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Editorial

This Eighth Volume of the *Strathmore Law Journal* (SLJ) reflects a breadth of topics on some of the pertinent issues pressing the legal systems in Africa and how they have been tackled over the years. From insightful analyses of more established topics such as justice systems to emerging frontiers in global health and environmental governance, this edition exemplifies and edifies the growing richness and sophistication of homegrown scholarship on the continent.

Layla Latif's piece sets the stage for this edition as she explores important answers within an emerging frontier. In her work, Latif tackles the global health financing structure, postulating that it currently, likewise historically, disparately impacts the Global South. With the employ of an adept historical analysis, Latif draws a direct connection between colonial-era policies and procedures and the persistent inequities in resource allocation for addressing global diseases. Cognisant of the ongoing multilateral discussions on restructuring the global financial system for equity, particularly regarding Africa, Latif ultimately concludes that only a comprehensive restructuring of the financing system can achieve true global health equity.

Next, Macharia Kaguru pivots the discussion towards the realisation of environmental rights in the contemporary era of constitutionalism. Through a case study of Kenya and South Africa, her contribution addresses the enduring implementation gap between the enshrinement of environmental rights in national constitutions and material environmental protection. Gray advocates for a 'harmonised' approach grounded in a deeper appreciation and understanding of fundamental values to actualise environmental rights both in substance and in form.

The subsequent section presents a series of articles pertinent to the administration of justice. Three distinguished authors contribute insightful analyses drawn from their experiences within three distinct jurisdictions.

Maurice Okech-Owiti, Albert Mumma, and Professor Kariuki Muigua take the baton and delve into the work of Kenya's judicial task force on alternative justice systems. Amidst increasing reliance on such systems, Okech-Owiti *et al.* highlight the ambiguity surrounding fundamental concepts on alternative justice systems, terming this a 'conceptual minefield', and illuminating the challenges this presents for the administration of justice.

Rounding off this section is Odunsi and Odunsi's contribution which takes a wide view of a collection of issues affecting the administration of justice in Nigeria. Centring their analysis on the constraints of a positivist approach, the authors explore the degree to which narrow constructivist applications meet the principles of justness and equity.

The final section of this edition contains three articles on varying topical matters across the African legal landscape.

Within the domain of criminal justice, Fasilat Olalere, Eti Herbert, and Ademola Ojekunle undertake a critical interrogation into the causes of wrongful convictions in Nigeria, through an inter-jurisdictional analysis. From flawed investigative process to inadequate judicial scrutiny of evidence at the trial stage, the authors argue that the undue reliance on confessional statements risks jeopardising access to justice, and therefore ought to be mitigated by intelligence gathering and forensic evidence.

Addressing administrative challenges in public procurement, Dare Ayinde examines Nigeria's emergency procurement framework exposing its vulnerability to corruption. Ayinde advocates for targeted reforms aimed at closing existing loopholes. Among his most critically recommended transformation includes giving procuring entities the options of competitive negotiation and framework agreements, as well as strengthening reporting mechanisms and audits once emergency procurement processes are completed.

The issue closes with a debate on regional responses to coups/overthrows of constitutionally established governments in post-independence Africa. Tayewo Adewumi and Oluwayemi Ogunkorode spotlight the recent case of Niger and investigate whether the Economic Community of West African States (ECOWAS) can reconcile its authority to intervene with respect for state sovereignty, and the rule of law. The authors conclude that ECOWAS's mediation mechanism is more appropriate and can meet the goal of taking decisive action against coup/overthrow instigators, while protecting human life.

In this eighth issue of *Strathmore Law Journal*, we are deeply appreciative of the many blind peer reviewers who have been a critical part of the editorial process for this publication. We extend our deepest gratitude to them, and, to our copy editor(s) and language editor who completed this work. As we look to our tenth year, we continue in our purpose to enable knowledge production and scholarship on African law and the law in Africa amidst the evolving African landscape.

Mukami Wangai
Issue Editor, March 2025.

Foreword

It is with great honour that we publish the latest edition of the Strathmore Law Journal; Volume 8(2). As the Chief Editor, I am privileged to have overseen this year's issue, encompassing a diverse array of article handling various legal areas of law.

In this year volume, we delve into the intricate world of legal issues, exploring the nuances and complexities that shape our legal landscape. Our esteemed authors have exerted considerable effort to produce content that not only informs but also inspires and provokes thoughtful discourse.

We are particularly delighted to share that this volume continues to contribute to the overarching aims of the Strathmore Law Journal. A publication dedicated to promoting the diffusion of knowledge and fostering interdisciplinary debate on various legal issues. By publishing articles tackling a mired of legal issues, we aim to provide a platform for scholarly discourse that encompasses philosophical, public policy, governance, and economic perspectives. We hope this issue has done so.

I would like to extend my heartfelt gratitude to our International Advisory Board and the Editorial Board for their invaluable guidance and support in the editing of this journal. Their expertise and dedication have been instrumental in shaping the content and direction of its publication. To the authors, we wish to express our sincere gratitude for your rigorous research and insightful contributions that have been pivotal in making this volume a success. I would also like to extend my sincere appreciation to Ms. Mukami Wangai, this issue's sectional editor for the dedication and support towards making this issue a reality.

To the readers, thank you for your continued support. We trust that you will find this issue both enlightening and thought-provoking.

