



**2ND CONFERENCE OF THE  
DEPARTMENT OF PRIVATE AND PROPERTY LAW  
FACULTY OF LAW  
RIVERS STATE UNIVERSITY  
NKPOLU-OROWORUKWO, PORT HARCOURT**

*Theme*

**CONTEMPORARY  
ISSUES IN PRIVATE  
AND PROPERTY LAW  
IN NIGERIA**

*Date:* **Wed. 5th & Thur. 6th  
June, 2024**

*Venue:* **Faculty of Law Auditorium**

*Time:* **9:00am**

**PROCEEDINGS OF THE**  
**SECOND CONFERENCE**  
**OF THE DEPARTMENT OF PRIVATE AND PROPERTY LAW**  
**FACULTY OF LAW RIVERS STATE UNIVERSITY**

**Theme:**

**Contemporary Issues in Private and Property Law in Nigeria**

**Date: Wednesday 5<sup>th</sup> and Thursday 6<sup>th</sup> of June 2024**

**Edited by: Prof. G. O Akolokwu**

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**COMMUNIQUE ISSUED BY THE DEPARTMENT OF PRIVATE AND PROPERTY LAW  
FACULTY OF LAW, RIVERS STATE UNIVERSITY, NKPOLU-OROWORUKWO, PORT  
HARCOURT AT THE CLOSE OF HER CONFERENCE HELD ON 5<sup>TH</sup> AND 6<sup>TH</sup> JUNE, 2024  
AT DR NYESOM EZENWO WIKE AUDITORIUM, RIVERS STATE UNIVERSITY**

The second conference of the Department of Private and Property Law with the theme: Contemporary Issues in Private and Property Law in Nigeria held at the Dr Nyesom Ezenwo Wike auditorium, Rivers State University on the 5<sup>th</sup> and 6<sup>th</sup> days of June 2024. 6 papers were presented. On the first day of the conference, 297 persons (excluding students) were in attendance, and on the second day of the conference, 133 persons (excluding students) were in attendance.

A welcome address was delivered by Prof Grace Akolokwu, Head, Department of Private and Property Law. The conference was declared open by its Chairman, Hon Justice Adolphus Enebeli (Rtd) DSSRS, Retired Judge of the Rivers State High Court and Chairman, of Rivers State Independent Electoral Commission (RSIEC). The keynote address was delivered by Prof Mike Ozekhome, SAN, CON, OFR, FCI Arb represented by Dr FC Amadi. Goodwill messages were received from:

- Prof CC Wigwe, SAN, Dean, Faculty of Law;
- Prof N.S Okogbule, Vice Chancellor, Rivers State University;
- Hon Justice Mary Ukaego Peter-Odili, CFR, Justice of the Supreme Court (Rtd) and
- the Chief Judge of Rivers State, Hon Justice Simeon Chibuzor Amadi represented by Hon Justice Kio Daketima, Judge of the High Court of Rivers State.

The topics discussed at the conference are as follows:

1. Law on Land Control and Compensation in Nigeria by Sir Cosmos Ikechukwu Enweluzo, SAN.
2. The Tort of Defamation and Privacy in the Digital Age by Prof A.D Badaiki, SAN

3. The Nuisance of Noise Pollution and the Citizens' Right to a Peaceful Environment by Prof Lucky Worika.
4. Curbing the Trends of Building Collapse in Nigeria: Causes and Regulations by Dr Anugbum Onuoha, DSSR.
5. Alternative Dispute Resolution in Private and Property Law: Exploring Innovative Methods by Chioma S. Jack, Esq, FICMC, MCI Arb, (UK).
6. Emerging Legal Issues in Intellectual Property Rights in Nigeria by Anwuri Chinda, Esq.

The highlights noted from the papers presented are laid down as follows;

**1. Law on Land Control and Compensation in Nigeria by Sir Cosmos Ikechukwu Enweluzo, SAN.**

The conference noted that during the pre-colonial era, the pre-dominant land tenure system in Nigeria was the customary land tenure where ownership of land was vested in communities or families. The concept of partitioning was subsequently introduced, thus, enabling individual ownership of land. Today, the Land Use Act stands as the cornerstone legislation on land control and compensation in Nigeria. The Land Use Act 1978, s28(6) and (7) requires the Governor to give 2 notices (notice of intention to acquire and notice of acquisition) before the compulsory acquisition of land for public purposes. The notices must be served in accordance with the provisions of the Land Use Act 1978.

The conference made the following observations.

There are divergent decisions of the Court of Appeal on whether a family has the legal capacity to maintain an action in defence of their land, in view of the fact that, the family can alienate land. There is, however, no Supreme Court decision on this. The Land Use Act 1978, s29 is at variance with the provision of the Constitution of the Federal Republic of Nigeria (CFRN) 1999, s44(1).

The Land Use Act 1978 bestows enormous powers on the Governor and the Land Use Allocation Committee. An action for trespass cannot be maintained if the Governor or a government institution enters the land of a private person. The Land Use Act 1978, ss30 and 47 do not promote equity and fairness in land compensation as Governors (the States) are made judges in their cases and the jurisdiction of the court is ousted concerning matters pertaining 'to the amount or adequacy of compensation paid on or to be paid under' the Land Use Act. The CFRN 1999, s315(5) gives the Land Use Act gives too much latitude. The conference therefore makes the following recommendations:

- The provisions of the Land Use Act 1978 should be liberalised to bring it in line with global best practices.
- The Land Use Act 1978 should make provisions for qualified and competent estate surveyors and other professionals who should assess based on the prevailing market value of the land at the time of revocation.

## **2. The Tort of Defamation and Privacy in the Digital Age by Prof A.D Badaiki, SAN**

The conference noted that there is a rising menace of on-line defamation in this digital age, and the law tries to balance the right to freedom of speech with the rights of persons to privacy. An alleged defamatory statement must be stated verbatim in the Claimant's pleading. The law of defamation is reasonably justifiable within the ambit of CFRN 1999, s45(1). The conference observed that: It is not every negative statement that is defamatory. Libel may also be addressed to the ear contrary to the view that libel is addressed to the eyes while slander is addressed to the ear. The court will not presume that people read an alleged defamatory statement. Conference therefore recommends that the claimant in a defamation suit should call more than one witness because the more witnesses called by the claimant, the more evidential value there is; even though generally, a case can be proved with one witness, a claimant in a suit for defamation will have to prove that people read the defamatory statement within the jurisdiction.

### **3. The Nuisance of Noise Pollution and the Citizens' Right to a Peaceful Environment by Prof Lucky Worika.**

The conference noted that Noise pollution affects the quality of life and by extension, the right to life. The CFRN 1999 does not expressly provide for the right to health and a peaceful environment. The environment is not on the Exclusive Legislative list. Conference observed that Rivers State does not have specific laws that control noise pollution. The conference therefore calls for the enactment of specific laws to address noise pollution in Rivers State.

### **4. Curbing the Trends of Building Collapse in Nigeria: Causes and Regulations by Dr Anugbum Onuoha, DSSR.**

The conference noted that in the past few years, the construction industry in Nigeria has been severely dented by multi-faceted challenges including the collapsing of several buildings leading to fatalities. However, building collapse occasioned by defective construction integrity is a universal phenomenon. The conference observed that:

The majority of collapsed buildings in Nigeria seem to be privately owned or funded buildings. Some of the causes of building collapse are corruption; use of poor materials and workmanship; and severing of buildings as a result of Right of Way during renewal and expansion of roads.

The Institutional Framework for Enforcement of Building and Construction includes the Architect Registration Council of Nigeria (ARCON), the Council of Registered Builders of Nigeria (CORBON), the Standards Organisation of Nigeria (SON), and the National Environmental Standards and Regulations Enforcement Agency (NESREA).

The conference therefore recommends that, rather than severing a building as a result of Right of Way during renewal and expansion of roads, the government should not rely on precise measurements to cut costs but should demolish the entire building and the owner should be compensated or relocated. The multiple institutions regulating the building and construction industry in Nigeria should be compressed into one.

**5. Alternative Dispute Resolution in Private and Property Law: Exploring Innovative Methods by Chioma S. Jack, Esq, FICMC, MCI Arb, (UK).**

Conference noted that across the globe, a great number of disputes are resolved through Alternative Dispute Resolution (ADR). The conference observed that not all cases need to be subject to litigation. ADR has not come to replace litigation. In Nigeria, cases such as matrimonial cases can be resolved through ADR and the terms of reference remitted to court for adoption. Rules of Professional Conduct for Legal Practitioners 2023, Rule 15(3)(d) mandates legal practitioners to inform their clients of ADR options before resorting to litigation. Online Dispute Resolutions can be utilised to settle disputes. Conference therefore recommends that lawyers undergo ADR training up to membership level in any of the forms of ADR (Negotiation, Mediation, Conciliation, Arbitration, et cetera).

**6. Emerging Legal Issues in Intellectual Property Rights in Nigeria by Anwuri Chinda, Esq.**

The conference noted that the digital era has changed the way intellectual Property is created, disseminated and protected, leading to several challenges in digital intellectual property rights. The conference observed that there are available enforcement mechanisms that can effectively handle complex intellectual property disputes. There is no African standard for intellectual property and trade liberalisation. The conference therefore recommends that, for Nigeria to compete in the global market, there must be emphasis on having an African standard for the

African intellectual property system and trade liberalization in view of the one single market project being promoted by the African Continental Free Trade Agreement (AfCFTA).

## **CONCLUSION**

The Conference generally noted that, Private law is characterised by a focus on the relationships between individuals and entities of private significance. Property law governs the various forms of ownership and tenancy in real property, regulating rights in and over land, including the creation, management, transfer, and termination of those rights. The conference observed that:

- There is no specific law on noise pollution in Rivers State.
- Not all cases need to be the subject of litigation.
- Severing of buildings as a result of the Right of Way during renewal and expansion of roads is one of the causes of building collapse in Nigeria.
- The Institutional Framework for Enforcement of Building and Construction includes the Architect Registration Council of Nigeria (ARCON), The Council of Registered Builders of Nigeria (CORBON), the Standards Organisation of Nigeria (SON), and the National Environmental Standards and Regulations Enforcement Agency (NESREA).
- The Land Use Act 1978, s29 is at variance with the provision of the Constitution of the Federal Republic of Nigeria, 1999, s44(1).
- The Land Use Act 1978 bestows enormous powers on the Governor and the Land Use Allocation Committee. An action for trespass cannot be maintained if the Governor or a government institution enters the land of a private person.
- The Land Use Act 1978, ss30 and 47 do not promote equity and fairness in land compensation as the Governor (the State) is made a judge in his case and the jurisdiction of the court is ousted concerning matters pertaining ‘to the amount or adequacy of compensation paid on or to be paid under’ the Land Use Act. The Supreme Court has,

however, held that the LUA 1978, s47 is inconsistent with the provision of the CFRN 1999.

- There is no African standard for intellectual property and trade liberalisation.

## **RECOMMENDATIONS**

Towards advancing the development of Private and Property Law in Nigeria, the Conference recommends the following:

- The enactment of specific laws to address noise pollution in Rivers state.
- Lawyers should undergo ADR training up to membership level in any of the forms of ADR (Negotiation, Mediation, Conciliation, Arbitration, et Cetera).
- Rather than severing a building as a result of the right of way during renewal and expansion of roads, the government should not rely on precise measurements to cut costs but should demolish the entire building and the owner should be compensated.
- The multiple institutions regulating the building and construction industry in Nigeria should be compressed into one.
- The CFRN 1999, s315(5) which gives too much latitude to the LUA 1978 should be expunged.
- Provisions of the LUA 1978 should be liberalised to bring it in line with global best practices.
- The LUA 1978 should make provisions for qualified and competent estate surveyors and other professionals who should assess based on the prevailing market value of the land at the time of revocation.

- For Nigeria to compete in the global market, an African standard on intellectual property and trade liberalization should be developed in view of the one single market project being promoted by the African Continental Free Trade Agreement (AfCFTA).

Thank you.

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**WELCOME ADDRESS BY THE HEAD, DEPARTMENT OF PRIVATE AND PROPERTY LAW; PROFESSOR (MRS) GRACE OGONDA AKOLOKWU**

I am deeply honoured and privileged as Head, of the Department, of Private and Property Law in the Faculty of Law, Rivers State University to welcome the Pro-Chancellor and Chairman of Council, the Vice-Chancellor and the University Management Team, the Chairman of the Occasion, the Keynote Speaker and other erudite Scholars and Speakers, Dean of Law, Professors, esteemed colleagues, Ladies and Gentlemen to the 2nd Conference of the Department of Private and Property Law with the theme “ Contemporary Issues in Private and Property Law in Nigeria.”

I consider the theme very apt and timely in this season of national and global uncertainties, economic pressures, national stress, and social dislocations of all sorts including the catastrophic effects of building collapses in different parts of the country, persistent housing challenges which have made the UN sustainable development goal of achieving affordable housing in Nigeria a continuing mirage. Amidst issues of adequate compensation for real property compulsorily acquired by Government and the unrelenting tenacious grip of the Federal Government on land through the Land Use Act 1978, Real Estate Development in Nigeria remains epileptic.

The private rights of persons to a peaceful environment as well as proper protection of a person’s intellectual output and property which have been variously attacked by different, sometimes discordant and very high decibels of noise; indiscriminate access to the digital space are to be interrogated in this Conference which promises to deconstruct various remedial strategies in law as well as proffer and expound innovative Alternative Dispute Resolution methods in Private and Property Law.

This second conference of the Department highly powered by our former HOD, Dr Anugbum Onuoha is a further attempt to expand the frontiers of the laws directly impinging on private rights and property rights of citizens in Nigeria. We welcome spirited discussions, and expositions on the various issues that will be raised subsequently as well as questions that would probably elicit further research and discussions which make the ivory tower tick and bubble. It is indeed going to be a harvest of rich ideas and information as we have painstakingly assembled the best brains to educate and re-educate us. I enjoin you to relax and enjoy our banquet of legal ideas, theory, practice and academic exercise as we delve into the complexities of private and property law led by very erudite scholars who have left indelible footprints in the legal terrain of our country. Once again welcome and God bless us all.

# **CONTEMPORARY ISSUES IN PRIVATE AND PROPERTY LAW IN NIGERIA BY PROF. MIKE A. A. OZEKHOME, SAN, CON, OFR, FCIArb, LL.M, Ph.D, LL.D, D. Litt, D.Sc, DA, DHL.\***

## **ABSTRACT**

Private and property law encompasses legal regulations governing individual rights and obligations regarding their personal affairs and property ownership. This includes laws relating to contracts, torts, property ownership, inheritance, and other civil matters.

Property rights are foundational to any legal system, serving as cornerstones of economic prosperity and individual autonomy. In Nigeria, the concept of ownership has deep cultural roots, reflecting indigenous customs and colonial legacies. However, the modernization of property law as well as its evolution has introduced new dynamics, challenging traditional notions of private autonomy.

Private and property law in Nigeria is a dynamic field constantly evolving to address emerging challenges in a rapidly changing society. This lecture undertakes a thorough examination of personal property law in Nigeria, tracing its historical development, analysing contemporary issues, and proposing reforms to uphold private autonomy in the 21st century.

## **1.0 OVERVIEW OF PRIVATE AND PROPERTY LAW IN NIGERIA**

### **1.1 SCOPE AND DEFINITION**

#### **1.1.1 PROPERTY LAW**

The term 'property' is used in various contexts, often leading to confusion. It may refer to ownership or title,<sup>1</sup> as seen in phrases like "property in goods pass to the buyer immediately a contract of sale is concluded." This ownership entails an interest in the item, granting certain rights such as the right to use or profit from it, though it may be less than full ownership.<sup>2</sup> A property right grants someone the sole power to decide how a resource is utilized, regardless of whether that resource is owned by the government or individuals. When it comes to land, this means that the landowner has the authority to dictate its usage.

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\* Being a keynote speech by Prof. Mike A. A. Ozekhome, SAN, CON, OFR, FCIArb, LL.M, Ph.D, LL.D, D.Litt, D.SC, DA, DHL delivered at Rivers State University on 5<sup>th</sup> June , 2024, during the second conference of the Department of Private and Property Law, Faculty of Law, Rivers State University, Nkpolu-Oroworukwo, Port Harcourt.

<sup>1</sup> Simon Douglas, 'The Scope of Conversion: Property and Contract' (2011) 74 MLR 329, 335; Sarah Worthington, 'The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation' (2007) Texas International Law Journal 917, 919

<sup>2</sup>*Ibid*

Alternatively, "property" can denote the physical object itself, known as the "res," over which ownership and other interests may be exercised. This includes tangible items like goods and land, as well as intangible assets. Essentially, property encompasses anything capable of being owned, regardless of its form. For this discussion, we adopt the interpretation, where 'property' signifies either individual property items or an aggregate of such items.

In legal terms, property is commonly classified into two categories: **‘real’** and **‘personal.’** Real property referred to as **‘realty,’** encompasses land and anything attached to it, both naturally and artificially, such as buildings and crops.<sup>3</sup> It also includes intangible rights derived from interests in land. On the other hand, personal property, also known as **‘personalty,’** refers to anything other than land that can be owned, such as stocks, money, patents and copyrights.<sup>4</sup> Just as real property, the law further categorizes personal property into **tangible** (or chattel or choses in possession) and **intangible** personal property (also known as choses in action).<sup>5</sup>

Additionally, it is widely recognized that contractual claims represent one form of intangible property,<sup>6</sup> although there is ongoing debate regarding the extent of legal protection afforded to such claims.<sup>7</sup>

For others, ‘property’ equates to ‘property law.’ **Property law** governs the various forms of **ownership and tenancy in real property**, regulating rights in and over land, including the creation, management, transfer, and termination of those rights – Some scholars even discuss ‘contracts’ as falling under the umbrella of ‘property.’ Additionally, ‘property’ may refer to

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<sup>3</sup> *Armstrong DLW GmbH v Winnington Networks Ltd.* [2012] EWHC 10 (Ch) 171.

<sup>4</sup> Roger J. Smith, *Property Law* (9th edn Pearson Longman, Harlow, Essex 2017) 8

<sup>5</sup> *Armstrong DLW GmbH v Winnington Networks Ltd.*, *Supra* (n 6), 171.

<sup>6</sup> Stephen A. Smith, *Contract Theory* (OUP, Oxford 2004) 98.

<sup>7</sup> Lutz-Christian Wolff, ‘The Relationship between Contract Law and Property Law’ (2020) 49 *Common Law World Review* 31.

either the entirety of an individual's assets<sup>8</sup> or specific items considered to be under property rights.<sup>9</sup> Property law, therefore, encompasses the intricate web of legal relationships among individuals concerning assets.

Land poses unique challenges due to its immovability and the ability to be owned in different forms. Various interests may coexist on land simultaneously, each enforceable by its holder.

To facilitate the division of ownership and rights in land, the theoretical **doctrine of estates** is employed. For example, an individual may have a life estate over a property, with another holding a future interest. Meanwhile, the property may be leased to a third party, who may then mortgage their term. Upon the life tenant's death, the future interest holder cannot take possession until the leases and mortgages have expired. This demonstrates how different interests in land run concurrently, with future interests running consecutively to those of current tenants.

This descriptive understanding of property law highlights its ubiquity across legal systems, emphasizing that while terminology and classifications may vary, every legal system addresses the relations between individuals concerning tangible assets.

## 2.0 PRIVATE LAW

Private law, as delineated by **Holland** and expounded upon by **N R Madhava Menon**, occupies a distinct sphere within the legal framework, characterized by its focus on the relationships between individuals and entities of private significance. Unlike public law, where the state assumes the role of both arbiter and interested party, private law functions primarily as an

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<sup>8</sup> Andreas Rahmatian, 'Intellectual Property and the Concept of Dematerialised Property' in Susan Bright (ed), *Modern Studies in Property Law* (vol 6 Hart Publishing, Oxford; Portland 2001) 361, 363.

<sup>9</sup> Eveline Ramaekers, 'What is Property Law?' (2017) 37 (3) *Oxford Journal of Legal Studies* 588, 591.

impartial adjudicator of the rights and duties that exist between citizens.<sup>10</sup> This delineation underscores the essential autonomy of individuals within the private sphere, where they are afforded the legal tools to act strategically in their own interests.

The foundational principle of ownership and individual autonomy serves as the bedrock of private law, empowering citizens to navigate their personal, social, and institutional environments as they see fit.<sup>11</sup> Within the realm of private law, individuals are not inherently obligated to act in the public interest; rather, they are afforded the freedom to pursue their own objectives within the parameters of legal norms and contractual obligations. This emphasis on individual autonomy distinguishes private law from its public counterpart and underscores its role in facilitating private relationships and transactions.

Central to the function of private law is the creation and enforcement of legal norms designed to establish a private sphere wherein individuals and entities are free to conduct business, conclude contracts, and interact with one another on mutually agreed terms.<sup>12</sup>

If we consider the multitude of effects stemming from each person's relationship with others, along with the complex chains of these interactions – for instance, Adamu sells his land to Bola, who then sells it to Chukwu, mortgages it to Oghenayo, and rents it out to Frances – providing clear outcomes for these transactions becomes an overwhelming challenge.<sup>13</sup> These interactions, ranging from simple transactions to complex chains of events, present significant challenges in providing clear outcomes and resolutions. Private law would seem like an impossible endeavour. However, this is where other forms of law play a crucial role – emerging

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<sup>10</sup> Thomas Erskine Holland, *The Elements of Jurisprudence* (Clarendon Press 1880); NR Madhava Menon, *Holland on Jurisprudence* (Generic Book 2020).

<sup>11</sup> *Ibid.*

<sup>12</sup> For more on Horizontality and Neutrality in private law see Daniela Caruso, 'Private Law and State-Making in the Age of Globalization'.

<sup>13</sup> Henry E Smith, 'Property as the Law of Things' (2012) 125 Harvard Law Review 1691.

as a fundamental pillar within private law, addressing these challenges by providing legal frameworks for the fostering of societal trust by providing a foundation of legal certainty upon which private interactions can take place. In the case of property law, a framework for the ownership and transfer of assets.<sup>14</sup> As R.W. James expounded in his treatise on Land Law:

*“The most comprehensive relations that may exist in land is that expressed in the notion of ownership. It connotes the totality of rights and powers that are capable of being exercised over a thing.”*<sup>15</sup>

Whether in the realm of torts, contracts, or property rights, private law serves to delineate the rights and obligations of individuals, thereby safeguarding their autonomy and facilitating the smooth functioning of private relationships.

Additionally, it is worth noting that the evolution of technology and changes in societal norms have introduced new dimensions to the concept of private law, challenging traditional distinctions between substantive and procedural aspects. As private law continues to evolve, it must adapt to accommodate these changes while preserving its core principles of individual autonomy and private ownership. By providing a legal framework for private relationships and transactions, private law plays a crucial role in shaping the dynamics of modern society and safeguarding the autonomy of individuals within the private sphere.

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<sup>14</sup> *Ibid*

<sup>15</sup> Roden William James, *Modern Land Law of Nigeria* (University of Ife Press 1973).

### 3.0 HISTORICAL APPROACH TO PRIVATE AND PROPERTY LAW

#### 3.1 EVOLUTION OF PRIVATE PROPERTY LAW

The historical evolution of private and property law offers insight into the development of key legal concepts and principles. In **ancient Rome**, the idea of dominium laid the groundwork for modern notions of private property, characterized by absolutism, autonomy, and perpetuity.<sup>16</sup>

As, English Jurist, Sir William Blackstone asserted

*“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”*<sup>17</sup>

However, during the ancient era, property was intertwined with familial and political structures – in which land is not just seen as a physical entity, but as a source of utilities assigned and ownership shared to the collective i.e. households, communities and groups of individuals – complicating its legal interpretation.<sup>18</sup> In the **Middle Ages**, the feudal system introduced new elements to property law, such as the concepts of tenure and estate, which reflected the complex relationships between landowners, tenants, and the monarchy, that is the **famous bundle of sticks metaphor**.<sup>19</sup> Additionally, communal ownership, exemplified by the commons, played a crucial role in sustaining peasant communities, though this was gradually eroded by enclosures and modernization.<sup>20</sup>

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<sup>16</sup> Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* / Ugo Mattei. (Greenwood Press 2000).

<sup>17</sup> William Blackstone, *Commentaries*, Vol 1, Bk 2, Ch 1 (emphasis added). Available at <http://lonang.com/library/reference/blackstone-commentaries-law-england/>.

<sup>18</sup> H Lawson and B Rudden, *The Law of Property* (Oxford University Press 2002; 3rd edn).

<sup>19</sup> Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’, cit.; Tony M Honoré, ‘Ownership’, in A G Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford University Press 1961) 107–147.

<sup>20</sup> Cohen and M L Weitzman, ‘Enclosures and Depopulation: A Marxian Analysis’, in William N Parker and Eric L Jones (eds), *European Peasants and their Markets*,

The theological debates of the thirteenth century, particularly those led by **Franciscan scholars**, challenged traditional views of property by emphasizing individual autonomy and self-determination<sup>21</sup>. This shift laid the foundation for later theories, including **John Locke's** justification of private property based on labour and productivity.<sup>22</sup>

In the seventeenth century, philosophers like **Hugo Grotius** and **Thomas Hobbes** contributed to the emergence of modern property rights, tying them to notions of natural law and social contract.<sup>23</sup> Hobbes, in particular, advocated for absolute sovereignty and possessive individualism, asserting that property rights were essential for maintaining social order.<sup>24</sup>

The **Napoleonic Code of 1804** codified the bourgeois ideology of individual ownership, solidifying property as a fundamental right protected by law. This legal framework, though rooted in historical precedents, marked a departure from feudal and communal forms of ownership, establishing a highly individualistic conception of property.<sup>25</sup>

**German legal** scholars in the nineteenth century further refined the concept of private property as a subjective right, emphasizing individual autonomy and sovereignty over resources.<sup>26</sup> This development mirrored the expansion of capitalism and colonialism, underscoring the link between property rights and economic power.

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<sup>21</sup> David Burri, *Olivi and Franciscan Poverty: The Origins of the Usus Pauper Controversy* (University of Pennsylvania Press 1989).

<sup>22</sup> *Supra* n(16), Ugo Mattei.

<sup>23</sup> Matthew H Kramer, *John Locke and the Origins of Private Property* (Cambridge University Press 1997).

<sup>24</sup> Norberto Bobbio, *Giusnaturalismo e positivismo giuridico* (Laterza 2011).

<sup>25</sup> James Gordley, 'Myths of French Civil Code' [1994] 42(3) AJCL 459; Paolo Grossi, *La proprietà e le proprietà nell'officina dello storico* (Giuffrè 1988); A A Rozental, 'Enclosure Movement in France' [1956] 16 Am. J. Ec. & Sociol. 55.

<sup>26</sup> Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (3 vols, 1891; Italian translation by Bensa and Fadda, Utet 1930).

Overall, the evolution of private and property law reflects broader societal changes and ideological shifts, shaping the legal landscape and influencing notions of ownership, autonomy, and freedom.

Throughout the 19th century, alternative views on property emerged, particularly among the working class who bore the brunt of capitalist exploitation. **Karl Marx** critiqued private ownership of the means of production, arguing it led to worker exploitation and alienation.<sup>27</sup> Marx advocated for collective management of production means while preserving personal property. The rise of **socialist movements** and revolutionary attempts disrupted bourgeois property law, highlighting the social function of property. French jurist Léon Duguit emphasized property's obligation to serve societal needs, a concept later incorporated into various constitutions.

In the late 19th century, a legal debate arose on ownership limits in the public interest to curb unrestricted capitalism. This concept termed the "**social function**" of property, aimed to balance individual rights with societal needs.<sup>28</sup> The **Weimar Constitution** and later Constitutions integrated this clause, allowing public regulation<sup>29</sup> to ensure property serves the general interest.

**Post-World War II**, the social function clause gained prominence, enabling governments to limit property rights for social reforms. Many scholars and experts have argued that the social aspect of private property has undergone a profound transformation in the constitutional

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<sup>27</sup> Karl Marx, *Capital: A Critique of Political Economy*, vol. 1 (Penguin 1976; translated by Ben Fowkes. First published in German in 1867). He defined this phenomenon as the primitive accumulation.

<sup>28</sup> For a comparative perspective see S Foster and D Bonilla, 'The Social Function of Property: a Comparative Perspective' [2011] 80 Fordham L. Rev. 1003; Gregory Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press 2006); Anna di Robilant, 'Property: A Bundle of Sticks or a Tree' [2013] 66(3) Vanderbilt L. Rev. 869.

<sup>29</sup> Gregory Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence*, cit.; Anna di Robilant, 'Property: A Bundle of Sticks or a Tree'

safeguarding of property rights across numerous nations since the conclusion of World War II.<sup>30</sup> This pivotal concept, enshrined in various twentieth-century constitutions, particularly in regions such as Europe, South America, post-colonial Africa and the Middle East, emphasizes the ability to restrict property rights through public regulation<sup>31</sup>. The aim is to serve societal interests and prevent owners from engaging in self-centred or excessively individualistic behaviour. However, its efficacy remains debated.<sup>32</sup>

**Neoliberalism** emerged in the **late 20th century**, advocating for minimal state intervention and promoting private property as a fundamental condition for market development. This ideology influenced global economic policies, favouring privatization and deregulation. There's a growing need to reinterpret property law to address contemporary ecological challenges. While private property remains dominant, its traditional autonomy is diminishing, replaced by centralized control in the digital age. This necessitates rethinking property to protect individual autonomy and serve societal and ecological needs, challenging capitalist exploitation and promoting generative interpretations of property law.

### **3.2 NAVIGATING THE INTERPLAY OF PRIVATE AND PROPERTY LAW IN NIGERIA.**

The concept of private property, deeply ingrained in Western legal and political thought, forms the cornerstone of property law. Originating in continental Europe during the eighteenth and nineteenth centuries,<sup>33</sup> this concept emphasizes the right of individuals to fully and exclusively

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<sup>30</sup> *Supra* n(29), Foster and Bonilla.

<sup>31</sup> Gregory Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence*, cit.; Anna di Robilant, 'Property: A Bundle of Sticks or a Tree', cit.

<sup>32</sup> *Supra* n(16), Ugo Mattei

<sup>33</sup> Richard Schlatter, *Private Property: The History of an Idea* (Russell & Russell 1973); Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge University Press 2007).

enjoy and dispose of their assets. Such rights are closely tied to notions of personal autonomy and fulfilment.<sup>34</sup>

Both the civil law and common law traditions recognize the importance of the right to exclude within the property paradigm, although they approach its construction differently. In civil law, property law governs the relationship between individuals and their possessions, maintaining a distinct separation between subject and object. Conversely, common law views property law as regulating the relationships between individuals, focusing on power dynamics and relational aspects.<sup>35</sup>

Despite these distinctions, both legal systems share the objective of ensuring stability in wealth allocation through well-defined rules governing private property. In essence, private property entails granting decision-making authority to the owner while excluding unwanted intrusion by third parties.

In the same vein, the nexus between private and property law in Nigeria lies in the recognition and protection of property rights for individuals. **Private law governs the legal relationships between individuals, including their rights and obligations regarding property ownership, possession, transfer, and use.**

**Property law in Nigeria** is primarily governed by private law principles. **It establishes the legal framework for the acquisition, enjoyment, and protection of various forms of property rights, such as land, buildings, intellectual property, and personal belongings.**<sup>36</sup>

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<sup>34</sup> *Supra* n(16), Ugo Mattei.

<sup>35</sup> Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 The Yale Law Journal 710.

<sup>36</sup> Mike Agbedor Abu Ozekhome, *Personal Property Law in Nigeria* (Pretoria University Law Press (PULP) 2019).

Private law principles ensure that individuals have a legal basis to acquire and possess property while also defining their entitlements to use and enjoy that property. These principles also establish mechanisms for resolving disputes arising from conflicting claims or infringement upon these rights.

Consider for instance that Chukwu possesses a book, Obot resides in a house, and Hadiza bears a notable surname. Legally, the inquiry delves into the meaning of 'possession'. Does Chukwu own the book, does Obot merely rent the house, and can Hadiza monetize her surname? These inquiries lead us to the crux of property law. While a surname lacks transferable ownership and cannot be sold, it unequivocally belongs to Hadiza. However, does Obot's occupancy of the house through renting confer ownership? Renting a property grants the right to inhabit it, contingent upon the landlord's discretion to lease the premises.

In many legal systems, private law provides the foundation for establishing secure property rights in Nigeria by regulating transactions involving properties between individuals. By ensuring clarity in ownership rights and facilitating enforceable contracts related to properties, private law supports economic growth by providing a stable framework for investments and promoting social order through respect for individual proprietary interests.

### **3.3 OWNERSHIP: EXPLORING PRIVATE AND PROPERTY LAW INTERSECTION**

A comprehensive grasp of ownership within the domain of private and property law is essential for navigating the intricate legal structures governing asset possession, control, and transfer in society. Ownership serves as the bedrock of property rights, delineating the parameters of individual authority over both tangible and intangible assets. It not only forms the basis for economic transactions and social relations but also serves as a linchpin in legal adjudications. Exploring the multifaceted nature of ownership not only elucidates the rights and obligations

vested in owners but also sheds light on its broader implications for societal organization, economic progress, and individual freedoms.

Thus, a nuanced understanding of ownership within the private and property law framework is imperative for promoting clarity, coherence, and equity. Within the context of private law, which encapsulates principles governing personal interactions and individual autonomy, the comprehension of ownership assumes even greater significance as it underscores concepts of possession and control, delineating authoritative ownership. As Matti put it:

*“In the paradigmatic description of ownership, which property lawyers (and social scientists) assume to be a monolithic concept based on the idea of “mine,” the right to exclude is the essential feature of owning property, and every limit is at most exceptional and temporary.<sup>4</sup> In this view, property is individual sovereignty: the owner at home is like the queen in her castle. Once a limit is no longer applicable (for example, a servitude of access that allows a neighbour to cross a park), ownership naturally returns to its previous unrestrained might.”<sup>37</sup>*

This understanding of ownership is instrumental in analyzing the interface between private law and property in Nigeria, thereby addressing pertinent issues within the domain of private property law.

In both its theoretical and legal manifestations, **ownership embodies a legal manifestation of property relationships concerning possession, utilization, and disposal, formalized within legal frameworks that reflect production dynamics.<sup>38</sup> In the realm of property, ownership connotes an unequivocal and comprehensive entitlement over a property.** As the allodial

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<sup>37</sup> *Supra* n(16), Ugo Mattei

<sup>38</sup> Agbosu L. K.: The Land Use Act and the State of Nigerian Land Law: *Journal of African Law*, Vol. 32, No. 1 (Spring, 1988), pp. 1-43 at p. 5

owner, the proprietor enjoys unassailable dominion, unaffected by the rights of others. The property's existence is intrinsically tied to the owner, leaving no room for external claims.<sup>39</sup> This portrayal epitomizes an absolutist interpretation of property ownership, a perspective that has faced rightful scrutiny and shall be elaborated further below.

Ownership is a multifaceted legal concept with its roots tracing back to Ancient Roman Law, where it was distinguished from possession, termed *dominium* and *possessio*, respectively.<sup>40</sup>

***Dominium* represents an absolute right over a thing, while *possessio* denotes mere physical control.** Ownership encompasses various claims, including liberty, power, and immunity concerning the owned object.<sup>41</sup> Scholars have offered diverse definitions of ownership, all of which recognize it as the comprehensive or paramount right exercisable over anything.<sup>42</sup> **Waldron** for instance views ownership primarily in terms of private property, emphasizing the correlation between individuals and objects, upheld by societal adherence to an individual's decisions regarding the object.<sup>43</sup> However, this perspective falls short of addressing the concept of public property. For **Garner**, ownership is a legal relationship between an owner and an object – capable of being owned, encompassing both natural and juristic persons as owners and a range of material and intangible objects as ownable entities. An essential and widely agreeable aspect of ownership is the finality of decision-making, where the owner's decisions hold ultimate authority over the object, unchallenged by others.<sup>44</sup> As **Katz** rightly asserted:

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<sup>39</sup> *Attorney General of Lagos State v. Attorney General of the Federation & 35 others* (2003) 12 NWLR (833)

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<sup>40</sup> JW Cecil Turner, 'Some Reflections on Ownership in English Law' (1941) 19 Canadian Bar Review 342.

<sup>41</sup> *Ibid.*

<sup>42</sup> Akintunde Kabir Otubu, 'The Land Use Act and Land Ownership Debate in Nigeria: Resolving the Impasse.'

<sup>43</sup> Waldron J. The right to private property. Oxford: Clarendon Press, 1988

<sup>44</sup> Katz L, "The Concept of Ownership and the Relativity of Title" (2011) 2(1) Jurisprudence 191–203

*“What makes his decision an ownership decision is its quality of finality: no other private person can override his decision in the way that he can override mine.”*<sup>45</sup>

In other words, ownership entails non-interference from outsiders including the state, establishing the owner as the sole agenda-setter for the object – “ownership is a corollary of individual freedom and acts as a shield against the power of the state”.<sup>46</sup> This exclusivity grants the owner special authority over the thing, distinct from exclusionary rights.<sup>47</sup>

**Kant** propounds one of the significant perspectives that strongly advocates for the exclusivity of ownership, which firmly opposes the notion of equating the owner with the thing as the foundation for property rights. Kant's theory lies in unveiling the relational nature of ownership – how a property system establishes legal relationships among individuals regarding the essentials for liberty.<sup>48</sup> Accordingly, ownership delineates a realm of exclusivity over an object, wherein one's decisions on the ascribed property remain independent of others' choices.<sup>49</sup>

These fundamental features traditionally define ownership, as articulated by **Blackstone**, whose definition emphasizes sole and absolute dominion over external things. He asserts:

*“...sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”*<sup>50</sup>

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Supra* n(16), Ugo Mattei

<sup>47</sup> *Ibid.* Note that exclusivity here, pertains to the unique position of authority held by the owner concerning a thing. It's important to differentiate exclusivity from exclusion, which is often associated with the right to exclude others from a thing. While exclusion is a common aspect of ownership, exclusivity encompasses a broader sense of authority that extends beyond mere exclusionary rights.

<sup>48</sup> Ernest Weinrib, 'Ownership, Use, and Exclusivity: The Kantian Approach' (2018) 31 Ratio Juris 123.

<sup>49</sup> Ripstein. A, Force and Freedom: Kant's Legal and Political Philosophy (Harvard University Press, 2009)

<sup>50</sup> 'William Blackstone: Commentaries on the Laws of England (1765-1769)' (LONANG Institute) <<https://lonang.com/library/reference/blackstone-commentaries-law-england/>> accessed 9 May 2024.

While an absolutistic view of ownership has declined in modern times, recent cases such as *Attorney General of Lagos State v. Attorney General of the Federation & 35*<sup>51</sup> others have echoed absolutist notions, prompting debates. In said case, Niki Tobi JSC, in a minority judgment sought to utilize the absolutist concept of ownership as justification for his judicial reasoning. He held:

*“Title to land is the highest form of land ownership in our tenure system. Ownership is a complete and total right over a property. The owner of the property is not subject to the right of another person, as long as he remains the allodial owner. In so far as the property inheres in him, nobody can say anything. This is because the property begins with him and ends with him.”*

However, critics with the instrumentalist view, i.e. that individual property rights should be allocated in ways that best promote societal goals such as **Smith** argue against absolutism, citing the erosion of ownership rights by common law and statutory provisions – planning laws, easements, and restrictive covenants exemplify restrictions imposed on landowners' rights, challenging the notion of absolute ownership.<sup>52</sup>

While ownership may defy a precise definition, it remains paramount that ownership fundamentally resides with the entity holding the ultimate right to the property's reversion.<sup>53</sup> Scholars have endeavoured to elucidate its essence by delineating its essential components. Among these scholars, **Honoré** undertook a comprehensive examination to discern the

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<sup>51</sup> *Supra* n(17).

<sup>52</sup> Smith I. O., "Power to Make Town Planning Laws in a Federation: The Nigerian Experience" (2004) Vol. 24 JPPL pg. 23. It is worth noting that this absolutistic perspective was previously endorsed by the learned jurist at the Court of Appeal in the case of **Abraham v. Olorunfunmi** (1991) 1 NWLR (Pt. 165) 53, where the owner of the property was characterized as the Alpha and Omega, possessing unrestricted authority over its use. However, this viewpoint faced criticism from scholars such as **Professor C. Ilegbune**, who argued against such a simplistic interpretation in "Land Ownership Structure Under the Land Use Act" (2003) Vol. 23 JPPL pg. 25.

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fundamental incidents of ownership.<sup>54</sup> Drawing upon extensive analysis of property jurisprudence, he identified **11 distinct rights, duties, and elements that collectively embody the concept of ownership**. These incidents include the rights to possess, use, and manage, as well as entitlements to the income and capital derived from the owned property. Additionally, ownership encompasses rights to security, transmissibility, absence of term, and the duty to prevent harm, along with liabilities such as execution and the incident of residuality.<sup>55</sup> It is crucial to recognize that these incidents of ownership are interdependent and cumulative, albeit, at times, susceptible to influence by state intervention in property rights, potentially subjecting them to state control.

This comprehensive understanding of ownership within property law underscores the intricate balance between individual rights, societal interests, and state regulations, shaping the landscape of private law in contemporary legal systems.

#### **4.0 CONTEMPORARY ISSUES ELUCIDATED**

In exploring the evolution of property law, property rights, and private ownership and autonomy in Nigeria, it is imperative to acknowledge the historical emphasis placed on real property within the legal framework. Throughout much of the earlier era, property law in Nigeria predominantly centred on real property, reflecting the socio-economic significance and tangible nature of land ownership.<sup>56</sup>

**Real property, encompassing interests in land and immovable structures**, served as the primary medium through which property rights were asserted and regulated. The evolution of

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<sup>54</sup> Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press 1987).

<sup>55</sup> *Ibid.*

<sup>56</sup> Mike Agbedor Abu Ozekhome, *Personal Property Law in Nigeria* (Pretoria University Law Press (PULP) 2019).

property law in Nigeria, therefore, is intrinsically intertwined with the development and transformation of real property principles.

As such, an examination of the historical progression of real property law offers valuable insights into the broader evolution of property rights and private ownership in Nigeria. By tracing the evolution of real property concepts, doctrines, and legal frameworks, we can discern the underlying principles and dynamics that have shaped the contemporary landscape of property law in the country.

In the forthcoming sections of this discourse, I will undertake a comprehensive examination of the challenges facing private and property law in Nigeria, focusing first on real property and subsequently on personal property. This analysis will encompass an exploration of key legal milestones, precedents, and legislative enactments that have significantly influenced the development of property rights and private ownership in the country. Through this scholarly inquiry, we seek to illuminate the intricate interplay between legal principles, socio-economic factors, and cultural dynamics that have shaped the trajectory of private and property law in Nigeria.

#### **4.1 PRIVATE OWNERSHIP OF REAL PROPERTY: ANALYSING THE LAND USE ACT IN NIGERIA.**

In Nigeria, a complex interplay of interests exists within the legal landscape, a reality that continues to provoke scholarly discourse.<sup>57</sup> As **R.W. James** highlights:

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<sup>57</sup> In the case of *Izevbigie v Olobor* (2005) All FWLR pt 2005, p 1546, the court emphasized that the Land Use Act of 1978 did not abolish pre-existing interests in land. It clarified that the Act did not strip occupiers of their land interests prior to its enactment. Additionally, the court highlighted that the Act vested control and management of urban land in state governors and non-urban land in local governments, but did not extinguish customary ownership rights. Similarly, in *Folarin v Durojaiye* (1988) 1 NWLR pt 70, p 351, Justice Oputa emphasized Nigeria's dual legal system, comprising indigenous/customary law and received English law. He

*“The earliest system of land tenure in Nigeria was the customary or indigenous system with its own peculiar forms of land-holding, but with the inception of the English-law-system new forms of holding were introduced which although did not supersede the indigenous forms, greatly influenced and supplemented them.”*<sup>58</sup>

In other words, the inception and early stages of land tenure systems in Nigeria, emphasize the coexistence and mutual influence of customary<sup>59</sup> and received English law systems<sup>60</sup>. While the indigenous customary system retains its significance, the introduction of English law principles has brought about new forms of landholding, greatly shaping the legal framework.

**Under customary law, the notion of absolute ownership remains foreign**, despite subsequent legislation.<sup>61</sup> This principle was underscored in the Privy Council case of *Tijani v Secretary of Southern Nigeria*.<sup>62</sup> The court emphasized that in native land law, the concept of individual ownership is fundamentally alien. Instead, land is regarded as communal property, belonging to the community, village, or family, rather than to any individual.

For example, in the landmark case of *Bangbose v Oshoko*<sup>63</sup>, the Supreme Court held that an allotment of family property under customary law merely grants permission or license to utilize family land, with ownership remaining vested in the family. Conversely, inheritance of family

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asserted that this duality is inherent and necessary for legal growth and development, drawing parallels to cultural evolution. Furthermore, the case of *Kasali v Lawal* (1986) 3 NWLR pt 28, p 305 is also relevant in this context.

<sup>58</sup> *Supra* n(15), Roden William James.

<sup>59</sup> Customary Law was defined in *Oyewumi v Ogunesan* (1990) 3NWLR pt137, 182,207 by Obaseki, JSC- “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 transaction of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it”

<sup>60</sup> Received English laws, including the Statute of Frauds 1677, which mandates certain transactions to be in writing to prevent fraud; the Wills Act 1837 (reenacted by various states), affirming the right of every adult to dispose of their real or personal property inter vivos; and the Conveyancing Act 1881, governing the practice of vesting interests in property, among others.

<sup>61</sup> Benjamin Obi Nwabueze, *Nigerian Land Law* (Nwamife Publishers 1972), p. 7.

<sup>62</sup> (1921) 2 AC 399, 404.

<sup>63</sup> (1988) 2 NWLR pt 78, p 509.

land confers absolute ownership upon the beneficiary, extinguishing joint interests of other family members – this distinction becomes apparent in situations where inherited land has been previously vested for any plethora of reasons in the person from whom said land was inherited. Additionally, as Belgore JSC noted:

*“Family land is always held in trust by the head of the family. He decides on allotment to each member of the family according to his needs. This he does in consultation with other leading members of the family.”*<sup>64</sup>

This assertion by Belgore JSC further underscores the **trustee role** of the head of the family in managing family land allotments based on individual needs, in consultation with other family members.

As opposed to the concept of absolute ownership, legally recognized concepts such as communal,<sup>65</sup> family,<sup>66</sup> and stool landholding exist, each conferring distinct categories of interests, primarily in terms of use and usufruct.

With a substantial portion of the population residing in rural areas, customary law remains the prevailing regulatory regime for landholding among individuals and communities.<sup>67</sup>

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<sup>64</sup> *Ibid.*

<sup>65</sup> See *Oyetona v Ajani* (1959) W.N.L.R 213, 216, the court held that "Land belongs to the community, village, or family, and never to an individual, nor does it attach itself to a title."

<sup>66</sup> In the case of *Sewoniku v Orotosakin* (1986) 3 NWLR pt 30, p 597, the court addressed the issue of the validity of a sale under customary law. The court held that according to native law and custom, the Head of the family's concurrence is required for a sale to be considered valid. Without the Head's concurrence, the sale is deemed void or voidable, particularly if it lacks the agreement of the principal members of the family. This principle aligns with the precedent established in *Ekipendu v Erika* (1959) 4 FSC, 79, and is further supported by the case of *Atunrase v Sunmola* (1985) 1 NWLR pt 1, p 105.

