



**NIGERIAN
NATIONAL HUMAN RIGHTS
COMMISSION**

Journal

NNHRCJ

Vol 11

2025



NNHRCJ

Volume 11

2025

Published by
National Human Rights Commission
19 Aguiyi Ironsi Street, Maitama, FCT, Abuja, Nigeria
PMB 444. Garki-Abuja.

www.nigeriarights.gov.ng

E-mail: nhranigeria@yahoo.com

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The Nigerian National Human Rights Commission
Journal is published annually

This edition may be cited as (2025) VOL 11 NNHRCJ

ISSN 2276-8599

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Limiting rights or testing limits? The constitutional paradox of legislative criminalisation of fundamental rights

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Abstract

The two major constitutional legislative procedures for controlling unbridled exercise of rights are the civil limitation and criminalisation of such actions. Legislatures employ these same modalities when they rely on constitutional limitation clause to limit fundamental constitutional rights. The objective of this paper is to interrogate legislative criminalisation of fundamental constitutional rights as a tool for the limitation of fundamental constitutional rights of persons. The methodology is doctrinal. Among other things, this paper will show that the constitutional basis for any criminalisation regime is not just the constitutional legislative power to legislate on any aspect of fundamental constitutional right matters. It is also legislatures' constitutional legislative power to legislate on the least crucial aspect of a fundamental constitutional right that must be operative. Upon further finding that this crucial

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aspect of fundamental constitutional right matter is inoperative, the paper recommends that courts and legislatures exculpate themselves from this constitutional legislative anomie.

Keywords: Compelling state interest, constitutional legislative competence, direct criminalization, fundamental constitutional right, national constitution

1 Introduction

In most federal democracies of the world,¹ the national constitutions do not contain penal provisions,² as these are usually left to be taken care of by ordinary statutes.³ The above statement is also the position of the Nigerian Supreme Court⁴ on the Constitution of the Federal Republic of Nigeria (CFRN) 1999.⁵ The consequence is that a state's power to punish acts constituting offences is mostly competently conferred, not by the national constitutions, but by their derived ordinary statutes. The constitutional competence of the federal or state legislatures within a state to create and punish offences is not at large, but is clearly conferred on the respective legislatures by the national constitutions. It is trite law that for a legislature to have the competent authority to enact a law on a constitutional legislative matter which has been appropriately, constitutionally assigned to the legislature, the legislature shall have a competent constitutional legislative power to legislate on an equally competent constitutional legislative matter.⁶ Under the United States (US) national constitution,⁷ the power of the US federal legislatures to make

¹ Including Nigeria, United States of America (U.S.) and Canada.

² There are some exceptions, for instance the U.S. Constitution.

³ U.S. employs constitutional criminalization with other constitutional stratagems.

⁴ In *Attorney General of Abia State & 2 Ors v Attorney-General of the Federation & 33 Ors* (2006) 2 All NLR 24.

⁵ Cap C23 Laws of the Federation of Nigeria (LFN) 2004 (CFRN).

⁶ See in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII) 184; CFRN s 4 & 318(1) and Parts I, II & III of the Second Schedule. Similar provisions are found in the constitutions of other federations.

⁷ See CRS Report R43023, Charles Doyle, Congressional Authority to Enact Criminal Law: An Examination of Selected Recent Cases (CRS Report R43023, 2013) <https://crsreports.congress.gov> accessed 19 April 2025.

criminal laws is provided for by the Necessary and Proper Clause,⁸ Commerce Clause,⁹ Article I, Section 8, Clause 10,¹⁰ Spending Clause,¹¹ and the Military Clause.¹² Federal constitutional legislative matters are enumerated in the relevant legislative list. Although the US constitution has granted the federal legislatures extensive legislative powers,¹³ that constitution only explicitly empowered the Congress to enact criminal law in only three places: punishment of counterfeiting US securities and current coin;¹⁴ definition and punishment of piracies and felonies committed on the high seas, and offenses against the law of nations;¹⁵ and crime of treason.¹⁶ The remaining congressional competence to enact criminal laws are found in the implementation power of the US Congress, that is, the constitutional legislative competence to enact laws necessary and proper to the implementation of those other powers,¹⁷ including the authority that by implication includes the authority to enact reasonably related criminal laws.¹⁸

The Necessary and Proper Clause of the US constitution allows the Congress to legislate criminal enactments when reasonably related to Congress's constitutionally enumerated powers. Even at that, this latter federal constitutional criminal competence is not unlimited. The US federal government, being a creature of the US constitution,¹⁹ can only enjoy authorities that are traceable back to the constitution. The US Congress, as an arm of US government, is also not left out of this limited government;²⁰ as the Congress's criminal law legislative

⁸ U.S. Constitution art I s 8 cl 18; *U.S. v Comstock* (2010) 560 US 126, 130 S Ct 1949.

⁹ U.S. Constitution art I s 8 cl 3; *National Federation of Independent Business v Sebelius* (2012) 567 US 519, 132 S Ct 2566.

¹⁰ See *United States v Smith* (1820) 18 U.S. (5 Wheat.) 153, 158-59. The US Supreme Court interprets the Clause to have three distinct grants of power.

¹¹ U.S. Constitution art I s 8 cl 1; *South Dakota v Dole* (1987) 483 U.S. 203, 207-208.

¹² U.S. Constitution art I, s 8, cl 11, 12, 13, 14, 16; see also *U.S. v Brehm* (2012) 691 F.3d 547, 549 (4th Cir).

¹³ U.S. Constitution art I, s 1 (granting all legislative powers therein to U.S. Congress).

¹⁴ *ibid* art I s 8 cl 6.

¹⁵ *ibid* art I s 8 cl 10.

¹⁶ *ibid* art III s 3.

¹⁷ This clause enables a constitutional legislative power to legislate on ancillary or incidental aspects of a constitutional legislative matter.

¹⁸ US Constitution art I s 8 cl.

¹⁹ *Reid v Covert* (1957) 354 U.S. 1

²⁰ *United States v Morrison* (2000) 529 U.S. 598

power and matters are not boundless. US Congress is shackled with limitations of federalism,²¹ and limitations of individual persons' fundamental constitutional rights. In most federations also,²² states are partially sovereign and autonomous, and unless the national constitution takes away state power and gives it to the federal government, the states have broad residual authority to regulate activities within the state.²³ Most criminal laws at the state level are therefore derived from the state's general police powers, or authority to make and enforce criminal law within their geographic boundaries.²⁴

The Nigerian criminal law framework, for the federal or state legislatures, is not the same as that of the US. In Nigeria, criminal and civil constitutional legislative competence of the federal and state legislatures is composed of constitutional legislative powers and constitutional legislative subject matters neatly arranged for civil and criminal legislations.²⁵ Within Item 68 of Part I of the Second Schedule²⁶ are the constitutional legislative matters for the federal legislation of criminal laws. Constitutional legislative federal criminal matters are in Part III of the Second Schedule²⁷ as the incidental and supplementary matters to the other enumerated matters in the Second Schedule to the CFRN. The constitutional legislative criminal subject matters for state legislatures are the incidental and supplementary matters to the other unremunerated matters in the Second Schedule to the CFRN. In this way, the federal legislatures are the only competent authority to enact federal criminal laws as incidents to the realization of the objects in enumerated matters,²⁸ while the state legislatures are the only

²¹ The limitations that flow from the fact the constitution emerged as a compact between the sovereign it created and the sovereigns that created it, as espoused in Kenneth R Thomas, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power* (CRS Report RL30315, 2013)

²² Including U.S. and Nigeria.

²³ *Brecht v Abrahamson* (1993) 507 U.S. 619, 635; *Patterson v New York* (1977) 432 U.S. 197, 201.

²⁴ See Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press 2005) 18–28.

²⁵ See CFRN s 4 (harbouring all the constitutional legislative powers), and the Second Schedule (harbouring the constitutional legislative subject matters).

²⁶ *ibid*

²⁷ *ibid*

²⁸ CFRN Second Schedule.

competent authorities to enact state criminal laws as incidents to the realization of the objects in the unremunerated matters in the Second Schedule to the CFRN.²⁹

Fundamental constitutional rights are those rights of persons which stand above the ordinary laws of the land, and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence.³⁰ According to the Court in *Asemota v Yesufu & Anor*,³¹ fundamental right is an undoubted inalienable right which corresponds to a *jus naturale*, a natural law.³² Fundamental rights are so basic that they are inserted into the national constitutions. In Nigeria, for instance, fundamental rights are inserted in sections 33-45 of the CFRN,³³ while section 46 of the CFRN provides for the constitutional enforcement of the rights.³⁴ In the US, fundamental rights under the US constitution are primarily outlined in the Bill of Rights, which consists of the first ten amendments to the US constitution.³⁵ These amendments, like sections 33-45 of the CFRN, directly or impliedly, guarantee fundamental rights such as freedom of expression, privacy, movement, life and liberty. The Fourteenth Amendment to the US constitution provides further protections against state actions that infringe upon fundamental rights. Unlike the constitutional provision for the judicial enforcement of fundamental rights in Nigeria, there is no such provision in the US constitution; but an alleged state violation of fundamental right creates 'constitutional tort,' a cause of action that is distinct from any otherwise available state tort remedy.³⁶ Constitutional tort or

²⁹ See also *Attorney General of Abia State & 2 Ors v Attorney-General of the Federation & 33 Ors*. (2006) 2 All NLR 24.

³⁰ See *Ransome-Kuti v The Attorney General Federation* (1985) 2 NWLR (PT. 6) 211.

³¹ (1981) 1 NSCR 420 (Eso, JSC).

³² O. Awolowo, *Path to Nigerian Greatness* (Fourth Dimension 1981).

³³ *Raymond S. Dangote v Civil Service Commission, Plateau State & Ors* (2001) 4 SCNJ Page 131.

³⁴ *Mitin v COP Bayelsa State* (2023) 12 NWLR (Pt. 1898) 259 (SC).

³⁵ It also includes the 14th Amendment to the US constitution.

³⁶ A mostly academic term originating posterior to the Supreme Court's decision in *Monroe v Pape* 365 U.S. 167 (1961), which held that the civil action code for deprivation of rights, provides a separate federal remedy for individuals suing state or municipal government officers who have violated their constitutional rights.

constitutional damages claim is also used in the context of Bivens actions.³⁷

Apart from the national constitutional legislative obligation to protect the exercise of the fundamental constitutional rights, countries also ratify international human right treaties³⁸ with the singular aim of ensuring the respect and protection of these rights. With this enormity of protection and value placed on the fundamental rights of persons, national legislatures, in their bid to provide some constitutionally permitted limitations to an unbridled exercise of these fundamental constitutional rights, go to the length of criminalising the exercise of the rights. The question underlying this paper is: can a legislature that has enormous constitutional obligation to respect and protect fundamental constitutional rights, directly criminalise the exercise of those fundamental rights? The objective of this paper is to resolve the issue that arises where an ordinary law of legislatures who are cognisant of the enormous constitutional obligation to respect and protect fundamental constitutional rights of persons, directly criminalises the exercise of the right. The methodology is doctrinal. The paper is organized in five parts, including Part One, this Introduction. Part Two investigates if fundamental constitutional rights can be directly criminalised. Part Three provides instances of direct criminalisation of fundamental rights in national laws. The concept of indirect criminalisation of fundamental rights is the focus of Part Four, while Part Five concludes the paper.

2 Can fundamental constitutional rights be directly criminalised?

Criminalisation of an act simply means to 'define it as a crime in the substantive criminal law, and thus to render those alleged to have engaged in it liable to be prosecuted and tried, and to render those convicted of it liable to criminal punishment'³⁹ This work is not set out to unravel the understanding of the scope and content of the criminal law, or an understanding of the criminalization regime, or

³⁷ Which are lawsuits under federal common law for constitutional violations committed by federal government employees.

³⁸ These treaties include the three International Bill of Rights.

³⁹ Antony Duff, *The Realm of Criminal Law* (OUP 2018) 39.

principle such as various versions of the harm principle, the wrongness principle, the sovereignty principle, and so on.⁴⁰ Equipped with the requisite knowledge and understanding that criminalization is a constitutional legislative function⁴¹ while the determination of criminal liability is a constitutional judicial function,⁴² we limit the scope of this enquiry to the constitutional competence of legislatures to enact criminal laws directly on matters of fundamental constitutional rights; knowing that the executive arm of government is under a national or international obligation to respect and protect persons' civil and political (CIPO) rights while enforcing the laws⁴³ made by the legislatures and interpreted by the judiciary.⁴⁴ The governments' bounding obligation regarding persons' CIPO rights, as outlined in national constitutions and international human right treaties⁴⁵ is to respect and ensure that these rights are respected and protected for all persons within their territories and jurisdictions.

The national constitutional obligation, which attaches to executive and legislative functions alike,⁴⁶ includes refraining from infringing on these rights, protecting individuals from being denied these rights, and taking positive actions to facilitate people's enjoyment of these rights.⁴⁷ That constitutional obligation to respect and protect fundamental constitutional rights provides a specific incidental constitutional aspect of fundamental constitutional right matters. Even though that national constitutions do not usually embrace dynamic incorporation of international human right treaties until

⁴⁰ Victor Tadros, 'Criminalization: In and Out' (2020) 14 *Crim L & Phil.* 365 <<https://doi.org/10.1007/s11572-020-09536-7>> accessed 10 April 2025.

⁴¹ Item 2(a) Part III Second Schedule Constitution of the Federal Republic of Nigeria 1999 (as amended).

⁴² *NOSDRA v Mobil Producing Nigeria Unlimited (Exxon-Mobil)* (2018) LPELR 44210 (CA).

⁴³ art 19 of the UN General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁴⁴ *NNPC v Trinity Mills Ins Brokers* (2002) LPELR (7142) 1 (Ogakwu, JCA) 14 pp 35-38 paras B-C.

⁴⁵ See the CFRN, 1st-10th & 14th Amendments to the U.S. constitution and the ICCPR statute. Constitution of the Federal Republic of Nigeria 1999 (as amended); U.S. Constitution amends I-X and XIV; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁴⁶ See also *Reid v Covert* (1957) 354 US 1, 5-6.

⁴⁷ This obligation indirectly extends to rights in ICCPR statute.

enacted into the national laws;⁴⁸ yet, dynamic incorporation of international CIPPO rights is no longer necessary as most countries have integrated CIPPO rights into their national constitutions as fundamental constitutional rights.⁴⁹ We have not lost sight that national constitutions and international human right treaties also confer on national legislatures the constitutional legislative power, in limitation clauses, to directly limit some fundamental right matters⁵⁰ while removing other rights from any form of legislative limitation.⁵¹ It is our vehement contention in this work that a constitutional limitation power on fundamental constitutional rights cannot extend to the punishment of the exercise of the limited rights. It cannot be that a legislature, bound by a 'respect-and-protect' obligation to its people's CIPPO rights, and is bestowed with the constitutional legislative power to directly punish the exercise of those CIPPO rights! This is where we unveil the constitutional foundation upon which we base our vehement contention.

Various national constitutions utilize different constitutional stratagems to achieve criminalisation of constitutional legislative matters. These national criminal stratagems, which are not specifically compiled anywhere, include direct constitutional criminalisation of a constitutional legislative matter,⁵² direct constitutional conferment on the legislatures to criminalise constitutional legislative matters,⁵³ and the indirect constitutional conferment on the legislatures to criminalise constitutional legislative matters.⁵⁴ Constitutional legislative matters have their substantive and incidental aspects to them;⁵⁵ and the civil or criminal nature of the eventual legislation depends on which aspect of which constitutional legislative matter is involved.⁵⁶

⁴⁸ CFRN s 12.

⁴⁹ CFRN chap IV.

⁵⁰ See for instance, right to expression and association in sections 39 and 40 of the CFRN.

⁵¹ See for instance, right to life, conscience and right against torture or servitude in sections 33, 34(1)(a & b) and 38 of the CFRN.

⁵² U.S. Constitution art III s 3.

⁵³ *ibid* art I s 8 cls 6 & 10.

⁵⁴ *ibid* art I s 8 cl 18; CFRN Second Schedule pt III.

⁵⁵ See for instance, CFRN Second Schedule pt III; U.S. Constitution art I s 8 cl 18.

⁵⁶ Criminal laws take their origins from the exercise of constitutional legislative power on a constitutionally earmarked substantive or incidental aspect of the constitutional

In the US, the constitution employs three of those stratagems. The first is the direct constitutional criminalisation of the whole of the constitutional legislative matter.⁵⁷ The second is the constitutional conferment of criminalisation power on legislatures on the constitutional legislative matter.⁵⁸ The third is the constitutional conferment of criminalisation power on the incidental aspect of the constitutional legislative matters.⁵⁹ Nigeria and the U.S. employ the third constitutional legislative criminal stratagem, that is, the constitutional empowerment of legislatures to legislate on a constitutionally designated incidental aspect of constitutional legislative matters.⁶⁰ Criminalisation is thus the exercise of a constitutional legislative power on the substantive,⁶¹ constitutionally related⁶² or incidental⁶³ aspects, as the case may be, of a constitutional legislative matter. Nigeria only permits its legislatures to criminalise the incidental aspect of constitutional legislative matters, not the substantive aspect.⁶⁴ In other words, to criminalise a fundamental constitutional right matter, the legislature must have to show that it is conferred with the constitutional legislative power to legislate on an operative incidental criminal aspect of the fundamental constitutional right matter.⁶⁵ By directly criminalising fundamental constitutional rights, the legislatures insist that there is

legislative matter. See U.S. Constitution art I s 8 cl 18. See also Item 68 of pt I and para 2a of pt III of the Second Schedule to the CFRN.

⁵⁷ This involves the criminalisation of the substantive and incidental aspects of the constitutional legislative matter. See US Constitution art III s 3. Nigeria does not have a similar provision.

⁵⁸ Here, the legislatures are at liberty to criminalise either or both of the substantive and incidental aspects of the constitutional legislative matter. See U.S. Constitution art I s 8 cls 6 & 10. Nigeria has no similar provision.

⁵⁹ Here, the legislatures may only criminalise earmarked incidental aspect of the constitutional legislative matter and nothing more. See U.S. Constitution art I s 8 cl 18; See also pt III of the Second Schedule to the CFRN.

⁶⁰ U.S. Constitution art I s 8 cl 18; CFRN Second Schedule pt III; see also *Attorney General of Abia State & 2 Ors v Attorney-General of the Federation & 33 Ors* (2006) 2 All NLR 24.

⁶¹ U.S. Constitution art III s 3.

⁶² *ibid* art I s 8 cl 18.

⁶³ CFRN Second Schedule pt III item 68.

⁶⁴ *ibid* Second Schedule pt III para 2(a) and pt I item 68.

⁶⁵ There is no constitutional legislative competence to criminalise fundamental rights under part III of the Second Schedule to the CFRN.

an operative and available incidental criminal aspect of the fundamental constitutional right matter for them to legislate upon.⁶⁶

The constitutional legislative intention expressed in fundamental right limitation clauses is not for the legislatures to have unreserved control over the exercise of fundamental rights; but for the legislature to safeguard necessary and proportionate public and other private interests from a person's unbridled exercise of his fundamental constitutional rights. The insertion of fundamental rights into national constitutions is at the root of the constitutional legislative intention not to leave the fundamental rights of persons to unreserved legislative control and interference. Criminalisation, under Part III of the Second Schedule to the CFRN, and under the US' Necessary and Proper Clause, is an instrument of enforcement of a constitutional legislative power on an unreserved constitutional legislative matter. In the case of fundamental constitutional right matters, the matters are reserved for the constitution, and the provision of Part III of the Second Schedule to the CFRN cannot be the final criminalisation statement on the matter.

Fundamental right matters, when enacted into the national constitutions, lose their designated criminal aspect, i.e. they lose their incidental criminal aspect that ordinarily applies to every constitutional legislative matter.⁶⁷ In countries where fundamental rights have become protected as constitutional rights, such as Nigeria, Canada, and the U.S., fundamental right matters have no incidental aspect⁶⁸ upon which the legislatures may exercise their

⁶⁶ See *NCP v National Assembly* (2016) 1 NWLR (pt 1492) 1 (CA); *Madu v Mbakwe* (2008) 10 NWLR (pt 1095) 293 (CA); *Tukur v Governor of Gongola State* (1989) 4 NWLR (pt 117) 517 (SC); *Amusan v Olawuni* (2002) 12 NWLR (pt 780) 30 at 57 (CA); *R. Benkay (Nig) Ltd v Cadbury (Nig) Plc* (2006) 6 NWLR (pt 976) 338 (CA); *NCP v National Assembly* (2016) 1 NWLR (pt 1492) 1 (CA); *Madu v Mbakwe* (2008) 10 NWLR (pt 1095) 293 (CA); *Tukur v Governor of Gongola State* (1989) 4 NWLR (pt 117) 517 (SC); *Amusan v Olawuni* (2002) 12 NWLR (pt 780) 30, 57 (CA).

⁶⁷ Exercise of fundamental constitutional rights is to be legislatively protected and not punished.

⁶⁸ Though there may be more than one incidental aspect to a fundamental constitutional right matter, national constitutions usually designate a particular incidental aspect to criminal law action. In Nigeria, this incidental aspect is described in the CFRN as 'incidental and supplementary' to other constitutional legislative matters. Read CFRN Second Schedule para 2a of pt III item 68 of pt I ch.

criminalisation powers.⁶⁹ In other words, if fundamental right matters have lost their incidental criminal aspect, where then have the legislatures obtained the constitutional legislative competence to directly criminalize fundamental right matters?⁷⁰ Legislatures do not invent lost incidental matters; in fact, the criminal aspects of constitutional legislative matters are created along with the legislatures themselves by national constitutions.⁷¹ The legislature cannot therefore invent its own incidental criminal aspect⁷² and goes ahead to criminalise its own invention.⁷³ Assuming without conceding that it is argued that legislatures under constitutional limitation clauses enjoy constitutional legislative powers over the substantive and incidental aspects of fundamental constitutional right matters,⁷⁴ then the art and science of constitutional legislative competence will apply.⁷⁵

Valid legislation is all about a proper intercourse between competent legislative powers and competent legislative matters.⁷⁶ To criminalise a fundamental right matter in a jurisdiction where legislatures may only criminalise incidental aspect of constitutional legislative matter, the legislature must have the constitutional legislative power over the substantive and incidental aspects of the fundamental constitutional right matter.⁷⁷ Fundamental rights, before preservation in national constitutions, have acquired a posteriori a special incidental aspect of respect and protection, resulting in a conflict between its special incidental aspect and the incidental criminal aspect of the fundamental constitutional right

⁶⁹ Nihil ex nihilo fit; you cannot place something on nothing and expect it to stand. See *Macfoy v United Africa Company Ltd* [1961] 3 All ER 1169, 1172 (PC).

⁷⁰ Nihil non-expectant aedificare store.

⁷¹ The creation of the legislatures is assigned old as the creation of constitutional criminal aspects. See eg CFRN s 4, Second Schedule pt I item 68 and pt III.

⁷² Incidental and supplementary fundamental right matter.

⁷³ Criminalisation of fundamental constitutional rights is a constitutional legislative sacrilege.

⁷⁴ For a jurisdiction where the legislatures may only criminalise incidental aspect of a constitutional legislative matter as obtains in Nigeria.

⁷⁵ To apply art and science to constitutional legislative competence, the process must accord with principles of law guiding the application of law to the facts of a case.

⁷⁶ See In References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 (CanLII) 184.

⁷⁷ The Latin maxim is *accessorius sequitur naturam Sui principalis*, i.e. an accessory follows the nature of its principal. See *Tukur v Government of Gongola State* (1989) 4 NWLR (pt 117) 517.

matter that is ordinarily available to all constitutional legislative matters. In this conflict of incidental aspects, the incidental fundamental right aspect, which is specific to the fundamental right matters, prevails⁷⁸ over the conflicting incidental criminal aspect that is general to all constitutional matters.⁷⁹

3 Instances of direct criminalisation of fundamental rights in national laws

The balancing test developed by US Supreme Court does not disarm the government of power to trench upon the field in which the US Constitution says 'Congress shall make no law.' Legislatures directly criminalise acts constituting the exercise of a fundamental constitutional right.⁸⁰ In this section, we shall briefly discuss the direct criminalisation of the following fundamental constitutional rights, that is, the criminalisation of the right to: expression, life, privacy, movement and liberty; so as to ascertain their constitutionality or otherwise. National constitutions harbouring fundamental rights may, by different modalities, sanction direct limitation of the rights.⁸¹ This by no means translates to a constitutional authority to criminalize the rights. Section 33 of the CFRN provides as follows:

33(1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria. (2) A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary (a) for the defence of any person from unlawful violence or for the defence of property; (b) in order to effect a lawful arrest or to prevent the escape of

⁷⁸ The Latin maxim is *specialibus generalibus derogant* ie, specific provision limits general provision. See *Kraus Thompson Organization v NIPSS* (2004) LPELR (1714) 1, 18.

⁷⁹ The legal maxim is *generalia specialibus non-derogant* ie, general provision does not limit specific provision. See *Ardo v Nyako* (2014) LPELR (22878) 1, 47.

⁸⁰ See defamation laws, vagrancy laws, official secrecy laws, abortion laws, homosexual laws, firearms laws etc.

⁸¹ See CFRN ss 39(3) and 41(2). See also Canadian Charter of Rights and Freedoms s 1.

a person lawfully detained; or (c) for the purpose of suppressing a riot, insurrection or mutiny.

The Firearms Control Act Cap F28 Laws of the Federation of Nigeria (LFN) 2004 directly criminalises the civilian possession of firearms for any reason including for self-defence of life or property. The Act thus criminalises section 33(2) (a) of the CFRN. In the case of *Echo Garrison v Louisiana*,⁸² in its generalities, 'unless a fundamental right is so brigaded with overt acts of criminality, there is nothing that may be criminalised in the exercise of the right'. Contrast the Nigerian law above with the second amendment to the US national constitution, ratified in 1791 along with nine other articles of the United States Bill of Rights, that provides for: 'A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.'

In *SERAP v Federal Republic of Nigeria*,⁸³ the court states that it will hold that access to Twitter being one of the social media of choice to receive, disseminate and impart information is one such

derivative right that is complimentary to the enjoyment of the right to freedom of expression according to the provisions of Article 9(1) & (2) of the ACHPR and Article 19 of the ICCPR.

Rights to firearms are derivative rights that are complimentary to the enjoyment of the right to life in violent-crime societies like Nigeria and US. Although the issue of possession of firearms for private persons' defence of life or property is a state matter, there is curiously no state law on possession of firearms for the defence of life or property in Nigeria. In the midst of this vacuum, the Nigeria Police Force commands members of the general public, vigilantes, watch night men, and neighbourhood watch groups throughout Nigeria, who are in possession of firearms, to surrender them to the Commissioner of Police in their states within 21 days.⁸⁴

⁸² (1964) 379 US 64.

⁸³ ECW/CCJ/JUD/40/22 at 23.

⁸⁴ Security and safety matters, 'Inspector-General of Police orders recovery of prohibited firearms, weapons, ammunition in Nigeria' Worldpress.com (Lagos, 25 February 2018) <<https://securityandsafetymatters.wordpress.com/2018/02/25/inspector-general-of->

Section 37 of the CFRN provides that: 'The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.' This fundamental right is directly criminalised by section 229 of the Criminal Code attached to the Criminal Code Act.⁸⁵ The section criminalises a pregnant woman's enjoyment of her privacy to procure her own miscarriage by herself at a gestational age when the pregnancy is still private, and when she can procure her own miscarriage without the need of the assistance of an abortion service provider.⁸⁶ Unlike the US where the right to privacy is an implied right,⁸⁷ privacy right in Nigeria is an express constitutional right.⁸⁸ The Nigerian Same Sex Marriage (Prohibition) Act 2013,⁸⁹ which punishes homosexual relationship between consenting adults even within the privacy of their homes,⁹⁰ is a direct criminalisation of privacy right. Even though there is no express constitutional right to 'private' abortion and homosexual relationship, yet section 37 of the CFRN is broad enough to accommodate abortions and homosexual relationships privately undertaken. Thus, the legislatures have no constitutional competence to criminalise those privacies 'unless the privacy is so brigaded with overt criminal acts.' These provisions criminalising private abortion and private homosexual relationships are state enactments for the Federal Capital Territory (FCT) which does not apply to other states until adopted by them.⁹¹

Section 39 of the CFRN provides as follows:

39(1) every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference. (2) Without

police-orders-recovery-of-prohibited-firearms-weapons-ammunition-in-nigeria> accessed 19 April 2025.

⁸⁵ Criminal Code Act, Cap C38, Laws of the Federation of Nigeria (LFN), 2004.

⁸⁶ See also *Dobbs v Jackson Women's Health Organization* (2022) 597 U.S. 215.

⁸⁷ See *Roe v Wade* (1973) 410 U.S. 113, 163.

⁸⁸ CFRN s 37.

⁸⁹ <https://www.refworld.org/legal/legislation/natlegbod/2013/en/19556> accessed 20 April 2025.

⁹⁰ Same Sex Marriage (Prohibition) Act 2013 s 7(a).

⁹¹ Matters of abortion and homosexual relationship are not enumerated matters.

prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions: Provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President on the fulfilment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for, any purpose whatsoever. (3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society - (a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or (b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.

There is nothing in the above section to justify the direct criminalisation of expressions that are not brigaded with overt criminal acts.⁹² A constitutional limitation clause on fundamental constitutional rights cannot anchor the direct criminalisation of the rights. Section 373 of the Criminal Code, devoid of any brigade with overt criminal acts, is an unconstitutional piece of legislation. Section 41 of the CFRN provides as follows:

41(1) every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereby or exit therefrom. (2) Nothing in subsection (1) of this section shall invalidate any law that is reasonably justifiable in a democratic society- (a) imposing restrictions on the residence or movement of any person who has committed

⁹² Section 373 of the FCT Criminal Code provides: Defamatory matter is matter likely to injure the reputation of any person by exposing him to hatred, contempt, or ridicule, or likely to damage any person in his profession or trade by any injury to his reputation.

or is reasonably suspected to have committed a criminal offence in order to prevent him from leaving Nigeria; or (b) providing for the removal of any person from Nigeria to any other country to - (i) be tried outside Nigeria for any criminal offence; or (ii) undergo imprisonment outside Nigeria in execution of the sentence of a court of law in respect of a criminal offence of which he has been found guilty: Provided that there is reciprocal agreement between Nigeria and such other country in relation to such matter.

Fundamental right to movement is directly criminalised by section 250 of the Nigerian FCT Criminal Code. The promulgation of the Minor Offenses Act⁹³ has abolished the vagrancy provision in the FCT Criminal Code and Penal Code. The Minor Offenses Act is a state law, and thus has not repealed the vagrancy laws in Criminal Code laws of states in Nigeria. There is no desuetude doctrine in Nigerian jurisprudence.⁹⁴ The failure of the state executive branch to enforce these laws does not result in the modification or repeal of those draconian state laws. While state legislatures have the constitutional legislative power to criminalise movements that brigade with overt criminal acts, state legislatures, in time of peace, cannot criminalize civilians' movement in unrestricted public places and highways if the movement does not brigade with an overt criminal act.

4 The concept of indirect criminalisation of fundamental rights

No power or right is absolute in all ramifications, even if it is stated in absolute terms.⁹⁵ Like most rights, the right secured by the US Second Amendment, which is expressed in absolute terms, is not unlimited.⁹⁶ The lack of a limitation clause in the US Constitution has not resulted in rights being deemed absolute but rather in the judicial implication of limits.⁹⁷ Thus, a power or right may be statutorily or constitutionally absolute, but loses its absolutism upon ad hoc

⁹³ Cap M16 LFN 2004.

⁹⁴ See also *District of Columbia v John R Thompson Co* (1953) 346 US 100, 113-14.

⁹⁵ Irving Brant, 'Seditious Libel: Myth and Reality,' (1964) 39 N Y U L Rev 1, 18-19.

⁹⁶ *District of Columbia v Heller* (2008) 554 U.S. 570, 626.

⁹⁷ Stephen Gardbaum, 'The Myth and the Reality of American Constitutional Exceptionalism,' (2008) 107 Mich L Rev 391, 40.

judicial balancing. Importantly too, each section of national constitutions is absolute.⁹⁸ Since constitutional draftsman is not known to extravagante words or provisions, it is anathematic to construe a section in such a manner as to render other sections redundant or superfluous.⁹⁹

In interpreting provisions of national constitutions, care must be taken not to render any other section redundant or impotent.¹⁰⁰ It therefore follows that, although fundamental constitutional rights are preserved in the national constitutions, it does not therefore mean that some criminal law(s), competently made outside fundamental constitutional right matters, cannot indirectly criminalise a fundamental constitutional right. Indirect control or criminalisation of fundamental constitutional rights occurs when the legislatures enact a criminal law under a constitutional legislative competence outside matters of fundamental rights,¹⁰¹ and the enacted criminal law turns out to be a criminalisation of an act constituting the exercise of a fundamental constitutional right. Such criminal law that faces up against a fundamental constitutional right can only survive if it serves the overriding interest of state to suppress imminent lawlessness.¹⁰² For instance, 'freedom of expression can be suppressed if and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.'¹⁰³

There is a world of difference between the criminalisation of a fundamental constitutional right matter, and the criminalisation of matters that do not relate to fundamental constitutional rights, even when both equally impede the exercise of the fundamental constitutional rights. Care must be taken to differentiate acts of persons; as some acts may mimic the exercise of fundamental rights, while in reality, they are not.¹⁰⁴ The state can only succeed if it is able to show that the act committed falls outside the fundamental

⁹⁸ See *Opara & Anor v Amadi & Anor* (2013) LPELR 20747(SC).

⁹⁹ *NURTW & Anor v RTEAN & Ors* (2012) 10 NWLR (pt 1307) 212.

¹⁰⁰ See *Opara & Anor v Amadi & Anor* (2013) LPELR 20747 (SC).

¹⁰¹ Under the overriding interest of state occasioned by an imminent lawlessness.

¹⁰² *Garrison v Louisiana* (1964) 379 U.S. 64.

¹⁰³ *Roth v U.S.* 354 U.S. 514.