Macharia Kaguru
Editor-in-Chief

Global Health Governance's Colour Line: How Finance Has Shaped Global Health Disparities in African Countries

Lyla Latif*

Abstract:

The global health financing structure carries imprints of colonial-era power dynamics, perpetuating health inequities between the Global North and South. Tracing the historical origins of these inequities, this paper analyses how colonial policies and philosophies shaped early health systems to serve the interests of the European colonisers over indigenous populations in Africa. Consequently, this paper demonstrates how institutionalised racial biases from the colonial period echo in contemporary global health governance. The analysis shows the connections between historic prejudices, economic exploitation, and persisting disparities in the Global South. The author highlights how present-day inequities stem from systemic imbalances in global health financing and governance rooted in colonial mentalities. Furthermore, the author scrutinises how these colonial legacies have influenced global financial institutions and manifested in unequal resource allocation, priorities, and access—widening the global disease burden gap. The author also discusses the emergence of digital health apps and how their financing and data stewardship can risk perpetuating new forms of exploitation reminiscent of colonial extractivism. Therefore, the author argues that rectifying these structural flaws by realigning financing and governance is essential for equitable global health.

Keywords: Colonialism, Global Health Governance, Global South, Inequalities, International Finance

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I. Introduction

The global health financing structure, with its intricate web of funding bodies, philanthropic endeavours, and policy dictators, is not insulated from the influences of major financial centres.¹ Historically, these centres have perpetuated a patron-client mindset, where regions, especially those once colonised, are often perceived as mere recipients awaiting directives, rather than stakeholders with a voice.² This patron-client dynamic is eerily reminiscent of colonial relationships, where the coloniser dictated terms and the colonised followed. Such a dynamic inevitably leads to a misalignment of resources and priorities. Often, the health challenges prioritised for funding and attention resonate with the worldviews and interests of the dominant financial territories, side-lining the urgent needs of the needy and vulnerable communities they claim to assist. For instance, despite bearing a significant burden of global diseases, African countries often grapple with constrained access to pivotal health resources. A poignant example of this sad reality is the HIV/AIDS epidemic. For years, while antiretroviral treatments were available in affluent parts of the world, many patients in Africa struggled to access these life-saving drugs due to financial constraints and patent restrictions, a situation aggravated by the global health financing dynamics.³

Additionally, there is a conspicuous skew when one observes the landscape of health research and development. Diseases that are rare yet prevalent in economically powerful regions might witness an influx of research funding, while ailments that wreak havoc in former colonial territories remain under-researched. To exemplify, tropical diseases like schistosomiasis or guinea worm disease,⁴ despite affecting millions, are often termed as 'neglected tropical diseases'—reflecting not just the neglect in medical attention but also the neglect in global health financing. Furthermore, the disparities become even more evident during global health crises. The COVID-19 pandemic serves as a glaring example. While wealthier nations were quick to secure vaccine doses for their populations, many countries in Africa and other historically marginalised regions faced significant

¹ Pearson JL, *The colonial politics of global health: France and the United Nations in postwar Africa*, Harvard University Press, Cambridge, 2018; Schrecker T, 'The power of money: Global financial markets, national politics, and social determinants of health' in KA Williams (eds) *Global health governance. International political economy series*, Palgrave Macmillan, London, 2009.

² Cobbett E, *Gatekeepers of financial power: from London to Lagos*, Routledge, 2020.

³ Krikorian G and Torrelee E, 'We cannot win the access to medicines struggle using the same thinking that causes the chronic access crisis', 23(1) *Health Hum Rights*, 2021, 119-127.

⁴ Viergever RF, 'The mismatch between the health research and development (R&D) that is needed and the R&D that is undertaken: an overview of the problem, the causes, and solutions', 10(6) *Glob Health Action*, 2013.

delays, not due to a lack of will or capability, but due to the financial and contractual power plays in the global health finance domain.

This cyclical architecture does not just perpetuate inequities; it embeds them even deeper. The underinvestment in health infrastructure in historically oppressed regions makes such regions perennially dependent on external aid. As health challenges intensify due to these inequities, it unfortunately reinforces certain stereotypes about the affected regions' capacities. This is not just a health matter; it is a matter of a broken system that was entrenched decades ago and continues to exert its influence today. Consequently, this paper aims to trace the historical roots of these inequities, analysing how global health governance structures have been intrinsically shaped by colonial-era philosophies and financial architectures.

By exploring the legacy of European colonialism in regions like Africa and Asia, this paper explains how institutionalised inequities in health systems were established during the colonial period and how that era's financial and ideological biases continue to echo in contemporary global health governance. The analysis demonstrates the deep connections between historic racial prejudices, economic exploitation, and persisting health disparities in the Global South. Ultimately, the objective is to highlight how present-day health inequities stem from systemic imbalances in global health financing and governance, which have origins in colonial-era philosophies and practices. Rectifying these structural flaws, therefore, is essential for building a more just and equitable global health governance.

Having delineated the historical contours of inequity, it is crucial to also point towards the contemporary landscape where digital health apps are at the forefront. This technological evolution, while promising to revolutionise healthcare, does not occur in a vacuum. It unfolds within the very fabric of the global health financing structures previously outlined, structures still carrying the imprint of colonial-era power dynamics. It is within this context that this paper also scrutinises the emergence of digital health solutions and their financing, understanding that without careful and conscious redirection, these advancements may inadvertently echo the patterns of the past.

