Justiciability of the Right to Food Under Nigerian Law: Lessons from India and South Africa

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Abstract

In some parts of Nigeria, and the Continent of Asia, and other parts of Africa, the right to food and food is under serious threat. The aim of this article is to appraise the justiciability of the right to food (food security) and to also advance adequate legal proposals for a complete elimination of hunger in Nigeria. The comparative approach herein suggests that Nigeria can draw useful lessons from other jurisdictions in the quest for filling the gaps in the Nigerian legislation with regards to food security. Thus, the article concludes that Nigeria needs to review her laws by making the right to food to be among the enforceable human rights. If this is implemented, then Nigeria would have succeeded in significantly curtailing hunger among her citizens. The writers also explore the impact and effort of the Food and Agricultural Organization (FAO), which is an agency of the United Nations in promoting food security and how it is maintaining a zero hunger ratio in Nigeria.

Keywords: Hunger, Right to food, Sustainable Development Food Security, Justiciability.

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Introduction

The right to food is one of the basic necessities for human survival. There is no gainsaying the fact that this right is the fulcrum on which other human rights are hinged. With the alarming rate of death by starvation and malnutrition in Africa as well as some parts of Asia, the right to food and food security now needs to be protected more than ever before. To emphasize the importance of this right, the national law of different countries, the regional law and international instrument recognize the significance of right to food. Besides, with the level of displaced persons in the North East of Nigeria, the right to food/food security also requires adequate attention and enforcement to save the lives of many displaced and malnourished children.

This accounts for incorporating this right as one of the components of international sustainable development goals.[4] In spite of the importance of the right to food, the 1999 Constitution of Federal Republic of Nigeria (as amended) (herein referred to as the CFRN) regrettably makes right to food non justiciable. This portends negative consequences for food security in Nigeria. The paper however submits that the right to food can still be justiciable in some cases in Nigeria. Nigeria can also borrow from the strategies adapted by the Indian courts in making right to food enforceable. This article is divided into five parts. Part 1 is the general introduction. Part II expounds the legal methodology of making right to food justiciable even though it is not enforceable under the 1999 CFRN (as amended). Part III examines the unique and creative methods adopted by the Indian and South African judiciary in order to make this right justiciable. Part IV discusses how the United Nations special agency, that is the Food and Agricultural Organization (FAO) has been promoting the right to food/ food security. Part V is the recommendation and general conclusion.

Justiciability of the Rights to food Under Nigerian Legal Regime Under Nigerian 1999 CFRN (as amended), the right to food or food security is not expressly guaranteed. However, Section 16(2) of the 1999 CFRN as amended implicitly enshrines the right to food when it provides that "the state shall direct its policy towards ensuring suitable and adequate shelter, suitable and adequate food are provided for all citizens."[5]

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[4] See K. Hanson, K.P. Puplampu and T.M Shaw, From Millennium Development Goals to Sustainable Development Goals: Rethinking African Development (Routledge, 2018).

[5] E.O Ekhator and K.I Ajibo, "Legal and Theoretical Assessment of the Right to Food in Nigeria" in R.T Ako and D.S Olawuyi (eds), Food and Agricultural Law: Readings on

Although this right is stated in Chapter II of the 1999 CFRN (as amended), sadly it is not justiciable.[6] Generally, the socio-economic rights enshrined in Chapter II of the 1999 CFRN are not enforceable against the state by virtue of Section 6(6) of the 1999 CFRN.[7]

Nevertheless, the civil and political rights enshrined under Chapter IV of the 1999 CFRN (as amended) are justiciable against the state and citizens.[8] It however contended that socio-economic rights including the right to food can be enforced in spite of the non justiciability of this right under Nigerian case law.[9] Some scholars have posited that socio economic rights can still be enforceable under the Nigerian legal regime by adopting some legal methodologies.[10]

It is submitted that despite the fact that the 'right to food' provision is not constitutionally justiciable, yet this right can still be made enforceable by adopting diverse legal mechanisms. First and foremost, although directive principles in the constitution of India are not enforceable but the Supreme Court of India has expanded the right to life under Article 21 of the Indian Constitution to include the right to food.[11] In addition, the courts in India have also recognized the right to food as a subset of the right to human dignity.[12]

Ekhator and Ajibo have contended that the right to food can be implied into the Nigerian constitution through Chapter IV of the constitution which is justiciable. For instance, another learned author, opined that the right to food and right to life are interwoven and interdependent.[13] Oluduro rightly posited that 'without the right to food, all other rights will be meaningless.[14]

Sustainable Agriculture and Law in Nigeria (Afe Babalola University, Nigeria 2001).

6 See the 1999 CFRN (as amended); s. 6.

7 Ibid.

8 For instance, see the case of Gbemre v. Shell Suit No FHC/B/CS/153/05, see also A.G Ondo State v. AG of Nigeria and Ors (2002) 9 NWLR (Pt. 772) 222.

9 E.O Ekhator and K.I Ajibo (n. 2).

10 Ibid.

11 See the case of Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors (1981) SCR (2) 516.

12 See E.O Ekhator and K.I Ajibo (n. 2).

13 O.Oluduro, Oil Exploitation and Human Rights Violations in Nigeria's Oil Producing Communities (Intersentia Publishing, 2014).

14 Ibid; See also, the Presidential Commission on World Hunger 1980 cited in P. Alston,

The right to food remains a topmost priority in the fulfillment of other rights. Without adequate guarantee of the right to food, the right to life will be illusory and worthless. Hence, this necessitates the urgent need to make the right to food enforceable. There is no gainsaying the fact that many lives have been lost due to the deprivation or denial of the right to food. It is been opined that unless this right is upheld, the protection of other human rights becomes a mockery for those who must exert all their energy to sustain life itself.[15] Thus , in order to infer enforceability into the right to food provision in the 1999 CFRN (as amended) Nigerian courts could also have recourse to the development and genesis of the right in other countries, in particular, the creative and expansive interpretation by the Indian judiciary, seems worthy of emulation in respect of justiciability of the right to food.

Similarly, the right to food is also interwoven with the right to dignity of human person which is enforceable under Chapter IV of the 1999 CFRN (as amended).[16] The absence of food and malnutrition of children have led to different forms of diseases such as kwashiorkor which disfigures the human body and make affected children to appear as 'caricature in their outlook'. It is submitted the non- enforcement of this right as well as high level of malnutrition have brought a lot of indignity, disfigurement to the appearances of affected children. This also should justify the need for the justiciability of the right to food in Nigeria.

Another legal methodology advance to make the right to food enforceable in Nigeria is by upholding the country accountable to respect international obligations concerning the conventions it has ratified in relation to the right to food.[17] The fundamental rationale for this reasoning is that contracting countries to treaties, conventions cannot rely on its internal

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'International Law and the Right to Food' in Wenches E. de and UweKracht (eds.) Food as Human Right under the United Nations (University, Tokyo, 1984) 162-174.

[15] See E.O Ekhator and K.I Ajibo (n. 2) Legal Sustems in Africa (2007) *Fordham International Law Journal,* p. 173.

[16] See the 1999 CFRN (as amended) s.34 See also, P. Obani, 'Reflections on the Right to food under the Constitution of the Federal Republic of Nigeria, 1999 (2019-2020) Nigerian Current Law Review, pp. 29-45.

[17] For instance, the Universal Declaration of Human Rights, 1948 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1996 and the African Charter on Human and Peoples Rights

law as reasons for not honouring its expected obligations under such treaties.[18] It is submitted that the 1999 CFRN (as amended) cannot be pleaded in breach of international obligations. Furthermore, a learned scholar[19] rightly posited that:

> The idea that a government could assume an obligation at the international level but remain free to breach it at the national level seems legally unattractive and morally reprehensible, it paints a picture of an irresponsible government.[20]

The other mechanism to make right to food justiciable is by the provision of Section 19(d) of the 1999 CFRN which states that respect for international law is one of the forign policy of objectives of the Nigerian government as enshrined in the 1999 CFRN (as amended). For Nigerians to be taken seriously in the comity of nations, the respect for international law includes honouring obligations willingly entered into as a state party. This is in terdem with the principle of pactun sunt servanda (agreement entered into must be honoured and kept). As such, Nigeria is under obligation to honour and comply with jus cogens (normative customary international norms). Any deviation or refusal to honour customary international norms and obligation could make Nigeria to be seen as a pariah in country. It is submitted that right to food also constitute one of the international obligations which Nigeria promised to uphold and so the Nigerian government should accord this right the respect it observes by making it enforceable under her constitution.

While the right to food or food security under the Nigerian constitution may still be debatable however, it is settled law that the right to consumption of safe food is justiciable under Nigerian legal regime.[21] The legal framework for the protection and enforcement of the right of food consumers in Nigeria includes: the Food and Drugs Act, the National Agency for Food and Drugs Administration and Control Act, the Marketing

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[18] See Article 27 of the Vienna Convention on Treaties.

[19] R.F Oppong, "Re-imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa" (2006) 30 *Fordham International Law Journal,* p. 296

[20] Ibid.

[21] See U.G. Eze " A survey of the Legal Framework for the Protection of the Right to Safe Food in Nigeria and China" (2019) 3(1) African Journal on Law and Human Rights, 176-191.

of Breast Milk Substitute Act, the Food and Drugs Products, Registration Act, the Animal Disease Control Act, counterfeit & unwholesome processed foods (Miscellaneous Provisions) Act of 1999 (formerly Decree 25).

It has been observed by a former United Nations Special Rapporteur that the right to food[22] implied the right to water from the right to food, thus equating water with "liquid food". Interestingly, the African Commission gave a remarkable decision on the right to food in the case of Social and Eocnomic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria.23 In this instant case, the right to food was implied in the rights to life, health and economic, social and cultural development in the African Charter. The African Commission further held that the right to food is intricately linked with human dignity and that it is essential for the enjoyment of other rights like education, work and political participation.

The decision of the court reiterates the justiciability of right to food in Nigeria. Again, the right to food can also be enforced if the Nigerian legislature specifically enacts laws to protect this right. In this respect, the Nigerian Senate a while ago was in the process of passing a bill for the alteration of the constitution to compel the Federal Government to take concrete, proactive steps to guarantee food security for Nigerians.

In particular, the bill was entitled "Constitution of the Federal Republic of Nigeria (Alteration) Bill 2019 (SB 240). The principal aim of this bill was to ensure that the state directs its policy towards food security and also make access to food a fundamental human right in the constitution. Even in 2021, during the review of the 1999 CFRN as amended, different right groups and non-governmental organization (NGOs) had demanded that food security should be moved to Chapter IV of the constitution so as to make the right to food a fundamental human right which will be actionable and justiciable.[24] If the Bill scales through the Senate and it is assented to by the President, the right to food will also become justiciable by virtue of the enactment of a new legislation.

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[22] J. Ziegler, "The Right to Food" Report by the Special Rapporteur on the Right to Food, Mr. Jean Zieglar.

[23] Communication 155/96 (2001) http://www.achpr.org/communications/decision/155.96 accessed on 19th November, 2022.

[24] See F. Ibirogba, Senate Constitution Review Committee to Consider Food as Human Right reported in *The Guardian* Newspaper of 24th June, 2021.

Justiciability of the Right to Food in India and South Africa

(a) India

The Indian constitution expressly and implicitly provides for a right to food. Article 47 clearly states the Directive Principles of the Indian Constitution by enshrining and imposing a "duty on the State to raise the level of nutrition and the standard of living and improve public health". Since this provision is not enforceable under the Directive Principles, nevertheless the Indian Judiciary have creatively interpreted right to food within the justiciable ambit of right to life enshrined in Article 21, which deals with the Fundamental Rights Section of the Indian constitution.[25]

Gladly, the Indian Supreme Court in a number of cases expressly affirmed that the right to life should be interpreted as a right to live with dignity of human person which also incorporates the right to food. For instance, in the case of Shantistar Builders v. Narayan KhimalaTotame,26 the Supreme Court reiterated that "the right to life is guaranteed in any civilized society. That would take within its sweep the right to food . . ."

Undoubtedly the right to food constitutes a fundamental human right. It is so pivotal that if the state deprives it, it may render human survival and life meaningless, worthless and regrettable. Arising from this viewpoint, the Indian Supreme Court has creatively expanded the scope of Article 21 when it rightly posited that, "right to life does not merely mean "animal existence" but connotes living with "human dignity" which include the right to the basic necessities of life . . ."[27] In the celebrated case of Kishen Pattnayak and Ors v. State of Orrisa,[28] it was reported that the people of Kalahand, Koraput and other districts of Orissa that many people were dying as a result of hunger. The learned Justice P.N Bhagwati explicitly stated that "no one in this country can be allowed to suffer deprivation and exploitation particularly when social justice is the watchword" of our constitution. It should be noted that the inclusion of

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[25] See P. Obani, "The Right to food under the Constitution of the Federal Republic of Nigeria, 1999" (2019-2020), *Nigerian Current Law Review,* pp. 29-45.

[26] S. Gowda, "Right to Food in India: A Constitutional Perspective" (2016) 3(2), *International Journal of Law and Legal Jurisprudence Studies.*

[27] (1990) ISCC 520.

[28] See the case of Francis Coralie v. Union of Territory, Delhi ALR 1981 SC 746.

access to food in directive principles of state policy does not automatically create legal basis for justiciability of the right to food,[29] however the courts can use such principles as tools of judicial interpretation and thus protect the right.

The Indian Supreme Court while interpreting Article 47 of the Indian Constitution stated that "the directive principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country". Accordingly, in the case of Olga Tellis v. Bombay Municipal Corporation,[30] the Indian Court enforced the right to food as part of the right to life (Article 21) by interpreting Article 47 which obligates the Indian government to improve the level of nutrition of its people. The Supreme Court of India considered the right to food in the landmark case of Peoples Union for Civil Liberties v. Union of India and Others.[31] In this case, the court ordered the government to identify poor persons in need of food aid and implement various national food distribution schemes to address hunger among the most vulnerable groups in society including children, mothers and the elderly. This case clearly shows that the right to food can become justiciable against the state. This particular case was brought before the Indian Supreme Court to address the occurrence of chronic famines and hunger related deaths in drought affected regions of the country.

Importantly, the enactment of the National Food Security Act, 2013 (herein referred to as the NFSA, 2013) in India heralded a fundamental change in the approach to food security from welfare to rights based approach. The NFSA, 2013 makes laudable provision for subsidized foodgrains to be supplied to 75 percent of the rural population and 50 percent of the urban population are also entitled to receive subsidized foodgrains under Targeted Public Distribution System. The NFSA also prescribes higher nutritional norms for malnourished children within 6 years. Similarly, under the NFSA, pregnant women and lactating mothers are also entitled to supplement nutrition and cash maternity benefits for

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[29] AIR 1989 AIR 677.

[30] H.A Tura, "The Right to Food and its Justiciability in Developing Countries (2018) 7 Haramaya Law Review 48-74.

[31] 2 Supp SCR51 (1985) See also M.J McDermott, "Constitutionalizing on Enforceable Right to Food: A Tool for Combating Hunger" (2012) 35(2) Boston College International & Comparative Law Review 543.

wage loss during the period of pregnancy. One of the notable innovations under the NFSA, 2013 is that in the event of the inability of the government to supply the appropriate quantities of foodgrains or meals to persons entitled under the NFSA, then such persons are entitled to obtain food security allowance from the Indian State Government.[32]

The NFSA, 2013 makes food security a matter of right rather than a welfare programme.33 Although this Act has now made the right to food justiciable in India as the Indian government has enforced different programmes such as the Midday meal, Public Food distribution but there are still a number of challenges affecting food security sustainability in India.

(b) South Africa

The right to food is enshrined in different sections of the Constitution of the Federal Republic of South Africa. In particular, section 27(1)(b) of the said constitution provides thus:

> Everyone has the right to have access to sufficient food and water. Section 27(2) states that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

The right to food is also entrenched in section 28(1)(c) where it is referred to as "the right of children to basic nutrition and similarly in section 35(2)(e) the right of detained persons to nutrition is also recognized by the South African Constitution. The foregoing shows that the South African constitution explicitly recognizes the right to food.[34] In respect of justiciability of the right to food and other economic, social rights, South African Constitutional Court has affirmed in the case of Exparte Chair-person of the Constitutional Assembly in Certification of the Constitution of the Republic of South Africa (first certification judgment)[35] that "at the very minimum, socio-economic rights can be negatively protected from

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[32] See the Indian Food Security Allowance Rules, 2015.

[33] J. Kaur, "Right to Food vis-à-vis Food Security in India: A Review with Special Reference to the National Food Security Act, 2013" (2021) 18(3) Webology p. 11.

[34] F. Coomans and K. Yakpo, "A Framework Law on the Right to Food – An International and South African Perspective" (2004) 4(1) African Human Rights Law Journal 17-33; (2003) Writ Petition (Civil) No. 196 of 2001 and Interim Order of 2 May 2003.

[35] 1996 (4) SA 744 (CC), paras 77-78.

improper invasion". Negative protection of the right to food is synonymous with negative protection of other human rights and it stipulates that the state should desist from interfering with efforts made by individuals to feed themselves. As such, the state ought to protect this right and refrain from derogating the right. It has been posited that negative obligations do not necessarily require the use of state resources.[36]

However, it has been observed that positive obligations to ascertain that individuals have access to food in every situation have been considered more justiciable in implementing this right. The South African Constitutional courts have been enforcing social economic rights as if they were justiciable rights like the civil land political rights. The right to housing was justiciable in Grootboom and Others v. Government of Republic of South Africa and Others.[37] Similarly, in the case of Minister of Health and Ors v. Treatment Action Campaign and Or,[38] the Constitutional Court of South ordered the state to remove the restriction to healthcare and roll out a national comprehensive health care programme. In this case, the Treatment Action Campaign challenged the decision by the South African Government to limit provision of the drug Nevrapine used to limit mother-to-child transmission of HIV/AIDS, to certain pilot health-care centres. The constitutional court held that the state had breached its obligations concerning the right to health by restricting access to the Nevrapine to only a few, while excluding others who equally need the drugs too.

There has been a lot of clamour for food justice around the globe.[39] It has been observed that a food system governance approach that would usher in a just and nourishing food system in South Africa remains elusive.[40] Food insecurity statistics are stagnant and the double burden of malnutrition continues to rise even in South Africa.[41] Current activism

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[36] See M.J Dennis and D.P Steward, "Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints, Mechanism to Adjudicate the Rights to Food, Water, Housing and Health? (2004) 98 (3) American Journal of Internal Law, p. 498.

[37] Case No CCT/1/00, decision of 4th October, 2000.

[38] Case NO CCT 8/0020.

[39] R. Gottlieb and A. Joshi, Food Justice (Cambridge, MA: The MIT Press, 2010).

[40] Case NO CCT 8/002.

[41] S. Hendriks, "Food Security in South Africa: Status quo and Policy Imperatives (2014) 53(2) Agrekon pp. 1-24.

around the right to food in South Africa may be described as still emerging.[42]

Food justice as a concept is premised on the fact that injustices within the food system continue to disproportionately impact the poor and working class communities, especially people of colour who have been traditionally marginalized and prejudiced. The South African constitution recognizes the justiciability of the right to food and it requires that the state take reasonable measures to achieve its progressive realization. The constitutional court has upheld the justiciability of several economic, social and cultural rights but it seems litigation has not addressed the right to food in South Africa.[43]

Justiciability of the Right to Food under International Law

The pioneer international legal instrument for the enforcement of right to food is the 1948 Universal Declaration of Human Rights (herein referred to as the UDHR). The UDHR made provisions for both a right to food and the justiciability of this right through judicial mechanism.[44] The UDHR recognizes that "everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food".[45]

The International Covenant on Economic, Social and Cultural Rights (referred to as ICESCR) of 1966 explicitly provides for the rights to adequate food and freedom from hunger.[46] In advancing the right to food, the 1996 World Food Summit (WFS) which was held in Rome reiterated the importance of the right to food.[47] The summit later came up with

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[42] H.B Moyo and A. Thow, "Fulfilling the Right to Food for South Africa: Justice, Security, Sovereignty and Politics of Malnutrition (2020)11 (3) World Nurition, pp. 112-152.

[43] See Oxfam, "Hidden Huger in South Africa. The faces of Hunger and Malnutrition in a food secured Nation Available at http://www.oxfam.org/en/research/hidden-hunger-south-african accessed on 22nd November, 2022.

[44] See the UDHR 1948; art. 25; See also, M.J Cohen and M.A Brown, "Access to Justice and the Right to Adequate Food: Implementing Millennium Development Goal One" (2005) 6(1) Sustainable Development Law & Policy, pp. 54-81.

[45] See (the UDHR) 1948; Art. 25.

[46] See 'the ICESCR, 1966; art 11.

[47] See the Declaration on World Food Security and World Food Plan of Action November, 13, 1966.

Declaration of the World Summit after deliberating on a number of plans of action.[48] The WFS Plan of Action prompted the United Nation system to conceptualize and define the right to food and fashion out methods of enforcing these rights while considering the formulation of voluntary guidelines for food security for everyone. In adhering to the advice of the WFS, the United Nations Committee on Economic, Social Cultural Rights adopted General comment 12 in 1996 which had profound effect on the justiciability of the right to food. It provides thus: "any person or group who is a victim of the violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels."[49]

Subsequently in 2004, an intergovernmental working group created under the Food and Agricultural Organization (FAO) conceded to establishing comprehensive Voluntary Guidelines as to enforcing the right to adequate food.[50] Guideline 7 of the FAO Voluntary Guidelines 2004 is pivotal to actualization and enforcement of the right to food. The aforesaid guideline provides thus:

> States are invited to consider in accordance with their domestic legal and policy frameworks, whether to include provisions in their domestic law, possibly including constitutional or legislative review that facilitates the progressive realization of the right to adequate food in the context of national food security.[51]

States are (also) invited to consider, in accordance with their domestic legal and policy frameworks, whether to include provisions in their domestic law, which may include their constitutions, bill of rights or legislation to directly implement the progressive realization of the right to adequate food. Administrative, quasi-judicial and judicial mechanisms to provide adequate, effective and prompt remedies accessible, in particular to members of vulnerable groups . . .[52]

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[48] Ibid.

[49] See L. Cotula and M. Vidar, The Right to Adequate Food in Emergencies, FAO Legislative Study No 77 (2003); See also the UN Economic and Social Office, General Comment 12 as at 1996 50FAO, Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, adopted by the 127th session of the FAO Council November, 2004.

[51] Guideline 7, para 7.1.

[52] Ibid, Guideline 7, para 7.2.

It submitted that para 7.2 of the Guideline will significantly enthrone the enforcement of the right to food because it enjoins countries to establish quasi-judicial and judicial mechanisms, to provide adequate, effective and prompt remedies". In this regard, the Indian case of People's Union for Civil Liberties v. Union of India and Others[53] is very instructive and commendable. Also relevant is the case of Kumar Basnet v. Prime Minister & Ors.[54] In this case, the petitioners initiated a writ before the Supreme Court to order the government of Nepal to provide food for populations exposed to hunger. Although the court obviously admitted that the government is responsible to protect the right to life by providing food, but sadly it did not pass the order sought by the petitioners.

Gladly, in Prakash Mani Sharma and others on behalf of Forumfor Protection of Public Interest (Pro Public) v. Government of Nepal,[55] the petitioners claimed that the shortage of food, inefficiencies in food distribution and the dissemination of rotten food caused pervasive hunger and disease in some parts of Nepal.

The petitioners sought the adoption of a sufficient legal framework, the establishment of infrastructures, storage facilities and the introduction of an effective food distribution scheme. Although the Supreme Court stayed a final judgment however it issued an interim order that acknowledged the fundamental right to a dignified life and directed the concerned governmental bodies to directly provide food in affected districts. In addition, the Court pronounced the final judgment in 2010 and emphatically stated that "the right to food, health . . . social security is all basic human rights" and that the state is obliged to realize them.[56]

The Role of the Food and Agricultural Organization (FAO)

The FAO observed that most countries have recognized the justiciability of the right to food or some aspect of the right through legislative

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[53] Supra.

[54] Writ No 3341 (1998).

[55] Cited in International Development Law Organization (IDLO, 2014).

[56] See B. Achikari, Nepalese 'Supreme Court Decision on the Right to Food' In S. Oenema, F. Valente and B. Walters (eds) Right to Food and Nutrition Watch. Claiming Human Rights: The Accountability Challenge, (Heidelberg, Germany, F/AN International, 2011) 94-95.

enactments and ranging from social security guarantees and through food safety legislation.[57] It has been argued that the justiciability of the right to food obtains legal support from both the international and regional legal framework. For instance, Article 8 of the UDHR recognizes that all human has the right to an effective remedy, to be provided by competent national tribunal in the event of violation of the fundamental rights enshrined by the constitution or by national law. The FAO has made significant efforts at promoting the justiciability of the right to food.

The FAO posits that adequate food is a human right of every person around the world.[58] However, the realization of this indispensable right has been very difficult in practice.[59] The FAO's principal instrument aimed at realizing the enforcement of the right to food is the Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security.[60]

The FAO has made tremendous inroads at enthroning the 2030.

Agenda for sustainable Development by advancing the right to food. The FAO has been working assiduously to combat hunger and attain global food and nutrition security. One of the cardinal objectives of the UN Sustainable Development Goals (SDGs) is to end poverty, hunger and malnutrition. The SDG 2 expressly provides for zero hunger and impliedly, the concept of food security, safe and nutritious food for everyone underlines the 2030 Agenda. The FAO has reiterated that to attain the targets of SDG2 by 2030, healthy diets must be delivered at lower cost to contribute to people's ability to afford them.[61] The FAO has been advancing a cross-cutting human rights based approach to food security and nutrition which fortifies legal, policy and institutional framework of many countries. As a matter of fact, the freedom from hunger is one of the paramount objectives of the FAO.[62]

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[57] Food and Agricultural Organization (FAO), Justiciability of the Right to Food (FAO, Rome).

[58] Food and Agricultural Organization, The Right to Food in Practice: Implementation at the National Level (FOA of the UN, Rome, 2006).

[59] Ibid.

[60] This Framework was adapted by the FAO's Council in November, 2004.

[61] FAO, Strategic Framework 2022 – 31 (FAO, Rome, 2021).

[62] FAO, The State of Food Security and Nutrition in the World; Repurposing Food and Agricultural Policies to make Healthy Diets more affordable (FAO, Rome, 2022).

FAO has also intervened in defeating undernourishment as well as many cases of food insecurity around the globe. Chronic hunger and food crisis are also given serious attention by FAO so that people do not die of starvation or other diseases that occur as a result of malnutrition. A crucial component of FAO's responsibility on food security statistics is the voices of the Hungry Project. This project was developed to combat Food Insecurity Experience Scale (FIES) by gathering or obtaining timely information on the adequacy of people's access to food by asking people directly about their experiences concerning food shortages and food insecurity. The data obtained is used to enforce policies targeted at realizing the human right to food.[63] The FAO has championed many campaigns, declarations, conferences, workshops, submit and research that will provide and increase global awareness of the realization of the right to adequate food for the attainment of the SDG2 that is, maintaining zero hunger.[64]

Recommendations and Conclusion

In order to make right to food justiciable under Nigerian legal regime the following are recommended. First and foremost, the National Assembly should expedite action on enacting a national Food Act which will carry the force of law and prescribe sanctions for any form of violation of the right to food in Nigeria.

Accordingly, the Food Bills pending before the National Assembly should be quickly passed into law. Secondly, it is also suggested that the Nigerian judiciary should expand the interpretation given to the right to life and dignity of human person by linking them inextricably to the right to food. This can only be done through judicial activism. The Nigerian Judiciary should emulate the Indian courts which have made right to food justiciable even though the right to food is enshrined in the non-justiciable section of the Indian constitution. In addition, Nigerian should also honour and respect various international conventions and regional law (African Charter in Human and People's Right) which she voluntarily acceded to, by elevating right to food as a fundamental human right into Chapter IV of

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[63] See the Food Insecurity Experience Scale (FIES) Microdata from the FAO's Microdata Catalogue.

[64] FAO, Fifteen Years Implementing the Right to Food Guidelines: Reviewing Progress to Achieve the 2030.

the 1999 Constitution of the Federal Republic of Nigeria (as amended). In this respect, there is a need for constitutional amendment if the right to food is to be enforced.

The FAO has estimated that between 702 and 828 million people were affected by hunger in 2021.[65] The number is increasing sporadically to about 150million due to the outbreak of the COVID 19 pandemic. It is submitted that there is a setback in the attainment of SDG Targets 2.1 and 2.2, ending hunger and ensuring access to safe, nutritious and sufficient food for all people throughout the year. Besides, eradicating the adverse forms of malnutrition globally has been very difficult to fulfill. All these negative outlooks could be attributed to the adverse impact of the COVID 19 and poverty in Africa and Asia. If poverty is defeated, the right to adequate food can also be realized.

[65] FAO The State of Food Security and Nutrition in the World 2022 (FAO, Rome, 2022).

Causes and Effects of Atmospheric Pollution: An Evaluation of International and Domestic Responses

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Abstract

Atmospheric pollution is a global phenomenon that has caused immeasurable havoc to the global environment, with man, animals and the entire eco-systems at the receiving end, as every life on earth depends on air. Atmospheric pollution often results from human activities, which include both corporate and domestic activities which have the capacities to emit gases that are not usually environment friendly, into the atmosphere. Such gases, such as chlouroflourocarbons (CFCs) are responsible for the depletion of the ozone layer. Biological, nuclear and toxic substances released into the air also constitute great danger to the human environment, considering their catastrophic consequences not only to man but to animals, plants and properties. Hence, the need to respond at both international and national levels by legal instruments as a means to regulate, check and where possible, also, festal all the human activities that pollute the atmosphere, particularly those done illegally. This piece therefore, would showcase international treaties such as the United Nations Framework Convention on Climate Change 1992 and the Kyoto Protocol of 1997. It will also feature the Vienna Convention of 1985, and other international treaties that have direct bearing with the issues of global atmospheric pollution, such as the ENMOD Convention of 1977. It would also capture some relevant international laws that classified the right to a healthy environment, including the right to quality air as

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fundamental human rights such as the Stockholm of 1972, and the Universal Declaration of Rights of 1948. Apart from the international legal responses, this work will also focus on some of the national laws on the protection of the atmosphere, precisely the Nigerian legislations and Constitution, in order to reveal the efforts of the Nigerian government in tackling the issue of atmospheric pollution and guaranteeing the safeguard of air quality in Nigeria, for the citizens via her legal tool and international conventions to which she is a signatory.

Keywords: Pollution, Atmospheric, International Law, Nigeria.

Introduction

The concept of pollution is a global phenomenon that has received responses from States, and at the international fora, respectively. Atmospheric pollution resulting from the activities of man, such as industrial activities, domestic activities, to mention but a few have caused monumental harm not only to human health but also to the entire living creatures within the planet earth. This is not far-fetched from the fact that, every living thing on earth, depends on the air to exist. Life ceases to be sacrosanct without oxygen that every living creature, including man breathes and the gases surrounding the earth. Therefore, man, trees, animals, birds, plants, fishes and every other thing either found in the air, water or on land depends on the good state of the atmosphere, for survival. In fact, it is not gainsaying that air is very essential for life.

Unfortunately, as afore said, human activities and inventions have in great measures distorted the state of the atmosphere to the level that those activities pose great threats and dangers to man and the ecosystems. For example, the industrial activities of man have led to the pollution of the atmosphere via the release of carbon dioxide and other harmful substances into the atmosphere. Also, domestic activities such as cooking with firewood's, gas, kerosene and use of gadgets such as refrigerators, Air-Conditioners, home/industrial generators for electricity emit carbon dioxide and carbon monoxide substances into the atmosphere.

The acts of burning bushes, and carbon monoxide evolving from motor vehicles and other self-propelled machines, such as aircrafts, ships, etc. are not left out. In fact, they all release not only carbon dioxide and carbon monoxide but also hydrocarbons, nitrogen oxide, sulphur dioxide, etc., into the atmosphere and consequently distorting and altering the physical and chemical conditions of the atmosphere, to the detriment of

man and the ecosystems, as global warming, climate change, with their deleterious to the human health and the global environment have become the resultant effects. Introduction or release of biological or any non-conventional substances or weapons either into the atmosphere or water, or on land could also cause harm to the atmosphere, considering their destructive nature to the environment.

These catastrophic phenomenon have no jurisdictional limitation as any can occur within a state, yet, with the potential or capacity to palmate the neighboring State and cause grave harm therein, i.e. the Long Range Trans-boundary Air Pollution, a situation that requires both international and domestic responses, with the view to preventing, controlling, and also, where necessary, mitigating the menace, challenges and effects of atmospheric pollution. The international and domestic laws are therefore germane in this regard as instruments of prevention, control and mitigation in the circumstances.