<sup>67</sup> TO Elias, *Nigerian Land Law: By T.O. Elias* (4th ed, Sweet and Maxwell 1971), p. 7. "Land is held under community ownership, and not, as a rule, by the individual as such. It is true that the impact of English ideas of property law upon indigenous conceptions, largely due to (a) the efforts of practicing African lawyers trained in English law, (b) the change from the subsistence economy of the autonomous household or village to the market economy.....(c) the increased pressure of population upon the land consequent upon this change.....But the indigenous customary law of land tenure remains essentially corporate'.

Furthermore, through multiple legislative actions concerning land in Nigeria, we have observed subtle modifications in land ownership and use. Initial reference must be made to the enactment of the **1999 Constitution of the Federal Republic of Nigeria (as amended)** which guarantees the right to property ownership for every citizen. **Section 43** confirms that citizens have the right to acquire and possess immovable property anywhere in the country.<sup>68</sup> Additionally, **Section 44** states that no movable or immovable property shall be taken compulsorily without due process, including prompt compensation and access to legal recourse. **Section 44** asserts:

*“No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over interest in any such property shall be acquired compulsorily in any other part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things.*

*a. requires the prompt payment of compensation, therefore; and*

*b. give to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or anybody having jurisdiction in that part of Nigeria.”<sup>69</sup>*

In addition to the Constitution, the **Land Use Act of 1978** introduces intricacies to the notion of absolute property rights by delegating control and management authority to State Governors and Local Governments. **Section 1** of the Act stipulates as follows:

*“Subject to the provisions of the Act, all land comprised in the territory of each state in the Federation are vested in the Governor of that state and such land shall be held in*

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<sup>68</sup> **The Constitution of the Federal Republic of Nigeria (as amended) 2011**, Section 43.

<sup>69</sup> *Ibid*, Section 44.

*trust and administered for the use and common benefit of Nigerians in accordance with the provision of this Act.*<sup>70</sup>

This empowerment allows governors to issue certificates of occupancy or grant ownership to individuals, even in the absence of prior titles, while retaining the discretion to revoke granted rights. However, complexities arise from issues of priority and competing interests with regard to the allocation of land.

It is crucial to recognize that despite these legal reforms, pre-existing land interests remained intact, as affirmed by judicial rulings. The Act preserves customary land tenure practices while introducing mechanisms for the allocation of rights of occupancy and certificates of ownership.

Furthermore, several other statutes, including the **Property and Conveyancing Law (Western Region) 1959**<sup>71</sup> and the **Companies and Allied Matters Act 2020**, play a significant role in shaping property rights and practices in Nigeria. However, they will not be the focus of our discussion at this time.

Following the introduction of the **Land Use Act**, a debate arises regarding the ownership of land, specifically whether it is vested in the State or in individual citizens. While it has been argued that "ownership of land per se is irrelevant"<sup>72</sup> it remains undeniable that ownership of land bestows enduring rights and opportunities upon the holders of such ownership rights. This legislation represents a significant legal framework that redefined land ownership in Nigeria. It diverges from the concept of private property ownership, a fundamental aspect of capitalist

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<sup>70</sup> Land Use Act 1978, Section 1.

<sup>71</sup> Sections 67(1) pertains to the requirement of a deed, while sections 77(1) and 78(1) delineate the format necessary for the valid execution of a deed. Additionally, section 97(1) outlines the conditions for the creation of leases, among other provisions.

<sup>72</sup> After the release of the Land Use Panel's report in 1978, General Olusegun Obasanjo, who was the Nigerian military head of State at the time of the Act's promulgation, made a special broadcast to the country.

economics discussed by Grotius and Hobbes as noted by Chambliss. Moreover, the characterization of real property as outlined in the **Land Use Act** deviates slightly from the principles of private law discussed earlier. These principles primarily govern relationships between legal entities on a horizontal level, typically without government interference.

With reference to real property i.e. land, ownership pertains to the entitlement of the landowner to possess, utilize, benefit from, and dispose of the land.<sup>73</sup> It represents the most comprehensive right achievable in land, conferring upon the occupant an immediate or indirect right to land possession unimpeded by any superior claim vested in another party.<sup>74</sup> Ownership constitutes the ultimate interest in land, surpassing all other claims or interests.

Within the realm of ownership, numerous subsidiary rights exist, each detachable from absolute ownership and transferable to another individual. The litmus test for ownership lies in identifying the residual interest remaining after subtracting other land interests. **Dias**, building upon **Salmon's** perspectives and those of other jurists, asserts that ownership entails having an interest that outlasts the interests of others in the same property.<sup>75</sup> Even if an owner's practical benefits are greatly diminished or entirely stripped away, their status as owner persists, as their interest in the property endures beyond that of others.

The concept and locus of ownership rights under the **Land Use Act** are subject to ongoing debate, enriched by scholarly and judicial discourse and amplified by input from various stakeholders. Divergent opinions abound regarding whether the Act effectively nationalized all lands in the country in favour of the State or whether land ownership in Nigeria remains vested

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<sup>73</sup> Qin L..M, Reform of land system in China 1994 *Singapore journal of Legal Studies* 495-520

<sup>74</sup> Olawoye. C. O. Title to land in Nigeria. Evans Brothers Ltd ( 1974) p. 1

<sup>75</sup> Dias R. W. M *Jurisprudence*, 3rd Edition Butterworth & Co Publishers Ltd pp 369-70; Fitzgerald P.J: *Salmond on jurisprudence. Sweet & Maxwell 12th ed. 1966*

in citizens despite the Act's promulgation. The gravamen of the argument is founded upon **Section 1** of the Act already highlighted above.

Courts, commentators, and academic scholars have interpreted this specific provision of the Act in diverse ways. For some, it signifies the demise of private property rights, as it appears to nationalize all lands in the country by transferring ownership to the state through the Governor. Conversely, others argue the opposite, contending that the provision does not entail the expropriation or annulment of individual land rights. These contrasting perspectives, often labelled as the **Nationalization and Private Property Rights schools of thought**, are thoroughly examined here.

#### 4.1.1 THE NATIONALIZATION SCHOOL

The foundation for the nationalization school of thought finds its roots in the government White Paper on the Report and Recommendation of the Land Use Panel in 1978.<sup>76</sup> This ideology was expounded upon in a national broadcast following the presentation of the report, where the government articulated the rationale and doctrinal philosophy behind the enactment of the **Land Use Act** concerning customary land tenure. It held:

*“[A]ll Nigerians are collective owners of all land in the country and the rights of all Nigerians to use and enjoy the land of the country and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their*

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<sup>76</sup> The Federal Military Government had appointed a 12-member Land Use Panel on May 16, 1977, chaired by the Honorable Justice Chukwunweike Idigbe, a Justice of the Supreme Court of Nigeria. The panel was tasked with the following terms of reference:

- (i) Conduct an in-depth study of various land tenure, land use, and conservation practices in the country and propose measures to streamline them.
- (ii) Analyze the implications of a uniform land policy for the country and explore the feasibility of its implementation nationwide, along with recommending guidelines for execution.
- (iii) Evaluate the necessary steps for regulating future land use, as well as the opening and development of new lands to meet the needs of the government and Nigeria's growing population in urban and rural areas, and provide appropriate recommendations (Nigeria: Land Use Panel 1977:1).

*families should be ensured, protected and preserved. Ownership of land per se is irrelevant. What is important is the use to which land is put and no Government should abdicate its responsibility in respect of a proper planning of land use within its territory.”*<sup>77</sup>

Therefore, as explained earlier, **Section 1** of the Act confers ownership of all lands within each state of the Federation upon the Governor of the State, who is mandated to hold them in trust and administer them for the collective benefit of all Nigerians in accordance with the Act's provisions.<sup>78</sup> **Uchendu** noted that, by implication, the Nigerian state emerges as the de facto authority in land matters, despite not being expressly mentioned in the law (Decree).<sup>79</sup> This perspective has been echoed by various legal scholars and jurists, affirming that the Act fundamentally alters preexisting land tenure systems and rights, essentially divesting customary legal entities of their allodial ownership rights.<sup>80</sup>

The Nationalization school of thought has been supported by judicial pronouncements, notably in the case of *Nkwocha v. Governor of Anambra State*<sup>81</sup>, where it was stated that:

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<sup>77</sup> General Olusegun Obasanjo, the Nigerian Military Head of State at the time the Act was promulgated stated in a special broadcast to the nation that its purpose was ‘to make land for development available to all including individuals, corporate bodies, institutions and government...’

<sup>78</sup> Supra n(68)

<sup>79</sup> Uchendu, State, Land and Society in Nigeria. A Critical Assessment of the Land Decree, *Journal of African Studies* (1978) Vol. 6 pp. 62-74;

<sup>80</sup> Agbosu L. K.: The Land Use Act and the State of Nigerian Land Law: *Journal of African Law*, Vol. 32, No. 1 (Spring, 1988), pp. 1-43 at p. 5; R.K Understanding Nigeria’s Land Use Law. Paper delivered at Nigeria Land Rights Forum Speakers and available at <http://www.course.earthrights.net/node/416> --> accessed 11/05/2023. See also: Udo, R.K. (1990), *Land Use policy and Land Ownership in Nigeria*. Ebieakwa Ventures, 12 Aba Road, Ikot Ekpene

<sup>81</sup> (1984) 6 SC 362.

*“(T)he tenor of that Act as a single piece of legislation is the nationalization of all lands in the country by the vesting of its ownership in the state leaving the private individuals with an interest in land which is a mere right of occupancy.”*<sup>82</sup>

Within academic schools of thought, this perspective is articulated by **Umezulike**, who suggests, among other assertions, that **Section 1** of the Act hints at a single radical possibility, which is the **expropriation or nationalization of land**.<sup>83</sup> According to the scholar, this provision fundamentally reshaped existing land laws, particularly in the Southern region of the country, in three key ways: (i) it displaced corporate groups, families, and chiefs from land trusteeship, substituting them with the State governor; (ii) individual land interests, which had expanded due to economic development from the 'oil boom,' were reduced to rights of occupancy, falling short of full ownership; (iii) communal allodial interests in land were either denied or frozen, and local sovereignties were amalgamated into a single sovereign.<sup>84</sup>

A similar perspective was espoused by **Fatula**, who argued that **Section 1** of the Act suspended all previous forms of land ownership prior to its enactment by vesting all lands in the State Governor.<sup>85</sup> **In its place, the Act introduced a right of occupancy as the paramount interest, granting individuals the right to use and occupy land rather than full ownership.**

Further support for the nationalization argument was also expressed by **Mabogunje**, who viewed the Decree as an abrogation of Nigerians' land ownership rights, particularly in the Southern region, and its nationalization by the government as inconsistent with democratic principles and free market economic systems. In the same vein, **Aluko** and **Amidu** echoed

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<sup>82</sup> *Ibid* at p. 404.

<sup>83</sup> Umezulike “Does Land Use Act expropriate” Another view (1986) 5 JPPL p. 61.

<sup>84</sup> Uchendu. C, State land and society in Nigeria: a critical assessment of the Land Use Decree of 1978. Seminar paper. Institute of African Studies, University of Nigeria, Nsukka, Nigeria. 1979

<sup>85</sup> Fatula, O.A: *Fundamentals of Nigerian Real Property Law*. Afribic Press Ibadan 2012 p175

similar sentiments at the 5th FIG Regional Conference on Promoting Land Administration and Good Governance in Ghana. They observed that the Decree removed corporate groups, chiefs, and families from land trusteeship, replacing them with the state governor.<sup>86</sup> Consequently, Nigeria now operates under a contractual tenure system validated by certificates of occupancy, which outline the terms of tenure including access, succession, duration, and rents.

Central to the nationalization argument is the interpretation of terms such as **"vested"** and **"trust"** as used in **Section 1** of the Act. These terms, according to legal experts, signify a transfer of ownership from private individuals to the government, thereby abolishing private ownership and reposing maximal title to all lands in only three categories of owners: the Federal government, existing Federal Agencies, and State Governors.<sup>87</sup> **Consequently, preexisting ownership sources such as communities, chieftaincies, families, and individuals are entirely excluded under the Act, leaving citizens with only a right of user.**<sup>88</sup>

This monumental shift in land ownership rights has been poignantly described as the end of various traditional estates and the establishment of a singular legal proprietary interest in land—the right of occupancy—as enshrined in the **Land Use Act**.

#### **4.1.2 PRIVATE PROPERTY RIGHT SCHOOL**

An alternative viewpoint elucidated by **Prof. J.A. Omotola**,<sup>89</sup> **James**,<sup>90</sup> **Fekumo**,<sup>91</sup> and **Smith**<sup>92</sup> – identified as the **private property right school**, offers a different perspective. Notably championed by Prof. Omotola and his adherents, the view contends that the **Land Use Act**

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<sup>86</sup> Aluko B.T & Amidu A. R: Women and Land Rights Reforms in Nigeria. Promoting Land Administration and Good Governance 5th FIG Regional Conference Accra, Ghana, March 8-11, 2006

<sup>87</sup> Ilegbune. C. Land ownership structure under the Land Use Act 1978 (2003) 23 JPPL p. 33.

<sup>88</sup> *Ibid*, pp. 24-42.

<sup>89</sup> Omotola.J.A. "Does the Land Use Act Expropriate? (1985) 3 JPPL.

<sup>90</sup> James R.W. "Nigerian Land Use Act, Policy and Principles" Unife Press 1987 p. 33

<sup>91</sup> Fekumo.J.F Does Land Use Act Expropriate? - A Rejoinder. (1978/88) 8/9 JPPL p. 5-20

<sup>92</sup> Smith I.O "Practical Approach to Law of Real Property in Nigeria" (Ecowatch) 1999 p. 70-71.

does not effectuate a nationalization of all lands within the state, as ample provisions exist to uphold the recognition and retention of private property rights under the Act.

Omotola posits that the **Land Use Act**, by its language, does not operate to nationalize land in the country; instead, it preserves the citizen's right to enjoy their interest in land, albeit with limitations on the alienation of this interest concerning land specified in **Section 36** of the Act.<sup>93</sup> Therefore, according to Omotola, little has been altered regarding tenure and citizens' ownership interests in land.<sup>94</sup> He further notes that existing rights are preserved under the Act's transitional provisions, granting them a right of occupancy without a defined expiration date.<sup>95</sup>

Omotola suggests that **Section 1** of the Act, including the term "vested," must be interpreted in light of other provisions, to discern its true effect.<sup>96</sup> He argues that a holistic reading of the other sections reveals the limited powers vested in the Governor and the supremacy of private property rights, **subject only to the requirement of obtaining consent before any land alienation**. Additionally, Omotola points out that if the Governor were the sole owner of all lands, **Section 28**, which grants the power of revocation to the Governor, would be unnecessary.<sup>97</sup>

Fekumo echoes Omotola's viewpoint by highlighting that, **Sections 24, 29(3), and 35** of the Act recognize various ownership units existing before the Act, indicating that customary right of occupancy predates the Act.<sup>98</sup> He suggests that under the Act, there are three types of

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<sup>93</sup> *Supra* n (87), p. 1.

<sup>94</sup> *Ibid.*

<sup>95</sup> Omotola, J.A. Does land use act expropriate? (1985) 3 *JPPL*; Omotola, J.A. Tenth Anniversary of the Land Use Act. (1978/88) 8/9 *JPPL*.

<sup>96</sup> *Supra* n(87), p. 6

<sup>97</sup> *Ibid.* This contention contradicts the reality that the governor revokes only the possessory rights of the occupier, not ownership, which is already vested in the governor. Furthermore, the absence of compensation for the revocation of the right of occupancy over undeveloped land supports this claim, as the government does not compensate for its own land in the possession of another who has made no improvements to the land.

<sup>98</sup> Fekumo, J.F., *supra* n (89), pp. 15-18.

ownership: **customary ownership, customary right of occupancy, and statutory right of occupancy.**<sup>99</sup> Fekumo contends that the Governor, as a trust-owner, holds radical title in the land, while the real ownership remains with indigenous owners.

This is a central theme of the private property rights school, their assertion of private ownership stems from the idea that the Governor is not the beneficial owner of the land under **Section 1** of the Act but only a trustee, as the section establishes a trust in favour of all Nigerians.

However, **Smith's** position seems most pragmatic here as although he aligns partially with Omotola's perspective, he acknowledges that while **Section 1** of the Act replaces unlimited rights and interests in land with limited rights in the form of a right of occupancy, the transitional provisions safeguard existing land rights in this limited form. He concedes that the current state **under the Act entails a user right, which is inherently less than ownership.**

#### **4.1.3 UNRAVELING THE STATE'S STAKE IN LAND: EXPLORING ITS ESSENCE AND IMPLICATIONS**

In summary, **Section 1** of the **Land Use Act** fundamentally alters the legal status of land users in Nigeria, shifting it from one of ownership to statutory occupancy. Consequently, the economic benefits and interests associated with statutory rights of occupancy are significantly curtailed, as proprietary interests in land are relinquished, and claims are restricted solely to improvements made on the land.<sup>100</sup> Before the enactment of the **Land Use Act**, ownership of land was acquired through various means such as **settlement, conquest, sale, gift, or inheritance.** However, with the introduction of the Act, any ownership acquired through these traditional methods was nullified and vested in the Governor of the state. **Pre-existing freehold**

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<sup>99</sup> *Ibid.*

<sup>100</sup> Matthew Enya Nwocha, 'Impact of the Nigerian Land Use Act on Economic Development in the Country' (2016) 8 Acta Universitatis Danubius. Administratio 117.

**interests were converted into leaseholds, with the Governor assuming the role of lessor.**

This effectively divested individuals, families, and communities of their ownership rights and transferred them to the state authority.

The Act was conceived to challenge alternative sources of societal authority by relegating all private land transactions to governmental agencies. For individuals, this regulatory framework takes the form of certificates of occupancy, which now serve as the exclusive legal instrument for land transactions.<sup>101</sup> The overarching aim is to nationalize land ownership, removing absolute ownership and control from communities, families, and individuals and vesting them solely in the government.

This assertion is supported by the fact that the **ultimate reversionary interest in all lands within the state is vested in the state itself, represented by the Governor.** Smith, in his inaugural lecture, acknowledges this reality, affirming the transfer of ownership and control from individuals to the government.<sup>102</sup>

To conclude, it is pertinent to reference the commentary of Ezejiofor when examining the implications of the provisions within the Land Tenure Law of Northern Nigeria,<sup>103</sup> which served as the precursor to the **Land Use Act.** Ezejiofor articulated.

*“The Law and its predecessors took away from the natives of Northern Nigeria proprietary rights to the lands which originally belonged to them and which they occupied and over which they exercised acts of ownership according to their native*

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<sup>101</sup> Williams, D.C Measuring the Impact of Land Reform Policy in Nigeria *The Journal of Modern African Studies*, 30, 4 (1992), pp. 587-608

<sup>102</sup> Smith I.O.: Sidelineing Orthodoxy In Quest For Reality: Towards An Efficient Legal Regime of Land Tenure in Nigeria. An Inaugural Lecture Delivered at the University of Lagos On Wednesday, 18th June 2008 University of Lagos Press, 2008 p 20-21

<sup>103</sup> Ezejiofor. G Constitutional Guarantee of Property Rights in Nigeria *Journal of African Law*, Vol. 18, No. 2 (Autumn, 1974), pp. 127-148.

*laws and customs. In place of their ownership titles, they got mere customary rights of occupancy-the right to occupy and use the land- which can be revoked by the Minister or a local authority for good cause and sometimes without payment of compensation for improvements on the land. At no time was any compensation paid to the natives of Northern Nigeria for this act of expropriation.”*<sup>104</sup>

#### **4.1.4 MY STAND**

As a result, I contend that the **Land Use Act** effectively nationalized all lands in favour of the state, while permitting private ownership of improvements made on the land. The position advocated by the private property rights school overlooks the significance of **Section 29, Subsections (1) and (4)**, which essentially transfer private beneficial interests in land to the state. These provisions stipulate that holders and occupiers are entitled to compensation for the value of their unexhausted improvements at the time of revocation of their right of occupancy. Compensation, according to **Subsection (1)**, is calculated based on the rent paid by the occupier during the year in which the right of occupancy was revoked. Consequently, the essence of this provision is that the beneficial value of land becomes vested in the state, as private rights to compensation for land are relinquished to the state.

However, it must be said that the majority of land in the country is located in rural non-urban areas and primarily held under deemed grants of customary rights of occupancy, with tenure often indeterminable and free from government restrictions, except for the requirement of the Governor's consent for alienation and revocation. Consequently, it could be argued that holders of these rights enjoy rights similar to ownership over the land in their possession. They pay no rents and have no official dealings with the government regarding land management. Even in

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<sup>104</sup> *Ibid*, p. 142.

instances where the land is compulsorily acquired by the state for overriding public purposes and subsequently allocated by the government, these communal land "owners" often demand repurchase or additional compensation before permitting any development on the land.

The indication of the possessive authority created by this "**Omo-Onile phenomenon**"<sup>105</sup> in land ownership disputes within Nigeria likely prompted the Lagos State government to enact legislation criminalizing land theft. Similar challenges arose during the Niger Delta militant movements and debates over resource control.

Hence, it is challenging to dismiss the fact that some semblance of ownership traits persists among citizens, particularly concerning land that is not subject to an actual grant of rights of occupancy. Given this context, it can be argued that the **Land Use Act** did not nationalize all lands in the state, except those lands vested in the federal government and its agencies. This viewpoint is reinforced by the fact that landowners, prior to the enactment of the Act, referred to as deemed grantees, are not compelled to convert to the new determinable interest of rights of occupancy by the Act, unless they choose to do so at their own risk. This interpretation finds support in the provisions of **Sections 36 and 48** of the Act, which afford deemed holders the discretion to decide whether to convert their holdings or retain their existing proprietary titles

#### **4.2 PRIVATE OWNERSHIP OF PERSONAL PROPERTY: ANALYSING THE SECURED TRANSACTIONS ON MOVABLE ASSETS (STMA) ACT IN NIGERIA.**

Over a century ago, **MacLeod** underscored the critical role of credit, likening it to the lifeblood of any economy.<sup>106</sup> Reflecting on MacLeod's insights, **Obama** reiterated the significance of

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<sup>105</sup> Rufus T Akinyele, 'Contesting for Space in an Urban Centre: The Omo Onile Syndrome in Lagos', *African Cities* (Brill 2009) <[https://brill.com/display/book/edcoll/9789047442486/Bej.9789004162648.i-308\\_007.xml](https://brill.com/display/book/edcoll/9789047442486/Bej.9789004162648.i-308_007.xml)> accessed 14 May 2024.

<sup>106</sup> MacLeod arguably is one of the few authors that have extensively commented on credit. Even though his work on credit is more than a century old, each paragraph remains highly relevant in today's world. See HD MacLeod *The Principles of Economical Philosophy* (1872) ch VIII.

credit during his address to the US Congress in 2008 amidst the financial downturn.<sup>107</sup> This underscores the vital role of credit in driving economic growth and development, particularly in facilitating business ventures and other economically significant endeavours. **In Nigeria, the lending landscape is primarily dominated by banks and financial institutions,** operating within a framework that necessitates interest rates to remain competitive. Consequently, the absence of collateral to secure loans poses risks not only to lenders but also to the broader economy, as **default by borrowers can precipitate financial crises, as witnessed during the 2008 global financial meltdown.**

The intrinsic value of security interests becomes evident in times of default or bankruptcy, as creditors with secured claims seek to recover their investments. Despite a debtor's initial intent to repay debts, bankruptcy fundamentally alters the dynamics, prompting secured creditors to assert their claims. This often leads to protracted legal battles, sometimes compounded by challenges in asset recovery, especially when debtors resort to transferring assets beyond the reach of creditors.<sup>108</sup>

Moreover, the absence of collateral requirements may raise suspicions regarding lenders' motives, potentially exposing borrowers to exploitative lending practices. Thus, **access to affordable credit is invariably linked to the availability of collateral to secure loans.** However, under the previous legal regime in Nigeria, the compartmentalization and obsolescence of laws governing secured credit hindered access to credit, particularly for individuals and small businesses lacking real property assets.<sup>109</sup>

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<sup>107</sup> See Barack Obama 'State of the Union address' 24 February 2009.

<sup>108</sup> See generally H Fleisig 'Secured transactions: The power of collateral' (1996) Finance and Development, <https://www.imf.org/external/pubs/ft/fandd/1996/06/pdf/fleisig.pdf>; U Drobnig 'Secured credit in international insolvency proceedings' (1998) 33 Texas International Law Journal 53.

<sup>109</sup> *Supra* n(19), Mike Ozekhome.

The emphasis on real property assets as collateral further exacerbated the challenges of accessing credit, as many individuals and SMEs lacked such assets or were unwilling to risk them. Consequently, the economy suffered from limited business growth and job creation opportunities.<sup>110</sup> Furthermore, the reliance on possessory security interests proved problematic, as **movable assets depreciate over time** and may not suffice to cover outstanding debts in the event of default.

The inherent shortcomings and gaps within the legal framework governing movable assets severely hindered individuals from effectively leveraging their ownership rights, profoundly impacting their ability to utilize these assets as collateral for various endeavours. A notable consequence of this inadequacy was the restricted access to credit, as institutions often demanded immovable assets as security, a criterion unattainable for many. Also, banking institutions tended to favour individuals of high social standing, extending non-performing loans with minimal collateral obligations. **However, this skewed allocation of resources often saw funds channelled towards political purposes rather than productive business, thereby exacerbating the dearth of enterprises capable of absorbing the burgeoning workforce.**

This is particularly true in contexts like Nigeria, and similar emerging economies where aspiring entrepreneurs sought to initiate ventures with modest capital, the requirement of affluent guarantors posed a formidable barrier.<sup>111</sup> The practicality of finding such guarantors, willing to underwrite loans without assured repayment, was minimal, significantly impeding the ease of conducting business activities.

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<sup>110</sup> *Ibid.*

<sup>111</sup> See P Wallace 'Nigeria's bad loans soar as banks battle slumping economy' Bloomberg 4 October 2016, <https://www.bloomberg.com/politics/articles/2017-06-09/how-may-ssure-thing-became-a-political-disaster-for-the-ages>.

Even in instances where movable assets were accepted as collateral, their possession by lenders introduced a host of complications. While possessory security interests aimed to circumvent issues of ambiguous ownership, they provided minimal protection to lenders, as movable assets depreciated over time, diminishing their value as repayment assurance. Moreover, certain assets, like perishable goods, were unsuitable for possession, further complicating the lender's recourse in the event of default.

The adverse effects of possessory security interests were not limited to lenders; debtors also faced significant challenges. The scenario of **lenders holding production assets** as collateral, while incurring maintenance costs, contradicted the very essence of collateral-backed lending. It defied commercial logic that debtors, lacking the means to leverage loans for profit generation, would be entangled in arrangements detrimental to their productive capacity and financial viability.

Before the STMA – which was primarily aimed at addressing these systemic flaws, there was an earlier effort to reform the secured transactions law through the **Central Bank of Nigeria's (CBN) Regulations on the Registration of Security Interest in Movable Property by Banks and other Financial Institutions in Nigeria**. This initiative sought to tackle the issue by eliminating possession as a means of perfecting security interests. However, lenders, driven by the need to mitigate risks and facing challenges with robust identification systems, persisted in demanding stringent collateral requirements. Additionally, unlike in England where regulations hold primary legislative status, in Nigeria, such regulations are considered secondary legislation and therefore cannot supersede the legal framework in place before the reform.<sup>112</sup>

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<sup>112</sup> For a critique of the pre-reform law in Nigeria, see W.C. Iheme, S.U. Mba, "Towards Reforming Nigeria's Secured Transactions Law: The Central Bank of Nigeria's Attempt through the Back Door", *Journal of African Law*, 2017, Issue 1, pp. 131-153.

Consequently, the prevailing lending environment was sometimes credit-unfriendly, perpetuating a cycle of constrained credit flow and stunting the growth of businesses essential for addressing the unemployment crisis in a nation with a population exceeding 180 million. More importantly, the prevailing lending practices diminished private individuals' ability to capitalize on their movable assets and their ownership rights with regards to said assets as granting credit facilities based on individual's movable properties were deemed risky.

In particular, shortsighted governmental credit policies regarding credit left a gaping void, particularly for **low-income individuals and small and medium-sized enterprises (SMEs) who harboured entrepreneurial ambitions**. These aspiring entrepreneurs found themselves thwarted, unable to translate their innovative ideas into viable businesses due to a lack of sufficient personal savings or assets, and the absence of affluent guarantors necessary for securing bank loans. Consequently, the absence of accessible credit rendered the populace exceedingly vulnerable, making some succumb to the allure of such get-rich-quick gambits as Ponzi schemes.<sup>113</sup>

In **2016**, as in the preceding years, Nigeria witnessed a deluge of such schemes offering extravagant returns ranging **from 50 to 80 per cent on investments**.<sup>114</sup> Fueled by tales of early investors' successes, many initially skeptical individuals withdrew their funds from traditional banking institutions, where interest rates stagnated as low as 5 per cent per annum, and transferred them to these attractive ventures.<sup>115</sup> In Recognition of the peril that such schemes posed to the stability of the banking sector and the broader economy, the Nigerian government

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<sup>113</sup> For a quick understanding of Ponzi schemes and how they function, see 'Ponzi schemes, US securities and exchange commission', <https://www.sec.gov/fast-answers/answersponzihtm.html>

<sup>114</sup> Even after sinking the savings of many Nigerians, the MMM Ponzi scheme remains operative, asking people to invest in it. See <http://mmm-nigeria.net/>.

<sup>115</sup> See <https://nigeria.deposits.org/> (accessed 11 May 2024).

intervened through media campaigns, urging the public to be wary of such fraudulent enterprises.

The inevitable collapse of these schemes during the Christmas season of 2016 resulted in catastrophic losses, with countless individuals robbed of their life savings, including funds entrusted to them by others. Drawing from global experiences, the ramifications of Ponzi scheme implosions extend beyond individual financial ruin to systemic economic collapse. The ensuing cascade of defaults stifles economic activity, disrupts consumption patterns, and engenders a climate of financial uncertainty, thereby impeding credit circulation and exacerbating socio-economic challenges.

Notwithstanding, the widespread devastation wrought by **Ponzi schemes**, many ordinary Nigerians who had invested in them harboured no regret. They perceived their actions as a response to the systemic failure of banks and financial institutions to extend credit facilities to aspiring entrepreneurs from low-income backgrounds. Indeed, the dearth of accessible credit facilities can catalyze a host of adverse outcomes, with the Ponzi scheme debacle serving as just one manifestation of this systemic failure. **Heightened crime rates, diminished life expectancy, and other socio-economic maladies** are among the potential consequences stemming from governmental inadequacies in ensuring equitable access to affordable credit within the market.

In essence, the narrative underscores how lacunae and deficiencies in laws pertaining to movable assets have eroded individuals' constitutional rights to utilize their property freely. By elucidating the nexus between restricted access to credit and the proliferation of Ponzi schemes, the discourse underscores the imperative of policy reforms aimed at bolstering financial

inclusivity and fortifying regulatory frameworks to safeguard against financial exploitation and systemic collapse.

The crux of the matter is the gaps and insufficiencies within the legal framework governing movable assets, which have impeded individuals from fully exercising their ownership rights. For instance, the **Chattel mortgage, once touted as Nigeria's closest approach to a non-possessory security interest regime**, allowed debtors to offer their legal title in chattels to lenders while retaining possession. However, the cumbersome requirement to register chattel mortgage transactions often outweighed the benefits, particularly for chattels of low value.<sup>116</sup> Failure to register posed a significant risk, potentially leading to the loss of title if the chattel were acquired by a bona fide purchaser without notice.

This can be illustrated by this scenario: Chukwu owns a book, Obot resides in a house, and Hadiza bears a notable surname. Now, if Oyeka receives the book as security for a loan granted to Chukwu and then sells it to John, a series of questions arise regarding the transfer, possession, and ownership of tangible property. Oyeka initially held the book on behalf of another (the loan's owner), but upon selling it to John, he took possession for himself. Despite possessing the book, Oyeka did not truly own it, as ownership entails possession with the right. So, does John now own the book after purchasing it from Oyeka? This inquiry delves into the

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<sup>116</sup> Further, given that registration was compulsory and a precondition for retaining priority in the event of conflict with another mortgagee or with a bona fide purchaser for value without notice, lenders could not accept certain types of property that were not of high value. They did not see any reason for assuming the burdensome task of registration for low-cost chattels. The negative result of this was that while chattel mortgage was aimed at utilising the debtor's personal property to secure a loan, the difficulty of registration, which caused lenders to demand high-valued chattels, automatically cut off a large number of individuals and SMEs that could not meet the provision of high-valued chattels. Omotola also shares the view that the Bills of Sale Act 'was impracticable and unrealistic in its expectation and implications, particularly on the effects of registration and the implied expectation that an acquirer of personal chattels ought to search the Bills of sale registry prior to acquisition in order to ascertain that such are free from encumbrancers. While this may be practicable for banks and other institutional lenders, etc, it may seem rather unrealistically cumbersome and excessive to expect an individual who wishes to acquire a second hand television, air conditioner or other such equipment to have to engage in searches at the Bills of Sale registry before he can conduct such a simple transaction at the risk of losing (sic) the item to a registered encumbrancer.' See J Omotola *The law of secured credit* (2006) 144.

complexities of private law, which vary across jurisdictions. However, it is widely understood that if the property is sold to a bona fide purchaser for value without notice, ownership is typically deemed to be vested in the purchaser, regardless of any preceding fraud.

It is thus evident that, due to inefficiencies in laws governing security transactions involving movable property and the absence of a unified register, individuals face inherent risks when using movable assets as collateral.

The consistent underperformance of Nigeria in the **World Bank Ease of Doing Business reports** is compelling evidence of the economic repercussions stemming from the outdated secured transactions law and the necessity for the **2017 reform**.<sup>117</sup> **Section 63** of the **STMA** purports to offer a comprehensive reform adopting the **unitary-functional approach** to secured transactions, amalgamating security devices and retention of title (ROT) mechanisms into a single security interest. However, it failed to explicitly repeal the **Hire Purchase Act 1968** and **Equipment Leasing Act 2015**, both ROT statutes.<sup>118</sup> ROT transactions, characterized by the absence of public registration, grant the legal title of collateral to the creditor, thus presenting a dualistic legal framework that poses challenges to credit accessibility.

#### **4.3 DOUBTS REGARDING THE ACT AND ITS LEGAL TRANSPLANTS**

Influenced primarily by the World Bank, the diffusion of secured transactions law, from the perspective of **Uniform Commercial Code (UCC) Article 9**, spans various legal systems worldwide, regardless of their common law or civil law orientation.<sup>119</sup> Objective research,

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<sup>117</sup> B. Igbinosun, "Security Interests in Personal Property and the Nigerian Secured Transactions in Movable Assets Act 2017: An Appraisal", *Journal of African Law*, 2020, Issue 3, pp. 357–371.

<sup>118</sup> In the US functional approach regime, ROT transactions are governed by the UCC Article 9. See P.W. Schroth, "Financial Leasing of Equipment in the Law of the United States", *American Journal of Comparative Law*, 2010, p. 323. For the European perspective on ROT, see R. Pennington, "Retention of Title of the Sale of Goods Under European Law" *International & Comparative Law Quarterly*, 1978, p. 277.

<sup>119</sup> A.A. Gikay, "Rethinking Ethiopian Secured Transactions Law Through Comparative Perspective: Lessons from the Uniform Commercial Code of the US", *Mizan Law Review*, 2017, Issue 1, pp. 153-197.

including the World Bank Ease of Doing Business reports, suggest that countries undergoing secured transactions law reforms experience economic enhancements compared to their pre-reform situations.<sup>120</sup> As Kenneth Dam notes, the positive impact of access to credit and secured transactions law reform extends to developing countries, including those in Africa where a majority have reformed their secured transactions legal frameworks.<sup>121</sup> Despite Nigeria's comprehensive reform aligning with **UCC Article 9** standards in 2017, its economic benefits remain arguably inconspicuous in practice, with economic laws and practices still resembling the pre-reform regime. The complexities surrounding the **STMA** may deter legal practitioners and the business community, possibly due to its departure from established norms. While recognizing that seven years since the enactment of the **STMA** in 2017 might not suffice to condemn it, ongoing law reform should remain a dynamic process, open to further amendments.<sup>122</sup>

In line with legal realism, this lecture identifies major defects overlooked during the **STMA** enactment, highlighting the risks associated with legal transplants. The cultural, social, and economic disparities between donor and recipient countries often result in incompatible legal frameworks, undermining the economic welfare of the latter. **Dahan** and **Simpson** argue that law reformers must consider the compatibility of proposed concepts with the local conditions of the recipient country to avoid detrimental effects. Hence, skepticism regarding the success of transplanted legal concepts is warranted, emphasizing the need for vigilant monitoring and adaptation post-reform.<sup>123</sup> This caveat underscores the necessity for Nigerian lawmakers to

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<sup>120</sup> The World Bank Ease of Doing Business Rankings, available at: <https://www.doingbusiness.org/en/rankings> [last accessed 11.5.2024].

<sup>121</sup> K.W. Dam, "Credit Markets, Creditors' Rights and Economic Development", John M. Olin Law & Economics, Working paper number 28, 2nd Series, 2006, p. 1.

<sup>122</sup> G. Esangbedo, "Secured Transactions in Moveable Assets Act, Company Charges and Funding Micro, Small and Medium Enterprises under Nigerian Law", *Journal of African Law*, 2020, Issue 1, pp. 81-105.

<sup>123</sup> F. Dahan, J. Simpson, *Legal Efficiency for Secured Transactions Reform: Bridging the Gap between Economic Analysis and Legal Reasoning*, in F. Dahan, J. Simpson (eds), *Secured Transactions Reform and Access to Credit*, Edward Elgar Publishing, 2008, p. 125.

continually evaluate the effectiveness of existing laws and address persisting issues, such as the reluctance of lenders to accept movable assets as collateral and the problem of 'ostensible ownership'<sup>124</sup> due to the absence of a collateral registry. Despite the absence of official impact assessments, this lecture conducts a doctrinal assessment of the **STMA**, scrutinizing its compatibility with Nigeria's local conditions and its alignment with **UCC Article 9** principles. This analysis underscores the rationale behind Nigeria's secured transactions law reform in 2017, encapsulated in **section 1** of the **STMA**.

In the 2008 case of *Ajayi v Osunuku and Others*, the Nigerian Court of Appeal reaffirmed the common law principle that “the basic rule of the temporal order of priority is modified by the maxims in stating that where equities are equal, the first in time ought to prevail; where however there exist both legal and equitable interests, in property, the former would supersede and take over priority over the latter.”<sup>125</sup> This underscores a significant aspect of English common law, which shares similarities with Nigerian law, in categorizing rights into legal and equitable rights, with the former generally considered superior to the latter.<sup>126</sup>

As already stated, the reform introduced by the **Secured Transactions in Movable Assets Act (STMA)** had been influenced by the philosophical underpinnings of the **Uniform Commercial Code (UCC) Article 9**, particularly regarding the unitary-functional approach to security interest rights. Unlike the English common law's dual categorization of rights, the **STMA** amalgamates legal and equitable rights into a single 'security interest.' **Section 63(1)** of the **STMA**, mirroring the **UCC Article 9**, establishes that any type of right, whether legal or

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<sup>124</sup> For instance, see the Fraudulent Conveyance Act of 1571, which is also a statute of general application in Nigeria since January 1 1900. Ostensible ownership was the major preoccupation of the court in the *Twyne's Case* [1601] 76 ER 809. Also see Polsky

*D. S & A Services* [1951] 1 All ER 185; R. M. Goode, *Commercial Law*, London: Penguin, 4th ed, 2010, pp. 643-645.

<sup>125</sup> (2008) LPELR-8332 (CA), pp. 35-36, paras D-F.

<sup>126</sup> *Ibid.*

equitable, can support the creation of a valid security agreement, provided that the borrower has a property right in the collateral and the secured creditor advances credit in exchange for an in-rem security interest in the borrower's collateral, perfected by registration.<sup>127</sup>

Under **section 23** of the **STMA**, the perfection and priority of a security interest in a borrower's asset are determined based on the time of registration at the **National Collateral Registry**<sup>128</sup>, rather than the time of creation. This approach mirrors a strand of **UCC Article 9**'s publicity rules.<sup>129</sup> This departure from traditional legal frameworks is highlighted by scholars such as **McCormack** and **Taji**, who contrast reformed and unreformed secured transactions laws.<sup>130</sup> In reformed regimes enacted through the framework of the **UCC Article 9**, **priority is determined by the order of registration or perfection, rather than the time of creation**, as seen in unreformed regimes.

However, **section 2(3)** of the **STMA** retains the operation of floating charges under the **Companies and Allied Matters Act 2020 (CAMA 2020)**<sup>131</sup>. A floating charge, as defined in **section 203 of CAMA 2020**, is an equitable security device that converts into a fixed charge upon crystallization triggered by a borrower's insolvency or default in repayment of debt. This

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<sup>127</sup> Refer to section 63(1) of the STMA, which defines a 'security interest' as "a property right in collateral that is established through agreement and serves to secure the fulfillment of an obligation, irrespective of whether the parties have explicitly labeled it as a security interest."

<sup>128</sup> Section 23 of the STMA stipulates that "The priority between perfected Security Interests in the same Collateral shall be determined by the order of registration."

<sup>129</sup> See J.J. White, R.S. Summers, Uniform Commercial Code, West, 6th ed., 2010, ch. 25, entitled 'Priority conflicts'; H. Kanda, S. Levmore, "Symposium on the Revision of Article 9 of the Uniform Commercial Code: Explaining Creditor Priorities", Virginia Law Review, 1994, pp. 2108-2151.

<sup>130</sup> G. McCormack, "Rewriting the English Law of Personal Property Securities and Article 9 of the US Uniform Commercial Code", Company Lawyer, 2003, p. 68; T. Taji, Comparative Secured Transactions, Akademia Kiado, 2002

<sup>131</sup> Refer to Section 203 of the Companies and Allied Matters Act.

retention of the legal and equitable rights classification contradicts the STMA's overarching approach of conflating both types of rights into a single security interest.<sup>132</sup>

The conflict between the **STMA** and **CAMA 2020** becomes evident in the treatment of floating charges. While on the one hand, the **CAMA 2020** maintains the traditional classification of legal and equitable rights, the former deemed superior<sup>133</sup>, the **STMA**, under **sections 63 and 23**, abolishes this categorization by merging both types of rights into a single security interest. This undermines the perfection and priority regime of the **STMA**, especially concerning the creation of floating charges by companies under section **2(3) STMA**.<sup>134</sup> The conflict between a **CAMA** floating charge and the after-acquired floating security right of **section 6(1)(b) STMA** is therefore obvious. While the **CAMA**-floating charge originates from English law, the latter has similarities with the US floating lien concept under **UCC Article 9-324**.<sup>135</sup> The functional equivalence of **UCC Article 9-324** with **section 6(1)(b) STMA** is highlighted by the “**first to file or perfect**” rule,<sup>136</sup> except for specific transactions like purchase money security interest (PMSI) under **section 27** and the perfection of documents of title and negotiable instruments under **section 31 STMA**.<sup>137</sup>

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<sup>132</sup> Section 203 and 204 of **CAMA**; G. Esangbedo, “Secured Transactions in Moveable Assets Act, Company Charges and Funding Micro, Small and Medium Enterprises under Nigerian Law”, *Journal of African Law*, 2020, Issue 1, pp. 81–105

<sup>133</sup> Section 202-205 **CAMA 2020**.

<sup>134</sup> L. Gullifer, “The Reforms of the Enterprise Act 2002 and the Floating Charge as a Security Device”, *Canadian Business Law Journal*, 2008, p. 399. The typical features of a proper law reform on movable assets have been highlighted by H. Beale, “An Outline of a Typical PPSA Scheme” in L. Gullifer, O. Akaeli (eds), *Secured Transactions Law Reform: Principles, Policies and Practice*, 2016, Hart Publishing, p. 7.

<sup>135</sup> See D.W. Carroll, “The Floating Lien and the Preference Challenge: Some Guidance from the English Floating Charge”, *Boston College Law Review*, 1967, p. 243,

<sup>136</sup> See V.M. Ngo, “Getting the Question Right on Floating Liens and Securitized Assets”, *Yale Journal on Regulation*, 2002, p. 85.

<sup>137</sup> **UCC Article 9-324** addresses the priority of purchase money security interests (PMSI). For further exploration of PMSI, refer to P. Shupack's work on “Defining Purchase Money Collateral” in the *Idaho Law Review* (1992) and K. Meyer's analysis in “A Primer on Purchase Money Security Interests under Revised Article 9” published in the *University of Kansas Law Review* (2001). It's worth noting that the super-priority of PMSI is expected to be confined to a borrower's inventories, as discussed by A. Schwartz in “A Theory of Loan Priorities” in the *Journal of Legal Studies* (1989), pages 250-254.

One of the apparent defects of the STMA is the contradiction between its **section 2(3)**<sup>138</sup> and **section 23**<sup>139</sup> provisions. While, according to **sections 203 and 204** of the **CAMA 2020** and established case law<sup>140</sup>, a floating charge confers an equitable interest until its crystallization, the **STMA** prioritizes registration under the first to register, first to perfect rule of **section 23**. This conflicts with the essence of a floating charge, which allows the borrower to use and dispose of assets in the ordinary course of business. Under the **STMA**, attachment of a security interest on a borrower's collateral must occur at the outset, whereas in a **CAMA**-floating charge, attachment to assets occurs only upon crystallization due to default or insolvency.

From the perspective of **sections 202-205** of the **CAMA 2020**, a registered floating charge remains equitable and does not normally have priority over a fixed charge until crystallization. However, the **STMA** determines the priority of such a registered floating charge based on the time of registration rather than attachment (crystallization), conflicting with the **CAMA 2020**.<sup>141</sup> This conflict may lead to litigation and can potentially disrupt settled rights in corporate insolvency. A temporary solution may be found in the **principle of statutory interpretation**, where a special statute (**CAMA 2020**) generally takes precedence over a general statute (**STMA**) concerning a particular subject matter (floating security in corporate borrower's assets).

Additionally, due to insufficient knowledge and limited access to electricity and the internet, electronic registration at the CBN National Collateral Registry is likely to remain inaccessible to many Nigerians, particularly those residing in rural areas, thereby undermining the intended

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<sup>138</sup> Section 2(3) STMA provides that "nothing in this Act shall prevent the creation of a security interest in the form of charges by companies registered under the Companies and Allied Matters Act"

<sup>139</sup> Section 23 STMA: "The priority between perfected Security Interests in the same Collateral shall be determined by the order of registration."

<sup>140</sup> For example, see *Illington v. Houldsworth* [1904] AC 355; *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710; *Re Spectrum Plus Ltd* [2005] UKHL 41, p. 106.

<sup>141</sup> *Supra* n(18), Mike Ozekhome.

goal of financial inclusion and the expansion of credit access outlined in section 1 of the STMA. Furthermore, the presence of multiple, yet unconnected collateral registries for movable assets in Nigeria continues to hinder affordable access to credit due to the persistence of undisclosed liens and the ostensible ownership issue. Despite the absence of an official impact assessment report on the effectiveness of the STMA in the lending sector, this lecture conducts a comparative analysis of its doctrinal framework. It contends that the STMA fails to accurately reflect Nigeria's local conditions and thus warrants amendment. Certain crucial elements of the unitary-functional approach were regrettably overlooked by the reformers, presumably due to an inadequate understanding of the source law, namely the UCC Article 9.

