, and political leaders are allowed to use the church as a platform for their campaigns. These activities show that Kenya lacks a clear separation between the church and the state. In *Lemon v Kurtzman*, the court stated that, “the state might assist religion if the primary purpose is secular, the assistance should neither promote or prohibit religious activities.”

The church provides a platform of political affairs by providing a tribune to political leaders to undertake campaigns in the church in the name of attending church services. In addition, religious leaders have in the past been appointed by the president, to public offices for governance purposes. These activities have created a thin line of separation between religion and the state as there is an intersection of state and religious activities.

A clear separation between the church and the state is necessitated by the need to uphold the freedom of opinion in learning institutions and public institutions. The entanglement of the state and the church resulted in the church taking over duties that could otherwise be the state's function such as, providing education and health services. Where religious institutions take over such functions, there might be a suppression of freedom of opinion since the institutions might be biased on religious grounds. This is against the call for distinct separation of the state and the church; what Thomas Jefferson termed ‘freedom of opinion’.

The state has also experienced a major problem in maintaining a clear separation and respecting people's freedom of religion, belief and opinion. The constitutional requirement of the state to respect people's religion, beliefs and opinion, leaves many questions than answers; whether a clear separation of the church and the state could be actualized by respecting everyone's freedom of religion in public institutions. This creates challenges in instances where different religions exist with different beliefs. For instance, Rastafarian`s religious rules require them to have dreadlocks and long strands of woven hair as their religious practice. A major question that arises is whether the state should allow such practices in public institutions, where people are required to operate within certain professional standards.

Kenya has faced difficulty in its effort to maintain a wall of separation since religious institutions perform key societal functions such as offering communal services. If the state then prevents religious institutions from offering services such as managing schools, it remains the burden of the state to offer those services.

An examination of decided cases is necessary to provide possible answers to societal challenges. The case of *JWM (alias P) v Board of Management O High school & 2 others*, offers a solution to the past challenges, where learning institutions had mandatory requirements necessitating that learners attend religious functions in the institution. The court stated that forcing someone to engage in an act that is inconsistent with his/her religious faith is unconstitutional and is equally discriminatory. It was also found that forcing all learners to shave their heads before reporting to the school, as was the case, is discriminatory on the basis of religion.

Since religious services are always conducted in accordance with the institution`s religious faith, it has always been hard for learners who do not ascribe to the institution`s religious faith to comply with those requirements. These requirements coined by religious institutions have always led to

learners dropping out of school thus denying them the right to free compulsory education. The repercussions that follow when students do not abide by the mandatory requirement to participate in activities in line with the institution`s religious faith denies learners the right to education which violates Article 43(1)(f) of the constitution. The case of *JWM v Board of Management* has shown that activities perpetrated in religious institutions could as well interfere with the principle of secularism. The state has a duty to observe, promote and fulfil rights and fundamental freedom in the Bill of Rights. This includes respecting the freedom of religion. Therefore, the state is under a duty to ensure activities conducted in all learning institutions as well as other institutions conform to the constitutional principles of freedom of religion, belief and opinion.

Religious organizations should be allowed to run learning facilities but in doing so, they ought to maintain the status quo by ensuring they do not compel learners to ascribe to the institution's religious faith. They should also be allowed to manage academic institutions and offer communal support at their own will in the interest of the community.

The state is not allowed to interfere with the church so as to maintain a clear line of separation. Government schools in Kenya have also been allowed to offer religious courses hence, interfering with the separation of the church and the state. It is not a public duty to offer any form of religious education, and so doing contravenes constitutional principles of secularism. The state should not prioritize offering religious courses in public schools, but where the course taught incorporates religion, it is therefore necessary for the purpose of such a course. Teaching religion in public schools could be argued to be the state's act of promoting religious activities. This is because most people spend their youth in school and it is there they develop socially, academically and intellectually, and thereafter make major decisions regarding their religious faith. It is therefore arguable that Kenya does not fully meet the requirements of a secular state as it promotes religious

activities. For a country to be secular, the state should not be instrumental in promoting religious activities which ought to be conducted by religious institutions instead.

In conclusion, it is clear that Kenya is yet to achieve the secularity envisioned in Article 8, of the 2010 constitution as there is no clear line of separation between the church and the state. The state only strikes a balance between what can be termed as a secular state and a non-secular state. The constitution is societally transformative in its text, however, not much effort has been applied for its full actualization.

CHALLENGES ARISING FROM THE IMPLEMENTATION OF RULE OF LAW IN EAST AFRICA

Mwangolo Kombo Shaibu¹¹⁷

ABSTRACT

The rule of law is the cornerstone for modern democracy, East African Heads of State are continuously reforming laws and establishing new institutions to implement the rule of law. However, their efforts seem not to yield the desired results because there is a sharp decline in the implementation of the rule of law in Eastern Africa. This is often attributed to factors such as government inefficiency, poverty and the rights of the LGBTQ+ community. This article uncovers some of the important solutions to the existing deficit in the rule of law, which include the establishment of a specific commission to oversee the implementation of the rule of law, and the establishment of independent anti-corruption agencies to curb corruption.

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INTRODUCTION

The concept of the rule of law originated from ancient Greece during a time of great political innovation, particularly towards Athenian democracy.¹¹⁸ The main idea was to submit rulers to the law,¹¹⁹ so as to curb their discriminatory and arbitrary powers.¹²⁰ In English rule, it resulted from the signing of the Magna Carta, which aimed at subjecting the monarch to the law and its due process.¹²¹ For example, it stated that: “*no freemen shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.*”¹²²

The rule of law is essential to modern constitutional democracy, and therefore, its maintenance is of critical importance.¹²³ African States signed and ratified international and regional instruments confirming their commitment to respecting the rule of law in the 1990s, signifying the beginning of democratic governance and an end to one-party dictatorship.¹²⁴

Over twenty African countries included the rule of law in the preamble of their constitutions.¹²⁵

However, Africa continues to witness a steady decline and deterioration in the obligation to respect

¹¹⁸ J& Matthieu. Burnay, ‘*The rule of law: origins, prospects and challenges*. Issue 2 Belgian Review of International Law Chapter 1 (2018)p1<https://www.elgaronline.com/display/9781788112383/09_chapter1.xhtml >accessed 7th July 2023

¹¹⁹ Ibid

¹²⁰ Peter Shivute, *The rule of law in sub-Saharan Africa – An overview*. P1<https://www.kas.de/c/document_library/get_file?uuid=2528ba94-446b-ce48-a32d-fa34b630faf1&groupId=252038 >accessed 7th July 2023

¹²¹ Makau Mutua, *Africa and the rule of law: The problematic rebirth of liberalism in Africa and why the rule of law must be reconsidered to achieve sustainable development*, Sur - International Journal on Human Rights (2016)p160<<https://sur.conectas.org/wp-content/uploads/2016/09/13-sur-23-ingles-makau-mutua.pdf> >accessed 7th July 2023

¹²² Magna Carta Article 39

¹²³ Charles Manga, *An overview of the crisis of the rule of law in Africa: African Human Rights Law Journal* 213-243 (2018) p214<http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962018000100012 >accessed 7th July 2023

¹²⁴ Ibid

¹²⁵ Ibid n5

and implement the rule of law.¹²⁶ Hence, the question arises: Does Africa have the necessary tools to implement the rule of law at national, regional and continental levels?¹²⁷

Some commentators argue that the failure in the proper implementation of the rule of law results from lack of universal clarity on its meaning, fundamental features, nature and scope.¹²⁸ A.V Dicey defined the rule of law on the basis of legality and equality before the law; however, to some, this definition appears outdated.¹²⁹ In the same vein, the United Nations (UN) secretary general, defined the rule of law in terms of having accountable institutions, equality before the law, separation of powers, respect to international human rights norms and standards.¹³⁰ This covers some important hallmarks of respect for the rule of law, like the principle of legality, which requires an impartial judiciary and independence of media institutions.¹³¹ When state institutions fail to protect human rights, cannot resolve disputes expeditiously, or are corrupt, then there must be a deficit in the rule of law.¹³²

States must invest in the rule of law by reforming laws, drafting good constitutions, and ensuring equal access to justice.¹³³ For example, The Republic of Tanzania has implemented several measures to enhance the accessibility of government organs responsible for dispensing justice to

¹²⁶ Ibid n7

¹²⁷ Ibid

¹²⁸ Advancing the rule of law in Africa: *Trends, barriers and inspirations for the rule of law in Africa from 24 jurisdictions* (2021/2022)p2< https://www.lexisnexis.co.za/____data/assets/pdf_file/0004/901948/LN_Rule-of-Law_Report_Final.pdf >accessed 7th July 2023

¹²⁹ AV Dicey, *An introduction to the study of the law of the constitution* (1945)188-196

¹³⁰ The rule of law and transitional justice in conflict and post-conflict societies : report of the Secretary-General (2004)< <https://digitallibrary.un.org/record/527647?ln=en> >7th July 2023

¹³¹ Ibid n4 page3

¹³² Irene Khan, Statement of the International Development law Organization: *Africa and the rule of law*, Italian Ministry of Foreign Affairs and International Cooperation. Rome (18 May 2016)P1< <https://www.idlo.int/news/policy-statements/africa-and-rule-law> >accessed 7th July 2023

¹³³ Ibid

all citizens.¹³⁴ These measures include amending and reviewing laws and procedures to accelerate case disposal.¹³⁵

Restructuring the office of the Attorney General to enhance efficiency in discharging of duties,¹³⁶ and increasing court infrastructure. The latter include measures such as using technology in case management, and introduction of mobile courts to reach out to people in areas with no physical courts, as well as making justice accessible to the vulnerable people.¹³⁷ Rwanda also align its vision with the rule of law, ensuring that institutions and systems remain responsive and accountable to the people.¹³⁸ This is because the rule of law is a prerequisite for democracy,¹³⁹ and a framework for transparent, responsive and accountable institutions which strengthen the trust, and confidence of the people, as well as promoting societal peace.¹⁴⁰

Despite having all these measures in place, there is still a dramatic decline in adherence to the rule of law by East African Heads of State.¹⁴¹ This may be attributed to several factors. For example, previous research shows that corruption, violence, government inefficiency, lack of awareness,¹⁴² transparency, and accountability, as well as inconsistent enforcement mechanisms are responsible

¹³⁴ H.E Mero J, *The statement of Tanzania to the United Nations at the 6th Committee of the 73rd session of the UN General Assembly on item 186-the Rule of Law at the national and international level*, (2018)pp1&2.< https://www.un.org/en/ga/sixth/73/pdfs/statements/rule_of_law/tanzania.pdf > accessed 23rd July 2023

¹³⁵ Ibid

¹³⁶ See the order published in GN No.48 of 2018< <https://breakthroughattorneys.com/restructuring-office-attorneygeneraltanzania/#:~:text=This%20Order%20was%20published%20in,48%20of%202018.&text=A%20new%20office%20of%20the,civil%20litigation%20and%20arbitration%20proceedings.> >accessed 23rd July 2023

¹³⁷ Ibid n19

¹³⁸ Kayinamura Robert, *Statement of Rwanda to the United Nations on the Rule of Law at national and international level before the sixth committee, 76th session of the UN General assembly*. (2021)p2< https://www.un.org/en/ga/sixth/76/pdfs/statements/rule_of_law/06mtg_rwanda.pdf >accessed 23rd July 2023

¹³⁹ Ibid n4 page4

¹⁴⁰ Ibid n17

¹⁴¹ Ibid n7

¹⁴² Ibid n13pp3&4

for the less-effective enforcement of the rule of law in Kenya and Uganda.¹⁴³ Similarly, factors such as lack of financial disclosure, disregard of procedures and legal framework, as well as failure to implement legally binding decisions are still prevalent in Burundi.¹⁴⁴ This is despite President Ndayishimiye's promise to restore the rule of law.

This essay is divided into five parts including this introduction. Part two and three deal with socio-economic and political challenges, respectively. Part four deals with potential solutions to these challenges while part five presents the conclusion to the essay.