What is Atmosphere?

The term 'atmosphere' has been described as 'mixture of gases surrounding the earth; air in any space, thus, the air, which contains the oxygen which we breathe in and which sustains our lives, is an aspect or component of the atmosphere.

In our own term atmosphere could be defined as the entire space within the planet earth and its numerous gaseous elements, including the air and other liquid and chemical substances above the mountains, lands and water bodies sharing boundaries with them, up to the cloud or heavens. Hence, the atmosphere comprised the troposphere and the stratosphere. The troposphere is the portion of the atmosphere closest to the earth,[1] while the stratosphere is the portion of the atmosphere lying just above the troposphere.[2]

Uses of the Atmosphere

Human beings use air and the atmosphere in many ways. Some use extract

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[2] D. Hunter *et al*, *International Environmental Law and Policy* (2nd edn. Foundation Press, 2002 p. 4).

[3] T. Tietenberg, *Environmental Natural Economics* (7th edn; Elm Street Publishing Services, Inc, 2006) p. 404.

gases from the air, such as oxygen in the acts of breathing or burning fossil fuels. Human consumption of atmospheric gases is minuscule compared to the available supply, thus, there is no danger of the resource being depleted. Other uses entail putting substances into the atmosphere to dispose of them, or in other words, the emitting of pollutants.

It was once assumed that the atmosphere also had a boundless capacity for dispersing pollutants to harmless concentrations, but in recent decades it has become all too apparent that there are limits to the quantity of pollutants that can be absorbed without serious environmental consequences. Human communities also make use of the atmosphere by taking advantage of its climate, for example, in agriculture. For the most part, this is done passively with no impact on climate. However, experiments have been conducted with techniques that would alter weather in ways that serve agriculture for military purposes.

The atmosphere has generally been treated an open-access resource. To deny people the use of the atmosphere for respiration, assuming it was possible, would be tantamount to refusing them the right to live.

Traditionally, all people have been free to use the atmosphere as a convenient medium for disposing of many of their waste substances. Thus, in these senses, the atmosphere is a common pool-resource. In recent decades, however, the right to pollute has been significantly circumscribed by domestic and international laws and policies that restrict emissions of certain pollutants to enhance air quality in the common interest.[3] Apart from uses by human beings, every other living thing on earth depends on the atmosphere for its survival. These include those on land, beneath the land, those in the water and air.

The Legal Status of the Atmosphere

The atmosphere does not have a very well defined legal status. The states presumably have jurisdiction over the air that resides in their spaces at any given time, just as they could lay claim to fish swimming through the 200-mile exclusive economic zone of their coasts or the water of rivers flowing through their territories. The atmosphere differs from these other

[3] The Atmosphere as a commons<www.managing the atmosphere as a Clipbal commons. Pdf-adobe reader> accessed on 21/05/2020.

moving resources in that it is impossible to impound and take control of substantial units of air in the way that fish can be caught and consumed, or river water can be dammed up and used for irrigation.

Rivers Systems are shared resources, a legal designation which also can be applied to fish stocks and aquifers that migrate between or straddle national Jurisdictions. An extensive body of International Customary Law and Treaty Law has been applied to the use of some of these shared resources based on the principles of limited sovereignty and equitable use. The widely acknowledged Helsinki Rules, which were drawn up by the non-governmental International Law Association in 1966, suggests that: 'Each Basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage system'.[4] The atmosphere as a whole is not properly categorized as a shared resource because, at any given time more than half of it resides in air space above the oceans and Antarctica, and thus is outside the Jurisdiction of any state. The doctrine of equitable use may, nevertheless, have potential as a basis for an international law of the atmosphere.

None of the treaties that address atmospheric problems takes up the question of the legal status of the atmosphere. The Vienna Convention and Montreal Protocol simply refer to the ozone layer as being 'above the planetary boundary layer'. The issue has also been side stepped in talks on climate change. When Malta proposed to the General Assembly in 1988 that the global climate be designated the common heritage of mankind, as it had successfully done for the seabed two earlier, a compromise was reached on referring to the atmosphere by the vague phrase the 'common concern of mankind'. This language has been incorporated into several international documents, including the 1989 Noordwijk Declaration and the 1992 Framework Convention on Climate Change.

What is Pollution?

There has been several definitions of the term 'Pollution'. As early as 1924, at a conference of the International law Association, 'Pollution' of the sea was defined as:[4] 'An act whereby the inoffensive use of the water

[4] P. van Heijnsbergen, "The Pollution Concept in International Law" (1979) 5 Environmental Policy and Law II.

becomes impossible either for animal life or human use, or creates a danger to such life or such use'. The NESREA Act in Section 34 defines 'Pollution' as 'man-made or man-aided alteration of chemical, physical or biological quality of the environment to the extent that it is detrimental to the environment beyond acceptable limits.[5] The 1972 United Nations Conference at Stockholm defines pollution as: 'The discharge of toxic substance and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless'.[6] Another definition that is of general acceptance is that given by the OECD regarding Trans-Frontiers Pollution: 'Pollution' means 'the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystem, and interfere with amenities and other legitimate uses of the environment'.[7]

In 1974 the World Health Organization limiting the guidelines for determining whether environment is polluted noted that: 'the environment is polluted when it is altered in composition or condition directly or indirectly as a result of the activities of man so that it becomes less suitable for all or some of the uses for which it is naturally suitable.[8]

The impact of pollution on the environment is far-reaching, as it affects the delicate balance which exists in the interaction of the various key factors at play in the environment. Pollution therefore affects land, water and air; the pollution of the environment through various polluting agents may indeed show the relationship between development, pollution and Environmental Pollution.[9]

Atmospheric Pollution

The 'term' air is used inter changeably with the term 'atmosphere'. This must be as a result of the fact that the air is a component or part of the atmosphere which contains two basic gases such as oxygen and Nitrogen

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5 Cap N164 LFN 2007, S. 34.
6 L. Atsegbua, et al, Environmental Law in Nigeria. Theory and Practice (Ambik Press, 2010), pp. 93, 94.
7 Atsegbua, (n8) 94.
8 Ehighelua, Environmental Protection Law (NEW PAGES Law Publishing Co. 2007), p. 33.
9 Ehighelua (n10) 34.

which sustain lives. Air pollution is the upsetting of the natural arrangement of the different gases in the air, this alteration of the composition of air may have adverse effects on man, plants and animals. Air Pollution is the accumulating of substances in the air in sufficient concentrations to produce measurable effects on man, plants and animals. It involves the emission of harmful substances into the atmosphere, which will cause danger to any living thing.[10]

It is the contamination of the atmosphere by gases and solids, produced in the burning of natural fuels, chemical and some industrial processes, and in nuclear explosions. It may be considered to include contamination produced by such processes as accumulation of cosmic dust, raising by wind of surface dust, eruption of volcanoes, decay of vegetation, evaporation of sea salt spray and natural radioactivity. Air Pollution is the presence of foreign matter (either gaseous, Particulate or a combination of both) in the air, which is determined to the health and welfare of man.[11]

Air Pollution can therefore be defined as: the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment, and 'air pollutants' shall be construed accordingly.[12]

Article 1 of the Convention on Long Range Trans-boundary Air Pollution defined Air Pollution as:

> The introduction by man directly or indirectly of substance of energy into air resulting in deleterious effect of such a nature as to endanger human health, farm, living resources and ecosystems and material property; and to cause an impairment or to interfere with amenities and other legitimate use of the environment.[13]

The *Black's Law Dictionary* defines Air Pollution as: any harmful substance or energy emitted directly or indirectly into the air, especially if the harm

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[10] Atsegbua (n8) 103

[11] Awake "Child Labour, Its End in Sight", may 22nd 1999, P. 28

[12] Gundling, "International Environmental Law: Atmosphere, Freshwater and Soil" (UNITAL, 1998) p. 6.

[13] Convention on Long Range Trans-boundary Air Pollution 1979, Article 1(a).

is to the environment or to the public health or welfare.[14] The World Health Organization (WHO) defines Air Pollution as a 'case where the air outside the work premises contains material concentrations harmful to humans or their environmental components.[15] The American Social Medical Association for Industrial Hygiene defines it as the presence of impurities or contaminants in the air, either by nature or man-made, in quantities and for a sufficient duration to breach the comfort of many exposed to this air or damage to public health or the lives of humans, animals, plants and properties.[16]

Sources and Causes of Atmosphere Pollution

Sources of Air Pollution include factories, electric cables, motor vehicles, homes and incinerators, etc, Motor vehicles account for roughly half of air pollution, where digging or tilling, and burning of fires when cooking or clearing bushes account for the other half. In the burning of oil and other local produces, sulphur (IV) oxide, a very dangerous pollutant responsible for most of the recent air pollution hazards to man, plants and animal is produced.[17]

Acid rain or acidification occurs when sulphur dioxide (Sulphur (IV) oxide) and Nitrogen oxide emissions meet and react with other agents in the sky and precipitate as rain, snow and mist, affecting the soil and causing consequent damage to plants and buildings.[18]

The depletion of the ozone layer which results from the release of chlorofluorocarbons (CFCs) into the atmosphere with the consequent increased ability for harmful ultra-violet radiation from the sun to penetrate a high incidence of skin cancer in humans is a major consequence of air pollution.[19]

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[14] B.A. Garner, Black's Law Dictionary (8th edn., West Publishing Co; 2004) P.77.
[15] A. A Gawad, Air Pollution (AL-Arabia for Distribution and Publishing 1991) P.23.
[16] A.J. Ashour, H.A. Wahab, The Legal Framework and for the Protection of the Air under International Convention (2016) 11 (14) Medwell Journals of the Social Sciences 3491.
[17] Atsegbua (n8) 103, 104.
[18] Atsegbua (m8) 104.
[19] H.E. Hesketh, "Air Pollution – A moral Issue Air-cleaner" (1970) Vol. 2, No. 3 The Magazine for Environmental Administration, 19-20.

Some of these substances that are responsible for air pollution (Air Pollutants) are: Sulphur Dioxide known by formulae, So_2 is a light yellow non-metallic element (with symbol S) found on the earth, which burns with a blue flame giring of a shocking smell and is used in the production of matches, gunpowder, etc.[20] Therefore, when you strike a match, either to light up your stove, gas cooker, stick of cigarette, lantern or candlelight, you are contributing to the pollution of the atmosphere or the air we breathe. Similarly when you let off your short gun, double barrel, machine or submachine gun, or even dane gun, you are also guilty of contributing to air pollution.

Nitrogen gas constitutes nearly four-fifth (4/5) of the air we breathe. However, its main oxide nitrogen dioxide that is formed from the combustion of fossil fuels is a major air pollutant, both indoors and outdoors. It is also a major precursor of acid rain.

The element Nitrogen is also a component of some fertilizers (in form of Nitrates) and in this form it is major water pollution as run-off from agriculture soils where fertilizers have been applied.[21]

Carbon dioxide is 'a gas present in the air, breathed out by man and other lower animals'.[22] it is perhaps amazing to learn that even the air we breathe out and those of other lower animals constitute air pollutants. But that is the stark reality, which goes further to show how fragile our atmospheric environment is.

Carbon monoxide is 'a poisonous colourless, odourless gas formed by the complete combustion of carbon, e.g. car exhaust gases.[23] It is found in the gases given off by car engines, lorries, generator engines, motorcycle engines, aircraft engines, diesel engines, et cetera. The result is that some of these engines produce deadly exhaust fumes and thick smokes including tick smokes that pollute the air, thereby endangering human and environmental health.

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[20] Hornby (n1) 753.
[21] Hornby (n1) 482.
[22] Hornby (n1) 92.
[23] M. Robinson, G. Davidson, Chambers 21st Century Dictionary, in A.C Osondu, Our Common Environment: Understanding the Environment, Law And Policy (University of Lagos Press 2012) p. 62.

Hydrocarbons are substances, which are formed by a combination of hydrogen and carbon elements. Examples of these can be found in things like paraffin, coal gas, and benzene. Hydrogen is a type of colourless gas, which has neither smell nor taste and which forms water when combined with oxygen. Carbon, on the other hand, is a non-metallic element, which is present in all living matter in form of pure diamond and graphite. It also occurs in coal and charcoal in its impure form.

Also, hydrocarbon emissions can be traceable to sunlight in situations where there are stagnant high-pressure weather conditions. All these have adverse effects on the air, an aspect of the atmosphere.

Effects of Atmospheric Pollution

It is apt to note that, what affects the air also affects the atmosphere; hence, both share the same effects. In this context therefore, the effects of atmospheric pollution is the same as those of the air pollution in so far as the entire atmospheric space constitutes air as part of the components of the atmosphere. None is isolated from the other.

Atmospheric pollution is perhaps the most serious of all environmental problems. This is because of its trans-boundary and lasting effect over long distances and periods of time.[24] According to World Health Organization (WHO), atmospheric pollution has serious adverse effects on human, animals and environmental health.[25]

Effects on Environmental Health

The effect of Atmospheric Pollution on environmental health is both serious and enormous. It results in air pollution, depletion of the stratospheric ozone layer and causes climate change. Recent scientific discoveries have shown that above the Antarctica, atmospheric pollution has caused a large hole, as large as twice the continent of Europe, to be formed on the ozone layer.[26] Ozone is a form of oxygen with a sharp

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[24] A.C. Osondu, Our Common Environment: Understanding the Environment, Law and Policy (University of Lagos Press, 2012) p. 67.

[25] World Health Organization (WHO), Health and Environmental Effects of Ultraviolet Radiation, A Summary of Environmental Health Criteria 160 Geneva 1995, pp. 9 and 11.

[26] Awake (n13) July 22, 2000, 19.

smell, which is located in the upper atmosphere at between 25-40 kilometers above the earth's surface.[27] It is a very important component of the atmosphere. This is because it protects human beings and other life forms that exist on earth from the harsh effects of 'short wave length ultraviolet radiation from the sun.[28]

Ozone layer depleting substances are commonly referred to as 'chlorofluorocarbon' (CFCs). The depletion of the ozone layer exposes the environment to a grave threat of ultraviolet radiation. Ultraviolet radiation (UV) '. . . is one of the non-ionizing radiations in the electro-magnetic spectrum and lies within the range of wave-lengths 100mm to 400nm.[29] There are various sources from which UV may be contracted, chief among which is the sun. It has been reported that 'half of the sun's UV comes from the blue sky and clouds.[30] The ozone

layer and other, atmospheric components are responsible for absorbing UV thereby reducing its harsh effects on life forms on earth. However, with the rapid depletion of the ozone layer and ineffectiveness of other UV absorbing agents, human beings and other life forms are for a more serious exposure to UV effects.

Other environmental effects of atmospheric pollution are global warming and the problems of acid rain. Global warming is a substantial increase in the atmospheric temperature as a result of intense harsh effects of sunlight, which is a direct result of ozone layer depletion.[31] It can cause rise in sea level and flood which may result in death and diseases. Acid rain has been described as '. . . when the oxides of nitrogen and sulphur and hydrogen sulphide are photo chemically oxidized into nitric and sulphuric acids respectively in a humid altmosphere.[32] The effect of this on the environment is reduction in freshwater productivity, which in turn results in death of fish stock of different species.

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[27] Gundling (n14) 10.
[28] Gundling (n14).
[29] WHO (n27) 5.
[30] WHO (n27) 18.
[31] Osondu, (n26) 69.
[32] F. Allanah, Corrosion and Environmental Pollution in Environmental News, a quartely publication by the Nigerian Environmental Society, Jan-March, 2009, p. 8.

Climate change is another effect of atmospheric pollution on environment. Greenhouse gases are responsible for climate change. These greenhouse gases have both useful and adverse effects. Their useful effect is that they provide the warmth in the climate, which prevents the earth from freezing. It is noteworthy that oxygen and carbon dioxide are among the atmospheric components that absorb ultraviolet radiation. On the other hand, if the accumulation of greenhouse gases in the atmosphere is too high, as it has been found to be today, it could result in an unprecedented atmospheric warming at a global level, to such a degree that human beings and other living matters will not be able to withstand the heat.[33]

Effects on Human Health

Atmospheric pollution has serious adverse effect on human beings. Most of these adverse effects are caused by the absorption of ultra-violate radiation (UV) into the human body. Studies have shown that ultra-violate radiation affects some vital organs of the human body, such as the human immune system, the skin and the eyes.

The extent of damage of ultra-violet radiation on the human skin has been observed to depend on two important factors. First is 'the incident intensity and wave lengths content', and secondly, on the 'depth of penetration of these wave lengths into the skin'.[34] Among the effects of acute UV absorption on the human skin include such skin diseases as 'solar erythema and sunburn'. Severe sunburn may result in blistering and destruction of the surface of the skin with secondary infection and systematic effects, similar to those resulting from a first or second degree heat burn.[35] UV also causes other skin diseases such as skin cancer, benign abnormalities of melanocytes, malignant melanoma, and so forth.

Ultraviolet radiation also affects the human immune system. It alters the immune responses by changing the activity and distribution of the cells responsible for triggering these responses.[36] When the immune system is low and ineffective, then the rate of contacting infection by man becomes very high.

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[33] Gundling (n14) 14.
[34] WHO (n27) 11.
[35] WHO (n27).
[36] WHO (n27) 13.

Also, the eye is not left out from the adverse effects of ultraviolet radiation. Such eye diseases include photokeratitis, photo- conjunctivitis, pterygium and squamous cancer of the conjunctivia and cataract of the eyes.[37] These diseases can lead to partial or complete blindness.

Effects on Animal Health

Scientific studies have also shown that UV exposure produces adverse health consequences on animals, just as it does on human.[38] It affects their immune system, the skin and the eyes. The skin diseases on animals include skin cancer and melanomas. It causes suppression of the immune system, weakens it and renders it ineffective, just as in human beings. The result is lower resistance to other infections and ultimately death.

Atmospheric Manipulation

Atmospheric manipulation by the military for hostile purpose by conventional or nuclear means can as well have deleterious effects on the human environment and human health. It has been suggested that a large scale nuclear war would initiate horrendous fires on a huge scale sufficiently to have a dramatic hemispheric impact and deleterious consequences for the weather for a period of weeks or months.[39] The result would be quite destructive to the human environment. It is suggested by scientists that the impact of nuclear war on the atmosphere, often referred to as 'nuclear winter' would seriously affect an area possibly as large as half of the globe for a period of weeks or months.[40]

A typical example of atmospheric manipulation with the military use of nuclear weapon is the Persian Gulf War, where there were reports that, as a result of a nuclear attack on the Kuwait oil Well, the Kuwait oil well fires blotted out the sun and made breathing almost impossible as the sun was so heavily obscured by the smoke that motorist had to use headlights at noon and temperatures reportedly slipped down ten degrees lower than normal, 'chilling what is usually a gentle spring, and causing

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[37] WHO (n27).
[38] Osondu (n26) 71.
[39] M. Okorodudu-Fubara, "Oil in the Persian Gulf War" (1991) Vol. 23:123 St. Mary's Law Journal 148.
[40] Okorodudu-Fubara (n41).

respiratory diseases among the elderly and young'.[41]

Note that this form of military warfare is not only a means of attempting the modification of the atmospheric, geospheric, and hydrospheric phenomena of the earth by advanced technological means but also advanced scientific, chemical and bacteriological (biological) weapons, as possible and efficient means of surprise attack to dwindle the resistance and fighting capacity of the opponents.[42] Some of the notable manipulations of the atmosphere for military objectives are rainfall enhancement, climate modifications by incendiary means, release of materials to alter the electrical properties of the atmosphere, and injection of electromagnetic fields in the atmosphere.[43] All these result in pollution of the atmosphere and threats to lives.

Regulations on Atmosphere

Since states are unlikely to take strong enough action on their own, to avert major global problems such as acidification, ozone depletion, and climate change, international regulations appear to offer the only hope for preserving the critical qualities of the atmosphere. Applicable rules may be found in international customary law, such as the responsibility of states to prevent damage to other states or to areas outside any jurisdiction. These principles of customary law have proven to be too vague, however, to define limits on polluting activities, especially where specific sources of pollution cannot be definitely linked to specific damages.[44] Thus, it has been necessary to draw up more specific mandates for states in the form of negotiated treaties that are binding on ratifying states.

Protection of the Air as a Right to a Healthy Environment Under International Conventions

The right to live in an environment that is pollution-free was reflected in a large number of international conventions on human right, notably the International Convention on Economic, Social and Cultural Rights of 1966,

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41 San Antonio Express-news, March 16, 1991, at 10 A.
42 Okorodudu-Fubara (n41) 146,
43 Okorodudu-Fubara (n41) 147.
44 The Atmosphere as a Commons (n4).

as it confirmed the economic, social and cultural rights and highlighted other types of human rights that have been forgotten by the Universal Declaration of Human Rights for the year 1948. For example, humans have the right to live in a healthy environment. Article 12 which postulates that, 'the states parties to the present covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', including the steps that states parties must take in the current covenant in order to achieve completely this right is necessary to:

- Work to reduce the percentage of deaths in newborns and in child mortality for the healthy development of the child.
- Improve the various environmental and health aspects.
- Prevent infectious diseases, endemics and occupational diseases.
- Create conditions whereby everyone will be provided medical services and medical care in the event of sickness.[45]

In addition, the declaration on the progress and development in the social field adopted by the General Assembly of the United Nations on the 11th of December 1969 highlighted the protection of the environment from air pollution. For example, Article 13 thereof stipulates that 'social progress and development should target the progressive realization of the main objectives including the protection and improvement of the human environmental, and what makes any social progress mainly pass by the protection of the environment and its elements including natural air as one of its most important elements.[46]

In the same context, the first United Nations conference on the environment held at Stockholm in 1972 developed the concept of the right to a healthy and balanced environment as a human right and the first principle of this conference considers that a person has a fundamental right to liberty and equality and favourable conditions of life in an environment that allows him to live in dignity and well-being.[47] It also states that a person has a sacred duty to protect and improve the

[45] ICESCR 1966, art. 12.
[46] Ashour (n18)3492.
[47] Ashour (n 18).

environment for the present and future generations. The conference concluded with the adoption of a wide range of important recommendations to face and reduce pollution by urging states to commit to take all the necessary measures to prevent air pollution to coordinate and cooperate with organizations active in the field of environmental protection and to establish an international responsibility for those who caused air and other environmental pollution since air pollution occurring in a state can spread to several other countries, even though it is not adjacent to it.[48]

The African Charter on Human and People's Rights ('Banjul Charter') 1981 was a pioneer in the field of environmental protection as Article 24 thereof states that 'all peoples shall have the right to a general satisfactory environment favourable to their development' and accordingly it is among the most prominent international agreements at the regional level establishing regional unions and approving the importance of the environment explicitly and making it one of the objectives to pursue for the regional bloc of African countries.[49]

Furthermore, in 1992, the United Nations Conference on Environment and Development held in Rio Janeiro in Brazil state that, living in a healthy environment is a human right, as its principle 1 stipulates that 'human beings are at the center of concerns for sustainable development;[50] they are entitled to a healthy and productive life in harmony with nature. Principles 2 stipulates that 'states have in accordance with the charter of the United Nations and the Principles of International law, sovereign right to exploit their own resources pursuant to their own environment and developmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[51] Countries should ensure that there are opportunities for all individuals to benefits to the fullest extent of their potentials and they have the right to an appropriate standard of living for themselves and their families, including enough food, clothing, housing, water and sanitation.

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[48] Ashour (n 18).
[49] Ashour n(n 18) 3493.
[50] Ashour n(n 18).
[51] Ashour n(18) 3494.

Treaty Banning Nuclear Weapon Test in the Atmosphere, in Outer Space and Under Water and Disarmament Under Strict International Control, in Accordance with UN Objectives

In order to ensure a total disarmament under strict international control in accordance with the objectives of the United Nations and also the discontinuance of all test explosions of nuclear weapons for all time, the state parties to this agreement have agreed under article 1 of this convention to undertake to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, any place under its jurisdiction or control: (a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high sea; or (b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosion in conducted. It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the parties have stated in the preamble to this treaty, they seek to achieve. Under Art. 1(2), each of the parties to this treaty undertakes furthermore to refrain from causing, encouraging, or in any participating in the carrying out of any nuclear weapon test explosion, or any way other nuclear explosion anywhere, which would take place in any of the environment described, or have the effect referred to in paragraph 1 of this Article.[52] The original parties to this convention are the governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republic. The convention entered into force on October10, 1963,[53] and Nigeria ratified this on 17th December, 1967.[54]

Vienna Convention for the Protection of the Ozone Layer 1985 and the Montreal Protocol 1987

The Vienna Convention on the protection of the Ozone layer was adopted in Vienna, Austria on 22nd March, 1985, and it came into force on 22nd

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[52] <http://hrlibrary.umn.edu/peace/docs/treatynuc1963.html > 21/05/2020.
[53] (n54).
[54] Atsegbua (n8) 22.

September 1998.[55] Membership is open for ratification, acceptance, approval and accession to all states and regional economic integration organizations. The objective of the convention is to protect human and the environment against adverse effects resulting from the depletion of the ozone layer58. It provides for 30 percent reduction in CO_2 emissions. Hence, it provides states with the international legal framework for working together address a global atmospheric issue and is open to participation by all states. Art. 1 defines the ozone layer to mean the layer of atmospheric ozone above the planetary boundary layer.[57]

The first and to date the only protocol to the Vienna Convention is the last Montreal Protocol. It is a landmark international arrangement providing a precedent for new regulatory techniques and institutional arrangements, and the adoption and implementation of innovative financial mechanisms. The Montreal Protocol sets forth specific legal obligations, including limitations and reductions in the calculated levels of consumption and production of certain controlled depleting substances.[58] This international treaty sets targets for CFCs production to be cut back to 1986 baseline by mid 1989, cut to 80 percent of baseline by 1993, and to 50 percent of baseline level by 1989.[59]

The protocol sets target date by which developing countries must phase out the production of ODS. Developed countries provide funds through a multilateral fund to meet the incremental costs to developing countries of meeting their commitments under the protocol.[60] Up to 20% of each donor's total contribution to the multilateral fund may be spent bilaterally with developing countries. Nigeria ratified the Vienna convention on 29th January, 1989, and it also ratified the Montreal Protocol on 1st January 1989.[61] Note that the 1992 Copenhagen amendments to the Montreal protocol provide for a permanent end to the production and use of CFCs and certain other chemicals that pose threats to ozone layer.[62]

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55 Ehighelua (n10) 55.
56 Ehighelua(n10)56.
57 Vienna Convention for the Protection of the Ozone layer 1985, Art. 1.
58 Montreal Protocol Art. 3 provides for the method of calculating controls levels.
59 E. Emejuru, "Effects of Ozone Layer Depletion", (Unpublished Article, 2015), p. 11.
60 Atsegbua (n8) 81.
61 The Atmosphere as a Commons (n4).
62 Atsegbua (n8).

United Nations Framework Convention on Climate Change

The United Nations framework Convention on Climate Change (UNFCCC) was adopted against the international backdrop of global climate caused by emission of greenhouse gases. The convention was completed at the Earth summit 1992 and came into force on March 21, 1994. The objective of this convention is 'to achieve stabilization of greenhouse gas concentrations in the atmosphere at low cost energy level to prevent dangerous anthropogenic interference with the climate system'.[63] The convention though singling out carbondioxide, also includes the panoply GHG. The ambiguity of this language provides the conference of party under Art. 4(2)(d) with real latitude in attempting to develop qualifiable emission limit in future.

The convention also adopted and applied the concept of common but differentiated responsibilities wherein it made a distinction between three different categories of states parties such as:

(i) Developed country parties, upon whose shoulders were placed the responsibility of taking the lead in combating the problem of climate change and the provision of new and additional financial resources;

(ii) Country parties in economic transition; this category of countries are in-between developed and developing country parties whose economies are still undergoing some structural adjustments. They are allowed some degree of flexibility to address climate change problems;

(iii) Developing country parties, which are to benefit from financial assistance and transfer of technology from developed country parties to enable them address issues of climate change.[64]

Note that, under this convention stabilization of greenhouse gas concentration in the atmosphere is to be achieved within a time frame that will enable ecosystem to adapt naturally to climate change, ensure that food production is not threatened and ensure sustainable economic development.[65]

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[63] UNFCCC 1992 Arts. 4(2) 9 &3(6).

[64] A. Kiss, Introduction to International Environmental Law (UNITAR, 1997), p. 113.

[65] J.C. Nwafor; "Environmental Impact Assessment for Sustainable Environment: The Nigeria Perspective (1st edn. EDPCA Publishers, 2006), p. 433.

Kyoto Protocol

In 1997, the Kyoto Protocol being a protocol to the United Nations Framework Convention on Climate Change (UNFCCC) of 1992 was concluded and legally established binding obligations for developed countries to reduce their greenhouse gas emission in the period 2008 2012.[66] Article 3(1) of the convention states that 'parties should act to protect the climate system on the basis of common but differentiated responsibilities, and that developed country parties should take the lead in addressing climate change.[67] Kyoto protocol of 1997 has it as its objectives that each party including Annex 1 (developed parties), in achieving its qualified emission limitation and reduction commitments shall inter alia,[68] protect and enhance sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol; promote sustainable forms of agriculture in the light of climate considerations; limit and/or reduce methane emissions through recovery and use in waste management, as well as the production, transportation and distribution of energy. Though Nigeria is a signatory to the 1992 United Nations Framework Convention on Climate Change, but is yet to ratify its 1997 Kyoto Protocol,[69] which seeks to get member countries to reduce emission of greenhouse gases, which scientist have identified as a major contributor to global climate change and global warming.[70]

Paris Agreement

In 2011, parties adopted the Durban Platform for enhanced action another[71] legal instrument or an agreement outcome with legal force under the convention applicable to all parties. At Durban[72] and Pohan,[73] parties noted with grave concern that current effects to hold global warming to below 2 or 1.5oC relative to the pre-industrial level appeared in adequate. In 2015, all (then) 196 parties to the convention came together to the UN climate change conference in Paris 30 November – 12 December and

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66 E. Emejuru, "Environmental Security: A Legal Approach" (2018), Vol. 3. University of Port Harcourt Journal of Private Law 99.
67 Emejuru (n68).
68 Kyoto Protocol 1997, Art. 3.
69 Emejuru (n68).
70 Emejuru (n68).
71 Conference of the Parties (Cop) paragraph 2-4, 2012, p. 2.
72 COP (n73).

adopted by consensus the Paris Agreement, aimed at limiting global warming to less than two degree Celsius, and pursue efforts to limit rise to 1.5 degree Celcius.[74] The Paris Agreement was signed in 2016 in New York, and it would enter into force upon ratification by 55 countries including Nigeria, representing over 55% greenhouse gas emissions.

ENMOD Convention 1977

The Convention provides for the protection of the atmosphere against pollution. The crux of how entire question of law effectively international law protects the environment in time of war is what happens in the event that a state has breached the prohibition against environmental war fare, or attack against the environment, as contained in the 1977 ENMOD Convention or the 1977 protocol (1).[75] Article 1(1) of the convention states that each state party to this convention undertakes not to be engaged in military or any hostile use of environmental modification techniques having wide-spread, long-lasting, or severe effects as the means of destruction damage, or injury to any other state party."[76] Under art. 35 (3) of the 1977 protocol (1) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 'states are prohibited to employ methods or means of warfare which are intended or may be expected to cause widespread, long term and severe damage to the natural environment.[77] On a clear interpretation of Art 1(1) of ENMOD, the obligation of states not to engage in environmental warfare exists only to the extent that the damage, injury, or destruction resulting from the prohibited techniques has widespread, long-term, or severe effects. In other word, the law does not guarantee an obligation on the state not to embark on environmental warfare causing damage, injury, or destruction which falls below the stipulated threshold. Thus, a comparable 'damage' which under treaty 'X' gives rise to compensation in reparation may not necessarily evoke the same legal rights and entitlements under treaty 'Y'. It all depends on a legal construction of the provision of each Treaty.

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[73] Conference of the Parties (COP) 2013, p. 13.
[74] COP 21/United Nations Conference on Climate <www.cop21.gov.fr> accessed 5/12/2017.
[75] Okorodudu-Fubara (n41) 209.
[76] Okorodudu-Fubara (n41) 203.
[77] Okorodudu-Fubara (n41) 203.

While Article 1(1) of the ENMOD convention and article 35(3) of the 1977 protocol (1) represent examples of non-absolute obligations where 'damage', 'injury, or 'destruction' is caused to the environment, article 192(2) of the 1982 UN Law of the Sea Convention presents a stricter obligation in this sense. It provides that: 'States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution or to other states and their environment.[78] The question of the degree of damage disallowed here is not qualified as under the ENMOD Convention or the 1977 Protocol (1).