This paper is structured into four main sections. The introduction explores the historical foundations of inequity in global health. The second section delves into the enduring imprints of colonialism on health systems. The third section examines contemporary health inequities and the persistent influence of colonial-era structures. The final section presents recommendations and concludes the discussion.

II. Historicising Health Inequities

Thandeka Cochrane argues that the historical legacy of European colonialism in Africa has left deep-rooted imprints on numerous facets of contemporary African societies, particularly in the realm of health systems.⁵ According to George Ndege, establishing these health infrastructures during the colonial era was intrinsically interwoven with the racially charged ideologies of the colonisers,⁶ and it is crucial to critically analyse their motives and methodologies to better comprehend present-day disparities. To fully grasp the extant disparities in African health systems, it is imperative to critically examine the motives and methodologies employed by the colonisers. Tayyab Mahmud argues that the racial ideologies that pervaded the colonial period were not merely passive beliefs but actively informed the strategies and approaches of European powers in Africa.⁷ In Ndege's and Conklin's views, many European colonisers, driven by a sense of racial superiority, believed in their civilising mission, asserting that they were bringing progress and development to 'backward' societies.⁸ This perceived superiority influenced their motives, as they sought to craft health systems that predominantly catered to the European settlers, often neglecting the healthcare needs of the native populations.

John Harrington's observations serve as a poignant extension of this argument. He highlights the colonisers' methodological flaws rooted in racial biases.⁹ Their frequent dismissal and undermining of traditional African medicinal practices—labelling them as primitive or unscientific—speaks to their deep-seated ethnocentrism. Instead of seeking a collaborative integration that recognised the merits of indigenous knowledge, they opted to impose a Eurocentric medical model. This choice, while strategic, sowed seeds of disparity. Building on this narrative, Peter Duignan and Lewis Gann's scholarship intertwines the establishment of health systems with the overarching imperialistic strategy during the late 19th and early 20th centuries.¹⁰ They underscore that Africa was predominantly perceived through the lens of untapped resources, waiting to be

⁵ Cochrane T, 'Colonial entanglements and African health worlds' 9(3) *Medicine Anthropology Theory*, 2022, 1-9.

⁶ Ndege GO, *Health, state and society in Kenya: Faces of contact and change*, NED-New edition, Boydell & Brewer, 2001.

⁷ Mahmud T, 'Colonialism and modern constructions of race: A preliminary inquiry', 53 *University of Miami Law Review*, 1999, 1219.

⁸ Ndege, *Health, state and society in Kenya: Faces of contact and change*, Conklin A, *A Mission to civilize: The republican idea of empire in France and West Africa, 1895-1939*, Stanford University Press, 1997.

⁹ Harrington J, *Traditional Medicine and the Law in Kenya*, Routledge, 2015.

¹⁰ Duignan P and Gann LH, *Colonialism in Africa 1879-1960*, Cambridge University Press, 1973.

extracted and exploited. The colonisers, motivated by both racial superiority and economic ambitions, sought to harness Africa's vast riches. Against this backdrop, this paper argues that the health infrastructures that were established were not just influenced by racial ideologies but were also a mechanism to sustain and facilitate resource extraction. Healthy European workers, administrators, and settlers were essential to maximise the exploitation of Africa's natural resources. Thus, health systems, while overtly showcasing a façade of development, covertly perpetuated a cycle of racial hierarchy and resource extraction, leaving a lasting legacy of inequality and exploitation in post-colonial African societies.

For example, Ndege confirms that in Kenya, the inception of the colonial health department had little to do with the welfare of the indigenous population.¹¹ It was fundamentally crafted to shield the European settlers from tropical maladies like malaria. Rather ironically, these settlers viewed the native Africans, who had lived in harmony with their land for millennia, as mere vectors of disease. While they sought refuge in well-established health facilities, healthcare services for the indigenous population were sparse and relegated to rudimentary care in remote mission stations.¹² The draconian segregation laws further accentuated this disparity, shoving Africans into congested reserves, away from European settlements, which invariably escalated their health vulnerabilities.

A similar narrative unfolded in Nigeria. Ibrahim Abubakar et al.¹³ explain that Britain's primary interests lay in harnessing Nigeria's abundant resources and ensuring the smooth functioning of its local workforce. To this end, establishing a health system was merely instrumental, aimed more at preserving economic interests than fostering community welfare. While stringent quarantine laws ensured that no epidemic disrupted the mining and production sectors, the overall health infrastructure remained skeletal at best. Hospitals, few and far between, primarily catered to British functionaries and a handful of local elites, leaving the masses largely neglected. Zimbabwe, according to Makambe,¹⁴ also witnessed a health infrastructure largely tailored to support its burgeoning mining industry and the European agrarian settlements. Africans were ousted from their ancestral lands by rampant land grabs and cornered into native reserves where the only semblance of healthcare came from missionary-run clinics. Meanwhile, in urban

¹¹ Ndege, *Health, state and society in Kenya: Faces of contact and change*.

¹² Latif L, 'Can you reap what you don't sow? Health finance in Kenya's progress towards universal health coverage' 1(3) *Financing for Development*, 2009, 41-67.

¹³ Abubakar I, Dalglish SL, Angell B, et al, 'The Lancet Nigeria Commission: Investing in health and the future of the nation', 19(399) *Lancet*, 2022, 1155-1200.