¹⁰⁴ Speech that causes 'harm' is differentiated from speech that causes 'unjustified harm' in *Gertz v Robert Welch Inc* (1974) 418 U.S. 323.

constitutional right of the person exercising his fundamental constitutional right. In *Gertz v Robert Welch Inc*,¹⁰⁵ the Supreme Court of the US differentiates between speeches that may cause 'harm' and speeches that may cause 'unjustified harm'. Speeches that may cause 'harm' are classified as fundamental constitutional rights that cannot be criminalised, while speeches that may cause 'unjustified harm' are considered outside the protected fundamental constitutional rights. The SCOTUS establishes that 'speech advocating illegal conduct is protected under the First Amendment' unless the speech is likely to incite 'imminent lawless action.'¹⁰⁶ Indirect criminalisation is therefore the criminalisation of a fundamental constitutional right exercised with the intent to cause imminent lawlessness.¹⁰⁷

In balancing the right of speech and other speech protective harms, only the proof or a showing of a compelling state interest can rebut the resulting presumption of invidious purpose.¹⁰⁸ According to the Court, the test is whether such an advocacy is directed to the incitement or production of imminent lawless action, and is also likely to incite such an action.¹⁰⁹ As originally formulated,¹¹⁰ the test is whether the words are such that create a clear and present danger that will bring about the substantive evils that the legislatures have the constitutional right to prevent.¹¹¹ Such a compelling state interest may consist, for example, of the likelihood that the words will produce any of the following: some acts of subversion,¹¹² result in a breach of public peace¹¹³ or cause an unjustified harm¹¹⁴ to another individual's reputation.¹¹⁵

¹⁰⁵ (1974) 418 U.S. 323.

¹⁰⁶ *Brandenburg v Ohio* (1969) 395 U.S. 444.

¹⁰⁷ In *Counterman v Colorado* (2023) 600 U.S. 66, SCOTUS hold the standard of the defendant's intent to be subjective.

¹⁰⁸ Usually described as the likelihood that the speech produces a clear and present danger of a substantive evil that the state has a right to prevent.

¹⁰⁹ *Brandenburg v Ohio* (n 106) 447.

¹¹⁰ By Justice Holmes.

¹¹¹ *Schenck v U.S.* (1919) 249 U.S. 47, 52.

¹¹² *Dennis v U.S.* (1951) 341 U.S. 494.

¹¹³ *Chaplinsky v New Hampshire*, (1942) 315 U.S. 568.

¹¹⁴ A valid restriction must target only unjustified harm, meaning speech made for purposes outside the constitutionally protected values of expression.

¹¹⁵ *Gertz v Robert Welch Inc* (1974) 418 U.S. 323.

In *Arthur Nwankwo v The State*,¹¹⁶ the court held that the legislature has the constitutional legislative power to make ordinary laws that deepen or enhance fundamental constitutional rights, so as to enhance the enjoyment of the rights, and not to impede or restrict those rights. The ordinary laws advocated in *Arthur Nwankwo* do not seek to criminalise fundamental constitutional rights. Thus, where constitutional legislative power has been conferred on fundamental constitutional right matters, laws may be made for the extension or civil limitation of fundamental rights, but never for the criminalisation of the rights. *Counterman v Colorado*¹¹⁷ separates acts constituting the exercise of a fundamental constitutional right from acts constituting true threat using court's determined category of *mens rea*; and finds at the end that the complained acts fell within the appellant's fundamental constitutional right. Criminalisation of fundamental constitutional rights is an imposition of conditions inconsistent with the free exercise of the fundamental constitutional rights.¹¹⁸ This unconstitutional control of fundamental rights has already been deprecated by the Nigerian courts.¹¹⁹ It is trite that any law restricting the method or mode of exercising a fundamental right guaranteed by the CFRN will be inconsistent with the CFRN.¹²⁰

A cursory look at the various criminal defamation laws in Nigeria will quickly reveal that what is criminalised in those laws is the substantive aspect of the fundamental constitutional right matter of expression, and not the incidental aspect of state interest like true threat of violence or unjustified harm.¹²¹ The prohibitions of the true threat and unjustified harm aspect of overriding state interest accords with constitutional dictates, notwithstanding that the prohibitions may extend to impede the free exercise of the fundamental rights of expression enshrined in the constitution.¹²² While the criminalisation of acts that threaten imminent danger of

¹¹⁶ 228 6 NCLR (1985).

¹¹⁷ (2023) 600 U.S. 66.

¹¹⁸ Any law which imposes conditions inconsistent with the free and unrestrained exercise of that right, is void to the extent of such inconsistency'. See *Adediran and Akintujoye v Interland Transport Ltd* (SC 119 of 1987) [1991] NGSC 2, 115, 116 (Karibi-Whyte, JSC).

¹¹⁹ *Adediran and Akintujoye v Interland Transport Ltd* (SC 119 of 1987) [1991] NGSC 2.

¹²⁰ *George Timinimi v Ramsome Awiliki & Ors* (2021) LPELR-54637(CA).

¹²¹ *Gertz v Robert Welch Inc* (1974) 418 U.S. 323.

¹²² *Garrison v Louisiana* (1964) 379 U.S. 64, 74.

violence may be constitutional upon ad hoc judicial balancing, the criminalisation of the fundamental constitutional right matter of expression itself is menacingly unconstitutional and void under national constitutions that preserve fundamental rights. As held by Olatawura JCA in *Arthur Nwankwo*: 'To retain section 51 of the Criminal Code, in its present form, that is even if not inconsistent with the freedom of expression guaranteed by our Constitution, will be a deadly weapon to be used at will by a corrupt government or a tyrant.'¹²³

The fears of Olatawura JCA have even been compounded by the promulgation and enforcement of the Cybercrime (Prohibition and Prevention) Act 2015. As if to overcompensate for the many pushbacks on the defamation laws, the Cybercrimes Act, which has disingenuously handed over state crimes to federal legislatures,¹²⁴ is now the toast of elements in and around government, so much so that the slightest expression of dissent, scrutiny or criticism, protected under section 39 of the CFRN, is visited with arrest, detention and criminal prosecution for one or more of the so-called cybercrimes. These cybercrimes are essentially rehashes of direct fundamental right prohibitions in state Criminal Code of the Nigerian FCT rather than prohibitions of true threat of violence or unjustified harm occasioned by expression.

In *Aviomoh v Commissioner of Police*¹²⁵ the Nigerian Supreme Court appears to say that the Criminal Code defamation law before them is made under section 45(1) of the CFRN, and legislatures criminalise expression, relying on the limitation clause in section 45(1) of the CFRN. While we respectfully do not consider that section 45(1) of the CFRN is a limitation clause for sections 37-41 of the CFRN,¹²⁶ we respectfully contend that even if section 45(1) of the CFRN were a limitation clause, the apex court has not evaluated the constitutional relationship between a limitation clause on one hand and criminalisation on the other hand. We submit with utmost respect that a fundamental right limitation clause does not confer on the

¹²³ *Arthur Nwankwo v The State*, (1985) 6 NCLR 228.

¹²⁴ The offences in the Act appear to be state offences.

¹²⁵ (Pt 1819) 69, 120 4 NWLR (2022).

¹²⁶ Our consideration on this issue is outside the scope of this work.

legislatures the constitutional legislative power to criminalise fundamental constitutional rights.¹²⁷

The procedure for criminalisation is straightforward: the legislatures look at a constitutional legislative matter, and proceed to identify their constitutional legislative competence over the operative aspects of the matter. If the legislatures discover that there is no operative incidental criminal aspect to the matter, as it is the case with fundamental constitutional right matters, the legislatures cannot go any further. It becomes their duty to carry out every other constitutional legislative function conferred on them regarding the matter, save criminalisation.¹²⁸ Section 373 of the FCT Criminal Code law cannot have been constitutional as that there is no requirement of true threat, or that situates the offence outside direct criminalisation of expression,¹²⁹ as there would have been no valid criminal liability on an accused person exercising their fundamental constitutional rights. It is the legislative insertion of true threat requirement in a criminal defamation law that makes it a valid criminal law. If not, section 373 of the Code is just an invalid piece of legislation, being unconstitutional.

In Nigeria for instance, superior courts are constitutionally entitled to declare unconstitutional ordinary statutes void under section 1(3) of the CFRN 1999.¹³⁰ Legislatures may also repeal unconstitutional laws made by them. Human right courts and treaty bodies have developed a test to establish whether a measure limiting a non-absolute right is legitimate on the basis of provisions such as article 19 of the International Covenant on Civil and Political Rights (ICCPR). The test involves providing answers to the following queries: Is there a legal basis for the measure limiting the right? Does the limitation on the right pursue a legitimate aim; if so, is the

¹²⁷ A constitutional competence to limit a right matter does not automatically translate to a constitutional competence to criminalise the right matter. Criminalisation is only an instrument of primary constitutional regulation. See also *U.S v Bond* (2012) 681 F.3d 149, 159 (3d Cir.).

¹²⁸ *Barenblatt v U.S.* (1959) 360 U.S. 109.

¹²⁹ *Garrison v Louisiana* (1964) 379 U.S. 64, 74.

¹³⁰ The Supreme Court of Nigeria has done same on many occasions including the case of *Attorney General of Abia State & 2 Ors v Attorney-General of the Federation & 33 Ors* (2006) NGSC 45; (2006) 2 All N.L.R. 24.

limitation necessary to achieve the legitimate aim, and is the extent of the limitation proportionate in pursuit of the identified legitimate aim? Is the restriction non-discriminatory?¹³¹ While direct criminalisation will never pass this test,¹³² indirect criminalisation is required to pass the test to stand.

The SCOTUS has held that absolute fundamental constitutional rights are but presumptive protections rebuttable by the showing of a compelling interest of the state, and narrow tailoring.¹³³ The right to free speech reflects a presumption of protection of persons to say or express themselves in any manner whatsoever; it is only overridden where the state can show that the speech is intended and likely to incite imminent lawless action.¹³⁴ In *Brandenburg v Ohio*,¹³⁵ the SCOTUS held that the government cannot punish a person for expressing his opinion, even if the opinion is considered offensive or defamatory, unless the speech rises to the level of inciting imminent violence to others. The Brandenburg standard requires that an expression must be of a nature that it is likely to cause a clear and present danger of substantial harm to the community or to others before it can be considered punishable under criminal defamation laws.

The law is trite in the US¹³⁶ that the only way the state can show that the act of the defendant does not constitute an exercise of their guaranteed fundamental constitutional rights is by proving that such act was done with intent to incite a lawless action which the state is obligated to quench; and not showing that the act of the person exercising their fundamental constitutional right violated an extant criminal law.¹³⁷ The First Amendment to US constitution has, since

¹³¹ These tests, though have been applied to criminal and civil limitations in different jurisdictions of the world (see *Aviomoh v COP & Anor* (2021) LPELR-55203 SC), have no legal basis for direct criminalisation of fundamental constitutional rights.

¹³² The first query is the nemesis of all criminal limitation of fundamental constitutional right, as there is no legal basis supporting its criminalisation.

¹³³ *Schenck v United States* (1919) 249 U.S. 47, 52. See also *Dennis v United States*, 341 U.S. 494 (1951); *Chaplinsky v New Hampshire*, 315 U.S. 568; *Gertz v Robert Welch, Inc.* (1974) 418 U.S. 323; *United States v Stevens* (2010) 559 U.S. 460, 468.

¹³⁴ *Brandenburg v Ohio* (n 106).

¹³⁵ (1969) 395 U.S. 444.

¹³⁶ And ought to be even trite in Nigeria going by the clear texts of the CFRN.

¹³⁷ See for instance *Garrison v Louisiana* (1964) 379 US 64, 74.

its enactment in the US, permitted restrictions on a few historic categories of speech. These categories include defamation, fraud, incitement, obscenity, and speech integral to criminal conduct¹³⁸ that are far removed from the core values of freedom of expression. The SCOTUS has determined that shouting 'fire' in a crowded theatre in order to cause a disturbance is not considered a protected right to expression for the purpose of the guaranteed fundamental constitutional right to freedom of expression of US citizens.¹³⁹ Expression is protected by the national Constitutions if its dissemination promotes known purposes of the right, namely: the promotion of the democratic process in the state; the exercise of individual autonomy to create and express opinions, and to freely transfer and receive information to and from other persons; and the promotion or discovery of the true meaning of things through the enrichment of the marketplace of ideas. If an expression promotes any of these outlined objects or goals, then it is of a substantive positive social value, and the fundamental constitutional right to freedom of expression shall naturally apply to it without state restrictions.¹⁴⁰

In *Lawrence v Texas*,¹⁴¹ the court invalidates criminal sodomy laws in 14 states of the US. The SCOTUS held that intimate consensual sexual conduct is part of the fundamental right to liberty protected by the Fourteenth-Amendment substantive due process. It is therefore immaterial that the act of sodomy is considered immoral by some sections of the state, as the sectional feeling of immorality alone does not satisfy the second arm of the requirement for criminalization which is the 'compelling state need' alternatively referred to as 'the overriding interest of the state'. The US court in *Robinson v California*¹⁴² reasoned that addiction is a status, not voluntarily chosen conduct, and held that an ordinary civil law criminalising drug addiction is a violation of the constitutional protection against cruel and unusual punishment. In *Powell v Texas*,¹⁴³ Justice Thurgood

¹³⁸ *United States v Stevens* (2010) 559 U.S. 460, 468.

¹³⁹ *Schenck v United States* (1919) 249 U.S. 47, 52.

¹⁴⁰ Fiss, 'Money and Politics' (1997) 97 *Colum L Rev* 2470, 2477-78.

¹⁴¹ (2003) 539 U.S. 558.

¹⁴² (1962) 370 U.S. 660.

¹⁴³ (1968) 392 U.S. 514, 533.

Marshall was of the ex-cathedra opinion that Robinson so viewed brought the Court close to the substantive criminal law; and that unless Robinson was seen from that perspective, it would be difficult to see any limiting principle that would serve to prevent the Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate decider of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the US.¹⁴⁴

5 Conclusion

In view of constitutional and international treaty obligations to respect and protect fundamental rights, there is no constitutional legislative power available to the legislatures, to criminalise fundamental constitutional rights. In view of the preservation of fundamental rights in national constitutions, there is no operative incidental criminal aspect of the fundamental constitutional right matter available for legislative criminalisation. It is clarified that while national constitutions provide legislatures with wide constitutional legislative power to criminalise enumerated and unenumerated matters, constitutional limitation clauses, in conferring on legislatures the power to limit fundamental right matters, have been unable to confer constitutional legislative power over the incidental criminal aspect of the fundamental constitutional right matter. Most of the time, the constitutional basis for criminalisation is not only the constitutional legislative power over the substantive aspect¹⁴⁵ of the constitutional legislative matter, but the constitutional legislative power over the incidental aspect¹⁴⁶ of the matter. To have chosen to render the criminal aspect of a constitutional legislative matter incidental while placing the civil aspect substantive, framers of national constitutions have shown clear intent that legislatures have no constitutional legislative competence to wield their criminalisation power on every

¹⁴⁴ Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 *Mich L Rev* 505; Singer and Husak, 'Of Innocence and Innocents: The Supreme Court and Mens Rea since Herbert Packer' (1999) 2 *Buff Crim L Rev* 861; Michaels, 'Constitutional Innocence' (1999) 112 *Harv L Rev* 828; Packer, 'Mens Rea and the Supreme Court' (1962) *Sup Ct Rev* 107.

¹⁴⁵ The substantive aspect enables civil legislation extending or limiting fundamental constitutional rights.

¹⁴⁶ The incidental aspect enables criminal legislation limiting fundamental constitutional rights.

constitutional legislative matter, particularly where the constitution itself has demonstrably implied contrary incidental aspect to a specific constitutional legislative matter like that seen in fundamental constitutional right matters. The paper recommends that courts and legislatures exculpate themselves from this constitutional legislative anomie.

The responsibility to protect civilians during armed conflicts under international law: challenges and prospects

Akame Nnoko Remi Joel*

Abstract

The central task of this paper is to ascertain the extent to which international law protects civilians under principle of responsibility to protect (R2P) during armed conflicts since its development in 2001 and subsequent adoption as Resolution 60/1 of 24th October 2005 by the United Nations (UN) General Assembly. The article assesses the application of the principle in line with civilian protection during armed conflict. It makes use of qualitative methodology which is ideal for legal research and adopts doctrinal method. The analysis includes primary data from treaties, declarations, resolutions as well as secondary data from journal articles, reports and online sources. The research reveals that the real purpose of R2P, which is protection of civilians against mass atrocities as laid down in theory, has not materialized in practice especially in the last decade. The main solutions advanced include reforms of the UN Security Council particularly with regard to the composition of permanent members as well as use of veto power. The use of an early warning signal system on likely mass killings and a timely response to distress by the actors forming the international community. Legality and uniform enforceability of the principle is only achievable when all the players are operating on a level platform. This study is important to the international community as it establishes the fundamentality of the R2P. States must act collectively in ensuring the observance of the principle to protect civilians in armed conflict. It becomes complex when the state is a perpetrator of violation of civilians' rights in armed conflict.

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1 Introduction

The responsibility to protect ¹ is an important policy concept which has been applied numerously in conflicts across the world. This concept has been applied in Africa, a continent riddled with conflicts, as well as in other developing countries. Among the countries where the concept has been applicable are Libya, Yemen and Cote d'Ivoire.

In these jurisdictions, some successes have been recorded in the application of the principle, including among others, cooperation between the international community and the State Party, as well as the forceful role of the United Nations Security Council (UNSC) amid opposition from concerned state despite these successes, challenges persist. These include legal and structural issues within the R2P framework, operational constraint of the UNSC such as its composition, limited resources, rivalries among permanent members of the UNSC, and stalemates between members with veto powers. This paper addresses the research question on 'how effective is the responsibility to protect civilians during armed conflicts under international law?' It also achieves the third specific research objective on analysing the effectiveness of the concept of the responsibility to protect civilians during armed conflict under international law. This work is underpinned by the theory of liberalism as it acknowledges human rights and the need for state cooperation in guaranteeing the protection of those rights. It postulates peaceful interventions and cooperation amongst nations and a world with no war.

¹ Responsibility to protect refers to the notion that the national community has a legal responsibility to protect civilians against the potential or on-going occurrences of the mass atrocity crimes of genocide, large scale war crimes, ethnic cleansing and crimes against humanity. R2P allows for intervention where the individual state is unable or unwilling to so protect its people or is in fact the perpetrator. The responsibility to protect is an international norm that seeks to ensure that international community never fails to halt mass atrocity crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity.

2 Practical application of the responsibility to protect civilians during armed conflicts

The practical application of the concept of R2P is evident in armed conflict scenario. This principle is practiced in several countries such as; Libya, Somalia, South Sudan, Kenya, Ukraine, Central African Republic, Côte d'Ivoire, Democratic Republic of the Congo, Liberia, Mali, Somalia, Yemen. This work will focus on Libya, Côte d'Ivoire and Yemen due to the unique circumstances and challenges each country presents. R2P in Libya was the first UN military mission justified by government's failure to protect its citizens. In Côte d'Ivoire, the UNSC authorized military action to protect civilians while in Yemen, R2P depicts complex challenges in its application.

2.1 The case of Libya

The first Libyan conflict in 2011 'presents an important case study on R2P and particularly authorization of the use of force on normative basis² when the crisis was dire, to protect the public.³ Libya was seeking to free itself from the four-decade long regime under Colonel Muammar Gaddafi, which was viewed as tyrannical with no space for opposition or nonconforming political expressions.⁴ Not much economic development was achieved during his era⁵ as the 'undemocratic regime used repressive security services to maintain its power.'⁶ Civilians protested the bad leadership but Gaddafi did not heed to their calls of change of his leadership style.⁷ He called the protesters 'cockroaches' and 'rats' who did not deserve to live.⁸ In February 2011, civilian protestors went wild on the street protesting against the long reign of Muammar Gaddafi and lack of economic growth in the country. Pressure was mounting on Gaddafi to step down 'so that a different and more committed person can be given a

² Osita Afoak, 'The Responsibility to Protect: A Comparative Analysis of UN Security Council Actions in Libya and Syria' (2015) *IJL* 5.

³ UNSC Res 1631 (17 October 2005) UN Doc S/Res/1631 (2005).

⁴ *ibid*

⁵ At the World Summit in 2005.

⁶ Jonathan M. Winer, 'Origins of the Libyan Conflict and Options for Its Resolution' (Policy Paper 2019-12, *Middle East Institute* <https://www.mei.edu/sites/default/files/2019-05/Libya_Winer_May%202019%20update_0.pdf> accessed 23 August 2024

⁷ Petra Perisic, 'Implications of the Conflicts in Libya and Syria for the Responsibility to Protect Doctrine' (2017) 47 *Zbornik Pravnog Fakulteta u Zagrebu* 783-814.

⁸ Nathalie Tocci, 'On Power and Norms: Libya, Syria and the Responsibility to Protect' (2016) 8 *Global Resp Protect* 51.

chance to rule the country'.⁹ In turn, Gaddafi's government attacked the civilians and more so, by using armed forces which quickly escalated to a civil war that caused many deaths and displacements.¹⁰ This scenario set a centre stage for the application of the principle of Responsibility to Protect in Libya in 2011.

The International Coalition for the Responsibility to Protect, an international security and human rights organization comprising of regional and non-governmental organizations founded on 8 January 2009 reported that 'the crisis in Libya seized the attention of the international community and has been labelled a clear case for when timely and decisive response to uphold R2P in the face of an imminent threat of mass atrocities should occur.'¹¹

Early on in the crisis, The UN High Commissioner for Human Rights and Special Advisers had severally called upon the Libyan government to stop using violence against civilians and other protestors amidst threats for crimes against humanity.¹² Resolution 1970 adopted on 26 February 2011 was passed freezing Gaddafi's assets, travel restriction and referring the matter to the International Criminal Court for investigation.¹³ The United Kingdom, United States, Germany and France notably proposed the resolution. The resolution was also in line with Article 41 of the UN Charter that encourages not involving the use of force but allows the use of economic and communication disruption to give effect to its decisions. The Gaddafi government, however, failed to heed to the calls aggravating the crisis and violence. Though the exact number

⁹ *ibid*

¹⁰ Hanah Saleh, *To End the Killings in Libya, the Cost balance has to Change* (Human Rights Watch, 15 December 2020) < <https://www.hrw.org/news/2020/12/15/end-killings-libya-cost-balance-needs-change>> accessed 23 August 2024.

¹¹ Martin Mennecke, 'Never again? The Role of the Global Network of R2P Focal Points in Preventing Atrocity Crimes' (2021) 39 *Neth Q Hum Rts* 161.

¹² Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (4 May 2011) <<https://www.icccpi.int/Pages/item.aspx?name=statement+to+the+united+nations+security+council+on+the+situation+in+the+li>> by an accessed 14 September 2024.

¹³

<<https://www.icccpi.int/Pages/item.aspx?name=statement+to+the+united+nations+security+council+on+the+situation+in+the+li>> by an accessed 23 August 2024

of casualties varies, unwarranted deaths of innocent civilians running in thousands have been documented.¹⁴

One of the significant interventions was North Atlantic Treaty Organization (NATO)'s involvement¹⁵ and the UNSC's issuance of the Operation Unified Protector,¹⁶ as provided for under Resolution 1973¹⁷ and Chapter VII of the UN Charter. It allowed the use of force or military action and the institution of a no-fly zone over at-risk cities.¹⁸ As a result of the resolution, NATO sent military forces to Libya and no-fly zones over regions such as Benghazi were set, which were considered high risk for violence.¹⁹ The no-fly zones applied to all except for forces protecting Libyan citizens. They blocked away Gaddafi air forces and allowed freedom fighters with the support of the country to change the tide of the conflict, defeat Gaddafi and create a chance for a representative government.²⁰ Military action was applied on a higher level, which was justified by the fact that the UN attempt to use peaceful negotiations and calls to Gaddafi to end the violence against civilians was not significant.²¹ In the process, the violence had escalated, necessitating measures that are more aggressive. The intervention was considered a success because of the involvement of NATO²², marking the first time that

¹⁴ Armed Conflict Location and Event Data Project (ACLED), listed over 6000 fatalities; WHO listed slightly over 2000 deaths

¹⁵ Kate Ferguson, 'Did the Libyan Intervention give R2P a bad name?' (January 2017) *The Syrian Issue* <<https://una.org.uk/did-libyan-intervention-give-r2p-bad-name>> accessed 23 August 2024.

¹⁶ *ibid*

¹⁷ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 (2011).

¹⁸ Clotilde Asangna, 'Quick to the Rescue: Humanitarian Intervention in Libya' (*E-international Relations*, 9 November 2015) <<https://www.e-ir.info/2015/11/09/quick-to-the-rescue-humanitarian-intervention-inlibya/>> accessed 23 August 2024.

¹⁹ Sarah Brockmeier et al, *The Impact of the Libya intervention debates on principles of protection* (Taylor & Francis 2015) 234.

²⁰ AJ Kuperman, 'NATO's intervention in Libya: A humanitarian success?' In: A Hehir and Murray (eds), *Libya, the responsibility to protect and the future of humanitarian intervention* (Palgrave Macmillan 2013).

²¹ UNSC Res 1970 (26 February 2011) UN Doc S/Res/1970 (2011); UNSC Res 2016 (27 October 2011) UN Doc S/Res/2016 (2011); UNSC Res 2040 (12 March 2012) UN Doc S/Res/2040 (2012).

²² GO Lekarenko and KV Gostev, 'NATO and EU's Involvement in the Libyan Crisis (2011–2020)' (2021) 23 *Bulletin of the Kemerovo State University* 350 <<https://vestnik.kemsu.ru/jour/article/view/4992>> accessed 23 August 2024.

NATO had operated in North Africa.²³ Compared to other humanitarian interventions in countries suffering from civil unrest like Syria, aims and consequences of the collaborative diplomatic community engagement against Gaddafi was remarkable.²⁴

An estimated number of 500-700 civilians were killed over several weeks as Libya government deployed the military and used tanks against civilians and rebel forces in the besieged cities of Benghazi, Misrata and elsewhere.²⁵ In response to these attacks on civilians, the UNSC adopted resolutions 1970 and 1973, invoking the Responsibility to Protect, authorizing the use of force to protect the populations. Subsequently, a NATO-led alliance conducted air strikes against military targets that posed a severe threat to civilians.

2.2 The case of Yemen

The Yemen war has 'led to the displacement of more than 3.6 million civilians and two overthrown governments creating the world's biggest humanitarian crisis since its beginning in 2011.'²⁶ Similar to the previous cases, the civil war arose as part of the Arab spring movement which had sprouted as a result of oppressive government regime. It was a case against Yemen's President (Ali Abdulla Saleh) who had ruled the country for over three decades.²⁷

Fighting between Houthis rebels, members of the General People's Congress, the Southern Transitional Council, and forces loyal to the

²³ Debora Valentina Malito, 'The Responsibility to Protect What in Libya?' (2017) 29 *Peace Rev* 289-

298 <[http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?vid=3&sid=ace48d7f-1c98-4518-b159-](http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?vid=3&sid=ace48d7f-1c98-4518-b159-96daae9a49a7%40sessionmgr4007)

96daae9a49a7%40sessionmgr4007> accessed 23 August 2023.

²⁴ Matthew Green, 'To What Extent Was the NATO Intervention in Libya a Humanitarian Intervention?' (E-International Relations, 2 February 2019) <<https://www.e-ir.info/2019/02/06/to-what-extent-was-the-nato-intervention-in-libya-a-humanitarian-intervention/>> 23 accessed August 2024.

²⁵ Global Centre for the Responsibility to Protect, 'Libya' (2 April 2022) <https://www.globalr2p.org/countries/libya/>. Accessed 9/10/2023.

²⁶ Karen da Costa, 'On the Controversial 'Responsibility to Protect' Doctrine and Why It Adds No Value to Disasters,' in Flavia Zorzi Giustiniani, Emanuele Sommario et al (eds), *Routledge Handbook of Human Rights and Disasters* (Routledge 2019).

²⁷ Ronald F Inglehart, 'Changing Values in the Islamic World and the West: Social Tolerance and the Arab Spring,' in Michele J Gelfand and Mansoor Moaddel (eds), *Values, Political Action, and Change in the Middle East and the Arab Spring* (OUP 2017).

internationally recognized government as well as airstrikes by a Saudi Arabia and United Arab Emirates (UAE)-led international coalition. It resulted in the deaths of more than 12,000 civilians since March 2015 though, the actual death toll is believed to be much higher. At least 3.6 million people have been displaced and the conflict has created the world's largest humanitarian crisis.²⁸

Due to recurrent war crimes and crimes against humanity, the UN insisted on an inclusive, peaceful, orderly led transition. External partners²⁹ formed a coalition and began military airstrikes geared towards protecting civilians. A series of resolutions³⁰ were passed by the UNSC, to renew Yemen regime sanctions, Yemen assets freeze, travel ban measures, and UN mandates in a bid to foster the protection of the civilian population. A valid invitation for military intervention couched in the language of R2P was issued by Presidents Hadi to regional bodies. In response, a military intervention was carried out by a Saudi-led coalition with the aim of protecting the population from mass atrocities.

2.3 Côte d'Ivoire

The Second³¹ Ivorian civil war broke out in March 2010 when the crisis in Côte d'Ivoire escalated into full-scale military conflict between forces loyal to Laurent Gbagbo, the President of Côte d'Ivoire since 2000, and supporters of the then internationally recognized president-elect Alassane Ouattara."³² Côte d'Ivoire's general election was marred with rigging leading to the incumbent president refusing to accept the results, which had declared the opposition leader Ouattara, the winner.³³ Ouattara was even certified by the then UN Secretary General Representative in the

²⁸ Alex J Bellamy, *Rethinking Humanitarian Intervention* (Palgrave 2018) 37.

²⁹ Saudi Arabia, Egypt, Morocco, Sudan.

³⁰ UNSC Res 2692 (10 June 2023); UN Doc S/Res/2692; UNSC Res 2675 (15 Feb 2023); UN Doc S/Res/2675; UN SC Res 2643 UN Doc S/Res/2643.

³¹ 'Ivory Coast Poll Overturned: Gbagbo Declared Winner,' *BBC News* (3 December 2010) <<https://www.bbc.co.uk/news/world-africa-11913832>> accessed 14 September 2024.

³² Andrew Harding, 'Civil war, Ivory Coast-style' *BBC News* (London, 9 April 2011) <https://www.bbc.co.uk/blogs/thereporters/andrewharding/2011/04/civil_war_ivory_coast-style.html> accessed 14 September 2024.

³³ Samuel Momodu, 'Second Ivorian Civil War (2010-2011)' <<https://www.blackpast.org/global-africanhistory/events-global-african-history/second-ivorian-civil-war-2010-2011/>> accessed 22 February 2021.

region as the duly elected president.³⁴ The regional block, the Economic Community of West African States (ECOWAS)³⁵ and the UNSC general declared Ouattara the winner which seemed to aggravate the situation, leading to the commencement of atrocities from both political sides. ECOWAS acted as a regional organization with mandate under the UN Charter to act in pacific settlement of disputes. Article 52 thus provides:

- (1) Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
- (2) The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
- (3) The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the States concerned or by reference from the Security Council.
- (4) This Article in no way impairs the application of Articles 34 and 35.³⁶

The UN Operation in Côte d'Ivoire³⁷ was created through a resolution,³⁸ a UNNATO peace-keeping mission 'whose aim was to

³⁴ 'Côte d'Ivoire Post-Gbagbo: Crisis Recovery (2 December 2004 - 3 May 2011) <<https://www.everycrsreport.com/reports/RS21989.html>> accessed 14 September 2024.

³⁵ Economic Community of West African States whose member countries are: Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

³⁶ UN Charter chap VIII.

³⁷ United Nations Operation in Ivory Coast.

³⁸ UNSC Res 1528 (27 February 2004) UN Doc S/Res/1528.

facilitate the implementation³⁹ by the Ivorian parties of the peace agreement signed by them in January 2003.’⁴⁰ In January 2003, a meeting was held in Linas-Marcoussis in France for the purpose of negotiating a peace settlement. The key parties were the leaders of the rivalling political factions with third parties made up of the UN, African Union (AU) and ECOWAS representatives overseeing the negotiations. The highlight of the agreement was a power sharing strategy in which President Gbagbo was to retain power as head of State but the opponents would get the ministries of Defence and Interior.⁴¹ The provisions of the agreement includes but not limited to reconciliation, preparation of a ‘timetable for holding a credible and transparent national elections, rebuilding the security forces and organizing the disarmament of all armed groups’⁴² In 2007, a state of emergency was declared due to the postponement of the presidential election.⁴³

UN Security Council reminded all parties of their R2P with the rising threats for violence and mass killings. In the context, and with the need for protection of civilians increasing,⁴⁴ diplomatic efforts were exercised in two dimensions. As per the provisions of Chapter VII of the UN Charter, firstly, Côte d’Ivoire was suspended from ECOWAS membership with calls for Gbagbo to step down⁴⁵ failure to which

³⁹ Agossou Lucien Ahouangan, ‘Conflict Resolution and the UN Peacekeeping Operation in Côte d’Ivoire’ (E-International Relations, 25 February 2019) <<https://www.e-ir.info/2019/02/25/conflict-resolution-and-the-unpeacekeeping-operation-in-cote-divoire/>> accessed 15 September 2024.

⁴⁰ Authorized by Security Council Resolution 1528 on 27 February 2004 to take over from MINUCI (United Nations Mission in Côte d’Ivoire) from 4 April 2004. The mandate was subsequently extended several times, including 31 October 2008, 31 January 2010, 27 May 2010, 20 December 2010, and most recently on 27 July 2011.

⁴¹ UNSC Res 99 (27 January 2003) UN Doc S/2003/99 (2003) (Linas-Marcoussis Agreement Cote d’Ivoire).

⁴² *ibid*

⁴³ Deniz Cil and Alyssa K Prorok, ‘Selling Out or Standing Firm? Explaining the Design of Peace Agreements’ (2020) 64 *Int’l Stud Q* 329–342 <<http://eds.b.ebscohost.com/eds/pdfviewer/pdfviewer?vid=2&sid=1609b128-3621-4252-ad8ef65935e1e53d%40pdc-v-sessmgr03>> accessed 15 September 2024.

⁴⁴ Human Rights Watch, ‘Côte d’Ivoire: Pro-Gbagbo Forces Abducting Opponents’ (23 December 2010), <<https://www.hrw.org/news/2010/12/23/cote-divoire-pro-gbabo-forces-abducting-opponents>> accessed 15 September 2024

⁴⁵ ‘Regional Body ECOWAS Deepens Integration in Cote d’Ivoire and Beyond’ (27 June 2020) <<https://oxfordbusinessgroup.com/analysis/stronger-together-regional-body-ecowas-has-deepened-localintegration>> accessed on 15 September 2024.

military interventions would be taken⁴⁶ as provided for in the UN Charter Article 41.⁴⁷

Evidently, in this case study, the intervention by regional organizations, the international community and finally the UN Security Council bore fruits. This played a big role in the protection of innocent civilians and saving of lives, which would have otherwise been lost, had the situation been left unattended to. There are misgivings with regard to the players having their own vested national interest, regime change accusation as well as the perceived rushed decisions to use the military, but the results outweighed the measures.

