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ABOUT THE JOURNAL

Kampala International University Law Journal is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of an in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal pays high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

The Journal offers useful reference material to legal practitioners, international organisations, non-governmental organisations and the academia. It also provides multipurpose policy guide for the government.

The Journal is a biannual publication. Calls for articles and submission datelines are determined by the editorial board.

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EDITOR-IN-CHIEF'S NOTE

On behalf of the Editorial Board of the Kampala International University Law Journal, I am pleased to present volume 2 issue 1 to our esteemed readers and contributors. This issue contains 12 well-researched articles on contemporary legal issues from seasoned-scholars from various jurisdictions.

Consistent with the policy of the Journal, peer review continues to remain a vital component of article submitted for assessment. In this light, I wish to appreciate the effort of our various reviewers for their useful comments and our contributors for the patience and perseverance in addressing reviewers' comments. These continue to make the Journal a reference material among researchers and students and has the potential to shape thinking within and outside the research community.

The Journal will continue to publish high-quality research and encourage contributors to strive to meet the standards set by the Journal. Additionally, the Journal will continue to encourage practitioners in the field to submit articles that will help in further understanding working of the legal rules and to strike a balance between legal rules and social reality.

I wish to thank all the members of the Editorial Board, our esteemed contributors who have toiled in the production of the scholarly works and have chosen to publish their findings in our Journal. I also wish to thank our readers for their patronage and useful comments toward improving the quality of the Journal.

Kasim Balarabe (Ph.D)

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Scope

Kampala International University Law Journal (KIULJ) is the official journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well-researched articles that are in sync with sound academic interrogation and professional experience on topical legal, business, financial, investment, economic and policy issues and other sectors.

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TABLE OF CONTENTS

AN APPRAISAL OF INVESTMENT DISPUTE ARBITRATION PRACTICE AND THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL TRANSACTIONS IN NIGERIA

By

Adamu Ibrahim (Ph.D)*

Abstract

This research elucidates the concept of international arbitration, and investment disputes which have become contemporary issues in the settlement of emerging conflicts resulting from the application of bilateral investment treaties and other investment laws. Contemporary international practice and procedure has shown that foreign investment protection is better regulated and enhanced through arbitrations and bilateral investment treaties. An appraisal of the Nigerian legal system in this regard has extensively stimulated this research in appreciating the legal control of arbitration and bilateral investment agreements. This research is aimed at deepening the practice and procedure these concepts have brought to bear in international commercial transactions with as or local point.

Introduction

The need for Direct Foreign Investment in any nation whether developed or developing cannot be overemphasized in today's globalized economy and international commerce. This is because globalization has far widened the fund raising economic horizon of each nation in its economic developmental strife among other competing needs in the development and growth of its citizens. The ineffectual self-imposed economic walls that were hitherto the order of the day, by different nations in their quest for economic growth, has suddenly collapsed whereby many nations, corporate entities, etc now look beyond borders, to seek for funds, infrastructure, machinery, skills and different opportunities in their quest for the development of their economies and citizenry including Nigeria.

Just like every human venture, practice and procedure have shown that often at times disputes emanate from this assemblage of worthy intends and purposes thereby bringing dispute resolution mechanisms to bear on this type of international commercial transaction. This is because when these disputes or commercial conflicts are not timely and adequately resolved, they affect the overall development of international commercial transaction on both parties. This observation has made it necessary for a research of this nature in order to provide the *modus operandi*

of dispute resolution and arbitration when the need arises especially in Nigeria as it is the norm globally.

In the view of Akoh:[1]

> there are basically two forms of foreign investment, i.e. Direct Investment and Portfolio Investment. Direct Investment involves the acquisition of physical items such as machineries, plants, factories, buildings etc for use in the production process and this inevitably entails the participation of foreign investors (be it foreign company or national in the control and management of a domestic company usually a subsidiary). This may jointly be owned or wholly owned by the foreigner. Portfolio investment on the other hand is the acquisition of securities by foreign companies or nationals in a stock market. More often than not, the foreign investor is concerned more with the returns to the capital gains diversification than with the actual control of the management of the company whose stock he has acquired.

Conceptual Evaluation of Foreign Investment

A straight forward definition of foreign investment may not be that fashionable but rather the indices that formulate what could be termed to be foreign investment is more practicable in the definition of the word "foreign investment". Foreign investments are such investments which are principally and legally owned by natural juridical persons who do not enjoy the nationality of the host state. Generally, such investments are for the purposes of acquiring substantial ownership in the service, finance, production, manufacturing and distribution sectors of the economy.[2]

Basically, most foreign investments are either Foreign Direct Investments (FDI) or Portfolio Investments (PI). FDI means, the investment of money, goods, services, etc in a project for an entrepreneurial commitment, especially establishing subsidiary companies or take-over of enterprises, capitalizing branches and plants (endowments). This could equally include securing equity holdings in corporations with the pavers of management and control

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[1] Akoh, I.I., "Legal Framework requirements for Foreign Investment in Nigeria Capital Market", In Jimoh, A.A. (ed.) *Modern Practice Journal of Finance and Investment Law*, Lagos: Learned Publishments Limited, 1999 Vol. 3, No. 2, pg. 288.

[2] Ubogu, E.R., *Development Planning in ECOWAS* (Lagos: Heinemann Publishers Nigeria Limited, 1981) p. 341.

(generally 25% making long term loans with lower partnership type interest rates in conjunction with equity holdings.

These types of investments are characterized by their direct use for specific projects (not through the capital market) amortization, and profit dependent upon the success of the project (entrepreneurial risk) that may be long term with an enduring entrepreneurial commitment to the project accompanying such investments.[3]

Portfolio Investment on the other hand is an investment that is placed through the capital market without entrepreneurial commitment. This is short termed and made only for the sake of capital yield (like fixed interest, securities, capital shares of enterprises without controlling interests, bank loans etc.)

Portfolio investment has now developed into an industry of its own right and fulfils a wide function entitling the individual and corporate investors involved therein to adequate protection not only to ensure the security of such investment but also to avoid jeopardizing the immense resources obtainable from the aggregate of these investors. Portfolio investment's distinctive feature is that it assumes the form of share/security acquisition among other things in the operation of the firm in the host country without a necessary control in the management of the enterprise by the foreign stock or security holder.

Foreign Investment and Practice in Nigeria

Nigeria is unarguably the most populous African country as she boasts of over 180 million people[4] which reasonably translates to a double or more of the population of many African countries put together. It is very significant to note that one out of every ten Africans is a Nigerian and as a necessary corralling, one out of every twenty black people in the diaspora is a Nigerian. Nigeria's Gross Domestic Product (GDP)[5] is estimated at $568.51 billion which is 0.92% of the world economy and surpasses that of many African countries put together. Such massive and invaluable endowments may lead to the conclusion that Nigeria is a developed country. The most poignant aspect of the foreign investment

[3] First Directive of the Council of the European Communities for the Implementation of Art. 67 of the Treaty of Rome. "Definitions" *Official Journal of the European Communities* pp. 932-960, OECD report. Investment in Developing Countries (4th edition, 1999) pp. 5 and 6.

[4] www.nigeria.masterweb.com visited on 11/4/2018 at 3.00pm.

[5] www.tradingeconomics.com/nigeria/GDP visited on 11/4/2016 at 3.16pm.

operations in Nigeria is that despite the considerable presence and growth of such investment within the economy, the nation lingers in a state of industrial underdevelopment, economic stagnation, and huge security and unemployment challenges. In the course of the operation of some of these foreign investments in Nigeria, disputes have equally arisen either from the side of the investors or the host state as the case may be. Resort to mechanisms of investment dispute arbitration as well as bilateral investment treaties among other municipal and international legal frameworks have often provided the desired reprieve in the promotion and protection of foreign investment in Nigeria.

It is many at times thought that arbitrating investment disputes is the privilege of capital exporting countries, particularly in connection with investment in developing economies. This view however sometimes overlooks the fact that developing countries have not only signed numerous bilateral investment treaties but have done so both with developed countries and among themselves.[6] Not few arbitration proceedings have been initiated by companies, and individuals from developing countries against other developing countries, as well as against developed countries.[7]

This is why investment arbitration in Nigeria like many other countries, has become one of the central features of contemporary legal research for legal practitioners, scholars, government officials, investors and arbitrators in general. Investment dispute resolution has led to the development across the globe of such specialized institutions like the International Centre for Settlement of Investment Disputes (ICSID), the United Nation Conference on Trade and Development (UNCTAD), and the growing utilization of other means of settlement of investment disputes within other arbitration institutions such as the London Chamber of International Arbitration (LCIA), International Chamber of Commerce (ICC), United Nations Commission on International Trade Law (UNCITRAL) among others. The use of arbitration in investment dispute resolution mechanism as well as bilateral investment treaties have not received the ultimate or desired practice that it is supposed to play in Nigeria's foreign investment practice. It is important to note that investment arbitration is not purely an alternative open to investors alone, but equally to the host states. Under the ICSID Convention, or other

[6] Vicuna, F.O., ICSID REVIEW *Foreign Investment Law Journal,* Vol. 26, No. 1, Spring 2011 p. 53.
[7] Vicuna, F.O., *op. cit.,* p. 53.

arbitration arrangements, it is not only an investor that can bring a state to court but also a host state can initiate proceedings against an investor, provided that a written consent to such arbitration has been given by both, as is often the case under direct investment agreements and occasionally under investment contracts.[8]

The need for the economic development of the country among many other factors have made it inevitable for Nigeria to engage in these international commercial transactions with other developed countries. About ninety percent of Nigeria's foreign currency earnings are from oil and gas. While about eighty percent of her total income from all sources is from oil and gas. These involve major international contracts and multinational corporations in form of foreign investment participation. Because of Nigeria's historical circumstances and underdevelopment in many ways, it is very rare, if not unthinkable, that international commercial contracts with international corporations will not contain international commercial arbitration provisions carefully crafted by first class lawyers with the necessary experience and expertise[9]. When there is a dispute, questions relating to the conduct of the arbitration proceedings themselves will be central, e.g.:

(a) how and when is the arbitration to commence?
(b) how are the arbitrators appointed?
(c) once appointed, what is it that the arbitrators may, must or must not do?
(d) what happens if an arbitrator is in breach of an obligation?
(e) what can be claimed or awarded?
(f) how are the proceedings conducted?
(g) what is required by way of written submissions and evidence?
(h) what is required for the purpose of a valid and enforceable award?[10]

The inclusion of arbitration clauses apart from bilateral investment treaties, have globally become a standard practice in international trade and commerce generally. This is because referring a matter to arbitration in international business relationship has very important advantages which include among others: -

(a) element of speed in the determination and resolution of disputes arising from such business transactions.

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[8] Vicuna, F.O., *op. cit.,* p. 63.

[9] Akinjide, R., "International Commercial Arbitration and Multi-National Corporations" in Jimoh, A.A. (ed.) *Modern Practice Journal of Finance and Investment Law* (Lagos: Learned Publishers Limited, 2001) pp. 42-60 at pg 42.

[10] Akinjide, R., *op. cit.,* p. 44.

(b) cost effectiveness in the sense that it is cheaper for the parties involved in the arbitration processes when compared to the conventional national courts.
(c) there is the advantage of flexibility and informality of procedures to be adopted in the arbitration proceedings when compared to what is obtainable in the conventional courts.
(d) the proceedings in arbitration is confidential compared to open regular court proceedings whereby the foreign parties may fear submitting to national courts outside its own environment as a result of the substantial wide negative publicity of the issues that may be sought to be resolved during this arbitration proceedings. Undue publicity of proceedings may have an unfavourable image problem to the parties involved later after the resolution of the disputes.

There are times that there are divergent opinions as to whether a given arbitration is domestic or international. Thus, some have focused on the parties, their nationality or habitual place of residence, or in the case of juristic persons, the headquarters of its central control or management,[11] yet others insist on the nature of the dispute.[12] Be that it may, an arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, indicated their places of business in different states or
(b) one of the following places is situated outside the state in which the parties have their places of business or
(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country as the case may be.

The Arbitration and Conciliation Act[13] in Nigeria under section 57(2) provides that an arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, indicated their places of business in different states or

[11] Agbo, C.U., "Party autonomy in International Commercial Arbitration under the Law in Nigeria".
[12] Article 1492 of the French Code of Civil Procedure Decree Law Nos. 805 of 12-5-1981. The ICC Rules adopted a similar position in 1923 but amended same in 1927 to cover disputes which contain a foreign element, notwithstanding that the parties were nationals of the same country. Article 1(1) ICC Rules.
[13] Cap A18 Laws of the Federation of Nigeria (LFN) 2004 hereinafter called the "Act".

(b) one of the following places is situated outside the state in which the parties have their places of business,

(i) the place of arbitration if such place is determined in or pursuant the arbitration agreement

(ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected, or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(d) the parties despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.

It is doubtful if in reality, parties to a dispute that should ordinarily be resolved by domestic arbitration would prefer to have such dispute settled in an international arbitration. This is because an international arbitration process is bound to be more expensive and time consuming where by the arbitrators may be of the opinion that since the arbitral process is international, their fees should also be paid in hard currency which the parties may not be in a position to do.[14]

One basic fact is that whether such arbitration is international or domestic, the process of arbitration as a dispute settlement mechanism cannot be overemphasized. Even though arbitration process has not been able to always achieve the much-desired benefit of speedy trial, cost saving, procedural flexibility etc, because at times it is confronted with myriads of challenges that do not facilitate achieving many of the desired advantages, arbitration is generally inevitable in every context.

Nigeria has no international arbitration institution but depends largely on foreign adopted ones. The Lagos Regional Centre (LRC), which is to facilitate arbitration procedures in international commercial disputes, is yet to be fully functional or autonomous on its own.[15]

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[14] Amucheaze, O.D., "Recognition and Enforcement of International Arbitral Awards in Nigeria" in Jimoh, A.A. (ed.) *Modern Practice Journal of Finance and Investment Law* (Lagos: Learned Publishments Ltd., 2002) pp. 61-82 at p. 63.

[15] Some of the international arbitration institutions that parties to international commercial agreements may refer to are as follows: International Centre for Dispute Resolution (ICDR), Court of Arbitration of the International Chamber of Commerce (CAICC), London Court of International Arbitration (LCIA), United Nations Commission on International Trade Law (UNICITRAL), Association of International Arbitration (AIA), International Centre for Settlement of Investment Dispute (ICSID).

The provisions of the Arbitration and Conciliation Act[16] have gone a long way in further solidifying the practice of arbitration and international trade in Nigeria notwithstanding the fact that Nigeria has no international arbitration institution. Several other countries of the world have different challenges depending on what the subject matter may be when it comes to international arbitration.

In India for example, their present arbitration system is facing challenges of having loopholes and the quality of arbitration has not adequately developed as a quick and cost-effective mechanism for resolving commercial disputes.[17]

In New Zealand, the challenge to arbitration is whether there should be separate Acts for domestic arbitration, and international arbitration or to have one Act to cater for both. On this, the Bar Council of New Zealand has finalized a Draft Act to the Office of the Attorney-General's Chambers, that the UNCITRAL model law be used for the international arbitration, with two regimes (domestic and international).[18]

Foreign investment regulation in India had historically been restrictive, reflecting socialist economic policies adopted since its independence in 1947 and arguably also its colonial history. In 1991, in reaction to its balance of payments crisis, India initiated an economic liberalization project reform which included reduction in taxes, tariff, rates, easing licensing requirements, and regulations on corporations which opening the economy to foreign investment.[19] This said to the creation of Foreign Investment Promotion Board (established to liaise with international firms over investment clearance and dispute resolution). The liberalization of the FDI require continued throughout the 1990's, with the creation of the Foreign Investment Promotion Council (to promote foreign investment) and the Foreign Investment Authority (to streamline the

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[16] *op. cit.*

[17] Gupta, P.K. *et al*, "Commercial Arbitration in India" in 2010 International Conference on Economic, Business and Management IPEDR Vol. 2 (2011) at (2011) IACSIT Press, Manila Philippines, p. 190.

[18] Bath, V. *et al,* "Foreign Investment and Dispute Resolution Law and Practice in Asia: An Overview", University of Sydney, Sydney Law School, Legal Studies Research Paper No. 11/20 (March, 2011) at http://ssrn.com/abstract=1789306. Visited on 24/4/2017.

[19] See Mohan (2008:263-5 and 277), Singh (2005:3-9) and Nabeel Manchest "India's FDI Policies: Paradigm Shift" 24th December, 2010 at http://www.eastasiaforum.org2010/12/24. visited on 17/3/2017. see also Bath, V. *et al, op. cit.,* at p. 6.

foreign investment application process). From 2010, India has been moving towards reform of FDI restrictions in the retail, real estate and insurance industries.[20]

An Appraisal of the Nigerian Arbitration and Conciliation Act

The Nigerian Arbitration and Conciliation Act[21] is a laudable legislative effort in the establishment and promotion of Alternative Dispute Resolution mechanism within the contemporary Nigerian Legal System and promotion of international commercial arbitration. The irony however is that the effect of the Act is not appreciated to some extent due to lack of adequate education and application of its contents in different fora of litigation and dispute resolution mechanisms. The Nigerian courts hardly recommend disputes to arbitration to enable the public know the uses and functions of arbitration practice under the Nigerian legal system. Arbitration practice by these actions have been relegated to the background which leaves the sparing use and practice of arbitration as a pivotal procedure in our judicial adjudication systems. An observation of some developed economies like the United States, United Kingdom and many European countries, has shown that arbitration has increasingly become a major dispute resolution mechanism for the settlement of domestic and international commercial disputes and transactions. This on the other hand has contributed to greater economic development of such countries where commercial disputes in international transactions do not take very long periods on like what is obtainable under the Nigerian system where most commercial disputes are often resolved in litigations that take longer time.

Most of the superior courts of record in Nigeria, only insert such arbitration provisions in their various rules of practice but are largely reluctant or unwilling to insert to it as an alternative to litigation. There are the wrong impressions that litigation is the only avenue through which disputes which arise from commercial transactions can be resolved within the Nigerian legal system. The resultant effect of this development is that, many people that are in positions to transact international contracts, both foreigners and citizens are scared of what to do in the event of defaults among parties if such commercial transactions are eventually consummated

[20] Bin Bukhari, K.Z., "Arbitration and Mediation in Malaysia". http//www.aseanlawassociation.org/wumalaysia.pdf p. 3 visited on 25/4/2017.
[21] *op. cit.*

and some disputes eventually rare their ugly heads even after the parties have consciously avoided such disputes.

The mechanisms to guarantee adequate arbitration are complex, lacking in uniformity, varying from jurisdiction to jurisdiction. The nature of the contract, the laws of the nation, of parties involved in the contract, and many other issues which often lead parties into confusion over which clause to use to achieve maximum advantages[22] in arbitration have equally manifested themselves in some regard. Under section 57(2)(d) of the Nigerian Arbitration and Conciliation Act, a dispute which can be resolved nationally by domestic arbitration can be elevated to the statues of international arbitration. But the effect of this provision is the difficulty or confusion in choosing or appointing the arbitrators, more so where the parties have failed *ab initio* to appoint or designate an appointing authority. The appointing authority in such a case would now be the Secretary-General of the Permanent Court of Arbitration at The Hague.[23] This development would entail more cost to the parties especially where they had not intended or envisaged that a dispute relating to the transaction in question can lead to such level of dispute resolution. It becomes more tasking when there are no visible financial strengths to embark on such dispute resolution mechanisms.

The conclusion that this section appears to give the opportunity for arbitral redress on the one hand and taking away same opportunity on the hand becomes an inevitable fact in this regard. Especially, when such a party does not have the financial muse to get to the international arbitration tribunal like in this case. The reason for the inclusion of this section in the Act is not very clear, but rather seems to be intended to douse the fear of foreigners who may have some interest in corporate entities operating in Nigeria which have affiliated partnership to some other companies operating outside Nigeria.[24] The fact is that even where the financial resources are available, it is doubtful, if the parties will be prepared to spend so much money on a dispute, which could have been resolved by domestic arbitration under normal circumstances. Under section 15(1), it provides *inter alia* that, "the arbitral

[22] Ezejiofor, G., *The Law of Arbitration in Nigeria,* (Ikeja: Longman Nig. Plc, 1997) pp. 12-15. See also Elukpo, J.A.N., "Arbitration Process in Nigeria: Advocating for Strong Legal and Institutional Framework" A Postgraduate Seminar paper submitted to the Faculty of Law, Kogi State University, Anyigba 18/9/2014.
[23] See section 54(1) Arbitration and Conciliation Act, LFN, 2004.
[24] Ezejiofor, G., *op. cit.,* p. 63.

proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule of the Act," but section 15(2) equally provides that:

> Where the rules referred to in subsection (1) of this section contain no provision in respect of any matter related to or connected with particular arbitral proceedings, the arbitral tribunal may, subject to this Act, conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing.[25]

Section 15 of the Act, appears to whittle down and indeed derogate from the principle of party autonomy in arbitral procedures by its categorical and mandatory provision. Section 15(2) appears more devastating in the derogation at first glance. It appears to transfer the choice of arbitral rules to the "arbitral tribunal" instead of the parties, in the event of the Arbitration Rules in the First Schedule of the Act containing no provision in respect of any matter related to or connected with particular arbitral proceedings. The only condition imposed on the arbitral tribunal is merely to "conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing"[26]

The Act in general is in total agreement with other international arbitral rules that consenting parties can decide and choose which rules, arbitrators, and jurisdiction that can govern or regulate their transactions with respect to party autonomy. These include the UNCITRAL, the AALCO, the ICC, the LCIA, the AAA, or the ICSID rules as the case may be. Section 47(1) of the Act confers on the parties the right to decide on the applicable law to the arbitral proceedings. In the words of the Act, "the arbitral tribunal shall decide the disputes in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the dispute".

It is however noteworthy to observe here that even though the Act has specified mediums of seeking for redress in arbitration cases, arbitration as a means of dispute resolution has equally been imbedded in the Nigerian customary dispute resolution mechanisms. Following from this, settlement of disputes in African

[25] This is similar to the provisions of Article 15(1) of the Arbitration Rules, First Schedule of the Act. See also Agbo, C.U., *op. cit.,* p. 144.

[26] In contrast, in similar circumstances, the rules of most international arbitration institutions reflect characteristic autonomy of the parties in arbitration practice and thus confer rights of such option first on the parties. It is only when the parties fail to exercise the option, that the arbitral does so. See for example Article 15(1) of the International Chamber of Commerce (ICC) Rules. See also Agbo, C.U., *op. cit.,* p. 44.

ancient customary laws are in formed by the ultimate will of the parties involved to settle disputes locally among themselves before any other external intervention. To further give weight and effect to the provisions of the Arbitration and Conciliation Act of 2004, some State High Court Civil Procedural Rules in Nigeria, have adopted arbitration, conciliation and mediation as rules of practice of courts in civil proceedings. For example, under Order 17, rule 1(a-d) of the High Court of the Federal Capital Territory, Abuja Civil Procedure Rules, 2004, a judge or court with the consent of the parties may encourage settlement of any matter before it by either (a) Arbitration, (b) Conciliation, (c) Mediation or (d) any other lawfully recognized method of dispute resolution. In this context, even though there appear not to be a total recognition of traditional alternative dispute resolution mechanisms, there is a subsumed encouragement and application of same under the Arbitration and Conciliation Act. This can be illustrated by the decision of the Nigerian Court in *Okore v. Nwoke,*[27] where the court held that:

> It is well accepted that one of the many African modes of settling disputes is to refer a dispute to the family head, or an elder of the community to first of all try settlement. It is when such settlements become impossible that the parties can resort to other alternative dispute resolution mechanisms.

Basically, the Arbitration and Conciliation Act is divided into four parts with three schedules, and the provisions of this Act supersedes any other law relating to arbitration in Nigeria like in the case of *G.G. Geophysique v. Etuk*[28] Firstly every arbitration agreement shall be in writing while section 2 of the Act makes which agreements irrevocable except when the parties agree to very same or by the leave of the court. While sections 4 and 5 of the Act provides for a stay of proceedings in respect of any arbitration matter, section 7(4) on the other hand provides *inter alia* that "a decision of the court under subsection (2) and (3) of this section shall not be subject to appeal".

Parties can expressly state in the arbitration agreements that the agreement shall not be revocable as was in the case of *Bendex Engineering & 1 Or v. Efficient Petroleum*[29] and *Chief Felix Ogunwale v. Syrian Arab Republic*.[30]

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[27] (1991) 3 NWLR (Pt. 209) 317.
[28] (2004) 1 NWLR (Pt. 853) 20 CA.
[29] (2001) NWLR (Pt. 716) 506.
[30] (2009) 9 NWLR (Pt. 721) 227 Some scholars have seriously argued in this case, that this decision contravenes S. 241(1) and (2) of the Constitution of the Federal

The non-provision for the right of appeal even though is a collective agreement of both parties to the arbitration agreement which was freely entered into, can be said to have negated the provisions of section 241(1) of the 1999 Constitution which gives right of appeal to an aggrieved party. The face of the agreement *abinitio*, each party gladly signs without ratification of any breach from any part, but when such fanciful wishes fall against the background of the irrevocability of the agreement, the desire by the aggrieved party for an appeal becomes more glaring.

Section 6 provides for the parties to determine the number of arbitrators to be appointed while parties can equally agree to disqualify a person from being appointed as an arbitrator by reason of his nationality as per section 44(10). Under this Act, parties are at liberty to choose the language to be used in the arbitral proceedings as well as the form of hearing and written proceedings[31] One issue which has always surfaced in arbitral proceedings worldwide is the right of each party to determine the rules of the proceedings or the game. It is not in all given circumstances that parties agree to the rules of proceedings the right to determine such rules are not absolute in that they are subject to such safeguards that public interest considers necessary and imperative. On the other hand, the parties may through mutual agreement state that "no court of law shall intervene in any matter herein except where expressly agreed upon by the parties involved".[32]

Though this provision forms part of the Act, it on the other hand, appears to contravene the constitutional provisions of the High courts having unlimited jurisdiction in view of the sweeping provisions of sections 7 and 34 of the Act. However, looking at the intent and purpose of the above provision, it is submitted that the aim is to practically minimize unwanted interferences to arbitration proceedings by the regular courts. In the case of *Owners of M.V. Lupex v. Nigerian Chartering and Shipping Ltd.*[33] The Court of Appeal held *inter alia* that arbitration agreements as they often and usually first make resort to arbitral proceedings, in respect of differences that may arise from such agreements, do not in effect seek to oust the jurisdiction of the courts. That is to say, in effect that any of such provisions that purports to oust the jurisdiction of

Republic of Nigeria which makes provision for right of Appeal. See also *NNPC v. KLIFCO Nig. Ltd* (2011) 10 NWLR (Pt. 1255) 209 SC.

[31] See sections 69 and 70 respectively.

[32] Section 34.

[33] (2004) 3 WNR 135 at 139-140.

the regular courts would be null and void and contrary to public policy.[34] It is in this regard that Achiji JCA (as he then was) stated further in *Confidence Insurance Ltd v. Trustees of Ondo State College of Education Staff Pension*,[35] that "Today, it is common place for parties to a contract to incorporate an arbitration clause in their agreement. It should be noted that the inclusion in the agreement to submit a dispute to arbitration does not generate the heat of ouster of the court's jurisdiction."

Arbitration clause therefore is only procedural, it is a provision whereby parties agree that any dispute arising therein, should be submitted to arbitration rather than the regular courts which does not exclude or limit the rights of the parties or remedies but simply stipulates a procedure under which the parties may settle their differences.[36] In the case of *NNPC v. Lutin Investment Ltd*.[37] Ogbuagu JSC (as he then was) stated that:

> An arbitration is a reference of a dispute or differences between not less than two parties for determination after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction to decide only what has been submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority and can consequently the whole of the arbitration process will be null and void and of no effect, these will include any award he may subsequently make.

In the NNPC case, the arbitral tribunal transferred its sittings to London in order to obtain the evidence of two key witnesses who fled to London on the fear and threat to their lives and safety in Nigeria as a result of the over zealousness of security apparatus in relation to the subject matter. The Supreme Court of Nigeria, affirming the concurrent findings of the Federal High Court and the Court of Appeal held that the tribunal acted within the ambit of subsections (1) and (2) of section 16 of the Act.

Awards and Enforcements under the Act

Where parties agree to refer their disputes to arbitration and an award is made under the Arbitration and Conciliation Act, it is binding on all the parties as if it has been made or pronounced by a court of competent jurisdiction. Sections 21 and 51 of the Act make all awards binding and enforceable by the parties to such

[34] *KLIFCO Nig. Ltd v. NNPC* (2004) 3 WRN 135 at 139-140.
[35] (2001) 53 WRN 192.
[36] *Magba Gbeola v. Sani* (2001) 53 WRN 192.
[37] (2006) 25 NWLR (Pt. 968) (9) 542-543 paragraph H.

arbitration and this is illustrated in the case of ***Tulip Nigeria Limited v. Neloggioe Transport Maritimes SAS***.[38] The respondent by originating summons dated 20th November, 2003 sought leave of the court to recognize and enforce an arbitral award made in the U.K on 3rd June, 1998 against the appellant and the trial court gave judgment in favour of the respondent. Being dissatisfied the appellant appealed to the Court of Appeal which dismissed the case where the court held *inter alia* that:

The award of the tribunal is binding on all the parties since the arbitral award was not fraudulently procured and is not against public policy, the court is bound to give effect to such awards.

While section 31(1) of the Arbitration and Conciliation Act makes for the recognition and bindingness of an award from an arbitration, section 51(1) of the Act makes an award made in a foreign country to be recognized and binding upon application in writing to the court. However, under contemporary Nigerian legal system, a foreign arbitral award is enforceable directly in Nigeria pursuant to the New York Convention of "within 12 months" of the award as required by the applicable legal statutes and as illustrated in the Nigerian case of ***Macaulay v. R2B Austria***.[39] In this context and to ensure the enforceability of such awards, it must be through application to the courts, be registered and recognized within 12 months of the award. However, the leave of the court must be sought for and obtained before such an award can be elevated to the status of a High Court judgment and this was the position of the Nigerian Court in the case of ***Shell Trustees Nigeria Ltd. v. Imani & Sons Ltd***,[40] but a High Court enforcing an arbitral award has no discretion to alter what the arbitrator has already awarded. Equally under sections 26 and 29 such award by an arbitral tribunal shall be by a majority which shall state the reasons, rate, and the place that it was made, and must be signed by a majority of the arbitrators, whereby any aggrieved party may within 3 months apply for the setting aside of the arbitral award in case of dissatisfaction. A court of competent jurisdiction can also set aside an award or arbitral proceedings upon the request of an aggrieved person. In the case of ***Baker Marine Nigeria Ltd v. Chevron***[41]the court held that:

What the court has to do in setting aside an arbitral award is to look at the award and determine whether the state of the law as

[38] (2011) 4 NWLR (Pt. 1237) 223-428.
[39] (2003) 18 NWLR (Pt. 52).
[40] (2000) 6 NWLR (Pt. 662), 669 at 662.
[41] (2000) NWLR (Pt. 681) p. 303.

understood by the arbitrator and stated on the face of the award, and whether the arbitrator complied with the law as he himself rightly or wrongly perceived it.

Equally of importance is that for an award to be enforceable, it must be entered into voluntarily by the parties, and it must not be illegal.[42] That is to say that once the parties have given their consent voluntarily, neither party can unilaterally withdraw same.[43]

Enforcement of International Arbitral Awards under the Act

Under section 57(2) of the Act, an arbitration is international if:

(a) the parties to an arbitration agreement have at the time of the conclusion of the agreement their places of business in different countries, or
(b) one of the following places is situated outside the country in which the parties have their places of business;
   i. the place of arbitration if such place is determined in or pursuant to the arbitration agreement
   ii. (ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected, or
(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country,
(d) the parties dispute the nature of the contract expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.

Subsection (c) of section 57 envisages that where any arbitral agreement does not relate to one country, the arbitration shall be considered as an international arbitration. The basic consideration in determining whether any arbitration is domestic or international is the regulating law. The word "international" is used to define and distinctly set aside a purely national or domestic arbitration from that which in some aspects transcend national frontiers and is thus, international.[44] There are also instances whereby other scholars have rather deferred in opinion and posited that the parties, their nationality, or habitual place of residence, or

[42] *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 385 (Pt. 417-418), *Taylor Woodrow v. S.E. GMBH* (1993) 4 NWLR (Pt. 286) 127 SC.
[43] Article 25(1) of the ICSID Convention.
[44] Redfern & Hunter Law and Practice of International Commercial Arbitration (London: Sweet & Maxwell, 1999) p. 14. See also Agbo, C.U., *op. cit.,* p. 140.

in the case of juristic persons, the headquarters of its central or management, while others insist on the nature of the disputes. One striking issue to all this determinant consideration is what law that can be applied whether the nationality, habitual place of residence, the parties involved etc. In a situation whereby all the parties are of the same nationality for example and one domiciled in the same place but the agreement is predicated or regulated by international laws, practice and convention, it cannot be fair to suggest that since they are of the same nationality and domiciled in the same environment that it is a domestic arbitration. The inclusion of international law, practice and conventions automatically makes such arbitral agreement to be of an international nature and should be so regarded and treated in accordance with the intent and purposes of the contracting parties.[45] It follows therefore under the ICC Rules that a contract entered into by two parties of same nationality for performance in another country is international in intent and purpose and must be treated as such.[46]

Under the United Nations Commission on International Trade (Model Law or UNCITRAL) an arbitration is "international" if: -

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement their place of business in different states or
(b) one of the following places is situated outside the country in which the parties have their places of business;
   i. the place of arbitration if such place is determined in or pursuant to the arbitration agreement
   ii. (ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected, or
(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

There have been questions as the how international arbitral awards can be enforced. Basically, there are five methods of enforcing international arbitral awards under the Nigerian Act viz:

(a) Enforcement by a court action upon the said award.
(b) Enforcement under the International Centre for Settlement of Investment Disputes Convention (ICSID).

[45] See ICC Publication No 300 1977 p. 19.
[46] Agbo, C.U., *op. cit.,* p. 140.

(c) Enforcement under the Foreign Judgments Reciprocal Enforcement Act.[47]
(d) Enforcement under section 51 of the Arbitration and Conciliation Act.[48]
(e) Enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Development of International Commercial Transaction in Nigeria

Globalization and the attendant liberalization policies of nation-state in international commerce have created an insatiable trade environment whereby goods and services are in constant demand with increasing production costs and accompanying trade challenges. This trend is equally applicable to Nigeria as a developing economy. The ever-increasing volume of transactional trade and commerce over the centuries has witnessed an enormous growth in the law and procedure of international commerce. This has equally given rise to attendant trade disputes, trade rivalry among other issues as resultant effects.

There is an unprecedented growth in the volume of cross-border trade and investments as witnessed in Nigeria in the last two decades. The World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD) as international trade regulating bodies have equally noticed that national economies (Nigerian inclusive) have been increasingly interdependent as no single world economy is an island onto itself any longer. The whole world is presently and rapidly moving towards a globalize economy. The Nigerian economy is rapidly and deeply becoming interweaved with other world economies and this partly contributable to its ability and willingness to access and equally depend in large part on the utilization of imports, goods and services from other nations. It's capacity to export corresponding goods and services to other nations, have equally expanded the national economy and the general standard of living of the citizens. The enlargement of the new international trade theory prevent in the country has given rise to Nigerian's Gross National Product (GNP). The decision to invest in the economy of another state is primarily hinged on the possibility

[47] Cap 152 LFN, 2004.
[48] LFN, 2004.

of making profit and sometimes, on the possibility of achieving influence in the affairs of the recipient state.

The trend amongst the comity of nations now is strategic positioning for the purpose of attracting foreign investments and thereby encouraging international trade. This notwithstanding, there have been arguments as to whether a shift towards a more integrated and interdependent global economy is a good approach to Nigeria. Many influential economists, politicians, business leaders, academics and a host of others think thus to be a good and healthy effort of the development of the social economic life of Nigerians. They have argued that the resultant effect of the falling barriers to international trade and investment are the front engines that drive modern economies to global levels of development, and that Nigeria should not be left out of this emerging trend.

In the global investment area, certain technologies and patents haves evolved over the years with resultant changes. These investments are *sine qua non* to a proper comprehension of the dynamics of foreign investment and international trade, because they constitute the imperatives that will adequately equip an investor for an informed evaluation of any given investment climate in order to make investment decisions. The investment policies of any given state equally determine the kind of inter trade flow within its economy.

There have been drastic policy and social economic changes in the world's nation states from the 20th century. Part of what has been responsible for this the wave of democratic revolutions among nations that have swept the world. With this phenomenon is the attendant willingness of different nation to cross trade internationally. A strong belief that economic progress leads to the adoption of a democratic regime underlines the fairly permissive attitude that many western governments have adopted towards many developing countries including Nigeria.

The exist of the Royal Niger Company marked the full entrance of the British colonial administration which continued with the war of conquest towards the end of the 17th century in the in road of foreign traders in Nigeria. After the establishment of the colonial administration in Nigeria, a systematic process of attracting international trade and foreign investment into the colony in line with the need of the metropolitan Britain in areas of raw materials,

communication, market etc. was tactfully put in place.[49] The presence of multinational corporations in Nigeria has further contributed to the volume of international commercial transactions in the country. Multi-National Corporations (MNCs) play important roles in globalization whereby they may choose to locate in a special economic zone which is a geopolitical region that has economic and other laws that are more free-market-oriented than a country's typical or national laws. Multinational Corporations are often sought after where governments compete against one another to attract such facilities in developing the economies of developing countries (Nigeria inclusive). Anti-corporate advocates criticize multinational corporations for entering countries that have low human rights or environmental standards. They claim that multinationals give rise to huge merged conglomerations that reduce competition and free enterprise. They also argue that they raise capital in the host countries but export the profits, while exploiting countries of their natural resources etc.

Conclusion

The general trend in international commerce has been the dominance of the economic space is intimidating multinational corporations, which have often suffocated economic nationalism across developing in defendant states. There is no doubt that, there had been a concerted effort at evolving an international contract law theory in a desperate bid to neutralize the relevance of municipal laws in regulating the trans-investment agreement between multinationals and capital imparting countries. But the most often issues of resolving conflicting business interests and disputes appear to be rather enlarging everyday even with modern dispute resolution mechanisms contained in the contracting agreements.

There have been instances where there have been disinclinations of courts over these matters towards international law in determining the applicable regulatory regime for international commercial agreements in view of preponderance at that time of absolute immunity theory which denied the multinational corporations the requisite legal capacity to bring an action against a sovereign state. Rather put succinctly in a different dimension, the foregoing scenario of different arbitral resolution mechanisms in international trade agreements are reflective of the

[49] Olukoshin, O., "Foreign Investment in the Nigerian Economy: Problems and Prospects" cited in *Modern Practice Journal of Finance and Investment Law* (MPJFIL, Vol. 6, No. 12, 2002).

bitter struggle between the capital importing countries trading internationalization of the agreement and perhaps that has hampered the evolution of a mutually acceptable principles of trans-investment law.[50]

From the foregoing it appears that it is the preference of a foreign investor in any international transactions be arbitrated upon in a neutral jurisdiction as provided for under the arbitration clause of such international investment agreements. In any case the establishment of the ICSID has to a great extent developed expertise in settling trans-investment disputes which would not have been possible previously. The arbitration clause usually defines the jurisdiction of the tribunal, and any award beyond the scope of jurisdiction provided for would be a nullity. However, what seems open to debate is whether such arbitral clause could survive the unilateral government termination.[51]

[50] Zuru, S.A. "The dummy of mutually incompatible theories of internalization and internationalization in trans-national investment law and policy"- in ed. Nasir, JM. etal Contemporary Reading in Governance, law and security (Ibadan: 2009) et page 81.

[51] Zuru, S.A ibid.

REASSERTING WOMEN'S HUMAN RIGHTS TO LAND IN UGANDA: A POST-STRUCTURAL FEMINISM PERSPECTIVE

By

Godard Busingye (LL.D)*

Abstract

This paper seeks to unravel the problem of denial of women's human rights to land in Uganda using the post-structural feminism perspective. The paper adopts an historical perspective to lay a firm foundation for discussing the inhibitors to women's realisation of human rights to land. It analyses some of the United Nations human rights instruments, which recognise that all (women and men) are equal before the law and no one should be discriminated against based on any criteria such as sex or gender. It, therefore, establishes that women's human rights to land are human rights, but that the ideology of patriarchy denies them the opportunity to realise and enjoy those rights. Using the post-structural feminism perspective, it establishes that women in Uganda are aware of the arenas that deny them their human rights to land and some of them have, through their agency attempted to resist the operations of the ideology of patriarchy and are now in involved in other decision-making arenas such as politics, which act as a stepping block for them to reassert and enjoy their human rights to land. It, equally establishes that the paradigm of universalisation of human rights meets resistance from that of cultural relativism, which fronts a different view of human rights, namely that human rights must be understood from the perspective of a particular cultural set up and are not universal. The paper concludes with a call on women in Uganda to reassert their human rights to land, because there are able to do so having been enlightened by the post-structural feminism perspective, which unpacks the loci of oppression crafted within the ambit of the ideology of patriarchy.

Introduction

Women's land rights are human rights, much as they are not usually included in the list of rights to be enjoyed by all, women and men.[1] Within the ambit of this paper, it is asserted that women do not enjoy equal human rights to land with the men because the ideology of patriarchy robbed and continues to deny the women of those human rights. They are excluded from the core avenues of enjoying any rights to land, namely access, ownership, control and

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[1]V. Bhushan Rawat and D. Leena (Eds.), Land Rights are human rights, Social Development Foundation 188, Master Block, Lane No 5 Shakarpur Extn. Delhi - 110092 India, 2010, available at: http://www.landcoalition.org/sites/default/files/documents/resources/land-rights-are-human-rights.pdf.

use, in their individual right. Women's enjoyment of human rights to land remains a hotly contested field and is not automatic in the sectionalised patriarchal society. Women must assert their human right to land or remain at the peripherals of the arenas where such rights are enjoyed by their male counterparts. The patriarchal society is a global network of oppressors of women in a sectionalised social environment, where the ideology of the fathers is revered and cherished. By its very nature, that ideology discriminates against women, much as there some men who similarly suffer its wraths.[2] This scenario is experienced in Uganda, where women are discriminated against and do not enjoy equal land rights with men, even after several reminders by the United Nations Committee on the Elimination of Discrimination against Women.[3]

The strongholds of the ideology of patriarchy ideology in Uganda are being attacked from all corners and are weakening day by day—thanks to the progressive ideology of post-structural feminism which are now influencing legal reforms in the country. Due to these and other progressive ideologies, largely within the feminism thinking, there is a human face to the problem of women and land reform in Uganda.[4] Painting land rights in Uganda with a human face rhymes with the propositions of human rights paradigm in the United Nations framework. The United Nations Charter framework, as reiterated in the Universal Declaration of Human Rights creates a regime of human rights that is all embracing irrespective of sex, and gender. The Universal Declaration of Human Rights recites:

> [W]hereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights,

[2]G. Businge, Law and Gender Relations in Land Decision-Making Processes: A Case Study of Ibanda Town Council, Western Uganda, LL. D Thesis, Makerere University, 2016.

[3]See CEDAW/C/UGA/CO/7; The Committee on the Elimination of Discrimination against Women Forty-seventh session, 4 - 22 October 2010; Concluding observations: Uganda where, in its Report, the Committee: urged the State Party (Uganda) to accelerate its law review process to harmonize its domestic legislation with its constitutional principles relating to non-discrimination and equality between women and men and with its obligations under the Convention without delay and within a clear time frame. The Committee specifically urged the State Party (Uganda) to expeditiously enact the Marriage and Divorce Bill, which to date has never been so enacted.

[4]J. Asiimwe, Making Women's Land Rights a Reality in Uganda: Advocacy for Co-Ownership by Spouses, Yale Human Rights and Development Journal Volume 4 Issue 1 Article, 2-18-2014, 8, p.1, available at: http://digitalcommons.law.yale.edu/yhrdlj/vol4/iss1/8.

> in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.[5]

This recitation sends a strong message to governments to ensure that their national laws do not condone discrimination against women in all spheres. The need to promote respect of women's human rights to land in Uganda, is therefore, pegged on a strong legal framework, the Charter of the United Nations, much as it has never been fully realised—the opposing forces are equally bed rocked in a strong ideology, that can only be dismantled progressively. In furtherance of the philosophy enunciated in the Charter of the United Nations, the Universal Declaration of Human Rights, states:

> [A]ll (women and men) are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.[6]

The Convention for Elimination of All Forms of Discrimination against Women (CEDAW), equally crafted within the United nations framework, defines the term 'discrimination against women' to mean:

> [a]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[7]

This paper is premised on an understanding that following the adoption of the United Nations Charter in 1945, consensus has gradually and consistently been building up on the fact women's rights are human rights, and land rights are human rights. Land rights, in particular, constitute the basis for access to food, housing and development, and without access to land many people find themselves in a situation of great economic insecurity.[8] It is equally the understanding in this paper that the philosophy espoused in the Charter of the United Nations regarding human rights is only

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[5]The Universal Declaration of Human Rights, 1948, Preamble.

[6]*Ibid.,* Article 7.

[7]The Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, Article 1.

[8]J. Gilbert, Land Rights as Human Rights, The Case for a Specific Right to Land*, International Journal on Human Rights, June 2013, Issue 18,* available at: http://sur.conectas.org/en/land-rights-human-rights/.

universally acknowledged, but not universally practiced. To this end, Gilbert avers:

> [I]n many countries, access and rights over lands are often stratified and based on hierarchical and segregated systems where the poorest and less educated do not hold security of land tenure. Control of rights to land has historically been an instrument of oppression and colonisation.[9]

Gilbert's averments resonate well with the general realisation that there is a growing concern that women are not able to realise their human rights in several spheres of their lives, including land rights. Indeed, the United Nations Human Rights Commissions observes that:

> [A]ttaining equality between women and men and eliminating all forms of discrimination against women are fundamental human rights and United Nations values. Women around the world nevertheless regularly suffer violations of their human rights throughout their lives and realising women's human rights has not always been a priority. Achieving equality between women and men requires a comprehensive understanding of the ways in which women experience discrimination and are denied equality so as to develop appropriate strategies to eliminate such discrimination.[10]

Development of appropriate strategies to deal with the problem of discrimination against women in the realisation and equally enjoyment of the human right to land could not have been achieved outside the ambit of the post-structural feminism perspective. These perspectives are largely relied upon in this paper to interrogate the ideology of patriarchy which among others excludes women from arenas where human rights to are enjoyed. The paper relied on a desk review methodology to obtain relevant and appropriate literature on the subject under discussion.

Theoretical Framework

This paper, therefore, adopts the broad post-structural feminist approach to discuss avenues through which women can readily reassert their human rights to land in Uganda. It is asserted in this paper, that through the lenses of the post-structural feminism perspectives, women have developed a strong tool of agency as a

[9]*Ibid.*

[10]Office of the United Nations Human Rights Commission, The United Nations, United Nations Publication Sales No. E.14.XIV.5 ISBN 978-92-1-154206-6 E-ISBN 978-92-1-056789-3, New York and Geneva, 2014, available at: http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf.

measure to resist male domination and oppression.[11]Through their agency, women find their voices, channel them, modify them, and gain a measure of empowerment. Women equally use their agency to deconstruct structural problems that limit their personal, social and political capacity to manoeuvre for their own interests.[12] Indeed, these perspectives can engage in a dialogue for the common cause, much as there might occur some instances of intellectual intolerance amongst them.[13]

The ideology of patriarchy which promotes gender inequalities contrary to the philosophy of equal human rights espoused within the United Nations framework subject women to social devaluation, oppression, subjectivation, objectification, and discrimination in regard to land rights.[14]It is noteworthy that there are differences in the way in which scholars' perspectives treat the socio-legal phenomena that impact on the daily lives of women and men as they struggle to eke a living based on the land. The feminist critique starts from the experiential point of view of the oppressed, dominated and devalued, while other paradigms such as the Marxism perspective start from the male-constructed place of privilege in which domination and oppression can be described and imagined, but not fully experienced.[15] A combination of these perspectives, therefore, helps to crack the crux of oppressive ideologies and liberate women so that they are in position to reassert their hitherto taken away human rights to land. Freeman describes feminism as:

> [A] range of committed inquiry and activity dedicated first, to describing women's subordination—exploring its nature and extent; dedicated second, to asking both how—through what mechanisms, and why—for what complex and

[11]*Op. cit.* note no. 2.

[12]M. M. Charrad, Women's agency across cultures: Conceptualizing strengths and boundaries, Women's Studies International Forum, Volume 33, Issue 6, November–December 2010, pp. 517-522, available at: https://www.sciencedirect.com/science/article/abs/pii/S0277539510001184.

[13]A. Linz, Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue, *Hofstra Law Review, Vol. 20, Issue 4, Article 5 (1992)*, available at http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1752&context=hlr.

[14]A. A. Gordon, Transforming Capitalism and Patriarchy: Gender and Development in Africa, Lynne Rienner Publishers, London, 1996.

[15]C. Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or The Fem-Crits Go to Law School, Journal of Legal Education*, Vol. 38, No. 1/2 (March/June 1988), pp. 61-85, available at http://www.jstor.org/stable/42893008.

> interwoven reasons women continue to occupy that position; and dedicated third to change'…Feminism inquires into the politics of law, but its particular focus is on the 'law's role in perpetuating patriarchal hegemony.[16]

Feminism as conceptualised by Freeman, is a theoretical framework ascribed to by persons, female or male, committed to working for the transformation of gender relations in any given society at any level.[17] Feminism critiques the range of ways in which the law has operated over time and failed to recognise the gendered and glaring empirical evidence of legal inequalities (between women and men).[18] The Stanford Encyclopaedia of Philosophy in this regard opines:

> The topic of the self has long been salient in feminist philosophy, for it is pivotal to questions about personal identity, the body, sociality, and agency that feminism must address. Simone de Beauvoir's provocative declaration, "He is the Subject, he is the absolute—she is the other," signals the central importance of the self for feminism. To be the 'Other' is to be the non-subject, the non-person, the non-agent—in short, the mere body. In law, in customary practice, and in cultural stereotypes, women's selfhood has been systematically subordinated, diminished, and belittled, when it has not been outright denied. Throughout history, women have been identified either as pale reflections of men or as their opposite, characterised through perceived differences from men and subordinated as a result of them; in both cases, women have been denigrated on the basis of these views.[19]

The law, which embodies gender inequalities, thus becomes an avenue of women subjectivation, marginalisation and discrimination because it treats them as inferior persons in comparison to the men. Women subjectivation, marginalisation and discrimination then act as building blocks upon which the notion of male supremacy, which is a concept of the ideology of patriarchy, is constructed. In order to maintain its potency, the ideology of patriarchy operates through the medium of law and custom to the

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[16]M.D.A Freeman, Lloyd's Introduction to Jurisprudence, (Sixth edn.), Sweet & Maxwell Ltd London, 1994, 1028.

[17]S. N. Ssali, J. Ahikire and A. Madanda, Gender Concepts Handbook (Popular Version), Gender Mainstreaming Division, Makerere University, Kampala, 2007.

[18] A. Manji, The Politics of Land Reform in Africa: From Communal Tenure To Free Markets, Zed Books, London, 2006.

[19]Stanford Encyclopedia of Philosophy, Feminist Perspectives on the Self, First published Mon Jun 28, 1999; substantive revision Mon Jul 6, 2015, available at: https://plato.stanford.edu/entries/feminism-self/.

extent that each legitimises gender inequalities in the drive to deny women the benefit of enjoying their inherent human rights to land.[20]

As a concept of gender inequality, the ideology of patriarchy breeds another concept of intersectionality, which thrives on class hegemony constructed within the capitalist mode of production.[21] Carastathis argues that in feminist theory, intersectionality has become the predominant way of conceptualising the relation between systems of oppression which construct our multiple identities and our social locations in hierarchies of power and privilege.[22] Carastathis further argues that:

> [I]t has become commonplace within feminist theory to claim that women's lives are constructed by multiple, intersecting systems of oppression. This insight—that oppression is not a singular process or a binary political relation, but is better understood as constituted by multiple, converging, or interwoven systems. It originates in antiracist feminist critiques of the claim that women's oppression could be captured through an analysis of gender alone. Intersectionality is offered as a theoretical and political remedy to what is perhaps the most pressing problem facing contemporary feminism—the long and painful legacy of exclusion.[23]

Carastathis' analysis offers a platform upon which a paper like this one can base to unpack the potency of the ideology of exclusion, which is a tool of the ideology of patriarchy. Other feminist scholars link intersectionality to neo-liberalism (also referred to as 'late capitalism'), which involves certain forms of cultural production that reinforce and reproduce class distinction.[24] Indeed, understanding intersectionality as a gendered concept of women exclusion helps to reveal the relationships among multiple dimensions and modalities of social relationships and subject formations in the women's human rights to land paradigm and their

[20]*Op. cit.* note no. 11.

[21]Bandana Purkayastha, Intersectionality in a Transnational World, Volume, (2012) 26 issue: 1, pp. 55-66
Available at: https://doi.org/10.1177/0891243211426725.

[22]Carastathis, A., The Concept of Intersectionality in Feminist Theory, Philosophy Compass 9/5 (2014): 304-314, 10.1111/phc3.12129, available at https://www.academia.edu/4894646/The_Concept_of_Intersectionality_in_Feminist_Theory.

[23]*Ibid.*

[24]P. Bourdieu, Social Space and Symbolic Power, Sociological Theory, Vol. 7, No. 1. (Spring, 1989), pp. 14-25, available at: http://links.jstor.org/sici?sici=0735-2751%28198921%297%3A1%3C14%3ASSASP%3E2.0.CO%3B2-T

other daily experiences.[25]Feminism equally provides avenues through which the ideals of the ideology of patriarchy can be resisted by self-evaluation and self-definition to oneself.[26] The main role played by understanding the metaphor of intersectionality is its contribution to awareness on the evils of discrimination against women in a number of foras. These include: 'double jeopardy', 'multiple jeopardy' and 'interlocking oppressions'.[27]

While discussing women's human rights to land in Uganda, this paper largely agrees with Carastathis on the root cause of women's denial of human rights to in broad terms. Information provided by feminist scholars highlight the dangers of the social construction and conscription of women in Uganda in the domains inferior to those of men. It equally helps to reveal in clear and discrete terms that, knowledge based mainly on male culturally specific experiences represents skewed perceptions of reality and is only partial knowledge.[28] Feminism is relied upon in the study because in its totality, it takes into account women's daily experiences in the oppressive gendered world. Application of the ideology of feminism to women's daily experiences helps to liberate and empower them to start interrogating the inherent logic of the law and its role in legitimating particular social relations, and the hierarchies and institutions it creates.[29]

It is noteworthy that even within the broader family of feminism, there are divergences centred on how proponents of each branch of the ideology package their views. Feminism (largely the second wave), whose birth is intertwined with the emergence of neo-liberal capitalism and its consumer politics in early 1970s, however, does not offer a satisfactory explanation on the continued gendered and reconstructed inequalities between males and females in the overall human rights paradigm.[30] Post-structural feminism,

[25]C. Bettinger-Lopez, Human Rights at Home: Domestic Violence as a Human Rights Violation (December 2, 2008). Columbia Human Rights Law Review, Vol. 40, pp. 19-77, 2008. Available at SSRN: https://ssrn.com/abstract=1310316.

[26]C. Kimberle, Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color, Stanford Law Review Vol. 43, No. 6 (Jul., 1991), pp. 1241-1299, available at: http://www.jstor.org/stable/1229039.

[27]*Op. cit.* note 23.

[28]J. Kagwanja, 'Land Tenure, Land Reform and the Management of Land and Natural Resources in Africa', 2002, available at: <http://www.capri.cdiari.org/pdf/brief_land.pdf>.

[29]Obbo, Christine, African Women: Their Struggle for Economic Independence, Zed Press, 57 Caledonian Road, London, 1980.

[30]*Op. cit.* note 14.

therefore, faults the partnership between the second wave feminism, neo-liberal capitalism and globalisation as one that has lost its bearings, and moved to support capitalism and also to legitimate cultural gender relations. Indeed, partnerships of some of these paradigms work together to devalue women and to exclude them from the public domain and realisation of human rights to land.[31]

The argument advanced here is that despite its long presence as a women's rights advocacy forum, feminism has not totally altered power relations between men and women and capitalism. The second wave feminism is, hence, still critiqued for its binary thinking, essentialism, ideas on sexuality, vision on the relationship between femininity and feminism and body politics. On the other hand, post-structural feminism provides and articulates alternatives by focussing on difference, anti-essentialism and hybridism. It also focuses on choice and re-evaluating the tension that existed between femininity and feminism.[32]

There is, however, no clear evidence to show that any of these paradigms are specifically intended to help women in Uganda out of the problems created for them by the ideology of patriarchy and its cohort, the capitalist mode of production. All is not lost, though. Feminism, (in particular, the strands of Marxist and post-structural feminism), remains a vibrant paradigm because the cultural struggle it started has established primacy over the socio-economic pre-occupational hazards against women.[33]

In order to reduce the shortfalls identified in feminism, it is important to examine other ideological values such as those embedded within the early childhood engenderment (the socio-biology) theory. Childhood engenderment is a concept that partly helps in understanding the origins of gendered inequalities crafted around the sex attributes. Sex attributes are erroneously used as the basis of training a child to become either a female or male adult.[34] In this regard, with Haskar opines:

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[31]L. Tibatemwa-Ekirikubinza, 'Multiple Partnering, Gender Relations and Violence by Women: Reflections from Uganda's Penal Regime', East African Journal of Peace & Human Rights, 4 (1): 1998: 15-40.

[32]J. Muteshi-Strachan, 'Coneptualising the Nairobi Forward Strategies: Continuing Relevance for African Women,' in Muteshi-Strachan, Jacinta, Kameri-Mbote, Patricia & Ruto, Sara, Promises & Realities: Taking Stock of the 3rd Un International Women's Conference, AWFs and ACTS, Nairobi, 2009.

[33]*Op. cit.* note 20.

[34]N. Haskar, 'Dominance, Suppression and The Law,' In Lotika Sarkar And Sivaramayya, B. (Eds.), Women and Law, Vikas Publishing House PVT Ltd, New Delhi, 1996, 32.

> [E]arly in childhood, women and men are socialised with regard to temperament, role and status. Women are socialised to become more sensitive and perceptive in their relationships with other people; they are more dependent on these relationships and are passive. Men are socialised into being aggressive, outgoing, and more confident and are trained to control and manipulate the external environment. The socialisation of gender roles takes place within the family and aims at creating the good and respectable woman who finds it impossible to demystify the source of her oppression.[35]

Training a child at an early stage of development may make him or her to become more aggressive in assuming roles of leadership and decision-making in society. In the alternative, it may make someone to become passive in regard to actions related to leadership and decision-making processes.[36] Understanding the role played by socialisation at an early stage of a child helps to interpret situations in which women or men exhibit unique patterns of social behaviour. Behaviours and attitudes developed during the early childhood training later regulate the social relations between women and men with more women largely exhibiting tendencies of depending on the decisions made by men.[37]

Each of the theoretical frameworks discussed herein contributes to the current debate by human rights, gender and women's rights activists on women's right to individually the bundle of human rights to land. These frameworks further help society to appreciate how law and custom can shape the entire life of a human being.[38] In the case of Uganda, the debate generated within the ambit of these theoretical frameworks has indeed sparked off a number of legal and social reforms, some of which resulted in the promulgation of the 1995 Constitution of Uganda. For the first time in in its constitutional history, Uganda promulgated a Constitution that is a seemingly pro-women piece of legislation,

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[35]*Ibid*.

[36]*Ibid.*; See also R. Cook, 'Human Rights of Women: National and International Perspectives', Alberta Law Review, (1996) 34 (34), 485, available at: <http.www. LexisNexis.com>, accessed 12 /12/2010, see also McCune, Julie, 'Problematic Aspects of Ester Boserup's Women's role in Economic Development', 2008, available at :<http://www.africaresource.com/index.php?view=article&catid=145%3Agender &id=131%3Aproblematic-aspects-of-ester-boserups-womans-role-in-economic-development&format=pdf&option=com_content&Itemid=347>.

[37]O. Sunkel, 'National Development Policy and External Dependence in Latin America', Journal of Development Studies, 6 (1): 1969.

[38]*Op. cit.* note 19.

much as its enforcement still remains curtailed by the dominant contestations of the ideology of patriarchy. The same debates equally influenced the enactment of other seemingly pro-women legislation, for example the Land Act and Mortgage Act.[39] This debate, however, has been hijacked and distorted by the strong believers in the ideology of patriarchy especially in the on-going discussions concerning the Marriage and Divorce Bill, 2009. This Bill seeks to address law and gender relations and rights of women not only to access, but also to own and control the land they use in their individual right.[40]The Bill, which seeks to reassert women's human rights to land, may, however, never be passed until it has been so mutilated so as to reduce its potency to the minimum thresholds.

Historicising Women's Human Rights to Land

Historically, in many parts of the world, women did not enjoy equal human rights in land and other spheres with men. This was because world politics were crafted within the ambit of the ideology of patriarchy, which promotes rule of the fathers over the mothers.[41] The most striking and ground-breaking statement in an attempt to challenge the *status quo*, and come out clearly on women's human rights was made by Clinton in her speech during the United Nations Fourth Conference on Women at Beijing in 1995:

> [I]t is time for us to say here in Beijing, and for the world to hear, that it is no longer acceptable to discuss women's rights as separate from human rights. Women must enjoy the rights to participate fully in the social and political lives of their countries, if we want freedom and democracy to thrive and endure.[42]

[39]S. Mishambi, Kawamara, 'Response to President Yoweri Museveni's views on the reform of the Domestic Relations Bill', 2003, available at: <http://www.wougnet.org/Alerts/drbresponseSKM.html.

[40]E. D. Naggita-Musoke, 'Why Men Come Out Ahead: The Legal Regime and the Protection and realisation of Women's Rights in Uganda', East African Journal of Peace & Human Rights, 6 (1): 2000: 34-61.

[41]E. M. Akita, Hegemony, Patriarchy and Human Rights: The Representation of Ghanaian Women in Politics, PhD. Thesis, the College of Education of Ohio University, 2010.

[42]H. R. Clinton, *Remarks to the U.N. 4th World Conference on Women Plenary Session,*
Delivered 5 September 1995, Beijing, China, available at: http://www.americanrhetoric.com/speeches/hillaryclintonbeijingspeech.htm.

Clinton's averments could not change the *status quo* in a flash of a second, they were, however, an-add to previous efforts in that direction, including that of Eleanor, who worked tirelessly towards the adoption of the Universal Declaration of Human Rights document in 1948.[43]Eleanor worked hard and ensured that the Universal Declaration of Human Rights recognised human beings as equal before the law, and, without discrimination. The principle of equal rights for all was captured in the first paragraph of the Declaration thus:

> [W]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[44]

Since the adoption of the 1948 Universal Declaration of Human Rights, tremendous achievements have been attained in the promotion of women's human rights globally. Subsequent human rights instruments make it clear that women's rights are human rights.[45] Despite the unprecedented gains in respect to equal human rights of men and women, both in theory and practice, a number of challenges still persist worldwide. For example, the subject of human rights has had to bear with the problem of universal *vis-à-vis* culturally-specific conceptual interpretations. In regard to universalism *versus* cultural relativism, Lubbers, *et al.*, assert:

> [A]nother aspect of the implementation of human rights in which cultural diversity plays a large part is the issue of equal rights for women. At first sight this may seem surprising, for ever since the UN Charter was first drawn up the phrase 'for all without distinction as to ... sex' has been included wherever human rights and fundamental freedoms have been mentioned. This inclusive notion of human rights—reinforced by the complementary principle of freedom from discrimination—can be found in every major human rights document, including the Universal Declaration and the two UN Covenants of 1966. Nevertheless, discrimination on grounds of sex, both *de jure* and *de facto*, has proved an extremely persistent phenomenon in many countries of the world.[46]

[43]Eleanor Roosevelt was the Chair of the United Nations Human Rights Commission, and the driving force in creating the 1948 Charter of Liberties, The Universal Declaration of Human Rights.