¹⁴ Makambe EP, 'The exploitation and abuse of African labour in the colonial economy of Zimbabwe, 1903-1930: A Lopsided Struggle Between Labour and Capital' 23 *Trans African Journal of History*, 1994, 81-104.

centres, well-furnished hospitals were erected, exclusively catering to the white settlers. In stark contrast, the rural clinics, aimed primarily at the indigenous population, had a singular objective: ensuring a steady supply of healthy black labour for the colonial enterprise.

Across the Mediterranean in Algeria, under French rule, the narrative was not remarkably different. Hannah-Louise Clark reports that the French colonial administration, with its eyes firmly set on promoting settler agriculture, crafted health policies that overwhelmingly favoured white farmers.¹⁵ Arabs and Berbers found themselves subjected to an array of stringent health laws, from quarantines to mandatory vaccinations, all designed to preserve the health of the settlers. The chasm between the settlers and the indigenous population was vividly reflected in the healthcare facilities too. The settlers enjoyed access to state-of-the-art hospitals, while the natives had to make do with rudimentary mobile clinics.

Shifting gaze to Southeast Asia, in Burma and former Malaya, the British colonial narrative, although geographically distinct, echoed similar motifs. As waves of Indian labour migrated to these regions, it became increasingly evident that their health was not just a humanitarian concern but intertwined with economic imperatives. Amarjit Kaur has pointed out that while Burma's bustling factories and Malaya's expansive plantations depended heavily on Indian labour, establishing the health sector was more about ensuring the continuity of this labour force than genuinely addressing their health needs.¹⁶ The racial dynamics at play ensured that the Indian labourers, despite their critical contributions, remained on the periphery of the colonial health matrix.

Across these diverse colonial landscapes, be it Africa or Southeast Asia, the establishment of health systems was not an act of colonial benevolence. It was, more often than not, a strategic move driven by racial prejudices and economic ambitions. The health of the indigenous and migrant populations was inextricably linked to their utility in the colonial machinery, and their welfare was secondary to the overarching imperial objectives. These examples demonstrate that the very establishment of these systems was marred by the racial prejudices of the time, which viewed Europeans as inherently superior and Africans as inferior – and, more detrimentally, as carriers of diseases.¹⁷ Therefore, to ensure the safety and well-being of European settlers, strict health measures like quarantines,

¹⁵ Clark HL, 'Expressing entitlement in colonial Algeria: Villagers, medical doctors, and the state in the early 20th century,' 48(3) *International Journal of Middle East Studies*, 2016, 445–72.

¹⁶ Kaur A, 'Indian labour, labour standards, and workers' health in Burma and Malaya, 1900–1940' 40(2) *Modern Asian Studies*, 2006, 425–475.

¹⁷ Tilley H, 'Medicine, empires, and ethics in colonial Africa,' 18(7) *AMA J Ethics*, 2016, 743–753.

mandatory vaccinations, and even unsanitary settlements were enforced on the African populace.¹⁸

This dual standard was evident everywhere. Ann Beck demonstrates that while European enclaves had sophisticated medical facilities and swift responses to health threats, African settlements had to make do with rudimentary services, which were more focused on ensuring they remained productive workers rather than genuinely healthy individuals.¹⁹ The blatant racism of the colonial era was evident in the vast discrepancies in health spending. It is telling that small outbreaks among European populations would trigger immediate and extensive interventions, whereas large-scale epidemics in African communities were met with apathy, seen as mere natural occurrences rather than tragedies that required action. Furthermore, the introduction and imposition of Western bio-medical models often side-lined and belittled indigenous medical practices and knowledge.²⁰ Instead of harnessing local expertise or trying to integrate indigenous and Western practices for a holistic healthcare approach, colonial health policies were characterised by a top-down, coercive approach.

Beyond just the establishment of health systems, the attitudes and strategies employed in their deployment were emblematic of the broader colonial ethos. Europeans' self-proclaimed civilisational superiority not only guided economic and political policies but also deeply influenced sectors like healthcare. What was promised as the spread of 'civilisation' was, in fact, the imposition of a racially biased system that viewed healthcare not as an intrinsic right for all, but as a tool of control and differentiation.²¹

While many African nations have achieved political independence, the shadows of their colonial pasts still loom large, especially in critical sectors like healthcare. The systems and policies, originally crafted with racial biases, have often persisted, requiring modern African nations to grapple with these legacies as they endeavour to create health systems that are truly inclusive and equitable. In essence, the colonial health systems of Africa, while draped in the rhetoric of welfare and development, were, in reality, manifestations of the racial prejudices of the era.

¹⁸ Vaughan M, *Curing their ills: colonial power and African illness*, Stanford University Press, 1991, 288.

¹⁹ A Beck, *A history of the British medical administration of east Africa, 1900-1950*, Cambridge, Massachusetts, 1970.

²⁰ J Iliffe, *East African doctors: A history of the modern profession*, Cambridge University Press, 1998.

²¹ Latif L, *Islamic wealth taxation and financing of public health in Kenya: An interdisciplinary analysis of human rights law, Islamic law and constitutional law*, Ethics Press, 2023.