3 Successes in the application of the concept of responsibility to protect civilians

The Responsibility to protect principle has gained a plethora of successes by the UNSC in some nations with armed conflict. These successes will be examined in the cases of Mali, Libya and Côte d'Ivoire. The successful applications of the R2P principle in Côte d'Ivoire, Libya and Mali were due to one or a combination of the following three circumstances: the government committing mass atrocities did not obstruct the intervention, or if there was government obstruction an interested Permanent five member had the political will to overcome it; there was cooperation 'between regional organizations or neighbouring regional powers and the Security Council to coordinate the R2P response;' and the Council was able to respond to the perpetration of the mass atrocities in an efficient and effective way to protect civilians.⁴⁸ These successes will be examined under the cooperation between the international

⁴⁶ 'ECOWAS Bloc Threatens Ivory Coast's Gbagbo with force,' *BBC News* (25 October 2010) <<https://www.bbc.co.uk/news/world-africa-12077298>> accessed 15 September 2024.

⁴⁷ "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of the economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

⁴⁸ Jared Genser, 'The UN Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement,' Global Centre for the Responsibility to Protect, *Policy Brief* (September 2018) 2-5.

community and the state party, and the forceful role of the Security Council amid opposition from concerned state.

3.1 Cooperation between the international community and the State Party

In Côte d'Ivoire, following the November 2010 election of a new president, the former president refused to accept the legitimate election results. Supporting factions for each side began a violent military clash that led to war crimes and crimes against humanity committed by both factions. In response, and through the ensuing and escalating crisis, the UNSC issued a series of resolutions culminating in Resolution 1975. It authorized the acting UN peacekeeping mission to use 'all necessary means to protect civilians under imminent threat of physical violence . . . including the prevention of the use of heavy weapons against the civilian population.' The resolution also allowed the use of targeted sanctions against the former president and his group for the 'commission of serious violations of human rights and international humanitarian law.'⁴⁹ Although the illegitimate government objected to the Council's intervention, the legitimate government accepted its assistance.⁵⁰

In 2012, a coup succeeded in taking control from a newly elected president in Mali, exacerbating an already existing situation with various rebel groups. One rebel group eventually claimed control of northern Mali and began a reign of war crimes and crimes against humanity involving civilians.⁵¹ In September of 2012, the UNSC adopted Resolution 2085, which took the following three actions; authorized the deployment of an African led International Support Mission (AFISMA); re-emphasized the Malian government's responsibility to protect civilians under pillar one, and; granted AFISMA 'all necessary measures to support the Malian authorities in their primary responsibility to protect the population.'⁵²

⁴⁹ UNSC Resolution 1975 (30 March 2011) UN Doc S/Res/1975.

⁵⁰ Jared Genser, 'The UN Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement,' (2018) 18 *Chicago J Int'l L* 435-440.

⁵¹ *ibid* 445-449.

⁵² UNSC Res 2085 (20 Dec 2012) UN Doc S/Res/2085.

3.2 The forceful role of the Security Council amid opposition from concerned state

In early 2011, the Arab Spring began in Libya with protests against the four-decade rule of Muammar Al-Qaddafi. These demonstrations spread throughout the country, leading Al-Qaddafi to respond with extreme brutality including air bombing and heavy artillery against his own citizens.⁵³ The Security Council, supported by the Arab League, issued a press statement condemning Al-Qaddafi's actions and calling on the Libyan government 'to meet its responsibility to protect its population.'⁵⁴ When Al-Qaddafi's assault on his citizens continued, on February 26, 2011, the Council unanimously adopted Resolution 1970 which 'condemned the violence and use of force against civilians,' stating that such 'may amount to crimes against humanity.'⁵⁵

In addition, the Council adopted the use of measures including an arms embargo, travel bans, and asset freezes against senior leadership of the government, and referred the situation to the International Criminal Court (ICC) for investigation.⁵⁶ The imminent threat of a massacre by Al-Qaddafi's forces against rebels in Benghazi in March 2011, caused the Gulf Cooperation Council (GCC) and the Arab League to urge the Security Council to act.⁵⁷ Thereafter, the Council adopted Resolution 1973 authorizing member states 'to take all necessary measures to protect civilians and civilian populated areas under threat of attack' and established a no-fly zone to help protect civilians.⁵⁸

The Libyan situation differed from that of Cote d'Ivoire because Libya's acting government, Muammar Al-Qaddafi, objected to the intervention authorized by the UNSC and continued to perpetrate mass atrocities against civilians.⁵⁹ These three cases show how the UNSC successfully implemented the principle of responsibility to

⁵³ Anne Peters, 'The Security Council's Responsibility to Protect,' 8 *Int'l Org L Rev.* 440-445.

⁵⁴ *ibid* 441.

⁵⁵ UNSC Resolution 1970 (26 February 2011) UN Doc S/Res/1970.

⁵⁶ *ibid*

⁵⁷ *ibid* 442

⁵⁸ *ibid*

⁵⁹ Genser (n 50) 3.

protect to shield civilian populations from on-going or imminent mass atrocities to preserve the international peace and security.⁶⁰

4 Shortcomings in the application of the concept on the responsibility to protect civilians during armed conflict

In spite of the successes achieved in the application of the R2P civilians during armed conflicts, a number of challenges are also imminent. These challenges include, among others; the legal structure of Responsibility to Protect Implementation, the Structure of the UN Security Council (amongst which include; the composition of the UN SC, Lack of sufficient resources to cater for effective operations of the UNSC, Rivalries amongst permanent members of the UNSC, and stalemate between veto members, each will be treated in turn.

4.1 Challenges from the legal structure of Responsibility to Protect implementation

One of the most fundamental challenges of R2P implementation is State sovereignty as enshrined in the UN Charter given that no State is supposed to intervene in other States' matters without the approval of the UN Security Council.⁶¹ All the States are meant to be anarchic with no overall boss. Even though the permanent members in the UN Security Council have the right to intervene in any country without waiting for approval unless it is militarily, this has also been applied discriminately. Swifter actions in Libya and Ivory Coast and not so much for Yemen and Syria lays a basis for non-uniformity.⁶²

Protecting this fundamental right of each State Charter of the UN and many related documents prohibited States from threatening or using force, except in self- defence or pursuant to Security Council authorization. Central concepts of international law (sovereignty,

⁶⁰ *ibid*

⁶¹ Sandra Fabijanić Gagro, 'The Responsibility to Protect (R2P) Doctrine' (2014) 3 *Intl J Soc Sci* 1, 2

⁶² Anthony H Cordesman, 'Afghanistan, Iraq, Syria, Libya, and Yemen: The Long-Term Civil Challenges and Host Country Threats from 'Failed State' Wars' (Report by Centre for Strategic and International Studies, 25 October 2019) <<https://www.csis.org/analysis/afghanistan-iraq-syria-libya-and-yemen>> accessed 26 August 2024.

territorial integrity, non-intervention, self-defence, etc.) rely on the exclusive or dominant role of the State.⁶³

A challenge that emerges with non-cooperation from some States is their passing of immunity of heads of States as a buffer mechanism in case the ICC takes action against them. For example, a dictator leader who does things carelessly, and many people are killed by his actions, would not want interference.⁶⁴ In such cases, when other countries or organizations come in to protect the people from the atrocities, the leaders would argue that every nation is sovereign and free from external interference.⁶⁵

In military intervention, the approval process, in most cases, takes a long time.⁶⁶ Thus, when a country is in a state of war, the intervention from outside its borders could tarry, and therefore, the delay leads to more casualties.⁶⁷ For instance when the US, Russia, Egypt, and Saudi Arabia intervened in both Yemen and Syria conflicts, it was a bit late since hundreds of thousands of the civilians had already been killed millions of poor people had already been displaced from their homes.⁶⁸

Another fundamental challenge is implementing the R2P is its limited application on the crime against humanity, ethnic cleansing, and genocides.⁶⁹ The law does not cover other risks that endanger the lives of people. In other words, the international community is only required by the law to intervene when there is a crime against humanity, genocides, or ethnic cleansing. However, when the civilians are faced with other life-threatening risks, the international community is not permitted to intervene. Many people lose their

⁶³ *ibid*

⁶⁴ *ibid*

⁶⁵ Henry F Carey, Stacey M Mitchell et al, *Understanding international law through moot courts: genocide, torture, habeas corpus, chemical weapons, and the responsibility to protect* (Lexington Books 2014) 45.

⁶⁶ Christine Longo, 'R2P: An Efficient Means for Intervention in Humanitarian Crises: A Case Study of ISIS in Iraq and Syria' (2016) 48 *George Washington Intl Rev* 894

⁶⁷ *ibid*

⁶⁸ *ibid*

⁶⁹ Brian Barbour and Brian Gorlick, 'Embracing the "Responsibility to Protect": A Repertoire of Measures including Asylum for Potential Victims' (2018) *Intl J Refugee L* 536.

lives from other risks that are not concerning the concept of R2P.⁷⁰ The international community should be allowed to intervene in other matters other than the crime against humanity, genocides, and ethnic cleansing.

4.2 The Challenge from the Structure of the Security Council

Challenges stemming from the structure of the UNSC include, among others, the composition of the UNSC, lack of sufficient resources to cater for effective operations of the UNSC, and the rivalry among the permanent member States in the UNSC. The composition of the UNSC is regarded as one of the biggest reasons as to why the implementation of the R2P is a challenge.⁷¹ By virtue that the permanent members hold veto power, the action or inaction of the UNSC determines the failure or success in a situation needing intervention.⁷² The UNSC being one of the six major organs of the UN specializes in international security.⁷³ It has been tasked under Article 24 of the UN Charter to be a gatekeeper for maintenance of international peace and security. Further, its resolutions are binding to the UN members States. Examples of provisions in the UN Charter that gives the UNSC powers over world peace are Articles 39 and 46. Article 39 provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

However, such important decisions affecting security issues in the entire world are decided by both permanent and non-permanent members of the UNSC. While 15 members of the Council have the vote, five permanent members (China, France, Russia, the United

⁷⁰ Anne-Marie Judson, *'Where is R2P grounded in international law?'* (University of Otago Press 2002).

⁷¹ Justin Morris and Nicholas Wheeler, 'The Responsibility not to Veto: A Responsibility too Far' in Alex J Bellamy and Tim Dunne (eds), *The Oxford Handbook of Responsibility to Protect* (OUP 2016) 38-68

⁷² Nawaz Shamsa, 'Violation of the UN Resolutions on Kashmir: India's Quest for UNSC Permanent Membership' (2018) 38 *Strategic Studies* 1, 145-162.

⁷³ UN Charter art 24.

Kingdom and the United States) hold veto powers, meaning they can block resolution, even if all other members agree. The ten non-permanent members are elected for two-year terms and do not have veto power and the candidates are distributed in all regions across the world as provided for in the UN Charter. Article 23 provides that the non-permanent members of the UNSC shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the UNSC from eleven to fifteen, two of the four additional members shall be chosen for a term of one year.

Since inception, more than 50 States have never been members of the UNSC.⁷⁴ The inadequate implementation of the R2P by the UNSC can therefore be attributed to the structure of the UNSC itself. It has been over 70 years when the design of the UNSC was formed. Having permanent and non-permanent members in this Council contribute to its inefficiencies and with the knowledge that permanent members are the ultimate decision makers.⁷⁵ They have the power to dictate what resolution should be adopted. Each of the permanent members is not precluded from only supporting resolutions that take care of their interests.⁷⁶ Permanent members remain the ultimate decision makers who always act based on their respective interests which hampers intervention.

4.3 Lack of sufficient resources to cater for effective operations of the Security Council

Resolutions by the UNSC are enforced with the support of member States in terms of offering military forces as part of UN Peacekeeping mission.⁷⁷ Article 43 of the UN Charter provides:

⁷⁴ *ibid* art 46.

⁷⁵ A Hehir, 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect' (2013) 38 *Intl Sec* 137-150.

⁷⁶ Matthew Gould and Matthew Rablen, 'Reform of the United Nations Security Council: Equity and Efficiency' (2017) 173 *Public Choice* 1/2, 145-168 <<http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?vid=4&sid=66a04950-7509-4d36-916e-23c2ee81d866%40sdc-v-sessmgr03>> accessed 25th August 2024.

⁷⁷ *ibid*

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rites of passage, necessary for the purpose of maintaining international peace and security.

On its part, Article 44 provides;

When the Security Council has decided to use force, it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 46 further provides that: 'Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.'

The UNSC might be unable to implement R2P efficiently since the current world faces a high rate of conflicts than at any other time in history.⁷⁸ For instance a budget of '\$6.37 billion for 12 Peacekeeping Missions from July 2021 to June 2022'⁷⁹ was approved on 29 June 2021 by the UN General Assembly. This is a drop compared to the over 80 peace keeping missions world-wide which cannot function without adequate resources⁸⁰ both in terms of manpower and financial.⁸¹

⁷⁸ Vesselin Popovski, Sampford CJG et al, *Norms of Protection: Responsibility to Protect, Protection of Civilians and their Interaction* (UN University Press 2012) 201.

⁷⁹ UNGA, 55th session GA/AB/4368 <<https://www.un.org/press/en/2021/gaab4368.doc.htm>> accessed 26 August 2024.

⁸⁰ Paul D Williams, 'The Security Council's Peacekeeping Trilemma' (2020) 96 *Intl Affairs* 2, 479-499 <[https://eds.b.ebscohost.com/eds/pdfviewer/pdfviewer?vid=12&sid=c4cf1f68-c52a-4da7-af25-](https://eds.b.ebscohost.com/eds/pdfviewer/pdfviewer?vid=12&sid=c4cf1f68-c52a-4da7-af25-2e6adc47a5a6%40pdc-v-sessmgr03)

2e6adc47a5a6%40pdc-v-sessmgr03 > accessed 26 August 2024.

⁸¹ *ibid*

4.4 The rivalry among the permanent member states in the Security Council

Rivalry is another factor that has been mooted as leading to inadequate implementation of the R2P. The last few years have seen the UNSC's permanent members fight each other either economically to politically.⁸² Russia, China, and the US are the main rivals in the equation. In most cases, when one of the members take a stand on a particular issue, the others would take the opposite stand bringing about a stalemate in implementation of R2P.⁸³ For example, UNSC as whole has done little towards the Yemen conflicts since the council has been voting several times on the resolutions, but sabotage comes from the permanent members.

5.5 Stalemate between members veto powers

The past fifteen years resolution have encountered challenges from veto acts as is, has stymied collective action to address atrocity crimes. Syria is the most high-profile instance of such a situation, but equally worthy of mention are Yemen, Myanmar, and the Democratic People's Republic of Korea all instances in which one or more of the crimes articulated in the World Summit Outcome Document has been documented.⁸⁴ The UNSC Permanent Five have been endowed with power to veto resolution regardless of circumstances.⁸⁵ Article 27 of the UN Charter provides for concurrence of all the permanent members with regards to decisions of the UNSC that is: each member of the UNSC shall have one vote, decisions on procedural shall be made by an affirmative vote of nine members, decisions on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter

⁸² Jennifer M Welsh, 'The Security Council's Role in Fulfilling the Responsibility to Protect' (2021) 35 *Ethics & Intl Affairs* 227-243.

⁸³ Alexander Skander Galand, *UN Security Council Referrals to the International Criminal Court: Nature, Effects and Limits* (Brill Nijhoff 2019).

⁸⁴ Welsh (n 82).

⁸⁵ Hardeep Singh Puri, *Perilous Interventions: The Security Council and the Politics of Chaos*, (HarperCollins Publishers 2016) 65-153.

VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.⁸⁶

The veto power is probably the UN Charter's most crucial distinction between the permanent members and the non-permanent members. Initially, the right to veto did not exist, but it was brought about following Russia's request at the Yalta conference also referred to as the Crimea conference in 1945 particularly when discussing the reorganization of Europe and Germany after World War II. Nevertheless, the veto has turned out to be a tool of rivalry among the five members; hence, it does not serve its purpose and expectation. The veto powers were created to maintain peace and international security yet voting against a resolution that is meant to bring peace, is working contrary to what is expected.⁸⁷ The right to veto has indeed paralyzed the UN Security Council. It is due to this reason that many scholars in the fields of international relations as well as international law have argued that the UNSC needs to be reconstituted and streamlined so that to make it more useful to be able to handle the modern conflicts.⁸⁸ Attaining world peace and security with the Security Council's current State would be quite tricky.

5 Conclusion and recommendations

The Responsibility to protect principle has been promoted to ensure peace and save life. Nevertheless, this concept has not been practiced well according to the Syrian and Yemen conflicts' stakeholders. These conflicts have lasted for almost a decade, and less has been achieved despite high numbers of killings and displacements. The UNSC has a huge task in practicing the Responsibility to protect concept, which is seen in the cases of Libya is wanting as far as the Syrian and Yemen conflicts are concerned. The Security Council has

⁸⁶ UN Charter art 27.

⁸⁷ Security Council Report, 'UN Security Council Working Methods: The Veto' (2023) <<https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php>> accessed 23 August 2023.

⁸⁸ Sujit Datta, 'Humanitarian Military Intervention in Kosovo and Libya: An Assessment on Relevant Theories of International Relations' (European Scientific Journal Special Edition, May 2014) <<https://core.ac.uk/download/pdf/328024262.pdf>> accessed 4 March 2021.

the power to draft the resolutions to address any security threat in any country across the world. The UNSC intervenes in the security situations to protect the civilians in times when the local government has failed in protecting its civilians as in Libya. Although the justifications of the interventions come under a lot of criticism and scrutiny, the interventions in the nations of Mali, Libya and Côte d'Ivoire have yielded desirable results and especially in protect preserving humanity and promoting human rights.

The elements of timeliness and extent of intensity to approach an intervention are subject to improvement over time. It is unlikely that perfection is attainable. However, the UN's R2P prowess in the Syrian and Yemen wars has not been so far as evident and driven as in Libya and Côte d'Ivoire. Primarily, the reluctance in Syria and Yemen is because the Council attempted to present resolutions, but some Council members vetoed them. This slowed down the necessary response and urgency to the escalating killings in the Middle East countries and forms part of the shortcomings or challenges in the realization of the R2P principle under international law.

Human rights due diligence and mining risks in Nigeria

Oluwakemi Omojola *

Abstract

Human rights have historically concerned governments, and the welfare of citizens. However, private organisations, businesses large and small, and perhaps especially the world's great transnational organisations such as the mining sector are intrinsically involved in some of the human rights abuses in the business sector. The mining sector in Nigeria has contributed to the socio-economic development of the country at a great cost. The sector is bedevilled with human rights challenges, ranging from land rights issues to labour rights violations and environmental impacts on the host communities and other related adverse effects. This paper explores the concept of human rights due diligence (HRDD) within the context of mining activities in Nigeria, with the aim of identifying and addressing potential risks and impacts on human rights. The recommendations of the paper include the need for effective HRDD practices in order to avoid or mitigate adverse human rights impacts.

1 Introduction

Nigeria's rich mineral resources, including gold, tin, limestone, and lead, have long attracted both local and international interest. However, the country's mining sector has significant challenges, particularly concerning human rights violations and environmental degradation.¹ From forced displacement and child labour to unsafe working conditions and conflict-driven exploitation, the risks associated with mining operations in Nigeria highlight the urgent need for stronger accountability frameworks. In this context, Human Rights Due Diligence (HRDD) a process through which companies

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¹ O Ogunnowo, 'An Evaluation of Natural Resources Extraction and Host Communities' Reaction in Nigeria and South Africa 2005-2015' (PhD thesis, North-West University South Africa 2022).

identify, prevent, mitigate, and account for how they address their impacts on human rights has emerged as a critical tool for ensuring responsible mining practices.² Despite Nigeria's existing legal and regulatory frameworks, enforcement remains weak, and many mining operations, especially artisanal and small-scale activities, continue to operate without proper regulation. This has led to widespread abuse particularly in rural communities where state presence is limited.³ Aligning the Nigerian mining sector with international human rights standards such as the UN Guiding Principles on Business and Human Rights requires not only policy reform but also mainstreaming of HRDD into the general operations of the mining sector in Nigeria.

The paper is doctrinal using existing laws, books, case laws, internet sources and newspaper reports. The paper finds that the mining industry is rapidly growing but faces governance, regulatory and serious human right issues. This paper explores the intersection of human rights and mining in Nigeria, examines the current gaps in legal protections and enforcement, and evaluates how human rights due diligence can be effectively integrated into the sector to mitigate risks and promote sustainable development. The paper is divided into five sections including this introduction. Section two is an overview of the mining sector in Nigeria including peculiar human rights violations that are prevalent. Section three deals with the legal framework while section 4 unpacks the concept of HRDD as encapsulated in the United Nations Guiding Principles on Human rights and Business (UNGPS) and mainstreaming HRDD into the Nigerian Mining Sector. Section five concludes with useful recommendations for mitigating mining risks in Nigeria.

2 Overview of the mining industry in Nigeria

The mining industry in Nigeria is a key sector with the potential to significantly drive economic growth and diversification, though it

² D Chimisso and SL Seck, 'Human Rights Due Diligence and Extractive Industries' in S Deva and D Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 151–174.

³ OJ Olujobi and OS Irumekhai, 'Strategies and Regulatory Measures for Combatting Illicit Mining Operations in Nigeria: A Comprehensive Legal Perspective' (2024) 88 *Resources Policy* 104459.

remains underdeveloped in comparison to other sectors like oil and gas.⁴ Historically, the mining industry contributed substantially to Nigeria's GDP, particularly in the 1940s to 1970s, with minerals such as coal, tin, and columbite being major exports. However, with the discovery of oil in the 1970s, focus shifted away from mining, leading to a decline in its contribution to the economy. The Royal Niger Company recorded the earliest mining of tin ore in 1905, followed by gold mining in 1914 within the present day Niger and Kogi States. By the 1940s, Nigeria had emerged as a significant producer of tin, columbite, and coal. Tin production notably increased to 15,842 tonnes in 1943 from a minimal 1.36 tonnes in 1904.⁵ Tin and columbite mining were concentrated primarily in Jos, located in present day Plateau State, but also extended to other areas including Jarawa Hills (also in Plateau State), Wamba in Nasarawa State, Kafanchan in Kaduna State, Ningi in Bauchi State, and Ririwe in present-day Kano State.⁶ In recent years, the Nigerian government has been making concerted efforts to revive the mining sector as part of its diversification strategy under the Economic Recovery and Growth Plan (ERGP). The Ministry of Mines and Steel Development has also initiated reforms aimed at attracting local and foreign investments to the sector.

There are about 44 distinct types of mineral deposits comprising both precious and base metals. These mineral deposits are dispersed across numerous locations within all 36 states of the country and the Federal Capital Territory, Abuja.⁷ Some of these valuable mineral deposits include clay, kaolin, gold, gypsum, iron ore, lead, zinc, phosphate, and tin. The Federal Government, through the Ministry

⁴ O O David, OA Noah and SA Agbalajobi, 'An Empirical Analysis of the Contribution of Mining Sector to Economic Development in Nigeria' (2016) 19(1) *Khazar Journal of Humanities and Social Sciences* 88–106.

⁵ S J Mallo, 'The Nigerian Mining Sector: An Overview' (2012) 7(1) *Contemporary Journal of Applied Sciences* 34–45.

⁶ Nigeria Extractive Industries Transparency Initiative (NEITI), *A Survey of the Solid Minerals Landscape and Endowments in Nigeria* (January 2021) <<https://neiti.gov.ng/cms/wp-content/uploads/2021/08/NEITI-OPS6-A-Survey-Solid-Minerals-Landscape-Endowments-in-Nigeria-310120.pdf>> accessed 16 April 2025.

⁷ Nigeria Extractive Industries Transparency Initiative (NEITI), *Nigeria's Mining Sector Governance Landscape and Prospects: A Diagnostic Report* (February 2023) <file:///C:/Users/Dell/Downloads/Mining%20Sector%20Report%2015022023_1676537407.pdf> accessed 15 April 2024

of Mines and Steel Development, has identified baryte, bitumen, coal, gold, iron ore, limestone, lead-zinc, and coal as Nigeria's strategic mineral deposits due to their significant economic importance.⁸

The mining industry in Nigeria is organized around three main types of operations Large-Scale Mining Operated by multinationals; this sector is underdeveloped but offers significant potential for investments. Small-Scale Mining Largely informal, small-scale mining is widespread, employing thousands in the country, particularly in gold mining. Artisanal Mining this is the most common form of mining, carried out by individuals or small groups using rudimentary tools. It accounts for a significant portion of the gold mining sector. Nigeria has a well-defined regulatory framework for the mining sector aimed at encouraging private sector participation.⁹ Key regulatory bodies include Ministry of Mines and Steel Development which is responsible for formulating policies and providing oversight for mining activities, the Nigerian Mining Cadastre Office which handles the issuance of mining licenses and permits as well as the Nigerian Geological Survey Agency. This body provides geological data to facilitate mining investments.¹⁰

The Nigerian Minerals and Mining Act of 2007,¹¹ coupled with the National Minerals and Metals Policy, provides a legal framework for exploration, exploitation, and development of minerals. Despite its potential, the Nigerian mining industry faces several challenges including human rights violations. The connection between resource extraction and sustainable development in Africa has been a subject of ongoing debate. Conversely, critics emphasize the adverse socio-economic consequences experienced by marginalized and

⁸ Strategic Minerals; Ministry of Mines and Steel Development.

⁹ KPMG, *Nigerian Mining Sector* (KPMG Nigeria, 2020) <<https://assets.kpmg.com/content/dam/kpmg/ng/pdf/advisory/ng-Nigerian-Mining-Sector.pdf>> accessed 12 March, 2024.

¹⁰ Nigeria: Mining 2021' (GTDT, 2021) <https://enradvisory.com/wp-content/uploads/2021/06/GTDT_2021_mining_Nigeria.pdf> accessed 12 March, 2024.

¹¹ The Nigerian Minerals and Mining Act 2007 LFN 2004.

impoverished communities as a result of the mining industry.¹² The mining sector in Nigeria is no exception, it has faced challenges because of regulatory legal issues, and human rights violations.¹³ It is of paramount importance to address and interrogate human rights violation in mining operations because resolving human rights issues builds trust between mining companies, governments, and local communities.

Effective engagement and consultation with affected communities foster mutual understanding and collaboration in achieving sustainable development goals. Human rights violations often disproportionately impact marginalised and vulnerable groups, including indigenous communities and women. Addressing these violations promotes social justice and equity by ensuring that all individuals have equal access to benefits and protections. Addressing human rights violations is essential for upholding the fundamental rights and dignity of individuals, including the right to life, health, and livelihoods. Communities affected by mining have the right to live in a safe and healthy environment, free from harm caused by mining activities. HRDD aims to assess and identify potential human rights risks and impacts associated with mining in Nigeria.

3 Human rights violation in the mining industry

Mining, as an industry, has historically been associated with a range of human rights violations. These issues have spanned from the colonial era to the present, affecting communities, workers, and the environment in both developing and developed nations. The violations include labour exploitation, environmental degradation, displacement of indigenous peoples, and violence linked to resource extraction. The industry has largely been associated with artisanal and small-scale mining (ASM), which presents significant human

¹² FXD Tuokuu, JS Gruber, U Idemudia and J Kayira, 'Challenges and Opportunities of Environmental Policy Implementation: Empirical Evidence from Ghana's Gold Mining Sector' (2018) 59 *Resources Policy* 435 <<https://doi.org/10.1016/j.resourpol.2018.08.014>>.

¹³ Mining in Nigeria: Challenges, Opportunities, and Prospects' (Mining Review, 2021) <<https://www.miningreview.com/gold/mining-in-nigeria-challenges-opportunities-and-prospects/>> accessed 12 March 2025.

rights challenges such as:¹⁴

3.1 Labor rights violations in Nigeria's mining sector

One of the most pressing labour rights issues in Nigeria's mining sector, especially within ASM, is the widespread prevalence of unsafe working conditions. Thousands of miners operate in informal and often unregulated settings, using rudimentary tools and working in structurally unstable pits. These hazardous environments expose workers to significant risks, including mine collapses, respiratory illnesses from dust and chemical exposure, and physical injuries.¹⁵ Artisanal miners typically lack access to personal protective equipment, medical care, and insurance coverage. In addition, poor lighting, lack of ventilation, and exposure to toxic substances such as mercury exacerbate the dangers they face daily. These unsafe conditions are not only a violation of basic labour rights but also contravene several national and international legal standards.

The Nigerian Minerals and Mining Act, 2007 in section 61¹⁶ requires mining lease holders to ensure the safety of workers by adhering to prescribed health and environmental standards. It mandates the implementation of safety measures and the protection of workers' health. Child labour is a worrisome human rights concern in Nigeria's mining sector. In several states such as Zamfara, Niger, and Plateau states, young children are found working in mines. They are typically employed in the sorting, washing, and crushing of mineral ore, or sent into narrow mine shafts to retrieve materials. These tasks expose children to life-threatening risks, including tunnel collapses, respiratory diseases from dust inhalation, and lead poisoning¹⁷ in section 59 Labour Act¹⁸ prohibits the employment of children under

¹⁴ FXD Tuokuu, JS Gruber, U Idemudia and J Kayira, 'Challenges and Opportunities of Environmental Policy Implementation: Empirical Evidence from Ghana's Gold Mining Sector' (2018) 59 *Resources Policy* 435 <<https://doi.org/10.1016/j.resourpol.2018.08.014>>.

¹⁵ S Fowora, LITE-Africa, 'LITE-Africa Report Exposes Child Labour, Rights Abuses and Environmental Degradation in Nigeria's Mining Sector' (Nigerian Mining, 10 May 2023) <<https://nigerianmining.com/lite-africa-report-exposes-child-labour-rights-abuses-and-environmental-degradation-in-nigerias-mining-sector/>> accessed 13 May 2025.

¹⁶ Nigerian Minerals and Mining Act 2007 s 61

¹⁷ Fowora (n 15).

¹⁸ Cap L1, LFN 2004 s 59.

the age of 15 in an industrial setting. The Child Rights Act 2003¹⁹ section 28 prohibits the use of children in exploitative labour and in any employment that is injurious to the child's health, education, or development. International Labour Organization (ILO) Convention No. 138²⁰ and No. 182.²¹ Nigeria has ratified both Conventions, which address minimum age for employment and the elimination of the worst forms of child labour, including mining. The minimum age being 12 years.

3.2 Environmental degradation and health hazard in Nigeria's mining sector

Environmental degradation is a major consequence of poorly regulated mining activities in Nigeria, particularly in artisanal and small-scale mining. The ecological footprint of mining operations includes soil erosion, deforestation, loss of biodiversity, water and air pollution, and, in extreme cases, toxic contamination. These have far-reaching consequences for human health and sustainable development.²²

One of the most devastating environmental and public health disasters linked to mining in Nigeria occurred in Zamfara State in 2010, where artisanal gold mining exposed entire communities to dangerously high levels of lead. The processing of lead-rich gold ore inside residential compounds, without any safety precautions or knowledge of the ore's toxicity, led to severe lead poisoning. Over 400 children died, and thousands more suffered neurological damage, developmental delays, and other long-term health issues.²³ Also in a study carried out in Madaka Area of Niger State, the outcome of the metal pollution index revealed that groundwater

¹⁹ Child Rights Act s 28.

²⁰ ILO Convention No 138 concerning Minimum Age for Admission to Employment and Work (adopted 26 June 1973, entered into force 19 June 1976) ILO C138.

²¹ ILO Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) ILO C182.

²² A A Tella and N D Danjibo, 'The Environmental Impact of Mining Activities in the Local Community: A Structural Equation Modelling Approach' (2024) 11(1) *International Journal of Social Work* 44.

²³ A Anka, 'Lead Poisoning in Zamfara State Nigeria: Effects on Environmental Health' in *Poisoning – Prevention, Diagnosis, Treatment and Poison Repurposing* (IntechOpen 2024).

system in the area are greatly polluted with iron and lead and moderately polluted with chromium, manganese, mercury and nickel while arsenic, cadmium, cobalt, copper and zinc were lightly polluted. The water quality index confirms that the water in the area is not good for domestic use.

The study has established that the mining activities domiciled in the area have constituted serious water quality problems which have resulted to environmental and health challenges in their host communities. Mining techniques and laws that guarantee adequate protection of the natural environment especially soil and water should be enforced in the area.²⁴ In section 119 the Nigerian Minerals and Mining Act, 2007 mandates mining companies to conduct an Environmental Impact Assessment (EIA) before commencing operations. It also mandates an Environmental Protection and Rehabilitation Programme to minimize adverse effects on the environment. Section 2 of the Environmental Impact Assessment Act, Cap E12 LFN 2004²⁵ mandates EIAs for all activities likely to significantly affect the environment, including mining. Any mining activity without EIA approval is unlawful.

3.3 Displacement of communities

Mining in Nigeria has, in many instances, led to the displacement of communities, land grabbing, and forced evictions. According to U.N. Office of the High Commissioner for Human Rights (OHCHR), internally displaced persons are:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border.²⁶

²⁴ A N Amadi, A Musa, E E Ebieme, C I Unuevho, I M Ameh and U N Keke, 'Mining on Surface and Groundwater Quality in Madaka Area of Niger State Using Water Pollution Indices' (2016) 14(2) *Nigerian Mining J* 101–111a.

²⁵ Environmental Impact Assessment Act, Cap E12 LFN 2004.

²⁶ United Nations. (2004). United Nations Guiding Principles on Internal Displacement U.N. Office of the Commissioner for Human Rights, United Nations.

Internal displacement leads to loss of land resulting in economic decapitalisation.²⁷ Most rural households depend on land for survival, being displaced is tantamount to impoverishment, for example, by being unable to grow food.²⁸ This constitutes serious human rights breaches particularly the rights to housing, livelihood, and cultural identity. As reported in the Punch Newspaper as mining expands, displaced individuals find it difficult to gain employment within the sector, as the jobs often require technical skills or are reserved for specialised workers. Mining-induced displacement extends beyond mere physical relocation; it disrupts the deep cultural and social roots that communities have with their land. Many communities have occupied the same lands for generations, establishing family and community networks integral to their identity and resilience.

As noted by Habibu Abubakar Wushisi, Chairman of the Federation of Nigerian Mining Host Communities, a group that advocates for the rights of host communities in Nigerian mining industry, most of the displaced persons cannot go to their communities anymore, 'we see communities completely displaced. It affects our identity and social cohesion.'²⁹ He further stated that

There are over 56,000 displaced persons in Nigeria due to mining, many of us can no longer visit our communities, where we see Chinese miners working under security protection, while we face banditry just next door.

The foregoing paints a picture of what obtains in mining communities. The local communities are neglected and displaced

²⁷ M M Cernea, 'The Risks and Reconstruction Model for Resettling Displaced Populations,' (1997a) 25(1) *World Development* 1569-1587.

²⁸ Robson Mandishekwa and Enard Mutenheri, 'Mining-Induced Displacement and Resettlement: An Analytical Review' (2020) 17(1) *Ghana Journal of Development Studies* 114-140 <<https://www.ajol.info/index.php/gjds/article/view/195643>> accessed 17 May 2025.

²⁹ Joy Baba Yesufu, 'Examining the Impact of Mining-Induced Displacement on Host Communities,' *Peoples Daily* (6 November 2023) <<https://www.peoplesdailyng.com/examining-the-impact-of-mining-induced-displacement-on-host-communities/>> accessed 17 May 2025.

without compensation as provided under section 107 of the Mining Act.