In an arbitration which involved the United States and Canada which today is popularly called the Trail Smelter Arbitration,[79] concerning a zinc and lead Smelter on Canadian soil, which was releasing large quantities of sulphur dioxide, residues from these clouds of smoke contaminated the air and fell as toxic precipitated on numerous farms in the USA. The United States proposed that the trial of the matter be referred to an international joint commission for investigation. The commission presented its report in 1931, and recommended that the United States be compensated up to January, 1932. The Tribunal held Canada responsible under international law for the conduct of the Trails Smelter and further directed the Trails Smelter to refrain from causing further damage through fumes in the United States, the tribunal recommended a regime of control which would stem the tide of further damage in the territory of the United States of America. The Tribunal further noted that a state owes at all times a duty to protect other states against injurious acts by individuals from within its jurisdiction. Infact, the decision was specifically expressed in the following terms by the Arbitral Tribunal:

> No state has the right to use or permit the use of its territory in such a way as to cause injury by fumes in, or to the territory of another, or the property or persons therein, when the case is of serious consequences, and the injury is established with clear and convincing evidence. It provides for states sovereign right to exploit their own resources pursuant to their environmental policies, but not to the detriment of other states. States have the responsibility to ensure that activities within their jurisdiction or control do not cause

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[78] UNCLOS 1982, Art, 192 (2).

[79] United States v Canada [1930 and 1934] vol. 3 Report of International Arbitration (RAAA) 1905.

> damage to the environment of other states, or areas beyond the limits of national jurisdiction.[80]

This decision was the basis for the Declaration of principle 21 of the United Nations Conference on the Environment in June 1972 at Stockholm.[81] Note that 'The Corfu Channel'[82] was a decision of the international court of justice. It followed the Trail Smelter Principles and ruled that no state may use its territory for activities which violate the rights of other states. These cases have formed the basis of treaties signed by Nigeria, which form part of the sources of the Nigerian environmental law.

1959 Antarctic Treaty

The defense of the planetary environment in warfare or situations connected with military, scientific, or technological activities, began to receive a more explicit consideration in multilateral and bilateral arms control treaties. The 1959 Antarctic Treaty marked the first international treaty which sought to protect a specified area of the earth's environment from the effects of nuclear weaponry and warfare.[83] Article 1 of the treaty prohibits in Antarctica, inter alia 'any measure of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any types of weapons.[84] Article V specifically prohibits 'any nuclear explosions in Antarctica and the disposal there of radioactive waste materials'.[85] The treaty, however, does not prevent the use of Antarctica for scientific research and other peaceful purposes.

1972 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction

This document states expressly in the preamble that 'for the sake of all mankind, to exclude completely the possibility of bacteriological

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[80] The Canada (n81).
[81] Atsegbua (n8) 48.
[82] I.C.J. Report 1949, p. 244.
[83] Antarctica Treaty 1959.
[84] Antarctica Trteaty (n85), Art. 1.
[85] Antarctica Treaty (n85) Art V.

(biological) agents and toxins being used as weapons', based on the conviction that 'such use would be repugnant to the conscience of mankind and that no effort would be spared to minimize this risk'.[86] Article II provides that:

> Each state party to this convention undertakes to destroy or to divert to peaceful, purposes, as soon as possible but not later than nine months after the entry into force of the convention, all agents, toxins, weapons, equipment, and means of delivery specified in Article I of the convention, which are in its possession or under its jurisdiction or control. In implementing the provisions of this article all necessary safety precautions shall be deserved to protect populations and the environment.[87]

The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the moon and other Celestial Bodies

This Treaty provides in Article IX that 'State parties to the Treaty shall pursue studies of outer space including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter, and where necessary shall adopt appropriate measures for this purpose.[88]

National Laws on the Atmospheric Pollution

Apart from international legal instruments on the atmospheric pollution, there are also domestic laws on the atmospheric protection, whose essence is to ensure quality air for human, animal, marine or plants' life. The principal legislation in Nigeria, on the Environmental Protection is the National Environmental Standards and Regulations Enforcement Agency Act[89] 2007. Section 20(1) of the NESREA Act provides that, 'the Agency may make Regulations setting specification and standards to protect and enhance the quality of Nigeria's air resources as to promote the public health or welfare and the normal development and production capacity

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[86] Preamble, 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and toxin weapons and on their Destruction.
[87] Preamble, 1972 Convention (n88) Art. II.
[88] Okorodudu-Fubara (n41) 192.
[89] Cap N164LFN 2007.

of the nation's human, animals, marine or plant life and include in particular:

(a) Minimum essential air quality standards for human, animal, marine or plant health;

(b) the control of concentration of substances in the air which separately or in combination are likely to result in damage or deterioration of property or of human, animal, marine or plant health.

(c) the most appropriate means to prevent and combat various forms of atmospheric pollution;

(d) control of atmospheric pollution originating from energy sources, including that produced by aircraft and other self- propelled vehicles, industries, factories and power generating (situation) stations or facilities;

(e) standards applicable to emission from any new mobile or stationary source which in the Agency's judgment causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare; and

(f) the use of appropriate means to reduce emission to permissible level.[90]

A permit will be granted on application by an Industry to NESREA on terms similar to those of an application for a discharge of Industrial effluents into a water body or course.[91] Exceeding a permit imposed on the emission of an atmospheric pollutant by an Industry is a criminal offence punishable under section 20(3) and (4) of the NESREA Act. For an Industrial, the penalty is a fine of #200,000 or to imprisonment and an additional fine of #20,000 for every day the offence subsists. For a body corporate, it is a fine not exceeding #2,000,000, and an additional fine of #50,000 for everyday the offence subsists. While section 20 of the NESREA Act is limited to section 17 of the repealed FEPA Act,[92] it fails to include the provision in the FEPA Act wherein the corporation may be required to rehabilitate the damaged environmental media or pay

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[90] (n91) s.20(1).

[91] A.K. Usman, "Environmental Protection Law and Practice" (Ababa, Press Ltd, 2012) p. 42.

[92] The FEPA Act was repealed by Section 36 of NESREA Act 2007.

compensation to any victims of the pollution.[93]

Section 20(2) of the NESREA Act provides that "the agency may establish monitoring stations or network to locate sources of atmospheric pollution and determine their actual or potential danger".[94] This is a good proactive provision amenable to effective atmospheric protection.[95]

Furthermore, Regulation 1(1) made pursuant to the NESREA Act provides that no person shall import, manufacture in part or in whole, install, offer for sell or buy new or refurbished facilities intended to be used for the production of any Ozone-depleting substance (ODS), unless for the recovery and recycling of substances already in use.[96]

Regulation 2(1)(a)(b)(c)(d) provides that subject to the provision of the regulation 2(2) of this regulation, no person shall release or permit to be released into the atmosphere an ozone-depleting substance from an equipment or any part of an equipment, fire extinguishing except during firefighting, a container used in the supply, recovery, recycling, reclamation, transportation or storage of an ozone- depleting substance or an ozone depleting recovery, recycling or reclamation system.[97]

The agency in exercising its power to enforce compliance under the Act, is empowered under Reg. 11(1)(2) to exercise such power over any premises and other Industries or enterprises using ozone depleting[98] substances and who shall require permit for its activities. Reg. 22(1) provides that 'any person who violates the provisions of these regulations commits an offence and liable on conviction to a fine of not more than #200,000 or imprisonment for a term not exceeding one year or both fine and imprisonment and an additional fine of #10,000 for every day the offence subsists'.[99] Regulation 22(2) provides that, where an offence under these regulations is committed by a body corporate, it shall be liable to a fine of not exceeding #1,000,000 and an additional fine of #50,000 for every day the offence subsists.[100]

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93 Usman (n 93) 43.
94 (n91) S. 20 (2).
95 Usman (n93).
96 National Environmental (Ozone Layer Protection) Regulations, 2009, Reg. 1(1).
97 (n98) Reg. 2(1) (a)(b)(c)(d).
98 (n98) Reg. 11 (1)(2).
99 (n98) Reg. 22(1).
100 (n98) Reg. 22(2).

The Constitution of the Federal Republic of Nigeria, 1999

Section 20 of the Constitution of Nigeria, 1999, as amended 2011, under the environmental objectives provides that: "The stated shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria."[101] This provision seeks to protect the entire Nigerian environment against activities that may likely endanger life and/ or pollute the atmosphere within the territorial limit of Nigeria, such activities include but not limited to Industrial and domestic activities which possess the characteristics and potentials to engender ozone layer depletion and its attendant consequences. Thus, section 20 of the constitution guarantees the safeguard of quality air for all Nigerians.

Furthermore, section 12(1) of the constitution, with regard to the implementation of international treaties in Nigeria, provides as follows: "No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the national assembly."[102] Section 12(2) stipulates that 'the National Assembly may make law for the Federation or any part thereof with respect to matters not included in the exclusive list for the purpose of implementing a Treaty'.[103]

Also, section 12(3) went further to provide that a bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the president for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly of the Federation.[104]

From the foregoing, therefore section 12 of the Nigerian constitution empowers the National Assembly of the Federal Republic of Nigeria to ratify every treaty or international convention Nigeria is a party or signatory to, for such treaty to have a force of law in Nigeria. It is therefore our submission that the Nigeria's ratification of international conventions she is a party to, particularly on the global atmospheric protection, will enhance an unhindered implementation of such international agreements in Nigeria, for the safeguard of the Nigerian environment.

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[101] Cap C 23 LFN 2004, Section 20.
[102] (n103) S. 12(1).
[103] (n103) S. 12(2).
[104] (n103) S. 12(3).

Nuclear Safety and Radiation Protection Law, 1995[105]

Focusing on the regulation of the use of radioactive substances and equipment emitting and generating ionizing radiation, this Act establishes the authority for the protection of the environment from the harmful effects of ionizing radiation[106] and makes registration of premises and the restriction of ionizing radiation sources to those premises mandatory.[107]

The Act defines a radioactive waste as any substance or article which has been contaminated in the course of production, storage or use of radioactive material or by contact with or proximity to other waste falling within the provisions of this law.[108] Under this law a consignor or carrier and consignee of radioactive waste shall have a valid licence from the Authority and notify it well in advance prior to the delivery, transport and receipt of such wastes.[109] Similarly, a person packaging radioactive wastes is required to do so according to laid down procedures in the code of practice.[110] Such a person is financially and otherwise liable for all incidents and accidents during the transportation or storage in transit of the said radioactive wastes,[111] 'otherwise' the liability of such a person will include the cost of restoring the environment to its original state.[112] A person who breaches any of the above provisions will on conviction be liable to a fine not less than #100,000.00 or not more than #3,000,000.00 or to imprisonment of not less than 2 years or not more than 10 years or both such fine and imprisonment.[113] In addition, the Act provides that the authority may cancel, revoke or suspend any registration, exemption or licence that might have been affected or granted to the person.[114]

Where the offence has been committed by a body corporate and it is proved to have been committed with the consent, connivance or is

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105 Cap N142, LFN 2004.
106 (n107)S.37(i)(b).
107 (n107)Ss.15 and 16.
108 (n107)S.48.
109 (n107)S.42.
110 (n107).
111 (n107).
112 (n107) S.43(2).
113 (n107).
114 (n107).

attributable to any act or default on the part of any person or persons in apparent control of the body corporate, such persons as well as the body corporate shall be liable to be proceeded against and punished accordingly.[115]

Associated Gas Re-Injection Act[116]

The Act was enacted in September, 1979, with the aim of compelling every company producing oil and gas in Nigeria to submit not later than 1st of April, 1980, preliminary programme for gas re-injection and detailed programmes for the implementation of gas re-injection.[117] Section 3(1) of the Act provides that: "Subject to subsection (2) of this Section no company engaged in the production oil and gas shall after 1st January, 1984 flare gas produced in association with oil without the permission in writing of the minister."[118]

The penalty for contravening section 3 of the Act is a withdrawal of the concession granted for the particular field where the contravention took place,[119] and the minister may withhold any entitlements towards the cost of completion or implementation of a desirable re-injection scheme or the repair or restoration of any reservoir in the field in accordance with good field practice.[120] Due to the fact that most companies could not meet up with the deadline, in 1984 the minister in pursuance of the powers conferred by section 3 and 5 enacted the Association Gas Re-Injection (continued flaring of Gas)[121] Regulation which had a commencement date of 1st January 1985.

The Act provides that where the minister is satisfied after 1/1/1984 that utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields, he may issue a certificate in that respect to a company producing oil or gas specifying such items and conditions as he may at his discretion choose to impose for the continued flaring of gas on the particular field(s); or permitting the company to continue to flare gas

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115 (n107) S. 45(3).
116 Cap A 25, LFN 2004.
117 (n107)S. 207.
118 (n107)S.3(1).
119 (n107)S.4.
120 (n107)S.4(2).
121 I. Ehighelua, (n10)p301-302.

in the particular field(s), if the company pays a sum, as the minister may, from time to time prescribe for every 28.317 standard cubic metres (SCM) of gas flared.[122] Note that the Gas Re-Injection (Continued Flaring of Gas) Regulation required the payment of two kobo (2k) penalty for M.S.F. of gas flared, which was reviewed to 50k in 1992 and N10.00 (Ten Naira) in 1998, hence the oil companies find it cheaper to flare gases than to put re-injection schemes in place.

However, the National Assembly of the Federal Republic of Nigeria had in 2009 passed a bill titled; 'The Gas Flaring (Prohibition and Punishment) Bill 2009 (S.B 126) which prohibits gas flaring in Nigeria after 31st December, 2010 and prescribes strict punishment for oil companies that violate the order.[123] Section 1 provides that, 'natural gas shall not be flared in any oil and production operation, block or field onshore or offshore or gas facility (processing treatment plant etc.), which shall commence operations after the commencement of this Act.[124]

Section 2 specifically provides that no company engaged in the production of oil and gas shall after December, 2010 flare national gas produced whether in association with oil or not.[125] The Bill provides strict punishment for oil companies, which fail to stop gas flaring after 31st December 2010, by stating that, they shall be made to pay twice the price of gas flaring in the international market.[126] The bill provides also that an additional 50% of that fine be paid to the host communities, which payment will be made through the ministry of petroleum and re-routed to local government chairman of affected communities.[127]

The bill further requires operators in the oil sector to present reports of all flared gas resources, such as daily quality flared, reserve, location and composition within 90 days.[128] It also requires them to submit data along with gas utilization plan to the minister, for the gas they intend to utilize

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122 Cap A25, LFN, 2004, S.3(2).
123 Atsegbua, (n8), 195.
124 Atsegbua, (n8).
125 Atsegbua, (n8).
126 Atsegbua, (n8).
127 Atsegbua, (n8).
128 Adetutu Folasade-Key, Nigeria Senate Okeys New Law, December 2010 Deadline for Gas Flaring <http://al>accessed 17th January 2013.

prior to the December 2010 flare out deadline, for his approval.[129] The minister may also impose as penalty a shut-down order as against the former fine of $4 per cubic feet of gas flared.[130]

Despite the strict penalties provided in this law, there is also a downside, as it still permits continued flaring of gas on certain condition. For example, it provides that the minister may grant a permit to flare or vent gas in cases of start-up equipment failure or shut-down for period not more than 30 days.[131] Currently, the gas flaring (Prohibition and Punishment) Bill 2016, which is in many respects a reproduction of the 2009 bill, is being considered by the senate for possible passage into law.[132] The bill has fixed the flare-out deadline for December 2016.[133] Section 1 of the bill prohibits the flaring or venting of natural gas in any oil and gas production operation as soon as the Act comes into effect.[134] By its section 4, no company engaged in the production of oil and gas shall flare gas after December 31, 2016.[135] These are only two instances where gas is permitted to be flared under the bill. First is where flaring or venting is technically and economically justified. Second is in the case of start- up, equipment failure, shut down or safety flaring in which case a permit must be obtained from the minister of petroleum resources, and which permit must not last for more than 30 days.[136] This is the only instance where the minister is empowered to permit gas flaring, as the bill takes away section 3 of the Associated gas Re-injection Act[137] under which flaring of gas may be continued.

On the other hand, the petroleum industry Bill, which is now the Petroleum Industry and Governance Bill PIGB 2018 (SB.237)[138] the new

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129 Adetutu (n130)
130 Adetutu (n130)
131 Harrison Declan, 'What Gas Flaring Prohibition Bill will achieve <https:// Punchng.com/gas-flaring-prohibition-bill-will-achive/>.accessed 29/10/2019
132 Harrison (n133)
133 Harrison (n133)
134 Harrison (n133)
135 Harrison (n133)
136 Harrison (n133).
137 Harrison (n133).
138 Umuoru *et al*, NASS Passes New PIGB Stipulating 5% Levy on Petroleum (Vanguard Newspaper Thursday March, 2018), p. 12.

framework to regulate the country's petroleum sector which has been passed by the National Assembly, fixed the end of gas flaring for 2012.[139] Unfortunately, notwithstanding the government efforts to discourage and/or stop the flaring of gas in Nigeria, through its laws, gas is still being flared in Nigeria and other oil producing communities in the Niger Delta.[140] It should be noted that gas flaring is against the human rights of the people living in affected communities.[141] For example the Federal High Court in Nigeria held in the case of Mr. Jonah Gbemre v. Shell Petroleum Development Company Nigeria Ltd, Nigeria National Petroleum Corporation and Attorney General of the Federaltion[142] that: gas flaring is a "gross violation of the constitutionally-guaranteed rights to life and dignity, which include the right to a clean poison-free, pollution-free healthy environment; Note that this decision by the Federal High Court, follows the unprecedented ruling given by the African Commission on Human and Peoples' Rights, in the case of The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria,[143] where Nigeria was found to have breached the rights to environment under Article 24, to life under Article 4, to health under Article 16, amongst others.

The presiding judge in Gbemre's case, Justice C.V. Nwokorie also put a restraint upon the respondents, their servants or workers, from engaging in further flaring of gas in the applicant's community (Iwherekan Community in the Niger Delta area of Nigeria) and stated that they were to take immediate steps to stop further flaring of gas in that community.[144]

Conclusion

It is not gainsaying that the threats posed by atmospheric pollution have received myriads of responses across the globe as both international legal instruments and domestic laws have evolved with the bid to regulate, monitor, check or control the human activities that portend danger to the

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139 Harrison (n133).

140 Sufuya Ojeifo, "Nigeria: Gas Flaring-Senate Passes prohibition Bill" <http://allafrica.com/stories/200907030119.html accessed 17th Jan, 2013.

141 Atsegbua (n8).

142 Unreported Suit No: FHC/B/CS/53/05.

143 Comm. No. 155/96 (2001).

144 Jim Lobe, Nigeria: Judge Orders Gas Flaring to stop Immediately <http://www=3101>accessed 5/10/2006 (hereinafter: Jim, flaring).

environment, particularly as they relate to atmospheric pollution. The consequences of the atmospheric pollution are obviously not human and environment-friendly, as they can lead to loss of lives, properties, damage to living resources and economic stagnation.

International law enjoins state parties, to respect treaties in compliance with the principle of 'Pacta Sunt Savanda', in order to uphold the sanctity bestowed upon it; and therefore follows that state parties should domesticate same, so that its relevance will be felt at the national levels, hence the Nigerian Constitution, empowers the National Assembly of the Federal Republic of Nigeria under Section 12(1), to ratify International treaties, for Nigeria to enjoy the benefits thereof. Nigeria being a signatory to several International treaties on the Protection of the global atmosphere against pollution is interesting, but ratification through federal legislations is key.

More so, Customary International Law enjoining every state to avoid activities within its territorial limit that will cause harm or injury to the neighbouring states(s) finds it's expression and potency in Trail Smelter Arbitration[145] and Corfu Channel[146] cases where in the neighborhood principle was emphasized in trans-boundry atmospheric pollution. This is a plausible and commendable scenario, as atmospheric pollution knows no boundary.

From the above, it is therefore, our suggestions that all states parties to international agreements, including Nigeria should show enormous commitments and respects to international agreements they are parties to. The domestication of international agreements is key, as it provides means by which citizens can derive the benefits thereof. Although Nigeria has avalanche of laws on atmospheric pollution, which must be enforced or implemented otherwise they are better construed as mere garment of cosmetic complexion. Laws must therefore, not only be made, but must be seen to be obeyed.

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145 The Trail Smelter (n81).
146 The Corfu Channel (n84).

Protecting the Environment from the Impact of Climate Change: Environmental Law and Policy to the Rescue

Igonibo F. George*

Abstract

Climate change remains a topical and thorny issue of major concern across the globe. Alteration in the world climate system has impacted negatively on all aspects of human activities around the world. Global warming has progressively triggered immeasurable natural and human induced disasters ranging from incessant earthquakes, landslides, melting of the polar ice caps and flooding, amongst other extreme occurrences. Consequently, the necessity to find permanent solution to this seemingly obstreperous challenge has become imperative; otherwise more unquantifiable devastation will befall humans and will continue to be hard hit from the impact therefrom. Recourse has been had to laws and policies on climate change by fashioning out same to either moderate the frequency of human activities through mitigation or cushion the impacts of climate change through adaptation. But as a result of the fragility of climate change laws and policies, which leads to their unenforceability, recourse has also been made to environmental law and policy impliedly to augment or breathe life to the soul of climate change law and policies. Thus, climate laws and policies, which have been tailored to regulate climate change, have made little or no impact in mitigating climate change. On its part, environmental law and policy, have by implication, been resorted to for the regulation of climate change but unfortunately have not made any significant impact in mitigating climate change. This article critically examines the mitigating impact of climate change through environmental law and policy.

Keywords: Climate Change, Global Warming, Environmental Law and Policy.

Introduction

In climate change, there is a long-term alteration in weather conditions

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marked by changes in winds, precipitation, temperature and other indicators. Climate change involves alteration in average weather conditions and changes in variability, which can lead to extreme occurrences.[1] Climatic conditions naturally vary on all time scales. But, its long-term status and average temperature are regulated by balancing incoming and outgoing energy, which ascertains the energy balance of the earth. Factors that lead to a sustained change to the amount of incoming energy or the amount of outgoing energy can trigger climate change.

Factors that are extraneous to the climate system are referred to as 'climate forcers'. This creates the impression that they force or push the climate on the path of a new long-term state; it could be warmer or cooler depending on what caused the change.[2] Different causes are operational on varying time scales, and not all of those causes that have led to changes in climate in the past are germane to present day climate change. For this purpose, factors that trigger climate change can be grouped into two classes - natural processes and anthropogenic activity. Besides natural causes of climate change, changes intrinsic to the climate system, like variations in the currents of ocean or atmospheric circulation, can also affect the climate for a short duration. The variability in this natural internal climate is submerged in the long-term forced climate change.[3]

The global climate system is warming uncontrollably as a result of human activities. Regrettably, human beings, who are the prime causative agents of climate change, also suffer from its devastating effects.[4] It is against this backdrop that this article seeks to critically examine the causes and consequences of this negative change of the climate system and explores

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1 Service Canada, 'Causes of Climate Change' <http://www.climatechange.gc.ca/default.asp?lang=en&n=E18C8F2D-1> accessed 17 May 2023.

2 E D A Aina and N O Adedipe, *The Making of the Nigeria Environmental Policy* (Ibadan University Press 1991) 22.

3 A J Glasson, R Therivel and A Chadwick, *Introduction to Environmental Impact Assessment* (2nd edn London University Press 1999) 12.

4 L S Anderson and C E Davies, 'The UN Convention on Biological Diversity: A follow-up on EEA member countries' (1996) <http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDoQFjAA&url=http%3A%2F%2Fwww.eea.europa.eu%2Fpublications%2F92-9167-0774%2Fat_download%2Ffile&ei=ng7VUaDLMsOM7QbrpICACA&usg=AFQjCNFNoO5mGgoQRJNzKDariAU9u2lCA&sig2=lJK02Q9EO4RUiT4zJyDRaA&bvm=bv.48705608,d.d2k&cad=rja> accessed 17 May 2023.

avenues by which humanity, which is also the major causative agent, can cushion the consequences of climate change and adapt to it. Perceived urgent strategy designed in mitigating and regulating sources of greenhouse gas emissions quickly eroded appreciable progress on the formulation of adaptation strategies fashioned to respond to the adverse impacts of climate change on both humans and the environment. Recently, this 'adaptation deficiency' became of utmost importance and actively included in policy debate of climate change.[5] In the past, discussion on adaptation was a no go area but the climate change policy world has reluctantly accepted it as the reality of unsuccessful efforts to achieve universal mitigation policy. However, adaptation policy is not expected to play out for environmental law the way mitigation policy has done.[6]

The Concept of Climate Change

The physical climate system consists of land surfaces, the earth's atmosphere and oceans, in addition to the snow and ice that is a prominent feature in some parts of the world. There is a constant interaction between these components and with aspects of the earth's biosphere to ascertain not only the daily weather, but also the long- term averages that is referred to as 'climate'.[7]

The climate system is triggered by energy from the sun (sunlight). Some of this energy reflects back into space, but the land and ocean absorbs the rest and re-emitted as radiant heat. Some of this radiant heat becomes absorbed and re-emitted by the lower atmosphere in a process called the greenhouse effect. The average temperature of the earth is ascertained by the overall balance between the quantum of incoming energy from the sun and the quantum of radiant heat that finds its way to the atmosphere and is released to space.[8]

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[5] A Kiss and D Shelton, *Guide to International Environmental Law* (Leiden: Martinus Nijhoff 2007) 19.

[6] McKinsey & Company, 'Environmental and Energy Sustainability: An Approach for India' (2009) <http://www.mckinsey.com/~/media/mckinsey/dotcom/client_service/Sustaina bility/cost%2520curve5%2520PDFs/Environmental_Energy_Sustainability.ashx.> accessed 17 May 2023.

[7] J F K Akinbami, 'Renewable Energy Resources and Technologies in Nigeria: Present Situation, Future Prospects and Policy Framework: Mitigation and Adaptation Strategies for Global Change' [2001] (6) *Journal of the Earth,* 155-181.

[8] O G Amokaye, 'Environmental Pollution and Challenges of Environmental Governance in Nigeria' [2012] (10) (1) *British Journal of Arts and Social Sciences,* 26-41.

An important feature of the climate system is that there is no uniformity on how the sun's energy is distributed but rather is usually intense at the equator and weakest at the poles. This non uniformity in energy distribution results in temperature variations, which the atmosphere and ocean act on by the transportation of heat from the warm tropics to the cold Polar Regions. This non-uniform heating and the resultant heat that is transported, result in ocean currents, atmospheric circulation, evaporation, and precipitation that is ultimately experienced as weather.[9]

Any disturbance in incoming and outgoing energy will alter the quantum of heat within the climate system and adversely impact on all the processes so described that move heat around the world. This is experienced as changing weather patterns, the effects of which can have a lasting implication since a lot of human activities have adapted to conditions that have lingered for long.[10]

Climate Change and Global Warming

Global warming in specific terms refers to any alteration in the global average surface temperature. Often times, global warming is misconstrued to imply that there will be uniformity on how the world warms. As a matter of fact, a rise in average global temperature will also stir a change in atmospheric circulation, leading to some areas of the world warming more than others. Regrettably, even though it, to a large extent, does not paint the real picture of what really happens, the term 'global warming' has been frequently used to describe climate change. Climate change transcends just warming. This explains why the term 'global warming' is an inexact description of the phenomenon.[11] However, one of the effects of global warming is changes in atmospheric conditions of a place leading to changes in climate of that place.[12]

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[9] O Awogbemi and C A Komolafe, 'Potential for Sustainable Renewable Energy Development in Nigeria' [2011] (12) (1) *The Pacific Journal of Science and Technology,* 161-169.

[10] *Ibid.*

[11] O Adedeji and Others, 'Global Climate Change,' [2014] (2) *Journal of Geo-science and Environment Protection,* 114-122.

[12] A Abracosa and E Ortolano, 'Environmental impact assessment in the Philippines: 1977-1985' [1987] (7) *Environmental Impact Assessment Review,* 293-310.

The debate of whether or not global warming is triggered by human activities is developing into a great scientific discourse of modern time. Assuming it holds true that global warming is indeed caused by human activities, what will agitate the mind is what the climate consequences will be and whether or not the situation is hapless.[13]

Policymakers met in Copenhagen putting those questions at the front burner. They had failed to reach a consensus on an international treaty to regulate greenhouse gas emissions in a bid to control global warming while maintaining current living standards.14 A critical factor that appears to stagnate this is the upsurge of uncertainty in the science behind the debate.15 Core climate scientists are of the view that man-made global warming cannot be wished away since it was happening. However, some global-warming antagonists maintain that the conclusion reached by the core climate scientists is riddled with so much guesswork.[16]

Good science lies at the heart of this back and forth argument – science that is still unfolding. Undoubtedly, the atmospheric carbon dioxide concentration of the earth has been on the rise since the late 1700s during the Industrial Revolution, with most of the increase witnessed as early as 1950. There is a consensus that the increase in carbon dioxide is mainly the result of emissions from burning of fossil fuels. There seems to be unanimity to the fact that the global average temperature has been on the increase since 1850, with most of the warming taking place in the 1970s.17 At the heart of the global- warming debate is whether warming is the direct effect of rising anthropogenic carbon dioxide levels or whether it is merely natural climate variability.[18]

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[13] S K Ritter, 'Global Warming and Climate Change: Believers, deniers, and doubters view the scientific forecast from different angles' <http://cen.acs.org/articles/87/i51/Global-Warming-Climate-Change.html> accessed 17 May 2023.

[14] M A Ajomo, 'Law and Changing Policy in Nigeria's oil Industry' in J A Omotola and A A Adeogun (eds) *Law and Development (Lagos: Published for the Faculty of Law,* University of Lagos by the University of Lagos Press, 2017) 84-99.

[15] B Alo, 'Environmental impact analysis: policy formulation and implementation in Nigeria' in S Appiah-Opoku, *Environmental impact assessment in developing countries: The case of Ghana* (Environmental Impact Assessment Review 2004), 59-71.

[16] R W Kates and Others, 'What is Sustainable Development? Goals, Indicators, values and Practice' [2005] (47) (3) *Environment: Science and Policy for Sustainable Development*, 8-21.

[17] S K Ritter (n 13).

[18] *Ibid.*

According to the fourth Assessment Report titled 'Climate Change 2007' by Intergovernmental Panel on Climate Change (IPCC), a body established by the United Nations Environmental Programme and the World Meteorological Organisation, 'warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level'.[19]

Causes of Climate Change

Climate change has become a thorny issue of discourse in recent times. It arises from the emission of greenhouse gases and this adversely affects the environment. It therefore raises questions on the causative factors – whether it is man-made or part of nature's cycle. While climate change opponents attribute climate change to natural causes, climate scientists believe that human activities primarily contribute to climate change.[20] The focus of the article will now shift to the causes.

(a) Natural Causes

Riebeek[21] contends that nature is also a contributory factor to climate change by the emission of carbon dioxide from volcanoes. As submitted by Wuebbles:

> Volcanoes used to release CO_2 many millions years ago. Back then when dinosaurs existed, we had levels of CO_2 that is approximately similar to what we have now because of the CO_2 emitted by volcanoes. But, volcanoes release a small amount of CO_2 and they can't explain the increase of CO_2 that we had in the last century. Volcanoes do contribute to climate change by emitting CO_2. However, the amount of CO_2 they emit is relatively small if we compare it to the amount of CO2 that is being released by human activities.[22]

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[19] K Mwambazambi, 'A Glance on Environmental Protection in Africa: Theological Perspective' [2009] (2) (3) *Ethiopian Journal of Environmental Studies and Management,* 19-26.

[20] Climate Sight, 'Human fingerprints on climate change rule out natural cycles,' <https://www.skepticalscience.com/global-warming-natural-cycle.htm> accessed 17 May 2023.

[21] H Riebeek, *Global Warming: Global Cooling* (NASA 2010) 17.

[22] D Wuebbles, *Ecological Impacts of Climate Change* (The National Academies of Science 2009) 23.

According to the National Aeronautics and Space Administration (NASA), volcanoes averagely emit between 130 and 230 million tons carbon dioxide yearly. However, the burning of fossil fuels by humans caused to be released about 26 billion tons of carbon dioxide into the atmosphere yearly.[23]

Continental drift is one of these natural causes. The discovery of fossils of tropical plants (appearing as coal deposits) in Antarctica has provided the basis for the conclusion that this frozen land has in time past been located closer to the equator, where the climate was tropical, with swamps and lush vegetation in abundance.