## **5.0 PROPOSED REFORM**

Nigeria, like many countries, grapples with complex issues in its private and property law framework. From challenges in land ownership to issues surrounding secured transactions on movable assets, there is a pressing need for comprehensive reform to address these issues effectively. A comprehensive reform of private and property law in Nigeria is essential to address the complexities and challenges facing the country. By **prioritizing inclusivity, compatibility with local conditions, and continuous evaluation**, Nigeria can foster a legal framework that promotes economic growth, protects individual rights, and advances the overall welfare of its citizens. Through collaborative efforts and adaptive strategies, Nigeria can pave the way for a more equitable and just society.

### **5.1 LAND OWNERSHIP AND THE LAND USE ACT**

The Land Use Act, enacted in 1978, has been a focal point of contention in Nigeria's land ownership landscape. While intended to provide a framework for land administration, its implementation has raised concerns about the balance between state control and individual

property rights. A comprehensive reform should involve revisiting the Act's provisions to ensure fair compensation for landowners affected by government acquisition and formalizing communal land ownership rights. By recognizing customary rights of occupancy and facilitating communal participation in land management, the reform can promote equitable access to land resources.

## **5.2 SECURED TRANSACTIONS ON MOVABLE ASSETS (STMA) ACT**

The STMA Act, introduced in 2017, aimed to facilitate access to credit by reforming the legal framework for secured transactions on movable assets. However, inconsistencies and conflicts with other laws, such as the Companies and Allied Matters Act 2020, have undermined its effectiveness. A comprehensive reform should address these inconsistencies, reconcile the treatment of security interests, and strengthen consumer protection measures. By enhancing accessibility, inclusivity, and fairness, the reform can promote responsible lending practices and empower vulnerable individuals and SMEs.

### **5.2.1 LEGAL TRANSPLANTS AND COMPATIBILITY WITH LOCAL CONDITIONS**

Legal transplants, borrowing legal concepts from foreign jurisdictions, have played a significant role in shaping Nigeria's legal framework. However, the compatibility of these concepts with local conditions is often overlooked. A comprehensive reform should involve conducting a thorough review of proposed legal reforms to assess their compatibility with Nigeria's cultural, social, political, and economic contexts. By promoting stakeholder engagement and consultation, the reform can ensure that legal reforms align with local norms and practices.

### **5.2.2 CONTINUOUS MONITORING AND EVALUATION**

Effective reform requires continuous monitoring and evaluation to assess its impact on the ground. By establishing mechanisms for ongoing feedback and evaluation, Nigeria can identify areas of success and areas needing further refinement. This iterative approach ensures that the legal framework remains responsive to evolving needs and challenges.

# **CONTEMPORARY ISSUES IN PRIVATE AND PROPERTY LAW IN NIGERIA WITH SPECIAL REFERENCE TO LAW ON LAND CONTROL AND COMPENSATION BY SIR C. I. ENWELUZO. SAN**

A PAPER PRESENTED DURING THE SECOND CONFERENCE OF THE DEPARTMENT OF PRIVATE AND PROPERTY LAW FACULTY OF LAW RIVERS STATE UNIVERSITY PORT HARCOURT.

## **1.0 INTRODUCTION:**

Originally, Land under customary law in Nigeria was the soil and the soil only.<sup>142</sup> However, section 18 of the Interpretation Act (CAP 123 Laws of the Federation of Nigeria 2004) defines land as "including any building and any other thing attached to the earth or permanently fastened to anything so attached, but does not include minerals". One may query, why exclude mineral resources from our conception of land. Are mineral resources for example gold, uranium, tin, limestone and above all petroleum products not a part and parcel of land?

Under the common law, however, land in its legal acceptance. "Land includes everything up to the sky and down to the centre of the earth..."<sup>143</sup>

This topic therefore is a legal trust on land control and compensation in Nigeria. In tackling this topic, we have to consider the interplay of statutes, regulations and customary practices in Nigeria. As of today, the Land Use Act of 1978 stands at the Cornerstone Legislation shaping the landscape of Land ownership, acquisition and compensation across the country.<sup>144</sup>

This paper accordingly aims to provide a detailed analysis of the legal framework surrounding land control and compensation in Nigeria, exploring the provisions of the Land Use Act, the customary land tenure systems, compensation mechanisms and the role of state-specific laws. It must be stated at the outset that there are various issues and challenges plaguing the legal framework, hindering effective land management.

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<sup>142</sup> See R. W. James, *Modern Land Law of Nigeria* (1973 — University of Ife (now Obafemi Awolowo University) press. Ile-Ife, P.14

<sup>143</sup> Macaulay, J. C. A. In the case of *Madam Adama Ibrahim V. Alhaji bappa Yola* (1986) 4

<sup>144</sup> CA (pt.1), 98 at p. 115 3 Land Use Act, Cap L5, Laws of the Federation of Nigeria, 2004

This paper explores the complexities surrounding land control and compensation laws in Nigeria, analysing the key issues and challenges faced as well as a proposing recommendation for reform and improvement.

## 2.0 HISTORICAL CONTEXT

To understand the complexities of land compensation in Nigeria, it is essential to examine its historical context.

### 2.1 PRE-COLONIAL ERA

Pre-colonial Nigeria operated under diverse land tenure systems, with customary practices governing land ownership and usage. During the pre-colonial era, the predominant land tenure system in Nigeria was the customary land tenure where ownership of land rested on the villages, towns, communities and families. Land during this period was deemed not owned by individuals but by communities and families in trust for all the family members. This position was emphasized by **Lord Haldane in the celebrated case of *Amodu Tijani v Secretary to the Government of Southern Nigeria*,<sup>145</sup>** where the learned Lord Haldane poignantly stated that:

**'land belongs to the community, the village or family, never to the individual'.**

The implication of this is that during the pre-colonial era, the legal estate in a land is vested in the family, or community as a unit and not to an individual. Consequently, individual members of the family or community had no such interest as fee simple absolute in possession as the absolute interest in the land was by custom vested in the community or family as a unit.<sup>146</sup>

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<sup>145</sup> (1921) 2 A. C, 399

<sup>146</sup> N.B. Udoekanem, D.O. Adoga and V.O. Onwumere "Land Ownership in Nigeria: Historical Development, Current Issues and Future Expectation" (2014) (4) (21) Journal of Environment and Earth Science, 183

According to Dosumu (1977) and Aniyom (1978), the customary land tenure in the areas comprising the Southern States of Nigeria before colonial rule was held in the following ways:

- (i) Communal Lands
- (ii) Stool or Chieftaincy lands
- (iii) Family lands

The community lands comprised lands in which the entire community has an individual or proprietary interest. Such community lands were supervised and administered by the chiefs and traditional rulers. The stool or chieftaincy lands were found mostly among the Yoruba and comprised the Oba's palace and the surrounding lands. The family lands were lands that were vested in the members of the family as a corporate group.

One may ask at this point, if a family or community owns land under the Customary Land Tenure System in Nigeria, can the family and/or community have the legal capacity to maintain an action in court against, say, a trespasser or even the government for wrongful acquisition of the land? The answer to this poser was given by the Court of Appeal, per Ejembi Eko J.C.A (as he then was) in ***S.P.D.C Ltd v Amadi* (2010) 13 NWLR (Pt. 1210) 82 at P. 124 - 125 paras E- A**, where he stated that:

"The learned senior counsel relying on this court's decision in *Nduka v. Ezenwaku* (2001) 6 NWLR [Pt. 7091494 and *Abu v. Ogli* (1995) 8 NWLR [Pt. 4131 353, further submitted that only a proper juristic person can sue or be sued and that "a family is not a person at law" and therefore cannot be represented in an action. I will pause a little to quickly point out that the case of *Abu v. Ogli* (supra) is not about a family under the Customary law. "Ojei G 'Ache Ign'll G'ondu" in that case is just a loose association of some Christian adherents. Suffice at this juncture to say that *Fewehinmi v. Nigerian Bar Association* (No. 2) (supra) recognize that by common law a party other than a natural person can acquire a legal person to sue or be sued. What then is the difference between the Common Law and the Customary Law, otherwise called native law and custom? If the common law can, in jurisprudence, give a party other than a natural person the persona to sue or be sued why not the customary law? It appears to be beyond

doubt now from the case of *Amodu Tijani v. Secretary of Southern Nigeria* (1921) 2 AC 399 or (1921) 3 NLR 56, *Sunmonu v. Disu Raphael* (1927) AC 881, *Adeyeye v. Adewoyin* (1963) 1 All NLR 421 that the Nigerian jurisprudence recognizes that in the customary law the family is vested with persona to own interest in land and by extension to alienate same by lease, pledge, sale etc. and also to sue or be sued in protection of the family interest in land. I should think the family under the Customary Law of any group in Nigeria is an entity with a legal persona.

Going further from the above authority is whether stool land is capable of acquisition or alienation. The cases of *Adedeji v. Olos*<sup>147</sup> and *Olusesi v. Oyelusi*<sup>148</sup> give an opposite answer to this very issue. In the case of *Olusesi v. Oyelusi* (supra), the Court of Appeal makes it *ex abundanti cautela* when it states:

"A "Royal Estate" or "stool land" connotes perpetuity of the estate or family land, as in the case of official lands or estates permanently attached to a chieftaincy head under native laws distinct from a family land of Chieftaincy family.

## 2.2 NIGERIA LAND SYSTEM DURING THE COLONIAL ERA

The advent of colonialism disrupted the traditional system of land ownership that existed before the coming of the colonial masters. With the advent of colonialism came English land laws, as European powers imposed their land tenure arrangements, often leading to the dispossession and marginalization of Indigenous communities. As a major factor of production, land was inevitably required by the colonial authorities to achieve their economic, social, and political objectives. The British merchants who came to the country purely on economic motives required land to establish their merchandise. The National African

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<sup>147</sup> (2207) 5 NWLR (Pt. 1026) 133 at P. 169 paras B-D.

<sup>148</sup> (1986) 3 NWLR (Pt. 31) 634.

Company and its successor, the Royal Niger Company required land to expand its business in Nigeria. The colonial governors also required land for public purposes. Because land ownership in pre-colonial Nigeria was communal, the colonial authorities, initiated laws and regulations governing land ownership, land use and development among others to enable them to acquire and convey titles to land for the purposes of commerce and governance.

The English law introduced many innovations into the Nigerian land law which include compulsory acquisition of land, the doctrine of estate: freehold, fee simple, fee tail, life estate, prescriptions, leases and tenancies. The Colonial masters equally introduced several laws and treaties, to aid their acquisition and control of land. Principal among these legislations was the Treaty of Cession (1861), Land Proclamation Ordinance (1900), Land and Native Rights Act (1916), Niger Lands Transfer Act (1916), Public Lands Acquisition Act (1917), Native Lands Acquisition Act (1917), State Lands Act (1918) and Town and Country Planning Act (1947).

The Treaty of Cession of 1861 became the principal of all the treaties signed by the colonialists with traditional chiefs in Nigeria. It has been argued that the legal effect of the cession of 1861 was that the root title of the land comprised in the Treaty was passed to the British crown<sup>149</sup>.

In 1900, the Land Proclamation Ordinance was enacted by Lord Lugard. The legislation disregarded the principles of native law and custom and provided that title to land could only be acquired through the High Commissioner. The Land Proclamation Ordinance was enacted to kill the institution of family and communal land ownership by facilitating the acquisition

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<sup>149</sup> T. O. Elias *Nigerian Land Law*, (4<sup>th</sup> edn, Sweet and Maxwell, 1971)

of title to land through the High Commissioner. The Land and Native Rights Act was enacted in 1916 to vest in the colonial Governor all rights over all native lands in Northern Nigeria.

Sections 3 and 4 of the said Act provided as follows:

"(3) All native lands and rights over the same are hereby declared to be under the control and subject to the disposition of the Governor, and shall be held and administered for the use and common benefit of the natives of Northern Nigeria and no title to the occupation and use of any such lands shall be valid without the consent of the Governor.

(4) The Governor, in exercise of the powers conferred upon him by his Proclamation with respect to any land, shall have regard to the native laws and customs existing in the district' in which such land is situated".

### **2.3 NIGERIA LAND SYSTEM NIGERIA CIVIL WAR PERIOD**

1. Confiscation of properties: During the war, properties were confiscated from individuals and communities, especially in the secessionist Biafran territories. Many people were displaced, and their properties were taken over by the government or occupied by other individuals.
2. Abandoned Properties: After the war, many properties were left abandoned, and the government took control of them. The Abandoned Properties Act was passed in 1979 to manage these properties.
3. Requisitioning of land: The government requisitioned land for military purposes, such as building barracks, airports, and other military infrastructure.

4. Displacement and resettlement: The war led to massive displacement, and many people were resettled in new areas, often on land that was previously owned by others.
5. Land reform: The government attempted to reform land ownership and use, leading to conflicts with traditional landowners and communities.
6. Compensation and restitution: Efforts were made to compensate and restitute properties to their original owners, but this process was often slow and incomplete.

These factors significantly impacted land ownership in Nigeria during and after the Civil War, leading to ongoing disputes, conflicts, and challenges in the country's land administration system.

### **3.0 EXTANT LAW ON LAND CONTROL AND COMPENSATION IN NIGERIA**

#### **3.1 THE LAND USE ACT**

As it is today, the Land Use Act stands as the cornerstone Legislation of land control and compensation in Nigeria.

This is a truism because section I of the said Act vests control of land on the state Governor. It provides that from the commencement of this Act:

...all lands comprised in the territory of each state in the federation is hereby vested in the Governor of the State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act. "

Furthermore, the Land Use Act made provisions on the control and management of land in section 2 (1) of the Act which provides thus:

"(1) As from the commencement of this Act-

- (a) all land in urban areas shall be under the control and management of the Governor of each State; and
- (b) all other lands shall, subject to this Act, shall be under the control and management of the local government within the area of jurisdiction of which the land is situated. "

Part of the control and management responsibility saddled with the State Governor is that of designation of the parts of the area of the territory of the State constituting land as an urban area. See Section 3 of the Land Use Act.

The manner and extent to which the Governor exercises his power of control and management is encapsulated in Section 5 (1) of the Land Use Act. The section under reference provides that the Governor in respect of land, whether or not in an urban area shall have the powers to:

- "(a) grant statutory rights of occupancy to any person for all purposes;
- (b) grant easements appurtenant to statutory rights of occupancy;
- (c) demand rental for any such land granted to any person;
- (d) revise the said rental-
  - (i) at such intervals as may be specified in the certificate of occupancy; or
  - (ii) where no intervals are specified in the certificate of occupancy at any time during the term of the statutory right of occupancy;
- (e) impose a penal rent for a breach of any covenant in a certificate of occupancy requiring the holder to develop or effect improvements

on the land, the subject of the certificate of occupancy, and to revise such penal rent as provided in section 19 of this Act;

- (f) impose a penal rent for a breach of any condition, express or implied, which precludes the holder of a statutory right of occupancy from alienating the right of occupancy or any part thereof by sale, mortgage, transfer of possession, sub-lease or bequest or otherwise howsoever without the prior consent of the Governor;
- (g) waive wholly or partially, except as otherwise prescribed, all or any of the covenants or conditions to which a statutory right of occupancy is subject where, owing to special circumstances, compliance therewith would be impossible or great hardship would be imposed upon the holder;
- (h) extend except as otherwise prescribed, the time to the holder of a statutory right of occupancy for performing any of the conditions of the right of occupancy upon such terms and conditions as he may think fit."

All land in urban areas was designated to be under the control and management of the Governor of each state, all other land in rural areas was delegated to the management of the Local Government within the area of designation in which the land is located.

Section 5 (l) (a) of the Land Use Act empowers the Governor of a state in respect of land whether or not in an urban area to grant the right of occupancy to any person for all purposes.

A statutory right of occupancy automatically extinguishes all existing rights in respect of the parcel of land over which it is granted<sup>150</sup>.

Is this the reality in Nigeria today? It is not. Handing down the unanimous decision of the **Court of Appeal, per Orji-Abadua, J.C.A. (of blessed memory) in *Edohoeket v. Inyang* ((2010) 10 NWLR (Pt. 1092) 25 at p. 43. paras. A — C held as follows:**

"Where a Certificate of Occupancy has been granted to one or two claimants who have not proved a better title, it must be deemed to be defective, of no validity and to have been granted or issued erroneously and against the spirit of the Land Use Act and the holder of such a certificate would have no legal basis of a valid claim over the land in issue. Therefore, where it is shown by evidence that another person other than the grantee of the Certificate of Occupancy had a better right to the grant, the court may have no option, but to set aside the grant or otherwise discountenance it as invalid, defective and for being spurious".

see also the cases of ***Olohinde v. Adeyoiu* (2010) 10 NWLR (Pt. 676) 562.**

In fact, the Supreme Court of Nigeria hit the nail on the head in these two recent decisions of the Court.

First is the case of ***BAC Electrical Co. Limited v. Adesina* (2000) 14 NWLR (Pt. 1745) 548 at Pp. 569-570, paras F-A: 572-573, paras II-A** where it was held that:

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<sup>150</sup> See *Olagunju v. Adeseye* (2009) 9 NWLR (Pt. 1146) 225

"Certificate of occupancy is only Prima facie evidence of title or exclusive possession of the land it covers and no more. It does not ipso facto convey the title nor revoke and take away an existing title. Once it is shown that someone else has a better title over the land before the issuance of the certificate of occupancy, the court would readily revoke the certificate of occupancy. Thus, where a right of occupancy is purportedly granted to one person over a piece of land that another person has a valid and subsisting rival or competing customary right of occupancy that has not been previously revoked or extinguished, the right of occupancy is incompetent, invalid and a nullity. "

Secondly in ***Omiyale v. Macaulay & ors* (2009) LPELR 2640 sq 2009 7 NWLR (Pt. 1141)**

**597.** the Supreme Court held:

“...It is also formally settled that where it is shown by evidence that another person other than the grantee of a Certificate of Occupancy had a better right to the grant, a court such as this court may have no option but to set aside the said grant or otherwise, discountenance it as invalid, defective and/or spurious.”

The above notwithstanding, there are other roles the Governor performs under the Land Use Act.

By virtue of section 5(1) (f) of the Act, the governor can impose penal rent for breach of any condition express or implied, where the land is covered by the statutory right of occupancy granted by the governor. The implication of the provision is that rights of occupancy not statutorily granted under section 5(1) are excluded from the application of the provisions. In

essence, the governor is principally interested in the control and management of lands statutorily granted by him.

It is also to be noted that in granting the right of occupancy, the governor, by the provision of section 14 of the Act, holds possession concurrently with the occupier. Furthermore, section 11 of the Act gives the governor or any public officer duly authorized by him the power to enter and inspect the land comprised in any statutory right of occupancy or any improvements effected thereupon at any reasonable hour in the daytime.

It is evident from the express provision of section 14 of the Act that action in trespass is not maintainable against the governor or his duly authorized officer for such entry because the occupier's possession is not exclusive of the governor's.<sup>151</sup> It is thus obvious that the power of the governor over the management and control of land varies depending on whether the land is covered by the statutory right of occupancy or not, and whether the land is subject to certificate of occupancy or not. This dichotomy, which breeds vagaries in land administration in Nigeria, has great implications for landholders, land administration and property market development.

### ***3.1.1 POWER TO REVOKE RIGHT OF OCCUPANCY***

In the administration of the Act, the governor is empowered to revoke the granted right of occupancy in deserving cases as stipulated by the Act.<sup>152</sup> The power of revocation is exercisable irrespective of whether the land is in the urban area, directly under the governor, or non-urban lands, under the control of the local governments. It is also of no moment that

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<sup>151</sup>*Akpan Sam Adua v Akpan Akpan Udo Udo Essien* [2010] 8 ALL FWLR (pt. 535) 361 where the Court of Appeal held that "for a plaintiff to commence an action in trespass, he must show that he is in exclusive possession: exclusive possession in the sense that he does not share his right of possession with any other person. He need not show ownership of the land: proof of actual possession can sustain an action in trespass". 51 Land Use Act 1978, s 28.

<sup>152</sup> Land Use Act 1978, s 28.

the right of occupancy is actual or deemed granted. The governor's power in this respect is exercisable where the land is required for overriding public interest/public purposes or where the revocation results from the exercise of the penal powers of the governor under the Act.

**The need for the distinction between the two revocation powers of the governor is premised on the fact that whilst compensation is payable for revocation for overriding public interest/public purposes, there is no compensation for penal revocations.** Also, whilst revocation for overriding public interest/public purposes impacts all landholders/occupiers, penal revocation affects only rights of occupancy granted by the governor or evidenced by a certificate of occupancy. The exercise and instances of the two powers are further discussed below.

### **Revocation for Overriding Public Interest/Public Purposes**

By the provisions of Section 28(2) (a-c), Overriding public interest in the case of a statutory right of occupancy means:

- "(a) the alienation by the occupier, by assignment, mortgage, transfer of possession, sublease or otherwise of any right of occupancy or part thereof contrary to the provisions of the Land Use Act or any regulations made there under
- (b) the requirement of the land by the Government of the state or by a Local Government in the state in either case for public purposes within the state or the requirement of the land by the Government of the Federation for public purposes of the Federation
- (c) the requirement of the land for mining purposes or oil pipelines or any purpose connected with it"

### **3.1.2 POWER OF REVOCATION AND COMPULSORY ACQUISITION OF EXISTING RIGHT OF OCCUPANCY WHETHER DEEMED OR STATUTORY**

However, despite the very bogus provisions in the Land Use Act, the Governor cannot in practical reality just revoke or compulsorily acquire a piece or parcel of land at his whims and caprices. Certain procedures must be followed, the failure of which will have attendant legal consequences. This is because:

“A plea of revocation involves acknowledgement of the existence of the right of occupancy prior to the act of revocation. The burden to plead and prove valid revocation of the right of occupancy therefore rests on the party alleging such revocation ...”<sup>153</sup>

Revocation is not automatic. Notice of revocation must be addressed and served on the holder of the land before the revocation of his right of occupancy. See sections 28(6) and (7) of the Land Use Act.

The Supreme Court of Nigeria has interpreted the provisions of section 28(6) and (7) of the Land Use Act, to mean, inter alia, that notice of revocation is required to be given to the holder of a right of occupancy. See the case of *Nigerian Engineering Works Ltd v. Denap Ltd. (2001) 18 N.W.L.R. (Pt. 746) 726, on page 757, paragraph F*, which reads:

"By the provisions of s.28(6) and (7) of the Land Use Act, notice must be given to the holder before the revocation of his right of occupancy and the

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<sup>153</sup> Nigerian Engineering Works Limited V. Denap Limited & anor (1997) 10 NWLR (Pt. 746) 481, page 526, paras B-C

service of the notice must be in accordance with the provisions of section 44 of the said Act".

The word "holder" was statutorily defined in section 51 (1) of the Land Use Act, supra, as follows:

"holder" in relation to a right of occupancy, means a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validity passed on the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgage, sub-lessee or sub-under lessee".

Explaining the definition of "holder", the Court of Appeal, in the case of ***Attorney General Of Lagos State & Anor v. John Babafemi Sowande*** (1992) 8 N.W.L.R. (Pt. 261) 589, on page 601, paragraphs B to C, per TOBI, J.C.A., as he then was, delivering the leading judgment, said:

"So much is involved in the definition. In the first limb, a holder is a person who by virtue of his previous ownership of the land before 1978 when the Land Use Act was promulgated, is entitled to a right of occupancy. In the second limb, a holder is a person to whom a right of occupancy has been validly assigned. In the third limb, a holder is a person to whom a right of occupancy had validly passed on the death of the original holder"

In the case of *Samuel Ononuju & Anor. v. Attorney-General Anambra State & 2 Ors* (2009) 10 N.W.L.R. (Pt. 1148) 182, it was held by the Supreme Court of Nigeria (per ONNOGHEN, J.S.C.) on page 221, paragraph A, thus:-

"It is settled law that revocation of a right of occupancy can only be valid if notice of same has been issued and served on the owner or occupier of the property concerned. "

From this decision, two things are very clear. The first is that the notice of revocation must be "issued" to the owner or occupier of the property concerned. Secondly, such notice must be served on the owner or occupier of the property concerned. The use of the word "and" in the portion of the Supreme Court decision quoted above, is unarguably, conjunctive and not disjunctive. See *Chief Sunday Ogunyade v. Solomon Oluyemi Oshunkeye & Anor* (2007) 15 N.L.W.R. (Pt. 1057) 218, on page 245, paras. E to G. per TOBI. J.S.C., thus:

"In grammar or syntax, a sentence does not end with the word "and". It is a conjunction playing the role in the grammatical construction of connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first".

The notice must not only be given to the holder before the revocation of his right of occupancy but it must also be served in accordance with the provisions of section 44 of the Act.

It is clear from the Supreme Court decision in *Nigerian Engineering Works Ltd v. Denap Ltd & Anor.* **supra**. It is not sufficient to prove that a holder of a right of occupancy was served with a notice of revocation. It must also be proved that the service of the notice was in accordance with the provisions of section 44 of the Land Use Act. Section 44 of the Land Use Act is entitled SERVICE OF NOTICES and provides as follows:

"Any notice required by the Act to be served on any person shall be effectively served on him:

- (a) By delivering it to the person on whom it is to be served; or
- (b) by leaving it at the usual or last known place of abode of that person; or (c) by sending it in a prepaid registered letter addressed to that person at his usual or last known place of abode; or
- (d) In the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at its registered or principal office or sending it in a prepaid registered letter addressed to the secretary or clerk of the company or body at that office; or
- (e) If it is not practicable after reasonable inquiry to ascertain the name or address of a holder or occupier of land on whom it should be served, by addressing it to him by the description of "holder" or "occupier" of the premises (naming them) to which it relates, and by delivering it to some person on the premises or, if there is no person on the premises to whom it can be delivered, by affixing it, or a copy of it, to some conspicuous part of the premises".

**There must also be notice of intention to acquire the land served on the holder.** It is the law that notice of intention to acquire land, as distinct from notice of revocation must be served on the holder of a right of occupancy before the compulsory acquisition would be valid. See, firstly, the decision of the apex court in *Nigerian Engineering Works Ltd v. Denap Ltd & Anor* (supra) on page 758. paragraphs A to B, where it was held, thus:-

"Any holder of a right of occupancy, whether evidenced or yet to be evidenced by a certificate of occupancy, holds that right as long as it is not revoked. Revocation in this instant is that one done in accordance with the law. Nobody will lose his right of occupancy by revocation without his being notified first in writing and the subsequent revocation must also be notified to him in writing. Any other method may be a mere declaration of intent. It will never be a notice of revocation. It will be a nullity."

From this decision, two notifications are required. The first notification is an intention to acquire. The second notification is the subsequent revocation.

To drive home the point and show, beyond doubt, that the law requires service of notice of intention to acquire land on the holder of the right of occupancy (such as Plaintiff in this case), reference is respectfully, made to the decision of the Supreme Court of Nigeria in ***The Attorney-General of Bendel State & 2 Ors. v Aideyan (1989) 4 N.W.L.R (Pt. 118) 646. On page 674. paragraphs G to H,*** Where it was held that there must be personal service on the land owner of notice of intention to acquire property and that such requirement is a rule of substance, a breach of which is capable of rendering nugatory a person's right to property and right to a fair hearing.

In ***Provost Lagos State College Of Education & Ors. v. Dr. Kolawale Edun & Ors (2004) 6 N.W.L.R. (Pt. 870) 476, on pages 508 to 509, paragraphs II to A,*** it was held by the Supreme Court of Nigeria that where an acquiring authority seeks to acquire private property before the private property is acquired, the acquiring authority must give notice of intention to acquire the property before publishing same in the gazette. It was also held in that case that where a statute specifically provides for a particular way by which the Government or any

party can obtain title, the Government or the party can only acquire title by strict compliance with the statute. See page 506, paragraph H of the report.

**The holder must also be given a hearing so as to express his view about the acquisition.**

The law is well settled that the Plaintiff whose right of occupancy was allegedly revoked by the 4th Defendant is entitled to be heard as enshrined in section 36 of the Constitution of the Federal Republic of Nigeria, 1999, as amended, before the revocation can be valid.

In the case of *The Attorney-General of Bendel State & 2 Ors. v Aideyan* (1989) 4 N.W.L.R. (pt. 118) 646, on page 674. Paragraphs B to C, the Supreme Court held that as right of property is a fundamental right under section 40 of the Constitution of the Federal Republic of Nigeria, 1979 (equivalent to section 43 of the Constitution of the Federal of Nigeria, 1999, as amended), the land owner is entitled to exercise his right to fair hearing by making representations to the acquiring authority against the compulsory acquisition, or claim compensation therefore, or appeal or petition against it.

In the *University of Nigeria Teaching Hospital Management Board & Anor. v. Hope Ciiinyelu Innoli* (1994) 8 N.W.L.R. (Pt. 363) 376 on page 419, paragraph G, it was held that it is settled in common law countries including Nigeria that no decision involving the process of revocation of a person's right of occupancy over land can be valid without a notice and hearing given to him.

See also the case of *Oba Jacob Oyeyipo v. Oyinloye* (1987) 1 N.W.L.R (Pt. 50) 356: *IKA Local Govt. Area v. Augustine Mba* (2007) 12 N.W.L.R.

(Pt. 1049) 676, on page 705. paragraphs D to G.

**ON PAYMENT OF COMPENSATION**

In the case of **Alhaji Dantiri A. Zango v. Military Governor of Kano State & Anor.** (1986) 2 N.W.L.R. (PT. 22) 409 at Page 415, paragraph D. The Court of Appeal (per **AKPATA. J. C. A.**) held thus: -

"The true position is that compensation is claimed by a Plaintiff in the alternative should the court find the acquisition or revocation valid. Compensation in the strict sense and in the sense it is used in the Land Use Act, unlike damages (special and general), is only payable where the acquisition or revocation is valid."

#### **QUANTUM OF COMPENSATION.**

Under the public land acquisition law applicable in each of the regions of Nigeria before the civil war, the following items of claims were considered and payable as compensation for the acquisition of Land for it to be considered as being fair and adequate:

- i. Payment of all consequences of eviction from the said land
- ii. Legal cost of purchase of comparable property
- iii. Loss of special rent
- iv. Increased rental and other outgoings
- v. Cost of forced sale and diminution of nature resulting therefrom
- vi. Loss of goodwill
- vii. Loss of profit during re-establishment

This is because the law, as it were, recognized the fact that private selfishness must give way to public interest. However, the person whose land is taken as a result of public interest must be paid compensation for his said Land and adequately too.

Unfortunately, the Land Use Act raises its ugly head on the issue of compensation thereby voiding the provisions of the Constitution of the Federal Republic of Nigeria, 1999 as amended. Of course, the problem itself is from the Constitution which gives that ugly leverage to the Land Use Act. This will be seen hereunder.

Compensation means recompense for loss, deprivation or injury suffered. Section 44(I) of our constitution provides that:

"No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed for a law that, among other things-

(a.) requires the prompt payment of compensation therefore and

(b.) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria."

Contrary to this provision of the 1999 Constitution, section 29 of the Land Use Act which makes provisions relating to the payment of compensation to a holder provides as follows:

"(1.) If a right of occupancy is revoked for the cause set out in paragraph (b) of subsection (2) of section 28 of this Act ..... the holder and the occupier ***shall be entitled to compensation for the value at the unexhausted improvements.***" See also (2), (3), and (4) of Section 29 of the land use act.

In simpler terms, where land is required by the government of the state or local government or government of the federation for public purposes, compensation has to be the value at the date of revocation of their unexhausted improvements.

From this provision, it should be noted that the Land Use Act limits payments of compensation to unexhausted improvements on the land only. In other words, owners of bare lands are not entitled to compensation. We submit that the provisions of the Land Use Act which limits the payment of compensation to improvements on lands only, are repugnant to natural justice, equity and good conscience and above all, unconstitutional.

### **WHO DOES THE CALCULATION OF WHAT SHOULD BE PAID AS COMPENSATION?**

The compensation payable above is to be assessed based on the prescribed method of assessment as determined by the appropriate officer. Who is this appropriate officer? Who can appoint this appropriate officer? Is he a member of the Land Use and Allocation Committee? What are his qualifications? Can this assessment by the appropriate officer not be challenged? Can this appropriate officer accurately and fairly assess the quantum of compensation to be allocated to land occupiers?

These posers will take us to the provisions of Section 2(2) of the Land Use Act which established in each state a body to be known as the Land Use and Allocation Committee which shall have responsibility for---

- (a.) advising the governor on any matter connected with the management of the land to which land in urban areas relates (section) (a).
- (b.) advising the governor on any matter connected with the resettlement of persons affected by the revocation of rights of occupancy on the ground of overriding public interest under this act; and
- (c.) determine disputes as to the amount of compensation payable under this act for improvements on land.

It is important to state here that the Land Use and Allocation Committee have been vested with enormous powers which run contrary to the provisions of Section 44(1) of our Constitution. The said section 44(1) categorically empowers any person claiming compensation a right of access to a court of law or tribunal or body having jurisdiction. In other words, a court of law should not be excluded as a resort for any aggrieved individual who feels that the compensation due to him is inadequate.

It will also not be out of place to refer to Section 36 (1) of the Constitution which stipulates a person's right to fair hearing in the following words:

'In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law.... '

If we have these fair and just provisions of the Constitution which is applicable in every case in Nigeria, whether civil or criminal, why does Section 30 of the Land Use Act say that:

'where there arises any dispute as to the amount of compensation calculated in accordance with the provisions of section 29 of this act, such dispute shall be referred to the appropriate land use and allocation committee.' ?

Why should the Land Use and Allocation Committee which advises the governor on the matter connected with the resettlement of persons affected by the revocation of rights of occupancy also be the same committee that will determine disputes arising from the amount of compensation?

As if that is not enough disregard for fairness, equity and fair play, Section 47 of the Land Use Act provides thus:

"(1.) This act shall have notwithstanding anything to the contrary in any law or rule of law including the constitution of the Federal Republic of Nigeria and, without prejudice to the generality of the foregoing, no court shall have jurisdiction to inquire into

- (a.) any question concerning or pertaining to the vesting of all lands in the governor in accordance with the provisions of this Act; or
- (b.) any question concerning or pertaining to the right of the governor to grant a statutory right of occupancy in accordance with the provisions of this Act; or
- (c.) any question concerning or pertaining to the right of a local government to grant a customary right of occupancy under this Act.

(2.) No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act."

In my humble but considered opinion, this is a dictatorial provision that has ousted the jurisdiction of our courts and has also whittled down the potency of our hallowed courts of law. The Land Use Act has by its provisions assumed superiority over the provisions of the Constitution and believes that it is not subject to any charge, inquiries and is not answerable to any powers, laws or courts, including our Constitution.

On the other hand, the Land Use Act was audacious enough to be dictatorial because the Constitution has given it a 'blank cheque', a 'free hand' to continue implementing its provisions.

The above assertion can be confirmed by section 315(5) of our Constitution which provides that '**Nothing in this constitution shall invalidate the following enactments, that is to say-**

(d.) the Land Use Act... and the provisions of those enactments shall continue to apply and have full effect in accordance with their tenor and to the like extent of any other provisions forming part of this constitution and shall not be altered or repealed except in accordance with the provisions of section 9(2) of this constitution.

Section 13 of our Constitution which spells out fundamental objectives and directive principles of state policy has provided that it shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of the Constitution.

What a dilemma! All these contradictions between our Constitution and the Land Use Act have negative effects on the people and land owners because there is no law that favours them where they are aggrieved.

Nigeria is not ready to move forward and adopt the best practices which are seen in other saner climes. For example, in Norway, the Act that governs land acquisition recognizes the expropriation Court whose main task is to calculate compensation in accordance with the 'Expropriation Compensation Law'. This procedure follows normal court standards with lawyers on both sides and the Court's decision can be appealed to higher Courts.

In Ghana, Article 20 (1) of their 1992 Constitution and Section 125 of the State Land Act of 1962 also seem to agree on the right of owners of land to approach the courts in the event of a disagreement over the amount to be paid as compensation. Article 20 (1) of the said Constitution provides that:

"No property of any description or interest in or right over any property shall be compulsorily taken possession of or acquired by the state unless the following conditions are satisfied: a. The taking possession of acquisition is necessary in the interest of defense, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and b. The necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property. "

**Article 20 (2)** of the same Constitution states that compulsory acquisition of property by the state shall only be made under a law which makes provision for:

- i. The prompt payment of fair and adequate compensation;
- ii. A right of access to the High Court by any person who has an interest in or right over the property whether direct or on appeal from any other authority, for the determination of his interest or right and the amount of compensation to which he is entitled.

We can see from this article that the practice adopted in Ghana did not appoint any tribunal or anybody appointed by the governor, it only recognizes the high court as it should be.

Even in Kenya, Section 22 of the Kenyan Land Acquisition Act provides for the establishment of a Land Acquisition Compensation Tribunal (LAC T) which consists of five members including an advocate as chairman and two valuers as members to determine appeals against compensation awards.

When you juxtapose the entire provisions and policies from other Nations of the world as revealed above, we can see that the Land Use Act of Nigeria is obnoxious, and undemocratic (because it was not made for the benefit of the people). The 'democratic' system in Nigeria is put into question by the provisions of our Land Use Act.

In the book, 'Land Reform, Experience from Nigeria: Promoting Land Administration And Good Governance, Olayiwola, L.M & Adeleye O. A. summarized the controversies and deficiencies of the Land Use Act in the following words:

'In the course of these years, it has become clear that due to its implementation, not its structure or intendment, the objectives for which the Land Use Act was promulgated have largely remained unfulfilled; indeed, they have been distorted, abused and seriously undermined. The lofty hope in the second stanza of the preamble that the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them provide for the sustenance of themselves and their families be assured, protected and preserved or in section I "that all land be held in trust and administered for the use and common benefit of all Nigerians" has been nothing but a forlorn hope, a pipe dream. '

#### **4.0 RECOMMENDATIONS:**

1. The Land Use Act has been in force since 1978 and there should be a liberalization of its provisions to meet the best global practices adopted in advanced countries. In other words, the Land Use Act should be amended to acknowledge the supremacy of the Courts over the Land Use and Allocation Committee and any other body appointed by the Governor. The people should not be coerced into unfair negotiation with the state with respect to the amount of compensation payable. The Land Use and Allocation Committee cannot oust the

jurisdiction of our Courts. There should be an established tribunal constituted of qualified lawyers estate valuers and any other relevant professionals that will sit as a 'court of first instance' to hear any dispute as to the amount of compensation. Thereafter, citizens who are dissatisfied with the compensation award can seek redress in any High Court.

2. The compensation payable in the instances provided for in Sections 28 and 29 should not be subject to any calculations or assessment by an 'appropriate officer' as shown in Section 29 of the Land Use Act. The recurring problem we face in our society today is the quantum of compensation which ought to be paid and not the land acquisition itself. This is why I will recommend that there should be laws laid down that will guide us in the payment of compensation. Rather than compensation to be assessed and determined by a Land Use and Allocation Committee or with an amount convenient for the governor, there should be law setting out what amount of compensation is payable to the land occupiers. This compensation law can also form part of the subsidiary legislation of the Land Use Act.

Where there are clear and simple laws reduced into writing and accessible to the society at large, we will have little or no disputes with respect to payment of compensation. The open market value of the land or unexhausted improvements on the land as of the date of revocation of rights of occupancy should not be negotiable.

3. Who determines this open market value of the land or unexhausted improvements? Our Land Use Act should make provisions for qualified and competent estate valuers, surveyors and other professionals whose sole responsibility would be to determine the accurate value of the land sought to be acquired and this value ascertained will form part of the compensation laws. We also recommend that these estate valuers should be officers of the Ministry of Lands and Survey who have been in the civil service and assessment should be based on the prevailing market value at the time of revocation.

4. Section 2(1)(b) of the Land Use Act has provided that all other land shall, subject to this Act, be under the control and management of the Local Government within the area of jurisdiction of which the land is situated. In practice and reality, do these local governments even have control and management over the lands within their jurisdiction?

The local government should enjoy autonomy over the lands within their area of jurisdiction and the Governor should not impose authority over the local government without genuine or cogent overriding public interest.

5. Section 47(2) of the Land Use Act should be expunged as it does not conform with the provisions of Section 44(1)(b) of our Constitution which gives opportunity to any person claiming compensation a right of access for the determination of his interest in the property and the amount of compensation to a Court of law.

In the case of *Controller General of Prisons & Ors v. Elema & Anor* (2021) LPELR-56219(SC, EMMANUEL AKOMAYE AGIM, JSC (Pp 25 27 Paras C - B) speaking on whether Section 47(2) of the Land Use Act is inconsistent with the Constitution of the Federal Republic of Nigeria emphatically held thus:

"Section 47(2) which provides that "No Court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act" is in conflict with Section 40(1) of the 1979 Constitution the same with Section 44(1) of the 1999 Constitution) that provides that: "No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things - (a) requires the prompt payment of compensation therefore; and (b) gives, to any person claiming such compensation right of access for the determination of his interest in the property and the

amount of compensation to a Court of law or tribunal or body having jurisdiction in that part of Nigeria." Section 40(1)(b) of the 1979 Constitution gave to a person whose property is compulsorily acquired and who has not paid compensation or adequate compensation for the said property, the right of access to a Court for the determination of the amount of compensation due to him or her. Section 47(2) of the Land Use Act by ousting the jurisdiction of the Court to inquire into questions concerning the amount or adequacy of compensation paid or to be paid, deprives the person whose property is compulsorily acquired the right of access to a Court for the determination of the amount of compensation due to him or her, which right is given to him or her by Section 40 (1) (b) of the 1979 Constitution. By taking away the right of access to the Court to determine the amount of compensation payable for a compulsorily acquired property, Section 47(2) conflicts with Section 40(1) (b) of the 1979 Constitution. It is on account of this conflict, unconstitutional and void by virtue of Section 1(3) of the 1979 Constitution which provides that "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of the inconsistency be void. "

6. The proviso to Section 315 (5) of the Constitution as it relates to Section 9(2) should be put in motion to amend Section 47(2) of the Land Use Act to conform with Section 44 of the Constitution.

## **5.0 CONCLUSION**

There have been critical appraisals of our Constitution and our Land Use Act by scholars, decisions of courts and legal practitioners as well as recommendations but unfortunately all these appeals have fallen on deaf ears of our undemocratic government.

However, we believe that if all of the above go beyond a mere academic exercise and are implemented, Nigeria will become a better country.

# THE TORT OF DEFAMATION AND PRIVACY IN THE DIGITAL AGE

BY PROF. A. D. BADA IKI, SAN.

## 1.0 INTRODUCTION

There is a rising menace of online defamation and violation of the right to privacy in the present world of the digital age in general and the context of Nigeria in particular. This is exacerbated by social media<sup>154</sup> interaction and attendant massive online communication.<sup>155</sup> While the strong influence of the digital age which affects or touches virtually every aspect of a person's life, undoubtedly, has positive contributions to modern life by making human interactions easier and convenient, there are other corresponding negative effects of online communication networks by the misuse or abuse to which they have been and are being put. In this computer age, information, especially the false and negative type, attenuates speedy communication. Information goes viral and spreads faster than wildfire.

With the rise of the internet and networking communications, freedom of expression and free speech is being exercised to a crescendo, and that right is advanced as a justification for all manner of online communications. The fact remains that the law balances the right to free speech with the right to protect persons who are injured by the content of the speech. The discourse will show how this balancing mechanism is operated and achieved by examining the tort of online defamation and privacy. Although the concept is novel in nomenclature, the paper seeks to examine the applicable mechanism in Nigerian jurisprudence to deal with violations

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<sup>154</sup> This is in form of Facebook, X (formerly Twitter), Instagram, WhatsApp, and Blogger, Search Engines, Amazon and other modes of expression.

<sup>155</sup> A majority of people in Nigeria, like in other parts of the world, own and use mobile phones including smart mobile phones and have internet access, with attendant use of social media by all age groups in the world. This has increased significantly interconnectivity between individuals, organisations and governments. Social media users are allowed to provide links to other websites and online resources, thereby connecting to the real world. See Onyemelukwe, C. "Digital Technology, Social Media and Cyber-Enabled Gender-Based Violence and the Law in Nigeria", in Agbede, I. O. and Arowolo, A., *Babcock University Essays on Contemporary Legal Issues*, Princeton & Associates Publishing Co. Ltd, Lagos, 2017, p. 67.

of this aspect of the law of civil obligation. It also seeks to answer the question of whether every negative publication is defamatory or amounts to the tort of privacy, and the connection, if any, between defamation and privacy. Legislative intervention in these common law-rooted laws is also examined before a conclusion is drawn on their impact on Matching the laws with illegal technological development.

## 2.0 CONCEPTUAL CLARIFICATION

A number of words need to be defined for purposes of understanding the context in which they are used in this discourse. “Defamation” is the publication of a statement about a person that tends to lower his reputation in the opinion of right-thinking members of the community or to make them shun or avoid him.<sup>156</sup> It is “usually in words, but pictures, gestures, and other acts can be defamatory”.<sup>157</sup> It is the “act of harming the reputation of another by making a false statement to a third person... a false written or oral statement that damages another’s reputation”.<sup>158</sup>

Blackstone and George define defamation as the tort of publishing a statement which tends to bring a person into hatred, contempt or ridicule, or to lower his reputation in the eyes of right-thinking members of society generally.<sup>159</sup> “Any publication or statement which tends to lower the claimant in the estimation of right-thinking members of the society or to cause other persons to shun, avoid, or expose him to ridicule, contempt, hatred or to discredit him in his profession or even to injure his financial credit is said to be defamatory.”<sup>160</sup> It connotes the transmission of information to a third party, such that could damage the reputation of another

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<sup>156</sup> Martin, E. A. (ed.) *A Dictionary of Law*, Fifth Edition, Oxford University Press, Oxford New York, 2002, p. 140

<sup>157</sup> *Ibid.*

<sup>158</sup> Garner, B. A. (ed.) *Black’s Law Dictionary*, Ninth Edition, West Publishing Co., Minnesota, 2004, p. 479.

<sup>159</sup> Blackstone, W. and George, J., *Elements of the Law of Tort*, 2<sup>nd</sup> Edition, Blackstone Press, 1949, p. 167.

<sup>160</sup> Badaiki, A. D., *The Law of Torts in Nigeria*, University Law Publishing Co. Ltd, Lagos, 2018, p. 236.

person and expose that person to hatred, ridicule, contempt and/or causes him to be shunned or avoided by right-thinking members of society.

Section 4 of the Defamation Law of Osun State<sup>161</sup> defines defamation as a published matter concerning a person which tends:

- a. To affect adversely the reputation of that person in the estimation of ordinary persons;
- b. To deter ordinary persons from associating or dealing with that person(s); or to injure that person in his occupation, trade, office or financial credit.

Judicial ascription of meaning to defamation is reflected in the recent case of *Abalaka v. Akinsete*<sup>162</sup> as follows:

A defamatory statement tends to injure the reputation of the person to whom it refers and tends to lower him in the estimation of right-thinking members of the society generally and in particular causing him to be regarded with feelings of hatred, contempt, ridicule, fear, disdain or disesteem.

A common denominator in all the definitions is that the words must injure the reputation of the claimant in the minds of right-thinking members of the society generally, not merely in the minds of a particular section of the public, that is, a body of persons who subscribe to

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<sup>161</sup> Cap. 39, Laws of Osun State of Nigeria, 2002.