SOCIO-ECONOMIC ISSUES AND CHALLENGES

The first challenge is reduced civic space which is exacerbated by ignorance of the civil society, and non-governmental actors in the realization of the rule of law by East African heads of State.¹⁴⁵ Freedom of the media is among the most infringed freedoms in Eastern Africa.¹⁴⁶ For instance, in Kenya after the 2018 general elections, three TV channels including Citizen TV were shut down by the Kenyan government, for airing the inauguration of the opposition leader Raila Odinga.¹⁴⁷ Similarly, media officers and journalists are constantly arrested and criminalized for reporting to the people during elections in Uganda.¹⁴⁸

In the same vein, the freedom of assembly and demonstration is subjected to unlawful limitations

¹⁴³ Ibid page4

¹⁴⁴ Commission of inquiry Burundi, *Ongoing erosion of the Rule of Law* (2021)p1<
<https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CoIBurundi/ReportHRC48/Rule-of-law-v2-en.pdf> >access 23rd July 2023

¹⁴⁵ Ibid n4 Page8

¹⁴⁶ Maryke Botha, *African leadership and the Role of the Presidency in African Conflicts: A Case Study of Uganda's President Yoweri Museveni*; Thesis presented in partial fulfilment of the requirements for the degree of Master of Arts (International Studies) in the Faculty of Arts and Social Sciences at the University of Stellenbosch (March 2012)p59< <https://core.ac.uk/download/pdf/37348772.pdf> >accessed 9th July 2023

¹⁴⁷ Katharine Houreld, *Final Kenyan television shut down by government back on air*, Reuters Staff(2018)para1<
<https://www.reuters.com/article/us-kenya-politics-idUSKBN1FS23D> > accessed 11th July 2023

¹⁴⁸ Ibid n31 pages60&62

by East African Heads of State. For instance, in Uganda the opposition leader, Bobi Wine was kept under house arrest after leading protests against President Yoweri Museveni.¹⁴⁹ In Kenya, 23 citizens have recently been killed, and thousands injured by the police, while protesting against the high cost of living imposed by President William Ruto.¹⁵⁰ Recently, a student in Kisumu was shot nine times by the police during demonstrations.¹⁵¹ Despite the injuries, and death of civilian protestors, President William Ruto praised the police, and promised to deal with the civilians who attacked the brutal police officers.¹⁵² This is contrary to the rule of law since shrinking of civic space, hinders public participation in decision making.¹⁵³

The second challenge to the rule of law is the rights of the LGBTQI+ community which is a difficult issue in Africa.¹⁵⁴ In Eastern Africa people with diverse sexual orientations live in constant fear,¹⁵⁵ for example, in Tanzania same-sex relationships are illegal, and can lead to a lengthy prison-term and politicians like Marry Chatanda are pushing for harsher punishment, such as castration for those found guilty.¹⁵⁶ Similarly, Kenya has illegalized the same, in fact the

¹⁴⁹ See Aljazeera: *Ugandan opposition leader Bobi Wine 'under house arrest'* (14 December 2021)< <https://www.aljazeera.com/news/2021/12/14/uganda-opposition-leader-bobi-wine-under-house-arrest> > accessed 9th July 2023

¹⁵⁰ See YouTube; *Six dead as police break demonstrators in Kenya* (13th July 2023)< <https://www.youtube.com/watch?v=YmkEqGa1yJ4&pp=ygUZcG9saWNIIGJydXRhbGl0eSBpbjBLZW55YQ%3D%3D> >accessed 23rd July 2023

¹⁵¹ See NTV News; *Student shot 9 times in Kisumu during Azimio protests* (21st July 2023)< <https://www.youtube.com/watch?v=Vy1RuMT-EGY&pp=ygUZcG9saWNIIGJydXRhbGl0eSBpbjBLZW55YQ%3D%3D> >accessed 23rd July 2023

¹⁵² See Citizen TV; *President says attacks on police officer will be dealt with* (23rd July 2023)< <https://www.youtube.com/watch?v=cLjHG1sxjLw&pp=ygUZcG9saWNIIGJydXRhbGl0eSBpbjBLZW55YQ%3D%3D> >accessed 23rd July 2023

¹⁵³ Ibid n29

¹⁵⁴ International Institute for Democracy and Electoral Assistance, *Challenges to the Rule of Law in Africa*: Workshop report, Pretoria South Africa(2016)p27< <https://www.idea.int/sites/default/files/publications/challenges-to-the-rule-of-law-in-africa.pdf> > accessed 11th July 2023

¹⁵⁵ Isaac Kaledzi, *East Africa's LGBTQ community under siege* (2023)< <https://www.dw.com/en/east-africas-lgbtq-community-under-siege/a-65068984> >accessed 23rd July 2023

¹⁵⁶ Women's wing of Tanzanian ruling party demands castration of homosexuals (2023)< <https://www.scmp.com/news/world/africa/article/3214095/womens-wing-tanzanian-ruling-party-demands-castration-homosexuals> >accessed 23rd July 2023

Kenyan Government intensified its restrictions on imported books with LGBTQI+ themes.¹⁵⁷

Law makers in Uganda also enacted an anti LGBTQI+ law, with death penalty for same sex acts that was signed by President Yoweri Museveni.¹⁵⁸ The signing of this law was condemned and seen as permission for hate and dehumanization by Ugandan activists like Sarah Kasande who referred to it as a stupid law because Queers are also Ugandans.¹⁵⁹ Its worth noting that East African states have failed to define the status of the Bisexual and Transgender (B&T),¹⁶⁰ serving a foundation for human rights violation, and thus departing from the principle of equal protection by the law which is an important aspect of the rule of law.

The third challenge is poverty and economic power.¹⁶¹ All the seven member States are victims of poverty and low economic development,¹⁶² especially South Sudan which is the newest state that emerged from decades of armed conflicts,¹⁶³ and the Democratic Republic of Congo (DRC), a state which has experienced prolonged conflicts. It is worth noting that implementing the rule of law also requires vision, and money to fund the institutions responsible for dispensing justice.¹⁶⁴ Therefore, in ensuring that the poor can access justice, those who speak for the poor must put in

¹⁵⁷ Ibid n40

¹⁵⁸ Samuel Okiror, Ugandan president signs anti-LGBTQ+ law with death penalty for same-sex acts, the Guardian (29 May 2023) < <https://www.theguardian.com/global-development/2023/may/29/ugandan-president-yoweri-museveni-anti-lgbtq-bill-death-penalty> > accessed 11th July 2023

¹⁵⁹ Ibid

¹⁶⁰ Ibid

¹⁶¹ Ibid n39

¹⁶² Lars Kamer, *Extreme poverty rate in East African countries 2019-2021*, Statista (June 19, 2023) < <https://www.statista.com/statistics/1200550/extreme-poverty-rate-in-east-africa-by-country/#:~:text=Extreme%20poverty%20rate%20in%20East%20African%20countries%202019%2D2021&text=Extreme%20poverty%20rate%20in%20the,percent%20and%2080%20percent%2C%20respectively> > accessed 11th July 2023

¹⁶³ Directorate-general for external policies of the union, directorate B Policy department workshop South Sudan: *enhancing capacities for human rights* (2013) p1 < [https://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/433727/EXPO-DROI_AT\(2013\)433727_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/433727/EXPO-DROI_AT(2013)433727_EN.pdf) > accessed 24th July 2023

¹⁶⁴ Ibid n17

place mechanisms to ensure accountability, and responsiveness in the administration of justice.¹⁶⁵

In Eastern Africa these mechanisms are limited, thus poor communities refrain from accessing courts, due to fear of legal fees, leading to increased rate of inequality which signifies a deficit in the rule of law especially on equal access to justice.¹⁶⁶

The fourth challenge is corruption. This scares away poor citizens from accessing courts for justice.¹⁶⁷ For instance, before Tanzania declared the war against corruption,¹⁶⁸ accessing justice was complicated. Previous research indicates that the DRC experiences all forms of corruption, for example, State officials are accused of extorting money from citizens due to lack of oversight-mechanisms.¹⁶⁹ Furthermore, people must pay bribes whenever they come into contact with the police, judiciary, educational services and permit officers,¹⁷⁰ and private firms must make informal payment, or pay gifts valued at 9% of the total value to get things done, or to get a contract secured by the government.¹⁷¹

Equivalently, in Uganda the integrity and trustworthiness of judges and police officers is questioned by many,¹⁷² for example, in 2015 about 45% of the citizens contended that almost all judges and magistrates were corrupt.¹⁷³ The idea that wealthy persons benefit from corrupt

¹⁶⁵ Department for international development, *The Politics of Poverty: Elites, Citizens, and States; Findings from ten years of DFID-funded research on Governance and Fragile States 2001–2010*, A synthesis paper. Page61 < <https://www.oecd.org/derec/unitedkingdom/48688822.pdf> >accessed 24th July 2023

¹⁶⁶ Ibid n4 page27

¹⁶⁷ Ibid

¹⁶⁸ Ibid n19 page3

¹⁶⁹ Overview of corruption and anti-corruption in the Democratic Republic of Congo(DRC)< https://www.transparency.org/files/content/corruptionqas/Country_Profile_DRC_2014.pdf >accessed 24th July 2023

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² Thomas Isbell & Dominique Dryding, *Ugandans endorse rule of law, but distrust and perceived corruption mar views on courts*, Afrobarometer Dispatch No. 253(12 November 2018)p6< https://www.afrobarometer.org/wp-content/uploads/2022/02/ab_r7_dispatchno253_perceptions_of_ugandas_judiciary.pdf >accessed 9th July 2023

¹⁷³ Ibid

officials was voted by 83% stating that it was easy for rich people to avoid courts by paying bribes.¹⁷⁴ During the swearing in of 11 judges at Entebbe in 2018, President Yoweri Museveni of Uganda appealed to judges to desist from corruption.¹⁷⁵ He said this in recognition of the important conditions for judges to effectively and efficiently serve the society, which include; judges' legitimacy, public trust, judicial accountability and efficient administration of justice.¹⁷⁶ These are all important aspects of the rule of law.

In Kenya, judicial officers are also accused of corruption, for instance, the scandal regarding Justice Said Chitembwe who was found in possession of Ksh.770,000 believed to have been proceeds of corruption though he denied the allegations.¹⁷⁷ In addition to this, the Presidential pardon is also used to free corrupt officials, for example, the case of Dr. Davy Koech, the then director of the Kenya Medical Research Institute (KEMRI), who was serving a six-year prison-term for corruptly acquiring Sh19.3 million, was recently pardoned by President Ruto and allowed to walk free.¹⁷⁸ All these are examples to illustrate the challenges of the rule of law.

¹⁷⁴ Ibid

¹⁷⁵ Baker Batte Lule, Museveni warns judges against corruption (March 25, 2018) < <https://observer.ug/news/headlines/57305-museveni-warns-judges-against-corruption.html> > accessed 9th July 2023

¹⁷⁶ UNODC, *Judicial independence*, (2020) < <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1-general-issues--judicial-independence-as-a-fundamental-value-of-the-rule-of-law-and-of-constitutionalism.html#:~:text=The%20rule%20of%20law%20implies,the%20State%20and%20its%20representatives.>> access 24th July 2023

¹⁷⁷ Business daily, *Suspended High Court judge Chitembwe has 10 days to appeal removal*, (2023) para 5 < <https://www.businessdailyafrica.com/bd/economy/suspended-high-court-judge-chitembwe-appeal-removal-4115132> > accessed 24th July 2023

¹⁷⁸ Kiplagat Sam, *Former Kemri boss Davy Koech jailed for corruption pardoned by President Ruto*, (2023) para 2 < <https://www.businessdailyafrica.com/bd/economy/former-kemri-boss-koech-jailed-for-corruption-pardoned-by-ruto-4315114> > accessed 24th July 2023

POLITICAL ISSUES AND CHALLENGES

The first challenge is executive dominance: This interferes with constitutionalism which only exists where there is an independent, and impartial judiciary.¹⁷⁹ The independence of the judiciary is the cornerstone of the rule of law,¹⁸⁰ since the judiciary checks on public functions, ensures accountability, and limits arbitrary exercise of power by submitting public functions to scrutiny.¹⁸¹ Judicial independence has failed because executive officials control the judiciary, they only appoint judges who support them. In Kenya, for instance, the then President Uhuru Mwigai Kenyatta rejected the appointment of six judges by the Judicial Service Commission, for failure to meet the required threshold,¹⁸² however, when President William Ruto took-over he confirmed their appointment.¹⁸³

Furthermore, during elections the police are used by high-profile leaders to harass, and arrest opposition leaders, and media officials.¹⁸⁴ For example, in Uganda during elections the police and military forces were used to secure President Museveni's win by arresting opposition protestors, criminalizing journalists and media workers and charging them with defamation.¹⁸⁵ A good example is Dr. Kizza Besigye's brutal detention,¹⁸⁶ and Bobi Wine's house arrest for being an opposition to President Museveni, and leading protestors, respectively.¹⁸⁷ All these illustrates the

¹⁷⁹ Ibid n4 page2

¹⁸⁰ Ibid n61

¹⁸¹ Ibid

¹⁸² Paul Ogemba, *Heartbreak for six judges as Uhuru rejects their appointment* (2021)< <https://www.standardmedia.co.ke/national/article/2001414750/heartbreak-for-six-judges-as-uhuru-rejects-their-appointment> > accessed 11th July 2023

¹⁸³ Sam Kiplagat, *President William Ruto appoints six judges rejected by Uhuru Kenyatta*, (13 September 2022)< <https://www.businessdailyafrica.com/bd/economy/president-ruto-appoints-six-judges-rejected-by-uhuru-kenyatta-3947510> > accessed 11th July 2023

¹⁸⁴ Ibid n59 page1

¹⁸⁵ Ibid n31 pages60&62

¹⁸⁶ Ibid page64

¹⁸⁷ Ibid n34

challenges of the rule of law.