The continents that exist today were formed millions of years back when landmass started drifting apart slowly. This drift equally impacted on the climate because it altered the physical qualities of the landmass, how they are positioned and the position of water bodies. The separation that affected the landmass altered the flow of ocean currents and winds, which in turn adversely impacted the climate. This drift of the continents continues even up till now.[24]

Aside continental drift, variation in the solar output is another natural cause of climate change. Many scientists believe that the radiation output of the sun only varied negligibly over many years. However, satellite measurements equipped with radiometers in 1980s and 1990s indicated that the sun's energy output may have varied even more than was earlier thought and showed a remarkable decrease in the total amount of solar energy reaching the earth. An extension of this trend over several decades could affect global climate.[25]

Volcanic eruption represents another natural cause of climate change. When there is a volcanic eruption, it emits large volumes of sulphur dioxide, water vapour, dust, and ash into the atmosphere, which has the capacity to influence climatic patterns for many years. Volcanic eruption affects people in diverse ways, and on different scales. Localised problems are sometimes experienced by the release of noxious gases when volcano

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[23] Riebeek (n 21).

[24] M Z A Khan, 'Climate Change: Cause & Effect' [2012] (2) (4) *Journal of Environment and Earth Science,* 49-61.

[25] *Ibid.*

erupts. Fine ash from the explosion of Krakatoa in 1883, for example, moved through the help of gas and vapours to a height of 27 km. It was scattered all over the world and resulted in exotic sunsets and other climatic effects. Generally speaking, millions of tons of sulphur dioxide gas can get to the upper heights of the atmosphere from a serious eruption. The gases and particles of dust block the incoming rays of the sun partially which has an ultimate effect on heat budget. Sulphur dioxide mix with water to produce minute droplets of sulphuric acid which take the form of acid rain that is very toxic to ecosystem. These droplets are very tiny to the extent that many of them can survive for many years.[26]

Variation in the earth orbit and axis is yet another natural cause of climate change. The Earth's orbit appears elliptical, meaning that the distance between the earth and the sun varies over a one year period. This ultimately affects how solar energy is then distributed.[27] The implication is that there will be variation in the solar radiation reaching the earth by about 3.5% above or below the average 'solar constant'. Nearness to the equator equally affects the climatic condition of a place, because regions that are situated in the equator receive full incoming solar radiation throughout the year. A drift pole ward will signal a decrease in the solar energy.

The Earth's axis is usually assumed to be fixed. In reality, however, it is not constant: the axis witnesses movement at the rate of slightly above a half-degree every century. This gradual alteration in the direction of the earth's axis, called precession accounts for changes in the climate. The shift of the earth's axis from the normal to ecliptic varies, passing through a slow oscillation, with a period of about 40,000 years. Changes in the shifting pattern of the earth can influence the gravity of the seasons – more shift leads to warmer summers and colder winters; less tilt leads to cooler summers and milder winters.[28]

(b) Anthropogenic (Human) Causes

In addition to the natural causes of climate change, scientists hold that human activities contribute greatly to climate change because humanity

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[26] Khan (n 24).
[27] *Ibid.*
[28] C Anyadiegwu, 'Overview of Environmental Impact Assessment of Oil & Gas projects in Nigeria' [2012] (1) *International Journal of Science & Technology,* 66.

depends on fossil fuels for energy needs.[29] Ndubuisi and Asia[30] submit that, 'a large amount of climate change happens widely because we are burning fossil fuels and that increases gases such as carbon dioxide, methane, and some other gases in the atmosphere.'[31]

According to Palmer and Robb,32 the world is dependent on fossil fuels like oil, coal and natural gas for 80% of its energy needs. It, therefore, makes it extremely difficult to abandon fossil fuels for any other form of energy since the dependence on fossil fuel is very high. The emission of greenhouse gases has dramatically increased, mostly from the burning of fossil fuel for energy needs, agriculture, industries and transportation. Certain human activities cause climate change. They include: deforestation, industrial advancement, use of chemical fertilizers and burning of fossil fuels.

Plants give oxygen which is the most important thing for man's survival. They pass through a process of photosynthesis in which they give out oxygen and absorb carbon dioxide. Plants consume the air, sunlight and carbon dioxide to produce food and oxygen. The cutting of trees would mean that plants will no longer produce oxygen and carbon dioxide concentration will be on the increase. An increase in the quantum of carbon dioxide in the air is unhealthy for humans and it will equally disturb the water cycle and create a total imbalance of the ecosystem.[33]

Industrial advancement is another man-made cause of climate change. Uncountable industries and factories spring up in this modern world to satisfy the yearnings of human beings. These factories utilise huge amount of fuels like coal, petroleum for power and electricity in order to keep their machines going. When these fuels are burnt, a huge amount of carbon

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[29] D Anton and D Shelton, *Environmental Protection and Human Rights* (Cambridge: Cambridge University Press 2011) 9.

[30] A L Ndubuisi and I O Asia, 'Environmental Pollution in Oil Producing Areas of the Niger Delta Basin, Nigeria: Empirical Assessment of Trends and People's Perception' [2007] (1) (4) *Environmental Research Journal,* 18-26.

[31] *Ibid.*

[32] A Palmer and C Robb, *International Environmental Law in National Courts* (vol. 4 Cambridge University Press 2004) 454.

[33] D N Sadeleer, *Environmental principles: From Political Slogans to Legal Rules* (Oxford University Press 2005) 275-277.

dioxide is released to the atmosphere. The atmosphere then absorbs the toxic radiations from the sun, leading eventually to global warming. The smoke emanating from these factories mixes with air, making it toxic for breathing.[34]

The use of chemical fertilizers is also human-induced cause of climate change. When Human beings use artificial chemicals to grow crops, it could lead to global warming. These chemicals are very harmful to the earth as well as to humans. These fertilizers are composed of nitrogen oxide, which is even more toxic than carbon dioxide. Oxides from nitrogen depletes the ozone layer faster than any other greenhouse gas and thus permit the dangerous ultraviolet rays enter the atmosphere, warming up the earth and resulting in global warming.[35]

Climate Change Mitigation through Environmental Law and Policy

Climate mitigation is any step adopted to completely end or reduce the long-term danger and hazards of climate change to human life and property.[36] The IPCC[37] defines mitigation as 'an anthropogenic intervention to reduce the sources of greenhouse gases'. The process of climate change involves a complex interaction of environmental, institutional, climatic, economic, technological, political and social forces. It cannot be tackled or understood in isolation of wider societal goals like equity or sustainable development or other existing future sources of stress.

The United Nations Framework Convention on Climate Change (UNFCCC) outlined three conditions for the attainment of greenhouse gas stabilisation in the atmosphere:

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[34] Sadeleer (n 13).

[35] L A Feris, 'Environmental Rights and Locus Standi' in A R Paterson and L J Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Cape Town: JUTA) 129-151.

[36] Global Greenhouse Warming, 'Climate Mitigation and Adaptation: Defining Climate Mitigation and Adaptation, <http://www.global-greenhouse- warming.com> accessed 17 May 2023.

[37] Intergovernmental Panel on Climate Change, C*limate Change 2007: Impacts, Adaptation and Vulnerability* (Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change 2007) 51.

(a) That it should take place within a time-frame sufficient to allow ecosystems to adapt naturally to climate change;

(b) That food production is not threatened and;

(c) That economic development should proceed in a sustainable manner

In order to end or reduce the dangers posed by climate change to human life and property, policy instruments and technology must both be adopted within the purview of sustainable development.

Climate change mitigation, therefore, comprises actions to confine the magnitude of long-term climate change.[38] Generally, climate change mitigation consists of reducing human (anthropogenic) emissions of greenhouse gases (GHGs).[39] Mitigation is also achievable by upping the capacity of carbon sinks through reforestation.[40]

Policies on mitigation can effectively bring to the barest minimum the risks posed by human-induced global warming.[41]

The IPCC's 2014 Assessment Report aptly summed it up, 'mitigation is a public good; climate change is a case of the tragedy of the commons.'[42] Enduring climate change mitigation is not achievable if individuals, institutions or countries act independently in furtherance of their selfish interests, suggesting the need for concerted effort. However, some adaptation actions appear like private good as benefits of actions may inure more directly to the individuals, institutions, or countries that carry them out, at least on a short term basis. That notwithstanding, financing such adaptive activities remain an issue, particularly as it relates poor individuals and countries.[43]

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[38] M T Ladan, *Biodiversity, Environmental Litigation and Access to Environmental Justice* (Zaria: Faith Printers 2007) 15.

[39] IPCC, 'Summary for policymakers,' Climate Change 2007: Working Group III: Mitigation of Climate Change, Table SPM.3, C. Mitigation in the short and medium term (until 2030), in IPCC AR4 WG3 2007 <http://www.ipcc.ch/publications_data/ar4/wg3/en/spmsspm.c.html> accessed 17 May 2023.

[40] *Ibid.*

[41] K Lawal, 'Ecology and Culture: Reflections on Environmental Law and Policy in Sub-Saharan Africa' in S Simpson and O Fagbohun (eds.), *Environmental Law and Policy* (Law Centre, Faculty of Law, Lagos State University 1998) 24.

[42] IPCC Fifth Assessment Report, 2014.

[43] D McDonald, *Environmental Justice in South Africa.* Ohio University Press 2002), 32.

Mitigation examples include closing out fossil fuels by embracing low-carbon energy sources, like renewable and nuclear energy and the expansion of forests and other 'sinks' to eliminate huge amount of carbon dioxide from the atmosphere.[44] Energy efficiency also has a role to play, for example, through improving the insulation of buildings.[45]

United Nations Framework Convention on Climate Change 1992

The solidarity principle can be seen in different angels throughout the international climate change framework, buttressing the fact that international cooperation is crucial to the success of any global climate change agreement. However, it is important to highlight a key feature of the climate change framework, owing to the manner in which the principle of solidarity can be seen operating in practical terms.[46]

The principle of 'common but differentiated responsibilities' (CBDR) is predicated on the need for states to cooperate in the spirit of global partnership so as to preserve and protect the ecosystem. In specific terms, the principle holds that 'in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities'.

The implication is that industrialised states should accept the responsibility that is on their shoulder in pursuit of sustainable development and owing to the pressures their societies place on the global environment and of the technologies and financial resources they control.[47] The CBDR principle is a clear example of solidarity harmonising responsibilities for concerted action, in addition to recognizing existing differences within the global community and fast-tracking support and assistance measures.[48]

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[44] C I Obi, 'Political and Social Considerations in the Enforcement of Environmental Laws' in A O Ajomo and O Adewale (eds) *Environmental Law and Sustainable Development in Nigeria* (Lagos: NIALS 1994) 42.

[45] P O Sada and F O Odemerho, *Environmental Issues and Management in Nigerian Development* (Ibadan: Evans Publishers 1998) 12.

[46] A Williams, 'Solidarity, Justice and Climate Law,' [2016] (10) *Melbourne Journal of International Law,* 10-16.

[47] K Dunion, *Troublemakers: The Struggle for Environmental Justice in Scotland* (Edinburgh: Edinburgh University Press 2003) 21.

[48] C Dunn and S Kingham, 'Establishing links between air quality and health: searching for the impossible' [1996] (42) (6) *Social Sciences Studies of Medicine,* 831–841.

The United Nations Framework Convention on Climate Change (UNFCCC) stands for a concerted effort on how to tackle the global menace of climate change. Participating states, however, vary to a large extent on how they contribute to the problem and their capacity to respond. That notwithstanding, a global solution and total participation is non-negotiable if the problem is to be adequately tackled.[49]

Kyoto Protocol 2005

The conference held at the Japanese city of Kyoto in 1997 appeared to be a success since it resulted in an agreement on a document that covers a very difficult subject traversing diverse interests. It represents appreciable progress toward a global consensus on greenhouse gases and by implication, the production and utilisation of energy. However, those at the negotiation table arrived at that achievement only by postponing to subsequent meetings and tackle some questions that the United States considers fundamental.

The United States did not achieve its demand at Kyoto that the largest of the developing countries undertake to certain kind of limitation on emissions. In Congress, there is a wide consensus, including both parties, against any agreement that exclude China, Mexico, and South Korea. There is a growing concern that the restriction on emissions in this country will simply provide an economic stimulus to companies to move industrial production, and the jobs it represents, to sites abroad where those expensive rules does not apply.[50]

The United States is insisting on global trading in emissions rights and on collective implementation. Trading in this context means that any country that is within its limit can sell emissions rights to another country, or to a firm in a country, that is above its limit. Concerted implementation entails that a company in, for instance, Nigeria, desirous of expanding

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[49] V Eady, 'Environmental Justice in State Policy Decisions' in J Ageyman, R D Bullard and B Evans (eds) *Just Sustainabilities; Development in an Unequal World* (London: Earthscan 2003) 10.

[50] C E Akporido, 'Environmental information needs of rural dwellers in oil production communities in Delta State, Nigeria' [2005] (3) (2) *International Journal of Environmental Issues,* 18-25.

and increasing its emissions, can earn the right to do so by investing in reducing emissions elsewhere in the world. However, for this to be a reality, all parties to the deal have to be under emission restriction. Otherwise there will be no yardstick to measure an increase or reduction in emission. The greatest way to cheaply reduce emissions is in the developing countries. That fuels the American interest in moving developing countries into the fray.[51]

In fashioning a template for trade emission rights, the United States experience is evidence that trading will fully utilise the efficiency of emissions reduction. The American legislation to tackle acid rain provided a market in sulphur oxide emissions rights, and this has led to bringing down those emissions at an amount way below what is expected. When this lesson is applied to global warming gases, it will turn out to be good economics.[52]

Conclusion

The activities of man, particularly fossil fuels combustion and the large-scale transformation of land cover, adversely impact on ecosystems globally and alteration in temperature, precipitation, and water chemistry are changing the environment. These changes have equally affected environmental regulatory mechanisms, either making them appear ineffective or coercing them to adapt to attain their goals under changing conditions.

There has been an increase in global temperature over the last century. Climate scientists forecast that the earth should brace up for more increase as a result of the quantum of carbon dioxide that is already dotting the atmosphere. Rise in temperatures have been followed by diverse environmental changes like retreat of sea ice and glaciers, sea level rise, and changes in the intensity and frequency of storms and precipitation events. Rise in the concentration of carbon dioxide has not only altered the composition of the air humans breathe, but it is also adversely impacting the water chemistry. Oceans absorb carbon dioxide, which forms carbonic acid, causing acidiûcation. Climate change frustrates the

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[51] F Daniel and M Peeters, *Climate Change Law* (Cheltenham: Edward Elgar Publishing Ltd, 2016) 28.

[52] T Kaime, *International Climate Change Law and Policy: Cultural Legitimacy in Adaption and Mitigation* (New York: Routledge, 2014) 16.

ambitious goals of the various environmental laws. Climate change has the ability of jeopardising the survival and recovery rates of endangered species and is likely to change hydrologic processes in a manner that is capable of undermining the goal of making available clean, safe water resources. Climate change can also worsen the quality of by increasing the propensity of unhealthy or ecologically-damaging conditions. Nevertheless, it still behoves on environmental law to protect the climate through adequate climate change mitigation laws.

The Consensus Principle of the World Trade Organization and the Interests of Developing Countries: A Legal Evaluation

Anugbum Onuoha[1]
&
Okemdi C. Nnubia[2]

Abstract

The article examines the process of decision-making in the WTO. This consideration was provoked by the attribution of the Doha Round Negotiation impasse to the way the WTO makes decision in addition with the spate of criticism against the WTO and the multilateral Trade Regime. The article attempts to answer the question whether the problem with Doha Round Negotiations lies in the way and manner the multilateral decision is made. The alternatives proposed by scholars to replace consensus and the principle of Single Undertaking were considered. The adoption of any of the alternative may not be the lasting solution to the problem of the WTO. A change of decision making process of the WTO particularly a replacement of consensus rule and the principle of single undertaking is not an antidote to the problem of WTO. The emerging issue in the multilateral trade is that of development particularly in the developing and least developed countries. Economic growth of multilateral trade may not mean the same thing as development but how the negative impacts of global trade could be cushioned is the challenge that could bring lasting solution to the problem of the organization.

Keywords: International Law, WTO, Multilateral Trade, Consensus Principle.

Introduction

What is the problem with Doha trade negotiation, a Round with developmental agenda to correct the imbalance in the multilateral trade

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regime in favour of the developing and least developed countries? It has been argued that the problem lies in the decision-making- process of the WTO.[3] But the question still remains unanswered. Can the problem be solved if decision making process is changed or reformed? This article therefore seeks to examine the decision making process of the World Trade Organization with a view to answering that question.

WTO adopts consensus principle as a decision-making mechanism from the GATT 1947. Consensus means that, 'no member, present at the meeting when decision is taken, formally objects to the proposed decision'.[4] It means therefore that before decision can be taken every member present must support such decision since objection from one member can truncate the whole exercise unless compromise is reached between members.

Consensus principle was successful under the GATT. For over forty- seven years, the GATT sponsored eight rounds of trade negotiations that reduced 'average industrial tariffs among its members from 40 percent to just 3 percent".[5] The last of the round, Uruguay Round 'drafted the far more ambitious WTO agreement'.

The success of consensus principle under the GATT could be traced to three major reasons. The first one is less membership; the GATT began with just twenty-nine contracting members though its membership increased later to 131 countries at the end of the Uruguay

Round. There is no doubt that the organization must have benefited from its fewer membership at the beginning by taking the advantage to reach decisions easily. When members are not many, consensus is easier to reach but when members are many, objection is common; ally and compromise is difficult to come by. The second reason is as a result of the wide scope of WTO rules. After the Uruguay Round of trade negotiation in 1994 and the establishment of WTO in 1995, the rules of WTO extended into so many areas 'that had been outside' the GATT system. Sensitive areas like intellectual property rights, agriculture, textiles and so on are

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[3] J Alvarez, *International Organizations as Law Makers* (Oxford University Press 2010) 14.

[4] Marrakesh Agreement. Article IX. This agreement which was signed in Morocco in 1994 established the World Trade Organization and came to force on first of January 1995.

[5] K Jones, *Who is afraid of the WTO?* (Oxford University Press 2004) 1-18.

now covered.[6] To reach compromise in such sensitive areas became a daunting task.

The result is that, the members now have a greater stake in the outcome of the WTO's negotiation, the aftermath of which decision can no longer be reached easily. The incessant failure of Doha Round negotiations since 2001 could be attributed to that factor. The final reason is that the membership of WTO unlike the GATT now consists of members with different needs and interests. Members with competing interests are desirous to have their respective interests protected, thus making decision by consensus difficult.[7]

The result is catastrophic as a wide spread criticism is hurled not only at the decision-making mechanism but to the entire policies of the WTO. The criticism comes from the protesters who are outsiders, as well as as from the members of the organisation, including its officers. In addition to verbal attacks, the organisation finds it difficult to overcome incessant failure that is stultifying Doha Round Negotiations since it began in 2001.

Decision-Making in International Economic Organizations.

The importance of decision-making by an international organisation cannot be over-emphasised. Decision determines not only the path to which an organization must take, but when and how to attain her objectives. Decision-making is therefore of a great benefit to every international organization. In the past,[8] international organizations made decisions by the rule of unanimity, in order to promote the concept of state sovereignty.[9] The rule of unanimity promotes 'the fundamental principle of traditional international law'[10] and has three important advantages which are the fact that no states will be forced to submit to obligations without her

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[6] D Acemoglu and J A Robinson, *Why Nations Fail: The Origin of Power, Prosperity?* (Crown Publishers 2012) 12.

[7] G T Abed and H R Davoodi, *Challenges of Growth and Globalization in the Middle East and North Africa* (IMF 2003) 7.

[8] Between nineteenth- and early twentieth- century.

[9] M Bacchetta and M Jansen, *Adjusting to Trade Liberalization: The Role of Policy, Institutions and WTO Disciplines* (WTO Publications, 2003) 10.

[10] D V Verenyov, 'An Analysis of Decision- Making Alternatives for the World Trade Organization' [2010] (51) *Buffalo Law Review,* 427-481.

consent,[11] second being the most suitable concept for attainment of sovereign immunity[12] and fast track implementation of decisions when all have consented.[13]

The only exception to the requirement of decision-making by unanimity during that early period was the International Labour Organization (ILO) which used to take decision by majority vote.[14]

The method of reaching a decision by majority vote was popular after the Second World War because it was embraced by the new international organizations established after the war[15] which opted to avoid defects that might be encountered by the rule of unanimity. It was discovered that the rule could lead to a state of 'liberum veto' which could make individual member of the organization to 'block a collective decision'.[16] As a result, a number of disastrous consequences might follow the adoption of unanimity rule.[17] First, the exercise of that power by an individual member is capable of reducing 'the efficiency of international collective action'.[18] Second, by giving an individual member to veto a collective decision, unanimity is regarded to be an enemy of international cooperation[19] thus the traditional contention that it is the best concept to attain equality fell by the way side[20] to the advantage of the majority rule.

However, the popularity of majority rule itself in decision making was possible at the time because of the spirit of fraternity prevailing among

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[11] *Ibid.*
[12] *Ibid.*
[13] D Bhattasali and Others (eds), *China and the WTO: Accession, Policy Reform and Poverty Reduction Strategies* (Oxford University Press 2004) 31.
[14] P V Bossche and I Alexovijc, 'Effective Global Economic Governance by the World Trade Organisation' [2005] (8) *Journal of International Economic Law,* 667-686.
[15] *Ibid,* 670.
[16] A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press, 2007) 26.
[17] Verenyov (n 8).
[18] A D Grant, 'The World Trade Organisation: Revolution in International Dispute Settlement' [1995] (50) *Dispute Resolution Journal,* 73.
[19] *Ibid.*
[20] S Peter and H Van Houte, *Legal Issues in International Trade* (Kluwer Academic Publishers Group 1990).

member states coupled with the influence of the United States and its democratic tenets.[21] That notwithstanding, the majority rule based system endeavors to address the weaknesses inherent in the rule of unanimity. First, it increases 'the institutional efficiency of international collective action'[22] by ensuring 'a pre-determined majority of members' to support concerted decision[23] while 'considerably diminishing the risk' that an individual member could truncate the decision making process.[24] Second, the likelihood of being outvoted in decision making process could actuate a move by the 'obstinate participants' to lead a mutual process for rapprochement.[25]

Thus persuasion becomes the universal tool of decision making as most institutions founded after Second World War 11 adopted the majority rule and weighted voting formulas.[26] A great example is the United Nations ['UN'] Charter[27] which jettisoned the rule of unanimity[28] in total embrace of majority vote[29] while simultaneously retaining the 'one nation –one vote system'.[30]

The recent practice by some international organizations shows a departure from decision-making by majority vote to decision-making by consensus.[31]

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[21] P Collier, *The Bottom Billion: Why the Poorest Countries are Failing and what can be done about it* (Oxford University Press, 2007) 28.

[22] Grant (n 16).

[23] L D Bhagirath, *The Current Negotiations in the WTO: Options, Opportunities and Risks for Developing Countries* (Zed Books, 2005).

[24] S Charnovitz, 'Should the Teeth Be Pulled? An Analysis of WTO Sanctions' in D L M Kennedy and J D Southwick, *Political Economy of International Trade Law: Essays in Honor of Robert E Hudec* (Cambridge University Press, 2002).

[25] *Ibid.*

[26] E Perez, 'Making WTO's Dispute Settlement practicable for Developing Countries' (2003) Paper presented at the Graduate Institute of International Studies, Geneva, 7th March.

[27] U N CHARTER, <http://www.un.org/Overview/Charter/contents.html> accessed 15 May 2023.

[28] B L Das, *The WTO Agreements: Deficiencies, Imbalances and Required Changes* (Zed Books, 1998).

[29] UN Charter 1945, art 18 para. 3 ['Decisions [of the General Assembly] . . . shall [generally] be made by an affirmative vote of nine members . . .

[30] UN Charter 1945, art. 18 para. 1 [Each member of the General Assembly shall have one vote"]; Art.27,para 1 [' Each member of the Security Council shall have one vote"].

[31] P Gallagher and Others, *Managing the Challenges of WTO Participation: 45 Case Studies* (Cambridge University Press, 2005).

Despite the preference for decision-making by consensus, decision-making by majority rule is not in extinction in the international plane, one can then say with certitudes that both mechanisms [decision-making by consensus and by majority vote] are the means by which international organizations do reach decisions today.

However, decision-making process differs from one international organization to another. Even where the same procedure is employed by two organizations, there is great likelihood that the approach to attain the procedure might differ. For example, decision-making by majority vote can be reached through one nation-one vote and can also be achieved through weighted voting system.[32] The difference in decision-making process is because each organization adopts the best method suitable to achieve her objectives. With difference in objectives, there could be no uniformity in decision-making process.

Some of the international organizations with weighted voting system are the World Bank, the International Monetary Fund (IMF) and the European Economic Community (EEC). All those organizations give voting power to member countries, according to the size of their respective quotas. Each member country of the International Monetary Fund has 250 basic votes, with a weighted voting of one additional vote for each part of a country's quota, equivalent to US$100,000.

The World Bank's voting system is similar to that of the International Monetary Fund; each member has 250 basic votes, plus one additional vote for each share of capital equivalent to US$100,000 subscribed.[33]

The EEC's weighted voting is different from that of the International Monetary Fund and the World Bank in the sense that it does not set forth the specific standards by which it can determine the voting strength of its members but instead consider a number of factors such as population, political reality, historical precedent and economic strength.[34]

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[32] S Zamora, 'Voting in International Economic Organisations' [2000] (74) *American Journal of International Law,* 566.

[33] E S Mason and Robert E Ansher, *The World Bank since Breton Woods* (The Broking Institution, 1974) 17.

[34] W N Gianaris, 'Weighted Voting in the International Monetary Fund and the World Bank' [1990-1991] (14) (4) *Fordham International Law Journal,* 910-945.

While it can be argued that weighted voting breed's inequality among member states, the argument in its favour lies in the equilibrium between 'equality before the law' and 'equality of participation and responsibilities'.[35] The maxim is he who pays the piper dictates the tune. Consequentially, members who contribute more by acquiring more shares should have more voting power. In addition, the major contributors to the World Bank and International Monetary Fund demanded for a strong voice in the decision making process so as to safeguard their investment in the system.[36]

Decision-Making Process in the WTO

It is important at this juncture, to explain the meaning of decision- making in order to avoid misconception, because words have different meanings depending on the context in which they are used. Decision- making here means the process by which WTO reaches decision or resolve issues concerning the conduct of trade negotiations and the management of the trading system. It does not include dispute settlement since that is judicial and not managerial. Therefore, the issues to be discussed here are the Consensus principle, the Single Undertaking and the "Green room".

The Rules for Decision-making

The Marrakesh Agreement37 establishing the WTO provides that the WTO shall continue the practice of decision-making by consensus, which was the usual practice under the General Agreement on Tariffs and Trade [GATT][38] 1947. Article IX of the WTO makes it clear that the process of decision-making is by consensus.

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[35] Z Stephen, 'Voting Rule in International Economic Organizations' [1999] (74) (3) *American Journal of International Law,* 566-608.

[36] Stephen (n 33).

[37] The World Trade Organization is responsible for development of an integrated multilateral trading system in the world. It came in to existence officially on Jan 1 1995 under the Marrakesh Agreement which replaced the General Agreement on Tariffs and Trades [GATT] <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf> accessed 15 May 2023.

[38] General Agreement on Tariffs and Trade is a set of multilateral trade agreements negotiated under the UN Conference on Trade and Employment by 23 countries at Geneva in 1947 [to take effect on Jan1 1948] It was later replaced by the WTO in 1995.

The term consensus is defined as the absence of objection by any member present to the 'proposed decision'.[39] This definition has been described as 'obstruction principle'[40] this is because it suggests the likelihood of no decision, if there is objection, whether the objection is meaningful or not. It creates a room in which one member can veto or block the proposed decision by its objection.

One must note that consensus is not the same as unanimity since consensus does not take in to consideration the views of those who are absent at the meeting.[41] Presence at the meeting is essential for a member of the WTO to be involved in the decision-making process. If there is no consensus because there is objection to the proposed decision, an alternative provision is made for voting[42] as recourse to settle the stalemate and determine what would be the decision of the organization. In spite of the statutory provision for recourse to voting as antidote to resolve objection and determine the fate of proposed decision, WTO decisions are taken by consensus and not by voting.[43]

Decision-making by the Ministerial Conference and the General Council shall be taken by majority of the votes cast. For that purpose, each member of the WTO shall have one vote. This gives equality to each state without favoritism to anyone. To prevent a situation by which EU can take advantage of other members who are not members of the Union in decision making process of the WTO, the agreement provides that in circumstances where the European Communities use their right to vote, they shall be entitled to "a number of votes equal to the number of their member states" in the WTO.[44]

When a proposal to amend the provisions of the Marrakesh Agreement or the Multilateral Trade Agreement is submitted to the Ministerial

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[39] Marrakesh Agreement, art XI.

[40] G Claude, 'Inconsistency between Diagnosis and Treatment' [2005] *Journal of International Economic Law* 291, 295.

[41] H Jiaxing, 'The Role of International Law in the Development WTO Law' [2004] *Journal of International Economic Law,* 143.

[42] Marrakesh Agreement, art IX.

[43] A Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices* (Cambridge University Press, 2001) 10.

[44] Marrakesh Agreement, art IX.

Conference, the members of the conference shall decide by consensus whether or not to refer the proposed amendment to the whole members for acceptance.[45] That is a preliminary decision that must be made first before anything else is done. If consensus is not reached on the issue within 90 days after the proposal has been formally received by the Ministerial Conference, then, the Ministerial Conference will resort to voting and decision shall be made by a two- third majority of the members.[46]

Decisions to adopt interpretations of the WTO Agreement including those multilateral trade agreements and decisions to grant a waiver to a WTO member shall be taken by three-fourths of the members[47] while the Ministerial Conference approves the accession agreement by a two-third majority of the members.[48]

Amendment is important in any organization. It corrects the existing past rules to meet the standard of the present but despite the usefulness of amendment it should be done with caution.[49] This is because amendment can be categorized into two. Some are fundamental, some are minor. The fundamental amendment can affect the existing rights and obligations of the members while the minor one does not have such effect. It is understandable and reasonable that the WTO agreement takes note of that fact in deciding when and how the amendment accepted by the members will take effect.[50]

The agreement provides that any amendment that is of nature that would alter the rights and obligations of members shall become effective to only members who have accepted them notwithstanding the fact that such amendment has been accepted by the two-third of the whole members of the WTO.[51] The consequence of that provision is that enforcement of an amendment on any member will depend upon the

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[45] *Ibid,* art X: 1.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid,* art XII:2.
[49] B M Hoekman, *Development, Trade, and the WTO* (World Bank, 2002).
[50] S Lester and Others, *World Trade Law; Text, Materials and Commentary* (Hart Publishing, 2008) 22.
[51] Marrakesh Agreement, art X:3.

member's consent and the consent of such member will be determined by its acceptance of the amendment. It also means that there is no uniformity as to when an amendment is binding on all members of the organization.[52]

A situation in which the effect of an amendment to members will not take place at the same time, if some members have not accepted them may not augur well for the organization if such an amendment touches the fundamental objectives of the organization. As a result of that consciousness, the agreement gives power to the Ministerial Conference to look in to the nature of the amendment and decide whether any member who has refused to accept the amendment within the time specified should be allowed to withdraw or still remain a member. In such instance, to remain as a member, the consent of the Ministerial Conference is needed.[53] In any case, [either to withdraw or to remain] the Ministerial Member shall take decision by a three-fourths majority of the members.[54]

That power given to the Ministerial Conference to determine the fate of members who have not accepted the amendment is 'extraordinary' and it is capable of influencing the decision of the WTO members, although the Ministerial Conference may not likely be disposed to exercise such power regularly.[55]

This is also because the issue of WTO interpretations is not designed to be taken regularly.[56] It must be taken with utmost caution. In fact, for forty-eight years of GATT, there were only six amendments and since 1995 when the WTO came into existence, there has not been any amendment or a single interpretation.[57]

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[52] M J Schoenbanum and C. Mavroidisr, *The World Trade Organization-law, Practice and Policy* (Oxford University Press, 2004) 34.
[53] Marrakesh Agreement, art X.
[54] *Ibid.*
[55] *Ibid,* art 11.
[56] *Ibid.*
[57] *Ibid.*

'Green Room', as a Path to Trade Negotiations

The Trade Negotiations Committee oversees the conduct of the WTO negotiation under the authority of the General Council.[58] However to ease the burden of decision making process among members, various techniques have been devised to reduce the number of participants in the deliberation.[59] One of such devices is an informal negotiation called Green Room negotiation which is adopted to ensure speedy decision-making. By this system, small group of members meet in an unofficial atmosphere to decide on contentious issues and once agreement is reached among them, they attempt to forge consensus by selling the outcome to the whole members as if the decision was made by all. There shall be a full discussion on the criticism and justification of this system in the next part.