3.4 Conflicts and violence in Nigeria's mining sector

Another cause of displacement is violence in the mining areas. An estimated 80% of mining in the North West region is carried out illegally and on an artisanal basis by local populations. The mining of large untapped mineral deposits in the area, especially gold which has strategic importance and economic value is at the root of community violence.³⁰ Consequently in April 2019, government banned artisanal gold mining in Zamfara State and across the region, deploying soldiers to enforce the ban. The conflict had spread to Kaduna, Katsina, Kebbi, Plateau and Zamfara States.

In throwing light on the clandestine nature of mining in some parts of the country, Dr Chris Kwaja, a Senior Researcher at Modibbo Adama University of Technology in Yola, Nigeria told the ENACT organised crime project that illegal mining leads to violent local conflicts in two ways in the North West. First, those funding the mining fight over control of the mine fields. These 'sponsors' are protected by some state governments, and act as if they are above the law.³¹

3.5 Modern day slavery and labour exploitation

Illegal mining zones have also become sites of modern-day slavery and forced labour, particularly involving vulnerable groups such as children and women. Reports have emerged of women being trafficked into mining areas for sexual exploitation or coerced into labour. Children are forced to carry ore, work underground or separate minerals under hazardous conditions often without any pay or protection. Modern-day slavery (MDS) is a pressing issue

³⁰ Nigeria Suspends Mining in Zamfara State after Banditry Surges,' *Reuters* (2 April 2019) <<https://www.reuters.com/article/us-nigeria-security-mining-idUSKCN1RE0V5>> accessed 22 May 2025.

³¹ Maurice Ogbonnaya, 'How Illegal Mining is Driving Local Conflicts in Nigeria' (ReliefWeb, 4 September 2020) <<https://reliefweb.int/report/nigeria/how-illegal-mining-driving-local-conflicts-nigeria>> accessed 17 May 2025.

that affects countless people.³² Three key points in defining MDS have been identified: (i) the inclusion of actions such as coercion and other forms of abuse, (ii) the vulnerability of victims and their inability to leave the "service" due to a lack of viable options, and (iii) a continuous cycle of victimization that prevents them from improving their situation.³³ The extractive industry in Africa, including the mining sector, is particularly at risk of modern slavery, particularly in the forms of forced labour and child labour, and there is often underreporting of such crimes due to the complex nature of the issue.³⁴

4 Legal frameworks

While Nigeria has a number of laws aimed at regulating land use, mining, and protecting community rights, enforcement has often been weak or inconsistent.

4.1 Minerals and Mining Act 2007

The Minerals and Mining Act (2007) is the primary law governing Nigeria's mining sector. The law regulates all aspects of the exploration and exploitation of solid minerals in Nigeria. It has a total of 164 sections. The Act repealed the Minerals and Mining Act, No. 34 of 1999. The Act governs ownership, licensing, environmental considerations, community development, and royalty payments in the solid minerals sector. Section 1 of the Act vests ownership of mineral resources in the government. The entire property in and control of all Mineral Resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and water' courses throughout Nigeria, any area covered: by its territorial waters or constituency and the Exclusive Economic Zone is and shall be vested in the Government of the Federation for and on behalf of the people of Nigeria.

³² O Oluwatobi, *An Examination of Modern Slavery in the Mining Industry: Case Study of Nigeria's Mining Sector* (August 2023) <<https://doi.org/10.13140/RG.2.2.31797.86249>> accessed 22 May 2025.

³³ P Dominika, 'Modern Day Slavery: Definition, Detection, and Identification' (2014) 48(3) *Psychiatria Polska* 567.

³⁴ J Koepke and R Hidron, *The Nexus of Illegal Gold Mining and Human Trafficking in Global Supply Chains* (Verité, July 2014).

In Sections 100–104 it is required that mining titleholders give owner or occupier notice and to obtain consent from landowners or pay compensation for disturbance or damage to land and property. Section 116 mandates Community Development Agreement that will ensure the transfer of social and economic benefits to the community. Section 119 provides for Environmental Impact Assessments (EIA) before any mining activity begins, which should include community engagement and identification of potential displacements. Sections 107 and 108 acknowledge the rights of occupiers and land users, and provides for compensation and the assessment of compensation in the event of displacement. Restoration of river bank is provided for in section 128 which requires any person who, in the course of mining operations, unlawfully interferes with the bank of any watercourse to restore the bank to the condition in which it was immediately prior to interference

Pursuant to section 21 of the Mining Act the Mining Regulations are the subsidiary legislation issued under the Mining Act. The Regulations contain detailed provisions for the administration of mineral titles by the Mining Cadastre Office, including the procedure, duration and documentation required for the application of a small-scale mining lease and for the application for a permit to export minerals for commercial purposes. The Mining Act and the Mining Regulations are administered by the Ministry of Mines and Steel and the Mining Cadastre Office.³⁵

4.2 Land Use Act³⁶

The Land Use Act is essential to mining operations because it governs how land is accessed, used, and compensated for. Section 1 vests all land in a state in the Governor, who holds it in trust for the people. Section 28 empowers the governor to revoke rights of occupancy for overriding public interest. Overriding public interest

³⁵ A Adetuyi and N Williams, 'Understanding the Legal and Regulatory Considerations for Mining Solid Minerals in Nigeria' (Brooks & Knights Legal Consultants, 13 October 2020) <https://brooksandknights.com/2020/10/13/understanding-the-legal-and-regulatory-considerations-for-mining-solid-minerals-in-nigeria/> accessed 22 May 2025.

³⁶ Cap L5, LFN 2004.

includes the requirement of the land by the Government of the State or by a Local Government in the State and the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith. Section 29 of the Act provides that the holder and the occupier shall be entitled to compensation under the appropriate provisions of the Minerals and Mining Act or the Petroleum Act or any legislation replacing the same.

4.3 The Constitution of the federal republic of Nigeria, 1999 (As Amended)

Section 44(3) provides the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria... shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly. Section 44 (1) prohibits the compulsory acquisition of property without prompt payment of compensation. In section 33 under which right to life is protected, environmental degradation and unsafe mining practices may threaten this right for instance lead poisoning, water contamination. Section 20 which is under chapter 2 (Fundamental Objectives and Directive Principles of State Policy.) It is provided that the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria while it is not justiciable. Section 20 places a clear obligation on the State to protect and improve the environment and safeguard the water, air and land...'

4.4 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the United Nations General Assembly in 1966 and entering into force in 1978, stands alongside the International Covenant on Civil and Political Rights (ICCPR) as a fundamental component of the International Bill of Human Rights, the Covenant is comprised of thirty-one articles organized into six parts. At its foundation, article 1 affirms the right of all peoples to self-determination, which includes the liberty to determine their economic, social, and cultural development and to manage their own natural resources.

The most substantive part of the Covenant is found in Part III where the primary socio-economic rights are laid out. These include the right to work³⁷, the right to fair and just working conditions³⁸ the right to form and join trade unions³⁹ and the right to social security.⁴⁰ The Covenant also protects the right to family life⁴¹ and outlines the right to an adequate standard of living⁴², which specifically includes access to food, clothing, and housing. Other protected rights include the right to health.⁴³ The ICESCR provides a comprehensive framework for the protection of economic, social, and cultural rights, with particular emphasis on the conditions necessary for a life of dignity and freedom. Its recognition of collective rights, such as self-determination, aligns with individual entitlements, such as housing and employment rights.

4.5 African Charter on Human and Peoples' Rights⁴⁴

The African Charter on Human and Peoples' Rights (ACHPR) was ratified by Nigeria and domesticated through the African Charter (Ratification and Enforcement) Act⁴⁵, which guarantees the rights of individuals to property, development, and protection from exploitation.⁴⁶ Article 14 guarantees the right to property. This protects communities from being displaced without adequate compensation or consultation. Article 24 provides; *all peoples shall have the right to a general satisfactory environment favourable to their development. This section guards against pollution of water sources, destruction of farmland, and toxic waste from mining.* Article 22 enshrines that *all peoples shall have the right to their economic, social and*

³⁷ art 6

³⁸ art 7

³⁹ art 8

⁴⁰ art 9

⁴¹ art 10

⁴² art 11

⁴³ art 12

⁴⁴ OAU Doc CAB/Leg/67/3/Rev 5.

⁴⁵ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria 2004.

⁴⁶ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1981) 21 ILM 58; ratified and domesticated in Nigeria by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria 2004.

cultural development. This guarantees that local communities benefit economically from mining on their land. Article 16 guarantees right to health of all Africans. It states that *every individual shall have the right to enjoy the best attainable state of physical and mental health.* There are occupational health hazards from dust and chemical, especially in artisanal mining, which violate this right.

In the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,⁴⁷ the Ogoni people of Nigeria filed a complaint alleging serious violations of their rights due to oil exploration activities by the Nigerian government in conjunction with Shell Petroleum Development Company. The government failed to prevent pollution, allowed destruction of farmland and water sources, and did not consult or compensate the Ogoni people. This landmark decision by the African Commission on Human and Peoples' Rights found the Nigerian government liable for failing to regulate oil companies whose actions violated articles 16, 21, and 24 of the Charter. Though related to oil, the principles apply equally to mining and establish that states must prevent rights abuses by corporations.

4.5 United nations guiding principles on business and human rights (UNGPS)

In June 2011, the UN Human Rights Council unanimously accepted the Guiding Principles on Business and Human Rights, by Professor John Ruggie, the former Special Representative of the UN Secretary-General for Business and Human Rights. Before Ruggie's appointment in 2005, governments, businesses, and civil society had no solid source of information on preventing and responding to business-related human rights violations. The UNGPs have impacted the development of certain local human rights legislation, even though they are considered international soft law and do not impose direct legal duties on enterprises.⁴⁸

⁴⁷ Communication No. 155/96 (2001) African Commission on Human and Peoples' Rights.

⁴⁸ D Krebs, 'Environmental due diligence obligations in home state law with regard to transnational value chains' in B Kreß and F Peña-Lévano (eds), *Corporate Liability for Transboundary Environmental Harm* (Nomos 2023) 245.

The UNGPS have 3 main pillars. The first pillar is the responsibility to protect which builds on existing legal obligations and requires states to prevent, investigate, redress, and punish human rights abuses by private actors. It comprises Foundational Principles (Guiding Principles 1-2), general state regulatory and policy functions (Guiding Principle 3), the state-business nexus (Guiding Principles 4-6), and supporting business respect for human rights in conflict-affected areas (Guiding Principle 7). It also includes provisions on ensuring policy coherence (Guiding Principles 8-9-10).⁴⁹

The second pillar is the Corporate Responsibility to Respect Human Rights, which entails avoiding infringing on the rights of others and addressing adverse impacts with which a business is involved. It comprises (Guiding Principles 11-15), Operational Principles, Human Rights Due Diligence (HRDD) (Guiding Principles 16-21), and Remediation (Guiding Principles 22-24).

The third pillar is the need for greater access by victims to effective remedies, both judicial and non-judicial. It has the following principles: Foundational Principles (Guiding Principle 25) and Operational Principles (Guiding Principles 26-31). These three pillars are encapsulated in 31 Principles, each with explanatory commentary.⁵⁰ The UNGPS are relevant to mining because just like any other sector, mining operations can abuse the human rights of their employees, and other stakeholders in the supply chain.⁵¹

5 Human rights due diligence

According to its definition, due diligence “is the amount of caution, activity, or assiduity that would be reasonably expected of and typically exercised by a reasonable and prudent person in the given circumstances; it is determined by the specific facts of each case

⁴⁹United Nations Guiding Principles on Business and Human Rights 2011 UN Doc HR/PUB/11/04.

⁵⁰ J Ruggie, C Rees and R Davis, ‘Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations’ 6(2) *Bus & Hum Rts J* (2021) 179.

⁵¹ G Ghirardi, ‘Understanding and Managing the Financial Sector’s Responsibilities in Terms of Human Rights: The UniCredit Experience’ (2012) 106 *Notizie di Politeia* 67.

rather than by any particular standard.”⁵² The Interpretive Guide to the UNGPs provided by the Office of the High Commissioner for Human Rights (OHCHR) defines HRDD as ‘an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances to meet its responsibility to respect human rights.’⁵³ In the context of the UNGPs, HRDD comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake.⁵⁴ Principle 17 stipulates that corporate organisations must do human rights due diligence to detect, avoid, mitigate, and account for how they resolve their detrimental impacts on human rights.⁵⁵

This is achieved by assessing both possible and actual effects on human rights, considering the results and acting upon them, keeping an eye on reactions, and outlining the necessary actions to address the consequences.⁵⁶ The concept of HRDD suggests that due diligence on human rights should encompass any negative impact on human rights that the company may cause or contribute to via its operations, or that may be directly related to its goods or services through its commercial affiliations.⁵⁷ The scale of the business, the potential impact on human rights, the nature and location of the business's operations, and other factors all affect how complicated the due diligence procedure can be.⁵⁸ It should also be continuous, noting that as a company's activities and operational environment change over time, so too may risks and human rights impacts. (HRDD) has become a common currency widely embraced among stakeholders operating in the Business and Human Rights (BHR) field. According to the UNGPs, HRDD will be the main instrument used by companies to detect, stop, lessen, and account for any

⁵²B. Garner 2004. *Black's Law Dictionary* (8th edn, West Group, 1990).

⁵³ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, UN Doc. HR/PUB/12/02 (2012) 4.

⁵⁴ *ibid*

⁵⁵ United Nations Document E/CN.4/2005/87. April 2005 United Nations Guiding Principles 17.

⁵⁶ J Martin, J. *Business and Human Rights: What's the Board Got to Do With It?* (2013) *U. Ill. L. Rev.*, 959.

⁵⁷ J Bonnitcha and R McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 *Eur. J Int'l L* 899.

⁵⁸ United Nations Development Programme. *Human Rights Due Diligence. An Interpretative Guide* https://www.undp.org/sites/g/files/zskgke326/files/2022_21.pdf.

negative effects that their operations may have on universally acknowledged human rights.⁵⁹

5.1 The importance of human rights due diligence in mining operations

The need for human rights due diligence (HRDD) in ethical business practices is becoming more widely acknowledged, especially in high-risk industries like mining. Mining activities are frequently connected to a variety of human rights abuses, such as internal displacement, child labour, environmental damage, land confiscation, and war funding, particularly in poor nations. HRDD lowers legal, social, and financial risks by assisting mining firms and host governments in identifying, preventing, mitigating, and accounting for the human rights implications of their operations. Incorporating HRDD into corporate practices not only helps businesses respect human rights but also fosters a more ethical and sustainable approach to doing business, creating benefits for both companies and society at large.⁶⁰ HRDD is increasingly recognised as a critical component of responsible business conduct, particularly in high-risk sectors such as mining. The importance of HRDD includes:

5.1.1 Prevention of human rights abuses

Mining projects frequently intersect with vulnerable communities, indigenous populations, and fragile ecosystems. Without adequate safeguards, mining can result in forced evictions, unsafe working conditions, pollution of water sources, and destruction of livelihoods. HRDD requires companies to conduct impact assessments before operations begin, consult with affected communities, and ensure that risks to rights like housing, health, water, and a clean environment are minimised.⁶¹ This is in line with instruments like the UNGPs.

⁵⁹ S Ramasastry and F Wettstein, 'Beyond Human Rights Due Diligence: What Else Do We Need?' (2023) 8(2) *Bus & Hum Rts J* 133.

⁶⁰ B FASTERLING, 'Human Rights Due Diligence as Risk Management: Social Risk versus Human Rights Risk' (2017) 2(2) *Bus & Hum Rts J* 225.

⁶¹ O Gaisie, *Intersection between Ecological Destruction and Human Rights: Study of Illegal Mining Activities in Ghana* (2024).

5.1.2 Legal and regulatory compliance

HRDD strengthens compliance with both domestic laws (e.g. Nigeria's Environmental Impact Assessment Act, Land Use Act) and international obligations (e.g. ICCPR, ICESCR, ACHPR).⁶² As laws evolve to impose mandatory due diligence requirements such as the EU Corporate Sustainability Due Diligence Directive⁶³ mining companies that fail to integrate human rights safeguards face increased litigation, penalties, and loss of operating licenses.

5.1.3 Conflict prevention and peacebuilding

HRDD helps identify root causes of tension, and respects land rights especially for indigenous and host communities.⁶⁴ In regions like Zamfara and the Niger states, illegal mining and resource mismanagement have fuelled violent conflict and criminal activity. HRDD helps to reduce grievances and builds trust with local populations.

5.1.4 Reputational and investment risk management

International investors and buyers increasingly demand ethical sourcing of minerals. Mining companies that cannot demonstrate HRDD face divestment, exclusion from global supply chains, and damage to their reputation. HRDD allows companies to manage stakeholder expectations⁶⁵ and align with Environmental, Social, and Governance (ESG) standards.

5.1.5 Access to remedy and accountability

A core part of HRDD is ensuring access to grievance mechanisms and effective remedies for affected individuals. This not only improves corporate accountability but also reflects a commitment to

⁶² N Inoue, *Business and Human Rights in Africa: Which Stakeholders and Actions Are Necessary in Rural Places Furthest Away from the Assumption of the United Nations Guiding Principles* (PhD thesis, Tokyo University of Foreign Studies).

⁶³ Directive (EU) 2024/825 of the European Parliament and of the Council of 24 April 2024 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 [2024] OJ L 246/1.

⁶⁴ O Abe, 'Towards a Human Rights-Based Approach to Energy Transition in Africa' (2025) 10(1) *Bus & Hum Rts* J 11.

⁶⁵ D Chimisso and S L Seck, 'Human Rights Due Diligence and Extractive Industries' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 151.

justice and fairness.⁶⁶ Especially where the state is unable or unwilling to protect rights. Mining holds significant economic promise but poses serious social risks, embedding HRDD into mining operations is essential for balancing profit with protection.

5.2 Mainstreaming HRDD in the mining sector

Identifying and assessing human rights impacts in mining operations requires understanding of the specific risks posed by mining activities and a proactive engagement with affected communities and workers. By incorporating human rights due diligence (HRDD) into their operations, mining companies can mitigate risks, promote responsible business practices. Mainstreaming HRDD in the mining sector involves embedding human rights risk assessments, mitigation, and accountability mechanisms into every stage of mining operations and governance. HRDD must go beyond compliance. It should be a continuous process aimed at improving working conditions and strengthening human rights throughout the different stages of the mining business. Rather than treating it as a one-off exercise, companies need to embed HRDD as a core part of their operations to drive lasting change for workers and communities.⁶⁷ Mainstreaming HRDD into the mining business includes.

5.2.1 Legal and policy integration

It is important for government to enact laws requiring mining companies to conduct and publicly report on HRDD, similar to the EU Corporate Sustainability Due Diligence Directive.⁶⁸ HRDD should be a prerequisite for obtaining exploration or mining licenses,

⁶⁶ J Saloranta, 'Collective and Collaborative Worker-Driven Mechanisms? A Mission (Im)Possible to Enhance Access to Remedy in Relation to Human Rights Due Diligence?' (2023) 34(2) *Eur Bus L Rev*.

⁶⁷ M Karadana, 'Mined Minerals and Metals: Integrating HRDD is Key to a Just Transition' (Ethical Trading Initiative Blog, 10 April 2025) <https://www.ethicaltrade.org/insights/blog/mined-minerals-and-metals-integrating-hrdd-key-to-just-transition> accessed 23 May 2025.

⁶⁸ On 25 July 2024, the Directive on corporate sustainability due diligence ([Directive 2024/1760](#)) entered into force. The aim of this Directive is to foster sustainable and responsible corporate behaviour in companies' operations and across their global value chains. The new rules will ensure that companies in scope identify and address adverse human rights and environmental impacts of their actions inside and outside Europe. [Corporate sustainability due diligence - European Commission](#).

with periodic compliance reviews. There are a growing number of legislative requirements for companies to report and demonstrate action to tackle human rights abuses. The UK Modern Slavery Act 2015⁶⁹ in section 54 has a legal requirement for companies to consider their due diligence systems as the basis for annual statements that set out steps they are taking to prevent, mitigate and act on risks of modern slavery in their supply chains.

5.2.2 Implementation by the mining sector

Mining companies must adopt human rights policies aligned with the UN Guiding Principles on Business and Human Rights. Companies should conduct regular human rights impact assessments (HRIAs) across their value chains, including subcontractors and artisanal miners. Check human rights record latest reports; check discriminatory laws and practices. HRDD findings must influence decision-making in procurement, community relations, security arrangements, and site management. It is important to identify which working practices drive human rights abuses. Such as recruitment practices, purchasing practices, pay systems, agency working. Consultation with others to identify ways of reducing risks of rights abuses and preventing rights violations in of paramount importance.⁷⁰

5.2.3 Stakeholder engagement and participation

It is important to engage with key stakeholders in assessing, mitigating and monitoring risks. Such stakeholders like NGOs, Trade Unions, Workers, and local communities. They should assess influence and leverage, and actively engage with most relevant stakeholders that can help to improve working conditions and respect workers' rights, prevent negative impacts, repair damage or compensate for negative impacts. Furthermore, engaging host communities in meaningful, inclusive dialogue before, during, and after project implementation helps protect the host community. Protecting human rights defenders and ensuring their freedom of

⁶⁹ Modern Slavery Act 2015, c 30.

⁷⁰ M Karadana, 'Mined Minerals and Metals: Integrating HRDD is Key to a Just Transition' (Ethical Trading Initiative Blog, 10 April 2025) <https://www.ethicaltrade.org/insights/blog/mined-minerals-and-metals-integrating-hrdd-key-to-just-transition> accessed 23 May 2025.

expression without fear of retaliation is key to mainstreaming HRDD by mining companies. ⁷¹

5.2.4 Grievance mechanisms and access to remedy

Mining companies should set up independent, culturally appropriate, and accessible grievance systems at mining sites and establish clear procedures for restitution, compensation, and remediation when harm occurs. Assess company decision-making systems, accountability and responsibility for human rights issues - especially at senior levels. It is important to establish board and executive governance indicators for tackling human rights as well as establish Key Performance Indicators (KPIs) at corporate and workplace levels for reviewing and acting on human rights due diligence.

5.2.5 Capacity building and training

Providing HRDD training to management, staff, and contractors on identifying and mitigating human rights risks as well as support training and capacity building on worker-management communication. The training should also include strengthening the capabilities of regulatory agencies to monitor, enforce, and support HRDD practices. Empowering local populations with knowledge of their rights and how to engage with HRDD frameworks.⁷²

5.2.6 Transparency and reporting

Mining companies should put in place a system that report publicly on corporate policies, strategies and actions to manage, mitigate and prevent risks of human rights violations. There should be credible evidence of steps taken where risks are found and provide yearly evidence. An accountability systems in languages understood in the community must be communicated. It is important to communicate with staff and others where risks or incidence of human rights violations have been found, and actions taken.⁷³

⁷¹ *ibid*

⁷² *ibid*

⁷³ *ibid*

6 Conclusion

Mining activities in Nigeria, particularly in artisanal and small-scale operations, are with serious human rights risks. These include forced displacement, child labour, environmental degradation, and conflict-driven exploitation. Despite existing legal and regulatory frameworks such as the Nigerian Minerals and Mining Act, enforcement remains weak, and corporate accountability is almost non-existent. HRDD provides a critical framework for identifying, preventing, mitigating, and accounting for human rights impacts within the mining sector. It is imperative therefore for the mining sector to embrace and mainstream HRDD. It is recommended that legislative reforms be made to make HRDD mandatory for businesses including the mining industry. This will ensure that companies in the mining sector assess and address human rights risks in their operations and supply chains. This also will ensure that HRDD is integrated into mining practices through collaborative efforts involving the government, corporations, civil society, and affected communities. It is also recommended that mining companies engage local communities and ensure access to remedy for rights violations. Grievance mechanisms should be accessible and transparent. Capacity training and continuous creation of awareness should be targeted at companies.

There should be targeted efforts to build awareness among companies, regulators, and local communities on the importance of HRDD and how it can be implemented. Banks and other financial institutions and investors should require HRDD as a prerequisite for funding mining projects. This will help companies align mining practices to human rights standards and responsible business conduct.

Class action in human rights litigation in Nigeria: developing or defeated

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Abstract

Human rights litigation in Nigeria has evolved over the years, resulting in constitutional amendments and enactment of statutes to protect Nigerian residents. This paper examined the extent to which class action as a mode of ensuring the protection of human rights in Nigeria has fared so far and while adopting the doctrinal research methodology it was discovered that class action is a veritable tool for the protection of human rights however, the mechanism has hitherto been underutilized due to the lack of awareness amongst litigants and inadequate legal framework for its use. In order to uplift class action to its pride of place as a veritable tool for human rights litigation, the paper recommended the expansion of the list of causes of action that can be subject of class action to include human rights litigation and the amendment of the Fundamental Rights Enforcement Procedure Rules 2009 to incorporate it.

Keywords: Class action, human rights, Fundamental Rights Enforcement Procedure Rules

1 Introduction

Class action, being a legal procedure that permits an individual to institute legal action on behalf of a class of people or group of people

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with a common claim, has not received the kind of attention it deserves in Nigeria; hence the procedure is scarcely used even though there are numerous opportunities for its use in order to protect and preserve the rights and claims of people. The paucity of knowledge and awareness of this legal procedure, coupled with its numerous advantages and the desire to bring this to the consciousness of the Nigerian litigating community remain the researcher's motivating factor. In view of this, this article will attempt to define the concept of class action, highlight briefly the evolution of class action in Nigeria, touch on the institutional framework for instituting class action and also delve into some of the perceived reasons why the procedure is not common in the Nigerian judicial system.

The article will further focus on the categories of matters that qualify for class action and also do an exposition on locus standi for instituting a class action in Nigeria. Finally, the article will highlight the procedure for instituting class action and conclude with the remedies available in class action, while trying to ascertain whether the use of class action for human rights litigation in Nigeria is still developing or already defeated.

2 Conceptual clarifications

2.1 Class action

Class action is a form of lawsuit in which an individual or a group of persons with a common legal claim or injury collectively sue a defendant on behalf of a large class of persons.¹ It is also defined as a legal proceeding in which one or more plaintiffs bring a lawsuit on behalf of a larger group known as the class.² In *Babalola v Apple Inc*, the learned justices of the Court of Appeal assert that:

According to Black's Law Dictionary, Eight Edition, Page 267, class action is defined as a lawsuit in which the Court authorizes

¹ Oghogho Eghusa, Assessing the Efficacy of Class Action Regimes in Nigeria <<https://greymile.wordpress.com/wp-content/uploads/2013/09/download-full-article-here.pdf>> accessed 22 November 2024.

² Adam Hayes, Class Action Definition, Lawsuits, Types, Benefits, Example <<https://www.investopedia.com/terms/c/classaction.asp>> accessed 22 November 2024.

a single person or a small group of people to represent the interests of a larger group, specifically a lawsuit wherein the convenience either of the public or of the interested parties requires that the case be settled through litigation by, or against only a part of the group of similarly situated persons and where a person whose interests are or may be affected does not have an opportunity to protect his or her interests by appearing personally or through a personally selected representative or through a person specifically appointed to act as a trustee or guardian.³

To the learned justices of the Court of Appeal, in a class action, the class must be so large that individual suits would be impracticable and there must be legal or factual questions common to the class.⁴ Finally, according to them, a fundamental feature of a class action must see to it that the claim or defences of the representative parties must adequately protect the interests of the class in its entirety.

A class action is permitted in some instances when a litigant has only a minor personal interest but is acting for a large number of persons in a particular situation.⁵ Mulheron opines that a class action is a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in one suit as it allows one or more persons (plaintiff) to sue on his or her own behalf and on behalf of a number of persons (class) who have a claim to a remedy for the same or similar alleged wrong to that alleged by the plaintiff and who have claims that share questions of law or fact in common with those of the plaintiff (common issues).⁶ In a class action, only the representative plaintiff is a party to the action as the class members are usually not identified, but merely described. It is further defined as a form of

³ *Babalola v Apple Inc* (2019) LPELR – 30986 (CA).

⁴ *ibid*

⁵ *Gallaher Limited v British American Tobacco Co. Ltd* (2014) LPELR (CA).

⁶ Rachael C Mulheron, *The Class Action in Common Law Legal Systems: A comparative Perspective* (Hart Publishing 2004).

lawsuit in which a large group of people collectively bring a claim to court and/or in which a class of defendants is being sued.⁷

On the whole, a class action is a form of legal procedure allowing an individual or group of individuals having a common interest, aggrieved by the same sets of infringements to bring an action against an individual or group of individuals who are alleged to have been complicit in the infringements being sought to be redressed in order to avoid multiplicity of action.

2.2 Human rights

Put simply, human rights are the basic rights and freedoms that belong to everyone.⁸ Nweke defined human rights as 'privileges and opportunities which a person is entitled to by the simple virtue of the fact that he is a human being.'⁹ The United Nations,¹⁰ on its part, views human rights as 'rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.'¹¹ Even though the Constitution of the Federal Republic of Nigeria 1999 (CFRN) did not explicitly define human rights, it listed the rights that constitute human rights.¹² These rights include the right to life,¹³ right to dignity,¹⁴ right to personal liberty,¹⁵ right to fair hearing,¹⁶ right to privacy and family life,¹⁷ right to freedom of thought, conscience and religion,¹⁸ right to freedom of

⁷ Nigerian Institute of Advanced Legal Studies, Communique on the Roundtable on Class Action Litigation in Nigeria, 13 March 2013.

⁸ Irish Human Rights and Equality Commission, Human Rights Explained, <https://www.ihrec.ie/download/pdf/ihrec_human_rights_explained.pdf> accessed 1 February 2025.

⁹ Ogochukwu Nweke, Understanding Human Rights, <<https://www.researchgate.net/publication/342946672>> accessed 1 February 2025.

¹⁰ United Nations Charter 1945.

¹¹ <https://www.un.org/en/global-issues/human-rights> accessed 4 October, 2025

¹² Constitution of the Federal Republic of Nigeria (CFRN) 1999.

¹³ *ibid* s 33.

¹⁴ *ibid* s 34.

¹⁵ *ibid* s 35.

¹⁶ *ibid* s 36.

¹⁷ *ibid* s 37.

¹⁸ *ibid* s 38.

expression and press,¹⁹ right to peaceful assembly and association,²⁰ right to freedom of movement,²¹ right to freedom from discrimination²² and right to acquire and own immovable property in Nigeria.²³ Summarily, the rights highlighted above, according to the CFRN, constitutes human rights in Nigerian parlance. The Constitution went a step further in protecting the rights highlighted above to provide that, where any of the rights is infringed or there is a threat to its infringement, the individual to whom the rights accrue can seek redress for the threat to his enjoyment of the right and protection of same.

Drawing from the above definitions, it can then be said that human rights refer to all the privileges and entitlements that compulsorily and mandatorily accrues to a person for the singular reason of being a human being, of which a threat of its breach or its actual breach is actionable in court and, where successful, entitles the person to remedies.

2.3 Human rights litigation

Litigation is defined as the process of resolving rights-based disputes through the court system, from filing a law suit through arguments on legal motions, a discovery phase involving formal exchange of information, courtroom trial and appeal.²⁴ It is also defined as the process of taking a case to a court of law so that a judgement can be made.²⁵ Drawing from the definitions of litigation and Human rights as earlier espoused, human rights litigation can therefore be defined as the process of instituting a legal action in a court of law for the protection, preservation and/or enforcement of the mandatory and compulsory entitlements and privileges accruing to a person for the simple reason of being a human being.

¹⁹ *ibid* s 39.

²⁰ *ibid* s 40.

²¹ *ibid* s 41.

²² *ibid* s 42.

²³ *ibid* s 43.

²⁴ <<https://law.uc.edu/education/areasofstudy/litigation-alternative-dispute-resolution.html>> accessed on 1 February 2025.

²⁵ <<https://dictionary.cambridge.org/dictionary/english/litigation>> accessed 1 February 2025.

3 Evolution of class action

Historically, it is believed that class action began in the English Court of Equity as a Bill of Peace in the seventeenth century.²⁶ It is also believed in some quarters, that the origin of class-action lawsuits can be traced to Anglo-Saxon and Norse tradition during the medieval times because during this period, towns, villages and hamlets collectively bring their complaints against the government who, at the time, was mostly the monarch. This procedure remained in place from the 1400s till the mid-1800s when the procedure started waning with the enactment of several statutes by parliament to deal with issues of certain organization bringing claims to court.²⁷

It is also submitted that class action procedure was imported into the United States from England with the introduction of the Civil Procedure Rules which expanded and changed the landscape of class action litigation.²⁸ One of the earliest cases of class action in the United States is the case of *West v Randall*.²⁹ The case concerned the estate of General William West, a Revolutionary War General from Rhode Island, who passed in 1814 and there was dispute as to who should be made a party to the lawsuit regarding his estate.³⁰ Justice Joseph Story, who presided on the case, became famous for his decision in the suit for formulating the modern standard for class action when he stated that:

It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be.³¹

The Nigerian experience reveals that there is no law specifically made to cover class action as an adjudicatory procedure for legal wrongs in Nigeria. However, there have been provisions for class

²⁶ *ibid*

²⁷ <https://charlestonlaw.libguides.com/c.php?g=1255231&p=9277567> accessed on the 24 November 2024.

²⁸ *ibid*.

²⁹ (1820) 29 F. Cas. 718 (R. I.).

³⁰ https://en.wikipedia.org/wiki/West_v_Randall accessed on the 24 November, 2024.

³¹ *West v Randall* (n 29) 721

actions as a mechanism for ventilating perceived wrongs in the rules of court as far back as 1972.³² To this end, the legislative origin of class action in Nigeria can be traced to the rules of court, even though the procedure has not been effectively and adequately utilized by legal practitioners and litigants in the quantum that it can be said that the procedure has achieved and attained its pride of place.

The reason for the inadequate use of the procedure in litigation in Nigeria may not be easily ascertainable, but that does not derogate from the fact that class action is not unknown to the Nigerian adjudicatory procedures and jurisprudence. One of the reasons that might have been responsible for the lacklustre attitude of practitioners and litigators to the use of class action in the Nigerian adjudicatory processes may not be unconnected with the concept of all man for himself. This concept of all man for himself portends from everyday existential and experiential living, that for an average Nigerian, once the wrong does not affect him personally, he is not perturbed and even where he shows concern, he scarcely does anything judicial to remedy the wrong perceived or committed against the fellow. As a result of the all man for himself concept currently permeating the Nigerian system, nobody really seemed to care so much about the wellbeing and interest of the larger percentage of the people, provided the individual's interest and rights are protected and guaranteed. Further to the above, there is also the perceived notion that litigation in itself is expensive, time consuming and unpredictable.³³ There is, therefore, usually a drawback in the pursuit of seeking redress or enforcement of a common right because, more often than not, there is scarcely anybody that wants to bear the burden of the litigation, either financially or otherwise.

Another reason that might have dealt a heavy blow on the use of class action could also be traced to the lack of awareness and sensitization on the availability of the procedure in seeking redress

³² Lagos High Court Civil Procedure Rule 1972, Order 13 Rule 15.