<sup>162</sup> (2023) 13 NWLR (pt. 1901) 343 @ 367-368; *Nwokolo v. Aham* (2016) LPELR – 41511; *NEPA v. Inameti* (2002) 11 NWLR (pt. 778) 397; *Benue Printing & Publishing Corp. v. Gwagwada* (1989) 4 NWLR (pt. 116) 439; *Isenalumhe v. Amadin* (2001) CHR 458 where the Federal High Court, Benin City, regarded defamation as “degrading, reviling, holding one up to public oblique, lowering a person in estimation of the public, exposing to disgrace, dishonor, or contempt.

standards of conduct which are not those of society generally.<sup>163</sup> The standard for determining a right-thinking member of society is that of a normal reasonable man, who is not polluted by extra-conscientious or censorious characteristics. Not people who may be so emotionally weak that they regard every simple negative statement as defamatory.<sup>164</sup> It cannot be denied that defamatory meaning may change from society to society, and word may cease to be or become defamatory over time.<sup>165</sup>

“Online defamation” does not bear a different meaning from the generic or paradigm defamation. It connotes statements or activities made or expressed and published through online mediums with the aim of harming the reputation of a person. Online defamation, otherwise known as cyber defamation, is one committed within cyberspace where defamatory words are published through social media and other online digital platforms. This specie of defamation has the peculiar feature of covering a wider area than a usual defamation by reason of other online users on the internet spreading it faster and wider than the maker of the publication.

Privacy refers to “the right of the individual to be protected against intrusion into an individual’s personal life or affairs, or those of his family by direct physical means or by publication of information.”<sup>166</sup>

“Digital age” refers to the era or period in which a large amount of information in audio, visual or audio-visual form is widely available to many people and such information is recorded or transmitted, broadcast or otherwise communicated using computer or other electronic

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<sup>163</sup> *Egbuna v. Amalgamated Press of Nigeria Ltd* (1967) 11 All NLR 25 @ 30.

<sup>164</sup> Rogers, W. V. M., *Winfield and Jolowicz on Torts*, 13<sup>th</sup> Edition, Sweet & Maxwell, London, 1990

<sup>165</sup> McEwen, R. L., *Gatley on Libel and Slander*, 7<sup>th</sup> Edition, Sweet & Maxwell, London, 1979.

<sup>166</sup> Cooke, J., *Law of Tort*, Eight Edition, Pearson Longman, London, 2007, p. 432

technology, and especially on the internet.<sup>167</sup> It is the age of online transmission of information. According to the Court of Appeal in *Daily Times (Nig.) Plc. v. Arum*<sup>168</sup>, “online means connected to, served by, or available through a system and especially a computer or telecommunications system such as the internet”.

### **3.0 TORT OF DEFAMATION AND PRIVACY**

#### **A. DEFAMATION**

##### **MEANING:**

The Meaning of defamation is as stated under conceptual clarification.

#### **3.1. TYPES OF DEFAMATION:**

Defamation is the general term that is commonly used to cover libel and slander. “Libel” is a defamatory statement made in permanent form, such as writing, pictures, photographs, visual images, painting, cartoon, statue, caricature, effigy, film and other methods of signifying meaning. Radio and television broadcasts, public performances of plays, and statements posted on the internet are treated as being made in permanent form for the purposes of the law of defamation. A libel is actionable in tort *per se*, that is without proof that its publication has caused special damage (actual financial or material loss) to the person defamed.

“Slander” is a defamatory statement made not in permanent form.<sup>169</sup> A slander is a spoken defamatory utterance or gesture. Generally, slander is only actionable on proof that its publication has caused special damage (actual financial or material loss), not merely loss of

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<sup>167</sup> The age is ushered in by ‘digital technology’, a “base two process technology that enables information to be compressed on small storage devices that can be easily preserved and transported within the fastest possible time”. <https://www.encyclopedia.com/doc/IG2-3401801216.html>. Accessed 3rd May, 2024.

<sup>168</sup> (2023) 17 NWLR (pt. 1914) 559 @ 575.

<sup>169</sup> That is in a transient form. Incidentally, it is only in common law systems that the distinction between defamation in permanent form and in a transient form is drawn. The customary law makes no such distinction and defamation is usually inferred from oral statements or gestures. See Badaiki, A. D. Ibid, p. 236.

reputation. Proof of special damage is not necessary when the slander implies the commission of a criminal offence punishable by imprisonment, infection with a contagious disease, unchastity in a woman, or is calculated to disparage a person in his office, business, trade, or profession. These are circumstances in which slander is actionable *per se* as in libel. In *Abalaka v. Akinsete*,<sup>170</sup> the Supreme Court held, inter alia, that a statement of defamation, if properly established, is actionable *per se* without proof of damages.

Can it be said as Kodinliye stated that libel is addressed to the eye, whilst slander is addressed to the ear?<sup>171</sup> Defamatory statements contained in recordings such as tape, cassettes and other audio devices are in permanent form and yet addressed to the ear. A better view is that such statements are libel.

### **3.2 NATURE AND INGREDIENTS OF DEFAMATION**

#### **Ingredients of Defamation**

In an action for defamation, the plaintiff has the onus of proving six conterminous ingredients which are:

- a. publication of the offending words by the defendant;
- b. that the words complained of refer to the plaintiff;
- c. that the words are defamatory to the plaintiff;
- d. publication to third parties;
- e. falsity or lack of accuracy of the words complained of;
- f. that there are no justifiable legal grounds for the publication of the words.<sup>172</sup>

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<sup>170</sup> Ibid.; *Adegbite v. Ogunfaolu* (1990) 4 NWLR (pt. 146) 578.

<sup>171</sup> Kodinliye, G. and Aluko, O., *The Nigerian Law of Torts*, Spectrum Book Ltd, Ibadan, 2001, p. 139.

<sup>172</sup> *Abalaka v. Akinsete*, Ibid. p. 368 where the Supreme Court recently stated these elements.

There is a world of difference between the actual statement (aka the “publication”) by a person and the spin or interpretation or the manner in which the words have been couched. In order, therefore, to consider whether or not the statement which is the subject of a defamation claim is defamatory, it is necessary to ask two questions:

- a. What meaning or meanings would it convey to an ordinary and reasonable person?
- b. Is that meaning or are those meanings defamatory?

Whether or not there is a serious dispute on either of these questions will depend on the nature of the statement.<sup>173</sup>

### **Ingredients of Libel**

In an action for libel, the plaintiff must prove that:

- a. The defendant published in permanent form the statement or words which the plaintiff complains of as defamatory. This means that the words complained of must have been written;
- b. The statement must be false;
- c. The statement or words must refer to the plaintiff;
- d. The statement or words must be defamatory, that is, convey defamatory meaning or imputation to those whom it was published;
- e. The statement or words must refer to the plaintiff, that is, was defamatory of the plaintiff in the sense that:
  - i. it lowered him in the estimation of right-thinking members of the society; or
  - ii. it exposed him to hatred, ridicule contempt; or

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<sup>173</sup> Price, D., and Duodu, K., *Defamation: Law, Procedure and Practice*, Third Edition, Sweet & Maxwell, London, 2004, p. 5.

- iii. it injured his reputation in his office, trade, or profession; or
- iv. injured his financial credit.<sup>174</sup>

The statement complained of must be shown to be false even in the absence of defence by the defendant. In *Abalaka v. Akinsete*,<sup>175</sup> where the appellant failed to prove the tort of defamation against any of the respondents, even in the absence of defence by the 1<sup>st</sup> and 2<sup>nd</sup> respondents at the trial, the claim failed. The Supreme Court emphasised the need to prove the falsity of a statement. According to the court:

If a statement complained of appears to be derogatory disparaging or injurious to a person to impeach his character or reputation, it may still not amount to defamation unless the party or person complaining proves that it was a false statement. Where a plaintiff has established that he was defamed by words published or caused to be published by the defendant, the onus lies on the defendant to prove the truth of the words so published.<sup>176</sup>

#### **4.0 ACTIONABLE ONLINE DEFAMATION**

When is online defamation actionable, that is, when can a defamation action be instituted in court? Three key factors that are used or considered as threshold of actionable defamatory statements are:

- a. The online statement must be false, that is, must be a lie.
- b. There must be actual harm, that is, serious harm as against the old “substantial harm test.”

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<sup>174</sup> *Abalaka v. Akinsete*, Ibid., pp. 373-374; *Anozia v. Attorney-General of Lagos State* (2023) 2 NWLR (pt. 1869) 545 @ 556, both decisions of the Supreme Court.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.; pp. 373-374.

c. There must be evidence.

(a) **The online defamatory statement must be false.**

As it is under the general principle of defamation, it is not every negative comment or statement that is defamatory.<sup>177</sup> Freedom of speech and the press is enshrined in the legal systems of most countries of the world as a human right.<sup>178</sup> It is derogable, that is qualified, and as such where a person makes a statement, it needs to be determined whether it is legitimate and the extent to which the maker is protected. In *Aviomoh v. C.O.P.*<sup>179</sup> the Supreme Court stated that the right provided by Section 39(1) of the Constitution (as Amended), which entitles a person to freedom of expression and imparting ideas and information, is not a blanket right. It must not be utilised or invoked in such a way that it offends public safety, order, morality and health, and it must not be injurious to the rights and freedom of other persons. The limit of that right amounts to the saying by the Supreme Court that “once a person lives in a community, his rights stop where the rights of the other members of the community begin...A person cannot, in the guise of exercising his freedom of expression or imparting information, trample upon the rights of other persons in society. He must not act in such a way that he defames their character or... if he acts to the detriment of others, he can be liable in a civil action”.<sup>180</sup> The court reiterated the law that Section 39 of the Constitution (as Amended) cannot operate to invalidate any law enacted by any legislative body when the law is made in the interest of the defence, public safety, public order, public morality, public health, or for the purpose of protecting the rights and freedom of other persons.<sup>181</sup> The law on defamation is one of the laws

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<sup>177</sup> *Abalaka v. Akinsete*, Ibid. states that such a statement must be proved to be false.

<sup>178</sup> See for example Section 39 of the 1999 Constitution of the Federal Republic of Nigeria (as Amended)

<sup>179</sup> (2022) 4 NWLR (pt. 1819) 69 @ pp. 121-122

<sup>180</sup> Ibid, p. 122.

<sup>181</sup> Ibid, p. 121.

that is reasonably justifiable in a democratic society for the purpose of protecting the rights and freedom of others within the ambit of Section 45(1) of the 1999 Constitution (as Amended).<sup>182</sup>

The test of ascertaining whether a statement is protected or defamatory is the evidential examination of the statement to determine its falsity or otherwise. In *Daily Times (Nig.) Plc. v. Arum*,<sup>183</sup> the Court of Appeal dismissed the appeal from the trial court. There, the respondent alleged that the appellants made a libellous publication to the public about him on the appellant's online page on the internet in which the appellants falsely presented him as a paedophile, a rapist who raped a 16-year-old girl multiple times, and a dangerous criminal, and thereby injured him in his character. The respondents averred that he, his friends, relations and colleagues who lived in and accessed the appellants' online publication in Enugu State.

More apposite on falsity is the Australian case of *Wilson v. Bauer Media Pty Ltd*,<sup>184</sup> where an Australian-born actress, Rebel Wilson, instituted an action against Bauer Media, the publisher of the Women's Day Magazine. The plaintiff complained that articles published in the magazine stated that Wilson lied about her name, age, upbringing and life events. The claim was for general and special damages for the loss of business opportunities from May 15 to the end of 2016. Dixon, J. found that the plaintiff had proved that the publication was false, and the lies were sufficient to give rise to reasonable cause of action for defamation. He upheld the action and awarded the plaintiff \$650,000 in general damages and \$3,917,472 in special damages. The court took into consideration aggravating factors including substantial loss of business and income.

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<sup>182</sup> Ibid, p. 122.

<sup>183</sup> Ibid, p. 559.

<sup>184</sup> (2017) VSC 521 (Australia)

Availability of justification defence may negate any attempt to prove a defamatory allegation.

**(b) There must be actual harm.**

The requirement that there must be actual harm is consistent with the scope of the law of tort which is “primarily concerned with providing a remedy to persons who have been harmed by the conduct of others.”<sup>185</sup> It is also in consonance with the purpose of the law of defamation which is to protect the reputation of people from injurious statements and safeguard the plaintiff’s interest in the good opinion which people hold of him. Harm can be or occur in different forms: loss of business and income,<sup>186</sup> loss of job or employment, stress resulting in heart attack, etc. They should, however, be injuries that can be quantified.

What is the test for determining harm? The previously applicable test was the “substantial harm” standard. This test has been cascaded into a higher threshold of “serious harm” to the plaintiff’s reputation. This was clarified, formulated and applied in *Lachaux v. Independent Print Ltd.*<sup>187</sup> A Frenchman was married to a British woman but had divorced her. He was working in the United Arab Emirates (UAE). Three publishers published between 20 January and 10 February 2014 a series of articles which recounted events in the UAE, including proceedings against the Frenchman’s British ex-wife for allegedly “kidnapping” their son, and allegations, including domestic abuse, made against the Frenchman by his ex-wife. The Frenchman instituted five separate actions against the three publishers. There was a trial of preliminary issues including meaning and reference for certain articles like “serious harm” and

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<sup>185</sup> Jones, M. A., *Textbook of Torts*, Eight Edition, Oxford University Press, Oxford, 2002, p. 1

<sup>186</sup> As in *Wilson v. Bauer Media Pty Ltd*, *Ibid*.

<sup>187</sup> (2017) EWCA CIV 1334 (England)

the son's abuse. The court clarified the application of the serious harm test to defamation cases and stated the necessity for the claimant to prove "serious harm" to his reputation.

**(c) There must be evidence.**

The onus of proof of every material ingredient of defamation is on the claimant and must succeed or fail on the strength of his case and the evidence that he brought to court notwithstanding the weakness in the case of the defence. Apart from the proof of publication of defamatory words in a claim for damages, the claimant must prove that the words refer to him and that they are in fact defamatory in the sense that they are untrue or false. The onus is on the claimant to show that the published words complained of are defamatory or that they convey a defamatory imputation. Where, however, the words complained of are defamatory in their natural and ordinary meaning, the claimant has no legal duty to lead any evidence to show additional defamatory meaning as understood by persons possessing some particular facts.<sup>188</sup>

The burden of proof on the claimant in a defamation claim underscores the importance of evidence to prove all the elements of this tort. One of the first steps to take is to identify the defendant(s) who wrote the statement, the owners, operators and publishers of the digital platform (medium of communication) where the infringing or defamatory content is published as well as internet intermediaries.<sup>189</sup> There is controversy over whether Internet intermediaries are liable for the defamatory content generated on their platforms by third-party users, that is operators of Internet digital platforms who only make such digital platforms available for

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<sup>188</sup> *Guardian Newspapers Ltd v. Ajeh* (2011) 10 NWLR (pt. 1256) 439; *Iloabachie v. Iloabachie* (2005) NWLR (pt. 943) 695; *Abalaka v. Akensef*, Ibid.

<sup>189</sup> See *Awoniyi and Others v. The Registered Trustees of the Rosicrucian Order (AMORC)* (1990) 6 NWLR (pt. 154) 42 where it was stated that a document like a book, a magazine or a newspaper or a postcard (posted) is *prima facie* evidence of publication by the proprietor, editor, printer, and publisher and any person who sells or distributes it.

citizens to express themselves.<sup>190</sup> Relying on foreign cases including *Tamiz v. Google Inc.*,<sup>191</sup> Ilgieuno Iyamu and Kazeem (the authors of a 2011 article), argue that internet intermediaries faced with online defamation will be able to plead and successfully rely on the defence of innocent dissemination if it can prove the three necessary elements of the defence stated in the Defamation Act of England, 1996. The challenge to such an argument is that there has to first of all be such enabling legislation in Nigeria and within *pari materia* provisions with the Reformation Act of England. In the absence of that, the rejection of the defence of innocent dissemination in *Awolowo v. Kingsway Stores & Another*<sup>192</sup> represents the state of the law in Nigeria.

Before the commencement of action, it is also pertinent to identify the witnesses to give evidence. Not just anybody, but persons who read, accessed or downloaded the alleged defamatory statement. The mere fact that the alleged defamatory statements were made towards a targeted individual is not sufficient if a third party does not read it, and is willing, available and ready to testify about it. In *Giwa v. Ajayi*<sup>193</sup>, the Court of Appeal held that a claimant must prove publication by leading evidence as to whom the alleged defamatory matter was published, and failure to do so in the instant case meant that there was in law and in fact no publication of the alleged defamation.

In this connection, elements to prove in an online defamation are:

(a) Substantial and real publication of the alleged defamatory material. This is because publication cannot be inferred solely by the mere fact that defamatory allegations have been

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<sup>190</sup> See Ilgieuno, S. M., Iyamu, N. and Kazeem, L., “Online Defamation: Rethinking the Liability of Internet Internet Intermediaries for Third Party Defamatory Contents in Nigeria”, *The Gavitas Review of Business and Property Law*, September 2021, Vol. 12, No. 3, pp. 118-130

<sup>191</sup> (2013) 1 WLR 2151; *Bunt v. Tilley* (2006) 3 ALL ER 336; (2007) 1 WLR 1247; (2006) EWHC 407 (Q.B) and *Godfrey v. Demon Internet Service* (2001) QB 201 where the defence was lost.

<sup>192</sup> (1968) 1 All NLR 217

<sup>193</sup> (1993) 5 NWLR (pt. 294) 423; *Omo-Agege v. Oghojafor* (2011) 3 NWLR (pt. 1234) 341

accessible on the internet. In *Jameel v. Dow Jones Inc.*,<sup>194</sup> an article was published on an internet website about a Saudi businessman. He sued the defendant publishers in respect of the article. It was argued on behalf of the plaintiff that the article was available to 5,000 (five thousand) and 10,000 (ten thousand) subscribers within the jurisdiction. The plaintiff urged the court to draw the inference that a substantial number of readers of the main article would have read the page to which the hyperlink led. The defendant publishers adduced evidence that only 5 (five) subscribers within the jurisdiction had been able to access the alleged libel via the hyperlink. Of those five, three were members of the plaintiff's camp. The Court of Appeal struck out the claim as an abuse of process on the ground that the extent of the publication within the jurisdiction was minimal and did not amount to a real and substantial tort. The court refused to raise a presumption of publication.

In *Mohammed Hussein Al Amoudi v. Jean Charles, Brisard and Another*,<sup>195</sup> the plaintiff alleged that the defendants published to a substantial and unquantifiable number of readers in the jurisdiction a statement that the plaintiff was funding terrorists. The statement was on a website in Switzerland. The plaintiff gave evidence that he uploaded the website in Switzerland. The defendants denied that the words had been published in the jurisdiction. The plaintiff applied to strike out that part of the defence or alternatively prayed for summary judgment upon it. According to him, where a plaintiff complained about an item on an internet site open to general access, he could rely upon a rebuttable presumption of law that substantial publication of that item had taken place within the jurisdiction of the court. That is to say that the publication on the internet was published to a substantial but unquantifiable number of

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<sup>194</sup> (2005) QB 946; (2005) 2 WLR 1614; *Al Amoudi v. Brisard* (2007) 1 WLR 113

<sup>195</sup> (2006) 3 All ER 294; *King v. Lewis* (2004) EWCA CIV 1329.

people within the jurisdiction. The court rejected the plaintiff's contention on a presumption of publication. The court stated *inter alia*:

A plaintiff in a libel action on an internet publication was not entitled to rely on a presumption of law that there had been substantial publication...the plaintiff bears the burden of proving that the words complained of were read or seen by a third party. From that proposition, it would appear to follow that, in the case of an internet libel, it would be for the plaintiff to prove that the material in question was accessed and downloaded...

It is well known that some facts are capable of direct proof, whereas others may properly be proved by inference. Thus, the publication of the items complained of in the present case to a particular individual could be proved by calling that individual to say that he/she accessed the items and downloaded them within the jurisdiction. A wider publication may be proved by establishing a platform of facts from which the tribunal of fact could properly infer that substantial publication within the jurisdiction has taken place...

(b) The alleged defamatory material must have been read or accessed by a third party to constitute substantial tort.<sup>196</sup> It is essential to prove the high readership of the publication or prove that the posting caused or is likely to cause serious reputational harm.

(c) The said material must have been accessed and downloaded within the court's jurisdiction. This is aside from the provisions of the rules of court on where to commence an action for tort which is in the Judicial Division in which the cause of action arose or where the defendant resides or carries on business. In *Daily Times Nig. Plc v. Arum*,<sup>197</sup> the appellants entered a joint conditional appearance and raised a preliminary objection to the trial court's jurisdiction on grounds that the respondent's statement of claim did not disclose a cause of action against either of the appellants, that the appellants were neither resident nor carrying on business in Enugu; and that by the rules of the trial court, the High Court of Enugu State was a forum non-convenient to institute the respondent's suit. Dismissing the preliminary objection, the trial held that the suit disclosed a reasonable cause of action and that it had jurisdiction to hear the suit. On appeal, the Court of Appeal considered the provisions of Order 2 Rule 4(1) of the High Court of Enugu State (Civil Procedure) Rules, 2006 which provides:

All other suits may be commenced and determined in the  
Judicial Division in which the cause of action arose or where  
the defendant resides or carries on business.

The court held, *inter alia*, that publication of materials available online takes place where it is downloaded, thereby constituting a cause of action actionable at such jurisdiction. Furthermore, online or internet-based publications by their nature are globally accessible but do not confer jurisdiction globally merely on the basis of mere virtual existence. Passive internet activity is

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<sup>196</sup> *Jameel v. Dow Jones Inc*, Ibid.; *Mohammed Hussein Al Amoudi v. Jean Charles, Brisard and Another*, Ibid.

<sup>197</sup> Ibid.

also not a basis for the assumption of jurisdiction. Further, because the cause of action for libel is complete only on publication, the cause of action in respect of a publication online or which is internet-based is not complete until the online or internet-based publication has been accessed or downloaded by a third party. Therefore, for the High Court of a State, other than where the defendant resides or carries on business, to have jurisdiction for libel in respect of online or internet-based publications, the publication must have been accessed or downloaded in that State by the plaintiff or claimant who ordinarily resides or carries on business in that State, and the publication must equally have been accessed or downloaded in that state by the witnesses of the plaintiff or claimant. The court held therefore that the trial court rightly held that the publication of the alleged libel took place in Enugu State and accordingly it had jurisdiction to entertain the suit of the respondent in that the cause of action was completely constituted in Enugu State thereby assuring the jurisdiction of the High Court of Enugu State.

Significantly, the court stated:

An online publication is meant for a global audience and readership, and an aggrieved victim of the publication can initiate an action wherever the offending publication is consummated, downloaded and/or retrieved, particularly, where the victim of the publication was targeted, profiled, exposed and/or attacked. A blogger or publisher should not evade or try to defy any opportunity offered to him to substantiate, prove and/or justify his claims in the

publication he offloaded into the internet when challenged to do so, anywhere it is read.<sup>198</sup>

(d) Reputational damage suffered by the claimant must be proved. This requires leading evidence as to the harm suffered by the claimant as a result of the defamatory statement. Although proving reputational damage is not simply a game of numbers, the more readers that accessed and downloaded the statement, the greater the likelihood of reputational damage. In *Monroe v. Hopkins*,<sup>199</sup> two tweets were made by the defendant, a journalist, in 2015 in which he accused the plaintiff, a food writer, of desecrating a war memorial. The publication went viral and was read by a lot of people. It was held that there was libel and the sum of £24,000 in damages was awarded to the plaintiff considering that the publication was widespread and read by a lot of people.

### **Means of proof**

How can one prove online defamation?

(a) Oral Testimony

The claimant and his witnesses who accessed downloaded and read the alleged defamatory statement can give oral evidence.

(b) Documentary evidence

By the nature of online defamation action, proof by documentary evidence is most useful. Electronic evidence is very pertinent. Proof should be in compliance with the rules of evidence in the Evidence Act, 2011 (as Amended). The rule governing computer-generated evidence is what governs the admissibility of a defamatory publication against a person through

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<sup>198</sup> Ibid., p. 580

<sup>199</sup> (2017) EWHC 433 (QB)

social media. A document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Admissibility of a computer-generated document or document downloaded from the internet is governed by the provisions of Section 84 of the Evidence Act, 2011.<sup>200</sup> A person who received a copy of a libellous publication can tender the document in evidence.<sup>201</sup> A party willing to tender such publication should lay the necessary foundation.

### **Requirements for admissibility of computer-generated evidence**

Section 84 Evidence Act (EA) stipulates the conditions for the admissibility of computer-generated evidence<sup>202</sup>

- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual.
- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period, the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

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<sup>200</sup> *Kubor v. Dickson* (2013) 4 NWLR (pt. 1345) 534.

<sup>201</sup> *Okpara v. Selobar* (2003) FWLR (pt. 142) 1.

<sup>202</sup> *Impact Solutions Ltd v. International Breweries Plc* (2018) 16 NWLR (part 1645 377; *Daudu v FRN* (2018) 10 NWLR (pt. 1626) 169.

- (d) that the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of those activities.<sup>203</sup>

Section 84(3) of the Act governs treating two or more computers used over a period of time as one computer for the purposes of subsection (1) of the section. It reads:

Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(a) of this section was regularly performed by computers, whether—

- (a) by a combination of computers operating over that period; or
- (b) by different computers operating in succession over that period; or
- (c) by different combinations of computers operating in succession over that period; or
- (d) In any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers; all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

By Section 84(4) EA, in any proceedings where a party desires to tender a statement in evidence relating to computer evidence, he is required to tender alongside a certificate<sup>204</sup> of identification. The certificate is to:

- a. identify the document containing the statement;

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<sup>203</sup> Section 84(2) of the Evidence Act, 2011 (as Amended)

<sup>204</sup> A certificate is defined in *Blaise v. FRN* (2017) 6 NWLR (pt. 1560) 90 @ 136

- b. describe the manner in which the document was produced; or
- c. give such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer; or
- d. deal with any of the matters to which the conditions earlier stated relate, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be.

For the purpose of the requirement in the subsection, it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it. Notably, the certificate is to be signed by a person occupying a responsible position in relation to the operation of the computer device used in the production of the document to be tendered or management of the relevant activities as the case may be.

In practice, a party who desires to rely on a document electronically generated deposes to an affidavit of compliance with Section 84(4) EA wherein all the information stated above is provided.

There is no ouster clause against the admissibility of statements or documents. The relevant phrase is “a statement contained in a document produced by the computer.”<sup>205</sup>

## **5.0 DEFENCES TO DEFAMATION**

The fact that the claimant proves the elements of defamation does not mean that he will necessarily win the case. If the defendant cannot establish a defence, the claimant will win the case and be entitled to appropriate relief. In legal terminology, a defamatory allegation becomes libellous or slanderous when the defendant has failed to establish a defence. It then falls to the

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<sup>205</sup> *Omisore v. Aregbesola* (2015) 15 NWLR (pt. 1482) 208 @ 295; See *NBA v. Kekejaiye* (2016) 6 NWLR (pt. 1508) 393 @ 424-425

defendant to seek to establish one or more of the recognised defences. The most common defences are:

**a. Legal Truth**

This is also known as justification. The defence of justification means that everything the defendant says is legally true in substance to the plaintiff to establish that the defendant's statement is untrue. The plaintiff is merely to show that there had been a publication of a statement that is defamatory of him. The plaintiff's character is necessarily to be put in the issue since the law will not reward or give satisfaction for injury, or recompense a plaintiff for a loss that he has not incurred. It is up to the defendant then to prove that what he said was true in fact. Some cases, e.g., *Hornal v. Neuberger Products*<sup>206</sup> suggest that proof should be greater in weight, number, strength, etc.

In *Megawalth Ltd v. Securities and Exchange Commission*,<sup>207</sup> the Court of Appeal stated that justification is a complete defence to an action for libel that the words complained of were true in substance. The court held, *inter alia*, that where a defendant intends to raise a plea of justification in action for defamation, the defendant must prove that the alleged defamatory imputation is true. The defendant must justify the precise imputation complained of. In other words, strict proof is demanded. The court further held that in the instant case, the respondent had the onus of proving not only that the facts were truly stated, but also that any comments on them were correct. The respondent established that it was true that the appellant was not registered with them as prescribed by the Investment and Security Act (ISA), hence illegal and therefore defeated the appellant's claim for defamation.

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<sup>206</sup> 1957 1 K.B. 247.

<sup>207</sup> (2017) 13 NWLR (pt. 1583) 345; *Din v. African Newspapers Ltd* (1990) 3 NWLR (pt. 139) 392; *ACB Ltd v. Apugo* (2001) 5 NWLR (pt. 707) 483.

The jurisprudence of Nigeria is that justification or the truth can be both a sword and a shield. In an action for defamation, the onus is on the plaintiff to prove that the words complained of conveyed a defamatory meaning to whom they were published. In *Abalaka v. Akinsete*,<sup>208</sup> the court however stated that where the words complained of are defamatory in their natural and ordinary meaning, the plaintiff has no legal duty to lead any evidence to show additional defamatory meaning as understood by persons in possession of some particular facts.

The problem of justification recompense boils down to the question of proof. The defendant must not prove only that what he said of the plaintiff is generally true. But for the statement to be justified it must tally with what interpretation it can bear. In *Wakely v. Cooke* where the defendant had called the plaintiff a libelous journalist proved that the plaintiff had once been found liable for libel was held to be insufficient justification for an imputation that the journalist habitually libelled people. A minor inaccuracy will be overlooked.

In *African Press v. Ikejiani*,<sup>209</sup> the defendant claimed the plaintiff to be a doctor of science but he was a doctor of medicine. It was held that the difference between being a doctor of science and medicine is enough to bring defamation. In *Akintola v. Anyam*,<sup>210</sup> it was held that there is a difference between saying that the plaintiff came from Ogbomosho and Ilesha for that would amount to telling the electorate lies as to the ethnic identity of the plaintiff. One pitfall of this defence is that a plea of justification when it fails, is considered to be a circumstance that worsens the damage. This reveals conflicting purposes in the law. Obviously, the truth must be told and yet one runs the risk of attracting a penalty if one is unable to prove albeit on technical grounds the truth of his assertions then one runs the risk of paying higher damages<sup>211</sup>.

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<sup>208</sup> Ibid. p. 372-373

<sup>209</sup> 1953 14 WACA 386.

<sup>210</sup> 1961 NLR 508

<sup>211</sup> Date-Bah, "The Right to Public the Truth & The Plea For Justification" 10 UGL 536.

No wonder then that in *Ogbemudia v Nnaji Jupita Publishers*, the defence of justification is described as a daring defence.<sup>212</sup>

#### **b. Fair comment and Justification**

According to Street, fair comment defence allows criticism of matters of public interest in the form of comment upon true or privileged statements of facts. Such comments must be made honestly and by a person who did not believe the statement to be untrue and who was not otherwise actuated by malice. “Fair comments” means comments on matters of public interest. Thus, a person in the public eye must be prepared for comments on the way he discharged his public function<sup>213</sup>. It is therefore a defence for an action for slander or libel that the words complained of are fair comments on matters of public interest. What then are matters of public interest? The defence covers matters of government and public administration including local government, and management of institutions of substantial public concern. The defence can be raised in relation to matters although of no public interest, have been submitted to criticism by the person concerned e.g. books, articles, every other form of published literature, architecture, works of art, musical and other dramatic performances. The defence covers also matters which can fairly be said to invite comments. In order to successfully raise the defence of fair comment, the comments on facts should be a fair criticism<sup>214</sup>.

Fair comment is available only in relation to the expression of opinion. Justification covers both facts and opinions. It is therefore possible that the defendant may be unable to plea fair comment because it is not a matter of public interest. A plea of fair comment does not require proving the truth of the comment, but only that the opinion was honestly held. If the defendant wishes to justify matters of opinion, he must prove both that he honestly held the

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<sup>212</sup> See also *Haywald v. Thompson* (1981) 3 ALLER.

<sup>213</sup> *Ogbemudia's* case, Ibid.

<sup>214</sup> *Akomolafe v. Guardian Press Ltd. v. Ors.* (2010) 3 NWLR (pt. 1181) 338

views expressed and that the views were also correct. Sections 6 and 7 of the Rivers State defamation law provide for when justification and fair comment respectively will not fail.

To be fair, comments must be based on certain facts that are true, for even if the comments were honestly made, a defendant cannot plea fair comment if the facts are untrue. In Street's e.g. a defendant who says of the plaintiff that he is a disgrace leaves the learner to believe that this is a comment based on unstated facts, but he cannot claim fair comment unless he goes on to say that he has for instance deserted his wife and children.

**c. The rolled-up plea:**

Since it is necessary to separate facts from opinion where fair comment is an issue and since defendants are generally reluctant to do so the rolled-up plea has come into use. A defendant would plea that in so far as the words are facts, they are true, in so far as the words are comments they are fair and are based on a matter of public interest.<sup>215</sup>

Comments must be honest and must not be actuated by malice. Lord Ershe stated in *Meribale v. Person*<sup>216</sup> that every latitude must be given to opinion and prejudice and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment. Mere exaggeration would not make the comment unfair. However wrong the opinion expressed may be in point of truth or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this – would any fair man, however prejudiced he may be, however exaggerated or obstinate he may be, have said that which this criticism had said of the word which has been criticised? The test aside, the defendant must also have genuinely believed the plea of the comments and not simply intended to injure the plaintiff by making them.

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<sup>215</sup> see *Kelmsey v. Foot* (1952) A.C. 345; (1952) a ALLER 501.

<sup>216</sup> (1887) 20 Q.B.D. 275.

#### d. Privilege

In some situations even though the statements in issue bear a defamatory sense they are held not to be actionable because the occasions on which they are made are deemed to be privileged. There are two broad distinctions here. Some occasions confer absolute privilege on the maker/publisher of the statement while others confer qualified privilege.

- i. ***Absolute Privilege:*** This privilege is accorded to protect communications necessary for the efficient functioning of the government or the judiciary. This privilege extends to speeches in legislatures, anything said in the course of or preparatory to proceedings in a court of law by a judge, counsel or witness and to communication between High State officials. In *Chatterton v. Secretary of State for India*,<sup>217</sup> it was held that a letter from the U.K. Secretary of State for India to his parliamentary Under-secretary, which provided material for the answer to a question raised in parliament, was absolutely privileged.
- ii. ***Qualified privilege:*** The meaning of this defence was succinctly given in *MTS Ltd v. Akinwunmi*<sup>218</sup> as an occasion where the person who makes a communication has an interest or duty, legal, social or moral to make it to the person to whom it is made and the person to whom it is made has a corresponding interest to receive it. An occasion is said to be privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. The existence of such an interest or duty destroys the

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<sup>217</sup> (1985) 2 QB 189. Section 11 of the same law provides for limitation of privilege at election to legislative house or local government. See also Section 9, Rivers State Defamation Law, which states that Newspaper reports of proceedings in Court are privileged.

<sup>218</sup> (2009) 16 NWLR (pt. 1168) 633 @ 651 - 652

inference of malice which the law makes and allows for the occasion to be privileged, except if there is evidence of actual or express malice.

In *UBA Plc v. Davies*,<sup>219</sup> the Court of Appeal stated that for the defence of qualified privilege to avail in a libel action, two conditions must exist:

- a. There must exist a common interest between the maker of the statement and the person or persons to whom it was made. Reciprocity of interest is therefore an essential element in the law of qualified privilege.
- b. The facts relied on by the maker must be true; a mere belief will not sustain the defence.

The court further stated that in determining whether a publication was communicated on a privileged occasion, the court must consider three critical factors as follows:

- a. the duty test,
- b. the interest test and
- c. the circumstantial test.

In analysing the duty test, the court considers whether the publisher was under a legal, moral or social duty to the person or persons to whom the material was published. The recipient of a libellous publication must have an interest in receiving it. This is an important aspect of the defence of qualified privilege. Furthermore, the nature, status and source of the material and the circumstances of the publication must be such that the publication is made to protect the public interest, devoid of express malice. An occasion may only be privileged for a reason. The mere fact that an occasion is privileged does not make every publication made in it a privileged one. The defendant

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<sup>219</sup> (2011) 11 NWLR (pt. 1259) 591 @ pp 625 – 626; *Iloabachie v. Iloabachie* (2005) 13 NWLR (pt. 943) 695

is only entitled to protection of the privilege if he uses the occasion for that same reason. The defendant will not be entitled to the protection of privilege if he uses the occasion for any purpose other than that which makes the occasion privileged. The court in that case further stated that it is not sufficient that the defendant honestly and reasonably believed that he was discharging a duty or that he had a legitimate interest in making the communication. He must have a moral duty to make it to the person who receives it and the person who receives it has an interest in hearing it. Both of these conditions must exist in order that the occasion may be privileged.

Provided a person is not actuated by malice he is entitled to make defamatory statements about another when a qualified privilege attaches to the occasion. In law and in defamation cases, malice means any indirect motive other than a sense of duty or any corrupt motive, any wrong motive or any departure from duty or making use of the occasion for an indirect purpose.<sup>220</sup> Malice is of two categories, namely, 'technical malice' otherwise known as malice in law which is always presumed in the plaintiff's favour, and 'express malice,' otherwise known as malice in fact which is never presumed but must be proved by evidence.<sup>221</sup> Evidence of malice may be either:

- (a) Intrinsic, that is found in the words themselves or
- (b) Extrinsic, that is found in external circumstances unconnected with publication.

Where malice is alleged, the onus is on the plaintiff to prove malice on the part of the defendant and not the other way around. The evidence adduced must be such that raises the probability of malice and is consistent with its existence rather than without existence. Where the occasion is privileged, it follows that the *bona fide* of the

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<sup>220</sup> *MTS Ltd . Akinwunmi, Ibid., pp. 653 - 654*

<sup>221</sup> *Ibid.; Ciroma v. Ali (1999) 2 NWLR (pt. 590) 317*

defendant is automatically presumed. Thus, where the evidence of malice falls on the borderline and equally consistent with either the existence or non-existence the presumption of *bona fide* arising from the privileged occasion is not rebutted.

The statement must be made honestly and there should be no indirect or improper motive. Malice destroys this privilege.<sup>222</sup> Malice can be shown:

a) If the defendant does not believe in the truth of his statement or was recklessly careless whether the statement is true or false.<sup>223</sup> Essentially, the defendant's belief must be honest. If it is honest then even proof of prejudice will not strip the defendant of his qualified immunity.<sup>224</sup> Even though motive is important it must be motive that shows "spite" or "ill will". In *Winstanley v. Bamton*,<sup>225</sup> a creditor who wrote a defamatory letter to the commanding officer of the plaintiff's debtor could not claim qualified privilege because his anger and indignation had led him to defame the plaintiff. In an American case, *Brants v. Morgan* an indignant creditor forfeited what amounts to a qualified privilege when he put up the following placard in the window of his garage "Dr. W.R. Morgan owes an account here of 40 dollars 57 cents and if promises would pay an account", this account would have been settled long ago. This account would be advertised as long as it remains unpaid."

Where the communication is mixed with extraneous matter it affords evidence of malice.<sup>226</sup> In *Ogbemudia v. Nnaji & Jupiter Publishers*, the defendant published that Ogbemudia was a criminal and that he was an unrepentant criminal – stole a diamond in the Congo and was deported, stole zinc as a teacher, and sacked by Murtala for corruption and

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<sup>222</sup> Section 8, Rivers State Defamation Law, states that, Publication in a Newspaper of Matters Mentioned in the Schedule shall be privileged unless the publication is proved to be made with malice.

<sup>223</sup> *Royal Aquarium & Summer & Winter Garden Society v. Parkinson* (1892) 1 Q.B. 431.

<sup>224</sup> *Horrocks v. Lowe* (1975) A.C. 135.

<sup>225</sup> (1943) K.B. 319.

<sup>226</sup> *Adam v. Ward* (1917) A.C. 309.

dismissed accordingly. As far as qualified privilege is concerned, Justice Uwaifo had this to say: “There must be a duty on the part of the person claiming privilege and a corresponding interest on the part of the person to whom the statement is published.” The main classes of privilege are stated to be:

- a) statements made in the discharge of a public or a private duty;
- b) Statements made on a subject matter in which both the defendant and the person to whom the statements are made have a legitimate common interest;
- c) Statements made by the defendant in the course of his own affairs in a matter which concerns his own interest;
- d) Statements made by the defendant to obtain redress for a grievance;
- e) Statements made by the defendant in reply to inquiries by or on behalf of the plaintiff.

In *Oyejobi v. Ayoola*,<sup>227</sup> the defendant wrote a letter to the A-G of the state and the military government accusing the plaintiff of unethical conduct as a senior civil servant. Specifically, he charged that the plaintiff had secretly removed a document from his government office and had produced this document in public to the embarrassment of the defendant. In an action for defamation, the defendant pleaded qualified privilege. It was held that the privilege if it existed at all, had been destroyed by malice since the defendant’s motive was simply to get back at the plaintiff to whom he had lost in a chieftaincy dispute.

The statutory defence of qualified privilege in respect of newspapers is stated in section 16 of the Defamation Law<sup>228</sup>, and the Rivers State Defamation Law. It is in two parts in the schedule of the said law. The first part of this, which deals with privilege without explanation is as follows:

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<sup>227</sup> Unreported H.C. Oyo State.

<sup>228</sup> Cap. 52. Laws of Lagos State 2016.

1. A fair and accurate report of any proceedings in public of the legislature of any commonwealth country;
2. A fair and accurate report of any proceedings in public of an international organization of which the state or federation of Nigeria is either a member or of any international conference to which either the state or federal government sends a representative;
3. A fair and accurate report of any proceedings in public of an international court;
4. A fair and accurate report of any proceedings before a court of law exercising jurisdiction throughout a commonwealth country or of any proceedings before a court martial held outside Nigeria;
5. A fair and accurate report of any proceedings in public of a body or of a person appointed to hold a public inquiry by the government or the legislature of any commonwealth country outside Nigeria.<sup>229</sup>

Unlike absolute immunity, qualified privilege protects freedom of expression only to the extent that the publication is made to serve a legitimate purpose on the occasion and not some ulterior motive or some interest that is protected. In *Adam v. Ward*<sup>230</sup> the court stated that the person who makes the communication must have an interest or a duty, legal or social or moral to make it to the person to whom it is made, and the person to whom it is so made must have a corresponding interest or duty to receive it.

The occasion qualified for privilege is endless and the test is whether it is in the interest of society generally that an individual who makes an inherently defamatory statement be granted immunity. A statement made pursuant to a public or private duty whether legal or moral, is conditionally privileged as long as it was published to someone with a corresponding

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<sup>229</sup>*Omo-Osagie v. Okutobo & Daily Times of Nig.* (1969) 2 ALL NLR 175 – Case of the publication in Lagos weekend about matrimonial proceedings in the H.C. of Lagos under the caption “Chief Justice tells a teacher: “You are a bad woman”. Adefaresin J held that since the evidence showed that the C.J. never used those words, the report was not fair and accurate.

<sup>230</sup> (1917) A.C. 309 at p. 334.

interest to receive it. Even though a recipient of the information may have a legitimate interest in what is said, the maker of the statement must have had an obligation to make it. Thus, in *Watt v Logsdon*<sup>231</sup> it was held that a stranger was not privileged to make disclosures to a wife reflecting on the morals and integrity of her husband. Clearly, a spouse will have a legitimate interest in the other spouse's action or conduct, but the law does not recognize a social obligation in a stranger to pass on such information. The test as to whether there is a social or moral obligation is based on the standard of values held by average persons of ordinary moral outlook – an intellect (the reasonable man). Where the duty to give information is a public duty, then, even if the information ends up being defamatory the occasion will still be privileged. In *Adam v. Ward* where the plaintiff was an ex-soldier but at the time of the litigation a parliamentarian, it was held that a report of an investigation highly defamatory of the plaintiff, but occasioned by the plaintiff's own charges in parliament against a high-ranking army officer under whom plaintiff had served was privileged. A qualified privilege extended to the report in the above case because the accusation had been made in a public forum and the only form that the resulting refutation or denial could take was public.

A duty to speak out arises, more readily if the statement was made in reply to a question rather than where the statement had simply been volunteered. Protection is given to a defendant who makes a statement defamatory to another to the police in the course of an investigation or to a businessman who answers another businessman's request for information on the firm standing of an intending customer.

As to whether the contractual duty of a trade protection society to supply the financial standing of others to its subscribers is the type of obligation that will provide immunity is not clear. In *McKintosh v. Den*<sup>232</sup> the Privy Council denied protection to an organization which was

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<sup>231</sup> (1930) 1 K.B.

<sup>232</sup> 1908 A.C. 390.

run purely as a business venture on the ground that it was not in the public interest to protect communications made from motives of self-interest by persons who trade for profit in the characters of other people. The defendant's contractual duty to their customer could not create a social duty recognised by law for the welfare of the general public. This decision has been severely criticised and has not been followed in some cases.<sup>233</sup>

**(a) Consent (Assumption of Risk):**

This defence may be very crucial if for example, a person asks another person for a reference and the first person actuated by malice provides a damning reference. The general rule is that consent is an independent defence in defamation. The extent of consent is a question of fact. In *Chapman v. Ellesmerme*,<sup>234</sup> the defence of assumption of risk or consent was upheld. In that case, the plaintiff argued that even if he had as a condition of membership in the Jockey Club, consented, to the publication by an inquiry by the club, he had not consented to its publication in such a form to contain an innuendo against him. The Court of Appeal rejected this argument and pointed out that the plaintiff must be deemed to have run the risk of the particular form that the statement might assume.

**(f) Factual, Unharmful and Non-malicious Statements made about a public person:**

These include government office holders, political candidates authors, celebrities, movie stars etc.

**(g) Government Bodies**

**(h) Public Records**

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<sup>233</sup> *London Association for Protection of Trade v. Greenland* (1916) A.C. p. 15.

<sup>234</sup> 1932 2 K.B. 431; 1932 ALLER 221

- (i) Minor errors in reporting, such as a person's age, title inaccurate or wrong address but not in name.

## **6.0 REMEDIES FOR DEFAMATION**

### **a. Non-Judicial**

#### **i. Apology:**

The offer of an apology is not a defence at common law. However, if an apology is offered or made it could go towards mitigation of the damages. The statutory scheme in Nigeria which reproduced, in essence, the approach adopted by section 2 of the Libel Act of 1843 is as follows: Section 8 of the Defamation Law states that an offer of apology is admissible in evidence in mitigation of damages where the defendant specially pleads that he has offered an apology before the trial or that as soon as he had the opportunity to do so he has offered such an apology. The problem posed here is what the defendant should do when a claim of apology by the plaintiff is coupled with a demand for amends in monetary terms that are beyond the defendant's capacity to fulfil. In *Awolowo v. Kingsway* e.g. the plaintiff's demand made known to the defendant before the trial included the following:

- (1) An immediate stop to the circulation of the book.
- (2) A withdrawal from circulation of copies of books already circulated.
- (3) The publication of an offer of amends by way of an apology on the front pages of at least 3 national dailies in Nigeria with the wildest circulation.
- (4) Payment of £100,000 being the defendant's share of the damage caused by their involvement in the circulation of the libel.

In view of the suggested solatium to be paid for amends the defendants, in a fix, neither made the apology nor offered to make amends. The court thought that these were clearly

severable and the defendant's failure to offer any apologies undercut any claim that they were distressed by the innocent dissemination of the libel. According to Adefarasin:<sup>235</sup>

One would think that the demand at 'b' was almost an impossibility and that the demand at the defendant was entirely out of proportion with the harm done by the defendant.