The analysis of the historical legacy of European colonialism in Africa reveals a stark and consequential inequity in health finance, highlighting how the priorities of the colonisers did not extend to the well-being of the indigenous populations. This is evident in the case of Kenya, where the colonial health department was established to protect European settlers from diseases. This racially charged approach translated into a lack of investment in the health of the native population. The colonisers left health financing predominantly in the hands of local native councils,²² reflecting their disregard for the wellbeing of the local populace. The colonisers' emphasis on economic exploitation over humanitarian concerns resulted in a systemic imbalance in health funding. While the European enclaves enjoyed access to well-funded and advanced medical facilities, the indigenous settlements were left with meagre resources and underfunded clinics.²³

This financial divide was a direct consequence of the colonial agenda, which viewed the health of the native population as secondary to maintaining a productive workforce for their economic interests. Thus, the colonial legacy of inadequate health financing remains an enduring challenge for modern African nations striving to rectify historical injustices and create truly equitable health systems. Global health finance, to a significant extent also reflects the biases and structures established during the colonial period. The ecosystem of global health financing is complex and composed of diverse actors including governments, multilateral agencies, bilateral partnerships, non-governmental organisations (NGOs), private sector entities, and philanthropic foundations. Each actor brings its priorities, strategies, and forms of governance to the table, influencing how resources are allocated and what health issues are addressed on a global scale. This complex ecosystem is characterised by power imbalances and funding streams that can be seen as reflections of a colonial mindset. The next section discusses this in detail.

III. A Transition from Colonial to Global Health Inequities

The foundation of today's global financial infrastructure (GFI), as described by Michael Barr in his work,²⁴ reflects an era post-World War II, distinguished by the creation of the International Monetary Fund (IMF), the World Bank Group, and the General Agreement on Tariffs and Trade (GATT), which later

²² Ndege, *Health, state and society in Kenya: Faces of contact and change*

²³ Cavanagh E and Veracini L, *The Routledge handbook of the history of settler colonialism*, Routledge, 2017.

²⁴ Barr MS, 'Who's in charge of global finance', 45(4) *Geo. J. Int'l L.*, 2014, 1027.

evolved into the World Trade Organisation (WTO). Rooted in response to the financial crises of the 1930s and informed by the protectionist barriers that arose during the Great Depression, the Bretton Woods conference yielded institutions committed to liberalising trade. John Keynes was instrumental in crafting this vision, primarily centring on economic stabilisation, reconstruction, and growth.²⁵ However, beneath the progressive façade of these institutions lay inherent flaws. Ha-Joon Chang makes it evident that while these institutions were framed as universal platforms for economic cooperation, their operations were deeply entrenched in the imperialistic ambitions of the dominant Western powers.²⁶ In his seminal work 'Kicking Away the Ladder: Development Strategy in Historical Perspective,' Chang provides a nuanced critique of these international financial institutions. He argues that developed nations, after having benefited from various protectionist measures during their developmental phases, now advocate for free-market policies in developing nations, effectively 'kicking away the ladder' that they had used to climb to prosperity. This perspective can be seen as an extension of imperialistic ambitions, where former colonial powers, through these financial institutions, seek to maintain their dominance and continue extracting value from their former colonies.

Despite their stated objectives, the IMF, World Bank, and WTO often advanced policies that were in line with the interests of the Western powers. Structural Adjustment Programs (SAPs), for instance, which were enforced by the IMF and World Bank in many developing countries during the 1980s and 1990s, mandated a slew of liberalisation and privatisation reforms. While these reforms were purported to stabilise economies and ensure debt repayment, they often led to the erosion of local industries, increased economic dependence on the West, and the diminishment of public welfare systems, including health and education. Furthermore, these institutions' governance structures inherently favoured the Western economies. Voting rights in the IMF and the World Bank are determined by financial contributions, ensuring that wealthier, predominantly Western nations have a disproportionate say in decision-making processes. Such an arrangement invariably places the priorities and interests of these mighty nations above those of the developing world. While advocating for free trade, the WTO has often been criticised for advancing the interests of Western multinational corporations. The trade-related aspects of intellectual property rights (TRIPS) agreements, for example, have often been seen as tools that

²⁵ Keynes JM (1919), *The economic consequences of the peace*, Springer International Publishing, 2019.

²⁶ Chang HJ, *Kicking away the ladder: Development strategy in historical perspective*, Anthem Press, London, 2004.

limit the ability of developing nations to access essential medicines or develop indigenous industries, thereby perpetuating their economic subservience.

Clearly, despite representing a vast spectrum of economies, the influence within the IMF, World Bank (and later the WTO) is disproportionately skewed towards larger Western economies and against the historically marginalised communities. The fact that both the IMF and World Bank decision-making were heavily influenced by contributions from member states, with the USA's unprecedented economic size allowing it the largest voice, meant that policies and financial decisions often mirrored Western, especially American, interests.²⁷ While the system was ostensibly successful in revitalising post-war economies, notably in Europe and Japan, it subtly entrenched a paradigm where the 'developed' West was seen as the norm and other economies were measured against this yardstick. Barr's observation on the crisis of legitimacy in institutions like the IMF and World Bank is particularly enlightening here.²⁸ Though these institutions purportedly represented numerous countries, the power dynamics heavily favoured a select few economically powerful, predominantly Western Nations. Such imbalances in representation and decision-making often resulted in policies favouring these dominant countries. The side-lining of nations in Africa, Asia, and Latin America—regions with diverse racial and ethnic groups—underscores the racial architecture of these institutions, where non-Western countries often found their voices diminished. This bias indicated deeper issues of transnational accountability and legitimacy. It became evident that while these bodies, in theory, served numerous countries, in practice, only a select few, the economically dominant, were steering the ship.²⁹