Second is the two-thirds gender rule. It is imperative to recognize the importance of women,¹⁸⁸ thus the need for specific rules on how institutions should handle special cases concerning women.¹⁸⁹ This rule limits gender discrimination,¹⁹⁰ which is an important element of the rule of law. In East Africa, the underrepresentation of women in positions of power is untenable. It is worth noting that a country cannot progress economically, politically or socially without half its citizens participating meaningfully in political spheres, and critical decision-making processes.¹⁹¹ Implementing the two-thirds gender rule is a challenge to East African countries, due to issues like poverty.¹⁹² For example, in Kenya if this rule is strictly followed, there will be an additional burden of almost 2.5 billion Kenya Shillings per year, to tax payers to cater for the nominated women to fill the gender deficit.¹⁹³

Thirdly, disrespect for the law by leaders, this is common among East African Heads of State. For example, in Kenya the then President, Uhuru Kenyatta disregarded the directions of the Chief Justice on dissolution of parliament, following a failure to enact the gender rule.¹⁹⁴ Equivalently, the Ugandan President is also accused of ignoring the law and courts which is contrary to the rule of law.¹⁹⁵ Uganda is also home to rigged and marred elections, intimidation of voters and other

¹⁸⁸ Ibid n17 P2 para8

¹⁸⁹ Ibid

¹⁹⁰ The Constitution of Kenya 2010, Article 27(8)

¹⁹¹ SID, *Actualization and implementation of the 'two-thirds gender principle' in Kenya* <
<https://www.sidint.net/content/actualization-and-implementation-two-thirds-gender-principle-kenya.html>
>accessed 11th July 2023

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ Chief Justice's advice to the President on dissolution of parliament for failure to enact the gender rule (September 2020)< <http://kenyalaw.org/kenyalawblog/chief-justices-advice-to-the-president-on-dissolution-of-parliament/>
> accessed 7th July 2023

¹⁹⁵ Ibid n59 page6

election malpractices perpetrated by President Museveni,¹⁹⁶ for instance in 2005 and 2011 he used smart tactics, and copious amounts of money to rob the citizens of Uganda of their democratic right.¹⁹⁷

Fourthly, government inefficiency: This is a major threat to the implementation of the rule of law in East Africa,¹⁹⁸ and it is exacerbated by lack of accountability, and transparency in service delivery.¹⁹⁹ This is often attributed to foreign interference in judicial matters, and court processes of developing countries by some western countries as it was noted by Rwanda.²⁰⁰ In addition to this, corruption and poverty also contribute to government inefficiency, for instance, Uganda used to have only 320,000 civil servants serving 45 million people.²⁰¹ There is also a lack of coherence, and poor coordination in all aspects of governance,²⁰² for example, the Ministry of Housing and Urban Development, and the Ministry of Local Government, both have roles to play in the development of cities, and urban areas, but they rarely consult before developing a project.²⁰³

POTENTIAL SOLUTIONS

Firstly, East African Heads of State must adhere to the legal framework for the rule of law, which is important for the protection of human rights. States must ensure equal enjoyment of rights, without discrimination and to be limited as per the law.²⁰⁴ States must avoid arbitrary deprivation of rights, uphold equality, and protect judicial independence,²⁰⁵ as required by the African Charter

¹⁹⁶ Ibid n31 page59

¹⁹⁷ Ibid page60

¹⁹⁸ Ibid n13 pages3&4

¹⁹⁹ Mutabazi S. Stewart, *Why Governments are Inefficient*, Uganda Road Sector Support Initiative(August 12, 2022)para1< <https://ugandaroadsector.org/why-governments-are-inefficient/> >accessed 9th July 2023

²⁰⁰ Ibid n23 page2

²⁰¹ Ibid n93 para2

²⁰² Ibid Para3

²⁰³ Ibid

²⁰⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR 1967) Articles 2,3&4

²⁰⁵ International Covenant on Civil and Political Rights (ICCPR 1967) Articles 6,9,14,15&29

on Human and Peoples' Rights. Member States must exercise their powers according to the rule of law,²⁰⁶ to ensure gender equality, separation of powers, condemn corruption, conduct regular, free and fair elections,²⁰⁷ and establish strong institutions, to protect human rights, fight impunity, ensure citizen participation, and uphold the supremacy of the Constitution.²⁰⁸ Transparency, good governance, an accountable administration and the creation of a conducive environment for the existence of the civil society, is echoed by the Charter, it is also an obligation for every member state to put in place measures to alleviate poverty.²⁰⁹ Good governance include; adherence to the principles of democracy, and the rule of law which are the foundational principles of the East African Community.²¹⁰

Secondly, expansion of the civic space, which includes ensuring participation of the civil society, media, and NGOs in promoting the rule of law. This will enhance constitutionalism, accountability, and responsiveness among government agencies. Expanding the freedom of the media will also enable judicial institutions to monitor police brutality, and ensure the perpetrators face the wrath of the law.

Thirdly, East African Heads of State must have neutral, and independent anti-corruption agencies to reduce the amount of funds being wasted, as well as to improve accountability in government agencies. This will earn public trust and confidence in State agencies, as they will not be seen as disconnected from the citizens who are to benefit from them.²¹¹ Therefore, agencies like the Office

²⁰⁶ African Charter on Democracy, Elections, and Governance (ACDEG)Article 2

²⁰⁷ Article3

²⁰⁸ Article7,8&10

²⁰⁹ See Articles13&40

²¹⁰ Treaty for the Establishment of the East African Community, Article 6(d)

²¹¹ Ibid n17 page2para8

of the Ombudsman, must be established by all Heads of State to fight social evil.²¹² States that already have these agencies, should operationalize them, and free them from governmental, and political interference.

Finally, East African member States, should consider the formulation of a specific commission with an oversight role, which includes overseeing the implementation of the important aspects of the rule of law, such as gender equality, and protection of human rights by member States. This commission will be required to conduct specific investigations in all the East African member States, and come up with an annual report on the level of implementation of the rule of law by each State, this report will then be submitted to the East African Court for consideration and for legal opinions. This commission will also be tasked with advising member States on the required rules, and on dealing with specific issues regarding the implementation of the rule of law in East Africa.

CONCLUSION

The rule of law is the cornerstone for modern democracy, East African Heads of State are making efforts to uphold the implementation of the rule of law. This include establishing institutions and amending legislations. Despite all these efforts, there is still a sharp decline in the implementation by East African Heads of State. The decline is often attributed to factors such as; government inefficiency, corruption, poverty, lack of judicial independence, issues on the LGBTQI+ community and the two-thirds gender rule which challenge the implementation of the rule of law in Eastern Africa. To cover the existing deficit in the rule of law, East African Heads of State must invest in the rule of law, by operationalizing important institutions to curb corruption, upholding

²¹² Ibid n4 page8

judicial independence, promoting gender equality, expanding the civic space for public participation, promoting good governance and promoting international human rights standards. It is worth noting that East Africa has the required tools to implement the rule of law, however, they must replace the best men's rule with that of the best laws for there to be limited arbitrary and discriminatory exercise of powers.

AN APPRAISAL OF THE CONSTITUTIONAL POWERS OF A GOVERNOR TO SUSPEND OR REMOVE THE STATE CHIEF JUDGE

Akanmu Jamiu Aralamon²¹³

ABSTRACT

In a democratic system of government, the constitution usually vests powers in the hands of State governors to appoint, suspend or remove a chief Judge of the state, for having been incapacitated in the performance of his/her duties due to factors such as gross misconduct, sickness, or miscarriage of justice.

The constitution is a grundnorm in which every power and authority in the State is rooted, and all other laws are subject to its provisions therein. Thus, enacted rules and powers which contravene the provisions of the constitution will be considered null and void.

Furthermore, it is on the plethora of the constitutional powers, that formulate the principles of separation of powers for the administration of government are grounded. The principles entails that, no organ of the government should interfere with the duties, and powers of the other, and Nigeria in its constitutional authority, provided the powers and procedures to appoint, suspend, or removing of the sitting chief Judge of a state in the federation, and specifically in chapter VII (7) of the Constitution of the Federal Republic of Nigeria 1999, as (amended) 2011.

Therefore, this paper will feature introduction, doctrine of checks and balances, Power of a governor to appoint and remove a Chief judge, grounds for the removal, and conclusion.

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Keywords: Power of Governor to appoint and remove a Chief judge, Conditions for the removal of a chief Judge, and conclusion.

1. 0. INTRODUCTION

The removal of judicial officers from office over misconduct by the executive is not new, and there are myriad precedents at both the federal and state levels. Sometimes around January 2019, the formal President Muhammadu Buhari suspended the then Chief Justice of Nigeria, Walter Nkanu Samuel Onnoghen, over an allegation of false declaration of his assets, an action in contravention with the provisions of the constitution, and he was immediately replaced by Justice Tanko Muhammad as the acting chief justice.

This action, which seems invidious to some parts of the people, generated quite a lot of constitutional crisis, while the nub of the issue surrounding the controversy was whether the suspension was in fact executed in accordance with due process.

The suspension, however, does not indicate an end to further removals, whose validity and legality are subject to debate. The same recurred at the state level.

In Kwara State, around 2009, the then Kwara State Chief Judge, Justice Raliat Elelu Habeeb, was suspended by Governor Bukola Saraki during his administration. Abia State Chief Judge in 2018, Justice Theresa Uzokwe was also suspended over judicial misconduct, an allegation that was later affirmed and was subsequently sacked by the National Judicial Council. The recent faction between the judiciary and the executive in Osun State over the purported suspension of the State Chief Judge, Justice Oyebola Ojo, for alleged gross misconduct is another.

This particular issue has sparked different public reactions and preconceptions on the legality of her suspension by the governor.

The essence of this article is to unravel and examine the constitutional validity or otherwise of the power of the governor to appoint and suspend the Chief Judge of the State.

2.0. THE DOCTRINE OF CHECKS AND BALANCES

The three branches of the government, in the process of discharging their functions, have been subjected to different allegations of misconduct, embezzlement, and excessive abuse of authority, which, if go unchecked, is capable of bringing about the total breakdown of the rule of law.

Hence on the basis of the doctrine of checks and balances, which arises as an outgrowth of the classical theory of separation of powers, the powers of the three branches of the government are not absolute and are subject to review and checks.

The purpose of the doctrine is to ensure that governmental powers will not be used in an abusive manner. Checks and balances are the constitutional controls that separate branches of government to ensure that they have limiting power over each other so that no branch will become supreme or encroach on and exercise the power of another, and each arm serves as a check on the misuse of power by the other, hence, in all of our constitutions, the judiciary, executive and legislature are clearly separated and entrusted to a separate organ or body, for instance;

Section 4 vests the legislative powers of the Federation in the hands of the National Assembly, which consists of a senate and a House of Representatives.

Section 5 vests executive powers in the presidents and the governors.

Section 6 vests judicial powers in the courts established by the constitution.²¹⁴

3.0. THE CONSTITUTIONAL POWERS OF A STATE GOVERNOR TO APPOINT A CHIEF JUDGE

The governor of a state wields and enjoys a great deal of significant executive powers, such as the power of appointment and removal, prerogative of mercy, making of regulations, and immunity from legal proceedings among others.

It is necessary at this stage to ask whether the powers of the governor also extend to the power to appoint, suspend, or remove a Chief Judge of a State.

The virtue of the provisions of Sections 270(2)(a) and 271(1) of the 1999 Constitution establish the office of a State Chief Judge, whose appointment shall be made by the Governor of the state on the recommendation of the National Judicial Council, subject to confirmation of the appointment by the House of the Assembly of the State.²¹⁵

Section 271 states that;

(1) The appointment of a person to the office of Chief Judge of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council, subject to confirmation of the appointment by the House of Assembly of the State.

²¹⁴ The Constitution of the federal Republic of Nigeria 1999, (Amended)2011.

²¹⁵ Ibid no. 1.

The wording of the above section attests to the fact that a governor lacks executive power to directly or single-handedly appoint anyone of his choice as the State Chief Judge unless the National Judicial Council first recommends such and the House subsequently consents and confirms the same.

The National Judicial Council is an integral part of the judicial system in Nigeria according to Section 158 and paragraph 21²¹⁶ which grant provisions for the powers and functions of the National Judicial Council such as, recommending the appointment of judicial officers, exercising disciplinary action over judicial officers; and recommending the removal of judicial officers among others. Hence, an appointment of a Chief Judge of a State by a governor without the above process remains invalid, unconstitutional, and cannot stand. Now that the governor's power to appoint the Chief Justice of the state in conformity with the provisions of the constitution has been established, it needs to be further stretched here to determine whether such power should be construed to include the power to remove or suspend the Chief Judge of the state.