But, continue the learned Judge forcefully

Until now the defendants have not thought it fit to offer an apology to the plaintiff. The conduct of the defendants did not appear to support the great distress which they claim to have suffered as a result of the distress which the plaintiff had suffered by any book on sale in their stores.

Even where there is no malice underlying the defamation a refusal to make an apology when one is demanded and when the defendant becomes aware of the falsity of the statement would be taken into consideration on the matter of malice.<sup>236</sup>

It is therefore suggested that a claim of amendment in an appropriate case is severable from an apology. For one thing, if an apology is tendered and received, it only goes to the mitigation of damages as earlier noted, whereas, if amends are made by the defendant, it excludes an action for defamation entirely for making amends amounts to basically a settlement out of court. Section 10(1) of the Defamation Law allows a defendant to offer to make amends which offer if accepted bars any action against the particular defendant without of course prejudice to the plaintiff's cause of action against others jointly liable for the defamation. An offer of amends under section 10 (3)(a)&(b) involves publishing or joining in publishing a suitable retraction, correction or apology in respect of the offending words and further

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<sup>235</sup> At p. 263 of the decision.

<sup>236</sup> See *Ikoku v. Zik's Press Ltd* 19 NLR 112.

disseminating either the correction, apology or retraction in as wide a manner as the original publication and securing withdrawal from circulation unsold copies where it is appropriate. In *Akintola v. Ayan*,<sup>237</sup> the court accepted the mitigation of damage. The defendants tendered the unsold copies of the offending publication and the defendant offered to withdraw them.

## **ii. Retraction**

This is non-judicial where the maker of the alleged defamatory statement retracts the statement.

## **iii Offer of Amends**

This is an offer to retract, explain or contradict the alleged defamatory statement. Section 5(3) Rivers State Defamation Law defines the offer of amends.

## **b. Judicial**

**i. Injunction:** This is an order seeking to restrain the continuation of a tort, for example, online defamation and breach of privacy.

### **(a) Interim injunction**

**(b) Interlocutory injunction:** In view of the constitutional provision on the right to freedom of speech and expression, the question arises whether it is lawful to grant an interlocutory injunction pending the determination of a defamation suit. The approach of the English Court is that such an order is a violation of this fundamental human right. The reasoning of the Court of Appeal in *Bonnard & Anor. v. Perryman*<sup>238</sup> is that “the right of free speech is one which it is for the public interest that individuals should possess and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong

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<sup>237</sup> (1961) ALL WLR 508 at 516.

<sup>238</sup> (1891-4) All ER Rep. 965 @ 968

committed”. This means that until the allegation of defamation is proven, the court will be unwilling to grant an interlocutory injunction. It is difficult to classify a publication as defamatory until the court has read it or received evidence concerning it. The implication is that the alleged publication is taken to be defamatory even before hearing the defence. Although there are critiques of this reasoning of the court, the case of *Registered Trustees of AMORC v. Awoniyi*<sup>239</sup> reiterates the reluctance of the court to grant such an injunction. There, Oguntade JCA (as he then was) expressed the attitude of the court thus:

...there is an even more fundamental reason why the injunction sought by the applicant cannot be granted...I am asked to restrain the respondents from publishing a book which I have never read. I do not know if indeed it contains material defamatory of the applicants...there is an inherent error of principle in asking the court to restrain a publisher from publishing an article that has not yet been pronounced to be defamatory of another

(c) **Perpetual injunction**

**ii. Damages:** The primary remedy for a tort is damages.

Types of damages include the following:

- **Contemptuous damages:** That which reflect the court’s or law’s opinion of the winning plaintiff and this has been frequently used in defamation *Marshall v. Buller*,<sup>240</sup> the jury issued half a farthing. The lawyer said that the amount could not buy anything and was not available. The jury replied, “I know somewhere in Oxford where the

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<sup>239</sup> Ibid.

<sup>240</sup> (1618) 2 Roll Rep. 21.

amount could buy bear”. In *Dearing v. Uris*<sup>241</sup>, the plaintiff was awarded 1/2 d damages and he also had to pay all his own costs and those of the defendant after he had refused to accept payment of 14s by the defendant as compensation. It is only jurists that can award it.

- **Nominal Damages** are damages that recognize the plaintiff’s claim without necessarily implying the approval of the plaintiff. These are awarded where the plaintiff establishes he suffered any actual damage. They are awarded most often for those torts actionable *per se*, e.g. libel, and where the plaintiff cannot show actual damage. They are awarded where the fact of damage is proved, but no evidence as to its extent so compensatory damages are virtually impossible<sup>242</sup>.
- **General Damages:** That which one does not need to plead specially or specifically. It is one of the species of compensatory damages. It is such damage as the law will presume to have resulted from the defendant’s tortious conduct, e.g. damage to reputation.
- **Special Damages:** That which is specially or specifically pleaded and proved. It involves losses that one can tabulate or calculate. It is awarded for a cause that is provable. It is also a species of compensatory damages and it is that which the law does not presume<sup>243</sup>.
- **Aggravated Damages** are worked but based on the conduct of the plaintiff<sup>244</sup>.
- **Punitive Damages:** That which is calculated to punish the defendant for outrageous conduct. In *Rooges v. Barnard*<sup>245</sup>, an attempt was made to give the condition under

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<sup>241</sup> (1964) Times 7 May.

<sup>242</sup> *Akani v. NEPA*.

<sup>243</sup> : *Dumez (Nig) Ltd. v. Ogboli*.

<sup>244</sup> *Drawe v. Evangeou; Ogbemudia’s case, Nwanka v. Ajaegbu*.

<sup>245</sup> (1964) 2 W. L R 269.)

which punitive or exemplary damages could be awarded by laying down the following principles by Lord Delvin who gave the lead judgment:

1. Where under the umbrella of government an official conducts himself in a high-handed manner i.e. abuse of office.
2. Where people out of a desire to be greedy act without regard to their neighbours.

In *Cassell & Co. Ltd v. Brooms*, the defendant wrote a book alleging connivance with the Nazis in which the British ship was perished. The plaintiff requested that the writer and publisher should come for facts. The writer and publisher were carried away by the money the sensation would yield. Punitive or exemplary damages are being awarded by a civil court and not a criminal court and this has always been the criticism since the realm of punishment has always belonged to criminal law. This is one reason why the amount of punitive damages was reduced in *Rookes v. Barnard*.

- **Exemplary damages:** Exemplary damages are usually awarded when a defendant's conduct is sufficiently oppressive, arbitrary or unconstitutional, outrageous and vindictive, showing the content of the plaintiff's right.<sup>246</sup>

**iii. Apology:** Where a Court orders it as part of the relief granted to the claimant, it becomes judicial. As was previously pointed out, if the apology was rendered before Court action, it mitigates damages<sup>247</sup>. It can be a basis for out-of-court settlement.

**iv. Retraction:** This can be judicial where it is ordered by a court compelling the defendant to retract the defamatory statement.

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<sup>246</sup> *Megawalth Ltd v. SEC*, Ibid. pp. 380 – 381; *Baker Marine Nig. Ltd v. Chevron Nig. Ltd* (2006) 13 NWLR (pt. 997) 276

<sup>247</sup> See Section 5 Rivers State Defamation Law.

**v. Offer of Amends:** This may serve as a defence in view of the provisions of section 5(1)(b) of the Rivers State Defamation Law that an offer of amends shall be a defence if the offer is not accepted by the aggrieved party in respect of the publication in question to prove that the publication was made innocently.

## **B. TORT OF PRIVACY**

### **1. RIGHT TO PRIVATE LIFE**

Privacy has been defined as “the right to be left alone. The right to a private life.”<sup>248</sup> According to *Black’s Law Dictionary*<sup>249</sup>, privacy refers to “the condition or state of being free from public attention to intrusion into or interference with one’s acts or decisions” It can be in the form of autonomy privacy<sup>250</sup> or informational privacy.<sup>251</sup> It is the antithesis of what is public. Like the definition given in the *Calcutt Report* (1990), it has been stated to be “the right of the individual to be protected against intrusion into an individual’s personal life or affairs, or those of his family by direct physical means or by publication of information.”<sup>252</sup> Privacy, therefore, refers to everything concerning an individual’s home, family, health, religion, sexuality, legal and financial affairs. A right to privacy includes protection from:

- a. Physical intrusion;
- b. Publication of hurtful or embarrassing personal material (whether true or false);
- c. Publication of inaccurate or misleading personal material; and
- d. Publication of photographs or recordings of the individual taken without his consent.

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<sup>248</sup> Martin, E. A. (ed.) *A Dictionary of Law*, Fifth Edition, Oxford University Press, Oxford New York, 2002, p. 381

<sup>249</sup> Garner, B. A. (ed.) *Black’s Law Dictionary*, Ninth Edition, West Publishing Co., Minnesota, 2004, p. 1316

<sup>250</sup> For example, the constitutional right to do certain things to one’s body, such as to have an abortion

<sup>251</sup> Ibid, p. 1316, such as telephone calls

<sup>252</sup> Cooke, J., *Law of Tort*, Eight Edition, Peason Longman, London, 2007, p. 432

## **2. THE POSITION OF RECEIVED ENGLISH LAW**

English law does not recognise a general right to privacy in the sense of tort of invasion of privacy as embodied in the French Civil Code or created by the German courts and some other jurisdictions. The approach of English law is the use of existing torts (defamation, trespass, malicious falsehood, nuisance, passing off or breach of confidence) and protection given incidentally by a variety of other causes of action including infringement of copyright, the law of contract, restitution, or criminal law. It is debatable whether these principles were adequate in protecting the right to privacy.<sup>253</sup>

The debate on the adequacy of existing legal principles to protect the privacy of individuals began in the United States as long ago as 1890, with an article published by Samuel D. Warren and Louis D. Brandeis in the Harvard Law Review cases on defamation, breach of copyright and breach of confidence as being based on the protection of common value called privacy and that the courts should declare the existence of a general principle which protected a person's appearance, sayings, acts and personal relations from being exposed in public. US courts began to develop a jurisprudence of privacy but it became apparent that it could not be confined within a single principle. What emerged was a complex of four different torts:

1. Intrusion upon the claimant's physical solitude or seclusion - this would include unlawful searches, telephone tapping, telephoto lens photography and telephone harassment.
2. Public disclosure of private facts.
3. Publicly putting the claimant in a false light.
4. Appropriating the claimant's name or likeness.

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<sup>253</sup> Cooker, Progress Towards a Statutory Right to Privacy. 434

This picture has likely changed as a result of the English Human Rights Act, of 1998.

In the early 1970s and 1990s, the creation of a general right of privacy was rejected unlike in France and Germany. This was mainly because it was thought that it was difficult to define.

Cooker states thus:

The difficulty in defining a general right to privacy as opposed to specific instances such as the right not to have your medical records disclosed has made English courts reluctant to use the forum of relationship or transaction in litigation to create such a right.<sup>254</sup>

Furthermore, there was sustained opposition to it from the British press.

The lack of development in this area did not foreclose discussions on the matter and certain extra-legal protections.<sup>255</sup> Attempts were, however, made to rely on a number of existing torts in order to overcome the lack of causes of action in complaints about invasion of the claimant's privacy. Of all the existing causes of action, malicious falsehood was acceptable by the court as represented by *Kaye v Robertson*.<sup>256</sup> In this case, *P* was a well-known actor who had undergone extensive surgery after suffering a head injury driving during a storm. *D1* was the editor of *The Sunday Sport*. *D2* was the publisher of *The Sunday Sport*.

Journalists from *D2's* newspaper got into *P's* hospital room ignoring notices prohibiting entry and interviewed and took photographs of *P*. *P* apparently agreed to be interviewed and did not object to the photographs. *D1* and *D2* announced their intention to publish the interview and photographs and *P* sued seeking an interlocutory injunction to prevent publication. *P* relied on:

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<sup>254</sup> Cooker, *ibid*, pg 434.

<sup>255</sup> The most prominent protective mechanism was the establishment of the Press Complaints Commission and the Broadcasting Standards Commission, with the former applying a code but that did not contain direct sanctions in form of damages or injunction which private law could not apply.

<sup>256</sup> [1991] FSR 62.

- i. malicious falsehood;
- ii. libel;
- iii. passing off; and
- iv. trespass to the person.

The basis of (i) and (ii) was that he had consented to the interview was false as, to the journalists' knowledge, he had not been in a fit state to consent.

In this first case, it was alleged that this was libellous in that it would lower *P* in the esteem of right-thinking people, by analogy with *Tolley v Fry*.<sup>257</sup> In the second case, it had caused damage by the loss of ability to be paid for his interview.

The basis of (iii) was also the false statement of consent, i.e. that the proposed article would falsely be represented to the public as having been consented to by *P*.

The basis of (iv) was that the use of flash photography in such circumstances was a battery. *P* was granted an interlocutory injunction by Potter J which restrained use of publication of the photographs or interview, based on (i), (ii) and (iii).

On appeal, the Court of Appeal held that no injunction could be granted based on (ii), because of the rule in libel that an interlocutory injunction could only be granted in the clearest cases, which this was not.

Further, no injunction could be based on (iv), since the injunction sought aimed at the fruits of the trespass not at preventing a repetition of the trespass.

The Court held that (iii) was not seriously arguable, as *P* was not in the position of a trader with regard to his interest in the story.

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<sup>257</sup> [1931] AC 333.

Of all the English torts, breach of confidence turned out to be the most recognised in the context of privacy. This tort commonly arises in circumstances where there is or has been some relationship or transaction between the parties. This can be in marriage, employment, sale or purchase. Traditionally, breach of confidence was restricted to cases of prior relationships or transactions. This was applied in cases of marriage. An example from marriage is *Duchess of Argyll v Duke of Argyll*,<sup>258</sup> where after the parties' divorce, the Duke was restrained from publishing articles disclosing the marital secrets. Another is *Pollard v Photographic Co*,<sup>259</sup> where a lady commissioned a photographer to take and supply her with some photographs, later to find, to her surprise, that the photographer was incorporating her image in Christmas cards for general sale.

Confidence may be breached where;

- a) the information has the necessary quality of confidence;
- b) the information has been imparted in circumstances importing an obligation of confidence;
- c) there is an unauthorised use of the information to the detriment of the original communicator of the information.

In *Attorney General v Guardian Newspapers*,<sup>260</sup> The conditions for its application identified by Lord Goff were that there should be confidential information, which:

Comes to the knowledge of a person (the confidant) in circumstances where he has noticed or is held to have agreed, that the information is confidential, with the effect that it would be just in all

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<sup>258</sup> [1967] Ch 302

<sup>259</sup> [1888] 40 ChD 345

<sup>260</sup> (*No 2*) [1990] 1AC 109 (the second *Spycatcher* case) at 281.)

circumstances that he would be precluded from disclosing the information to others.

Lord Goff said that he had:

Expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include situations, beloved of law teachers-where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place and is then picked up by a passer-by.

Lord Goff also left open whether and if so what sort of detriment was always required to be shown. He went on, however, to identify the qualification, which applies to any claim to protect confidence, whereby the court must consider whether there is any countervailing public interest which on a balance of all relevant factors outweighs the plaintiff's interest in protecting their confidence.

The essence of the tort is that the information should be and be known to be confidential. Where information relates to matters of an obviously private nature, the conditions for its application may well exist. English law has not yet developed the full implications of this. But there are signs that it is pointing in a direction which may bring it closer to some continental systems. A

well-known dictum in this sense is that of Laws, J in *Hellewell v Chief Constable of Derbyshire*<sup>261</sup>:

If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceed to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be a breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available.

### **3. STATUTORY REGULATION OF TORTS OF DEFAMATION AND PRIVACY**

Nigeria's jurisprudence on tort is one in which there has been a preference for the common law of England, the origin of the modern development of tort law in the country. Hence, omission of or inadequate Nigerian legislation or omission of the use of such legislation in many jurisdictions in the country.

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<sup>261</sup> [1995] 1 WLR 804 at 807

As far back as 1961, the Torts Laws of Western and Eastern Nigeria were enacted.<sup>262</sup> In 1986, the Supreme Court decision in *Nasiru Bello v. Attorney-General of Oyo State*<sup>263</sup> took cognisance of the Torts Laws of Western Nigeria, an equivalent of which is the Torts Law of Oyo State, 1978, to arrive at its landmark decision.

As regards defamation, a number of States have respective Defamation laws. For example, Cap 43 of Laws of Rivers State 1999, in which 19 sections regulate broadcast statements from the perspective of defamation.

A modern legislative formulation of general torts is the Law Reform (Torts) Law,<sup>264</sup> Laws of Lagos State 2015. Of particular relevance is the provisions of Section 29 on invasion of privacy. The section provides:

“(1) Anyone who intentionally intrudes, physically or otherwise, on the solitude or seclusion of another or private affairs or concerns, is liable for invasion of privacy if the intrusion would be highly offensive to a reasonable person.

(2) Anyone who uses the name or likeness of another in a manner and to an extent which suggests to a reasonable person an intention to appropriate the name and likeness of another or that is associated with another is liable to damages.

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<sup>262</sup> Subsequently, following the creation of states, virtually all the states that comprised these regions enacted their Torts Laws, for example, in the Torts Law of Oyo State, 1978 there are provisions for the tort of invasion of privacy. This contrasts with the Torts Laws of many other states which do not have the same provisions. See for example, Tort Law Cap 131, Laws of Rivers State, 1999; Torts Laws of Bayelsa State, Cap T3 Volume 4, Laws of Bayelsa State 2006; Torts Law of Bendel State 1976, Vol. VI, Cap 164, applicable in Edo State, which provided for compensation for families of persons killed by accidents, assessment of damages relating to contributory negligence and contributions between tort-feasors, and to abolish the defence of common employment.

<sup>263</sup> (1986) 5 NWLR (part 45) 828

<sup>264</sup> Chapter L82

(3) Anyone who publicizes a matter concerning the private life of another is liable for invasion of privacy if the matter publicized is of a kind that:

- (a) Would be highly offensive to a reasonable person and
- (b) is not of legitimate concern to the public”

#### **4. DEFENCES TO TORT OF PRIVACY ACTION**

Defence of tort of privacy or breach of confidence claim includes any of the grounds for derogation of the right to private life and family in section 45 of the Constitution (as amended).

They include:

- (a) Public Interest: In addition to the constitutional qualification of the right to privacy, the common law recognizes these defences as stated in the dictum in *Hellewell v Chief Constable of Derbyshire* in Section 29 of the Law Reform (Torts) Laws of Lagos State justifies any publication that is of legitimate concern.<sup>265</sup>
- (b) Defence
- (c) Public safety
- (d) Public morality
- (e) Public health
- (f) Protection of the rights and freedom of others.

#### **5. REMEDIES FOR TORT OF PRIVACY**

These remedies adequately represent available remedies in this tort.

Section 31 of the same law provides for remedies for invasion of privacy thus:

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<sup>265</sup> Ibid.

“The remedies that a Court may grant in an action for invasion of privacy includes:

- (a) Injunction
- (b) Damages
- (c) An order directing the defendant to account for the claimant's profits that have accrued or may later accrue to the defendant because of the invasion of privacy.
- (d) An order directing the defendant to deliver to the claimant any material, article, photograph or documents that have come into the defendant’s possession because of a violation of privacy and
- (e) Any other appropriate order or relief.”

## **7.0 CONCLUSION**

It is recognised that freedom of expression and information constitutes one of the essential principles of a democratic society. This inalienable, but derogable human right enjoys protection for global individuals by the present global information technological system. In the present digital age, the tort of defamation is more often committed in cyberspace than in physical space. The digital age has brought entirely new scenarios that have expanded the concept of defamation beyond what the law could have ever conceived a few decades ago. While the paradigm defamation subsists, few new principles and new applications of the principles have emerged in response to information technology reality.

It is revealed that while websites and internet or digital platforms may be extraterritorial in their reach or applications, the law on jurisdiction over online or internet defamation is localised and as such it is in the jurisdiction where the alleged defamatory statements are accessed and downloaded that defamation action can be instituted.

It shows the nature and scope of the concepts of defamation and privacy and the circumstances in which they will be committed as torts. It is further shown that there is neither defamation nor privacy tort if a defendant successfully puts up a defence or defences to both as the case may be. It is found that the defence of innocent dissemination does not avail intermediaries for third-party defamatory content in Nigeria. The ground for the actionable tort of privacy would have been poorer if it were not so.

Legislative efforts have not successfully removed uncertainties, especially from the law of privacy. Many States in the country have torts legislation but focus on claims of death by accident. A number of states have Defamation Laws that complement laws that complement the common law, but there is no equivalent of privacy laws. Lagos State stands out in this respect as it has a Law Reform (Torts) Law, which incorporates privacy in particular. It is recommended that States and the Federal Government should enact laws that can reform tort laws in the context of defamation and privacy. The Law Reform (Torts) Law of Lagos State, with necessary modifications, can serve as a model for legal transplantation.

# **THE NUISANCE OF NOISE POLLUTION AND THE CITIZEN'S RIGHT TO A PEACEFUL ENVIRONMENT BY IBIBIA LUCKY WORIKA ESQ.\*<sup>266</sup>**

A Paper Presented at the Second Conference of the Department of Private and Property Law,  
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## **1.0 BACKGROUND AND INTRODUCTION**

On one's return to Nigeria, after my Ph.D. and post-doctoral research at the University of Dundee back in 2001 one of the things that held me spellbound was the burgeoning number of churches and make-shift mosques and religious houses of worship at every nook and cranny.<sup>267</sup>

In Port Harcourt, more specifically, Agip Estate, where I resided, I was almost surrounded at the four cardinal points by churches of one description or the other, equally at such proximity that, it became increasingly difficult to have a good night's sleep, or at any time of day. I was surrounded to the east, west, north and south by churches, which were not farther than 50 to 100 metres from my residence by several churches. When one church was rounding up its religious programme for the day, the other was almost certainly about to begin. Sometimes, all three churches were in session, not necessarily on a Sunday, which would have been understandable. Those conversant with the operational dynamics of the Pentecostal Assemblies would attest to the loud and vociferous sessions with loudspeakers placed outside the churches blaring in different directions. Sadly, it would appear we have all accepted this as the norm. But, it does not mean we are all happy about the nuisance that is occasioned.

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<sup>267</sup> Ibibia Lucky Worika, "Taming the Chimera of Religionism in Nigeria (I)" at <https://nigeriaworld.com/letters/2001/may/231.html> accessed 22/5/24; See also Ibibia Lucky Worika, "Taming the Chimera of Religionism in Nigeria (II)" at <https://nigeriaworld.com/letters/2001/jun/142.html> accessed 22/5/24

Now this is the incredible bit, a court action against these purveyors of noise pollution is out of the question as you are likely to be viewed as an agent of the Devil, or Satan. God help you if anything by way of an accident happens to you in the ordinary course of living. It would be taken as a triumph of good over evil, of light over darkness and God over the Devil! Having schooled and lived in Lagos for a better part of my teenage and early adult life, one is not unaware that the same applies to mosques, which wake up the faithful in the early hours of the morning and assume that everyone who lives in the neighbourhood must be faithful.

To be clear, churches and mosques are not the only sources of noise pollution. Noise is a consequence of human activity, forming part of our day-to-day activities. We have become accustomed to accepting it or simply tolerating it. Notwithstanding, noise tends to cause conflict between its generators and victims of noise pollution.<sup>268</sup> It is no gainsaying that noise pollution has become a nuisance and, invariably, degrading the environment and negatively affecting our quality of life. Whether the noise from the blaring of horns in the traffic, the excessive noise from car radios from mostly ‘yahoo-yahoo’ boys, or noise from large speakers during birthdays, weddings and other social occasions to the noise from geophysical and geological drilling for oil and gas exploration and development to the noise from aircraft, trains and lorries, humans are at the epicentre of noise pollution. Noise pollution from any or all of these aforesaid sources impinges on the right of citizens to a peaceful environment. This paper essentially examines the Nuisance of Noise Pollution and the Citizens’ Right to a Peaceful Environment. It achieves this in five major steps beginning with this background and introduction in the first step. The Second step examines the conceptual terms used within the context of this paper. In step 3, the Law of the Nuisance of Noise Pollution is critically ‘

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<sup>268</sup> Ranjit Singh, “Legal Control of Noise Pollution in India: A Critical Evaluation” 3(4) International Journal of Research in Humanities and Social Sciences (April, 2016) at p. 34 cited at <https://www.ijrhss.org/pdf/v3-i4/5.pdf> accessed 26/05/2024

examined vis-à-vis that of the Citizens' Right to a Peaceful Environment. The fourth step is an international and comparative survey of the Law of Noise Pollution across jurisdictions to draw any examples worthy of emulation by Nigerian law. The fifth step wraps up one's final thoughts with a summary of the major findings and recommendations.

## **2.0 CONCEPTUALISATION**

### **2.1 Nuisance of Noise Pollution**

Noise pollution is an unwanted sound that can affect animal and human behaviour. A sound which has unpleasant effects and discomfort to the ears is called noise. Generally sound generated by vehicles, horns, loudspeakers, planes, construction etc. are reasons for noise pollution. Noise pollution is also considered as environmental pollution although it is not as harmful as air, water or soil pollution, the effects of noise pollution for a longer period can be severe.<sup>269</sup> Not all noise is pollution. The WHO classifies noise above 65 dB as pollution. Noise is detrimental at 75 dB and agonizing at 120 dB. Thus, daytime noise levels should be kept below 65 dB, and nighttime ambient noise beyond 30 dB prevents restful sleep. In 2018, the WHO limited traffic noise to 53 dB for health reasons. The noise record citywide is divided into four zones: commercial, residential, industrial, and silent.<sup>270</sup>

UNEP Executive Director Inger Andersen says that as cities grow, noise pollution is becoming a threat to man and the environment. High levels of noise can cause tinnitus or deafness, especially in children and the elderly. The health effects of high levels of noise can be physical, psychological, and mental resulting in insomnia and memory loss. Excessive noise can cause respiratory agitation, racing pulse, high blood pressure, migraines, gastritis, colitis, and

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<sup>269</sup> Perfect Pollution Services, "What is Noise?" at <https://www.ppsthane.com/blog/how-to-reduce-noise-pollution> accessed 22/5/24

<sup>270</sup> Earth5R, "Noise Pollution in India – A Silent Killer" at <https://earth5r.org/noise-pollution-in-india-a-silent-killer/>

heart attacks from extremely loud, persistent noise. Noise can cause human and animal discomfort, tiredness, depression, anxiety, aggression and hysteria. Once it exceeds 45dB, noise can disrupt sleep. The WHO recommends 30 dB. Over time, noise can impair focus and performance. Memory loss makes studying difficult. Our ears need more than 16 hours to recover from two hours of noise at 100 dB. It may also affect wildlife. Urban noise may hinder bird communication, predator detection, and breeding. Loud noises can make caterpillars' dorsal vessels beat quicker, and bluebirds have fewer offspring.<sup>271</sup> Research has also shown that exposure to loud sounds can cause hypertension (high blood pressure) and higher stress and may affect sleep cycles. Moreover, noise pollution is also associated with the decline of cognitive capacity.<sup>272</sup>

The factors and sources of noise pollution are varied as they are diverse. They include urbanization, industrialization, Growth in population, poverty and illiteracy, non-effectiveness of noise pollution regulation and, in particular, the ineffectiveness of implementing and compliance enforcement agencies of government, customs, festivals and religious ceremonies, social functions and political rallies etc.

The sources of noise pollution may be broadly categorized into industrial and non-industrial sources. The industrial sources may include noise from various industrial operations in cities, like boilers, machinery, foundries, flour mills, cutting machines, etc. Noise is a byproduct of energy conservation and every industry produces noise. Pollution due to big machines working at a high speed has high noise intensity.<sup>273</sup> The non-industrial sources will include loudspeakers,

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<sup>271</sup> Ibid.

<sup>272</sup> "Effects of Noise Pollution" at <https://byjus.com/biology/effects-of-noise-pollution/#:~:text=Research%20has%20also%20shown%20that,the%20decline%20of%20cognitive%20capacity> accessed 22/5/24

<sup>273</sup> Noisy Patriot, September 25, 1983 quoted in Satish Shastri, Pollution and the Environmental Law, p.163 cited in Ranjit Singh note 2 supra.

construction works, automobiles, trains, aircraft, radio microphones and the projection of satellites in space.<sup>274</sup>

Reducing the negative impacts of exposure to environmental noise is a key objective under the **EU's zero pollution action plan**, which aims to reduce the number of people chronically disturbed by noise from transport by 30% by 2030 (compared with 2017).<sup>275</sup> Noise pollution is regarded as a nuisance. What then is nuisance?

Nuisance is defined in the Black's Law Dictionary as "A Condition, activity, or situation (such as a loud noise or foul odour) that interferes with the use or enjoyment of property; especially, a nontransitory condition or persistent activity that either injures the physical condition of adjacent land or interferes with its use or with the enjoyment of easements on the land or the public highways."<sup>276</sup> Joseph and Howard Joyce, in *Treaties on the Law Governing Nuisances*, had this to say about Nuisance,

"It is not practicable to give other than a general definition of what constitutes a nuisance. A precise technical definition, applicable to all cases, cannot be given, because of the varying circumstances upon which the decisions are based. To this, there is the exception generally of what is designated as a nuisance *per se*. The only approximately technical method of determining the meaning of the term nuisance is to examine the cases adjudicating what are and are not nuisances....it is also true that one of the great difficulties in defining a nuisance technically is to describe the degree of annoyance necessary to cause the actionable injury...A nuisance may generally be defined as anything that works

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<sup>274</sup> Ibid.

<sup>275</sup> European Environmental Agency (EEA), "Noise" at <https://www.eea.europa.eu/en/topics/in-depth/noise#:~:text=Noise%20negatively%20impacts%20wildlife%2C%20both,other%2C%20especially%20during%20mating%20season> accessed 22/5/24

<sup>276</sup> Bryan A. Garner ed., *Black's Law Dictionary* 11<sup>th</sup> ed. (U.S.A: Thomson Reuters, 2014), p. 1233

or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the enjoyment of his legitimate and reasonable rights of person or property; or that which is unauthorized, immoral, indecent, offensive to the senses, noxious, unwholesome, unreasonable, tortuous, or unwarranted, and which injures, endangers, or damages one in an essential or material degree in, or which materially interferes with, his legitimate rights to the enjoyment of life, health, comfort, or property, real or personal. A nuisance may exist not only because of doing an act but also by omitting to perform a duty.”<sup>277</sup>

Nuisance is generally categorized as either private or public. A private nuisance affects a private right not common to the public or causes a special injury to a person or property of a single person or a determinate number of people. It is also a condition that interferes with a person’s enjoyment of property; esp., a structure or other condition erected or put on nearby land, creating or continuing an invasion of the actor’s land and amounting to a trespass to it. The condition constitutes a tort for which the adversely affected person may recover damages or obtain an injunction.

Public nuisance, on the other hand, is an unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to the community's moral standards, or unlawfully obstructing the public in the free use of public property. Such a nuisance may lead to a civil injunction or criminal prosecution. Public nuisance is also termed a common nuisance. In the very words of Ranjit Singh,

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<sup>277</sup> Joseph A. Joyce & Howard C. Joyce, *Treatise on the Law Governing Nuisances* 22 (1906) cited in Bryan A. Garner ed., *Black’s Law Dictionary* *ibid* at p. 1234.

[N]oise and human civilization will always go together. Noise is one of the main pollutants causing the most hazardous consequences for human life. Excessive noise is an inescapable product of the industrial environment which is increasing very fast with the advancement in industrialization. Noise is an unwanted, unpleasant and annoying sound caused by the vibration of the matter. Vibrations impinge on the eardrum of a human or animal and set up a nervous disturbance, which we call sound. When the effects of sound are undesirable, it may be termed as "Noise." Noise from industry, traffic, homes and recreation can cause annoyance, disturb sleep and affect health. Thus, sound is a potentially serious pollutant and threat to environmental health. Noise pollution is a serious threat to public health and welfare. Noise is a major health hazard. Noise is a stressor on the human body. It causes "fight to flight" syndrome, releasing cortical and other harmful chemicals into the bloodstream. Over time, these chemicals build up in the body, leading to a host of health problems, including cardiovascular disease, aggression, chronic fatigue, headaches, high blood pressure, mental illness, and anxiety. In addition, a growing body of evidence confirms that noise pollution has both temporary and permanent effects on the endocrine and autonomic nervous systems.<sup>278</sup>

The nuisance of noise pollution, whether it is private or public is antithetical to the right to a healthful and peaceful environment. What then is the environment? Is there a constitutional right to a healthful or peaceful environment?

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<sup>278</sup> Ranjit Singh, note 2 supra at p. 38

## 2.2 Environment

The environment is the physical surroundings, conditions, circumstances, etc in which a person lives. In this sense, environment encompasses the nature and the entire ecosystem, the totality of the physical and human conditions on Earth.<sup>279</sup> In this sense, environment includes strong anthropocentric, pathocentric, biocentric and ecocentric as well as terracentric ecological ethics.<sup>280</sup> While Nigeria's Constitution does not define "environment", it did state under Chapter II titled, "Fundamental Objectives and Directive Principles of State Policy" in section 20 that:

The State shall protect and improve the environment and safeguard the water, air, forest and wildlife of Nigeria."<sup>281</sup> Arguably, this provision imposes a duty on the State to protect and improve the environment, while safeguarding the water, air, forest and wildlife of Nigeria. That section, per se, does not grant a right to a peaceful environment. Besides, section 20 of the Constitution is non-justiciable under section 6(6)(c) of the Constitution, which provides that:

The judicial powers vested in accordance with the foregoing provisions of this section shall not except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter II of this constitution.

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<sup>279</sup> Ibibia Lucky Worika, *Environmental Law & Policy of Petroleum Development: Strategies and Mechanisms for Sustainable Management in Africa* (Port Harcourt: Anpez Centre for Environment & Development, 2001) at. p. 20

<sup>280</sup> Ibid at pp. 20-23

<sup>281</sup> Constitution of the Federal Republic of Nigeria 1999 (As amended) at <https://www.wipo.int/edocs/lexdocs/laws/en/ng/ng014en.pdf> accessed 24/5/2024

The latter provisions oust the jurisdiction of the court to entertain any matter related to the enforceability of the duty of the State to protect the environment. We shall come back to this in the next section.

### **3.0 THE NUISANCE OF NOISE POLLUTION vs THE RIGHT TO A PEACEFUL ENVIRONMENT**

#### **3.1 The Common Law of Tort on the Nuisance of Noise Pollution**

The tort of nuisance has historically been the main avenue for redress against pollution in Nigeria, and many common law countries.<sup>282</sup> The attraction ‘lies in the fact that, unlike negligence, it dispenses with the requirement of proof by the plaintiff of a duty of care, and its breach by the defendant.’<sup>283</sup> Despite this, the success of nuisance claims against polluters particularly TNCs in Nigeria is uncertain, due to reluctance within the court system to assign damages to individuals or communities as a whole.<sup>284</sup> Nuisance claims can be made if the activities of the wrongdoer or polluter cause interference with the enjoyment of public or private rights over lands. Private claims are more likely to succeed on this basis if the plaintiff can prove that the damage to their property and way of life was the direct result of the company’s operations.<sup>285</sup> Despite its attraction, the utility of private nuisance is limited by the burden of proof imposed on the plaintiff as he has to prove that the defendant’s act caused

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<sup>282</sup> KM Mowoe, ‘Quality of Life and Environmental Pollution and Protection’ in JA Omotola (ed), *Environmental Law in Nigeria Including Compensation* (Faculty of Law, University of Lagos Press 1990) 185.

<sup>283</sup> T Osipitan, ‘Problems of Proof in Environmental Litigation’ in JA Omotola (ed), *Environmental Law in Nigeria Including Compensation* (Faculty of Law, University of Lagos Press 1990), 120.

<sup>284</sup> JG Frynas, ‘Legal Change in Africa: Evidence from Oil-related Litigation in Nigeria’ (1999) 43 *Journal of African Law* 125.

<sup>285</sup> *Abiola v Ijeoma* (1970) 2 ALL NLR 768; *Tebite v Nigerian Marine and Trading Company Ltd* (1971) UILR 432.

damage to him.<sup>286</sup> The plaintiff must also prove that the defendant was unreasonable in his interference with the use and enjoyment of the defendant's premises. In the determination of unreasonable interference, the court usually seeks to strike a balance between the competing rights of the plaintiff and the defendant.<sup>287</sup> In environmental tort cases, the court considers reasonable use of property by the defendant against the backdrop of the social utility of the defendant's conduct. Within the context of the exploration of crude oil upon which the economy of Nigeria is principally based,<sup>288</sup> the court usually considers the social utility of the defendant's (oil company) conduct against the competing rights of the plaintiff,<sup>289</sup> and tends to lean in favour of the defendant, especially in instances where injunctive reliefs are sought, thereby 'prioritising the economic interests of the state over the environment'.<sup>290</sup>

The requirement of reasonable use of land does not apply to actions in public nuisance. Hence, once there is an injury to the enjoyment of property, an action will be obtained irrespective of whether or not the use of the land by the defendant had been objectively reasonable.<sup>291</sup> Nevertheless, the attraction of public nuisance lies in the fact that it covers 'multiple sins, great or small'.<sup>292</sup> Previously, action in public nuisance was constrained by the plaintiff having to prove special or peculiar damage suffered by him or her or in the alternative, institute the action with the consent of the Attorney-General.<sup>293</sup> Presently, this is no longer necessary by the

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<sup>286</sup> T Osipitan, 'A Conspectus of Environmental Law in Nigeria' (1997) 1 The Nigerian Journal of Public Law 85, 91. (hereinafter Osipitan II).

<sup>287</sup> *ibid.*

<sup>288</sup> J Udeh, *Petroleum Revenue Management: The Nigerian Perspective*, Workshop on Petroleum Revenue Management, in World Bank/IFC Petroleum Revenue Management Workshop, Washington DC, October 23-24, 2000, 2.

<sup>289</sup> *Chinda & Ors v Shell BP* (1977) 2 RSLR 1; *Allar Irou v Shell-BP*, Suit No W/89/71 (Warri High Court), (unreported); *Onyoh v Shell-BP* (1982) 12 CA 144, 159-160.

<sup>290</sup> E Emeseh, 'Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria' (2006) 24(4) Journal of Energy & Natural Resources Law (JENRL) 574, 603. See also Frynas (n 1) 122-123.

<sup>291</sup> *Richard v Lothian* (1913) AC 263.

<sup>292</sup> *Southport Corp v Esso Petroleum Co. Ltd* (1954) 2 QB 182, 196 (per Lord Denning).

<sup>293</sup> *Amos v Shell-BP* (1974) 4 ECLR 436; and *Lawani v Nigerian Portland Cement Co. Ltd* (1977) SC 345.

Supreme Court decision in *Adediran and Anor v Interland Transport Limited*,<sup>294</sup> where the Court held that by virtue of section 6(6) (b) of the 1979 Constitution of Nigeria (now 1999 Constitution), a private person may commence an action in public nuisance without the consent of the Attorney-General, and without joining him or her as a party. The liberalization of this rule has greatly enhanced the right of victims of environmental (noise) pollution to seek judicial remedy in Nigeria; even though, the tort of public nuisance plays only a residual role in the control of pollution, which is now the subject of extensive statutory control.<sup>295</sup>

### 3.2 Statutory Provisions on the Nuisance of Noise Pollution

In addition to the common law of tort dealing with the nuisance of noise pollution, new systems of environmental regulation and liability through federal and state regulation and compliance enforcement were introduced in Nigeria through the enactment and subsequent amendments of environmental statutes and the creation of environmental agencies.<sup>296</sup> These environmental statutes and agencies regulate, amongst others, water resources,<sup>297</sup> harmful waste,<sup>298</sup> air, parks, vehicular emissions,<sup>299</sup> forests, land use, animals, pests, mining, hides and skins, oil pipelines<sup>300</sup> and nuclear safety.

<sup>294</sup> (1992) 9 NWLR (Pt 214) 155.

<sup>295</sup> Amokaye (n 9) 90.

<sup>296</sup> See for example the National Environmental Standards Regulation and Enforcement Agency (Establishment) Act No. 92, 2007 at <https://www.nesrea.gov.ng/wp-content/uploads/2020/04/NESREA-ACT.pdf> accessed 27/5/2024; See also Noise Standards and Control Regulations No. 67, vol. 96 2009 at [https://www.nesrea.gov.ng/wp-content/uploads/2020/02/Noise\\_Standards\\_and\\_Control\\_Regulation%202009%20.pdf](https://www.nesrea.gov.ng/wp-content/uploads/2020/02/Noise_Standards_and_Control_Regulation%202009%20.pdf) accessed 27/5/2024

<sup>297</sup> See Water Resources Act No. 101, 1993 at <https://faolex.fao.org/docs/pdf/nig4832.pdf> accessed 27/5/2024

<sup>298</sup> Harmful Waste (Special Criminal Provisions) Act No. 42 of 1988 Chap. 165 LFN at <https://faolex.fao.org/docs/pdf/nig18377.pdf> accessed 27/5/2024

<sup>299</sup> National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations No. 47 Vol. 98 2011 at [https://www.nesrea.gov.ng/wp-content/uploads/2020/02/Control\\_of\\_Vehicular\\_Emissions\\_from\\_Petrol\\_and\\_Diesel\\_Engines\\_Regulation%202011%20.pdf](https://www.nesrea.gov.ng/wp-content/uploads/2020/02/Control_of_Vehicular_Emissions_from_Petrol_and_Diesel_Engines_Regulation%202011%20.pdf) accessed 27/5/2024

<sup>300</sup> Oil Pipelines Act Chap. 338 LFN 1990 at [https://www.chr.up.ac.za/images/researchunits/bhr/files/extractive\\_industries\\_database/nigeria/laws/Oil%2](https://www.chr.up.ac.za/images/researchunits/bhr/files/extractive_industries_database/nigeria/laws/Oil%2)

Modern oil and gas operations thrive on the use of directional drilling, installations such as wells, wellheads, flow stations, pipelines and other assets, including hydraulic fracking in other jurisdictions, which produce noise levels that may increase adverse effects on human health.<sup>301</sup>

The Nigerian **Petroleum Industry Act Upstream Safety Regulations 2022**<sup>302</sup> provides as follows under Regulation 11:

(a) Personnel are provided with the appropriate hearing protection if noise levels are equal to or greater than 85 dBA for an 8-hour Time Weighted Average (TWA).

(b) No person shall, unless appropriately protected, be exposed to a noise level equal to 115 dBA or greater for any length of time, notwithstanding that the TWA is below 85 dBA action level.

(c) The sound pressure level at the edge of the nearest residential area shall not exceed 50 dBA at night

(d) Annual audiometric tests are conducted for all personnel working in high-noise areas and results are made available on demand to the Commission

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[0Pipelines%20Act.pdf](#) accessed 01/6/2024. See also the Complete LFN 2004 at <https://placng.org/lawsofnigeria/view2.php?sn=425> accessed 01/6/2024.

<sup>301</sup> Ann Brody Guy, “Noise Pollution from Oil and Gas Development may Harm Human Health” at <https://wvutoday.wvu.edu/stories/2016/12/22/noise-pollution-from-oil-and-gas-development-may-harm-human-health#:~:text=Modern%20oil%20and%20gas%20development,are%20negatively%20impacted%20by%20stress%2C> accessed 01/6/2024.

<sup>302</sup> The Petroleum Industry Act Safety Regulations 2022 at <https://www.nuprc.gov.ng/wp-content/uploads/2022/08/Upstream-Petroleum-Safety-Regulations.pdf> accessed 01/5/2024

Noise control regulations are established and implemented by the National Environmental Standards and Regulations Enforcement Agency (NESREA).<sup>303</sup> The relevant provisions against noise pollution under this Act are as follows:

“22.—(1) The Agency shall, on the commencement of this Act, in consultation with appropriate authorities:

(a) identify major noise sources, noise criteria and noise control technology; and  
(b) make regulations on noise, emission, control, and abatement, as may be necessary to preserve and maintain public health and welfare.

(2) The Agency shall enforce compliance with existing regulations and recommend programmes to control noise originating from industrial, commercial, domestic, sports, recreational, transportation or other similar activities.

(3) A person who violates the Regulations made pursuant to sub-section (1) of this section commits an offence and shall on conviction be liable to a fine not exceeding N50,000 or to imprisonment for a term not exceeding one year or to both such fine and imprisonment and an additional fine of N5,000 for every day the offence subsists.

(4) Where an offence under subsection (3) of this section is committed by a body corporate, it shall on conviction be liable to a fine not exceeding N500,000 and an additional fine of N10,000 for every day the offence subsists.”<sup>304</sup>

The purpose of the National Environmental (Noise Standards and Control) Regulations 2009 is to ensure the maintenance of a healthy environment for all people in Nigeria, the tranquillity

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<sup>303</sup> National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2018.

<sup>304</sup> Section 22 of the NESREA Act 2018

of their surroundings and their psychological well-being by regulating noise levels and generally, to elevate the standard of living of the citizens by –

- “a) Prescribing the maximum permissible noise levels a facility or activity to which a person may be exposed;
- b) Providing for the control of noise and for mitigating measures for the reduction of noise; and
- c) Generally, for giving effect to the provisions of section 22 of the Act.”

Projects that could have a major impact on the environment are required to undergo studies under the Environmental Impact Assessment Act, which includes considerations for noise pollution.<sup>305</sup> These legislations demonstrate the increasing awareness of the need to safeguard residents' rights to a quiet, healthful and peaceful environment and shield them from the negative consequences of noise.<sup>306</sup>

Even with these rules in place, enforcement is still quite difficult. The efficient application of noise control measures is a challenge in many developing nations, including Nigeria, because of inadequate infrastructure, a lack of public knowledge, and limited resources. Many individuals continue to be exposed to dangerous noise levels because of the frequent discrepancy between the law and its actual implementation.<sup>307</sup>

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<sup>305</sup> AA Ibrahim, ‘Environmental Impact Assessment in Nigeria: A Review’ *World Journal of Advanced Research and Reviews* (2020) 8 (3) 330-6.

<sup>306</sup> JI Mantu, ‘NESREA And The Challenge Of Enforcing The Provisions Of Environmental Impact Assessment Act In Nigeria (2019) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3410104](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3410104) accessed 24 May 2024.

<sup>307</sup> EA King and E Murphy, ‘Environmental Noise ‘Forgotten’ or ‘Ignored’ pollutant?’ *Applied Acoustics* (2016) 112 211-5.

### 3.3 Fundamental Human Rights Enforcement Suits

The Constitution of the Federal Republic of Nigeria<sup>308</sup> does not explicitly provide for a right to a healthy or peaceful environment. Rather, it provides among its Fundamental Objectives and Directives Principles of State Policy, that ‘[t]he State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria’.<sup>309</sup> Following the persuasive precedent laid down by the Indian Supreme Court,<sup>310</sup> this provision arguably provides for an implicit right to a healthy environment. Hence, when confronted with a similar situation, Nigerian courts are urged to reinterpret the fundamental rights in the Constitution especially the rights to life, dignity of human persons, private and family life, and property in the light of the provision of section 20, to uphold the constitutional right of every Nigerian to live in a peaceful and healthy environment.<sup>311</sup> On the other hand, the right to a healthy environment is explicitly provided under Article 24 of The African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act,<sup>312</sup> (hereinafter, African Charter Ratification Act) which transformed the provisions of the African Charter on Human and Peoples’ Rights,<sup>313</sup> into municipal law in Nigeria. The implication is that victims of noise pollution can rely on the right in their litigation against noise polluters. The procedure to be used is the same as those provided for the enforcement of fundamental rights under Chapter IV of the Constitution. This is because the 2009 Fundamental Rights Enforcement Procedure Rules,<sup>314</sup> (hereinafter FREP 2009 Rules), in its preamble, stated as one of its overriding

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<sup>308</sup> Constitution of the Federal Republic of Nigeria, 1999 (As Amended) at <https://www.wipo.int/edocs/lexdocs/laws/en/ng/ng014en.pdf> accessed 24/5/2024

<sup>309</sup> *ibid*, s 20.