[44]*Op. cit.* note 6, The Preamble.

[45]For example, Banjul Charter, 1981 & Beijing Declaration and Platform, 1995.

[46]R.F.M. Lubbers, *et al.,* Universality of Human Rights and Cultural Diversity, No. 4, June 1998, available at: https://aiv-advies.nl/download/d610af2e-eb72-454c-a238-8a061f99a088.pdf.

Cultural relativism has more to do with the conceptual interpretations or misinterpretations of the social phenomena as well as the law and custom. The latter determine how a given society, will understand and apply the 'no distinction' or 'no discrimination' paradigms in the United Nations human rights instruments. In support of this argument, Nasr avers:

> [U]niversal human rights theory holds that human rights apply to everyone simply by virtue of their being human. The most obvious challenge to the universality factor comes from 'cultural relativism', which maintains that universal human rights are neo-imperialistic and culturally hegemonic. While this perspective may be tempting, the relativist argument encompasses a debilitating self-contradiction; by postulating that the only sources of moral validity are individual cultures themselves, one is precluded from making any consistent moral judgements.[47]

Further, the cultural relativist approach in fact makes a universalist judgement in arguing that 'tolerance' is the ultimate good to be respected above all. Hence, it is a naturally self-refuting theory that engages universalism in its own rejection of the concept. In a practical sense, the cultural relativist position is foundationally incompatible with human rights, as human rights themselves could not exist if they were stripped of common moral judgement. It is contended in this paper that cultural relativism is indeed, an attempt to frustrate the whole notion of universality of human rights that inhere in humans by virtue of their being human, and are not dependent on the State.[48] Consequently, the tendency to give human rights a universal face, while it is clear that cultural relativism cannot be ignored especially when discussing the human rights of women to land must be attacked from all corners, including the law.[49] In support of this position, Richardson asserts:

> [L]egislators have seemingly ignored the cultural realities of their countries and have passed laws that are largely unpopular and consequently ineffective. To develop systems of inheritance that truly respect women's rights, laws must be written and implemented in ways that recognise and respect the cultural traditions in which these systems are based. Laws that ignore this reality are doomed to be ineffective and ultimately irrelevant. …As human rights

[47]L. Nasr, Are Human Rights Really 'Universal, Inalienable, and Indivisible'?, The London School of Economics and Political Science, 14 September, 2016, available at: http://blogs.lse.ac.uk/humanrights/2016/09/14/are-human-rights-really-universal-inalienable-and-indivisible/.

[48]Article 20 (1) 1995 Constitution of Uganda.

[49]J. Donnelly, The Relative Universality of Human Rights, *Human Rights Quarterly, 2007*.

> organisations seek to change cultural understandings about women's inheritance rights, the statutory law should also be sensitive to the context in which it will be applied.[50]

In traditional African setting, women's land rights were essentially relegated to a low level, much as it may be argued that they were presumably catered for in the households, which unfortunately were headed by men.[51] That syndrome has not yet died off. In a majority of cases, patrilineal relations are still hailed as the ideals of society.[52]Fortunately, feminist paradigm, as championed by various scholars has now come out clearly to condemn patrilineal relations as the *loci* for women's subordination.[53] Today, the human rights of women to access, own, control and use of land in Uganda is viewed from such lenses, which are a product of a human rights-based approach to the social phenomena. Several scholars agree that a human rights-based approach constitutes a legally binding framework of individual and group rights.[54] This view is founded on an understanding that human rights instruments impose legal obligations on governments and international community to respect and protect human rights without discrimination. It is contended in this paper that a human rights-based approach might provide a solution to diversity in cultural values, such as those in Uganda, where women's human rights to land are at variance with the international legal regime.[55]

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[50]J.Oloka-Onyango, Law and State in the Political Economy of Underdevelopment: A Study of the Dialectics of Neo-colonial Crisis in Uganda, Unpublished Doctor of Juridical Studies (SJD) dissertation, Harvard University, 1988; see also A. M. Richardson, Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform, Human Rights Brief, American University Washington College of Law, Volume 11, Issue 2, Article 6, 2004, available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1356&context=hrbrief, on 11 May, 2018.

[51]E. Scalise Indigenous women's land rights: case studies from Africa; 2012, available at http://minorityrights.org/wp-content/uploads/old-site-downloads/download-1117-Indigenous-womens-land-rights-case-studies-from-Africa.pdf.

[52]P. O. Townshend, A Gender-Critical Approach to the Pauline Material and the Zimbabwean Context with Specific reference to the position and Role of Women in Selected Denominations, MA of Theology, University of South Africa, 2008.

[53]*Op. cit.* note 33.

[54]B. Morten and S. Hans-Otto, Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences, The International Journal of Human Rights, Volume 22, 2018 - Issue 5, available at: https://www.tandfonline.com/author/Broberg%2C+Morten.

[55]*Op. cit.* note 53.

It is further argued in this paper that from an historical perspective, human rights, by their very nature are universal, but their enjoyment can be curtailed or enhanced by other social factors such as custom, the level of economic, social and political development.[56]It is not surprising, therefore, that due to varied cultural backgrounds; women in Uganda do not agitate for similar issues in relation to land rights. This is the case even at a much wider global level. For example, women of the South strongly focus on issues of economic and political justice for themselves and their nations while northern women's broad concerns divide their attention to sexual politics and their patriarchal-relations.[57]

At a sub-regional level, women of the East African Community exhibit differential understanding and appreciation of women's human rights to land. For example, during the land reform process in Tanzania, women's rights activists did not agitate for land rights as a major component of their human rights, as did their counterparts in Uganda. Tanzanian women human rights activists were more interested in employment rights.[58]The choice made by Tanzanian women's human rights activists' shows that they viewed employment rights as an entry point by Tanzanian women into the decision-making process arenas—which presumably would lead them to enjoy more rights to land. On their part, the Ugandan women fronted land rights as the entry point into other arenas, including employment rights.[59]

At a national level, urban women exhibit different interests in land in comparison to those living in rural areas.[60] Historicisation of women's human rights to land justifies the need

[56]S. McInerney-Lankford, Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective, *Journal of Human Rights Practice*, Volume 1, Issue 1, 1 March 2009, pp. 51–82, accessed at: https://doi.org/10.1093/jhuman/hun005.

[57]United Nations, Women's Social, Economic Inequality Leads To Trafficking, Domestic Violence, Exploitation, Say Speakers In Women's Commission, Forty-seventh Session, 5th & 6th Meeting, WOM/1390, 5 March 2003; see also Muteshi-Strachan J., 'Coneptualising the Nairobi Forward Strategies: Continuing Relevance for African Women,' in Muteshi-Strachan, Jacinta, Kameri-Mbote, Patricia & Ruto, Sara, Promises & Realities: Taking Stock of The 3rd Un International Women's Conference, AWFs and ACTS, Nairobi, 2009.

[58]*Op. cit.* note 18; see also Ambreena, Manji, The Politics of Land Reform in Africa: From Communal Tenure To Free Markets, Zed Books, London, 2006.

[59] *Ibid.*

[60]T. Pateman, Rural and urban areas: comparing lives using rural/urban classifications, *Springer,* June 2011, Volume 43, Issue 1, pp. 11–86, accessed at: https://link.springer.com/article/10.1057/rt.2011.2.

for human rights activists, research institutions and individual researchers to be sensitised on the dilemma created by cultural relativism in regard to women's human rights to land in a particular setting such as Uganda. It equally justifies why governments' reformists and functionaries must adopt appropriate strategies to be able to guarantee women's human rights to land.

In the case of Uganda, the latter position is reinforced by the on-going debate on land rights in Uganda. This debate points to the fact that due to social adherence to the ideology of patriarchy, women do not enjoy equal rights with men, yet they should.[61]Some male chauvinists, however, argue that women's land rights are subsumed in those of the men.[62]They contend that men are responsible for making right decisions concerning land both for themselves and the women. The views of male chauvinists in this respect ought to be disregarded in favour of the views advanced within the feminist liberating perspective. This is desired because women in Uganda need to play a visible and decisive role in matters of access, ownership, control and use of land in their individual right, as men do.[63]Women's human rights to land must be affirmed in all land policies and laws in the country. The affirmative action advocated for must set the criteria for differential treatment that is reasonable, objective and legitimate under the human rights paradigm.[64]

The foregoing narrative of the contradictions surrounding women's human rights to land, for example, an argument that women are part of a group, such as the community and so are not really discriminated against in terms of human rights to land, therefore, becomes baseless. This submission is premised on an understanding that land rights are of the same importance like any other human rights for both women and men and as such are

[61] Ssewakiryanga, Richard, Women's Land Rights And The Local Face Of Culture, Centre for Basic Research, Kampala, 2011.

[62]*Op. cit.* note 19.

[63]K. Njogu and E. Orchadson-Mazrui, Gender Inequality and Women's Rights in The Great Lakes: Can Culture Contribute to Women's Empowerment? Twaweza Communications, 2009, available at: https://www.researchgate.net/publication/254308626_Gender_Inequality_And_Women's_Rights_In_The_Great_Lakes_Can_Culture_Contribute_To_Women's_Empowerment.

[64]O. De Schutter, the Special Rapporteur on the right to food, Human Rights Council Sixteenth Session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

inalienable rights. Noting that controversies still surround this position, this paper proposes total support to strengthen women's agency so that women act in unison while advocating for their realisation of the human rights to land in Uganda. Their agency must be strong and built on a strong foundation of feminism. Women's agency must be supported by everyone, including the government, which in some cases pays lip service to women specific socio-legal empowerment needs.[65]

Women's Human Rights of access, ownership, control and use of Land

Reviewed literature indicates that women play a vital role in Uganda's rural agricultural sector and contribute a higher than average share of crop labour in the region. They also make up more than half of Uganda's agricultural workforce, and a higher proportion of women than men work in farming—76 percent versus 62 percent.[66]They, however, lack security of tenure.[67]This problematic situation is compounded by the fact that women have traditionally not been part of the country's written history, and, therefore, their contribution towards land development is least known.[68] Other literature reviewed shows that considerable progress has generally been made in the recent past to re-inscribe women and gender issues in the decision-making arenas of African societies.[69] Some, scholars such as Wengi[70]and Nyamu-Musembi[71] consider that law and custom play a refined role in determining women's access to, and control of land. Wengi states:

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[65]S. Tamale, When Hens Begin to Crow, Fountain Publishers, Kampala, 1999; see also Josephine Ahikire, Cutting the Coat According To The Cloth: Decentralisation And Women's Agency On Land Rights In Uganda, Centre for Basic Research (CBR)) 53, Kampala, 2011.

[66]D. H. Bowen, Leveling the field for women farmers in Uganda, The World Bank, 2015, available at: https://blogs.worldbank.org/voices/leveling-field-women-farmers-uganda.

[67]J. Ahikire, Cutting the Coat According To The Cloth: Decentralisation And Women's Agency On Land Rights In Uganda, Centre for Basic Research (CBR)) 53, Kampala, 2011.

[68]*Op. cit.* note 29.

[69]F. Asiimwe, 'Gender and Home Ownership: The Dynamics of Home Ownership in Kampala, Ugand'*, Mawazo: The Journal of The Faculties of Arts and Social Sciences, Makerere University,* 9 (1): 2010.

[70] Wengi, Jennifer Okumu, Weeding the Millet Field: Women's Law and Grassroots Justice in Uganda, Uganda Law Watch, Kampala, 1977 42-43.

[71]C. Nyamu-Musembi, 'Local Norms, and Women's Property Rights in Rural Kenya', East African Journal of Peace and Human Rights 9: 2003 at 272.

> [A]s a general rule, customary law recognises property rights but in a limited way. A woman is a worker in the home and traditionally expected to lay no claim to the wealth of the family. During the subsistence of the marriage, a woman hardly owns immovable property. This is because, in traditional societies, land and all that is on the land belong to men. As such, as long as she is a spouse, a woman only has life interest in movable property. Customary law fails to take into account the realities of married life in which spouses form a real partnership in respect of their different but equal and complimentary contributions, to the welfare of the family.[72]

On her part, and in support of Wengi's position, Nyamu-Musembi states:

> [A]s a matter of practice, land is registered in the names of the male heads of households as sole owners, leaving the interests of other family members unregistered. …among the interests deemed extinguished are interests based on customary law, such as interests of wives that allow them to live on and use family land by virtue of marriage. It seems that for some reason, labelling the claims as 'customary' gives them meaning that makes it easy for them to be disregarded.[73]

In Uganda, where much of the land is not registered (approximately 75 percent) and is governed by customary law, it is either the man or the clan who are seen as owning the land.[74] Indeed in such a patrilineal setting, women are less likely to be listed on ownership documents, especially titles. The land titling regime in Uganda, too, contributes to the magnification of an already worse situation—denial of women's rights to land therefore, becomes a function of both custom and the law.

This impact is much felt after the death of or separation from their husbands. At that point in time, women lose their limited human rights to land because their voices can no longer be heard in the patriarchal institutions in their former husbands' familial set up.[75]Women's rights of access to land are further reduced by the problems of competing ideologies (tradition versus modernity) and

[72]*Op. cit.* note 70.
[73]*Op. cit*. note 71.
[74]M. Matembe, Gender, Politics, and Constitution Making in Uganda, Fountain Publishers, Kampala, 2002.
[75] *Op. cit.* note 73.

legal pluralism (customary versus statutory laws) where neither works to women's expectations and protection of their rights.[76]

Legal pluralism entails various kinds of law such as state law, made by the legislature and enforced by the government, religious law—including both the written doctrines and accepted religious practice, customary law—including interpretations thereof, and in a globalised world, project (programme) law. In the case of developing economies, the law is conditioned by regulations associated with the programme of donation.[77]

Within the patriarchal setting, most women are able to access land through their male kin with the latter being the ones to determine the household land use patterns in any given area.[78]It is possible because of long exposure to the ideology of patriarchy that some women think that familial land access rights belong to men.[79]Sadly, that exposure must have weakened women's agency and hence curtailed some of their abilities to assert their rights to access, own, control and use land in their own right. The need for women to access land in their individual right is underpinned by the fact that such access defines spaces within which other market and distributional processes operate.

In reality, male members of African families exercise direct control over land and women. Women do not have an automatic right to access and utilise land in some African families. That position is, however, changing gradually; a few women in Uganda now have unlimited access land rights. This aspect is, however, being systematically resisted by some of the social structures created by law and custom.[80]Other controversial views indicate that customary laws concerning land tenure and inheritance proactively and specifically provide for the protection of women and children by their stronger family members.[81] The position of this

[76]A. Sebina-Zziwa, The Paradox of Tradition: Gender, Land and Inheritence Rights Among the Baganda, Unpublished Doctor of Philosophy (Ph.D) dissertation, University of Copenhagen, 1999.

[77]M. Di Gregorio, K. Hagedorn, M. Kirk, B. Korf, N. McCarthy, R. Meinzen-Dick, and B. Swallow, Property Rights, Collective Action and Poverty: The Role of Institutions for Poverty Reduction, International Food Policy Research Institute, Washington, 2004.

[78]*Op. cit.* note 72.

[79]*Op. cit* note 33.

[80]*Op. cit.* note 28.

[81]J. Adoko, J. Akin and R. Knight Understanding and Strengthening Women's Land Rights Under Customary Tenure in Uganda, Land and Equity Movement in Uganda (LEMU) & International Development Law Organization (IDLO), Kampala, 2011.

paper, however, remains that much as most women access land under the customary or communal—family or clan systems—under the ambit of their male acquaintances, they should not be treated as underlings. Within the patriarchal setting, women are accommodated in the gendered law and social structures only in their dependent position as wives, mothers or daughters in idealised households.[82] They, however, need and are entitled to similar land rights as men by virtue of them being humans, not communal rights as members of a larger community. Philips describes communal land ownership:

> [T]he system by which each valley or hills is occupied solely by a solid block of people consisting each of a different clan... They do not admit or understand the private ownership of land, which is held by the tribe, sub-divided into the clan, for the benefit of the family or community. They consider land as the birds, the water, and the air, to be the attributes of mother earth to provide a sufficiency for the direct maintenance of all.[83]

An analysis of Philips' conceptualisation of communal land ownership clearly indicates that women are excluded from important land decision-making processes, because communal land rights in Uganda are vested in communal leaders, who are historically and potentially men. Moreover, the levels of ownership of land in Uganda vary from one part of the country to the other, they are not uniform and hence, all women in Uganda may not be accommodated in their communal settings in equal proportion.

Much as a majority of women in Uganda's human right to land have not yet been fully integrated in the land related legal norm, they are increasingly getting involved in the general process of decision-making through different avenues such as legislative action for example in Local Councils (LCs). Some of them are actively engaged in Parliamentary politics and are gradually moving into government, party, NGO and other leadership positions. Previously, those positions lay within the exclusive domain of men.[84]Women in Uganda's involvement in legislative action, and other decision-making arenas, however, has not enabled a majority

[82]F. Asiimwe, 'Gender and Home Ownership: The Dynamics of Home Ownership in Kampala, Uganda', Mawazo: The Journal of The Faculties of Arts and Social Sciences, Makerere University, 9 (1): 2010.

[83]Murindwa-Rutanga, People's Anti-Colonial Struggles in Kigezi Under the Nyabingi Movement, 1910-1930 in Mamdani Mahmood and J. Oloka-Onyango, (eds.), Uganda: Studies in Living Conditions, Popular Movement and Constitutionalism, JEP Books, Vienna, 1994, 232.

[84] *Op. cit.* note 65.

of them to enjoy human rights to land in equal tune with the men, and in each woman's individual right. Those seemingly women empowerment avenues are still limited in scope and are not well entrenched in the socio-legal fabric as men's human rights are.[85]

Conclusion

The debate surrounding women's human rights to land in Uganda centres on socio-legal and ideological exclusion of women. The male gendered ideology patriarchy is still identifiable in traditional familial structures and political structures such as the institutions of community, the family, and clan, which are socially constructed. Women who feel that they have full ownership and control over land resist these patriarchal familial political practices.

Studies undertaken in Uganda identified increased resistance by women of the patriarchal ideological practices regarding women's human rights to land. The findings suggest that patriarchal ideological practices are gradually responding to the pressure exerted on them by gender sensitive ideologies such as the post-structural feminism. The findings reflect the need for continued interrogation of the essence of the ideology of patriarchy and its practices that promote exclusion of women, as a gender, from fully enjoying human rights to land in the same tune as men do. Within the ambit of the ideology of patriarchy, there are exclusionary practices, which must be resisted in order to pave way for the Ugandan women to fully enjoy their human rights to land.

At a theoretical level, there is an interlocking relationship between concepts of gender relations, women exclusion, subordination, socialisation, globalism and empowerment in regard to women's human rights to land. In order for a majority of women in Uganda to enjoy their full human rights to land, however, certain conditions must be fulfilled. They must socially be encouraged to be active participants in land and other decision-making arenas, be financially empowered, be encouraged to have and promote self-esteem, get support from women pressure groups, which should be strengthened in order to achieve their agendas. In addition, they need legal empowerment, either through the affirmative action or requiring that the ratios of men to women in such fora are

[85]A. Tripp Mari, 'Women's Movements, Customary Law, and Land rights in Africa: The Case for Uganda', *African Studies Quarterly Online* (2004)7(4). <http://www.africa.ufl.edu/asq/v7/v7i4a1.htm>.

balanced.[86]At the end of the power struggle, the feminine gender suffers the defeat under the auspices of the patriarchal social hierarchies and is subjected to an inferior position in the decision-making arena.

In comparative terms, the severity of the problem of women in Uganda's social exclusion is greater than that of men. This is the case, much as this situation is not static.[87] This situation is likely to change if there is a change in the ideals of custom, ideology of patriarchy, and global development discourses, largely informed by the western capitalist-patriarchy partnerships.[88]

Women's social exclusion from human rights to land is a form of devaluation and subordination that ultimately translates into marginalisation of women while men are made more visible and their human rights to land made prominent.[89]

The foregoing discussion implies that a majority of women in Uganda are: i): powerless in respect to human rights to land—they are not decision-makers in land matters; ii): they forced into a position of powerlessness by other structures including custom and law—they cannot participate in decisions concerning land; and iii): they are in position to overcome this situation if they work with others (collective agency), and, lastly women in Uganda must reassert their human rights to land.

[86]L. Fishbayn, 'Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce', Canadian Journal of Law and Jurisprudence, (2008) 21 Can. J.L. & Juris. 71 - 96 ((2008) 21), 71-96. < LexisNexis.co>, accessed 7/01/2011.

[87]Obbo, Christine, African Women: Their Struggle For Economic Independence, Zed Press, 57 Caledonian Road, London, 1980.

[88]J. Ssenkumba, & W. Bikako, 'Gender, Land and Rights: Contemporary Contestation in The Law, Policy and Practice in Uganda,' in L. Muthoni Wanyeki, (ed.), Women And Land In Africa: Culture, Religion And Realizing Women's Rights, Zed Books Ltd, London, 2003.

[89] A. E. Cudd, 'Oppression by Choice', Journal of Social Philosophy, 25: 1994.

ENFORCEMENT OF HUMAN RIGHTS, PROTECTION AND SECURITY OF VICTIMS IN CONFLICT SITUATIONS UNDER REGIONAL INSTRUMENTS IN AFRICA

By

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Abstract

Human Rights are rights inherent in human beings notwithstanding nationality, place of residence, sex, religion or other status. While States assume duty to protect, enforce and secure human rights, they must not hesitate to investigate, punish and ensure redress of rights violations committed against their citizens otherwise known as victims. Victims are persons who individually or collectively suffers harm including physical, mental, emotional, economic loss or substantial impairment through acts or omissions that constitute gross violations of human rights or human security. Most victims are not informed of existing rights talk less of enforcing the rights in respect of crimes committed against them. However, internationally, regionally and nationally the victims are entitled to remedy and reparation where necessary. This paper therefore examines some concepts of human rights, human security, protection, enforcement and limitations of rights by States during conflicts situations in Africa. The paper reveals that the States have duty to protect, implement and enforce victims' rights as provided under various bodies of law in Africa. Reliance is placed on historical and context analysis approaches and both primary and secondary sources of information were used. Recommendations were proffer in order to ensure the enforcement protection and security of victims' rights in conflict situations.

Key words: Human Rights, Enforcement, Security, Victims of Crimes and Protection of Victim's Rights.

Introduction

Human beings by virtue of existence and being rational possess certain basic and inalienable rights and these rights are referred to as human rights.[1] The concept of human rights arises from the intrinsic nature of man. As a being, he is responsible for his actions and equal to his next-door neighbour or any person

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[1] Agarwal, H. O., *International Law and Human Rights* (17th ed) Central Law Publication, Allahabad, 2010) at p. 730.

anywhere in the world. This is the premises in which human rights issues have always been treated for academic and /or practical purposes.[2]

On the other hand, the phrase 'human security' has increasingly surfaced in scholarly literature in the conversations of policy professionals, policy advocates and occasionally, in the popular media.[3] The phrase suggests a departure from the esoteric jargon of the cold war, preoccupied with state-centric issues of thermonuclear holocaust, strategic alliances and deterrence.[4] Despite its increasing usage, the new concept is rarely defined for the lay reader and seems to carry a slippery range of alternative definitions.[5]

Conflicts in the African continent have been over tolerated by Africans which have resulted in suffering, death and some have become refugees or internally displaced. More so, most conflict situations in Africa are often attached to either religious, political or tribal differences. These make it complex to determine the causes and resolution mechanism for the situations. Hence, the protection and enforcement of victims' rights in conflict situations cannot be underrated. However, screams of victims' of human rights abuses and human security have long been neglected in Africa. In fact, international, regional and national legal frameworks, including African Charter on Human and Peoples' Rights (African Charter) and domestic Constitutions contained expressed provisions for safeguarding the rights of accused persons and perpetrators of crimes but no expressed provision for the protection of victim's

[2]OKpara Okpara, 'Nature of Human Rights,' in Okpara Okpara (ed)*Human Rights Law & Practice in Nigeria*, (Cheglo Limited, Enugu, 2005) at pp. 36-44 at p. 38.

[3] Dan Henk, 'Human Security: Relevance and Implications, (Summer, 2005) at p. 91.
https://www.researchgate.net/publication/24113083_Human_Security_Concept_of_Human_Security (Referenced 2 February 2018).

[4] Ibid.

[5] For some, the association of 'human security' with the United Nations Development Programme (UNDP) either commends its value or undermines its validity, regardless of the content. For others, the phrase connotes an exciting or troubling consensus on security themes by putative global intelligentsia. Again, Policy makers in several countries have gone far as to embrace the concept as a foundation for their national foreign policy while United States Policymakers are at best ambivalent or, more commonly skeptical.

rights.[6] Thus, the request for the protection, enforcement and security of human rights during conflicts situations. This paper therefore examines some relevant concepts in the protection, enforcement and security of victim's rights through national and regional instruments in conflict situations in Africa.

Understanding Relevant Concepts

1. Human Rights

Human rights are inherent in all human beings and are not gifts to be withdrawn, withheld or granted at someone's will.[7] In this sense, they are said to be inalienable or imprescriptible. When removed from any human being, such being becomes less than human being. These rights are part of the nature of human beings and attached to all human beings everywhere in all societies.[8] The rights are central to the stability and development of countries irrespective of their systems of government. However, Constitutions and other codes do not create human rights but declare and preserve the existing rights. Perhaps, this is why statutory provisions for the first generation of human rights are couched in negative terms.[9] For instance, 'No person shall be deprived of his personal liberty.' This presupposes that personal liberty is an existing right.[10] The purpose of reorganizing and safeguarding human rights is to ensure the possibility of living fully and completely in dignified freedom.[11]

The language of human rights is more of a question than that of an answer. Many issues seemed to form the content of the controversies. Obviously, what is termed as human rights is said to involve some degree of universality but it appears that the universal traits in the issue of human rights is what gives its essential troubling

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[6] Benson, C. O. and Wachira, G. M., 'Enhancing the Protection of the Rights of Victims of International Crimes: A Model for East Africa,' (2011) 11 (2) *African Human Right Law Journal pp.* 608-637 at p. 609.

[7] See Universal Declaration of Human Rights: Magna Carta for all Humanity (United Nations Department of Public Information, Feb, 1998), in Ogbu, O N, (ed.), Human *Rights Law and Practice in Nigeria: An Introduction*, CIDJAP Press, Enugu, (1999) at p. 2.

[8]Ogbu, O.N, *Human Rights Law and Practice in Nigeria: An Introduction* (CIDJAP Press, Enugu, 1999) at p. 2.

[9] ibid

[10]Sam, N., 'Institutional Mechanisms for Human Rights Protection in Nigeria: An Appraisal.' (2012) 3, An International Human Rights Journal, Department of Public Law, Ahmadu Bello University, Zaria, at pp. 56-69 at p. 57.

[11]Igwe O.W*, Preliminary Studies in Human Rights Law* (Ring and Favolit Limited, Lagos, 2002) at p. 1.

career and character. The first aching question concerning what human rights means centers on whether one has rights just because one is a member of a particular state or society which is of course, a most eminent and evident fact of human life.[12]

In essence, human rights are the rights which stand above the ordinary laws of the land and which is in fact, antecedent to political society itself. It is the preconditions to civilized existence and what has been done by virtue of the Nigerian Constitution since independence is to have these rights enshrined so that they are immutable to the same extent that the Constitution itself is immutable.[13] They are inherent in any human being simply by the fact of his humanity. In its indirect sense, human rights include those civil, political, economic, social, cultural, groups, solidarity and developmental rights which are considered indispensable to a meaningful human existence.[14] Human rights are the results of an age-long struggle against oppression and exploitation. As a result of this, the first ethical, moral and religious rules emerged, which systematically metamorphosed into legal rules first at municipal level, then, at international level. The aim is to promote fundamental freedoms and protection of human rights.[15] The United Nations in 1987 provides: 'Human rights could be generally defined as those rights which are inherent in our nature and without which we cannot function as human beings.'[16]

If the above be the situation, then African States have to stand up to the challenge of protecting, enforcing and securing lives and properties if the unrest situations must be averted. The paper thus advocates for compliance with rights that have been enshrined in the international, regional and national instruments for Africans.

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[12] Idowu, W., 'The Special Right Theory within the Context of Human Rights: How not to Reconstruct Sexual Equality.' *Human Rights Review, (2012)* 3 *An International Human Rights Journal, Department of Public Law, Ahmadu Bello University, Zaria* at pp. 1-26 at p. 3.

[13] See Kayode Eso, JSC in *Ransome Kuti v Attorney-General of the Federation* [1985] 2 NWLR (Pt 6) 211, 230.

[14] Hammed, A. H. 'An Overview of the Rule of Law and Human Rights.' (2012) 3 *An International Human Rights Journal, Department of Public Law, Ahmadu Bello University, Zaria* at pp. 27-55 at p. 37.

[15] Gasiokwu, M. O. U., *Human Rights History, Ideology and Law* (FAB Education Books, Jos, 2003), iv.

[16] Hammed, A. H. 'An Overview of the Rule of Law and Human Rights.

2. Victims of Crimes

The Rome Statute did not define the term victim, however, the International Criminal Court (ICC) Rules of Procedure and Evidence (RPE) defines victims as natural persons who have suffered harm as a result of the Commission of any crime within the jurisdiction of ICC.[17] The RPE further provides that victims may include organisations or institutions that have sustained direct harm to any of its property, which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.[18] It is imperative to state that the trial chamber of the ICC in the case of *Prosecutor v Thomas Lubanga Dyilo*[19] interpreted Rule 85 generously to include any person who had suffered harm as a result of commission of a crime within the jurisdiction of the court.[20]
Victims of crimes have further been defined as:

> …persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the victim also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[21]

The UN Principles further defines victims as:

> …persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are

[17] See Rules 85 of Procedure and Evidence of the International Criminal Court adopted by the Assembly of State Parties, 1st session in New York, 3-10 September, 2002, ICC-ASP/1/3, http://www.icc.int/NR/rdonlyres/F1EOACIC-A3-43C (Referenced 19 February 2018).
[18]Rule 85 (b) of the RPE of the ICC.
[19]International Criminal Court -01/04-01/06-1119, Decision on victims' Participation, Paras 90-92, 18 January 2008.
[20] Ibid, para 90
[21] UN General Assembly, Basic Principle and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Resolution adopted by General Assembly, 21 March 2006, A/RES/60/147, http://www.unhcr.org/refworld/docid/4721cb942.htm (Referenced 20 February 2018).

violations of criminal laws operative within member states….[22]

From the above, victims' rights before, during and after conflict situations must be attended to without fear or favour. It is only when victims' rights are protected that a State can be said to have peace, security and development.

3. Human Security

An early milestone in the success of the new approaches occurred in 1993 when the United Nations Development Programme (UNDP) published its annual Human Development Report which promulgated the formula 'human security,[23] a phrase given even sharper definition in the following year's report.[24] Though, it remained controversial and subject to varying interpretation, the human security paradigm subsequently became something of a benchmark for an emerging new model of security. It is therefore appropriate to briefly review how this concept was framed in 1994 UNDP publication.[25] The publication offers a qualifying discussion, castigating at the same time the inadequacies of earlier thinking on the subject.

The concept of security has for long been interpreted narrowly as security of territory from external aggression, or as protection of national interests in foreign policy or as global security from the threat of an unclear holocaust. It has been related more to nation-states than to people…. Forgotten were the legitimate concerns of ordinary people… For many of them, security symbolized protection from the threat of disease, hunger, unemployment, crime, social conflict, political repression and environmental hazards.[26]

Security is an all-encompassing condition in which individual citizens live in freedom, peace and safety, participate

[22] UN General Assembly A/RES/40/34, adopted 29 November 1985 at 96th plenary meeting. (UN Principles), para, 1.

[23]United Nations Development Program, Human Development Report, 1993. http://hdr.undp.org/reports/global/1993/en (Referenced 2 February 2018).

[24]United Nations Development Program, Human Development Report, 1994. http://hdr.undp.org/reports/global/1994/en (Referenced 2 February 2018).

[25] Dan Henk, 'Human Security: Relevance and Implications, (Summer 2005) at p. 92. https://www.researchgate.net/publication/24113083_Human-Security_Concept (Referenced 2 February 2018).

[26] United Nations Development Program, Human Development Report, 1994, 22.httpp://hdr.undp.org/reports/global/1994/en (Referenced 12 December 2017).

fully in the process of governance; enjoy the protection of fundamental rights; have access to resources and the basic necessities of life and inhabit in an environment which is not detrimental to health and well-being.[27] Human security has therefore been defined as the protection of people and communities rather than of states from violence and imminent danger, has become a central feature of the contemporary international order.[28]

Human security and human development are interlinked but are by no means identical. Human development is a broad concept, aiming at enlarging people's choices and freedom. Human security is about assuring priority freedoms so that people can exercise choices safely and can be confident that the opportunities they have are protected.[29] Human security therefore forms parts of the family of human concepts like human flourishing, human rights, human needs and human development.[30] The 1994 UNDP document argued that human security required the attenuation armaments of a wide range of threats to people.[31] These are grouped under several constituent parts:

i. Economic Security, assuring every individual a minimum requisite income.
ii. Food Security, guaranteeing physical and economic access to basic food.
iii. Environmental Security, protecting people from the short-term and long-term ravages of nature, man-made threats in nature and deterioration of the natural environment.
iv. Political Security, assuring that people live in a society that honours their basic human rights.
v. Health Security, guaranteeing a minimum protection from disease and unhealthy lifestyle.

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[27] South African White Paper on Defence (Pretoria, Department of Defence at p. 166.

[28] Thomas K. T., 'African Union Promotion of Human Security in Africa.' African Security Review (2007) at p. 27. https://www.researchgate.net/publication/237829213 (Referenced 7 February 2018).

[29] Human Development Report, 1994 at p. 23.

[30]Oscar A. G. and Des, G., 'United Nations Development Programme.'*Human Development Report Office*, 3.

[31]Dan Henk, 'Human Security: Relevance and Implications, (Summer, 2005) at p. 91.
https://www.researchgate.net/publication/24113083_Human_Security_Concept_of_Human_Security (Referenced 2 February 2018).

vi. Personal Security, protecting people from physical violence, whether from the state, from external states, from violent individuals and sub-state actors, from domestic abuse, from predatory adults, or even from the individual himself (as in protection from suicide).

vii. Community Security, protecting people from loss of traditional relationships and values and from sectarian and ethnic violence.[32]

The human security network sees itself as an informal, flexible mechanism for collective action, bringing international attention to new and emerging issue which seeks to apply a human security perspective to energise political processes aimed at preventing or solving conflicts and promoting peace and development which is the focus of this paper for Africans. For any development, progress and peace in the society, security of human beings is the most important solution.

Protection of Victim's Rights in Conflict Situations

The principle of protection of human rights generally is derived from the concept of man as a person and his relationship with an organised society which cannot be separated from universal human nature.[33] The need for human rights protection arouse due to inevitable increase in the control over man's action by the government which by no means was entirely desirable. The consciousness on the part of human beings as to the existing inalienable rights has also necessitated protection by the state. Therefore, the essence of laws whether national or international, must be to protect all-round development of individual personality.[34] Meaning that, victims' protection before, during and after conflict situations in any given State must be guaranteed. This position leads the writers to examine other sub-divided concepts as thus:

[32]Ibid, at p. 93.

[33] Hammed H. A. and Egbewole, W O., 'Protection of Women's Rights in Africa: Roles of the New Partnership for Africa's Development, Islamic Jurisprudence and other International Instruments. *(2017)* 3 (1)' *Novena University Law Journal at pp.* 12-37 at p. s16.

[34] See Maurice Cranston, 'What are Human Rights'?

i. The Right to Peace and Security under Peoples' Right

Under the international, regional and national instruments, peace and security were emphasized to show their importance to human existence. For instance, Article 23 of the African Charter guarantees that 'all peoples have rights to both national and international peace and security.' It gratifies to point out that maintenance of international peace and security is also the primary purpose of United Nations,[35] New Partnership for Africa's Development (NEPAD) and African Union (AU).[36] The Constitution of the Federal Republic of Nigeria, in section 14 (2) (b) declares explicitly that: 'security and welfare of the people shall be the primary purpose of government.' The international Criminal Tribunal for the former Yugoslavia has equally held that international body can intervene in internal conflict for the purpose of protecting human security and human rights.[37] The significance of the right to peace and security was pointed out by Machowski that the full implementation of any human and peoples' rights is possible only on conditions of peace and security.[38]

It is interesting to note that under the African Charter on Democracy, Elections and Governance, African leaders reaffirmed their collective will relentlessly to deepen and consolidate rule of law, peace and development in their respective countries.[39] The right of people to satisfactory environment favourable to their development is significant to security and development which means that there can be no security and development without satisfactory environment.[40] In the case of *SERAC and Another v Nigeria*,[41] the African Commission held that the right to a general satisfactory environment guaranteed under Article 24 of the African

[35] UN Charter, Article 1 (1).

[36] Constitutive Act of AU, Art. (8) Promotes peace, security and stability on the continent.

[37] *Prosecutor v Tadic (Jurisdiction) (1996),* 35 LL.M. 35, where judge Cassese of the ICTY declare that 'internal armed conflict' still constitute a threat to the peace.

[38] See Machowski J, 'Peoples Rights as a new form of Human Rights, in Emmanuel, G B and Bola B A (eds), *Contemporary International and Human Rights* (1991) at pp. 345-360.

[39] See African Charter on Democracy, Election and Governance, adopted in Addis Ababa, Ethiopia, on 30 Jan 2007, preamble at p. 13.

[40] Yerima, T F. and Hammed, H A., 'Magistracy and Internal Security Challenge in the Administration of Criminal Justice in Contemporary Nigeria.' *(2014)* 20 (1) *East African Journal of Peace and Human Rights, at pp.* ss100.

[41] Social and economic Action Right Centre and Another v Nigeria, Comm. No.155/96, www.wits.ac.39/humanrights/africa/comcases/155-96.html (Referenced 12 February 2018).

Charter requires the state to take reasonable and other measures to prevent pollution and ecological degradation and to protect conservation which invariably implies that, security and peace are needed keys for development.

ii. Great Lake Pact as an instrument to protect victims

The entry into force of the Great Lake Pact (GLP) in June 2008 restated the desire by member states of the International Conference on the Great Lake Region (ICGLR) to ensure the protection of victims of international crimes. The Great Lakes Region of Africa is made up of eleven states, including all members of the East African Community (EAC).[42]The first Summit of Heads of States and Government of the GLR adopted the Dar es Salam Declaration of Peace, Security, Democracy and Development in the GLR in November, 2004. GLP was adopted by the second Summit of the Heads of State and Government in December, 2006 to give effect to the Dar es Salam Declaration. The essence of Dar es Salam Declaration is to proclaim peaceful co-existence and security of lives and properties.

GLP is made up of ten protocols and four programmes of action[43] including the Protocol on the Prevention and Suspension of Sexual Violence against Women and Children and the Protocol for the Prevention and the Punishment of the Crime of Genocide, war Crimes and Crimes against Humanity.[44]

The protocol for the prevention and the punishment of the Crime of the Genocide, War Crimes, Crimes against Humanity and all Forms of Discrimination complements several treaties and conventions aimed at preventing impunity.[45] It further provides that member states undertake to take the necessary measures to ensure

[42] Members of the ICGLR are Angola, Burundi, Central African Republic, Congo Brazzaville, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia.

[43] Dan Henk, 'Human Security: Relevance and Implications.

[44] Beyani, C., 'Introduction Note on Security, Stability and Development in the Great Lakes region' International (2007) Legal Materials, 173.

[45] For instance, the Convention against Racial Discrimination: the Convention on elimination of all Forms of Racial Discrimination, adopted by the UN General Assembly on 21 December, 1965; the Convention on Elimination on all Forms of discrimination against women, adopted by the UN General Assembly on 18 December, 19979; the Geneva Conventions: the Four Conventions on Humanitarian Law adopted on 12 August, 1949 by the Diplomatic Conference for Drawing up International Conventions….

that the provisions of Protocols are domesticated and enforced and in particular to provide effective penalties for person guilty of genocide, war crimes and crimes against humanity.[46]

The Protocol for the Prevention and Suspension of Sexual Violence against Women and Children (Sexual Violence protocol) is another important instrument in the protection of the rights of the victims, particularly in conflict situations. The Protocol provides for the establishment of regional mechanism for providing legal, medical and social assistance that includes counselling and compensation to victims of sexual violence in the context of international crimes.[47]

iii. Africa Union/The New Partnership for Africa's Development and Protection of Human Rights and security

African leaders appreciated the centrality of human rights and security and the need to incorporate it in the programme of African Union (AU)/ New Partnership for Africa's Development (NEPAD) because it seeks stability for Africa.[48] For instance, NEPAD is a vision, philosophy, movement and an evolving process which undertakes to eradicate poverty and place Africa on the path of sustainable economic growth and development. It automatically brings peace, security to the victims and the oppressed can seek redress. Therefore, African leaders are enjoined to promote and protect human rights and security in their respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at national and sub-national levels.[49]

A great challenge to African governments is to demonstrate that NEPAD can make difference in the realisation of human rights and security in the continent. It is a colossal challenge to ensure that NEPAD becomes an instrument which will deliver change for ordinary African, particularly, victims of crimes in

[46] Article 9, Protocol for Prevention and the Punishment of the Crime of Genocide, War Crimes and crimes against Humanity and all Forms of Discrimination, adopted on 29 November 2006.
[47] Ibid, Article 6.
[48] A Nicolaides, A. and Van der Bank C M., 'Globalisation, NEPAD, Fundamental Human rights, South Africa and Central Development.' (2013) l (2) *International Journal of Development and Economic Sustainability* at pp. 54-72 at p. 63.
[49] Ibid, para, 49.

conflict situations.[50] By integrating human rights with the programme of NEPAD, African governments will display to the world that NEPAD can make difference in the protection of human rights and security in Africa.[51] Considering the commitment of NEPAD to human rights, the African Commission will play a strong institutional role in order to ensure coherence between efforts under NEPAD framework and the human rights obligations of states pursuance to the African Charter on Human and Peoples' Rights, whereas, the Commission is a partner to the African Peer review Mechanism (APRM).[52]

On the other hand, the African Union human security agenda in the areas of peace and security is clearly expressed in article 4 (h) of the Constitutive Act (CA) of the African Union. Article 4 (h) which empowers the union to intervene in the affairs of a member state in order to prevent war crimes, genocide and crimes against humanity was initiated into the CA as a number of informed writers on the CA have eloquently argued with a view to protecting ordinary people in Africa from abusive governments.[53] To provide an operational arm to this specific human right element, AU made room for the creation of an African Standby Force (ASF) charged with the task of intervening militarily in the states for humanitarian purpose.[54] The condition laid down for human security intervention under the AU goes beyond the provision made for intervention in the internal affairs of a country in the UN Charter.[55]

The AU, unlike other international organisations does not necessarily require the consent of a state in conflict to intervene in its internal affairs when populations are at risk. Therefore, the Organisations for African Unity (OAU) system of complete consensus have been abandoned. Under the AU, a decision on the part of a two-thirds majority of the Assembly is required for

[50]International Criminal Court -01/04-01/06-1119, Decision on victims' Participation.

[51] Nicolaides A and Van der Bank C M., 'Globalisation, NEPAD, Fundamental Human rights, South Africa and Central Development.'

[52] African Commission, Section 3.

[53]Malan, M., 'New Tools in the Box? Towards a Standby Force for the African Union.' (2002). *Pretoria, Institute for Security Studies.*

[54] African Union, 2001.

[55] Schoeman, Maxi, 'The African Union after the Durban 2002 Summit.' 2003. http://www.tool.ku.dk/cas/nyhomepage/mapper/occasional%20paper/Schoeman-_interversi.doc (Referenced 20 February 2018).

intervention.[56] The AU used the principle to arrive at the decision to deploy a peacekeeping force to monitor a ceasefire in Burundi in April 2003.[57] The Assembly also used this principle to decide on the mission to the Darfur region of Sudan in the summer of 2004.[58] The AU has also recently intervened in what would have led to total war in Zimbabwe in 2017.[59] These and more are what the instruments have done to bring peace, development and security in Africa region which is the focus of this paper.

It is worthy of note to point out that the AU has adopted an approach to political governance in Africa that is, human security-Centre as much as the CA commits member states to promoting respect for the sanctity of human life.[60]Article 4 (i) makes it clear that the African people have right to live in peace, Article 3 (h) therefore commits member states to path where they will promote and protect human and people's rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments. It is imperative that Article 3 (g) enjoins member states to promote democratic principles and institutions, popular participation and good governance. This provision is important because it is generally understood in the human security research community that democratic development is critical aspect of human security.[61] The decision to remove any AU state whose governments came to power through unconstitutional means advances the human security agenda of AU and brings security of lives and properties.

iv. African Commission on Human and Peoples' Rights

Article 30 of the Charter establishes the African Commission on Human and Peoples' Rights (hereinafter referred to

[56] Powel K and Tieku T.K, 'The African Union and the Responsibility to Protect: Towards a Protection Regime for Africa? *International Insight 20 (2005)* (1 &2) at pp. 215-235.
[57] ibid
[58] ibid
[59] ibid
[60]Article 4 (o).
[61]Hammerstad A., 'AU Commitment to Democracy in Theory and Practice: An African Human Security Review.' *South Africa Institute of International Affairs Monograph 2005* http://www.africanreview.org/forum/docs/feb04partmeet/serial.pdf (Referenced 20 February 2018).

as Commission)[62] to promote and protect human rights in Africa. To perform this task effectively, Article 42 assigns specific duties that are incidental to the attainment of the main goal. They are the promotion of human rights through sensitization of the public and institutions by organizing conferences, seminars and offering advices and recommendations to the governments,[63] setting of standards, principles and rules aimed at solving contemporary legal problems relating to human rights and freedoms of the peoples upon which the states may rely to enact their own domestic laws,[64] cooperating with other similar institutions in Africa and the global level that have the same objective to pursue attainment of human rights,[65] interpreting the provisions of the Charter and performing any other functions that may be assigned to it by the African Heads of state and Government.[66]

The major instrument by the Commission is the consideration of communications that are brought by states and non-states entities and its decisions or recommendations are presented along with other matters in a report to be submitted to the Assembly of the AU annually and the whole report shall remain confidential until such time that it has been considered and authorized for publication by the Assembly.[67] It is expected that through the exercise of that power, the Commission should be able to monitor states to ensure that they enforce human rights in their territories. However, most states are unwilling to submit their reports promptly to the Commission for scrutiny[68]which means the essence of this instrument is not achievable. This paper therefore advocates for the prompt cooperation of African States to protect and ensure peace and security of its people.

[62]Preamble to the African Charter on Human and Peoples' Rights, Article 45 (1) and (2). Done 27 June 1981, entered into force on 21 October 1986 and ratified by all member states of AFRICAN union.
[63] Ibid, Article 45 (1) (a).
[64] Ibid, Article 1 (b).
[65] Ibid, Article 1 (c).
[66] Ibid, Article 45 (4).
[67] Jacob, O.A., 'An Appraisal of the Rights in the African Charter on Human and Peoples' Rights and Notable Institutions for their Enforcement.' (2016) 4 (1) *Akungba Law Journal* at pp. 328-347 at p. 340.
[68] Isanga, J. M., 'The Constitute Act of the African Union, African Courts and the Protection of Human Rights: New Dispensation*?* (2013) 11 *Santa Clara Journal of International Law* at p. 280.

v. National Human Rights Commission

The Nigerian government appreciate the concept of human rights and on this background, the National Human Rights Commission was established through National Human Rights Commission Act, 1995[69] in line with the resolution of the United Nations which enjoins all member states to establish Human Rights Institutions for the promotion and protection of Human Rights and human security. The Commission serves as mechanism to enhance the enjoyment of human rights and security. Its establishment aims at creating an enabling environment for extra-judicial recognition, promotion and enforcement of human rights, security and provides a forum for public enlightenment and dialogue on human rights issues thereby limiting controversies and confrontations.[70]

The mandate of the Commission is to:

i. deal with all matters relating to the protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria, African Charter, United Nations Charter and the Universal Declaration on Human Rights and other International Treaties on human rights to which Nigeria is a Party;[71]
ii. monitor and investigate all alleged cases of human rights violation in Nigeria and make appropriate recommendations to the Federal Government for the prosecution and such other actions as it may deem expedient in each circumstance;[72]
iii. assist victims of human rights violation and seek appropriate redress and remedies on their behalf;[73]
iv. undertake studies on all matters relating to human rights and assist the Federal Government in the formulation of appropriate policies on the guarantee of human rights;[74]
v. publish regular reports on the state of human rights protection in Nigeria;

[69] See Cap N46 LFN, 2004, Vol. II. It came into effect on 27th September, 1995.
[70] Sam Nnamani, 'Institutional Mechanisms for Human Rights Protection in Nigeria: An Appraisal.' *(2012)* 3, An *International Human Rights Journal, Department of Public Law, Ahmadu Bello University, Zaria, at pp.* 56-69 at p. 58.
[71] Cap N46, LFN, 2004, Section 5 (a)
[72] Section 5 (b).
[73] Section 5 (c).
[74] Section 5 (d).

vi. organise local and international seminars, workshops and conferences for public enlightenment;[75]

vii. liase and co-operate with local and international organisations on human rights for the purpose of advancing the promotion and protection of human rights;[76]

viii. participate in all international activities relating to the promotion and protection of human rights;[77]

ix. maintain library, collect data and disseminate information and materials on human rights generally;[78] and

x. carry out all such other functions as are necessary for expedient for the performance of these functions under the Act.[79]

If these functions are carried out, the enforcement of human rights, protection and security of victims in any situation in Africa will be minimized if not eradicated.

States and the Protection of Victims' Right in Conflict Situations

States assume obligation under international law to respect and fulfil human rights and security. The obligation to respect means that, states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect groups and individuals from human rights abuses. The obligation to fulfil means that, states must take positive step to facilitate the enjoyment of human rights and human security.[80]

As part of states' obligation to protect human rights, they must prevent, investigate, punish and ensure redress for human rights violations committed by third parties like private individuals, commercial enterprises or other non-state actors during armed conflicts and other situations of violence.[81] States also have to fulfil, for instance, by taking legislative, administrative, budgetary,

[75] Section 5 (e).
[76] Section 5 (f)
[77] Section 5 (g).
[78] Section 5 (i).
[79]Section 5 (j).
[80] United Nations Human Rights of the High Commissioner, "International Legal Protection of Human Rights in Armed Conflict. *New York and Geneva*, (2014) at p. 14.
[81]Ibid.

judicial and other steps towards the realization of human rights and human security. This obligation may be realized progressively in relation to economic, social and cultural rights.[82]

The African Commission is mandated to promote and protect the rights as contained in the African Charter on Human and Peoples' Rights.[83] As parts of its protection responsibilities, the Commission examines communications submitted by victims and/or civil society organisations alleging violation of the Charter by a member state. The Charter does not contain separate express right to reparation, such a right is implied as victims have a right to file complaints with the Commission, which has the power to specify or recommend reparation where it finds that a state party has violated the Charter. Article 7 (para 1) provides that: Every individual shall have the right to have his cause heard. This comprises:

i. The right to an appeal to competent national organs against acts of violating his fundamental right as recognized and guaranteed by Conventions, laws, regulations and customs in force;
ii. The right to be presumed innocent until proven guilty by a competent court or tribunal;
iii. The right to defence, including the right to be defended by counsel of his choice; and
iv. The right to be tried within reasonable time by an impartial court or tribunal.

Victims of oppressed are also protected by States and instruments through Article 21 (para 2) which provides that in case of spoliation on the dispossessed, victims shall have the right to the lawful recovery of his/her property as well as to an adequate compensation irrespective of whether its available from the State, financial compensation from the offender for physical or psychological injuries or other harm sustained in connection with crime. This will to a large extent have important healing effect on

[82]The committee of Economic, Social and Cultural Rights, No. 3 (1990) the nature of state parties obligations has indicated that "while the full realization of the relevant rights may be achieved progressively, steps towards the goal must be taken within a reasonable short time after the covenant's entry into force for the state concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting that progressive realization of economic, social and cultural rights.

[83] The Charter African Charter on Human and Peoples' of the Organisation of African Unity (now African Union) on 27 June, 1981.

the victim concerned and will also increase his or her confidence in the criminal justice system and bring peace, development and security.

In most cases, the international human rights treaties do not specify how a breach of a legal obligation should be remedied. This is logical because the states parties to a human rights treaty are free to decide how to enforce the rights and freedoms concerned.[84] However, Article 14(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment specifies that States parties have a duty to ensure that victims of torture obtain redress and that they have an enforceable right to fair and adequate compensation, including the means for a full rehabilitation as soon as possible. In the event of the death of the victim as a result of the torture, his or her dependants shall be entitled to compensation.

Rehabilitation for victims of abuse is also foreseen by Article 39 of the Convention on the Rights of the Child, according to which States parties shall take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.[85]

A leave could also be borrowed from the Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women which imposes a duty on States parties to establish the necessary legal and administrative mechanisms to ensure that women subjected to violence in armed conflict have effective access to restitution, reparations or other just and effective remedies.

To this end, the protection of victims during conflict situations is an incumbent duty on States party. Nigeria for instance is advised to aggressively enlighten its citizens on the need to report any act of oppression and insecurity that might occur. Corruption and favoritisms should be discouraged, especially by the people in authority if the country is to achieve the international, regional and

[84]Protection And Redress For Victims Of Crime And Human Rights Violations http://www.ohchr.org/Documents/Publications/training9chapter15en.pdf (Reference 8 October 2017).

[85]General Recommendation No. 19 (Violence against women), in United Nations Compilation of General Comments, 221, para. 24(t) (iii).

national objective of peace, protection and security which this paper advocates.

Enforcement of Victim's Rights in Conflict Situations

Enforcement simply connotes the act of compelling observance of or compliance with a law, rule or obligation. International, regional and national instruments provide for the implementation of victims' rights through the available laws. For instance, Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment provides that a victim of torture is entitled to an enforceable right to fair and adequate compensation, rehabilitation and in the case of the death of the victim, adequate compensation to the survivors of the victim.[86]

States are also encouraged to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious harm; and the family, in particular dependents of person who have died or become physically or mentally incapacitated as a result of such victimization.[87] The Declaration on basic principles of justice for victims and abuse of power by the United Nations General Assembly requires the Governments to review their practices, regulations and laws to consider restitution as an available sentencing in criminal cases, in addition to other criminal sanctions.[88] In cases of substantial harm to the environment, restitution, if ordered, should include as far as possible, restoration of environment, reconstruction of infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.[89]

Under international human rights law and international Humanitarian States have obligation to prevent violation from occurring and to investigate them when they occur. The duty of state further involves the obligation to respect, ensure respect for and implement international humanitarian rights law as provided for under the respective bodies of law which include inter alia, the duty to:

[86] Article 14 (i), CAT.
[87] Section 12 of the Declaration on Basic Principle of Justice for Victims and Abuse of Power by the United Nations General Assembly of 25 November, 1985.
[88] Section 9.
[89] Section 10.

- Take appropriate legislative, administrative and other appropriate measures to prevent violations;
- investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take actions against those allegedly responsible in accordance with domestic and international law;
- provide those who claim to be victims of human rights and humanitarian laws violation with equal and effective access to justice; and
- provide effective remedies to victims, including reparation.

In essence, victims should be treated with humanity and respect for their dignity and appropriate measure should be taken to ensure their safety, physical and psychological well-being and as well as those of their families.

Security Challenges and the Implications on Human Development

The New Partnership for Africa's Development (NEPAD) statement of the African problem notes that the impoverishment of the African Continent was accentuated primarily by the legacy of colonialism. Cold war, the working of the international system and the inadequate of and shortcomings in the policies pursued by many African countries in the post-independence era. Postcolonial Africa inherited weak states and dysfunctional economies that were further aggravated by poor leadership, corruption and bad governance in many African countries which has remain security challenges in many Africa Countries.[90]

Weak state is another major obstacle to sustainable development which will adequately address the challenges of human security in the African continent. Obviously, one of the Africa major challenges is to strengthen the capacity to govern short and long-term policies to address human security. On the balance, the increasing inability of the African countries to translate the continent's abundant natural resources into prosperity remain a major issue for policy to all those who want to see Africa turn table of underdevelopment and improve on human security.[91]

[90] NEPAD Document, 2001.

[91] Eze-Micheal, Ezedikachi, N., 'The Role of African Union Vis-à-vis Human Security in Africa.' *(2016)* 50 *International Affairs Global Strategy at pp.* 30-31. http://www.liste.org/journals/index.php/IAGS/article/download/339864953 (Referenced 7 February 2018).

Inequalities and Unfairness is another major root cause of insecurity in Africa. There is a rooted general perception of inequality and unfairness which has occasioned in grievance by a large number of people in African continent. This perception stems out as a result of marginalization by a section of the people, government development policies and political offices and this has become a primary source of dissatisfaction and resentment.[92] A large population of Africa is frustrated and has lost hope, especially the youths and have now emerged to express their disillusion about the pervasive state of insecurity. A good example is the case of Niger-Delta in Nigeria where the Avengers, Niger Revolutionary Crusaders have been blowing up installations thereby reducing the exploration and production of oil to the terrible level. The activities of the avengers were responsible for the epileptic power supply in Nigeria as well as the inability of state governors to pay workers' salaries due to low revenue generated in the oil sector as a result of the attack on pipeline.[93] These and more are reasons for insecurity and underdevelopment.

Corruption among African Leaders and cheer greed on the part of the African leaders is also reason for failure to address human security in Africa. Most African leaders virtually lack accountability and detest the principles of separation of power and checks and balances in Africa. They also make use of national resources for personal purposes. There are some African leaders who are Lack of Institutional Capacities resulting in government failure described as the deterioration or break down of institutional infrastructures. The foundation of the institutional framework in Africa are very shaky and have deteriorate governance and democratic accountability, thereby paralyzing the existing set of constraints including the formal and legitimate rules nested in the hierarchy of social order. This is manifested in the incapacity of African leaders to deliver public services and provide basic needs for the African masses. The lack of basic needs for people has resulted in frustration thereby making people readily exploded by any event of violent. The argument here is that Africa has resources to provide for the needs of its people but corruption in public offices has made it difficult for the office holders to focus on the provision of basic needs for the

[92]Nigeria-South Africa Chamber of Commerce, 'Security Challenges in Nigeria and the Implications for Business Activities and Sustainable Development.' 2016 at p. 2 http://nsacc.org.ng/security-challenges-in-nigeria-and-the-implications-for-business-and-sustainable-development (Referenced 7 February 2018).
[93] Ibid.

people and this leads to insecurity and limitation on human development.[94]

Inter and Intra States Conflicts exist since the colonial period. Many African countries had been bedeviled by inter and intra conflicts and development and human security can only be achieved in an atmosphere of peace. Africa, more than any other continents, in the last two decades have witnessed frequent severe and indeterminate conclusion of the conflicts.[95]

Loss of Socio-Cultural and Communal Value System is another clog on the part of security and development in Africa. The traditional value system of the Africa is the porous frontiers of the African continent where individual movement are largely untracked. The porosity of countries' borders in Africa has serious security implications on the continent. Given the porous borders as well as weak and security system, weapons proliferate into neighbouring African countries are threats to security in Africa and which needs holistic address. Small arms and light weapons proliferation and the availability of these weapons have enabled militant and criminal groups to have easy access to arms. Furthermore, the porosity of borders among African countries made it possible for unwanted influx of migrants from one neighbouring country to the other such as Republic of Niger, Chad, Republic of Benin and Cameroon. These migrants who are mostly youths are the major perpetrators of criminal acts in Africa thereby constituting threat to human security.[96]

Another reason that has assailed human security in Africa is non-sensitivity of African elites to the plight of the masses. African elites only engage in selfish political conflicts and contentions aimed at strengthening their stronghold on power at the expense of the masses.[97] There is also the problem of dependence on foreign donors to cater for the needs and improvement of African states and this has resulted in the threats to value of human security. Most African Countries depend largely on donations from

[94] Ibid.

[95] There is a long list of inter-States conflict and civil wars in Africa: Eritrea and Ethiopia, Congo, Liberia, Sudan, Sierra-Leone, Somalia

[96]Nigeria-South Africa Chamber of Commerce, 'Security Challenges in Nigeria and the Implications for Business Activities and Sustainable Development.' [2016, 3 http://nsacc.org.ng/security-challenges-in-nigeria-and-the-implications-for-business-and-sustainable-development (Referenced 7 February 2018).

[97]Nigeria-South Africa Chamber of Commerce, 'Security Challenges in Nigeria and the Implications for Business Activities and Sustainable Development.'

humanitarian gesture of western countries to combat health challenges such as HIV/AIDs, immunization and other health related issues in Africa. This paper is of the opinion that, for all the numerous challenges to be resolved, Africans need to be informed and enlightened about how their rights could be enforced. African leaders have indulged in corruption for too long and this is the major obstacle to the enforcement of instruments that will restore peace, security and development in the continent. Most leaders refuse to implement, apply and domesticate useful instruments that will enhance security, peace and development.

Limitations of Victim's Rights in Conflict Situations

Some instruments have been limited by clauses in them. For instance, the International Covenant on Economic, social and cultural rights have been limited by the restriction of available resources of States to carry out their obligations. Examples of these rights are: right to food, right to water, right to clothing and shelter, right to adequate standard of living among others. These rights are not enforceable, simply because their realisation is subject to availability of resources.[98] The International Convention on Civil and Political rights also include terms allowing limitations on the extent to which the rights can be exercised.[99] There are limitations that can be applied in times of armed conflict as well as at other times.[100]

Also, the International Court of Justice (ICJ), citing the Human Right Committee's general comment No. 27 (1999) on freedom of movement, noted that the restrictions on human rights must conform to the proportionality and must be the least instructive instrument among those which might achieve the desired result. It applied similar conditions to its assessment of the limitations on the enjoyment of economic, social and cultural rights resulting from the construction of the law.

[98] Sections 2, 11 and 12 of ICESCR are instructive

[99] Article 4 of the International Covenant on Economic, Social and Cultural Rights provides that the state may subject covenant rights only to such limitations as are contained by law only in so far as this may be compatible with nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

[100] Article 18 of the International Covenant on Civil and Political Rights provides that freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or moral or the fundamental rights and freedom of others.

In Nigeria, Chapter ll of the Constitution[101] contains promising objectives of the government but has been limited by not been enforceable.[102] This means that the purpose of its enactment has been defeated. This and more are the limitation on the part of beneficial instruments both national and international.

Concluding Remarks

It is obvious that Africa is a continent where human security situation is tremendously problematic, complex and challenging. The issue of human security has several dimensions but essentially it affects human beings and their communities. Failure of African leaders to address key specific value of human security is among the factors responsible for human rights abuse and violation of victims' rights, particularly in armed conflicts. Human rights violation of the victims in Africa is unfortunately reflective of the level of protection and enforcement that Africa accords in the regional instruments, which means that drastic steps need to be taken in terms of protection, security, development and enforcement of rights to bring human dignity and peaceful co-existence among Africans.