This asymmetry in representation and influence has deep-rooted implications that extend beyond economics. It perpetuates a paradigm where the Western 'developed' model is held as the gold standard, against which other nations are compared and often found lacking. The side-lining of nations from Africa, Asia, and Latin America further illuminates the racial and ethnocentric underpinnings of these institutions. The challenges and voices of these non-Western nations, representing diverse racial and ethnic groups, are often overshadowed by the priorities of the dominant Western countries. This raises crucial questions about transnational accountability, representation, and the very legitimacy of these institutions.

²⁷ Barr, 'Who's in charge of global finance', 1027.

²⁸ Barr, 'Who's in charge of global finance', 1027.

²⁹ Hickel J, Dorninger C., Wieland H, et al, 'Imperialist appropriation in the world economy: Drain from the global South through unequal exchange, 1900-2015' 73 *Global Environmental Change*, 2022, 102467.

A. Global Health Financing

Translating these financial and political imbalances to the realm of global health reveals a landscape riddled with disparities. For instance, while the WHO's prioritisation of diseases with pandemic potential is essential for global health security, it can be perceived as reminiscent of colonial-era policies that emphasised the protection of European settlers over the health of local populations.³⁰ This dynamic is legally encapsulated in the International Health Regulations (IHR 2005), which focus on preventing the spread of disease internationally, akin to the quarantine laws of the colonial period.³¹ Additionally, the centralised decision-making process of the WHO often sees wealthier member states exerting significant influence, potentially overshadowing the voices of less affluent countries, a structure that can be regarded as analogous to colonial governance systems. In resource allocation, the pattern of directing funds towards specific projects instead of bolstering national health systems bears similarity to the colonial approach, favouring elite health services over comprehensive public health infrastructure.³²

The global health law further reflects these disparities, particularly in the protection of intellectual property rights through agreements like the TRIPS which has been criticised for favouring pharmaceutical companies in high-income countries at the expense of accessible healthcare in the Global South.³³ Moreover, deploying universal guidelines without adequate consideration of local contexts may perpetuate a one-size-fits-all approach, potentially marginalising indigenous knowledge. Emergency response and international aid, often framed as humanitarian assistance, can sometimes create dependencies that echo the paternalistic 'civilising missions' of colonial powers rather than empowering local health systems.³⁴ Moreover, the occasional deficiency in cultural competency within health interventions can be traced back to the colonial disregard for indigenous customs, which were integral to community health practices.

Furthermore, global health is not merely influenced by natural epidemiological factors but is significantly intertwined with the policies and priorities of global financial institutions. For instance, health programs funded by the World Bank often mirror the health priorities of the West, side-lining

³⁰ Bhattacharya S, 'Colonialism/postcolonialism and global health', *Lancet*, 2021.

³¹ Fidler D, *SARS, governance and the globalization of disease*, Palgrave Macmillan, 2004.

³² Mackey T, 'Global health diplomacy and the governance of counterfeit medicines' *Journal of Health Diplomacy* 2013.

³³ Hoehn E, *The global politics of pharmaceutical monopoly power*, AMB Publishers, 2009.

³⁴ Pearson, *The colonial politics of global health: France and the United Nations in postwar Africa*.

pressing health challenges endemic to regions like Africa or Asia. Consequently, countries might be nudged towards adopting Western health financing models, which might not resonate with their socio-cultural and economic contexts. This misalignment risks creating health systems that do not cater to the unique needs and contexts of their populations, potentially widening health disparities. For instance, donor countries might earmark funds for high-profile diseases such as HIV/AIDS, tuberculosis, and malaria, which, while undeniably critical, can overshadow basic healthcare services, maternal health, and non-communicable diseases that represent a growing burden in low-income regions. This situation can perpetuate a form of dependency where recipient countries tailor their health agendas to fit donor preferences, a dynamic that is not dissimilar to colonial economic systems where local economies were restructured to serve the interests of the colonisers.

Paul Farmer's work also offers a compelling critique of this dynamic, emphasising the structural violence embedded in global health systems.³⁵ Farmer highlights how global economic policies, predominantly influenced by the West, exacerbate health inequalities, especially in resource-limited settings. Global health financing mechanisms such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, and GAVI, the Vaccine Alliance, represent significant efforts to channel funds towards specific health crises. However, while successful in many respects, these vertical funds may contribute to health system fragmentation as they sometimes bypass national systems, creating parallel structures that can undermine the sovereignty of domestic health policy planning. Another manifestation of the influence of these global financial institutions on health is seen in the Structural Adjustment Programs (SAPs). Designed with economic objectives, these programs inadvertently led to diminished public health spending in many developing countries. The outcome was a beleaguered health infrastructure, leading to increased preventable diseases and deepening the divide in health outcomes.

The disparities in global health, influenced by the policies and biases of major global financial institutions, are evident in empirical data. According to the WHO, health spending starkly contrasts between economic strata; low-income countries allocated a mere sixty-three US Dollars per capita on health in 2021, whereas high-income countries spent four thousand four hundred and ninety-one US Dollars.³⁶ This is further accentuated by the effects of SAPs, leading several low-

³⁵ Farmer P, *Pathologies of power: Health, human rights, and the new war on the poor*, University of California Press, 2003.