<sup>310</sup> *Subash Kumar v State of Bihar*, (1991) AIR 420, (1991) SCR (1) 5; *L.K. Koolwal v Rajasthan* (1988) AIR 2 (High Court of Rajasthan); *Charan Lal Sahu v Union of India* (1990) AIR (SC) 1480; *T. Damodhar Rao v Municipal Corp of Hyderabad* (1987) AIR 171 at 181; *M.C. Mehta v Kamal Nath* (2000) 6 SCC 213.

<sup>311</sup> EP Amechi ‘Triggering Environmentalism Through Access to Court: Imperative of Deepening the Recognition of the Right to Healthy Environment in Nigeria’ (2022) 2 (7) *Isagoge Journal of Humanities and Social Sciences* 1, 7.

<sup>312</sup> Cap A9, LFN 2004.

<sup>313</sup> OAU Doc.CAB/LEG/67/3 rev.5, 21 Int’l Leg. Mat. 58 (1982).

<sup>314</sup> Fundamental Rights (Enforcement Procedure) Rules, 2009, entered into force on 1 December 2009.

objectives, the purposive and expansive interpretation of both the provisions of the Nigerian Constitution (especially Chapter IV), as well as the African Charter Ratification Act to advance and realise the rights and freedoms contained in them and affording the protections intended by them.<sup>315</sup>

Furthermore, the preamble defines fundamental rights as including “any of the rights stipulated in the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act”.<sup>316</sup> Such explicit definition under the Rules should have rested any lingering doubt regarding the justiciability of the socio-economic provisions of the Act including the right to a healthy environment. This assertion finds support in the fact that before the adoption of the 2009 FREP Rules, it has already been held by the Court of Appeal in *Abia State University v Anyaibe*,<sup>317</sup> that since the erstwhile 1979 Rules were made pursuant to section 42(3) of the 1979 Constitution (now section 46(3) of the 1999 Constitution), they form part of the Constitution and have the same force of law as the Constitution. It should be noted that despite such lofty objective stated in the preamble to the FREP Rules 2009, article 24 and other provisions of the Act are still subject to the provisions of the Nigerian Constitution and any other subsequent law repealing or modifying it.<sup>318</sup> In essence, the definition of a fundamental right under the Rules to include any right under the African Charter Ratification Act does not place rights under the Act on the same fundamental level as rights guaranteed under Chapter IV of the Nigerian Constitution. This is because, unlike constitutional rights, rights under the Act are still

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<sup>315</sup> *ibid*, para 3 (a).

<sup>316</sup> *ibid*, para 1 (2).

<sup>317</sup> (1996) 3 NWLR (Pt 439) 646.

<sup>318</sup> *Abacha v Fawehinmi* (2000) FWLR 586, F-G 12 (1).

not immune from alteration, modification, or suspension by the Legislature in the ordinary process of legislation.<sup>319</sup>

The validity of the 2009 FREP Rules, a subsidiary legislation in endowing particularly the socio-economic rights in the Act including the right to a healthy environment with fundamental flavour, has been questioned. However, this appears to have been laid to rest by the Nigerian Supreme Court in *the Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*, with its explicit recognition of the right to a healthy environment.<sup>320</sup>

The emergent approach to environmental rights in Nigeria has been to utilise the fundamental rights enforcement option in litigating claims for pollution arising from bad oilfield practices of oil and gas companies, which would include the nuisance of noise pollution from aerial surveys, geological and geophysical drilling operations, including noise pollution from gas flare operations as well as the earth-shaking movement of heavy-duty vehicles. These claims have been largely based on Article 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act<sup>321</sup> - a Nigerian statute enacted to give effect to the provisions of the African Charter on Human and Peoples' Rights.<sup>322</sup> The said Article 24 of the ACHPR Ratification Act recognises, provides for and makes enforceable the right to a generally satisfactory environment conducive to development.<sup>323</sup> Furthermore, the Fundamental Rights (Enforcement Procedure) Rules<sup>324</sup> made pursuant to Section 46(2) of the Constitution of the Federal Republic of Nigeria<sup>325</sup> define the human rights that are enforceable

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<sup>319</sup> EP Amechi, 'Strengthening Environmental Public Interest Litigation through Citizen Suits in Nigeria: Learning from the South African Environmental Jurisprudential Development' (2015) 21 (3) African Journal of International and Comparative Law 323, 327-330.

<sup>320</sup> *Centre for Oil Pollution Watch v NNPC* (2019) 15 NWLR (Pt 1666) 518.

<sup>321</sup> ACHPR Ratification Act (n 59), art 24.

<sup>322</sup> ACHPR (n 60).

<sup>323</sup> *ibid*, art 24.

<sup>324</sup> FREPR (n 61).

<sup>325</sup> 1999 (As Amended) [CFRN].

by means of the FREPR 2009 to include the human rights protected in the ACHPR.<sup>326</sup> This, therefore, seems to suggest that the right to a pollution-free and poison-free environment can be litigated as a fundamental right in Nigeria. A few pollution cases have been litigated using this medium.

While not specifically on the nuisance of noise pollution, *Jonah Gbemre v SPDC*<sup>327</sup> and *Okpara v SPDC*<sup>328</sup> are two cases in which attempts to enforce the right to a pollution-free environment by local communities affected by acute gas flaring activities were made using the fundamental rights enforcement procedure and could serve as persuasive cases. In both cases, the Applicants who represented members of their respective communities in the Niger Delta alleged that the gas flaring activities of the respondent company caused risks such as premature death, respiratory illnesses, asthma and cancer to inhabitants of their communities. Specifically, the applicants alleged that gas flaring contributes to adverse climate change in the affected communities as the emitted carbon dioxide and methane cause warming of the environment, contaminated food and water, painful breathing, chronic bronchitis, decreased lung function, affected the food security of the affected communities and also caused acid rain which corrodes corrugated iron sheets and other metals, amongst sundry claims. Flowing from the above claims, the applicants who instituted separate actions before different divisions of the Federal High Court, sought various declarations, the principal among which was a declaration that the constitutionally guaranteed fundamental rights to life and dignity of the human person provided for in Sections 33(1) and 34(1) of the CFRN, and reinforced by

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<sup>326</sup> *ibid*, para 3 of the Preamble to the FREPR (n 61) and Order 1(2).

<sup>327</sup> Suit No: PHC/CS/B/153/2005 (Unreported judgment of the Federal High Court Benin Division delivered on 14 November 2005); (2005) AHRLR 151 (NGHC 2005).

<sup>328</sup> Suit No. FHC/PH/CS/518/2005 (judgment of the Federal High Court Port Harcourt Division delivered in 2005).

Articles 4, 16 and 24 of the ACHPR Ratification Act, inevitably includes the right to a clean, poison-free, pollution-free and healthy environment;

It is noteworthy that the two suits terminated with contrasting outcomes. In the *Gbemre* suit, the Federal High Court sitting in Benin held that the constitutionally guaranteed rights to life and dignity of the applicants inevitably include the right to a clean, poison-free, pollution-free and healthy environment and accordingly held that the gas flaring activities of the respondent constitute a gross violation for the applicants' rights as enshrined in the CFRN. The court proceeded to grant all the reliefs sought by the applicants. However, in *Opara's* case,<sup>329</sup> the applicants' suit was struck out on technical grounds of wrong procedure and wrong joinder of cause of action. The Federal High Court Port Harcourt Division held that the suit could not be maintained in a representative capacity as the injuries alleged by the plaintiffs were different in degree and character. On appeal in *Opara v SPDC*,<sup>330</sup> the Court of Appeal was called upon to determine the following questions: (1) whether the rights created by the ACHPR can be enforced by the FREPR; (2) whether the appellants being different persons representing different communities impacted by pollution can institute their claim in a representative capacity; and (3) whether the rights to life and dignity of human person alleged by the appellants as being violated by the activities of the respondents can be said to have been breached by the gas flaring activities of the respondents.

As regards the first issue/question, it is the view of the Court that the human rights created under the ACHPR are enforceable via the FREPR. As regards the second issue/question, the Court of Appeal held that the rights created under Chapter IV of the CFRN as well as the ACHPR, such as the right to life and dignity of human person, are personal rights as against communal rights. This being the case, only a person or an individual who alleges that any of

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<sup>329</sup> *Okpara v SPDC* (n 59).

<sup>330</sup> (2015) 14 NWLR (Pt 1479) 307.

his rights enshrined in Chapter IV of the CFRN and the ACHPR can enforce the same via the FREPR. Such rights cannot be claimed or enforced by a community, or group of persons in a representative action. It was also pointed out that the appellants could not commence the action in a representative capacity as their respective claims and reliefs were disparate. The Court did not answer the third issue/question as doing so would necessarily require a determination of the suit on its merits. The appeal was accordingly dismissed.

The *locus classicus* in terms of oil pollution claims in Nigeria appears to be *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation*<sup>331</sup> delivered on 20 July 2018. In that case, the appellant in enforcing its mandate as an environmental rights organisation sued the respondent in the Lagos Division of the Federal High Court, seeking some relief for the alleged neglect of its pipelines in the Acha Autonomous community in Isukwato Local Government Area of Abia State. The Appellant alleged that the negligence of the respondent in maintaining its pipelines resulted in oil spillage which contaminated the only drinking water sources of the Acha Autonomous community. While this case was decided by the Supreme Court of Nigeria entirely on the preliminary objection argued by the respondent against the competence of the suit - namely that the appellant was not a member of the affected community and, therefore, lacked the *locus standi* to sue, both the lead judgment and concurring opinions of the Supreme Court panel reflect a new dawn in awareness of the linkages between the right to a healthy environment and the enjoyment of the right to life. Apart from expanding the frontiers of *locus standi* to accommodate the appellant and similarly situated public-spirited litigants, they harped on the duty of the State to protect the environment, thus:

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<sup>331</sup> *Centre for Oil Pollution Watch v NNPC* (n 51).

[...] Section 20 of the Constitution provides that the “State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of the country.” On its part, section 17(4) of the Oil Pipelines Act forbids the compromise of public safety by the holder and prevention of pollution of land and waters, as in the instant case. The subsection provides that every license shall be subject to the provisions contained in the Act and to such regulations concerning public safety, the avoidance of interference with works of public utility in, over and under the land and the prevention of pollution of such land or any waters. It was pursuant to section 17(4) of the Oil Pipeline Act that the Oil and Gas Pipeline Regulations were promulgated. A community reading of the above constitutive provision with regulation 9(a)(ii) and (b)(ii) and (iii) would reveal that they require the oil pipeline license holder to institute mechanisms for the prevention of accidents like crude oil spill and remediation action for the protection of the environment and control of accidental discharge from the pipeline. In the instant case, it was obvious from the appellant’s pleading that the respondent, a public authority, by the acts complained of acted in violation of both its constitutional obligation under section 20 thereof and its statutory obligations. These occasioned injury to public interest or public injury. From the pleadings, the appellant’s interest was unambiguous. Therefore, the suit was not prompted by ill motive or mischief. The appellant’s case was that the respondent’s action(s) was/were in breach of the law and that the result of the objectionable deed(s) was an injury to the health of the people and/or dangerous to the environment thereby making it necessary for the appellant to

initiate the action to enforce the law and save lives and protect or restore the environment.<sup>332</sup>

## **4.0 COMPARATIVE SURVEY OF THE NUISANCE OF NOISE POLLUTION REGULATIONS**

### **4.1 South Africa**

Like most modern societies, South Africans are generally exposed to noise pollution in the form of traffic, aeroplanes and construction work just to mention these. There is a myth regarding noise, not just in South Africa, but in most parts of the developing world, that people can generally make noise until 22h00 on weekdays and 24h00 on weekends. Notwithstanding, most municipalities in South Africa focus on the decibels produced rather than the time when the noise occurred. Municipal by-laws are based primarily on disturbing noise, which is the objective and is defined as a scientifically measurable noise level, compared to the existing ambient noise level.

South Africa's Noise Control Regulations in terms of S. 25 of the Environment Conservation Act 1989 regulates Noise at the national level.<sup>333</sup> The Noise Control Regulations have given local authorities extensive powers to regulate noise.<sup>334</sup> The Regulations define 'noise disturbance' as "any sound which disturbs or impairs or may disturb or impair the convenience

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<sup>332</sup> *ibid*, 569, paras. E-H; 570, para. B; 572, paras. C-F; 574, para. D [Per Nweze, JSC].

<sup>333</sup> Noise Control Regulations in terms of section 25 of the Environment Conservation Act, 1989, (No. 73 of 1989) Published by Government Notice R154 in Government Gazette 13717. Commencement date: 10 January 1992 at <https://cer.org.za/wp-content/uploads/2014/02/Noise-control-regulations.pdf> accessed 02/6/2024.

<sup>334</sup> See for example the Noise Control Regulations – PN 627 of 1998 of Western Cape, South Africa at [https://www.ehrn.co.za/download/reg\\_noise.pdf](https://www.ehrn.co.za/download/reg_noise.pdf) accessed 28/5/2024.

or peace of any person” and “disturbing noise” as “a noise level that exceeds the ambient sound level measured continuously at the same measuring point by 7 db or more.”<sup>335</sup>

Citizens of South Africa, have a few options when it comes to dealing with disturbing noise. The first option involves laying a complaint with the local authority by way of a written statement. Several local authorities have Noise Control Units that investigate noise complaints. If the noise persists there is a second option to approach the courts for relief. An important aspect of these options is to acquire scientifically measured noise levels. A certified and calibrated sound level meter is required to provide accurate and reliable measurements. These noise levels are compared with the ambient noise level as well as the National Noise Regulations and municipal by-laws to determine whether the noise is above the allowable limits.<sup>336</sup>

## **4.2 India**

Like other responsible governments around the world, the government of India has been concerned with the need to provide a clean and healthful environment through environmental policy, planning and management since the 1970s. This has been very clear from the various national development plan documents.<sup>337</sup> Environmental matters have assumed increasing importance, including the subject of environmental conservation and control. Considering the challenges of the environment and its impact on national development, environmental management is a priority at the hands of various governments. This is easily noticeable in the

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<sup>335</sup> Ibid.

<sup>336</sup> EVASS NEWS, “Noise Pollution” at <https://www.envass.co.za/noise-pollution-2/> accessed 22/5/24

<sup>337</sup> The management of environmental despoliation was for the first time clearly provided in the Fourth Five Year Plan (1969-74).

setting up of a separate Department of Environment (DOE) to tackle the ecological crisis, with the result that some states have also set up their own Department of Environment.<sup>338</sup>

The Bhopal gas tragedy of 1984, one of the world's worst industrial disasters which claimed 30,000 lives and crippled 1,500,000 revealed several inadequacies in India's safety and environmental legislations, particularly in its capacity to prevent and deal with consequences of catastrophic accidents involving hazardous chemicals. Since the disaster, India has experienced rapid industrialization. While some positive changes in government policy and the behaviour of a few industries have taken place, major threats to the environment from rapid and poorly regulated industrial growth remain. Widespread environmental degradation with significant adverse human health consequences continues to occur throughout India.<sup>339</sup>

Notwithstanding, in the period following the Bhopal disaster, there have been major changes and new enactments namely;

- a) 1987 amendments to the Factories Act, 1948 and the rules;
- b) Enactment of a new Environment (Protection) Act 1986 and a series of rules; including the 1992 amendment to Environment Protection Rules;
- c) Manufacture Storage and Import of Hazardous Chemical Rules, 1989;
- d) The Public Liability Insurance Act, 1991;
- e) Revised Motor Vehicle Act, 1988;
- f) Central Motor Vehicle Rules, 1989 with latest amendments;
- g) Narcotic Drugs and Psychotropic Substance Act, 1985;

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<sup>338</sup> Quoted in V.K. Prabhakar, Environmental Protection and Law p.109 cited in Ranjit Singh, supra note 2 at p. 39.

<sup>339</sup> Edward Broughton, "The Bhopal Disaster and its aftermath: A Review" at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/#:~:text=On%20December%203%201984%2C%20more,death%20for%20many%20thousands%20more> accessed 27/5/2024

h) The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985; amongst others.

Noise Pollution Control under the Indian Penal Code (1860) Section 268 of the Indian Penal Code provides that:

“A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage.”

The provisions of the Criminal Procedure Code, 1973 (Cr. P. C) can also be invoked to prevent pollution of almost all kinds, including noise pollution. The Police Act, 1861<sup>23</sup> covers the problems of noise arising from music, which is one of the aspects of noise pollution. Under the provisions of this Act Superintendents of Police are authorized to regulate the extent to which music may be used in streets on the occasions of festivals and ceremonies. The Environment (Protection) Act, 1986 and the Environment (Protection) Rules, 1986 Section 6 of the Act empowers the government to make rules to regulate environmental pollution. Under Section 27 the Central Govt. can make rules providing for "the maximum allowable limits of concentration of various environmental pollutants (including noise) pollution in different areas."

All these legislation taken together have provided a significant framework for the preservation and control of major accidents involving noise pollution, and hazardous chemicals and have placed new responsibilities on and in challenging role for key factors

i.e. industry and its top management workers and their organizations, regulatory agencies and local authorities and people residing in the vicinity of the industry. The effective implementation and enforcement of these provisions, the establishment of a suitable supporting infrastructure and maintenance and the role awareness among key factors would continue to remain challenges in the years to come.<sup>340</sup> The fitting of multi-toned horns and the emission of excessive smoke are prohibited under Central Motor Vehicle Rules, 1989.<sup>341</sup>

### 4.3 China

The Law of the People's Republic of China on the Prevention and Control of Environmental Noise Pollution which was adopted at the 22nd Meeting of the Standing Committee of the Eighth National People's Congress on October 29, 1996, was promulgated and entered into force as of March 1, 1997. This Law was enacted to prevent and control environmental noise pollution,<sup>342</sup> protect and improve the living environment, safeguard human health and promote economic and social development.<sup>343</sup> "Environmental noise" refers to the sound produced in industrial production, construction, traffic, transportation and social life to disturb the living environment in the neighbourhood.<sup>344</sup> "Environmental noise pollution" refers to a situation in which the noise is produced in excess of the standard set by the state on the discharge of environmental noise to disturb others' normal lives, work or study. This Law applies to the prevention and control of environmental noise pollution within the territory of the People's Republic of China. This law does not apply to the prevention and control of noise hazards suffered by persons who perform their duty in production or business operations.<sup>345</sup> The State

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<sup>340</sup> Quoted in Vishawajit Gupta Environment and Law cited in Ranjit Singh *ibid*.

<sup>341</sup> Rule 119 and Rule 115(2)

<sup>342</sup> Underlining for emphasis.

<sup>343</sup> Article 1

<sup>344</sup> Art. 2

<sup>345</sup> Art. 3

Council and local people's governments at all levels shall incorporate the prevention and control of environmental noise pollution into environmental protection plans, and take economic and technical policies and measures beneficial to the protection of the sound environment.<sup>346</sup> Local people's governments at all levels, when making plans for construction in cities, towns and villages, shall take into full account the impact of noise produced in construction projects and regional development and renovation on the neighbouring living environment, and shall make overall planning and rational arrangement for functional areas and distribution of constructions to prevent or diminish environmental noise pollution.<sup>347</sup> The environmental protection department under the State Council shall establish the national standards for sound environmental quality respectively for various functional areas. Local people's governments at or above the county level shall, following the national standards for sound environment quality, designate areas within their administrative divisions for the implementation of various standards for sound environment quality and conduct management accordingly.<sup>348</sup> Under Article 14, it is provided instructively that:

[F]acilities for the prevention and control of environmental noise at a construction project shall be designed, built and put into operation simultaneously with the principal part of the project. Before a construction project is put into operation or use, its facilities for the prevention and control of environmental noise shall be inspected by the environmental protection department which examined and approved the environmental impact statement. If the facilities do not conform to the requirements specified by the state, the said project shall not be put into operation or use.

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<sup>346</sup> Art. 4

<sup>347</sup> Art. 5

<sup>348</sup> Art. 10

Chapter III deals with the subject of industrial noise pollution, while Chapter IV deals with the prevention of noise pollution in construction sites. The combined effect of these two chapters requires industrialists and construction companies to report appropriately to the people's government in their localities about any equipment that is likely to produce industrial noise or noise at construction sites within two weeks before the commencement of operations and take appropriate measures to curtail such noise pollution and report same.

Chapter V deals with the Prevention and Control of Traffic and Transportation Noise. "Traffic and transportation noise" mentioned in this Law refers to the sound produced by means of traffic and transportation in operation such as motor vehicles, locomotives, motor vessels and aircraft to disturb the living environment in the neighbourhood.<sup>349</sup> The provisions in Article 34 are particularly instructive:

Motor vehicles running in urban districts, motor ships sailing along waterways in inland rivers within urban districts and locomotives running through or entering urban districts or recuperate districts shall use their sounding devices as stipulated. The installation and use of sirens on motor vehicles such as police cars, fire engines, engineering salvage vehicles and ambulances shall conform to the provisions of the public security department under the State Council. When performing non-emergency duties, they shall be prohibited from using sirens.<sup>350</sup>

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<sup>349</sup> Art. 31

<sup>350</sup> Art. 34

Chapter VI deals with the prevention of noise in social life. Article 41 defines noise in social life as "...sound produced in human activities to disturb the living environment in the neighbourhood not including industrial noise, noise in construction and traffic and transportation noise."<sup>351</sup> Under Article 45, all units and individuals are prohibited from using tweeters in urban districts where noise-sensitive buildings concentrate. In the cases where acoustic equipment is to be used in recreational activities or assemblies held in public places within urban districts such as streets, squares and parks and is likely to produce too high a volume of sound disturbing the neighbouring living environment, the organizers shall comply with the provisions of local public security organs.

Chapter VII on Legal Responsibility invokes sanction for the violation of different provisions of this Law. Unlike what we may be forced to believe about the Chinese legal system, no violation of noise pollution law requires the death penalty. Sanctions range from suspension of the operations in the case of a construction project, which fails to meet the requirement set by the State,<sup>352</sup> warning or imposition of a fine for refusal to report or filing of false report,<sup>353</sup> order to make corrections or concurrently impose a fine.<sup>354</sup> Article 61 explicitly provides that:

Any unit or individual that suffers from an environmental noise pollution hazard shall have the right to demand the elimination of the hazard by the polluter. The polluter shall make compensation according to law if losses have caused. A dispute over the responsibility for making compensation or the amount of compensation may, at the request of the parties, be settled under reconciliation by a competent environmental protection department or another supervisory and

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<sup>351</sup> Art. 41

<sup>351</sup> Articles

<sup>352</sup> Art. 48

<sup>353</sup> Art. 49

<sup>354</sup> Articles 50, 51 and 57.

management department or organ for the prevention and control of environmental noise; if a party refuses to accept the decision, it may bring a suit before a people's court. The party may also bring a suit before the People's Court directly.<sup>355</sup>

## **5.0 FINDINGS AND RECOMMENDATIONS**

### **5.1 Nature of Noise Pollution**

We found that noise pollution is a ubiquitous environmental problem that affects both individuals and communities. It is undesired or excessive sound that disturbs the natural balance of life. It has a variety of sources, including transportation, building, urbanisation, and industrial activity, construction or even social relations. Noise pollution causes a variety of health concerns for people, including cardiovascular disorders, stress, sleep disturbances, and hearing loss. Prolonged exposure can have negative effects on one's quality of life and long-term health. Noisy environments can be stressful and less productive to live in, disturb nearby species, and lower overall environmental quality in a community.

The release of damaging or excessive sound, which can harm people's comfort and health, is what defines noise pollution.<sup>356</sup> Noise pollution, in contrast to other types of pollution, though fleeting, is ubiquitous, affecting many facets of everyday life.<sup>357</sup> Industrial machinery, urban nightlife, building operations, and modes of transportation (such as vehicles, trains, and

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<sup>355</sup> Article 61

<sup>356</sup> AL Bronzaft, 'Noise Pollution: A Hazard To Physical And Mental Well-Being' In R. B. Bechtel and A Churchman (eds), *Handbook of Environmental Psychology* (John Wiley & Sons, Inc 2002) 499–510.

<sup>357</sup> Y Tao and others, 'Understanding Noise Exposure, Noise Annoyance, And Psychological Stress: Incorporating Individual Mobility And The Temporality Of The Exposure-Effect Relationship' *Applied Geography* (2020) 125 102283.

aeroplanes) are common sources.<sup>358</sup> Particularly in urban areas, these sources significantly increase ambient noise levels.

## 5.2 Effects on the Health and Welfare of Humans

There is ample evidence linking noise pollution to negative health outcomes.<sup>359</sup> High noise exposure can cause cardiovascular problems, stress, hypertension, sleep disorders, and hearing loss. Prolonged exposure to noise pollution is especially detrimental, as it can result in long-term health issues and a lower standard of living.<sup>360</sup> For example, research indicates that continuous exposure to noise from busy highways and airports increases the risk of heart disease and high blood pressure.<sup>361</sup>

## 5.3 Ecological and Environmental Consequences

The environment is also significantly impacted by noise pollution. Sound is essential to wildlife communication, navigation, and predator and prey detection.<sup>362</sup> These instinctive behaviours are disturbed by excessive noise, which causes confusion, interferes with mating calls, and raises animal mortality rates.<sup>363</sup> Noise pollution from shipping and industry affects marine life and can interfere with echolocation and breeding behaviours.<sup>364</sup>

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<sup>358</sup> M Bala and D Verma, 'Investigation & Examination of Noise Pollution-Definition, Sources, Effects, Monitoring and Control' *International Journal of Research in Social Sciences* (2020) 10 (7) 182-207; D Jhanwar, Noise Pollution: A Review' *Journal of Environment Pollution and Human Health* (2016) 4 (3) 72-7.

<sup>359</sup> S Morrell and others, 'A Review Of Health Effects Of Aircraft Noise' *Australian and New Zealand journal of Public Health* (1997) 21 (2) 221-36.

<sup>360</sup> I van Kamp, Noise and health from different perspectives. In Proceedings of the 20th International Congress on Acoustics (ICA), Sydney 2010, 23-27.

<sup>361</sup> Y Fan and DM Weinhold, 'Urban Noise, Sleep Disruption and Health' *Applied Economics* (2022) 54 (50) 5782-99.

<sup>362</sup> R Sordello and others, 'Evidence of the Impact of Noise Pollution on Biodiversity: A Systematic Map' *Environmental Evidence* (2020) 9 1-27.

<sup>363</sup> CR Kight and JP Swaddle, 'How and Why Environmental Noise Impacts Animals: An Integrative, Mechanistic Review' *Ecology Letters* (2011) 14 (10) 1052-61.

<sup>364</sup> A Chahouri and others, 'Recent Progress In Marine Noise Pollution: A Thorough Review' *Chemosphere* (2022) 291 132983.

## 5.4 Legal Framework and Citizens' Rights

There is growing recognition that the right to a quiet environment is an essential human right.<sup>365</sup> Several national and international regulatory systems are designed to combat noise pollution and shield people from its harmful consequences. For instance, Since the Middle Ages, common law has dealt with noise as a nuisance<sup>366</sup> and several European Union (EU) directives address the limitation of noise from automobiles, motorcycles, aeroplanes, trains, and outdoor equipment.<sup>367</sup> In Nigeria, environmental rules and regulations intended to limit and reduce noise pollution, govern the legal framework surrounding noise pollution amounts in both rural and urban regions.

## 5.5 International Regulations

The World Health Organisation (WHO) has set global standards for noise pollution in communities, suggesting the lowest possible decibel levels to safeguard public health. Many nations develop their noise limits based on these recommendations.<sup>368</sup> Furthermore, to control ambient noise, the European Union has put rules into place that mandate member states to map noise levels and create plans of action to minimise exposure.

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<sup>365</sup> A Boyle, 'Human Rights or Environmental Rights? A Reassessment' *Fordham Environmental Law Review* (2007) 471-511; Ayodele Babalola, "Is the Right to a Clean Environment in Nigeria a Fundamental Right?" 26(1) *Hastings Environmental Law Journal* (Winter, 2020) at [https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1576&context=hastings\\_environmental\\_law\\_jou\\_rnal](https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1576&context=hastings_environmental_law_jou_rnal) accessed 29/5/2024; Abdulkadir B. Abdulkadir, "The Right to a Healthful Environment in Nigeria: A Review of Alternative Pathways to Environmental Justice" *Afebablola University Journal of Sustainable Development* (2014) 3:1

<sup>366</sup> F McManus, 'Noise Law in The United Kingdom—A Very British Solution?' *Legal Studies* (2000) 20 (2) 264-90.

<sup>367</sup> EA King, 'Here, there, and Everywhere: How the SDGs Must Include Noise Pollution in Their Development Challenges' *Environment: Science and Policy for Sustainable Development* (2022) 64 (3) 17-32.

<sup>368</sup> D Schwela, 'The New World Health Organization Guidelines for Community Noise' *Noise Control Engineering Journal* (2001) 49 (4) 193.

## 5.6 National Legislation

Nigeria has some legislative tools to combat noise pollution. Noise control regulations are established and implemented by the National Environmental Standards and Regulations Enforcement Agency (NESREA).<sup>369</sup> Projects that could have a major impact on the environment are required to undergo studies under the Environmental Impact Assessment Act, which includes considerations for noise pollution.<sup>370</sup> These legislations demonstrate the increasing awareness of the need to safeguard residents' rights to a quiet environment and shield them from the negative consequences of noise.<sup>371</sup>

## 5.7 Challenges and Enforcement of Noise Pollution Control Measures

Even with these rules in place, enforcement is still quite difficult. The efficient application of noise control measures is a challenge in many developing nations, including Nigeria, because of inadequate infrastructure, a lack of public knowledge, and limited resources. Many individuals continue to be exposed to dangerous noise levels because of the frequent discrepancy between the law and its actual implementation.<sup>372</sup>

## 5.8 Advocacy and Public Awareness

Mitigating noise pollution requires increasing public awareness of its risks. Campaigns aimed at educating the public on the causes and impacts of noise pollution can motivate people to live quieter lives. Advocacy groups are essential for applying pressure on governments to create stricter noise control measures and enforce current regulations. To effectively combat noise

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<sup>369</sup> National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2018.

<sup>370</sup> AA Ibrahim, 'Environmental Impact Assessment in Nigeria: A Review' *World Journal of Advanced Research and Reviews* (2020) 8 (3) 330-6.

<sup>371</sup> JI Mantu, 'NESREA And The Challenge Of Enforcing The Provisions Of Environmental Impact Assessment Act In Nigeria' (2019) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3410104](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3410104) accessed 24 May 2024.

<sup>372</sup> EA King and E Murphy, 'Environmental Noise 'Forgotten' or 'Ignored' pollutant?' *Applied Acoustics* (2016) 112 211-5.

pollution and protect citizens' rights to a tranquil environment, community involvement is crucial.<sup>373</sup>

## **5.9 Lessons for Nigeria from Comparative Jurisdictions: South Africa, India and China**

South Africa and India were chosen as common law jurisdictions, while China a non-common law jurisdiction was included for a comparative survey of how these various jurisdictions dealt with noise pollution.

In Nigeria, noise pollution is dealt with first under the common law of tort as either private or public nuisance. Secondly, and closely related to this method is the use of the courts' system in resolving conflicting claims, demands and interests as it relates to noise pollution. Over the years, we have found a weakening of the hitherto stringent rules of locus standi even in judicial adjudication of public nuisance cases. Thirdly, noise pollution is further dealt with under statutory laws and regulations. The NESREA Act, which identified noise pollution as an environmental issue is, ironically inapplicable to the petroleum industry. We have also seen a gradual paradigm shift in recognizing the right to a healthful or peaceful environment as a human right. In general, while this is still in its formative stages, the recent Supreme Court of Nigeria decision in *COPW v NNPC* has set the tone for a much more expansive and vigorous construction of the environmental and human rights, while simultaneously contemporaneously liberalizing locus standi to increase access to environmental justice.

While India's statutory regime on the regulation of noise pollution is highly fragmented, its judiciary clearly shows the way to accept that the implicit in the right to life is a clean and healthful environment. The Indian Supreme readiness and willingness to accept the

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<sup>373</sup> M Polacheck and others, *Safe and Sound: How the Environmental Protection Agency Can Protect Us from Dangerous Noise* (Centre for Progressive Reform 2024)

interlinkages between environment and human rights is one that easily lends itself worthy of emulation by our Nigerian courts. India's pro-environment, pro-life and pro-human rights approaches to environmental degradation contrast sharply with the undue technicality of Nigerian courts save the recent Supreme Court decision in *COPW v NNPC*.

While not much is known about the Chinese courts' system and how they deal with the vexed issue of noise pollution, China's statutory regulation of noise pollution is deliberative, focused and comprehensive. Nigeria, South Africa and India trail behind the People's Republic of China in its statutory regulation of noise pollution. Nigeria should therefore borrow a leaf from China in this regard.

## **6.0 A FINAL WORD**

A universal and frequently disregarded type of environmental deterioration, noise pollution has serious negative effects on human health as well as the environment. To safeguard the rights of citizens to a tranquil environment, strong legislative frameworks, efficient enforcement, and improved public awareness are necessary. To protect public health and guarantee a higher standard of living for everybody, it will be increasingly important to control noise pollution as urbanisation and industrialization grow.<sup>374</sup> To reduce noise pollution and protect the fundamental right to a healthful and peaceful environment, governments, communities, corporations and individuals must collaborate.

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<sup>374</sup> CR Bragdon, *Noise Pollution: The Unquiet Crisis* (University of Pennsylvania Press 2016) 11.

**A LEGAL REVIEW OF THE CHALLENGES OF THE INTEGRITY OF BUILDING  
CONSTRUCTION IN NIGERIA – A CASE STUDY OF BUILDING COLLAPSE BY  
ANUGBUM ONUOHA, PHD**

**Being a Paper Presented at the 2<sup>nd</sup> Annual Conference of the Department of  
Private and Property Law, Rivers State University, Nkpolu-Oroworukwo, Port  
Harcourt, Nigeria**

**1.0 INTRODUCTION**

The starting point of this discourse is to acknowledge the provision of section 43 of the current Constitution of the Federal Republic of Nigeria which states inter alia: Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria. Nonetheless, the right to acquire and own immovable property does not preclude the laws regulating health, safety and the integrity of building constructions in Nigeria.

Building collapse has been defined as a failure in a structure due to its inability to serve the purpose for which it was built. In the past few years, the construction industry in Nigeria has been severely dented by multi-faceted challenges including the collapsing of several buildings leading to fatalities. However, building collapse occasioned by defective construction integrity is a universal phenomenon.<sup>375</sup> The degree of the magnitude of the menace was encapsulated by the Punch Newspaper of 10<sup>th</sup> May 2023 as follows:

The Building Collapse Prevention Guild recorded at least 62  
catastrophes in 2022, causing 84 deaths and injuring 113 persons.  
Lagos had 20 cases, while Kano and Anambra recorded five building

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<sup>375</sup> B. Baiche, N. Walliman and R. Ogden, Compliance with Building Regulations in England and Wales. (2006) (24)(4) Structural Survey 279 – 299.

accidents each, and Delta and Jigawa four each. Also, 135 cases were reported between 2007 and 2013.

Globally, notwithstanding the several causes of building collapse, all the causes often fall into two main categories namely: Natural disasters and human factors. However, in Nigeria, the bulk of the collapsed buildings could be attributed to human factors. Hence, the sustenance of building construction integrity requires effective laws, regulations and strong institutions. It is against this background that this paper sought to explore the efficacies and challenges of the contemporary legal and institutional structures of Nigeria's building construction industry. To make legal sense of the subject-matter, it is important to look at the legal framework.

## **2.0 THE LEGAL FRAMEWORKS OF BUILDING CONSTRUCTIONS IN NIGERIA**

The legal framework for the governance of building construction in Nigeria revolves around three complex pivots namely: The common law principles, enacted legislation and regulations.

### **2.1 Common Law Principles**

The common law principles are often factored into building designs, affirmation of structural integrity at contract execution stages, estates and town planning rules and laws which are basically based on the common law creeds of fit-for-purpose.<sup>376</sup> Where a contract for building construction is breached on the failure of a party to adhere to the required structural integrity and standards, such wilful negligence leading to building collapse is actionable under the various principles of common law.<sup>377</sup> Under the common law, there are minimum legal necessities relating to the health, safety and welfare of persons employed in the building construction industries. Therefore, prior to the commencement of building construction,

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<sup>376</sup> J. R Burby, P. J May, E.E Malizia and J Levine, Building Code Enforcement Burdens and Central City Decline. (2000) (66) (2) Journal of the American Planning Association, 143-161.

<sup>377</sup> M. Aalders and T. Wilthagen. Moving beyond command-and-control: reflectivity in the regulation of occupational safety and health and the environment. (1997) (19)(4) Law and Policy, 415-443.

adequate care is required in the planning and execution of construction works. Any Claimant that relies on negligence at common law must prove that the defendant owes a duty of care. In *Civil Design Construction Nig. Ltd. v. SCOA Nigeria Limited*<sup>378</sup>, the Supreme Court held as follows:

It is settled law that a plaintiff must succeed on the strength of <sup>379</sup>his case and not on the weakness of the defence and that where the evidence of the defence supports the case of the plaintiff, the plaintiff is entitled to rely on the same in proof of his case.

## 2.2 Enacted Legislation

In Nigeria, there are specified laws and regulations crafted for the governance of buildings and constructions such as the Pension Reform Act;<sup>5</sup> Factories Act;<sup>380</sup> Builders Registration Act,<sup>381</sup> Engineers Registration Act, Quantity Surveyors Act,<sup>382</sup> Architects Registration Act<sup>383</sup>; the Nigerian Urban and Regional Planning Act,<sup>384</sup> the Environmental Impact Assessment Act<sup>385</sup> and Estate Surveyor/ Valuation Board Registration.<sup>386</sup> For the benefit of space and time, this paper has selected a few of the legislation for discussion.

### (a) *The Labour Act*<sup>387</sup>

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<sup>378</sup> *Civil Design Construction Nig. Ltd. v. SCOA Nigeria Limited* (2007) 2 All N.L.R. 243; [2007] NGSC 7; SC 216/2001.

<sup>379</sup> Pension Reform Act 2014

<sup>380</sup> Factories Act Cap F1 LFN 2004

<sup>381</sup> Builders Registration Act Cap B13 LFN 2004

<sup>382</sup> Engineers Registration Act, Quantity Surveyors Act Cap Q1 LFN 2004

<sup>383</sup> Architects Registration Act 2004

<sup>384</sup> Nigerian Urban and Regional Planning Act Cap A19 LFN 2004

<sup>385</sup> The Environmental Impact Assessment Act Cap E12, LFN 2004

<sup>386</sup> Estate Surveyor/ Valuation Board Registration Cap E 13 LFN 2004

<sup>387</sup> The Labour Act Cap L1 LFN 2004

Section 56 (1) of the Labour Act,<sup>388</sup> established the Employee's Compensation Fund into which shall be credited all moneys, funds or contributions by employers for adequate compensation to employees or their dependants for any death, injury, disability or disease arising out of or in the course of employment. The Labour Act provision is in tandem with the articles of established international laws contained in the International Labour Organisation's Workmen's Compensation Conventions of 1925, 1935, 1934, and 1964.

The goal of Employee Compensation is to safeguard injured worker (including construction workers) and their dependants from want and degradation (social and economic) as a result of industrial accidents such as death from collapsed buildings.<sup>389</sup> Similarly, the Employee's Compensation Act, of 2010 re-enforced the International Labour Organisation's Workmen's Compensation Conventions particularly, the Employment Injuries Benefit Convention (EIBC, 1964) as amended. By the same token, the Employee's Compensation Act, of 2010 is probably the most comprehensive and relevant to building constructions that in recent times, have witnessed fatalities from building collapses. The Act essentially sets out in section 1 that: "Any employee, whether or not in a workplace, who suffers any disabling injury arising out of or in the course of employment shall be entitled to payment of compensation ..." By the same direction, Section 1 contained inter alia:

- a) ... an open and affair system of guaranteed and adequate compensation for all employees or their dependants for any death, injury, disease or disability arising out of or in the course of employment;
- b) Rehabilitation to employees with work-related disabilities as provided in this Act;

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<sup>388</sup> The Labour Act 2004

<sup>389</sup> I. N. E Worugji. Work Injuries Compensation under the Employee's Compensation Act in Nigeria: What is Next? (2013) (10) Journal of Law, Policy and Globalization 30- 45

- c) Establish and maintain a solvent compensation fund managed in the interest of employees and employers;
- d) Fair and adequate assessments for employers;
- e) Provide an appeal procedure that is simple, fair and accessible, with minimal delays; and
- f) Combine efforts and resources of relevant stakeholders for prevention of workplace disabilities, including the enforcement of occupational safety and health standards.

Despite the wider ambit of the Employee's Compensation Act, there are two legislation that specifically regulates the nature and structural arrangements of buildings and several aspects of construction in Nigerian towns and cities. The first of such laws is the Nigerian Urban and Regional Planning Act.<sup>390</sup>

**(b) *Nigerian Urban and Regional Planning Act*<sup>391</sup>**

The Nigerian Urban and Regional Planning Act is responsible for regulating the development and use of land in Nigeria. It provides for the establishment of planning authorities at the Federal, State and Local Government levels, and sets out the procedures for the preparation and implementation of development plans.<sup>392</sup>

Nigerian Urban and Regional Planning Act regulates land use in accordance with the Land Use Act. It creates zoning and development control. Furthermore, it provides procedures for land use arrangements, regulates building stumbling blocks, makes provisions for the height of buildings and zone regulations as well as provides for other planning considerations. The Act created the Development Control Department, in charge of approving and rejecting

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<sup>390</sup> The Nigerian Urban and Regional Planning Act.CAP 138 LFN of 2004

<sup>391</sup> Nigerian Urban and Regional Planning Act Cap N138, LFN 2004

<sup>392</sup> Agboola Agbeniga. Nigeria Building Regulations and Enforcement.

Online at: <https://www.linkedin.com/pulse/nigeria-building-regulations-enforcement-agboolaagbeniga/> accessed 5th June 2024

development and planning permits. It guarantees that the grant of planning and development permits are in conjunction with the terms and conditions attached to every certificate of occupancy or a customary right of occupancy. Furthermore, the Development Control Department is mandated to annul hitherto issued planning and development permits.<sup>393</sup>

(c) *Environmental Impact Assessment Act*<sup>394</sup>

Section 2(1) and (2) of the EIA provides that all projects which are likely to adversely affect humans and the environment should undertake a comprehensive assessment of the magnitude of such possible externalities. By finding such possible negative effects, the project proponents are mandated to devise ways and means of averting calamities such as building structural failures which are likely to cause fatality.

Despite the available national laws, there are numerous State laws and regulations governing integrity, designs and building constructions in Nigeria. The regulations stipulate the designs and building standards which the owners, developers, architects and building contractors must comply with when undertaking the construction works.<sup>395</sup>

Amongst the many viable State laws are the Urban and Regional Planning and Development (Amendment) Laws, 2019 of Lagos State; and the Physical Permit Regulations 2019 of Lagos State. Irrespective of the standard forms, the state laws require that the construction of building and construction contracts must not contravene the provisions of the relevant laws of the country and the relevant State.<sup>396</sup>

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<sup>393</sup> Ibid

<sup>394</sup> Cap E12, LFN 2004

<sup>395</sup> N. Gunningham. Investigation of Industry Self-Regulation in Workplace Health and Safety in New Zealand, (2011) (31) (13) Journal of Safety Research, 120–143.

<sup>396</sup> P. J May. Compliance motivations: Affirmative and negative bases. (2004) (38) (1) Law & Society Review, 41-68.

## **2.3 National Regulatory Codes and Supplementary Policies**

In addition to the laws and regulations, there are other relevant national policy codes such as the Standards Organization of Nigeria (SON).

### **a) Standards Organization of Nigeria (SON)**

The Standards Organization of Nigeria (SON) created regulations which are responsible for ensuring that products and services in Nigeria conform to national and international standards. The regulations cover a wide range of products and services, including building materials, and provide for the testing, certification, and marking of building materials in Nigeria.<sup>397</sup> Simply put, the Standards Organization of Nigeria promulgated the National Building Code which specified guidelines and principles for planning, construction, renovation, and upkeep of building structures in Nigeria. It earmarks the precarious areas that require sufficient attention such as the structural stability, fire prevention, electrical setups, plumbing, and accessibility.<sup>398</sup>

### **b) National Building Code**

The National Building Code is designed with the contemplation of enhancing safety safeguards for both human safety and assets preservation in Nigeria. Thus, the code is incorporated by the government of all levels as a vivacious tool for the prevention of pointless loss of life and property during construction projects.<sup>399</sup> In summary, the Nigerian Building Code,<sup>400</sup> also known as NIS 89: Part 5 of 1991 sets out the minimum requirements for the design,

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<sup>397</sup> *ibid*

<sup>398</sup> Ndidiama Ojomah. *The Firma Advisory. Exploring The Legal And Regulatory Landscape Of The Nigeria's Construction Industry: A Comprehensive Analysis*. Online at: <https://thefirmaadvisory.com/> Accessed 5<sup>th</sup> June 2024.

<sup>399</sup> *Ibid*

<sup>400</sup> A. Ogus. *Comparing regulatory systems: institutions, processes and legal forms in industrialised countries* (No. 1649-2016-135871). (2002). Working Paper Series No. 35, Manchester: Centre for Regulation and Competition.

construction and maintenance of buildings in Nigeria. It covers a wide range of issues, including structural design, fire safety, and disability access.

### **c) National Environmental (Construction Sector) Regulations, 2011**

The National Environmental (Construction Sector) Regulations (NECR) was published by The National Environmental Standards and Regulations Enforcement Agency (NESREA). The regulation was designed for the purpose of promoting accountable environmental practices and operative waste management within the construction industries including but not limited to decommissioning of projects and all manners of demolition undertakings.<sup>401</sup> Article 14 of the Regulations specifically forbids the use of asbestos at construction sites. The regulations also provide guidelines for the appropriate handling of asbestos-containing materials during demolition or renovation projects. Operators are required to remove asbestos materials from structures prior to any potentially disruptive activity to ensure safety and environmental protection.<sup>402</sup> Nonetheless, the laws are meant to be enforced by institutions.

## **2.4 The Institutional Framework for Enforcement of Building and Construction**

In order to enforce the laws and regulations with respect to the structural integrity of buildings and allied construction projects in Nigeria, a few institutions have been created as follows:

### **a) Architect Registration Council of Nigeria (ARCON)**

This agency regulates and superintends the architectural industry in Nigeria. It has the powers to register, discipline and de-list architects whose designs fail structural integrity.

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<sup>401</sup> O Omollo. Barriers to the Effective Regulation of the Building Construction Industry: An Empirical Analysis. (2019) (3) (2) Journal of Construction Business and Management, 49-58.