This paper has examined how the rights of victims during conflict situations have been protected through some instruments. It further looks at how the rights could be enforced, the security challenges and its implications on human development. The paper concludes that Africans can only enjoy peace, security and development if the issue of corruption of its leaders is addressed and when human rights provision in the various instruments are upheld. There is therefore the need for clear legislation to be introduced specifically for the protection of victims' during conflict situations. The absence of such legislation is a significant lacuna in the domestic legal framework which needs urgent attention.

Another challenge as regard reparation is addressing the lack of political will on the part of the African leaders to comply with court judgment holding the states jointly liable to pay compensation for crimes committed by its agents. The states in most cases do not pay compensation to victims. The state failure to provide reparation in the form of compensation seriously

[101] Chapter ll of the 1999 Constitution is on Fundamental Objectives and Directive Principles of State Policy which are on enforceable by virtue of section 6 (6) (c) of the same Constitution

[102] Section 6 (6) (c) makes it unjustifiable.

undermines the rule of law and leaves victims empty handed, as most often, convicted offenders are unable to pay compensation. There is need to put in place apparatus to enforce compliance.

THE SETTLEMENT OF DISPUTES BETWEEN THE DEPOSITS GUARANTEE FUND AND DEPOSITORS DURING REIMBURSEMENT OF DEPOSITS: AN ISSUE PARTIALLY REGULATED

By

Kelese George Nshom (Ph.D)*

Abstract

In a bid to reinforce the protection of creditors during crises in credit institutions, the Central African Economic and Monetary Community (CEMAC) lawmaker created the Deposits Guarantee Fund (FOGADAC) in 2004. This Fund went operational in 2011, with the aim of reimbursing depositors in case of unavailability of funds in credit institutions of the sub region or during their liquidation. In the course of such reimbursement disputes may arise. Conscious of this, the legislator has, in the Regulation creating the Fund and other related instruments, provided administrative and judicial mechanisms of their settlement. The objective of this article is to examine these mechanisms with the view of determining their effectiveness. Upon critical analysis of the Regulation creating FOGADAC and other CEMAC instruments in this domain, it is realised that the mechanisms put in place by the said instruments are ineffective. This article brings out their various lacunae and proposes possible reforms.

Key words: committee – complaint – indemnification – litigation – payment – petition

Introduction

One of the things that guarantee the protection of depositors in any banking system is the assurance that their savings will always be available, secure and yielding interest. As such, those who deposit money in a credit institution expect its availability in time of need; they expect to recover the same whenever they desire to do so or otherwise as stipulated in the banking contract[1]. In other

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[1] Kelese Nshom, G. 2014. Regional Integration Laws and Banking Security in Cameroon. PhD Thesis: University of Dschang, (unpublished); Kelese Nshom, G. 2017. 'Deposits Guarantee and the Stability of the CEMAC Banking System'. In Y.R. Kalieu Elongo (dir). Régulation et Intégration Bancaires dans la CEMAC, Actes du Colloque du 10-11 décembre 2015, Université de Dschang: PUA: 225-252, 225.

words, depositors will only feel at ease saving their money in credit institutions if they have confidence in them and the banking system as a whole[2]. All attempts at banking control are geared towards protecting depositors' savings and consequently instilling confidence in the banking system.

However, the control of banking activities in the Central African Economic and Monetary Community (CEMAC)[3] sub region has not been able to fully attain the above objectives. Authorities in charge are conscious that the prudential supervision of credit institutions is not a satisfactory guarantee against the non-reimbursement of deposits by them, and that it is indispensable to reinforce the stability of the banking system and the protection of depositors. Convinced therefore, that the control exercised by the Central African Banking Commission (COBAC)[4] cannot alone guarantee the availability of savings collected by credit institutions, notably those of small customers,[5] mechanisms are put in place to ensure that depositors' savings are always available. One of such has been the creation of the Deposits Guarantee Fund for Central Africa (FOGADAC).

The creation of the Fund was highly advocated for the protection of credit institutions against failures in the CEMAC sub region[6]. Nevertheless, its creation was not as expeditious as it was

[2] Ellinger, E.P. and Lomnicka, E. 1994. Modern Banking Law. 2nd Edition: New York: Oxford University Press, 25; Cornu, C. 1996. **'**Les Conséquences de la Défaillance d'une Banque: La Protection des Déposants'. RJC: 70-79, 70; Cranston, R. 1997. Principles of Banking Law. New York: Oxford University Press, 71; Nah Fuashi, T. 2001. 'The Banking Profession in Cameroon at the Crossroads: A Search for a Better Control Mechanism'. Annales de la FSJP-UDs 5: 105-127, 106; Kenmogne Simo, A. 2004. La Protection des Etablissements Bancaires Contre la Défaillance en Afrique Noire Francophone. Thèse de doctorat: Université de Yaoundé II, 326-330 (inédit); Medamkam Toche, S.J. 2006. La Sécurité de Déposant dans le Système Bancaire de la CEMAC. Mémoire de DEA: Université de Dschang (inédit) ; Marinč, M. and Vlahu, R. 2012. The Economics of Bank Bankruptcy Law. New York: Springer, 2.

[3]Communauté Economique et Monétaire de l'Afrique Centrale instituted by a treaty of 16 March 1994 to replace the Custom and Economic Union of Central Africa (UDEAC) founded in 1964.

[4]Commission Bancaire de l'Afrique Centrale created in 1990 through the Convention of 16 October 1990.

[5] See the Preamble of « Règlement nº 01/04 /CEMAC/UMAC/COBAC du 31 Mars 2004 portant création d'un Fonds de Garantie des Dépôts en Afrique Centrale ».

[6] Kenmogne Simo, A. 2004. La Protection des Etablissements Bancaires Contre la Défaillance en Afrique Noire Francophone. op. cit., 326-330.

imperative. The Guarantee Fund now in place in Central Africa has been a subject of discussion for decades. The Regulation creating the Fund was drafted in 1996[7] and validated by the Finance Ministers of CEMAC on 9 April 1998 at Libreville. The Fund only saw the light of day on 31 March 2004, following the adoption of Regulation nº 01/04/CEMAC/UMAC/COBAC creating FOGADAC, simply because the procedure adopted was delaying.[8] This Fund did not go operational because of many lapses[9] in the above Regulation, thus, Regulation nº 01/09/CEMAC/UMAC/COBAC of 20 April 2009 was adopted to replace it.[10] Regulation COBAC R-2009/3 on the Organisation and Functioning of the Fund[11] was equally adopted on 15 December 2009 and the Fund was put in place on 21 February 2011.

FOGADAC is a sub-regional public institution with legal personality and financial autonomy.[12] It has its seat in the General

[7] The Board of Directors of BEAC approved the draft bill creating the Deposits Guarantee Fund for Central Africa in its session of 31 July 1996.

[8] The text creating the Deposits Guarantee Fund was initiated in the form of a convention, which needed the ratification of the parliaments of the various member States of CEMAC. The various parliaments delayed the procedure and it was thought that since CEMAC Regulations are of immediate and direct application in the CEMAC countries, submitting the text in the form of a Regulation would accelerate the procedure. In the ordinary meeting of 16 November 2002, COBAC noted the impossibility of some countries to ratify the text within the required time, and gave the mandate to its President to submit the text to the Ministerial Committee of UMAC for adoption in the form of a Regulation. In its ordinary meeting of 28 March 2003 at Douala, the Ministerial Committee of UMAC accepted that the text should be submitted to it as a Regulation for final adoption. On the proposition of the Governor of BEAC following the conformity opinion of its Board of Directors on 11 July 2003 at N'Djamena, the text was adopted on 27 January 2004 at Libreville.

[9] Some of these shortcomings were the absence of the rules of procedure for reimbursement, the deadline for reimbursement, uncertainty in the financing of the Fund and the amount of indemnification, just to mention a few. To correct these shortcomings, COBAC authorised its General Secretariat to undertake the revision of the text on 30 June 2006. The revised text was submitted in the ordinary meeting of COBAC on 10 July 2007 which authorised the Secretary General to undertake the necessary consultations.

[10] « Règlement nº 01/09 /CEMAC/UMAC/COBAC du 20 avril 2009 portant création d'un Fonds de Garantie des Dépôts en Afrique Centrale », see its article 36.

[11] See « Règlement COBAC R-2009/3 du 15 décembre 2009 relatif à l'Organisation et au Fonctionnement du Fonds de Garantie des Dépôts en Afrique Centrale ».

[12] Article 2 of « Règlement nº 01/09/CEMAC/UMAC/COBAC du 20 avril 2009 ».

Secretariat of COBAC and is made up of two main organs – the Management Committee and the Permanent Secretariat.[13] FOGADAC provides a mechanism of deposits guarantee which reimburses deposits of unpaid depositors after liquidation of the credit institution or in case of liquidity problems. Adherence to this mechanism of guarantee in Central Africa is mandatory for all credit institutions.[14] This obligation is understandable as there are no other mechanisms of guarantee for credit institutions in the sub region, unlike in countries like France where there are several organs[15] which provide satisfactory guarantee of deposits[16].

The Deposits Guarantee Fund carries out a mission of general interest bestowed on it for the purpose of protecting the savings of small depositors. Its missions consist of indemnifying the savers of a credit institution in case of liquidity crisis and extending a hand of help to a credit institution whose situation leaves fears of total or partial illiquidity within a short time.[17] As a legal entity, FOGADAC can only function through natural persons who take decisions or act on its behalf. Since human beings are fallible, those who act as agents of the Fund, notably the Management Committee, may take decisions in the course of reimbursement of deposits that hurt the depositors. In such a situation, disputes may arise. Disputes here refer to conflicts or misunderstanding that may arise during reimbursement of deposits, which may give rise to a lawsuit. Disputes that may arise in this process are many. First, it may happen that the persons intervening in the reimbursement procedure are guilty of fraudulent manoeuvres which may lead to their

[13]Ibid, article 7.

[14] Article 4 of « Règlement nº 01/09/CEMAC/UMAC/COBAC du 20 avril 2009 ».

[15] After providing that every approved credit institution in France adheres to the system of guarantee intended to reimburse depositors in case of liquidity crises or insolvency, article 52-1 of the Law of 24 January 1984 exempts credit institutions affiliated to central organs deemed to satisfy the obligation of guarantee. See also, article 3 of the European Directive of 16 May 1994 on the System of Deposits Guarantee. These organs as enumerated by article 20 of the same Law are: « La Caisse Nationale du Crédit Agricole, La Chambre Syndicale des Banques Populaires, La Confédération National du Crédit Mutuel, La Caisse Central de Crédit Coopérative, Le Centre Nationale des Caisses d'Epargne et de Prévoyance, et Chambre Syndicale des Sociétés Anonymes de Crédit Mobilier ».

[16] Credot, F.J. 1993. 'Risque Juridique et Crédit Bancaire aux Entreprises'. Petites Affiches 81: 10-15.

[17] Article 1 of « Règlement nº 01/09/CEMAC/UMAC/COBAC du 20 avril 2009 ».

prosecution.[18] Second, disputes may arise when the Fund subrogates depositors to recover the money it has paid to them either from credit institutions or their managers.[19] Third, disputes may arise from the evaluation of contributions by credit institutions. Fourth, it may happen that the depositors are contesting the decisions of the Management Committee of the Fund. This piece of work is interested in the last two categories of disputes. A pertinent question is: are depositors sufficiently protected when disputes arise in the process of reimbursement? This question is of practical importance because the legislator is out to protect depositors and must ensure that this protection is equally guaranteed during reimbursement of deposits. However, the answer to the above question is in the negative even though the CEMAC legislator offers them the right to object to certain decisions taken by the Management Committee of FOGADAC.

The law is not sufficiently elaborate on the mechanisms opened to the aggrieved depositors. In fact, the Regulation creating FOGADAC has only two provisions relating thereto. Its article 29 provides that 'the Management Committee is competent to receive pre-litigation petitions relating to reimbursement of depositors,' while article 30 stipulates that 'decisions of the Management Committee relating to reimbursement shall be challenged before the CEMAC Court of Justice which shall rule at first and last instance.' These two provisions leave several questions unanswered and therefore, create doubts as far as these mechanisms are concerned. The purpose of this paper is to critically analyse the mechanisms of settling disputes available to depositors who may be aggrieved by the decisions made by the Management Committee in the course of reimbursement of deposits. The depositors can make a pre-litigation complaint that opens up an administrative procedure for conciliation[20]; where conciliation fails, they can initiate a legal action before the CEMAC Court of Justice.[21]

[18]Ibid, articles 32 and 33.
[19]Ibid, articles 24 and 25.
[20] Article 29 of « Règlement nº 01/09/CEMAC/UMAC/COBAC du 20 avril 2009. »
[21]Ibid, article 30.

The Administrative Procedure of Settlement of Disputes during Reimbursement of Depositors by FOGADAC

The administrative procedure for settling disputes relating to reimbursement of depositors is actually a pre-litigation phase. By pre-litigation here, is meant settlement of disputes through administrative means without recourse to judicial proceedings. This is often done upon a pre-trial or administrative complaint made by the aggrieved person. Pre-trial complaints are of two main categories; one is known as appeal to the superior in hierarchy and the other is a pre-litigation petition. Appeal or petition to the hierarchical superior is a complaint made to the administrative superior of the author of the decision while a pre-litigation petition is one made to the author of the decision. The CEMAC lawmaker has instituted only the pre-litigation petition. It is necessary to examine this notion before discussing its practice as concerns the reimbursement of depositors.

1. The Notion of Pre-litigation Petition

A pre-litigation petition as regulated by the CEMAC lawmaker is what is usually known in French administrative law as *recours gracieux.* This notion has no direct translation in English but it is variously known in English administrative law as non-contentious petition, pre-trial complaint, pre-litigation complaint or pre-litigation petition. In criminal law, it is known as petition for reprieve. In this write-up, pre-litigation complaint and pre-litigation petition are used interchangeably.

A pre-litigation complaint is a preliminary compulsory step that must be accomplished before the actual contentious phase of a dispute. It is common in administrative matters that when there is a contentious decision, the court may not be seized immediately. This is often the case when there is a legislative or regulatory provision stipulating that a pre-trial complaint must precede a jurisdictional one. Where such a provision exists, it transforms what could simply be optional into an obligation[22].

A pre-litigation petition is a pre-trial complaint brought before the administration itself in view of causing it to annul one of its

[22] Chapus, R. 1999. Droit Administratif Général 1: 13e Edition: Paris: Montchrestien, 769.

decisions or to pay a pecuniary compensation[23]. The petition or complaint could equally be aimed at causing the administration to review and correct its decision. It is made either to the author of the contested decision, or to his superior in hierarchy, within the deadline specified by law. Where the law imposes such a petition on any potential litigant, it becomes a condition for the admissibility of his complaint by the competent court[24]. It is a necessary requirement for extra contractual liability in administrative matters. This requirement is strict and where the petition is rejected for lack of a pre-trial complaint, there is no possibility of regularisation[25]. This underlines the public policy (ordre public) nature of a pre-litigation petition.[26]

The CEMAC Regulation governing FOGADAC has instituted only one form of administrative complaint, the pre-litigation petition (recours gracieux) without defining it.[27] In this context, it may be regarded as a preliminary complaint by any person aggrieved by the decision of the Management Committee of FOGADAC to the latter, seeking some respite or relief (usually temporal) from any prejudice that might have been caused by the decision. This complaint is usually intended to ensure an amicable settlement of any disputes that might have arisen between the complainant and the author of the decision and to avoid any potential litigation.

The putting in place of the pre-litigation phase by the CEMAC legislator is justified for at least three reasons. First, the Guarantee Fund is a sub-regional public institution[28] endowed with a mission of general interest. As a public entity, its functioning is governed generally by rules of public law, that is, the general principles of administrative law and particularly, by CEMAC and COBAC

[23] Guillien, R. et Vincent, J. 2011. Lexique de termes juridiques. 18e Edition: Paris: Dalloz, 285.

[24] Chapus, R. 1999. Droit Administratif Général. op. cit., 769.

[25] Chapus, R. 1998. Droit du Contentieux Administratif. 7e Edition: Paris: Montchrestien, 342 and 362.

[26] In certain litigations involving agents of the community, the CEMAC Court of Justice has upheld this public policy requirement to reject certain petitions before it, that were not preceded by a pre-litigation petition, see the cases of Galbert ABESSOLO ETOUA c/ CEMAC, Arrêt n° 001/CJ/CEMAC/CJ/04 du 18 mars 2004 and OKOMBI Gilbert c/ CEMAC, Arrêt n° 002/ CJ/CEMAC/CJ/05 du 09 juin 2005.

[27] Article 29 of « Règlement nº 01/09/CEMAC/UMAC/COBAC du 20 avril 2009. »

[28]Ibid, article 2.

regulations. Its decisions are administrative decisions or acts and as a fundamental rule of procedure in most administrative litigations, a pre-litigation petition is required as a prerequisite for any litigation against them.

Second, the legislator intends to facilitate the resolution of disputes between the depositors and the Fund arising from the reimbursement procedure. This requirement is intended to impose a preliminary conciliation phase. Through this out-of-court settlement of disputes, cost is reduced and waste of time mitigated, if attempts at preliminary conciliation succeed.

Third, out-of-court resolution of disputes between the Fund and depositors helps in decongesting the CEMAC Court of Justice, which is competent to hear those disputes. Being the only court to hear disputes between individuals and community institutions, if all complaints were to be made directly to the court, it would be overcrowded with complaints and consequently, there would be slow down in the procedure. Of course, it is a common saying that "justice delayed is justice denied."

In addition, a pre-litigation complaint helps in clarifying issues and in limiting the scope of any potential litigation[29]. This implies that before the competent court, the petitioner cannot request the court for anything other than what he was claiming in the pre-litigation petition. Thus, he would be required to use the same means of proof as that put forward in the pre-litigation complaint. This has the advantage of clarifying debates in the course of litigation. Hence, any additional claims or arguments other that those presented in the pre-litigation petition will be inadmissible. The justification for this is simple; the purpose of the pre-litigation petition is to submit the complainants claim for first examination. It is just logical that any further petition on other grounds should not be admitted. This holds true as far as pre-litigation petitions against decisions of FOGADAC are concerned.

2. The Submission of a Pre-litigation Petition against Decisions of FOGADAC

A pre-litigation complaint relating to reimbursement of deposits is made to the Management Committee of FOGADAC,

[29] Chapus, R. 1998. Droit du Contentieux Administratif. op. cit., 343.

which is competent to receive and scrutinise the same.[30] This organ will examine the complaint and either reject or grant the claims of the complainant. Where the claims of the complainant are granted, it ends the procedure. However, if they are rejected or if the complainant is not satisfied with the decision of the Management Committee, he can appeal against it to the CEMAC Court of Justice.

Despite the importance of this mechanism, the CEMAC legislator has not provided detail regulations on it; only one provision, article 29 of the Regulation creating FOGADAC makes reference to a pre-litigation complaint. It states simply that the Management Committee is competent to receive pre-litigation petitions relating to reimbursement of depositors.[31] This leaves so many procedural issues opaque and there is need for the CEMAC legislator to introduce reforms to clarify them.

The first major difficulty with this administrative phase of resolution of disputes relates to the time limit within which administrative complaints must be made. In fact, neither the Regulation creating FOGADAC nor that which lays down its organisation and functioning has laid down a deadline within which the complaint must be made as is generally the case in administrative litigations. However, the internal regulations of FOGADAC provide that where a claim is wrongly evaluated, the concerned has fifteen days within which to forward its remarks or objections to the Management Committee of FOGADAC. In addition, creditors or depositors who were left out in the course of establishing attestations of deposits by the Fund have two months within which they must make their complaints.[32] The major question is whether the various time limits above constitute the deadlines for pre-litigation complaints. This may be the case if the objections fall within the meaning of pre-litigation petition as provided for by the Regulation creating the Fund.[33] If that were to be the case, it would imply that the deadline varies with the object of the complaint or nature of the problem.

Assuming that the deadlines in the cases previously mentioned were the time limits for pre-litigation complaints, when then should

[30] Article 29 of « Règlement nº 01/09/CEMAC/UMAC/COBAC du 20 avril 2009. »
[31] « Les recours gracieux portant sur l'indemnisation des déposants relèvent de la compétence du Comité de Direction ».
[32] Article 19 of internal rules and regulations of FOGADAC.
[33] Article 29 of « Règlement nº 01/09/CEMAC/UMAC/COBAC du 20 avril 2009. »

a potential litigant make his complaint if it does not fall within the two cases mentioned, that is, where the cause or causes of action are other than those contemplated by the legislator? The law is silent on this issue. Generally, the deadline[34] for the introduction of a pre-litigation complaint varies depending on the type of decision contested.[35] Under CEMAC law, to introduce any pre-litigation petition against administrative decisions, the litigant in most of the cases is required to do so within two months from the day the decision was notified to him.[36] This deadline is strict and where a litigant fails to seize the court within the deadline, the consequence is that his petition will no longer be admissible. Where the procedure requires a pre-litigation petition, the advantage is that when the petition is made within the required time, the deadline for seizing the competent court is prolonged.[37]

In a related development, the Regulation provides neither the time within which the Management Committee must respond to the pre-litigation petition nor the effect of its silence. Concerning the deadline within which the Management Committee should react, usually in administrative proceedings, the authority who receives the pre-litigation petition is required to respond within two months except the law provides otherwise. As to the effect of its silence, it is the principle in administrative law that silence of the administration is denial or disapproval; it can only amount to

[34] The deadline for a pre-litigation petition against an administrative decision in Cameroon ranges from three months to four years depending on the decision. A pre-litigation petition against an administrative decision must be made within three months; a pre-litigation petition claiming damages must be made within six months from when the damage became known; and a pre-litigation petition against administrative default must be made within four years, see section 17 of Law nº 2006/022 of 29 December 2006 to lay down the Organisation and Functioning of Administrative Courts.

[35] Keutcha Tchapnga, C. 2007. 'La réforme attendue du contentieux administratif au Cameroun'. Juridis Périodique 70: 24-29.

[36] See in this perspective, pre-litigation petitions in disputes relating to the community public service (article 111 du Statut du personnel de l'ISSEA, article 118 du Statut du personnel de l'ISTA). This was equally the case with unfavourable opinions of COBAC relating to the approval of credit institutions and disciplinary decisions before the advent of the CEMAC Court of Justice, see section 18 of the 1990 Convention creating the Banking Commission for Central Africa (COBAC).

[37] Lombard, M. 1997. Cours de droit administratif. Paris: Dalloz, 222; Chapus, R. 1998. Droit du Contentieux Administratif. op. cit., 358.

approval if it is so provided by the law. Consequently, the silence of the Management Committee of FOGADAC is rejection.

Another shortcoming in the law is its failure to provide for a class petition or action, whereas there are some conflicts that may affect depositors generally or a certain category of them. For instance, there may be undue extension of the deadline for reimbursement. The Management Committee of FOGADAC must reimburse depositors within two months from when the Banking Commission requested its intervention. However, the law gives it the possibility of extending the deadline for reimbursement if circumstances so require. The extension is made for a maximum of two months with the authorisation of COBAC. This deadline can exceptionally be extended twice by the Management Committee and with the authorisation of COBAC, for a maximum of four months.[38] Where extension exceeds the prescribed time limit, it may be prejudicial to the depositors and they are entitled to object to such extension. In this case, where the depositors are collectively affected, will they petition the Management Committee individually or collectively?

By class petition, is meant a petition by several persons against a single decision or a petition by one person against several decisions[39]. In principle, class petitions are inadmissible in administrative matters. In other words, for petitions against administrative decisions to be admitted by the competent authority, they should be made individually. This principle may be difficult to apply here, especially with the numerous depositors that credit institutions always have. In fact, if it applies *strictu sensu*, depositors will invade the Management Committee with petitions. However, though the law is silent, technically, a class petition is possible as far as reimbursement of depositors is concerned. This is evident if insolvency proceedings have been initiated against the credit institution. In fact, the decision of the Management Committee of FOGADAC to indemnify depositors wholly or partially entails the withdrawal of the credit institution's approval.[40] Under CEMAC law, a credit institution whose approval has been withdrawn goes

[38] Article 42 of Regulation R-2009/03 of 15 December 2009.
[39] Chapus, R. 1998. Droit du Contentieux Administratif. op. cit., 438.
[40]Article 48 of Regulation R-2009/03 of 15 December 2009.

into liquidation.[41] Consequently, insolvency proceedings for liquidation will be initiated against the credit institution and all the creditors will be grouped into the body of creditors to act as one.[42] In this case, therefore, it is possible for them to introduce a class petition to the Management Committee. Nevertheless, it would have been better for the CEMAC lawmaker to expressly provide for a class petition even when insolvency proceedings are not declared against the credit institution. Under European community law, class petitions are permitted[43].

Another intriguing question is: can an expert assist a depositor at the pre-litigation phase of the disputes? The answer to this perfectly legitimate question may be difficult to find given that the pre-litigation phase of the disputes is purely an amicable negotiation phase and may not require third parties. This may explain why the CEMAC legislator has not contemplated this possibility. However, the law does not prohibit a complainant from seeking the assistance of an expert. In fact, it is possible for the Management Committee of FOGADAC to invite the petitioner after receiving the pre-litigation petition, to hear more about his petition for possible reversal of its decision. Given that, certain matters of law are complicated and especially in financial matters where the depositor may have difficulties understanding certain issues, it is possible and even advisable for the depositor to be assisted in this case by an expert.

Even if the above queries were resolved, administrative resolution of disputes relating to reimbursement of depositors would still be criticised. In fact, the Management Committee of FOGADAC that receives the pre-litigation petition in our opinion is political. Its political character is seen first from its composition and second, in the manner in which decisions are taken. Most important decisions of the Management Committee of FOGADAC are taken unanimously.[44] Fortunately or unfortunately, the law does not

[41] See article 17 of the annex to the 1992 Convention on the Harmonisation of Banking Regulations in Central Africa.
[42] See the Uniform Act Organising Collective Proceedings for Wiping Off Debts, 1998 as amended in 2015.
[43] Bergeres, M.C. 1998. Contentieux Communautaire. 3e Edition: Paris: PUF, 98.
[44] See for example, article 27 of « Règlement no 01/09/CEMAC/UMAC/COBAC du 20 avril 2009 » and article 54 of Regulation R-2009/03 of 15 December 2009 and article 12 of internal regulations of FOGADAC.

specify the manner in which decisions in response to pre-litigation petitions are taken. In order not to stifle such decisions, we suggest they should be taken by simple majority. If they were to be taken unanimously, it implies that while considering a pre-litigation complaint from a depositor, if one member of the Committee is absent in the meeting, no decision would be reached and the complainant would have to wait indefinitely until when all the members would attend the meeting. This may cause prejudice to the depositor. In any case, any unsatisfied complainant can appeal against the decision of the Management Committee of FOGADAC to the CEMAC Court of Justice. This begins the litigation or judicial phase of settling disputes.

The Judicial Procedure of Settlement of Disputes during Reimbursement of Depositors by FOGADAC

A legal action against decisions of FOGADAC poses one principal question to be determined. Is it an independent procedure? In other words, is it begun only when the pre-trial phase has failed or it may be initiated independent of the pre-litigation petition? This question is pertinent because where there is a legislative or regulatory provision stipulating that an administrative complaint must precede a jurisdictional one, it transforms what could simply be optional into an obligation[45]. Unfortunately, provisions of the CEMAC regulations relating to reimbursement of deposits by FOGADAC do not provide an answer to the above question. Article 30 of the Regulation creating FOGADAC states simply that 'decisions of the Management Committee relating to reimbursement shall be challenged before the CEMAC Court of Justice which shall rule at first and last instance.'[46] A major worry here is to determine the decisions referred to by the legislator. Are they decisions of the Management Committee generally or those in response to pre-litigation petitions? If it concerns the former, it implies that an aggrieved depositor has the option to begin the procedure either by introducing a pre-litigation petition or by initiating action before the CEMAC Court of Justice directly. If it concerns the latter, then a complainant must begin with a pre-litigation complaint. Though the

[45] Chapus, R. 1999. Droit Administratif Général. op. cit., 769.

[46] « Les décisions du Comite de Direction en matière d'indemnisation sont susceptibles de recours contentieux auprès de la Cour de Justice de la CEMAC qui statue en premier et denier ressort ».

law is not clear on the issue, we are of the opinion that the latter is the rule. This is obvious because the tendency has always been for the CEMAC Court of Justice to throw out cases that have not been first submitted to internal procedures of settling disputes.[47] Nevertheless, under CEMAC law actions based on extra contractual liability of the community are not necessarily preceded by a pre-litigation petition except expressly stated by the law.[48] In any case, it is fascinating to first underscore the significance of initiating legal action before the CEMAC Court of Justice before discussing judicial proceedings proper.

1. The Importance of a Legal Action against Decisions of FOGADAC

The attribution of competence to the CEMAC Court of Justice to hear actions against decisions of FOGADAC is in line with the main objective of the Court, which is to ensure the respect of community law for the good functioning of community institutions.[49] In addition, the Court has competence to hear matters brought before it by natural persons and not only states, institutions and organs of CEMAC[50]. In fact, CEMAC law does not only create rights and obligations for its states, institutions and organs but also for individuals[51]. That is, it is a law that is becoming more and more concerned with individuals because the latter are aspirators, instigators and actors of socio-economic transformations within the sub region. It is, therefore, cogent to protect these individuals. The possibility of a legal action against the decisions of the Management Committee of FOGADAC is justified by the need to protect these

[47] Galbert ABESSOLO ETOUA c/ CEMAC, Arrêt n° 001/CJ/CEMAC/CJ/04 du 18 mars 2004 and OKOMBI Gilbert c/ CEMAC, Arrêt n° 002/ CJ/CEMAC/CJ/05 du 09 juin 2005.

[48] Article 38 of the Convention of 30 January 2009 governing the CEMAC Court of Justice; CJ/CEMAC, Arrêt nº 015/2011 du 12 mai 2011, Anicet Didier SAMBA c/ CICOS et Commission CEMAC.

[49] See the preamble to the Convention of 30 January 2009 governing the CEMAC Court of Justice.

[50] Nsie, E. 2005. 'Les compétences de la Cour de Justice de la CEMAC'. Actes du Séminaire Sous-régional, Libreville-Gabon 2-6 novembre 2004, sur la sensibilisation au droit communautaire et à l'intégration dans la zone CEMAC, Paris: GIRAF 15-32.

[51] Kamtoh, P. 2014. Introduction au système institutionnel de la CEMAC. Afrédit, 210 et seq; Gnimpieba Tonnang, E. 2016. L'ordre juridique communautaire de la CEMAC. Paris: L'Harmattan, 140 et seq.

individual depositors by making sure that there is justice and transparency in the reimbursement of deposits.

The CEMAC legislator understands that the Management Committee of FOGADAC could be reticent to review its decisions when objected by a depositor. This is obvious because during amicable settlement, it is at the same time a party and a judge. In fact, the purpose of a complaint for administrative review or reconsideration is to ensure that the misunderstanding between the depositor and the Management Committee of FOGADAC is resolved through reconciliation. Where the Management Committee is lukewarm or adamant and reticent to reconsider its decision, the aggrieved depositor is not left without a remedy; he is protected since a neutral person can enter the scene to play the role of a referee. This implies that there is a possibility for the decision to be re-examined by a jurisdictional organ. Thus, if the pre-litigation complaint is without effect, the unsatisfied complainant can appeal against the decision of the Management Committee. Such an appeal is the beginning of the litigation phase of the dispute before the CEMAC Court of Justice.

The CEMAC Court of Justice controls the implementation of community law[52]. The intervention of the Court is primordial because there is need for fair trial and due process of law. In fact, the right to fair trail and due process of law has become fundamental, guaranteed by the legislator[53] and therefore an essential element of any judicial proceeding[54]. Such a guarantee would benefit the aggrieved depositor who appeals against the decisions of the Management Committee since he appears to be the weaker party in the process.

Fair trial and due process of law are intended as safeguards for good administration of justice. This requirement warrants that judicial proceedings must be equitable, just and egalitarian. This is

[52] Boumakani, B. 1999. 'Les juridictions communautaires en Afrique noir francophone : la cour commune de justice et d'arbitrage de l'OHADA, les cours de justice de l'UEMOA et de la CEMAC'. Annales de la FSJP-UDs 3: 67-86, 69.

[53] See the universal declaration of human rights, the African charter on human and people's rights, the protocol to the charter, and the preambles of the constitutions of CEMAC member states.

[54] Nguele Abada, M. 2005. 'La réception des règles du procès équitable dans le contentieux du droit public'. Juridis Périodique 63: 19-33, 19 ; Gnimpieba Tonang, E. et Fanjip, O. 2010. 'La Cour de Justice de la CEMAC et les Règles du Procès Equitable'. Penant 872: 329-356, 331.

guaranteed by principles such as independence, impartiality and the binding and obligatory nature of court decisions[55]. Independence entails absence of control or subordination; the CEMAC Court of Justice is not subject to any influence by any power, executive or legislative or by parties to any proceedings. It is independent from states and other institutions and organs of CEMAC and its members exercise their functions in all independence in the interest of the community.[56] The members of the Court must be of good morality and present guarantees of independence and integrity.[57] Their independence is guaranteed in the objective manner in which the judges are chosen. They are chosen from amongst several candidates presented by each member state.[58] Before assuming duty, the judges take oath to carry out their functions in all independence.[59]

Impartiality requires that the judge is to act only according to law and his conscience without leaning on one side; without favouring one party and causing detriment to the other[60]. It may also imply that the court is composed in a manner as to guarantee objectivity in its decisions. The CEMAC legislator strongly recommends the impartiality of judges since before assuming duty, judges appointed to the CEMAC Court of Justice must swear to carry out their duties in all impartiality, independence and to preserve the secrecy of deliberations.[61] They must judge and not prejudge[62].

The binding and obligatory nature of the decisions of the Court also guarantees fair trial and due process of law. Decisions of the CEMAC Court of Justice are *res judicata* and have an *executory*

[55] Gnimpieba Tonang, E. et Fanjip, O. 2010. 'La Cour de Justice de la CEMAC et les Règles du Procès Equitable'. op. cit., 331 et seq.
[56] Articles 2 and 3 of « Acte Additionnel n° 06/00/CEMAC-041-CCE-CJ-02, Portant Statut de la Chambre Judiciaire de la Cour de Justice de la CEMAC ».
[57] Article 4 of the 2009 Convention governing the CEMAC Court of Justice.
[58]Ibid, articles 4 and 7.
[59]Ibid, article 8.
[60] Ngono, S. 2005. 'L'application des règles internationales du procès équitable par le juge judicaire'. Juridis Périodique 63: 34-45, 37.
[61] Article 8 of the 2009 Convention governing the CEMAC Court of Justice.
[62] Gnimpieba Tonang, E. et Fanjip, O. 2010. 'La Cour de Justice de la CEMAC et les Règles du Procès Equitable'. op. cit., 337.

force as soon as they are pronounced.[63] Thus, they must be enforced; they are obligatory in the member states[64].

To enable judges perform their duties in line with these guiding principles, the law ensures that they enjoy some privileges, immunities and must not perform any duty incompatible with their functions.[65] Their privileges and immunities are those enjoyed by the personnel of the community.[66] Good administration of justice in this case is ensured by the fact that the procedure is contradictory at all levels and open (open debate) except in consultative matters. It must guarantee equality of litigants and free arguments of parties. Oral arguments are done publicly except the Court orders that they should be made in chambers. The Court can also request for expert opinion if need be.[67]

The Court must also decide within reasonable time[68]. No provision of the law states the time limit within which the CEMAC Court of Justice must decide on an action against the decisions of FOGADAC. However, a perusal of the decisions of the Court shows that it has been doing its best to decide within a reasonable time on matters brought before it[69]. Most cases brought before the Court have been decided within two years.[70] Nevertheless, two years in

[63] Article 88 of « Acte Additionnel n° 4/00/CEMAC-041-CCE-CJ-02, Portant Règles de Procédure de la Chambre Judiciaire de la CEMAC. »

[64] Boumakani, B. 1999. 'Les juridictions communautaires en Afrique noir francophone : la cour commune de justice et d'arbitrage de l'OHADA, les cours de justice de l'UEMOA et de la CEMAC'. op. cit., 73.

[65] Articles 17 and 18 of « Acte Additionnel n° 06/00/CEMAC-041-CCE-CJ-02 ».

[66] See « Acte Additionnel N° 6/99/CEMAC-024-CCE.02 relatif au Régime des Droits, Immunités et Privilèges accordés à la Communauté, aux Membres de ses Institutions et à son Personnel. »

[67] Article 44 et seq of « Acte Additionnel n° 4/00/CEMAC-041-CCE-CJ-02, Portant Règles de Procédure de la Chambre Judiciaire de la CEMAC. »

[68] Kamtoh, P. 2002. La mise en œuvre du droit communautaire dans les états membres de la CEMAC. www.izf.net (referenced 10 novembre 2017).

[69] Gnimpieba Tonang, E. et Fanjip, O. 2010. 'La Cour de Justice de la CEMAC et les Règles du Procès Equitable'. op. cit., 354.

[70] See GAZZO Samuel Aron c/ CEMAC, Arrêt n° 001/CJ/CEMAC/CJ/03 du 20 juillet 2003 ; Thomas DAKAYI KAMGA c/ CEMAC, Arrêt n° 004/CJ/CEMAC/CJ/03 du 17 juillet 2003 ; Galbert ABESSOLO ETOUA c/ CEMAC, Arrêt n° 001/CJ/CEMAC/CJ/04 du 18 mars 2004 ; MAMOUDOU DJIKA c/ CEMAC, Arrêt n° 002/CJ/CC/04/05 du 14 octobre 2004 ; OKOMBI Gilbert c/ CEMAC, Arrêt n° 002/ CJ/CEMAC/CJ/05 du 09 juin 2005 ; MOKAMANENDE John Wilfried c/ CEMAC, Arrêt n° 02/CJ/CEMAC/CJ/06 du 31 novembre 2006.

our opinion, are much as concerns the reimbursement of depositors. The mechanism of guarantee is intended to protect small savers and when a poor depositor has to take two years of judicial proceedings to recover what he is due, it becomes disturbing and dispiriting. In our opinion, actions relating to reimbursement of depositors should be treated as summary proceedings (référé). Fortunately, the law has made provisions for summary proceedings before the Court.[71]

2. Judicial proceedings against the decisions of FOGADAC

Petitions against the decisions of the Management Committee are made to the CEMAC Court of Justice which will rule at first and last instance.[72] This means the decision of the Community Court of Justice is final and not subject to appeal. By providing for pre-litigation and litigation of disputes in favour of the depositors or creditors, the CEMAC legislator gives them a veritable means of protecting their rights; a move that has been saluted by some researchers[73]. However, it is regrettable that the regulations governing FOGADAC are silent on issues of procedure concerning legal actions against the decisions of the Management Committee of FOGADAC by disgruntled depositors. For instance, the texts governing FOGADAC have not stated the conditions for the admissibility of such actions. Conditions for the admissibility of legal actions before the Community Court are numerous: they could be conditions of substance such as capacity, interest, etc. Other conditions are those of form such as time, the manner in which the Court is seized, the content of the petition, etc. In addition, the law does not mention the effects of a pending petition, the possible sanctions for failure to fulfil conditions to initiate action, and the time limit within which the CEMAC Court of Justice must rule on the petition. These issues require some precision because the procedure for reimbursement of deposits is a special procedure and should be rapid. In the absence of any special provisions relating to issues mentioned above, recourse would obviously be made to the

[71] Articles 54-56 of « Acte Additionnel n° 4/00/CEMAC-041-CCE-CJ-02, Portant Règles de Procédure de la Chambre Judiciaire de la CEMAC. »

[72] Article 30 of « Règlement nº 01/09/CEMAC/UMAC/COBAC du 20 Avril 2009. »

[73] Feudjio, P.P. 2011. Le Fonds de Garantie des Dépôts en Afrique Centrale et le Traitement des Défaillances des Etablissements de Crédit. Thèse de Master: Université de Dschang, 77 (inédit).

rules of procedure before the Court. This is regrettable because the protection of depositors intended may not be achieved.

The procedure before the CEMAC Court of Justice is governed by Additional Act nº 04/00/CEMAC-041-CCE-CJ-02 of 14 December 2000. This paper is going to examine the initiation of a legal action against FOGADAC in the light of the above text beginning with the conditions of substance and form for the admissibility of actions. With regards conditions of substance, article 13 of the rules of procedure insists on capacity and interest, to which could be added the legal status to act. We need not overemphasise the point that when a person is initiating action in court, he should have capacity to seize the said court and a legitimate interest in the matter or remedy sought. With respect to capacity, access to the CEMAC Court of Justice is opened to artificial and natural persons. Any natural person seeking redress from the Court needs to have come of age. The problem with age is that national laws define majority age. Fortunately, history has made it that member states of CEMAC have the same laws relating to majority age[74]. The age is generally twenty-one years except the litigant is an emancipated minor.[75]

However, he would have to justify certain and legitimate interest in the matter.[76] Interest is what attaches the litigant to his action and makes it admissible, without which the litigant will not be allowed to initiate action[77]. It entails the advantage that will accrue to the litigant following the legal action. It is justified by the fact that there is a right which is likely to be prejudiced by the decision attacked[78]. Legitimate interest requires that the claim of the litigant should be licit. Certain interest entails that the interest existed at the time the action was begun or is actual when proceedings are going on. It is also required that the interest should be personal except in situations where class actions are permitted. One cannot take a legal action on behalf of another. The litigant

[74] Zankia. Z. 2008. Le contentieux de la fonction publique communautaire de la CEMAC. Mémoire de DEA: Université de Dschang, 76 (inédit).
[75] Code Civil, articles 388, 476, 477, 478; section 1 of Family Law Reform Act 1969.
[76] Article 13 of Additional Act n° 4/00/CEMAC-041-CCE-CJ-02 on the rules of procedure.
[77] G. Cornu (dir). 2017. Vocabulaire juridique. 11e Edition: Paris: PUF, 565.
[78] Bergeres, M.C. 1998. Contentieux Communautaire. op. cit., 112.

must be affected directly and personally by the decision of the Management Committee in question.

The legal status required to initiate a legal action may deprive a person who has interest. Legal status takes into consideration the situation of the litigant at a given time. This is because the interest may exist but the situation of the litigant prohibits him from introducing an action in court. This could be possible if the litigant is not enjoying his civil rights. The question could also be whether the litigant is the person entitled to act in the circumstance. It is only when this requirement is satisfied that legal action can be introduced. Generally, the rules of the Court are very flexible as far as actions for reparation of prejudice are concerned[79].

With respect to the conditions of form for admissibility of a legal action, the law insists on time, the form of the petition, etc. In relation to the time of initiating proceedings, the rules of procedure before the Court distinguish between actions for annulment of a decision and actions for reparation. As to the former, it is required that the procedure should be initiated within two months from the date of the event that has prompted the litigation, except there is any special text that provides to the contrary.[80] Unfortunately, the text governing FOGADAC has not provided any special time limit within which a petition against the decision of the Management Committee should be made. In the absence of such provision, it is obvious that any person contesting the decision of the Management Committee should do so within two months following the notification of the said decision to him.

Considering actions for reparation or indemnity, the time bar is five years.[81] In the case of Thomas DAKAYI KAMGA,[82] the CEMAC Court of Justice reiterated this distinction stating that actions for indemnity are not subject to two months time bar laid down in article 12 of the rules of procedure of the judicial bench because it applies only to petitions for annulment. The deadline

[79] Kamtoh, P. 2014. Introduction au système institutionnel de la CEMAC. op. cit., 213.

[80] Article 12 of Additional Act n° 4/00/CEMAC-041-CCE-CJ-02 on the rules of procedure. Such special time limits are provided by the rules governing the personnel of the community. See « article 122, du Statut du personnel de l'ISTA ; article 113 al. 2 du Statut du personnel de l'ISSEA ; article 113 al. 3 du Statut des fonctionnaires du Secrétariat Exécutif de la CEMAC. »

[81] Article 38 of 2009 Convention instituting the CEMAC Court of Justice.

[82] Arrêt n° 004/CJ/CEMAC/CJ/03 du 17 juillet 2003.

provided for the liability of the community itself is five years.[83] These deadlines usually start running after the expiry of the deadline for pre-litigation petition or that required for exhausting all the internal amicable procedures[84].

It is fascinating to ask these questions: is variation in time limit depending on the object of the litigation of any significance to litigants? Could it not be better if the legislator or the Court makes a distinction in the deadlines taking into consideration distance? For instance, prolonging the deadline for litigants found out of the seat of the Court in Ndjamena. Under European Union law, the time bar for actions in view of annulment is generally one month but can be prolonged for those living out of the seat of the European Community Court in Luxemburg[85]. The CEMAC legislator could do the same for litigants living in other member states of CEMAC.

With regards to commencement of action, the law is silent on the manner in which the action should be commenced. By virtue of articles 13 to 16 of the rules of procedure before the CEMAC Court of Justice, action is commenced either by a petition (requête) or by notification of a *compromis* or a decision of *renvoi* from a national court. Given that the relationship between FOGADAC and depositors is not contractual where there could be a *compromis* and that national courts have no competence in hearing actions against decisions of the Management Committee, the action cannot be commenced by notification of *compromis* or *renvoi*. Thus, the Court may only be seized by a petition (requête). The 'requête', which is addressed to the Court or deposited at its registry, must contain the names, professions and addresses of the parties, object of the petition, brief summary of the litigation and arguments. To it should be attached the decision challenged.[86] If the action relates to deficiency in the functioning of FOGADAC, the depositor would be required to attach the notice addressed to FOGADAC warning it on its deficiency or shortcoming. If the depositor had first attempted conciliation through a pre-litigation petition and failed, he will be

[83] Article 38 of 2009 Convention instituting the CEMAC Court of Justice.

[84] Kamtoh, P. 2005. 'Le recours en responsabilité extracontractuelle devant la Cour de Justice de la CEMAC'. op. cit., 54 ; Kamtoh, P. 2014. Introduction au système institutionnel de la CEMAC. op. cit., 210.

[85] Bergeres, M.C. 1998. Contentieux Communautaire. op. cit., 105.

[86]Article 16 of Additional Act n° 4/00/CEMAC-041-CCE-CJ-02 on the rules of procedure.

required to attach the decision of non-conciliation or rejection of the complaint by the Management Committee of FOGADAC to his file. Since in the pre-litigation petition the depositor makes claims and raises arguments to support them, his claims before the Court are bound to be substantially the same like those in the pre-litigation complaint. He must not deviate from the original claims or extend them.

The CEMAC lawmaker has not defined the language to be used in actions before the Court. It is obvious that a petition initiating action can be written in any of the working languages of the community, which are Arabic, English, French and Spanish.[87] Nevertheless, with the present composition of the Court, it is doubtful if it can actually handle cases in languages other than French. The expression "working languages" used by the CEMAC legislator is misplaced because the working language of the community is actually French and others are only official languages.

Representation by a lawyer is compulsory[88] and indispensible in actions against the decisions of FOGADAC. In fact, the procedure before the CEMAC Court of Justice like in other international courts is essentially written and this can only be perfectly done by a professional. It should, however, be recalled that the Court may order oral interrogation of the parties and even a visit to the locus.[89] It is regrettable that the seat of the Court is in Ndjamena Tchad and litigants from other member states may have difficulties attaining oral hearings. This is further rendered complex by the obstacles to free circulation in the CEMAC zone[90]. This problem is equally faced by lawyers from other CEMAC countries who may not attend the Court and give oral arguments for their clients.[91] Until recently, there was no free circulation of persons in

[87] Article 59 of CEMAC Treaty as revised on 26 June 2009.

[88] Mongo Antchouin, J. 2002. 'Les règles de procédures devant la Chambre Judiciaire de la Cour de Justice de la CEMAC'. Actes du Séminaire Sous-régional sur la Sensibilisation au Droit Communautaire de la CEMAC, 16-20 décembre 2002, Paris: GIRAF: 34-43, 39.

[89] Articles 37 et seq of Additional Act n° 4/00/CEMAC-041-CCE-CJ-02 on the rules of procedure.

[90] Gnimpieba Tonnang, E. 2016. L'ordre juridique communautaire de la CEMAC. op. cit. ; Tchabo Sontang, H.M. 2017. 'Le statut des étudiants ressortissants de la CEMAC en droit positif camerounais. Annales de la FSJP-UDs 19: 171-192.

[91] In the European Union, lawyers not resident at the seat of the community court are given privileges and facilities to attend the court without difficulties.

the CEMAC sub region despite legislative provisions in favour of free circulation of persons. In the recent months the legislative authorities of the zone have taken serious measures to suppress barriers to free circulation of persons and this difficulty would soon be an issue of the past. Another solution is that the CEMAC Court of Justice can organise circuit courts in Tchad or other CEMAC member states[92]. However, to the best of our knowledge, this has never been held in any country of the CEMAC. Whatever the case, the depositor must elect residence in Ndjamena and indicate the name, profession and address of the person empowered to receive summonses and other court processes.[93]

The litigant is also required to pay a consignment of 100,000 francs before the beginning of the hearings.[94] The money may be added in the course of the proceedings if need be. This is another huddle that may taint an attempt to initiate action against FOGADAC. In effect, the deposits guarantee protects mostly small savers and there are some of them that may claim amounts less than or little above the said consignment. It may be difficult for them to pay such a consignment. It would have been better the procedure be free of charge like in labour matters.[95]

A stimulating question is: what will happen if the above requirements are not fulfilled? This question is pertinent because the law does not mention the deadline for regularisation of any omissions in the petition. Does it mean that there is no possibility of regularisation? This cannot be the case because impossibility of regularisation occurs only where a requirement that is violated is a rule of public policy. The law talks about inadmissibility for lack of some requirements but says nothing about others. This implies the sanction may be different from inadmissibility or that there is possibility of regularisation. It is, therefore, cogent for the legislator to provide for the deadline within which regularisation may be allowed. In the absence of any deadline, the litigant should regularise within a reasonable time or as requested by the Court.

Another flaw of the law is the fact that it does not provide for the effects of initiating action against the decisions of FOGADAC.

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[92]Article 3 of the 2009 Convention governing the CEMAC Court of Justice.

[93] Article 19 of Additional Act n° 4/00/CEMAC-041-CCE-CJ-02 on the rules of procedure.

[94]Ibid, article 20.

[95]Ibid, article 23.

One may be tempted to ask if it entails a stay of execution. In other words, can the procedure for reimbursement be suspended pending the determination of the petition? In principle, an action before the CEMAC Court of Justice does not suspend the execution of the decision challenged. However, the Court may order the stay of execution of the decision if circumstances so warrant.[96] This may possibly be the case if the decision challenged affected all the depositors or a certain category of them. Unfortunately, the law does not provide for a class action.

In the same line of reasoning, the law does not provide for the remedies that may be sought from the CEMAC Court of Justice. Generally, when administrative decisions are attacked, the litigant may be requesting for the annulment of the decisions, the suspension of same or the award of damages for prejudice suffered. Whereas the request for annulment may easily be granted by the Court if the decision was taken in flagrant violation of the law, especially rules of public policy, damages may hardly be granted. For damages to be granted the depositor must show proof of having suffered special prejudice, that is, the damage must be real and certain. There should equally be a causal link between the prejudice and the decision challenged.[97] In addition, the litigant must not have been negligent or contributed to the damage[98]. Under European Union law, a litigant can take action to claim damages if they are foreseeable, sufficiently certain and imminent. However, the court requires that the litigant should be prudent and vigilant.

Nevertheless, the CEMAC lawmaker fails to provide adequate disciplinary sanctions for whoever violates the reimbursement procedure. The Regulation creating FOGADAC[99] provides generally that, the violation of the provisions of the Regulation are punished with sanctions provided in article 15 of the annex to the 1990 Convention and articles 39 et seq of the annex to

[96]Ibid, article 57.

[97]Tasha Loweh Lawrence c/ CEMAC, Secrétariat Exécutif, Arrêt nº 001/CJ/CEMAC/CJ/05 du 7 avril 2005.

[98] Kamtoh, P. 2005. 'Le recours en responsabilité extracontractuelle devant la Cour de Justice de la CEMAC'. op. cit., 54 et seq; Kelese Nshom, G. 2017. 'The liability of COBAC for prejudice caused to individuals by its acts or omissions in Cameroon: reflections on a legal vacuum'. KIULJ 1(2): 77-100, 92.

[99] See article 32.

the 1992 Convention. These sanctions are inadequate[100]. Their inadequacy lies in the fact that they are not suited for the reimbursement procedure. In fact, the sanctions are meant for banks which are not yet facing liquidity crises or insolvency and not those who are involved in reimbursement. There is need to provide for disciplinary sanctions that are adequate to faults or illegal acts committed during reimbursement of depositors and creditors.

Unlike disciplinary sanctions, criminal sanctions are adapted to the procedure of reimbursement. Article 33 of the Regulation creating FOGADAC punishes any person who through fraudulent manoeuvres, attributes the indemnity provided in article 23 to himself or to a third party, with a fine of from 100,000 CFA francs to 5,000,000 CFA francs. These sanctions apply without prejudice to those provided by national Penal Codes.

The Court is equally to rule at first and last instance. This poses a problem especially when the matter was not preceded by a pre-litigation petition. It implies that the matter would not be examined for the second time. Thus, an unsatisfied litigant is deprived of the opportunity to have his case heard again for proper administration of justice. The legislator would have given the Court the opportunity to examine the matter for the second time as the final court of review (cassation)[101] as is the case with judicial review in English administrative law.[102]

Conclusion and Recommendations

The CEMAC legislator has done well to enable the depositors question the decisions of FOGADAC when they jeopardise their interest. Through the pre-litigation petition or legal actions, they can make their rights prevail and therefore, feel protected during reimbursement of deposits. However, these mechanisms are partially regulated; many lapses exist in the rules governing them. In fact, the legislator does not clearly state whether a pre-litigation petition must precede a legal action before the Community Court of

[100] Feudjio, P.P. 2011. Le Fonds de Garantie des Dépôts en Afrique Centrale et le Traitement des Défaillances des Etablissements de Crédit. op. cit., 78.
[101] Nsie, E. 2005. 'Les compétences de la Cour de Justice de la CEMAC'. op. cit., 18.
[102] Graic, P.P. 2003. Administrative Law. 5th Edition: London: Sweet & Maxwell, 726 et seq; Leyland, P. and Anthony, G. 2005. Textbook on Administrative Law. 5th Edition: Oxford: Oxford University Press, 232 et seq.

Justice. Also, the judicial procedure is governed by general rules before the CEMAC Court of Justice, which have some shortcomings and therefore, not adapted to disputes relating to reimbursement of depositors. The effect is that the protection of the depositors of credit institutions in distress intended by the lawmaker may not be achieved. For this reason, it will be better the CEMAC lawmaker make these mechanisms special and adapted to the specificities of disputes relating to reimbursement of depositors. Fortunately, FOGADAC is still young and disputes relating to reimbursement of depositors have not yet arisen to come before the competent bodies empowered to resolve them. Pending the time that disputes will begin to surface, it is recommended that the legislator initiates reforms to address lapses discussed above so as to facilitate the implementation of the above means of settling disputes. In particular, as concerns the pre-trial phase, the CEMAC lawmaker should state the deadline for introducing a pre-litigation petition and that of response by the Management Committee (two months for instance), provide for a class petition or action and the possibility of depositors being assisted or represented by an expert in the conciliation phase. The manner of taking decisions in the Management Committee should be made flexible; decisions should be taken by majority and not unanimously. Concerning the procedure before the CEMAC Court of Justice, it is recommended that actions relating to reimbursement of depositors should be treated as summary proceedings (référé). The fee (consignment) of one hundred thousand francs paid before the commencement of the hearings should be reduced or even suppressed in case of litigation relating to reimbursement of depositors. Adequate disciplinary sanctions should be provided for whoever violates the reimbursement procedure; the present disciplinary sanctions are inadequate and not adapted to the reimbursement procedure. While waiting for the legislator to initiate reforms to incorporate the above recommendations and address other worries raised by this research, the CEMAC Court of Justice would have to lay precedence on difficulties that may arise in the course of settling disputes with respect to reimbursement of depositors.

DEATH PENALTY UNDER CAMEROON'S 2014 ANTI TERRORISM LAW AND INTERNATIONAL HUMAN RIGHTS LAW

By

Fon Fielding Forsuh (Ph.D)*

Abstract

The existence of the death penalty in Cameroon's criminal law is not a 21st Century issue because it has long existed as a principal penalty. The escalation of terrorism-related offences, especially with the activities of the Boko Haram in the Northern part of the country led to the enactment of Law No 2014/28 of 23 December 2014 on the Suppression of Acts of Terrorism. Demonstrating the Country's great will to fight against and deter acts of terrorism, this law makes provision for the death penalty in many sections. The availability of the death penalty in the 2014 law can be said be contradictory with the country's commitment to international human rights treaties which consecrates the right to life as a fundamental human right. This paper therefore examines the various acts that would amount to terrorism under the 2014 Law and further demonstrates that the availability of death penalty in this law contradicts International Human Rights Law. The death penalty in the said law has had a limited deterrent effect on terrorism as evident by the fact that the country has continued to witness several attacks, especially in the Grand North. An appropriate alternative to death penalty could be longer periods of Imprisonment, accompanied by serious reformation and rehabilitations procedure which might help a great deal to deter acts of terrorism. A reformed terrorist(s) might be used as a medium for sensitisation against the ills of terrorism and to negotiate peace with terrorists.

Key Words: Death Penalty, Human Rights and Law, Terrorism.

Introduction

The death penalty in Cameroon's criminal law is not a 21st century issue because it has since 1960 been incorporated in its penal code as a principal punishment.[1] The country's position with respect to this penalty has remained the same with the enactment of

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[1] Law No 65-LF-24 of 12 November 1965 and Law No 67-LF-1 of 12 June 1967 amended by Law No 2016/007 of 12 July 2016 relating to the Penal Code of Cameroon. This law prescribes death penalty as a principal punishment in its section 22 and further makes provision for the various offences that attracts such a punishment. Examples include Capital Murder section 276, crimes against the external security of the state like Treason section 102 and espionage section 103, we also have crimes against the internal security of state like secession section 111 and civil war section 112.

Law No 2014/28 of 23 December 2014 on the Suppression of Acts of Terrorism.[2] This law was enacted in order to address the security issues caused by the activities of the Boko Haram terrorist group principally in the northern part of the country. The provision for the death penalty in several sections of this law shows the country's great will to fight against terrorism.

Cameroon's attachment to the death penalty can be said to be contradictory with its commitments to International Human Rights treaties which consecrates the right to life as a fundamental human right. It has ratified several International Human rights treaties which protect the right to life and to demonstrate the conviction with which Cameroon proceeded to this, the cardinal principles found in these international treaties are enshrined in the preamble of its Constitution, which provides that human being has inalienable and sacred rights.[3] It also proclaims the attachment of the people of Cameroon to the fundamental human rights inscribed in the Universal Declaration of Human Rights, the United Nations Charter, the African Charter on Human and Peoples' Rights and all other international conventions on human rights duly ratified. As per section 45 of the Constitution, ratified treaties and international agreements shall, following publication, override national laws provided the other parties implement the said treaties or agreements. Moreover, the preamble of the Constitution is an integral part of the Constitution as the last paragraph of the preamble provides that 'the state guarantees to all citizens the rights and liberties enunciated in the Preamble of the Constitution.' This is further upheld by Article 65 which provides that the preamble is an integral part of the Constitution. With all these commitments toward International Human Rights Law, Cameroon's position with respect to death penalty in its criminal law and most especially the 2014 Anti-Terrorism Law can be said to be conflicting. The legislators' intention to prescribe the death penalty for acts of terrorism may be premised on the fact that the offence is a serious violation to human rights. Whatever the intention of the legislators may be, the country's international commitment should be respected. This paper therefore examines Cameroon's anti-terrorism law in relation to

[2] See sections 2(d), 3(b), 4(b), and 5(1). Herein referred to as the 2014 Anti-Terrorism Law.

[3] Law No 2008/001 of 14 April 2008 to amend and supplement some provisions of Law No 96/06 of 18 January 1996 to amend the Constitution of 2 June 1972.

international human rights law. It makes as appraisal as to if death penalty can effectively serve as deterrence to acts of terrorism.

Understanding Terrorism under the 2014 Anti-Terrorism Law

The 2014 Anti-Terrorism law does not in any section provide a definition of what terrorism is all about. It simply makes provision for elements that would amount to acts of terrorism in its chapter II which is captioned 'Offences and Penalties'. In this regard, to know what terrorism is, resort can be made to doctrinal sources and international laws which try to define the term, given the fact that there is no universally acceptable definition.[4] The lack of a universally accepted definition has caused a lot of controversies thereby allowing different countries to adopt different meanings of the terrorism. The implication here is that the meaning of terrorism varies from country to country and how different groups of persons and entities perceive terrorist activities leading to some controversies.

Definition of Terrorism

The fact that the draftsmen of the 2014 Anti-Terrorism Law limited themselves to making provision for acts that would constitute terrorism is not enough. For the term to be better comprehended, they needed to start by bringing out, if not a generally acceptable definition, but at least a working definition, before proceeding to enumerating the various elements that would amount to terrorism. Terrorism has assumed an alarming dimension to the extent of becoming a household name both locally and internationally because of the incessant menace of terrorist activities.[5] In this respect, there is a need to examine some available definitions and look at the controversies attached to the lack of a universally accepted definition of the term.

Bryan Garner defines terrorism as the use or threat of violence to intimidate or cause panic especially as a means of affecting political

[4] Most international Scholars agree that there is no universally accepted definition for terrorism. See Blakesley, C. L. 2003. 'Ruminations on Terrorism and Anti-Terrorism'. 57 *University of Miami Law Review:* 1073. See also Scalabrino, M. 'Fighting Against International Terrorism: The Latin American Response'. in Bianchi, A. (ed.), *Enforcing International Law Norms Against Terrorism,* Oxford: Hart Publishing, 2004, 163-210, at163.

[5] Ogwo, B. 2012. 'Terrorism Act, 2011 and the Boko Haram Activities in Nigeria: An Appraisal'. *Benue State University Law Journal:* Vol. 4, No. 1, p. 137.

conduct.[6] It has also been defined as the use of bombs and violence, especially against ordinary people to try to force a government to do something.[7] Like the foregoing definitions which are very similar, Albert Sydney Hornby follows the same trend by defining terrorism as the use or threat of violence to intimidate or cause panic, especially as a means of effecting political change.[8]

The above definitions reflect the idea brought forth by the International Convention for the Suppression of Terrorist Bombings[9] which defines terrorism as: 'Any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature and context, is to intimidate a population, or to compel a government or any international organisation to do or to abstain from doing an act'.

This Convention was closely followed by the International Convention for the Suppression of the Financing of Terrorism[10], which requires nations to prevent and counteract the financing of terrorists and to prosecute individuals and organisations that provide any such finance. This convention re-enacts the definition of terrorism posited above.

Looking at the above definitions of terrorism, it can be notice that most terrorist activities involve the use of unlawful means to cause a situation of general fear in a particular state aimed at forcing or intimidating the state government to achieve their wishes or aspirations. In the majority of these cases, the aspirations concerned involve the satisfaction of political desires of the terrorists. Another important aspect about these definitions is that terrorists act against civilian populations or targets, as opposed to the presumably more legitimate target of state institutions.