³⁶ WHO, *Global expenditure on health: Public spending on the rise? 2021* <<https://www.healthdata.org/research-analysis/gbd>> on 21 January 2025.

income nations to curtail public health expenditures. The 2019 Global Burden of Disease Study illustrates a pronounced gap in life expectancy, with countries like Japan boasting a figure over eighty-three years while nations like Sierra Leone lag sit at a meagre fifty-five years.³⁷ Similarly, under-five mortality rates, as indicated by UNICEF,³⁸ remain alarmingly higher in low-income nations, a testament to the differential health system performance. The pervasive influence of SAPs has been detrimental, with countries under these programs experiencing diminished health infrastructure and personnel, particularly in sub-Saharan Africa during the 1980s and 1990s.

A study by Brown et al. further serves as a compelling testament to the continued entrenchment of systemic racism and social exclusion in what one might assume to be universally accessible sectors, such as water and sanitation, even in high-income countries (HICs).³⁹ This deeply embedded disparity offers insights into the way global financial architecture has evolved. Rooted in a racist understanding of health, these financial systems inadvertently perpetuate health inequities across the globe, leading to a vicious cycle where health disparities, in turn, influence economic decisions.

In the modern era, with centuries of investment behind them, HICs have realised the profound public health benefits associated with universal access to water and sanitation. Yet, as Brown et al. aptly underscores, the journey towards achieving these fundamental human rights has been tumultuous, mired by systemic exclusion of marginalised communities.⁴⁰ These disparities cannot be divorced from the broader tapestry of global financial systems. The architecture of such systems, largely defined by HICs, often reflects the biases and inequities inherent within these countries. For instance, the dominant discourse in global water, sanitation, and hygiene (WASH) focuses predominantly on low and middle-income countries. Such a narrow focus, stemming from the global financial blueprint, overlooks the underlying challenges even in HICs. Instances like the water crisis in some areas of the United States of America, serve as stark reminders that even nations with abundant resources can falter, primarily

³⁷ See: <<https://www.healthdata.org/research-analysis/gbd>> accessed on 21 January 2025.

³⁸ UNICEF, *Under-five mortality*, 2023 <<https://www.unicef.org/reports/under-five-mortality>> on 21 January 2025.

³⁹ Brown J, Acey C, Anthony C, et al, 'The effects of racism, social exclusion, and discrimination on achieving universal safe water and sanitation in high-income countries' 11(4) *The Lancet, Global Health*, 2023, E606-E614.

⁴⁰ Brown et al, 'The effects of racism, social exclusion, and discrimination on achieving universal safe water and sanitation in high-income countries'.

due to systemic racism and exclusions deeply woven into their socio-economic structures.⁴¹

Furthermore, the global financial architecture, which plays a pivotal role in shaping health priorities and investments worldwide, is influenced by these racial underpinnings. Suppose only a minute fraction of the population in HICs remains excluded from basic services like water and sanitation due to systemic barriers. In that case, it brings into question the fairness and equity of global financial institutions in addressing broader health disparities. Persistent disparities in HICs, as Brown et al. emphasise, are not merely about lack of resources but are intricately linked to environmental discrimination, systemic racism, and social exclusion.⁴² The global financial landscape, heavily influenced by these HICs, inadvertently becomes a conduit for these biases. It moulds policies, funds, and resources in a manner that may perpetuate these disparities, rather than alleviate them. By orienting more towards economic growth and less towards equitable health access, this architecture may further widen the gap between the haves and the have-nots, both within nations and on a global scale.

The analysis by Brown et al. underscores the grim reality that historically marginalised groups—encompassing minority racial and ethnic populations, indigenous peoples, migrant communities, and people of colour—are frequently found on the peripheries of essential amenities such as water and sanitation. The repercussions of systemic racism manifest in these glaring disparities, an issue that remains largely underacknowledged due to the dearth of comprehensive data stemming directly from these marginalised communities. The intricate interplay between housing development and infrastructure disparities in some HICs further illuminates the depth of this issue. Many communities with subpar housing and neighbourhood infrastructure, or those confined by policies that hinder property ownership, invariably grapple with compromised water and sanitation services. This complex web of systemic exclusion is especially palpable in the U.S. context, where the archaic practice of redlining has left indelible marks on urban landscapes. This policy, sanctioned and perpetuated by state apparatuses, ensnared cities in cycles of stark inequality, resulting in disparities that encompassed not just housing, but extended to crucial infrastructure, subsequently influencing health, economic status, and overall quality of life.

⁴¹ Ruckart P, Zeitz E, Hanna-Attisha M, et al, 'The flint water crisis: A coordinated public health emergency response and recovery initiative', 25(1) *J Public Health Manag Pract*, 2019, 84-90.

⁴² Brown et al, 'The effects of racism, social exclusion, and discrimination on achieving universal safe water and sanitation in high-income countries'.