<sup>402</sup> Ndidiamaka Ojomah [N. 21]

#### **b) The Council of Registered Builders of Nigeria (CORBON)**

CORBON is a national institution whose purpose is to regulate property developers. It is one of the key agencies tasked with the regulation, supervision, and management of building construction, maintenance, and related practices within Nigeria.<sup>403</sup> CORBON is responsible for governing and supervising the entire spectrum of the building profession, ensuring its adherence to established standards and principles.<sup>404</sup>

#### **c) Standards Organisation of Nigeria (SON)**

SON is the primary agency that regulates and creates ethics and principles to ensure high-quality building and construction materials are used for projects executed in Nigeria.<sup>405</sup> It provides leadership for measurements, materials, processes, and services.

#### **d) National Environmental Standards and Regulations Enforcement Agency (NESREA)**

The main duty of the NESREA agency is to safeguard and promote a safe environment including the prevention of environmental degradation. The agency also investigates construction and building collapses where lives are lost.

### **3.0 BUILDING COLLAPSE IN NIGERIA: A STUDY**

The bulk of this work is focused on understanding the issues surrounding building collapse in Nigeria while proffering solutions to deal with the menace.

A study on collapsed buildings within the last 10 years shows that it is more frequent in more populated or larger cities than in smaller areas. In the study conducted by Awoyera et al, it is

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<sup>403</sup> Ibid

<sup>404</sup> Ibid

<sup>405</sup> M. Aalders and T. Wilthagen. Moving beyond command-and-control: reflectivity in the regulation of occupational safety and health and the environment. (1997) (19) (4) Law and Policy, 415–443.

shown that the majority of the building collapse in Nigeria between 2010 and 2019 happened in Lagos state. The reason for this may be tied up to a lot of different reasons. However, the same study noted that man-made conditions constitute about 87.5% of the cause of building collapses.<sup>406</sup>

Similarly, the majority of these collapsed buildings seem to be privately owned or funded buildings. This assertion is further strengthened by the report of the Stakeholders Forum of Nigerian Building & Road Research Institute (NBRRI) in May 2011 as captured by Akinyemi et al to the effect that building collapses are common in major cities like Lagos, Abuja, and Port Harcourt and that while about 60% of this collapse happens in Lagos state, about 70% of collapsed buildings belongs to private organizations/corporations.<sup>407</sup>

Following the above reports, it is evident that in curbing building collapse in Nigeria, a lot of scrutiny will be placed on buildings by private organizations or persons, especially in major cities. This does not infer that public organizations are left out of the mix especially as they are usually tasked with granting approvals and licenses needed to commence the building of these structures.

Whereas the reasons for building collapse in major cities are numerous, a study of the various structural failures shows that the majority of them are caused by the human nature of greed which usually presents itself through cost-cutting or use of inferior materials, failure to gain any necessary approvals in a bid to hasten building projects and failure to use qualified personnel amongst other things.

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<sup>406</sup> Awoyera et al (n.2) pg 3-6.

<sup>407</sup> Akinyemi A. P., Dare M. D., Anthony A. I., Dabara D. I., “ Building Collapse In Nigeria; issues and Challenges” [2016] *Conference of the International Journal of Arts & Science*. 4. < [\(PDF\) BUILDING COLLAPSE IN NIGERIA: ISSUES AND CHALLENGES \(researchgate.net\)](#)> accessed 5 May 2024.

An evident trend is the recent demolition of buildings in Lagos state due to various reasons. These demolitions have resulted in several outcries from members of the public. The Lagos state government and Federal Housing Authority have cited reasons for the demolition such as false or incomplete documentation, inappropriate location of the building, building on swampy land without meeting the requirements etc.<sup>408</sup> However, it begs the question of how the approvals for the buildings were earlier obtained from the agencies in charge of such duties. What is evident is that the public sector's connivance has also led to building improperly in undesignated areas which may invariably lead to the collapse of such structures.

It is evident that even in the face of town planning laws, individuals and organizations wilfully contravene these laws and proceed with their structures despite the environmental concerns or safety concerns that may be raised not minding that building construction should be based on achieving the stability of such buildings.<sup>409</sup>

The commencement part of the National Building Code in Nigeria expressly provides incessant collapse of buildings as one of the reasons for the evolvement of the National Building Code. According to Awoyera et al collapse in developed countries is majorly due to natural causes or man-made causes like bombings. However, collapses in developing countries like Nigeria are usually due to poor quality or substandard materials, poor supervision, non-adherence to standards and regulations, unqualified professionals, overloading, no geotechnical/sub-soil investigation, poor construction procedure, illegal approval, wrong demolition process, lack of maintenance and numerous others.<sup>410</sup> This infers that the issue of building collapse is one which

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<sup>408</sup> <<https://www.thisdaylive.com/index.php/2023/12/04/examining-lagos-demolitions-and-its-trailing-controversies>> accessed 7 May 2024.

<sup>409</sup> Odeyemi S. O., Giwa Z. T., Abdulwahab R., "Building Collapse in Nigeria (2009- 2019), Causes and Remedies – A Review" [2019] (1) (1) *USEP: Journal of Science and Engineering Production*. 122-135.

<sup>410</sup> Awoyera et al (n.2) page 3.

requires penchant attention to resolve. In a bid to resolve these issues, it is thus prudent to now analyse some of the causes of building collapse in Nigeria.

### **3.1 Causes of Building Collapse in Nigeria**

The causes of building Collapse in Nigeria include:

1. Cost Cutting (Use of poor materials and workmanship)
2. Failure to obtain necessary approvals.
3. Knowledge Deficit
4. Refusal to adhere to set building standards.
5. Inadequate laws and adjudication.
6. The severing of buildings as a result of Right of Way during renewal and expansion of roads.
7. Natural disasters

#### **3.1.1 Cost Cutting**

Authors such as Awoyera et al, and Akinyemi et al have all identified that the use of substandard materials and poor workmanship are causes of collapse in Nigeria. In this paper, both factors have been grouped and termed cost cutting. The current trend being witnessed in the property sector of the economy is building as many properties as possible while using substandard materials. The properties are then sold at exorbitant prices not minding that the materials used may not be efficient for such building styles or models. This will most times invariably lead to the collapse of such buildings as it has been reported that the use of inferior materials is said to be up to 10% contributory factor to building collapse cases in Nigeria. Similarly, materials such

as blocks, and steel for reinforcement in some cases are substandard and some dubious contractors who like to cut corners use inferior materials.<sup>411</sup>

A notable issue that must be raised under this heading is the use of unqualified personnel in property construction in Nigeria. Clients who prefer to cut certain costs would prefer to hire unqualified personnel instead of trained experts or individuals in the field. More so, most of the issues regarding structural failures would be easily addressed where there were qualified personnel supervising the building of these structures. This finds support in the conclusions of Odeyemi et al who are of the opinion that the lack of qualified and appropriate professionals to ensure quality construction are major cause of building collapse in Nigeria.<sup>412</sup>

### **3.1.2 Failure to Obtain Necessary Approvals**

The regime of property ownership in Nigeria is such that there are guidelines and steps to be taken to achieve the aim. For instance, the procedure for alienation of property in Nigeria changed upon the introduction of the Land Use Act and the requirement to obtain of Governor's consent.<sup>413</sup> This infers that regarding the construction of buildings, there also exist certain steps that should be taken, and necessary approvals are also to be obtained before any such constructions commence.

Using the Lagos State Government as a case study, there exist certain procedures that a person or organization aspiring to build must adhere to, such as submission of architectural drawing, structural drawing and even soil test where applicable. It should be noted that where such documents are submitted and comprehensively reviewed, it would be easy to spot certain

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<sup>411</sup> Awoyera et al (n.2), Akinyemi et al (n.6).

<sup>412</sup> Odeyemi et al (n.8)

<sup>413</sup> Land Use Act 1978.

mistakes which may directly or indirectly lead to structural failure of buildings. However, the failure to obtain the necessary approvals hinders such discoveries which could be made.

It is instructive to also point out that based on the nature of the Nigerian system in practice, it would not be farfetched to consider that the officers of these public offices may also not be equipped to review those documents and where they are, there exist other factors which may take place that would prevent a proper review from being achieved. The ‘Nigerian factor’ as termed by Ede which involves lawlessness and corruption is one of such factors which may prevent a comprehensive review leading to the grant of building approvals.<sup>414</sup>

### **3.1.3 Knowledge Deficit**

This heading can be linked to cost-cutting. This means that failure of proposed builders to engage the services of experts or learned personnel in various fields before constructing their buildings may invariably lead to building in contravention of town planning laws or building codes. The use of qualified personnel in construction cannot be overemphasized as they are equipped with the requisite knowledge ranging from environmental knowledge to the actual building stage. More so inadequate knowledge of building structural performance and environmental phenomena may contribute to building failure.<sup>415</sup>

The knowledge of town planning laws does not just prevent structural failures but also prevents demolitions where constructions disregard these laws and regulations as laid down. Thus, the low level of awareness of the existing building regulations by clients and contractors is also a factor affecting the issues regarding building collapse in Nigeria.<sup>416</sup>

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<sup>414</sup> Ede, A. N. “Building Collapse in Nigeria: The trend of casualties in the last decades (2000-2010)”. [2010] (10) (6), *International Journal of Civil and Environmental Engineering IJCEE-IJENS*, 32–42.

<sup>415</sup> Ayininuola, A. J., & Olalusi, O. O. “Assessment of Building failures in Nigeria: Lagos and Ibadan case study” [2004] (5) *African Journal of Science and Technology* 73–78.

<sup>416</sup> Fagbenle, O. I., & Oluwunmi, A. O. “Building Failure and Collapse in Nigeria: The influence of the informal Sector”. [2010] (3) (4) *Journal of Sustainable Development*, 268–276.

### **3.1.4 Refusal to Adhere to Set Building Standards**

The aim of the National Building Code in Nigeria as evidenced in the code is to set minimum standards for Building Pre-design, designs, construction and post-construction stages to ensure quality, safety and proficiency in the building Industry. It is evident that the code has set out certain procedures from the design stage of the building to the end of the building project itself.

However, it must be noted that the blatant disregard for such codes and other building standards will only result in substandard buildings that may fail structurally. Hasty constructions may ordinarily not take cognizance of the codes and standards as the aim would be to finish the project as soon as possible. Non-compliance with approved building design for certain areas amongst other things are factors which aid this menace.<sup>417</sup> According to Awoyera, in some cases, the client becomes the contractor while in other cases the contractor listens and obeys the clients' instructions forfeiting safety to keep his/her job.<sup>418</sup> This infers that such a contract may likely ignore the building codes and standards that he should ordinarily adhere to, in a bid to satisfy his client.

### **3.1.5 Inadequate Laws and Adjudication**

The regimes of laws in Nigeria are such that they are adaptative and dynamic. The Historical School of Jurisprudence believes that laws are made by people and should adapt to the evolving needs of society. This infers that the enactment of laws which strictly address failure to comply with building standards and in turn building collapse will aid to curb the menace. Although the perpetrators may be charged or sued under different areas of law depending on the peculiarities

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<sup>417</sup> Folagbade, S. O. "Case Study of Building collapse in Nigeria. In Proceedings on building collapse: Causes, Prevention and Remedies, Ondo State, Nigeria" [2002] *The Nigerian Institute of Building*. 110–121.

<sup>418</sup> Awoyera et al (n.2) 7.

of each case, what is evident is that there remains a lot to be done as regards the legal aspect of this Issue.

The Lagos chapter of the Nigerian Institute of Building had disclosed at a press conference that it might take legal action against the Lagos State Government to compel it to fully implement the law against building collapse as the several efforts of the institute to curb the menace are not yielding desired results because of impunity caused by inadequate enforcement by government officials.<sup>419</sup>

The adjudication on issues emanating from building collapse such as death, injuries and other effects is one which is rarely seen in our Courts. A study of cases of building collapse in more developed countries results in several forms of litigation from the affected persons. For instance, the British Broadcasting Corporation had reported that the owner of a collapsed building was liable to face legal action for his building which partially collapsed in Cumbria.<sup>420</sup> Similarly, the family of a man who lost his life when a New York City parking garage collapsed also sued the owners of the building on that issue.

The trend on adjudication of such issues in more developed countries is one which has also seen engineers of structures being sued by the owners of the buildings. In Iowa in the United States of America, the owner of a building that collapsed sued the firm of structural engineers for failing to identify the risk of collapse, the danger of such a collapse and repairs that would have avoided a collapse.<sup>421</sup>

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<sup>419</sup> <[https://punchng.com/institute-may-sue-lagos-over-building-collapse/#google\\_vignette](https://punchng.com/institute-may-sue-lagos-over-building-collapse/#google_vignette)> accessed 10 May 2024.

<sup>420</sup> <<https://www.bbc.com/news/articles/cnd8n58wx59o>> accessed 10 May 2024.

<sup>421</sup> <<https://www.nbcnews.com/news/us-news/owner-iowa-building-collapsed-killed-3-people-sues-engineering-company-rcna103594>> accessed 10 May 2024.

Thus, failure to enact laws strictly addressing this issue and the failure to also bring such issues before our courts indirectly enforce the trend of building collapse in Nigeria as the perpetrators are not in fear of legal actions when they decide to cut corners.

1. The severing of buildings as a result of Right of Way during renewal and expansion of roads: during acquisition by the Government for Right of Way, the Government is always concerned with precise measurements and the Estate Surveyors and Valuers are required to pay for the precise measurements. In most cases, buildings are severed and when buildings are severed, it reduces the strength of the building from the foundation to the strength of the material, leading to the collapse of buildings.

### **3.2 The Effects of Building Collapse in Nigeria**

Consequences of building collapse in Nigeria are usually in the form of economic and social implications. The economic effects of building collapse lead to economic waste in terms of loss of property, investments, jobs, income, etc. The social implications are seen in the form of injuries to persons, loss of human lives and a societal menace because these areas serve as a hideout for criminals and wild animals.

### **3.3 Measures and Resolutions to Curb Building Collapse in Nigeria.**

Having analysed the issues surrounding building collapse in Nigeria, it would be prudent at this point to proffer certain measures which may aid in regulating this issue. These measures include:

1. Monitoring: procedures which will aid the monitoring and supervision of adherence to already laid down regulations will help to cure the issues inherent in a building collapse. Agencies, regulatory bodies, and other stakeholders may decide to conduct routine checks on ongoing constructions and review of documents. Particularly on such

constructions which may pose a risk more than others such as high-rise buildings, factories etc.

2. Training: The organization of various workshops and awareness programs for professionals, construction, and real estate companies either by the Government or other professional bodies will address the knowledge deficit inherent in the construction sector. Such programs may focus on acceptable standards and codes in construction while also educating on the need for qualified personnel in every project.
3. Government: The government plays a crucial, if not the most important role in curbing this issue. The regulatory bodies and agencies must be primed to perform their duties, conduct adequate checks, reduce or eliminate corruption in the various departments and ensure that every building undertaken is done strictly as provided by the town planning laws and other regulations in place. It also behoves the government to ensure that its staff are equipped, well trained and updated on current trends in the construction sectors to be able to effectively resolve issues that may arise and understand the concepts.
4. Update of Laws, Regulations and building standards: As earlier stated the laws regulating this issue are not adequate. It is the duty of the law-making bodies at this point to create laws which are in tandem with the evolving society. Such laws would reasonably deter the perpetrators of this menace. The enactment of laws with punitive measures would reasonably be adequate in this instance. Similarly, the building codes and standards must be updated to reflect the current sustainable trends around the world. Trends that will be sufficient to address the issue and reduce or eradicate the menace that is building collapse in Nigeria.

#### 4.0 THE CHALLENGES AND PROSPECTS OF REGULATING BUILDING AND CONSTRUCTION IN NIGERIA

Several studies, e.g. Ayininuola and Olalusi,<sup>422</sup> and Ede<sup>423</sup> found that the laxity in the enforcement of the laws, regulations and codes are the major challenges to effective building and construction management in Nigeria. It is also public knowledge that corruption affects all facets of Nigerian well-being.<sup>424</sup> Nonetheless, the agencies responsible for regulating the building sectors do lack sufficient expertise and experience. For the officials that possess the right expertise and experience, they suffer from resource scarcity and hence, find it difficult to inspect and enforce building codes and regulations, allowing unsafe buildings to go unnoticed.<sup>425</sup> According to the report of the Nigerian Institute of Building,<sup>426</sup> the major problems are as follows:

- The incursion of unqualified building and construction personnel.
- Unsatisfactory enforcement mechanisms
- Weak and deficient legislation
- Duplication of institutional functions.
- The non-technical nature of the building control laws, and.
- The lack of awareness of the building control laws by stakeholders.
- The cumbersome and unreliable justice system

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<sup>422</sup> A. J Ayininuola and O O Olalusi. "Assessment of Building failures in Nigeria: Lagos and Ibadan case study" [2004] (5) African Journal of Science and Technology 73–78.

<sup>423</sup> A. N Ede. "Building Collapse in Nigeria: The trend of casualties in the last decades (2000-2010)". [2010] (10) (6), International Journal of Civil and Environmental Engineering IJCEE-IJENS, 32–42.

<sup>424</sup> Federal Republic of Nigeria (1993) Proposed Draft National Building Code, Federal Ministry of Works and Housing, Lagos.

<sup>425</sup> E. L Glaeser and J. Gyourko. The impact of building restrictions on housing. In Affordability," (2003) Economic Policy Review.

<sup>426</sup> NIOB, 2023, Online at: <https://www.niobnat.org> accessed 5<sup>th</sup> June 2024

## **5.0 CONCLUSION**

In conclusion, Nigeria has several building and construction laws, regulations and codes in place to ensure the safety and structural integrity of buildings, but there are obstacles preventing compliance. Improving building and construction regulations and enforcement will require a multi-faceted approach, including increasing funding, training and resources for the designated institutions. The personnel and regulators, need to be provided with capacity-building opportunities as well as involving communities in the enforcement process.

## **6.0 RECOMMENDATIONS**

In view of the foregoing discussion, it is hereby recommended that the multiple institutions regulating the building and construction industry in Nigeria should be compressed into one. The power to enact functional laws for building and construction projects should be rested in the State Governments. There should be a law reform commission to evaluate the building and construction laws in conjunction with consultations with major stakeholders. There should be compulsory indemnity insurance for all professionals involved in building and construction projects including compulsory continuous professional development for all personnel in the industry.

The government is advised to pay compensation for the complete building instead of focusing on precise measurements.

## **ALTERNATIVE DISPUTE RESOLUTION IN PRIVATE AND PROPERTY LAW:**

### **EXPLORING INNOVATIVE METHODS BY CHIOMA S. JACK, ESQ.**

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#### **1.0 INTRODUCTION**

The scope of this lecture covers the application of innovative methods through Alternative Dispute Resolution (ADR) in Private and Property Law. It outlines some salient points about the various ADR mechanisms and the advantages of ADR in Private and Property Law Disputes. It also addresses the use of the Rivers State Multi-Door Courthouse (RSMDC) in resolving Private and Property Law Disputes and concludes with an appeal to all Lawyers.

#### **2.0 BRIEF OVERVIEW OF PRIVATE AND PROPERTY LAW**

Private and Property Law covers the laws that govern dealings within the realm of private relations (mostly between individuals), the various forms of ownership in real property and personal property, land laws including transfer of rights, limits to land, estate tenure, and laws governing family affairs including inheritance rights. Property here refers to legally protected claims to resources, such as land and personal property, including intellectual property.

Nigerian Legislation enacted by either the Federal Government or the State Governments which regulate Private and Property Law Practice include the

Constitution of the Federal Republic of Nigeria, 1999 (See Sections 43 and 44), the Land Use Act, Property and Conveyancing Laws, the Legal Practitioners Act, Registration of Titles Law, Tenancy Laws, Wills Laws, Administration of Estates Laws, Land Instruments Registration Laws, the Stamp Duties Act, the Companies and Allied Matters Act, Town Planning Laws, Mortgage and Property Laws, etc.

### **3.0 LITIGATION**

Litigation is the traditional and most recognized form of formal dispute resolution throughout the world. Litigation under Private and Property Law covers disputes bordering on contracts, disputes between landlords and tenants, ownership or lease disputes, property disputes relating to development and construction, and probate disputes amongst others.

Litigation is publicly financed and administered, carried out in a public forum, and is bound by rigid rules about processes, evidence and testimony. It is not voluntary. Parties have to appear when required or suffer some penalty. The decision in litigation is binding, though it may be subject to appeal. Being formal and very technical, court procedure is not flexible. This greatly reduces the ability of litigants to participate directly in the resolution of their disputes. The time taken to obtain a decision is often measured in years. It is therefore expensive and time-consuming. As a matter of fact, the value of many disputes is usually exceeded by the eventual cost and time of the resolution.

The adversarial nature of litigation leaves wounds which damage, and even sometimes destroy relationships. It is an open secret that the adversarial process usually leaves the parties exhausted, embittered and often impoverished. Litigation is suited mainly for criminal, constitutional and other rights-based issues.

Hon. Justice Olukayode Ariwoola, the current Chief Justice of Nigeria (CJN), while speaking at the Special Session of the Supreme Court to mark the beginning of the 2022/2023 Legal Year stated as follows:

“The Nigerian public needs to be reminded of the need to do less litigation and embrace more of Alternative Dispute Resolution to free the courts of this unnecessary overstretching of human and material resources...As rightly observed, Nigerians are the most litigious people on earth; especially the political class...We don’t need to rush to court after every little disagreement. We have various Alternative Dispute Resolution mechanisms across the country that we can conveniently leverage on, with a view to freeing the courts of this incessant case overload.”

#### **4.0 ALTERNATIVE DISPUTE RESOLUTION**

Alternative Dispute Resolution (ADR) denotes a wide spectrum of settlement mechanisms used in place of litigation. ADR covers a range of processes that complement or supplement litigation, but not to supplant litigation. Litigation remains the “conventional” dispute settlement mechanism.

Although dispute resolution practices have been in place practically since the beginning of time in Africa and different cultures all over the world, the term “Alternative Dispute Resolution (ADR)” originated in the USA in a drive to find alternatives to the traditional legal system, which was felt to be adversarial, costly, unpredictable, rigid, damaging to relationships and limited to narrow rights-based remedies. A hallmark of the success of the American ADR movement is the strong support from non-profit professional organizations such as the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution. Worthy of note is the effort made by the American legal education

system to support the ADR movement, as many law schools include courses on Alternative Dispute Resolution in their curricula and have university-based conflict resolution programs.

ADR is fast becoming an expected procedural step in many legal systems and has gained widespread acceptance around the world. In the United States, the United Kingdom, Canada, India, Australia, Singapore, and other countries, a great number of disputes are resolved through ADR processes.

For instance, in a 2023 UK case *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, the Court of Appeal held that the court has the power to stay a claim or compel parties to take part in ADR. This power is subject to the caveat that it does not impair the essence of the Claimant's right to a judicial hearing and is proportionate to the legitimate aim of settling the dispute fairly, quickly and at reasonable cost. The decision is consistent with the UK's longstanding move towards ADR and means that parties will now have to consider whether ADR is appropriate in their case in order to avoid a court order.

Worthy of mention also is a UK judgment handed down 20 years ago in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [www.practicallaw.com/8-102-8495](http://www.practicallaw.com/8-102-8495)) where the Court held that a party that unreasonably refuses to take part in ADR may be subject to adverse cost consequences.

Some common ADR mechanisms are Negotiation, Mediation/Conciliation, Arbitration, Early Neutral Evaluation (ENE), and the hybrid processes such as Med-Arb, Arb-Med, etc. Although some authors have argued that due to the technical and quasi-judicial nature of arbitration, it ought not to be listed as part of the ADR family, it has also been strongly argued to the contrary that, in so far

as arbitration is consensual and party-driven and conducted in an informal environment with a third-party neutral intervener selected by the parties in dispute, it remains an ADR process.

Disputes which can be negotiated for settlement either directly by the parties or through a 3rd party intervener are generally suitable for ADR. Cases which are suitable for ADR are generally commercial in nature – Property, Banking, Contract, Maritime, Sports, Family, Workplace, Construction, etc. Plea Bargain as provided for in Part 28 of the Rivers State Administration of Criminal Justice Law (ACJL) No. 7, 2015 is also part of ADR under the Restorative Justice package.

However, capital offences, matters of injunction, legal interpretation, judicial review, actions on winding up of a company and order of dissolution of marriage are not for ADR. They are for litigation.

NB: Ancillary matters in matrimonial cases which relate to the sharing of property, custody and maintenance can however be resolved through ADR, and the Terms of Settlement remitted to the Court to adopt in addition to its Dissolution Order.

#### **4.1 LEGAL FRAMEWORK FOR ADR:**

- ADR has become engrained in our Justice Delivery System.
- Legal backing for ADR in most of our State High Court Rules (See Pretrial Protocol in Order 1, Rule 5 of the Rivers State High Court (Civil Procedure) Rules 2023).
- Institutional Support through the Multi-Door Courthouses, Citizen's Rights Mediation Centres and Professional Associations and Institutes.
- Section 19(d) of the CFRN 1999 (as amended) also provides for the settlement of disputes through ADR.

- Rule 15(3)(d) of the Rules of Professional Conduct for Legal Practitioners 2023 mandates Legal Practitioners to inform their clients of ADR options before resorting to Litigation. See also, Section 19 (2) of the RSMDC Law No. 9 of 2019.
- The Arbitration and Mediation Act 2023 (which provides a unified legal framework for the fair and efficient settlement of commercial disputes in Nigeria through Arbitration and Mediation).

## **5.0 ALTERNATIVE DISPUTE RESOLUTION (ADR) IN PRIVATE AND PROPERTY LAW**

Using ADR in Private and Property Law Disputes provides the opportunity to meet on neutral grounds with an impartial person to oversee the discussions and avoid the stress and challenges of litigation already earlier mentioned. Some common ADR Mechanisms which can be used to resolve Private and Property Law Disputes include the following:

**5.1 Negotiation:** Negotiation refers to a strategic discussion intended to resolve an issue in a way that both parties find acceptable. Negotiations involve give and take, which means one or both parties will usually need to make some concessions. In this process, the parties involved in the dispute negotiate directly with one another.

**5.2 Mediation:** Mediation is a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences and in reaching an amicable dispute settlement. In Mediation, the outcome of the dispute is determined by the parties. However, the Mediator acts as a guide and facilitator who assists parties in reaching a mutually satisfactory settlement of their dispute through the use of Mediation skills and techniques. Mediation is “assisted negotiation,” and it is a voluntary,

flexible, confidential, and interest-based process. The outcome of Mediation is typically called a Settlement Agreement.

**5.3 Conciliation:** Like Mediation, Conciliation is a process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences and in reaching an amicable dispute settlement. It is a voluntary, flexible, confidential, and interest-based process like Mediation. The main difference between Conciliation and Mediation proceedings is that, at some point during the Conciliation, the Conciliator will be asked by the parties to provide them with suggestions, potential solutions or a non-binding settlement proposal. A Mediator, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal.

NB: See S.73(6) of the Arbitration and Mediation Act, 2023 – Conciliation is still subsumed in the New Act.

**5.4 Arbitration:** Arbitration is a dispute resolution process in which the disputing parties choose one or more neutral third party(ies) to make a final and binding decision resolving the dispute. The parties may choose a third party by mutual agreement or may agree to have an Arbitration institution appoint the third party. Some hold the view that arbitration should not be classified as an ADR process because of its adversarial nature and similarities to Litigation (some even refer to it as private Litigation), but it is still an alternative to Litigation and possesses features which Litigation does not (e.g., privacy, flexibility, party autonomy, etc.) A decision in Arbitration is called an Award and there are different types of awards namely interim award, partial award, consent award, final award, etc.

**5.5 Early Neutral Evaluation (ENE):** This is a dispute resolution process where parties refer their case to an expert (usually an experienced lawyer or professional in the area of their dispute, a retired judge, etc.) who is asked to provide a balanced and unbiased evaluation

of the dispute. The Neutral Evaluator identifies each side's strengths and weaknesses and provides a non-binding opinion or evaluation of the likely outcome of a trial. This evaluation can assist the parties in assessing their case and may propel them towards a settlement. Despite its advantages, ENE may not be advisable in cases involving complex facts that need to be proven through witnesses. This is because, in ENE, the neutral third party only evaluates the dispute based on his knowledge and does not call on witnesses or for evidence.

**5.6 Hybrid ADR:** Hybrid ADR involves the combination of two or more ADR mechanisms to arrive at a resolution or decision. Some examples are Med-Arb, Arb-Med, Arb-Med-Arb, etc.

**5.7 Online Dispute Resolution (ODR):**

Online Dispute Resolution (ODR) is the resolution of disputes using digital technology and techniques of Alternative Dispute Resolution (ADR), such as Negotiation, Mediation and Arbitration. ODR has become more popular since the pandemic and it can make the ADR processes more accessible, efficient and cost-effective. Some disadvantages however include technological/network disruptions, privacy breaches, greater difficulty in building rapport or fostering empathy (e.g., in Mediation), etc.

**SOME ADVANTAGES OF ADR IN PRIVATE AND PROPERTY LAW DISPUTES**

- Saves time/Speedy justice
- Reduces costs
- Protects the privacy of parties and ensures their confidentiality (ADR Practitioners must maintain Neutrality and Impartiality at all times)
- Fosters amicable resolution and accurate/satisfactory justice (win/win outcome)

- Flexible
- Preserves existing or pre-dispute relationships
- Builds the capacity of the parties
- Party autonomy (See Section 1 (2) AMA 2023)
- Allows parties to control the process and/or outcome of the dispute
- Finality etc.

## **6.0 THE USE OF THE RIVERS STATE MULTI-DOOR COURTHOUSE (RSMDC) IN PRIVATE AND PROPERTY LAW DISPUTES BRIEF HISTORY OF THE MULTI-DOOR COURTHOUSE**

The Multi-Door Courthouse is a concept first brought to light in 1976 by Professor Frank E. A. Sander, Professor of Law Emeritus at the Harvard Law School. He sought to expand on a lecture earlier delivered in 1906 by Professor Roscoe Pound about the public's dissatisfaction with delayed justice delivery. In Professor Sander's lecture, he suggested a type of court system with multiple doors of resolution instead of a mono door, Litigation. He noted that the other doors other than Litigation are Dialogue, Negotiation, Mediation, Conciliation, Arbitration, etc.

Professor Sander postulated that having such a court system with other doors is the true Comprehensive Justice System which will create more access to justice, quicken the time of justice delivery and reduce the general frustration faced by parties in dispute. It was actually the American Bar Association that preferred to use the name "Multi-Door Courthouse" in place of the "Comprehensive Justice System" in their journals, and since then many scholars have maintained the name "Multi-Door Courthouse".

The first Multi-Door Courthouse in Nigeria (and in Africa) the Lagos Multi-Door Courthouse (LMDC) was established in Lagos, Nigeria on June 11, 2002. Since then, other Multi-Door Courthouses have been established in Abuja, Kano, Akwa Ibom, Ogun, Oyo, Edo, Rivers and others. As of today, there are at least 22 Multi-Door Courthouses in Nigeria.

## **6.1 THE RIVERS STATE MULTI-DOOR COURTHOUSE (RSMDC)**

The Rivers State Multi-Door Courthouse (RSMDC) is a Court-connected Public Alternative Dispute Resolution (ADR) Centre which offers a range of ADR processes. The Mission of the RSMDC is to supplement litigation by providing enhanced, timely, cost-effective and user-friendly access to justice. The multi-Door refers to the various options available at the RSMDC which include Mediation, Arbitration, Early Neutral Evaluation and Hybrid Processes.

The RSMDC was established pursuant to Section 1 of the Rivers State Multidoor Courthouse (RSMDC) Law, No. 9 of 2019. The Centre was formally inaugurated at the Rivers State High Court premises by His Excellency, the former Governor of Rivers State, Chief Nyesom Ezenwo Wike, CON, GSSRS on 14th October 2021, and Operations commenced on 18th October 2021. The Rivers State Multi-Door Courthouse is the 18th Multi-Door Courthouse in Nigeria.

The RSMDC has its main office located at Block E of the High Court Complex, Port Harcourt; and other offices may be located in the other parts of Rivers State with time. See Section 1 (2) (d) of the RSMDC Law.

Pursuant to Section 2 of the RSMDC Law, **the core objectives of the RSMDC are to:**

- a. Enhance access to justice by providing alternative mechanisms to supplement litigation in the resolution of disputes;
- b. minimize frustration and delays in the justice delivery system by providing a standard legal framework for fair and efficient settlement of disputes through ADR;
- c. serve as the focal point for the promotion of ADR in Rivers State;
- d. promote the growth and effective functioning of the justice system through ADR methods.

In simple words, the RSMDC assists in decongesting the courts through the use of ADR mechanisms. In order to bring its core objectives into manifestation, the RSMDC undertakes timely settlement of disputes by the use of Negotiation, Mediation, Conciliation, Early Neutral Evaluation, Arbitration and other hybrid processes. See Section 3 (a) of the RSMDC Law.

Another ADR-related law which was enacted in 2019 is the Rivers State Arbitration Law, No. 10 of 2019. It enhances the practice of Arbitration in Rivers State.

These two laws are vital for the practice of ADR in Rivers State. The RSMDC also has a set of Rules and Practice Directions in a booklet signed by the Chief Judge of Rivers State, Hon. Justice Simeon Chibuzor Amadi on 4<sup>th</sup> October 2021. The RSMDC Rules also contain its Schedule of Fees for ADR Services.

The RSMDC has a Governing Council comprising the Chief Judge as its Chairman, ADR Judges and other Members including the Director as its Secretary. It also has a Director and a Deputy Director who doubles as the Registrar and is responsible to the Director for the administration of the Centre. The RSMDC at present has in-house Neutrals known as

Dispute Resolution Officers (DROs) who are lawyers and also trained in ADR. The RSMDC also has a list of registered external Neutrals (mainly Mediators, Conciliators and Arbitrators) from which parties in dispute may choose for the resolution of their disputes. The offices of the RSMDC open by 8:30 am and close by 4:00 pm from Mondays to Fridays. There are Administrative Officers to receive and to attend to anyone who visits the Centre, as well as other key staff. The RSMDC has an email address.

([riv.multidoorcourthouse@gmail.com](mailto:riv.multidoorcourthouse@gmail.com)), Instagram page (@riversmultidoor) and LinkedIn page. There are also designated phone numbers (with the main line being +2349032745403) to contact the Centre.

**A property-related case or any other appropriate case can be initiated at the RSMDC through any of these ways:**

**a. Referral** – This is for a case already in court. A party in a property-related dispute may apply for a matter in court to be referred to the RSMDC for settlement through any of the ADR processes. See Sections 18(1)(e) and 21(2)(a) of RSMDC Law.

**b. Walk-in** – A party may simply walk into the RSMDC and lodge a complaint against the other party at the RSMDC by filling out a Request Form. It would then be the responsibility of the RSMDC to invite the other party with the information provided by the party who lodged the complaint. See Section 21(2)(b) of the RSMDC Law.

**c. Direct Intervention** – Section 21(2)(b) also provides for direct intervention. The RSMDC may, for the purpose of public interest, invite parties in dispute with a view to seeking their consent to have their dispute settled. This may be typical of communal disputes or companies and host communities-related matters, etc.

**PLEASE NOTE:** At the RSMDC, settlements are enforceable. A Settlement Agreement arising from Mediation through the walk-in process which is duly signed by the parties when endorsed and adopted by an ADR Judge is deemed to be enforceable as a Judgment of the Court. Referred cases when settled through Mediation are also returned with the Settlement Agreement for adoption as Consent Judgment. Where there is an Award, it shall be transmitted to a Court for Recognition and Enforcement Order. This notable feature distinguishes the RSMDC from private ADR Centres.

## **6.2 PROPERTY DISPUTES SETTLED OUTSIDE THE RSMDC**

It is important to also state that External Settlement Agreements and Memorandum of Understanding (MoU) covered by Private and Property Law can now be filed at the RSMDC and such shall be transmitted to an ADR Court or regular Court for endorsement as Consent Judgment. See Section 17(5) of the RSMDC Law. This innovation in contractual relationship is to end the regular complaint of parties acting in breach of MOUs.

### **6.2.1 JURISDICTION**

Property disputes and other appropriate disputes can be referred to the RSMDC from Rivers State Courts, Federal Courts and even Courts outside Rivers State, Private Persons, Public Institutions, Corporations, Dispute Resolution Organisations, etc. See Section 3(a) of the RSMDC Law. This means that the RSMDC is not limited by territorial jurisdiction. It is important to state that just like Equity came to mitigate the harshness of the Common Law, the RSMDC has come to reduce the harshness and challenges of litigation. Disputants can now have swift access to Justice through the Multidoor Courthouse (MDC) either by walking in or through court referrals, and Property Lawyers and lawyers generally can now have quicker access to their complete Professional Fees.

The method of settling disputes through the use of the Multi-Door Courthouse became an instant hit in Lagos, Nigeria, in a landmark case involving the former Vice President of Nigeria, the late Dr Alex Ekwueme, who was involved in a dispute in Lagos in a sale of land in his capacity as the Chairman of an investment corporation. The case had been ongoing for seventeen (17) years, but as soon as the matter was referred to the Lagos Multi-Door Courthouse (LMDC) for Mediation, it was resolved in one day and the parties signed the terms of the settlement that same day.

At the Rivers State Multi-Door Courthouse (RSMDC), a good number of property-related cases and other cases have been settled in one day including a case involving a well-known International Oil Company with respect to the lease of a community land. Most cases at the RSMDC are typically resolved between the space of 2 weeks and 3 months. Even when parties are unable to reach a settlement, they leave the process better informed about their dispute resolution options in the near future, and with a better knowledge and appreciation for ADR. These examples showcase the importance and effectiveness of the Multi-Door Courthouse in the justice delivery system.

In achieving a just, efficient and speedy dispensation of justice, the Courts are to utilise ADR as part of their case management system by referring appropriate matters to the RSMDC (See Order 1, Rule 5 of the Rivers State High Court (Civil Procedure) Rules 2023). It is worthy to note that the outcomes of such referred cases also form part of the Court's Quarterly Returns. The RSMDC Law provides for the roles of the Court, Lawyers and Parties amongst others. Every lawyer is encouraged to get a copy of the RSMDC Law and Rules from the RSMDC or High Court premises, and thoroughly digest the same for a more effective and wholistic legal practice.

### **6.2.2 SOME BENEFITS OF ADR AND THE RSMDC TO PROPERTY LAWYERS**

The responsibility of Lawyers with regard to ADR is to the Court, the RSMDC and the Legal Profession to promote a better and more efficient justice delivery system.

Property Lawyers stand to gain from ADR and the RSMDC in the following ways:

#### **As a Property Lawyer without ADR Training:**

- Billing of clients with an option of ADR (Quick turnover of cases and legal fees)
- Retaining of Large Clientele through Client Referrals
- Assisting Parties to obtain Judgment by the use of Memorandum of Understanding
- Acting as a Legal Representative in ADR Sessions

#### **As a Property Lawyer with ADR Training:**

- Earning as an ADR Practitioner/Neutral at the RSMDC and in Private ADR Centres duly registered by the RSMDC
- Earning from ad hoc ADR/Appointments by the RSMDC
- Earning as an In-house Neutral
- Earning as an ADR Trainer
- Earning through Research and Book writing
- Earning through Collaboration with Peace Building Institutions
- Improvement of Goodwill and Rise to Eminence

## **7.0 CONCLUSION**

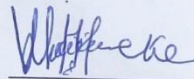
ADR skills constitute an important tool in the 21st Century Lawyer's Dispute Resolution Toolbox. Property Lawyers (and indeed all Lawyers) are therefore enjoined and encouraged to:

1. Train in ADR at least up to Membership level in any form of ADR (Negotiation, Mediation, Conciliation, Arbitration, etc). This will make room for the lawyer to easily assess information in ADR, build capacity and also make additional income from ADR practice.
2. Join in the promotion of the Rivers State Multi-Door Courthouse (RSMDC) because it has come to save litigation from the anger of litigants arising from the frustrations arising out of the delay associated thereto.
3. Foster ADR Advocacy by screening their cases to see those which are amenable to resolution through ADR and encouraging the referral of cases to the RSMDC whilst using the walk-in option for new cases.
4. Acknowledge the role that ADR has to play in the Dispute System Design of Rivers State and how this can generate more jobs for lawyers, other professionals, indigenes and residents, and also attract potential investment to the State.
5. Ensure that parties entering into a contract insert a well-thought-out and specifically timed multi-tiered ADR Clause in order to avoid endless litigation if a dispute arises between the parties. *See the sample below.*
6. Participate in the activities of the RSMDC which are designed for lawyers and cooperate willingly with the RSMDC in the settlement of matters through ADR and in its general peace-building strategies.

7. Update their ADR knowledge continuously and attend ADR conferences, webinars, trainings and programs (domestic and international) to foster continuous ADR professional development and to build capacity in ADR.
8. Accept that ADR has come to stay and foster a symbiotic relationship between all dispute resolution mechanisms. There should be no antagonism between any; each dispute resolution mechanism (including Litigation) has its proper placing and attendant benefits. In the long run, ADR should be seen as “Appropriate Dispute Resolution” where all cases are screened and the appropriate dispute resolution

1.0 **A SIMPLE SAMPLE OF MULTI-TIERED DISPUTE  
RESOLUTION CLAUSE BY THE RIVERS STATE MULTI-  
DOOR COURTHOUSE (RSMDC)**

- 1.1. The parties agree that in the event of a dispute arising from the contract under the agreement, parties shall explore Alternative Dispute Resolution mechanisms in the sequence as herein described.
- 1.2. In order to amicably resolve the dispute, recourse shall first be made to Negotiation within 15 days from the date of Notice for Negotiation.
- 1.3. In the event that parties are unable to amicably resolve the dispute through Negotiation within the said 15 days, a party shall refer the dispute to the Rivers State Multi-Door Courthouse (RSMDC) for Mediation and the RSMDC shall serve the other party a Notice for Mediation as the Mediation service provider.
- 1.4. Where parties are unable to amicably resolve the dispute through Mediation within 45 days from the date of pre-hearing session for Mediation, recourse shall be made to Arbitration.
- 1.5. For the Arbitration process to take place, a party shall write to the Director of the Rivers State Multi-Door Courthouse (RSMDC) requesting the Director to give the other party Notice of Arbitration; upon this, the Director shall give the Notice of Arbitration and the RSMDC shall administer the Arbitration with a sole arbitrator in accordance with the Rivers State Arbitration Law, No. 10 of 2019 except the parties agree otherwise; Port Harcourt shall be the venue of the Arbitration; and there shall be a final award within 90 days from the commencement of the arbitration process.



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# **EMERGING LEGAL ISSUES IN INTELLECTUAL PROPERTY; DELVING INTO THE COMPLEXITY OF INTELLECTUAL PROPERTY RIGHTS IN THE DIGITAL AGE BY RITA ANWIRI CHINDAH, ACIArb**

## **1.0 INTRODUCTION**

We are surrounded by a multi-layered intellectual property (IP) that has been created and developed by someone or a group of persons whose human intellect and output which must be used in commerce make our everyday lives easy. However, as we have moved from the status of industrial revolution of 1.0 to 4.0 and presently 5.0 the need to balance the needs of the users of these intangible assets and the owners of these works has raised some complex issues which has questioned the rights and entitlement of users.

This presentation delves into the complexity of the digital era such as generative works, infringement in the virtual world, cross-border enforcement, use of smart contracts, the concept of inventive steps, data rights against intellectual property rights etc. It further begs the question of whether it is time we adopt a universal intellectual property law as opposed to territorial protection to be able to combat the divergence that the digital age and emerging issues bring.

## **2.0 INTELLECTUAL PROPERTY**

Intellectual property is a set of intangible assets that have been created and innovated to be used for commerce and grants territorial protection to the owners of these works such as inventions, logos, books, designs etc. The World Intellectual Property Organization (WIPO),<sup>427</sup>

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<sup>427</sup> World Intellectual Property Organization (WIPO), *What is Intellectual Property?*<https://www.wipo.int/about-ip/en/> accessed 2 June 2024

further defines it to be the creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.

With the above definition, it is clear that every economic and business advancement needs intellectual property as it is a crucial asset but for this to work, we would require competent regulatory advisors to help navigate the intellectual property landscape as it affects their industry especially because intellectual property interplays with every sector and also help the government in curtailing the activities of violations, counterfeiter and imitations of their intellectual output.

An intentional effort must be made to raise awareness and involve different stakeholders to help a nation like Nigeria which imports more goods than it exports to boost its GDP and revenue generation. This can be achieved by offering incentives to intellectual property owners to join the ranks of disruptive innovators who use robotics in law and policy, voice cloning, artificial intelligence (AI) and big data, nanotechnology, machine learning (ML), web 3 and other transformative technologies to improve their intellectual property system.

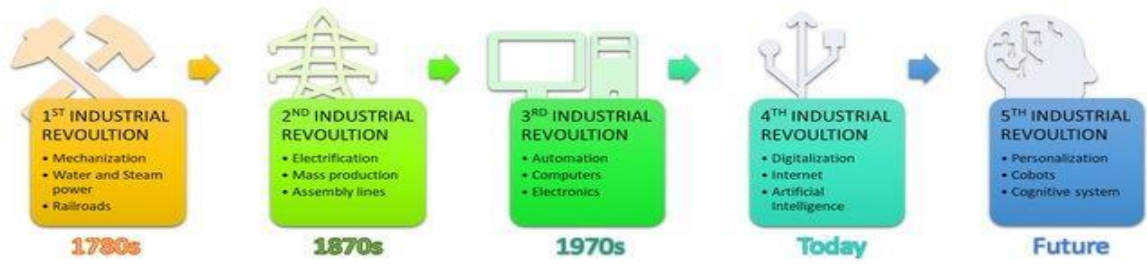
## **2.1 ERA OF THE INDUSTRIAL REVOLUTION AND NIGERIA'S ROLE**

The Industrial Revolution was a monumental era in humanity that marked the transition from traditional agrarian society to modern industrial ones.<sup>428</sup> This was not about machinery, factories or technological advancement but the interconnection with intellectual property enforcement steered the direction and pace of the industrial revolution. Interestingly, the United Kingdom whom we borrowed our intellectual property laws was among the first countries to institutionalize the intellectual property system which attracted the most outstanding innovators

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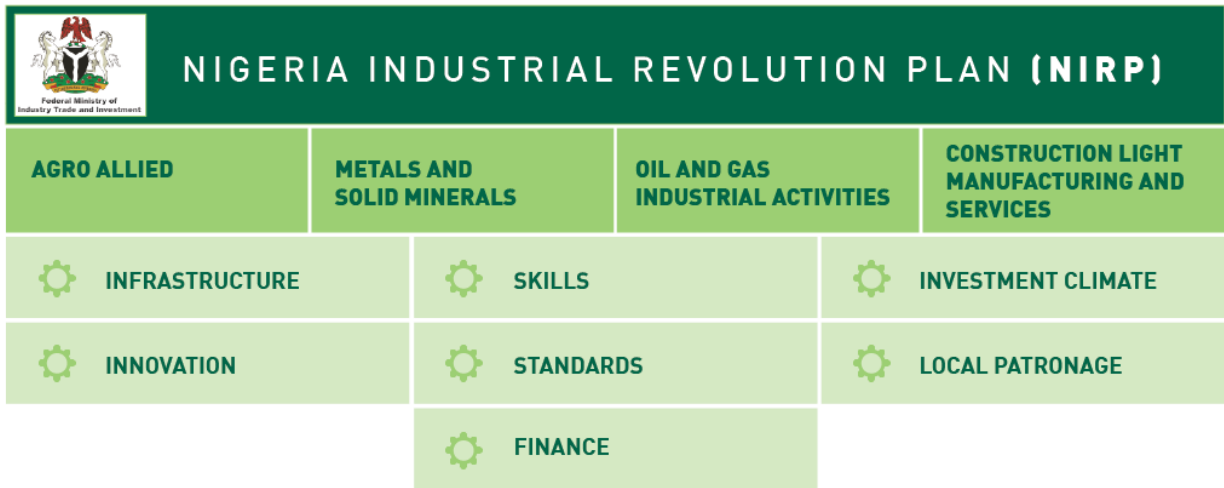
<sup>428</sup> Goldstone, Jack A. "Efflorescences and economic growth in world history: rethinking the" Rise of the West" and the Industrial Revolution." *Journal of world history* (2002): 323-389.

across Europe so they could enjoy legal backing, protection and financial reward for their intellectual output by granting them exclusive rights to their creations and inventions.