Another means by which WTO facilitates decision making is by resorting to a plurilateral agreement[60] instead of a multilateral agreement which is a better strategy to compromise decision making when consensus could not be reached. In addition, members can negotiate to reduce their binding duties or their commitments in the WTO Agreement provided that the diversity of individual participating countries is taken in to consideration.[61]

The Single Undertaking as Mechanism of Negotiations

Single Undertaking is a principle of decision making in the WTO which endeavors to treat all separate items of negotiation as a whole to the extent that consensus must be reached on all items for there to be an agreement.[62] Its use in the global trade dates back to the launch of the Kennedy Round in the 1960s[63] and reverberates in the Tokyo Round[64]

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[58] Doha Ministerial Declaration, para 46. <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> accessed 15 May 2023.

[59] B M Hoekman and Others, *The Political Economy of the World Trading System* (Oxford University Press, 1995) 11

[60] They have few signatories and members of the WTO who are not its signatories and are not bound by its provisions.

[61] GATT, art XXVIII.

[62] P Gallagher, *Guide to Dispute Settlement* (Kulwar Law International, 2002) 19.

[63] R Wolfe, 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor' [2000] (12) (4) *Journal of International Economic Law,* 835-858.

[64] C Grasstek and P Sauve, 'The Consistency of WTO Rules: Can the Single Undertaking be squared with variable Geometry? [1997] (9) (4) *Journal of International Economic*

and the Uruguay Round negotiations.[65] In fact, the principle of Single Undertaking was explicitly enunciated in the ministerial declarations that launched both Uruguay and Doha Rounds.[66] The consequence is that 'a seemingly inconsequential issue of value to only a few countries' could stultify the whole decision making process and 'prevent subsequent negotiations to go forward'.[67]

Critiquing the Decision-Making Process

WTO has attracted a lot of criticism not only on how its decisions are reached but for its decisions and what it stands for. The criticism comes not only from the outsiders but also from the insiders; the academicians, the non-governmental organizations, the developing country members and the protestors who used to carry placards and protest outside at every trade meeting.

Criticism of such magnitude should not be treated with levity. There is hardly any trade meeting of the WTO without a protest from the public: The 1998 Geneva and 1999 Seattle Conferences were disrupted by massive street protests staged by a non-ranged of non- governmental groups .In 2001, the organization sought for refuge at Qatari capital of Doha [as the venue of the meeting] where protest is not usually allowed but the result was the same.[68] The Cancun conference of 2003 followed the same pattern

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Law, 837-864; A Lanoszka, 'The Promises of Multilateralism and the Hazards of Single Undertaking: The Breakdown of Decision Making within the WTO' [2012] (16) *Michigan State Journal of International Law* 655-675 – the author notes that 'the principle of Single Undertaking was first adopted in the attempt to clean up the muddled post-Tokyo Round set of Codes that GATT Contracting Parties could pick and choose to sign in'.

[65] R Wolfe, 'Global trade as a Single Undertaking: The role of ministers in the WTO' [1996] (6) *International Journal of Trade,* 691-711.

[66] The 1986 Punta del Este Declaration that launched Uruguay Round provides that 'The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a Single Undertaking' while paragraph 47 of the Doha Ministerial Declaration states: 'the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking '.

[67] Taniguchi, 'The WTO Dispute Settlement as Seen by a Proceduralist' [2009] (6) *Cornel International Law Journal,* 1.

[68] J Lacarte-Muro and G Pettina, 'Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench' [2015] (9)(1) *Journal of International Economic Law,* 89.

but with a bizarre tragedy when a Southern Korean farmer, Kun Hai Lee, took his life in protest of the WTO policies.[69]

Similarly, the WTO meeting in Hong Kong in December 2005 witnessed what could be described as the closest protest to the venue of the WTO conference as protesters forced themselves to the venue of the conference.[70] Furthermore, there was huge protest in front of the WTO headquarters on the 1st of October 200571 and on the 17th of April 2007; the Pakistan farmers could not but carried placards against the WTO.[72] From Quarter in 2001 to Potsdam in 2007, it is protest galore against the WTO by the people.

But protest could have been ignored as unavoidable if there is progress in the organization; at least, on the pretext that wide acceptability without any opposition from some quarter is a mirage. However, this is not so for the WTO, decision becomes difficult to reach as every negotiation turns to deadlock and the organization could not forge ahead.

The Doha Round negotiations in November 2001 could not produce result, the 2003 Cancun negotiation which was "intended to forge concrete agreement on the Doha Round objectives collapsed after four days" because there was no agreement on farm subsidies and access to markets,[73] the Geneva negotiation in 2004, Paris and Hong Kong trade talks in 2005, Geneva in 2006 and Potsdam in 2007 all ended in failure and consensus could not be reached on Doha "Development" Agenda till 2010. What a catalogue of failure to a round that was scheduled to conclude in 2005!

Alternative to Consensus

Many scholars have posited that the greatest problem of the WTO is the consensus rule in Article IX which could lead to paralysis and deadlock.[74]

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[69] Q Asif, 'Interpreting WTO Agreements for the Development Objective' (2016) paper presented at ICTSD conference <http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf> accessed 16 May, 2023.

[70] *Ibid.*

[71] M E Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement' [2001] (35)(1) *Journal of World Trade,* 55-98.

[72] *Ibid.*

[73] Footer (n 69).

[74] John H Jackson, 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited' [2001] (4) *JIEL,* 67.

In addition, the consensus rule and the principle of Single Undertaking have been fingered as the major cause of the Doha stalemate.[75] But consensus is not without an alternative in the WTO; if consensus could not be reached, the members should resort to voting but the likelihood of voting its self is a mirage due to this principle of consensus.[76]

Effort is made to facilitate consensus by using the Green room meetings where only few members could participate. Unfortunately, developing countries which could have benefited greatly from the voting system because of their number become the victims of consensus principle as many of them are excluded from the Green room meetings.

Apart from the fact that the exclusion of developing countries is a constrain to participation in decision making, the working pattern of the WTO contributed immensely in alienating developing countries from decision making of the organization. The ignorance of the working rules of the WTO and lack of financial capacity to meet obligations and commitments in the organization are problems that put developing countries at the backside of decision making.[77]

Consequentially, the decision making of the WTO through consensus attracts a lot of criticism from all and sundry as it has been discussed in this article. Perusing the criticism hurled against the WTO, it is obvious that the standard for assessing the organization on the issue of decision making is concepts of governance. The decision making process is said to be undemocratic, not transparent and unfair. It is alleged that WTO is not accountable to the people and the organization violates sovereignty of the members.[78]

Indeed, this study has article that consensus- based decision- making system could not be said to be democratic nor transparent or fair; meetings

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[75] C Ehlermann and L Ehring, 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organisation Adequate for Making, Revising and Implementing Rules on International Trade?' [2005] (8) *JIEL,* 51.

[76] Marrakesh Agreement, art IX.

[77] U H Manni and M N Ibn-Afzal, Effect of Trade Liberalization on Economic Growth of Developing Countries: A Case of Bangladesh Economy' [2012] (1) (2) *Journal of Business, Economics and Finance,* 22.

[78] H M Herath, *Impact of Trade Liberalization on Economic Growth of Sri Lanka: An Econometric Investigation* (Wayamba University Press of Sri Lanka 2010) 34.

are held in the green rooms without the participation of developing member countries who are longing to be involved in such meetings.[79] Everything about the meeting from invitation to agenda and proceedings remains mysterious to majority of the members and yet once decisions are made from such meetings, the next thing is to sell the outcome to the whole members through consensus and "peer pressure"[80] in form of proposal and all agenda must be taken as Single Undertaking.

Though the developing members could oppose such proposal, the fear of open confrontation to policies supported by developed countries makes them to remain silent.[81] The outcome of silence means there is no objection and therefore consensus is reached but it is doubtful if that process is democratic.

That is not to say the system is of no value. To reach an agreement between many members with diverse interests in an organization like the WTO may be a difficult task if not impossible. Consensus is essential as a ploy to reach agreement and that can be archived through compromise. If members are divided in to smaller units, it will be easier for them to reach an agreement. That is the idea of the Green room meetings but the criteria for selection of participants for the meetings and the secrecy which used to attend the meeting leave much to be desired. Furthermore, if the principle of single undertaking is not employed, the whole idea of a unified multilateral rule may give way to plurilateral rule as members indulge in 'cherry-picking' as to which agreements to adopt and the one to shun.

It has been suggested by Cottier and Takenoshita that the adoption of weighted voting could be antidote to the problem of reachin consensus in the WTO negotiations.[82] Hufbauer explains further that the adoption of a weighted formula is inevitable if obstacle to decision making placed

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[79] F Jawara and A Iawa, *Behind the scenes at the WTO the real World of internal negotiations the lesson of Cancun* (Zed Books .2003) 201.

[80] For example, peer pressure was a key element in forging agreement in Doha.

[81] A H Khan, 'The Impact of Trade Liberalization on Economic Growth in Pakistan' [2012] (3) (1) *Interdisciplinary Journal of Contemporary Research in Business,* 13.

[82] T Cottier and S Takenoshita, 'Decision-Making and the Balance of Powers in WTO Negotiations: Towards Supplementary Weighted Voting' in S Griller (ed) *At the Crossroads: The World Trading System and the Doha Round* (Springer 2008) 181.

by the majority of members who have not more than 10% of the world trade will be checked.[83]

The truth of the matter is that voting whether weighted or not will produce result but the outcome of the result is widely a "win-or-lose" situation which is not the best for an international organization like WTO where all members are supposed to be equal. Consensus is preferable because there is no "losers who lose face".[84] Decisions that emanate from such system tends to be of wide acceptance and mutually satisfactory.[85]

In addition, the criticism that consensus system allows developed countries to control the process could be mitigated by the developing countries making use of the power they have to block any proposal which is inimical to their interests.[86] In this respect, findings have shown that the developing countries have changed their lukewarm attitude during the early years of the WTO and are now participating very well at the General Council meetings.[87]

However, in order to improve the quality and legitimacy of their participation, the developing countries must carry their citizens along through effective consultation and periodic feedback. The approach of India on this issue calls for attention of all developing countries:

> . . . the rights and obligations arising from the WTO agreements and to evolve the position of India in negotiations under the Doha Work Programme, . . . Periodically, seminars, workshops and symposia are held with interested parties with the cooperation of the WTO secretariat, the UNCTAD, ESCAP and other multilateral bodies, universities and industry associations. The Department of Commerce website has a separate web page on "India and WTO", which explains provisions of the agreements and updates the stakeholders on the status of the negotiations . . . India has been engaged in

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[83] G C Hufbauer, 'Inconsistency Between Diagnosis and Treatment' [2005] (8) *Journal of International Economic Law,* 291, 296.

[84] Dmitri Vereyou, 'Vote or Lose; an analysis of decision-making Alternatives for the WTO' [2003] (17) *Buffalo Law Review,* 13.

[85] C Dieter and L Ehring. 'Is the consensus Practice of the WTO Adequate for making, Revising and Implementing International Trade?' [2005] *Journal of International Economic Law,* 51.

[86] A H Khan, 'The Impact of Trade Liberalization on Economic Growth in Pakistan' [2012] (3) (1) Interdisciplinary Journal of Contemporary Research in Business, 13.

[87] *Ibid.*

> the WTO negotiations to ensure that its core concerns and interest continue to be adequately addressed at each stage of the negotiations."[88]

What amuses one is that despite the opposition against consensus, proposal for its replacement only comes from the academics while majority of developing and developed countries still want it to be retained.[89] When a proposal was made for the establishment of a WTO parliamentary body to be a decision making organ which will include representatives from parliaments of all WTO members as well as WTO delegates, the WTO Secretariat and political representatives in national capitals,[90] developing countries went against it contending that addition of a parliamentary dimension would add to their burden, exacerbating the disadvantages that they already face in WTO negotiations on account of resource asymmetries.[91]

Though the parliamentary body is expected to foster deliberation among parliamentary representatives at the international level so that they can better understand the constituencies of the WTO and national trade related policies,[92] there is no doubt that the proposal is not the most appropriate means of resolving the issue of transparency. Another proposal was made for an Executive Board like that of International Monetary Fund to facilitate consensus among members and be a substitute to the most dreaded green room meetings.[93] It was argued in support of the proposal that it could be the most promising mechanism for balancing decision-making efficiency and the requirement of consensus[94] but opposition also came from the developing countries who argued that 'decision- making needs to be

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[88] D Greenaway and Others, 'Trade Liberalisation and Growth in Developing Countries' [2002] (67) *Journal of Development Economics,* 229-244.

[89] *Ibid.*

[90] G Shafer, 'Parliamentary Oversight of WTO Rule-making; the Political, Normative, and Practical Contexts' [2004] (7) *Journal of International Economic Law,* 629.

[91] C C Wigwe and I F George, 'Developing Trade Liberalisation and Removal of Inequalities in the West African Market: An International Economic Law Dimension' [2018] (4) (1) *Port Harcourt Journal of Business Law,* 1-10.

[92] Loayza and Others, 'Macroeconomic Volatility and Welfare in Developing Countries: An Introduction' [2010] (21) (3) *World Bank Economic Review,* 343-357.

[93] D Irwin, 'Comparative Advantage in International Trade: A Historical Perspective' [2000] (22) (4) *Journal of the History of Economic Thought,* 515-516.

[94] G Feketekuty, *International Trade in Services: An Overview and Blueprint for Negotiations* (The American Enterprise Institute, 2000).

member-driven rather than board-led, and that the full participation of members is fundamental to trust and confidence in the functioning of the organization as a member-driven-intergovernmental entity.'[95]

Another suggestion was made by Jackson, who advocated a critical mass decision making, an idea which could prevent members from blocking consensus 'when a critical mass of countries supports a proposed change',[96] The corollary is that the outcome of decision making emanating from critical mass action can hardly be different from that of the weighted voting because some members shall loose face though unlike weighted voting the ground of being discarded will not be on trade strength.

In the light of all this, it can be opined that the position of members to retain consensus is reasonable in the sense that it could stabilize the competing interests in the WTO; Developing countries will be protected from the possible block vote from developing countries and the developing countries will not be presented with irreversible accomplishment as it is presently being done. The fact is that consensus protects all members depending on the situation and the status they find themselves.[97]

Conclusion

A change of decision making process of the WTO particularly a replacement of consensus rule and the principle of single undertaking is not an antidote to the problem of WTO. No doubt, the present decision making process needs to be reformed; total replacement is not a guarantee of public acceptability or an easy ride to consensus in the present or future WTO negotiations.

The emerging issue in the multilateral trade is that of development particularly in the developing and least developed countries. Economic growth of multilateral trade may not mean the same thing as development but how the negative impacts of global trade could be cushioned is the challenge that could bring lasting solution to the problem of the

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[95] *Ibid.*

[96] S P Anderson and N Schmitt, 'Non-tariff Barriers and Trade Liberalization' [2003](41) (1) *Economic Inquiry,* 80-97.

[97] P Auerbach, 'Firms, Competitiveness and the Global Economy' in M Mackintosh and Others (eds) *Economics and Changing Economies* (London Open University) 393-425.

organization. Reaching agreements through weighted voting will not solve the problem. The Doha Round launched in November 2001 is capable of transforming the organization if the aspects of the negotiations that touch development to the developing and less developed countries are not distorted. The essence of global trade governance is to create an enabling environment for countries to grow and develop. If all members of the WTO are committed to this ideal, to arrive at consensus will not be difficult despite divergent interests.

Rethinking Voting Age in Elections in Nigeria Under the Electoral Act, 2022: A Comparative Analysis

Preseley Efe Idahosa[1]

Abstract

Globally, electing political leaders into various offices in a country is seen as a very serious business and one that should be participated in by those citizens and inhabitants who are legally qualified to do so. This paper, adopting the doctrinal and comparative research methods or approaches, appraises the current voting age in Nigeria which is statutorily pegged at 18 by the Electoral Act, 2022 and the positions in such jurisdictions like Argentina, Austria, Germany, Brazil, Cuba, Scotland, Wales, Ecuador, etc. This paper finds that in many of the other jurisdictions examined, the voting age has been reduced to either 16 or 17, and in some, voting has been made mandatory with regard to specific elections and specific posts. It is the contention and conclusion of this paper that Nigeria has lessons to learn from the countries examined herein with regard to voting age and voting cum electioneering policies. On the whole, the paper advocates a reduction in the current age of 18 to 16 years as practised in the jurisdictions examined. It further recommends the possibility of extending franchise to all students of tertiary institutions of learning even though they may be less than the statutory voting age herein canvassed, all persons who are gainfully and legitimately employed in the private or public sector, and all those artisans who are now masters in their various trades.

Keywords: Voting age, Elections, Nigeria, Electoral Act.

Introduction

The right to participate in elections by any person, who has attained the requisite age and requirements, is one of the basic rights he enjoys as a bona fide citizen of a country.[2] By international standard, both men and

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[2] F. C. Uwakwe and T. W. Nwoke, 'An Appraisal of the Rights of Women to Participate in

women, old and young, have equal rights in the eyes of the law to everything including participating fully in elections.[3] They equally have right to freedom of association and can belong to any party of their choice.[4] The right to assemble and associate peacefully is guaranteed to every citizen of Nigeria by the Constitution of the Federal Republic of Nigeria, 1999 (as amended).[5] Electoral participation by eligible Nigerians begins with the biometric data capturing and registration of voters during Continuous Voter Registration (CVR) exercise conducted by INEC[6] (Independent National Electoral Commission) established by both the 1999 Constitution[7] and the Electoral Act, 2022.[8]

It is hereby submitted in line with the wordings of section 1 (2)[9] of the Constitution of the Federal Republic of Nigeria (as amended) that voting and elections have since become veritable tools and legally accepted means used in engendering constitutional change of governments in modern democracies globally. Elections are a means of making popular voices heard and of putting practical effect to the description of that political form as government of the people, by the people and for the people.[10] In liberal democratic theory, an election is a viable mechanism for consummating representative government and voting is the main form of political participation in democratic societies.[11] Elections in democracies help to promote representation of popular will and to secure legitimacy

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an Election underthe Nigerian Electoral Laws' [2022] (6) (1) *African Journal of Law and Human Rights (AJLHR)*; 168.

3 *Ibid.*

4 *Ibid.*

5 Constitution of the Federal Republic of Nigeria, 1999 (as amended), s. 40.

6 O. E. Olubusoye, O. J. Akintande and E. A. Vance, 'Transforming Evidence to Action: The Case of Election Participation in Nigeria' <https://pdf.usaid.gov/pdf_docs/PA00Z332.pdf>Accessed May 16, 2023.

7 Constitution of the Federal of Nigeria, 1999 (as amended) s 153(1)(f).

8 Electoral Act, 2022, s 1.

9 It provides that: 'The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.'

10 B. Ugochukwu, 'Ballot or Bullet: Protecting the Right to Vote in Nigeria' *African Human Rights Journal* http://www.scielo.org.za/pdf/ahrlj/v12n2/10.pdf Accessed 11 May 2023.

11 E. F. Obani and B. H. Odalonu, 'Election and Voting Behaviour in Nigeria' [2019] (5)(1) *South-East COEASU Journal of Teacher Education;* 122.

of the political system.[12] Because of the primacy of voting and elections in birthing legitimacy in political governance, a discussion of the capacity and age for participating in the electoral process of deciding who leads or occupies political offices becomes imperative.

Prior to the Second World War of 1939-1945, the voting age in almost all countries was 21 years or higher. In 1946, Czechoslovakia became the first state to reduce the voting age to 18 years[13] and by 1968, a total of 17 countries had lowered their voting age, of which 8 were in Latin America, and 8 were communist countries.[14] Many countries, particularly in Western Europe and North America, reduced their voting ages to 18 years during the 1970s, starting with the United Kingdom (Representation of People Act, 1969), Canada, Western Germany (1970), the United States (26th Amendment, 1971), Australia (1974), France (1974), Sweden (1975) and others.[15] It was argued that if young men could be drafted to go to war at 18, they should be able to vote at the age of 18.[16] By the end of the 20th century, 18 had become by far the most common voting age. However, a few countries maintain a voting age of 20 years or higher, and a few countries have a lower voting age of 16 or 17.[17]

In the late 20th and early 21st centuries voting ages were lowered to 18 in Japan, India, Switzerland, Austria, the Maldives, and Morocco. The vast majority of countries and territories have a minimum voting age of 18-years-old as of October 2020.[18] According to data from the ACE Electoral Knowledge Network, 205 countries and territories have a minimum voting age of 18 for national elections out of 237 countries and territories the organisation has data on as of October 2020.[19] As of the aforementioned date, 12 countries or territories have a minimum voting age of less than 18, with 3 countries or territories at 17-years-old, and 9 countries or territories at 16-years-old.[20] 16-years-old is the lowest minimum age globally for national elections; while the highest is 25-years-old which is

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12 *Ibid.*
13 <https://en.wikipedia.org/wiki/Voting_age> Accessed 11 May 2023.
14 *Ibid.*
15 *Ibid.*
16 *Ibid.*
17 *Ibid.*
18 *Ibid.*
19 *Ibid.*
20 *Ibid.*

only the case in the United Arab Emirates (UAE).This age of 25 was also the case in Italy for Senate (upper house) elections until it was lowered to 18 in 2021. Italy's lower house of Parliament, the Chamber of Deputies, has had a minimum voting age of 18 since 1975, when it was lowered from 21.[21]

Since modern democratic transitions in any political system strive on elections and voting, an appraisal of the voting age in the 21st century Nigeria becomes pertinent.

Historical Overview of Elections and Voting in Nigeria

Generally, elections in Nigeria started in 1923 following the direction of a British colonial administrator (Hugh Clifford) Clifford) through a legislative Act known as the Clifford Constitution.[22] However, considering the diversity of people, groups and different cultures confined within the Nigerian borders, the different tribes and tongues as well as the colonial authorities that dominated the Western, Eastern and Northern regions of Nigeria, the people were offered vastly different suffrage qualifications.[23] For instance, it was only adult males who accumulated a minimum income of £100 in the year preceding the election, who were residents of Lagos or Calabar for at least one year, who were above the age of 21 and who were British subjects or natives of the Nigerian protectorate that were granted suffrage under the Clifford Constitution.[24] In 1923 when election was introduced via the Clifford Constitution of 1992 to 1953, no woman had the right to participate in election in Nigeria. It was only in 1954 that women of the Eastern and Southern regions were also granted the right to participate in election under the Lyttleton Constitution.[25]

In 1979 however, the women of the Northern region were granted the suffrage under the Constitution of the Federal Republic of Nigeria (1979).[26]

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[21] *Ibid.*

[22] T. Takena 'Governor Clifford and Representative Government' [1967] (4) *Journal of the Historical Society of Nigeria;* 117-124

[23] E. Ezinge 'The Right to Vote in Nigeria: A Critical Commentary on the Open Ballot System' (1994) (38) (2) *Journal of African Law;* 173-180.

[24] J. A. A. Ayoade, 'Electoral Laws and National Unity in Nigeria' [1980] (23) (2) *African Studies Review;* 39.

[25] L. Oke, 'Democracy, Women's Political Participation and the Policy Environment in Nigeria' [2015] *Developing Country Studies;* 5.

[26] E. Azinge, op. cit.

The voting age more so, was lowered to 18 and the citizens of Nigeria were included in presidential elections. Being under serious pressure from parties such as the Women's Movement of Nigeria (WN) and the Women Wing of the Action Group (AG), Nigeria and the British colonial government passed through series of constitutional Conferences in order to ascertain the methods through which elections would be framed post-British colonialization.[27]

The Lyttleton Constitution of 1954 afforded tax- paying Southern Nigeria women the right to participate in elections.28 However, owing to the fact that many women did not pay taxes, the female electoral base was abysmally curtailed.[29] The Women Movement, notably including its president (Elizabeth Adekogbe), argued for universal suffrage excluding the tax requirement in order to expand the electoral process by voting or running for office.[30] It was, however, only after the military coups of 1966-1978 that true universal suffrage was granted under the 1979 Constitution of Nigeria. Since the return to democracy in 1999, Women have been participating in elections in Nigeria. The 1999 Constitution of Nigeria guarantees gender equality and no one is discriminated upon by reason of sex, tongue, tribe, etc.[31]

From the foregoing historical accounts, and as submitted by one writer,[32] colonialism affected Nigerian women adversely as they were denied the franchise. It was also only in the 1950s that women in Southern Nigeria were given the franchise.[33] Three women were appointed into the House of Chiefs, namely Chief (Mrs.) Olufunmilayo Ransome Kuti (appointed into the Western Nigeria House of Chiefs); Chiefs (Mrs.) Margaret Ekpo and Janet Mokelu (both appointed into the Eastern Nigeria House of

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[27] S. Panata, 'Campaigning for Political Rights in Nigeria: The Women Movement in the 1950s' [2016] *Women, Gender, History;* 175-185.

[28] L. Oke, *op. cit.*

[29] J. A. A. Ayoade, *op. cit.*

[30] S. Panata, *op. cit.*

[31] See Constitution of the Federal Republic of Nigeria, 1999 (as amended) s 42 (1) (a) (2).

[32] O. Oluyemi, 'Monitoring Participation of Women in Politics in Nigeria'https://unstats.un.org/unsd/gender/Finland_Oct2016/Documents/Nigeri a_paper.pdf > Accessed 16 May 2023.

[33] *Ibid.*

Chiefs).[34] The women's wings of political parties possessed very little functional relevance.[35]

Conceptualization of Election

As opined, by one writer,[36] the founding pillars of any democratic political system, whether considered fragile or established, remain undoubtedly elections which can simply be taken as the most critical and visible means through which all citizens can peacefully choose or remove their leaders, and which are evidently costly affairs.[37] In other words, elections are the principal instruments that 'compel or encourage the policy-makers to pay attention to citizens.[38] Indeed, the winning political party of the elections, or ruling party, is conceived as holding temporarily the mandate of the entire citizenry, only in so far as it continues to win elections.[39]

Elections are the central institution of democratic representative governments.[40] Because in a democracy, the authority of the government derives solely from the consent of the governed.[41] The principal mechanism for translating that consent into governmental authority is the holding of free and fair elections.[42] All modern democracies hold elections.43 Jeane Kirkpatrick, scholar and former U.S. ambassador to the United Nations, has offered this definition:

> Democratic elections are not merely symbolic . . . They are competitive, periodic, inclusive, definitive elections in which the chief decision-makers in a government are selected by citizens who enjoy broad freedom to criticize government, to publish their criticism and to present alternatives.[44]

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[34] *Ibid.*
[35] *Ibid.*
[36] B. Mesfin, 'Democracy, Elections & Political Parties: A Conceptual Overview with Special Emphasis on Africa' <https://www.files.ethz.ch/isn/98951/PAPER166.pdf> Accessed 31 May 2023.
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*
[40] See < https://usa.usembassy.de/etexts/gov/democracy-elections.htm> accessed 23, May, 2023.
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*

According to Nwagboso Chris Iwejuo,[45] 'Election is the process of choosing a person or a group of people for a political position through the instrumentality of voting.'[46] It is an indispensable attribute of democracy in every well-intentioned society.[47] Most social and political groups like Nigeria often times adopt election as a means of selecting their leaders and policy makers.48 Elections, therefore, are central institutions of democratic representative governments. Election in most democratic states is usually conducted by an institution set up by law.[49] Quoting the Vanguard of 13 February, 2009, a learned writer has posited that 'Free and fair elections are the cornerstone of every democracy and primary mechanism for exercising the principles of sovereignty of the people. Through such elections, citizens participate in the governance of their country, by choosing those who govern in the quest for development.'[50]

On his part, Ayoade defines elections as the means by which the general public determines the people who govern them and the policies under which they are governed.[51] There is a strong link between elections and democracy.[52] We view elections as the legally and statutorily backed and recognised means of periodically choosing aspirants and candidates for political offices in a democracy. They are a means through which the qualified electorates register their likes and dislikes over candidates vying for elective positions in countries and societies governed by democratic tenets.

The word 'election' has equally been conceptualized by the Nigerian judiciary. The term as used in section 137(1) (b) of the Constitution of

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[45] Nwagboso Chris Iwejuo, 'Elections and Electoral Tribunal in Nigeria' [2011](5)(2) *African Research Review: An International Multi-Disciplinary Journal, Ethiopia,* 43.

[46] *Ibid.*

[47] *Ibid.*

[48] C. E. Ibe and U. H. Onyekachi, 'Proving Substantial Non-Compliance in Election Petition Under the Nigerian Electoral Act: A Mirage or a Reality?' <https://www.nigerianjournalsonline.com/index.php/ACARELAR/article/downloa d/1702/1664? cf_chl_tk=hoDJFdPm_FZk.wJiWr4HR3QheyIQuTkfiXcJitZDVRA-1684858960-0-gaNycGzNC7s> Accessed 23 May, 2023.

[49] *Ibid.*

[50] Nwagboso Chris Iwejuo, *op. cit.*

[51] M. A. Ayoade, 'The Legal Framework for E-voting System in Nigeria '[2009] (1)(1) *Ambrose Alli University Law Journal,* 1.

[52] *Ibid.*

the Federal Republic of Nigeria 1999 (as amended) has been broadly interpreted by the Court of Appeal in Progressive People Alliance (APP) v. Sariki[53] to mean the "process of choosing by popular votes a candidate fora political office in a democratic system of government."

It cannot refer exclusively to the polls.The casting of votes by the electorates on the day of the polls is just part of the electoral process.[54]

There is no doubt, from the foregoing definitions, that free, fair, credible and periodic elections conducted and monitored by fearless and independent electoral institution are the hallmarks of true democracy. As rightly noted, free and fair elections are the keystone of any democracy.[55] They are essential for the peaceful transfer of power.[56] When voters elect representatives, they elect the leaders who will shape the future of their society. This is why elections empower ordinary citizens: they allow them to influence the future policies of their government, and thus, their own future.[57]

The Concept of Voting

Although it is true that voting is not a sufficient condition for democratic governance, it is certainly a necessary condition thereof.[58]

Indeed, along with bargaining it belongs to the most important ways of reaching collectively binding decisions.[59] Voting is resorted in a wide variety of contexts: political elections, decision making in multi- member bodies, electing best entries in song contests, determining the winners in figure-skating, issuing verdicts in juries, electing officers to various positions in public organizations etc.[60] Voting is sometimes used in purely informal and ad hoc settings, such as when a group of people is deciding how to spend an evening together or a family is deciding on the name of

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53 [2007]17 NWLR (pt. 1064) 456.
54 *Ibid.*
55 https://americancenterjapan.com/wp/wp-content/uploads/2015/10/elections_brief.pdf > Accessed 31 May 2023.
56 *Ibid.*
57 *Ibid.*
58 H. Nurmi, Voting Theory https://www.researchgate.net/publication/226664299_Voting_Theory > Accessed 31 May, 2023.
59 *Ibid.*
60 *Ibid.*

a just acquired pet.[61] From Nurmi's conceptualization, voting permeates all collective decision-makings. According to M. P. Fiorina,[62] in his conceptualization, of all possible political actions the voting decision has received the most attention from behavioral political scientists.[63] The voting act is the fundamental political act in a democracy.[64] It is the most widespread political act.[65] Furthermore, on the surface, at least, the voting act would appear to be one of the simplest (and therefore, most understandable) political acts.[66] The term 'vote' refers to 'a valid mark on an official ballot indicating the voter's preference for a particular candidate or ballot question.'[67] The voting process concerns an entire array of procedures, people, resources, equipment and locations associated with conducting elections.[68] From the foregoing conceptualisations, it is beyond doubt in our humble view, that the terms 'election' and 'voting' are inseparable.

Legal and Institutional Frameworks for Elections and Voting in Nigeria

Elections and voting being so important to Nigeria's democracy and the entire polity have legal backing and regulatory regime.

(a) The Constitution of the Federal Republic of Nigeria, 1999 (as amended)

The Constitution of the Federal Republic of Nigeria[69] 1999 (as amended) being the supreme legal document of the country by virtue of section 1(1) (3) of the Constitution itself, is one of the legal basis of elections and voting in Nigeria. The CFRN has by section 153(1) (f) established the Independent National Electoral Commission (INEC) among other federal commissions and councils. The composition and powers of INEC

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61 *Ibid.*

62 M. P. Fiorina, 'The Voting Decision: Instrumental and Expressive Aspects' [1976] (38) *The Journal of Politics,* 391 < https://core.ac.uk/download/pdf/211370371.pdf> Accessed 31 May 2023.

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 https://www.eac.gov/sites/default/files/glossary_files/Glossary_of_Election_Terms_EAC.pdf > Accessed 31 May 2023.