And since it is not new that the executive branch is usually the body that appoints and inaugurates natural persons to office, therefore, it is not far-fetched to say that where any appointee conducts himself in a manner that the appointor finds unacceptable, the latter may not hesitate in his power to fire him. However, there are instances where an appointor cannot directly remove a default officer without first recourse to another body.

²¹⁶ The third scheduled of the Constitution of the Federal Republic of Nigeria 1999 (amended) 2011

4.0. POWERS OF THE STATE GOVERNOR TO REMOVE CHIEF JUDGE AT THE STATE LEVEL

The state Governors, being the chief executive officer of the states, are saddled with powers not limited to the execution of the governmental policies, but also to appoint and remove any judicial officer who by virtue of either disease of the mind, or body making him incapable of performs his official duties, then the chief executive officer of that state can judiciously and judicially remove that sitting judicial officer, and also replace him accordingly with the recommendation of the Judicial service commission of that state, and approve therein by the state house of Assembly of that state.²¹⁷

5.0. GROUNDS FOR THE REMOVAL OF A CHIEF JUDGE

The removal of judicial officers from office, shall not been on mere speculation as its stands, but rather rooted in a reasonable ground, and with authorized power to do so.

- Incapable to perform official duties:

A sitting chief Judge or judicial officer of a state, who is incapable of discharging his official duties as required of him to perform diligently for the administration of justice for that state, either due to insanity, sickness, or misconduct, contrary to the code of conduct, can be removed by the state Governor subject to the Power vested on him to do so, by the constitution.²¹⁸

²¹⁷ Section 292(1)(a) ii, of the Constitution of the Federal Republic of Nigeria 1999, (Amended) 2011.

²¹⁸ Ibid no.4

- Acting and representing Clients before a court, or Tribunals:

An active chief Judge of a state, can also be removed from sitting as a chief Judge of a state, where it is firmly assured that, he stands before any court of Law, or Tribunals, representing a litigants of either prosecuting, or defending such clients in judicial litigation, then he is entitled to be remove by the Governor of that state therein.²¹⁹

Therefore, the first condition that must be satisfied in the process of removing a judicial officer is that the Governor, acting on the recommendation of the Judicial Council, that the judicial officer be so removed for his inability to discharge his functions arising either from infirmity of mind or body or for misconduct or contravention of the code of conduct.

However, where there is no such recommendation of the National Judicial Council, the governor shall be acting on an address supported by a two-thirds majority of the House of Assembly of the State, praying that he be so removed for his inability to discharge the functions of his office or appointment arising either from infirmity of mind or of body or for misconduct or contravention of the Code of Conduct.

Hence, any removal or suspension of the judicial officers with disregard to the above mandatory process will be void and be pronounced unconstitutional notwithstanding the provisions of Section 11 of the Interpretation Act,²²⁰ which confers upon an appointor the power to appoint as well as the power to remove or suspend at the same time as this Act is of no any effect and totally irrelevant to this instant case having regard to the supremacy of the constitution over any other

²¹⁹ Ibid no. 4, Subsection (2).

²²⁰ Interpretation Act, 2004.

statute or act and being the groundnorm by the virtue of Section 1(3) of the 1999 constitution as amended with which other enactments derive their validity from, and as such that any inconsistency with it shall be declared void.

The Court in *ADESINA OKE & ANOR v SHITTU ATOLOYE & ORS*²²¹ affirms the irrelevance of the Section 11 of the interpretation act in interpreting the power of suspension over judicial officers since the constitution contains express provisions on the disciplinary power over judicial officers.

The proper approach of the court to interpretation of statutory provisions, as held by the Court of Appeal in the case of *VISITOR IMO STATE UNIVERSITY v OKONKWO & ORS*,²²² it is trite law that provisions of a constitution or statute must be construed literally, giving the words in such a constitution or statute their ordinary grammatical meanings, unless that would lead to some absurdity.

There are considerable numbers of precedents in support of the compulsory constitutional requirements the governor must satisfy before proceeding to remove or suspend the Chief Judge of the State.

The law is settled in the case of *Elelu-Habeeb & Anor v A.G. Federation & Anor*²²³, The Court held that the Chief Judge of a State cannot be removed under any guise without recourse to the National Judicial Council.

²²¹ 1985

²²² (2014) LCN/6823(CA)

²²³ (2012) 12 NWLR.

Also, in *Nganjiwa v FRN*,²²⁴ the court reiterates that any misconduct attached to the office and functions of judicial officers must first be reported to and determined by the National Judicial Council.

In other words, an unlawful and unconstitutional removal that is either politically motivated, malicious, or for other ludicrous and unreasonable excuses that is not within the ambit of the laid down procedures enshrined in the constitution is a blatant violation and abuse of the rule of law, a judge in Nigeria shall not be removed without the involvement of the National Judicial Council, the Senate, or the State House of Assembly, as the case may be, regardless of the level of the allegations of misconduct.

CONCLUSION

In conclusion, the significance of the provisions of Section 201 and 292 in the administration of government is to offer transparency in the process of the operation of law and to ensure strict adherence to the rule of law and the means of upholding the rule of natural justice by holding defaulters accountable and facing the consequences of their act of insubordination in accordance with the provisions of the constitution.

The judiciary being the last hope of the masses in the pursuit of justice must be fair and free from every misconduct and impropriety and must be ready to portrays and upholds the course of law to ensure proper dispensation of justice, a judicial officer occupies a very unique and sacred position

²²⁴ (2017) LPELR-43391.

in the society, occupying this position means that a high level of integrity, honesty and accountability is expected from judicial officers.

THE PLIGHT OF CLIMATE REFUGEES IN AN ERA OF ENVIRONMENTAL CRISIS

Ndiritu Carlos Mwangi²²⁵

ABSTRACT

In the wake of climate change menace, there is the emergence of a new class of refugees known as climate refugees. This is a group that has enjoyed little of any legal protection due to lack of a proper legal framework addressing this adversity. There is need to boldly address this issue otherwise the continued proliferation of their rights will not cease. In times when environmental justice is gaining traction there would be no other opportune time to address the problem and give recommendations. This paper sees to it that this controversial topic is deciphered of its intricacies and offered evocative, informative, positive and revolutionary insights. It is aimed at acknowledging the existence of these people, analyzing the contributors to it and also the role of the law in trying to combat it as well as the role nations have to play in helping eradicate it and not forgetting the interplay between all these and human rights.

Keywords: Climate change, climate refugees, environmental justice, human rights.

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INTRODUCTION

The 1951 UN Convention on refugees defines a refugee as a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him or herself of the protection of that country, or to return there, for fear of persecution. This definition in its true sense limits those who can be regarded as refugees to those who are wary of getting persecuted due to their race, the religion they profess, their nationality or their political or social group affiliation.

In recent times, we have witnessed the emergence of new classes of refugees distinct from the traditional refugees. This has been catalyzed by the sporadic changes in different spheres from when last the term was defined. Even though change is eminent, no one would have envisaged that change would lead to the looming destruction and mass displacement all amplified by climate change amongst many other factors.

Amongst this new classes are the class of refugees as a result of adverse effects of climate change in their respective nations. These refugees seek asylum in other countries which have not been hit by this menace. According to recent statistics, over 376 million people around the world have been forcibly displaced by floods, windstorms earthquakes or droughts since 2008, with a record 32.6million in 2022 alone. Since 2020, there has been an annual increase in the total number of displaced people due to disaster compared with the previous decade of 41 % on average. The upward trend is alarmingly clear. With climate change as the driving catalyst, the number of 'climate refugees' will continue to rise. The Institute for Economics and Peace predicts that in the

worst-case scenario, 1.2 billion people could be displaced by 2050 due to natural disasters and other ecological threat.

To bring the point closer home, in the year 2022, Submissions to the UN Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change reported that The Horn of Africa was experiencing an unprecedented drought, the worst to strike the region in 40 years. Nearly 40 million people were affected by dire food insecurity and near famine. Nine million livestock had died, destroying the livelihoods of the primary pastoralist communities and further contributing to malnutrition in 5 million children. Consequently, over one million people in Somalia alone had now been displaced both internally and across borders to Yemen, Ethiopia, Kenya and beyond. Humanitarian agencies noted that almost 60,000 Somali refugees fled climate change to Kenya's Dadaab refugee camp.

Amid this appalling state of affairs, the rights of these refugees continue to be elided, the driving factor being that they are not amongst the group of people regarded as refugees under the statutory definition. Therefore, they fail to enjoy the rights other refugees enjoy.

There is need to address this issue objectively with the urgency it demands. Also, we need to analyze the role the law plays in matters climate refugees and where the law can be incorporated to help address the augmented violation of their rights. The role of law in the thematic topic is twofold; Law in mitigating climate change and law in protection of climate refugees.

LAW IN MITIGATING CLIMATE CHANGE

Law draws a blueprint for the society, it also shapes it to be what it wants. Moreover, it has proven to be the best monitor of behavior and best administrator of justice. Therefore, the best way to

curb this predicament is by using the law to enforce ideologies that averts the continued defilement of the environment and absolve our undoing to mother nature.

Two areas of law have emerged in recent times and they can be instrumental in this fight, they are: Climate litigation and environmental justice.

CLIMATE LITIGATION

Climate litigation can be defined as legal proceedings aimed at addressing climate matters or aimed at spurring climate change mitigation actions.

The realm of climate litigation has experienced significant expansion as individuals have embraced its efficacy in combatting climate change. As of December 2022, there have been a staggering 2,180 cases concerning climate-related matters filed across 65 jurisdictions worldwide, including international and regional courts, tribunals, quasi-judicial bodies, and other adjudicatory entities such as Special Procedures at the United Nations and arbitration tribunals. This marks an unwavering rise from merely 884 cases in 2017 to a notable figure of 1,550 cases just three years later in 2020.

This should therefore be a clarion call to legal practitioners to take up and savor this avenue in helping combat climate change. The general public should also be sensitized on the existence of climate litigation for them to seek legal redress whenever they feel like their rights are being violated.

An example of climate litigation in action is in the Australian case where, the court in Taralga Landscape Guardians Inc vs Minister for planning upheld a proposal for a wind farm noting that

the overall public benefit and the concept of inter-generational equity outweighed any private burdens particularly where such a development would contribute less GHG emissions.

ENVIRONMENTAL JUSTICE

Environmental justice is a multifaceted discipline characterized by its staunch activism towards the equitable treatment and involvement of people of all races, cultures, nations, and socioeconomic backgrounds in the development, implementation, and enforcement of environmental programs, laws and policies.

The challenges related to addressing environmental justice, including climate justice, require equitable solutions and the respect, protection and fulfillment of human rights in the context of climate change mitigation and adaptation, biodiversity conservation and pollution control efforts. Examples include the protection of land and tenure rights of indigenous people in a bid to enhance protected areas and forest coverage for climate mitigation purposes; rights of youth, children and future generations with regards to climate impacts and ensuring public participation and access to information for all in society with regard to climate change policy and decision making, as well as access to justice for human rights violations caused or triggered by the changing climate and environmental degradation. Another important aspect is the need to promote just transitions to a low emissions and sustainable economy, and equity in reaching global net-zero emissions by the middle of the century, as required by the Paris Agreement (PA). This requires not only an enabling legal framework, but also adherence to the rule of law, and the respect of human rights.

The term 'access to environmental justice' can refer to two related but distinct concepts. In the broadest sense, it means that everyone has the right to a clean and healthy environment, regardless of their socioeconomic status, where they live, or their background. More specifically, it also refers

to the ability to access legal redress when environmental concerns arise. This includes having access to legal services, information, and resources to effectively resolve environmental disputes.

To achieve environmental justice, states must include measures in their national laws, policies, and practices that give due regard to the following principles:

- i. A disproportionate burden to protect the environment should not be borne by any particular group, and specifically not by vulnerable populations.
- ii. The benefits of both the natural (such as clean air) and social (such as services and amenities) environment should be equally accessible to all.
- iii. There should be transparency and the opportunity for meaningful public participation in decision-making for all.
- iv. Everyone should have access to effective remedies for violations of environmental rights, irrespective of political or economic background.
- v. Environmental protection to sustain human health and well-being and ecosystem equilibrium should be achieved and maintained.