The problem with the definitions by the above convention is that they are limited to terrorist acts that can be carried out during armed conflicts. This is because they do not contemplate situations

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[6] Bryan, A. G. 2009. *Black's Law Dictionary*, 9th Edition, (USA: West Group St. Paul Minn), p. 1611.
[7] Longman, 2005. *Active Study Dictionary*. 5th Edition, England: Pearson Education Limited, p. 925.
[8] Hornby, A.S. 2010. *Oxford Advance Learner's Dictionary of Current English*. 8th Edition, London: Oxford University Press, p. 1543.
[9] Adopted by General Assembly Resolution 52/164 of 15 December 1997, (1998) 37 ILM 249.
[10] Adopted by General Assembly Resolution 54/109, U.N.1999.

where terrorist acts can be perpetrated out of the context of armed conflicts. Today, most terrorist bombings are being carried out during peaceful periods. There is a global report of about 592 suicide attacks in 2014, a 94% increase, which caused the deaths of approximately 4,400 people compared to some 3,200 in 2013.[11] In the Middle East, for example, there were about 370 attacks with a death toll of about 2,750 in 2014, compared to 163 attacks in 2013 and a death toll of some 1,950.[12] Moreover, in Nigeria, the Boko Haram terrorist group has made use of suicide attacks. It carried out a suicide bombing at Maiduguri market by using a girl of about years old. This group has increasingly employed women as suicide bombers and has stepped up its activities by abducting girls across North East Nigeria, including the kidnapping of more than 200 of them in the town of Chibok in April 2014.[13] They had been a suicide attack in Yemen that targeted a mosque and killed more than 130 people[14]. Most of these attacks are perpetrated out of armed conflicts and these are circumstances that have not been contemplated by above mentioned conventions.

Controversies Caused by Lack of Universal Definition

The fact that there is no universally accepted definition of terrorism has led to different meanings being attributed to the term. This has led several states to adopt national laws and attribute different meanings within the framework of their national interests.[15] The most significant controversy results from the fact that some people view it as bad while others have a contrary view, giving rise to a statement like "one man's terrorist is another man's freedom fighter" which constitutes a serious obstacle to reaching a

[11] With regard to this see Yoram, S. Ariel, L. and Einav, Y. 2015. 'Suicide Attacks in 2014: The Global Picture'. The Institute for National Security Studies (INSS): Insight No. 653, January 6.

[12] Ibid. The countries involved are Iraq, Yemen, Lebanon, Afghanistan, Pakisatn and Syria.

[13] Adam Nossiter, In Nigeria, New Boko Haram Suicide Bomber Tactic: a Little Girl, The New York Times, 10 January, 2015.

[14] Mohammed Ali Kalfood, Kareem Fahim and Eric Schmitt, Suicide Attacks at Mosques in Yemen Kill More Than 130, The New York Times, March 20, 2015.

[15] Abitarin, O. and Ogwo, B. 2006. 'Assessing the Global War on Terrorism' in selected essays on War and Peace (Edoko, S.E ed) published by the Department of Public Law, Ambrose Ali University, Ekpoma, Edo State, Nigeria, 2006, p. 1.

universally accepted definition and hampers the efforts aimed at successfully dealing with terrorism.[16]

Terrorist organisations like Islamic State of Iraq and Syria (ISIS) which has been very active in Syria and Iraq, and Boko Haram which has been very active in Nigeria, Cameroon and Chad have been perceived by some people as bad and others as good. The ISIS is an Islamic Fundamentalist group considered by both the governments of Iraq and Syria for example, as terrorists and bad because of their modes of operations which targets civilian and governmental institutions leading to several deaths, massive destruction of property and displacement of large number of civilians. On the other hand, others perceive them as good and sympathise with their ideology that the world's Muslims should live under one Islamic state ruled by sharia law which will be an ideal state.[17] War and instability in Syria and Iraq have given the ISIS an opportunity to attempt to build a proto-state in the adjacent Sunni-majority areas of these two countries, before spreading further.[18] Just like ISIS, Boko Haram is also an Islamic fundamentalist group which opposes western education and has led several attacks against Christians in Northern Nigeria and has tried to control most of the region in order to form an Islamic State.[19] Those who align with their ideologies look upon them as fighting for their liberation and state-hood and thus their freedom fighters. What makes terrorists activities to be generally viewed as bad are their methods of operation which usually target unarmed civilian and leads to massive and unnecessary destruction of properties, causing general fear and insecurity.

[16] Ganor, B. Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter? September 24, 1998) Available at http//www.ict.org.il. (Referenced 25 February 2011).

[17] Dexter Filkins, The fight of their lives, the White House wants Kurds to save Iraq from the ISIS. The Kurds may be more interested in breaking away, The New Yorker. See also, Al Jazeera Blog, ISIS in pursuit of Legitimacy, 5th January, 2015. The Economist Digital Edition, What ISIS, an Al-Quaida affiliate in Syria, really wants, 20th January 2014.

[18] Ibid.

[19] Ogwo, B. 2012. 'Terrorism Act, 2011 and the Boko Haram Activities in Nigeria: An Appraisal', supra, p. 148-154. See also, Ilechukwu, L. C. 2014. 'Religious Terrorism (Boko Haram) and the Future of Education in Nigeria, *Research on Humanities and Social Sciences*: Vol.4, No.24, pp. 62-77.

Constituent Elements of the Offence of Terrorism under the 2014 Anti-Terrorism Law

In criminal law, for an offence to be consumed so as to engage criminal responsibility, there must be an act or omission which involve the commission of the offence (*actus reus*) and the intention of causing the result which completes it (*mens rea*). In this light, the 2014 Anti-Terrorism law in several sections makes provision for acts that would amount to terrorism and a special intention attached to them.

A. The Actus Reus of Terrorism under the 2014 Anti-Terrorism Law

This involves either acts or omissions directed against the human body and those leading to both material and environmental damages. It can also consist of conduct, its consequences and the circumstances under which the act was committed.[20]

a) Acts Directed against Physical Integrity

In protecting the physical integrity of Cameroonian citizens, the 2014 Anti-Terrorism law in its section 2(1) categorises as acts of terrorism, actions likely to cause death, endanger physical integrity and cause bodily injury. Acts likely to cause death might result to offences like murder and capital murder as provided for in sections 275 and 276 of the Cameroon's Penal Code.[21] Acts likely to endanger physical integrity and cause bodily injury may cover acts of grievous harm,[22] genital mutilation,[23] prevention of growth,[24]

[20] Ade Akwo, C. M. 2009. *A Text Book on Criminology and Penology*. Published by Gospel Press: Nkwen, Bamenda, First Edition, November. P. 178.

[21] The Cameroon's Penal Code is considered in the analysis of the 2014 Anti-Terrorism Law because its Chapter I on general provisions, Section I on Purpose and scope takes into consideration the provision of the Penal Code. In this respect, the Provision of the Penal Code promulgated by Law No 2016/007 of 12 July 2016 relating to the said law are considered in defining acts amounting to the offence of terrorism in the 2014 Law. This 2016 Law amends and supplements certain provisions of Law No 65-LF-24 of 12 November 1965 and Law No 67-LF-1 of 12 June 1967 on the Penal Code of Cameroon.

[22] Section 277 of Law No 216/007 of 2016 ibid.

[23] Ibid, Section 277-1.

[24] Ibid, Section 277-2.

torture,[25] assault occasioning death,[26] assault occasioning grievous harm,[27] simple harm[28] and slight harm.[29]

Torture is not an offence punishable per se. Unlike the other actions which endanger physical integrity, for an individual to be responsible as defined in sub 5 of Section 227-3 of the Penal Code, the acute pain or suffering inflicted on a person should be carried out by public servant, a traditional leader or any other person acting in the course of duties either at his own instigation or with his expressed or implied consent. The purpose should be to obtain confession from the victim or another, to punish him/her for an act that he/she or any other person has committed, or is presumed to have committed, to intimidate or overawe him/her or any other person, or for any other motive based on discrimination. This is in line with the definition of torture provided by the Convention against Torture and other Cruel Inhumane or Degrading Treatment or Punishment.[30] This position had been confirmed by the International Criminal Tribunal for former Yugoslavia in The *Prosecutor v. Anto Furndzija*[31] where the above-mentioned requirements were considered for torture to be established.

b) Acts Leading to Material Damage

The term material damage covers a wide spectrum of protected objects. According to Cameroonian criminal law, this refers to the destruction of properties belonging to both private individuals and the state. The Penal Code of Cameroon in several sections proscribes the destruction of public and private properties. With respect to this, it punishes damage to public and protected

[25] Ibid, Section 277-3.
[26] Ibid, Section 278.
[27] Ibid, Section 279.
[28] Ibid, Section 280.
[29] Ibid, Section 281.
[30] Adopted by UN General Assembly on the 10th of December 1984 and ratified by Cameroon on the 19th of December 1986. See Forsuh, F. F. 2010. 'Human Rights Protection in Cameroon: Stakes and Challenges'. A Dissertation Submitted in Partial Fulfilment for the Award of a 'Diplome D'Etude Approfomdie (DEA)' in Private Law', to the Department of English Private Law, University of Yaounde II SOA- Cameroon. pp. 38-39.
[31] Case No. IT-95-17/1-A, 21 July 2000 (App. Ch), Para 111. Referred to as The Furundzija. For more information see Forsuh, F. F. 2016. 'The International Criminal Court and War Crimes: A critical Appraisal', A Thesis Submitted in Fulfilment for the Award of a PhD in Law to Department of English Private Law, University of Yaounde II SOA- Cameroon, pp. 33-35.

property,[32] removal and destruction of public records,[33] and arson and destruction[34]. To further enhance the protection of private property, the Penal Code dedicates a Chapter to this effect.[35] In this light, it proscribes the destruction of property belonging in part or in whole to a person in Section 316. It also prohibits the destruction of boundary marks[36] and rented premises.[37]

c) Attack on the Environment and Cultural Heritage

An attack on the environment will obviously have a negative effect on natural resources. It is an act which is equally proscribed as an act of terrorism by the 2014 Anti-Terrorism law in section 2(1). In recent years, there have been growing understanding of the widespread and long-term effects of certain weapons or methods of combat on the ecosystem, as well as growing awareness of the value of environmental considerations. Today, most states agree that a balance be struck between military and humanitarian considerations and account be taken of the potential for damage to the environment that is not immediately apparent.[38] The legal consideration consistent with present day customary law is that, when an attack is launched, environmental considerations should play a vital role in the targeting process.[39] This is reflected in the prohibition of attacks that may cause widespread, severe and long-term damage to the natural environment and in the requirement that any environmental damage, especially long term damage, should be factored into proportionality calculations. In this sense, any attack whose damage to the environment is excessive to the military advantage anticipated should be called off. Since terrorist do not follow conventional rules of war, they tend to apply any means to

[32] Section 187 of the Law No. 2012/007 of 12 July 2016 relating to the Penal Code Supra.
[33] Ibid, Sections 188, 188-1 and 188-2.
[34] Ibid, Section 227.
[35] Ibid, Chapter IV Captioned 'Property' A- Destruction.
[36] Ibid, Section 317.
[37] Ibid, Section 322-2.
[38] There is extensive State practice indicating the need to protect the environment during armed conflict, which is expressed in terms that are not limited to the specific prohibitions contained in the laws of war. See for example Principle 24 of the Rio Declaration on Environment and Development (annexed to Report of the United Nations Conference on Environment and Development of 12 August 1992, UN Doc. A/CONF.151/26 (Vol. I)
[39] Dinstein, Y. 2004. *The Conduct of Hostilities Under the Law of International Armed Conflicts*. Cambridge: Cambridge University Press. P. 177.

achieve their objective which might lead to environmental hazards. Taking from the provision of section 229-1 of the Cameroon Penal code and in line with the objective of the 2014 Anti-Terrorism law, any person making use of toxic waste to carry out acts of terrorism can as well be charged for the said offence.

Cultural heritage for the purpose of the 2014 Law and in line with the Penal Code[40] include both movables and immovables of historic, artistic, philosophical, scientific, technical and touristic value that makes them worthy of preservation as such. The 2014 law proscribes as act of terrorism any action or attack directed against these objects that would undermine their purpose and existence.

d) Use of War Weapons and other Toxic Weapons

War weapons for the purpose of the 2014 Anti-Terrorism Law[41] and the Penal Code include both normal armed property and any other article carried with the intent to inflict bodily harm or material damage.[42] Other toxic weapons on the other hand refer to destructive elements created with the use of micro-organism, any biological agent[43] and making use of chemical, psychotropic radioactive or hypnotizing substances.[44] These may also include poison or poisoned weapons, asphyxiating and poisonous or other gases. Opposed to the former, these are weapons likely to cause superfluous injuries, unnecessary sufferings and wide spread effects on the natural environment. International law seriously prohibits the development, production and stockpiling of any of such weapons. Examples include Biological Weapons Convention,[45] the Chemical

[40] Section 187-1 of the Penal Code, Op. Cit.
[41] Section 2(2)(a).
[42] Section 117 of the Penal Code, Op cit.
[43] Section 2(2)(b) of the 2014 Anti-Terrorism Law.
[44] Ibid, Section (2)(2)(c).
[45] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction opened for signature 10 April 1972, (entered into force 26 March 1975) ('Biological Weapons Convention').

Weapons Convention,[46] and the Ottawa Convention, which prohibits anti-personnel landmine.[47]

e) Hostage Taking

Hostage taking is prohibited as a terrorist act in Section 2(2)(d) of the 2014 Anti-Terrorism Law. It can be defined as the seizing or detention of an individual(s) coupled with a threat to kill, injure or continue to detain such individual(s) in order to compel a third person or governmental organisation to take some actions. This follows the definition in Article 1 of the International Convention against Hostage Taking of 1979 and it is considered as an unlawful detention. It can be considered lawful in certain circumstances, notably when it is necessary to protect civilians or for security reasons. But the 2014 law punishes such acts only when it is unlawful as defined by the 1979 International Convention against Hostage Taking which according to the said law amounts to acts of terrorism.

f) Financing of Acts of Terrorism

This refers to activities that provide financing or financial support to individual terrorists or terrorist groups. This may involve funds from legitimate sources such as personal donation, profits from business and charitable organisations as well sponsorships from states.[48] Such funds could also be raised from illegitimate sources like kidnapping for ransom, smuggling of weapons, drug trafficking, fraud, extortion and other criminal sources.[49] The international community had designed the International Convention for the Suppression of the Financing of Terrorism to criminalise the financing of terrorism.[50] In criminalising same, the 2014 Anti-Terrorism Law in Section 3 goes further to make the prohibition

[46] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, opened for signature 13 January 1993, (entered into force 29 April 1997) ('Chemical Weapons Convention').

[47] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, opened for signature 18 September 1997, (entered into force 1 March 1999) ('Ottawa Convention').

[48] National Terrorist Financing Risk Assessment, 2015. Pp. 16-17.

[49] Ibid, pp. 14-16. See also

[50] Article 2(1). Cameroon is party to this Convention by accession and it acceded to it on the 6th of February 2006. United Nations Treaty Collection, Status at 13-01-2017. See, Financial Transaction and Report Analysis Centre Canada, 2012. Available at www.fintrac-canafe.gc. (Referenced 09 January 2017).

stronger by providing that the act of financing terrorism would be deemed as consumed even when the funds or materials destined for terrorism have not been effectively used to commit the offence.[51] In this light, this law punishes attempts to commit acts of financing terrorism just like the Penal Code which punishes same in Section 94. Moreover, according to the 2014 law, the act of financing terrorism would be deemed to have been committed when goods, materials and services collected in Cameroon to promote the course of terrorism are offered on the territory of another state for the same course.[52]

g) Laundering of Proceeds of Terrorism

This can involve transferring illegally obtained proceeds or money through legitimate channels or accounts so that its original source cannot be traced.[53] It is a process used to disguise the source of money or assets derived from criminal activity. This illegal activity can include drug trafficking, smuggling, fraud, extortion, corruption and terrorist activities. The scope of criminal proceeds is significant. The International Monetary Fund (IMF) estimated that some $500 billion (U.S.) is laundered worldwide each year.[54] In insuring a serious fight against this, the 2014 law in its Section 4(a) and (b) punishes those who take part in the laundering process and those who partake in the sharing of the proceeds, even occasionally. The laundering of money and other proceeds occurs worldwide, and the techniques used are numerous and can be very sophisticated. Technological advancements in e-commerce, the global diversification of financial markets and new financial products provide further opportunities to launder money and obscure the trail leading back to the underlying crime.[55]

h) Recruitment and Training for Terrorist Activities

Recruitment is the act of getting recruits or enlisting people for an army or any other cause. Terrorists are adaptive adversaries who use a variety of tools and tactics to reach potential recruits and supporters. They make use of mostly youths in their squads and

[51] Section 3(2) of the 2014 law.
[52] Ibid, section 3(3).
[53] Bryan, A. G. 2009. *Black's Law Dictionary,* 9th Edition, (USA: West Group St. Paul Minn), p. 1097.
[54] Financial Transaction and Report Analysis Centre Canada, 2012. Op cit.
[55] Ibid.

there is increasing evidence that terrorist organisations are drawing school-age youths into their ranks all around the world.[56] Youths have helped to fill the ranks of militaries, militias, gangs, and terrorist groups. Young persons' roles within these organisations have varied, from providing logistical support, serving as "lookouts" or "mules," raising funds, taking part in battles, or carrying out attacks. The 2014 law proscribes this by punishing any person who recruits and train people for acts of terrorism to be committed around the world.[57]

The process by which members become involved in these groups also varies, with some being cajoled with gifts into joining, others being coerced and some voluntarily join. Some are victims of raids and are captives while some are born into radical environments that promote violence. The 2014 law further punishes any individual(s) who either by promising benefits or presenting gifts and using force causes another to be part of a terrorist group.[58] It goes further to prohibit any act of voluntary involvement in any group of same nature.[59] Moreover, by this law, the act of recruitment would have been committed even when urging someone to be part of a terrorist group fails to materialise. Boko Haram uses both voluntary and coercive strategies for recruitment. Fighters joining voluntarily may be motivated for ideological and religious reasons, but may also join due to past victimization by the Nigerian military, which has been accused of human rights violations in the fight

[56] Preliminary research found evidence that at least 23 of the 42 currently active groups designated by the U.S. Department of State as Foreign Terrorist Organisations utilize school-aged youth in some capacity. These groups, with differing goals and motivations, are located in a variety of countries and regions throughout the world to include Turkey, Iraq, Iran, Nepal, Afghanistan, Pakistan, Thailand, Palestine, Lebanon, Colombia, Somalia, Philippines, Japan, Sri Lanka, Peru, Bosnia, North Africa, and Western Europe. Some terrorist groups involved in such recruitment and training include Hamas, Hizbollah, Jemaah Islamiyah (JI), Al-Qaida and affiliated groups (primarily includes those active in Afghanistan, Pakistan, Iraq, and the United Kingdom), Al-Qaida in the Islamic Maghreb (AQIM0), Euskadi Ta Askatasuna (ETA), Al-Shabab. See Homeland Security Institute (HSI), "Recruitment and Radicalisation of School-Aged Youths by International Terrorist Groups", Final Report, April, 23rd, 2009. HSI Publication Number: RPo8-37-01. P. 1. See also National Counter-Terrorism Center (NCTC), Hearing before the Senate Homeland Security Committee, Violent Extremism: Al-Shabaab Recruitment in America, 11 March 2009.

[57] Section 5(1)

[58] Section 5(2)(a)(b)

[59] Ibid, section 5(3).

against the sect.[60] Boko Haram also reportedly uses monetary incentives to attract recruits.[61] For example, gang members in Diffa, Niger (across the border from Borno State) reported that Boko Haram was regularly recruiting youth using financial incentives.[62] It also, in its raids against towns and villages, has routinely kidnapped individuals who are later forced to fight or otherwise provide support to the group.[63]

i) Interruption of the Offence or its Effects

Interruption of offence according to the 2014 law refers to stopping the effect of the offence. In this respect, section 7 punishes whoever conceives any offence related to acts of terrorism. In this case, the principal offender or an accomplice who can either be a co-offender[64] and an accessory[65] that stops the effects of acts of terrorism would still be punished. This is because the offence as conceived by the parties was already in execution showing a manifest intention to commit and should be punished in spite of the fact that the objective has not been attained. This goes in the same line of reasoning with the penal code which punishes attempts in section 94.

[60] Civil society representative engaged in democracy and development. Interviewed by Amy Pate, Bukola Ademola-Adelehin, and Kop'ep Dabugat. August 14, 2014. Abuja, Nigeria; Academic. Interviewed by Chris Kwaja. August 19, 2014. Jos, Nigeria. Cited from Pate, Amy. 2014. 'Boko Haram: An Assessment of Strengths, Vulnerabilities, and Policy Options'. Report to the Strategic Multilayer Assessm
ent Office, Department of Defense, and the Office of University Programs, Department of Homeland Security. College Park MD: START, January 20. P. 16, foot note 134.

[61] Academic Interviewed by Amy Pate and Bukola Ademola-Adelehin. August 13, 2014. Abuja, Nigeria; Civil society representative engaged in democracy and development. Interviewed by Amy Pate, Bukola Ademola-Adelehin, and Kop'ep Dabugat. August 14, 2014. Abuja, Nigeria; Academic. Interviewed by Chris Kwaja. August 19, 2014. Jos, Nigeria. Cited from START Ibid.

[62] Fessy, Thomas. 2014. 'Niger Hit by Nigeria's Boko Haram Fallout'. BBC News Africa, April 22.
http://www.bbc.com/news/world-africa-27111884. (Referenced 8 January 2017).

[63] START, Op Cit, p. 17.

[64] Section 96 of the Penal Code.

[65] Ibid, Section 97.

j) Acclamation of Acts of Terrorism

This is a mode of committing acts of terrorism which does not require direct involvement in the commission of the act. It involves acts of loudly showing approval or praise to acts amounting to terrorism. This can be done through various medium including public media like television and radio channels, the social media and other means of outreach to the general public. Such acts are prohibited by the 2014 Anti-Terrorism Law in Section 8 as acts of terrorism. It involves some sort of public justification for such acts and like the 2014 law, the Penal Code in Section 267 prohibits acts of publicly justifying criminal offences.[66] This is because such acts might accord psychological support and encouragement to those involved in acts of terrorism, thereby making them to see no evil in their activities.

k) False Statement or Defamatory Report

This does not refer to defamatory reports in the sense of statements that damage the reputation of a person in the estimation of right-thinking members of the society. By Section 9 of the 2014 Anti-Terrorism Law, this refers to false statements made to the administration or judiciary with the intention to interrupt the prosecution of individuals charged with committing acts of terrorism. Such statements could be seen in the light of accessory after the fact in Section 100 of the Penal Code involving acts aimed at sheltering an offender or his accessory from criminal investigations.

B. The Mens Rea (Intention) of Terrorism

Mens rea is the mental element or the guilty mind which refers to the offender's state of mind at the time he/she committed the offence.[67] It is also known as the criminal intent. In criminal law, for an individual to be criminally responsible, he/she must have committed the acts amounting to an offence with the intention to achieve its results as clearly stated in section 74(2) of the Cameroon Penal Code. This therefore implies that as far as terrorism is concerned, criminal responsibility shall lie upon he/she who

[66] The offences involved include felonies of murder, depredation, arson, destruction or felonious theft, or any felony or misdemeanour against the security of the state.
[67] Ade Akwo, C. M. 2009. *A Text Book on Criminology and Penology*. Published by Gospel Press: Nkwen, Bamenda, First Edition, November. P. 178.

commits the above discussed acts of terrorism with the intention to achieve specific results that accompany it.

The intention required for an individual to be responsible for committing acts of terrorism is not the same as under general principles of criminal law. This is because it requires specific intention which generally is to compel a public or a prominent private authority including international organisations to take, or refrain from taking, an action.[68] This is clearly provided for in Section 2(1)(a)-(c) of the 2014 Anti-Terrorism Law. Therefore, an individual will be criminally responsible for acts of terrorism when he/she wilfully commits the above discussed elements with the intention of:

- intimidating the public, provoke a situation of terror or force the victim, the government and/or a national or international organisation to carry out or refrain from carrying out an act, adopt or renounce a particular position;
- disrupt the normal functioning of public services, the delivery of essential services to the public or create a crises situation among the public; and
- create widespread insurrection in the country.

From the foregoing discussions, there would be no offence of terrorism when the *actus reus* and the *mens* rea are absent. For an individual(s) to be responsible for the said offence, both elements must be proven beyond reasonable doubt.[69] When this is established by the prosecution, the next aspect is the appropriate punishment.

International Human Rights Standards for the Use of Death Penalty and the 2014 Anti-Terrorism Law

Several International Human Rights Instruments prohibit the use of capital punishment or encourage its abolition and/or limit its application. The question to answer here is whether the availability of death penalty in Cameroon's 2014 Anti-Terrorism Law conflicts with International Human Rights Law or not. Just like

[68] Cassese, A. 2006. 'The Multifaceted Criminal Notion of Terrorism in International Law', *4 Journal of International Criminal Justice*: p. 940.

[69] Law Number 2005/007 of 27 July 2005 instituting the Criminal Procedure Code of Cameroon. Section 8 provides that all accused must be presumed innocent before proven guilty and proof must be beyond reasonable doubt.

the penal code which categorises death penalty as principal,[70] the same can be categorised in the 2014 law as a major principal penalty among others.[71] This is because this law lays emphasis on this penalty by making provision for it in several sections with respect to different acts qualified as acts of terrorism.[72] The availability of death penalty in this law conflicts with international law which to a greater extend limits and prohibit both its availability and applicability.

1. Prohibition and Limitation of Death Penalty for Terrorism Related Crimes by International Human Rights Law

Since 1963, a number of United Nations (UN) terrorism-related conventions and protocols[73] have been adopted which oblige states to criminalise certain acts.[74] However, none of them require or even mention the imposition of the death penalty as a punishment. The UN legal infrastructure emphatically does not require the imposition of the death penalty and the guidance issued by the United Nations Office on Drugs and Crime (UNODC) insists that counter-terrorism measures be based on human rights standards.[75]

The 1948 Universal Declaration of Human Rights in Article 3 guarantees the right to life, while Article 5 categorically states that:

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[70] Section 18 Law No 65-LF-24 of 12 November 1965 and Law No 67-LF-1 of 12 June 1967 amended by Law No 2016/007 of 12 July 2016 relating to the Penal Code of Cameroon. Supra.

[71] Other principal penalties like imprisonment and fine.

[72] Examples included Section 2(1), Section 2(2)(d), Section 3(1)(b), Section 4(b) and Section 5(1).

[73] Examples include 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; 1997 International Convention for the Suppression of Terrorist Bombings; 1999 International Convention for the Suppression of the Financing of Terrorism.

[74] United Nations Office on Drugs and Crime, Legislative Guide to the Universal Legal Regime Against Terrorism, 2008, page 5 available at: http://www.unodc.org/documents/terrorism/LegislativeGuide2008.pdf. (Referenced 28 November 2016.

[75] UN General Assembly, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 9 August 2012, A/67/279, page 5 available at http://www.refworld.org/docid/509a69752.html. (Referenced 28 March 2016).

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". These human rights breaches may occur in the period following sentencing and before execution. Moreover, the various methods of execution have also been identified as unacceptable at international law. The Human Rights Committee has deemed the use of the gas chamber to constitute cruel, inhuman and degrading treatment.[76] The committee has also found that all forms of public execution[77] incompatible with human dignity as some of them subject the victim to prolonged suffering before death.[78]

A key but controversial protection against the use of the death penalty for counter-terrorism is found in Article 6(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR) which demands that for countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes. In accordance with opinions of the Human Rights Committee, this term has been interpreted to mean that the death penalty should only be applied to the crime of intentional killing.[79] The same position has been taken by the Special Rapporteur on extrajudicial, summary or arbitrary executions (UNSR Executions) that death penalty should be limited in cases where it can be shown that there was an intention to kill, which resulted in the loss of life.[80] Moreover, in 2013, the UN Secretary General confirmed the international position that the death penalty should only be used for 'the most serious' crimes of 'murder and or intentional killing'.[81]

This international position can be put to test when reference is made to crimes like genocide, crimes against humanity, war crimes

[76] Louise Arbour, In the Matter of Sentencing of Taha Yassin Ramadan, Application for Leave to Intervene as Amicus Curiae and Application in Intervention of Amicus Curiae of United Nations High Commissioner for Human Rights (Iraqi Tribunal: 8 February 2007)

[77] They can take the forms of firing squad, hanging, stoning etc.

[78] Schabas, A. W. 2002. *The Abolition of the Death Penalty in International Law*. Third Edition: Cambridge University Press, p. 376.

[79] Human Rights Committee, General Comment No. 6: Article 6 (Right to life), Sixteenth session (1982), paras 6-7.

[80] UN Human Rights Council, 5th Session, Civil and Political Rights, including the Questions of Disappearances and Summary Executions: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 29 January 2007, A/HRC/4/20.

[81] UN Human Rights Council, 24th Session, Question of the death penalty: Report of the Secretary-General (Secretary-General's report), 1 July 2013, A/HRC/24/18.

and aggression[82] which unlike terrorism, have been qualified as international crimes and can produce the same or more negative effect, but death penalty has not been prescribed as punishment for them.[83] It has been argued that the exclusion of the death penalty by the international courts for the most heinous crimes imaginable suggests that there is now no crime serious enough to warrant the death penalty.[84] Evolving customary norm is reflected by the sentences used by international tribunals. The International Criminal Court (ICC) has prosecuted some of the aforementioned international crimes but the international community did not permit these offences to receive the death penalty in any circumstances. This decision follows a line of jurisprudence in international criminal law that has seen the death penalty increasingly excluded as a punishment. The international criminal tribunals, for genocide and crimes against humanity committed in Rwanda, the former Yugoslavia, Sierra Leone and Lebanon, do not include the death penalty as a potential punishment. When tribunals have sought to reach completion of their duties and transfer cases to national courts as in the former Yugoslavia and Rwanda, they have done so on the condition that the national courts do not impose the death penalty. Though these decisions to preclude the death penalty were not intended to bind national courts more generally, international criminal law has proven to be influential at a national level. For example, Rwanda has gone on to abolish the death penalty altogether,[85] while it is legal in Cameroon.

Contradicting the introduction of death penalty in national legislations of several countries like the case of Cameroon's 2014 Anti-Terrorism Law, the Counter-Terrorism Implementation Task Force (CTITF) of the Office of the High Commissioner for Human

[82] See the Rome Statute of 1998 Articles 6, 7, 8 and 8 *bis*. See also the Charter of the International Criminal Tribunal for former Yugoslavia 1993, Articles 4, 5. 2 and 3, the Charter of the International Criminal tribunal for Rwanda 1994, Articles 2, 3 and 4.

[83] The highest punishment is imprisonment which according to Article 77(1) of the Rome Statute of 1998 should not exceed a maximum of 30 years.

[84] Eric, P.2004. *The Death Penalty versus Human Rights' in Death Penalty: Beyond Abolition*. Council of Europe Publishing: Strasbourg, p. 2.

[85] Amnesty International, 'Rwanda abolishes the death penalty', Amnesty International website, 2 August 2007. Available at http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802. (Referenced 24 February 2015).

Rights (OHCHR) produced a reference guide in 2014.[86] According to this guide, the reintroduction of death penalty for crimes of terrorism would be considered as contrary to the spirit of the ICCPR and to the repeated calls by the General Assembly for all States that still maintain the death penalty to progressively restrict the use of the thereof. States are called upon to reduce the number of offences for which it may be imposed, to establish a moratorium on executions with a view to abolishing the death penalty, and for those States which have abolished the death penalty, not to reintroduce it. Moreover, the Human Rights, Terrorism and Counter-terrorism Factsheet of the OHCHR, stresses on how international and regional human rights law, makes the protection against arbitrary deprivation of life non-derogable even in a state of emergency threatening the life of the nation and thus even in the context of countering terrorism.[87]

2. Due Process and Fair Trial Standards

With the limitation placed on the availability and applicability of death penalty by International Human Rights law, if an individual is to face this capital punishment, he/she is entitled to the right to fair trial and due process of the law. This right is not expressly provided for in the 2014 Anti-Terrorism Law, but it makes reference to the application of the Criminal Procedure Code (CPC)[88] which is a piece of legislation that guarantees the aforementioned rights. This Code is very elaborate as far as access to justice and fair trial are concerned. It lays down the rights and duties of all stakeholders of the criminal trial and is the barometer par excellence to guarantee the protection of the rights of individuals charged with a criminal offence.[89] Like the CPC the right to a fair trial and due process of

[86] Basic Human Rights Reference Guide: Conformity of National Counter-Terrorism Legislation with International Human Rights Law, produced by the Counter-Terrorism Implementation Task Force (CTITF), OHCHR, October 2014.
[87] Human Rights, Terrorism and Counter-terrorism Factsheet, Fact Sheet No 32, OHCHR.
[88] Instituted by Law No 2005/007 of 27 July 2005. The 2014 law makes provision for the application of the Criminal Procedure Code in its Section 1(2).
[89] The CPC protects human rights of an accused person during arrest in its sections 30-37. Section 8 provides that all accused must be presumed innocent before proven guilty and proof must be beyond all reasonable doubt[89]. Section 436 of the CPC enables every person who is not satisfied with any judgment delivered by the High Court and in Courts of First Instance, including Military Tribunals to lodge

the law is guaranteed in a number of International Human Rights Instruments.[90] The UN Human Rights Committee has stated that the right to a fair trial underpins non-derogable rights, such as the right to life, and thus cannot be diminished where this would circumvent the protection of these non-derogable rights.[91]

In Cameroon, the right to fair trial is guaranteed by the Constitution in its preamble by providing that every defendant is presumed innocent until found guilty during a court hearing conducted in strict compliance with the right to defence. Article 8(1) and (2) of Ordinance No 2006/015 of 29 December 2006[92] on judicial organisation specifies that justice is free except for financial provisions relating to stamps and registration.[93] Article 5 of Decree No 95/048 of 8 March 1995, amended by Decree No 2004/080 of 13 April 2004 on the status of magistrates, establish the independence and impartiality of courts and magistrates thereby providing for judicial independence which is indispensable for any judicial system, which strives to safeguard the right to fair trial.

In spite of the availability of the right to fair trial both by international human rights and local laws, there are several obstacles hindering its effectiveness. The judiciary which is supposed to be independent remains subject to executive influence, is corrupt and inefficient. The Constitution names the president as the first magistrate, thus, the chief of the judiciary and the theoretical arbiter of any sanction against the judiciary. The president also appoints judges[94] with the advice of the Higher Judicial council. This provides the executive with powers to influence the judiciary since

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an appeal. This is just to cite a few because, the CPC contains several provisions protecting the human rights of accused persons to ensure their rights to a fair trial.

[90] These rights are guaranteed in Article 14 of the ICCPR, Article 6 of the European Convention on Human Rights, Article 8 of the American Convention on Human Rights, Article 7 of the African Charter on Human and Peoples', Article 13 of the Revised Arab Charter on Human Rights as well as in the Rome Statute and Common Article 3(1)(d) of the Geneva Conventions. Certain aspects of the right hold the status of customary international law.

[91] Human Rights Council, 14th Session, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 20 May 2010, A/HRC/14/24, para. 51(a).

[92] Ordinance No 2006/015 of 29 December 2006 amended and repeals provisions of Ordinance No 72/4 of 26 August 1972.

[93] Law No 2011/027 of 14 December 2011 amends and supplements certain provisions of Law No 2006 ibid, but the above-mentioned provision has not been affected by the revision.

[94] Section 37 of Law No 2008/001 of 14 April 2008 to amend and supplement some provisions of Law No 96/06 of 18 January 1996.

judges appointed by the President might serve according to his whims and caprices. The judiciary has shown modest signs of growing independence. For instance, in September 2008, the Supreme Court nullified six municipal elections conducted in November 2007, involving some senior Cameroon People Democratic Movement (CPDM) officials[95] .

There have been serious violations of the Criminal Procedure Code (CPC) especially in trials. Lawyers and human rights organisations observed several violations of the CPC as regards government's responses to the February 2008 unrest. For example, some detainees in police or gendarmerie cells did not receive medical assistance or access to an attorney. Judges tried persons in masses, while the law provides for individual trials, which must be fair, in front of an independent and impartial tribunal. An example of mass trial with terrorism-related prosecutions is the situation in Egypt where mass trial conducted did not establish the individual responsibility of each presumed terrorist. According to Amnesty International, in 2015, at least 3,000 civilians stood trial before unfair military courts on terrorism and other charges alleging political violence. Many, including leaders of the Muslim Brotherhood, were tried in mass trials. Moreover, military trials of civilians are fundamentally unfair and courts handed down hundreds of death sentences on defendants convicted on terrorism.[96] In Cameroon, there is a record of 89 presumed members of Boko Haram who were sentenced to death under the 2014 Anti-Terrorism Law by a military tribunal in 2015.[97] In Chad, the trial of ten suspected Boko Haram members was expeditious and violated their right to effective representation. Three legal aid lawyers were assigned to them on the eve of the trial and they were not able to meet even once with their clients in order to prepare their defence.[98]

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[95] Amnesty International Report, Cameroon: Impunity Underpins persistent abuse, AI Index: AFR 17/001/2009.

[96] Amnesty International, Annual Report 2015/2016, Egypt, available at https://www.amnesty.org/en/countries/middle-east-and-north-africa/egypt/report-egypt/. Cited from World Coalition Against Death Penalty, 'The Death Penalty for Terrorism', Detailed Fact Sheet, 14th World Day Against the Death Penalty, (Referenced 10 November 2016). P. 13.

[97] Amnesty International, Death Sentences and Executions in 2015, ACT 50/001/2016, p. 16, 6 April 2016, cited from World Coalition Against Death Penalty, ibid, p. 5.

[98] World Coalition Against Death Penalty, ibid, p. 13.

Trials in terrorism-related cases often fall well below standards of due process.[99] The United Nations Special Rapporteur (UNSR) on Counter-terrorism has repeatedly noted over a number of years, the fair trial shortcomings in terrorism-related cases. He has emphasised, with some force, that any authority looking forward to use the death penalty for terrorist crimes is obliged to ensure that full fair trial rights under Article 14 of the ICCPR are guaranteed, both during the trial and for all stages preceding and succeeding the trial.[100] The UNSR expressed particular concern about cases where the executive has a broad discretion in referring suspects to military or special courts and where the executive holds the ultimate power to review the decisions of those courts.[101] The Rapporteur suggested that such courts are characterised by lower fair trial guarantees, inadequate access to counsel, intrusion into the attorney-client confidentiality and strict limitations on the right to bail and appeal as well as the use of extra-legal practices to obtain evidence. The UN Working Group on Arbitrary Detention has concluded that military justice systems should be prohibited from imposing the death penalty under all circumstances.[102] This prohibition can also be said to be directed to Cameroon wherein the 2014 law provides in Section 1(3) that the competent court to try terrorism related cases are the military tribunals. Ensuring full adherence with fair trial rights is absolutely necessary where the potential punishment is death as provided for in the 2014 Anti-Terrorism law. However, even fair trials can produce wrong outcomes, meaning that the only sure way to prevent an innocent person being put to death is to remove the death penalty as an option for punishment and adopt other punishments like imprisonment, fines and other accessory penalties for natural persons.[103]

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[99] United Nations Counter-Terrorism Implementation Task Force, 'Right to a Fair Trial', available at http://www.un.org/en/terrorism/ctitf/proj_righttotrial.shtml. (Referenced 25 February 2016).

[100] UN General Assembly, 63rd Session, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 6 August 2008, A/63/223.

[101] Ibid.

[102] Commission on Human Rights, 55th Session, Report of the Working Group on Arbitrary Detention, 18 December 1998, E/CN.4/1999/63, para. 80. See also Commission on Human Rights, 55th Session, Report of the Working Group on Arbitrary Detention: Mission to Peru, 11 January 1999, E/CN.4/1999/63/Add.2.

[103] Accessory penalties for natural persons like those provided for in Section 19(a) of the Penal Code including forfeiture, publication of the judgment, closure of

Limited Deterrent Effect of Death Penalty on Terrorism

The reason behind the re-introduction of death penalty in the 2014 Anti-Terrorism Law by the Cameroonian legislators might be attributed to the country's great will to sanction and deter the commission of acts of terrorism. Death penalty among others[104] has erroneously been considered as the most effective element to deter grievous crimes like murder and acts of terrorism. Since the introduction of capital punishment in the above-mentioned law, about 89 presumed members of Boko Haram have been sentenced to death in 2015, but no executions were recorded.[105] In spite of this, the insecurity posed by the sect has continued with several attacks in the Northern part of the country. There have been several suicide attacks in many localities of the Grand North. One of such attacks was recorded in the early morning of 31st January 2017 when a suicide bomber hit the Far North region killing about four people.[106] There are records of many of such attacks perpetrated the said group which has led loss both military and civilian lives, including destruction of properties.

Like Cameroon, the Iraqi government enacted its anti-terrorism law in 2005[107] and instituted the death penalty because of the country's extraordinary security situation and to serve as deterrent to acts of terrorism.[108] This view according to which the death penalty is a deterrent to violence, including terrorism, appears not to be valid given the deteriorating security situation over the past years. Since the re-introduction of the death penalty in 2005, Iraq has faced a significant increase in armed insurgency, terrorist violence and a concomitant surge in civilian casualties. United Nations Assistance Mission for Iraq (UNAMI) estimates that in 2006, over 16,000 Iraqi civilians were killed with countless others injured; while in 2007 it was not possible to maintain verifiable casualty figures owing to the extent of the violence and the numbers

establishment and confiscation. Section 14 of the 2014 Law makes provision for the use of the aforementioned penalties.

[104] Imprisonment, fines and other accessory punishments.

[105] Amnesty International, Death Sentences and Executions in 2015, ACT 50/001/2016, 6 April 2016, p. 16.

[106] Canal 2 English, 8 P.M News, 31st of January 2017.

[107] Anti-Terrorism Law No.13 of 2005.

[108] United Nations Assistance Mission for Iraq and Office of the High Commissioner for Human Rights (UNAMI/OHCHR), Report on the Death Penalty in Iraq, Baghdad October 2014. P. 28.

of casualties that resulted.[109] Some sources estimate that possibly more than 30,000 Iraqi civilians were killed during that year through insurgent and terrorist violence.[110] Between 2009 and 2014, a period during which a significantly higher number of executions were carried out, the level of armed insurgent and terrorist violence has markedly increased. In 2013, the highest number of executions since 2005 was registered in parallel with the largest number of civilian casualties since 2008.[111] In most cases, those engaged in committing acts of terrorism are motivated by extremist ideologies and are prepared to die to achieve their objectives, which cause them not view the death penalty as a deterrent.

In the same light, Nigeria on her part enacted the anti-terrorism law in 2011[112] to address the security threats posed by Boko Haram and other terrorist activities. Like Cameroon and Iraq, Nigeria adopted the death penalty to deter the commission of acts of terrorism. In spite of this, the country has since the adoption of this law witnessed several terrorists' attacks especially from the Boko Haram.

The above examples demonstrate that capital punishment does not effectively serve as deterrence to the commission of acts of terrorism. In the resolution adopted by the Human Rights Council on the High-level panel discussion on the question of the death penalty held at the Human Rights Council at its 30th session, several delegates observed that capital punishment did not serve any deterrent purpose in combating terrorism. They also deplored that some States expanded the use of the death penalty for crimes relating to terrorism. Expressing deep concern about atrocities committed by the Islamic State in Iraq and the Levant (ISIL) or by other terrorist groups in different parts of the world, they emphasised that all efforts must be made to counter terrorism and hold perpetrators accountable, but any measures to counter those threats needed to be consistent with the common values of justice and human rights. It was also mentioned that death penalty clearly

[109] Ibid.
[110] Ibid.
[111] UN casualty figures for December, 2013 deadliest since 2008 in Iraq, 2 January 2014, available at http://www.uniraq.org/index.php?option=com_k2&view=item&id=1499:un-casualty-figures-for-december-2013-deadliest-since-2008-in-iraq&Itemid=633&lang=en. (Referenced 12 March 2015).
[112] Terrorism Act, 2011.

did not deter persons from committing terrorist acts as being executed transformed them into martyrs.[113]

In the light of the above discussions and taking examples from the availability and application of the death penalty for the offence of murder in the United States of America, it has been proven that capital punishment does not effectively deter the commission of murder, like the case of terrorism. In the USA, murder has been more common in states with capital punishment than in those without it. Data from of 1973 to 1984 show that murder rates in states without death penalty were consistently lower and average only by 63% of the corresponding rates in states retaining it.[114] An experiment on the effects of abolition of death penalty on the commission of murder was carried out and the result showed that the deterrent effect of capital penalty in states which have not abolished it was not higher than in states which have abolished it.[115] Moreover, there are cases where the death penalty has been a cause of homicide rather than deter it. In a medical paper, Dr. Louis West described what he calls "attempting suicide by homicide".[116] In this case a person kills in order to court death by execution. Others have also documented examples of killing to invite execution. Clinton Duffy, the former warden of San Quentin prison, describes several cases of his 1963 book 88 Men and 2 Women. In these instances, the death penalty was the cause of homicide rather than preventive.[117]

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[113] A/HRC/30/21.

[114] Data from Peterson, R. and William, Bailey, W. 1988. 'Murder and Capital punishment in the evolving context of the post-Furman era'. Social Forces, March, pp. 774-807.

[115] William Bailey and Ruth Peterson, 'Murder; capital punishment, and deterrence: a review of literature', Chapter 9 in Bedau (1997), note 2. See also Peterson and William Bailey, "Murder and Capital punishment in the evolving context of the post-Furman era", Social Forces, Op. Cit. For more experiment to show the less deterrent effect of death penalty on murder see further Bailey, W and Peterson, R, (1994. 'Murder and Capital Punishment, and Deterrence: a review of evidence and an examination of police killings'. *Journal of Social Issues*, summer, pp. 53-74.

[116] Dr. Louis West, "Medicine and Capital Punishment", in *To Abolish the Death Penalty,* Hearings before the US House Judiciary Committee, March and July, 1968, p. 124.

[117] Espy Jr. M. W. 1980. 'Capital Punishment and Deterrence: What the Statistics cannot show'. Crime and Delinquency, October, pp. 537-544. As to the aspect that death penalty can be the cause of murder commission, see further Bowers, W. and Pierce, G. 1980. 'Deterrence and Brutalisation: What is the effect of executions?'. Crime and Delinquency, October, pp. 453-484.

Conclusion

The importance of penalty in crime repression cannot be undermined. This is because it is the availability of prescribed punishment for crimes that makes criminal law a society regulating element. Punishment has generally been based on the principle of proportionality that demands that penalties be proportionate to their severity to the gravity of the offender's criminal act.[118] In this light, the death penalty might thus have been prescribed by the Cameroon's 2014 Anti-Terrorism Law as a punishment for acts of terrorism. But the availability of this penalty in the said law conflicts with the country's international human rights law obligation which consecrates the right to life as a fundamental human right, an obligation which is stated in its constitution. Unlike other penalties, capital punishment in the said law is intended to serve as effective deterrence especially where it is administered with certainty. But it is important to note that since the entry into force of this law, the country has not been able to effectively deter the commission of terrorists acts with the continuous acts of terrorism been perpetrated especially in the Northern part of the country. It is therefore proposed that longer periods of imprisonment or life imprisonment could be adopted for terrorism related offences. The rationale behind this is that longer periods of imprisonment might give room to reformation and rehabilitation, such that a once bad person(s) can one day become useful and could be used to sensitise others against the ills of terrorism. They can also be used to negotiate peace with those involved in terrorist acts.

[118] Ade Akwo, C. M, (2009), *A Text Book on Criminology and Penology*, Supra, p. 166.

DOUBLE DERIVATIVE ACTION AS MECHANISM FOR PARENTAL CONTROL OVER SUBSIDIARY COMPANIES IN UGANDA

By

Valentine T. Mbeli (Ph.D)*

Abstract

This study analysed the law governing derivative actions within the context of intercompany relationships for the furtherance of good corporate governance and effective monitoring of the activities of kindred companies. It evaluated the appropriateness of the existing conceptual model on double derivative action in Uganda vis-à-vis case law developments in other jurisdictions. A major finding indicates that there is potential miscomprehension of the conceptual foundation of double derivative actions in Uganda namely; the understanding of the right to bring a derivative action as a membership right. The practical effect of this restrictive model is an outright denial of standing to bring an action by members of a parent company to vindicate the rights of a subsidiary where the subsidiary's directors fail to institute an action. It argues that unlike direct derivative suit which is a membership right, double derivative action comes in to protect a plaintiff's legitimate claim as a member of company with shareholding in another. In consequence therefore, the study craves for more liberal application of the rules of standing to allow for greater parental control over subsidiary companies.

Introduction

Companies, though artificial persons, operate in real human environment that is open to ligations. In the context of corporate litigations, some basic principles have been established over time. The cardinal rule is the proper plaintiff rule enunciated in *Foss v Harbottle*[1]. By this rule, the proper plaintiff in respect of alleged wrong done to the company is *prima-facie* the company which retains the right to sue or to ratify same when a wrong happens to be a matter of internal irregularity. On substantive ground, this rule is justified by the separate legal personality of a company which is feature of incorporation. Procedurally, the rule is meant to limit vexatious litigations and abuse of processes of court.

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[1] (1843) 67 ER 189

Originally conceived as a mechanism for controlling corporate litigations, the rule in Foss v Harbottle has been whittled down by certain exceptions which serve as an instrument for minority protection. The philosophical narratives underpinning the quest for minority protection are in accord with broad economic objectives of promoting corporate investment in an environment that offers reasonable safeguards to both major and minor capital providers.

Corporate governance is anchored on the concept of majority rule, but minority protection is equally important for a good economy. One key area where the manifestation of majority rule is glaring is in relation to institution of actions on behalf of a company. This can only be done through human agents acting for and on behalf of the company. Institution of actions on behalf of the company falls under the decision-making prerogative of directors but the company in general meeting can waive its right of action. However, where the directors are the wrongdoers and would not want to institute an action on behalf of the company apparently against themselves, a member of the company can institute such an action as a nominal plaintiff. The same right is available to a holding company seeking to enforce the rights of a subsidiary company. This approach which has its roots in the decision of the court in *Wellesteiner v Moir (No2)*[2] has come to be accepted as a corporate governance mechanism for redressing breaches of directors' duties and may not be a subject of much academic debate where the plaintiff's right of action is primarily derivative of membership of a company.

But instances abound where members of parent companies seek redress based on injuries suffered by subsidiaries thus creating divergences in academic and judicial opinions. The argument is that such an action is most likely to meet substantial procedural challenges given the separate legal identity of the two companies involved. The plain implication is that while the parent company can take a derivative suit in respect of injury suffered by its subsidiary, an action at the instance of the parent company's shareholder may not be entertained. Whereas this can be legally defensible, strict adherence to this rule may cause moral hazards given the potency of forestalling genuine legal causes aimed at ensuring smooth and efficient management of companies with

[2] (1975) QB 373

corporate shareholding. It is on that note that this paper explores the potential of mainstreaming double-derivative actions in the context of broad policy objective of ensuring effective corporate governance for greater accountability and enhanced shareholder value. The specific objective of the paper is to explore theoretical and conceptual models that would promote close monitoring of subsidiary companies by those with beneficial interest in parent companies.

Derivative Suit and its Legal Premise

Generally, directors are empowered to commence proceedings on behalf of the company. But where majority of the board of directors is unwilling, any director or shareholder can institute an action[3] to vindicate the rights of a company that have been violated. This type of action is known as derivative action and is justified on some equitable grounds such as ensuring that every wrong is legally redressed but also that directors are not allowed to benefit from their wrongdoing by not instituting actions against themselves. It further serves to dilute the unhealthy relationship usually brewing from conflict of interests where close identification of directors with controlling shareholders would ensure that appropriate resolutions are not passed[4] or decisions taken. In this breath derivative suits are largely perceived as a mechanism for minority shareholders' protection.

Derivative suit is essentially an equitable innovation available only at the discretion of the court[5]. Being an equitable remedy, this class of lawsuits is subject to certain equitable doctrines. On that basis, the law has developed a much more restrictive set of criteria for determining when an individual shareholder can sue to enforce company's rights against errant directors. First is the gatekeeping requirement of seeking and obtaining leave of court to institute an action. This serves as a sieve whereby actions considered to be an abuse of process of court are struck out in limine. It further ensures that the minority shareholders

[3] Adebajo v Adebajo (2006) 3 WRN 32. See also Ladejobi v Odutola Holdings Ltd (2003) WRN 94; Haston (Nig) Ltd v ACB Plc (2002) 12 WLR (pt. 782) 623

[4] Farrar, J.H. et al. *Farrar's Company Law* 4th edn (London: Butterworth's, 1998) p. 381

[5] Davies, P.L. *Gower and Davies' Principles of Modern Company Law* 8th edn (London: Sweet and Maxwell, 2008) p. 668

do no transform themselves into knights in shining amour policing the corporate neighbourhood[6].

A long-standing position of the law has been that for leave of court to be granted, the directors must *inter alia* be wrong doers. This position resonates with the legal model for enforcement of directors' duties based on the assumption that directors would not want to institute actions against themselves where they are the wrong doers. But then it seems to have fallen out of tune with practical realities considering that derivative action is not only useful in cases of enforcement of directors' duties. Rather, it takes care of an array of instances where the directors fail to protect the interest of a company by instituting an action, for example, where they fail to seek remedy for breach of auditors' duties.

Another key element to be considered before granting an application for leave to institute a derivative suit is the motive behind such an action. In this vein, a derivative suit would not be allowed where it is being pursued for an ulterior motive and not *bona fide* in the interest of the company[7]. The court would equally not entertain a derivative suit where the plaintiff has not come with clean hands, for instance where the plaintiff participated in the wrong doing[8]. Therefore, where the minority shareholder in good faith and on reasonable ground, brings an action in the name of the company, the court should recognise his *locus standi*[9].

It has been pointed out that the concept of derivative suit is essentially of judicial origin and available only at the discretion of the court. However, there have been attempts at giving it statutory clothing in some jurisdictions. Bakibinga[10] has highlighted the efforts that have been put in place to codify derivative suits beginning from early calls for statutory derivative action in Britain drawing from the Common Wealth experience of statutory reform of the derivative action, as well as the rich experience of the uses and abuses of derivative suits which the American case law and

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[6] This expression is borrowed from Ikongbeh J.C.A in Shell Petroleum Development v Nkawa (2001) FWLR (Pt. 48) 1363 cautioning against abuse of minority rights.

[7] Nurcombe v Nurcombe (1985) 1 WLR 370. See also Barret v Ducket (1995) 1 BCLR 243

[8] Whitman v Watkin (1898) 78 LJ

[9] Walleistener v Moir (No.) (1975) OB 373

[10] Bakibinga, J. David Company Law in Uganda 2nd Edition (Allahabad, The WrittenWord Publications, 2013) p. 296

reforming legislation provide[11]. Coming back home, he makes a contrast with other jurisdictions such as the US, Canada and Ghana. He maintains that in Uganda, the Companies Bill, 2009 proposed to enable the court to authorise the bringing of derivative action under Clause 252 (2) (c) but did not specify the circumstances under which such action may be brought[12].

In the absence of a specific statutory pronouncement, a derivative suit can still proceed under common law. *Salim Jamal & 2 Others v Uganda Oxygen Ltd & 2 others*[13] is a Ugandan case in which the Supreme Court adopted with approval the decision of Lord Denning in *Wallesteiner v Moir (No.2)*[14] when he said

> Derivative action is a suit by a shareholder to enforce a corporate cause of action. The corporation is a necessary party and the relief which is granted is a judgment against a third party in favour of the corporation. An action is derivative when action is based upon a primary right of the corporation but is asserted on its behalf by the shareholder because of the corporation's failure, deliberately or otherwise, to act upon the primary right.

However, because the existing case law on derivative action has been found to be confused, complex and often obscure[15], the case for express statutory provision remains a legitimate concern.

In Nigeria, the Companies and Allied Matters Act[16] clearly delineates the circumstances under which a derivative action may be instituted. First, application of leave of court to bring a derivative action is required[17]. Secondly, the directors must be the wrongdoers who are in control and reluctant to bring such action[18]. The applicant must also have given reasonable notice to the directors of his intention to bring the action[19] and must be acting in

[11] Bakibinga op cit p. 296, citing Boyle A.J. Derivative action in Company Law, 1969 JBL 120-127
[12] Ibid p. 301
[13] Civil Appeal No. 64 of 1995 at P. 22 to 28 (unreported)
[14] Supra
[15] This acknowledgement has been made by the UK Law Commission. See Nyombi, C and Kibandama, A. Principles of Company Law in Uganda (Kampala: Law Africa, 2014) p. 120
[16] Cap C20, Laws of Federation of Nigeria, 2004
[17] Section 303 (1)
[18] Section 303 (2) (a)
[19] Section 303(2) (b)

good faith[20]. Finally, the court must be satisfied that it appears to be in the interest of the company that the action be brought[21].

An attempt to address the problem of cost of litigation is made under section 304 (2) (d) of the Nigerian law which provides for the payment of reasonable legal fees by the company in respect of cost incurred by a person who sues in derivative capacity. This, however, appears to be too sketchy as the law is silent on the procedure for making such claims. Besides, what amounts to reasonable legal fee may be subject to conjecture. Under English law, these concerns have been resolved by the recognition of the right of minority shareholders to apply to the court for an order that the company indemnifies them in respect of costs of the litigation and the power of the court to make such orders as it thinks fit[22]. In England, there are other statutory safeguards put in place to further strengthen the workability of the mechanism of derivative action. First, there is a restriction according to which proceedings may not be discontinued or settled by the minority shareholders without leave of court and which allows the court to impose terms on any leave it grants[23]. Davies and Sarah defend this provision on the ground that it reduces the risk of "gold digging" or "greenmail" claims where the purpose of the claim is to extract from the company a private benefit for those suing in derivative capacity for the settlement of the claim rather than to advance the interest of the company as a whole[24]. Secondly, the law confers on the minority, the right to all information relating to the subject matter of the litigation which is in the possession of the company, so that the group can better decide in what way to prosecute the litigation[25]. This right extends to information which is reasonably obtainable by the company (for example, from another group company). The court may enforce this right by order[26].

[20] Section 303(2) (c)
[21] Section 303 (2) (d)
[22] Davies, P.L and Sarah Worthington Gower and Davies Principles of Modern Company Law 9th Edition (London: Sweet and Maxwell, 2012) p.651
[23] Section 371 (5) Companies Act of UK, 2006. This section applies to cases brought under section 369 on behalf of a company in the event of unauthorised donations by directors.
[24] Davies P.L and Sarah Worthington *op cit* p. 650
[25] Ibid p.651
[26] Section 372 UK Companies Act, 2006

The abovementioned legislative features emphasise the interest of the company as the ultimate goal of the mechanism of derivative action. The novelty of the general statutory derivative claim is that it places the decision about whether it is in the interest of the company for litigation to be commenced in any particular case in the hands of the court, i.e. an outsider to the company.[27]

In Uganda, the absence of these legislative features is most likely to negate the proper functioning of the mechanism of derivative suits which is an important method of driving corporate success and ensuring full compliance with the law by company directors. Besides, where the legal framework is defective, minority shareholders are also likely to abuse the system and by that transforming what is otherwise meant to promote corporate success into a conduit for abuses. All these concerns put together create a strong desirability for comprehensive legislative reforms that can streamline the workability of the mechanism of derivative action in line with its perceived objectives.

Having laid down the legal premise of derivative suit, there are some salient points which should be reiterated for a sound understanding of the concept of double-derivative suit which constitutes the crux of this study. First, derivative suits are used mostly to enforce breaches of directors' duties to their respective companies but also generally to vindicate rights belonging to a company when the directors fail to institute an action. A good example is where directors fail to proceed against an errant auditor. This bears the hidden benefit of promoting accountability and transparency in corporate governance. The next point to note is that the person presented as the real plaintiff in a derivative suit is actually a nominal party as it is the company that will be actually bound by the outcome of the suit. It is for this reason that the company must be joined as a party. Normally, the corporation is joined as a nominal defendant because of its refusal to join the action as a plaintiff[28]. In other words, in a shareholder derivative suit, the corporation has traditionally been aligned as a defendant because it is in conflict with its stockholder about the advisability of bringing a suit. However, in the real sense, the only claim a shareholder plaintiff asserts against the nominal defendant corporation in a

[27] Davies P.L & Sarah Worthington *op cit* P. 652

[28]Bobby Unger, "Corporation as Nominal Defendant in Derivative Suit" Available at crosswindbusinessdivorce.com/corporation-as-nominal-defendant-in-derivative-suit/ visited on 22/04/17

derivative action is the claim that the corporation has failed to pursue the litigation. In essence, the corporation that is the subject of the derivative claim is generally a nominal party only. Because the claims asserted and the relief sought in the derivative complaint would, if proven, advance rather than threaten the interests of the nominal defendant, the nominal defendant must remain neutral in the action[29].

In effect, while the corporation may appear as a defendant, it is in real sense the actual plaintiff[30]. The joinder rule is applied here in order to avail the real defendants *res judicata* protection against any subsequent litigation. The basic rationale here is that the corporation is bound by the outcome of a validly instituted derivative suit.

The preceding segment of this study concentrated on the mechanism of derivative suit and how it interfaces with the relevant legal principles for an effective operation. These principles were traditionally laid down to regulate the procedure governing derivative suits stemming from the direct legal relationship between the shareholders and the corporation. The straight forward understanding is that the shareholder's right is derived from membership of the corporation. However, this concept is likely to encounter certain challenges when sought to be applicable in inter-corporate relationships involving parent and subsidiary companies. The double-derivative suit is a mechanism that has been evolved over time to deal with relationships of that nature. Admittedly, there are hardly any statutory provisions dealing with cases of double-derivative rights. Sadly too, there is a dearth of literature espousing its jurisprudential relevance.

Amid these challenges, courts in Uganda and elsewhere have had to deal with cases bothering on double-derivative rights in a manner expected to serve the ultimate goal of the law; that of rendering justice to the parties. In the succeeding segment of this study, the study proposes to examine the legal relationship between parent and subsidiary companies, how the issue of double-derivative rights has been approached by courts in Uganda and how it addresses the concerns of parent companies in monitoring the management and control of subsidiary companies.

[29] Chih Teh Shen v. Miller (2012) 212 Cal. App.4th 48
[30] Patrick v. Alacer Corp. (2008) 167 Cal.App.4th 995

The Legal Relationship between Parent and Subsidiary Companies

Parent/subsidiary relationships are common features on the corporate scene. This is perhaps inherent in the legal endorsement of the corporate shareholder concept giving rise to situations where corporations are able to subscribe for and acquire shares in the business undertakings of others. Several reasons have been advanced as factors that influence these relationships otherwise described by economists as inter-firm collaborations. All of these reasons are tied to managerial functions including; strategic decision-making, globalization of markets, and most importantly the fact that there are value-added activities that are best performed by subsidiaries[31].

In the eye of the law, every company that is duly registered bears a separate legal identity upon which it can sue and be sued in its corporate name. There are, however, certain laid down exceptions under which the separate legal identity can be disregarded and two or more companies treated as one. A common example is when considering the accounting documents of companies where group financial statements may be required. Similarly, where applicable, an investigation of the activities of a company may affect other companies to which the investigated company is related. There are also similar considerations underpinning certain legal principles such as the restriction on directors of one company from acting as auditors of another in which the former has shareholding and the recognition of the rights of an auditor to demand information from a subsidiary company for the purpose of auditing the accounts of the parent company.