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From the picture shared above it is clear that historically, Nigeria did not participate or contribute to the transition from the agrarian society to the present 4.0 era but as shown in the picture below Nigeria seems to have come up with her version that has nothing to do with intellectual property despite the growth of the entertainment, film, fashion, manufacturing and pharmaceutical industry.



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<sup>429</sup> Abirami Raja Santhi, Padmakumar Muthuswamy, *Industry 5.0 or industry 4.0S? Introduction to industry 4.0 and a peek into the prospective industry 5.0 technologies*, February 2023, *International Journal on Interactive Design and Manufacturing (IJIDeM)*, [https://www.researchgate.net/publication/368290993\\_Industry\\_50\\_or\\_industry\\_40S\\_Introduction\\_to\\_industry\\_40\\_and\\_a\\_peek\\_into\\_the\\_prospective\\_industry\\_50\\_technologies](https://www.researchgate.net/publication/368290993_Industry_50_or_industry_40S_Introduction_to_industry_40_and_a_peek_into_the_prospective_industry_50_technologies) accessed 23 May 2024

<sup>430</sup> The Nigeria Industrial Revolution Plan (NIRP) Project, <http://www.nirpproject.org/the-nirp-project-office/> accessed 1 June 2024

## **2.2 THE IMPACT OF THE INDUSTRIAL REVOLUTION ON INTELLECTUAL PROPERTY IN THE DIGITAL AGE**

From these various studies, this has been achieved and is still being studied in the following ways based on the demands in our society. The dependence on evolution and the extent of protection that intellectual property owners receive for their intellectual property. Lives are being made easier through these disruptors.

There is a push for the amendment of intellectual property laws and other subsidiary laws, for instance, the birth of the Artificial Intelligence (AI) law in Europe and the Strategic Lawsuits Against Public Participation (SLAPP) Law in the United States following the recent voice imitation and cloning case featuring one of the largest AI companies in the world.

A rise in evolving intellectual property rights strategy for brands as seen during the Metaverse and Non-Fungible Tokens (NFTs) era post-pandemic. Acquisition of new skills to be able to compete and still be in the market. But where is Nigeria in all of this conversation?

## **3.0 RELEVANT INTELLECTUAL PROPERTY IN THIS DIGITAL ERA**

Here we would be looking at the key drivers that add value to the said intangible asset which form the foundation for inventors, creators, and businesses to navigate their complex world and further provide a strong framework of rights and protections for these intangible assets. This can be divided into three pillars of development.

**3.1 Copyright:** This protects original expressions such as books, audiovisuals, broadcasts, images, performance rights, songs, artistic works, and sound recordings which must be in a

fixed or tangible format irrespective of the quality. Under the Nigerian Copyright Act,<sup>431</sup> it is required that a connection be established by the status of the author which will be determined by citizenship residency or by incorporation under the Nigerian Law in the case of a corporate entity; the place of first publication, reference to international agreement or the work of a government or an international body.

Copyright protection is automatic upon creation, however, section 84 of the Act,<sup>432</sup> makes provision for a depository system with the Nigerian Copyright Commission which is the regulatory agency for copyrighted works in Nigeria, and in the event of a dispute a Certified True Copy (CTC) will be obtained to use as documentary evidence as proof of ownership.

The owners of these copyrighted works enjoy exclusive economic rights to commercialize or monetize their works by way of reproduction rights, adaptation and translation rights, distribution rights, and communicating their works to the public as provided in sections 9-14 of the Act.

## **Industrial Property**

**3.2 Patents:** Industrial Property such as Patents, protects inventions that are new from inventive activity, and capable of industrial application, it does not form part of the state-of-the-art.<sup>433</sup>

**3.3 Industrial design:** Section 12<sup>434</sup> defines it to be “any combination of lines or colours or both and any three-dimensional form, whether or not associated with colours as long as it is

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<sup>431</sup> 2022; Sections 5, 6, 7, 8 and 64

<sup>432</sup> Copyright Act 2022

<sup>433</sup> Section 1(11-2) of the Patent and Design Act

<sup>434</sup> Patent and Design Act

new and not contrary to public order/morality <sup>435</sup> as its” purpose is to protect the aesthetic creativity of a product.”

**3.4 Trademark and Service Mark:** The Business Facilitation Act (BFA) 2023 has been revised to, describe a trademark as a mark – excluding certification trademarks – that is utilized or intended for use in connection with goods or services to signify a trade relationship. This connection is established through ownership rights or registration of the mark.

A trade secret is referred to as any commercial confidential information for which an intellectual property owner has taken preventive measures to ensure that the information that gives him an edge in the market and against his competitors is not disclosed without due process. For example, the Coca-Cola recipe is said to be the oldest and most kept trade secret in the world. It is important to state that the law discourages espionage or unlawful access to such information by improper means.<sup>436</sup>

### **3.5 Uncommon and Unpopular Types of Intellectual Property**

The third pillar was categorized by this author, due to the uncommon and unpopular nature and lack of proper legislation within our territory and they include as follows; Plant Variety protects and in line with its objective in section 1<sup>437</sup> seeks to promote increased staple crop productivity for smallholder farmers in Nigeria and encourage investment in plant breeding and crop variety development; promote increased mutual accountability in the seed sector; and protect new varieties of plants which also applies to breeder; and any plant genera and species. Additionally, these new varieties must meet the requirements in sections 12-16 of the Act.

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<sup>435</sup> Section 13 Patent and Design Act

<sup>436</sup> Desmond O. Oriahogba, Ifeoluwa A. Olubiyi, *Intellectual Property Law in Nigeria: Emerging Trends, Theories and Practice*, Paclerd Press Ltd, 2<sup>nd</sup> edition 2023, page 136

<sup>437</sup> Plant Variety Protection Act, 2021 <https://faolex.fao.org/docs/pdf/nig214136.pdf> accessed 30 May 2024

For Geographical Indication, we do not have any law on that but rather a bill was presented for public hearing in 2022 and is currently been reviewed by the technical working group, but this type of intellectual property protects the Traditional knowledge that is generally understood to mean the know-how, skills, innovations, and practices developed by Indigenous peoples and local communities, while traditional cultural expressions are generally understood as the tangible and intangible forms in which traditional knowledge and cultures are expressed.<sup>438</sup> These types of intellectual property focus on protecting and promoting various cultural expressions.

#### **4.0 EMERGING LEGAL ISSUES AND THEIR COMPLEXITY**

The digital era has changed the way intellectual property (IP) is created, disseminated, and protected which has now led to several emerging challenges in digital intellectual property rights from the unauthorized use of copyrighted material on social media platforms to training artificial models with contents and works owned by intellectual property owners to the intricate issues surrounding patent rights in the tech industry, these complexities raise questions about ownership and infringement that our current legal frameworks may not be fully equipped to handle. These issues are as follows:

Sometime in May 2024, Scarlet Johansson who plays Black Widow in the Marvel Franchise movie “Avengers” called out the CEO of OpenAI<sup>439</sup> who had initially reached out to the actress seeking her consent to use her voice for their recent model “Sky” but she had declined only to have OpenAI hold a live demonstration of the voice sometime in May, and many observers compared it to Johansson's voice in the 2013 Spike Jonze romantic sci-fi film "Her," which

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<sup>438</sup> WIPO, *Intellectual Property and Traditional Knowledge*, <https://www.wipo.int/export/sites/www/tk/en/docs/ip-tk-introduction-en.pdf> accessed 30 May 2024

<sup>439</sup> Bobby Allyn, *Scarlett Johansson says she is 'shocked, angered' over new ChatGPT voice*, 20 May, 2024 <https://www.npr.org/2024/05/20/1252495087/openai-pulls-ai-voice-that-was-compared-to-scarlett-johansson-in-the-movie-her> accessed 21 May 2024

centres on a man who falls in love with the female voice of his computer's operating system. This case further highlights the recent trend of scraping to train AI and why our laws would need to be amended to be able to curb further training that breaches the thin line between AI, and data protection which would not comply with the relevant principles including data minimization and principle of accuracy, and Copyright issues such as image and publicity rights, third party suing for unauthorized use of their work.

Requirement of the cross-border enforcement in the age of anonymity to pseudo-anonymity: this interplays with data privacy and data protection which will entail some sort of disclosure from Internet service providers (ISPs) but are sometimes limited by insufficient preventive or remedial powers, inconsistent legal regimes, and practical obstacles like resource constraints.<sup>440</sup>

Additionally, to address some cross-border issues and the framework of cross-border disputes, this entails the use of voluntary measures, judicial measures, and administrative measures against cross-border infringements of intellectual property rights.<sup>441</sup> The choice of jurisdiction refers to the location where the rights holder can bring an action against the alleged infringer and obtain damages for the prejudice suffered. These measures are used in conjunction with international agreements.

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<sup>440</sup> OECD (2006-06-18), “*Report on the Cross-Border Enforcement of Privacy Law*”, OECD Digital Economy Papers, No. 121, OECD Publishing, Paris. <http://dx.doi.org/10.1787/231304814207> accessed 1 June 2024

<sup>441</sup> Oleksandr BULAYENKO, Giancarlo FROSIO (project lead), Anna LAWRYNOWICZ-DREWEK, Natasha MANGAL, *Cross Border Enforcement of Intellectual Property Rights in EU*, [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/703387/IPOL\\_STU\(2021\)703387\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/703387/IPOL_STU(2021)703387_EN.pdf) accessed 22 May 2024

## 4.1 Deepfakes

Vishnu<sup>442</sup> defines them to be hyper-realistic digital manipulations of audio and video content, often indistinguishable from the real thing which have become even more sophisticated and difficult to detect and use advanced AI algorithms, particularly those based on machine learning and neural networks. According to Ramluckan, accessibility to the applications of deepfakes and their usage has increased drastically over the last five years.<sup>443</sup> Ramluckan further stated that they are now designed to harass, intimidate, degrade, and threaten people which often leads to the creation and dissemination of misinformation as well as creating confusion about important state and non-state issues. In addition, in addition to violating copyright, they may also violate intellectual property rights by, for example, using a trademark, logo, or label illegally. They may also result in more serious issues such as violations of human rights, privacy rights, and rights to safe personal data. As an illustration, we had a viral picture of the Pope in a white winter jacket.

Disclosure in the use of artificial intelligence tools in creating new works eg the Zarya of Dawn case in the United States<sup>444</sup> where the copyright office had to review Ms Kashtanova's initial application after she made a post on “X” formerly Twitter that her AI-generated image in her book was granted copyright and to cure that, they concluded that she was indeed the author of the Work’s text as well as the selection, coordination, and arrangement of the Work’s written and visual elements and enjoyed copyright for that. However, the images in the Work that were generated by the Midjourney technology are not the product of human authorship and

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<sup>442</sup> Vishnu Vijandran, Deepfakes and Intellectual Property Law: Applying the Concept of Passing Off, 11 March , 2024, <https://www.aqranvijandran.com/blog/the-intersection-of-deepfakes-and-intellectual-property-law-applying-the-concept-of-passing-off> accessed 4 June 2024

<sup>443</sup> Trishana Ramluckan, Deepfakes: The Legal Implications, [https://www.researchgate.net/publication/379221500\\_Deepfakes\\_The\\_Legal\\_Implications](https://www.researchgate.net/publication/379221500_Deepfakes_The_Legal_Implications) accessed 4 June, 2024

<sup>444</sup> US Copyright Office, Re: Zarya of the Dawn (Registration # VAu001480196), <https://www.copyright.gov/docs/zarya-of-the-dawn.pdf> accessed 29th May 2024

proceeded to cancel the original certificate issued to Ms Kashtanova and issue a new one covering only the expressive material that she created.

This development resulted in the ruling in *Thaler v. Perlmutter* ("Thaler")<sup>445</sup> on August 18, 2023, by Judge Beryl A. Howell, who concluded that "human authorship is a bedrock requirement of copyright" and hence an AI-generated piece of art could not be registered for copyright. With the use of generative AI known as the "Creativity Machine," the plaintiff, Stephen Thaler, created the image "A Recent Entrance to Paradise."

Following three denials of Thaler's application by the US Copyright Office ("USCO") between 2019 and 2022, Judge Howell upheld the denial through judicial review. Furthermore, the USCO has now,<sup>446</sup> issued a guidance stating that all copyright applications must disclose whether any part constitutes AI-generated content.

**4.2 Copyright and Data Protection:** In a bid to safeguard the rights of copyright owners and the users of the works, the digital age has created some emerging issues as it relates to copyright law which includes copyright in a digitalized world, hyperlinking, software, and open source, databases, and artificial intelligence<sup>447</sup> An overlap in legislation highlights access to data may even conflict with intellectual property rights (copyright) and contract laws.<sup>448</sup>

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<sup>445</sup> THALER v. PERLMUTTER et al, No. 1:2022cv01564 - Document 24 (D.D.C. 2023)  
<https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2022cv01564/243956/24/>  
accessed 7<sup>th</sup> May 2024

<sup>446</sup> Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, March 16, 2023

16190 Federal Register, Vol. 88, No. 51 Rules And Regulation  
[https://www.copyright.gov/ai/ai\\_policy\\_guidance.pdf](https://www.copyright.gov/ai/ai_policy_guidance.pdf) accessed 7<sup>th</sup> May 2024

<sup>447</sup> Grace Njasi Kalu, *Emerging Issues in Copyright Protection*, International Journal of Science and Research (IJSR), November 2023,  
[https://www.researchgate.net/publication/375765817\\_Emerging\\_Issues\\_in\\_Copyright\\_Protection](https://www.researchgate.net/publication/375765817_Emerging_Issues_in_Copyright_Protection) accessed 23 May 2024

<sup>448</sup> Barbara Pasa, *Copyright and Data Protection*, In book: *Privacy and Data Protection in Software Services*, January 2022, [https://www.researchgate.net/publication/353739765\\_Copyright\\_and\\_Data\\_Protection](https://www.researchgate.net/publication/353739765_Copyright_and_Data_Protection) accessed 1 June 2024

**4.3 Non-Fungible Tokens (NFT) and Trademark Infringement in the Virtual World:** After the pandemic, when the world was only beginning to recover, a new digital asset medium entered the virtual realm called NFT. This medium when developed is "tokenized on the cryptocurrency service, Blockchain. Trademark, as we know, protects as well as the first instance of trademark infringement concerning the "range of reimagined Hermès Birkin bags, all intentionally made with faux fur" designed by Mason Rothschild and Eric Ramirez. Naturally, this did not sit well with Hermès, who supposedly wrote Rothschild a cease-and-desist letter, to which the latter replied that "the First Amendment gives him every right to create art based on his interpretations of the world." Hermès sued Rothschild in New York for trademark infringement and dilution, but to no avail. The "Birkin" term has undoubtedly been trademarked by Hermès under many categories, such as leather goods and handbags. "It was claimed by the brand that it 'did not authorize nor consent to the commercialization or creation' of 100 virtual non-fungible tokens featuring Birkin bags." Rothschild clarified that Hermès was only acting in an artistic capacity, stating that this was his remix of an icon.<sup>449</sup>

The jury concluded on February 8, 2023, that using the "MetaBirkin" domain amounted to cybersquatting and that Rothschild's "MetaBirkins" were likely to mislead and confuse customers about the product's provenance. Rothschild was sentenced to pay Hermès \$23,000 for cybersquatting and \$110,000 for the anticipated profits he made from the NFT sales after the US District Court for the Southern District of New York dismissed his claims that his MetaBirkins were protected works of art.<sup>450</sup> This case also serves as evidence that proprietors of intellectual property must obtain trademark protection concerning NFTs and virtual goods.

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<sup>449</sup> Ycaitlin Muraca, *The 'MetaBirkin' and the Beginning of Trademark Litigation in the NFT Space*, 14 February 2022, <https://cardozoaelj.com/2022/02/14/the-metabirkin-and-the-beginning-of-trademark-litigation-in-the-nft-space/>, accessed 1 June 2024

<sup>450</sup> Saba Munraz, *Hermès -v- the 'MetaBirkin': Trademarks Entering the Metaverse*, 6 March 2023, <https://www.hilldickinson.com/insights/articles/hermes-v-metabirkin-trade-marks-entering->

Fair dealing: is considered to be the non-commercial use of an intellectual property which may include permitted use such as for private use<sup>451</sup>, right to independent use as provided under sections 7 and 8 of the Nigerian Trademark Act, no likelihood of deception, research, prior use, exhaustion of patent rights, where the user has a license for compulsory license<sup>452</sup> or a contractual license<sup>453</sup>

## 5.0 DISPUTE RESOLUTION MECHANISM

Dispute resolution takes an important place within the intellectual property (IP) framework.<sup>454</sup> The complexity of all of these emerging issues mentioned would need to be resolved somewhere and this is where the dispute resolution strategy comes into play to aid enforcement which will depend on the subject matter and the designation of the law or legal system applicable. Available mechanisms include:

### 5.1 Online Dispute Resolution (ODR)

The digital revolution led to the birth of ODR which extends the principles of ADR into the digital realm, by offering platforms and tools that allow for the resolution of disputes arising from online activities, as well as traditional disputes that can benefit from the efficiency and accessibility of online methods.<sup>455</sup> This method of dispute resolution is most common and explored by most social media platforms which is largely driven by rapid advancements in

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[metaverse#:~:text=On%208%20February%202023%2C%20the,%27MetaBirkin%27%20domain%20was%20cybersquatting. accessed 2 June 2024](#)

<sup>451</sup> Section 20 of the Nigerian Copyright Act, 2022

<sup>452</sup> Section 11 and First Schedule of the Patent and Design Act

<sup>453</sup> Section 23 of the Patent and Design Act

<sup>454</sup> Althaf Marsoof, Intersections Between Intellectual Property and Dispute Resolution, May 2021, <https://doi.org/10.1093/oso/9780198826743.003.0015> accessed 1 June 2024

<sup>455</sup> Santosh G, Emerging Trends in Online Dispute Resolution (ODR): Reshaping the Landscape of ADR, 22 February, 2024 <https://www.linkedin.com/pulse/emerging-trends-online-dispute-resolution-odr-reshaping-santosh-g-9ncuc/> accessed 1 June 2024

technology such as artificial intelligence (AI) and machine learning, blockchain, and virtual reality (VR)”<sup>456</sup>.

For example, eBay's Resolution Centre, one of the first and most effective instances of online dispute resolution, manages millions of claims every year addressing topics including item conditions, returns, and refunds. These methods were also most effective during the lockdown as a lot of proceedings were held virtually using avatars.

## **5.2 Litigation**

Althaf states that the starting point of any civil litigation is a disagreement between two or more parties, commonly known as a ‘dispute’ when an infringement or violation of a right has occurred<sup>457</sup> which then gives a designated court the exclusive jurisdiction to hear all civil and criminal actions arising from the infringement and unauthorized use of an intellectual property and as provided under the relevant intellectual property which in Nigeria is the Federal High Court<sup>458</sup>.

## **5.3 Dispute Resolution Board/Panel (DRB/P)**

This consists of a permanent set of panels that have been constituted to hear a specific type of dispute. According to the International Chamber of Commerce (ICC), dispute resolution boards are used to assist in avoiding or overcoming disagreements and disputes.<sup>459</sup> For instance, section 90 of the Nigerian Copyright 2022 provides that the Nigerian Copyright Commission may constitute a DRP to resolve any dispute arising from the payment of royalties, terms of license,

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<sup>456</sup> Ibid 28

<sup>457</sup> Ibid 22

<sup>458</sup> Section 251 (1)(f) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

<sup>459</sup> ICC, *Dispute Boards*, <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/dispute-boards/> accessed 28 May 2024

or any matter required under the Act, furthermore, WIPO has a Model Dispute Resolution Board (DRB) Clause for the Resolution of Video Games and eSports Disputes.<sup>460</sup>

### **5.3.1 Alternative Dispute Resolution (ADR)**

Touted to be most efficient as it preserves the relation of parties involved in such dispute. Intellectual property owners can opt to trigger their existing dispute resolution clause or submit to any proposed dispute resolution mechanism such as adjudication, negotiation, mediation and or arbitration depending on the subject matter and complexity of the dispute in question.

### **5.3.2 Take Down Notice**

This is issued in the event of an unauthorized distribution and reproduction of a copyrighted on a platform which will require that the internet service provider (ISP) takes down the infringing content immediately after the copyright owner notifies them of the Act.<sup>461</sup>

### **5.3.3 Cease and Desist Letter**

This is sometimes considered the first step to take after due diligence has been carried out to confirm that an infringement has truly occurred. This is a specific type of letter which demands that the recipient immediately stops unlawful activity within a timeframe and failure to comply would mean a lawsuit would be filed as the next alternative to resolving the said dispute.<sup>462</sup>

Small Claims Courts for a jurisdiction like the United States streamline copyright disputes through a small claims tribunal set up within the U.S. Copyright Office “the Copyright Alternative in Small-Claims Enforcement Act (CASE Act)”<sup>463</sup> with damages capped at

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<sup>460</sup> *WIPO Model Dispute Resolution Board (DRB) Clause for the Resolution of Video Games and eSports Disputes*, <https://www.wipo.int/amc/en/center/specific-sectors/videogames/clauses/index-copy.html> accessed 2 June 2024

<sup>461</sup> Sections 54 – 62 of the Nigerian Copyright Act, 2022

<sup>462</sup> Alex Kimberly, *Cease and desist letters*, July 25th, 2023, <https://www.gannons.co.uk/insights/cease-and-desist/> 1 June 2024

<sup>463</sup> *Copyright Small Claims and the Copyright Claims Board*, <https://copyright.gov/legislation/copyright-small-claims.pdf> accessed 1 June 2024

\$15,000 per claim and \$30,000 in total<sup>464</sup> and the United Kingdom<sup>465</sup> have been created to hear certain copyright related dispute and also have their guideline for instance the UK guideline had to be updated at the end of the Brexit transition period on 31 December 2020, certain EU registered and unregistered intellectual property rights which previously fell within the scope of the Intellectual Property Enterprise Court (IPEC) Small Claims Tribunal (SCT) ceased to be enforceable in the courts of England and Wales.

“Additionally, according to the document, the claim would depend on the type of intellectual property rights it relates to; its value; and the remedies sought as a result of claims from copyright, UK registered trademarks (including comparable UK trade marks) passing off, UK unregistered design rights (including continuing unregistered designs - CUDs - and “supplementary unregistered designs – SUDs’

### **5.3.4 Trademark Opposition and Other Administrative Procedure**

The procedure for a trademark registration leaves a mandatory two (2) months after an application has been accepted for the Registrar to put out a call in the trademark journal then the process for initiating a trademark opposition upon identifying and confirmation that an infringing mark is been applied for, the trademark owner (opponent) is required to submit a notice of opposition in writing and include a statement of grounds for opposition.<sup>466</sup> It is

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<sup>464</sup> Claudia Rosenbaum, *Congress Passes CASE Act as Part of COVID-19 Relief Bill*, 22 December, 2024, <https://www.billboard.com/pro/congress-case-copyright-reforms-covid-19-relief-bill/> accessed 1 June 2024

<sup>465</sup> Guide to the Intellectual Property Enterprise Court Small Claims Track , July 2023 <https://assets.publishing.service.gov.uk/media/64a82d47404eac000c763b52/ipec-sdt-guidance.pdf> accessed 2 June 2024

<sup>466</sup> Sections 19-21 of the Nigerian Trademark Act

important to state that, a trademark opposition in Nigeria is administrative proceedings before the Trademark Registry.<sup>467</sup>

### 5.3.5 Hybrid Mechanism

This usually occurs when parties have a contract that has a multi-layered dispute resolution clause or have submitted to exploring the available methods combined. For instance, they might negotiate first, attempt mediation, and then proceed to arbitration or litigation if necessary.<sup>468</sup>

## 6.0 ENFORCEMENT PROCEEDING

Depending on the dispute resolution mechanism the intellectual property owner opted for, these are the available enforcement mechanisms post-resolution that can effectively handle complex intellectual property disputes, given the rising importance of intellectual property, and the increasing frequency and complexity of IP disputes<sup>469</sup>. Lee further stated that “the effectiveness of resolution methods differs, depending on the type of IP dispute classified into seven issues, which are (i) requirement for validity of IP right, (ii) range and duration of IP right, (iii) transfer of IP right, (iv) licensing, (v) use of IP right, (vi) declaration of IP infringement, and (vii) estimation of damage”.

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<sup>467</sup> Resolution Law Firm, *Procedure For Trademark Opposition In Nigeria*, <https://www.mondaq.com/nigeria/trademark/1006768/procedure-for-trademark-opposition-in-nigeria> accessed 3 June 2024

<sup>468</sup> Faster Capital, *IP arbitration and dispute resolution Resolving Intellectual Property Conflicts: Strategies for Entrepreneurs*, <https://fastercapital.com/content/IP-arbitration-and-dispute-resolution-Resolving-Intellectual-Property-Conflicts--Strategies-for-Entrepreneurs.html> accessed 28th May 2024

<sup>469</sup> J u-Yeon Lee, Identifying Effective Dispute Resolution Mechanisms for Intellectual Property Disputes in the International Context, *Journal of Arbitration Studies*, Vol. 25 No. 3, 1 September, 2015, pp. 155, <https://koreascience.kr/article/JAKO201530360959876.pdf> accessed 30 May 2024

If it were any of the ADR mechanisms such as mediation or arbitration which are usually of a commercial nature; parties would be required to approach the court to recognize the award which is binding in line with section 57 of the Arbitration and Mediation Act<sup>470</sup> or settlement agreement in line with section 82<sup>471</sup> as a “Consent Judgement or Award” and in the case of an international settlement agreement the “Singapore Convention” would apply <sup>472</sup>.

In the event of an infringement case, the post-resolution would require that the intellectual property owner is made aware of the available remedies and damages as provided under the law such as injunctive relief, monetary compensation, or even criminal prosecution, depending on the severity of the infringement.<sup>473</sup>

Collaboration with relevant agencies and legal practitioners to help enforce and opt for the best strategy in ensuring all parties adhere to the resolution.

Finally, explore Protective Measures such as monitoring the market for potential infringements, conducting regular audits, and implementing robust internal processes to safeguard the IP assets to ensure compliance by taking the necessary steps listed to enforce and protect intellectual property rights.

## **7.0 CONCLUSION AND RECOMMENDATIONS**

As the world continues to progress, it is crucial to protect intellectual creations that can contribute to and shape the development of our economic framework. This protection should be in line with the principles of innovation and creativity, while also respecting and safeguarding the rights of intellectual property owners through robust intellectual property

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<sup>470</sup> 2023

<sup>471</sup> Arbitration and Mediation Act, 2023

<sup>472</sup> Section 87 of the Arbitration and Mediation Act, 2023

<sup>473</sup> Ibid 41

systems in the pursuit of human progress. For intellectual property owners and stakeholders in Nigeria, this presentation seeks to change the perception of how we all see intangible assets such as intellectual property and recommends the following in order for there to be a positive change in our status of industrial revolution. There are as follows:

1. Creations and inventions need to be seen as one with intangible component and the business angle to every intellectual property.
2. In order for Nigeria to be compete in the global market, emphasis must be made in having an African standard to our intellectual property system and trade liberalization in view of the one single market project being promoted by the African Continental Free Trade Agreement (AfCFTA). There needs to be work towards becoming a knowledge-based capital.
3. Tap into the wealth that intellectual property rights propose, for instance the likes of Silicon Valley and the budding Fintech hub in Kenya or the Tourism master template from Rwanda. There needs to be better incentives for creators, inventors and Research & Development (R&D) centres.
4. There needs to be a repeal of the Trademark, Patent and Design Act to be at par with international best practices. Furthermore, there is a serious need for the establishment of specialized intellectual property courts or tribunals and or small claims courts to handle specific intellectual property disputes.

**REPORT ON THE CONFERENCE OF THE DEPARTMENT OF PRIVATE AND PROPERTY LAW, FACULTY OF LAW, RIVERS STATE UNIVERSITY, NKPOLU-OROWORUKWO, PORT HARCOURT HELD ON 5<sup>TH</sup> AND 6<sup>TH</sup> JUNE, 2024 AT DR NYESOM EZENWO WIKE AUDITORIUM, RIVERS STATE UNIVERSITY**

**Theme: Contemporary Issues in Private and Property Law in Nigeria**

**DAY 1: OPENING CEREMONY**

The 2-day conference commenced with an opening ceremony which began at 10:56 am with the arrival of members of the High Table. The following persons constituted the High Table:

Hon Justice Mary Ukaego Peter-Odili, CFR, Justice of the Supreme Court (Rtd), Pro-Chancellor and Chairman of Council, Rivers State University;

Prof Nlerum S Okogbule, Vice Chancellor, Rivers State University;

Hon Justice Adolphus Enebeli (Rtd), DSSR, Retired Judge of the Rivers State High Court and Chairman, Rivers State Independent Electoral Commission (RSIEC), Chairman of Occasion;

Prof Victor A. Akajuru, Deputy Vice-Chancellor (Administration) Rivers State University;

Prof Valentine B. Omubo-Pepple, Deputy Vice-Chancellor (Academic) Rivers State University;

Prof Mike Ozekhome, SAN, CON, OFR, FCI Arb, Keynote speaker represented by Dr Felix C Amadi;

Prof C.C Wigwe, SAN, Dean, Faculty of Law;

Prof Grace Akolokwu, Head, Department of Private and Property Law and Chairman Conference Planning Committee;

Hon Justice Simeon C Amadi, Chief Judge of Rivers State, represented by Hon Justice Daketima G Kio, Judge, High Court of Rivers State;

Dr Anugbum Onuoha, DSSRS, Independent National Electoral Commission Resident Electoral Commissioner, Edo State; and

Prof AD Badaiki, SAN.

The Masters of Ceremony were Dr Edwyn Jonathan, Dr U Frank-Igwe and Ms Maudlyn Park. The opening prayer was offered by Dr. Mrs Mabel Izzi. Thereafter, the welcome address was delivered by the Head, of the Department of Private and Property Law who welcomed all present and emphasised that the law of property is central to our present realities. The Chairman of the Occasion delivered his opening address stating that the theme chosen for the conference shows the realisation that our laws may be in need of further harmonisation and reformation. Goodwill messages were received from the Dean, the Faculty of Law, the Vice Chancellor of the University the Pro-Chancellor and Chairman of Council, Rivers State University and the Chief Judge of Rivers State.

## SECOND SESSION- LECTURES

12:20 pm *Paper I- The Tort of Defamation and Privacy in the Digital Age by Prof AD Badaiki, SAN*

The paper notes that there is a rising menace of online defamation in this digital age. The law of defamation is reasonably justifiable within the ambit of the Constitution of the Federal Republic of Nigeria 1999, s45(1). The law balances the right to free speech with the rights of persons who are defamed by free speech. Citing cases such as *Abalaka v Akinsete*, the paper examines the applicable mechanisms in Nigerian jurisprudence when there is a violation of the right to privacy.

The paper states that contrary to the view expressed by Kodilinye, libel may also be addressed to the ear. Unlike slander, libel is actionable *per se* as the claimant need not prove that the defamation has caused special damage. There are exceptional cases where slander may be maintained even though the slanderous words have not caused actual damage.

There are defences to a claim of defamation. It is when the defendant has no defence that it can be said that there was defamation. The claimant must prove that the statement complained of is false. The onus to discharge this burden is on the claimant. The alleged defamatory statement must be stated verbatim in the claimant's pleading to enable the court to interpret the words. Failure to do this can lead to dismissal of the action.

Online defamation, which is also known as Cyber-defamation, does not bear a different meaning from the general definition. The online statement must be false. There must be actual/serious harm; there is a gravitation from substantial harm to serious harm. There must be evidence. It is not every negative statement that is defamatory. In online defamation, a major challenge is identifying the defendant and locating the publishers of the online platform. It is debatable whether operators (internet intermediaries) are liable. *Awolowo v Kingsway Stores* represents the state of the law in Nigeria. In an action for online defamation, the claimant must prove substantial and real publication; publication cannot be inferred. *Jameel v Dow Jones*. Regarding whether a claimant can seek an interlocutory order from the court to stop a defamatory statement, the court held that it is not possible to do that. The attitude of the court is geared towards protecting the right to free speech. On the right to privacy, the Tort Law Reform Law of Lagos state sets out conditions under which you can maintain an action for privacy.

In the Keynote address, delivered by Prof Mike Ozekhome, SAN represented by Dr Felix C Amadi, the speaker undertook a thorough examination of personal property law in Nigeria, tracing its historical development, analysing contemporary issues, and proposing reforms to uphold private autonomy in the 21st century. Property rights are foundational to every legal system. As far back as 1981, there were calls for reform of the Land Use Act. Property law encompasses the legal relationships among individuals concerning assets. Distinguishing between public law and private law, the Speaker noted that while in public law the state is both an arbiter and an interested party, private law, on the other hand, functions basically as an impartial adjudicator of the rights and duties that exist between citizens. He observed that the Secured Transactions on Movable Assets (STMA) Act, which was introduced in 2017, was geared towards facilitating access to credit by reforming the legal framework for secured transactions on movable assets. However, inconsistencies and conflicts with laws such as the Companies and Allied Matters Act 2020, have undermined the effectiveness of the STMA Act. The keynote speaker stated that to address the complexities and challenges facing Nigeria, there is a need for a comprehensive reform of private and property law in Nigeria. In doing this inclusivity, compatibility with local conditions, and continuous evaluation should be prioritised. The Keynote speaker made the following specific recommendations:

Amendment of the Land Use Act (LUA) 1978 to ensure fair compensation for landowners whose lands are acquired by the government.

Promoting equitable access to land resources through the recognition of customary rights of occupancy and facilitation of communal participation in land management.

A comprehensive reform that addresses the inconsistency between the STMA Act and other laws.

Before transplanting legal concepts from foreign jurisdictions, the compatibility of these concepts with local conditions should not be overlooked. Stakeholders should be engaged and consulted to assess the compatibility of these foreign concepts with Nigeria's cultural, social, political, and economic contexts, and ensure that legal reforms align with local norms and practices.

2:12 pm *Paper 2- Contemporary Issues in Private and Property Law in Nigeria: Law on Land Control and Compensation in Nigeria by Sir Cosmos Ikechukwu Enweluzo, SAN*

Originally, under customary law in Nigeria, land was regarded as the soil alone but the Interpretation Act, s18 defines land as ‘including any building and any other thing attached to the earth or permanently fastened to anything so attached but does not include minerals.’ During the colonial era, the predominant land ownership system in Nigeria was the customary land tenure. Parcels of land were usually owned by communities or families. Subsequently, the concept of partitioning was introduced. If a family can alienate land, there is the question of whether they can maintain an action in defence of their land. There is no Supreme Court decision on this but there are divergent Court of Appeal decisions. In *SPDC Limited v Amadi*, the Court of Appeal held that ‘The Nigerian jurisprudence recognises that in customary law the family is vested with persona to own interest in land and by extension, to alienate same by lease, pledge, sale, et cetera and also to sue and be sued in protection of the family interest in land.’ The Supreme Court answered the question of whether Chief land can be acquired/alienated in *Adedeji v Oloso*.

The LUA stands as the cornerstone legislation on land control and compensation. The LUA does not promote fairness in compensation as the Governor is made a judge in his own case. The LUA, s14 gives enormous powers to the Governor. You cannot maintain an action in trespass if the Governor or a government institution enters your land. The LUA, s28 states that

the government has the power to revoke a right of occupancy and compulsorily acquire land for overriding public interest.

The SC has interpreted the LUA, S28(6) and (7) to mean *inter alia* that ‘notices must be given’. There are 2 notices; a notice of intention to acquire the land and a Notice of acquisition. *Nigeria Engineering Works Ltd v DENAP Ltd*. The notices must be served in accordance with the provisions of the LUA. The LUA does not talk of adequate compensation but rather talks of compensation determined by the Land Use Allocation Committee (LUAC). There is a need to bring the provisions of the LUA in line with the Constitution of the Federal Republic of Nigeria 1999.

2:50 pm *Paper 3- The Nuisance of Noise Pollution and the Citizen’s Rights to a Peaceful Environment by Prof I Lucky Worika, Director, Centre of Advanced Legal Research, Rivers State University*

Noise pollution is an unwanted sound that can affect animal and human behaviour. A sound which has unpleasant effects and discomfort to the ears is called noise. Generally sound generated by vehicles, horns, loudspeakers, planes, construction etc. are reasons for noise pollution. Noise pollution is also considered as environmental pollution although it is not as harmful as air, water or soil pollution, the effects of noise pollution for a longer period can be severe.<sup>474</sup> Not all noise is pollution. The WHO classifies noise above 65 dB as pollution. Noise is detrimental at 75 dB and agonizing at 120 dB. Thus, daytime noise levels should be kept below 65 dB, and nighttime ambient noise beyond 30 dB prevents restful sleep.

CFRN 1999, s20 contains the environmental objective of Nigeria. The CFRN 1999 does not expressly provide for the right to health and a peaceful environment. Previously the consent of

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<sup>474</sup> Perfect Pollution Services, “What is Noise?” at <https://www.ppsthane.com/blog/how-to-reduce-noise-pollution> accessed 22/5/24

the AG was required before instituting an action for public nuisance but in *Adediran & Anor v Interland Transport* it was held that the consent of the AG is no longer required.

Noise pollution affects the quality of life and by extension, it affects the right to life. Discussing cases such as *Gbemre v SPDC & NNPC*, *COPW v NNPC*, and *Okpora v SSPDC* the paper recommends that Nigerian courts should follow the persuasive precedent of the Indian case of *Subaesh Kumar v State of Bihar*, and also draw lessons from China which has a specific law geared towards preventing and controlling environmental noise pollution.

### 3:30 pm *Question and Answer Session*

The following points were noted;

- i. Stakeholders such as members of legislative houses should be invited for subsequent conferences organised by the Department of Private and Property Law, Rivers State University.
- ii. Proceedings of this conference should be made available to legislators.

### **Land Use Act**

- iii. Land grabbing is an act of trespass and the Law of Tort has taken good care of it.
- iv. Although private selfishness must give room to the public interest, a person who suffers as a result of the public interest must be given adequate compensation.
- v. Before the government acquires land, the LUA provides for notices to be given in the prescribed manner and to the right person.
- vi. There is a need to expunge the CFRN 1999, s312(5).
- vii. The LUA should be amended and liberalised to bring it in line with global best practices.

- viii. The LUA should not be part and parcel of the Constitution.
- ix. The CFRN 1999, s44(1) juxtaposed with the LUA 1978, ss29 and 47(2) shows that the LUA is in conflict with the provision of the Constitution. Unconstitutional provisions of the LUA should be expunged.
- x. The words of the Constitution should be amended to acknowledge the supremacy of the Courts over the LUAC.
- xi. There should be laws to guide the assessment and payment of compensation. It should not be left in the hands of LUAC.
- xii. LUAC should make provisions for qualified and competent estate valuers, surveyors and other professionals who should assess based on the prevailing market value at the time of revocation.
- xiii. The laws should be aligned with the customs and practices of the people to promote compliance and enforcement.

### **Internet Defamation**

- xiv. Substantial publication of the alleged defamatory statement should take place within a particular territory to confer jurisdiction on the court.
- xv. The court will not presume that people read the alleged defamatory statement. Even though a case can be proved with a single witness, the more witnesses that show that the alleged defamatory statement was read, the more the evidential value.

### **Noise Pollution**

- xvi. There is a need for sustainable cities as the distinction between residential and urban areas in some parts of Nigeria has been blurred.
- xvii. It is difficult to measure noise pollution particularly when it is transient. The NESREA Act sets decibel limits for certain areas but proof of decibel limit requires the use of an audiometre which is not readily available.
- xviii. The environment is not on the exclusive legislative list so state legislative houses can pass laws on it.
- xix. Chapter 2 rights can be enforced in the West African Court on Human and Peoples' Rights. Chapter 2 rights are also enforceable based on the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

The Vote of thanks was offered by Prof G. Akolokwu and closing prayers were said by Prof Chidi Halliday. The events of the first day of the Colloquium ended at 4:06 pm.

## **DAY 2, 6<sup>TH</sup> JUNE, 2024**

The events for the second day of the Conference began at 10:50 am with the constitution of the Panel. The Masters of Ceremony were Dr Edwyn Jonathan, Ms Maudlyn Park and Dr Frank Igwe. The panel was made up of the following persons:

Prof NS Okogbule, Vice Chancellor, Rivers State University;

Prof V Omubo-Pepple, Deputy Vice-Chancellor (Academic) Rivers State University;

Prof Worudji, Chairman of the session;

Prof Grace Akolokwu, Head of Department, Private and Property Law;

Prof Halliday, Head of Department, Commercial and Industrial Law;

Dr CAJ Chinwo, Member Governing Council, Rivers State University;

Prof Achinewu;

Dr Anugbum Onuoha, DSSR Independent National Electoral Commission Resident Electoral Commissioner, Edo State;

Mrs Chioma Jack, Registrar and Deputy Director of the Rivers State Multi-Door Court House;

Anwuri Chinda, Esq;

The opening prayer was offered by Dr M.O Izzi. This was followed by the Chairman's opening remarks.

11:02 *Paper 1- Curbing the Trends of Building Collapse in Nigeria: Causes and Regulations by Dr Anugbum Onuoha, DSSRS*

The paper noted that the right to own immovable property is provided for in the CFRN 1999. The challenges associated with building industries are not peculiar to Nigeria. The paper discussed relevant statutes such as the NESREA Act, the Urban and Regional Planning Act, the Land Use Act, Environmental Impact Assessment Act, among others.

The paper noted that it is only when land is acquired for overriding public purposes that compensation is paid. Just like the 1979 Constitution, the 1999 does not make provision for adequate compensation. The law creates 2 options for compensation; monetary compensation and relocation. However, many citizens prefer monetary compensation. The primary aim of owning property is security.

The causes of building collapse include corruption, use of poor materials, refusal to adhere to building standards, and severing of buildings that obstruct the right of way. Building collapse

could be a result of manmade or natural causes. The paper recommends, among other things that there should be destruction of collapsed buildings to avoid criminals using them as hide-outs; building monitoring during projects; continuous training of regulatory officials; update of laws and merger of multiple regulatory institutions into one.

11:30 am *Paper 2- Alternative Dispute Resolution in Private and Property Law: Exploring Innovative Methods* by Chioma S Jack, Esq, FICMC, MCI Arb, (UK)

Rivers State has the 18<sup>th</sup> Multi-Door Court House in Nigeria. ADR can be initiated by referrals from the court, walk-in, or direct intervention. Litigation is adversarial in nature and leads to mudslinging which could lead to further breakdown of relationships after litigation. Alternative Dispute Resolution (ADR) is not intended to supplant litigation. It exists to complement or supplement litigation. Mediation, conciliation, Early Neutral Evaluation or a hybrid of these are forms of ADR. Matrimonial disputes such as custody and maintenance may be subjects of ADR.

In Arbitration, the Arbitrator decides the outcome with the involvement of the parties. Arbitration has an advantage over mediation as an award can be made with only one party as long as he/she has sufficient notice. In mediation, 2 parties must be present. The benefits of ADR include flexibility, and the ability of parties to choose their mediator or arbitrator, in addition to directing the pace of proceedings. ADR has come to stay

12 pm *Paper 3- Emerging Legal Issues in Intellectual Property Rights in Nigeria* by Anwuri Chinda Esq

The paper defined Intellectual Property as a set of intangible assets that have been created and innovated to be used for commerce and grants territorial protection to the owners of the works. Highlighting their complexities, the paper identified the following as some of the emerging legal issues in Intellectual Property: the use of deep fakes; the use of Artificial Intelligence tools in creating new works; copyright and data protection; Non-Tangible Tokens; and trade mark infringements in the virtual world.

The paper highlighted the place of dispute resolution mechanisms within the Intellectual Property framework. These mechanisms aid in the resolution of disputes arising from the complex issues identified above. The mechanisms include Online Dispute Resolution, litigation, dispute resolution board/panel; Alternative Dispute Resolution, Down Notice; Cease and Desist letter; small claims courts available in jurisdictions like the United States of America; Trademark opposition and other administrative mechanisms; and Hybrid mechanisms. The effectiveness of these methods is dependent on the type of Intellectual Property dispute they are used to resolve. The paper recommended, among other things, that Intellectual Property owners should have good infringement detection strategies to deter online and offline infringements. The paper further recommended that the Trademark, Patent and Design Act should be repealed as it is not at par with international best practices. In addition, Nigeria should adopt an African standard to its Intellectual Property system and trade liberalisation in view of the one single market project being promoted by the African Continental Free Trade Agreement.

12:26 pm Presentation by the Investment and Securities Tribunal

#### *Questions and Answers Session*

- The severance of buildings needs to stop in Rivers State
- Payment of compensation is a pre-condition for the validity of government acquisition.

- In *Comptroller General of Prisons v Enema* (2021) 12 NWLR (Pt 107) the Supreme Court declared the LUA, s47(2) to be inconsistent with CFRN 1999, s44.
- If a building collapse is caused by manmade factors, no compensation should be paid but if it collapses as a result of a natural disaster, the government should ameliorate the suffering of the owner.
- The LUA, ss2 and 3 have given the Governor power to designate an area for various purposes.
- The challenges of the LUA should be handled from the perspective of human rights.
- Care should be taken by the government in the allocation of lands so as not to allocate already allocated plots.
- In litigation, technicalities pose a challenge to the resolution of disputes.
- Stakeholders should be invited to subsequent conferences.
- Under the Arbitration and Conciliation Act 1988 there was no protection for Arbitrators but under the Arbitration and Conciliation Act 2023, s3 Arbitrators are afforded protection.
- Intellectual Property evaluations are done by Intellectual Property valuers to determine what should be earned as royalty for a product. It is not advisable to enter into royalty agreements spanning more than 2 years.
- If an artist is signed by a record label and you need to use his song, you are required to go through his record label in seeking consent. If the artist is not signed but has a publisher or distributor, you are required to go through them. You also have to go through the Collective Management Organisation (CMO). CMOs act as middlepersons between the copyright owner and third parties who want to use the copyright label.

- If you commission someone to take a photograph of you, you both have the exclusive license to do as you please except you sign off your economic and moral rights to the image.

### *Closing*

The Chairman of the Session, Prof Worugji, thanked all the presenters and emphasised the need to hold relevant persons accountable for buildings that collapse due to manmade factors. He recommended the teaching of Intellectual Property Law as a course in the Faculty of Law. The vote of thanks was given by Dr Bariyira S. Kpea-ue. The conference was brought to an end with a closing prayer offered by Dr M.O Izzi at 2:19 pm.