LAW IN PROTECTING CLIMATE REFUGEES

The human rights implications of climate change displacement, in particular for persons displaced across international borders due to climate change, are significant and disturbing. People displaced by climate change face multiple violations of their human rights. The climate change event may deprive people of their right to food, water, sanitation, housing, health, education and, for some, the right to life. Studies suggest that women and children are the most affected by

disasters and the effects of climate change, as they are up to fourteen times more likely to be killed than men by a climate disaster, such as a hurricane, typhoon, cyclone or flood. In 2018, more than half of the 41 million people internally displaced were women. In addition, most early warning systems for disasters and other emergencies are designed and used by men without considering a gender perspective.

Regardless of how critical this is, there is a dearth in legal protection of climate refugees mostly amplified by the political sensitivity of the matter and as a result their rights evaporate and disregarded by the host nation.

To cure this, a tripartite legal approach can be adopted to address the climate refugees' rights, which is: an international approach, a regional approach and a national approach.

INTERNATIONAL APPROACH

The prelude step to be taken should be the amending of the meaning of the term refugees under the Convention to include those people displaced by climate change, this can be achieved by the Human Rights Council preparing a resolution for submission to the UN General Assembly urging the body to develop an optional protocol under the Convention relating to the Status of Refugees to address displacement and legal protection for people all over the world affected by the climate crisis.

There are a number of international human rights treaties that are relevant in providing protections for persons displaced across international borders due to climate change. In addition, transnational criminal law addresses criminal actions related to migration, in particular the United

Nations Convention against Transnational Organized Crime, the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. It should be noted that there are significant gaps in the ratification of these treaties, notably among small island developing States, and more significant gaps in their implementation. Nevertheless, every effort should be made to encourage all countries to ratify these significant treaties.

The legal concept of non-refoulement, which aims to prevent a refugee from being forced to return to his or her country, is well founded in the Convention relating to the Status of Refugees. In addition, the concept appears to have been elevated to the level of customary international law and provides a legal obligation on all States to enforce this right. Under international human rights law, the principle of non-refoulement entails an obligation not to remove a person, whatever his or her status, when there are substantial grounds for believing that he or she would be at risk of being subject to serious violations of human rights, including torture or other cruel, inhuman or degrading treatment or punishment.

REGIONAL APPROACH

One of the regions hit hard by climate change is East Africa and the Horn of Africa subsequently there has been a surge in the number of climate refugees from this areas, it is this reason that led to countries making up the Intergovernmental Authority on Development (IGAD) and the East African Community (EAC) sign the Kampala Ministerial Declaration on Migration, Climate Change & Environment. In 2020, IGAD states adopted the Protocol on Free Movement of Persons

in the IGAD Region – the first to address people fleeing disasters and climate change specifically. Such free movement protocols enable easy migration and the migrants are offered protection until it's safe to return to their countries.

In the global context, the Council of the European Union Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons expands the definition of refugee to include “persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights”. The Special Rapporteur is of the view that the temporary nature of the protection provided by that Directive may allow for persons displaced across international borders due to climate change to be afforded temporary protection, but it would not be adequate for those displaced permanently due to slow onset events.

These are just but a few regional attempts to address the rights of those displaced due to climate change however, they act as a beacon to other regions that by enacting such enactment they can solve the problem of climate refugees in their respective regions.

NATIONAL APPROACH

Under national approach we look at the attempts by nations to come up with legislations or policies addressing the issue of climate refugees seeking asylum in their countries.

The United States offers temporary protection status to foreign citizens located in the United States, due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately. The temporary protection status currently only applies to citizens of 15 countries. The United States has provided temporary protection status for citizens of Honduras,

for example, due to the environmental disaster and substantial disruption of living conditions caused by Hurricane Mitch and the fact that Honduras was unable, temporarily, to handle adequately the return of Honduran nationals.

Other nations should adopt such an approach to try and curb the issue of climate refugees in their nations especially those faced with an influx in the number of people who seek asylum in their countries.

CONCLUSION

Climate change has brought mankind to heel. We are living in times where tomorrow is uncertain. These are monsters of our own making therefore; we must devise methods of slaying them before they swallow us whole.

To cut some slack to the Drafters of 1951 convention, they never foresaw climate change inducing displacement of people. This shows how quickly times changes and also how cautious we should be whenever we engage in activities that might affect the environment.

People are being forced to move to other nations to try and save their lives and those of their folks. It is time we get up, shake the dust from our cloaks and work towards a better tomorrow. Meanwhile as we do this, we should protect and take responsibility over those whom the catastrophe has already caught up with, learn from them and promise ourselves to never again let mankind suffer due to adverse climate change.

A brighter tomorrow depends on us all and if proper policies and legislations as elicited in this paper are enacted we will save current and future generations from a whole lot of trouble and the looming humanitarian crisis.

LITIGATION AS A TOOL FOR ENVIRONMENTAL PROTECTION IN NIGERIA

Jimoh Abdulgany Adisa²²⁶

ABSTRACT

Environmental Laws are set aside to reduce the stringent environmental hazards that emanates from different activities of mankind. To find solutions to this menace, courts are set up by the government with jurisdiction to consider environmental litigation to safeguard environmental litigants in the green and white nation, and the responsibilities of judiciary to procure solutions to such. The great percentage of common environmental difficulties affecting the country and universe at large emanated from industrial or manufacturing factories, processes, mechanism and products. It encompasses waste product from different manufacturing activities, different environmental dangers stemming from common manufacturing processes and mechanism and of life wastes and waste product from the use of their end-products. They display and storm the surrounding in form of air, water, noise and land pollution, depletion of the ozone layer, toxic and non-toxic wastes, global warming and climate change e.g. a non-biodegradable waste, cellphone and other plastic materials, bottles and other glass material. Consequent upon the increment in the industrial activities in Nigeria, the challenges attached to the manufacturing may also increase. In a similar fashion, just as the negative environmental effects of industrial activities had increased geometrically from the incipient stage of industrial revolution in Europe continent. It has therefore assumed startling proportion on the developed universe and it also attracts a lot of attention and action over there, up to an extent that some of these nations and their factories are moving to other less environmental zones of Asia and Africa. In this regard, Nigeria is not an

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exception, and other developing countries of the cosmos albeit, the primary objective of every government, state and city is to captivate industries, and investment devoid of any thoughts due to their environmental consequences and implications. In spite the inactiveness in environmental protection permeating Nigeria, the government have been very active in that aspect. To achieve this aim, the question which this treatise seeks to critically answer is litigation as a tool for environmental protection in Nigeria.

Keywords: Litigation, Environmental Law, Environmental protection

1.0. INTRODUCTION

A great percentage of environmental difficulties affecting the country, and the universe transcends industrial or manufacturing factories processes, mechanism and product. As such, it includes waste product from divergent production affairs; different environmental damages inherent in the production processes and product, end-of-life wastes and waste outcome emanating from the consumption of their end products. They manifest and assail the environment in the form of land, water, air and noise pollution, greenhouse effect, climate change and depletion of the ozone layer. Consequent upon the increment of the challenges of industrial activities in Nigeria, the challenges of industries also increases.²²⁷ Essentially, environmental litigation can be seen in the phase of criminal prosecution or civil litigation. In another sense, the known feature of various statutes in Nigeria is that they are attached with penal provision. Therefore, they disallow the practice of doing something that will lead to environmental pollution.

The provisions of most of these Acts carry criminal sanctions in nature of monetary fines and/or a term of imprisonment. In other words, if an individual or corporate body violates any of the provision of such statutes, he is liable to criminal charge. The main aim of this is to impose some pains on contaminator or impose them monetary loss.²²⁸

Along the same lines, Criminal prosecution is often instituted by public authorities saddled with the powers to do so. Most pieces of legislation on environmental protection have provisions enabling the institution to initiate criminal prosecution for the breach of their laws or regulations. For instance, section 1(2) (C) of NESREA Act, empowers the agency to be able to sue and being

²²⁷ Kenneth Kingsley EZEIBE & Dr. Meshach Nnama: A critical review of the law of Environmental protection for manufacturing industries in Nigeria.

²²⁸ See the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act [NESREA] 2007 ss. 20(3) and (4), 21(3), 22(3) and (4), 24(4) and (5), 25(2) 26(3) and (4), and 27(3), (4) and (5) and 37, which provides for Penalties in form of Fines/Imprisonment; see also Ibidapo-Obe, A. Criminal Liability for Damages caused by Oil Pollution. In Omotola (ed.) Environmental Laws in Nigeria including Compensation (Lagos: University of Lagos Press, 1990 p.232

sued in its company name.²²⁹ Definitely, section 8 (f) of the makes the agency to setup bile courts in line with the relevant agency. The section provides thus: ‘subject to the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and in collaboration with relevant judicial authorities establish mobile courts to expeditiously dispense cases of violation of environmental regulations.²³⁰

Without any modicum of doubt, this essay seeks to appraise litigation as a tool for environmental protection in Nigeria. To achieve this objective, the questions which this essay seeks to x-rays inter alia includes; conceptual clarification of key terms, development of environmental litigation in Nigeria, Litigation as a tool for environmental protection in Nigeria, jurisdictional courts to entertain environmental litigation in Nigeria, jurisdictional issues in environmental litigation in Nigeria, impediments of litigation in Nigeria, recommendation and conclusion.

2.0. CONCEPTUAL CLARIFICATION OF KEY TERMS

It is of utmost necessity to describe some concepts. These concepts are; Litigation, Environment, Environmental protection, Environmental Law, and Nigeria. Black Law Dictionary 7th edition at page 944 as” ***the process of carrying on a law suit.***”²³¹ Litigation is the taking of legal action by a litigant. It is a field of law that is concerned with contentious matters. The learned authors of Black's Law Dictionary explain the environment as: " the totality of physical, economic, cultural, aesthetic, and social circumstances and factors which surround and affect the desirability and value of property and which also the people's standard of living. " In another sense, the environment is the setting of man's various productive activities. Environmental protection refers

²²⁹ MT Ladan Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria’ (2012) 8 (1) Law, Environment and Development Journal, 116.

²³⁰ Section 8(f) of NESREA.

²³¹ Black Law Dictionary 7th Edition.

to setting pollution control standards in the area of air, water, solid waste, pesticides, radiation, and toxic materials; enforcing laws enacted to protect; and coordinating the anti-pollution.²³² The goal of environmental protection is anchored in the principle that "the polluter pays." Under this principle, the polluter must be held liable for the consequences of his action. Environmental Law is the field of Law dealing with maintenance and protection of environment, and all Laws related to the ensuing component of the environments, whilst Nigeria is the merging of the Southern Nigerian protectorate and the Northern Nigerian protectorate in 1914. Hence, litigation as a tool for environmental protection in Nigeria, is the main objective of this essay.²³³

3.0. SUCCINT EXPLANATION ON THE DEVELOPMENT OF ENVIRONMENTAL LAWS IN NIGERIA

As regards the development of the Nigerian Environment Law, it could be compartmentalized into two broads, to wit: The pre 1988 era and the post 1988 era.

The pre 1988 era: During this period, Nigeria was not very concerned with protecting the sanctity of the environment. Correspondingly, no policy was set aside to protect it. Consequent upon this, it gives rise to the front of nuisance because disputes in environmental law are not seen as public matters which require state intervention. Therefore, the few environmentally related laws that are in existence only criminalized activities that could demean the environment, among them was the criminal code Act of 1916 which disallows water and air pollution.

The post 1988 era: It is a matter of fact that the incidence of dumping poisonous and dangerous refuse in Nigeria reinvigorate the federal government to tackle the problem of environmental abuse. It transpired on the 19th September, 1987 when Sunday Oyemire Nana, a farmer in "Koko"

²³² *ibid*

²³³ <https://aboutnigerians.com/amp/what-does-nigerian-mean/> last accessed, 9th of June, 2023.

—small village located in the coast in the former Bendel state of Nigeria—was appointed by Gian Franco Raffaelli, an Italian Business who was once a resident in Nigeria for the period of 20 years to dispose 3880 tons of poisonous and dangerous waste on behalf of an Italian company. Be that as it may, this accelerated the creation of harmful waste (Special Criminal Provision) Decree and the then Federal Environmental Protection Agency (FEPA) now (Natural Environmental Standard and Regulation Enforcement Agency, which is the supreme reference to environmental matters in Nigeria).²³⁴

4.0. LITIGATION AS A TOOL FOR ENVIRONMENTAL PROTECTION IN NIGERIA

Without any modicum of doubt, and as far as Nigeria is concerned, environmental laws are set aside to reduce the intimidating and frightening environmental problems arising from human activities. In a bid to inspect these activities, the law courts are put in place by government with jurisdiction over matters relating to environmental litigation and redress environmental misfits in Nigeria.

Fundamentally, environmental litigation could be in the form of criminal prosecution or civil litigation. The common characteristics of different Nigerian statutes is that they are laden with penal provisions which in the long-run disallow the doing of something that may result in environmental pollution.