³³ N S Okogbule, 'Access to Justice and Human Rights Protection in Nigeria' <<https://sur.conectas.org/en/access-justice-human-rights-protection-nigeria/>> accessed 18 June 2025.

for perceived wrongs or infringements of a people's right.³⁴ Despite this lack of awareness and sensitization, the procedure still remains embedded in the Nigerian judicial process for seeking redress in the courts across the Federation of Nigeria.

The popularity of and preference for representative action in the Nigerian adjudicatory process could also be a reason for the scarce use of class action. Though similar, class action and representative action are markedly different in applicability and the preliminary steps for the use of either of the steps may be the reason for the preference of representative action over and above class action as a method for seeking redress. While class action requires appointment of a representative by a judge and notice of appointment, representative action does not have this requirement for the action to be commenced.³⁵ Further to this, in a class action, class members have the option to either opt in or out of the action, while in representative action, persons not captured by the representative cannot opt in.³⁶ Finally, in a class action, members of the class are only required to have interest in the subject matter of the suit and the interest may not be the same while in a representative action, the members must have the same interest.³⁷ To further seal the difference in class action and representative action the Court of Appeal held in *Babalola v Apple Inc* that:

A class action is restricted to interpretation of written instruments, statutes, administration of estates, property subject to trust, and customary, family or communal property. On the other hand, a representative action may be brought on any cause of action. A class action requires appointment by the Judge whereas a representative action does not require leave of court. In a class action, notice of appointment is required, whereas

³⁴ Class Action Lawsuits in Nigeria: How to empower Collective and Legal Action <<https://nigerianlawyerscenter.com/blog/class-action-lawsuits-in-nigeria-how-to-empower-collective-and-legal-action/>> accessed 18 June 2025.

³⁵ O Babalola, 'The Court of Appeal Clears the Air on the Difference between Class Action and Representative Actions' <<https://www.mondaq.com/nigeria/class-actions/892022/the-court-of-appeal-clears-the-air-on-the-difference-between-class-actions-and-representative-actions>> accessed 18 June 2025.

³⁶ *ibid*

³⁷ *ibid*

notice of representation is not required in a representative action. Class members may not be identifiable and ascertainable in a class action, but interested persons are ascertainable in a representative action. In class actions, members are only to have interest whereas in representative actions, members must have same interest.³⁸

Based on the provisions of the various civil procedure rules of the high courts which constitute the legal framework for the institution of class action in Nigeria, certain categories of matters are listed as qualified for class action and they include intellectual property rights, interpretation of written instruments or statutes, administration of estates, property subject to trust and land held under customary law as family or community property amongst others as will be later discussed in this work.³⁹ The limitation placed on the type of causes that can be redressed using class action by the various rules of court is also a reason for the under-utilization of the procedure in adjudication.

Though class action has been embedded in the rules of court since 1972, as earlier pointed out, arguably, the first and successful class action suit on record in Nigeria is *Shell Petroleum Development Company Nigeria Limited v Edamkue & Ors*,⁴⁰ which was instituted sometime in 2001 and concluded in 2010. The action which bothered on the oil spillage concerns in the Niger Delta region of Nigeria, was instituted on behalf of the Ejama-Ebubu Community in Tai Eleme Local Government Council of Rivers State. The oil spillage which occurred in 1970 affected about 256 hectares of land and water areas in Ejama-Ebubu Community. While awarding damages to the tune of 15.4 billion Naira in favour of the plaintiffs, the Supreme Court, amongst other things, held Shell Petroleum liable for the escape of the oil from their pipeline to the plaintiff's farmlands. The Court further held that the accumulation of crude oil in a waste pit by the Shell Petroleum was a non-natural use of land and, hence, Shell

³⁸ (2021) 15 NWLR (Pt 1799) 221 paras F-H; 214 paras A-B.

³⁹ C Uba, M Akinleye, I Reju, I Idris and U Alfred, 'Legal 500 Country Comparative Guides 2025, Nigeria Class Actions,' <<https://www.legal500.com/guides/chapter/nigeria-class-actions/?export-pdf>> accessed 18 June 2025.

⁴⁰ (2009) 14 NWLR (Pt 1160) 1.

Petroleum Development Company was liable for the damage arising from it.⁴¹

A more recent class action suit in Nigeria is the case of *Babalola v Apple Inc*⁴² where the appellant commenced a class action against the respondent for manufacturer's breach of warranty and negligence in respect of I-phone 6 and I-phone 6 plus. The appellant stated in the affidavit in support of his originating summons that on 18 February 2016, he purchased an I-phone 6 plus from an I-store in Lagos State, whose store is one of the respondent's authorized resellers in Nigeria and that there was a breach of manufacturer's warranty arising out of use and negligence by the respondent. But the appellant did not show that he made any complaint to the Consumers Protection Council before he filed his originating summons to commence his action at the trial court. The appellant filed along with his originating summons, two motions *ex parte*. The one for certification of the suit as a class action and the other for leave to serve the originating processes on the respondent in the United States of America. Both motions were granted by the trial court, and the respondent was served with the originating process by courier service in the United States of America on 6 January 2017. In response to the suit, the respondents filed its memorandum of appearance on 6 February 2017 and also filed a notice of preliminary objection.

After hearing the respondent's preliminary objection, the trial court delivered its ruling. It held that every I-phone user has a separate contract of sale; that the appellant did not at any time negotiate as an agent of all I-phone users in Nigeria when the I-phones were purchased or present evidence that he had the right to enforce the contractual rights of other members of the class of I-phones users or that an enforceable trust had been created. Further, the trial court held that the originating summons was not ripe for hearing because the appellant did not comply with the provisions of sections 6 and 8 of the Consumers Protection Council Act as requisite conditions

⁴¹ *ibid* 562

⁴² (2021) 15 NWLR (pt 1799) 193

precedent for commencement of the action. Thus, the trial court struck out the appellant's suit.⁴³

Dissatisfied with the ruling, the appellant appealed to the Court of Appeal. Though the Court of Appeal upon considering sections 6 and 8 of the Consumers Protection Council Act and Order 13 rules 12 and 13 of the High Court of Lagos State (Civil Procedure) Rules, 2012 dismissed the appeal on the ground of non-fulfilment of condition precedent⁴⁴, it is satisfying that the judgement of the Court of Appeal emphatically recognized class action as a judicial process and ultimately differentiated the procedure from representative action. The import of the decision in the Babalola's suit is that class action is gradually gaining the requisite recognition it most certainly deserves.

The case of *Gallaher Ltd v BAT Nigerian Limited*⁴⁵ is another appeal emanating from a class action suit. The 1st and 2nd respondents commenced an action against the 3rd respondent and their claim was for infringement of trade mark and passing off. Their complaint basically was that the package in which the Gold Bond brand of cigarettes was being manufactured and sold by the 3rd respondent was confusingly similar to the package in which their Benson and Hedges brand of cigarettes was being sold. The 1st and 2nd respondents alleged that they had registered as a trade mark the design and colour of the package in which their Benson and Hedges was being sold. The 1st and 2nd respondents also sought, by an *ex-parte* motion, leave to sue the 3rd respondent as representative of a defined class of persons; orders of interim injunction and an Anton Piller order against the 3rd respondent and all those persons on whose behalf the 3rd respondent was sued. The trial court heard the 1st and 2nd respondents' motion, and granted the orders sought but made some variations.

Subsequently, the appellants applied to be joined as defendants and they were joined. They then applied for the discharge of the interim

⁴³ *ibid* 228

⁴⁴ *ibid* 216

⁴⁵ (2015) 13 NWLR (pt 1476) 325.

orders of injunction and the Anton Piller order. The appellants asserted that the 1st and 2nd respondents failed to disclose the material fact; at the time they moved their motion for the injunctive orders and the Anton Piller order, that the appellants had registered Gold Bond and the package design of Gold Bond brand or cigarettes without colour limitation as trademarks. The Court of Appeal while considering Order 9 rule 4 of the Federal High Court (Civil Procedure) Rules, 2009 gave credence to class action and made the following pronouncements:

By the nature of class actions, such as this case, the plaintiff may not know or ascertain the person, persons or members of the class that the defendant has been dealing with; to wit: supplying and receiving infringing or passing off items, outlets where supplied infringing materials are sold, persons engaged in commercial production or sale of infringing materials.⁴⁶

Further to the above, the court of appeal also pronounced on the principles guiding class action thus:

The Federal High Court (Civil Procedure) Rules, 2009, allows a situation where the defendants named or represented in a class action concerning trademarks, copyright or patents and designs, can be flexible to allow defendants to opt in or opt out of the proceedings. It follows from rule 4 (1) and (3) of the Rules that in such class action, neither the named defendant(s) nor the ascertained described person(s), the class or members of the class interested may of necessity qualify as members of the class to represent other members of the class. In other words, by the rules of the trial court, the leave of the court allowing members of a class described in a particular way to be sued does not in any way conclude that they are indeed members of the said class let alone suggest their liability. Accordingly, the description of the appellants and the 3rd respondent on the face of the 1st and 2nd respondents' motion *ex-parte*, which was granted by the trial court did not presume the liability of the appellants and the 3rd respondent before trial or judgment and was justifiable under

⁴⁶ ibid 349 paras D-F.

Order 9 rule (4) of the Federal High Court (Civil Procedure) Rules, 2009.⁴⁷

4 Legislative and institutional frameworks for class action and human rights in Nigeria

Even though there is no clear-cut legislative framework in terms of primary legislation such as Statutes and Acts of the National Assembly for the institution of class action in Nigeria, the various rules of court and judicial pronouncements provide a level of insight into the legislative framework for class action in Nigeria.

The Lagos State High Court Civil Procedure Rules 2019 provides that class action can be instituted in the areas of administration of estates, properties subject to a trust, land held under customary law as family or community property and the construction of any written instrument, inclusive of a statute.⁴⁸ The Federal High Court Civil Procedure Rules, 2019,⁴⁹ on its part provides that class actions can be instituted in respect of Trademarks, Copyrights, Patents or Designs while the National Industrial Court of Nigeria Civil Procedure Rules 2017 provides and empowers one or more persons to sue on behalf or for the benefit of persons interested in respect of employment law or labour matters.⁵⁰

The Federal Capital Territory High Court Civil Procedure Rules 2018 (FCT Rules), in recognizing class action provides for a situation where the action is brought by numerous persons. The rule provides:

1. Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued on behalf of or for the benefit of all persons so interested.
2. Where there are numerous persons having the same interest in one suit and they seek to defend the action, the court may allow one or more of such persons to defend the action on behalf or for the benefit of all persons so interested.⁵¹

⁴⁷ *ibid* 349–350 paras F–A.

⁴⁸ Order 15 Rule 13 (1).

⁴⁹ Order 9 Rule 4.

⁵⁰ Order 13 Rule 11 (1).

⁵¹ Order 13 Rule 14 (1) & (2).

The import of the above cited provision is that the rule recognizes class action, even though it did not expressly call so. The FCT Rules further provides that class action can be brought in matters concerning administration of estate, property subject of trust, land devolved under other interest as family or community property, construction of any written instrument, statutes inclusive, torts or any other class action.⁵² The FCT Rules, when compared to other rules of court, did not only expand the categories of matters that can be dealt with under the class action procedure, it also gave an unending latitude to litigants to bring any action they deem fit under the class action procedure by providing thus: any other class action.⁵³

By the provisions of the various rules of court to wit: the various State High courts, National Industrial Court, Federal High Court and FCT High Court, it is evident that the institutional framework for the protection of class action in Nigeria remain in the various courts as highlighted above since they can all entertain class actions. However, the extent of the matters which they can entertain under the class action procedure is limited to the ones expressly stated in their respective rules.

With respect to human rights, the fundamental legislative framework for its protection in Nigeria remains the CFRN, particularly Chapter IV where all the fundamental human rights accruing to every Nigerian is itemized and guaranteed.⁵⁴ Further to the Constitution of the Federal Republic of Nigeria, amongst the legislation is the Fundamental Rights (Enforcement Procedure) Rules 2009 which provides the procedure for the protection and enforcement of the fundamental human rights of citizens. According to the Fundamental Rights Enforcement Procedure Rule⁵⁵, any individual who alleges that their fundamental rights, as provided for in the Constitution and to which they are entitled, have been, are being, or are likely to be infringed, can apply to the court in the state

⁵² Order 13 Rule 15.

⁵³ Order 13 Rule 15(e).

⁵⁴ Constitution of the Federal Republic of Nigeria 1999 ss 33-42.

⁵⁵ Fundamental Rights (Enforcement Procedure) Rules 2009 Order 2 Rule 1.

where the infringement occurred or is likely to occur for redress.⁵⁶ Also, in cases of actual or potential violations of fundamental rights, the affected individual can seek redress or prevention through the courts. As per the CFRN, the High Court (State or Federal) holds jurisdiction over fundamental rights actions, limited to subject matters within the specific court's jurisdiction.⁵⁷ The National Human Rights Commission (NHRC) Act 1995 (as amended) is part of the legal framework for the protection of human rights in Nigeria. The Act established the NHRC as an autonomous body with a mandate to safeguard and advance human rights within the country by raising public awareness about human rights, fostering collaborative efforts with governmental bodies and civil society organizations with respect to human rights matters and advocating for the protection of human rights, amongst other things.

Institutionally, the various courts in Nigeria (State High Courts and Federal High Courts, the Court of Appeal and the Supreme Court), the NHRC, the Nigeria Police Force, the Public Complaints Commission, the Legal Aid Council of Nigeria, to mention a few, remain key institutions established to protect and promote human rights and human rights awareness in Nigeria.

5 Features/categories of matters that qualify for class action

5.1 Class of persons being represented are not ascertainable

A major feature of class action is that the people on whose behalf the suit is brought or being proceeded against are so large that they are unascertainable, cannot be readily ascertained or, if ascertained, cannot be found.⁵⁸ To this end, it follows therefore that, for a suit to qualify for the class action procedure, the persons on whose behalf

⁵⁶ NH Worlu-Okolie and CO Joseph Asoh, 'Legal and Institutional Frameworks for Human Rights Protection in Nigeria: Challenges and Pathways to Effective Enforcement,' (2024) 1(2) *Fountain Univ LJ* 200 -219.

⁵⁷ Adeola Austin Oyinlade, 'The Enforcement of Fundamental Rights in Nigeria' <[https://www.mondaq.com/nigeria/human-rights/1439386/the-enforcement-of-fundamental-rights-in-nigeria#:~:text=The%20breach%20of%20any%20fundamental,from%20sections%2033%20to%202](https://www.mondaq.com/nigeria/human-rights/1439386/the-enforcement-of-fundamental-rights-in-nigeria#:~:text=The%20breach%20of%20any%20fundamental,from%20sections%2033%20to%202>)> accessed 2 February 2025.

⁵⁸ E Uwa, A Aderemi and I. Enigbokan, Collective Redress and Class Action 2024, <<https://www.mondaq.com/nigeria/trials-appeals-compensation/1562012/collective-redress-and-class-actions-2024>> accessed 10 June 2025.

the action is brought or against whom the action is instituted are so large that they cannot be ascertained, readily ascertained or where ascertained cannot be found. Civil rights litigation⁵⁹ qualifies as an example under this head of features and one of the most famous examples of civil rights action in the U.S. is the *Brown v Board of Education of Topeka*⁶⁰ case decided in 1954, where the U.S. Supreme Court struck down school segregation as unconstitutional.⁶¹

5.2 Commonality of interest

For a suit to qualify for the class action procedure, there must be common factual questions or legal interest with the claims or defence of the class of persons being represented or proceeded against. This position has been judicially pronounced on in the case of *Abraham Adesanya v President of the Federal Republic of Nigeria*⁶² where it was held that a class action must be centred on the principle of commonality.⁶³ This means there must be common factual questions or legal interest with the claims and defences of the larger group to be represented or being protected.⁶⁴

5.3 Representation

In a class action, because the class of persons being represented are so large that they cannot be readily ascertained and, where ascertained, cannot be found, it is usually the practice that a person or group of persons are appointed to represent the whole class. In the case of *Babalola v Apple Inc*⁶⁵ the Court of Appeal stated thus:

A lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group,

⁵⁹ Civil rights litigation can be said to arise where a category of persons belonging to the same class, for instance, race, tribe, gender, affinity, group, etc., are so large that they cannot all be ascertained or are scattered abroad in a manner that they cannot be easily found, institute an action for the enforcement or recognition of their civil rights.

⁶⁰ (1954) 347 US 483.

⁶¹ <<https://www.investopedia.com/terms/c/classaction.asp>> accessed 24 November 2024.

⁶² (1981) 5 SC 112.

⁶³ *ibid* 148

⁶⁴ E Uwa, A Aderemi, OB Omaghomi and I Enigboka, 'Collective Redress and Class Actions 2023,' <<https://www.mondaq.com/nigeria/class-actions/1399754/collective-redress-and-class-actions-2023>> accessed 24 November 2024.

⁶⁵ (2021) 15 NWLR 193.

specifically, a lawsuit in which the convenience either of the public or of the interested parties requires that the case be settled through litigation by or against only a part of the group of similarly situated persons and in which a person whose interest are or may be affected does not have an opportunity to protect his or her interests by appearing personally or through a personally selected representative, or through a person specially appointed to act as a trustee or guardian.⁶⁶

5.4 Ascertainment by the Court

For a suit to properly proceed under the class action procedure, the court must ascertain that the class of persons bringing the action or being proceeded against cannot be ascertained, readily ascertained or be found. This is usually done by the party seeking to bring the action filing a motion *ex parte* supported by an affidavit seeking the leave of court to appoint one or more persons named in the originating process to represent the class. It is only when this requirement is met that a suit can validly proceed as a class action. Where the class of persons to be represented are ascertainable and can be found, the suit no longer qualifies as a class action but, at best, a representative action.

6 Locus standi for class action

Locus standi is defined in *NBC v Ezeifo*⁶⁷ as the legal capacity to institute proceedings in court.⁶⁸ The issue of locus standi is so fundamental that it stands at the jurisdictional root of every suit. To this end, the survival or death of any matter instituted before any court is dependent on its ability to pass the jurisdictional test of the competency of the person bringing the action to bring same. When it is settled that the party instituting the action has the legal capacity and competency to institute the action, then it is said that the person has the locus standi to bring the action.

In Nigeria, persons who have the requisite locus standi to institute a class action are persons having an interest in the suit, which may be

⁶⁶ *ibid* 211 A-C

⁶⁷ (2001) 12 NWLR (pt 726) 11.

⁶⁸ *ibid* 28 paras A.

commenced or defended by one or more such persons for the benefit of other interested persons.⁶⁹ In a class action, it is sufficient for the parties to have common issues without necessarily having the same interest.⁷⁰

7 Procedure for institution a class action

As earlier noted, there is no clear-cut statutory provision on the institution and prosecution of class action in Nigeria. However, the various states High Court Civil Procedure Rules provide an insight into how it can be instituted. Using the High Court of Lagos State (Civil Procedure) Rules 2019 as a specimen, the procedure for instituting a class action is highlighted below:

A class action being a process of court for instituting action for redress could be commenced by way of a writ of summons⁷¹ or originating summons⁷² accompanied with the relevant documents as stipulated by the rules of court. Alongside the originating process is also filed an application by way of a motion ex-parte seeking leave to appoint one or more persons named on the originating process to represent the class in the subject matter of the suit.⁷³ Once satisfied that the suit qualifies and meets the requirement for a class action, the court certifies it as such and appoints either a person or group of persons to represent the class in the action.⁷⁴ Once the suit is certified, class members are thereafter notified, either by newspaper publication, advertisement or any other means, of the pendency of the lawsuit, their inclusion in the lawsuit and the option available to them to either opt in or out of the suit as members of the class.⁷⁵ Once the hurdle is crossed, the matter thereafter proceeds to trial or settlement, depending on the disposition of the persons being proceeded against.

⁶⁹ <<https://www.mondaq.com/nigeria/class-actions/1399754/collective-redress-and-class-actions-2023#authors>> accessed 25 November 2024.

⁷⁰ *ibid*

⁷¹ High Court of Lagos State (Civil Procedure) Rules 2019 Order 5 Rule 1.

⁷² *ibid* Order 5 Rule 4.

⁷³ *ibid* Order 15 Rule 12.

⁷⁴ *ibid* Order 15 Rule 13.

⁷⁵ *ibid* Order 25 Rule 15.

8 Remedies/reliefs available in a class action

8.1 Declaratory relief

Declaratory relief is where the court makes findings and pronounces on a legal issue that has been brought to its attention. This form of relief merely confirms or denies a legal right or an entitlement or the position of the law, but contains no specific order to be carried out by the successful party or enforced against the unsuccessful party.⁷⁶ It is also discretionary and granted only in circumstances where the court is convinced by credible evidence.⁷⁷ To this end, declaratory relief is not given either in default of defence or on admissions without the court hearing evidence and being satisfied by such evidence that the plaintiff is entitled to the declaration sought.

8.2 Injunctive relief

Injunctive relief is a readily available remedy in the private law field for preventing the commission of an unlawful act such as tort or breach of contract. However, in the public law field, it is a remedy available against a public authority to prevent the commission of or continuation of unlawful acts.⁷⁸ The remedy would not be made available to a litigant who does not have a legal right to the subject matter of the action. The types of injunctions available are:

- a) Mandatory injunctions, which are granted by the court to compel a party to do a specific thing or action;⁷⁹
- b) Prohibitory injunctions, which seek to prevent someone from engaging in a particular act pending the determination of the case;⁸⁰ and
- c) Perpetual injunctions, which are an ancillary relief, granted to protect an established right in law or in equity, and, where the substantive right has not been established, no injunctive relief would be granted.⁸¹

⁷⁶ *Fawehinmi v IGP* (2007) 7 NWLR (pt 665) 481.

⁷⁷ *CPC v INEC* (2011) 18 NWLR (pt 1279) 493, 576 para G.

⁷⁸ <<https://www.learnnigerianlaw.com/learn/administrative-law/judicial>> accessed 18 June 2025.

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ *ibid*

8.3 Damages

Where the matter complained about is a tort, the primary theoretical notion is to place the plaintiff(s) in a good position, as far as money can, as if the matter complained about had not occurred.⁸² The principle envisages that a party that has been injuriously affected by the act complained of must be put in a position in which they would have been if they had not suffered the wrong for which they are being compensated.

Damages awarded from a class action are in two categories:

- i. Compensatory damages: This is awarded to compensate for direct or actual loss suffered such as illness, loss of life or pain and suffering and could be further categorized as follows:
 - a. General damages: these are damages that the law will presume to be the direct, natural or provable consequence of the act complained of, or damages resulting from loss or harm suffered by the plaintiff, flowing naturally from the act of the defendant and which the plaintiff need not specifically set out in their pleadings.⁸³
 - b. Special damages: are specific and quantifiable financial losses, but not necessarily the result of injury or harm complained of, and which in fact follow such injury or harm as a natural and proximate consequence in the case.⁸⁴
- ii. Punitive damages: This is a form of exemplary damages postulating a punishment for the defendant and not mere compensation for the plaintiff and must also be specially claimed for the court to grant them.⁸⁵

⁸² Learning Nigerian Law, Judicial Remedies <<https://www.learnnigerianlaw.com/learn/administrative-law/judicial>> accessed 19 June 2025.

⁸³ *Chukwu v Makinde* (2007) 9 NWLR (Pt 1038) 195

⁸⁴ *Ajigbotosho v Renolds Const Co Ltd* (2019) 3 NWLR (Pt 1659) 287, 304 paras A-B.

⁸⁵ *Guardian Newspaper Ltd v Ajeh* (2005) 12 NWLR (Pt 938) 205, 230 paras G-A.

9 Applicability of class action to human rights litigation in Nigeria

The procedure for litigating and enforcing human rights action in Nigeria is governed by the Fundamental Rights Enforcement Procedure Rules 2009. Further to this, fundamental rights enforcement actions are *sui generis* and the courts with jurisdiction to entertain same are the High Courts of the various states, High Court of the Federal Capital Territory and the Federal High Court. Going by the definition of class action, as earlier discussed, and the preamble to the Fundamental Rights Enforcement Procedure Rule, 2009, particularly paragraph 3(e) which provides thus:

- (e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:
 - i. Anyone acting in his own interest;
 - ii. Anyone acting on behalf of another person;
 - iii. Anyone acting as a member of, or in the interest of a group or class of persons;
 - iv. Anyone acting in the public interest, and
 - v. Association acting in the interest of its members or other individuals or groups.

From the above provision particularly item iii on the list, it can be deduced that class action is highly permissible in the litigation and enforcement of human rights in Nigeria. In aligning with this deduction, Order 13 Rule 1 of the Fundamental Rights Enforcement Procedure Rules, 2009 provides that any person or body who desires to be heard in respect of any Human Rights Application and who appears to the Court to be a proper party to be heard, may be heard whether or not the party has been served with any of the relevant processes, and whether or not the party has any interest in the matter. Further to this, the Court of Appeal in the case of *Babalola v Apple Inc* held that a judge is empowered to appoint one or more persons to represent a person or class or members of the class in

instances where the judge is satisfied that the person, class or some members of the class interested cannot be ascertained and/or found.

It is given that from the above, class action can be used for human rights litigation. However, as at the time of writing this paper, there is no record of the use of the procedure for human rights litigation known to the author and this may not be unconnected with the reasons earlier highlighted as being responsible for the scarce use of class action in Nigeria, particularly the limitation placed by the various rules of court on the type of causes that can be subject of class action.

10 Conclusion

Though not very common in the Nigerian legal jurisprudence, class actions, by its nature, are viable tools for ameliorating regulatory failure, social re-engineering, consumer protection and civil rights activism. A properly developed legislative and institutional framework for class action in Nigeria and effectual utilization of same will serve Nigeria and Nigerians better because the socio-economic rights by way of human rights of the larger class of the oppressed persons can be redressed by way of class action.

Given the spate at which class action is being deployed to seek redress of perceived and alleged wrong in Nigeria lately, it can be said that the procedure is gradually rising to take its pride of place as a veritable tool for social re-engineering. Though as the time of writing, there is no case of the use of class action for human rights litigation known to the author. It is however glaring that the concept is developing and in the fullness of time, if given the necessary attention, publicity and development of the framework for its use, class action will fully take its pride of place. On the whole, the use of class action in redressing human rights violation is not defeated in anyway whatsoever but it still developing.

11 Recommendations

It is clear that class actions as an adjudicatory procedure in Nigeria is not common, despite its recognition by the legislative framework provided for it by the various rules of court in Nigeria. In order to

give class action its pride of place, especially as it pertains to human rights litigation, it is expedient that:

1. There should be a great level of awareness and sensitization amongst the litigating populace of the instrumentality of class action as a procedure for seeking redress for a large group of persons who may or may not be ascertainable. With this level of awareness and sensitization, the people become more aware of the existence of class action and its merits and the notion of all man for himself because of the expensive nature of litigation will be reduced drastically and the culture of being each other's brother's keeper will be further entrenched. This sensitization can be effectively done through the National Orientation Agency, National Human Rights Commission and Civil Society Organizations involved in human rights advocacy.
2. There should be an expansion of the list of causes of action that can be redressed using the class action mechanism to include human rights litigation. This can be done by either amending the Fundamental Rights Enforcement Procedure Rules, the principal legislation governing human rights litigation in Nigeria, to recognize expressly class action as a mechanism for human rights litigation.

Appraisal of the legal protections against sexual violence in Nigeria and the impact of the Violence against Persons (Prohibition) Act 2015

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Abstract

Sexual violence, which violates human rights, is widespread in Nigeria. The Violence Against Persons (Prohibition) Act (VAPPA) was enacted in 2015 to address issues of gender-based violence in the country. This article appraises the legal framework for the prohibition and punishment of sexual violence in Nigeria after the passage of VAPPA, to assess its adequacy in offering protection from sexual violence. Doctrinal research was utilised to analyse literature, judicial precedents and existing legislation to determine if VAPPA had strengthened the legal system. The findings of the research revealed that the laws in place before the Act were grossly inadequate and VAPPA bolstered the legal framework by criminalising most of the prevailing acts of sexual violence. The Act introduced measures, in line with global best practices to offer further protection from sexual violence. However, the implementation of the legislation has been hampered by a lack of funding among other challenges.

1 Introduction

Sexual violence is a grave violation of human rights and a source of concern across the globe. A report released in 2016 showed that there are huge gaps that need to be covered in the protection of women from violence. It revealed that 125 million African women and girls alive today were married before the age of 18 and 1 in 3 women have

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experienced either physical or sexual violence in their life.¹ Unfortunately, sexual violence is rife in Nigeria as well, affecting many, including children. The 2014 Nigeria Violence Against Children Survey, which was carried out by the National Population Commission and United Nations Children's Fund found that one in four girls and one in ten boys experience sexual violence.² It was observed in a Nigerian text on criminal law, that sexual offences and rape are ubiquitous and sexual violence sometimes escalates in periods of conflict.³ It is noteworthy that most regions of Nigeria have been affected in some way by conflict over the past decade.

Before 2015, when the Violence Against Persons (Prohibition) Act (VAPPA) was passed, the legal framework within the country for protection from gender-based violence, which includes sexual violence, was ineffectual. The legal mechanisms in place for the protection of women against violence, were the constitutional fundamental human rights protections, relevant provisions of the African Charter on Human and Peoples' Rights and the crimes in the Penal and Criminal Codes on physical and sexual assault. The offences covered by the codes are rape, indecent assault and abduction of any female. However, the laws were from the colonial era and they did not reflect the variety and trends of sexual crimes that have become prevalent in modern society. The prosecution and proof of these crimes of sexual violence in the courts was a tedious task that required evidence that was difficult to procure. Given the stigma attached to the offences and the trauma the victims pass through in court, people were not willing to seek justice against their aggressors.⁴

¹ African Union, Office of the United Nations High Commissioner for Human Rights & UN Women, *Women's Rights in Africa*(2019) 11 <www.ohchr.org/Documents/Issues/Women/WRGS/WomensRightsinAfrica_singlepages.pdf> accessed 23 March 2019.

² Tony Ojukwu and Benedict Okey (eds) *State of Human Rights Report 2016-2017* (National Human Rights Commission 2018) <www.nigeriarights.gov.ng/publications/state-of-human-rights-report.html 17> accessed 16 September 2022.

³ Alphonsus Okoh Alubo, *Modern Nigerian Criminal Law (Materials, Cases and Comparative Studies)* (3rd edn University of Jos Press 2018) 143.

⁴ Chibueze Ngozi, I Iyioha and ET Durojaye, 'The Violence Against Persons Prohibition Act, the Maputo Protocol and the Rights of Women in Nigeria' [2018] 39(3) *SLR* 313.

In view of the incessant occurrences of violence against women in Nigeria, many gender activists, stakeholders as well as local and international non-governmental organisations campaigned for legislative reform. Over the years, different groups had canvassed for separate bills to be enacted at the National Assembly, to address various aspects of gender-based violence. In 2001, they coalesced into a group called the Legislative Advocacy Coalition on Violence Against Women (LACVAW), to create a more significant impact by bringing their efforts together, merging all the bills into one and succeeding in campaigning for the passage into law of the Violence Against Persons (Prohibition) Act 2015. The objective of the Law is to provide protection and redress for survivors of violence and to eliminate violence in private and public life by prohibiting forms of violence including physical, sexual, psychological, domestic, harmful traditional Practices (HTP), discrimination against persons; and then to punish offenders appropriately. The Law identified emerging forms of violence against women and filled in the loopholes in criminal legislation on gender-based violence without being gender specific.⁵ In addition, the Law introduced innovations and measures to ensure effective implementation.

2 Meaning of Sexual Violence

The term sexual violence has been defined as any sexual act, remarks, or advances directed against a person using coercion, whatever their relationship may be with that person.⁶ Olomojobi describes the term as 'when a woman is physically pressured, coerced, forced against her wish by a male counterpart to have sexual intercourse against her consent or she is afraid of the consequences of her refusal to do so.'⁷ He stresses the essential aspect of duress, meaning that the woman is not a willing participant but restricts his definition to sexual intercourse. However, sexual violence is not just about rape, it includes sexual harassment,

⁵ Women's Rights Advancement and Protection Alternative (WRAPA), 'Wrapi Tool Kit - Gender-Based Violence: Facts and Consequences' <wrapanigeria.org.2016/07/wrapatoolkit-pages-5-april-.pdf> accessed 6 June 2017.

⁶ PSI, *Gender-based Violence: Evidence Series* (2016) <www.psi.org/wpcontent/uploads/2016/06/GBV_EvidenceSeries_d1.pdf> accessed 8 January 2018.

⁷ Y Olomojobi, *Human Rights on Gender, Sex and the Law in Nigeria* (2nd edn Princeton Publishing Company 2015) 89.

touching of sexual parts without consent, forced exposure to pornography, forced sterilisation and abortion, trafficking for sexual exploitation, incest and forced marriage.⁸ Limiting the definition to forced sexual intercourse would exclude other painful and humiliating experiences that women endure; violations like forced nudity, strip searches, compulsory miscarriages, rape with objects and deliberate sexual disease transmission.⁹

Sexual violence can occur in all kinds of settings: within the home, in the workplace, in schools, during periods of conflict and in refugee or internally displaced persons camps. The setting does not excuse or justify the action. It remains sexual violence in whatever circumstances. This position is supported by Alubo, who opines that 'sexual violence against women transcends cultural, religious, ideological and national boundaries' and can take place both at home and in times of conflict, supports this position.¹⁰ Sexual violence is often perpetrated by men, who may be acquaintances, strangers, or individuals with a pre-existing relationship with the victim.¹¹ Predators come from diverse backgrounds; regardless of socioeconomic status, education level or religious affiliation.¹² Perpetrators may not be moved by attraction to the victim but by a desire to subjugate and degrade the person.¹³ Although sexual assault is traumatising and usually leaves the victim scarred for life many victims do not report the offence. Globally, only about four out of 10 cases of rape are reported;¹⁴ thus, the majority of perpetrators are not punished.

In light of the above, sexual violence, for the purpose of this work means actions of a sensual nature that are directed, using duress, towards a person in a degrading or threatening manner. As previously mentioned, it is not just about rape alone but includes other derogatory sexual advances, like the examples given above. It

⁸ WRAPA (n 5) 5.

⁹ R Manjoo and C McRaith, 'Gender-Based Violence and Justice in Conflict and Post-Conflict Areas' (2011) 44 *CJ/L* <www.lawschool.cornell.edu 12> accessed 16 September 2022

¹⁰ Alubo (n 3) 342.

¹¹ PSI (n 6) 3.