68 *Ibid.*

69 Hereinafter referred to as the CFRN, 1999.

are respectively provided for under items 14 and 15 of Part I of the Third Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended). According to Item 15, Part I, Third Schedule, the Independent National Electoral Commission[70] shall inter alia have power to:

- Organize, undertake and supervise all elections to the offices of the President and Vice-President, the Governor and Deputy Governor of a state, and to the membership of the Senate, the House of Representatives and the House of Assembly of each state of the Federation;
- Register political parties in accordance with the provisions of the
- Constitution and an Act of the National Assembly;
- Monitor the organisation and operation of the political parties, including their finances; conventions, congresses and party primaries;
- Arrange for the annual examination and auditing of the funds and accounts of political parties, and publish a report on such examination and audit for public information;
- Arrange and conduct the registration of persons qualified to vote and prepare, maintain and revise the register of voters for the purpose of any election under this Constitution; and
- Monitor political campaigns and provide rules and regulations which shall govern political parties.

That elections and voting are backed by the Constitution could be gleaned from the wordings of sections 221-222. Section 221 precludes any association other than a political, from canvassing for votes for any candidate at any election.

(b) The Electoral Act, 2022

The Electoral Act, 2022, which repealed the Electoral Act, 2010[71] became effective and operational from 25th day of February, 2022 having been duly passed or enacted by the National Assembly[72] of the Federal Republic

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[70] Herein called 'the Commission'.
[71] No. 6, 2010.
[72] The phrase is the umbrella term for both the Senate (the Upper House) and the House of Representatives (the Lower House) in Nigeria.

of Nigeria. Electoral Act, 2022, is the principal legislation which has been specifically enacted in line with the constitutional provisions to regulate the conduct of Federal, State and Area Councils in the Federal Capital Territory elections; and for related matters.[73] It is the main statute which takes care of all election and voting procedures and processes including the qualification and disqualification of voters,[74] political parties and their candidates.

The Institutional Framework for Elections and Voting in Nigeria The key institution responsible for the conduct of national election in Nigeria is the Independent National Electoral Commission (INEC). It is a body corporate with perpetual succession and may sue and be sued in its corporate name.[75] INEC is the main regulatory and statutory body which constitutionally and statutorily empowered to among other things, Organize, undertake and supervise all elections to the offices of the President and Vice-President, the Governor and Deputy Governor of a state, and to the membership of the Senate, the House of Representatives and the House of Assembly of each state of the Federation;[76] register political parties in accordance with the provisions of the Constitution and an Act of the National Assembly;[77] conduct voter and civic education;[78] promote knowledge of sound democratic election processes;[79] and conduct any referendum required to be conducted under the provisions of the Constitution or an Act of the National Assembly.[80]

Qualification for Voting in Nigeria: A Comparative Perspective The voting age in Nigeria has been statutorily pegged at 18 years by the Electoral Act, 2022.[81] Age is not the only qualification for exercising franchise in Nigeria. apart from the age qualification, for a person to be eligible to be registered as a voter in Nigeria, such a person must be a citizen of Nigeria,[82]

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[73] See the Explanatory Memorandum to the Electoral Act, 2022.
[74] See the Electoral Act, 2022, s 12.
[75] See the Electoral Act, 2022, s1(1) (a) (b).
[76] Constitution of the Federal Republic of Nigeria, 1999 (as amended), item 15 (a) prt I, Third Schedule.
[77] Ibid. item 15 (b) prt I, Third Schedule.
[78] The Electoral Act, 2022, s 2 (a).
[79] *Ibid.* s 2 (b).
[80] *Ibid.* s 2 (c).
[81] *Ibid.* s 12(1)(b).
[82] *Ibid.* s12(1) (a).

that he or she is ordinarily resident, works in, originates from the Local Government Area Council or Ward covered by the registration centre,[83] that such a person presents himself to the registration officers of the Commission for registration as a voter,[84] that the person is not subject to any legal incapacity to vote under any law, rule, or regulations in Nigeria.[85]

It is an offence punishable with a fine of not more than #100,000 (one hundred thousand naira) or imprisonment for a term not more than one year or both for any person to intentionally procure the inclusion in the Register of Voters of his or herself or any other person with the knowledge that he or she or that other person ought not to have been registered.[86] It is submitted with respect that anyone who procures his or her registration as a voter in clear violation of section 12 (1) (b) of the Electoral Act, 2022 may be punished in accordance with the provisions of section 23 (1) (e) of the same Act.

It is decipherable from the Electoral Act itself that age alone is not the only qualification for registration as a voter in Nigeria. Nigerian citizenship is one of them.

Age of Voting Compared with Age of Criminal Liability in Nigeria

In the same Nigeria where a person who is less than 18 years old is disqualified from exercising his or franchise and not allowed to be registered as a voter under the Electoral Act, 2022, such a person may be deemed to be knowledgeable enough to differentiate between right and wrong.

For instance, by section 30 of the Criminal Code Act,[87] it seems that a person who is 12 years and above, but less than even 17 or 18 years of age, can be criminally responsible for some act or omission. By the wordings of the section, also, it appears that a person from 8 years to 11 years old may be criminally liable if there is proof that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

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[83] *Ibid.* s 12(1) (c).
[84] *Ibid* s 12 (1) (d).
[85] *Ibid* s 12 (1) (e).
[86] *Ibid* s 23 (1) (d)-(e).
[87] Cap C38 LFN 2004.

Section 30 of the Criminal Code Act seems to be saying that a male person who is not under 12 years, but may be less than 17 or 18 years old is capable of having carnal knowledge. For the avoidance of doubt, the third paragraph of section 30, Criminal Code Act reads and provides: 'A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.'

Worthy of our appraisal is the age of criminal liability for the offence of murder under the same Criminal Code.[88] By section 319 of the Criminal Code, 'where an offender who in the opinion of the court had not attained the age of seventeen years at the time the offence was committed, has been found guilty of murder, such offender shall not be sentenced to death but shall be ordered to be detained during the pleasure of the President and upon such an order being made, the provisions of Part 44 of the Criminal Procedure Act[89] shall apply.' From the quoted section of the Criminal Code, a person who is precluded (as a result of not being 18 years old) from taking part in the electioneering process leading to his being led and presided over by another is presumed to be knowledgeable enough at 17 years to differentiate between what is right and wrong. In our humble view, the approach of the Criminal Code and of course similar statutes, in punishing for murder those under the age of 18 years as well as other non-age criteria should be followed and adopted during elections.

Voting Capacity in Selected Jurisdictions

An attempt is made in this part to examine the voting ages in some countries and jurisdictions outside Nigeria.

(a) Argentina

In Argentina, the voting age is now 16 years by virtue of Article 1, Law 27,774 on Citizenship Rights promulgated in 2012.[90] Equally, in Argentina,

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[88] See the Criminal Code Act, Cap C38 LFN 2004 s 319(2).

[89] Before the enactment of the Administration of Criminal Justice Act(ACJA) 2015, and the Administration of Criminal Justice Laws of the various States of the Federation, the Criminal Procedure Act used to be procedural statute for criminal trials in the southern part of Nigeria, except Lagos State whose Administration of Criminal Justice Law existed before the ACJA, 2015.

[90] <https://archive.crin.org/sites/default/files/crin_voting_ages_compiled_0.pdf> Accessed 2 June 2023.

voting during elections is compulsory and failure or refusal to so vote attracts a small fine if no legitimate reason is given.[91]

Research on Argentina shows that compulsory voting has a greater effect on unskilled citizens than on skilled citizens, suggesting that compulsory voting lessens the inequality in turnout.[92] It is worthy of note that in Argentina, legal devices for voting from abroad were added in 1991 while implementation began in 1993.[93]

(b) Austria

In Austria, the voting age at all electoral levels was lowered from 18 to 16 years of age in 2007.[94] At the same time the minimum age for running as a candidate was reduced from 19 to 18 years of age.[95] The required age is 35 years only when running for president.[96] Voting restrictions for people with mental disabilities have also ceased to exist.[97] Until 1987, citizens under legal guardianship were automatically disenfranchised from all elections. The Austrian Constitutional Court found this unconstitutional since the law did not differentiate between the reasons for and the degree of guardianship.[98]

The right to vote for Austrian citizens has been significantly extended over the last 25 years concerning minimum age, the inclusion of people with disabilities and the inclusion of prisoners and convicts. Non-resident citizens have been granted the right to postal voting alongside Austrians

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[91] https://www.argentinaelections.com/Compulsory%20voting%20around%20the%20world_UK%20Commission.pdf > Accessed 2 June 2023.

[92] See Y. Gonz alez and S. A. Snell '¿Qui en Vota? Compulsory Voting and the Persistence of Class Bias in Latin America < https://scholar.harvard.edu/files/yanilda/files/gonzalezsnell_quien_vota.pdf > Accessed 2 June 2023.

93 Carlos Navarro Fierro and others, 'Electoral Studies in Compared International Perspective: Voting from Abroad in 18 Latin American Countries' < https://aceproject.org/about-en/voting-from-abroad-in-18-latin-american- countries > Accessed 2 June 2023.

[94] See Gerd Valchars, 'Report on Political Participation of Mobile EU Citizens: Austria <https://cadmus.eui.eu/bitstream/handle/1814/72560/RSCAS_GLOBALCIT_PP_2021_6.pdf?sequence=1> Accessed 2 June 2023.

[95] *Ibid.*

[96] *Ibid.*

[97] *Ibid.*

[98] *Ibid.*

temporarily abroad and (general) postal voting from inside the country by absentee ballot cards has been made possible for national and regional elections.[99]

It should be noted that in 2007, Austria became the first European country to lower its legal voting age to 16 in all national, regional and local elections.[100] Importantly, turnout in national parliamentary elections had dropped by almost 6 percentage points in Austria's 2006 parliamentary elections, which prompted the two members of the ruling coalition, the Social Democrats (SPÖ) and the People's Party (ÖVP) to discuss strategies to reinvigorate electoral participation.[101]

(c) Germany

In Germany, eleven of sixteen states have lowered the voting age for municipal elections or state and municipal elections from 18 to 16.[102] Following the German federal elections in 2021, the new coalition government committed to lowering the voting age to 16 at the federal level and for European Parliament elections.[103] In doing so, Germany joined other EU countries in making commitments to earlier enfranchise-ment such as Belgium, which has lowered the voting age for the upcoming European Parliament elections.[104] While the opposition Christian Democrats have opposed the move, new evidence from the elections suggests that earlier enfranchisement may indeed be a good idea.[105] A comparison of the turnout rates of young people who previously could vote in lower-level elections at the age of 16 to those who could not add to the increasing evidence from various countries that a lower voting age may provide opportunities for youth political engagement.[106]

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99 *Ibid.*

100 Laura Bronner and David Ifkovits, 'Voting at 16: Intended and Unintended Consequences of Austria's Electoral Reforms'[2019] (61) Electoral Studies https://www.sciencedirect.com/science/article/abs/pii/S0261379419300551 Accessed 2 June 2023.

101 *Ibid.*

102 See Arndt Leininger and Thorsten Faas, 'Votes at 16 in Germany: Examining Subnational Variation'<https://www.researchgate.net/publication/337605491_Votes_at_16_in_Germany_Examining_Subnational Variation > Accessed 3 June 2023.

103 Jan Eichhorn and Christine Huebner, 'Evidence from Germany: Does Reducing the Voting Age to 16 Lead to Higher Turnout at Elections?'

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

Germany is similar to the UK in its non-uniform approach to the voting age. While voting at general elections is restricted to those aged 18 years or older, whether you can vote at 16 in other elections depends on where you live.[107] There are some states in Germany in which the voting age is lowered for municipal elections, but not those at the state-level, resulting in a three-tier system of enfranchisement.[108]

(d) Scotland

Scotland has lowered the voting age to 16 for local and devolved elections.[109] This followed the extension of the vote to 16- and 17-year-olds to allow them to take part in the 2014 referendum on Scottish independence.[110] The law was subsequently changed in Scotland to lower the voting age to 16. This applies to elections to the Scottish Parliament and local government elections in Scotland.[111]

(e) Wales

The Wales Act, 2017[112] gave the National Assembly for Wales and the Welsh Government legislative competence for the administration of Assembly and local government elections in Wales, including the franchise for those elections.[113] The National Assembly for Wales passed the Senedd and Elections (Wales) Act, 2020 at the end of 2019 and it received Royal Assent on 15 January 2020.[114]

It amended the law to allow 16- and 17-year-olds to register to vote at Senedd Cymru/Welsh Parliament elections held on or after 5 April 2021.[115]

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[107] *Ibid.*

[108] *Ibid.*

[109] See Neil Johnston and Elise Uberoi, 'Voting Age' [2020] (1747) *Briefing Paper*, <https://researchbriefings.files.parliament.uk/documents/SN01747/SN01747.pdf Accessed 5 June 2023.

[110] Ibid.

[111] Ibid.

[112] Available at < https://www.legislation.gov.uk/ukpga/2017/4/contents/enacted > Accessed 5 June, 2023.

[113] Neil Johnston and Elise Uberoi, *op. cit.*

[114] The Senedd and Elections (Wales) Act 2019 became law in Wales on 15 January 2020. See< https://business.senedd.wales/mgIssueHistoryHome.aspx?IId=23754> Accessed 5 June, 2023.

[115] See Neil Johnston and Elise Uberoi, op. cit.

The Act also renames the National Assembly for Wales the Senedd Cymru or Welsh Parliament. The new names took effect on 6 May 2020. A Bill to allow 16- and 17-year-olds to vote in local government elections in Wales has now also been passed. The Local Government and Elections (Wales) Bill was introduced to the Senedd on 18 November 2019 and included provisions to lower the voting age for local government elections in Wales. The Bill passed its final stage in a year later, on 18 November 2020.[116] Police and Crime Commissioner Elections are a reserved matter and the voting age remains at 18 for PCC elections in Wales.[117]

(f) Brazil

In Brazil, as noted by T. J. Power,[118] voting is compulsory for all literate citizens between the ages of 18 and 69; it is voluntary for illiterates and for those aged 16-17 and 70 and over.[119] This means that citizens in the compulsory category must seek out the electoral justice and apply for a título eleitoral (voter registration card), but citizens in the voluntary category are not required to register.[120]

In the words of Raphael Bruce,[121] Brazil's current compulsory voting legislation started with the promulgation of the Brazilian Constitution of 1988.[122] It states that every literate citizen older than 18 and younger than 70 years old must attend the ballots on Election Day or justify its absence in a special court. Citizens older than 16 and younger than 18 are allowed to register to vote, but it is not compulsory. If an individual

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116 Royal Assent to the said Bill was given on 20 January 2021. See <https://business.senedd.wales/mgIssueHistoryHome.aspx?IId=26688> Accessed 5 June, 2023.

117 The Wales Act, 2017, s 8 (8) (1C) (a). Available at https://www.legislation.gov.uk/ukpga/2017/4/part/1/crossheading/elections/ena cted > Accessed 5 June 4, 2023.

118 T. J. Power, 'Compulsory for Whom/ Mandatory Voting and Electoral Participation in Brazil, 1986-2006'[2009] (1) (1) *Journal of Politics in Latin America,* 97-122. <https://d-nb.info/996074813/34> Accessed 5 June, 2023.

119 *Ibid.*

120 *Ibid.*

121 Raphael Bruce, 'Mandatory Voting and Political Interest in Brazil' [2015]*Preliminary Draft for the Harvard Political Economy Workshop,* https://web.lists.fas.harvard.edu/archive/list/gov3007- l@lists.fas.harvard.edu/message/C2C7ZHX5OHPYUGHCZYCEG64GEFSJZUDM/attachment/4/02-09-2015_Gov30_07_Bruce.pdf> Accessed 5 June, 2023.

122 *Ibid.*

fails to justify his absence, he or she must pay a small fine of R$ 3.00 (roughly 1.15 dollars), which can be multiplied tenfold according to the decision of the judge handling the case. Those who fail to justify three times are also subject to a number of sanctions, such as not being allowed to issue a new ID or a new passport, being ineligible for cash transfer programs, credit by financial institutions maintained by the government, public jobs and public education.[123]

Apart from the jurisdictions examined above, others such as Cuba, Ecuador, Malta and Nicaragua, have lowered voting age to 16 years.[124] According to the ACE Electoral Knowledge Network,[125] the age of voting is 17 years in countries such as Indonesia, Democratic People's Republic of Korea and Timor-Leste.[126]

The Utility of Lowering the Voting Age in Nigeria

Periodic and regular elections are a *sine qua non* to the sustenance of democracy. As noted, democracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status, i.e. to implement people's rule.[127] There is a general agreement about the centrality of elections as the means by which the people expresses its will, and through which it lays down the constitutional basis for the authority of government.[128]

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123 *Ibid.*

124 The ACE Electoral Knowledge Network, *Youth and Elections* <https://aceproject.org/ace-en/topics/yt/yt20/lowering-the-voting-age > Accessed 5 June, 2023.

125 The ACE Electoral Knowledge Network is a web portal with information on elections designed to meet the needs of people working in the electoral field. It was launched on 1 October 1998 < https://aceproject.org/> Accessed 5 June, 2023.

126 East Timor, also known as Timor-Leste officially the Democratic Republic of Timor-Leste, is a country in Southeast Asia. It comprises the eastern half of the island of Timor, of which the western half is administered by Indonesia, the exclave of Oecusse on the islands north-western half, and the minor islands of Atauro and Jaco Australia is the country's southern neighbour, separated by the Timor Sea. The country's size is 14,874 square kilometres Dili is its capital and largest city. https://en.wikipedia.org/wiki/East_Timor > Accessed 5 June 2023.

127 Congress of Local and Regional Authorities of the Council of Europe, *Voting at 16: Consequences on Youth Participation at Local and Regional Level* < https://rm.coe.int/en-vote-at-16-a6-web-collection-elections- democratiques/1680a8781c > Accessed 5 June, 2023.

128 *Ibid.*

According Barrett and Pachi,[129] 'Allowing 16- and 17-year-olds to vote has the additional benefit of enabling them to seek political representation on matters that can deeply affect their lives. This will not only reinforce their levels of political internal efficacy but will also have an effect on the candidates who are elected, their political priorities and the extent to which the policies that they put forward take into account the concerns and views of youth.'

It has been argued that giving young people the chance to vote earlier in life will also give them a habit of voting that over time will have a positive effect on turnout levels.[130] Allowing 16 and 17-year-olds to vote empowers them to engage with the political system.[131] Young people voting would lead to a fairer and more inclusive youth policy.[132]

Furthermore, there is the argument that young people should not be expected to contribute to society through taxation as members of the armed forces, or by parenting children, without having a say in how that society is governed. Another persuasive argument is that the low turnout of younger people at elections might be dealt with by engaging them earlier in the political process. Taken individually, each of those arguments is forceful, but collectively they make a robust case for reform.[133]

It is an opportunity to invigorate a new generation of politically active and engaged citizens, and that would create a more open and fair political system. Due to new technologies, young people are more informed than ever before, and more able to seek out information and to campaign on issues that affect them.[134]

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[129] Quoted in Norberto Ribeiro Carla Malafaia and Teresa Ferreira, 'Lowering the Voting Age to 16: Young People making a Case for Political Education in Fostering Voting Competencies' [2022] *Education, Citizenship and Social Justice,* 1-17.

[130] S. Champion, 'Votes at 16 will not solve the problem of youth disengagement overnight, but it will help us to address the issue' [2014] *Democratic Audit* < https:// www.democraticaudit.com/2014/05/14/votes-at-16-will-not-solve-the- problem-of-youth-disengagement-overnight-but-it-will-help-us-to-address-the- issue/> Accessed 5 June 2023.

[131] *Ibid.*

[132] *Ibid.*

[133] *Ibid.*

[134] *Ibid.*

Conclusion and Recommendations

This paper has found out that in many of the other jurisdictions examined, the voting age has been reduced to either 16 or 17, and in some, voting has been made mandatory with regard to specific elections and specific positions. We recommend that Nigeria should emulate the other jurisdictions examined herein by not only reducing the voting age from 18 to 16, but also by making voting compulsory as well.

The paper finds as a contradiction in terms in Nigeria for a person who is precluded or disqualified (for being less than 18 years old under the Electoral Act, 2022[135]) from taking part in the electioneering process leading to his being led by another, is presumed to be knowledge enough at age 17 to differentiate between right and wrong with regard to the offence of murder.[136]

In this wise, an amendment to the Electoral Act, 2022 is recommended and proposed so as to extend franchise to all students of tertiary institutions of learning,[137] even though they may be less than age 16 herein canvassed, all persons who are gainfully and legitimately employed in the private or public sector, and all those artisans who are now masters in their various trades.

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135 S 12(1)(b).

136 See the Criminal Code Act, ss 30, 319(2).

137 This should be so because very many young ones have passed out of secondary school before even age 16 and would been taught subjects such as social studies, civic education, government and history which would adequately equipped him or her with the knowledge to appreciate the essence of voting during elections.

An Evaluation of Citizens' Rights to Data Privacy and Protection in Nigeria

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Abstract

The right to data privacy emerged as a result of the rising need to protect individuals from risks occasioned from the automated or manual processing of their personal information due to the advancement in technology of systems that can collect, store, and process personal data. Under Nigeria's Constitutional framework, it is guaranteed for the protection and privacy of citizens, their homes, correspondence, telephone conversation and telegraphic communications. However, despite the increasing recognition for and the awareness of the right to privacy and data protection across the world, there is still lack of legal, institutional process and infrastructure to support the protection of rights in Nigeria. Data privacy and protection is yet to be given a significant attention, hence, the reason for inadequacies. This research work aims to provide a general overview on data privacy and protection, the extant legal and Institutional framework, its challenges and recommendation towards an effective enhancement of data privacy and protection framework in Nigeria. The research method used for this study is doctrinal method which consists of existing primary sources and secondary sources. The work recommends the need for a more concise principal legal framework and also accommodate a wider definition of personal information.

Keywords: Data, Inadequacies, Privacy. Protection and Rights.

Introduction

Data privacy and data protection are issues of profound importance around the world today as it concerns and affect everyone irrespective of status

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or age. Privacy has been hailed as "integral part of our humanity", "the heart of our liberty" and "the beginning of all freedoms."[3]

Nigeria is among the various countries that are making strides in terms of the access and usage of information and communication technology (ICT) although data protection and privacy are almost alien to the Nigerian society. Data subjects are, mostly unaware of their existing property rights in data and Data collectors/administrators are numb to their corresponding duty to protect and/or respect the privacy data entrusted in their hands.[4]

Nigerians have really never bothered about what happens to their data privacy and protection rights, except recently with the growing emergence of negligible few civil societies and development of ICTs which is spear heading the need for a proper data privacy and protection Regulation.[5] Data privacy is basically the right of data subjects to control the processing that is collection, storage and dissemination of their personal information so that it can be used only for the purposes they desire. Data privacy is so crucial today to the extent of it being addressed as the new oil by different authors and professionals.

Noticeably, the five largest companies in the world, Google, Amazon, Face book, Apple and Microsoft deal in data and data processing of its consumers. With recent transactions all over the world, the access and use of data has dominated the policy agenda of many international human rights and economic institutions hence, gaining a fundamental ground in the world policy market.[6] It is against this background that this research seeks to critically examine citizens' rights to data privacy and protection in Nigeria.

Literature Review

In today's modern society, data privacy and protection have become an area of law that needs attention as a result of the rising wave of technology

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[3] J D Solove, *Understanding Privacy* (Cambridge: Harvard University Press, 2008) 14

[4] B Olumide, "Data Protection and Privacy challenges in Nigeria" https://sig.ng>data (PDF) accessed on January 25th, 2020

[5] *Ibid* (n2).

[6] C Kurner, "The European Union and the search for an International Data Protection Framework" (2014) 2(1) *Groningen Journal of International Law,* 55.

and the daily activities of man in the use of these technologies. Due to the significance of data privacy as a contemporary human right, it has gained a lot of attention from scholars and policy makers worldwide.

Ndubueze,[7] examines the regulatory framework for data protection in Nigeria through the eye of international Human Rights standard on privacy. He concludes in his article that Nigeria is not lagging behind in her data protection framework, especially in the light of international standards on policy while she fails to appreciate the challenges Nigeria is faced with. However, this study is in disagreement with her position, this is because when there is no enforceable rules guiding a particular course, the state is free to act and this in return raises more violation than remedy.

Allotey,[8] holds the view that the constitutional reference to correspondence telephone and telegraphic communications envisages an intention to protect information privacy. He further submits that the constitutional provision is narrow and may not be a sufficient legal instrument for individuals to adopt for the enforcement of their fundamental rights or control of the access and use of their personal data. His submission are realistic because the constitution is so specific and do not cover other aspects of data privacy and protection guidelines. However, the author would have made few recommendations on what Nigeria should adopt or how to achieve a comprehensive workable data protection law.

Olumide,[9] argues that while he is like other data subjects grateful for NITDA's proactive interpolation in the mould of the NDPR, there will always be room for, not only an improvement, but further review of the

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[7] L E Ndubueze, "Analysis of Nigeria's Data Protection Framework viz-a-viz the International Human Rights Standards on Privacy," last modified November 12, 2019, <https://dnllegalandstyle.com/2019/analysis-of-nigerias-data-protection-framework-viz-a-viz-the-international-human-rights-standards-on-privacy> accessed on February 25th, 2020.

[8] A K Allotey, "Data protection and transborder data flows: Implication for Nigeria's integration into the Global network economy (unpublished LLS thesis, university of South Africa 2014, 175), https://uir.unisa.ac.za/handle/10500/13903 accessed on March 25th, 2020.

[9] Olumide Babalola, 'My thoughts on the Nigeria Data Protection Regulation' (NDPR) 2019 last modified June 4, 2019, available at https://thenigerianlawyer.com/my-thoughts-on-the- nigeria-data-protection-regulation-ndpr-2019, accessed on February 25th, 2020.

regulation to further respond to the dynamism of the Nigerian Socio-economic reality. Further, he opines that in as much as the NDPR has been rightly touted as Nigeria's comprehensive and contemporary regulation on data privacy, NITDA and all other stakeholders need not get complacent with this commendable regulation but it must be periodically revised and updated to cater for outstanding issues whether existing or arising in the future.

Izuogu[10] also carried out a similar but more detailed study of the government policy. He contends that the solution to the personal information proliferation would be the adoption of a law in line with the EU directive without anything more. However, I doubt if the practice in UK can be efficiently practiced and totally adopted here as Nigeria is still slow in terms of technological advancement. Emmanuel Salami,[11] in his article was able to highlight some relevant provisions of the regulation and other related issues particularly Nigeria's level of data protection compliance in the light of the new regulation. He points that a potential clog in the wheel of the Regulation and its attempt at data protection compliance in Nigeria is the unanswered question of whether the Regulation will apply in relation to personal data processing carried out by the government and its agencies. He further states that the regulation does not make any mention of processing activities carried out by the Government and that it can be inferred from the spirit of the law, the Regulation does not apply to the government. The author fails to address detailed possible ways to move the regulation forward.

Also, Senator Ihenyen[12] contends that Nigeria needs a principal legislation on data protection. Further, that after the ghostly existence of the NITDA Guidelines for up to six silent years, one would have expected that Nigeria would enact more comprehensive data protection legislation. Also, that for more efficient administration, regulation, and supervision, new

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[10] C E Izuogu, 'Data Protection and other implication of the ongoing SIM card registration process' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1597665 accessed on January 1st, 2020

[11] The Nigerian Data Protection Regulation 2019: Overview, Effects and Limits <https://www.datenschutz-notizen.de/the-nigeria-data-protection-regulation-2019-overview-effects-and-limits-3522349/

[12] S Ihenyen. "Nigeria: New Regulation demonstrates a serious approach to data protection" available on https://infusionlawyers.com/Nigeria-new-regulation-demostates-a-serious- approach-to-data-protection/ accessed on January 1st, 2020.

legislation should establish an overarching Data Protection Act. However, he did not make any recommendation as to how the Nigeria Regulation would be improved upon.

Ehondor and Ogbu,[13] assessed the NDPR in relation to how it seeks to stop data privacy violations perpetuated by social media companies. The NDPR is criticized for its weak and vague demand for compliance. To curb these violations, these authors propose that a regulation be issued to tackle the data controlling activities of social media companies at local and regional levels. Their work placed a particular emphasis on the activities of Facebook. It concludes that Government is saddled with the responsibility for protecting citizen's data given to social media companies. The above authors having based their recommendation on the assertion that data protection is a fundamental right in Nigeria, they went further to reinstate that such right must be demanded and protected. This argument was not made with reference to any law in Nigeria. Obviously, without a justifying enactment on the protection and privacy of data in Nigeria, Citizens' right will continue to be violated.

Legal Framework

Prior to the Nigeria Data Protection Regulations (NDPR),[14] most laws on data privacy and protection in Nigeria were industries related, categorized on certain ages and lacked provision for citizens' protection.

(a) Nigerian Data Protection Regulations, 2019

On 25th January 2019, the NITDA issued the NDPR (Nigeria's first codified Data Protection Legislation) pursuant to its power under the NITDA Act. The Regulations introduced a new data protection framework with novel

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[13] Beryl Ehondor and Silk Ogbu, 'Personal Data Protection and Facebook Privacy Infringement in Nigeria' (2020) 17(2) *Journal of Leadership Accountability and Ethics,* 142-156.

[14] NDPR was issued by the National Information Technology Development Agency (NITDA) under the NITDA Act on 25th January, 2019. E Ndubueze, Analysis of Nigeria's Data Protection Framework viz-a-viz the International Human Rights Standards on Privacy, modified on November 12, 2019 at https://dnllegalandstyle.com/2019/analysis-of-nigerias-data-protection- framework-viz-a-viz-the-international-human-rights-standards-on-privacy- ndubueze-ebere-l/#_ftn4 accessed on February 17th, 2019.

compliance requirements for organizations that deal with the data of individuals. The NDPR applies to all transactions intended for processing of personal data of natural persons residing in Nigeria or Nigerian Citizens residing in foreign Jurisdictions. The Objectives of the Regulations are as follows:

- To safeguard the rights of natural persons to data privacy;
- To foster safe conduct of transactions involving the exchange of personal data;
- To prevent manipulation of personal data; and
- To ensure that Nigerian businesses remain competitive in international trade; through the safeguards afforded by a just and equitable legal regulatory framework on data protection and which regulatory framework is in tune with global best practices.[15] This regulation applies to all transactions intended for the processing of personal data and to the actual processing of personal data notwithstanding the means by which the data processing is being conducted or intended to be conducted and in respect of natural persons in Nigeria; This regulation applies to natural persons residing in Nigeria or residing outside Nigeria but of Nigeria descent. This regulation shall not operate to deny any Nigerian or any natural persons the privacy rights entitled to under any law, Regulation, policy, contract, for the time being in force in Nigeria or in any foreign Jurisdiction. The Rights of Data Subjects are:
    - Right to access information on data free of charge – Section 3.1 (3)
    - Right to request rectification.
    - Right to withdraw consent.
    - Right to information on further processing.
    - Right to request deletion (an encapsulation of right to be forgotten).[16]

However, data subjects can object to the processing of their data when the data controller intend to process for the purposes of marketing.

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[15] Nigeria Data Protection Regulation, 2019.
[16] Nigerian Data Protection Regulation 2019, Regulations 3(8).

The Challenges of NDPR

(a) Enforceability

A major issue with the NDPR is enforceability. Since the NDPR, many data breaches has occurred and reported. It is unclear what NITDA is doing to address them. It is yet to be seen how NITDA intends to hold fellow agencies accountable and enforce punishment where applicable. There is a reason why in many parts of the world, including many African countries, data protection law sets up an independent data protection commission that has mandates that allows it to hold other government agencies including law enforcement and other entities that engages with data responsibility.[17]

In addition, the regulation provides for only penalties upon breach by data controllers which involves payment to NITDA. The NDPR does not necessarily provide penalties where individual's right are breached or provide any remedy for data subjects whose rights are infringed upon except redress in court; it lacks a punishment section. This lacuna is a fundamental one that cannot be overlooked.

(b) Applicability

The regulation solely "applies to all transactions intended for the processing of personal data and to actual processing of personal data . . . and to natural persons residing in Nigeria or residing outside Nigeria but of Nigerian descent." The NDPR applying solely to personal data and natural persons means the regulation excludes other forms of data and corporate organisations respectively. All over the world, transaction has gone beyond natural persons and now includes juristic persons. The applicability of NDPR is thus limited to only natural persons.

(c) Lack of Independency

The NITDA fails to fulfil the requirement of being independent because it is an agency under the Federal Ministry of Communication and Digital Technology and a combined reading of sections 31 and 34 of the NITDA

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[17] Adeboye Adegoke, Where is Nigeria's Data Protection Law? Modified September 26, 2019 available at https://www.livetimesng.com/where-is-Nigerias-data-protection-law accessed on January 25th, 2020.