The ensuing content of this act includes criminal sanctions in the form of monetary fines or a prison term. In a nutshell, if an individual breaches any of the provisions, he will be charged for criminality; an instance of this is very evident in the provision of Section 1 (2) of the National

²³⁴ Rethinking Environmental Law in Nigeria: Hakeem Ijaiya, O.T. Joseph

Environmental Standards and Regulations Enforcement Agency (herein referred to as SPREAD Act), according to the agency with the capability of suing and being used in its corporate name.²³⁵ In a similar fashion, section 8(f) of the Act permits the agency to establish mobile court in affiliation with the relevant agency, as it provides thus: 'subject to the provision of the constitution of the federal republic of Nigeria, 1999 and in collaboration with the relevant judicial authorities establish mobile courts to expeditiously dispense cases of violation of environmental law regulations.'

More so, the judicial system is saddled with the responsibility of conviction while the agency is to prosecute. As such, section 32(3) of NESREA Act gives the agency power to carry out such prosecution, subject to the provision of section 174 of the Nigerian Constitution (1999 as amended).²³⁶ That is, any officer of the agency may, with the consent of the Attorney General of the Federation carry out criminal proceedings in respect of offence under this Act or regulation under it.

In another sense, civil litigation is based on the premise of tortious liabilities or the infringement of a duty of care imposed by law, and it is very clear in the words of Tokyo, thus: "Civil litigation can be explained as enforcement of legal right(s) or redressing of legal wrong(s) as the case may be before a competent court or tribunal established by the law." Indeed, environmental protection in civil litigation surpasses criminal prosecution as far as environmental protection is concerned.²³⁷

Albeit, the common form of environmental litigation is an oil pollution by individual citizens against oil companies. As well, a regulatory institute can institute civil action all in a bid to

²³⁵ MT Ladan 'Review of Nesrea Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8(1) Law, Environment and Development Journal, 116.

²³⁶ This section relates to the power of the Attorney-General of the Federation to institute, continue, or discontinue criminal proceedings against any person in a court of law.

²³⁷ AE Akpan, 'Civil Liabilities and Criminal Sanctions in International Environmental Law: A General Appraisal (2006) 3 Fountain Quarterly Law Journal, 65-82

obtaining order of courts for shutting down premises of an area affecting the environment; as this standpoint received statutory baptism vide the provision of Section 30(1)(a) of the NESREA Act which establishes thus: "To obtain an order of a court to suspend be activities, seal and closed down premises including land, vehicle, tent, vessel, floating craft or any in land water and other structure whatsoever." ²³⁸

By extension of the aforementioned standpoints, it is a very clear fact that pollution of the Nigerian environment had received legal baptism, despite its beauty, it lacks effect due to some challenges that occur such as constitutional issues, lack of implementation, absence of judicial attitude as it is concomitant with the right to a fit environment in section 20.

As a matter of fact, entry to environmental fairness in Nigeria is a great challenge within the Nigeria corpus Juris; it is equally in line with the fact that before 1900, the Nigerian courts made little or no reserved judgment in favor of the victim of environmental pollution as established in *CHINDA v. SHELL B.P*(1974)2 R.S.L.R1, the plaintiff brought a complaint in respect of adverse effect of gas flare on their apartments, crops and plants. They institute an action asking the court to restrict Shell-BP against functioning a flare stack within five miles of the petitioner's community. In so doing, the court rejected to instruct an injunction on the ground that the liberation required was absurd and a wide demand.

In furtherance, in *ALLAN IRON v. SHELL BP*, the case centers on the fact that the plaintiff lodge a complaint about their farmland, fishpond and creeks being polluted by the defendant's activities on oil exploration in their community. Along the line, the court ruled in favor of the

²³⁸ Ibid

respondent, on plea, the Supreme Court set aside the judgment of the probate court and dismissed the respondent's suit.

More so, there are instances where entree to environmental justice is being frustrated with technicalities that emanated from the Nigerian corpus Juris, such technicalities are: the second party to an environmental suit (herein after referred as defendant) always raise defence that under section 6(6)(c) of the Nigerian constitution, the right to an environment is unenforceable and this defense was raised by the defendant in the case of *SPDC v. JONAH GBEMERE(2005)*, the plaintiff's counsel to obtain justice for the victims who had been severely affected by gas flaring had to connect the right to clean and healthy environment, to right to life, and (2005), the plaintiff's counsel to obtain justice for the victims who had been severely affected by gas flaring had to connect the right to clean and healthy environment, right to life, and protection against inhuman treatment as evident in chapter two of the fons et origo. In so doing, the court rejected to instruct an injunction on the ground that the liberation required was absurd and a wide demand.

In the same vein, the case of *SPDC NIG L TD v. AMBAH (1999)*, gives another instance of the impertinence of priests in the temple of justices (Judges) to oil—linked environmental damages, where the litigant demanded a whopping sum amount of #300,000 on behalf of his clients when the offender destroyed their lakes, creeks and fish ponds. The evidence establishes that improve that the improve cost that actually happened and were able to particularize special damage to the tune of #30,000 and they claimed the general damages of #300,000, although not proof. In so doing, but the trial and court of appeal awarded #300,000 to the respondents for the damage of the aforementioned properties. On appeal, the Supreme Court allowed the appeal and reduce the amount of #27,000 only, claimed by the respondent.

Along the same lines, the defense of locus standi—the right to challenge an action or bring some decision—vide the case of *SPDC v. CHIEF OTOKO & ORS (1990) 6NWLR 693*. The lawsuit was instituted in a representative capacity, claiming the sum of #499,855.00 as compensation payable for deprivation of use of the Andoni Rivers & Creeks, as a result of the crude oil spill. The court held that, it is of utmost necessary that the individuals who are to appear in person (s) or have a representative should possess similar interest in the cause of a grievance and matter.

In addition, the innovation on environmental litigation is birthed vide the case of *SPDC v. COUNCILOR FARNH & ORS*, in it, the appellant dredged a stream flowing over the land of the respondents with the full approval of the latter which lead to loss of sand & gravel; and it equally lead to the destruction of fishing equipment which hinder the fishing process. As a result of this, the respondent sued for damages in the sum of #60,000 and the learned trial judge ruled in favor of the respondent and therefore awarded #45,840 and on a petition, the petitioner court sustained the investigation court judgment. So, on appeal to the Supreme Court, the damages granted was set aside and reduced to #35,000.²³⁹

5.0. KEY ASPECTS OF LITIGATION AS A TOOL FOR ENVIRONMENTAL PROTECTION IN NIGERIA

Without any scintilla of equivocation, litigation could serve an effective tool for environmental protection in Nigeria and equally an avenue for individuals, communities and organisation to seek legal remedies and institute action against pollutants for their nonchalant actions. Consequent upon this, some key aspect of litigation as a tool for environmental protection in Nigeria could be fathomed below:

²³⁹ Environmental Law in Nigeria: A review on its antecedence, application, Judicial unfairness and prospects: Paul Argument Aidonije Osikemekha Anthony Anani, Omohoste Patience Agbale, John Ovie Oromukoro, Adetunji Oluwaseun Charles.

•**JUDICIAL ACTIVISM:** The Nigerian courts have displayed a large interest on environment issues and have shown judicial activism in environmental litigation.²⁴⁰

•**PUBLIC INTEREST LITIGATION:** It permits some factions of people to institute legal action in respect of public interest such as civil society organization, NGOs, and some dedicated citizens on environmental cases in the court of Law. This method has been deployed to combat some activities such as deforestation, environmental danger and oil spillage.²⁴¹

•**AWARENESS AND ADVOCACY:** Litigation gives room for awareness on environmental saga and improve public discourse on the relevance of safeguarding the environment.²⁴²

•**REMEDIES AND COMPENSATION:** Vide the dint of litigation, affected parties may get compensation and compensation for any environmental damage. This may include compensation of health impact, implementation of preventive measures, restoration of polluted areas, financial compensation for any loss of life.²⁴³

•**ATTAINMENT OF JUSTICE:** Litigation make sure the affected individuals and the community members possess means to justice and a medium to air their concerns on environmental deterioration.²⁴⁴

²⁴⁰ <<https://sabilaw.org/litigation-as-a-tool-for-environmental-protection-in-nigeria-2/#:~:text=Water%20pollution.&text=Litigation%20has%20been%20an%20essential,stronger%20environmental%20laws%20and%20regulations.>> accessed,12 January,2024

²⁴¹ ibid

²⁴² ibid

²⁴³ ibid

²⁴⁴ ibid

6.0 JURISDICTIONAL COURTS TO ENTERTAIN ENVIRONMENTAL LITIGATION IN NIGERIA

It is a well-known fact that the Nigerian judicial system encompasses the totality of the court system, its jurisdiction (which collectively forms its jurisdiction, composition and the judicial system) hierarchy. Be that as it may, the basic functions of the courts in Nigeria are categorized into adjudication, construing of laws, exercising of superior and judicial review over administrative bodies.²⁴⁵ Implementing the above stated functions, the courts have been generally known and deemed as the "hope of the common man." So, this assertion yields confidence the populace placed in the judicial system. Consequent upon the judicial powers, the court exercised over persons, authorities, and compromise on any conduct that tends to infringe or contravene environmental law. In the environmental suit, the courts exercise jurisdiction all in a bid to ascertaining rights and liabilities, punish offenders, stop practices that are hazardous to environment or order compensation for victims that had suffered from environmental misconducts and harms.

In furtherance of the above, agenda 21 of the 1992 Rio Declaration on Environment and development place much emphasis on the importance of the judicial system in protecting the environment when it calls on non-governments to create judicial and administrative institution and procedures for legal remedies.²⁴⁶ As far as Nigeria is concerned, no superior court of records with exclusive jurisdiction to hear and determine matters relating to environmental issues. For example, in Cross River State, there is a magisterial court.²⁴⁷ Finally, the courts are mainly

²⁴⁵ SG Ogbodo(n14); H Ijaya & O T Joseph(n1), See also CIN Emelie, The Judicial Approach to Environmental Protection in Nigeria: An overview<www.globalacademicgroup.com> accesses on 22|09|2018

²⁴⁶ Okonkwo, 'Environmental Constitutionalism in Nigeria: are we there yet? (2015), The Nigerian Judicial Review, 191.

²⁴⁷ They are the courts that fall below the high court in hierarchy, they are also known as courts of summary jurisdiction.

established to exercise criminal jurisdiction over those who have been brought before it, for breaching environmental sanitation and other sanitation regulation of the state.

7.0. IMPEDIMENTS OF ENVIRONMENTAL JURISDICTION

Predominantly and habitually, there are environment setbacks attached to litigation in Nigeria, irrespective of whether it is environmental or not. Such setbacks include the following to wit; delays, cost of litigation, ignorance of the law, remoteness of the courts, and services of legal practitioners. In addition, other impediments attached to litigation are burden of proof being placed on the victims who lacks means to hire technical to testify on their behalves, structural difficulty in redressing environmental justice in Nigeria, national laws and courts systems are devoid of independence and respected by the transnational oil companies.

8.0. JURISDICTIONAL ISSUES IN ENVIRONMENTAL LITIGATION.

Without a vestige of doubt, the locus classicus of *MADUKOLU v. NKEMDILIM* has laid down in apparent terms, the three threshold factors that determined the competence of court's jurisdictions, to wit;

- a) The court is properly constituted as regards members and qualification of the bench and no member is disqualified for one reason or another.
- b) The subject-matter of the case is within the court's jurisdiction and there is no feature in the case which prevents the courts from exercising; and
- c) The case comes before the court initiated by due process of the law and upon fulfilment of a condition precedent to exercise of jurisdiction. Over the years, these 3 components of jurisdiction have served as obstacles to environmental litigation. Aside the practical obstacles, a number of procedural particularities within the Nigerian judicial system further complicate the issues of jurisdiction in environmental litigation.

CONCLUSION AND RECOMMENDATION

Without any iota of doubt and as far as Nigeria is concerned, litigation is governed by various laws and rules of courts, which include the constitution of the Federal Republic of Nigeria, the Evidence Act and Civil Procedures Rules. Litigation is an important means of enforcing legal rights and obligations, and is often use in resolving disputes in various areas of Law, which Environmental Law is not an exception.²⁴⁸ The piece of advice in this regard is that there should be participation of the patriotic Nigerians in Environmental protection Law.

²⁴⁸< <https://thenigerialawyer.com/public-interest-litigation-in-nigeria-by-toheeb-mustapha-babalola/>> last accessed, 12th of January, 2024.