¹² *ibid*

¹³ Catherine Elliot and Frances Quinn, *Criminal Law* (10th edn Pearson 2014) 202

¹⁴ Alubo (n 3) 342.

occurs in almost every setting and could be carried out by a person or people the victim is familiar with or total strangers. Sexual violence includes rape, incest, marital rape, sexual assault, stalking, and sexual harassment.¹⁵

3 Sexual protection provided by VAPPA

The Criminal and Penal Codes offered limited protection from sexual violence focusing mainly on rape, which was defined in both codes in a restrictive manner. VAPPA expanded the meaning of rape to capture other aspects of sexual violence and criminalised additional categories of sexual violence. In addition, the legislation made provision for innovations that serve as deterrents to the predator and further protection for survivors of violence, among which are compensation for survivors and a sexual offender's register.

3.1 Rape

The crime of rape is reprehensible and a grave violation of the rights of the victim. It is, according to Okonkwo, 'the most serious kind of sexual assault.'¹⁶ Conventionally and traditionally, rape was known as sexual intercourse or more literally, penetration of the vagina by the penis,¹⁷ without the consent of the woman. Although there has been no legal definition accepted globally¹⁸; the popular common law definition was "A carnal knowledge of a woman not one's wife by force or against her will."¹⁹ This formed the basis for the definition of the crime that was reflected in the Criminal and Penal Codes, which had been inherited from British common law in the 1900s. The meaning of the offence of rape constituted by these laws was narrow and failed to address many aspects of this sexual assault adequately.

¹⁵ Saudatu Mahdi (ed), *Overview and Analysis of Gender-Based Violence in Nigeria (January - June 2010)* (Allsorts Network Ltd 2010) 10.

¹⁶ CO Okwonkwo, *Okwonkwo and Naish: Criminal Law in Nigeria* (2nd edn Spectrum Books Ltd 1980) 27.

¹⁷ Elliot and Quinn (n 13) 179.

¹⁸ MO Ashiru and OA Orifowomo, 'Law of Rape in Nigeria and England: Need to Re-Invent in the Twenty-First Century' (2015) 38 *JLPG* <www.iiste.org/Journals/index.php/JLPG/article/view/23513 ISSN 2224-3259 28> accessed 10 January 2018.

¹⁹ Dean G Kilpatrick, *Rape and Sexual Assault* <www.hoplofobia.info/wp-content/uploads/2014/05/underreported-crime.pdf> accessed 19 November 2023.

Under the Penal Code, which is now enacted as Laws in the various states of Northern Nigeria, the offence of rape is provided for in section 282 and states in sub-section 1 that

a man is said to commit rape who has sexual intercourse with a woman against her will or without her consent, or with her consent, when her consent has been obtained by putting her in fear of death or of hurt, or when the man knows he is not her husband and she believes that he is another man to whom she is lawfully married.

Also, with or without her consent, when she is under fourteen years of age or of unsound mind. Section 2 adds an exception that sexual intercourse by a man with his own wife is not rape if she has attained puberty. Section 357 of the Criminal Code, is closely linked with the Penal Code and provides that anyone who has 'unlawful carnal knowledge' of a woman or a girl, without consent or with consent obtained by force, fraud or impersonation commits an offence. These definitions limit the scope of the description of rape as recent trends have revealed sexual offences that are as grievous but because they do not fit into the legal definition of the offence, such travesties could not be classified as rape or punished accordingly.

The key ingredients constituting rape as defined above is sexual intercourse without consent or consent unduly obtained through threat, force or incapacity by reason of age or soundness of mind. These ingredients required under the Criminal Code, were listed out by the Court of Appeal as:

- i. The accused had intercourse with the victim;
- ii. The victim did not give her consent or her consent was obtained through intimidation, threats or fraud;
- iii. The victim was not the wife of the accused;
- iv. The accused had the intention to have intercourse with the victim without her consent (which would form the mens rea) and;

- v. There was penetration.²⁰ Proving the last ingredient of penetration could be a cumbersome process.

In the case of *Upahar v State*,²¹ the victim (a 13-year-old girl) claimed that the perpetrator had forcibly had sexual intercourse with her and while in the act her stepbrother heard her screaming and found the accused/appellant on top of her in a state of nakedness. A medical report revealed that there was general body pain, and a white substance in the private area, the hymen, though lax, was intact and there was no bleeding. The court of first instance found the accused guilty of rape but the Court of Appeal concluded that since the hymen was not broken, the penetration was not complete. The Supreme Court set aside the conviction of rape and substituted it with a conviction for attempted rape with a sentence of 3 years imprisonment.

If the elements listed above are strictly adhered to, many instances of sexual assault do not qualify as rape. For example, oral sex forcefully obtained would lack the ingredient of penetration; or if objects were used as the weapon of sexual assault, it would not qualify as sexual intercourse. Both actions are obviously sexual assault but neither would fit into the description of rape. Marital rape is also clearly ruled out and the wording of the Penal Code in section 282(2) in this regard 'if she (the wife) has attained puberty' appears to justify child marriage. Tragically, incidents of sexual violence reported involve other heinous actions but not meeting the standard description outlined in the Codes. This either inadvertently or deliberately amounts to failure to criminalise certain types of sexual assault or make convictions highly unlikely. Furthermore, rape as defined, by common law is not gender-neutral. It is described as a crime that can only be committed by a man against a woman.²² Moreover, the definitions in the Criminal and Penal Code, stated above, make it impossible for a man to be a victim of rape, only a

²⁰ *Alex Iwoghre v State* [2017] CA/B/ 338C/2017 Summaries of the Judgements of the Supreme Court & Court of Appeal Legalpedia [2020] 8-10.

²¹ CA/J/177C/99.

²² Kilpatrick (n 19) 3.

perpetrator.²³ While the majority of victims of rape are female, it is evident that male rape does occur.²⁴

Globally, the definition of rape has been evolving over the years; it is often determined by different societies' perceptions of sexual morality. Additionally, a vital component to the formulation of the meaning of rape, is how women are perceived in society, which is influenced by culture and religion.²⁵

Many countries have changed their laws to reflect the current trend of cases of sexual abuse.²⁶ In America, the common law definition of the 1960s was expanded by the 1970s and 1980s, to be gender neutral and to include penetration of other parts of the body apart from the vagina and by other body parts or objects, apart from the penis.²⁷ In England, it was not until 1994, that the Criminal Justice and Public Order Act 1994 brought reformation to reflect that there could be male victims of rape and broadened the description of rape to include, penetration of the anus.²⁸ The current operational law is The Sexual Offences Act 2003, which extended the offence to include oral intercourse²⁹ but still restricts the offenders to only male being able to commit the offence of rape.³⁰ In compliance with international human rights norms, the International Criminal Tribunals of Yugoslavia and Rwanda recommended that the definition of rape in modern day penal legislation should include the elements highlighted by the Rome Statute's Elements of Crimes. The tribunal characterised rape using gender-neutral language indicating that both male and female can be victims of rape. Additionally, it clearly stated that other body parts apart from the vagina, can be penetrated and other body parts (other than the penis) or even objects can be used to penetrate.³¹

²³ Ashiru and Orifowomo (n 18) 32.

²⁴ Maria Eriksson, *Defining Rape, Emerging Obligations for States Under International Law* (Martinus Nijhoff Publishers 2011) 31.

²⁵ *ibid* 47.

²⁶ Ashiru and Orifowomo (n 18) 28.

²⁷ Kilpatrick (n 19) 3-4.

²⁸ Elliot and Quinn (n 13) 179.

²⁹ *ibid*

³⁰ Ashiru and Orifowomo (n 18) 29.

³¹ Eriksson (n 24) 483.

In line with the legal reasoning outlined above, VAPPA expanded the definition of the offence of rape in Nigerian jurisprudence. It is one of the innovations in Nigeria's domestic legislation introduced by VAPPA. It is provided for in section 1 and states:

- (1) The person commits the offence of rape if –
 - (a) He/she intentionally penetrates the vagina, anus or mouth of another person with any other part of his/her body or anything else.
 - (b) The other person does not consent to the penetration; or
 - (c) The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or addictive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse/partner.

The first thing to note, from a cursory perusal of this section, is that a man or woman can be either perpetrator or victim. Gender neutrality is embraced completely right from the opening words – 'The person commits the offence.' Second, the crime is no longer restricted to terms like sexual intercourse or carnal knowledge, but extends the reach of the law by describing rape as penetration of the vagina, mouth or anus by any body parts or objects. This description captures most acts of sexual assault. A case at hand, that would previously not be classified as rape but by this expansion now fits into the crime, is of a woman in Ebonyi State that tortured her niece by inserting sticks into her vagina.³² This action, under Section 1 of VAPPA is categorised as rape and the perpetrator can be held liable even though she is a woman.

It has been said that anal rape was an offence previously under Section 214 and Section 284 of the Criminal Code and Penal Code respectively, which punish carnal knowledge against the order of

³² Ojukwu and Agu (n 2) 131.

nature.³³ However, these provisions appeared to target homosexual conduct as lack of consent, an essential ingredient of rape, was not included in describing the offence. Examples of sexual assaults against male survivors that qualify as rape under VAPPA, are the instance of a 9-year-old boy who was lured by two men with N100 and raped repeatedly in Gwanje ward of Maiduguri in Borno State in June 2017.³⁴ Another case was reported in the newspaper, *Daily Trust*, of a pastor, who raped a 13-year-old-boy in his church in Ifite Awka, Awka South Local Government of Anambra State in August 2016.³⁵

The traditional mode of definition, that had placed constrictions on the connotation of rape, was neutralised by the Nigerian Legislature with the passing of this law.³⁶ Furthermore, the key ingredient of lack of consent, is not just mentioned in passing, but a more detailed explanation is given of circumstances that can be construed as such. These include intimidation, fraudulent misrepresentation or using substances that could subdue the victim's consciousness. Finally, marital rape is included in this encompassing provision when the term 'any person' is employed to describe the perpetrator; particularly as there is no exception made that the husband of the victim cannot commit the offence as the Penal Code stated explicitly. Onyemelukwe believes that the absence of such an exclusion makes it possible to rope in a spouse who uses sex as a means of violence against his partner.³⁷ However, another school of thought is that since there was no specific provision made for marital rape under VAPPA, then the Act does not provide for the offence.³⁸ The courts would have to determine the correct position of the Act.

³³ AN Nwazuoke, 'A Critical Appraisal of the Violence Against Persons (Prohibition) Act 2015' (2016) 47 *JLPG* <www.iiste.org/Journals/index.php/JLPG/article/view/29658> 10 accessed 10 January 2018.

³⁴ Ojukwu and Agu (n 2) 172.

³⁵ *Daily Trust* (Abuja, 1 September 2016) 29.

³⁶ Alubo (n 3) 346.

³⁷ Cheluchi Onyemelukwe, 'Legislating on Violence Against Women: A Critical Analysis of Nigeria's Recent Violence Against Persons (Prohibition) Act, 2015' (2016) 15(2) *DJWGL* 26-27.

³⁸ Lights Uwaegbunem Izunwanne, 'Marital Rape Exemption in Nigeria: Time for a Departure' (2023) 9 *CLRJ* 415-442.

Subsection 2 of Section 1 of VAPPA, pronounces the punishment for the offence of rape in the following manner:

- (2) A person convicted of an offence under subsection (1) of this section is liable to imprisonment for life except –
 - (a) Where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years imprisonment;
 - (b) In all other cases, to a minimum of 12 years imprisonment without an option of fine
 - (c) In the case of rape by a group of persons, the offenders are liable jointly to a minimum of 20 years imprisonment without an option of fine.

There are several noteworthy things in the provision above. First of all, the punishment given for the offence, which is life imprisonment. The severity of the punishment, indicates the gravity with which the society wants it to be treated. Second, sentencing is not left completely to the discretion of the courts but a minimum sentence of 12 years is provided for without the option of a fine. The implication is that no one found guilty of rape, can get away with a slap on the wrist of a mild sentence as punishment. This means the judiciary does not have the complete liberty to sentence at their discretion.

This is momentous because, it has been a matter of concern that in cases of sexual assault, courts in several instances, gave light sentences, which did not reveal the gravity of the offence.³⁹ Although the sentence provided for in both codes is life imprisonment, many perpetrators have been handed down insignificant sentences that make it seem that justice has not been served. In *Popoola v State*,⁴⁰ the accused was found guilty of raping a student of Abeokuta Grammar School and was sentenced to just 5 years imprisonment. This sentence was upheld by the Court of Appeal and the Supreme Court. In order to avoid judges using their discretion to give short prison terms for the offence of rape, VAPPA included a minimum sentence

³⁹ O Izuora, 'The Perspective of Nigerian Women on Domestic Violence' in E Azinge and L Uche (eds), *Law of Domestic Violence in Nigeria* (Nigerian Institute of Advanced Legal Studies 2012) 64, 86.

⁴⁰ [2013] 17 NWLR [pt 1382] 96.

when suspects are found liable for the offence of rape. Nevertheless, this sentencing provision of VAPPA has been criticised by a renowned author, for using the word 'liable' when providing for life imprisonment instead of the word 'shall'. This is because the former gives the Court discretion to give a sentence lower than that maximum while the latter would compel the Courts to give the prescribed sentence.⁴¹ However, guidance was given for exercising this discretion by mandating 12 years as the minimum sentence. This provides the safety net required to ensure that once a guilty sentence has been handed out, an adequate sentence will be given.

There are two more observations culled from subsection 2 of Section 1 of VAPPA. Under the Criminal Code the wording of the offence was crafted in a way that boys under the age of 12, could not commit rape and thus would be charged or convicted with indecent assault.⁴² Conversely, the implication of Section 1(2) (a) of VAPPA is that children can be perpetrators of rape as provision is made for punishment of offenders that are less than 14 years. However, considering their status as minors, an exception is made for their sentencing, which should be a maximum of 14 years. This is in line with the provisions of Articles 37 and 40 of the Convention on the Rights of the Child 1989 which provides that children in contact with the law have the right to treatment that promotes their sense of dignity and worth take into account their age and aims at their reintegration into society. Furthermore, the convention prohibits the imposition of death penalty and sentences of life imprisonment for offences committed by persons under the age of 18.

Another aspect of sexual assault that has remained inadequately acknowledged in the Penal and Criminal Codes is gang rape, probably because it became more prevalent in recent times. This involves multiple perpetrators assaulting a single victim, often in the same incident. This form of sexual violence can have severe physical and emotional consequences for the victim.⁴³ A classic example of

⁴¹ Alubo (n 3) 346.

⁴² *ibid* 351.

⁴³ BA Garner (ed), *Black's Law Dictionary* (Thomson West 2004) 1450.

this is the case of *The State v Olumuyiwa and Ayodele*⁴⁴ where a young woman accompanied a girlfriend to meet with the friend's brother after school. Three young men she met in the house all forcibly had sexual intercourse with her. Two of the young men were found guilty of rape, while the third, who remained at large, was classified as an unindicted but named felon in the case. Gang rape is obviously, even more traumatic and damaging, physically and psychologically to a victim. VAPPA explicitly identifies it in section 1(2) (c), and the minimum punishment is 20 years.

3.2 Other Sexual Offences

There are other activities of a sexual nature that do not amount to rape but are harmful to the well-being of a victim physically, psychologically or otherwise. There are several offensive sexual actions recognised as punishable by VAPPA. Section 5 makes it an offence to compel another to engage in conduct whether sexual or otherwise that is detrimental to the victim's physical or psychological well-being. This offence is described as offensive conduct by the subtitle of the Act. The word offensive is defined as an action that causes displeasure, anger or resentment, particularly when it contravenes the prevailing sense of what is considered moral, proper and decent.⁴⁵ Therefore, this crime is directed to instances where the perpetrator coerces the victim under duress to engage in actions that are considered immoral and negatively affect the victim. The phrase, 'sexual or otherwise' is used in describing the types of activities that the victim may be forced to carry out underscoring the indecency alluded to in the use of the word offensive in the subtitle.

Where a person administers a substance to a person to overpower a person for sexual activity, it is an offence in section 22 of VAPPA, punishable by 10 years' imprisonment, a fine of ₦500,000.00 or both. The Criminal Code in Section 331 provided for an analogous offence; it does not specifically mention sexual activity but that

⁴⁴ [1982] (2) NCR 297.

⁴⁵ Garner (n 43) 1253.

any person who with intent to commit or to facilitate the commission of a felony or misdemeanour, . . . administers or attempts to administer any stupefying or overpowering drug or thing to any person is guilty of a felony and is liable to life imprisonment.

Stupefying a person in order to sexually assault the person in anyway would amount to a crime under this provision.

The offence of indecent exposure is provided for in Section 26 of VAPPA. The description of the crime is when a person exposes his or her genital organs deliberately intending to cause distress to another person. It is also an offence under this section, to expose genital organs and induce another person to touch, purposely to derive pleasure therefrom. It is pertinent to note the mens rea component of this offence, which is that there is an intention to cause distress to the other party. Nwazuoike found this portion of the Law puzzling and could not figure out its usefulness and how the offence would pass the test of proof in a court of law.⁴⁶ However, in other climes, where the offence has been in existence in penal law, there have been several convictions. A classic example of the crime is the case of *U.S. v Graham*,⁴⁷ where the accused invited a young lady, who was babysitting in his home to his bedroom and then dropped his towel; thereby exposing his private parts wilfully to an unsuspecting and uninterested person. The Court held that this was indecent exposure and the reason such conduct was criminalised was to protect members of the public from 'shocking and embarrassing displays of sexual activity.'

There is a similar provision in the Criminal Code in section 231 where it is considered criminal conduct for any person to wilfully and without lawful excuse to act indecently in any public place or in any place with the intent to insult or offend any person in. Such conduct, amounts to a misdemeanour, and could be sanctioned with imprisonment for two years. The huge scandal of Harvey Weinstien,

⁴⁶ Nwazuoike (n 33) 5.

⁴⁷ [2002] 56 MJ 266 Core Criminal Law Subjects: Crimes Article 134 - Indecent Exposure <www.armfor.uscourts.gov/digest/IIIA88.htm>.

an American film producer, which triggered off the #MeTooMovement, was founded on allegations of sexual assault by numerous victims. Some of them accused him of indecent exposure as they claimed that they were forced to watch him go naked or massage his genitals in order to advance their careers.⁴⁸ VAPPA, was already enacted in Nigeria before this scandal emerged in 2017 demonstrating how far-reaching the Law is in responding to emerging forms of gender-based violence. The crime is punishable with imprisonment for 1 year or a fine of N500,000.00⁴⁹

Incest, a serious sexual offence, is criminalised under Section 25 of VAPPA. The Law states that the crime occurs when a person knowingly and willingly has carnal knowledge of another within the prohibited degrees of consanguinity and affinity. The offender is liable on conviction to a minimum term of ten years imprisonment without an option of fine and where the two parties consent to commit incest, provided that the consent was not obtained by fraud or threat, 5 years imprisonment without an option of fine. The schedule referred to categorises those who fit into the prohibited degrees of consanguinity as the sister, daughter, granddaughter, niece, aunt, mother, grandmother and grandaunt, brother, son, grandson, nephew, uncle, father, grandfather or grand-uncle of the offender. It has been observed that the mens rea of this offence, is that for a person to be liable, the offence must have been conducted knowingly and wilfully. This means if the actors are not aware of the relationship between them, they have not committed a crime and are not culpable.⁵⁰

The Law punishes the offence with 10 years' imprisonment but a notable point in the penalty section of this crime is the use of the word 'consent' in section 25(b) of VAPPA, stating that consensual sexual relations between relatives attracts a lesser punishment of 5 years imprisonment. This implies that non-consensual sexual intercourse between relatives, is being labelled as the crime of incest

⁴⁸ 'Harvey Weinstein Timeline: How the Scandal Unfolded' BBC (2021) <www.bbc.com/news/entertainment-arts-41594672>.

⁴⁹ Violence Against Persons (Prohibition) Act 2015 s 26(3).

⁵⁰ Alubo (n 3) 518.

instead of being treated as rape. The absence of consent by a person involved in sexual relations constitutes rape; for which the same Law prescribes a minimum punishment of 12 years. This inadvertently implies that the same law that punishes rape with a minimum of 12 years imprisonment in Section 1 reduces the punishment to 10 years when the travesty is perpetrated by a relative. Obviously, rape perpetrated by a relative would be regarded as particularly offensive by society and possibly more traumatic for the victim and thus should be punished with greater severity. For instance, the case of the father of a three-year-old girl, who would watch pornographic films with his daughter. The mother noticed this then found semen in their daughter's vagina while bathing her.⁵¹ If found guilty of the offence, there should be no justification that would warrant him being given a lighter sentence than an accused who had no biological relationship with the child. However, the remedial measure a prosecutor could take would be to charge the relative of both offences of incest and rape.

4. Innovative tools for protection introduced by VAPPA

VAPPA, did not stop at identifying the issues that mostly affected women due to violence and criminalising them. It went further to put some provisions in place that are global best practices for the protection of women. A novel concept introduced to Nigeria by VAPPA is the sex offender register which was designed with the intention to create safer societies through public surveillance of offenders and thereby reduce recidivism. The original purpose of the register is not to serve as a further sanction for the offender but to ensure safety within communities and especially for child protection. Nigeria had not practised the use of a sex offender's register until VAPPA in Section 1 (4) stated that 'a register for convicted sexual offenders shall be maintained and accessible to the public.' Section 43 categorises a sexual offender as a person who has been convicted of a sexual offence by a Court and becomes a dangerous sexual offender if such person has more than one conviction for a sexual offence or has been convicted of a sexual offence against a child. The register was officially launched on November 25, 2019 by the then Vice President, Professor Yemi

⁵¹ Ojukwu and Agu (n 2) 101.

Osinbajo. It documents reported cases of sexual violations as defined in VAPPA, cases reported, arraigned in court and convicted.⁵²

The Sexual Offenders Register is contained within what is known as the Nigeria Sexual Offenders Database (NSOD) as mandated by VAPPA in Section 1, to keep a record of cases of sexual violence and name offenders. The website is accessible to security agencies as well as members of the public and the data of convicted offenders is available directly from there. The Register, is a resource for verifiable information to prevent recidivism and to conduct background checks on the profiles of prospective employees to be engaged for positions to care for the vulnerable, particularly children. There is a provision for States of the Federation to link their registers to the National Sexual Offenders Database.⁵³

Survivors of violence require retributive justice and not only punishment of offenders. VAPPA recognises this need of survivors of violence. Section 38 of the Law makes provision for the rights of victims to aid in their recuperation from the harm they have suffered. Thereunder, victims are entitled to obtain medical, psychological, social and legal assistance from government agencies and non-governmental organisations. They should be informed of the legal, health and social services available and given access to them. In addition, survivors of violence under VAPPA are eligible to participate in rehabilitation and reintegration programmes of the government, to equip them with vocational skills or to have access to formal education and micro-credit facilities.

Section 1(3) of VAPPA, permits the Court to award compensation to victims of rape in the circumstances that it deems appropriate. Where the respondent fails to pay a monetary relief ordered by the court, the employer of the respondent, or a bank in which the respondent operates an account or a debtor of the respondent, could

⁵² Ngamariju Titus Mangzha, *Nigeria Sexual Offender & Service Provider Database* <nsod.naptip.gov.ng.2> accessed 29 May 2023.

⁵³ National Agency for the Prohibition of Trafficking in Persons, *Violence Against Persons (Prohibition) Act 2015 Annual Report: 2021 Report* <www.naptip.gov.ng 43> accessed 29 May 2023.

be directed to pay the complainant directly or deposit the sum with the Court. The Act further provides that survivors of violence, shall not be expelled, suspended or punished in any way because of the circumstances in which they find themselves as a result of violence in compliance with the Act. Sanctions are stipulated for any organisation or individual that re-victimises a survivor by engaging in such actions.

VAPPA is a survivor-centred legislation and makes provision for court process that protects survivors from stigmatisation. Section 38(3) restricts the number of people that will attend the trial of offences committed under the Act to the officers of the Court, the parties to the proceedings and their legal practitioners or anyone bringing an application on behalf of the victim. There should be not more than 3 persons each to provide support for the complainant and respondent and any other person that the Court permits in the interest of justice. Publication of any information that may reveal the identity of any party to the proceedings is prohibited and subject to a penalty of 1 year imprisonment or ₦200,000.00 fine or both.

5 Challenges identified in VAPPA

The most significant gap identified in VAPPA is its narrow geographical spread because it only applies in the Federal Capital Territory.⁵⁴ The reason for this is that Nigeria operates as a Federation and the Constitution gives a guide for legislative responsibilities; criminal law is on the residual list of the Constitution making it a matter that States have to legislate on exclusively. VAPPA is a legislation that principally designates acts of violence as offences and provides penalties accordingly. Hence, VAPPA is criminal law and consequently⁵⁵ each State in the Federation would need to adopt VAPPA as Law for it to be operational in that State.⁵⁶ However, since its enactment, thirty-five states in the country have passed the Act into Law thereby making it enforceable in most parts of the country.

⁵⁴ Onyemelukwe (n 37) 45.

⁵⁵ *ibid.*

⁵⁶ C Onyemelukwe, 'Intersections of Violence Against Women and Health: Implications for Health Law and Policy in Nigeria' (2016) 22(6) *W&M J Wom & L* 614.

Another shortcoming identified was that in order to be all encompassing, in minimising violence through legislation, preventive measures should have been included in the Act. Unfortunately, VAPPA was not proactive enough to make mandatory some actions and activities that would prevent violence. There were no provisions made requiring that there should be education and awareness creation on the content of the Act for the general public; training of personnel that would enforce the Act; or to indicate the source of funding to implement the Act. Neither was provision made for structures to support survivors, in a manner that makes them confident to seek for help, particularly the requirement for shelters, safe homes⁵⁷ or sexual assault referral centres (SARC). Although the Act mentioned that survivors were entitled to health care, it does not specify whom the health care providers should be, the role that they should play⁵⁸ and who would pay for the service.

An additional impediment observed with the VAPPA is that although the Interpretation clause of the Act defined several sexual offences like sexual harassment, sexual assault, sexual abuse, sexual intimidation and sexual exploitation; however, they were absent in the body of the Act and were not made into offences. Earlier drafts of the law had captured them as offences with penalties but they must have been dropped off in the bid to make the Bill acceptable to the male-dominated legislature and to ensure it was passed.⁵⁹ Although the Act was initiated primarily for the protection of women, it was converted into a gender-neutral law to make it acceptable to a predominantly male parliament. The effect of this is that some of the provisions of the Act, when interpreted without women as beneficiaries, appear to be skewed against vulnerable women. These are some of the gaps in the legislation that could still be addressed by amendments in the future.

One of the major challenges of the implementation of VAPPA is caused by the stigmatisation that survivors face, which prevents them from reporting offences committed against them. A regular

⁵⁷ Onyemelukwe (n 37) 38.

⁵⁸ Onyemelukwe (n 56) 614.

⁵⁹ Onyemelukwe (n 37) 27.

trial in open court is traumatising, embarrassing and intimidating for most victims and discourages them from seeking justice, a sentiment echoed by family members due to the associated trauma. There is a culture of silence and concealment, which is a major obstacle in protecting women and girls from violence.⁶⁰ There is an unwillingness on the part of victims and their relatives to testify as a result of the stigma attached to sexual offences. This attitude has been attributed to the culture of silence among communities about such acts of violence, which causes several families to withdraw cases after commencement.⁶¹ VAPPA takes measures to mitigate the stigma faced by survivors by restricting the number of people present in court during trials in Section 38.

The Nigerian criminal justice system is designed with the principal objective of punishing the offender. This would usually give the victim the satisfaction that justice has been served but survivors of violence require more than just retributive justice. Having endured mental and physical trauma, many survivors face dire financial circumstances, thus the need for holistic interventions. Oftentimes, reports are not even made due to lack of institutional support for survivors.⁶² Survivors become weary during the prosecution of their cases, as there appears to be no clear benefit to them, and the focus is placed on sanctioning the offender without any support being offered to the survivor. This has been remedied by VAPPA making provision for compensation and support for survivors. This has to be publicised and enforced.

6 Conclusion

VAPPA puts in place a clear legal framework to offer protection from the prevalent issues of sexual violence in Nigeria that measures up to global best practises. It filled a gaping hole that had existed prior

⁶⁰ Westminster Foundation for Democracy, *The Impact of the Violence Against Persons (Prohibition) Act and Related Laws in Nigeria* (March 2021) 12.

⁶¹ Jennifer Ovenaone Uniga and Danladi Yakubu, 'Effective Implementation of the Violence Against Persons Prohibition (VAPP) Act, Curbing the Impunity of Perpetrators of Gender Based violence and Promoting Socio-Economic Development in Nigeria' (June 2021) 4(2) *IJMSSPCS*

<<https://www.ijmsspcs.com/index.php/IJMSSPCS/article/download/218/219201>> accessed 22 January 2023.

⁶² Ojukwu and Agu (n 2) 163.

to its enactment. As outlined above, the definition of rape has been expanded and other sexual offences have been created to ensure that perpetrators of violence are held accountable and punished. Robust provisions are made for victims of violence to be protected and remedies and rehabilitation are offered for survivors of violence.

It is however not sufficient that the legislation has been enacted, the government, through its enforcing agencies, should exhibit dedication towards investigation and prosecution of these offences of gender-based violence and take them as seriously as other crimes of violence. This would require training of investigators, prosecutors and the judiciary to enable them to understand the purpose of the Law in order to effectively prevent, investigate and prosecute. The mechanisms to implement the Act, such as SARC, should be put in place so that survivors have the support they require. The SARCs are one of the crucial structures that empower survivors to confidently report as they can be assured of the requisite support.

All the challenges outlined above require funding, whether it is creating awareness, training the actors in the justice dispensation chain or putting the necessary support structures for survivors. Thus, it is imperative that government make budgetary allocations to enable women seek legal aid and improve access to justice when they encounter gender-based violence. Although VAPPA introduced several innovations, there was no provision made about the source of funding for execution. The lack of budgetary backing of the law has impeded the effective implementation of the Law. Several civil society organisations have gotten involved in supporting or promoting one aspect of the Law or the other. An example of this is the intervention of an organisation, The Rule of Law and Anti-Corruption, which supported NAPTIP in establishing the National Sexual Offender Database and replicating it in several states. The support of Civil Society is always welcome but the financial commitment of government should be the cornerstone of advancing and ensuring the effective implementation of this legislation.

It may be naive to expect that the statutory intervention will bring an end to sexual violence but it is a major step in the right direction.

In order to ensure that the law is properly implemented, it should be sufficiently funded and the populace should be made aware of its existence through enlightenment programmes, adequate media coverage and advocacy to all relevant stakeholders. Women rights activists, relevant government agencies and lawyers, should put the law to the test and thereby add a bite to the loud barking that was all that could be done in the past.

7 Recommendations

The following are recommendations to ensure that VAPPA is properly implemented.

- a. The Act should be sufficiently funded. There should be budgetary provisions to support the requirements of VAPPA by the federal government and the VAPP Laws by state governments. VAPP Committees should be created with the mandate to oversee the enforcement of the legislation and funds allocated under their supervision for that purpose.
- b. The populace should be made aware of the existence of VAPPA through enlightenment programmes, adequate media coverage and advocacy to all relevant stakeholders. There should be a nationwide campaign to create awareness of the content of VAPPA through all platforms of the media, town hall meetings, road shows and outreaches to local communities, including advocacy to traditional and religious leaders. The Act and the laws in the States should be translated into simplified English and local languages, then distributed in cities and rural communities. Awareness of the legislation would empower victims and those close to them to report and simultaneously caution perpetrators. The knowledge may cause some of them to desist from such actions to avoid sanctions.
- c. There are structures that need to be put in place to support survivors, in a manner that makes them confident to seek help. A key resource is the Sexual Assault Referral Centre (SARC),⁶³ a 'one-stop service centre' manned by medical professionals,

⁶³ Victor Chigozie, 'Nigeria's Violence Against Persons Prohibition Act Has Been Widely Accepted, But What Now?' *humanglemedia.com* <<https://humananglemedia.com/nigerias-violence-against-persons-prohibition-act-has-been-widely-accepted-but-what-now/>> accessed 16 September 16 2022.

counsellors, police and other experts. Survivors of violence can access forensic examinations, medical treatment, psychological assistance and the required support at no cost at these Centres.⁶⁴ Unfortunately, there are only about 32 SARCs nationwide, located in 17 states out of the 36 states.⁶⁵ It is recommended that federal government and state governments establish government-run shelters for survivors of violence, at least one in each Senatorial Zone.

- d. There should be adequate training of law enforcement agents, prosecutors and the judiciary to play the roles set out in the Act. It was noted in this research that women's rights activists and civil society have played a pivotal role in the transformative development of the legal framework to protect women from violence. Therefore, further interventions are recommended in respect of creating awareness about the law, training of relevant stakeholders involved in implementing the Law, providing or supporting the provision of shelter and sexual assault referral centres.

⁶⁴ Lagos State Domestic and Sexual Violence Response Team, *Rape Manual* (Lagos State 2015) 4.

⁶⁵ Chigozie (n 63).

Deportation of settled migrants: appraisal of some deportation decisions of settled Nigerian migrant from the United Kingdom

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Abstract

Migrants are deported for several reasons, including removal for public interest, and national security. Deportation should be a last resort for settled regular migrants. The conundrum of deportation of settled migrants encompasses unsettling the migrant and difficulty of re-integrating in the country of origin. This work is a critical appraisal of some decisions concerning the deportation of settled Nigerian migrants from the United Kingdom (UK). The study adopted the doctrinal research approach to review three deportation cases affecting settled Nigerian migrants in the UK, *Balogun v. UK*; *KO (Nigeria) v. Secretary of State Home Department* and *Unuane v. UK* who were removed from the UK as foreign criminals for public interest. This article recommends an objective test for assessing the proportionality of deportation decisions rather than a subjective case-by-case evaluation for a better outcome for affected persons, and qualifying family members among others.

Keywords: deportation, settled migrants, Nigerians, United Kingdom

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1 Introduction

Deportation is a control measure adopted by sovereign states to regulate the stay of foreigners within their territories. States have the right to make laws stipulating conditions for the admission and stay of aliens in their territory. Deportation is defined as; 'the forced, involuntary removal of individuals from the territory on which they are located, and on which they are often residing.'¹ When a person admitted into a country violates the conditions of stay in the country, the state may choose to exercise its rights and powers, under enabling laws to deport such a person,² following the due process of the law, including stating the reasons for deportation to the person affected, and allowing the person to make representations as to why the person should not be removed from the host country.³ The laws regulating the stay of the migrant in the host country must be clear, and the process of the law should not be used to legitimize the removal of unwanted migrants.⁴ Deportation is not a means of getting rid of unwanted migrants based on prejudice or some other considerations outside the law, using the law as a cover, and justification for such acts.

Some of the conditions for the forceful removal of migrants from the host country include when the migrant is a threat to national security or public safety. Instances of removal on such grounds include when the migrant is involved in criminal activities of a serious nature. Issues of national security include the involvement of the migrant in acts of terrorism, including aiding and abetting such acts,⁵ or any act that tends to undermine the security of the host country.⁶ National security is not restricted to the acts mentioned above. It has been given a broad definition, and it has been defined as the capacity to

¹ Patti Tamara Lenard, 'Deportation and the Excluded Undeportable,' *Democracy and Exclusion* (New York, 2023).