In the light of the foregoing, it is clear that the parent-subsidiary relationship apart from fostering inter-company cohesion is also capable of generating issues with profound legal implications. But what constitutes a parent-subsidiary relationship is a question that should be addressed. There are certain legal imperatives upon which a parent-subsidiary relationship may be construed. In Uganda, section 161 of the Companies Act[32] is instructive and it states:

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[31] Enzo, Baglieri et al "The Parent Subsidiary Relationship. International Technology Cooperation: The Fiat Auto Case" (2010) Vol. 7 No. 3 *Revista Administraçao e Inovoçao* Pp. 200-201

[32] Act 1, 2012

(i). For the purpose of this Act, a company shall, subject to subsection (1), be taken to be a subsidiary of another only if-
  (a) the other company either-
    (i) is a member of it and controls the composition of its board of directors; or
    (ii) holds more than half in the nominal value of its equity share capital; or
  (b) the first-mentioned company is a subsidiary of any company which is that other's subsidiary

The foregoing provision sets out two principal criteria for determining whether a company is a subsidiary company or not namely; composition of the board of directors and shareholding. By default, a company that meets these two criteria vis-à-vis the subsidiary is the parent company or holding company. Therefore, a parent company is that with an amount of shareholding in another company known as the subsidiary giving the first-mentioned company power to exercise control over the subsidiary in terms of board control and decision making. The simple shorthand for this this is that a parent company is a company that has control over another by virtue of shareholding.

Controlling shareholding is not synonymous with ownership even where it is a wholly owned subsidiary. This is apparently due to the separate legal personality existing between the two companies[33]. But one thing that remains settled is that majority shareholding is a strong basis for corporate control stemming from the fact that corporate democracy is exhibited through the economic wealth of an individual[34].

The parent-subsidiary relationship essentially arises from equity ownership. Given that an effective corporate governance framework is that which ensures a reasonable degree of shareholder participation; apparently to diffuse the powers of corporate executives, it has become increasing important for the law to set out ways and modalities through which shareholders can monitor companies with the view to exercising ultimate control over those vested with managerial powers. One of such ways is by bringing

[33] See Okomu Oil Palm Plantation Co. Ltd v Iserhiurhien (2001) FWLR (Pt. 45) 670

[34] Imbwaseh, T. Akaa "A Critical Examination of Cumulative Voting as a Tool for Addressing the Pluralistic Interests in Public Companies (2006) Vol. 1 Frontiers in Nigerian Law Journal p. 134

accountability to bear on management through the enforcement of directors' duties.

The doctrine of derivative action was originally designed as a mechanism for minority protection, but there are grounds to suggest that it has transcended this perceived boundary as it now offers legal avenues for parental control over subsidiary companies. The usefulness of this mechanism in inter-company relationships is that it protects the economic rights of the parent company in the subsidiaries. On that basis, breaches of directors' duties, cases of fraud against the company and other forms of malfeasance could be legally redressed at the instance of the parent company.

It is direct derivative right which accrues to the parent company as a member of the subsidiary. But there are instances where a member of a parent company may desire to institute an action seeking redress in respect of wrong done to the subsidiary company. This creates an indirect relationship regulated by the concept of double-derivation to which the focus of this study now turns.

Double Derivative Actions

A vivid picturesque of the idea of double derivative action or suit has been offered by Kershew[35] thus:

> In a group of companies, wrongs may be committed by directors of subsidiary companies which damage the group as a whole and, indirectly, the shareholders in the parent company. Although the shareholder in the parent company are not members of the subsidiary company, the question we ask…is whether it is possible for a member of a parent company to bring a derivative action on behalf of the subsidiary to enforce the wrong done to the subsidiary? Such an action is typically referred to as double or multiple derivative action, which contrasts with the direct derivative action[36].

It is considered double derivative suit because the plaintiff's right of action is derived not directly from membership of the subsidiary but from his interest in the parent company. Coming back to the central question of whether such suits are maintainable, if we understand the right to bring a derivative action as a membership right, then the answer is likely to be "no". But if we understand derivative action as a way of ensuring that justice is done

[35] Kershew David, Company Law in Context 2nd Edition (Oxford: Oxford University Press, 2009) p. 629
[36] Ibid

in situations where the company is incapable of protecting itself then we may be more receptive to the idea[37].

These two lines of reasoning are likely to result in disagreements which could also influence the decisions of courts. It may be of interest to find out which line of reasoning Ugandan courts are more inclined to. *Nahurira v Baguma & 2 Ors*[38] is a recent decision of the Commercial Division of the High Court of Uganda in which the question of *locus standi* to institute a double derivative suit arose for determination.

The plaintiffs were members of the parent company and brought an action against the directors of the third defendant-Messrs Group Combine Efforts Properties Ltd which happened to be the subsidiary of the CEDA Financial Services Ltd (the parent company). The parent company had 96% equity ownership in the subsidiary (Messrs Group Combine Efforts Properties Ltd). The plaintiffs sort orders for the conduct of an audit, a declaration that the first and second defendants mismanaged the third defendant, an injunction to be issued against the first and second defendants from withdrawing funds without approval of the new board

The defendants applied to have the suit dismissed on a preliminary objection that the plaintiffs did not have *locus standi* to commence the suit on their own behalf or on behalf of members of the third defendant company Messrs Group Combine Efforts Properties Ltd. The third defendant Messrs Group Combine Efforts Properties Ltd was a private limited liability company. Secondly the defendants objected to the suit on the ground that the plaint did not disclose any cause of action against them and lastly that the claim of the plaintiffs was misconceived in law and as such is an abuse of the process of court.

Counsel to the defendant submitted that it is settled law that a derivative action is brought by a member of the company where the wrongdoers are in control and prevented the company itself from suing. Counsel further contended that since the plaintiffs were not members or shareholders in the third defendant company to sustain a derivative suit, the action was misconceived in law and a nullity. There was also the further contention that the plaintiffs were not minority shareholders to fall within the exceptions in *Foss v Harbottle*.

[37] Ibid

[38] (Civil Suit No. 392 OF 2014) [2015] UGCOMMC 76

In reply, Counsel for the plaintiffs submitted that the third defendant is a subsidiary of CEDA Financial Services Ltd (the parent company) with 96% ownership. *Ipso facto*, the controlling authority of the third defendant resided with the parent company and any shareholder in the parent company had locus to sue against mismanagement in the subsidiary.

In its ruling delivered on the 30th of April, 2015, the court per Justice Christopher Madrama IzamaI held:

> I … do not agree that the first plaintiff can institute a derivative action which right resides in the members of the 3rd Defendant. He has no standing to do so. Secondly the second plaintiff is merely a shareholder of the holding company. Both Plaintiffs can only bring an action against the parent company in case they have a cause of action for acts which are alleged to be fraudulent, ultra vires or oppressive of the minority….
>
> In the premises the Defendant's objection to the suit is sustained. The Plaintiffs have no locus standi to bring a derivative action and the objection of the Defendant is sustained. The plaintiff's action is accordingly struck out with costs.

Clearly, the decision of the court in the abovementioned case resonates with the earlier line of reasoning which fundamentally emphasises the right to bring a derivative action as a membership right. In other words, the court considered derivative suit to be a direct right flowing from a member's interest in the company thus ruling out any case of double derivative suit which is an indirect right of action. That being the case, it would appear that the court has sufficiently limited the level of parental control over subsidiary companies in Uganda.

On that note we may have to turn to other jurisdictions for guidance. In England, several cases of double derivative suits have been brought and their legality assumed, but such actions were neither challenged nor analysed.[39] This could be attributed to the fact that the issue of double derivative suit has mostly been addressed indirectly[40]. But recently, this issue was directly addressed by the Hong Kong Court of Final Appeal per Lord Millett in *Waddington v Chan*[41] where the Law Lord held that:

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[39] See for example, Halle v Trax BW Ltd (2000) BCC 1020; and Airey v Cordell (2006) EWHC 2728

[40] For example, in Wallersteiner v. Moir (No.2) (supra) itself the plaintiff brought two claims, one to recover damages for the company of which he was a member and the other to recover damages for its subsidiary

[41] (2009) 2 BCLC 82

> The justification of derivative action (wrongdoer control) …applies as to the case where the wrongdoers, who through their control of the parent company also control its subsidiaries, defraud a subsidiary company or sub-subsidiary as it is to the case where they defraud the parent company itself. In either case wrongdoer control precludes action by the company in which the cause of action is vested… The question is simply a question of the plaintiff's standing to sue… The court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it. The answer in the case of a person wishing to bring a multiple derivative action is plainly "yes". Any depletion of a subsidiary's assets causes indirect loss to its parent company and its shareholders.

Double derivative action has been recognised in many states of the United States, but the legal basis on which the action is maintainable has varied from State to State and from time to time. Many of the grounds upon which the action has been rationalised would not be accepted in England. In some cases the subsidiary has been treated as a mere instrument, agent or alter ego of the parent company; in others the corporate structure has been described as a fiction or "specious and illusory device" allowing the court to pierce the corporate veil. In *Melvin Brown v Richard Tenney*[42], the Supreme Court of Illinois analysed the double derivative action as really consisting of two actions, one by the shareholders against the directors of the parent company for breach of their fiduciary duty in failing to bring an action against the wrongdoers, and the other to vindicate a right vested in the subsidiary. The analysis assumes that a director of a company owes fiduciary duties to the shareholders, which appears to be the case in Illinois but is not the law in Uganda. While the United States cases are, therefore, of little assistance in deciding whether a multiple derivative action is maintainable in Uganda, they are helpful in demonstrating that it should be.

Following the enactment of Chapter 11 in the UK Companies Act bringing about statutory derivative suit in the UK, it has been argued that a double derivative suit is not available since no provision is made to that effect under the Chapter[43]. This view has, however, been faulted on the ground that the Act does not

[42] 125 III. 2d 348 (1988)

[43] Dan Prentice & Arad Reisberg "Multiple Derivative Actions" (2009) 125 LQR 209 see also Koh P. "Derivative Actions once Removed" (2010) Journal of Business Law 101

specifically exclude it especially as common law may recognise it[44]. Besides, the Law Commission in the review of shareholder remedies had concluded that the question of double derivative was best left to the courts and that it should not be included in statutory procedures[45]. This opinion was expressed in the final report of the Commission thus:

> We consider that the question of multiple derivative actions is best left to the courts to resolve, if necessary using the power under section 461 (2) (c) of the Companies Act 1985 to bring a derivative action. Accordingly, we do not consider that there should be any express provision dealing with multiple derivative action[46].

The clear implication of the foregoing remarks is that even where statutory derivative right is recognised, double derivative action is not *ipso facto* precluded as it could still be maintainable riding on its common law background. In that light, one is persuaded to think that Ugandan courts are still lagging behind in terms of embracing this case law development. Therefore, the take-home message for Ugandan courts is to jettison the idea that the right to bring a derivative action is a membership right and be more receptive to the conceptual model which views derivative action as a way of ensuring that justice is done in situations where the company is incapable of protecting itself and more importantly where it is shown that the plaintiff has a legitimate interest in the relief claim sufficient to bring the action.

Double Derivative Suits in Post-Mergers

It has long been a standing rule of practice that when a corporation merges during the pendency of a derivative suit, the merger leads to a dismissal of that derivative suit. The reason is that the plaintiff loses standing to bring any derivative suit as it requires the named shareholder to possess and maintain "continuous ownership" of stock in the corporation on whose behalf he is suing. This includes ownership at the time of the alleged wrong or transaction at issue, when the suit was commenced, and throughout the course of the litigation. Once a merger is consummated, the plaintiff no longer owns shares in the corporation he was suing. He,

[44] Kershew David op cit p. 631
[45] Ibid
[46] Law Commission Shareholder Remedies Final Report Para. 6.110

therefore, can no longer satisfy the "continuous ownership" requirement and, upon motion, his case will be dismissed[47].

Double derivative actions appear to have been the only way out of the hurdle. This fundamentally underscores the rationale behind derivative action as a shareholder's primary instrument for addressing issues relating to company mismanagement. It should be noted that the same procedural hurdle of pleading standing based on membership would ordinarily prevent the court from entertaining a derivative action in post-mergers transaction. This challenge has been expounded by Harvey[48] using the complications in case law. First, that the explosion of corporate mergers in the 1980s complicated the framework and, in many cases, eliminated a shareholder's ability to bring a derivative action.[49] Secondly, mergers foreclosed derivative actions by interrupting the shareholder's continuous ownership in the premerger corporation, thereby preventing the shareholder from satisfying the standing requirement[50]. These controversies arose within the framework of the interpretation of the Delaware laws.

But recently, the Supreme Court of Delaware had occasion to settle the controversy. In *Lambrecht v O'Neal*[51], in

[47] Lewis v. Ward, 852 A.2d 896, 904 (Del. 2004)

[48] Harvey, M. Christopher "Corporate Law-Mergers and Double Derivative Actions: The New Frontiers in Derivative Standing (1993) 38 Villanova Law Review 1194

[49] This complication arose in Kramer v. Western Pacific Indus., Inc., 546 A.2d 348, 350-51 (Del. 1988) (holding that plaintiff who lost shareholder status through cash buyout merger could not maintain derivative action); Lewis, 477 A.2d at 1042 (holding that plaintiff who exchanged his ownership interest in original corporation for shares in parent company, pursuant to merger agreement, lost ability to maintain derivative action on behalf of original corporation); Bonime v Biaggini, No. 6925, 6980, 1984 WL 19830, at *2 (Del. Ch. Dec. 7, 1984) (holding that plaintiff was unable to maintain derivative action on behalf of pre-merger corporation when pre-merger corporation became wholly-owned subsidiary of newly-formed parent company and plaintiff exchanged his shares in pre-merger corporation for shares in newly-formed parent company), aff'd without opinion, 505 A.2d 451 (Del. 1985)

[50] Kramer, 546 A.2d at 354-55 (noting that shareholder who relinquished ownership as result of cash buy-out merger failed to satisfy continuous ownership requirement); Lewis, 477 A.2d at 1049 (stating that shareholder who relinquished ownership in pre-merger corporation by exchanging his shares in pre-merger corporation for shares in newly-formed parent company failed to satisfy continuous ownership requirement); Bonime, 1984 WL 19830, at *2 (noting that shareholder who relinquished ownership due to merger after suit was filed failed to satisfy continuous ownership requirement).

[51] No. 135, 2010, 2010 WL 3397451 (Del. Aug. 27, 2010)

response to the defendants' policy argument that "allowing the plaintiffs' post-merger double derivative action to proceed would "disrespect the corporate separateness of the parent and subsidiary and run afoul of Delaware precedent on the impact of a merger on a pending derivative action, the Court determined that a double derivative action is not a *de facto* continuation of a pre-merger derivative action, but instead represents a "new, distinct action" in which the plaintiffs' standing to sue rests upon "a different temporal and factual basis," namely; a failure by the parent's board, post-merger, to prosecute plaintiffs' pre-merger claim against the defendants. Furthermore, because of this quite different structure, the policies favouring both the preservation of the corporate separateness of the parent and subsidiary and the prevention of abusive derivative suits are fully respected.

In an unequivocal manner this decision demonstrates the Delaware Supreme Court's validation of the bringing of double derivative actions in cases where standing to maintain a standard derivative action is extinguished as a result of an intervening merger. It also provides the clear guidance on when a plaintiff-shareholder may bring a post-merger double derivative action.

The foregoing are important case law developments that strongly support the use of derivative actions by shareholders of parent companies for actions accruing to subsidiary companies. In line with the developments, the rule that restricts standing to immediate shareholders of a company and by which shareholders of the parent company may not be heard is mitigated thereby allowing substantial justice to take precedent over technicalities. This approach is not meant to circumvent the rules of standing, rather it comes in to supplement the inability of subsidiary companies to deal with non-compliant directors.

Conclusion and Recommendations

This study was primarily an examination of the Ugandan law relating to double derivative actions. It gauged the legal nuances between different situations responsible for divergence in judicial reasoning on double derivative actions. In evaluating the appropriateness of the existing conceptual model on double derivative action in Uganda, the study equally examined the approaches in other jurisdictions including their underlying policy rationales. In that regard, a judicial attitude survey of UK, Hong Kong and Delaware in the United States was carried out. Findings indicate that there is a potential miscomprehension of the conceptual

foundation of double derivative actions in Uganda namely; the understanding of the right to bring a derivative action as a membership right. The practical effect of this model is an outright denial of standing to bring an action by members of a parent company to vindicate the rights of a subsidiary where the subsidiary's directors fail to institute an action. This was the reasoning of the court in *Nahurira v Baguma & 2 Ors*[52]. Even though a single judicial authority may not be sufficient statistical basis for characterising the judicial attitude of Uganda, it is capable of developing into a full-flesh precedent that may retard the growth of jurisprudence.

By contrast, the reasoning arising from decisions of courts in the aforementioned jurisdictions indicates a major development in jurisprudence on derivative actions beyond its nascent understanding. This can provide a useful guide to Ugandan courts on when the common law double derivative action can be available. This validates the legal premise for the relaxation of the rules of standing in the interest of justice and more so, when the plaintiff has a legitimate interest in the claim.

[52] Lambrecht v O'Neal n. 51

ENVIRONMENTALISM AND AN INTERNATIONAL COURT FOR THE ENVIRONMENT

By

Olanrewaju Aladeitan (Ph.D)* & Chidinma Therese Odaghara**

Abstract

The world is witness to the increase in ecological threats and crisis from diverse sources which has resulted to a gradual decline of its biodiversity. Though international environmental governance seeks to address the issue, it is quite evident that existing international legal and governance mechanisms are not potent enough to adequately address this decline. There is a general agreement on the need for a paradigm shift in this regard – but in what direction? Is it possible that in light of the trans-boundary nature of many of the existing environmental threats and degradation as well as their sources and the responsible entities, an International Court for the Environment (ICE) may just be a pragmatic means to an effective governance regime? This paper thoughtfully lends a voice in support of the establishment of an ICE. An examination of the concept of environmentalism as it relates to international adjudication and the divergent views on the proposal for an ICE lay foundation for the submission that the principles of international environmental law provide desirability and justifications for the proposed ICE. Therefore, environmentalists are on course in the call for a specialist environmental court.

Key words: Environmental governance, international adjudication, Multi-lateral Environmental Agreements, International environmental law

Introduction

Environmentalism[1] has grown out of concerns that the natural environment and human health are adversely affected by the

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[1] Environmentalism in this context implies the movement that seeks an improvement in quality of the natural environment through changes to environmentally harmful human activities, and the adoption of forms of political, economic, and social organization that are thought to be necessary for environmental management, conservation and protection. See LORRAINE

rapid growth of urbanization, industrialization, population and consumption in the modern era. [2] It is best described as a social movement and an associated body of thought that expresses concern for the state of the natural environment and campaigns for limitation of impact of human activities on the environment.[3] Environmentalism is founded on the laws of nature which are inescapable and must be acknowledged. One such law is that all human activities have an impact on the environment. Indeed, each individual has an "ecological footprint" that represents the sum of that person's resource use and contributions to pollution.[4] The ecological footprints of individuals vary considerably both within states and across the globe. A second natural law is that all environmental milieu (air, water, soil) and all species are interdependent and harm to one aspect of the environment is thus likely to have broad and unforeseen consequences. A chemical spill at a gold mine, for example, not only will pollute the nearby soil, but it can enter streams and rivers, be transported to the sea, and enter the food chain through absorption by plants and animals.

A related natural law which is of immense significance is that the environment knows no boundaries; harm in one territory can and often will have effects in another; that is what makes environmental issues global. International environmental governance is a necessity, and international environmental law, fundamental, because the extraction of natural resources embedded in local communities, trans-boundary pollution, inordinate use of global commons, activities that affect large areas encompassing several states, are local but widely shared issues (because they happen simultaneously in various States or because of general interest in addressing them).[5] In other words, most environmental issues that create dispute between States are global problems that call for joint and efficient actions by all; for instance, the reduction of Green-House Gas (GHG) emissions in the atmosphere.

ELLIOT, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/environmentalism last visited 28 April 2018.

[2]See MARK TADAJEWSKI, ET AL., KEY CONCEPTS IN CRITICAL MANAGEMENT STUDIES, 32-35 (Sage, London, 2011).

[3] STACY SILVEIRIA, *The American Environmental Movement: Surviving Through Diversity,* 28 Boston College Environmental Affairs, (2001)497-520

[4] DINAH SHELTON and ALEXANDER KISS, Judicial *Handbook on Environmental Law* (UNEP Press 2005) P. 27

[5]JAMES G. SPETH & PETER M. HAAS, GLOBAL ENVIRONMENTAL GOVERNANCE (Island Press: 2006) P. 15–16

Therefore, the idea that an International Court for the Environment (ICE) with the mandate of protecting the global environment irrespective of national boundaries can play a major role in redeeming and protecting the global environment is budding and increasingly gains popularity through advocacy by environmentalist. The move partly draws inspiration from the call for an ICE to ensure better global environmental protection first made at the UN Conference on Environment and Development held at Rio de Janeiro in 1992.

The paper suggests that the calls by environmentalists for an ICE in the face of international dispute resolution regimes that play significant roles in addressing environmental disputes with transnational effects is relevant at this point considering the instrumental and procedural shortcomings of extant institutions. The paper builds on the concept of environmentalism as it relates to international adjudication. It suggests that though extant international institutions with adjudicatory mandate over international environmental disputes impede the effort toward an ICE, duties to future generations should serve as motivation. It thoughtfully lends a voice in support of the establishment of an ICE.

Concept of Environmentalism in Belief Systems

There are key concepts and principles that form an inclusive definition to environmental law, and environmentalism is one of such. Beliefs supportive of environmentalism can be found in religious traditions from around the World representatives of Baha'ism, Buddhism, Christianity, Daoism, Hinduism, Islam, Jainism, Judaism, Shintoism, and Sikhism. For instance, ancient Buddhist chronicles, dating to the third century B.C. record a sermon on Buddhism in which the son of the Emperor Asoka of India stated that, "the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it." [6] Subsequently, the King initiated a legal system that continued to exist into the eighteenth century providing sanctuaries for wild animals.

Similarly, certain passages in the Judeo-Christian texts specify that humans do not own the earth and its resources. Jewish

[6]*The Mahavamsa, or the Great Chronicle of Ceylon,* Chap. 14, quoted in International Court of Justice *Case Concerning the Gabçikovo-Nagymaros Project on the Danube,* Sept. 25, 1997, Sep. Op. of C. Weeramantry, n. 44)

law provides for conservation of birds;[7] protection of trees during wartime;[8] and regulation of the disposal of human waste.[9] Christian tradition allows that man's dominion over nature includes a competence to use and manage the world's resources in the interests of all, being ready to help others in case of necessity. Individual title thus imposes a responsibility and a trust.

In 1983, Muslim experts studied the relationship between Islam and environmental protection.[10] Their analysis suggests that man is a mere manager of the earth and not a proprietor; a beneficiary and not a disposer. Man is granted inheritance to manage and utilize the earth for his benefit, and for the fulfillment of his interests. He therefore has to keep, maintain and preserve it honestly, and has to act within the limits dictated by honesty. Each generation is entitled to use nature to the extent that it does not disrupt or upset the interests of future generations. Islamic principles thus envisage the protection and the conservation of basic natural elements, making protection, conservation and development of the environment and natural resources a mandatory religious duty of every Muslim.[11]

Evolution of Environmentalism

Environmentalism is traceable to the middle of the 18th Century when nature writers started to suggest that nature had to be treated with respect because of the nexus between man and nature.[12]

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[7]The Holy Bible, Deut. 22:6-7

[8]The Holy Bible, Deut. 20:19

[9]The Holy Bible, Deut. 23:13

[10]See *Islamic Principles for the Conservation of the Natural Environment,* IUCN Environmental Policy and Law Paper (1983) 20.

[11] In *M.D. Tahir v. Provincial Government & Others (*1995 CLC 1730) Available at http://cmsdata.iucn.org/downloads/m_d_tahir_v_provincial_government_1995_clc_1730.pdf last visited 20 March, 2018, the Pakistani court analysed Islamic law prohibiting unnecessary hunting and killing of birds and animals when a constitutional petition sought an order to ban various hunts under articles18 and 199 of the Constitution. The court agreed that unnecessary hunting and killing is against the injunctions of Islam and the Constitution, but found that a blanket prohibition for hunting or killing of all animals and birds could not be granted

[12]The idea of a harmonious philosophy was taken up by early conservationists such as naturalist and writer John Muir (1838-1914). This Scottish-born visionary founded the US conservation organization the Sierra Club in 1892. Through the Club, he successfully used his literary gifts to encourage the US government to protect some of the great wildernesses of the country. Wilderness lovers like Muir and the hikers that enjoyed the land wanted large areas simply left alone. But they

Following Industrial Revolution in the 18th century, a high level of production activities emerged which generated an increase in land use. Forest clearance, land drainage and mining became rampant; causing some individuals to advocate for restraint in human exploitation of the environment. The major concern of environmental activism at that point in history revolved around two purposes: preservation of forestry's and the sustainable conservation of resources such as timber and deer.[13]

Conservation was a priority from the end of the 18th century up until the early 19th Century.[14] During that era, environmentalists called for humans to extend to nature the same ethical sense of responsibility that was extended to fellow human beings. For example, in North America, environmentalism traditionally highlighted the intrinsic, experiential, and recreational value of nature for humans. In Europe, where high population density and industrialization largely preceded the rise of

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met with opposition from the outset. Those with economic interests, like timber companies and politicians, agreed that large areas should be reserved, but only as a future resource of timber, oil, minerals, coal and water. Muir recognized the need to use natural resources and accepted that some forests would have to be sacrificed for their timber. But for him, wildernesses were spiritual places. So loss of wilderness meant a spiritual loss to humanity. See HENRY DAVID THOREAU, WALDEN; OR LIFE IN THE WOODS, (LONDON J.M. DENT 1908). First published in 1854, the book highlights Thoreau's two-year living experiment in woods near Massachusetts, USA, and sought to describe the harmony that humans can experience when living with nature.Thoreu's writing is significant in any discuss on the evolution of environmentalism because it gives an insight into justification for studies on ecology and environmental history; two major sources of modern-day environmentalism.

[13] By 1850, nature writers were evoking the power of the land and talking in terms of respect for nature. Henry David Thoreau describe the harmony that humans can experience when living with nature. The idea of a harmonious philosophy was taken up by early conservationists such as naturalist and writer John Muir (1838-1914). This Scottish-born visionary founded the US conservation organization the Sierra Club in 1892. Through the Club, he successfully used his literary gifts to encourage the US government to protect some wildernesses in the country. Inspired by visionaries like Thoreau and Muir, environmental awareness began to spread through the western world. At about this time, national parks were created in Australia, New Zealand and Canada. Britain also began to establish its first conservation-based organisations, like the RSPB (Royal Society for the Protection of Birds) in 1893 and the National Trust in 1894. Environmentalism at that time was largely aimed at legislation and regulations concerning nature conservation.

[14]See ALDO LEOPOLD, A SAND COUNTY ALMANAC, (OXFORD UNIVERSITY PRESS, 1949). The writer; ,a former US Forestry Service official and University of Wisconsin and Iowa State University professor eloquently and passionately wrote of the human obligation to protect the balance of nature

environmentalism, environmentalism focuses on managing industrial pollution and waste, protecting human health from toxics and nuclear risks, and energy efficiency.

Human welfare ecology, preservationism, animal liberation and ecocentrism are the modern forms of environmentalism. All of these forms of environmentalism galvanized into a coherent force from the 1960's with the rise in public awareness of the global eco-crisis.[15] For example, Rachel Carson's publication in 1962 popularized modern-day ecology; her book analysed the role of chemicals like pesticides and insecticides in contaminating the natural environment, harming human population and creating a silent spring. The publication of the Club of Rome's controversial study, *The Limits to Growth*, equally portrayed a bleak picture of humanity's future in the event of further degradation on the environment. These publications raised wide-reaching questions about the human impact on the environment.

Environmentalism equally arose in response to certain factors, one of which is the global rise in environmental risks. Starting with the eco-disasters of the 1967 Torrey Canyon accident (oil pollution in the North Sea)[16] and the 1971 Minamata cases (river pollution caused by organo-mercury in Japan), degradation in the global environment progressively emerged as a major concern for the international community.[17] Environmentalism at international level is thus, born out of the necessity to address environmental issues.

On the part of National governments, as environmental activism gained ground and metamorphosed into a gigantic phenomenon, nations and governments were propelled to address environmental concerns raised and seek solution. Innovative

[15] This was motivated by media attention and seminal publications, such as Rachel Carson's 1962 *Silent Spring*,[15] Max Nicholson's 1969 *Environmental Revolution* and the Club of Rome's 1972 *Limits to Growth readily* espoused by the 1960s. See JOHN MCCORMICK, THE GLOBAL ENVIRONMENTAL MOVEMENT: RECLAIMING PARADISE, (Belhaven Press 1989).

[16]See M' GONIGLE, R. MICHAEL AND MARK W. ZACHER, POLLUTION, POLITICS, AND INTERNATIONAL LAW: TANKERS AT SEA, (University of California Press, 1979) cited in PHILLIP SANDS, THE HISTORY AND ORIGIN OF INTERNATIONAL ENVIRONMENTAL LAW (Edward Elgar, 2015)

[17] Examples like the 1984 Union Carbide disaster in Bhopal, India; the Chernobyl meltdown in Russia in 1986; the Tokaimura Nuclear plant accident in 1999; the 1989 Exxon Valdez oil spill in Prince William Sound, Alaska; and the case of Ogoniland oil spill in Nigeria which lasted over a decade, are examples of eco-disasters across the world that necessitate the emergence of environmentalism.

national legal responses to the environmental challenge, such as Japan's 1967 Kogai Act, Sweden's 1969 Miljöskyddslag and the 1970 National Environmental Policy Act, in conjunction with the judge-made 'public trust doctrine' in the United States, launched environmentalism into the international sphere. Following an increased movement on the environment at national level, environmentalism gradually emerged as a trend in international law.

Impact of Environmentalism on International Environmental Law

At international level, the year 1972 saw the first of the 10-yearly Earth Summits. Held in Stockholm, Sweden, the UN Conference on the Human Environment is generally considered to be the primary defining event of international environmentalism.[18] The *Earth Summit* (officially called the United Nations Conference on the Human Environment) was initiated by the effort of environmental activists as they lobbied states in the developed world to address the environmental effects of industrialization (113 nations attended).[19] The conference produced the 26 principles of the Declaration of the United Nations Conference on the Human Environment, an Action Plan for the Human Environment, and an Environment Fund.

The success of the Stockholm Conference and the subsequent Declaration can be measured in part by the fact that Principle 21 is now accepted as customary international environmental law, thereby subjecting a State in violation of it to liability.[20] Although Principle 21 was not a significant departure from customary international law, its codification and acceptance by the international community reflect the growing awareness and concern for the international environment. Another significant

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[18] See http://www.encyclopedia.com/earth-and-environment/ecology-and-environmentalism/environmental-studies/environmental-movementlast visited 10 December 2017

[19] JACK LEWIS, The Spirit of the First Earth Day (January – February) (1990) US Environmental Protection Agency Journal < https://archive.epa.gov/epa/aboutepa/spirit-first-earth-day.html> last visited 28 April, 2018.

[20]VEDPRING NANDA, *Trends in International Environmental Law* 20CAL**.** W. INT'L L.J. 187 (1990), also see AUDRA DEHAN E, *An International Environmental Court: Should there be One?*3 Touro J. Transnat'l L. 135 (1992). International environmental law obligates states to regulate activities within their jurisdiction so that these activities do not cause harm to the environment beyond their jurisdiction." *Id.* at 198;

outcome was the establishment of UNEP (United Nations Environment Programme), designed to promote environmental practices across the globe.

Since the first earth summit, several innovations have occurred with respect to international environmental law. The 1980's witnessed an increase in the number of scientific concerns raised on the effect of pollution on the environment. For instance, with the report on the hole in the ozone layer, and how Chloro – Fluoro Carborns (CFCs) were contributing in no small measures to the ozone layer depletion, the interest in international environmental governance increased. Thus in 1985, the Ozone Treaty was agreed on by a number of States in international law.

Similarly, the UN General Assembly in furtherance to international effort towards a better international environmental governance regime created the UN World Commission on Environment and Development in 1983, and appointed Dr. Gro Harlem Brundtland, as chairperson. Four years later, in 1987, the UN published the Brundtland Report (*Our Common Future*) which fashioned out the term 'sustainable development'. The Report is considered a presentation on the linkages between developmental and environmental problems, and on the advancement of technological solutions.

Another Earth Summit was convened in Rio, Brazil, in 1992. The (Rio) UN Conference on the Environment and Development marked a high point in the history of environmentalism as it laid emphasis on the nexus between environmental, economic and social justice issues. Following the concerns raised by environmental activists, global warming was brought to the front burner at Rio, and major Treaties on climate change and biodiversity were signed.[21]

Presently, environmentalism as a movement has established a general awareness on issues such as environmental degradation, climate change, global warming and the impact of human activities on the environment. The movement has equally drawn attention to the role of effective environmental governance in the quest for a pragmatic means to tackle environmental harm and strengthen environmental management and protection.

[21] An example is the The Kyoto Protocol, which extends the 1992 United Nations Framework Convention on Climate Change (UNFCCC) that commits state parties to reduce greenhouse gas emissions, and sets mandatory limits on greenhouse gas emissions.

In analyzing its contribution to the development of international environmental law, it is quite difficult to differentiate the concept of environmentalism in the early history of environmental law and in the contemporary era because the primary motivation for the evolution of environmentalism equally features in the modern age. In recent times, all the forms of environmentalism including conservation has been promoted as part of the solution to transboundary regional and global environmental issues such as the effect of GHG emissions, ozone depletion, and climate change on States.[22] For instance, for developing and small Island States, the priority of environmentalism revolves around environmental issues like desertification, soil erosion, as well as pollution of air, land and water resources. Faced with severe peculiar environmental challenges that are not commensurate with their contribution to climate change, as these States emit less than one per cent of global emissions but suffer disproportionately from its effects; resource conservation, human welfare ecology, preservationism, animal liberation, and ecocentrism are all underlying perspectives that form part of the solution to the problem. [23]

Nonetheless, despite the impact of environmentalism on the development of international environmental law, there is still a considerable degree of uncertainty surrounding international environmental governance over issues of environmental pollution, environmental harm induced by human activities, and the question of human responsibility towards the environment; whether man is motivated by eco-centric motives or anthropocentric motives, or motives based on self-interest.

The world is yet to reach a coherent and unified stance on the essence of a decisive and effective environmental governance regime. Economic interest and trade are interwoven with most aspects of environmental issues. Thus, States are not on the same pedestal with respect to environmental governance and how best to

[22] See UNEP 2014.Emerging issues for Small Island Developing States. Results of the UNEP Foresight Process.<http://www.unep.org/pdf/Emerging_issues_for_small_island_developing_states.pdf>last visited February 10, 2018

[23]UNEP 2014.Emerging issues for Small Island Developing States. Results of the UNEP Foresight Process.<http://www.unep.org/pdf/Emerging_issues_for_small_island_developing_states.pdf>last visited February 10, 2018

respond to issues relating to the environment. Also, while some States question the rationale behind attaching immense significance to the environment; others question the subject of environmental protection. That is, whether the environment is protected because it serves as a source of energy, food and materials; or because it has value in its own right. This, to some extent explains the lack of coherence in international environmental governance regime.

The doubts notwithstanding, a peculiar effect of environmentalism on international environmental law, is the international dimension it has given to most environmental problems. Environmentalism has propelled issues such as depletion of the ozone layer, conservation of biological diversity, and GHG effect into international limelight and has galvanized interest in environmental issues. This has thus made issues relating to environmental governance such as the creation of a court for the environment; to be increasingly set on the international stage.

Creation of an International Court for the Environment: Conflicting Perspectives

Amidst growing agitations for an ICE, the debate on the prospects of a specialist court for the environment is yet to receive optimal attention in the realm of international law as some critics see the ideals of an ICE as esoteric.[24] Criticisms against the creation of yet another institution in the international environmental realm stress the interrelationship between environment and other aspects of human activities such as trade, finance, crime, corporate governance, human rights and even war as a fundamental issue that ruptures the conceptualization of any matter as an 'environmental disputes'. In other words, because the environment is related with all other aspect of human activity, it is often difficult to discern the 'environmental aspects' of a dispute from 'non-environmental aspects'.[25]

[24]ALAN BOYLE AND JAMES HARRISON, 'Judicial Settlement of International Environmental Disputes: Current Problems' *4 JIDS. 2 (2013) p. 243-276.*

[25] See PATRICIA BIRNIE, ALAN BOYLE AND CATHERINE REDGWELL, International Law and the Environment (3rd edn, OUP 2009) 250; SEAN MURPHY, 'Does the World Need a New International Environmental Court?' (2000) 32 George Washington Journal of International Law & Economics 333, 344; PHILIPPE SANDS, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' (OECD Global Forum on International Investment 2008); and Robert Jennings, 'Need for an Environmental Court?' (1992) 20 Environmental Policy and Law 312.

Critics consider the proposal for an ICE with skepticism because according to them, it is difficult to see how a dispute could arise which is exclusively 'environmental', without either having some relation to general public international law, international trade law or foreign investment law, for that matter. [26] Consequently, states are reluctant to define a dispute as 'environmental' for the purpose of international adjudication. Following the general *laissez-faire* attitude of states towards adjudication, opposing views on the ICE submit that the proposal for an ICE somewhat lacks clarity as to the parties that a specialist court would serve in the international environmental governance regime.[27]

International adjudication of dispute is a means to achieve the purposeful development of international environmental law because the decisions from international adjudication affect state behavior.[28] International adjudication is primarily fashioned out of the need to establish and maintain a coherent environmental regulatory regime in the international sphere; but it remains the case that most states exercise restraint towards the use of international adjudication as not all recognize the significant role it plays in the advancement of international environmental law. For instance, States are reluctant to accede to the ICJ's compulsory jurisdiction,[29] and many of the States that eventually submit; do so with broad reservations. States are perceived as inclined towards the resistance of international adjudication, especially since the principle of State sovereignty makes it practically impossible for a State to be brought before an international court or tribunal against its will. Indeed, the foregoing is enough reason for any insinuation of international

[26]PHILIPPE SANDS, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' (OECD Global Forum on International Investment 2008) in PEDERSEN OLE. An International Environmental Court and International Legalism (2012) 24 (3) JEL p.547-558. https://www.deepdyve.com/lp/oxford-university-press/an-international-environmental-court-and-international-legalism-lijgrNgix5. Accessed 12 April, 2018

[27] YOUNG ORAN, *Earth System Governance: Institutional Dynamics: Emergent Patterns in International Environmental Governance (*MIT Press, 2010)

[28]BORN GARY, A *New Generation of International Adjudication* Duke Law Journal 61.4 (2012): 778

[29] Of the 195 States in the world presently, only 72 States have expressed the intent to submit to compulsory jurisdiction by the ICJ. See <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>last visited 28 December 2017. See ALAN BOYLE AND JAMES HARRISON, *Judicial Settlement of International Environmental Disputes: Current Problems* JIDS (2013) 4: 2, pp. 245–276

adjudication as a medium of solidity in environmental governance to be dismissed.

States are often cautious of adjudication, as they must weigh a wide range of crosscutting concerns, including the diplomatic cost for bringing a case. International adjudication is a costly venture; financially and politically, prohibiting government action to serve extremely narrow or secondary interest groups that may be environmental victims or non–state parties with environmental interests.[30] In fact, unless the definition of parties in a dispute in international environmental law are expanded to include non-state actors, private individuals, local communities and even civil societies with legitimate claims to environmental harm may still be unable to access the environmental justice which an ICE proposes to serve through its platform.

The attitude of state parties toward resolution of disputes in most MEA is suggestive of an aura of general cautiousness towards the idea of an international court for the environment. Ideally, states are generally perceived to be favorably inclined towards adjudication in the environmental context. However, in reality, most state parties to MEAs are skeptical over the use of international adjudication for dispute resolution purposes.[31] Most international environmental agreements insert the average form of dispute settlement clause which is a restatement of the customary and UN Charter obligation to resolve disputes peacefully together with a recital of the catalogue of methods set out in article 33 of the UN Charter. However, the prevalent practice in MEAs is that of including a one-paragraph clause by which states agree to resolve dispute by peaceful means of their choice through procedures that involve multiple stages and a choice of fora for dispute resolution if it arises. Only few States actually provide for compulsory adjudication through an obligatory clause.[32]

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[30] ibid

[31] YOUNG ORAN, *Earth System Governance: Institutional Dynamics: Emergent Patterns in International Environmental Governance* (2010 MIT Press) P. 22.

[32]ROBERT JENNINGS, 'The Judicial Enforcement of International Obligations' (1987) 47 *Zeitschrift fur auslandischesoffentlichesRecht und Volkerrecht*3, 3 ('so-called compulsory jurisdiction turns out to be only another form of consensual jurisdiction' in YOUNG ORAN, *Earth System Governance: Institutional Dynamics: Emergent Patterns in International Environmental Governance* (2010 MIT Press),

On the instrumental level, critics of the proposal for an ICE agree that extant international institutions like the International Court of Justice (ICJ) and the World Trade Organisation (WTO) fail to give adequate regard and consideration to environmental issues, being mostly generalist in nature.[33] In fact, on an assessment of environmental litigation before international tribunals, Sands concluded that 'international courts are anthropocentric',[34] hence not very environmentally protective. Yet, opponents of the ICE submit that rather than indulge in radical reform that will bring about the creation of a specialised court for the environment, the adaptation of existing international adjudicatory institutions to reflect environmental principles and resolve disputes relating to the environment through the use of environmental experts is pragmatic and a better alternative.

Notwithstanding the criticisms against the proposed ICE, the general consensus is that a debate on the creation of a specialised court for the environment is fundamental because arguments flowing from the movement for an ICE present relevant contributions on how best to address collective action problems harming the environment. This may in the end assist in developing viable solutions to tackle the environmental governance challenge witnessed at international level.[35] For instance, while the ICJ has severally stressed the need for a healthy environment, it has clearly held that such concern is not sufficient to ban the use of nuclear weapons.[36] Given this situation, it is argued that the establishment of a specialised court with a dedicated environmental jurisdiction in the style of an ICE will go a long way to raise the profile of environmental protection and dispute resolution within the international realm.[37]

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[33] See PHILLIP SANDS, 'International Environmental Litigation and its Future' (1999) 32 U Rich L Rev 1619, 1633.

[34] See PHILLIP SANDS, 'Water and International Law: Science and Evidence in International Litigation' (2010) 22 ELM 151, 161.

[35] ibid

[36] See *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* opinion of 8 July 1996 (ICJ Reports 1996, 226) and *Case Concerning Gabcikovo-Nagymaros Project (Hungary/Slovakia)* decision of 25 September 1997 (ICJ Reports 1997, 7).

[37] Based on the idea espoused in: J Gillroy, 'Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of ''Environmental Sustainability'' in International Jurisprudence' (2006) 42 Stanford Journal of International Law 1, 23 - 31.

The Place of a Specialist Court in International Environmental Governance

The call for a specialist court for the environment raises fundamental issues in international environmental law. First, both from the contextual angle and in practical terms, a key issue that resonates when thinking of the prevalent condition of international environmental governance is the nature of environmental harm as a collective and difficult challenge that cuts across jurisdictions. As a result of the spatial scale and temporal diffusion of international environmental issues, the impacts of externalized harms are quite difficult to measure or perceive, making the benefits of cooperation among states less than obvious.[38] Nonetheless, despite the fact that trans-boundary environmental harm is as real as it is hazardous to the global environment, and require the advantages of a cohesive and coherent approach, the chances are that states in international law will remain reluctant to tackle environmental issues through an environmental governance mechanism that lays emphasis on adjudication by a specialist international court.

States are often cautious of adjudication, as they must weigh a wide range of crosscutting concerns, including the diplomatic cost for bringing a case. International adjudication is a costly venture ; financially and politically, prohibiting government action to serve extremely narrow or secondary interest groups that may be environmental victims or non–state parties with environmental interests.[39] Of course, this means that unless the definition of parties in a dispute in international environmental law are expanded to include non-state actors, private individuals, local communities and perhaps, civil societies with legitimate claims to environmental harm may be unable to access the environmental justice which an ICE proposes to serve through its platform.

Secondly, from antiquity, the law and adjudication have had significant role to play in effecting innovations in particular sectors of the society. As law interacts with the development of public attitudes and encourages the development of public attitudes,

[38] See ELIZABETH FISHER, The Need to Foster Legal Capacity: An Editorial Comment, Journal of Environmental Law (2016) 28 (1), DUNCAN FRENCH AND LAVANYA RAJAMANI, Law: Musings on a Journey to Somewhere' (2013) 25 JEL 437, Law 1, is an example of an early contribution. <http://www.oxfordjournals.org/our_journals/envlaw/special-virtual-issue.html> accessed 23 October 2017

[39] ibid

adjudication in turn reflects these developments through decision making made in an appropriate setting vested with jurisdiction and specialist capacity to handle matters related to the sector in question.

Adjudication in the international environmental realm has however followed a different pattern. There are several international institutions vested with jurisdiction to adjudicate in environmental matters as most environmental claims are seldom raised in isolation of international legal arguments on other substantive areas of the law. Such other areas include but are not limited to international trade agreements, war crimes, human rights issues, and matters relating to general aspects of international law, such as the relationships between treaty and custom, or the law of the environment and the law of State responsibility. The interconnection of environmental issues with other matters of interest in international law poses a fundamental challenge for a specialist environmental court because such forum will most likely lack the expertise to handle other international legal arguments outside matters relating to the environment in a given dispute. On the other hand, considering the pattern international adjudication of environmental dispute has taken so far, the pertinent question then is whether from their exercise of jurisdiction in environmental disputes, extant international institutions have expressed a willingness to recognise the place of environmental objectives in any given dispute related to the environment, which they preside over.

The world system designed under public international law is built on economic interest. Therefore, most extant international institutions with adjudicatory mandate are designed to promote and support matters relating to trade, but not necessarily, the environment.[40] Similarly, the ideals of globalisation and liberalisation wield huge influence over global trade, finance, and investment, thus generating conflict between economic needs and environmental interests. Therefore, international adjudication of environment related disputes by extant international institutions again raises a key question, which is whether so far, they have

[40] See SANFORD GAINES, The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures, 22 U. PA. J. INT'L EeON. L. 739, 784-90 (2001) in Howard F. Chang, Environmental Trade Measures, the Shrimp-Turtle Rulings, and the Ordinary Meaning of the Text of the GATT8 Chapman. Law. Review. 25 <(2005)https://www.law.upenn.edu/cf/faculty/hchang3/workingpapers/b8%20Chap.%20L.%20Rev.%2025%20(2005).pdf> accessed 02 December 2017

shown a willingness to give environmental protection objectives precedence over other economic objectives?

International environmental law as the primary subject of environmentalism is quite complex and vast, comprising obligations, rules and regulations that seek to protect the earth's living and non-living elements and its ecological processes. Thus, environmental governance at the global level requires an extraordinary degree of cooperation among nations that presents a difficult "collective action" problem.[41] It is because of these conflicts that international adjudication is a fundamental aspect of environmental governance at international level. This is because so long as environmental needs remain at variance with economic interests, it will continue to be subject to dispute resolution before international institutions as courts and other adjudicative tribunals.

Courts as part of adjudicatory institutions are vest with the mandate to uphold the rule of law, interpret and apply the law, as well as resolve disputes. Usually, courts will, in carrying out their given mandate, attribute responsibility, determine liability, as well as set out boundaries for lawful exercise of authority and implementation of binding environmental agreements.[42] Ultimately, this imposes a nexus between adjudication and environmental governance that is to a large extent, indissoluble.

The dynamic and polycentric nature of environmental issues however, make dispute resolution through adjudication in international environmental law such a challenge that no principle of law or judicial interpretation provided in the course of an environmental dispute is capable of wholly addressing all legal issues that arise. Therefore, a multifaceted and collective set of responses that includes adjudication by a specialist body will be

[41] A collective action problem occurs when rational individual action by each of the members of a group would lead to a sub-optimal collective outcome. The most notable examples are in natural resource or global commons use where maximizing individual utility leads to a depletion and ultimate ruin of the resource. See for example, Hardin, Garret. 1968. The Tragedy of the Commons. *Science*, 13 December. Hardin citing the case of a common pasture where adding more cattle is a rational individual decision but results in the destruction of the shared natural resource and ultimately to negative economic consequences. The seminal work in collective action theory is MANCUR OLSON'S "The Logic of Collective Action: public goods and the theory of groups," 1971.

[42]ELIZABETH FISHER, The Need to Foster Legal Capacity: An Editorial Comment, Journal of Environmental Law (2016) 28 (1).

considered one of the multi-faceted mechanisms to bolster international environmental governance.[43]

A substantial blue print for the ICE was prepared at the 1989 conference sponsored by the International Court for the Environment Foundation (ICEF) headed by Judge Amedeo Postiglione. [44] The Conference held at the National Academy of Lincei in Rome with experts from thirty countries in attendance and it among other recommendations; called for the establishment of an ICE accessible to State and Non-State actors to adjudicate over environmental disputes that arise from international environmental law. Another notable recommendation made was for the establishment of a new judicial institution to further access to environmental justice and settle transnational environmental disputes; emulating the success of the Court of Justice of the European Union. Of course, the 'judicial institution referred to was an international court for the environment.[45]

In 1992, at the United Nations Conference on Environment and Development held in Rio, a Draft Convention for an International Environmental Court (IEC) was presented as part of the efforts to promote the cause. However, the proposal for an international environmental court was jettisoned at the Rio Conference. Then President of the ICJ, Sir Robert Jennings in an address rejecting the proposal at the conference argued that a generalist court like the ICJ is better placed than a specialist one such as the proposed ICE because it is virtually impossible for a dispute to arise which is exclusively 'environmental' in the international realm. As a typical international dispute which is labeled 'environmental' is most likely one which has strands of general public international law, international trade law or foreign investment law, for that matter.[46]

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[43] ibid

[44] SEE AMEDEO POSTIGLIONE, The Global Environmental Crisis: The Need for an International Court of the Environment (1996) and F. MACMILLAN, WTO and the Environment (2001) 27. The proposal for an ICE is most closely associated with Judge AmedeoPostiglione, founder of the International Court for the Environment Foundation and Stephen Hockman (QC), Founder of the ICE Coalition.

[45]*Final Recommendations* – ICEF International Conference on Global Environmental Governance 2010

[46]ROBERT JENNINGS, '*Need for an Environmental Court?*' Environmental Protection Law Journal *20 (1992), page* 312.

The International Court for the Environment Coalition (ICE Coalition) led by Stephen Hockman (QC) is another civil society movement which has since inception in 2008 promoted the cause for an ICE. In the same vein, at the 2014 and 2016 Conference of the International Bar Association (IBA) respectively, calls have been made for the creation of a new international dispute resolution structure in the form of a specialist International Court for the Environment.

Environmentalism and the Proposed ICE

Environmentalism as an advocacy movement that transcends geographical, religious and cultural space, international environmental law is the primary focus of environmentalism. However, international environmental law is complex and vast; comprising obligations, rules and regulations that seek to protect the earth's living and non-living elements and its ecological processes. Hence, environmentalism through the principles of compliance, implementation and enforcement; seeks appropriate governance mechanisms to check environmental problems at international level.

Compliance in the context of international environmental law means fulfillment by the contracting State parties of their obligations under an environmental agreement and any amendments to the environmental agreement.[47]Compliance is dependent on states implementing the environmental obligations which are enshrined in the environmental agreements that they ratify.

For environmentalists, compliance is a key principle in the debate on the most effective governance regime for international environmental law. Compliance basically refers to the observance of obligations arising from international environmental law by state parties. "Compliance" in the context of international environmental law means the fulfillment by the contracting State parties of their obligations under an environmental agreement and any amendments to the environmental agreement.[48]Also, compliance is dependent on

[47]UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreementshttp://www.unep.org/delc/Portals/119/UNEP.Guidelines.on.Compliance.MEA.pdf Last visited 19 February, 2018

[48]UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreementshttp://www.unep.org/delc/Portals/119/UNEP.Guidelines.on.Compliance.MEA.pdf Accessed 19 April 2018

states implementing the environmental obligations which are enshrined in the environmental agreements that they ratify.

Implementation is another principle of environmentalism which is of immense significance to the question of an effective international environmental governance regime. Implementation by States implies the discharge of State responsibilities in environmental Agreements, and it is of various dimensions. It includes establishment by States of relevant domestic laws and procedures, fulfillment of obligations, and the enforcement of the law. States are said to have exercised compliance with the international environmental law regime when they discharge their obligations under an Agreement.

In the event of non-compliance and failure of states to implement their environmental obligations; enforcement is considered. Enforcement refers to a formal, legally circumscribed reaction to a breach of obligation.[49]Enforcement equally refer to the set of actions states can take to promote compliance with international environmental law. It is indeed the application of all available tools to achieve compliance, including compliance promotion, compliance monitoring and non-compliance response.[50]Enforcement also implies the set of actions States take to correct or halt behaviour that do not comply with given environmental management requirements. Such actions include negotiations with the State in breach of compliance to develop mutually agreeable schedules and approaches for achieving compliance; and legal action, where necessary, to compel compliance and to impose some consequence for violating the law or posing a threat to public health or environmental quality. The action of States flows from customary rules of international law which provides that where agreements are not complied with, States, are expected to take enforcement actions against the defaulting State to ensure violators come into compliance.[51] Enforcement may be

[49]MARTTII KOSKENNIEMI, NEW INSTITUTIONS AND PROCEDURES FOR IMPLEMENTATION, CONTROL AND REACTION in JACOB WERKSMAN (ed.) GREENING INTERNATIONAL INSTITUTIONS (London 1996) 237

[50]MOHAMMED LADAN, LAW, CASES AND POLICIES ON ENERGY, MINERAL RESOURCES, CLIMATE CHANGE, ENVIRONMENT, WATER, MARITIME AND HUMAN RIGHTS IN NIGERIA, (2009: ABU Press)

[51]In the domain of international environmental law, violations of *erga omnes* international environmental obligations create situation for a cause of action to arise even though there is no immediate material damage to a specific State or non-State actor. Where environmental matters arise from the aforementioned situation and

horizontal (through inter-state dispute settlement, which is the traditional approach of public international law) or vertical (in which there is a reliance on institutions , such as a court with mandatory jurisdiction).

Following the trend in environmentalism as a movement for advancing environmental ideals, it is clear that the attainment of an effective environmental governance regime for environmental management, protection, and conservation to counter environmental harm are key issues in international environmental law. Considering the public awareness raised by environmentalism and informed by scientific reports and predictions; the demand for law and the complementary institutional framework required to achieve environmental sustainability has increased in recent times. There is a growing pressure from national and international public opinion for an effective governance regime to combat pollution of waters, ocean, and air, as well as safeguard the ecological habitat. These development in international environmental law reflect a growing consensus to accord priority to the resolution of environmental problems through an effective governance regime.

Conclusion

A genuine quest towards cohesion in international environmental governance must reserve a place for the establishment of a specialist institutional framework that represent the core essence of environmental law, which is the protection, and preservation of the environment through regulation by adjudication. An effective adjudicatory system in international environmental law must however, consider the nature of the very law it aims to foster. A close examination of international environmental law shows that it is a significant aspect of law which is central to the management of the environment, but its boundaries are yet to be clearly defined.

It has been severally suggested that a significant key to tackle environmental problems at international level lies in the adoption of a pragmatic mechanism that will further the cause of environmental governance.[52] The call for an ICE is basically a reflection of the inclination to enhance international environmental governance through an institutional framework that is perceived as

are effectively subjected to international adjudication; they increase the chances of establishing a coherent international legal system for environmental law.

[52] REST, A. 1998. 'The Indispensability of an International Environmental Court'. *RECEIL* (1998) 7(1)

accommodating to both state and non-state actors, as well as coherent and decisive in the administration and interpretation of IEL. The growing consensus is that a paradigm shift is necessary in contemporary international environmental governance.

Amidst the increased call for an ICE by environmentalists, it is submitted that a perceptive aspect of the debate should revolve around the possibility of having a specialist court for the environment which will provide international environmental governance with the pragmatic platform that is required to address the challenges of fragmentation and incoherence that plagues it.

In addressing the afore-mentioned, Principles 10 and 26 of the Rio Declaration on Environment and Development are indicators of what is expected of any institution that seeks to provide coherent environmental governance. Both Principles urge States to provide the public with access to judicial and administrative procedures that are effective because of the 'remedy' and 'redress' that they provide. Perhaps, by relying on Principles 10 and 26 which lays emphasis on access to justice for all, initiatives of non-state actors in the domain of international environmental governance such as the call for an ICE can be legitimized in order to enhance international environmental governance.

SETTLEMENT OF INVESTMENT DISPUTES IN CAMEROON: AN APPRAISAL OF LAW NO. 2013/004 OF 18 APRIL 2013 TO LAY DOWN PRIVATE INVESTMENT INCENTIVES IN CAMEROON.

By

Mbifi Richard (Ph.D)*

Abstract

The Cameroon government is putting in a lot of effort with regard to the legal framework for the regulation of investments in Cameroon. In recent times, there has been a lot of legislation in this respect. The government is so concerned with this because of the important role investments play. The plethora of legislation in this domain is eloquent testimony of the importance that government attaches to the economic development of the country. The investment legislation in Cameroon provides for investment incentives, aimed at attracting investments, both local and foreign. The focus of this article is on the Settlement of Investment Disputes which is one of the key areas dealt with by the 2013 law on private incentives. There are a variety of mechanisms through which disputes could be settled. However, the 2013 law focuses on amicable settlement and arbitration. This gives the impression that the other mechanisms for the settlement of disputes are not effective or not appropriate or may not be appealing to investors. The worry of this article is, what happens in a case where amicable settlement and arbitration fail to produce the desired results. Does it mean that investors dread litigation as a mechanism for the settlement of investment disputes? In the course of espousing this worry, this article examines the meaning of investments, the mechanisms for the settlement of investment disputes provided by the 2013 law on the one hand as well as those not mentioned on the other hand. The article then ends by presenting a case for the amendment of the 2013 law on private investment incentives which had already been amended in 2017.

Introduction

Section 3 of law no. 2013/004 of 18 April 2013 to lay down private investment incentives for the Republic of Cameroon defines 'Investment' as an asset held and/or acquired by an investor (company, shares, equity, bonds, monetary claims, intellectual property rights, contractual rights, rights conferred by laws and regulations, any other tangible or intangible movable or immovable property, all related ownership rights). It goes ahead to define 'Investor' as a resident or non-resident Cameroonian or foreign natural or legal person that acquires assets in the conduct of business for profit.

Like the 2013 law, most multilateral and bilateral investment treaties and trade agreements adopt a broad definition of investment. They usually refer to 'every kind of asset' followed by an illustrative but usually non-exhaustive list of covered assets. Most of these definitions are open-ended and cover both direct and portfolio investments. Their approach is to give the term 'investment' a broad, nonexclusive definition, recognizing that investment forms are constantly evolving. However, there are some agreements which provide a different approach to defining investment, setting forth a broad but exhaustive list of covered economic activities.[1] It is therefore not strange that there is no single definition of what constitutes foreign investment. According to Juillard and Carreau, the absence of a common legal definition is due to the fact that the meaning of the term investment varies according to the object and purpose of different investment instruments which contain it.[2] The multiplication of definitions of investment thus results from the proliferation of different sources.[3]

The definition of investor and investment are among the key elements determining the scope of application of rights and obligations under international investment agreements. An investment agreement applies only to investors and investments made by those investors who qualify for coverage under the relevant provisions. Only such investments and investors may benefit from the protection and be eligible to take a claim to dispute settlement. Why is the definition of investor and investment so important? From the perspective of a capital exporting country, the definition identifies the group of investors whose foreign investment the

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[1] N. Rubins, "The Notion of 'Investment' in International Investment Arbitration" in N. Horn, S. Kroll (eds.), Arbitrating Foreign Investment Disputes (Kluwer Law International, The Hague, 2004). Rubins uses three categories of International Investment Agreements in order to organise the different approaches to defining investment: those which contain an "illustrative list of elements" (broad definition, most BITs), an "exhaustive list" (NAFTA) or a "hybrid list" (US-Singapore FTA for instance).

[2] D. Carreau, P. Juillard, Droit international économique (3e édition, Dalloz, Paris, 2007), 403 : "La difficulté que l'on rencontre, lorsque l'on veut proposer une définition del'investissement international, vient de la multiplicité des conceptions en cettematière – cette multiplicité des conceptions, en définitive, ne reflétant que laprolifération des sources."

[3] P. H. Khan, "Les investissements internationaux, nouvelles donnes : vers un droit transnational de l'investissement", in Ph. Kahn, Th.Wälde (eds.), New Aspects of International Investment Law (Martinus Nijhoff Publishers, Leiden/Boston 2007) 17-19.

country is seeking to protect through the agreement, including, in particular, its system for neutral and depoliticized dispute settlement. From the capital importing country perspective, it identifies the investors and the investments the country wishes to attract; from the investor's perspective, it identifies the way in which the investment might be structured in order to benefit from the agreements' protection.[4] With respect to the definition of an investor, he has been said to be a natural or legal person.[5] It is a firmly established principle in international law that the nationality of the investor as a natural person is determined by the national law of the state whose nationality is claimed. However, some investment agreements introduce alternative criteria such as a requirement of residency or domicile. The ICSID Convention requires nationality to be established on two important dates: the date of consent to arbitration and the date of registration. The Convention does not cover dual nationals when one of the nationalities is the one of the Contracting State.

Investment Disputes Settlement Mechanisms Provided for by the 2013 Law

Section 26 of the 2013 law provides that investors granted the incentives hereunder must first seize the Control Committee in case of dispute to seek amicable settlement. It goes further to provide that the parties may, where amicable settlement has not been obtained, refer the dispute to an arbitration body recognized by the State of Cameroon. This means that the 2013 law on private investment incentives makes provision for only two mechanisms for the settlement of investment disputes namely, amicable settlement and arbitration. These two mechanisms will be explained hereunder.

1. Amicable Settlement

It is important to indicate from the onset that though the 2013 law on private investment incentives talks of amicable settlement of investment disputes, it does not provide a definition of what it means by an amicable settlement. However, an amicable settlement of a dispute could be said to be a settlement that satisfies both the parties. When two persons have friendly relations, and are

[4] B. Legum "Defining Investment and Investor: Who is Entitled to Claim?" presentation at the Symposium "Making the Most of International Investment Agreements: A Common Agenda" co-organised by ICSID, OECD and UNCTAD, 12 December 2005, Paris.

[5] Section 3 of 2013 law.

polite to each other, they have amicable relations. Irritable people cannot have amicable relations with others. When the relations between two persons are amicable, there can be no quarrels or even arguments between them. An amicable settlement excludes the delay and the expenses of a court settlement. This amicable settlement may take the form of mediation or negotiation.

(i). Mediation

To avoid the expense and time associated with courtroom litigation, it may be a good idea to consider mediation, which is a voluntary, confidential, and informal way for people to resolve civil disputes. According to *Hans von Mangoldt*, mediation can be seen as the assistance provided by a state or international organization, which exercises its political authority as a third party to the dispute in proposing a solution. Mediation can be set in motion by one of the Parties or even by the mediator him or herself. The latter case seems to be the most frequent.[6]

Consequently, unlike with arbitration, the mediator's personality, value, authority, tact, and experience, as well as the confidence he or she inspires and his or her ability to influence or exert political pressure on the Parties are crucial to successful mediation.[7] Mediation is not an adversarial proceeding. There is no 'plaintiff' or 'defendant' as with arbitration, and the mediator does not seek to determine 'who is wrong' and 'who is right.' In terms of proceedings, the mediator is also not bound by specific rules. He or she therefore has as much latitude as necessary to propose a satisfactory dispute settlement.