Act, reveals that it is subject to the directives of the Minister of Science and technology. No doubt, Greanleaf concludes that NITDA is not independent, because the Minister may give it general directions concerning the carrying out of its functions.[18]

Other Relevant Laws

(a) The Constitution of the Federal Republic of Nigeria 1999 (as amended)[19]

The constitutional protection of data privacy in Nigeria is the foremost provision on data privacy. The constitution in its section 37 expressly provides for the right of privacy thus: "the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected." Although the provision does not specifically mention "data", it is arguable that information on homes, correspondences and telephone conversations are captured in the definition of personal data hence, the above provision can be used to safeguard such breach.[20] This contention was backed by the Court of Appeal in the decision in *Emerging Market Telecommunications Services v. Barr. Godfrey Nya Eneye*, the Court of Appeal held that:

> Section 37 of the Constitution under which the respondent instituted the action at the lower court provides: "the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected." It is my view that by giving those unknown persons and organizations access to the respondent's Etisalat GSM phone number to send unsolicited text messages into it, amount to violation of the respondent's right to privacy guaranteed by Section 37 of the Constitution, which includes the right to privacy of a personal's telephone line.

Same was also the decision of court in the unreported case of *Barr. Ezugwu Anene v. Airtel Nigeria Ltd.*[21] Also, section 45 provides for the limitation of

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[18] Graham Greenleaf and Bertil Cottier, 'International and regional commitments in Africa Data privacy laws: A comparative analysis', (2022) 44 (105638) Computer Law and Security Review.

[19] Constitution of the Federal Republic of Nigeria (as amended), 1999

[20] Olumide Babalola, " Data Protection and Privacy in Nigeria, (Legal Issues)", https:// sig.ng>2019/07>DA pdf accessed on January 25th, 2020.

[21] Suit No: FCT/HC/CV/545/2015 (Unreported).

the right thus:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society:

(a) In the interest of defence, public safety, public order, public morality or public health; or

(b) For the purpose of protecting the rights and freedom of other persons.

Furthermore, in Incorporated Trustees of Digital Rights Lawyer Initiative v. The National Identity Management Commission,[22] the Court held that the right a person has to privacy as provided under the Constitution also includes the protection of personal information from others. The Court further commented that, 'the right to privacy is not limited to his home but extends to anything that is private and personal to him including communication and personal data'. This has given credence to arguments that data protection is inextricably linked to privacy in Nigeria.

(b) The Freedom of Information Act (FOIA), 2011

The above provides for public access to public records and information. The Act also exempts personal information within or in the custody of public agencies to be accessed, unless the individual involved consents to the disclosure.[23] This very provision protects personal information/ data. In Habib Nigerian Bank Ltd. v. Fathudeen Syeed M. Koya,[24] there was an alleged disclosure by the appellant bank of a customer's transaction information, without the latter's consent. It was held by Court of Appeal that it was elementary knowledge that the bank owed a duty of care and secrecy to the customers. Thus, although the protection conferred on lawyers, journalists and doctors may not be explicitly provided by law to particular persons, the courts can recognize the existence of a duty of non-disclosure without consent.[25] However, this only applies to

22 Unreported Suit No. A/83/2020

information in the custody of public/government agencies and institutions in Nigeria; it makes no room for private institutions.

(c) The Cybercrimes (Prohibition, Prevention, etc.) Act 2015[26]

The above Act is Nigeria's foremost law on cybercrimes. It criminalizes data privacy breaches. Generally, this Act prohibits, prevents and punishes Cybercrimes in Nigeria. It prescribes that anyone or service provider in possession of any person's personal data shall take appropriate measures to safeguard such data.[27]

(d) The Child Rights Act 2003[28]

The Child Rights Act protects the privacy rights of children (persons under the age of 18). The Act protects and guarantees the right of every child to privacy, family life, home, correspondence, telephone conversation and telegraphic communication subject to the supervision and control of the parents and guardians.[29]

(e) The Federal Competition and Consumer Protection Act 2019[30]

The Act stipulates that the Federal Competition and Consumer Commission shall ensure that business secrets of all parties concerned in investigations conducted by it are adequately protected during all stages of the investigation or enquiry.[31]

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[23] The Freedom of Information Act, S. 14(1).
[24] (1992) 7 NWLR Pt. 251, P. 43.
[25] Udo Udoma & Belo-Osagie, "Data Privacy Protection in Nigeria" https:www.uubo.org/media/1337/data-privacy-protection-in-Nigeria accessed on January 25th, 2020.
[26] Federal Republic of Nigeria Official Gazette (15th May) Vol. 102.Available on https://cert.gov.ng/ngcert/resources/Cybercrime_Prohibition_Prevention_etc_Act_2015.pdf accessed on February 25th, 2020.
[27] Cybercrimes (Prohibition, Prevention, etc.) Act 2015, S. 21.
[28] Child Right Act No 26 of 2003 (Federal Republic of Nigeria Official Gazette No. 26, Vol. 90). Available on https://www.refworld.org/pdfid/5568201f4.pdf accessed 29th February, 2020.
[29] Child Rights Act 2003, S.8.
[30] Federal Republic of Nigeria Official Gazette No. 18 (1st February 2019) Vol. 106 http://fccpc.gov.ng/uploads/FCCPA%202019.pdf accessed 29th February, 2020
[31] Federal Competition and Consumer Act 2019, Section 34(6).

(f) The National Health Act (NHA) 2014[32]

The above Act which regulates health users and health care personnel restricts the disclosure of the personal information of users of health services in their records. It also ensures that health care providers take the necessary steps to safeguard such data.

(g) The NCC Consumer Code of Practice Regulation 2007[33]

Part VI of the Nigerian Communications Commission (NCC) regulation, generally deals with the protection of consumers' data in the telecoms sector. Reg. 35 requires all licensees to take reasonable steps to protect the information of their customers against improper or accidental disclosures. It prescribes that licensees shall not transfer this information to a third party except as permitted by the consumer or commission or by other applicable laws or regulation. Data collected by the licensee must be such that is reasonably required for business purposes and not to be kept for longer than necessary. This law extends not only to electronic or written data but also to verbal data recorded by the licensee.[34] It also provides for notification of the consumer of the use and disclosure of data obtained from them.

(h) The NCC Registration of Telephone Subscribers Regulation 2011[35]

Regulations 9 and 10 of the NCC Registration of Telephone Subscribers Regulation, 2011, deals with the data privacy and protection of subscribers. It provides for confidentiality of personal information of subscribers stored in the central database or a licensee's database.[36] It also provides that this information shall not be released to a third party nor transferred outside Nigeria without the prior written consent of the subscriber and commission, respectively. This regulation also regards the information stored in the Central Database as the property of the federal government of Nigeria.[37] However, the above regulation does not protect individual subscriber's right to privacy but treats any violation by licensees,

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[32] Federal Republic of Nigeria Official Gazette No 145 (27th October 2014) Vol 101

[33] Nigerian Communication Act 2003, Federal Republic of Nigeria official Gazette No. 87 (10th July, 2007) Vol. 94.

[34] CPC 2007, Regulation 35(3).

[35] Federal Republic of Nigeria OFFICIAL Gazette No. 87 (10th July, 2007) Vol. 94.

[36] NCA 2003, Regulation 9(2).

[37] *Ibid*, Regulation 5.

Independent Registration Agents as a breach of regulations. Invariably, lack of compliance with the data protection provisions would be solely treated as breach of regulations.

(i) The National Identity Management Commission (NIMC) Act 2007[38]

Section 26 of this Act requires the approval of the Commission before a corporate body or anybody can have access to data stored in their database. The Act also empowers the NIMC to collect, collate and process data of Nigerian citizens and residents. Although the above legislations capture data protection in its special ways, there is need for the legislature to harmonise the existing law to produce an all- inclusive data protection law like other countries.

(j) Electoral Act[39]

The act empowers INEC to compile, maintain and update the National register of voters for those eligible to vote anywhere in Nigeria. By so doing, personal data of individuals are collated on a continuous basis. The above act is only related to data stored for election purposes and did not provide any remedy to any data subject whose right is infringed upon.

Institutional Framework

Prior to 2022, what existed where sectorial institution. In the month of February 2020, the Federal Government of Nigeria, established the Nigerian Data Protection Bureau (NDPB), replacing the NITDA. The agency was saddled with the responsibility to oversee the implementation of the NDPR and ensure the establishment of a primary legislation.

The Nigerian banking industry provides for a centralized biometric identification system known as bank verification number (BVN) for identification of bank customers. The regulatory framework issued by CBN is to ensure adequate security and safety of the information of all banking customers.[40] However, there no specific sanctions for non-

[38] National Identity Management Commission Act No 23 of 2007 (Federal Republic of Nigeria Official Gazette No 23,Vol 94) https://www.nimc/gov.ng/docs/reports/nimc_act.pdf accessed on 28th February, 2020.

[39] Electoral Act 2010, S. 9(1).

[40] Clause 1.8 of the framework.

compliance other than the threat of imposition of penalties.

Data Privacy and Protection: Are they Fundamental Rights? Generally, privacy has often been regarded as an element of liberty, the right to be free from intrusions by the State. Privacy is a fundamental right essential to autonomy and the protection of human dignity serving as the foundation upon which many other human rights are built.[41] In the EU, human dignity is recognized as an absolute fundamental right. Privacy is most significant because it helps establish boundaries or limit to who has access to our bodies, places and things, as well as our communications and information. Almost every country in the world recognizes privacy in some way, be it in their Constitution or other primary legislation. The right to privacy or private life is enshrined in the Universal Declaration of Human Rights,[42] and Article 7 of the Charter of Fundamental Rights of the European Union[43] (Charter).[44] Also, Article 17,[45] states thus:

> No one shall be subjected to family home or correspondence nor to unlawful interference with his privacy, family home or correspondence, nor unlawful attacks on hid honour or reputation. The right to privacy is a fundamental right enshrined in many international human rights law as expressed above. The right to privacy is multi-faceted, but a fundamental aspect of it, increasingly relevant to people's lives, is the protection of individuals' data.[46]

As early as 1988, the UN Human Rights Committee, the body charged with monitoring and implementation of the international Covenant on Political and Civil Rights (ICCPR), recognized the need for data protection laws to safeguard the fundamental right to privacy recognized by Article 17 of the ICCPR.[47] However, privacy cannot function without protection. Hence, information relating to an identified natural (living) person,

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41 "What is Privacy?" last modified October 23rd, 2017 https://privacyinternational.org/explainer/explainer/56/what-privacy accessed on January 1st, 2020.

42 Universal Declaration of Human Rights 1948, Article 12

43 Charter of Fundamental Rights of the European Union 2009 (OJ C83/02)

44 Private life and privacy can be and are used interchangeably. See for more details on the usage and Interchangeability of the term Gonzalez Fuster (2014). Particularly p. 81-84 regarding the convention

45 International Covenant on Civil and Political Rights (ICCPR) 1996, Article 17.

46 A Rengel, "Privacy-invading technologies and recommendations for designing a better future for privacy Rights" *Intercultural Human Rights Law View,* 8 (2013) 204.

47 *Ibid.*

including names, dates of birth, photographs, video footage, email address and telephone numbers, need to be protected. Other information such as IP addresses and communications content-related to or provided by end-users of communication services are also considered personal data.

The notion of data protection originates from the right to data privacy and both are instrumental in preserving and promoting fundamental values and rights; and to exercise other rights and freedoms such as free speech or the right to assembly. Data Protection has precise aims to ensure the fair processing (collection, use, storage, personal data by both the public and private sectors.

Data protection appeared as an offspring of privacy and the two rights still seem inextricably tied up together with a birth cord. However, as any child, data protection is trying to mark its own way in life. There has been a debate as to whether data privacy and protection are fundamental rights. The protection of personal data has long been recognized as a fundamental aspect of the right to privacy. In recent years it has been recognized as a standalone right. Data Protection is a fundamental rights. Data protection is essential for exercise of right of privacy and hardly can privacy be discussed without protection in view. Article 12,[48] provides: "No one shall be subjected to the arbitrary interference with his privacy, family, home or correspondence . . . Everyone has the right to the protection of the law against such interference or attacks."

An important element of right to privacy is the right to protection of personal data. While the right to data protection can be inferred from the general right to privacy, some international and regional instruments also stipulate a more specific right to protection of personal data including the OECD's Guidelines on Protection of Privacy and Trans-border Flows of Personal Data, the Council of Europe Convention 108 for the Protection of Individuals with regard to the Automatic Processing of Personal Data, a number of European Union Directives and its pending Regulation, and the European Charter of Fundamental Rights, the Asia-Pacific Economic Co-operation (APEC) Privacy Framework 2004, and the Economic Community of West African States has a supplementary Act on data protection from 2010.[49] From the above, every individual is entitled to

[48] Universal Declaration of Human Rights.
[49] *Ibid.*

have their personal information protected, used in a fair and legal way, and made available to them at their request.

The fundamental rights protecting individuals' privacy and personal data are not ends in themselves. Their protection inherently contributes to furthering other individual fundamental rights and freedoms which we call privacy's and data protection's enabling function.

Recommendations

A critical examination of the NDPR reveals that those saddled with the responsibility of making law in the country still have great work to do in developing a comprehensive data protection Law capable of attaining adequate security of data. Regardless of the NDPR, it is necessary for the Nigerian Legislature to emulate and introduce from other Jurisdictions where they have failed to address important emerging issues. However, the following are possible recommendations.

(a) Nigeria should move beyond the NDPR to ensure the establishment of a comprehensive law on Data Protection in Nigeria.

(b) NITDA should put advocacy at the forefront as the courts have most not been effective in advancing data privacy and protection rights largely because cases on infringement are not brought before them.

(c) Government should also collaborate with bodies like WIPO, Privacy International and International Association of Privacy Professional (IAPP) to help train data subjects.

(d) Also, the law should provide that any proposed DPA must be independent, and shielded from the control and manipulation of the government.

(e) There is need for the law to accommodate a wider definition of personal information and data subjects.

Conclusion

Nigeria happens to be one of the African countries with an inadequate law. NDPR may be a step in the right direction and also a good means of expanding the revenue capacity of the NITDA, the question is can it effectively protect citizens' right? Government is a potential violator of citizen's privacy rights, so an effective data protection law should not be regulated within the ambit and confines of a government agency. It will

definitely create room for government's interference and make the regulation loose its independence and transparency. It is therefore most imperative for the National Assembly to go back to its drawing board to redraft the bill to accommodate and provide provisions capable of competing with international standards which would close the gap in the regulation to produce a robust data protection and privacy framework in Nigeria.

The Role of Policy in Developing Environmental Law in Nigeria

Lugard A. Emokpae[1]

Abstract

Protecting the environment is one of the major challenges facing many developing countries, inclusive of Nigeria. Damages to the Nigerian environment has been growing steadily and worse in recent decades. Every year, tons of waste are provided into the Nigerian environments which results in pollution and biodiversity endangered. The environmental problem in Nigeria is classified into two major folds. They are natural and anthropenic. While the natural problems are soil wash, sheet erosion coastal erosion and marine erosion, flooding, drought and desertification. The anthropogenic factors are oil pollution, oil well blow-out and other associated discharges, over population and squatter settlement, industrial waste, water, soil and water pollution, urban waste, non-biodegradable waste and used oil, interactional waste dumping and biodiversity loss and etc. The preservation and protection of the environment is crucial to the future of the Nigeria and future mankind. Therefore a regulatory policy is crucial to the control of these menaces. Various policies have been introduced in Nigeria by successive governments geared towards ameliorating the source of this preventable calamity. The National Environmental Agency (NFSREA) and other International Affiliation has provided adequate measures at securing for all Nigerians a quality environment adequate for good health and wellbeing and also recommended the best ways in conserving the environment and natural resources for the benefits of the present and future generation. The paper aimed at seeing some of the policies and legislations towards environmental sustainability in Nigeria. It was maintained that there exist a plethora of laws and legislation, both local and international, yet the Nigerian environment is far from being preserved. This paper concludes that political will power of state actors are a requirement for implementation of the policies of environmental laws. The paper recommends the use of cultural and religious identity of the indigenous natives for effective awareness in the management of environmental policies as this would promote sensitization and acceptability among the people.

Keywords: Environment, Law, Policy, Nigeria.

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The Role of Policy in Developing Environmental Law in Nigeria Environmental laws are greatly influenced by choice policy. In Nigeria, there exists a plethora of legal and policy options that regulate and control pollution menaces. Legislations provides the legal ambit through which government policies aimed at combating the problem of pollution as well as the protection of the environments are achieved.

The Nigeria government, both federal and states have done a lot in the regime of policy formulation and legislations with a view of dealing with the specific matters affecting the environment for the sole purpose of protecting and preserving the environment. For a country to achieve success in maintaining a healthy environment, it must make the appropriate policies and legislations towards the desired direction. Environmental policies and legislations have tremendous roles to play in the development of any nation's environmental laws, and Nigeria is not an exception.

Suffice it to say that environment policies and regulations in Nigeria were borne out of national emergency with the discovery of five shiploads of toxic waste of Italian origin in Koko, Warri, Delta State.[2]

Before 1988, Nigeria had no properly defined and articulated policy on the environment, as there existed transient laws and regulations which lacked coordination or coherence in a concerted focus at improving the decaying environment.[3]

The Koko toxic waste dump actually motivated serious consideration by government in formulating policies on environmental laws in Nigeria with the sudden realization that the erstwhile scope and concept of the environment needed a redefinition as well as the drafting of new anti-pollution measures to address emerging problems.[4] This incidence brought

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[2] Okonkwo Theodore, "The Laws of Environmental Liability" (Lagos: Afrique Publishers, 2003) p. 2.

[3] Niki Tobi, J.S.C. "National Environmental and International Agreements," Being the text of a paper presented by NIKI TOBI J.C.A. (as he then was) at the workshop and Training on the Role of Government Policy and Decision Makers in Environmental Management" organized by *Afrique* Environmental Development and Education (AEDE) in collaboration with the Government of Delta State (Local Government Service Commission) At Asaba, Nigeria, Tuesday 23 to Thursday 25 August, 2000.

[4] L. Atsegbua *et al.* "Environmnetal Law in Nigeria: Theory and Practice" (Lagos: Asaba Press ltd; 2003) p. 6.

to the fore greater public environmental awareness and the inadequacy of the legal framework for environmental protection in Nigeria.[5]

In response to this development, the Nigerian Government swiftly promulgated, the Harmful Waste (Special Criminal Provisions) Decree.[6] Decree which later became Act,[7] prohibited the carrying, depositing and dumping of Harmful Waste on any Land, Territorial Waters, Contiguous zone, Exclusive Economic zone of Nigeria or its Inland Water ways.

There was punishments attached to breach of these laws, heavy fines were imposed on offenders. Imprisonment for life compensation through the restoration of the polluted environment is all instruments are all instrument channeled towards checking and restoring the environment.

In "Environmental Management" organized by Afrique Environmental Development and Education (AEDE) in collaboration with the Government of Delta State (Local Government Service Commission) at Asaba, Nigeria, Tuesday 23 to Thursday 25 August, 2000.

The Government further promulgated the Federal Environmental Protection Agency Decree,[8] thereby bringing into existence the Federal Environmental Protection Agency charged with the responsibility of the overall management of the Nigerian Environment. Each of the 36 States of Nigeria and the Federal Capital Territory has two main laws dealing with environmental protection. In each of these states there exist the Environmental Laws and State Environmental Agencies. The laws are enforced by either their environmental sanitation taskforce waste management board or State Environmental Protection Agencies. It is the belief of the Nigerian government that the legislations as provided by the successive government would deal extensively on two major classifications of environmental problems bedeviling the National. They are natural and anthropenic problems.

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5 Okorodudu-Fubara, M.T., *Law of Environmental Protection* 1st ed (Lagos: Caltop Publication (Nig) Ltd. 1998) p. 57.

6 Decree No. 42 of 1988. [Now contained in LFN, 2004].

7 Cap. 165, Las of the Federation of Nigeria, 1990 (Law LFN, 2004).

8 Degree No, 58 of 1988, which later became FEPA Act, now replaced by the National Environmental Standards und Regulations Enforcement Agent (Establishment) Act", 2007.

What is a Policy?

This is a set of interrelated decision by a political actor or group of actors concerning the selection of goals and the means of achieving them within a specific situation where those decisions should, in principle be within the power of those actors to achieve.[9]

Environmental policies falls under the regulatory type among other policies of governments which involves the setting of standards and rules to restrict the activities of some groups in the society in other to prevent undesirable consequences of their action.[10] Regulatory policy must be articulated into the development of environmental laws to enhance optimal benefits in curbing the menaces associated with environmental degradation.

Policies and the Development of Environmental Law Environmental law is projected from the multi vintage of the law as an instrument of both social and economic engineering. Laws, both statutory and common laws are policies which regulate the foregoing stated areas of social and economic concern provide the framework of our environmental law.[11]

Governments, Non-Governmental Organizations, Community groups, scientists and other experts have all been important contributors to developing policies on the environment and defining practical responses to implement such policies.

The National Policy on the Environment and Development of Environmental Law

In Nigeria, prior to the adoption of the National Policy on the Environment in 1989, the country lacked a clear focus for the management of its environment. There was no defined and clearly articulated National policy goals for the Nation's environment.[12]

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[9] Jenkins, W.: Policy Analysis: A political and organization perspectives, Martin Robertson, 1978.

[10] Egonmwan J.A: Publc Policy Analysis (Concept and Applications) Resyin Nig. Ltd., Benin, 2000. p. 13.

[11] J.A. Adebsi. "The Role of Environmental Law in Attaining Sustainable Development: Nigeria's Experience" Environmental and Planning Laws Review at P. 107.

[12] Okorodudu-Fubara, M.T., Ibid at p56, se also Atsegbua, L. et al "Environmental Law in Nigeria: Theory and Practice" (Lagos: Ababa Press Ltd., 2003) at p. 151.

The September, 1988 International Workshop organized by the Federal Ministry of Works and Housing (Environmental Planning and Protection Division) and the United Nations Environmental Programme13 on the Goals and guidelines of the National Environmental Policy for Nigeria Report by the World Commission on Environmental and Development (Brundtland Report), the United Nations, "Environmental perspective to the year 2000 and beyond" and the "Cairo Programme of Action for Africa Co-operation in the field of Environment" all had significant influence on the National policy on the Environment.[14]

A fundamental role played by the National policy on the Environment towards the development of our environmental laws is that it helped tremendously to readjust the nation's relationship with its environment based on the principle of sustainable development and proper management of the environment and its resources.

Among other things, the National Policy on the Environment formulated National policy goals and strategies for implementation. The human factors, Land use and Soil conservation, Water Resources Management, Forestry, Wildlife and Reserves, Marine and Coastal resources, Sanitation and Waste management, Toxic and Hazardous substances, Mining, Agrochemicals, Air and Noise pollution, Occupational health safety and preservation of greenbelts, became easily recognized concepts in an effort to provide a regime of management regulations and policies to balance the problems they posed. It was here that the establishment of an administering and enforcement organ in the nature of the Federal Environmental Protection Agency[15] was proposed.

The Nigerian policy, which identifies the correlation between the health and welfare of all Nigerians and the urgent transition to sustainable development, attempts to provide the concepts and strategies that will lead to the procedures and other concrete actions required for launching Nigeria into an era of social justice, self- reliance and resource development that are environmentally friendly.[16]

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[13] [Hereinafter, The UNEP].

[14] *Ibid.*

[15] Now replaced with the NESREA Act, 2007.

[16] See Aina, E.O.A. and Adedipe, N.O. ed. "The making of the Nigerian Environmental Policy (Ibadan: University Press, 1991) pp. 313-329, see also Atsegbua *et al, ibid* at p. 53.

Another role of the National Policy on the Environment worth mentioning here is that the period between 1989, when the Nigeria policy was formulated and today has marked a period of intensive legal, administrative and to a lesser extent, judicial actions against man's activities that are deleterious to the environment.[17]

The policy is also aimed at ensuring a sustainable development based on proper management of the environment in order to meet the needs of the present and future generations.[18]

In order to achieve the policy of sustainable development, the following policy goals are enumerated in the National Policy.[19]

(a) To secure for all Nigerians a quality of environment adequate for their health and well-being;

(b) To conserve and use the environment and national resources for the benefit of present and future generation;

(c) To restore, maintain and enhance the ecosystem and ecological processes essential for functioning of the biosphere to preserve biological diversity and the principle of optimum sustainable yield in the use of living natural resources;

(d) To raise public awareness and promote understanding and essential linkages between environment and development and to encourage individual and community participant in environmental improvement efforts; and

(e) To co-operate in good faith with other countries, international organizations/agencies to achieve optimal use of trans-boundary natural resources and effective prevention or abatement of trans-boundary environmental pollution.[20]

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17 *Ibid.*
18 *Ibid.*
19 *Ibid.*
20 *Ibid.*

Prior to the enactment of the Land Use Act Decree 1978,[21] ownership of freehold or customary land imposed no corresponding obligation on the quality of development.[22] Besides, the existing laissez-faire attitude towards land encouraged fragmentation of holdings and under-utilization or substandard use of land. The Obasanjo Military Administration in revising the old trend adopted a trusteeship policy of land tenure for the country.

In the absence of an all-embracive Land Resources Conservation Law or policy, there are other specific laws and national policies which complement the objective of the Land Use Act.

Framework on National Policy Environmental Law

The national policy on the environment

(a) The Constitution of the Federal Republic of Nigeria (1999) as amended.
(b) National environmental standard and regulations enforcement agency NESREA Act.
(c) Environmental Impact Assessment Act.
(d) Land Use Act.
(e) Harmful Waste (Special Criminal Provisions) Act.
(f) Hydrocarbon Oil Refineries Act.
(g) Associated Gas re-infection Act.
(h) The endangered species Act.
(i) Sea Fisheries Act.
(j) Exclusive Economic Zone Act
(k) Pipe Line Act.
(l) Petroleum Act.
(m) Territorial Workers Act.
(n) Federal National Park Act.

An example of such policies is the Land Resources Policy 1988, which major role was to rehabilitate areas of the country that are affected by

[21] Now the Land Use Act, Laws of the Federation of Nigeria, 2004.
[22] MT, Okorodudu-Fubara, *ibid* at p. 40.

drought, desert encroachment, soil erosion and flood and to prevent the spread of these natural disasters.[23] Another policy is the policy on forest products which aimed at achieving self-sufficiency in wood products through the means of sound forest management principles and techniques. The Agricultural policy for Nigeria 1988, also seek to protect the Nation's forest products and wildlife, especially the endangered species. This invariably has a positive role to play in the development of our environmental laws. Nonetheless, in Nigeria, there are laws regulating water, air and land, amongst others are:

The Water Resources Act[24]

This is targeted at developing the quality of water in the country. Sections 5 and 6 provides authority to make pollution preventable and regulate for protection of fisheries, flora, fauna. Section 18 makes an offender liable with a fine. Control of water pollution is dealt with by a number of Federal and State statutes, some of the relevant Federal Laws are: The Nigerian Criminal Code, which prohibits the fouling of water and prescribed a punishment of six months imprisonment for an offender[25] and the oil in Navigable Water Decree[26] prohibits the discharge of oil into designated sea areas and provide penalties for the specified offences. The Minister of Petroleum is mandated by section 8 of the Petroleum Decree, 1969 (now Act to make regulations, among other matters, for the prevention of pollution of water.

Nuclear Safety and Radiation Protection Act[27]

This regulates the radioactive substances and equipment emitting and generating ionizing radiation. Section 4 of the Act provides authority to make regulations for the protection of the environment from harmful effect of ionizing radiation. Section 15 and 16 makes registration of premises and the restriction of ionizing radiation sources to premises mandatory.

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[23] Agricultural Policy for Nigeria 1988 Para 19.
[24] (Cap 22 LFN 2004).
[25] *Ibid*, Para 3.3(c) (2)(6).
[26] Section 245.
[27] Cap N142 LFN 2004

Air and Atmospheric Resources Laws

The air in this sense is taken to refer to the earth's atmosphere and has been defined as a mixture of gases surrounding the earth breathed by all land animals and plants.[28] The quality of air available for respiration and photosynthetic processes is very crucial to the continuity of life in the planet. Hence the needs to regulate conduct which may adversely affect the quality of air and protect the air resources.[29] The sum total of the provisions of sections 243 to 248 of the Criminal Code particularly sections 245 and 247, inclusive of section 20 of the NESREA Act is that a person must not pollute water, Air and the Atmosphere. The legislation does not seek merely to prevent deliberate or negligent pollution of the waters, air and the Atmosphere. It envisages that, at least, in many cases proper precautions must be taken to ensure that pollution does not occur. Experience has shown that it is not enough merely to take care: accidents will happen.[30]

The legislation envisages that in many cases care must be supplemented and precautions taken so as to ensure that pollution will not occur.[31]

The International Legal Initiatives

At the international scene, there exist several policies and laws which have helped in no small measure to sharpen and develop environmental laws. Some of the conferences where these laws and policies were carefully laid down are critically examined hereunder.

(a) Stockholm Declarations on the Human Environment

The urgent need to limit and if possible, eliminate the impairment of the human environment led to this conference in 1972.[32] One of the major roles of this conference in the development of environmental Laws is that it opened new frontiers in environmental law by focusing the attention of the international community on the environment. Thus, individual states and the people became more aware of the need to protect the

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[28] The Oil in Navigable Waters Decree 1968, gives municipal effects.
[29] Laws of the Federation of Nigeria, 2004.
[30] See Theodore Okonkwo, *The Law of International Liability* (Lagos: Afrique Environmental Development and Education, 2003) at p. 23.
[31] *Ibid.*
[32] L. Atsegbua *et al*, at p.11

environment against abuse and degradation. The most outstanding impact of the Stockholm Conference on the environment was principle 21, which states that: "states have a responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.[33]

Another fundamental role of the policies laid down in this conference is that it affirms the sovereign right of states to exploit their own resources pursuant to their own environmental policies in accordance with the United Nations Charter and the principles of international Laws. However, there were some constraints, which hampered the objectives and roles the policies laid down in the Conference sought to achieve.

An example of some of these constraints was the boycott of the Conference by the Defunct Soviet Union and most of the old Eastern Bloc of socialist states because the United States and other countries in the Western Capitalist bloc refused to admit the old East Germany from participating in the Conference. This controversy prevented a global participation in the Conference and also prevented the realization of the goals originally sought by many of the participant.[34]

(b) The Stockholm Conference

This conference was held on 2nd and 3rd June 2022 and included world leaders and representatives from government and organization. Civil society and youths gathered in Sweden on the title, a Healthy Planet for the prosperity of all-Our responsibility and Opportunity. It was a 2 days meeting to commemorate the 50th anniversary of the United Nations Conference on the Human Environment.

The Fundamental Policies laid down at Stockholm 50 was for every nation to realize that to "slave off a climate catastrophe, the world must have annual greenhouse gas emission by 2030 to reach net-zero by 2050. It was also pointed out that Air Pollution, the greatest environment threat to public health globally, accounts for an established 7 million premature death every year. The main objective of this conference was to protect Human Health from the effect of Organic Pollutants (POP).

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[33] L. Atsegbua *et al,* at p. 12.

[34] W.P. Gornley, Human Right and Environment: "The Need for International CO-operation" (Netherlands S.W. Sijthoff-Leyden 1976) p. 121.

(c) The Earth Summit

This conference otherwise known as the 'Earth summit', took place from 3rd to 14th June, 1992 in Rio de Janeiro, Brazil. One of the major roles played by the policies laid down at this Conference is that it brought about significant development practices. These developments have led to the recognition that government should prepare sustainable strategies and policies for its citizens.[35] The Conference adopted the Rio declaration containing twenty-seven non-binding principles on environment and development from a global perspective.

The need to protect the environment from ecological disaster prompted this United Nations Conference on Environment and Development (UNCED), held on 3rd to 14 June, 1992 at Rio de Janeiro, Brazil. This Conference developed a programme of Action for sustainable development otherwise known and called Agenda '21'.[36]

Agenda 21 as a comprehensive blueprint for action to be taken globally-from 1992 into the present twenty-first century-by Government, United Nations Organizations, Development Agencies, Non-Governmental Organizations and Independent-Sector Groups in every area on which human activity impacts on the environment.[37]

The Rio Declaration-which provides a context for specific proposals of Agenda 21 provides in its principle 11 that "States shall enact effective environmental legislation, environmental standards, management objectives and priorities which should reflect the environmental and developmental context to which they apply, standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."

Nigeria's Harmful and Hazardous Waste Law meets the provisions of principle Il of Agenda 21. Through the Laws, we can as a nation better manage and protect the ecosystem and bring about a more prosperous future for us all.[38] Despite the shortcomings of some of the policies of the

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[35] R.M., Wallace. "International Law" ed. (London: Sweet and Maxwell, 1997) p. 195.