² Ibid

³ *Sulaiman Oladokun v John R. Ryan* 06 CV 2330 (KMW).

⁴ Aashti Bhartiya, 'Fictions of Law: The Trial of Sulaiman Oladokun, or Reading Kafka in an Immigration Court,' in Nicholas De Genova and Nathalie Peutz (eds), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press, 2010) 329-350.

⁵ Helbling M and Meierrieks D., 'Terrorism and Migration: An Overview.' (2022) 52 *British Journal of Political Science* 977. doi:10.1017/S00071234200005876.

⁶ Emmanuel C Alita et al, 'Impact of Terrorism on Nigeria's National Security in Digital Era,' (2015) 15 *Afr J Pol & Admin Stud* 329.

control those domestic and foreign conditions that the public opinion of a given community believes necessary to enjoy its self-determination or autonomy, prosperity, and well-being.⁷

Public safety on the other hand was defined as; 'the public safeguarding people from crimes, disaster, and other potential dangers and threats.'⁸ Therefore, if a foreigner is involved in any form of criminal activity that impacts the safety of the citizens of the host country, it would be a duty on the part of the host country to remove such a person from its territory. Public safety is not restricted to criminal activities or acts of terrorism; it has diverse ramifications. Disease control and the prevention of the spread of a pandemic is an example of a public safety issue that does not border on crime or criminality,⁹ In this work, the focus is on the expulsion of 'foreign criminals,' which was the fulcrum of the decisions of the reviewed cases in this work.

The reviewed cases involved people who were deported or sought to be deported upon conviction for involvement in criminal activities. A conviction for a criminal act is not enough to deport a settled migrant, certain factors must be considered to justify deportation including the seriousness of the offence, the possibility of the person repeating the offence, or committing another offence, and the impact of the deportation on other guaranteed rights of the migrant.¹⁰ The above issues were considerations in the cases reviewed in this article. The aim of this article is a critical review of these decisions, analysing the justice and fairness of the decisions,

⁷ Charles S Maier, 'Peace and Security for the 1990s,' *Unpublished paper for the MacArthur Fellowship Program, Social Science Research Council* (12 June 1990), quoted in Romm (1993) 5 <https://en.wikipedia.org/wiki/National_security#cite_note-MacArthur_Fellowship_Program_1990_p.5-6> accessed 21 January 2025.

⁸ Goodwin University, 'What is Public Safety and Where Do You Fit in?' <<https://www.goodwin.edu/enews/what-is-public-safety-and-where-do-you-fit-in/>> accessed 12 October 2024.

⁹ B Gushulak et al, 'Migrants and Emerging Public Health Issues in a Globalized World: Threats, Risks and Challenges, an Evidence-based Framework,' (2009) 2 *Emerg Health Threats J.*

¹⁰ Gillian Brock, 'Travel Bans, Climate Change, Refugees and Human Rights: A Response to My Critics,' (2021) 14 *Ethics & Global Pol* 110.

the process of the decision-making, and examining other options that may be explored as alternatives to the deportation of settled migrants from the host country.

2 Conceptual clarifications: who is a settled migrant

Before summarising the facts of the cases, it is important to understand or define who a settled migrant is. The post-World War II approach toward migrant settlement was the assimilation approach, which expected migrants to assimilate into their host communities without significantly altering them.¹¹ The idea was for the migrant to 'dissolve' into the host country and become 'invisible'.¹² The preceding idea of migrant settlement runs contrary to modern accepted tenets of the socio-cultural rights of the migrants, and it is not the ideal concept of assimilation, in the context of integration of the migrant into the host country.¹³ In reality, the settlement of migrants in the host country creates diversity in the community and transforms the national identity of the host country.¹⁴

Although there may be difficulty in defining the term 'settled migrant', depending on the paradigm from which the concept is viewed, there are some key factors that have been used in determining or measuring the settlement of a migrant in the host country, and these include; the policies of the host country for migrant settlement, the presence of social network in the host country for the migrant, economic participation and circumstances of migration.¹⁵ From the preceding parameters for measuring migrant settlement in the host country, a definition or description

¹¹ Michael Fletcher, 'Migrant Settlement: A Review of the Literature and its Relevance to New Zealand,' *New Zealand Immigration Center* (Sept. 1999), <<https://www.mbie.govt.nz/dmsdocument/2675-migrant-settlement-review-literature-relevance-sept-1999-pdf>> accessed 22 January 2025.

¹² *ibid*

¹³ Tineke Fokkema and Heins de Haas, 'Pre-and Post-Migration Determinants of Socio-Cultural Integration of African Migrants in Italy and Spain,' <<https://heindehaas.org/wp-content/uploads/2015/05/de-haas-and-fokemma-2011-determinants-of-socio-cultural-integration.pdf>> accessed 22 January 2025.

¹⁴ Stephen Castles, *Globalization and Migration: Some Pressing Contradictions* (Blackwell Publishers, 1998).

¹⁵ Alice Bloch, 'Theories of Migrant Settlement,' in *The Migration and Settlement of Refugees in Britain* (Palgrave Macmillan, 2002).

can be given to the term 'settled migrant'. A settled migrant is a person who has left the country of origin or habitual residence on a permanent basis to the host country, and has fulfilled the conditions for stay in the host country, or was not removed in spite of not fulfilling the requirements of the law, has integrated and establish social ties, which may include participating in economic activities in the host country.

3 Summary of decisions under consideration

The cases reviewed in this work are the cases of *Balogun v. United Kingdom*; *KO (Nigeria) v. Secretary of State* and *Unuane v. United Kingdom*. They all bordered on the deportation of settled Nigerian migrants from the United Kingdom. The cases considered concern settled migrants, who fit into the definition proffered in this article. It must be stated that there are migrants that are considered settled, with either a regular or irregular migration status.¹⁶

The case of *Moshood Abiola Balogun v. the United Kingdom*¹⁷, involved a migrant, who was born in 1986, and migrated to the United Kingdom with his aunt at the age of 3, but the United Kingdom Home Department only became aware of his presence in the Country on 21st December 1994 when an unsuccessful application for indefinite leave to stay was made on his behalf by his aunt. A second application for indefinite leave to stay was successfully made on his behalf on 24th January 2003, by the Southwark Social Services when he was thrown out by his aunt and her boyfriend. Indefinite leave to stay was granted him on the 1st December 2003. He was convicted of possession of Class A drugs in 2007 and sentenced to 3 years in prison. He was subsequently notified of the intention to deport him on 18th October 2007. He appealed the decision on the ground of protection of his private and family life, and fundamental freedoms under Articles 8 and 34 of the European Convention on Human Rights. Despite the Court's finding that after his jail term, the applicant had no record committing any further crimes, he was

¹⁶ Simon Y Svirnovskiy, 'Finding a Right to Remain: Immigration, Deportation and Due Process' (2017) 12 *North Western J L & Soc Pol'cy* 32.

¹⁷ *Balogun v UK*, App no 60286/09) European Court of Human Rights.

deported from the United Kingdom. This is coupled with the fact that the only connection he has with Nigeria is his mother whom he does not know, compared to established family and social connections in the United Kingdom including a sustained relationship with his girlfriend.

The facts in *KO (Nigeria) v. Secretary of State Home Department*,¹⁸ the applicant sought protection of his rights under Article 8 of the European Convention on Human Rights. The applicant identified as KO, is a Nigerian who entered the United Kingdom unlawfully in 1986, he stayed there with his stepdaughter, born in December 1997 who had obtained indefinite leave to remain in the United Kingdom, his wife, and four children who were born between August 2005 and August 2013, citizens of the United Kingdom. KO was convicted of conspiracy, and sentenced to 20 months in prison. The Court had to determine the effects of his deportation on his children, whether his deportation would be 'unduly harsh' on the children, and if it would be in the 'best interest' of the children. The Court noted that KO's role within the household made it possible for his wife to work and that deporting him to Nigeria, while his family remains in the United Kingdom would mean separating the family forever, the European Court of Human Rights upheld the decision to deport him.

*Unuane v. United Kingdom*¹⁹ is similar to KO's case. A deportation order was made against a Nigerian, and the best interest of his children was under consideration in an appeal to set aside the deportation decision. The summarized facts of the case are that the appellant was convicted of falsification of immigration documents, likewise, his Nigerian partner, and he was sentenced to five years and six months imprisonment. Consequently, he was deported, but his partner was allowed to stay with the children in the United Kingdom. The decision was set aside on appeal in the best interest of the children. Article 8 of the ECHR was applied in reaching that decision, just like in KO and Balogun's case. Surprisingly, he was not a first offender, but upon consideration that the offence did not involve violence or drugs he was allowed to stay in the best interest

¹⁸ *KO (Nigeria) v Secretary of State for the Home Department (SSHD)* [2016] EWCA civ 617.

¹⁹ *Unuane v UK*, App no 80343/17) ECtHR 24 November 2020.

of the children, considering that his older son would need heart surgery shortly, and the children would need their father.

4 Analysis of decisions

This section is devoted to analysing the decisions in the cases under relevant sub-heads. Although there are similarities in all the cases, they also have points of distinction. The similarities and distinctions will be identified and analysed under appropriate headings, with the aim of proffering constructive recommendations that will aid future decisions of a similar nature.

4.1 Deportation to a 'home' country and ties to the host countries

All of the cases in this article involve the deportation of settled Nigerian migrants, all of them had established family ties in the United Kingdom. In Balogun's case, it was shown that he had no connection in Nigeria except his mother whom he did not know. It would be correct to say that in the case of Balogun, he might only know about his mother, and did not have ties with her. Ties to the country of origin of a migrant are categorized into generations, with the first migrants in the migrant's lineage representing the first generation.²⁰ The categorization of migrants in generations is used in determining their ties to the country of origin, and people born in the country of origin are said to have ties to the country by virtue of birth.²¹ Based on the facts in the case of Balogun, he came to the United Kingdom with his aunt at the tender age of three, consequently, he only had established ties and relationships in the United Kingdom. The question in that regard is whether he could be said to have ties with his home country, a known connection or memory at that tender age.

The concept of family ties is beyond mere family relationships. A person may have family relationships but have no ties or connections with them. Studies around kinship and ties have moved from the traditional perspective of origin to a new paradigm of kinship as

²⁰ Huang Wei-Jue et al, 'Attachment to the Home Country or Town? Examining Diaspora Tourism Across Migrant Generations,' (2018) 68 *Tourism Mgmt* 52.

²¹ *ibid.*

doing, in terms of practices and processes of becoming.²² Social or family ties in our discussion relate to the social-cultural and economic connections with either the host country or the country of origin, with specific reference to actual relationships maintained in a country to show belonging or dependence. Therefore, Balogun's deportation to Nigeria appears to be made without thorough consideration, and balancing the ties he had in the United Kingdom against his family connections in Nigeria. All the people deported in the reviewed cases were deported under Section 117C of the United Kingdom Immigration and Asylum Act 2002, and they all relied on the provision of Article 8 of the European Convention of Human Rights on appeal to challenge their deportation. The provisions of the laws are discussed under the preceding sub-heading.

The social context of integration in the host country by a migrant is a reality that could be disconnected from the political context of integration, or the legal requirements a person must fulfil to become a legal member of the host country.²³ The dissonance between social integration on the one hand, and political and legal integration on the other hand can lead to injustice in determining deportation cases, which compounds the already existing conundrum of issues relating to migrant protection under international law. It has been argued, that deporting a person to a home country without ties, is akin to forcible displacement.²⁴ Reflecting on it, forced displacement was defined by Dickey as; '... the coerced movement of people from

4.2 Deportation of foreign criminals

A foreign criminal is defined under Section 117C of the UK Immigration and Asylum Act, 2002 as a person who is not a British citizen, is convicted in the UK of an offence, and is sentenced to a period of imprisonment of at least 12 months, or convicted for an offence causing serious harm, or who is a persistent offender.²⁵ In

²² Andrikopoulos Apostolos and Jan William Duyvendank, 'Migration, Mobility and the Dynamics of Kinship: New Barriers and Assemblages,' (2021) 21 *Ethnography* 299.

²³ Laubenthal, Barbara, 'Introduction: Assimilation, Integration or Transnationalism? An Overview of Theories of Migrant Incorporation,' (2023) 61 *Int'l Migration* 84.

²⁴ Dickey Rebecca, 'The Evolution of Forced Displacement in International Criminal Law,' (2019) 58 *PKI Global Just J* <<https://globaljustice.queenslaw.ca/news/the-evolution-of-forced-displacement-in-international-criminal-law>> accessed 22 January 2025.

²⁵ Nationality, Immigration and Asylum Act 2002 s 117D.

addition to the above definition, in deportation cases, a person convicted for an offence in the UK and sentenced upon conviction to imprisonment for a period of 12 months but less than 4 years is considered a medium offender, while a person convicted and sentenced to 4 years imprisonment and above is a serious offender,²⁶ Likewise, a persistent offender or a person convicted for an offence involving violence or causing serious harm, in which case, one must show compelling reasons not to be deported from the United Kingdom.²⁷

One issue that runs through all the reviewed cases; they were all expelled because they were foreign criminals. The trend of deportation of settled migrants on the grounds of criminality is reported with concern that such policies are applied to settled migrants, even those who immigrated a long time ago, and no longer consider themselves migrants, implying that they see themselves as a part of the host country by integration. It was expressed as follows by Jürgen et cetera:²⁸

there has been a new wave of expulsion specifically targeting elements of the migrant population perceived as an inherent threat to public security, mainly in the context of counter-terrorism measures or in response to public demands to be tough on criminal foreigners. Particularly alarming in this context is the fact that policies of expulsion are applied to settled migrants—that is persons who immigrated long ago and may not even identify themselves as migrants.

There is a pattern of application of such expulsion measures on selected groups based on the profiling of certain people or groups as ‘inherently dangerous.’ Jürgen and others captured the above

²⁶ *ibid*

²⁷ Spencer Michael, ‘When Does a Crime Cause Serious Harm? Court of Appeal Considers the Application of Article 8 to Foreign Offenders,’ *Electronic Immigration Network* (June 2020), <<https://www.ein.org.uk/blog/when-does-crime-cause-serious-harm-court-appeal-considers-application-article-8-foreign>> accessed 28 January, 2025.

²⁸ Bast Jürgen et cetera ‘Preserving Social and Family Ties’ (2022), <www.researchgate.net> accessed 22 January 2025.

profiling as follows: 'Such security-driven policies target specific groups of the migrant population that have been identified in public discourse as inherently 'dangerous' '.²⁹ An example of expulsion of members of a profiled group is targeting Muslim communities, viewed as rising Islamophobic tides.³⁰ Such generalization, and profiling of people groups as inherently dangerous, or inherently criminal is not only an unfair and prejudicial treatment of the groups involved but violates the fundamental tenets of human rights, like equality and non-discrimination.³¹ The underlying notion by the decision-makers that members of these groups are 'inherently dangerous' would appear to influence their evaluation of the issues, whether from an administrative or judicial point of view.

For a group of persons to be described as having an inherent feature, it implies that such trait is normally found among such people group. The dictionary meaning of the word inherent is given as; '...existing in someone or something as a permanent and inseparable element, quality or attribute. It is involved in the constitution or essential character of something, and is intrinsic or belonging by nature or habit.'³² Such nuanced prejudices that come into play in making policies and judicial decisions will, if not addressed lead to political, administrative, and if care is not taken judicial persecution of the specified 'vulnerable groups'. Such prejudices ought to be addressed in the context of just and equitable processes, and administration of the law.

Nigeria has had the unfortunate saga of internal crisis owing to several factors, including violence perpetrated by Islamic extremist groups, from the Boko Haram era to the Islamic State of West African Province (ISWAP).³³ This situation coupled with a tacit perception of Nigerians as 'inherently corrupt,' and prone to criminal activities

²⁹ ibid

³⁰ ibid

³¹ Singh Deshraj 'Promoting Equality, Non-Discrimination, and Human Rights: A Comprehensive Stud (2023) 8 *International Journal of Novel Research and Development* 765.

³² <<https://www.dictionary.com/browse/inherent>>accessed on 22 June 2025.

³³ European Union Agency for Asylum, 'Boko Haram, Including JAS, ISWAP, and Ansaru,' *Common Analysis* (October 2021), <<https://euaa.europa.eu/country-guidance-nigeria-2021/131-boko-haram-including-jas-iswap-and-ansaru>> accessed 24 January 2025.

impacts Nigerian migrants.³⁴ Such subliminal profiling can impact judicial decisions made concerning Nigerian migrants, resulting in unduly harsh, or unbalanced application of the principles of law, similar to that associated with Islamophobia. The treatment meted out to Nigerian irregular migrants as foreign criminals have received much scholarly attention,³⁵ but there is a need to consider the treatment of regular Nigerian migrants that get involved in crime, and the proportionality of the reaction of the host country as manifested in deportation decisions. This will be discussed further in the context of the application of the provision of Article 8 of the European Convention on Human Rights under the next sub-head.

4.3 Application of article 8 of the European convention on human rights and deportation of foreign criminals

In all the cases reviewed, the Appellants relied on Article 8 of the European Convention on Human Rights for their appeal before the European Court of Human Rights (ECtHR), but despite the similarities in the cases, the ECtHR decided to uphold the deportation decision except in the case of *Unuane v. United Kingdom*. The application of the provision of Article 8 ECHR is examined in this section because it is a provision that is frequently relied upon by migrants in deportation cases. Article 8 provides for the protection of the right to private and family life, and to properly appreciate the application of the provision in deportation cases, it is necessary to reproduce the provision. Article 8 ECHR provides as follows:³⁶

1. Everyone has the right to respect his private and family life, his home, and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety, or economic well-being of the country, for the prevention of disorder or crime, for the

³⁴ Hope, Kemp Ronald, 'Institution and Culture of Corruption in Nigeria', (2018) 70 *Crime Law and Social Change* 503.

³⁵ Plambeck, Sine, 'Between "Victims" and "Criminals": Rescue, Deportation, and Everyday Violence Among Nigerian Migrants', (2014) 21 *Soc Pol* 1.

³⁶ European Convention on Human Rights 1950 art 8.

protection of health or morals, or for the protection of the rights and freedoms of others.

This provision is relied upon in deportation cases to prevent disruption of the family unit as a direct consequence of a deportation decision. The Government of the United Kingdom has a guidance document to assist decision makers including the Court on the application of Article 8. The UK Government Guidance provides conditions for the deportation of foreigners to include the following instances:

- i. When the deportation would be conducive for the public good.
- ii. If they are the family members of a person who has been ordered to be deported or deported.
- iii. If the court has recommended his deportation following a conviction punishable with imprisonment.
- iv. On the ground of public health, public security, and public policy.³⁷

It is imperative to note that the Guidance document was last updated on the 9th of May 2024 at the time of writing this article, after all the cases reviewed in this work were decided. The amendment was made to reflect certain decisions, including the case of HA (Iraq), RA (Iraq), and AA (Nigeria) v. SSHD.³⁸ The exceptions that can be relied on by a foreign criminal seeking to be deported under Section 117 of the UK Immigration and Asylum Act, were in issue in the above case, and the exceptions are categorized into 3 as provided for under the section as follows:

- i. In the case of a person convicted for an offence with a conviction of between 12 months and less than 4 years (a medium offender), the person must show that the deportation is disproportionate, predicated on existing social and cultural ties in the UK, and substantial obstacles

³⁷The UK Government Guidance Document on Article 8 ECHR, updated 9 May 2024. <<https://www.gov.uk/government/publications/criminality-guidance-in-article-8-echr-cases/criminality-article-8-echr-cases-accessible>> accessed 24 January 2025.

³⁸ [2022] UKSD 22.

- to be encountered in integrating into the country where the person is sought to be deported.³⁹
- ii. In the case of a medium offender, the person must show that he or she has a relationship with a qualifying partner or child in the UK, and deportation will cause undue harshness to the qualifying child, children, or partner.⁴⁰
 - iii. In the case of a serious offender, a person convicted and sentenced to a minimum term of 4 years, the person must be able to show compelling circumstances, which must be over and above the conditions set out for the above two exceptions.⁴¹

In analysing the decisions reviewed in this article, it must be stated that in the case of *Balogun*, the Appellant sought to rely on the disproportionateness of the deportation order in view of the ties he had in the UK and the obstacles or challenges that he would encounter, integrating in Nigeria, a country he barely knows.⁴² In *KO*'s case, he placed reliance on the second exception which borders on the principle of undue harshness of his deportation on his wife and children.⁴³ Whereas, in *Unuane*'s case he placed reliance on the undue harshness of the deportation order on his family, and he was bound to show compelling circumstances in view of the fact that he was convicted for an offence with imprisonment of 4 years and more.⁴⁴ Surprisingly, only *Unuane*'s appeal was successful, and part of the reason given by the ECtHR is that his offence did not include violence or drug, coupled with the medical condition of his child who would be requiring surgery in the near future.⁴⁵

³⁹ Reiss Joel. 'Deportation: Supreme Court Revisits Unduly Harsh and Very Compelling Circumstances Tests,' *Electronic Immigration Network* (3 August 2022), <<https://www.ein.org.uk/blog/deportation-supreme-court-revisits-unduly-harsh-and-very-compelling-circumstances-tests>> accessed on the 25 January 2025.

⁴⁰ UK Nationality, Immigration, and Asylum Act 2002 s 117D.

⁴¹ *ibid* s 117C.

⁴² *Balogun v UK* (n 17).

⁴³ *KO (Nigeria) v SSHD* (n 18) para 23.

⁴⁴ *Unuane v UK* (n 19).

⁴⁵ European Data Base of Asylum Laws (EDAL) '*Unuane v* United Kingdom: ECtHR' EDAL [2020], <<https://www.asylumlawdatabase.eu/en/content/unuane-v-united-kingdom-ecthr-finds-violation-article-8-case-deportation-following->

Considering the offences that each Appellant was convicted and sentenced for, Balogun was convicted for possession of Class A drugs and sentenced to 3 years imprisonment, KO was convicted for conspiracy to defraud and sentenced to 20 months imprisonment, and Unuane was convicted for falsification of immigration documents and sentenced to 5 years 6 months. The issues appear to be unsatisfactorily resolved and disproportionate. In Balogun's case, given his existing ties to the United Kingdom, and especially the trajectory that his life was taking towards transformation, which was acknowledged by the Court, it had no impact in swaying the outcome of the case. In KO's case, it was established that he had a qualifying partner and qualifying children, and played a domestic role that enabled his partner to keep a regular job, and financially support the family, yet in determining whether his deportation would be unduly harsh to his qualifying family, the Court attempted to make a distinction between what is 'harsh', and what is 'unduly harsh', without setting clear objective standards for measuring the harshness of the deportation on qualifying family members.⁴⁶ Lastly, Unuane was convicted and sentenced to a term of 4 years and above, putting the onus on him to prove compelling circumstances under the third exception in Section 117 of the UK Immigration, Nationality and Asylum Act to avoid deportation, which is over and above the requirements in KO's case, but Court considered his situation compelling and reversed the deportation order. The question then is what is the standard of assessment applied in the cases? This work maintains that setting objective standards for proportionality assessment would achieve consistent outcomes.

The proportionality test is done against public interest because public interest is the basis for deporting foreign criminals under Article 8 ECHR. The assessment of the proportionality of the impact of a deportation is balanced against public interest, and determined by the severity of the offence. The more serious the offence committed, the greater the public interest in deporting the

[prison#:~:text=The%20case%20concerns%20the%20deportation,from%20a%20serious%20heart%20condition>](#) accessed 25 January 2025.

⁴⁶ *Balogun v UK* (n 17).

person.⁴⁷ On the other hand, in determining the 'undue harshness' of the deportation on a qualifying partner or child, the evaluation as the court held in KO's case is in resolving the question, of whether it would be unduly harsh for the child to live in the country to which the person is to be deported, and whether it would be unduly harsh for the child to remain in the UK without the person to be deported, the Court held that the evaluation is of the impact of the deportation on the qualifying partner, and not the conduct of the person to be deported.⁴⁸ The court is obliged under such instances to balance public interest against the deportation on one hand, and the impact on a qualifying person against the deportation on the other hand. It is doubtful if that can be achieved without reference to the offence of the foreign criminal to be deported. Even the Court conceded to the difficulty of doing these in deciding the case KO's case.⁴⁹ Therefore, the exceptions ought not to be considered in isolation; if the severity of the offence is considered it would be fair and just to consider other mitigating factors including, but not limited to the transformation of the offender, and guarantees or indicators of the improbability of the person to be a repeat offender.

4.4 Determining the best interest of a child in migration cases

The complexity of applying the provision of Article 8 of the ECHR in deportation cases takes another dimension when assessing the best interest of a child, where there are qualifying children affected by the decision, according to the provision of the UK Immigration, Nationality and Asylum Act. The issue of applying the 'unduly harsh' test of deportation decisions on children is already challenging, despite the guidelines in place requiring case-by-case assessment, which is rarely done by the responsible administrative bodies.⁵⁰ The Court maintains that the aim of the test is not protecting the child from the 'harshness' of the decision, but the 'undue harshness' of the decision, which it insists should be handled

⁴⁷ UK Nationality, Immigration and Asylum Act 2002 s e117C (2).

⁴⁸ *KO (Nigeria) v SSHD* (n 18).

⁴⁹ *ibid* 10 para 20.

⁵⁰ Griffith Melania et. ceteraa, 'Unduly Harsh'? An Empirical Examination of Best Interest Assessment in the Context of Parental Deportation', (2024) 32 *The International Journal of Children's Rights* 690.

factually on a case-by-case basis, rather than setting an objective standard for determining when a decision is unduly harsh. The UK Supreme Court was emphatic in reiteration that there should be no abstract personality to be used in the assessment when it held that; "There should be no "notional comparator", and the fact-finding tribunal is obligated to consider an applicant's unique circumstances on a case by case basis and in the round."⁵¹ The situation is further compounded because the courts are enjoined to consider the best interest of the child in any case that involves a child, and how can the courts achieve that while permitting a degree of 'harsh' consequences on the child?

In determining the best interest of the child in deportation cases, the Court ought to consider only the interest of the child and not the offence upon which the deportation order is predicated.⁵² Balancing all these issues and the public interest of the host country is no doubt a conundrum, or to say the least, challenging, which the most objective Court may not be able to achieve without carefully thought-out standards expressed in an abstract persona of an objective reasonable man, to guide the Court in exercising its discretion, which the UK Government guidelines does not provide for, but leaves it to the discretion of the court on a case-by-case basis.

The principle of the best interest of a child is provided for in the UN Convention on the Rights of a Child under Article 3(1)⁵³ as follows:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.

The principle has gained acceptance and has been assimilated into regional, sub-regional, and domestic instruments, including the European Convention on Human Rights. The best interest of the child implies a consideration of the holistic well-being of the child

⁵¹ Reiss Joel. Op. Cit.

⁵² *KO v United Kingdom*, Op. Cit.

⁵³ UN Convention on the Rights of the Child 1990 art 3(1).

in any matter where the right of a child is involved.⁵⁴ Given the decision in KO's case, can it be said that there was a holistic consideration of the best interest of the children because of the distinction that the court sought to make on the meaning of what is 'harsh' and what is 'unduly harsh'? We answer the question in the negative and recommend a review of the test of the 'best interest of a child' in deportation cases.

5 Challenges of deported migrants and observations

In the course of this work, some challenges related to migrant deportation were identified, and reported below:

1. Difficulty of reintegration in the country of origin or that to which the migrant is to be deported due to the time already spent in the host country.⁵⁵ Acceptance upon return to the country of origin may be challenging, coupled with the stigma associated with returning as a deportee,⁵⁶ which could likely result in an attempt by the person to leave the country of origin or the country of deportation.⁵⁷
2. Deportation as a second punishment for the crime committed. It is conceded that the public interest of the host country is critical in making a deportation decision, but the effect of such on a person who has demonstrated remorse and transformation has the effect of a second punishment for the crime committed. An example is the case of Balogun who attempted suicide upon the trauma of facing deportation after serving his prison term and showed evidence of positive change.⁵⁸

⁵⁴ Versea Federica, 'The Best Interest of the Child as Put into Practice Worldwide', (February 2021) *Humanium* <<https://www.humanium.org/en/the-best-interest-of-the-child-as-put-into-practice-worldwide/>> accessed 26 January 2025.

⁵⁵ Edeh Vincent Obiora, 'Journey to Nowhere? Reintegration of Nigerian 'deported returnees' from Libya' (Masters' Thesis, International Institute of Social Studies, (2021) 19 <[file:///Users/mac/Downloads/Vincent-Obiora-Edeh-Journey-to-Nowhere.-Reintegration-of-Nigerian-deported-returnees-from-Libya%20\(2\).pdf](file:///Users/mac/Downloads/Vincent-Obiora-Edeh-Journey-to-Nowhere.-Reintegration-of-Nigerian-deported-returnees-from-Libya%20(2).pdf)> accessed 25 January 2025.

⁵⁶ Wapmuk Sharkdam. 'International Migration, Nigerian Returnee Migrants and Challenges of Reintegration into Local Communities's (2019) 9 *Arts and Social Science Research* 158.

⁵⁷ *ibid.*

⁵⁸ *Balogun v UK*, Op.Cit.

The issue of family disruption and the impact on the deportee's immediate family members is critical.

6 Exploring options for deportation and recommendations

As a result of the hardship caused to deported migrants under circumstances similar to those in the reviewed cases, there is a need to explore other options for deportation that will serve the interest of the host country and meet the needs of the migrant in question. The alternatives explored here are restricted to the context of the reviewed cases and do not address other instances of deportation like those following failed asylum applications, notoriously used by the Global North in addressing migration political controversies in what has come to be described as a political technology in migrant population decongestion⁵⁹ and justifiable removal of unsettled irregular migrants⁶⁰

It is conceded that there are instances where deportation is non-negotiable because of the danger the migrant poses to the host country, some of these instances include imminent threat to the national security of the host country.⁶¹ The alternatives explored are presented serially below.

6.1 Opportunity for rehabilitation and integration for previously convicted migrants:

Migrants convicted for offences, who have served their term in prison ought to be allowed to demonstrate that they are reformed and can contribute meaningfully to the host country. Deportation decisions should take note of efforts made by a migrant in that direction, and attach weight to them in deportation cases. States can put mechanisms in place that would assess character changes of previously convicted migrants, and issue certificates of good

⁵⁹ Lemberg-Pedersen Martin, 'The Contours of Deportation Studies', *Handbook of Return Migration* (2022),

<https://www.academia.edu/94612786/9_The_contours_of_deportation_studies>, accessed 24 January 2025.

⁶⁰ LeVoy, Michele, and Eve Geddie, 'Irregular Migration: Challenges, Limits and Remedies' (2009) 28 *Refugee Surv Q* 87.

⁶¹ Esteves, João. 'Migration, Security Challenges, and National Security, in A J Masys (eds) *Handbook of Security Science* (Springer, (2022).

conduct when the migrant demonstrates stability and positive integration in the host country. Balogun's case would have been decided differently if the Court placed weight on his transformation after he completed his jail term. His automatic deportation could be perceived as a second punishment for the crime of which he was remorseful.

6.2 Setting standards for proportionality assessment to achieve substantial consistency in judicial and administrative decisions:

The decisions reached in the cases reviewed in this article have a level of inconsistency in the assessment and application of the proportionality test. The proportionality test under each of the exceptions under Section 117 of the UK Immigration, Nationality, and Asylum Act, should not be left entirely to the discretion of the Courts, or administrative bodies, and even though there is a guidance document, it would be more appropriate to develop proportionality checklist to guide the Courts and administrative bodies in exercising their discretion, which should result in more consistent decisions.

6.3 Legal aid services to Nigerian migrants standing facing deportation trial:

The impact of deportation on Nigeria is multifaceted, there is the dimension of the negative image and publicity it gives Nigeria as a nation,⁶² and the impact on the self-image of Nigerians in the diaspora.⁶³ There is also the economic impact of reduced financial returns to extended family members of migrants in Nigeria, impacting the nation's economy.⁶⁴ Therefore, it is imperative for Nigerian embassies to make provision for qualitative legal aid services for their citizens in the diaspora to ensure proper legal representation and better outcomes for Nigerians in the diaspora.

⁶² Owuamanam Chukwuma M. and Alexander Nnaemeka Agbaenyi, 'Nigeria's International Image Crisis: An Evaluative Analysis' (2021) 4 *ZIK J Multidis. Rs'rch* 95.

⁶³ *ibid*

⁶⁴ Aja Innocent Ngene 'Diaspora Remittances Inflows and Nigeria's Socio-Economic Development in the 21st Century' (2024) 17 *Afr J Pol & Admin Stud* 173.

6.4 Further review of the 'unduly harsh' test in the best interest of the child in deportation cases:

There is a need to review what is harsh to a child and what is harsh to a person in general, the capacity of a child to endure harshness should not be on the same pedestal with the capacity of an adult to endure hardship. Therefore, the determination of what is unduly harsh should have a different standard of assessment when it involves the interest of a child, and such assessment must be done considering the holistic interest and well-being of the child.

7 Conclusion

This article reviewed three cases relating to the deportation of settled migrants from the United Kingdom, whose stay was regular at the time of their deportation. They all challenged their deportation based on the exceptions under Section 117 of the UK Immigration, Nationality, and Asylum Act, 2002, and relied on the protection of their rights under Article 8 of the European Convention on Human Rights. Some of the issues discussed in this article include the lack of an objective standard for determining the proportionality of the deportation with the public interest of the host country, which is handled by the courts on a case-by-case basis. The article argues that setting an objective test standard will result in more consistent decisions. Other issues discussed include the complexity in determining the best interest of a child, the undue harshness of a deportation order on a qualifying partner or child, and the public interest, stressing the need for carefully thought-out guidelines specifying situations that fall under each exception under Section 117 of the Act to guide courts and administrative bodies in decision making. Recommendations were made in line with the issues discussed, including the need to carefully consider, and weigh all facts placed before the court by a person facing a deportation trial, including a change in the behaviour and conduct of the person in the host country

The Ramadan school closure conundrum: a legal and policy analysis of religious freedom and the right to education in Nigeria

David Bassey Antia*

Abstract

This paper analyses the legal and policy dimensions of religious freedom in education, focusing on the recent *Ramadan*-related school closures in Northern Nigeria. It examines the constitutional and international human rights implications of such policies, especially their compatibility with Nigeria's secular framework under Section 10 of the 1999 Constitution. Using a proportionality approach, the paper assesses how religious accommodations can be balanced in a pluralistic democracy without infringing on the rights of others. Relying on Nigerian case law and comparative jurisprudence, including European Court of Human Rights decisions, it argues that state-mandated school closures for religious observance constitute an impermissible endorsement of religion. These policies violate the rights to education, religious freedom, and non-discrimination, thereby breaching both constitutional and international obligations. The paper concludes by stressing the importance of maintaining state neutrality in religious affairs to safeguard individual rights and promote national cohesion in a diverse and democratic society.