During mediation, a mutually selected impartial mediator helps parties discuss their differences and negotiate their problems. Unlike a judge, a mediator does not decide which party is right or wrong, nor does he or she render an opinion or issue a final decision. Instead, mediators help people work out their own solutions to problems by removing obstacles to communication and helping two people in conflict express their needs and concerns to each other. Mediation leaves the decision-making power solely with the parties and allows them to create tailored solutions to their problems.

[6]Mangoldt, Hans von, "Arbitration and Conciliation," in Judicial Settlement of International Disputes: International Court of Justice Other Courts and Tribunals, Arbitration and Conciliation: An International Symposium, Max Planck Institute for Comparative Public Law and International Law, Springer Verlag Berlin Heidelberg, New York, 1974, pp. 417–552, p. 426.

[7] Id., p. 430;

(ii). Negotiation

Negotiation is a method by which people settle differences. It is a process by which compromise or agreement is reached while avoiding argument and dispute. In any disagreement, individuals understandably aim to achieve the best possible outcome for their position (or perhaps an organisation they represent). However, the principles of fairness, seeking mutual benefit and maintaining a relationship are the keys to a successful outcome.[8]

In simplest terms, negotiation is a discussion between two or more disputants who are trying to work out a solution to their problem.[9]This interpersonal or inter-group process can occur at a personal level, as well as at a corporate or international (diplomatic) level. Negotiations typically take place because the parties wish to create something new that neither could do on his or her own, or to resolve a problem or dispute between them.[10]The parties acknowledge that there is some conflict of interest between them and think they can use some form of influence to get a better deal, rather than simply taking what the other side will voluntarily give them.[11]They prefer to search for agreement rather than fight openly, give in, or break off contact.[12]

When parties negotiate, they usually expect give and take. While they have interlocking goals that they cannot accomplish independently, they usually do not want or need exactly the same thing.[13]This interdependence can be either win-lose or win-win in nature, and the type of negotiation that is appropriate will vary accordingly. The disputants will either attempt to force the other side to comply with their demands, to modify the opposing position and move toward compromise, or to invent a solution that meets the objectives of all sides. The nature of their interdependence will have

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[8] http://www.skillsyouneed.com/ips/negotiation.html (Last accessed on April 29, 2018)

[9] "Negotiation," International Online Training Program on Intractable Conflict, Conflict Research Consortium, University of Colorado, [available at: http://www.colorado.edu/conflict/peace/treatment/negotn.htm] (Last accessed on April 29, 2018)

[10] Roy J. Lewicki, David M. Saunders and John W. Minton, Negotiation, 3rd Edition (San Francisco: Irwin McGraw-Hill, 1999), 5.

[11] Ibid., 7.

[12] E. Wertheim, "Negotiations and Resolving Conflicts: An Overview," College of Business Administration, Northeastern University, [available at: http://webarchive.iiasa.ac.at/Research/DAS/interneg/training/conflict_overview.html] (Last accessed on May 2, 2018)

[13] Lewicki, Saunders, and Minton, 8.

a major impact on the nature of their relationship, the way negotiations are conducted, and the outcomes of these negotiations.[14]

Mutual adjustment is one of the key causes of the changes that occur during a negotiation. Both parties know that they can influence the other's outcomes and that the other side can influence theirs. The effective negotiator attempts to understand how people will adjust and readjust their positions during negotiations, based on what the other party does and is expected to do.[15] The parties have to exchange information and make an effort to influence each other. As negotiations evolve, each side proposes changes to the other party's position and makes changes to its own. This process of give-and-take and making concessions is necessary if a settlement is to be reached. If one party makes several proposals that are rejected, and the other party makes no alternate proposal, the first party may break off negotiations.[16] Parties typically will not want to concede too much if they do not sense that those with whom they are negotiating are willing to compromise. The parties must work toward a solution that takes into account each person's requirements and hopefully optimizes the outcomes for both. As they try to find their way toward agreement, the parties focus on interests, issues, and positions, and use cooperative and/or competitive processes to come to an agreement.

2. Arbitration

Section 26 of the 2013 law provides that where amicable settlement fails, the parties should refer the dispute to an arbitration body recognized by the State of Cameroon. The 2013 law talks of arbitration but does not elaborate the procedure. However, it talks of arbitration recognized by Cameroon. It is important to point out that Cameroon recognizes arbitration under the 1966 Washington Convention on the Settlement of Investment Disputes between States and nationals of Other Contracting States to which she is a signatory[17]. Cameroon equally recognizes arbitration under the OHADA Treaty to which she is a signatory.[18] Before examining

[14] Ibid., 9.
[15] Ibid., 10-11
[16] Ibid., 13
[17] Cameroon ratified the ICSID Convention on January 3rd 1967.
[18] The OHADA Treaty was signed on the 17th of October 1993 and amended in 2008.

arbitration under these two bodies, it is necessary to examine what it is as well as its importance.

(i). Definition of Arbitration

Arbitration is an alternative to conventional litigation (alternative dispute resolution), used primarily for disputes of a commercial nature.[19] It is a private mechanism for settlement of disputes, which depends on parties' agreement. *Vocabulaire juridique*, published under the supervision of *Gérard Cornu*, defines arbitration as follows: 'A sometimes amicable or peaceful—but always adjudicative—method of resolution of a dispute by an authority (the arbitrator[s]) that derives its decisional power not from a permanent delegation of the state or an international institution, but from the agreement of both parties (who may be individuals or states).'[20]

Arbitration is preferred in international commercial transactions because it is seen as a fair option, cost efficient, free of unnecessary publicity, neutral, impartial, providing to the parties the expertise of the judges (arbitrators) in a specific field and giving them a certain control over the procedure, which is not the case in national courts. It permits parties involved in international commercial transactions to avoid the potential bias in local courts.[21]There are two sorts of arbitration:

Institutional arbitration is monitored by organizations having their own sets of arbitration rules. In this type of arbitration, parties choose to submit their dispute to a specific institution, which usually has its own set of rules that parties choose to follow.[22] For example: the International Chamber of Commerce (France), the American Arbitration Association (United States), the London Court of International Arbitration (United Kingdom), the International Center for Settlement of Investment Disputes (World Bank).

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[19] Thomas E Carbonneau, Arbitration in a nutshell, 2nd edition, (West, 2009) (hereinafter Thomas E.
Carboneau, Arbitration in a nutshell) see also Emilia Onyema, The doctrine of separability under
Nigerian Law, SOAS School of Law Legal Studies Research Paper Series, (Research Paper No 3, 2010)

[20] Presses Universitaires de France, 1992, p. 62.

[21] Eric Teynier and Farouk Yala, Un nouveau centre d'arbitrage en Afrique Sub-Saharienne, at 1.

[22] Ralph H. Folsom et al., International Business Transactions in a nutshell, at 327 (West, 2009).

Ad hoc arbitration: which is a process in which parties create their own procedures or apply the United Nations Commission on International Trade Law Arbitration Model Law (hereinafter UNCITRAL Model Law). This arbitration is reputed to be flexible, cheap, and fast.[23]

(ii). Importance of Arbitration

Parties, when entering into a contract of significant value, generally want to ensure that any dispute that might arise under the contracts in the future will be dealt with efficiently, rapidly, and confidentially.[24] Especially if the parties are from different countries, each of them may prefer disputes to be handled by a neutral body rather than by the national courts of the other party. This is the case especially in Africa where foreign investors, going through bribe and corruption, do not trust national courts and judicial systems. Usually, when states (or state entities) are involved, they can often only be sued before their national courts. Arbitration offers a neutral forum which can disregard states' sovereignty immunity and possible arguments concerning their capacity to be a party to an arbitration agreement or arbitration proceedings.[25] These are the considerations that have led to the popularity of arbitration in general and arbitration clauses in contracts in particular, especially in international contracts.[26]

In the past, foreign investors deplored the lack of a reliable arbitration reference in Sub-Saharan Africa and the lack of international arbitration institutions capable of monitoring complex arbitration proceedings with competence, confidentiality and impartiality.[27] They were using European or American arbitration forums, or the World Bank (ICSID), because they could not rely on African arbitration. However, those arbitration forums were not always adapted to African reality and issues.[28] That is why OHADA

[23] Thomas E. Carbonneau, Arbitration in a nutshell, at 10.

[24] Boris Martor et al., Business Law in Africa: OHADA and the harmonization process, 16(2nd ed., GMB
Publishing Ltd., 2007) At 259.

[25] Article 177 of the Switzerland's Code of Private International Law also article 2, para 2 of the
OHADA Uniform Act on Arbitration.

[26] See Martor et al., supra.

[27] Eric Teynier and Farouk Yala, Un nouveau centre d'arbitrage en Afrique Sub-Saharienne, at 1 (ACOMEX, Janvier-Fevrier 2011, n37).

[28] Richard Boivin and Pierre Pic, L'arbitrage international en Afrique: quelques observations sur l'OHADA, at 2 (Revue Generale de Droit, 2002) (hereinafter

has created a new international commercial arbitration forum in Africa, which is comparable to other major international arbitration forums in the world. OHADA created two kinds of arbitration: ad hoc and institutional. The OHADA Common Court of Justice and Arbitration (CCJA) is a new international arbitration institution which, being inter-governmental, provides certain advantages that other international arbitration institutions do not.

3. Arbitration under the ICSID Convention

This Convention in its Article 1, created a Centre for the settlement of investment disputes referred to as the International Centre for the Settlement of Investment Disputes between States and Nationals of other Contracting States (ICSID).

(i). What is ICSID?

ICSID is the leading institution for the resolution of international investment disputes. It was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which is a multilateral international treaty.[29] The ICSID Convention entered into force on October 14, 1966. As of December 31, 2013, ICSID had 158 signatory States, and 150 Contracting States had ratified the Convention.

The primary purpose of ICSID is to provide facilities and services to support conciliation and arbitration of international investment disputes.[30] Arbitration and conciliation under the Convention are entirely voluntary and require consent of both the investor and State concerned. Once such consent is given, it cannot be withdrawn unilaterally and it becomes a binding undertaking.

ICSID is an impartial facility and it does not decide the cases. The independent arbitrators and conciliators appointed to each case hear the evidence and determine the outcome of the dispute before them.

ICSID does not conciliate or arbitrate the disputes. Rather, it provides the institutional facility and procedural rules for

Richard Boivin et al., L'arbitrage international en Afrique: quelques observations sur l'OHADA).

[29] Article 1(1). There is hereby established the International Centre for Settlement of Investment Disputes.

[30] Article 1 (2). The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

independent conciliation commissions and arbitral tribunals constituted in each case.

ICSID arbitration proceedings are decided by independent and impartial tribunals. ICSID arbitrators are esteemed international jurists from all over the world. In most instances, the tribunals consist of three arbitrators: one arbitrator appointed by the investor, one arbitrator appointed by the State, and the third, presiding arbitrator appointed by agreement of both parties. When a party fails to make an appointment or when the parties do not agree on a tribunal president, ICSID may be asked to make the missing appointments. If parties consent to arbitration under the ICSID but fail to appoint their preferred arbitrators, it may be indicative of the fact that the consent was not genuine. Consequently, if the ICSID goes ahead, as required in the circumstances to appoint an arbitrator, it may already be a pointer to the fact that the outcome may not be acceptable to both parties. It is important to point out that the ICSID maintains a list of individuals who may be named as arbitrators in ICSID proceedings. This list is known as the ICSID Panel of Arbitrators. Each ICSID Member State may designate four arbitrators to the Panel. The ICSID Panel provides a source from which the parties to ICSID arbitrations may select conciliators and arbitrators, but parties may select any person they wish.

(ii). Jurisdiction of the Centre

Article 25(1) provides that the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw it unilaterally.[31] Article 25 (2) goes ahead to define 'National of another Contracting State' to means:

> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

[31] Article 25(1)

> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

4. Arbitration under the OHADA Treaty

OHADA adopted a Uniform Act on Arbitration, enacted March 10, 1999 and implemented June 11, 1999, which is applicable to every Member State and has become their national law on arbitration. Through title IV of the Treaty and the CCJA rules on arbitration, OHADA has also created an original regional arbitration institution, which is closer to investors in the OHADA area, cheaper in administrative cost and both after and more efficient regarding enforcement.

The objective of the Ohada Treaty as provided for in article 1 is the harmonization of business laws in the Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes.

In applying an arbitration clause or an out of court settlement, any party to a contract may, either because it has its domicile or its usual residence in one of the Contracting States, or if the contract is enforced or to be enforced in its entirety or partially on the territory of one or several contracting States, refer a contract litigation to the arbitration procedure.[32] The Common Court of Justice and Arbitration does not itself settle such disagreements. It shall name and confirm the arbitrators, be informed of the progress of the proceedings, and examine decisions, in accordance with Article 24 of the Uniform Act on Arbitration.

Disagreements may be settled by one arbitrator or by three arbitrators. In article, the expression 'the arbitrator' means either one or more arbitrators.[33] When the parties have agreed that the disagreement will be settled by only one arbitrator, they may appoint him under a mutual agreement subject to approval of the Court. If

[32] Article 21 of the OHADA Uniform Act on Arbitration
[33] Article 22

there is any disagreement between the parties, an arbitrator shall be appointed by the Court within thirty days from the date of notification from one party to another to have recourse to arbitration.

Where three arbitrators are to hear a matter, each party shall appoint an independent arbitrator, such appointment being subject to the approval of the Court. If one of the parties refuses or cannot do so, the Court shall appoint an arbitrator on behalf of that party. A third arbitrator, shall also be appointed solely by the Court and who will sit as Chairman. The Court may however allow the choice of the third arbitrator to be made by the two other arbitrators only where the latter have undertaken that they would elect as between them a third one, and this within a given period. In such a case, it is to the Court to approve the third arbitrator. If, at the expiration of the period fixed by the parties or allowed by the Court, the arbitrators cannot reach an agreement between themselves, the third arbitrator shall be chosen and appointed by the Court.

If the parties have not agreed upon the number of arbitrators, the Court shall appoint one sole arbitrator, unless it appears to the Court that the case must be tried by three arbitrators. In such a case, each party shall have fifteen days to appoint an arbitrator. The arbitrators may be chosen from the list of arbitrators established by the Court and updated annually. Members of the Court cannot be registered on that list.

The Court may rule on any challenge of an arbitrator by any party. In such a circumstance, the arbitrator shall be replaced on the following conditions namely, where he or she has passed away, he or she is unable to perform his or her duties, he or she is to resign from office whether by reason of a challenge as to his or her suitability or otherwise, and where the Court, after enquiry decides that he or she has not fulfilled his or her obligations according to such rules of arbitration as may be applicable.

Although the Common Court of Justice and Arbitration does not itself settle disagreements, it names and confirms arbitrators, in accordance with Article 24 of the Uniform Act on Arbitration. This overwhelming influence of the court on the arbitration process may be interpreted to mean that the decisions are taken by the court. The fact that the court draws up a list of arbitrators, approves the appointment of arbitrators and even appoints arbitrators is indicative of the massive influence of the court on the process. This may be said to be litigation in disguise.

Other Mechanisms Available for the Settlement of Investment Disputes

Amicable settlement of disputes and arbitration are not the only mechanisms available for the settlement of disputes. Other mechanisms exist namely conciliation and litigation.

(i). Conciliation

Vocabulaire juridique, published under the supervision of *Gérard Cornu*, defines conciliation as follows: 'An intervention to resolve an international dispute by a body without political authority that has the trust of the parties involved and is responsible for examining all aspects of the dispute and proposing a solution that the conciliation body has the trust of the parties.'

Without this trust, its involvement will be in vain. In addition, because it is responsible for examining all aspects of the dispute, it must identify the facts of the case. It can take into account not only applicable rules of law but also all non-legal aspects of the case. Its proposals can be based in whole or in part on the law. However, legal considerations may only be secondary and may even be absent altogether. Moreover, because the Parties are not bound to implement the body's solution, they are free to reject its proposals. The freedom of states remains unfettered.[34] For the conciliation body's dispute resolution proposal to be successful, its underlying reasoning—arrived at by an in-depth examination of all aspects of the case—must be sufficiently persuasive to convince the Parties that it is a good solution to their dispute and lead them to resolve their issues accordingly[35].

Without defining conciliation, the ICSID Convention outlines in its article 28 the procedure for conciliation proceedings as follows:

> (1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.
> (2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

[34] Cot, Jean Pierre, La conciliation internationale, Éditions A. Pedone, Paris, 1968, pgs 8 and 9.
[35] See note 28 supra, pg 430.

> (3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

(ii). Litigation

Litigation is the term used to describe proceedings initiated between two opposing parties to enforce or defend a legal right. Litigation is typically settled by agreement between the parties but may also be heard and decided by a jury or judge in court. Contrary to popular belief, litigation is not simply another name for a lawsuit. Litigation includes any number of activities before, during, and after a lawsuit to enforce a legal right. In addition to the actual lawsuit, pre-suit negotiations, arbitrations, facilitations and appeals may also be part of the litigation process.

The Need for The Amendment of Law No. 2013/004 of 18 April 2013

In this section, this article argues that Law No. 2013/004 of 18 April 2013 on private investment incentives needs to be amended so as to include litigation as one of the mechanisms for the settlement of investment disputes in Cameroon. In making this case, this article articulates on the jurisdiction of arbitration, the main characteristic and the supposed advantages of arbitration over litigation.

1. The Jurisdiction of Arbitration

The 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other Contracting States provides in article 25(1) that '… any legal dispute arising directly out of an investment ….' This means that arbitration can be used to resolve a wide range of disputes. Any matter which involves civil rights and obligations can be handled through arbitration. It can be used to deal with questions of fact. Here, the interpretation of the words used in the investment contract is primordial. Where an arbitration clause exists in a contract, it must be given a wide interpretation capable of excluding the jurisdiction of the court. For example, an arbitration clause in the case of *Roxburgh v. Dinardo*, (1981)[36] was held not to be wide enough to exclude the jurisdiction of the court. In that case there was a

[36] http://www.hoddereducation.co.uk (accessed on April 30, 2018)

partnership agreement which contained an arbitration clause to the effect that arbitration will be used in the event of 'any question, dispute or difference between the parties arising out of this agreement or relating to the partnership business.' This clause was held not to be wide enough to exclude the jurisdiction of the court so the ruling was given by the court to disregard the partnership. It is worth mentioning that there are some matters which cannot be handled through arbitration. Arbitration cannot be used to handle criminal matters. However, in the case of *Earl of Kintore v. Union Bank of Scotland*[37] it was suggested that a criminal matter concerning fraud could be resolved through arbitration. This case does not present itself as an exception to the rule because it was shown to be restricted to civil aspects of fraud. Consequently, where a company director, acting in capacity as director commits an offence, litigation will be the most appropriate mechanism through which to handle the issue. It therefore goes without saying that any law which excludes litigation from the list of mechanisms for the settlement of disputes, has to be 'detained for questioning.'

2. Characteristics of Arbitration.

A major characteristic of arbitration which is captured by the ICSID Convention is to the effect that once parties have consented to submit their dispute to arbitration, they can no longer go back on their decision.[38] This means that the parties accept to take the risk where the arbitrator(s) arrives at a wrong decision. In arbitration, there is no appeal. The right to appeal is a fundamental right and one of the principles of a fair trial. An arbitral award cannot therefore be compared to a court judgment if there can be no appeal against it. Litigation provides an opportunity for the enhancement of the principle of fair trial. In some cases, the courts are allowed to interfere with an arbitral award. This will be the case where the award is considered to be dishonest or tainted in some respect. In this connection Enid Marshall[39] pointed out that 'It clearly appears to be an implied condition under the contract that the parties shall only be bound by the award if it be pronounced with honesty and impartiality by the arbiter.' The courts can also interfere with an arbitral award in circumstances where the arbitrator acts 'Ultra fines

[37] (1863) 1 M. (HL) 11.
[38] Art. 26 of the ICSID Convention of 1965.
[39] General Principles of Scot Law (1996), Amazon.co.uk. (accessed on 30th April 2018).

compromissi.'[40] In such circumstances litigation ought to be the last bus stop for the parties.

3. Supposed Advantages of Arbitration over Litigation.

The Cameroonian legislator seems to have capitalized on the advantages which arbitration is said to have over litigation.[41] Even if arbitration has advantages which outweigh those of litigation, it does not mean that litigation does not have its place in the resolution of investment disputes. It is contended that arbitration is informal and thus effective in resolving disputes. This means that the parties decide on the degree of formality throughout the process. This however is not always the norm as the matter is sometimes allowed at the discretion of the arbitrator. It is important to point out that this state of affairs makes the process less strict and may affect the quality of the outcome. On its part, litigation is very formal, obeying well defined rules that make the process strict and capable of producing effective results.

As an advantage, the arbitration procedure is said to be fast. This is because the timetable is arranged by the parties and the arbitrator. This means that the decision of an arbitrator is far quicker to obtain that in the case of litigation where the case must wait its turn in the court room and also go through a meticulous procedure. Speed does not however, characterize all arbitration procedures as seen in the case of *Crudens Ltd v. Tayside Health Board*.[42] In this case, the arbitrator was in such high demand that his commitment prevented him from giving the case undivided attention and the parties spent a lot of time and money on a one hundred-day arbitration. The 2013 law cannot jettison litigation on the ground that it is a long drawn out process. Effectiveness cannot be sacrificed for speed.

Arbitration has also been considered to be far less expensive that the litigation process. This definitely is not wholly true. In some cases, a party in an arbitration process may wish to be represented by a legal practitioner. Also, some arbitrators can be very expensive owing to their popularity and expertise. What is more is that some investors may not care about the cost of obtaining

[40] This means to act beyond the limits of the compromise or outside the scope of the agreement to submit a dispute for arbitration. www.oxfordreference.com. (accessed on 30th April 2018)

[41] Harry T. Edwards, (2004), Advantages of arbitration over litigation, National Academy of Arbitrators. http://naarb.org. (accessed on 2nd May, 2018)

[42] (1979), 123 Sollicitors Journal, 406

justice.[43] The legislator should not take upon herself to try to protect the resources of investors. Investors should be given a fair chance to be able to choose.

Litigation seems to have been indicted by the 2013 law, for its openness. Arbitration proceedings are private and this has been considered a strength because parties may want to avoid disclosure of their financial details. It is important to point out that litigation does not mean that the financial records of the concerned will be put in the market place. Investment disputes may not only arise from financial issues to warrant fear of disclosure records. A cardinal principle of justice in Cameroon is that of public hearing.[44] To privilege arbitration over litigation on grounds of privacy is an affront to this principle. Litigation therefore is supposed to be given its place and parties allowed the latitude to choose.

The use of technical experts has also been advanced as one reason for widely using arbitration. In this connection, it is argued that the parties are able to pick the ideal men for the job. This means that if the dispute is in a certain technical area and very complex, the parties will be able to pick someone with more experience and understanding of the topic. This argument seems untenable as a reason for excluding litigation because during a trial, the court has the latitude to call expert evidence to illuminate the issues where and whenever the court is in doubt.

On the strength of the foregoing discussion, this article is of the opinion that all the mechanisms available for the settlement of investment disputes, have their strengths and weaknesses and the exclusion of any of them may safely be considered a human rights abuse. All citizens, physical or moral, national or foreign, have a right to fair justice and the legislator has an obligation to protect, promote and fulfill this right. This therefore makes the amendment of article 26 of Law No. 2013/004 to lay down private investment incentives in Cameroon not only compelling but urgent.

Conclusion

From the discussions presented above, it is clear that there are a variety of dispute settlement mechanisms. Consequently, this article argues that the 2013 law ought to provide beyond amicable settlement and arbitration. The law should make provision for 'ADR.' In this case, ADR will refer to litigation, conciliation,

[43] There is a popular saying which holds that cheap things end up being very expensive or in other words, being penny wise and pound foolish.
[44] Cf supra note 40

mediation, negotiation, etc. This will mean that all the avenues available are exploited in the process of settling an investment dispute. Litigation as a mechanism for the settlement of disputes ought not to have been neglected by the 2013 law. One would have expected the 2017[45] law amending the 2013 law, to amend article 26 of the latter law so as to give aggrieved parties the latitude to choose from a wide range of mechanisms. That having not been the case, this article argues very strongly in favour of another amendment of the 2013 law on private investment incentives, to expand the scope of article 26. This will be in consonance with the main objective of the OHADA Treaty which is to provide legal and judicial security for business in the sub – region.[46] This means that the OHADA system does not only contemplates but makes provision for litigation as one of the mechanisms for the settlement of investment disputes. The treaty specifically provides that 'the purpose of this Treaty is to harmonize business laws in States Parties by developing and adopting simple, modern and common rules adapted to their economies, setting up appropriate judicial procedures, and encouraging recourse to arbitration for settlement of contractual disputes.'[47] In making allusion to arbitration as a mechanism for the settlement of investment disputes, the treaty talks of 'encouraging recourse to arbitration for settlement of contractual disputes.' The treaty does not make arbitration mandatory. Considering that the importance of the OHADA laws as far as business in Cameroon is concerned cannot be overemphasized, this article therefore recommends that article 26 of the 2013 law on private investment incentives should be amended to include amicable settlement, litigation and ADR. There is no gainsaying that litigation before national courts has long been tagged as a disincentive to foreign direct investment. This is however, not synonymous to the thinking that litigation has no place in the settlement of investment disputes in Cameroon.

[45] *law* N°*2017*/015 of. 12 July *2017* amending and supplementing the provisions of the *law* setting forth *incentives* for private *investment* in the Republic of Cameroon (*law*. N°2013/004 of 18 April 2013).
[46] Article 1 of the OHADA Treaty
[47] Ibid.

ISSUES WITH SUSPENDED SENTENCE UNDER THE NIGERIAN ADMINISTRATION OF CRIMINAL JUSTICE ACT, 2015

By

Vearumun Vitalis Tarhule (Ph.D)*

Abstract

The Administration of Criminal Justice Act 2015 (ACJA) promulgated with a mindset to solving seemingly intractable problems (most especially delay) hitherto bedeviling the Nigerian criminal justice system is an impactful legislation in many ways, one of these being the introduction of new sentencing paradigms chiefly amongst which is the 'suspended sentence'. Motivated by this new penological tool, this article examines the import of the sentence, how it is to be applied and the challenges that are likely to ensue. The paper adopts the doctrinal method of research to interrogate the topic. It was found that suspended sentence as provided in the ACJA does not contain sufficient details for implementation and consequently, leaves wide discretionary powers to the courts; that it contains no answers to as to what happens to convicts sentenced to the order who breaches the terms of release; that public consternation is likely to follow the implementation of the sentence. The article advocates the amendment of the ACJA to incorporate more details as done by the United Kingdom's Criminal Justice Act, 2003; and the holding of sensitization and enlightenment advocacy to acclimatize the citizenry and the judiciary on how to apply the sanction.

Key words: conviction, delay, free, imprisonment, punishment, sanction

Introduction

There have been calls (within the last two decades) for Nigeria to adopt and implement more sentencing alternatives, particularly, those that are non-custodial in nature[1]. These calls became necessary for variety of reasons; first, the Nigerian judiciary has overtly over romanced with imprisonment and fines to the detriment of other available options of dealing with the offender[2];

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[1] Etudaiye, A. (2006) 'Reforming the Punitive Policies of the Nigerian Crime Control Regime as a Source of National Growth' 2006, *University of Ilorin Law Journal*, Vol. 2 pp 24 – 47 suggested the use of suspended sentence, parole and probation as veritable alternatives to incarceration; Auwal, I. Adebayo, M. and Kamal D. (2008) 'Review of Criminal Justice Policies: Options for Nigeria' Frontiers *of Nigerian Law Journal* Vol II (No 2) 39 -58; Shajobi-Ibinkunle G. (2014) 'Challenges to Imprisonment in the Nigerian Penal System: The way Forward' *American Journal of Humanities* Vol. 2 (No.2) 96 -104.

[2] Even though the Nigerian Criminal Statutes to wit: The Penal Code Cap 89 Laws of Northern Nigeria 1960 and the Criminal Code Cap C38 Laws of the Federation of Nigeria, 2004 have provided an array of options ranging from imprisonment,

secondly, and arising from the above, the cascading congestion of the country's prisons[3] has brought to the fore, the need to explore other options (particularly, non-custodial alternatives) of dealing with offenders.

In response to these calls and problems, the National Assembly promulgated the Administration of Criminal Justice Act, 2015 (ACJA) which has potently re-introduced non-custodial sentencing options of probation, and parole (hitherto restrictively available in several pieces of legislation but not applied by the courts) and additionally, introduced community service orders and suspended sentence as new sentencing options. These new sentencing options having entered Nigerian legal paradigm require exploration to know how best they can be harnessed for the purpose of advancing criminal justice delivery and *a fortiori* safeguarding the country from criminals and hoodlums.

Against this backdrop this article examines 'suspended sentence' (one of the newly introduced penal sanction) provided by the ACJA with a mindset to lay bare its contents, delineate its parameters and above all, provide prophetic view of how the court would apply it and the likely problems that would ensue. In doing this, the article is divided into five parts: Part One is the introduction; Part Two contextually situate 'suspended sentence'; Part Three examines the content of the ACJA provision on suspended sentence, Part Four examines the implementational bottlenecks, while Part five draws the conclusion and makes suggestions for reform.

Contextual Clarification of 'Suspended Sentence'

The phrase 'suspended sentence' appears to be devoid of legal polemics. Freiberg and Moore[4] defines it as 'a sentence of imprisonment which is imposed but not executed, served in the

fines, caning, forfeiture of assets, binding over orders, probation and parole, these were rarely if ever applied except imprisonment and fines.

[3] The World Prison Brief Data: Nigeria Country Report indicate a progressive rise in Prison population from 2008 t0 2016 shows that the Nigerian prisons held 41, 143 in 2008; 46, 586 in 2010, and 51, 560 in 2012; and 63, 142 as at 31st March, 2016 <www.prisonstudies.org/country/nigeria> (Referenced 3 January,17. Data from the official website of the Nigerian Prisons service as at the time of writing this article was not available.

[4] Freiberg, A. and Moore, V. 'Suspended Sentence and the Public Confidence in the Judicial System' <https://www.researchgate.net/publication/237510361> at 25/11/16

community, with or without supervision and with various degrees and levels of conditionality'.[5] Deducible from this definition is the fact that for suspended sentence to be imposed, the offender must have been tried and found guilty of a criminal offence and convicted but instead of sending him directly to prison, the offender is allowed back to the community with or without conditions and sometimes (though not mandatorily) under the watchful eyes of a supervising officer.

The United Kingdom Ministry of Justice Analytical Series, 2015[6] defines 'suspended sentence' as meaning that 'the offender does not go to prison immediately, but is given the chance to stay out of trouble and comply with one or more of the 13 requirements which the court may impose on the offender'.[7] This definition is in consonance with the view expressed by Justice Kirby of the Australian High Court in *Dinsdale v R*[8] that '… in cases where the suspended sentence is served completely, without re-offending, the result will be that the offender incurs no custodial punishment, indeed no actual coercive punishment beyond the public entry of conviction and the sentence with the attendant risks..'[9]

[5] *Ibid*, 1

[6] Mews, A. Hillier, J. McHugh, M. and Coxon, C. 'The Impact of Short Custodial Sentences, Community Orders and Suspended Sentence Orders on re-Offending" Ministry of Justice Analytical Series, 2015

[7] *Ibid* p. 5. These requirements are: (1) unpaid work for up to 300 hours; (2) Participating in activities such as developing skills or making amends to their victim; (3) Undertaking an accredited programme to help change offending behaviour; (4) Prohibition from doing particular activities; (5) Adherence to a curfew, so that the offender is required to be at a particular place at a certain times; (6) An exclusion requirement , so the offender is not allowed to go to particular places; (7) A residence requirement so that the offender is obliged to live at a particular address; (8) Mental health treatment with the offenders consent; (9) A drug rehabilitation requirement with the offender's consent; (10) An alcohol treatment requirement with the offender's consent; (11) Supervision by the Probation Service; (12) where offenders are under 25, they may be required to go to a centre at specific times over the curse of their sentence; and (13) A foreign travel prohibition requirement.

[8] (2000) 202 CLR 321 HC

[9] Freiberg and Moore Note 3. P 10

Sumar mirrors it simply as 'withholding all or some of the defendant's punishment[10]. Agreeing with this view point, Smart Justice[11] reasoned that:

> A suspended sentence allows a judge to decide that the offence is serious enough for a jail term, but in the particular circumstances of the case, some or all of the imprisonment should be suspended. If the offender breaches the sentence by committing another offence, they are liable to go to prison to serve the suspended sentence.

It follows from the explanation by Smart Justice that there are two variations of suspended sentence, complete suspension of the term and partial suspension. It is complete suspension if the offender is not to go to jail at all but to go home straight from the court's judgment. On the other hand, partial suspension occurs where the defendant is first sent to prison for short period and then have the remainder of the sentence suspended. Partial suspension of sentence is analogous to parole[12] but differs significantly from the later in that the defendant has prior knowledge of how long he will stay in prison before being released, and further, that his release is not predicated on any good behaviour he might exhibit while in the correctional institution but based firmly on the ruling of the court.

The United Nations Office on Drugs and Crime (UNODC)[13] defines 'suspended or deferred sentence' as a situation 'where the sentence of imprisonment is pronounced, but its implementation suspended for a period on a condition or conditions

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[10] Al-Amyn Sumar 'Understanding and Mitigating the Effect of Suspended Sentences' <https://nationalimmigrationproject.org/pdf (Referenced 2 5 November,16)

[11] Smart Justice 'Suspended Sentences' <www.smartjustice.org.au/resources/SMART-SUSPENDED -JUSTICE/pdf> (Referenced 25 November, 16)

[12] Parole is defined as the supervised early release of inmates from correctional confinement, or as 'an administrative decision to release an offender after he or she has served time to a correctional facility' or as 'a process whereby a convict is released from prison before the conclusion of his term to spend the remainder of his term in the community under certain conditions and under the watchful eyes of parole officer' See Vearumun Tarhule *Corrections under Nigerian Law* (Lagos: Innovative Communications, 2014) 360.

[13] UNODC 'Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment' https://www.unodc.org/pdf/criminal_justice/Handbook_of_basic_principles_and_promising_practices_on-alternatives_to_imprisonment (Referenced 30 January, 2017)

set by the court'.[14] It however warns that suspended sentence should not be triggered automatically; the authorities should decide in each case whether its imposition is appropriate.

To have a better appreciation of the connotation of the sentence, it is better to place it side by side with other concepts which though, appear similar are different in meaning to suspended sentence. These are 'deferred sentence'; probation; and 'community service'.

A deferred sentence is a situation where the court after entering a judgment differ the sentencing of the convict to another date to enable the court to have regard in determining the sentence to his conduct after conviction.[15] In a deferred sentence, the offender must consent to the postponement of sentencing to another date[16]. In other words, in a deferred sentence, the offender does not know in exactitude of terms the sentence which the court has in store for him until the date fixed for the deferred sentence to be read (usually not more than six months) form the date of deferment. Conversely, the offender in suspended sentence knows with precision the terms of the sentence (the duration of imprisonment/ or amount of fine etc.) at the time of sentencing but the term is made non-operational by the order save in case of violation of the conditions.

Suspended sentence is also distinguishable from probation. Probation is the sentence that places the offender under the supervision of a probation officer within the community instead of sending him to prison[17]. In many jurisdictions other the United States of America (USA)[18] probationers are never sent to prison. In Nigeria, under the ACJA regime, probation is not a conviction[19] except the offence involves reinvesting or restoring stolen property in which case, it is treated as a conviction. On the other hand,

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[14] *Ibid* p.33

[15] Criminal Justice (Northern Ireland) order 1996 Article 3 'Deferred Sentences' www.jsbn.com/resources/training-events/Documents/sentencing%20workshop/sentencing%20workshop%20May07.pdf (Referenced 2 February, 2017)

[16] Ibid

[17] Reid, S. *Criminal Justice* 8th Edn (Australia; Thomson, 2008) 338

[18] USA has one is termed 'Shock Probation' which involves the offender is first sentenced to a short term of imprisonment to enable him feel the pains of confinement before releasing him on probation, the goal being to compel him to comply with probation conditions. Reid n.16, 343

[19] ACJA s.454 (1), (2) & (4). A community reading of the three subsections clearly shows that probation is not a conviction under Nigerian law.

suspended sentence is *ipso facto* regarded as conviction.[20] There is however a notable area of convergence of the two sentences in that a suspended sentence maybe combined with probation orders within the community. Indeed, in most jurisdictions such as Canada, the practice is to mandatorily combine suspended sentence with probation[21].

Another term that is very similar in meaning to suspended sentence is community service orders. A community service order involves the obligation to perform certain number of hours of unpaid work for the good of the community during leisure time, within a given time limit and is imposed as a sentencing option or condition[22]. The point of convergence of the two sentences is that both are carried out within the community, and both are convictions. Their diverging point is that whereas, a suspended sentence maybe ordered without supervision or conditionalities, a community service order invariably involves supervision and is always fixed with conditions.

From the discussion thus far, it can be surmised that suspended sentence is an order of court that lets the defendant out of incarceration if the defendant keeps to the injunctions of the court. It follows that suspended sentence hangs like the Sword of Damocles over the head of the defendant and will consume him if he violates the conditionalities attached to it (if any) or if he re-offends during the operational period.

Suspended sentence must be tied to a particular time frame. Where it is ordered, the defendant is given a definite time frame within which he must not re-offend or breach a term of the sentence. If within this time he complies with the courts order by avoiding re-offending and religiously obeying the instructions as decreed by the court that will be the end of the matter. The crux of the punishment is thus, the fear of the term of imprisonment that is suspended. It has been enthused that the threat of imprisonment which follows each case of suspended sentence has a deterrent effect though in ideal situation, the sentence would not be imposed because the offender would have complied with the conditions.[23]

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[20] ACJA s.460

[21] An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment) S.C. (Statute of Canada) 2007 c.12 section 742.1

[22] Eight United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana Cuba 27th August – 7th September, 1990 pp 10 -17

[23] Ibid

Suspended Sentence under the ACJA

Given the fact that suspended sentence as punishment is novel in Nigeria, it is necessary to set out in full the provisions of ACJA touching on it. Section 460 of the ACJA provides:

(1) Notwithstanding the provision of any other law creating an offence, where the court sees reason, the court may order that the sentence it imposed on the convict be, with or without conditions be suspended, in which case the convict shall not be required to serve the sentence in accordance with the conditions of the suspension.
(2) The court may with or without conditions sentence the convict to perform some specified service in the community or such community or place as the court may direct.
(3) A convict shall not be sentenced to suspended sentence or to community service for an offence involving the use of arms, offensive weapons, sexual offences or for an offence which the punishment exceeds imprisonment for a term of three years.
(4) The courts in exercising its power under subsection (1) or (2) shall have regard for the need to:
    (a) reduce congestion in prisons;
    (b) rehabilitate prisoners by making them to undertake productive work;
    (c) prevent convicts who commit simple offences from mixing with hardened criminals.

This is the only section dealing with the administration of Suspended sentence as far as the ACJA is concerned. Is this enough guide to judges to implement this new penal sanction?

Section 460 (1) is to the effect that even if any criminal statute does not provide for suspended sentence, the court can still read it (suspended sentence) into the law provided, the courts thinks the punishment is the right antidote for the particular crime. The ACJA is an adjectival law and must of necessity, be read alongside the substantive criminal statutes such as the Penal Code, Criminal Code, Economic and Financial Crimes Commission Act (EFCC)[24] and Independent and Corrupt Practices Commission Act (ICPC), 2002 amongst a plethora of others. It means the ACJA is the vehicle by which these substantive criminal statutes are implemented. Effectively therefore, the courts are free to apply suspended

[24] EFCC Cap E.1 Laws of the Federation of Nigeria 2004.

sentence to all crimes in Nigeria subject only to the intrinsic limitation placed on its application to federal courts only[25].

Furthermore, the sub-section is discretionary hence the use of the word 'may order that the sentence be imposed on the convict'. It is consequently within the exclusive preserve of the presiding judge to decide on the desirability and application of the punishment. Indeed, the subsection under review has created far more discretion than the simple choice of imposing the sentence. The court further has the discretion to 'release the convict with or without conditions' as it deems fit to meet the justice of the case. This discretion is taken to high heavens as no clear requirements are given to the courts save the lean provisions of section 460 (4) dealing with the philosophical underpinning of the punishment. This is at variance with the practice in United Kingdom where clear guidelines are given to judges to choose from a pool of requirements for the imposition of suspended sentence[26].

Besides, for the invocation of this sub-section, the convict must have been sentenced to a definite term of imprisonment before that term can be suspended. This much is gathered from the phrase 'in which case, the convict shall not be required to serve the sentence in accordance with the conditions of the suspension'. It is only when the convict is sentenced in line with the criminal statute but the court sees good reason for the imposition of suspended sentence that it would so order.

Finally, on this sub-section, is the fact that suspended sentence is a conviction. This is clearly borne out by the use of the word 'convict' as opposed to offender employed in many places by the ACJA. It follows that despite the fact that the convict's sentence is postponed; he still bears the toga of convict for all intent and purposes. The implication is that if the crime boarders on dishonesty or criminal misappropriation, the convict would be excluded from holding some public offices as mandated by the Constitution of the

[25] ACJA in s 2 (1) limits its application to 'offences established by an Act of the National Assembly and other offences punishable in the Federal Capital territory, Abuja. This has triggered legal polemics as to whether ACJA applies only to Federal Courts or the State courts could also apply it if the matter involved touches on a Federal enactment.

[26] Criminal Justice Act Cap 44 (UK) 2003 s.190 gives catalogue as much as 14 requirements with details each requirement in a separate section spanning ss. 199 – 218. Yet UK has been implementing suspended sentence since 1967! Nigeria which is just introducing it has a single section!

Federal Republic of Nigeria, 1999) as amended (CFRN)[27]. It is submitted that this position taken by the ACJA is constructive.

Section 460 (2) ACJA is to the effect that the court may in her discretion sentence the convict to perform service in the community. This section is necessary and important in that suspended sentence (without community service) has of recent, come under serious criticism with several countries, out rightly calling for its modification. For example, suspended sentence which was first introduced in the United Kingdom in 1967, was modified in 1982 by the introduction of partially suspended sentences[28], gravely restricted in 1992[29] and expanded again in 2003[30] with the government considering outlawing Magistrate courts from applying it[31]. In Australia, the State of Victoria for example, introduced suspended sentence in 1915, abolished it in 1958, re-introduced in 1986, modified in 1991 and further modified in 1997, ordered to be reviewed in 2005 and recommended for abolition in 2006.[32] It did not fare any better in New Zealand[33] and Canada.[34]

The various changes effected in the laws relating to suspended sentences were in response to public outcry, angst and disenchantment over what they perceive as inadequate punishment or allowing the offenders to 'escape' or 'avoid' or 'walk free' from imprisonment.[35] Beyond these rather euphemistic statements lay the fact that most people were and still are deeply disgusted with the sentence which they do not view as a penalty, not to talk of sufficient penalty. To the victim of the crime, a suspended sentence is merely a 'slap on the wrist' of the person who has caused financial loss,

[27] See CFRN ss. 60 (1) (c); 107 (1) (c); and 182 (1) (c)

[28] This was vide the Criminal Law Act 1978 (UK) but it did not come into effect until 1982.

[29] Criminal Justice Act 1991(UK) s.5 (1) which removed the power to partly suspend a prison sentence while the use of wholly suspended sentence was confined to where 'exceptional circumstances' could be shown.

[30] The Criminal Justice Act 2003 (UK) contains suspended sentence provisions (ss.189 – 194 and further explanations from s. 199 - 218)

[31] Freiberg and Moore Note 3 p 2- 3

[32] Ibid

[33] New Zealand abolished suspended sentences vide the Sentencing Act 2002 (NZ) and considered and rejected their re-introduction in 2006. See Freiberg and Moore Note 3 p3.

[34] Canada introduced suspended sentences of imprisonment in 1996; then passed legislation, An Act to Amend the Criminal Code (conditional Sentence of Imprisonment) in 2007 limiting its use in relation to serious offences.

[35] Freiberg and Moore note 3 p 8.

physical pain, and psychological trauma to simply walk out of the court hall a free man. It has been enthused that:

> As an ordinary citizen observing the operation of the system, I find the use of suspended sentences as the single most abhorrent fact of administration of justice…the community expends time, money and effort in the provision of a police service and justice system. That system investigates crime, presents evidence to the court and the court then finds that an offence punishable by imprisonment has been committed by the defendant. It then lets him go free. The community does not consider that to be justice. I do not consider that to be justice…A suspended sentence is not a penalty[36].

Evidently, suspended sentence without more draws a lot of public cynicism which perhaps explains why the Nigerian Legislature in her wisdom, added this subsection directing courts in deserved cases to add community services to the order suspending sentences. Unfortunately, instead of making community service orders to mandatorily accompany a suspended sentence as done in Canada, the ACJA made it optional in Nigeria[37]. To this extent therefore, the subsection is not justified.

Section 460 (3) ACJA directs courts not to sentence a convict to community service or suspended sentence for offences involving the use of arms, offensive weapon, sexual offences or for an offence which the punishment exceeds imprisonment for a term of three years. Bluntly put, suspended sentences in Nigeria are limited to misdemeanors (simple offences) and not to felonies (serious offences). This provision can hardly be quarried particularly, the aspect aimed at preventing the contagion of hardened criminals and recidivist with minor and first offenders. For as shall be demonstrated later when section 460 (4) shall be analyzed, the entire purport of the sentence is to avoid pollution of minor and first offenders by recidivists in prison and to encourage productive work and rehabilitation. Given this avowed commitment then, only minor offenders ought to take benefit of this benevolent sentence. The subsection however appears paradoxical. How is productive work and rehabilitation encouraged when the court is given wide discretion to release the convict on suspended sentence 'with or without adding community service orders' and 'with or

[36] Sentencing Advisory Council*, Suspended Sentences Final Report part 1* (2006) (State of Victoria, Australia)

[37] An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment) S.C. 2007, Canada, S.742.1

without conditions or supervision'? As established earlier in this discourse, it is these types of provisions that heighten public perception of suspended sentences with sarcasm and cynicism.

The philosophical underpinnings on which suspended sentence is anchored are contained in section 460 (4) of the ACJA. These are to reduce congestion; rehabilitate prisoners by making them to undertake productive work; and to prevent convicts who commit simple offences from mixing with hardened criminals.

Suspended sentence has been adopted in several jurisdictions chiefly for the purpose of reducing prison congestions. In Australia for example, it has been argued that abolishing suspended sentences is likely to lead to drastic, costly and unmanageable increase in the prison population.[38] In the England and Wales, it has been found that 13% of all adult sentences imposed in 2013 were suspended[39]. Considering the fact that the UK Prison population stood at over 84,000 inmates in most months of that year[40], it means that suspended sentence played a major role in keeping the prison population at a manageable level. It follows that the Nigerian legislature hit the nail on the head when they assumed suspended sentence would reduce prisons congestion.

As for rehabilitating offenders and making them undertake productive work, it is submitted that while this goal is the ultimate aim in most jurisdictions such as Canada, UK, and Germany, its practical application in Nigeria is liable to be problematic. The suspended sentence in Nigeria as earlier adumbrated upon admits of several discretionary powers in the judges without clear cut guidelines. The chances of diluting it the way plea bargain[41] has been watered down is not completely out of place.

The legislature also envisaged suspended sentences to be for minor offences. This is clearly the crux of section 460(3) read alongside section 460 (4)(c) of the ACJA. This philosophy appears

[38] Smart Justice *Op. Cit*

[39] Ministry of Justice Analytical Series 2015 ibid p.1

[40] See the Annual Report 2012 - 2013 of the HM Chief Inspector of Prisons for England and Wales <https:/www.justice.gov.uk/downloads/publications/corporate-report/hmi-prisons/hm-inspectorate-prisons-crime-report2012-13pdf> accessed 14/4/17

[41] Schmalleger F. Criminal *Justice Today* 9th Edn (New jersey: Pearson Education Inc., 2007) 378 defined it as the process of negotiating an agreement among the defendant, the prosecutor and the court as to an appropriate plea and associated sentence in a given case.

to be the trend in most jurisdictions that make provision for the sanction. In Netherlands and Germany, Courts are directed to only suspend sentences of one year or less[42]. In Canada, the 2007 amendment to the Criminal Code expressly provides that courts should only order suspended sentence if the term imposed is not more than two years[43]. It follows that the provision of the ACJA limiting suspended sentences to minor offences with the view to preventing this category of offenders mixing with hardened criminals is justified.

Issues with the provisions

Suspended sentence has drawn a lot of flanks across the world. Some of the adjectives used to qualify it are 'controversial', 'unusual', 'volatile' and 'unstable sanction' in the sentencing table.[44] In England, the punishment has been described as clearly causing confusion to all the players in the criminal justice sectors: to the Judge/Magistrate contemplating its use, the offender unable to grasp its implications and the public puzzled by its intended massage and impact.[45] The only justification for its continuous invocation and operation is the undisputed fact that it decongests prisons. It is this contentious and unusual sanction that the legislature has finagled on the Nigerian criminal justice system in equally an atypical manner as shall now be demonstrated.

Insufficient sentencing guidelines

The ACJA provision is too diminutive to be comprehensible being as it were the bare skeleton without the flesh. It leaves out details such as the community service the convict is to perform, though this may be cured by section 461 (4) of ACJA,[46] it

[42] Ram, S. and Alison, S. 'Sentencing and Prison Practices in Germany and Netherlands: Implications for the United States' VERA Institute of Justice, 2013 p.8 available at <archive.vera.org/site/default/files/downloadseuropean-american-prison-reports/pdf>accessed 14/4/17

[43] An Act to Amend the Criminal Code (conditional Sentence of imprisonment, 2007 section 742.1

[44] Sanders, T and Roberts, J. (2000) 'Public Attitudes Towards Conditional Sentencing: Results of a National Survey 32 *Canadian Journal of Behavioural Science* 199

[45] David, T. 'Developments in Sentencing 1973- 1974 (11974*)' Criminal Law Review* 685.

[46] This section provides three types of community services a convict is to serve and this includes (a) Environmental sanitation including the cutting of grasses, washing

would have been neater if clearer provisions are made for this volatile sentence as done by the Criminal Justice Act, 2003.[47] The UK Criminal Justice Act, 2003 has detailed provisions relating to suspended sentences. In the first place, it expressly provides that the sentence should not be less than 28 weeks but not more than 52 weeks[48]; the sentence is ordered not to take effect unless the offender 'commits in the UK another offence (whether or not punishable with imprisonment),[49]where two or more sentences are imposed on the same occasion, suspended sentence cannot be ordered unless the aggregate of the terms does not exceed 65 weeks.[50] There are powers of review of suspended sentences called 'Review Hearings',[51] provisions for breach, revocation and amendment of the order[52] and many others besides. Even to a cursory observer, the Criminal Justice Act UK is more comprehensive and contemplates virtually all situations that a sentencing judge may face. Yet the UK has been applying suspended sentences for decades.

On the contrary, Nigeria that is just introducing the penal sanction has a lean section that has left out all the fine details. There is no provision as to what happens in the case of breach of the sentence suspended and who triggers the process of recalling the convict. It would appear that the Nigerian legislature did not effectively cover the minute details of the sentence thus creating an unnecessarily wide discretion to the courts, which may be subject to abuses.

Public Perception

Criminal trials which have the ultimate aim to met out sentences and punishments to the offender is a mode of conversing with the offenders, victims and the public. Of the various aims of punishment – retribution, deterrence, rehabilitation/reformation, and incapacitation[53], 'denunciation', occupy the central theme as expressly conveyed by section 401 (2) ACJA. Public perceptions of

drainages, cleaning the environment, and washing public places; (b) Assisting in the production of agricultural produce, construction or mining; and (c)any other type of service which in the opinion of the court would have a beneficial and reformative effect on the character of the convict

[47] Criminal Justice Act 2003 cap 44 UK.

[48] CJA Section 189 (1)

[49] Ibid Section 1189 (1) (b)

[50] Ibid section 189 (2)

[51] Ibid section 191 and 192

[52] Ibid section 193

[53] For a detailed discussion of these see, Vearumun Tarhule *Op.cit* P 9

sentencing and punishments is what makes the public to have confidence in the criminal justice system realizing that, should any injury befall them, the system will aright it, and *a fortiori*, the offender would desist from committing the same or similar offence in future. The effectiveness of sentencing and of punishments depends on the offenders and the broader public understanding of what the court in sentencing has set out to achieve. A situation where the public is confused or fails to understand what has been done would lead to skepticism and consternation against the sentence. This is likely going to be the fate of suspended sentence, particularly, as prescribed by the ACJA without conditions and clear-cut parameters. This submission is anchored on the correlation of public perception of the plea bargain in Nigerian in 2005.

Following its introduction, plea bargain arrangements were entered for Nwudu, Diepreye Alemamaiesegha, Lucky Igbinedion, Cecilia Ibru, Tafa Baologun, and a host of many others, who sacrificed a portion of their loot for ridiculous sentences sometimes as low as six months. The uncritical introduction and application of plea bargain in Nigeria without clear cut criteria drew public consternation and condemnation.[54] It is instructive to note

[54] Oyebaode, A. is quoted by Adegbeti, K. 'Plea Bargining in Nigeria: Any Legal Foundation?' www.academis.edu/975009/Plea-Bargaining-in-Nigeria-Any-Legal-Foundation accessed 16/04/17' as saying '…the thinking of the majority seldom coincides with that of their rulers who would always be trusted to be desirous of wanting to protect their own. The expectations of some lawyers that plea bargaining would be cost-effective and help de-clog the judicial system are apt to receive a hard hearing in a society where a common goat or yam thief goes to jail while the white or blue-collar criminal is given a mere symbolic sentence, most of which is either served in pleasurable surroundings or offered the opportunity of fines in lieu of incarceration'. See also Oguche Samuel 'Development of Plea Bargaining: is the Administration of Criminal Justice in Nigeria: A Revolution, Vaccination Against Punishment or Mere Expediency' <Nails.Nigeria.org/Pub/Oguche%20Samuel.Pdf accessed 16/04/17 who enthused 'The reading of it is that it will make people feel 'If I can steal the whole money from Nigeria and I can use it to my own advantage left, right and centre, once I can get into this plea bargain, I will be set free.' It is something that is not just morally right. It is something that will induce corruption. This corruption is endemic. If you have stolen, let it be taken by due process, in accordance with the rule of law. Let those who are found guilty serve their terms. What is the essence of someone arrested, tried, convicted, sentenced and at the end of it you release him on plea bargain?'

that in all these cases, the offenders forfeited part of their stolen wealth to the state, yet, the public continued unfazed in condemnation of plea bargain. One begins to wonder the amount of public disparagement that would herald the implementation of suspended sentence where the accused is allowed to go home without conditions as envisaged by the ACJA. Questions may well be asked why suspended sentence which places offenders under no greater obligation than other community members not to break the law, should be treated at law as more severe form of punishment than community sentence which generally place a number of positive obligations on offenders such as supervision requirements? Most uninformed Nigerians may in the circumstance find it extremely difficult to appreciate this sentence and the criminal justice system would find it a hard product to sell to the public in lieu of prisons and fines.

Supervision

The ACJA has left unanswered the question who supervises convicts whose terms of imprisonment are suspended. A careful perusal of the ACJA does not reveal whose duty it is to supervise the convict on suspended sentence. Admitted that those whose sentenced are conditionally suspended and who are additionally sentenced to community service may fall back on section 466 ACJA, the Act is completely silent on those whose sentences are suspended without conditions. This is serious lacuna that need not exist in a criminal statute for these are loopholes which corrupt judges exploit to let criminals go scot free. It is suggested that the Nigerian legislature should at the earliest opportunity revisit this provision with a view to fine tuning it in line with modern legislation that mandatorily tie suspended sentences to conditions and supervisions.

Conclusion/Recommendations

This article has examined the suspended sentence as provided by the ACJA. In doing this the definition of suspended sentence was undertaken and the sentence was also juxtaposed with similar concepts such as community sentences, probation, and deferred sentences noting the areas of convergences and

divergences. In appropriate cases, the experiences in other jurisdictions where the sentence has been in use were brought to bear on the discourse.

With specific reference to Nigeria, the article microscopically examined the provisions of section 460 ACJA and notes with dismay that this is the only section dealing with a sentence of this magnitude. In particular it is noted that suspended sentence could be ordered for any offence whether or not the substantive law has made provision for its invocation, the important consideration being whether the court thinks it is the correct antidote for that particular offence. It is observed that section 460 has given too much discretion to the courts especially when to decree suspended sentence, whether it should be with or without conditions, the type of conditions to impose should the court choose to make the order with conditions. These the article submits is not healthy to the criminal justice system chiefly giving the fact that no guidelines are given save the halfhearted provision of section 460 (4) ACJA. On the optimistic side, the Article notes with enchantment, the fact that suspended sentence is a conviction, its limitation to offences that carry prison terms of less than three years; and that the most appealing justification for its introduction is decongesting the cascading prison population.

Also examined are implantational issues that are likely to arise in the court's efforts at giving flesh and blood to this suspended sentence. These issues include: lack of clear guidelines as exemplified by the UK Criminal Justice Act 2003 especially in case of breach of the sentence, public skepticism of the efficacy of the order principally given the experience of Australia; and the issue of who supervises the convict whose sentence is suspended without conditions.

In view of these observations, this article recommends that:

1. The National Assembly and all States that have so far domesticated the ACJA should, at the earliest opportunity, amend the law by mandatorily making suspended sentences to be attached with conditions and spell out in minute details those conditions to be met by a convict as done by the UK Criminal Justice Act 2003. This step if taken would reduce the discretion of the judges/magistrate in ordering suspended sentences.

2. Extensive sensitization and enlightenment advocacy should be undertaken for the purpose of explaining the import this sentencing paradigm first, to the judiciary who has the burden of applying the law, and secondly, to the citizenry whose appropriate perception of the sentence would give the judiciary the needed confidence in imposing same on convicts. This is necessary to avoid the multifarious (though justified) criticisms that befall the introduction of plea bargain in the country.

The amendment being envisaged must also include what should happen to the convict, who breaches the suspended order, and in particular, imbue on identified persons or body the power of supervising convicts whose sentences have been suspended.

LIABILITY UNDER PRE-INCORPORATION CONTRACTS UNDER THE OHADA UNIFORM ACT ON COMMERCIAL COMPANIES AND ECONOMIC INTEREST GROUPS

By

NAH Thomas FUASHI*

Abstract

The Uniform Act on Commercial Companies and Economic Interest Groups of 1997 instituted the traditional civil law solutions relating to liability under pre-incorporation contracts. The reforms of the Uniform Act of 2014 have consolidated the solutions despite their drawbacks. In fact, liability under pre-incorporation contracts is imputed on the founders or first executives of the company or the company itself, depending on the circumstances of the case. This position has shortcomings due to some imprecision by the legislator on some aspects regarding the liability of the company under pre-incorporation contracts. Questions relating to the scope of liability of the company and the position of unincorporated companies are not sufficiently addressed. This article attempts answers to the problems identified around this area of the law.

Key words: acts – commitments – company – incorporation – registration – transaction

Introduction

Before a company is formed, somebody must initiate the idea of creating it and transform the idea, with the help of other persons, to bring the company into existence, thus, establishing a profitable business[1]. Thus, a company like a human being is conceived; it goes through the gestation period and finally sees birth[2]. The conception and the gestation periods of the company are masterminded by a category of persons known technically as the promoters (at common law) and founders (under civil law). The promoters or founders conceive the idea to form the company, nurture it through their various acts and commitments, and 'give it

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[1] Ekome, E. 2002. 'Promoters and pre-incorporation transactions at common law and under the Uniform Act'.*Juridis Périodique* 49: 110-118, 110.

[2] Nah Fuashi, T. 2002. 'Pre-incorporation contracts and impossibility of ratification under common law – the salutary jettison of a stifling principle by the civil law inspired uniform act relating to commercial companies and economic interest groups enacted by OHADA'.*Annales de la FSJP Université de Dschang* 6: 69-76, 69.

birth' through incorporation[3]. These acts and commitments during company formation are known as pre-incorporation contracts or transactions. Before the adoption of the Organisation for the Harmonisation of Business Law in Africa (OHADA)[4]Uniform Act on Commercial Companies and Economic Interest Groups (UACCEIG) in 1997, pre-incorporation contracts were governed in member states by civil law (for French speaking countries and francophone Cameroon) and English law (for Anglophone Cameroon). This Uniform Act consolidated the civil law position regarding pre-incorporation contracts without recourse to legislation from the common law background.

Pre-incorporation contracts are known under the Uniform Act as 'acts and commitments done on behalf of a company under formation'.[5] They are inevitable features of every new incorporation[6] as certain acts are actually indispensable[7]. When people wish to pursue a business opportunity and to incorporate a company for the purpose, they may make contracts relating to the intended company's affairs before the company is incorporated[8]. Pre-incorporation contracts are, therefore, contracts which promoters enter into on behalf of the company before it is registered. The would-be company will need, for example, land or a site to locate its headquarters, personnel to carry on its future activities and obviously a bank account to manage its financial affairs. It would be unwise and even detrimental for founders to wait until when the company is registered before the lease, employment and banking contracts are entered into by the company. The Uniform Act has made some of these contracts mandatory and they cannot be avoided, for instance, contracting for a bank account is imperative since it is there that shares subscribed would be paid for.[9] It holds

[3] Nzalie Ebi, J. 2002. 'Reflecting on OHADA law reform mission: its impact on certain aspects of company law in Anglophone Cameroon'.*Annales de la FSJP Université de Dschang* 6: 97-119, 97.

[4]*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*.

[5] Actes et engagements pris pour le compte de la société en formation (sections 106-113).

[6] Davies, P. L. 1997.*Gower's principles of modern company law.* London: Butherworths, 114.

[7] Mercadal, B. et Janin, Ph. 1995. *Sociétés commerciales.* Editions Francis Lefebvre, 86.

[8] Manjong shakar. 2016. Liability on pre-incorporation contracts under OHADA law. Masters dissertation: University of Dschang.

[9] See for instance UACCEIG, s. 313 and 393

true for a notary public contracted to draft the articles of association of the company and before whom the articles would be deposited.[10] During the process of formation, the company cannot enter into such contracts because it lacks legal personality[11] and the legal capacity to contract[12]. Common law will further hold that it is devoid of the capacity of taking over or ratifying[13] these contracts even if they were made on its behalf[14].

A controversy over the status of pre-incorporation contracts always arises as to who is bound by the contracts. It is just by determining this issue that the question of liability under such contracts is resolved. In this perspective, common law and civil law diverge. At common law, an unincorporated company cannot enter into a contract of any kind, for the simple reason that it lacks the legal capacity to do so. Similarly, a contract made by a person purporting to act as agent of an unincorporated company cannot be binding on the latter once incorporated. This position of the law is as a result of the infiltration into this area of company law of a purely technical agency principle which holds that for a principal to ratify the agent's act he must have been in existence at the time the act was done[15]. The basis for this common law position is *Kelner v Baxter*[16] where a person acting in relation to a non-existent company was held personally liable under the contract. This established an absolute rule that a person purporting to make a contract for a non-existent company would always be personally liable[17].