THE PROBLEM OF LEGAL TECHNICALITIES AND THE DEMAND FOR JUSTICE;
LAYMAN'S PERCEPTION OF TECHNICALLY DECIDED CASES

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ABSTRACT

This article examines the concept of technicality, its associated challenges, and potential solutions, along with the demand for justice. It explores the concept of technicality in depth, considering the judiciary's attitude towards it and finding that courts typically avoid technicality to serve justice. The paper compares the Nigerian legal system's substantive and procedural laws, revealing that substantive law relies on procedural law for enforcement, with litigants often invoke procedural law to highlight technicalities. It also discusses the administration of justice and its forms, distinguishing between formal justice (strict application of laws) and substantive justice (application of laws to achieve justice), and addresses how courts handle litigation irregularities and technicalities. It is noted that technicalities are categorized into minor and substantial, with courts tending to disregard the former and focus on the latter. The article further investigates how laypeople and legally informed individuals perceive cases decided on technical grounds, finding a common view that technicalities often obstruct justice. It recommends that courts should require strict adherence to procedural laws (rules of the court), except where otherwise stated, and suggests that minor errors by litigants should be overlooked or corrected in the interest of justice, to ensure the administration of justice is seen as fair and equitable.

Keywords; Technicality, justice, substantive law, adjectival law, litigation, layman, court Legal system.

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1.0. INTRODUCTION

The word legal technicality is generally taken in its ordinary parlance as to decide a case strictly on the basis of rules without taking a look at the merit of the case. It involves adherence to established rules at the prejudice of the merit of the case, it involves depending on a counsel's mistake at his prejudice in a legal subject matter. In the words of Nikki Tobi JSC (as he then was) notes²⁵⁰ that;

The respondent referred to the departure in their brief as mere technicality. What is technicality? In *Adeniji v. The State* (1992) 4 NWLR (Pt. 234) 248, I said at page 265: 'I realize that courts of law seem to be using the word technicality out of tune or out of turn, vis-a-vis the larger concept of justice. In most cases, it has become a vogue that once a court is inclined to doing substantial justice by deflecting from the rules, it quickly draws a distinction between justice and technicality so much so that it has become not only a cliché but an enigma in our jurisprudence. In most cases when the courts invoke the substantial justice principle, they have at the back of their minds the desire to put to naught technicalities which the adverse party relies upon to drum down on otherwise meritorious case. We seem to be overstretching, the technicality concept. We should try 'to narrow down the' already onerous and amorphous concept in our judicial process. A technicality in a matter could arise if a party is relying on abstract or inordinate legalism to becloud or drown the merits of a case. A technicality arises if a party quickly takes an immediate available opportunity, however infinitesimal it may be to work against the merits of

²⁵⁰ MOJEED SUARA YUSUF V. MADAM IDIATU ADEGOKE & ANOR Yusuf v. Adegoke (2007) 11 N.W.L.R. (Pt. 1045) 332 at 368-369, paras. D-B (SC)

the opponent's case. In other words, he holds and relies tenaciously unto the rules of court with little or no regard to the justice of the matter. As far as he is concerned the rules must be followed to the last sentences, the last words and the last letters without much ado, and with little or no regard to the injustice that will be caused the opponent.' Can respondents say with all seriousness and sincerity that ignoring the pleadings and making a different case at the hearing is mere technicality? I think not." Per Tobi J.S.C.

While the writer of the article is not opining that justice should be sacrificed to technicality, he insists that laws should be complied with by litigants seeking something before the court. This paper insists that only when rule of court is complied with that justice will be seen done.

This article contains 8 subsections. The first subsection introduces and expounds the concept of legal technicality. It explains to the reader what the term technicality entails. The second subsection explains the concept of legal technicality, and a broader look at the attitudes of courts towards legal technicality.

The third subsection takes a careful look at the Nigerian legal system taking into consideration substantive and procedural law. The fourth subsection takes a look at the process of the administration of justice, via the two mechanisms of justice; substantive and formal justice. The fifth subsection takes a careful look at the treatment of irregularities in the process of litigation and the difference between a mere and substantial technicality. The sixth subsection looks at the problems of technicality and layman and legally informed individual perception of technically decided cases. The last subsection of the article summarizes the article and makes some recommendations.

2.0. UNDERSTANDING THE CONCEPT OF LEGAL TECHNICALITY

(ATTITUDE OF COURT TOWARDS TECHNICALITY)

As afore defined the concept of technicality is the concept of deciding cases on rules without considering or taking a look at the facts/merits of the case. Usually counsels play a game of sense in trying to use technicality at their advantage by using the mistake of the other counsel at his/her own prejudice. The counsel who succeeds in obtaining a victory on the principles of technicality will leave the court with a shield of victory obtained on mere technicality. Whilst the other counsel leaves the court saddened that the court decided the matter at the prejudice of justice without having a look at the merit of the matter but sometimes he gets to understand that the other counsel has outsmarted him and he understands that the judge has no any other option than to decide the case the way its decided.

Usually the concept of technicality arises from the departure of a party from the established rules of court. These are rules that govern a court in administration of justice.²⁵¹ The whole purpose of laws and rules of Court is to ensure that the affairs of the Court during the administration of justice are carried out in an orderly fashion with reasonable degree of certainty that prescribed acts have been duly complied with by the parties in the interest of justice.²⁵²

Thus, where the law prescribes a way of carrying out an act, such is the only way to be followed, when a date is specified for the doing of an act, that date becomes sacrosanct.

This is because the rules of Courts and practice direction are made to be obeyed and no favour should be shown for not obeying same.²⁵³ However, it has also been judicially noted that strict and

²⁵¹ oxford dictionary

²⁵² F.S.B.Int. Bank Ltd Vs. Imano (Nig.) Ltd (2000) 11 NWLR (Pt.679) 620 at 634

²⁵³ Williams v Hope Rising Funds Society (1982), 2 Sc 145 quoted with approval in Jimoh O. Ojugbele v Mr. Musefiu O. Lamiidi (1999) LPELR-CCN/1/99, Ratio 2.

unreasonable adherence to technicality in the administration of justice shuts out justice.²⁵⁴ It's a settled law that everyone has a right to enforce his rights or to institute an action before any court of law (based on having regards to the issue of jurisdiction) but this right should come through the right way that is by adhering to the established rules of court in any court the individual decides to institute his action.

Failure to adhere to these rules will be of great effect to the party subject to rules outlined in the rules of court for the breach. It's settled that the substantive aspect of the law cannot be enforced except through the adjectival aspect of the law.

What are the attitudes of the court of law towards technicality? The courts are now more focused on doing substantial justice rather than sacrificing justice on the altar of technicality. Courts are now willing to ignore mere errors and do justice as long as that error will not cause prejudice to the other party. It was given judicial echo in the case of *ANPP v. R.E.C., Akwa Ibom State*²⁵⁵ where the court reiterated that;

The hey days of technicalities are gone forever. The court is now more interested in doing substantial justice than relying on technicalities which can only lead to injustice. The judicial process malfunctions and is discredited when it is bogged down by technicality and is manipulated to go from technicality to technicality and thrives on technicality. That is why at all times the tendency towards technicality should be eschewed and the determination to do substantial justice should remain the preferred option and hallmark of the judicial system. In this case, the resultant effect of the notices of preliminary objections, if followed to their logical

²⁵⁴ *Akeredolu v Abraham & Ors* (2018) LPELR- 44067 (SC).

²⁵⁵ *ANPP v. R.E.C., Akwa Ibom State* (2008) 8 NWLR (Pt.1090) 453 at 548-549, paras. H-C (CA)

conclusions, will abort or conclude consideration of the appeals which would amount to a technical justice or a knock out, rather than the modern trend in the courts of ensuring that substantial justice is done to all comers to the courts. [State v. Gwonto (1983) 1 SCLR 142; University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143; Maersk Line v. Addide Investment Ltd. (2002) 11 NWLR (Pt. 778) 317." Per Awala JCA.

3.0. NIGERIAN LEGAL SYSTEM (SUBSTANTIVE LAW AND PROCEDURAL OR ADJECTIVAL LAW)

Substantive law means the rules of law themselves. In other words, it means the body of legal rules. It is the law that prohibits the doing or the not doing of certain things by citizens. It defines a code of conduct and prescribes a penalty for the violation of that code. The citizens have no choice but to obey the law as it is. A breach or violation of substantive law may result in punishment which may be in the form of a fine, term of imprisonment, compensation and so on.

Substantive law embraces such subjects such as law of Contract, Torts, Criminal law and Constitutional law which are concerned with Statement of rights, duties and liabilities of individuals. For example, law of Contract consists of a body of rules which will determine whether a contract exist in law; what the terms of the contract are and whether the terms have been performed or discharged or whether there is a breach and the remedies available to the injured party if any. In Criminal law, too, the Criminal Code (of the Southern States of Nigeria) and the Penal Code (applicable to the Northern States of Nigeria) define the different offences and the punishment that follows if one is found guilty of the offence. For example, S.419 of the Criminal Code which defines the offence of obtaining goods by false pretences and prescribes punishment

of terms of imprisonment for anyone found guilty of the offence. Section 373 that deals with homicide etc.

Procedural or adjectival law on the other hand deals with methods of proceedings to enforce a certain right or duty and how the litigation or prosecution is conducted. In other words, it is the procedural rules by which the law (that is the Substantive law) is enforced in the courts. The rule of procedural law therefore specifies the way in which an action is to be initiated in court; the mode of proof; the manner of prosecution of evidence; the method of giving evidence at trial; the examination of witnesses; the manner of giving judgement and the enforcement of the judgement of the court.

The procedural rules are to be found mainly in the various Rules of Court for Civil Offences, the Administration of Criminal Justice Act, or the Administration of Criminal Justice Law for criminal trials in the both Southern and Northern States respectively, the Evidence Act, and the Sheriff and Civil Processes Act.

Usually technicality arises from a departure from the procedural law which makes lawyers defend on that mistake (departure) to raise issues (usually requesting for the court to strike out the case or give judgment in their favour) sometimes lawyers rely on substantial law to raise the issue of technicality by strict reading. For example, when a statute says '*whoever*', a lawyer might argue that the word doesn't accommodate more than one person inter alia.

4.0. ADMINISTRATION OF JUSTICE (FORMAL AND SUBSTANTIVE JUSTICE)

In ordinary parlance, law and justice are synonyms. However, justice is the correct application of a law, as opposed to arbitrariness. Law seeks justice. Law is therefore not an end in itself, but a means to achieving justice.

Notwithstanding the simplicity of the above statement, it would be misleading to assume that the concept of justice means the same thing to everybody at all times. Obviously, the word would mean different things to the employer and the employee; to the university authority and the students' union leaders; to the rich and the poor; to the plaintiff and defendant. This is because many factors contribute to the moulding of one's conception of justice such as - home background, educational qualification, religious belief, enlightened self-interests, personal idiosyncrasies, socio-political affiliation, etc. The problem is further complicated by the fact that the society cannot devise rules of law that will fully satisfy the often competing and conflicting demands of everyone at all times. Somebody or some group must 'win' and another must 'lose'. The question is the margin of the victory or defeat of the different interest groups. Hence, the society must, through the instrumentality of the law, make a choice as to which of the conflicting interests must prevail and how to balance the conflicting and competing interests. In doing so, certain interests which may be equally meritorious but regarded as less deserving of priority at a particular time may be sacrificed for some other interests.

Sometimes law and justice are used interchangeably. For example, Ministry for administration of law is referred as '*Ministry of Justice*'. Many people get confused as they mostly conceived justice as law and vice versa. However, it is important to know that the two concepts are not the same. Law deals with the conducts of people in the society, which gives them rights and duties while justice deals with the end(s) of law. When a judge applies the law the way it is, it is said justice is

done. It will be difficult to give a definite answer on what justice is. Even though the word justice is used almost by everybody globally there is no single convincing definition of the term justice. It will be wiser to define justice on the functions and what justice tends to achieve. Some scholars opined that justice should guarantee equilibrium between overlapping and conflicting interests, with a view to assuming the order essential to the maintenance of progress of human society. Justice is also described as what constitutes the idea of what is good, as no man can claim to be good and honest unless he respects justice willingly.

Therefore, we can understand that justice cannot be administered without law and without law there is no justice.

There are various theories of justice but only two of them will be considered here;

A. Formal Justice;

This theory postulates that the court must apply law strictly without any regard to any extra-legal considerations. In other words, the judge is bound to give effect to the law as it is and has no discretionary power to mitigate its harshness. Justice is said to be done when a case is decided strictly according to law. Perhaps, a classical example of the application of formal justice could be seen in the case of *Awolowo v. Federal Minister of Internal Affairs*.²⁵⁶ In that case, a popular political leader from the old Western Region was charged with the offence of treasonable felony punishable by either death or life imprisonment. The learned trial judge was reported to have said, "my hands are tied" meaning that whatever his sympathies for the accused might be, he was nevertheless constrained by law to convict him. Many reasons have been adduced to justify this

²⁵⁶ (1962) L.L.R. 177

mechanical approach in the exercise of judicial power. Formal justice, it is said, ensures the clarity and certainty of the law. According to Lord Eldon;²⁵⁷

"It is better that law should be certain than that every judge should speculate upon the improvement in it."