Keywords: Ramadan fasting, right to education, freedom of religion, 1999 Constitution of Nigeria, human right

1 Introduction

Education is a fundamental right and is reckoned as a cornerstone of socio-economic development. Across the globe, nations that have prioritized education have successfully transitioned from

underdevelopment to remarkable progress.¹ However, in Nigeria, particularly in the northern region, the contentious, nay, seemingly destructive superposition between religion and education has constituted a significant hindrance to educational progress. The overwhelming influence of religious interests over educational priorities, what can best be described as a corrosive clash in the politics of piety and pedagogy, has had a detrimental effect of not only heightening the existing barriers to education and perpetuating the educational stagnation of the region but also undermining the constitutional directive on state policies.

Nigeria has adopted the United Nations (UN) Sustainable Development Goals (SDGs), including Goal 4 of the 2030 Agenda for Sustainable Development, which aims to ensure inclusive and equitable quality education while promoting lifelong learning opportunities for all. However, despite this commitment, Nigeria faces a significant educational crisis. Of the approximately 263 million children worldwide who remain out of school, 10.5 million – aged 5 to 14 – are in Nigeria, giving the country the highest number of out-of-school children globally.² Alarmingly, around 50% of these children reside in the northern region, where educational challenges are particularly severe.

In light of this troubling setback in Nigeria's educational progress, particularly in the northern region, one cannot help but reflect on the fundamental question of whether the right to education is truly upheld for all citizens. It is this writer's view that education has not

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¹ Singapore is a perfect example in this regard. To maintain its global competitiveness, Singapore places a strong emphasis on human capital development, given its lack of natural resources. The Singaporean government invests heavily in education, particularly at the secondary level, and prioritizes lifelong training for its workforce. Interestingly, apart from defense, education receives the largest share of the national budget. The goal is to sustain Singapore's position in the global economy. Education has long been regarded as the key to a prosperous life, and since the early years of independence, the nation's political leadership has been committed to ensuring access to quality education for all. See C B Goh and S Gopinathan, 'Education in Singapore: Development since 1965' in B Fredriksen and JP Tan (eds), *An African Exploration of the East Asian Education Experience* (World Bank 2008) 80-108.

² United Nations Children Fund, *Evaluation Report: The Out-of-School Children Initiative* (February 2018).

received its deserved attention in the framework of our national policy and budgetary plan. Of particular concern is the role of state religious policies as is seen in the recent decision of some Northern Governors to shut down schools during the Ramadan fasting, which clearly hinders academic activities and further contribute to the region's educational stagnation. While some argue that this policy is justified on cultural and religious grounds, it is contended that the policy raises serious concerns about the right to education and the secular nature of Nigeria. This paper examines the legal and policy dimensions of this issue, with a focus on religious freedom, the right to education, and the constitutional obligation on the government to protect, enforce and balance these fundamental rights.

2 Ramadan in Nigeria: a brief historical and cultural overview

The term *Ramadan* is derived from the Arabic root word, *ar-ramad* or *ramida*, which simply means 'scorching heat' or 'scarcity of rations.' This designation is both etymologically and symbolically significant, as Ramadan is the sacred month of fasting ordained by the *Quran* – a practice required of all Muslims who have reached puberty and are physically capable of fasting. As the fourth pillar of Islam, Ramadan occupies the ninth month of the Islamic lunar calendar and serves as a period dedicated to fostering piety, encouraging charitable deeds, and promoting introspection and self-reformation. Importantly, it is believed amongst the Muslims that it was during this month that the initial chapters of the *Quran* were revealed to the Prophet Muhammad (peace and blessings be upon him). The Islamic month of Ramadan is marked by fasting, when Muslims refrain from eating and drinking from dawn to sunset, which has an impact on their dietary habits.³

In Nigeria, the celebration of Ramadan is marked by a synthesis of orthodox Islamic practices and indigenous customs. In northern Nigeria, for example, the observance extends beyond individual fasting to encompass vibrant communal rituals. It is customary for family and friends to gather for *iftar* (the breaking of the fast) and

³ SK Sulaiman and others, 'Nigerian Muslim's Perceptions of Changes in Diet, Weight, and Health Status during Ramadan: A Nationwide Cross-Sectional Study' (2022) 19 *Int'l J Env Res & Pub H'lth* 14340 <https://doi.org/10.3390/ijerph192114340>.

suhoor (the pre-dawn meal) during the period. Such gathering helps to reinforce social bonds and communal solidarity. Additionally, during this period, many towns and cities organize public events that include collective prayers, storytelling, music, and dance, thereby creating a festive yet reflective atmosphere. Also, a unique culinary tradition has emerged, with special dishes such as *fura da nono*—a traditional millet-based drink—and samosas becoming emblematic of Nigerian *Ramadan* cuisine.⁴

The culmination of *Ramadan* is celebrated with *Eid al-Fitr*, a major religious festival that consolidates the spiritual and social renewal achieved during the month of fasting. In Nigeria, *Eid al-Fitr* is observed with elaborate prayers, communal feasts, and widespread social gatherings. Muslims during this period traditionally adorn themselves with their finest attire, attend special mosque services, and engage in extensive visits with family and friends. This period is not only a time of joyful celebration but also a reiteration of communal identity and a moment of collective gratitude for the spiritual cleansing and discipline attained throughout *Ramadan*.

3 Policy context of Ramadan school closures in northern Nigeria

Northern Nigeria is characterized by a predominantly Muslim population, with a significant Christian minority. The recent policy of mandating school closures in the north during the holy month of *Ramadan* is punctuated by an inclination towards observing the cultural and religious traditions of the Muslims. Accordingly, the government of Katsina, Kebbi, Bauchi, and Kano have issued directives requiring all public and private schools to observe a month-long hiatus during *Ramadan*, a period marked by stringent fasting obligations for Muslims.⁵

⁴ Asiwaju Media, *Ramadan in Nigeria: A Month of Fasting, Faith, and Community Celebration* (4 March 2025) <<https://asiwajumedia.com/ramadan-in-nigeria-a-month-of-fasting-faith-and-community-celebration/>> accessed on 25 June, 2025.

⁵ Iyabo Lawal and Owede Agbajileke, 'Ramadan: Uproar as Bauchi, Kano, Katsina, Kebbi Shut Out 11.5m Schoolchildren,' *The Guardian* (4 March 2025) <<https://guardian.ng/news/ramadan-uproar-as-bauchi-kano-katsina-kebbi-shut-out-11-5m-schoolchildren/>> accessed 25 June 2025.

In Bauchi State, the Ministry of Education unilaterally revised the academic calendar, designating 26 February 2025, as the official closing date for all nursery, primary, and secondary schools. Schools were thereby explicitly instructed to remain closed from 1 March to 5 April 2025, with a categorical warning against any contravention of the directive.⁶ Similarly, in Katsina, the Hisbah (Sharia enforcement police) decreed the closure of schools during Ramadan and expressly prohibited supplementary academic activities, such as extra lessons, throughout this period. This precedent suggests an imminent extension of similar policies across other states with substantial Muslim-majority populations and active Sharia law implementation.⁷

It would be recalled that the formal introduction of Sharia law in Northern Nigeria in the early 2000s was initially accompanied by assurances from its advocates that its application would be strictly limited to adherents of Islam, the reality today speaks different.⁸ The compulsory closure of schools during Ramadan starkly contradicts such assurance. In practice, Sharia law has progressively transcended its purported religious boundaries, exerting a coercive influence on all individuals within its jurisdiction, regardless of their faith. This development has facilitated its appropriation by Islamist factions and political actors seeking to entrench a rigid theocratic order, thereby exacerbating concerns about religious liberty and the constitutionally enshrined secularity of the Nigerian state.

The enforced closure of schools during Ramadan strongly characterizes religious authoritarianism and raises profound constitutional and policy questions. It also leaves much to be desired

⁶ 'Full List: Here Are Northern States That Have Shut Schools for Ramadan,' *Pulse* (1 March 2025) <https://www.pulse.ng/articles/news/local/full-list-here-are-northern-states-that-have-shut-schools-for-ramadan-2025030112422592689#google_vignette> accessed 25 June 2025.

⁷ Diana Chandler, 'Christian Schools Forced to Close for Ramadan in Four Northern Nigeria States,' *Baptist Press* (21 March 2025) <<https://www.baptistpress.com/resource-library/news/christian-schools-forced-to-close-for-ramadan-in-four-northern-nigeria-states/>> accessed 25 June 2025.

⁸ "'Political Shari'a'? Human Rights and Islamic Law in Northern Nigeria," *Human Rights Watch* (21 September 2004) <<https://www.hrw.org/report/2004/09/21/political-sharia/human-rights-and-islamic-law-northern-nigeria>> accessed 25 June 2025.

regarding what esteem is paid to education by the government. If the governments are compelling schools to shut down in deference to Ramadan observance, why are commercial enterprises, financial institutions, and government offices permitted to remain operational? This policy paradox is particularly glaring given that fasting obligations primarily pertain to adults, while the disruption of academic activities disproportionately affects children, many of whom are not even up to the age of puberty required for the fasting.

This selective enforcement shows that education is not prioritized by the states concerned and points to the pressing need for a critical reassessment of the policy. The Nigerian government must recognize that such directives, if left unchecked, pose an existential threat to both the struggling education sector and the fundamental principle of religious neutrality in governance. A sustained failure to address this issue risks further entrenching a trajectory where in religious dictates would systematically encroach upon civic and educational institutions and undermine the sacredness of the nation's pluralism and constitutionalism.

Furthermore, Nigeria's policy approach towards education exhibits a troubling inconsistency, as evidenced by Section 215 of the Armed Forces Act.⁹ This provision allows for the billeting and occupation of schools by the military while exempting hospitals and places of worship. By failing to extend the same protection to educational institutions, the Nigerian state reveals a glaring disregard for the sanctity of learning spaces.

In contrast, other jurisdictions have demonstrated a more conscientious approach. In the landmark ruling *Exploitation of Children in Orphanages in the State of Tamil Nadu v Union of India*,¹⁰ the Supreme Court of India underscored the imperative of shielding schools from military occupation, categorizing such encroachments as clear violations of the principles of distinction and precaution in armed conflict. Similarly, the Military Order of Colombia, issued by

⁹ Cap A20 Laws of the Federation of Nigeria (2004).

¹⁰ *Exploitation of Children in Orphanages in the State of Tamil Nadu v Union of India*, Writ Petition (Criminal) No 102 of 2007, 17 April 2015 (SC India) <<https://www.lawfinderlive.com/archivesc/894449.htm>> accessed 25 June 2025.

the General Commander of the Military Forces on 6 July 2010, mandated the unequivocal protection of school buildings from military use, reinforcing the international consensus on safeguarding educational institutions.¹¹

This writer decrying our state of education as a country, in a newspaper article titled, 'The Incoming President Should Prioritize Education' said the following:

The current situation of Nigerian students trapped in Sudan as a result of the battle for hegemony between two leaders of the country have caused many Nigerians to entertain multiple thoughts and reflections about our welfare as citizens. Many people have wondered why any Nigerian would prefer to go to Sudan to study instead of their own country. Others have poignantly resolved the puzzle with an explanation that our country pays less attention to education compared to Sudan. Anyhow one may look at it, there is an undeniable causal nexus between our country's abandonment of the education sector and the increasing numbers of citizens who leave the country to get education abroad. From 2017 to 2022, ASUU has gone on strike for 21 months (that is, 1 year 9 months), leaving Nigerian students to bear the pains of abandonment and setbacks.¹²

I still firmly maintain the view that the Nigerian government has remained unwilling to elevate education—a fundamental right of every citizen—to its rightful place of priority. It is submitted that Nigeria must rouse itself from its policy inertia and address these entrenched systemic deficiencies with all sense of urgency. A nation that aspires to sustainable development must accord education the pre-eminence it deserves by instituting consigning itself to policy frameworks that shield schools from undue religious and military

¹¹ 'Schools and Armed Conflict: A Global Survey of Domestic Laws and State Practice Protecting Schools from Attack and Military Use,' *Human Rights Watch* (20 July 2011) <<https://www.hrw.org/report/2011/07/20/schools-and-armed-conflict/global-survey-domestic-laws-and-state-practice>> accessed 25 June 2025.

¹² David Antia, 'Incoming President Should Prioritize Education,' *Nigerian Tribune* (3 March 2023) <<https://tribuneonline.com/incoming-president-should-prioritise-education/>> accessed on 5 March 2025.

interference. Without such decisive reforms, the country's discount of history and prophetic future would only be defined by a perpetuation of a legacy of educational stagnation and governance failure, which ultimate end would be the erosion of its democratic and developmental aspirations.

4 The legal framework for the protection of religious rights in Nigeria

The right to freedom of religion encompasses the liberty to hold, adopt, maintain, or change one's religious convictions without any external interference. Inextricably linked to this fundamental right is the right to worship, which includes the entitlement to believe, profess one's belief, and engage in religious observances or rituals, either individually or in communal settings. Integral to this right is the freedom to renounce one's religion, to abstain from professing religious beliefs, and to refrain from participating in religious rites and practices.

Furthermore, the right to religious freedom protects individuals against discrimination, coercion, or hostility on the basis of their religious affiliation. Several legislative instruments are pertinent in upholding and enforcing this right.¹³ These instruments collectively reinforce the protection of religious liberty and ensure that individuals are not subjected to undue interference or persecution on account of their religious convictions. This section will illustrate with a few of these instruments.

4.1 The 1999 Constitution

The Constitution of the Federal Republic of Nigeria 1999 enshrines the right and limitation to freedom of religion through several key provisions, notably Sections 10, 38, 41(1)(a) -(b), and 222(b). Among these, Section 38 stands out as the most relevant as it delineates the broad and fundamental nature of the freedom of religion in Nigeria,

¹³ These include the Constitution of the Federal Republic of Nigeria 1999, the Child Rights Act 2003, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983, and the Universal Declaration of Human Rights 1948. Additional legal frameworks include the Criminal Code, the Penal Code, the Federal Character Commission Act (Establishment, etc.), 1996, Decree No. 34 of 1996, the Public Complaints Commission Act, 1975 (No. 31) (Chapter 377), and Laws of the Federation of Nigeria.

serving as the principal legal framework for religious freedoms. Other provisions earlier mentioned are complementary as they refine and elaborate on the nuances of this right. Other provisions of the constitution that reinforce the right to religious freedom includes the right to privacy under Section 37, the right to freedom of expression under Section 39, the right to freedom of association under Section 40, and the right to free movement under Section 41.

Section 38(1) of the Constitution explicitly guarantees the right to freedom of thought, conscience, and religion as follows:

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

A closer examination of this provision reveals that freedom of religion extends beyond its broad conceptualization and encompasses several distinct aspects such as the right to conscience, the right to independent thought, the right to change one's religion, and the right to propagate religious beliefs. Section 38(1) thus ensures that every Nigerian citizen possesses the inviolable right to adopt a religion of their choosing and is shielded from coercion that would compel them contrary to their beliefs. This provision highlights the fundamental principle that freedom of religion inherently includes the freedom of belief, allowing individuals to adhere to personal reasoning and convictions without subjection to actions that contravene their deeply held moral and ethical judgments.

Furthermore, Section 38(1) also extends the freedom of religion to institutional autonomy, allowing religious organizations to establish educational institutions in accordance with their doctrinal principles. This entitlement finds further articulation in Section 39(1) of the Constitution, which guarantees thus: 'Every person shall be entitled to freedom of expression, including the freedom to hold

opinions and to receive and impart ideas and information without interference.'

This provision reinforces the right to manifest and share religious beliefs freely without undue intervention by the state or the necessity of endorsement from other religious communities. Importantly, the enjoyment of religious freedoms is not contingent upon formal registration with the state, and religious communities or organizations should not be compelled to register in order to exercise their constitutional rights.

The Nigerian judiciary has affirmed these principles in the notable case of *Okogie and Others v The Attorney General of Lagos State*.¹⁴ In this case, the plaintiffs sought and obtained leave of court for the enforcement of their fundamental rights under section 36 of the Constitution dealing with freedom of expression, including freedom to hold opinion and to receive and impart ideas and information without interference. It was contended that the fundamental right was threatened with infringement by the Lagos State Government by its proposals to abolish all private primary schools in the state. Learned counsel for the plaintiffs contended that it was not for the Lagos State Government to tell parents where to send their children for primary or secondary education and that anybody should be at liberty to establish primary and secondary schools.

The court held that the Directive Principles of State Policy in Chapter II of the 1979 Constitution have to conform to and run as subsidiary to the Fundamental Rights under Chapter IV of the same constitution. It was further held that the fundamental objectives and directive principles enunciated in section 18 of the 1979 and 1999 Constitutions enjoining the state to provide equal and adequate educational opportunities are objectives to be carried out by any Government of the Federation without necessarily restricting the right of other persons or organizations to provide similar or different educational facilities at their own expense. This right also includes the right to establish a faith-based institution of learning.

¹⁴ (1981) 2 NCLR 337.

Thus, the 1999 Constitution, alongside judicial interpretations, provides a robust protection of the right to religious freedom, which ensures that individuals and religious institutions alike are protected from undue governmental interference, discrimination, or coercion in matters of faith and belief.

The freedom of religion for individuals in educational institutions represents another crucial dimension in which the Nigerian Constitution protects religious liberty. In particular, Section 38(2) of the Constitution explicitly protects children from being compelled to participate in religious practices that are inconsistent with their personal beliefs or those of their parents or guardians. The provision states:

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

This constitutional provision ensures that religious freedom extends to educational settings, thereby preventing undue coercion into observing or performing the religious rites of others and affirming the right of individuals, particularly minors, to adhere to their faith without external compulsion.

4.2 The Child Rights Act 2003¹⁵

The Child Rights Act (CRA) 2003 constitutes a pivotal legislative instrument aimed at protecting the rights of the children to religious freedom. The Act provides protection for children's religious liberties in a manner akin to the constitutional framework, yet upon closer examination, it becomes evident that the CRA's provisions on children's religious rights are both more comprehensive and more expansive than those articulated in the 1999 Constitution.

Notably, Section 7(1)-(4) of the CRA elaborates on the scope of religious rights for children, ensuring that their freedom of thought,

¹⁵ No 26 of 2003 (CRA).

conscience, and religion is both respected and upheld. The provisions state:

- (1) Every child has a right to freedom of thought, conscience, and religion.
- (2) Parents and, where applicable, legal guardians shall provide guidance and direction in the exercise of these rights, having regard to the evolving capacities and best interests of the child.
- (3) The duty of parents and, where applicable, legal guardians to provide guidance and direction in the enjoyment of the right in subsection (1) of this section by their child or ward shall be respected by all persons, bodies, institutions, and authorities.
- (4) Whenever the fostering, custody, guardianship, or adoption of a child is an issue, the right of the child to be brought up in and to practice his religion shall be a paramount consideration.

These provisions indicate the vital role of parental and guardian guidance while simultaneously recognizing the evolving autonomy of the child. The parental authority over a child's religious choices is not absolute and may be overridden by the state's compelling interest in the welfare and protection of the child. This principle was affirmed in the landmark case of *Esabunor v Fayewa*,¹⁶ where the Court of Appeal considered whether a parent could lawfully refuse life-saving medical treatment for their child on the basis of religious beliefs. The court held that a mother could not lawfully object to such a critical medical intervention, ruling that the state's duty to protect the child's right to life takes precedence over the mother's religious convictions. Consequently, the mother's right to freedom of religion was curtailed in favour of the child's fundamental right to survival. The decision reinforces the doctrine of the state's overriding interest in the welfare of a child. Similarly, in the Canadian case of *B (R) v Children's Aid Society of Metropolitan Toronto*,¹⁷ the court held:

¹⁶ (2019) LPELR 46961 (SC).

¹⁷ [1995] 1 SCR 315. Religious freedom is constitutionally protected under the Canadian Charter of Rights and Freedoms 1982 (the Charter). Section 1 of the Charter provides the

An exercise of parental liberty which seriously endangers the survival of the child should be viewed as falling outside s. 7 of the Charter. While the right to liberty embedded in s. 7 may encompass the right of parents to have input into the education of their child and in fact may very well permit parents to choose among equally effective types of medical treatment for their children, it does not include a parents' right to deny a child medical treatment that has been adjudged necessary by a medical professional and for which there is no legitimate alternative. The child's right to life must not be so completely subsumed to the parental liberty to make decisions regarding that child. Although an individual may refuse any medical procedures upon her own person, it is quite another matter to speak for another separate individual, especially when that individual cannot speak for herself. Parental duties are to be discharged according to the 'best interests' of the child. The exercise of parental beliefs that grossly invades those best interests is not activity protected by the right to liberty in s. 7. There is simply no room within s. 7 for parents to override the child's right to life and security of the person. To hold otherwise would be to risk undermining the ability of the state to exercise its legitimate *parens patriae* jurisdiction and jeopardize the Charter's goal of protecting the most vulnerable members of society

This case shows the legal position that while religious freedom is constitutionally protected; it is not absolute and may be lawfully restricted where it conflicts with the fundamental rights of others, particularly the right to life of a minor.

4.3 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter) has been ratified and domesticated into Nigerian law. As an integral part of Nigeria's legal framework, the African Charter contains provisions that reinforce the fundamental rights of Nigerian

state with authority to infringe on freedom of religion in the least restrictive way possible for a "compelling government interest.

citizens, particularly in relation to the freedom religion. The Nigerian judiciary has recognized the legal force and applicability of the African Charter, particularly in the celebrated case of *Abacha v Fawehinmi*.¹⁸ In this case, the Supreme Court elaborated on the implications of the domestication of the charter and affirmed that Nigerian courts are now obligated to enforce its provisions as they would any other law within their judicial competence.¹⁹

Article 8 of the African Charter, like Section 38(1) of the 1999 Constitution, affirms the right to freedom of religion and conscience. It provides:

Freedom of conscience, the profession, and free exercise of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

However, a comparative analysis between the 1999 Constitution and the African Charter reveals a notable distinction in their scope of protection regarding religious freedom. Unlike the Constitution, the African Charter does not explicitly guarantee the right to practice religion both privately and publicly or the right to change one's religion—both of which are fundamental aspects of religious liberty enshrined in Section 38(1) of the Constitution.

This distinction renders the constitutional framework more comprehensive in protecting religious freedoms, as it explicitly provides for both individual and collective religious expressions as well as the right to religious conversion. Consequently, while the African Charter affirms religious liberty, its protections are not as extensive or detailed as those provided by the 1999 Constitution, which offers a more holistic and explicit articulation of religious rights. This, it must be said, does not diminish the significance of the

¹⁸ (2001) 1 CHR 20.

¹⁹ *Alhaji Sani Dododo v Economic & Financial Crimes Commission and Others* (2003) 1 NWLR (pt. 1336) 468, the Court of Appeal held that African Charter is now part of the laws of this country protecting the social and economic rights of citizens. The Court further stated that The African Charter is preserved by the 1999 Constitution and must always be relied on to recognize political and socioeconomic rights.

African Charter as a legal instrument for the protection of religious freedom in Nigeria. For while the 1999 Constitution provides a more detailed articulation of religious rights, the African Charter remains a critical legal framework, particularly in reinforcing principles of religious tolerance and non-discrimination as set out in Article 28.

Beyond the prohibition of religious discrimination under Section 42 of the Constitution, Articles 19 and 28 of the African Charter explicitly prohibit religious intolerance in all forms. This is a laudable provision, especially in a culturally and religiously pluralistic society like Nigeria, where tolerance is essential for peaceful coexistence. Without such legal order, religious discrimination, domination, and marginalization could escalate into mistrust, conflict, and violence, threatening national unity and stability. By enshrining principles of mutual respect and coexistence, the African Charter complements the provisions of the constitution and ensures a broader framework for religious harmony in Nigeria's multi-religious society.

5 National legal frameworks for the protection of the right to education in Nigeria

Nigeria has initiated and developed several legal frameworks aimed at safeguarding the right to education. These include:

5.1 The 1999 Constitution

The Constitution as the basic law of the land has provided for the general protection of human rights enshrined in Chapter IV. Specifically, Section 18 mandates that the government shall direct its policies toward ensuring equal and adequate educational opportunities at all levels. The provision further highlights the duty of the government to eradicate illiteracy and, where practicable, provide free, compulsory, and universal primary education, as well as free secondary, university, and adult literacy education. Although this provision establishes a critical policy directive, it is embedded within the non-justiciable Chapter II of the Constitution, which many argue is a limitation to its enforceability. It is notable that the right to education has evolved into an enforceable fundamental right in Nigeria, empowering citizens to compel the government to

provide education if they so desire. This proposition is unequivocally supported by the decision of the Economic Community Court of Justice in *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v President Federal Republic of Nigeria and Another*,²⁰ which affirmatively established that every Nigerian has a justiciable right to education.

5.2 The Child Rights Act

The Child Rights Act (CRA) was enacted to implement the UN Convention on the Rights of the Child (CRC). It stands as the principal legislation, which recognize and protects the right of every child in Nigeria. Section 15 of the CRA unequivocally mandates the Nigerian government to provide free and compulsory basic education to every child.

5.3 The Compulsory, Free Universal Basic Education (UBE) Act 2004

This legislation reinforces the constitutional directive by explicitly affirming every Nigerian child's right to free, compulsory, and universal basic education. The act also establishes mechanisms for funding and administration, thereby strengthening the legal foundation for educational accessibility. Despite its ambitious scope, challenges such as inadequate funding, poor enforcement, and infrastructural deficits continue to impede its full realization.

6 Ramadan school closures in Nigeria: a legal analysis

The 1999 Constitution unequivocally prohibits the establishment or endorsement of any religion by the State. Section 10 provides: "The Government of the Federation or of a State shall not adopt any religion as State Religion." The policy of closing public schools during Ramadan in certain northern states constitutes a prima facie contravention of this constitutional safeguard. By mandating a school closure grounded in a specific religious observance, the policy operates as an indirect endorsement of one faith over others, thereby eroding the neutrality of the State. This principle of neutrality is a cardinal tenet of constitutionalism in plural societies, and it

²⁰ *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Anor* ECOWAS Court, 30 November 2010, ECW/CCJ/JUD/07/10.

resonates with the reasoning of the European Court of Human Rights (ECtHR) in *Lautsi v Italy*,²¹ where the display of religious symbols in public schools was held to violate state impartiality in matters of religion.

In addition, Section 38(1) of the Constitution guarantees to every person the right to freedom of thought, conscience, and religion, including the right not to be compelled to observe any religion. A state policy that suspends education in observance of Ramadan indirectly coerces non-Muslim students into participation by depriving them of access to a secular right – education – for reasons of religious observance. International human rights law provides further reinforcement. Article 18 of the Universal Declaration of Human Rights (UDHR), echoed in Article 18 of the International Covenant on Civil and Political Rights (ICCPR), protects the right to freedom of thought, conscience and religion, but makes clear that the manifestation of religion may only be limited by laws necessary to protect “public safety, order, health, morals or the fundamental rights and freedoms of others.” *Ramadan* school closures cannot plausibly be justified under these grounds: rather than protecting rights, they impair them – specifically, the right of children to education. Indeed, the Human Rights Committee has clarified that Article 18 of the ICCPR extends protection not only to religious believers, but also to those who do not profess any faith, thereby underscoring that no child should be compelled, directly or indirectly, into religious observance.

The right to education is also at stake. Section 18 of the Constitution obligates the State to ensure equal and adequate educational opportunities, a duty further reinforced by the Child Rights Act (2003) and the Universal Basic Education Act (2004), both of which mandate free and compulsory basic education. Although education under Chapter II of the Constitution is non-justiciable, the ECOWAS Court of Justice in *SERAP v Nigeria*²² has affirmed that Nigerians

²¹ *Lautsi v Italy* App No 30814/06 (18 March 2011) (ECtHR).

²² *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria & Universal Basic Education Commission (UBEC)* ECW/CCJ/APP/12/07; ECW/CCJ/JUD/07/10 (ECOWAS Community Court of Justice).

have a justiciable right to education. The Convention on the Rights of the Child (CRC), to which Nigeria is party, similarly mandates that States respect the child's right to education without discrimination. Regional human rights law reinforces this duty. Article 17 of the African Charter on Human and Peoples' Rights (ACHPR) guarantees the right to education, while Article 11 of the African Charter on the Rights and Welfare of the Child (ACRWC) specifically requires uninterrupted access to education, even in times of social or religious tension. *Ramadan* school closures are manifestly inconsistent with these obligations, as they deprive children – particularly non-Muslims – of continuous educational access.

Furthermore, the closures amount to discriminatory treatment under Section 42(1) of the Constitution, which prohibits restrictions based on religion. Article 2(1) of the ICCPR, Article 14 of the European Convention on Human Rights (ECHR), and Article 1(1) of the American Convention on Human Rights (ACHR) all prohibit discrimination in the enjoyment of rights, including on the basis of religion. The ECtHR's decision in *Thlimmenos v Greece* is apposite here: the Court held that indirect discrimination occurs where a seemingly neutral policy disproportionately disadvantages a religious or non-religious group. *Ramadan* school closures, though framed neutrally, have a disproportionate adverse effect on Christian and other non-Muslim students, thereby violating the principle of equality.

Given these constitutional guarantees, statutory obligations, and Nigeria's international commitments, it is submitted that *Ramadan* school closures are legally indefensible. They (1) undermine the secular character of the Nigerian State; (2) coerce students into indirect religious observance; (3) infringe upon the right to education under both domestic and international law; and (4) constitute unlawful religious discrimination. In sum, the policy is not only unconstitutional under Nigerian law but also contrary to Nigeria's binding obligations under international and regional human rights instruments. Thus, it is this writer's view that the *Ramadan* school closure constitutes a policy that is patently unconstitutional, discriminatory, and antithetical to the principles of religious

neutrality and equal educational access, as provided by both domestic and international judicial authorities.

7 Lessons from other jurisdictions

It is patently absurd and indefensible for certain Northern governors to order the closure of schools during the Ramadan fast, particularly when nations governed by Islamic legal systems—such as Saudi Arabia, Qatar, the United Arab Emirates, Bahrain, and Egypt—do not adopt such a regressive policy. These countries, deeply rooted in Islamic traditions, maintain academic continuity during Ramadan, which shows that they recognize the fact that education and religious observance are not mutually exclusive but can, in indeed, coexist harmoniously.

What conceivable benefit could be derived from shutting down schools and leaving children idle for an entire month at a critical time when their intellectual faculties are most receptive to learning? The repercussions of such a decision are grave, not only in terms of academic disruption but also in the broader socio-economic implications for a region already grappling with educational underdevelopment.

Moreover, Nigeria already observes an abundance of public holidays—spanning *Eid al-Kabir*, *Eid al-Fitr*, *Eid-el-Maulud*, Christmas, Easter, New Year's Day, Independence Day, Democracy Day, Workers' Day, and Children's Day. These, in addition to the ad hoc shutdowns occasioned by security crises, place significant constraints on the academic calendar. The decision to further truncate the school year with an unwarranted Ramadan closure is a disservice to the future of Northern children and an affront to the very principles of educational equity and invites serious concern.

8 The adverse impact on students

The consequences of this misguided policy are dire. These students, who are arbitrarily deprived of instructional time, are expected to sit for the same national and regional examinations alongside their peers from other states, many of whom have enjoyed uninterrupted

learning.²³ This disadvantage will only serve to widen the already alarming educational disparity between the North and the South. This concern is not novel. At the Conference on the State of Education in the North, convened by the Northern States Chamber of Commerce and Industry from December 6th to 8th, 1999, the alarming regression of Western education in the region was emphatically lamented:

It is evident that the gap between Western education development in the South and North is so wide and, in fact, appears to grow wider by the day in absolute numbers, no matter the percentage increase in the North. . . . There are fears that unless the Federal Government declares a state of emergency in education, any attempt by the North to bridge this imbalance will remain futile.²⁴

Two decades later, rather than making meaningful progress toward bridging this gap, some leaders are actively exacerbating it. How do we expect these students to compete on equal footing? Upon resumption, they will be subjected to haphazard crash programs, crammed under immense pressure, as if the fault lies with them rather than with the policymakers who have deprived them of structured learning.

Certain empirical research has revealed the detrimental effects of prolonged *Ramadan* weeks within an academic calendar. A study at VU Amsterdam shows that extended *Ramadan* observances correlated with lower academic performance among Muslim students.²⁵ It is, therefore, astonishing – if not outrightly alarming – that certain state governors in Northern Nigeria, at this crucial

²³ Baba Yusuf in a Newspaper commentary on the issue asked, “Is it strategic or rational to close schools during Ramadan?” He concluded: “It makes no sense to me that children will be kept out of school in northern Nigeria, whereas their mates in other States across Nigeria are going to school, and attending extra classes/lessons. Those children will definitely lag behind.” *Nation* 7 March 2025 <<https://thenationonline.ng.net/as-some-governors-stop-schooling-during-ramadan/>&/>.

²⁴ Omamurhomu Solomon Okobiah, ‘The Educational Imbalance Between the Northern and Southern States of Nigeria: A Re-Direction of Educational Policies’ (Lecture, Delta State University, Abraka 13 March 2002).

²⁵ Hessel Oosterbeek and Bas van der Klaauw, ‘Ramadan, Fasting and Educational Outcomes’ (2013) 34 *Econ Edu Rev* 219.

juncture in evolution as a society, would endorse such a regressive decision to shut down schools in observation of *Ramadan*.

Nigeria cannot afford to mortgage its future on the altar of ill-advised policies that further entrench educational backwardness. The imperative to prioritize education must transcend parochial and politically expedient decisions. Anything less is an abdication of duty to the very children whose future depends on sound and uninterrupted education.

9 Conclusion

While fasting during *Ramadan* is an indisputable tenet of Islamic faith, the wholesale closure of schools in observance of the fast does not in any way constitute a legally protected manifestation of religion. Rather, it represents a policy decision that, in effect, privileges one religious group over others and undermines fundamental rights to education and non-discrimination. Such a decision by any state contravenes the core principles of a secular state and infringes upon the constitutional rights of students to uninterrupted learning as provided for in the legal framework afore highlighted in this paper.

It is firmly asserted that while the state bears a duty to respect religious freedoms, it is under no legal or constitutional obligation to accommodate religious practices in a manner that disrupts essential public services, including education. A more proportionate and sound policy approach would be to adjust school hours rather than enforce blanket closures—thereby striking a balance between religious observance and the right to education. This pragmatic compromise is essential in fostering religious tolerance, mutual respect, and societal cohesion.

In conclusion, this writer is predisposed to the conviction that the decision by certain state governors in Northern Nigeria to shut down schools during Ramadan is not only unlawful but also unconscionable and unconstitutional. It constitutes a flagrant violation of the principle of secularity enshrined in Section 10 of the 1999 Constitution, a provision designed to serve as the bedrock of

national unity and integration. Any deviation from this constitutional mandate threatens to erode the delicate balance of religious plurality and undermine the broader objective of an inclusive, equitable, and progressive society.