Generally, English common law distinguishes two possibilities with respect to pre-incorporation contracts. First, that it was intended that the contract should be between the contractor and the person who was acting in anticipation of incorporating the

[10] UACCEIG, s. 10.
[11] *Ibid*, s. 98 and 115.
[12] Nde Ngo, s. 2016. Corporate personality under OHADA and English company laws: a comparative study. Masters dissertation: University Dschang.
[13] The appropriate word to use here is ratification but since the translated Uniform Act on Commercial Companies and Economic Interest Groups talks of takeover, the two words are used here as synonyms.
[14] Nah Fuashi, T. 2002. 'Pre-incorporation contracts and impossibility of ratification under common law – the salutary jettison of a stifling principle by the civil law inspired uniform act relating to commercial companies and economic interest groups enacted by OHADA'.*op. cit.,* 70.
[15] *Ibid.*
[16] (1866) LR 2 CP 174.
[17] Mayson, French and Ryan. 2008. *Mayson, French and Ryan on Company Law.* 24th Edition: Oxford: Oxford University Press, 596.

company, in which case the contract would exist and the person who apparently acted as an agent for a non-existent principal would be liable on the contract. Second, that it was intended that the contract should be between the contractor and the company, in which case, the company being non-existent, there was no contract at all and no one was liable on it.[18]

The above position of English common law has witnessed an evolution since the UK joined the European Economic Community (EEC) now European Union (EU). Oliver L.J. suggested in *Phonogram Ltd v Lane*[19] that the intentions of the parties when the contract was formed should be considered. This was applied by the Court of Appeal in *Catronic (UK) Ltd v. Dezonie*.[20] The courts appear to have been inspired by the first European Economic Community (EEC) company directive (68/151/EEC) which provides in article 7 that '... if, before a company acquires legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefore, unless otherwise agreed'.

This provision has been re-enacted, though with modification, in section 51(1) of English Companies Act 2006 thus:

> a contract that purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly.

The above provision suggests that the intention of the parties is important in determining the effects of pre-incorporation contracts. Nevertheless, the principle remains that promoters are personally liable in respect of pre-incorporation contracts made for the benefit of their unformed company, irrespective of the capacity in which they purport to contract and irrespective of their subjective beliefs.[21]

Civil law has a completely different perception of pre-incorporation contracts with respect to liability. The principle is that founders who entered into the contract on behalf of the would-be

[18] *Newborne v. Sensolid* (Great Britain) Ltd [1954] 1 QB 45.
[19] [1982] QB 938.
[20] [1991] BCLC 721.
[21] Mayson, French and Ryan. 2008. *Mayson, French and Ryan on Company Law. op. cit*., 596.

company are personally liable[22], but article 1843 of the civil code expressly authorises the company once incorporated to take over such contracts. When the acts are taken over, they are considered to have been made by the company from the origin. This is in sharp contrast with common law as in this circumstance the most the company can do upon incorporation is to enter into a different contract with the parties on similar terms and to the same effect, a kind of *novation*.[23] The position of civil law is more practical, attractive and meets with the practical realities of the business of creation of companies. This is the position adopted by the Uniform Act modelled on the provisions of French decree nº 78/704 of 3 July 1978. The Uniform Act like the French decree classifies pre-incorporation contracts into two categories namely, those entered into before the company is formed and those entered into after the formation of the company before its registration. This distinction is not made under common law. The position adopted by the Uniform Act implies that pre-incorporation contracts are binding on the promoters or the company, depending on whether or not the latter decides to ratify them[24]. This solution has not been altered by the Uniform Act amended on 30 January 2014 despite the drawbacks relating to issues of liability inherent in the former text.[25]

Despite the precision by the Uniform Act on who is bound by pre-incorporation contracts, the problem of liability under pre-incorporation contracts is still posed under OHADA law. This article seeks to clear doubts relating to the question: who is liable under pre-incorporation contracts under the Uniform Act? The response to this question is necessary because the rules governing incorporation of companies under the Uniform Act are unique and issues of liability under pre-incorporation contracts need to be handled with care so as to throw light on some areas where the law is wanting. Liability under pre-incorporation contracts may be borne

[22] Mercadal, B. et Janin, Ph. 1995. *Sociétés commerciales. op. cit*., 86; Lopez, C. 1998. 'La responsabilité solidaire et indéfinie des fondateurs : le sort des engagements pris au nom d'une société en formation en cas de défaut de reprise des actes par la société'.*JCP:* 408-414, 408.

[23]*Howard v. Patent Ivory Mfg. Co* (1888) 3 Ch. D. 156.

[24] Tatsadong Tafempa, J.M. 2011. Regards sur la société en formation (OHADA). Thèse de master: Université de Dschang, 50 et seq.

[25] Pougoue, P.G. et al. 2016. 'Acte uniforme du 30 janvier 2014 relatif au droit des sociétés commerciales et du groupement d'intérêt économique'.*in* J. Issa-Sayegh,P.G. Pougoue & M. Sawadogo Filiga (Coord).*OHADA*: *Traité et Actes Uniformes commentés et annotés.* Juriscope: 165-724.

by promoters or the company itself depending on the circumstances of the case.

The Liability of Promoters under Pre-incorporation Contracts

Concerning the liability of promoters for pre-incorporation contracts, it is important to determine to whom they are liable. The Uniform Act is clear on the personal liability of promoters to third parties with whom they contract, but it is silent on the question of their liability towards the would-be company.

The liability of promoters to third parties

In discussing the liability of promoters, it is necessary to point out that there is always the tendency to confuse founders with promoters, especially for those schooled in English law, thus the necessity for some precision on the notion before discussing the various hypotheses under which promoters or founders may be liable on pre-incorporation contracts.

Precision on the notion of promoters

Pre-incorporation contracts are made by founders or promoters who metaphorically may be described as the "parents" of the company[26]. Although the term promoters have been used in the English Companies Act since 1867 and in the Companies Ordinance Cap 37 of the Laws of the Federation of Nigeria 1958[27], there is no general definition of the term. Nevertheless, the definition of promoter has been attempted for specific purposes. For instance, the Joint Stock Companies Act 1844 defined a promoter as 'every person acting by whatever name in the forming and establishing of a company at any period prior to the company obtaining a certificate of complete registration'. Cockburn C.J. happened to have been inspired by the above definition in *Twycross v. Grant*[28] to define a promoter as 'one who undertakes to form a company with reference to a given project, and to set it going, and who undertakes the necessary steps to accomplish that purpose'.

[26] Nzalie Ebi, J. 2002. 'Reflecting on OHADA law reform mission: its impact on certain aspects of company law in Anglophone Cameroon'. *op.cit.,*112.
[27] The Nigerian Ordinance applied in Anglophone Cameroon before the advent of the Uniform Act by virtue of section 68 of the Constitution of the Republic of Cameroon, which permits the continuous application of laws enforced in the two federated states of Cameroon until they are repealed by the national legislator.
[28] (1877) 2 C.P.D. 469.

The Companies Ordinance Cap 37[29] defines promoters for the sake of imputing liability on them for misstatements in the prospectus or distinguishing promoters from professionals who furnished expertise during company formation. In this perspective, it provides that:

> for the purposes of this section, promoter means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity or person engaged in procuring the formation of the company.[30]

The above definitions are inadequate because they are limited to the time a company comes into existence or when it is registered, whereas, at common law promotion continues even after the incorporation of the company, that is its floating.[31] The definition rather ties with that of founders as proposed by the Uniform Act on Commercial Companies and Economic Interest Groups (UACCEIG). This Uniform Act states that, 'all persons who actively participate in transactions leading to the formation of a company shall be deemed to be founders thereof'.[32]This definition is lacking in the fact that the Uniform Act does not state to what extent a person must 'actively participate' to qualify as founder. This means that whether or not a person becomes a founder, depends on the circumstances of each case[33]. The person may not necessarily play an overt role[34] but associate with those actively involved on the understanding that he will share in the profit of the venture. Thus, emphasis is on active participation no matter the form it takes. Nevertheless, this surely excludes those acting in professional capacity such as notary publics who may be involved in drafting the company's articles of association. Also, liability concerns only those founders who acted on behalf of the company and not all the founders[35].

Founders of the company under the Uniform Act go out of the scene as soon as the articles of association are signed. Any

[29] of the Laws of the Federation of Nigeria 1958.
[30] Section 90(4).
[31] Re Darby [1911] 1K.B. 95.
[32] UACCEIG, s. 102.
[33] Ekome, E. 2002. 'Promoters and pre-incorporation transactions at common law and under the Uniform Act'. *op. cit.,* 112.
[34] Cross, J. 1970. 'Who is a company promoter?'.*L.Q.R* 86: 493-512.
[35] Mercadal, B. et Janin, Ph. 1995. *Sociétés commerciales. op. cit*., 87 ; Pougoue, P.G. et al. 2016. 'Acte uniforme du 30 janvier 2014 relatif au droit des sociétés commerciales et du groupement d'intérêt économique'. *op. cit.* 415.

other transaction that takes place before the incorporation of the company is no longer their business but that of the first company executives appointed by the constitutive meeting of the shareholders or partners.[36] For the purpose of this paper, the term promoters would be used because it covers both founders and those who act for the company after its creation. This is justified by the fact that personal liability for pre-incorporation contracts does not only concern founders but extends to the first executives of the company, especially when it concerns acts and commitments entered into after the formation of the company but prior to its registration.

The hypotheses of promoters' liability

The liability of promoters may arise in about five situations; either they intended to be bound by the contracts (no precision on liability), the project of creating a company does not materialise, the nature of the contract is such that the founder is personally liable, the company refuses to take over the contracts[37] or they act beyond the mandate given them by the constitutive general meeting. The Uniform Act makes allusion only to the last two; the first three are a matter of logic and common sense.

As regards failure to specify who is liable on pre-incorporation contracts, it is common knowledge that the founders who entered into such contracts would be considered to have intended to be personally bound by the contracts. Thus, to discharge themselves of liability, they must specify that they were acting on behalf of the company and not personally[38] so that if the company takes over the acts after registration, they are discharged. Lack of precision commits the founders and they are personally liable on the contracts[39].

It may so happen that the company conceived by founders is aborted. This means that the intention to create the company is not materialised and so no company is created. This is the case for example, where the articles of association are not written.[40] In this

[36] The terms partners and shareholders may not necessarily mean the same thing but in this article the two words are used as synonyms.

[37] Lopez, C. 1998. 'La responsabilité solidaire et indéfinie des fondateurs : le sort des engagements pris au nom d'une société en formation en cas de défaut de reprise des actes par la société'.*op. cit.,* 408.

[38] Merle, Ph. 2016. *Droit commerciales, sociétés commerciales.*19e édition: Paris: Dalloz, 117.

[39] Mercadal, B. et Janin, Ph. 1995. *Sociétés commerciales. op. cit*., 87.

[40]UACCEIG s. 115.

case, acts and commitments entered into by founders on behalf of the aborted company would personally bind them. This is different from a company arising from a de facto[41] situation (société créée de fait) whereby the shareholders (founders) are jointly and severally liable. In the latter, the shareholders or founders have commenced business which is not the case for an aborted company[42].

With regards to contracts which by nature impose personal liability on the founders, it is common knowledge that promoters may create bank accounts on behalf of the would-be company. Such accounts may be operated by cheques signed by founders. In this perspective, founders will be personally liable for cheques signed on behalf of the company, even if the company decides to take over their acts. This is because the signatory of a cheque is guarantor of its payment. The Central African Economic and Monetary Community (CEMAC) Regulation on Systems, Means and Incidents of Payment stipulates that, 'the drawer (of a cheque) is the guarantor of payment. Any clause by which the drawer exonerates itself from this guarantee is deemed to be unwritten'.[43] The bearer of such cheques would take measures of recovery against the founders, even if in reality, it is the company that should pay the money. In this case, the founders would pay and the company may reimburse them later.

Another major concern with pre-incorporation contracts has to do with refusal to take over pre-incorporation contracts, the Uniform Act provides that 'acts and commitments not taken over by the company under the conditions laid down by this Uniform Act shall not be binding on the company and the persons who made them shall have unlimited liability for the obligations they entail'.[44] Failure to take over by the company may be prompted by two reasons: either there is non-compliance with the conditions of the Uniform Act or the transactions are not in the interest of the company.

In relation to non-compliance with the procedural requirements of the Uniform Act, the acts and commitments may not be taken to the notice of the shareholders as required by the

[41] These are companies arising from irregular situations that are recognised by the Uniform Act for the sake of protecting those who might have traded with the irregularly formed company.
[42] Merle, Ph. 2016. *Droit commerciales, sociétés commerciales. op. cit.,* 116.
[43] Article 24, « Règlement nº 02/03/CEMAC/UMAC/CM du 4 avril 2003 relatif aux systèmes, moyens et incidents de paiement. »
[44] UACCEIG, s. 110(2).

Uniform Act[45] or are brought to the attention of only some of them. The shareholders may refuse to ratify transactions not in the interest of the company. The difference between the two situations is that whereas in the former the procedural requirements are not fulfilled, in the latter the procedure is fulfilled but shareholders regard the acts and commitments not to have been entered into in the interest of the company[46].

A pertinent question is: can the third parties insist on the personal liability of the founders despite takeover by the company? The Uniform Act is silent but it is possible. In fact, a third party may intentionally ignore the eventuality of takeover of contracts by the company. In that case, he is right to seek its execution against the person who acted on behalf of the company. A change of debtor cannot be imposed on him without his consent[47].

The last hypothesis of liability concerns promoters other than founders and has to do with acts entered into after formation of the company but before its incorporation. In this perspective, the Uniform Act provides that partners may, in the articles of association or in a separate deed, grant powers to one or more company executives, to enter into commitments on behalf of the company which is formed but not registered. The commitments must be defined and their scope specified in the terms of reference. Where the persons mandated act according to the terms of the authority or mandate, the subsequent registration of the company entails takeover of such acts.[48] Any acts done beyond the scope of their terms of reference may be taken over by the company as prescribed by the Uniform Act.[49] Otherwise, the persons who entered into the commitments would be jointly and severally liable for acting beyond their mandate on the basis of an agency relationship.[50]

The liability of promoters to the company

As mentioned earlier, the Uniform Act considers the personal liability of promoters to third parties for acts and

[45]*Ibid*, s. 106.
[46] Ekome, E. 2002. 'Promoters and pre-incorporation transactions at common law and under the Uniform Act'. *op. cit.,* 117.
[47] Mercadal, B. et Janin, Ph. 1995. *Sociétés commerciales. op. cit*., 108.
[48]UACCEIG, s. 111.
[49]*Ibid*, s. 112.
[50]*Ibid*, s. 110.

commitments entered into on behalf of the future company, if it does not take over those transactions upon attainment of legal personality. Whether the founders can be liable to the company is another question to be determined. Since the Uniform Act is silent, solutions to this question may be sought in ordinary law by examining the duties of promoters and the consequence of their breach.

Duties of promoters to the company

Here a distinction should be made between promoters who are founders and those who are appointed as the company's first executives. Promoters who are founders go out of the scene as soon as the company is created, that is, as soon as the articles of association are signed.[51] The Uniform Act provides that their role begins with the first transactions or with the performance of the initial acts for the purpose of setting up the company and ends on the date the articles of association are signed by all the partners or the sole proprietor.[52] Their role would obviously include determination of the object of the company, the choice of the form of the company, the search for shareholders and raising of capital, the choice of the principal place of business, drafting articles of association and internal rules, etc.

In the performance of their role, the Uniform Act does not impose on the promoters' specific duties to the company, the breach of which may commit them. Under common law, promoters are neither agents nor trustees of the company they are forming even if there is a suggestion of a trust relationship.[53] Though not agents or trustees, yet they are regarded as fiduciaries and are imposed two major duties – a duty not to make secret profit[54] and a duty of disclosure of any personal interest they have in dealing with the company. The duty not to make a secret profit prohibits the promoter from selling property to the company at a price which does not reflect its real value. The duty to disclose their interest gives shareholders of the company both present and future, the opportunity to appraise whether or not promoters have been acting for the interest of the company or their personal interest. The Uniform Act requires disclosure but the information to be disclosed

[51] *Ibid*, s 100.
[52] *Ibid*, s. 102(2).
[53] *Re Leeds & Hanley Theatres of Varieties Ltd* [1920] 2 Ch. 809 at 823.
[54] *Erlanger v new sombrero phosphate co.* (1873) 3 AC 1218; *Glukstein v Barnes* [1900] AC 240.

in the prospectus does not relate to the personal interest of the promoters.[55] Nevertheless, the information in the statement of acts done and commitments made on behalf of the company under formation[56] may disclose such information.

On the contrary, the duties of promoters who are appointed first executives of the company are known. They are defined by the articles of association or a separate deed. The latter empowers the first executives to enter into commitments on behalf of the company which though fully formed, has not yet been entered in the Trade and Personal Property Credit Register (TPPCR)[57] and equally defines the scope of such commitments. These promoters owe the duty to the company to act within the terms of reference (power of attorney) without which their acts would personally bind them and not the principal (company). The liability of promoters to third parties here is predicated on the law of agency but that is not the case with their liability to the company.

Liability of promoters to the company for breach of duties

Liability of promoters to the company for breach of duties is predicated on general principles of liability since the Uniform Act has no special rules on that. Concerning the founders, the Uniform Act does not impose duties on them and therefore, no remedies are provided to the would-be company. However, the Uniform Act sanctions some acts irregularly carried out and punishes some offences that may be committed by the founders, in the course of formation of the company.[58] Under common law, the breach of the fiduciary duties of promoters entitles the company to remedies such as recovery of secret profits, rescission and in appropriate cases, an action for damages for breach of fiduciary duties and for deceit[59].

The liability of promoters who are appointed as first executives of the company for pre-incorporation contracts is based on the rules governing the civil liability of company directors. Where they act beyond their mandate, they will be accountable to

[55] UACCEIG, s. 86.

[56] *Ibid*, s. 106.

[57] This is a register kept by national authorities wherein companies, traders, transferable securities and other commercial transactions are registered. In the OHADA member states, each state has the leeway to designate any authority to manage the register. In Cameroon for instance, the TPPCR is kept by the court of first instance.

[58] UACCEIG, s. 886-888.

[59] Cross, J. 1970. 'Who is a company promoter?'. *op. cit.,* 493-512.

the company if it suffers damage as a result of their acts. They will also be answerable to the company for faults committed in the course of execution of their mandate. Actions could be initiated against them in the interest of the company[60]. Actions in the interest of the company or shareholder derivative lawsuits are actions for damages suffered by the company as a result of a tort committed by a company executive or executives in the performance of their duties[61]. Where the first executives of the company act beyond their powers and cause prejudice to the company, action would be initiated against them to cause them compensate the latter for any loss incurred. If liability under pre-incorporation contracts is not borne by the promoters, then it would surely be shouldered by the company itself.

The liability of the company under pre-incorporation contracts

If a company decides to ratify pre-incorporation contracts, they are considered to have been made by it from the origin. Liability for the contracts is, therefore, shifted from the promoters to the company. Nevertheless, one peculiarity of OHADA law is that it recognises companies without legal personality but fails to impose on them liability under pre-incorporation contracts.

Institutionalisation of the liability of companies in case of ratification of pre-incorporation contracts

Pre-incorporation contracts generally are binding on the company only when it takes them over. The Uniform Act has regulated the procedure of takeover. This portion of the write-up presents the procedure, on the one hand and the scope of the company's liability, on the other hand.

The procedure of ratification of pre-incorporation contracts under the Uniform Act

The rules governing the takeover of pre-incorporation contracts vary depending on whether the acts and commitments were entered into before the formation of the company or after its formation but before its registration in the Trade and Personal Property Credit Register.[62]

[60]UACCEIG, s. 165 et seq.
[61]*Ibid*, s. 166.
[62]*Ibid*, s. 106-113.

Concerning acts and commitments before formation of the company, distinction should be made between companies formed without a constituent meeting and those formed with a constituent meeting[63]. Generally, the acts and commitments are brought to the knowledge of shareholders through a document known as the 'statement of acts done and commitments made on behalf of company under formation'. Where the company is formed without a constituent meeting, the statement which equally indicates the nature and the extent of the company's liability under the acts, is appended to the articles of association. Where the partners sign the articles of association and the statement, the company is deemed to have taken over the contracts automatically as from the date the company is registered in the TPPCR.[64] The French courts have ruled that contracts entered into before the signing of articles of association may be taken over automatically if a clause is inserted in the articles of association to that effect.[65] The Uniform Act does not contemplate this method of ratification.

The takeover of the acts may be posterior to the incorporation of the company in an ordinary general assembly. In this case, the shareholders are fully informed of the nature and extent of the company's liability under the acts. The founders who signed the acts and commitments are not allowed to vote the resolution of takeover of such acts and they are not considered in calculating the quorum.[66] This is to ensure transparency and objectivity in the process. If, however, founders who signed the acts participate in the vote, shareholders of the company may petition the court for the annulment of the resolution, if shareholders had interest in the acts.

Where the company is formed with a constituent general assembly, the acts and commitments are taken over through a special resolution voted during the constituent assembly under conditions laid down by the Uniform Act. In the creation of a public limited company, one of the resolutions that must be taken in the

[63] Pougoue, P. G., Anoukaha, F. & Nguebou, J. 1998.*Le droit des sociétés commerciales et du groupement d'intérêt économique OHADA.* Coll Droit Uniforme: Yaoundé: PUA, 52.
[64]UACCEIG, s. 106-107.
[65] Com. 10 octobre 1984, Rev. Soc. 1985, 821.
[66]UACCEIG, s. 108.

constituent meeting is that relating to acts and commitments entered into during the formation of the company.[67]

As regard acts and commitments after formation of the company prior to incorporation, the Uniform Act provides that shareholders in the articles of association or a separate deed can grant powers to one or more company's executives to take engagements on behalf of the company. The articles of association or the separate deed must sufficiently define the acts and their terms of reference. Where the persons mandated act within the terms of their mandate, subsequent registration of the company in the TPPCR entails automatic takeover of the acts.[68]

Acts done beyond the scope of their terms of reference or that are unrelated to their terms may be taken over by the company provided they are approved by the ordinary general meeting under the conditions laid down by the Uniform Act, unless otherwise provided by the articles of association. Those who contracted on behalf of the company are not allowed to vote and are not considered in calculating the quorum.[69]

A pertinent question is: can ratification or takeover of pre-incorporation contracts by the company be implied? The Uniform Act does not contemplate this possibility. However, the takeover of pre-incorporation contracts may be implied in a situation where shareholders have approved the financial accounts of the year including the funds that were used to finance those acts. In France, it is a recognised fact that by unanimously approving the financial accounts of the first year of the functioning of the company after registration and consequently the operations revealed by the accounts, the shareholders *implicitly but necessarily took over the engagements subscribed to by the founders*[70]. Once the company takes over the acts expressly or implicitly, those who acted on behalf of the company are discharged and it becomes liable on them.

The Scope of liability of the company for pre-incorporation contracts

With respect to the scope of the company's liability, the Uniform Act provides that the statement of acts and commitments will sufficiently describe the nature and extent of the company's

[67] *Ibid*, s. 410(4).
[68] *Ibid*, s. 109.
[69] *Ibid*, s. 112.
[70] Mercadal, B. et Janin, Ph. 1995. *Sociétés commerciales. op. cit*., 109.

liability. This poses no major difficulty; rather the main issue to determine is the person to whom the company is liable. Ordinarily, the company is liable to third parties who contracted with promoters. It is bound, therefore, to fulfil the obligations under the contracts, failure which will commit the company. However, the relationship between the company and the promoters is not addressed. The questions that come to mind is: can the company be liable to the promoters for acts and commitments made on its behalf?

The Uniform Act does not provide for the company's liability to promoters. Nevertheless, it is common knowledge that at pre-incorporation stage, promoters incur some expenses on behalf of the company. It is, therefore, normal that the company should indemnify the expenses incurred by promoters. If the company fails to do so, promoters could take action against it to recover their dues. The company could still be liable to the promoters even if it does not take over pre-incorporation contracts. This may happen in a situation where the company, in reality, might have made financial gain out of the acts and commitments made by promoters, which it has refused to ratify. The promoters can initiate action against the company on the basis of unjust enrichment.

Non-institutionalisation of the liability of companies without corporate personality

The one thing that is unique about the Uniform Act is that there is the possibility of a company existing without corporate personality. The question now is whether one could actually talk about pre-incorporation contracts under these companies, talk less of liability. To answer this question, this portion of the paper examines the companies without corporate personality under the Uniform Act and the impossibility of imposing liability on them.

Companies without corporate personality under the Uniform Act

These are unregistered forms of companies. The Uniform Act recognises one company without corporate personality known as the joint venture or consortium.[71] Other forms of companies without corporate personality arise from de facto situations and are generally known as de facto partnerships.[72]

[71]UACCEIG, s. 114 and 854.

[72] Nde Ngo, s. 2016. Corporate personality under OHADA and English company laws: a comparative study. Masters dissertation: University Dschang.

A joint venture according to the Uniform Act is an entity whose partners agree not to register in the Trade and Personal Property Credit Register and not to give it a corporate personality. It is not subject to publicity and its existence can be proved by any means.[73]The shareholders of the company agree freely on its object, duration, conditions of functioning, rights of partners and its termination, provided there is no derogation to the mandatory rules of the Uniform Act common to companies, with the exception of those relating to corporate personality.[74]

A joint venture is, therefore, a company created but deprived of corporate personality[75]. When mention is made of creation, it is imperative to know when a company is deemed to be created under the Uniform Act. A company is created as from the moment the articles of association are signed.[76] As a company, a joint venture is endowed with articles of association like any other company. The agreement of the partners on its object, duration, conditions of functioning, rights of partners and its termination, should therefore, be made in the articles of association of the company. This distinguishes the company from some de facto partnerships which may be deduced only from the comportment of the partners.

De facto companies or partnerships arise in de facto situations. A de facto company or partnership may exist between partners, though they never intended creating a company. But most often, de facto partnerships arise in situations where the intention to create a company is poorly manifested or is abortive. The revised Uniform Act distinguishes two types of de facto partnerships known as *société créée de fait* and *société de fait*.

The Uniform Act on Commercial Companies and Economic Interest Groups adopted in 1997 did not give any clear distinction between *société créée de fait* and *société de fait.* This position has greatly evolved as its reforms of 30 January 2014 clearly define the two types of de facto partnerships and distinguish

[73]UACCEIG, s. 854.
[74]*Ibid*, s. 855.
[75] Pougoue, P.G. et al. 2016. 'Acte uniforme du 30 janvier 2014 relatif au droit des sociétés commerciales et du groupement d'intérêt économique'. *op. cit.* 694.
[76]UACCEIG, s. 100.

them from a company which is not registered because articles of association are not written[77].

A *société créée de fait* is deemed to exist where two or more natural persons or corporate bodies act as partners without having formed between themselves one of the companies recognised by the Uniform Act.[78] The Uniform Act recognises five types of registered companies notably, private company (partnership), sleeping or limited partnership, private limited company, public limited company and simplified joint stock company.[79] If any two or more natural persons or corporate bodies act as partners without creating between themselves one of the above companies, a *société créée de fait* can be established or proved.

A *société de fait* arises where two or more natural persons or corporate bodies form between themselves a company recognised by the Uniform Act but have not fulfilled the constituent legal formalities, or have formed between them a company not recognised by the Uniform Act.[80]The underlying element which distinguishes *société créée de fait* and *société de fait* is intention. Whereas in the former there is no intention to create a company, in the latter the intention exists but is poorly manifested. In both cases the existence of the company can be proved by any means.[81]

The reforms of the Uniform Act of 30 January 2014 have also clarified the confusion created by section 115 of the Uniform Act of 1997 as regards a company whose articles of association are not written and de facto partnerships[82]. The said section provided that:

> where, contrary to the provisions of this Uniform Act, the articles of association or, where necessary, the unilateral deed of intent is not established in writing and, consequently, that the company cannot be registered, the company shall be referred to as a "de facto company". It shall not have a legal personality.

[77] Mba-Owono, C. 2014. 'Société créée de fait et société de fait en droit OHADA: l'apport de l'acte uniforme révisé relatif au droit des sociétés commerciales et du groupement d'intérêt économique'.*PENANT* 888: 353-371.
[78]UACCEIG, s. 864.
[79]*Ibid*, s. 6, 270, 293, 309, 385 and 853.
[80]*Ibid*, s. 865.
[81]*Ibid*, s. 867.
[82] Mba-Owono, C. 2014. 'Société créée de fait et société de fait en droit OHADA: l'apport de l'acte uniforme révisé relatif au droit des sociétés commerciales et du groupement d'intérêt économique'. *op. cit.,* 353-371.

This provision insinuated that a single person (sole proprietor) could create a de facto company, which is actually impossible since a de facto partnership must have more than one partner. The new reforms of the Uniform Act have ended the confusion by providing that in the situation described above, the company 'shall not have legal personality'.[83]

Issues relating to pre-incorporation contracts are not clearly regulated by the Uniform Act as far as the above companies are concerned. The major question that arises is whether the notion of pre-incorporation contracts even exists under these companies. It is only by providing a solution to this worry that the question of liability on such contracts can be addressed.

The impossibility of imputing liability on pre-incorporation contracts on companies without legal personality

An interesting question is: can a company which lacks corporate personality be liable on pre-incorporation contracts? In principle, the answer to this question is negative. The reasons are simple. First, when mention is made of pre-incorporation contracts, it implies that the company was incorporated posterior to the contracts; a company which has never been incorporated cannot have pre-incorporation contracts in its vocabulary. The Uniform Act lends credence to this view by providing, with respect to a joint venture, that 'each partner shall act in his personal name and shall be solely liable to third parties'.[84] This may mean that before and after the creation of the company, partners are acting in their personal names and therefore, there is nothing as pre-incorporation contracts in the relations of the company and its promoters.

Second, an unincorporated company lacks corporate personality and even if pre-incorporation contracts exist in such a company, it can never take them over since it will never have legal personality and consequently, no capacity to act. This reasoning is perfectly true for de facto partnerships such as *société créée de fait*. For a joint venture and a de facto partnership where partners create a form of company not recognised by the Uniform Act, we could ponder a little on the existence of pre-incorporation contracts and consequently their liability.

[83]UACCEIG, s. 115.
[84]*Ibid*, s. 861(1).

To begin with, a joint venture as already seen is a company whose partners agree not to register.[85] To be able to determine if pre-incorporation contracts exist in this company and therefore liability, it is important to answer one important question. When do partners agree not to register a joint venture? Is the agreement before or after creation of the company? If the agreement is made before creation of the company, that is, prior to the signing of its articles of association, pre-incorporation contracts cannot exist. This is because no partner would purport to act on behalf of a company he knows would never acquire legal personality.

If the agreement not to register the company is made posterior to the creation of the company, pre-incorporation contracts may possibly exist. Some founders might have been contracting on behalf of the company on the understanding that when it is subsequently incorporated, it would substitute them in relations with contracting parties, but fortunately or unfortunately, partners after signing articles of association decide not to incorporate the company. The question now becomes one of determining the status of such contracts made on behalf of the company before the agreement. What is the place of the company as far as liability for those contracts is concerned? This is a technical issue that is not envisaged by the OHADA lawmaker and it is doubtful if the company can be answerable to third parties. Could the shareholders (minority partners) who have acted in good faith and who now are victims of a vote by other shareholders (majority partners) not to register the company hold the majority shareholders liable? Taking into consideration sanction for abuse of majority power,[86] the minority shareholders can commit the majority ones for voting against a decision to register the company. However, it must be said that it is a difficult solution to come by.

A joint venture lacks corporate personality and consequently personal property and a corporate name. The Uniform Act provides that the assets necessary for the company's activity are placed at the disposal of the manager. However, each partner remains owner of the assets he places at the disposal of the company.[87] This implies that even if liability for pre-incorporation contracts could be imposed on the company, the latter will still lack

[85] *Ibid*, s. 114 and 854.
[86] *Ibid*, s. 130.
[87] *Ibid*, s. 857.

property which could be used to make good any claims against it. That is why where a partner reveals that he acted on behalf of the company, all the shareholders become jointly and severally liable[88]. This is also the case where they jointly put property or assets at the disposal of the company to be managed by the manager or themselves.[89]

Nevertheless, there is a possibility of re-investing the profit got from the company's activity. It is thus necessary to know who owns the profit that is ploughed back or re-invested by the company. The Uniform Act provides an answer to this question. In this perspective, it states that assets acquired by application of funds or re-investment of joint earnings shall be deemed to be joint holdings throughout the duration of the company, as well as assets which were joint before being placed at the disposal of the company.[90] Thus, profit ploughed back or re-invested remains the private property of the shareholders.

All the above obstacles demonstrate the impossibility of holding the company liable on pre-incorporation contracts. But could the legislator not contemplate the joint and several liability of the company and its shareholders? Apparently no, since the company does not have a personality and property of its own and most often is destined to be occult (secret). That is why the legislator contemplates only joint and several liability of partners. Nevertheless, the legal consecration of joint and several liability of the company and its partners is not without pertinence. In fact, if actually the shareholders have joint property to operate the company and that in their operations the company becomes ostensible, that is, no longer hidden to third parties, then the latter can act against them[91]. Here they are already acting openly as an entity thus, providing for joint and several liability of the company and its shareholders would not be without pertinence. It may even happen that shareholders agree on the liability of the company to third parties, since the law empowers partners to freely determine the functioning of the joint venture.[92] The solution is also justified since joint ventures are governed by the rules of private companies

[88] Mercadal, B. et Janin, Ph. 1995. *Sociétés commerciales. op. cit*., 1255.
[89]UACCEIG, s. 858.
[90]*Ibid*, s. 859.
[91] Pougoue, P.G. et al. 2016. 'Acte uniforme du 30 janvier 2014 relatif au droit des sociétés commerciales et du groupement d'intérêt économique'. *op. cit.,* 694.
[92]UACCEIG, s. 855.

(partnerships)[93] which impose the joint and several liability of the company and its shareholders.[94]

Besides, a joint venture is treated as an entity different from the person of its members as far as its fiscal regime is concerned. It must declare the results of its operation and justify such results with regular accounts[95]. This implies that the company should declare assets which the shareholders decided to put as joint property at the disposal of the company. If this is the case, then it is no big deal declaring the company jointly liable with its shareholders.

The debate raised above concerning joint venture does not hold true for de facto partnerships, except for a de facto partnership which arises in a situation where partners create a form of company not recognised by the Uniform Act.[96] In the latter case, they would likely encounter problems at the level of attempts to register the company in the Trade and Personal Property Credit Register. Unlike in a joint venture where the partners agree not to register, in a situation where partners create a company not recognised by the Uniform Act (may be out of ignorance), failure to register is involuntary since they cannot be able to present the attestation of 'declaration of regularity and conformity' of acts accomplished for the formation of the company.[97] In this case, pre-incorporation contracts may exist since partners might have carried out some acts on behalf of the company whose procedure of registration is aborted for non-conformity with the provisions of the Uniform Act. Whatever the case, the principle remains that partners are liable on such contracts.

Generally, the existence of a de facto partnership is always established during litigation for the purposes of dissolution and liquidation and the ultimate protection of third parties. Partners may operate a de facto partnership without knowing that they are doing so like in a situation where parties behave as partners without creating between them a form of company recognised by the Uniform Act.[98] Whatever the case, the purpose of establishment and proof of the existence of a de facto partnership is the protection of

[93]*Ibid*, s. 856.
[94]*Ibid*, s. 270.
[95] Mercadal, B. et Janin, Ph. 1995. *Sociétés commerciales. op. cit*., 1252.
[96]UACCEIG, s. 865.
[97]*Ibid*, s. 73.
[98]*Ibid*, s. 864.

third parties. In this type of de facto partnership, one cannot talk about pre-incorporation contracts and consequently, no liability of the company.

However, the theory of reality of legal personality could be applied to impose liability on companies without legal personality for pre-incorporation contracts. According to this theory, legal personality is a reality and its existence must be recognised even in the absence of law, to all entities that have collective interest distinct from those of its members and operate within a minimum organisation. Within this framework, it is the will of the entity that counts. This conception received judicial blessing in France in 1954 when the *Cour de Cassation* held that, groups endowed with the possibility of collective expression for the defence of licit and dignified interest and are legally recognised and protected, have legal personality.[99] This recognition by the court of legal personality is explained by the punctual necessity to defend legitimate interest[100]. This could be applied to companies without legal personality since they act for the collective interest of the members. Considered as such, the absence of legal personality should not constitute an obstacle against imputing liability on them[101].

Conclusion

The situation of promoters as regard pre-incorporation contracts has greatly evolved in the OHADA zone following the enactment of the Uniform Act on Commercial Companies and Economic Interest Groups. In fact, the Uniform Act has jettisoned the common law position according to which a company cannot ratify or take over contracts entered into by the promoters prior to its incorporation; a situation inimical to practical circumstances and realities of business. Henceforth, promoters as well as the company may be liable on pre-incorporation contracts depending on the

[99] Civ. 28 janvier 1954, D. 1954, Jur. 217, note Lavasseur, JCP, 1954, JCP, 1954.
[100] Lagarde, G. 1974. 'Propos de commercialiste sur la personnalité morale, réalité ou réalisme'. *Etudes A. Jauffret* : 426-436, 429 ; Paillusseau, J. 1993. 'Le droit modern de la personnalité morale'. *RTD Civ:* 705-712, 705 ; Baruchel, N. 2004. *La personnalité morale en droit privé.* Paris: LGDJ ; Sarah Bros. 2010. 'La quasi-personnalité morale'. in *La personnalité morale*, Journées Nationales de l'Association Henri Capitant: Tome XII: Dalloz: 50-61, 50.
[101] Kelese Nshom, G. 2017. 'The liability of COBAC for prejudice caused to individuals by its acts or omissions in Cameroon: reflections on a legal vacuum'. *KIULJ* 1(2): 77-100, 95.

circumstances of the case. Nevertheless, the Uniform Act has not paid particular attention to the liability of the company and especially companies without legal personality despite the fact that it authorises or permits the existence of some of them. Given that the recognition and existence of companies without legal personality is an exception, the legislator would have exceptionally, equally provided for the liability of these companies for pre-incorporation contracts where they can be found to exist. Whatever the case, what is salutary is that third parties who might have had dealings with such companies are not left without a remedy since generally, unless otherwise agreed by the partners, joint and several liability of the shareholders is always retained.

DISSECTING THE CHALLENGES OF ALTERNATIVE DISPUTE RESOLUTION IN NIGERIA: DETERMINING ARBITRABLE ISSUES

By

Longpoe W. William (Ph.D)*

Introduction

Arbitration can be said to be as old as the creation of man, in the sense that from the origin of mankind, differences, conflicts and disputes began to surface among them and such disputes needed to be resolved one way or the other. One can therefore safely say that arbitration has primordial origin.[1]In the chiefly or cephalous societies, customary arbitration was done by the Chiefs, while in the acephalous societies (e.g. the Igbos' in Eastern part of Nigeria), it was done by the Council of Elders or a few persons selected for that purpose – this type of arbitration was done in line with existing customary norms.[2]

Arbitration subsequently developed from its primordial origin to its present status and has continued to so develop and become so formally regulated and standardized by reason of various statutes that have been enacted to regulate the arbitral processes both at domestic and international levels. Today, arbitration tribunals are generally differentiated into four categories. These are domestic, international, institutional and *adhoc*. There is also what may be described as **Documents only arbitration**[3]. A **domestic arbitration** is one between persons resident or doing business in the same country and the, subject of arbitration is to be performed in the same country. **International arbitration** is where the subject matter of the arbitration agreement relates to more than one country or where the parties expressly agreed that any dispute arising from the

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[1] *The Nigeria Arbitration Law in Focus* (1997) I.

[2]Oguche, S *Lecture notes on Alternative Dispute Resolution, unpublished* Post Graduate Lecture Notes on Arbitration and Conciliation Law, Nasarawa State University, Keffi.

[3]Ajomo,M.A.,*Arbitration Proceeding*, being the test of a paper presented at the 17th Advanced Course in Practice and Procedure at the Nigerian Institute of Advanced Legal Studies, Lagos, on the 16th of June, 1997; Dele Peters, *Alternative Dispute Resolution in Nigeria:Principles and Practice*(Dee-Sage Nigeria Publishers 2004) 54.

commercial transaction between them, shall be treated as an international arbitration[4].

Adhocarbitration arises where the parties in their contract agreement do not refer to arbitration rules or commercial arbitration administering agency or institution but is entered into after a dispute has arisen. The parties to this type of arbitration usually establish the tribunal for the specific purpose of adjudicating over that dispute and they establish their own rules of proceedings that may be made to fit the fact of that particular dispute between them. The tribunal is terminated as soon as the disputes are attended to, either by way of an arbitral award or the tribunal is overtaken by any circumstance that can make it arbitrable.

Institutional arbitration on the other hand arises where parties provide in their contract for the arbitration to be conducted in accordance with the rules of a named arbitration institution or agency. Such arbitration institution includes the International Chamber of Commerce (ICC) in Paris, The London Court of International Arbitration (LCIA), The American Arbitration Association (AAA), The Regional Centers for Arbitration in Kuala Lumpar, Cairo and Lagos etc. Institutional arbitration is very common today[5] and in Nigeria, there exists the Lagos Regional Centre for International Commercial Arbitration, the Maritime Arbitrators Association of Nigeria (MAAN), the Citizens' Mediation Centre, the Chartered Institute of Arbitrators, UK (Nigeria Branch), Chartered Institute of Arbitrators, Nigeria[6] and many others created in several States of the Nigeria.

The foundation of every arbitration agreement is laid on the freedom of such individuals and groups to freely decide on who, how and where they intend their differences or disputes to be resolved. It is usually a private and personal arrangement by such parties which they are bound to obey and fulfil.

Arbitration is anchored on fundamental principles such as party autonomy, separability, arbitrability and judicial non-intervention. This paper is intended, to consider those issues that are

[4]Peters, D. *Alternative Dispute Resolution in Nigeria: Principles and Practice* (Dee-Sage Nigeria Publishers 2004) 54; see also s 57 Arbitration and Conciliation Act (ACA), Cap A18, Laws of Federation of Nigeria(LFN), 2004 (hereinafter referred to as the Act).

[5]Ibid

[6]Candido-Johnsonetal, *Commercial Arbitration Law and Practice in Nigeria* (LexisNexis 2012) 21-27.

arbitrable or that can be settled by way of arbitration and those that cannot be settled by arbitration.

It is the objective of this paper also to examine the extent to which individuals and group of persons are allowed to go into agreements that refer their disputes to arbitral tribunal without such agreements affecting or conflicting with other issues of the general good of the people or public policy requirements.

Meaning of Alternative Dispute Resolution (ADR)

ADR is one of the dispute resolution processes available to individuals, group of persons, corporations and entities, other than litigation. It is a method where two or more people agree to settle their civil dispute(s) in a private manner by referring such dispute(s) to a person or persons who would hear the parties and resolve the dispute in a judicial manner, by entering into a decision known as arbitral award, which shall be binding on the parties. ADR is technically referred to as arbitration

In arbitration, parties enter into an agreement called arbitration agreement, that in the resolution of the dispute between them or whatever dispute that may arise between them, parties would refer such a difference or differences to a private person or persons called Arbitral Tribunal or Arbitrator [7]to be resolved, instead of going to the regular courts.

Arbitration has also been defined in the case of ***Nigerian Agip Exploration Limited v. Nigerian National Petroleum Corporation & Anor***,[8] thus:

> …is the reference of dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction; whose decision is in general, final and legally binding on both parties appointed by a court, to hear the parties claims and render decision. The process of arbitration derives its force principally from an agreement of the parties and the law requires the parties to obey the rules, proceedings and awards of the arbitration panel[9].

In Arbitration, the disputing parties refer the matter to a private tribunal or persons for settlement in a judicial manner and

[7]Idornigie,P. O., *Commercial Arbitration Law and Practice in Nigeria* (Law Lords Publications 2015) 1.

[8] Suit No. CA/A/628/2011), decided by the Court of Appeal, Abuja Division, on 25 February 2014.

[9]Oguche,S Ibid, 4.

members of such tribunal or the arbitrator(s), are normally made up of people who are knowledgeable in the field of dispute. The decision of the tribunal is called an award,[10]as against the term judgment, as we have in regular courts.

Arbitration in Nigeria is regulated by the Arbitration and Conciliation Act[11]. Arbitration has been defined in the Black's Law Dictionary as "a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.[12]

As earlier stated, the contractual basis for the resolution of disputes or differences that may arise between parties by arbitration process, is an arbitration agreement. The Act did not specifically define what Arbitration or Arbitration Agreement is, but section 1 sub-sections (1) and (2) of the Act provide as follows:

(1) Every arbitration agreement shall be in writing contained: in a document signed by the parties; or

a) in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or

b) in an exchange of points of claims and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another.

(2) Any reference in a contract to a document containing an Arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.

It would therefore appear that by the use of the mandatory word 'shall', the Act will not give effect to any arbitration agreement purportedly entered by parties which is not in writing. Notwithstanding the fact that the Act has not given us a definition of the term 'Arbitration Agreement' Option 1, Article 7 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law has defined 'Arbitration Agreement' as:

> …an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be

[10] Oguche, S Article on: *Alternative Dispute Resolution in Civil and Commercial Cases*, 6

[11] Cap A18, Laws of the Federation 2004.

[12] Garner B.A., *Black's Law Dictionary*, (8thedn, West Publishing Co. 2004)112.

in the form of an arbitration clause in contract or in the form of a separate agreement[13].

Arbitration is distinguishable from other forms of dispute resolution processes in the sense that like litigation, it is adversarial in nature, while the other forms of alternative dispute resolution mechanism like conciliation, mediation, negotiation, med-arbitration, mini-trials are non-adversarial or consensual. However, to some extent, arbitration is consensual in the context of the principle of party autonomy.[14]

From the above, one can safely define *arbitration agreement as an agreement entered into voluntarily by two or more persons, wherein such parties agree that for the determination of any pending or future dispute between them, such dispute shall be referred to a person or persons otherwise called arbitrator or arbitrators, who shall resolve or arbitrate over such dispute in a judicial manner and with the understanding that the decision of the arbitrator(s) or arbitral award shall be binding on the parties.*

Purpose of Arbitration

Arbitration as a dispute resolution mechanism is preferred today by most businessmen, individuals and multi-national corporations particularly where agreements of commercial nature is entered into, whether with domestic or international flavour. Parties desire that their transactions and relationships, even when there is dispute, should remain a private affair and such disputes should equally be tackled in the manner they so desire.

This choice of parties to go into arbitration rather than litigation is mostly influenced by factors such as:

i. parties having a choice of nominating who their arbitrators/representatives should be;
ii. arbitration is less technical in comparison to litigation (where the professionalism or even 'smartness of the counsel counts so much);
iii. arbitration is time saving compared to litigation that can remain in the same court for several years. Even when judgment is delivered, parties may proceed on Appeal to the Court of Appeal, Supreme Court and back to the starting point, in order to frustrate their adversaries;

[13] 1985 as amended and adopted in 2006 (hereinafter referred to as the UNCITRAL Model Law);
[14]Idornigie, P.O., *Commercial Arbitration Law and Practice in Nigeria* (Law Lords Publications 2015) 132

iv. arbitration allows parties to participate directly in the proceedings and in arriving at the final decision/award;
v. since arbitration proceedings is done in private, parties usually save themselves from the ordeal of having their stories exposed in the public domain;
vi. to a large extent, the relationship of parties is better protected in arbitral proceedings, as they do not end up seeing themselves as enemies, having been personally involved all the way;
vii. in arbitration procedure, parties are better willing to obey the decisions or arbitral award, 'having been part of the decision' as against judgments imposed on them by reason of litigation where the voices of the parties may never be heard, but those of their respective Counsel.

In ***Commerce Assurance Ltd v. Alli***[15] Justice NnaemekaAgu, JSC (as he then was) stated:

> Now I believe that the appellant's contention on this issue reveals a lack of appreciation of the true nature of arbitration proceedings. The underlying principle is that parties to a dispute have a choice. They may resort to the normal machinery for administration of justice by going to the regular courts of the land and have their disputes determined both as to the fact and to the law, by the courts. Or they may choose the arbitrator to be the judge between them. If they take the latter course, they cannot when the award is good on the face of it, object to the award on grounds of law or of facts.

Be that as it may, the freedom of parties that may be so exercised to direct their disputes to arbitration has a limit in the sense that the right of a party usually ends where that or those of others would begin from. Such dispute so agreed to be referred to an arbitral tribunal must be justiciable. It must not be in any way contrary to public policy or will parties be allowed to settle in a private manner, that which involves the state and the society in general.

Arbitrability of Issues in Nigeria

Basically, disputes can be referred to arbitration in three ways, namely, under an order of a court, under an enactment and by agreement of parties.[16]What amounts to arbitrability vary from

[15] (1992) 3 NWLR (pt 232) 710
[16]Ibid. Idornigie P.O.

country to country. For example, in Yugoslavia, issues concerning the validity of patents and trademarks as well as antitrust disputes are not arbitrable; in Austria, matters that have to do with bills of exchange, the validity of patents, bankruptcy and attachment are not arbitrable.[17]

In Nigeria, it is not every dispute or disagreement of parties that can be referred to arbitration, notwithstanding the fact that parties to the agreement have expressly agreed to proceed before an arbitral tribunal. In his book[18], Professor Ezejiofor succinctly encapsulated this fact, thus: "Disputes that can be referred must be justiciable issues which can be tried as civil matters. They must be disputes that can be compromised by way of accord and satisfaction. These include all matters in dispute about any real or personal property, disputes as to whether contract has been breached by either party thereof, or whether one or both parties have been discharged from further performance thereof.…[19]

As a matter of general principle of law, arbitration agreements should be respected as they reflect the will of the parties to the agreement. However, the principle of arbitrability sets the limit to the choice of parties simply because a matter of state policy – political, economic and social, … are not capable of resolution by arbitration or contrary to public policy.[20]

Arbitrability simply means the quality of being capable of settlement by arbitration. Both statutory authorities and judicial pronouncements by our courts in Nigeria have helped so greatly in a better understanding of the issues under consideration and it will be apposite to reproduce the relevant portions of such authorities herein. Section 35 of the Act provides:

This Act shall not affect any other law by virtue of which certain disputes –

a) may not be submitted to arbitration; or
b) may be submitted to arbitration only in accordance with the provisions of that or another law.

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[17]Ibid, 132.

[18]"The law of Arbitration in Nigeria" (1997)3; Godwin Obla, *Arbitration as a tool for Dispute Resolution in Nigeria: How relevant today,* article published by Jide Olakanmi & Co, *Alternative Dispute Resolution: Cases & Materials* (Law Lords Publications 2013) 1 at 6-7.

[19]Godwin Obla, *Arbitration as a tool for Dispute Resolution in Nigeria: How relevant today?* article published by Jide Olakanmi & Co. Alternative Dispute Resolution: Cases & Materials (Law Lords Publications 2013) 1 at 7.

[20]Ibid, Idornigie, P.O.

The issue of arbitrability can arise at three stages in any arbitration proceeding; first, when an application is made to court to stay the arbitration when the opposition party claims that the tribunal lacks authority to determine a dispute because the dispute is not arbitrable; secondly, during the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction (the objection may be made to the tribunal or, subject to conditions, to the court); and, thirdly; when an application is made, challenging the award (the challenge would be to the tribunal's substantive jurisdiction or oppose the award's enforcement).[21]

Usually, the windows of matters that can be referred to arbitration are never closed, as facts of a given case could influence same. Some of the matters that are usually referable to arbitration are simple contracts, insurance and commodity contracts disputes from building and civil engineering contracts, rent-review clauses in commercial leases, partnership agreements, manufacturing, computer applications, imports and exports, general trading[22], agreements relating to professional fees, and so on.

On the other hand, bearing in mind (as has been stated earlier) that arbitration is a method of resolving civil disputes in which there can be accord and satisfaction by parties, it would therefore follow that the following matters are not arbitrable or referable to arbitration – tax matters, fraud related matters, void and illegal contracts, trade disputes, divorce petitions, rights created under the Constitution,[23] and so on. It has also been argued that since section 251 of the 1991 Constitution of the Federal Republic of Nigeria vested in Federal High Court to the exclusion of any other court, civil jurisdiction in matters like trademark, patents and designs, and copyrights, this may be taken to mean that such matters are not arbitrable.[24]

The writer here shares this view with respect to section 251 of the Constitution, but not completely. This is because in Nigeria, issues of trademarks and patents have elements of tortuous wrong which is a private or civil breach with its attendant benefits, which parties can agree to compromise without negatively affecting the public right. Therefore, the subject matter of any dispute arising

[21] Ibid, Candido–Johnson et al
[22]Ibid
[23]CFRN 1999, Ch 4.
[24]Ibid, Idornigie P. O.

from such issues ought to be first considered and the principle of separability applied in the circumstance.

The Nigerian Courts have had occasions to make pronouncements on the issue of arbitrability. One of such occasions was the landmark case of ***Kano State Urban Development Board V. Fanz Construction Ltd***[25], where it was held that:

> The dispute or difference which the parties to an arbitration agreement agreed to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised. Thus, an indictment for an offence of a public nature cannot be the subject of an arbitration, nor can disputes arising under agreements void as being by way of gaming or wagering. Equally, disputes leading to a change of status, such as a divorce petition, cannot be referred, nor, it seems, can any agreement purporting to give an arbitrator the right to give judgment in rem.

From the above and upon a general overview of the principle of arbitrability, it is clear that the category or windows of disputes that are not arbitrable are not closed.

Though the Act did not specifically define, nor did it outline matters that ate arbitrable or otherwise, but some of the provisions under the Act would appear to have been created as a safe guide towards the permission of certain issues or matters to be removed from the 'flowing rivers of arbitration'.

The Act provides in section 35, thus:

This Act shall not affect any other law by virtue of which certain disputes –

a) may not be submitted for arbitration, or

b) may be submitted with the provisions of that or another law.

In section 48(b)(i) and (ii), the Act provides:

The Court may set aside arbitral award –

b) if the court finds –

i) that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or

ii) that the award is against public policy of Nigeria.

Similarly, section 52(2)(b)(i) and (vi) provides that:

2) The Court where recognition or enforcement of an award is sought or where application for refusal of recognition or enforcement thereof is brought may, irrespective of the country in which the award is made, refuse recognition or enforce an award –

b) if the court finds –

[25](1990)4 NWLR (Pt 142)1.

i) that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria, or

ii) that the recognition or enforcement of the award is against public policy of Nigeria.

It will be relevant at this point, to examine some of the specific matters or issues that are not arbitrable, as that will help us in an easier and better understanding of all other issues that are capable of referal to arbitration, upon the agreement of parties.

Arbitrability of Tax Matters

It would appear that the *locus classicus* case on whether disputes arising from Tax is arbitrable or not is the case of ***Federal Inland Revenue Service (FIR) v. Nigerian National Petroleum Corporation and Ors,***[26] where one of the issues for determination by the apex court was whether an arbitral tribunal has the jurisdiction to determine the subject matter of the arbitration which deals with taxation, which jurisdiction is conferred on the Federal High Court by the Constitution. Secondly, whether the Arbitration Tribunal had the jurisdiction to enter into a valid award on the taxation of the defendants which will have a binding effect on the Federal Inland Revenue Service (FIRS) in the interpretation, application and administration of the Petroleum Profit Tax Act[27], the Deep Offshore and Inland Basin Production Sharing Contracts Act[28], Education Tax Act[29] and the Company Income Tax Act[30] and any other statute for the time being in force in Nigeria.

The defendants filed a preliminary objection challenging the jurisdiction of the Court to entertain the FIRS suit on the ground *inter alia*, that the suit as constituted is incompetent as it has no bearing on section 251(i)(b) of the Constitution. The Court, after relying on the Ugandan case of ***Heritage Oil and Gas Limited v. Uganda Revenue Authority***[31] that tax matters are statutory and not contractual, stated:

> It is not therefore intended by the Constitution of Federal Republic of Nigeria that issues of taxation or tax matters

[26] Suit No. FHC/ABJ/CS/774/11 (Unreported) judgment delivered on 29th February, 2012, per Bello,

[27] Cap P13, LFN 2004

[28] Cap D3, LFN 2004

[29] Cap E4, LFN 2004

[30] Cap C21, LFN 2004

[31] Civil Appeal No.14 of 2011 (2011) UG Comm 97, delivered on 1st September, 2011.

> should go to arbitration. I hold that such matters are not arbitrable. Consequently, I hold that the claim of the claimants (defendants herein) submitted to arbitration having been found to relate to tax disputes arising out of the operation of the PSC between the 1st defendant and the 2nd – 5th defendants is not one referable to arbitration. The subject matter is one within the exclusive jurisdiction of this Court granted by the Constitution.[32]

It is abundantly clear therefore, following the above case of ***FIRS v. NNPC & others***,[33] that Tax Matters are not arbitrable.

Arbitrability of Fraud Related Issues

The issues have already been extensively discussed in this paper above[34], that arbitration is method of resolving civil disputes, and this definitely excludes matters which are criminal in nature. The reason is simple, that arbitrators cannot impose criminal sanctions which are within the confines and responsibility of the state.

Where the dispute is centered on fraud, such a dispute is not arbitrable since fraud under the Nigerian law is acrime. In Pakistan, in the case of ***The Hub Power Company Ltd v. Pakistan WAPDA and others***,[35] a majority of the judges of the Supreme Court held that allegations of corruption were not referable to arbitration. The corruption had to do with issues of fraud and illegality. It further held that on ground of public policy such matters, which require findings about alleged criminality are not referable to arbitration[36].

In Nigeria, the Court of Appeal appears to have followed the Pakistani trend, in the case of ***BJ Exports & Chemical Processing Company Ltd v. Kaduna Refining and Petrochemical Company Ltd***[37] where the Court had to consider whether the Courts in Nigeria have the jurisdiction or powers under the Nigerian law to intervene where claims before an arbitrator are *prima facie* fraudulent, so that such claims are determined by a Court of law. While Counsel for the appellant submitted that with the combined effects of sections 2, 12 and 27 of the Act, the trial court had no

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[32]*FIRS v. NNPC &Ors*, Suit No. FHC/ABJ/CS/774/11 (Unreported) judgment delivered on 29th February, 2012, per Bello, Ibid,Idornigie P.O..

[33] Supra

[34]See para 1.2 (pages 4-6)

35 Judgment of Supreme Court of Pakistan, 14 June 2000 (Civil Appeal No 1398 and 1399 of 1999)

[36]Ibid, Idornigie P.O.

[37](Unreported) Appeal No.CA/KA/34/98 of 31 October, 2002.

power to revoke the arbitral clause after arbitral proceedings had commenced, except as provided under the Act, the Counsel for the respondent argued that fraud was not arbitrable and that the Courts have powers to refuse to enforce arbitration awards in situations where the underlying contracts is being challenged on grounds of illegality or charges of fraud.

The Court of Appeal, per Mahmud Mohammed JCA (as he then was), held inter alia that though parties are bound by their arbitration agreement however, where a party has a good cause to want to revoke the agreement, on allegation of the existence of *prima facie* evidence of fraud, that party must apply to the Court or judge to be granted leave to do so, which was properly done in this case. Under the rules of Court, fraud should be specially pleaded and at the hearing, it must be proved beyond reasonable doubt[38].

Arbitrablity of Void and Illegal Contracts

Generally speaking, contracts which are void and illegal in nature cannot be arbitrated upon. In the cases of ***M.V. Lupexv. N.O.C. & S. Ltd[39], Pan Bisbilder (Nig) Ltd v. FBN Ltd and Onyiukev. Okeke[40],*** the Federal High Court held that although the Nigerian courts have accepted the principles of separability and arbitrability, illegal contracts are unenforceable under the law. This is so because the consequence of illegality in relation to the parties to a contract is that the court will not come to the assistance of any party to an illegal contract who wishes to enforce it.

The above position is agreeable with this writer, who is of the opinion that based on public policy, parties should not be allowed to benefit from contracts tainted with illegality. This is supported by the latin maxim, *ex turpi causa non aritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.

Also, in ***Nigerian Telecommunications (NITEL) Plc & others v. Pantascope International BV Private Limited***[41], the plaintiff terminated the contract with the defendant on the ground that it was illegal and contrary to the provisions of section 54 of the

[38]Ibid, Idornigie P.O.
[39]*The Owners of the M.V. Lupex V. Nigerian Overseas Chartering and Shipping Ltd* (1993-1995) NSCC 182; Paul O.
[40]Ibid, Idornigie P.O.
[41] (Unreported) Suit No.FHC/ABJ/CS/36/2005, Federal High Court, Abuja, judgment delivered on 25th May, 2005 per Adah, J.

Companies and Allied Matters Act[42] which provides that every foreign company must be registered in Nigeria before such a company can do business. Subsection 2 of the said section 54 provides that any act of the company in contravention of the subsection (dealing with non-registration), shall be void. In the management contract of the parties in this case, clause 11.2.5 provides for arbitration. The plaintiff terminated the contract and proceeded to sue among other reasons, that the defendant did not register its company in Nigeria. The defendant on the other hand submitted that upon the principle of separability, the part of the agreement dealing with arbitration ought to have been so referred to arbitration and not a matter of the Court.

The Court held that once the validity of the entire contract is being questioned, the Court has a duty to pronounce on such validity; and consequently, by virtue of section 54 of CAMA, the management contract was not only void but illegal, and such a defect cannot be cured by the principle of separability provided in section 12(2) of the Act.

Some writers [43]have argued at different *fora* that separability cannot be circumscribed by arbitrability in all cases. That is to say, that based on the principle of seperability, the substance of the arbitration clause itself ought to be specifically considered and separated from the entire agreement under consideration. In fact, Emilia Onyema[44]on this ground proceeded to criticize the judgment of Adah, J. in the above case of ***Nigerian Telecommunications Plc & others v. Pentascope International BV Private Ltd***[45], arguing that his lordship ought to have applied the principle of separability in order to grant injunction therein and equally transfer the matter to arbitration, notwithstanding the voidness and illegality the management agreement was saddled with, due to non-registration of the defendant under the relevant provision of CAMA[46]. Professor Idornigie agrees with this view.

The writer herein however, thinks differently. Statutory provisions (like the said section 54(1) and (2) of CAMA) are made

[42] Cap C20, LFN 2004 (hereinafter referred to as CAMA)

[43]Onyema, E., *The Doctrine of Separability under Nigerian Law* in Apogee Journal of Business, Property & Constitutional Law, July – September 2009, Vol.1, No.1; Paul O. Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Law Lords Publications 2005) 129

[44]Ibid, Idornigie P.O.

[45](1976) 3 SC 1; See ibid, 128.

[46]s 54(1) and (2)

to protect the common good of the people. There would surely be chaos and anarchy if individuals and groups are allowed to flout and break the laws of the land with impunity.

In the circumstance of this case, if the foreign company that ought to have been so registered in Nigeria has refused to so register, such a company should not be allowed to benefit from its own wrong no matter the colouration. After all, the essence of arbitration is never to create an avenue where individuals will circumvent the existing laws of land. Such illegality should not be treated as a mere irregularity. If the foundation of a thing is already contaminated by illegality, there should not be any need to engage on a voyage of dissecting such illegality for the purpose of discovering legality. It will be a journey in futility.

In the English case of ***Joe Lee Ltd v. Dalmeny***[47] it washeld that disputes over whether a contract was ever entered into or was void or illegal fall outside the scope of an arbitration clause in the contract for, if the contract is not binding on the parties, neither is the arbitration clause.

In any case, the question whether or not the arbitral tribunal itself has the jurisdiction or competence to determine whether or not a particular issue under reference is valid or null and void, appear to have been settled in favour of arbitration. That is, that the arbitrators have the power to decide whether or not a contract is null and void[48]; and that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision that the contract is null and void shall not automatically affect the validity of the arbitration clause.

Arbitrability of Trade Disputes

Trade disputes are not arbitrable. By section 9 of the Trade Disputes Act[49], it is provided that:

(1) within fourteen days of the receipt by him of a report under Section 6 of this Act, the Minister shall refer the dispute for settlement to the Industrial Arbitration Panel established under this section.