The theory has also been justified on the ground that it makes for impartiality and independence in adjudication since a judge is denied the opportunity of showing partiality to either of the parties.

B. Substantive Justice;

This theory requires that where the strict application of the law may produce manifest absurdity or injustice, the judge may consider some extra judicial factors in interpreting the law in order to arrive at a just decision. This is the attitude that led to the development of the doctrine of equity. The practice of liberally interpreting the provisions of the law by a judge to advance substantive justice is now commonly known as judicial activism. Substantive justice is the most commonly used concepts in court today as the courts are now more focused on doing justice than punishing parties on mere errors.

5.0. TREATMENT OF IRREGULARITIES IN THE PROCESS OF LITIGATION/ADMINISTRATION OF JUSTICE (UNDERSTANDING THE DIFFERENCE OF MERE TECHNICALITY AND SUBSTANTIAL TECHNICALITY)

It is clear presently that Courts should not decide cases or resolve matters on mere legal technicalities.²⁵⁸ An example is when a party inadvertently approaches a Court for the redress by a wrong way. An individual whose rights have been infringed must be free to seek justice for such wrongs in the Court of law.

²⁵⁷ *Sheddon v. Goodich* (1803) 32 E.R. 441at p. 447

²⁵⁸ *Egolum v Obasanjo* (1999) 7NWLR (Pt. 511) 255, 413

It will amount to mere technicality to base a defence to such action on the fact that the action was instituted by wrong way.²⁵⁹ Also, a contention that a particular document was not tendered at particular stage of a trial will go to no issue, at best, it will be considered as a mere technicality which cannot influence the outcome of the procedure.²⁶⁰

An irregularity is substantial when it touches on the legality of the entire proceedings or process and in such situation, the technical failure is not a mere technicality but an irregularity that is transcendent to the *rem* of validity.

A substantial irregularity is the one which causes a proceeding to have a smell of miscarriage of justice and to allow that kind of trial which is hostile to the law to stand is in itself, denial of fair of hearing.²⁶¹

A breach of a constitutional provision is more than a mere technicality, it is fundamental. The breach vitiates the entire proceedings before the Court.²⁶² Commenting on this position of law, the Supreme Court rules that:

To suggest that because the hearing was in open Court, the delivery of judgment inside chambers is a technicality as no miscarriage of justice has been occasioned thereby, is to beg the issue. The delivery of judgment is, in my respectful view, part of the hearing of a cause or matter. A breach of a mandatory constitutional provision is more than a mere technicality; it is fundamental. And it is no argument that there has been no miscarriage of justice.²⁶³

²⁵⁹ See General Sani Abacha & Ors v Chief Gani Fawahinmi (2000) 6 NWLR (Pt. 660) 228

²⁶⁰ Madumere v Ole Okafor & Ors. Unreported Supreme Court of Nigeria Judgement delivered on the Tuesday, April 2, 1996.

²⁶¹ Ojasanmi v FGN: (2018) LPELR-44331(CA)

²⁶² Alhaji Nuhu v Alhaji Ogele (2003) 18 NWLR (Pt. 852) 251

²⁶³ Ifezue v Mbadugha (1984) 1 SCNLR 427; (1984) All NLR 256

Again, no matter the degree of grievous harm done to the victim of a crime, it will be a complete aberration, to suggest that failure of taking the plea of the defendant as established by the law is a mere technicality because no miscarriage of justice was occasioned to the defendant. Such an argument or contention will, with the greatest respect and humility, amount to begging the issue.²⁶⁴ Also, a litigant must adhere strictly to his pleading, hence a litigant who ignores his pleadings and makes a different case at the hearing will not be permitted to claim that such inconsistency is a mere technicality.²⁶⁵ It is the law that parties must be consistent in presenting their cases to the Court. This means that the pleadings and the oral evidence should say the same thing because this goes to the root of the case and the rule of pleadings.

It is loud law that parties are bound by their pleadings not to tell stories while giving oral evidence in contradiction from their pleadings. 'The case of a party is first made in the pleadings and because the pleadings have no mouth and not the intelligence to talk, the human being who is possessed of the two, narrates the content of the pleadings to the Court'.²⁶⁶

In effect, a party cannot move out of his pleadings and give evidence of facts not duly pleaded therein, such departure is not in the eye of law a mere technicality but a substantial irregularity that goes to the root of the departing party's case since same has the potentiality to overreach and do injustice to the other party.²⁶⁷

It is an irredeemable irregularity for judicial officer(s) who did not sit through a trial to deliver judgment in the case. The main function of the trial Court is to see and observe the witnesses. 'He watches their demeanour, candour or partisanship, their integrity, manner etc. He can therefore

²⁶⁴ See *Ogbonna Okeke v The State* (2018) LPELR-45053 (CA)

²⁶⁵ *Kode v Yussuf* (2001) 4 NWLR (Pt. 703)

²⁶⁶ *Mojeed Suara Yusuf v Madam Idiata Adegoke & Ors*, Supreme Court of Nigeria Judgment delivered on Friday, the 20th day of April 2007 S.C. 15/2002

²⁶⁷ *Kode v Yussuf* (Spra)

decide on their credibility and this affects a substantial part of his findings of fact'.²⁶⁸ The opportunity of a Court or Tribunal to observe the demeanour of a witness is an indispensable aspect of procedural jurisprudence, which is rooted in fair hearing.²⁶⁹

Consequently, the Supreme Court in *Adeleke v Oyetola*²⁷⁰ held that the decision of the Electoral Tribunal was a nullity because Justice Obiora who read and pronounced the majority judgment at the Tribunal was evidently absent from the proceedings, at least, one of the days of the trial and the failure of the absent panelist to be present on that day meant that the tribunal lacked the authorities to have given any judgment in the entirety of the matter.

The Supreme Court's majority decision in *Adeleke v. Oyetola* follows the West African Court of Appeal authority in the case of *Nana Tawiah v. Kwesi Ewudzi*,²⁷¹ where it was discovered that at least two of the Tribunal members who gave judgment were not present throughout the proceedings, and did not hear all the evidence.

6.0. PROBLEMS AND MERITS OF LEGAL TECHNICALITIES (LAYMANS AND LEGALLY INFORMED INDIVIDUAL PERCEPTION OF TECHNICALLY DECIDED CASES)

Having taken a bold look into what legal technicality is, its concept and all other terms, let's delve into both the problems and merits of legal technicalities. This problems and merits are discussed with intent of gaining a deeper insight into the concept of technicality:

²⁶⁸ *Okereke v The State* (2016) 1 SCM 99 at p.113

²⁶⁹ *Woluchem v Gudi* (2004) 3 WRN, 20

²⁷⁰ SC/553/2019

²⁷¹ 3 WACA 52

6.1. Problems of Legal Technicalities

- Perception of unfairness: Laypeople often perceive legal technicalities as loopholes that allow guilty individuals to escape punishment. For example, if a criminal case is dismissed due to a technicality, such as a procedural error or statute of limitations, it may undermine public confidence in the legal system.
- Complexity and Confusion: Legal technicalities can make the legal process complex and confusing for non-lawyers. The intricate rules and procedures may seem arbitrary and difficult to understand, leading to frustration and distrust in the system.
- Exploitation by legal experts: Some lawyers may exploit legal technicalities to gain an advantage for their clients. This can lead to accusations of manipulation or unfair tactics, especially if the technicality results in an outcome that appears unjust or contrary to the spirit of the law.
- Delay and procedural battles: Legal technicalities can prolong legal proceedings by leading to procedural battles between opposing parties. This can result in delays in justice and increased costs for all involved.

6.2. Merits of Legal Technicalities

- Preserving rights and due process: Legal technicalities play a crucial role in protecting individuals' rights and ensuring due process. For example, technicalities related to search and seizure laws prevent unlawful intrusion by law enforcement and safeguard privacy rights.

- Ensuring accuracy and precision: The meticulous application of legal technicalities helps ensure that legal decisions are based on accurate interpretations of the law. This promotes consistency, predictability, and reliability in the legal system.
- Balancing power dynamics: Legal technicalities can serve as checks and balances against government overreach and abuse of power. By holding authorities accountable to legal standards and procedures, technicalities prevent arbitrary or unjust actions.
- Promoting legal innovation and evolution: Legal technicalities often emerge from complex legal debates and interpretations. These discussions contribute to the evolution of the law, fostering innovation and adaptation to changing societal norms and values.

In conclusion, while legal technicalities can pose challenges and lead to perceptions of unfairness, they are essential for upholding the principles of justice, protecting individual rights, and ensuring the integrity of the legal system. It is crucial to strike a balance between respecting technical legalities and addressing concerns about fairness and accessibility in the legal process.

The perception of technically decided cases can vary greatly between laypeople and legally minded individuals each looks at the concept of technicality from his/her own understanding lets enunciate each view separately;

1. Layperson's Perception:

Firstly, frustration and distrust: Laypeople may feel frustrated and distrustful when a case is decided on technical grounds rather than the merits of the situation. They might see it as a way for individuals to "get off on a technicality" and evade justice, which can erode confidence in the legal system.

Secondly, simplistic understanding laypeople might have a simplistic understanding of legal technicalities, viewing them as arbitrary rules or loopholes that lawyers exploit to win cases. They may not grasp the nuances or complexities involved in legal reasoning and precedent.

Lastly, emotional response laypeople's reactions to technically decided cases can be heavily influenced by emotions, particularly if they perceive the outcome as unjust or contrary to their sense of morality. This emotional response may lead to criticisms of the legal system and calls for reform.

2. Legally Minded Perception:

Firstly, adherence to legal principles legally minded individuals, such as lawyers, judges, and legal scholars, recognize the importance of legal technicalities in upholding fundamental legal principles and ensuring procedural fairness. They understand that technicalities serve to safeguard rights and promote the rule of law.

Secondly, respect for precedent those with legal expertise appreciate the role of precedent and legal precedent in shaping the outcome of cases. They understand that decisions based on technicalities are often rooted in established legal principles and precedents, rather than arbitrary or capricious reasoning.

Thirdly, complexity and nuance legally minded individuals are more likely to appreciate the complexity and nuance involved in legal reasoning and decision-making. They understand that legal technicalities arise from intricate legal debates and interpretations, and they recognize the importance of precision and accuracy in legal analysis.

Lastly, balancing competing interest legal professionals understand the need to balance competing interests and values in legal disputes. They recognize that technically decided cases often involve

weighing the interests of different parties, interpreting statutes and regulations, and applying legal standards in a principled manner.

Overall, while laypeople may perceive technically decided cases through a lens of frustration and distrust, legally minded individuals appreciate the role of legal technicalities in upholding the rule of law and ensuring procedural fairness. Their understanding is shaped by a deeper appreciation of legal principles, precedent, and the complexities of legal reasoning.

CONCLUSION

This write-up reiterated that the courts of law should be obeyed and must be obeyed in all circumstances. It has taken a bold look at how the courts of law look at the concept of technicality when raised and the step the courts of law take to resolve the issue when raised. Therefore, one can solidly infer and understand the impact technicality on the rule of law and its ramifications. It's settled that a court will not tolerate disobedience to law in order to ensure that justice is done taking a look at the saying 'justice must not only be done but seen as done' therefore a party seeking something before the court must base it on the established laws based on the established rules of court he chooses to take his action to. While taking a look at the concept that courts are now more interested in doing substantial justice than relying on mere technicalities, it advocates/shows that courts should not punish litigants on their mere mistakes at the expense of justice. For example, a party omitted certain sentence in his brief or forgot to indicate the suit number in his processes, it's in the interest of justice that courts should overlook that to ensure that justice is done.

The laws are made to be obeyed and the law as a tool of justice. Whoever wishes to benefit from the law must be ready to obey the law looking at the saying 'ignorantia legis neminem' meaning ignorance of the law is not an excuse and when a litigant makes a mistake at the court it's at his own expense. That's why litigants are advised to consult lawyers or legal experts before instituting

any action before a court of law. This is what lawyers are trained to do: to follow the law to the letter.

The courts however can waive a technicality with the express consent of the opposing party, in other ways the opposing party objected to same. The court should order that the abnormalities be corrected immediately. Whenever a court waived a technicality on the interest of justice, they should provide a vivid explanation on why that is done to the satisfaction of the litigants in order to ensure that justice is being seen and done by all parties.

It is humbly submitted that if these suggestions are followed, the problems associated with where to place legal technicalities: mere or substantial, and the public complainants associated with courts using legal technicality to defeat justice will be reduced drastically. This will also encourage filing of quality processes before the court upon which quality and sound judicial justice will be produce by the court. It will make the outcome of judicial actions predictable, ascertainable and satisfying.