[36] Theodore Okonkwo; "The Law of Environmental Liability" (Lagos: Afique Environmental Development and Education), 2003 at p. 3.

[37] *Ibid.*

[38] Earth summit: Agenda 21, the United Nations Programme of Action from Rio, United Nations Publication. New York, NY i0017, USA, 1993 at p.10

Conference, for instance, it avoided many controversial issues such as population growth, consumption patterns and the international debt of developing countries.[39] On the whole, the Rio Conference played some positive roles in the development of international law, as it relates to the environment particularly with the adoption of the concept of sustainable development.

(d) Rio Conference 2012

This is another conference from Rio tagged "Rio 2012". It took place after 20 years from the former one. This conference emphasized on sustainable development through political commitment of nations. The conference is on 2 major concepts thus:

- A green economy in the context of sustainable development and poverty eradication.
- The institutional framework for sustainable development.

The conference was aimed at social inclusiveness, economic development and environmental protection are the avenues to sustainable development.

(e) United Nations Climate Change Conference

The 2022 United Nations climate change conference commonly referred to as COP 27 was the 27th United Nations Climate change conference held between November 6 and 20, 2022 in Egypt. At the Conference a 'loss and damage' fund was agreed for the first time which was considered a significant achievement.[40] This is an agreement to provide funding to countries who are most vulnerable and affected by climate change.[41]

(f) The World Summit on Sustainable Development[42]

This summit was held in Johannesburg South Africa, from 25 August to 4 September 2002. The major roles of the summit was that it directed the world's attention towards meeting difficult challenges including improving

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[39] Wallace, R. M.. ibid at p, 195.

[40] Climate change: Five Key take always from COP 27 BBC News 2022 accessed en.m Wikipedia.org wiki 2022 May 15th 2023.

[41] COP 27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for vulnerable countries. Accessed en.m Wikipedia.org wiki 2022 May 15th 2023.

[42] [Hereinafter, The WSSD]

people's lives and conserving the natural resources in a world that is growing in population with ever increasing demands for food, water, shelter, sanitation, energy, health services and economic security.[43] The summit also concentrated on the implementation of the concept of "Sustainable Development and attention was focused on how to identify concrete steps and quantifiable target for better implementation of "Agenda 21 of the Rio Declaration.[44]

Apart from the absence of the United States which rendered the summit partially impotent, the summit was criticized for excluding a variety of organizations and individuals who were instrumental in conservation and green history.[45]

(g) The Bamako Convention

This convention was adopted in Bamako, Mali, on January 31 1991, as a result of the dissatýsfaction of developing countries with the earlier Convention, "the Basel Convention" which was widely criticized for its partial ban on trans-boundary movement of Hazardous Wastes.[46]

The major role played by this convention in the Development of environmental law is that it created a framework of obligation through the suppression of hazardous wastes, the prevention of trans- boundary movement of or importation of hazardous wastes and the taking of precautionary measures against the occurrence of such wastes.[47]

African Union and the Development of Environmental Law

In 2002, with the coming of the African Union which replaced the defunct Organization of African Unity (OAU), a fundamental shift was made form

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[43] Johannesburg 'Summit (online) http /hohanesbgapit.org (accessed 29th May, 2023).

[44] *Ibid.*

[45] *Ibid.*

[46] Basic Facts About the United Nations United Nations, New York, 199% p. 264, Edna Chinyere Eguh.
"Regulation of Trans-boundary Movement of Hazardous Wastes: Lessons from Koko" (1997) RADIC, 130 at 141, sec also Liu Sylvia, F, "The Koko Incident: Developing International Norms for the Trans-boundary Movement of Hazardous Waste." (1991) Journal of National Resources and Environmental Law, Vol. 8 at 121.

[47] Ojwang. B "Kenya's place in international Environmental initiative" (1993) 5 *African Journal of International and Comparative Law,* p. 793.

predominantly political co-operation to a joint Africa growth and development and at the same time to participate actively in the World economy, enlarging Africa's economic prospects.

Its major role is that it addressed environmental challenges while reducing poverty and recognizes that the range of issues necessary to nurture the region's environmental base and promote the sustainable use of natural resources is vast and complex and thus that a systematic combination of initiatives is necessary to develop a coherent environment.

The National Standards Established by the National Environmental Standards and Regulation

Apparently, this Act which replaced the FEPA Act, is now the statutory threshold of a national policy on environmental protection in Nigeria. This Act encapsulates a broad-spectrum policy in the environment.[48] It set up a powerful agency called the National Environmental Standards and Regulation Enforcement Agency. Like the former Federal Environmental Protection Agency, its roles and functions are:

(a) It shall be the enforcement agency for environmental standards, regulations, rules, laws, policies and guidelines in Nigeria,[49]

(b) It shall have responsibility for the protection and development of the environment.[50]

(c) It shall have the responsibility for biodiversity conservation and sustainable development of Nigeria's national resources in general and environmental technology, including co-ordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.[51]

The Act in a pertinent sense heralded and projects the declared environmental values and precepts contained in the National policy on the Environment and places substantive duties on the Agency which it gave birth to. The Agency is also required to establish criteria and guidelines

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[48] Okorodudu-Kubara, M.T, *ibid* at p. 169.
[49] Section 1(2)(a) of the NESREA Ac, 2007.
[50] Section 2.
[51] See also section 7,

for the control of concentration of substances in the air which are likely to result in damage or deterioration in the health of property, human, animal or plant, the most appropriate means to prevent and combat different kinds of atmospheric pollution, and the use of appropriate means to reduce emission to permissible levels.

The coming of the NESREA Act, just like the FEPA Act, before it, is a great step towards improving other environmental degradation in the country.[52] The Act prohibits the discharge in such harmful quantities of any hazardous substance into the waters of Nigeria or adjoining shorelines, except as permitted or authorized by the law in force in Nigeria.[53] Before the coming of the FEPA Act, which the NESREA Act has just replaced, enforcement of environmental Laws and regulations in Nigeria was hazardous. Institutional enforcement of laws and regulations was done by several government agencies. This state of affairs had a negative effect on the achievement of an enduring compliance standard.[54] The Agency is also required by law to enter into consultation with appropriate authorities for the purpose of identifying major noise sources, noise criteria and noise control technology and on the basis of the findings established noise abatement programme and noise emission standards which the Agency deems necessary to pressure and maintain public health and welfare.[55]

The Challenges of Environmental Laws and Policies in Nigeria Laws and agencies exists in Nigeria for the protection of the environment from degradation, yet gas flaring indiscriminate waste and toxic drops abounds in Nigeria environment and this clearly depicts a state of non-compliance with the enabling laws for regulating the environment.

Scavengers are everywhere. They tore huge bad and sacks containing refuge thereby causing odours which thereafter translates to pollution of the environments. The Associated Gas-Re-Injection Act Cap 12 (LFN) 1990 which was signed to end wasteful and destructive gas flaring by forcing oil companies to develop scheme for re-injecting oil and gas into the main fold has hitherto failed to do so since 2010. Gas flaring remains Nigeria major source of pollution and this has led to the destruction of eco-system and other species.

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[52] Atsegbua *et al,* at p. 80.
[53] See section 27, NESREA Act.
[54] Atsegbua *et al,* at p. 168.
[55] Section 22 of the NESREA Act.

The criminal code[56] which protects environment from abuse has been taken for granted. Big multi-national companies take little or non-recognizance of this law to do whatsoever they like. A good example is the Shell Petroleum Development Company (SPDC) in the destruction of Ogoni Land in Rivers State.

Conclusion

Despite major efforts to protect the environment in many developing nations, there continue to be a vicious cycle of re-occurrence of environmental problems. The inevitability of occupation on Land, water, marine and coastal resources which resulted in the expansion of Agriculture and other urban uses of land led to increased degradation of natural ecosystems in Nigeria, and these activities is tantamount to human extinction as well as biodiversity. In this regard, policies and laws which inevitably provide a basis for the solution of the environment should be sustained.

The bilateral and multilateral co-operation amongst states on policies and strategies for the development of Environmental Law, must be a matter of serious concern to state actors. Nigeria is on a right direction in her affiliation to many international agencies with regards to affecting the various regulations and policies of FEPA (and now NESREA) is a welcome development.

The enforcement of such rules should however be decentralized through enhancement of the various states' Environmental Agencies. The government of Nigeria, though have encouraged various individuals entrepreneurs to go into waste management in line with the appropriate environmental laws of various states in the federation, government should also create an enabling atmosphere for them to operate no matter whose horse in gored.

The need for government to evolve more policies on the forest is not necessary as there exist enough policies to conserve the Nations environment from fire, erosion, insects, diseases, introduction or spread of noxious weeds, insects and animals and other causes of deforestation, rather the political will power to operate the already existing ones is key to the development of environmental laws in the Nation.

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[56] (Cap 77 LFN of 1997).

There is a need for government to evolve the cultural and religious beliefs of the indigenous natives on environmental socialization to make a positive impact on the effectiveness and efficiency in the management of the environment in any given location in Nigeria.

The Role of the Laws With the Most Significant Connection as a Choice of Law Rule in Resolving Conflicts in Private International Law

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&
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Abstract

The most significant connection doctrine plays important role in the conflict of laws. It has been applied not only in the field of contracts but also to several particular issues in areas other than contract. Courts in different jurisdictions have often adopted the notion of characteristic performance and provide some presumptions to determine the country of most significant connection. In default, the court has to impute an intention by asking, as just and reasonable persons, which laws of the parties ought to, or would, have intended to nominate if they had thought about it when they were making the contract. In the absence of express or implied agreements, the proper law of the contract will be determined to be the system of private law which the transaction has the closest or most real connection. This is an objective test to be determined by the circumstances of the case. This paper will examine briefly some select choice of law rules as well as the factors that a court will consider in determining the law with the most significant connection as well as its application in the Nigerian legal system and the United Kingdom.

Keywords: International Law, Jurisdiction, Conflicts Resolution.

Introduction

Each country's legal system reflects its values. As a result, national laws and the structure of domestic judicial systems vary considerably from

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country to country.[3] Nevertheless, many kinds of legal situations or events, such as marriage, decedents' estates, torts, and business transactions, often are not confined to a single country or even to a single jurisdiction within a country. The courts of each involved country may claim jurisdiction over the matter, and the laws of each involved country may be applicable under certain circumstances.[4]

Most Significant Relationship test is a test used to determine which state law is adequate and can be applied to a dispute. This doctrine is applied mostly in conflict of law cases. By this doctrine, the substantial relation between a state law with the occurrence and the parties is determined. While determining the appropriate state law, the courts take into consideration matters are:

(a) Place of occurrence;

(b) Residence, place of business, and the place of incorporation of the parties; and

(c) The relationship between the parties if any.[5] This is a conflict of laws approach that considers which state's law has the strongest relationship to the matter and the parties.[6]

Other Theories on Choice of Law in Private International Law Choice of law is a set of rules used to select which jurisdiction's laws to apply in a law suit.[7] Choice of law is a procedural stage in litigation of a case involving conflict of laws when it is necessary to reconcile the differences between the laws of different legal jurisdictions. The outcome of this process is potentially to require courts of one jurisdiction to apply the law of a different jurisdiction in lawsuits arising from, say, family law, tort, or contract. The law which is applied is sometimes referred to as "proper law."[8] The choice of law rules discussed in this sub heading is as follows:

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3 Ulrich M., H. Peter, 'Conflict of Laws' (2017) https://www.britannica.com/topic/coflict-of-laws Accessed 23/4/2023.

4 *Ibid.*

5 US legal, 'Most Significant Relationship Test' (2018) https://definitions.uslegal.com/m/most-significant-relationship-test/ Accessed 25/4/2023.

6 Quimbee, 'Most Significant Relationship' www.quimbee.com Accessed 25/04/2023.

7 Lawshelf, 'Doctrine and Choice of Law' (2013) https://lawshelf.com/courseware/entry/erie-doctrine-and-choice-of-law Accessed 27/4/2023.

8 https://en.m.wikipedia.org/wiki/Choice-of-law Accessed 27/4/2023.

(a) Law of the Place of Making (lex loci contractus);
(b) The Law of the Place of Performance (lex loci solutionis);
(c) Personal Law of the Parties (lex domicicili);
(d) The Law of the Place of Litigation (Lex Fori);
(e) Express Intention of the Parties (Party Autonomy).

The Law of the Place of Making (*lex loci contractus*)

This choice of law rule connects the laws of a territory to contracts made within that territory.[9] It is rooted in the territorial or vested right theory supported by Beale and his followers. Indeed it is a time honoured principle that parties in a given territory ought not to violate the law of that territory, lest their contract be invalidated by the law of that territory.[10] This theory proposes that a contract is born into a legal system and that rights are "vested" in a contract through its "place of birth".[11] This vested territorial right is inherent in the contract, no matter where it is interpreted or enforced.[12] Courts and writers favour the application of this rule when in doubt about the application of other choice of law rules. They justify it on the basis that the territoriality principle is similar to the one applicable in crime and tort cases – territorial principle of *lex loci delicti*.[13] Proponents of this rule conclude that it gives certainty in choice of law issues because the place where a contract is made is usually established and certain. This rule may however be problematic in some cases where contracts are made and signed electronically. For instance if a Nigerian enters into contract with a South African and sends an electronic copy of the contract document to the South African to also sign, determining the law of the place of making of such contract may become problematic.

The Law of the Place of Performance (*lex loci solutionis*)

This rule shares a theoretical underpinning with the *lex loci contractus* rule- the vested right theory or territorial principle. The difference is that,

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[9] J.H. Beale, 1935, *A Treatise on the Conflict of Laws,* Vol 2, New York: Baker Voorhis &Co, 1044-1045

[10] Arthur Nusbauum,1942, "Conflicting Theories of Contract; Cases Versus Restatement", Yale LJ, 899.

[11] A.V Dicey, 1896, *A Digest of the Law of England with Reference to the Conflict of Laws,* London, UK: Stevens and Sons, 660.

[12] Beale, *op cit,* 63-74.

while lex loci contractus rule makes the law of the place of execution the connecting factor, *lex loci solutionis* makes the place of performance the connecting factor for determining the applicable law. This rule attaches significance to the "mode" and "incidents" or modalities of payment or other performance of contract.[14] Proponents therefore argue that this rule is based on express intention rule (party autonomy) because the performance of a contract is usually based on the intention and the agreement of the parties.[15] Although the lex loci solutionis usually answers questions regarding the performance, discharge, and breach of a contract, opponents of this rule argue that it cannot be used to determine the validity of a contract.[16] This is because the vested right theory only refers to the question of the validity of a contract to the place of execution and not the place of performance.[17]

Personal Law of the Parties (*lex domicicili*)

This rule proposes that matters concerning an individual should be governed by the system of law mostly connected to the individual.[18] It connects the law of a domicile of parties to their contracts. The application of this rule appears straight forward because parties can only have one domicile at a time.[19] However, it becomes problematic in the contract where parties possess different domicile – an unavoidable situation in international contracts.[20] The difficulties arise from choosing the domicile that prevails. For example the rule proposes that the debtors domicile should determine rights and obligations arising from the debts. As a result they cannot promise more than what their domicile allows.[21] This makes the domicile of a debtor more important than that of the creditor. This

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[13] Sherman Chang, 1934, "The Validity of Contracts in the Conflict of Laws", China L Rev 33, 41-42.
[14] *Ibid,* 464.
[15] S. Chang, Opcit Note 16, 35.
[16] "Conflict of Laws, Party Autonomy in Contract," Note , (1957) 57:4 Colum L Rev, 568.
[17] *Ibid.*
[18] T.C. Hartley, 2009, *International Commercial Litigation.* Cambridge: Cambridge University Press. 507.
[19] *Ibid.*
[20] *Ibid,* 509.
[21] E. Rabel, *op cit,* 473.

means that the debtor's domicile governs the performance of a debt in another country-an unintended extra territorial effect.[22]

The Law of the Place of Litigation (*Lex Fori*)

This choice of law rule dictate that regardless of the contract contact with another states law or the intentions of the parties, the law of the place where the matter is litigated is applied (Forum law).[23] The party who argues for the application of a foreign law must show reasons for it application. The lex Fori rule is based on the theory that if the forum and a foreign state each have a domestic rule, the underline policies of which are applicable to the inter-state case in issue. It is improper for a court to give effect to the policies of another state in preference to those of its own state.[24] Therefore the forum policy interest trumps the application of any foreign law.[25] By this rule, the notion of justice to a case is based on the superiority of a state policy rather than the human conduct which is at the centre of the dispute. While this rule promotes the forum state policies, it encourages forum shopping because a plaintiff that is aware of a favorable state policy of an issue may litigate in that forum as opposed to the appropriate or agreed forum.

Express Intention of the Parties (Party Autonomy)

Party autonomy is the "entitlement of parties to select the laws under which their contractual terms will be interpreted (governed), and the jurisdiction in which those terms, will event of dispute, be enforced.[26]

Party autonomy has grown over the years. It has been described as "one of the fundamental principles of private international law,"[27] and a master of all rules in conflict of laws.[28] Countries usually begin the choice of law

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[22] See *Milliken v. Pratt* (1878)125 Mass Jud Sup Ct 374.

[23] See generally Albert Ehrenzweig, 1960, "The *Lex Fori* – Basic Rules in the Conflict of Laws" 58 Mich L Rev 637.

[24] *ibid.*

[25] *ibid.*

[26] A. Ehrenzweig & E. Jayme, 1977, Private International Law: A Comparative Treatise on American International Conflicts Laws, Including the Law of Admiralty. Leyden: AW Sijthof, vol 3, 253

[27] Institute of International Law, 1992, "Resolution on the Autonomy of Parties in International Contracts Between Private Persons or Entities" 64 II YB, 383.

[28] M. Lehmann, 2008, "Liberating the Individual from Battles Between State: Justifying Party Autonomy in Conflict of Laws" 41 Vand J Transnat'l L. 384

process by looking for the will of the parties before considering other rules. Therefore the application of other choice of law rules is treated as dependent on presence on absence of the parties' intention.

Application of the Law with the Most Significant Connection in Resolving Conflict of Laws

In its choice of applicable law, the court that exercises jurisdiction determines which law to apply to a case that involves foreign parties, foreign transactions, or a number of foreign elements.[29] Classic theories of conflict of laws were territorially oriented. The German jurist and legal scholar Friedrich Karl Von Savigny[30] sought to identify the law where "according to its nature", the legal problem or relationship had its "seat". Anglo-American legal scholar, Joseph Beale,[31] whose thoughts shaped much of American conflict of laws theories in the first half of the 20th century, referred to this as where the rights and obligations of the parties are "vested".

Classic theories of conflict of laws used a number of connecting factors to determine the territorially applicable law. In matters of family law, Anglo-American law used parties' domicile. In civil law countries by contrast, a person's nationality was until recently the most important connecting factor. However, the reference is now more commonly to the law of person's "habitual residence".

For torts, American law traditionally looked to the law of the place of injury whereas European law referred either to it or the law of the place where the wrongful conduct had occurred. For Contracts, most legal systems looked to the place of performance for breach but stipulated that the place of formation was a more important connecting factor for the question of validity.[32]

The Law with the Most Significant Connection in Torts

The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the place which has the most

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[29] US Legal, Opcit Note 4.
[30] 1779-1861.
[31] 1861-1943.
[32] US Legal, Opcit Note 4.

significant relationship to the occurrence and the parties. In *Pust v. Union Supply Co*,[33] the plaintiff Larry E. Pust was injured on October 31 1968, when his right arm was caught in the nip point of a conveyor at the Holly Sugar Corporation plant in Sydney, Montana. In 1979, Pust filed a products liability suit against the Union Supply Company in Denver District Court. The complainant alleged that Union Supply had designed and manufactured the conveyor in the Holly Sugar Plant, that the conveyor was defective and that it was the proximate cause of Pust's injuries. The bulk of the evidence was directed to the issue of exactly who was responsible for the design and manufacture of the conveyor. Union Supply had won the contract to manufacture the conveyor belt for Holly Sugar but subcontracted out the manufacture of most of its component parts.

At the close of evidence, the District Court granted Union Supply's motion to dismiss the complaint. On appeal, the Court of Appeals reversed the judgment dismissing Pust's complaint. Upon further appeal, the Supreme Court held that 'Looking at the evidence in the light most favorable to Pust, we find ample evidence that Union Supply was a designer of this conveyor system. There was evidence that Union Supply added the mechanical and structural design, together with necessary engineering specifications, without which the conveyor would not be built. Other evidence showed that Union Supply redesigned and modified each of the sections of the conveyor. Union Supply did the most substantial mechanical design necessary for the conveyor to become operational. Based on this evidence, a jury could find Union Supply to be a designer of the conveyor'. Union Supply was held liable in Pust's tortuous action because it played the most substantial role in the manufacture of the conveyor belt.

Under the most significant relationship rule, the most significant factors are the parties' domicile and location of the tort.[34] A parties' forum selection clause in any applicable agreement is also a factor a court will consider. In *Bates v. Superior Court*,[35] the court held that the inquiry to determine which state has the significant relationship is qualitative and not quantitative.

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[33] 38 Colo. App 435 (Colo. Ct. App 1976).
[34] See Melton v Borg Warner Corp 467 F. Supp. 983 (W.D. Tex. 1979).
[35] 156 Ariz 46 (Ariz 1988).

In tort action, the local law of the state where injury occurred determines the rights and liabilities of the parties, unless some other state has a more significant relationship with the occurrence and the parties to the particular issue involved, in which event local law of the latter will govern.[36]

In *Murphy v. Colorado Aviation Inc*[37] the court held that the choice of law rule applicable to multistate tort controversies is the significant contacts approach. The general principles which the forum should consider in determining which state has the most significant relationship with the cause of action are as follows:

(a) The rights and liabilities of the parties with respect to an issue in torts, and

(b) Contacts to be taken into account in applying the principles of a particular section to determine the law applicable to an issue.[38] The specific contacts to be taken into account when assessing which state has the most significant connection to a tort claim include:

(c) The place where the injury occurred.

(d) The place where the conduct causing the injury occurred

(e) The domicile, residence, nationality, place of incorporation and place of business of the parties, and

(f) The place where the relationship, if any, between the parties is centered.[39]

Another significant rule is the doctrine of depecage- whereby the contacts are evaluated according their importance with respect to particular issues.[40] In determining the most significant relationship under a choice of law issue, the mere counting of contacts will not be determinative of the law to be applied. Rather, it is the relevancy of the contact in the terms of policy considerations important to the forum vis-à-vis, other contact states.

In determining the most significant relationship under a choice of law issue, consideration is given to the policies and interests of the forum

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[36] See *Cassy v. Manson Constr. & Engineering Co.,* 247 Ore. 247 (Or. 1967).
[37] 41 Colo. App 237 (Colo Ct. App 1978).
[38] See *Melton v Borg Warner Corp, op cit.*
[39] *Bates v. Superior Court*, Supra Note 58.
[40] See *Wilcox v. Wilcox* 26 Wis. 2d 617 (Wis 1965).

state, the tort state, and of the other states that may have an interest by virtue of the domicile of the parties or other relevant factors. In *Wilcox v. Wilcox*[41] the court observed that it is obvious that one state may have legitimate contact with one facet or issue of the case but not with another, and hence it is not necessary in each case to apply only the law of a single state to all phases of the law suit. Adoption of the most significant relationship test does not require a court to disregard a foreign jurisdiction's law in all cases. The flexibility of the most significant relationship doctrine requires that each case be decided on its own facts.[42]

Law with the Most Significant Relationship in Contract

In the absence of the expressed or an implied choice of law, contracts should be governed by the law of contract with which the contract is significantly related.[43] At common law this significant relationship refers to the country with which the contract is closely connected.[44]

There is also a presumption in Rome Convention provisions to determine the most significant connection. The convention45 explains that the contract is closely connected with the country where the party at the time of conclusion of the contract resides or he is habitual resident of that particular country. The article 4 of the Convention further explains if the contract is made in the course of party's trade or profession then in this case the country of most significant relationship shall be the country in which the principal place of business is situated or where under the terms of the contract the performance is to be effected.

In *Lilydale Cooperative Limited v. Meyn Canada Inc*[46] the court took the opportunity to review the most significant relationship test, which was first established by the American Supreme Court in *Imperial Life Assurance Co of Canada v. Colmenares*.[47] Brief facts of the Lilydale case are as follows: The plaintiff, Lilydale Cooperative Limited, operated poultry processing

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41 Supra.
42 Travelers Indem. Co. v. Lake, 594 A.2d 38 (Del. 1991)
43 Article 4(1) of the Rome Convention of 1980
44 Law Teacher: 'Laws with the Most Significant Connection'. Available at www.lawteacher.net accessed 19/5/2023.
45 Article 4(2).
46 2015 ONCA 281.

plant in Alberta. The defendant, Meyn, was a multinational provider of poultry processing solutions that carried on business in Ontario.

In 1993 Lilydale purchased a fryer and oven system from Meyn. Lylidale used the oven for ten years until 2004 when a fire occurred in its plant. Lylidale alleged that the oven was defective and started the fire in its plant. Lylidale and Meyn jointly brought a motion by special case for the opinion of the court to decide whether Alberta or Ontario law applied to Lylidale's action in tort and contract. In Ontario the ultimate limitation period is 15 years whereas in Alberta the ultimate limitation period is 10 years. Lylidale's action in contract would be statute barred under Alberta law but was still under the ultimate limitation period allowed under Ontario law. Applying the most significant relationship test, the court held that the Alberta law applied to the tort claim but that Ontario law applied to the breach of contract claim. The court listed the following as the criteria that inform the most significant relationship test in the absence of express intention by parties to a contract:

(a) The domicile and even the residence of the parties;
(b) The national character of a corporation and the place where its principal place of business is situated;
(c) The place where the contract is made and the place where the contract is to be performed;
(d) The style in which the contract is drafted (e.g. whether the language is appropriate to one system of law but not appropriate to another);
(e) The fact that a certain stipulation is valid under one law but void under another;
(f) The identification and balancing of the relevant criteria that inform the closest and most significant relationship test in each particular case necessarily involves an exercise of judicial discretion.

Law with the Most Significant Connection in the United Kingdom

The conflict of law rules in the United Kingdom (particularly in England and Wales) has both statutory and common law (case law) sources, and the balance of each varies in each field of law. For example, choice of law

[47] (1967) SCR 443, 62 DLR (2d) 138.

in tort and contract is now dominated by statute: the Private International Law (Miscellaneous Provisions) Act 1995 and Contracts (Applicable Law) Act 1990 respectively. In cases where parties have made an express choice of law, or one that is demonstrable by reasonable certainty, this law applies. Where there is choice of court agreement, this is often enough to infer that the law of that court was intended to be chosen.[48]

In cases where there is no express choice of law, or one that is demonstrable with reasonable certainty, a two-part test applies in most contracts. At the first stage, there is the presumption that the law will be the law of the habitual residence of the characteristic performer. The characteristic performer is not always easy to identify, but is usually the party who is not providing payment for the goods or service (e.g. the characteristic performer is the vendor of a product, the lender in a banking transaction, the guarantor in a contract of guarantee). This presumption may be rebutted in favour of a country with which the contract is more significantly connected only in "circumstances which clearly demonstrate the existence of connecting factors justifying the disregarding of the presumption."

In cases involving consumer and employment contracts, the law of habitual residence of the consumer, and usual place of work of the employee, respectively will apply.[49]

In respect of issues relating to tort, the provisions of part III of the Private International Law (Miscellaneous Provisions) Act 1995 apply to most torts (defamation and related torts are excluded, and remain governed by the common law). Where all the events constituting a tort occur in a place, the solution is simple. Where the elements of those events occur in different countries, the applicable law under general rule is taken as being:

(a) In personal injury or wrongful death cases, the law of the country where the individual was when he sustained the injury;

(b) In cases of damage to property, the law of the country where the property was when it was damaged;

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[48] European Judicial Network in Civil and Commercial Matters: Applicable Law – England and Wales. Available at ec.europa.eu/civiljustice/applicable- law/applicable-law-eng-en.htm Accessed 19/5/2023.

[49] *Ibid.*

(c) In any other case, the law of the country in which the most significant element or elements of those events occurred.

In respect of the administration of trusts, the applicable law is that chosen by the settler, or, in the absence of such choice, by the law with which the trust is most significantly connected. This law determines the validity of the trust, its construction effects and the administration of the trust. A will on the other hand is interpreted by the law intended by the testator, which is presumed to be the law of his domicile at the date of the will. The validity of an alleged revocation of a will is determined by the law of the domicile of the testator at the time of the alleged revocation.[50]

The Law with the Most Significant Connection in Nigeria

The problem of conflict of laws in Nigeria is a complex issue. This is not only because of the federal form of government with its separate federal and state laws which sometimes create jurisdictional conflict, but more so because of the dual system of court and the States.[51] As a general rule, cases between natives or Nigerians or persons with Nigerian descent are to be decided under customary law being the law with which they are most significantly related. In Labinjo v. Abake52 a girl of seventeen or eighteen years of age was sued for certain trade debts. Her defense was based on Infant Relief Act which was to make such debt unenforceable against an infant. Both the trial judge and the Divisional Court assumed that the Act applied.

However, the full court in rescinding the earlier decisions, raised the question why the case had not been decided under customary law and stated as follows: The general rule is that if there is a native law and custom applicable to the matter in controversy, and if such law and custom is not repugnant to natural justice, equity and good conscience or incompatible with ant local ordinance, and if it shall not appear that it was intended by the parties that the obligations under the transaction be regulated by English law, the matter in controversy shall be determined in accordance with such native law and custom.[53]

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[50] *ibid.*

[51] N. Iguh 2010, "Conflict of Laws in Nigeria". *Nnamdi Azikiwe University Law Journal* Vol. 3. 55.

[52] (1924) 5NLR 33.

However, where the transaction is unknown to customary law, the English Law will apply, being the law significantly related to such transaction. To enter into a transaction that is only recognized by English law may be construed as an agreement to be bound by English law. For instance an agreement for transaction via electronic media is unknown to customary law and cannot be governed by it.[54]

Where there is conflict between different systems of customary laws, the law with the most significant connection will be the law "prevailing in the area of jurisdiction of the court or binding between the parties.[55]

In cases of succession, the general rule in jurisdictions is that in the case of both testate and intestate succession, where English law or local statutes do not apply, the personal law of the deceased, that is the customary law to which the deceased was normally subject, is the law binding between the parties and excludes the law of the place. This therefore means that in the case of conflict between the personal laws of the deceased and the law of the place where the deceased may have been resident, the personal law of the deceased prevails, being the law with which he has the most significant relationship.[56]

In land matters, where the land is subject to customary law, the most appropriate law for customary courts to apply in resolving land disputes should be the law of the area where the land is situated-lex situs. 57 This is so because it is the laws of the particular area where the land is situated that has the most significant relationship/connection with the land in dispute and this would ensure that the disposition of land in a particular area is always subject to the same customary law.

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[53] See also *Koney v. Union Trading Company* (1934) W.A.C.A.. In this case an action was brought by an educated African carpenter against a European company. The defense relied on the English statute of limitations and the plaintiff in reply contended that English law should not govern the case, relying solely on the fact that he was an African. The West African Court of Appeal however dismissed such assertion pointing out that under the relevant statutes, the usual combination of that fact with the further fact that the other party was not an African was to make English Law applicable.

[54] See *Rotibi v. Savage* (1944) 17 NLR 77.

[55] See section 23(1) of the Customary Law of Eastern Nigeria, Section 20(1) of the Native Courts Laws of Northern Nigeria and Section 20 of the Customary Courts law of the then Western Nigeria. These laws though repealed have been reenacted in the various states of the federation with similar provisions. See for example section 16 of the Customary Courts Law of Abia State.

Conclusion

The laws with the most significant relationship are an important aspect of choice of law rules in private international law. It comes to play mostly in cases where parties to a transaction do not state clearly what laws should govern their transactions or regulate disputes between them. In such instances the courts in adjudicating over disputes take various factors into consideration in deciding which law is best suited in resolving disputes between parties. This is a very significant choice of law rule and it has been used in determining the applicable law in disputes relating to various fields of law including contract, tort, succession, etc. The courts have also along the line formulated certain rules which serve as guides in determining the choice of applicable law based on the most significant relationship choice of law rule. These rules so formulated have served as veritable guides to the courts in most cases of conflicts in private international law.

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[56] See *Tapa v. Kuka* (1945)18NLR 5; 75, where Nupe native law and custom was held to govern the estate of a Nupe man who died intestate leaving a house in Lagos. See also Section 20(2) of the Customary Court Laws of the former Western Region.

[57] See section 20(1) of the Customary Courts Laws of Western Region and also section 21(2) of the Area Courts Edicts of Northern Nigeria.