Also, by section 12[50] it is stated that:

[47] (1927)1 Ch300
[48]S 12 of the Act and s 19 of the Arbitration Law (AL) of Lagos State 2009.
[49]TDA Cap T8, LFN 2004.
[50]Ibid.

> The Arbitration and Conciliation Act shall not apply to any proceedings of an arbitration tribunal appointed under section 9 of this Act or to any award made by such a tribunal.

From the above, it is clear that in the face of any dispute arising from Trade/Industrial Relations, it is the Industrial Arbitration Panel that has jurisdiction and such dispute cannot be referred to arbitration under the Act.

Other Non-arbitrable Issues

Having noted earlier that the window of arbitrability under the Nigerian jurisprudence is not closed, we shall hereunder, be considering some other matters that cannot be referred to arbitration, such as matters created for under section 251 of the Constitution, which jurisdiction is vested in the Federal High Court of Nigeria, to the exclusion of any other Court, including the arbitral tribunal. Here, issues or matters of trademark, patents and designs, and copyrights have been argued as non-arbitrable matters[51].

It would appear equally that those rights constitutionally enshrined and protected under the Constitution of the Federal Republic of Nigeria[52] cannot be compromised hence parties cannot agree to refer any breach of such rights to arbitration.

Equally, under the Matrimonial Causes Act[53] the High Court of the State (any of the states of the federation) is vested with jurisdiction to entertain suits that border on divorce petition or other issues thereunder. Moreso, divorce petitions, having to do with a change of status is a matter of public policy which is not private or personal and cannot be arbitrated upon. This was the position of the Court in ***Kano State Urban Development Board V. Fanz Construction Ltd***[54], where it was held that:

> The dispute or difference which the parties to an arbitration agreement agreed to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can

[51]Amazu, A.A *International Commercial Arbitration and African States: Practice, Participation and International Development* (Cambridge University Press 2001)154; See Copyright Act, Cap C28, LFN 2004; The Trade Marks Acts, Cap T13, LFN 2004; Patents and Designs Act, Cap P2, LFN 2004; Paul O. Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Law Lords Publications 2005) 112

[52]1999, ch 4.

[53]S 2, Cap M7, LFN 2004.

[54](1990)4 NWLR (pt142)1.

be compromised. Thus, an indictment for an offence of a public nature cannot be the subject of an arbitration, nor can disputes arising under agreements void as being by way of gaming or wagering. Equally, **disputes leading to a change of status, such as a divorce petition**, cannot be referred, nor, it seems, can any agreement purporting to give an arbitrator the right to give judgment in rem.

In addition, contracts which are contaminated by corruption and matters where criminal responsibility is involved cannot be arbitrated upon[55].

Effect of Non-arbitrability

There are several results when matters are stated or viewed as non-arbitrable; that is, not capable of being arbitrated upon. Firstly, any of the parties may apply to the High Court before the arbitral tribunal is convened, for an order of the Court to refuse to order the submission of parties to arbitration, as the issue is not arbitrable. At this level, the applicant will have to convince the court by factual (affidavit) evidence, why the discretion of the court should be exercised in his favour.

Secondly, it could give room to one of the parties challenging the jurisdiction of the arbitral tribunal. In such situation, an application would be made to the arbitral tribunal if the tribunal has been convened already, challenging the jurisdiction of the said tribunal.

Thirdly, a party may opt to challenge the arbitral award or oppose the enforcement of the said award, on the ground of arbitrability[56].

Conclusion

As a matter of general principle of law, arbitration agreements should be respected and the maxim, *pactasuntservanda*, rightly applied, because such agreements reflect the will of the parties concerned. Parties generally would prefer arbitration because it is faster, more private and a better way of resolving disputes, while maintaining the existing relationship.

It is however, not every issue that is desired by the parties to refer to arbitration that has the quality of being resolved by

[55] Ibid. Idornigie, P.O.

[56]ss 12, 29(2), and 32 of the Act); see ss 19 and 55 of the AL 2009; Idornigie, P.O.,

arbitration. The principle of arbitrability therefore sets the limit of the choice of such parties.

The Act did not specifically define or provide the issues that are arbitrable and those that are not, but has proceeded to create room for such eventualities as arbitrability being the ground on which an arbitral award could be set aside or recognition and enforceability refused. The writer is of the view that including some of the non-arbitrable issues in the Act, will help to resolve the cloud of arguments and confusion that have gathered over the years particularly with respect to arbitrability of void and illegal contracts with arbitration clauses.

While statutes and enactments have made provision for non-arbitrability of issues, the Courts of Record have greatly assisted in developing the frontiers of arbitrability in Nigeria. The Trade Dispute Act[57] for instance, provides that no issue arising out of Trade/Industrial Matters shall be referred to Arbitration, under the Arbitration and Conciliation Act. The Courts have held, relying on the various enactments also, that Tax Matters[58] are not matters that could be referred to Arbitration. Other issues relating to fraud, corruption, void and illegal contracts, and so on, have been held not to be arbitrable.

Criminal issues generally are not arbitrable, since individuals do not have the power to privately resolve or compromise on rights that affect the state and the public at large. More so, only judges and magistrates can punish criminals for offences committed against the state.

On the principle of separability, several writers and commentators have argued that an arbitration clause does not necessarily become extinguished and thereby become a nullity merely because the main agreement was nullified. This argument is quite reasonable except that care must be taken in order not to begin to use the instrumentality of arbitration clauses to promote and legalize illegality. The age-long doctrine that a party cannot benefit from an illegal or base transaction should be kept alive.

Finally, on the ground of non-arbitrability, parties are empowered to challenge the referral of matters to arbitral tribunals, raise the issue of the jurisdiction of such tribunals (if already constituted) and challenge the decisions of such arbitral tribunals

[57] S12
[58] FIRS V. NNPC &Ors (supra).

(the arbitral award) for the award to be set aside or recognition and enforcement refused by the Courts.

Arbitration is no doubt a safe route to ply in today's commercial and economic journeys, but parties to every arbitration agreement as well as the drafters of such arbitration clauses should therefore beware of matters they choose to refer to arbitral tribunals, as a result of the principle of arbitrability, to avoid falling into the deep pit of exercise in futility and frustration in the long run.

SURMOUNTING THE JURISDICTIONAL CHALLENGES OF THE CUSTOMARY COURT OF APPEAL IN BENUE STATE, NIGERIA

By

Raphael, Gabriel Okplogidi*

Abstract

Prior to the advent of the Europeans in Nigeria, there exist customs which the people regard as binding hence the evolution of customary law. Also, methods of resolving dispute among members of indigenous communities equally emerged. Nonetheless, the colonialist introduced its own judicial system. This system subsists till the coming into being of the 1979 Constitution of the Federal Republic of Nigeria wherein the Customary Court of Appeal and the Sharia Court of Appeal where introduced for States where same is desired. These courts were also provided for under the current Constitution. This article is motivated by the need to find solutions to the issues relating to the exercise of the jurisdiction of the Customary Court of Appeal. It was found that the interpretation of Section 247 of the 1999 Constitution of the Federal Republic gives room for litigants to challenge the jurisdiction of the Customary Court of Appeal especially in Benue State. One of the major recommendations made is Constitutional/statutory re-enactments in order to expand the scope of the Customary Court of Appeal in the interest of the preservation of customary laws in Nigeria.

> In view of the fact that this court is of limited jurisdiction, it has become fashionable for counsel to bring up objections at the slightest opportunity challenging the jurisdiction of the Court. We wish to state that this attitude will not aid the development of our customary law. The intention of establishing this class of Court, with specialized jurisdiction, was for it to help nurture and develop our indigenous laws. Counsel are enjoined not to thwart this noble objective.[1]

Introduction

Prior to the advent of the Europeans, pre-colonial societies in what is now referred to as present day Nigeria have their methods of adjudicating over matters and settling disputes. However, with the coming of the Europeans into Africa and Nigeria, the English method of resolving disputes was introduced. This led to the

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[1] Per Hon. Justice C.A. Idye in Terwase Uchia v Loho Azen & 1 Or, Appeal No. CCA/M/14A/16, Suit No. CVT.8/2016 p. 21

establishment of Superior Courts of records. Even at that, Customs were respected and allowed to evolve accordingly.

Flowing agitations local traditional institutions metamorphosed into Customary or Area Courts. Nonetheless, Customary Court of Appeal was allowed to be established by States who so desire same. It is conferred with powers to entertain issues relating to customary law and practices.

However, the Customary Court of Appeal is established with certain vision and mission. Taking a cursory look at the pre-amble to the Benue State Customary Court of Appeal Rules, 2015, the picture becomes clearer. It provides for the Vision of the Benue State Customary Court of Appeal thus:

> To discharge our Constitutional mandate as a Superior Court of Record in a manner that will positively and proactively reshape Customary Law in Benue State in particular, and Nigeria in General, and thus, make Customary Law the most preferred mode of settling disputes in the country, as the current trend is now drifting towards ADR and mediation the traditional ways of settling dispute by our forefathers.[2]

The above vision of the Customary Court of Appeal in Benue State vividly seeks to positively and proactively reshape Customary Law with focus on promoting Alternative Dispute Resolution which forms traditional ways of settling dispute by our forefathers. The mission of the Court further buttresses this point thus:

> To entrench a justice delivery system that is simple, fast, efficient and responsive to the needs and yearnings of the citizenry, and thus, command such respect and confidence that the Benue Society will always crave to entrust their Customary disputes for adjudication rather than resort to self-help and jungle justice.[3]

The essence of the Court is to entrench a justice delivery system that may be considered in the eyes of the ordinary man to be fast, efficient and responsive to the needs and yearnings of the citizenry. The challenge however lays in the exercise of the Courts powers over issues relating to its mandate. Sometimes in practice one may not sadly that the jurisdiction of the Court is being challenged as a result of issues that may be best considered technical to the detriment of substantive justice. This work therefore seeks to look at ways in which the challenges associated with the exercise of

[2] Pre-amble to the Benue State Customary Court of Appeal Rules, 2015.
[3] *Ibid*

the Jurisdiction of the Customary Court of Appeal particularly in Benue State can be surmounted.

Conceptual Clarification

For the purpose of clarity, it is important to attempt the contextualisation of certain legal concepts such as Custom and Jurisdiction. The above concepts may be described thus:

The Meaning and Nature of Customary Law

Customary law is a significant aspect of African law. Many have, however, though erroneously, equated customary law with African law simpliciter. To such people, a mention of African law denotes in all material particulars, customary law. But this is not exactly so. Both are related, but are not coextensive with and exhaustive of each other. One (the customary law) is only an aspect of the other (African law). Thus, the concept of African law today is broader and far more extensive than that of customary law.[4]

Customary Law has been variously described by academicians, jurist's practitioners of the Law and judges[5]. But generally, and simply put, Customary Law is the law relating to the custom and traditions of the people. With reference to Nigeria, it has been defined as, any rule or body of rules of human conduct regulating the rights and duties of a particular indigenous Nigerian Society whether by immemorial custom or usage or not but which are sanctioned by external force particular to such indigenous group.[6]

Okany[7] described customary law of a community as a body of customs and traditions which regulate the various kinds of relationship between members of the community.

Elias[8] on his part defined customary law as the body of rules which are recognized as obligatory by its members. While

[4] Ngwakwe, E. C., 2013, *African Customary Law: Jurisprudence, Themes and Principles.* Abakaliki: Ave Maria Academic Publishers

[5] Hon. Justice Olubor , J. O.,2018, 'Customary Laws, Practice and Procedure in the Area/Customary Court, and the Customary Court Of Appeal' *www.nigerianlawguru.com/.../customary%20law%20and%20procedure/CUSTOMAR.*

[6] Hon. Justice Makeri, S.H., 2007, 'Jurisdictional Issues in the Application of Customary Law in Nigeria' a paper delivered at 2007 all Nigeria judges conference 5th -7th November. P5

[7] *Ibid*

[8] Ibid

Obaseki, JSC (as he then was) in the case of *Oyewumi V Ogunsesan*[9] defined customary law as follows: -

> The organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that the customary law goes further and imports justice to the lives of all those subject to it.

Thus, from these definitions there is no single uniform set of customs prevailing throughout the country. The term customary law therefore used is as a blanket description covering many different systems. There are as many customary laws as there are ethnic groups, although in certain cases different groups may have the same customary law with little or no variations.

Meaning, Nature and Importance of Jurisdiction

Jurisdiction may be defined as the power of a court of Law to adjudicate on a cause or matter brought before it. Black's Law Dictionary defines jurisdiction as:

> The power of the court of decides a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. It also defines the powers of courts to inquire into facts, apply the law, make decisions and declare judgment.[10]

It must be noted, however, that jurisdiction and the competence of a court are inter-related. It is pertinent to state that jurisdiction is conferred on courts by statutes. It cannot be conferred on a court by parties to a legal cause or matter. Jurisdiction is the authority given to the court by the constitution and other enabling legislation to decide matters that come before it.[11]

A court without jurisdiction also lacks competence. In *Madukolu & ors. V. Nkemdilim* the Supreme Court held that:

> A Court is competent when – (a) It is properly constituted as regards numbers and qualification of the members of the bench, and no member is disqualified for one reason or another; and (b) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents

[9] Ibid

[10] Garner B., 2009, *Black's Law Dictionary, 9Th edn* USA: West Thomson Reuters Business. P. 927

[11] Per Rhodes Vivour JSC in *A.G. Kwara State v Adeyemo* (2017) 1 NWLR (Pt. 1546) 211 at 239

> the court from exercising its jurisdiction; and (c) The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

In other words, jurisdiction is an aspect of the competence of a court. The concept of jurisdiction is a very radical and crucial issue, as it is basic and fundamental to all judicial proceedings and must be clearly shown to exist at the commencement of, or during the proceedings. Where a court lacks jurisdiction, its proceedings no matter how well concluded and any judgment arising therefrom, no matter how well considered or beautifully written will be a nullity and waste of time. Similarly, no waiver and no acquiescence can confer jurisdiction on a court where none exists. The authorities are prolific on this principle.[12]

Brief Historical Development of Customary Courts in Nigeria

Customary Courts as we all know them today had their origin in what was called "Native Courts" Thus, it is necessary to examine succinctly the evolution and role of Native Courts in our judicial system before the advent of the modern customary courts. Before the arrival of the colonial legal system, there was already in operation a system of Law in Nigeria. In 1900, however, the Colonial Legal System in Nigeria permitted natives of the Colony of Lagos and its Protectorates to operate their Native Law and custom as far as they were not repugnant to natural justice, equity and good conscience and not incompatible with relevant statutes. While natives were allowed to administer their own native laws and customs, special arrangements were made under traditional leaders to ensure that dispute involving natives and non-natives were referred to the Governor. A clear distinction was drawn as to who was a "native" and "non-native" for administrative purposes. But because there were glaring injustices found in the native courts the colonial administrators had to bring the Native Courts within statutory ambit to ensure for a greater measure of surveillance or supervision. In 1906 therefore, the Native Courts Proclamation was made and it provided for a dual system of Native Courts namely – "minor Courts" and "Native Courts". Each category of court had its defined limits and could hear both civil and criminal cases between "natives" and consenting "non-natives". The same 1906 Northern Nigeria was occupied by the British who introduced the Native Courts Proclamation that reviewed the Native Courts in Northern

[12] Ibid

Nigeria.[13] This largely has to do with the perceptions that the custom as practiced by the people is archaic, barbaric, outdated and uncivilized.[14]

Nonetheless, it has been observed that with the amalgamation of Northern and Southern Nigeria on 1st January, 1914 the Native Courts Ordinance, 1915 – 18 which ushered in a system which was consistent with, and enhanced the amalgamated political structure? By these enactments Warrant Native Courts were established by Residents subject to the Governor's approval and were graded with varying powers and jurisdiction.

Additionally, by the Native Courts Law, 1956 (N. R. No. 6 of 1956) 600 Native Courts were established in Northern Nigeria with civil and criminal jurisdiction spelt out in the warrants establishing these Courts. Later new guidelines were made providing for operating the reformed and reconstituted Native Courts with political officers i.e. District Commissioners and Residents who supervised them by way of Appeals.

In view of the above, it may be submitted that the Northern Nigeria had a system whereby men of good conduct were made judges of Native Courts whose decisions were reviewed by administrative officers who were men of common sense but not learned in the law but fully imbued with the colonial system policy of indirect Rule in Nigeria. In these Courts where colonial administrative officers sat in judgment, Native Customary Law was regarded more or less as foreign law and had to be proved by evidence. This was the position of customary courts up till 1967 when the Area Courts were established and replaced the Native Courts in Northern Nigeria.

Also in Eastern Nigeria, Native Courts were established with warrant chiefs and judicial officers at village and community level. In the Western part of the country the story was very similar, Native Courts developed into Customary Courts too so that by 1957 there was the Customary Courts Law 1957 (Cap 31) Laws of Western Nigeria; (see also) Customary Courts Law (Eastern Region No. 21 of 1956).

When the Mid-West Region was created in 1963 out of old Western Region the Laws of the former became applicable in

[13] Hon. Justice Makeri, S.H. *Op. Cit*

[14] Nwagbara, C. 2014, 'The Nature, Types & Jurisdiction of Customary Courts in the Nigeria Legal System' (Volume 25) Journal of Law, Policy & Globalization (JLPG)

the new Region and continued to function until the promulgation of the Customary Courts Edict No. 38 of 1966. It is these native courts that metamorphosed into Area Courts throughout the Northern States in 1967. These same courts later again metamorphosed into Customary Courts in some states in the North. In 2001 Kaduna State for example the Government established Customary Courts and the Customary Court of Appeal by law No. 9 and 14 2001 respectively.[15] The essence of establishing the Customary Courts and the Customary Court of Appeal in particular is to ensure the smooth development of customary law in line with generally acceptable contemporary customary practices and observances and to bring about the development of same in view of influences from other global practices and norms.

Practice and Procedure in the Customary Courts of Appeal

The Customary Court of Appeal is one of the superior courts of record established under Section 6(5) of the Constitution of the Federal Republic of Nigeria 1999. The court has only appellate and supervisory jurisdiction in appeals brought before it in civil causes and matters involving questions of customary law. While Section 265(1) of the Constitution has provided for the establishment of a Customary Court of appeal for the Federal Capital Territory Abuja, Section 280 has only made provision for the establishment of the Customary Court of appeal of a State that requires it. Following the creation of the court under the 1979 constitution, some States in the Federation took advantage of the constitutional provision and established their Customary Court of appeal. The first State to do so was Plateau State, followed by the former Bendel State.[16] As of now, Abia, Benue, Edo, Delta, Imo, Nassarawa, and Plateau, other states are Taraba and Rivers States have taken advantage of the Constitutional provisions to establish the court.

By the provisions of Sections 269 and 284 of the Constitution, the President of the Customary Court of Appeal of the Federal Capital Territory, and the President of a Customary Court of Appeal of a State, is empowered to make rules for regulating the practice and procedure of the Customary Court of Appeal. Pursuant

[15] *ibid*

[16] Hon Justice Utsaha, A.P.B. 2001, 'Customary Laws-Practice and Procedure in the Area Courts, Customary Courts and the Customary Courts of Appeal' Being a Paper Delivered at the Induction Course for newly appointed Judges and Kadis, at Rockview Hotel, Abuja 25th June- 6th July. Pp 21-22

t the above provisions, the Presidents of the various Customary Court of Appeal of the Federal Capital Territory and the States which have established the court, made rules regulating the practice and procedure of their respective courts.[17] Aside the provision of the Constitution, the Laws establishing the Customary Courts of Appeal in various States also empowers the President of the Court to make rules for the smooth administration of justice in that Court. Section 51[18] allows the President of the Court in consultation with the Chief Judge of the State to make rules in respect of the matters provided therein. The Benue State Customary Court of Appeal Rules, 2015 is a clear example of the exercise of this function by the President of the Court in Benue State.

Jurisdictional Challenges of the Customary Court of Appeal

It is worth mentioning here that prior to 1979 all superior courts in the country were the English type of courts. Under 1979 Constitution of the Federal Republic of Nigeria, two additional superior Courts of record were established namely the Sharia Court of Appeal and the Customary Court of Appeal. These courts were made specialized courts to deal exclusively with Islamic Law and Customary Law matters. This was a deliberate effort by the government of the day to develop Sharia and Customary Law especially and thereby enhance their growth in the Nigerian Legal System. However, developments in these two areas particularly that of customary law has left much to be desired as we shall discover in a number of decisions of the Higher Courts in due course. S. 245 (1) of the 1979 Constitution provides: "There shall be for any state that requires it a Customary Court of Appeal for the State". Section 247(1) provides:

> A Customary Court of Appeal of a state shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.
> 247 (2) for the purpose of this section a Customary Court of Appeal of a state shall exercise such jurisdiction and decide such questions as may be prescribed by the House of Assembly of the state for which it is established.

However, Section 280 (1) of the Constitution of the Federal Republic of Nigeria 1999 provides that: "There shall be for any state that requires it a Customary Court of Appeal for that state". While Section 282 (1) of the said constitution provides: "A

[17] *Ibid*
[18] Customary Court of Appeal Law, Laws of Benue State, 2004

Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law". For the purpose of emphasis and clarity the Constitution in Section 282(2) further buttressed the fact that a Customary Court of Appeal of a State shall exercise such Jurisdiction and decide such questions as may be prescribed by the House of Assembly of the State for which it is established.

Another constitutional provision which is relevant in considering the jurisdiction of the Customary Court of Appeal and which is extricably linked to S. 282 (1) referred to above is Section 245 of the 1999 constitution. Section 245 (1) is to the effect that an appeal shall lie from decisions of a Customary Court of Appeal to the Court of Appeal as of right in any civil proceedings before the Customary Court of Appeal with respect to any question of customary law and such other matters as may be prescribed by an Act of the National Assembly".

Flowing from above, Sections 19-21[19] is to effect that the Court shall not exercise original jurisdiction in matter any cause or matter; the Court can only exercise appellate and supervisory jurisdiction subject to the provisions of the Constitution. The exercise of jurisdiction is basically subject to the Constitution and based on issues relating to Customary Law. In view of the rationale behind the creation of Customary Court of Appeal which includes among other things to ensure the growth and development of the indigenous laws in Nigeria and to decongest the High Court;[20] it is pertinent to expand and confer original jurisdiction to the Customary Court of Appeal to deal with issues that must not necessarily have to go to the State High Courts. The Federal Capital Territory took the lead in this regard. In 2001 the House of Representatives enacted the conferring original Jurisdiction to the Customary Court of Appeal on issues relating to chieftaincy within the Federal Capital. The Law provides in Section 1 to the effect that:

> Subject to section 267 of the Constitution, the Customary Court of Appeal of the federal Capital Territory Abuja, shall-
>
> a) exercise appellate and supervisory jurisdiction in proceedings where the subject matter of the claim is on, or relates to customary law; and

[19] Benue State Customary Court of Appeal Law, Cap. 52 Laws of Benue State, 2004 *Op. Cit*

[20] Idye C. A. 2013, 'The Customary Court of Appeal and Administration of Justice in Nigeria: An Appraisal' a dissertation submitted to the Postgraduate school, Benue State University, Makurdi in Partial Fulfillment of the requirements for the award of the Degree, Master of Laws (LL.M), (Unpublished) p xviii

> b) have exclusive original jurisdiction in the Federal Capital Territory, Abuja to hear and determine dispute on or relating to Chieftaincy matters.[21]

The above law clearly expands the jurisdiction of the Customary Court of Appeal of the Federal Capital Territory (FCT) to the relief of the High Courts of the Federal Capital Territory.

It has been submitted that the interpretation given to the provisions of Section 282[22] has rather created a challenge as to the jurisdiction of the Customary Court in exercising it adjudicatory powers as an appellate Court. This position was emphasized by Hon. Justice MM Igbetar thus:

> As plain as these provisions are, the interpretation placed thereon by the Court of Appeal and the Supreme Court has created a lot of difficulties for litigants and is in effect stultifying the development of Customary Law. These courts have held in several decisions that a general ground of appeal which complains of "weight of evidence" is not a proper ground before the Customary Court of Appeal since it does not raise any issue of customary law.[23]

The presented used cases emanating from Benue State to better illustrate the above points. In *Iorpuu Humor & 1 or v. AersarDzungu Yongo*, the proceedings leading to this appeal were first initiated at Adikpo Upper Area Court, Benue State. In that court, the respondents, as plaintiffs; claimed against the defendants, now appellants, a declaration of title to a piece or parcel of farm land situate at Mbane. Shanaev-va in Kwande Local Government Area of Benue State. The trial court, at the conclusion of hearing, dismissed the plaintiff's claims and entered judgment in favour of the defendants. The plaintiffs, being dissatisfied with this decision of the trial Upper Area Court, lodged an appeal against the same to the Customary Court of Appeal, Benue State, upon the sole ground that the decision of the trial court was "against the weight of evidence." Subsequently the plaintiffs applied for leave to file additional grounds of appeal before the Customary Court of Appeal, Benue State.

Before the appeal came on for hearing, the defendants filed a Notice of preliminary objection before the Customary Court

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[21] Customary Court of Appeal of the Federal Capital Territory, Abuja (Jurisdiction on Chieftaincy Matters) Act, 2011.

[22] 1999 Constitution of the Federal Republic of Nigeria (As Amended)

[23] Hon. Justice Igbetar , M.M 2005, 'The Role and Development of Customary Law in the Nigerian Legal System' being a paper presented at the 2015 All Nigeria Judges Conference, held at Ladi Kwali Hall, Abuja, Sheraton Hotel and Towers, Maitama, Abuja, 4th – 9th December. P16

of Appeal, Benue State. In it they contended that the original sole ground of appeal filed against the decision of the trial court had nothing to do with any question of customary law and that the appeal was therefore incompetent and unarguable. They further argued that since there was no valid appeal properly pending before the Customary Court of Appeal, the appellant's application to file and argue additional grounds of appeal was unsustainable, incompetent and misconceived and that the same ought to be dismissed. The Customary Court of Appeal, Benue State overruled the application on 12/11/96 and subsequent application for leave to file an appeal to the Court of Appeal on 2/12/96 that no leave was required in view of Section 224 of the 1979 Constitution. Defendant filed application direct to the Court of Appeal, Jos for leave to appeal on 17/2/97. The Court of Appeal ruled that it had no jurisdiction on matters other than Customary Law and relied on Section 224(1) of 1979 Constitution and struck out the appeal.

The defendants went to the Supreme Court. The court found that the sole ground of appeal upon which the Plaintiffs/Respondents sought to impeach the judgment of the Upper Area Court Adikpo is the omnibus ground of appeal which cannot be said to involve any questions regarding customary law, neither does it concern any matter prescribed by an Act of the National Assembly. Pursuant to Section 224 of the 1979 Constitution, the Supreme Court held that what the appellants were seeking for is the unlimited right of appeal from the decision of the Customary Court of Appeal to the Court of Appeal. The appeal was dismissed. The point here is that the rights of the parties thereto which is the interest in the customary family land, a matter proper before the trial Upper Area Court Adikpo, was buried under the interpretation placed on the statute.[24] The above clearly indicates the challenge faced by the court as far as issues relating to grounds of appeal and weight of evidence are concerned.

Another challenge the Customary Court of Appeal faces in trying to exercise its mandate have to do with matters incidental to the issues before it. This much is expressed by Abba- Aji JCA in *Customary Court of Appeal, Edo State v. Aguele & ors*[25] thus:

> The position as it is now is rather sad. Sad in the sense that Customary Court of Appeal while exercising its appellate jurisdiction is precluded from looking at incidental issue that may arise in the exercise of its constitutional jurisdiction, simply because these incidental issues do not raise questions

[24] *Ibid* pp 17-18

[25] (2006) 12 NWLR (Pt. 995) 545 per Abba

> of Customary law over which the Court can exercise its appellate jurisdiction just as in the instant case where the questions raised relate to fair hearing and service of process. I believe even in customary law there is fair hearing. There is therefore the need to develop the law in this respect by allowing Customary Court of Appeal to hear such incidental matters with the leave of the Customary Court of Appeal.

The above lamentation of His Lordship is a true presentation of jurisdictional challenges confronting Customary Court of Appeal in Nigeria today. In *Ochigbo & Ors V. Nwebonyi*[26] the same position was re-iterated by the same Court thus:

> The current judicial approach of excluding from the jurisdiction of the Customary Court of Appeal and this Court, non-customary law questions that are inextricably interwoven to the trial of the Customary law questions and arose as part of the process of trying the Customary law questions has made it virtually impossible to appeal against the decisions of Customary Courts to Customary Court of Appeal and to appeal from decisions of the Customary Court of Appeal to this appeal. Another effect of such approach is that it has left the Customary Court of Appeal with a very narrow appellate jurisdiction which it often times find difficult to exercise until an Act of the National Assembly is enacted to vest it additional jurisdiction.[27]

However, in *Nwaigwe Vs Okere*[28] Onnoghen JSC posit thus:

> I hold the considered view that a question of jurisdiction of a Court or tribunal is of universal application to every civilized society or community whether Customary or English. It follows therefore that since the concept of jurisdiction is of universal application and known to Customary law when applied to Customary Courts, an error of jurisdiction by Customary Court or Customary Court of Appeal, which is a defect, intrinsic to the adjudication, is an issue or question of Customary law within the meaning of Sections 247(1) and 224(1) of the 1979 Constitution, and therefore appealable as an issue of Customary law, up to the Supreme Court. To hold otherwise is to kill the development of that branch or system of adjudication in this country, as there would be no means of checking the excess or absence of jurisdiction in the relevant Courts and thereby encourage adjudication far in excess or absence of jurisdiction in the relevant Customary Courts, be it of first instance or appellate.[29]

[26] (2016) LPELR-40949(CA)
[27] Ibid per Agim JCA
[28] (2008) LPELR 2095
[29] Ibid page 26 - 27

This seems to be the position now adopted by the Court of Appeal while handling matters relating to its jurisdiction to entertain issues relation to the Jurisdiction of Customary Court of Appeal. In *Oguzie & Ors V. Oguzie*[30] the Court of Appeal posits that:

> Where the decision of the Customary Court of Appeal turns purely on facts, or on question or procedure such decision is not with respect to a question of Customary Law, notwithstanding that the applicable law is customary law. Applying the test stated above to the present case, it is evident in regard to the grounds for appeal before the Court of Appeal that the judgment of the Customary Court of Appeal is against the weight of evidence, and ground 6 which raises the question of the nullity of the proceedings, having regard to the Constitution of the trial Court, do not at all relate to a decision or the Customary Court of Appeal in respect of any question of Customary law. Thus, where a ground of appeal raised the question of the nullity of the proceedings, having regard to the Constitution of the trial Court (a case of absence of jurisdiction to hear the suit), the holding then was that, that was not an issue of Customary law. I think the latest position of the law accords with sound reason and good sense of Justice in the development of our customary law, to trace jurisdictional dispute/challenge in customary law as potent legal issue/question of law to resolve in customary law. To do otherwise in my opinion would be to continue to belabor in pretence and promote obvious errors, illegalities and injustice, where a Customary Court or Customary Court of Appeal wrongly assumes jurisdiction and acts or purports to act, without vires, or without being properly constituted to do so. The same wrong, I think, occurs, where a party's fair hearing is breached by the Customary Court of Appeal. In the circumstance, I hold that the issue one by the Appellant donates a valid legal point for this Court to consider, jurisdiction being now accepted as a question of customary law.[31]

The position clearly regarding the above circumstances and decision of Court is that issues relating to Jurisdiction of the Customary Court of Appeal are now treated as a matter that the Court of Appeal can attend to in the interest of Justice and the development of Customary Law.

The Way Forward

1. Constitutional/Statutory Re-Enactments/Amendments:

It is expedient to amend the provisions of the Constitution to adequately define what the term "question of Customary Law

[30] (2016) LPELR-41086(CA)
[31] Ibid per Per MBABA, J.C.A. (Pp. 20-28, Paras. C-C)

really means. More so, State Legislatures especially the various Houses of Assembly where Customary Courts of Appeal are established should expand the jurisdiction of the Customary Courts of Appeal in their states pursuant to the provisions of Section 282 (2) of the Constitution by conferring original jurisdiction on the Customary Court of Appeal in Chieftaincy matters, matrimonial causes and intestate succession under native law and customs.

Similarly, the various State Statutes establishing the Customary Courts of Appeal for instance in Benue State, Section 3(2)[32] be amended and its scope widen to cover the above-mentioned issues.

Taking a cursory look at the Area Courts Laws of various States in the North particularly that of Benue State, it would be discovered that aggrieved parties where the matter involves questions regarding moslem personal law, appeal lies to the Sharia Court of Appeal, but where the question borders on customary law, appeal may lie in the High Court or Customary Court of Appeal.[33] There is every need to amend these laws thereby stating clearly that where issues relates to customary law, then appeal should only lie at the Customary Court of Appeal of the state.

Again, the Law Establishing the Customary Court of Appeal especially in Benue State be amended to confer on the court sole and original jurisdiction on matters relating to disputes arising from chieftaincy matters.

2. Judicial Activism

There is also a dire need for change in the judicial approach to jurisdictional issues involving the Customary Court of Appeal. Courts are first of all, courts of justice and not just mere courts of technical law. Our superior appellate courts; the Court of Appeal and the Supreme Court must strive to live up to the *ubi jus ibi remedium* maxim. Strict and restrictive interpretation of the provisions of Section 282 (1) & (2)[34] will lead to denial of justice as appeals will be struck out without considering their merits. In *Ibwa v Imano*[35] the Supreme Court per Oputa JSC posit that: "…where rights are in jeopardy and the words of a statute are capable of more than one meaning, judicial activism may be justified. The court may

[32] Customary Court of Appeal Law, Cap 52 Laws of Benue State, 2004.
[33] See Section 53, Area Courts Law, Cap 11 Laws of Benue State, 2004.
[34] 1999 Constitution of the Federal Republic of Nigeria (As Amended)
[35] (1988) 3 NWLR (Pt. 85) 633 at 665

go beyond strict and literal interpretation against any encroachment of that right otherwise than by express provision."

In view of the above, it is pertinent for the appellate courts to sustain the interest of customary law by way of giving liberal interpretation of objections challenging the jurisdiction of Customary Court of Appeal of the various States that have established same.

3. Collaborative Efforts between the Courts and Counsel

Lawyers as ministers in the temple of justice also have a role to play in surmounting the jurisdictional challenges of the Customary Court of Appeal. While drafting the grounds of appeal for instance, legal practitioners are enjoined to avoid the use of general English principles such as *res judicata, res ipsa loquitor, non est factum* et cetera; since these terms could form basis for preliminary objection as to the jurisdiction of the court to entertain the matter. It has equally been suggested that English Common Law doctrines such as the doctrine of Standing By, Lachess and Acquiescence et cetera should be ordinarily explained and preceded by the formula: "the trial court below erred in customary law…"[36] Instead, attention should be given to issues relating to customary law, such as, inheritance, land dispute, guardianship of children under customary law.

Finally, both counsel and the courts should heed the advice of Uwaifo JSC in *Hirnor v Yongo,*[37] where the learned jurist posit that ominibus ground of appeal can be avoided by merely stating that the learned trial court or the Customary Court of Appeal erred in law in holding that the plaintiff failed to prove his case. Accordingly, such a formulation provides some considerable leeway for an insightful counsel to skillfully draw up competent grounds of appeal to meet appropriate grievances within the limitation imposed by Section 282 (1) of the Constitution.

[36] Assoh, M. T. 2017, 'Discussion on the Topic: Surmounting the Jurisdictional Challenges of the Customary Court of Appeal' at the Law Week of the Nigerian Bar Association Makurdi Branch held at Royal Choice Inn, Makurdi from 17th – 23rd April. Pp. 5-6.

[37] (2003) 9 NWLR (Pt. 824) 77

BYSTANDERS' PASSIVITY IN PREVENTING CRIMES DURING EMERGENCIES: SOCIOLOGICAL AND PSYCHOLOGICAL FACTORS INHIBITING HELP FROM THE UKRANIAN EXAMPLE

By

Kasim Balarabe (Ph.D)*

Abstract

During the Second World War, nearly 1.5 million people were killed in Ukraine. These killings were witnessed by Ukrainians but they stood by and watched and were passive in preventing them. This article assessed some of the factors deconstructing why bystanders do not usually help in preventing atrocities during emergency situations.

Introduction

In several documents, information has been documented on the killing of the *Einzatsgruppen* in the Ukraine. Some of the killings were witnessed by ordinary Ukrainians including the victims' friends and neighbours. Despite witnessing the atrocities however, the Ukrainians remained passive and, in some instances, actively participated in the killing. The passivity may be shocking and abominable especially in the context where the victims are neighbours and friends. However, in the context of an emergency, scientific research has proven that the passivity of bystanders can be explained on the basis of several sociological and psychological factors which inhibit helping. These factors for example include past devaluation of the victim, pluralistic ignorance, uncertainty and fear, cost of active bystandership, influence of others regarding the interpretation of the situation, belief in a just world and lack of connection to the victims' group. It is the aim of this article to explain the possible role of these factors in the Ukrainian situation during the Second World War.

Social and Psychological Inhibitors of Helping

In the face of an emergency, an individual is less likely to help when he is in the presence of other people than when he is alone.[1] Series of research have confirmed this "social inhibition of

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helping".[2] A bystander's possible intervention in a situation depended on his noticing the event, interpreting it as emergency, feeling of being personally responsible and possessing the ability to act.[3] Where noticing the event is unambiguous, it is at the points of interpretation and responsibility that a bystander may be influenced by audience inhibition, social influence, and diffusion of responsibility.[4]

These inhibitors of helping might in certain circumstances help in explaining why those who witnessed the killings in Ukraine failed to act. Without the influence of these factors and some other considerations below, a possible conclusion would be that the non-intervention was motivated by a similar ideology or sadism. It is not in doubt, and Ukrainians cannot deny that most of the atrocities were committed in their presence, with some of them giving passive support to the Nazis. The rounding-up of the Jews, their movement to the killing zones and the killings were all done in the presence of Ukrainians including their friends and neighbours.[5] This manifest clarity of the situation has displaced any claim which may be on pluralistic ignorance. However, because human beings are social animals and are influenced by psychological and sociological processes, interpreting the events must have been affected by these processes, although the extent of their influence remains to be seen.

Audience Inhibition and Social Influence and Diffusion of Responsibility

A bystander's interpretation of an event in the presence of other people can be affected by "audience inhibition".[6] Research has shown that a bystander will be reluctant to interpret an event as emergency because of his concern that if such interpretation is wrong, he may be embarrassed.[7] Because of this, each bystander is less likely to help. The feeling of being personally responsible to deal with an event naturally flows from the interpretation given to it because how an event is interpreted determines which action is

[1] B. Latane and J.M. Darley, *The Unresponsive Bystander: Why Doesn't He Help?* (New York: Appleton Century-Crofts, 1970).
[2] B. Latane and S.A. Nida, 'Ten Years of Research on Group Size and Helping', *Psychological Bulletin,* 89 (1981), 308-24.
[3] Ibid. P. 308.
[4] Ibid. P. 309.
[5] E. Sciolino, 'A Priest Methodically Reveals Ukrainian Jews' Fate', *New York Times,* 6 October 2007.
[6] B. Latane and S.A. Nida, 'Ten Years of Research on Group Size and Helping', (
[7] Ibid.

likely to follow.[8] In this context, a bystander will look to other individuals present to help define the event,[9] and it is at this stage that social influence plays a significant role. Where the individuals present did not consider the event as emergency, such a bystander is also less likely to interpret it as such and will thus not act.[10]

It cannot be disputed that some of those who have witnessed the killings in Ukraine and failed to act are ordinary individuals who are bound to be influenced by the above psychological and sociological processes. In several countries in Europe during the period, anti-Semitism is rampant and Jews have suffered continuous devaluation and dehumanisation pursuant to which many of them were exterminated. The atmosphere of passivity regarding these events appeared to be an acceptable social reality or a norm hence it would be normal for some of the witnesses in Ukraine to have considered the events as acceptable or not very critical. The "the progressive evolution of harmful action makes it possible to get accustomed to them and see them as normal, reducing reaction to the next step in the evolution.[11]

Diffusion of responsibility is simply that "when too many others are present, each person is less likely to help".[12] The presence of others "reduces the psychological cost of non-intervention" on the part of a bystander and which serves as a means of shifting the responsibility of helping to others.[13] Since almost everyone was witnessing the events in Ukraine including those who may be in a better position to intervene, the responsibility to act must have been diffused to the extent that some of the witnesses might have considered themselves not being solely responsible.

Similarly, authorisation, routinisation and dehumanisation are factors which reduce the strength of restraining forces against violence,[14] and which inhibit the feeling of responsibility to act. While authorisation and routinisation serve to reduce individual responsibility, dehumanisation considers the victim to be outside

[8] E. Staub, *Overcoming Evil: Genocide, Violent Conflict, and Terrorism* (Oxford: Oxford University Press, 2010).
[9] B. Latane and S.A. Nida, 'Ten Years of Research on Group Size and Helping', (
[10] Ibid.
[11] E. Staub, *Overcoming Evil: Genocide, Violent Conflict, and Terrorism*. P. 197.
[12] S. Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Cambridge: Polity Press, 2001). P. 143.
[13] B. Latane and S.A. Nida, 'Ten Years of Research on Group Size and Helping', (P. 309).
[14] M. Stohl, 'Outside of a Small Circle of Friends: States, Genocide, Mass Killing and the Role of Bystanders', *Journal of Peace Research,* 24/2 (June 1987), 151-66.

protection.[15] It must be noted that during the period, Ukraine was under Nazi occupation. As such in the context of a larger anti-Semitic movement, the Ukrainian bystanders must have considered the authorisation of the killings as unquestionable, a consideration which may have been solidified by the situation becoming routine not only in Ukraine but in many other countries.

In my opinion, the witnesses' belief in the acceptability of the situation must have been reinforced by the victims' apparent lack of resistance. As a witness narrated, the Jews just walked,[16] apparently themselves accepting the situation. When this is considered in the context of belief in a just world, the acceptability of the situation seems more plausible. This will be addressed later.

Cost and Benefit Appraisal

In circumstances requiring hard choices, bystanders assess the cost and benefits associated with intervening and not intervening and where the perceived costs of intervening outweighs those associated with not intervening, people are less likely to intervene.[17] Any analysis of the Ukrainian bystanders' passivity in the face of ongoing atrocities by the Germans must take into account the country's unique position during the period. Before the Germans' occupation, Ukraine was occupied by Russia for two years and its policies have impacted negatively on Ukraine causing several deaths and exiles.[18] To many Ukrainians, collaborating with the Germans and supporting their cause was the only option for Ukraine to secure its independence and free itself from the Russian oppressions.[19] Undermining Germans' ideology is certainly dangerous and costly and probably because the Jews were considered as members of an out group or outside of protection, the cost of intervening on their behalf weighed less especially in the

[15] Ibid.
[16] E. Sciolino, 'A Priest Methodically Reveals Ukrainian Jews' Fate'.
[17] K.W. Kerber, 'The Perception of Nonemergency Helping Situations: Costs, Rewards, and the Altruistic Personality', *Journal of Personality,* 52/2 (June 1987), 177-87.
[18] J.A. Armstrong, 'Collaborationism in World War Ii: The Integral Nationalist Variant in Eastern Europe', *The Journal of Modern History,* 40/3 (September 1968), 396-410.
[19] Ibid.

context where those who defined Nazi policies suffered arrest and execution.[20]

Situation of Uncertainty and Fear

The interpretation given to a situation involving other groups is capable of creating a situation of uncertainty and fear.[21] Through deliberate manipulations, the media, leaders and external bystanders' interpretation of an event can becloud its reality and create uncertainty and fear. Where this interpretation relates to a group, bystanders are likely to remain passive when the group is being persecuted.[22] In Ukraine, significant control of the situation was with the Germans and there were series of propaganda in the media on the reality of the situation. The *Volhyn,* a Nazi-controlled Ukrainian Newspaper for example in its publication of 1st September, 1941 stated that "The element that settled our cities (Jews)... must disappear completely from our cities. The Jewish problem is already in the process of being solved".[23] This deliberate manipulation painted the picture of the Jews as oppressive people which must be resisted. Intervention in their killings by Ukrainians will be less likely because they are considered a dangerous group.

The Influence of Believe in a Just World

It is not in doubt that some Ukrainians have collaborated with the Nazi, some have taken advantage of the chaos,[24] and several others have remained passive. The extent of bystanders' passivity must in addition to other factors take into the account the influence of the theory of Belief in a Just World (BJW). Because of the belief that good things happen to good people and bad things to bad people'[25] which BJW preaches and which is considered fundamental for psychological well-being and long-term plans,[26] bystanders' perception is likely to be influenced in the face of an ongoing

[20] R. A., 'Pope to Glorify Ukrainian Priest Who Saved Jews During the Holocaust', <http://www.ukrainian-orthodoxy.org/saints/aaOtherSaints.htm>, accessed 15 December 2017

[21] E. Staub, *Overcoming Evil: Genocide, Violent Conflict, and Terrorism*.

[22] Ibid.

[23] Naaf, 'The Holocaust 1941', <http://neverrepeat.org/1941.htm>, accessed 15 December 2017

[24] S. Cohen, *States of Denial: Knowing About Atrocities and Suffering*.

[25] M.J. Lerner, *Believe in a Just World: A Fundamental Delusion* (New York: Plenum Publishing Corporation, 1980).

[26] I. Correia, J. Vala, and P. Aguiar, 'Victim's Innocence, Social Categorization, and the Threat to the Belief in a Just World', *Journal of Experimental Social Psychology,* 43/1 (January 2007), 31-38.

situation. However, BJW has the potential of leading to a secondary victimisation, a situation where the victims will be blamed for their sufferings.[27] In a situation where the victim is innocent, he may be devalued more when the observers "are focused on long-term goals" than when they are not[28] especially when the victim is a member of an out group.[29] During the period, Jews were considered as outcasts and continuously devalued subsequent to which they were severally killed. Witnesses to the killings and holding this belief must have considered Jews as deserving of this treatment.

Jews as Members of an Out Group

When violence is increasingly evolving against a particular group and in the face of difficult life conditions, bystanders need connection to their group[30] for them to intervene. Where no such connection exists and the victims suffered past devaluation, a cultural tilt will be created "against the victimized group".[31] Intervention is also less likely where the bystander has connection with the perpetrator.[32] Information has been documented and several instances exist where Ukrainians have collaborated or supported the German cause such as serving in the German military, local administration and as guards in concentration camps.[33] In some of the massacres, Ukrainian Auxiliary Police was used in rounding-up the Jews[34] while others took advantage of the situation by offering to hide the Jews but subsequently smothering them in their sleep and stripping them of their possessions.[35] The lack of connection with the Jews and the involvement of some Ukrainians may have influenced the passivity of those who have witnessed the killings.

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[27] M.J. Lerner, *Believe in a Just World: A Fundamental Delusion*.
[28] I. Correia, J. Vala, and P. Aguiar, 'Victim's Innocence, Social Categorization, and the Threat to the Belief in a Just World', (
[29] M.J. Lerner and J.H. Goldberg, 'When Do Decent People Blame Victims? The Differing Effects of the Explicit/Rational and Implicit/Experiential Cognitive Systems', in S. Chaiken and Y. Trope (eds.), *Dual Process Theory in Social Psychology* (New York: Guildford, 1989), 627-40.
[30] E. Staub, *Overcoming Evil: Genocide, Violent Conflict, and Terrorism*.
[31] Ibid. P. 196.
[32] S. Cohen, *States of Denial: Knowing About Atrocities and Suffering*.
[33] J.A. Armstrong, 'Collaborationism in World War Ii: The Integral Nationalist Variant in Eastern Europe', (
[34] S. Spector, 'Babi Yar', in I. Gutman (ed.), *Encyclopedia of the Holocaust* (New York: MacMillan Publishing Company, 1990).
[35] F.P. Desbois, *The Holocaust by Bullets: A Priest's Journey to Uncover the Truth Behind the Murder of 1.5 Million Jews* (New York: Palgrave Macmillan, 2008).

Conclusions

This article demonstrated possible explanation on why those who have witnessed the killings of a nearly 1.5 million Jews in the Ukraine did not intervene and help the victims. Several psychological and sociological processes such as audience inhibition, social influence, diffusion of responsibility, cost and benefit appraisal, uncertainty and fear, BJW and lack of connection to the victims' group may have influenced the interpretation of the events and hindered witnesses from helping.

THE CONCEPT OF A REASONABLE MAN IN TORT LAW: A NEED FOR PARADIGM SHIFT?

By

Gloria Shajobi-Ibikunle (Ph.D)*

Abstract

The concept of a reasonable man permeates the periscope of the Nigerian law of tort. It is a safety net for judges to dispense justice based on a shadowy personality, a veil by which they interpret and judge the standard of conduct of a defendant. This is pertinent and very germane due to the ever lengthening apportionments ascribed to such a personality, and more importantly the ever widening scope of torts to which actions and conducts are judged by reference to the reasonable man and its application in law of contract and criminal law. This article makes a compelling examination of this concept and its continued relevance to tort and by extension civil litigations and judgments. It recommends that for now the doctrine remains as it is flexible enough to admit to peculiar socio-cultural realities of local jurisdictions wherever applicable.

Introduction: The Reasonable Man

Every religion has a God. In law, this is the reasonable man, a mystical, esoteric, ethereal being, revered by our high priest and priestess i.e. the judges of our courts of law, the ultimate legal fiction[1]. There is perhaps no other person in the history of common law jurisprudence whose notoriety approximates that of the reasonable man. His is the legend par excellence of the legal profession. Generations of law students have studied his every attribute. Scores of attorneys have proclaimed his virtues to the world. He has had a greater impact on the Anglo-Amercian system of jurisprudence than most of the renowned jurists of the last three centuries.[2] The 'reasonable man is not also gender specific. In *Director of Public Prosecutions v Campbell*[3], Justice Diplock said the concept of a reasonable man has never been confined to the adult male. It can mean an ordinary person of either sex. As a matter of fact, the term 'reasonable person' is gradually becoming the

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[1] *The Reasonable Man-Law's Ghost God,* www. Duhaime.org last accessed 4th December 2016

[2] ibid

[3] *Director of Public Prosecutions v* Campbell 1978, All ER 168

preferred expression.[4] In 1835, Adolphe Quetelet detailed the characteristics of *l'homme moyen*. His work is translated into English in several works. As a result, some authors pick "average man", "common man", "reasonable man", or stick to the original "*l'homme moyen"*. Quetelet was a Belgian astronomer, mathematician, statistician and sociologist. He documented the physical characteristics of man on a statistical basis and discussed man's motivations when acting in society.[5]

Two years later, the "reasonable person" made his first appearance in the English case of *Vaughan v. Menlove* (1837). [6] In *Menlove*, the defendant had stacked hay on his rental property in a manner prone to spontaneous ignition. After he had been repeatedly warned over the course of five weeks, the hay ignited and burned the defendant's barns and stable, and then spread to the landlord's two cottages on the adjacent property. Menlove's attorney admitted his client's "misfortune of not possessing the highest order of intelligence," arguing that negligence should only be found if the jury decided Menlove had not acted "bona fide to the best of his [own] judgment." The court disagreed, reasoning that such a standard would be too subjective, instead preferring to set an objective standard for adjudicating cases:

> The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question. Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was, in substance, the criterion presented to the jury in this case and, therefore, the present rule must be discharged.

English courts upheld the standard again nearly 20 years later in *Blyth v. Company Proprietors of the Birmingham Water Works*[7] holding that Negligence is the omission to do something which a reasonable man, guided upon those considerations which

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[4] *Winfield & Jolowicz On Tort*, 18th Edn, WHV Rogers, London: Sweet & Maxwell, 2010 p 92

[5] *On Man, And The Development Of His Faculties*, The Athenæm, by A. Quetelet, Secretary to the Royal Academy of Brussels. London: Bossange & Co pp. 593-594, August 8 1835 in https://en.wikipedia.org/wiki/Reasonable_person. last accessed 24th May 2016

[6] *Vaughan v. Menlove,* 132 ER 490 (Common Pleas 1837).

[7] 156 ER 1047

ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The concept was introduced into English law during the Victorian era. A reasonable man was defined as the man in the Clapham Omnibus. The route of the Clapham is today unknown but London bus route 88 was briefly branded as "the Clapham Omnibus".[8] It is now an archaic term for a public bus. It can also refer to the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves.[9] In Canadian jurisprudence, it is said that everyone must live up to the standard of the reasonable man. This concept is said to be based on objective guidelines and built on precedents, and that the standard allows the court to adopt to changing circumstances of what may be considered 'reasonable'.[10] Winfield & Jolowicz posit that the Reasonable man is an abstraction yet the standard of reference he provides can be applied to particular cases only be the intuition of the court.[11]

In Nigerian jurisprudence, the leading exposition of who is a reasonable man is as laid down by Eso JSC in *Adigun v A.G. Oyo State*[12] He stated

> One may ask, why measure justice by the standard of the common man or the ordinary reasonable citizen? It is not in vain that English law invented the standard of the man in Clapham Omnibus in describing the ordinary reasonable citizen. But then, except one has been to England, and appreciated the man that goes to work in an Omnibus in Clapham area in London as against the executive who drives in his Rolls Royce in Mayfair, the phrase 'Claphan Omnibus' is completely lost to him.

In essence, the reasonable man in England is not the gentry or the elite or the genteel Lords and Ladies. In essence, he is not of the upper class but the working class. His Lordship went on to say that

> .....In this country, a reasonable man may be a pleasant housewife shopping for a meal in Sand-grouse market, Lagos

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[8] *Time Out London Guide*, Penguin Books, 1995, D88 bus recently and rather self-consciously styled "The London Omnibus" starts its pleasantly circuitously route from here and points North of the River".

[7] Also used in *Hall v Brooklands Auto Rracing Club* by Greer LJ to define the standard of care a defendant must live up to in order to avoid being found negligent..

[9] Cited by Greer LJ in *Hall v Brooklands Auto Racing Club* (1933) 1KB 205 at 224

[10] *Torts In Canada*, Klar Lewis N. www.the canadianencyclopedia.ca./en/article on torts. Last accessed 04/10/16

[11] *Winfield & Jolowicz Op cit p 280*.

[12] *Adigun v A.G. Oyo State (*1987)1 NWLR Pt 53, p 678 SC

> and not Moloney market; the ordinary worker in Kano city living on his 'tuwo' and not the senior assistant secretary cruising in his officially produced air-conditioned Peugeot 505 SR to his air-conditioned office; or the plain woman in okrika dress and not the voile laced fashion enthusiast . It is what this reasonable 'man' sitting as an impartial observer, thinks.....that would matter.

Transposing this to the Nigerian situation, the reasonable man should not be of the elite or the rich or the middle class. It is submitted that where it to be juxtaposed to Lagos[13], it would be the commercial bus known as 'danfo' or its more notorious counterpart 'molue'. Transported to Abuja[14] of today, it would be the mass transit buses known as 'El- Rufai' bus. In tort, the reasonable man"s standard is a composite behavior pattern in the mind of the judge, or jurors. The term "reasonable man" does not mean an ability to reason *strict senso* but refers to qualities of Attention and Judgment in a reasonable man.

The Reasonable Man in the Tort of Negligence

The reasonable man is an ethereal concept of an average person and his/her conduct against which the actions of another is weighed.[15] It is an inscrutable concept for determining whether or not, in a given situation, conduct is negligent, thus exposing a person to liability and damages. The purpose of the reasonable man .....is to determine whether a particular plaintiff has failed, judged by a community standard in the duty of care he or she owes himself or herself'.[16] The difficulty is that it is not a certain principle, in fact it has been stated that 'it is not easy to pin down as it is shaped into a different form in each case, to suit the proper legal action or response to the facts at hand.[17] In the case of *Donoghue v Stevenson,*[18] it was stated that to establish the tort of negligence three principal ingredients are required. First, that there is a duty of care by the defendant to the plaintiff, second, that there has been a breach of that duty; and third that damages has been occasioned. Having decided that a duty of care was owed to the plaintiff in the particular circumstances, the court's next task is to determine whether the defendant was in breach of such duty. This

[13] Lagos, was the former capital of Nigeria and still is the commercial capital.
[14] Abuja is the capital of Nigeria.
[15] *Reasonable Man Definition*, www. Duhaime.org last accessed 02/01/17 '
[16] Levitt v Carr 66 BCLR (2d) 58 (BCCA), 1992)
[17] www.duhaime. Org
[18] *Donoghue v Stevenson,*1932 (AC) 532

is the question which, in practice, occupies most of the court's time and is based on the facts of each case. In deciding the question, the court considers whether or not a reasonable man, placed in the defendant's position, would have acted as the defendant did.

Standard of the Reasonable Man

To assist the court, determine if a defendant's action is up to the standard of care expected of a person in his shoes, the court considers Intelligence, Knowledge and Skill of the defendant.

(a) Intelligence

Lord Macmillian in Glasgow Corp v Muir[19] stated that the standard of foresight of a reasonable man eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. In determining whether the defendant in his action came up to the standard of a reasonable man, the court will measure those actions against the conduct expected of a person of normal intelligence, and the defendant will not be excused for having acted "to the best of his own judgment," if his "best" is below that to be expected of a man of ordinary intelligence. Thus, it is no defence that the particular defendant had unusually slow reactions or a lower-than-average intelligence or possessing unusually quick reactions will not be judged by his own high standards, and will not be liable for having failed to use those exceptional qualities.

(b) Knowledge

The reasonable man is expected to have that degree of common-sense or knowledge of everyday things which a normal adult would possess. For instance, a reasonable person knows that petrol is highly inflammable, that solid object sinks in water and that gas is poisonous when inhaled. Thus in *Yachuk v Oliver Blais & Co*,[20] a nine year old obtained some fuel from a garage attendant by informing him his mother's car had run out of fuel a short distance away. He then proceeded to pour the fuel at play which ignited and he sustained injuries. The court held that the garage attendant was negligent to have entrusted a child with fuel. Similarly, in *Glasgow Corporation v Taylor,*[21] a seven-year-old ate from some berries growing on a shrub in a park managed by the defendant, a city

[19] *Glasgow Corp v Muir* (1943) A.C. 448 HL
[20] *Yachuk v Oliver Blais & Co* (1949) AC 386
[21] Glasgow Corporation v Taylor, 1922 1 AC 44

corporation. It was held that knowing the berries were brightly colored and quite attractive to any child yet very poisonous and within reach of a child, the park management ought to have placed a warning notice to parents. It is my contention that not only a warning would have sufficed. Knowing the curiosity of children, the City Corporation should not have planted the berries there, and even if required for aesthetic purposes, should have fenced it away from prying hands of children. They ought to know that it was within the nature of children to be attracted to such.

Furthermore, where the defendant holds a particular position, he will be expected to show the degree of knowledge normally expected of a person in that position. Thus, for example, in *The Wagon Mound Case (No.2*[22]*),* the privy Council took the view that the ship owners were liable for damage caused by discharging oil from their ship into Sydney Harbour, because their chief engineer ought to have known that there was a real risk of the oil catching fire. This is also accounts for why an employer is required to know more about the dangers of unfenced machinery than his workman. Secondly, with regard to facts and circumstances surrounding him, the defendant is expected to have observed what a reasonable man would have noticed. The occupier of premises, for example, will be negligent if he fails to notice that the stairs are in dangerous state of disrepair, or that a septic tank in the garden has become dangerously exposed, so that lawful visitors to his property are put at risk. Moreover, a reasonable occupier is expected to employ experts to check those installations which he cannot, through his lack of technical knowledge, check himself, such as electrical wiring, or a lift. Finally, a related point is that where the defendant has actual knowledge of particular circumstances, the standard of care required of him may be increased. An example is *Paris v. Stepney Borough Council*[23]*,* where, as we have see, a higher measure of care was owed by an employer towards a workman who, to the knowledge of the employer had only one good eye. Similarly, a higher standard of care will be owed towards, for example, young children, elderly persons and a pregnant woman, because of their special susceptibility to injury. In Lord Summer's words:

> A measure of care appropriate to the inability or disability of those who are immature, or feeble in mind or body is due from others, who know or ought to anticipate the presence of such persons within the scope and hazard of their own operations.

[22] See *Overseas Tankship v Miller SS Co*. (1967) 1 AC 617
[23] *Paris v. Stepney Borough Council (1951)AC 367*

Knowledge of the existence of the risk is all-important, however. Thus, in *Whyte v Bassey* Taylor C.J. held that there is no greater duty to take imposed on motorist in respect of child pedestrians than in respect of adult ones, except where there are signs warning motorist of the existence of a school in the vicinity, or other indication or notice calling their attention to the presence of children. The defendant in this case was therefore not liable when a five-year-old-child dashed out into the road and collided with her car, there being no such warning signs.

(c) Skill

A person who holds himself out as having a certain skill either in relation to the public generally (e.g. a car driver) or in relation to a person for whom he is performing a service (e.g. a doctor) will be expected to show the average amount of competence normally possessed by persons doing that kind of work, and he will be liable in negligence if he falls short of such standard. Thus, for example, a surgeon performing an operation is expected to display the amount of care and skill usually expected of a normal, competent member of his profession; whereas a jeweler who pierces ears for earrings is only expected to show the skill of a normal jeweler doing such work, and not that of a surgeon. Thus in *R v Yaro Paki & Anor*[24] the 1st defendant operated on the tonsil of the plaintiff who consequently bled to deatn. He was a barber and claimed he had inherited the trade from his ancestors and had been operated on over 2000 patients for over 27 years without losing a patient. It was held that he was guilty of gross negligence because his operating tools were crude and unsterilized and he lacked sufficient skill and care for the operation. Somewhat surprisingly, however, it has been held that a learner driver must comply with the same objective and impersonal standard as any other driver. This decision may perhaps be explained on the ground that a car is potentially lethal weapon, and public policy requires that the strictest possible standards of care be maintained, even by learners.

Other Qualities

A reasonable man is not expected to be exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizen will exercise in society as it is today. It is necessary to warn against

[24] *R v Yaro Paki & Anor* (1955) 21 NLR 63

holding the reasonable man to perfection. It has been said that we must guard against reasonable probabilities whilst we are not bound against fantastic possibilities.[25] He does not possess the courage of Achilles, the wisdom of Ulysses or the strength of Hercules[26] although Justice Bramwell did say a reasonable possesses the agility of an acrobat and the foresight of a Hebrew prophet.[27] Quite formidable characteristics as long it remains a myth! Dohaime posits that if ever the reasonable man were to walk into a courtroom, the judges, lawyers, the clerks and the sheriff would all instantly prostrate before the apparition.[28] I do concur for such is his usefulness not only in the tort of negligence but also in contract law and negligence.

Conclusion

Duhaime submits that he is the catch all, the fall back, the safety net of the law, filling in and allowing for judgment when there is no written law or precedent on conduct in specific circumstances, the question of right or wrong in these cases determined by reference to standard of the reasonable man[29]. The ideal of a reasonable man exists only in the minds of men, and exists in different forms in the minds of different men. The standard is therefore far from fixed as statute, but it is the best all round guide that the law can devise[30].It is submitted therefore that the continued existence of the reasonable man be allowed to linger in tort law. It is flexible, useful and can be adapted to any tort as the judge would deem necessary.

[25] Bolton v Stone(1951)AC 805

[26] Winfield, Percy, *Textbook On the Law of Tort*, (London: Sweet & Maxwell, 1954) 6^{thE}ed p491

[27] Stansibie v Troman 1947 LJNCCR 134 (aaffirmed at (1948)1 KB 48, Note 1.

[28] The Reasonable Man-Law's Ghost God, www. Duhaime.org

[29] Duhaime ibid

[30] Carlson v Chochinov(1947)