Through the example of Flint, a city in Michigan, USA, it is evident how the repercussions of past decisions ripple into contemporary times as discussed by Carla Campbell et al.⁴³ The once-prized centralised water systems now bear witness to their glaring inflexibility. As cities like Flint experienced demographic shifts, typified by job losses and subsequent reduced demand for water, coupled with the demolition of housing units, the resultant water quality deteriorated. Crucially, this decline was most pronounced in the most depopulated areas, which were also the poorest. Thus, the ramifications of historical systemic racism and social exclusion, particularly in housing, came full circle, adversely affecting water quality and thereby impacting health. Campbell et al.'s scholarship demonstrates that the tentacles of systemic racism extend beyond just infrastructure.⁴⁴ They infiltrate the very core of civic participation, evident in strategies like gerrymandering, under bounding, and voting rights restrictions, to name a few. The water crisis in Jackson, another city in Mississippi, USA also serves as a case in point. A city with a majority Black populace was thrust into a prolonged water supply disruption, a culmination of years of underinvestment. This underinvestment is often perceived by locals as being intrinsically linked to state policies, which appear to divert available federal funds preferentially to predominantly white communities.

In essence, revisiting Brown's analysis paints a grim reality of the enduring legacy of systemic racism.⁴⁵ It is not just about denied access; it is about a historically embedded pattern of exclusion, perpetuated by both overt and covert means, that continues to disenfranchise marginalised communities, even in sectors as fundamental as water and sanitation. The analysis rendered by Brown et al. not only sheds light on the contemporary manifestations of systemic racism in high-income countries but also pulls back the curtain on the larger, more intricate web of historical colonial legacies that have underpinned such systemic inequalities. These legacies have dictated and delimited fiscal spaces for health and the potential for robust research and development within these historically oppressed communities.

As has been discussed, the roots of these glaring disparities can be traced back to the colonial era, when dominant powers, driven by a mix of economic and ethnocentric motivations, moulded governance structures in their colonies. These structures were predominantly designed to perpetuate an inequitable status

⁴³ Campbell C, Greenberg R, Mankikar D, et al, 'A case study of environmental injustice: The failure in Flint', 13(10) *Int J Environ Res Public Health*, 2016, 951.

⁴⁴ Campbell et al, 'A case study of environmental injustice: The failure in Flint', 951.

⁴⁵ Brown et al, 'The effects of racism, social exclusion, and discrimination on achieving universal safe water and sanitation in high-income countries'.

quo, concentrating wealth and access to essential resources in the hands of the colonisers while simultaneously depriving and disenfranchising local populations. As colonies achieved independence and transitioned into sovereign states, the economic and structural remnants of these oppressive regimes persisted. Many of these newly independent states grappled with inadequate fiscal spaces dedicated to health, and their capacities for innovation and research and development were stunted.

The colonial imprints are not confined merely to national governance and economic structures; they have also bled into global health governance. Global health institutions, although universally mandated, often reflect power dynamics that echo colonial-era hierarchies. Decision-making processes, allocation of funds, setting of health priorities, and research orientations are often influenced by these historically dominant entities, which unfortunately means that global health agendas are, at times, more reflective of the interests of the powerful rather than the needs of the most vulnerable. Furthermore, it means that while many global health initiatives might be lauded for their ambitious mandates and impressive scope, they can inadvertently reinforce and perpetuate health inequities that have their roots in colonial practices and structures. The design and operation of these institutions can lead to a system where resources, both in terms of knowledge and finance, flow predominantly to concerns that align with the interests of historically dominant entities. Consequently, issues faced by marginalised communities, which may be more pressing, often remain on the periphery of global health agendas.

B. Global Health Disparities Following COVID-19

While the WHO and the World Bank appear as democratic multilateral entities the concentration of power often lies with a few dominant member states, usually the largest financial donors. This imbalance not only marginalises voices from low and middle-income countries but also erodes the very ethos of global partnership. Furthermore, this asymmetry extends to fiscal matters. Wealthy nations, often rooted in former colonial powers, tend to steer the direction of global health funding. Such control sometimes skews attention towards diseases prevalent in high-income regions, side-lining conditions that majorly affect poorer nations. It is a scenario reminiscent of colonial days when the interests of the colonisers took precedence over the colonised. For instance, the past neglect of certain tropical diseases, despite their high prevalence, can be

seen as a reflection of this historical bias.⁴⁶ There is also the domain of research and development—a realm significantly dominated by the global North. HICs, with their advanced infrastructure and financial muscle, often take the lead in medical research. A recent case in point discussed by Sara Stevano et al. is the COVID-19 pandemic, where vaccine development and initial distribution were heavily monopolised by richer nations, leaving many poorer countries waiting in line.⁴⁷

The global health landscape, historically entrenched with myriad disparities, stands today at a critical juncture. The interplay between health inequities and the underlying financial structure of our modern world underscores a deeply troubling narrative. In this regard, the United Nations (UN) in its report on poverty eradication, cast a spotlight on the pervasive nature of poverty and illuminated the stark contours of global health disparities. By underscoring the 'existential crossroads' of the contemporary time, encompassing pandemics, economic downturns, and movements challenging systemic racism, Alston set the stage for a more profound scrutiny. The onslaught of the COVID-19 pandemic revealed more than just the vulnerabilities of the health systems. It became a mirror reflecting the failures of a global capitalist regime. Whereas prior crises of the century were rooted predominantly in financial collapses, COVID-19 emerged as a multifaceted monster, underlining the interconnectedness of health, economic, and social sectors. This virus, in its rampage, exposed the inefficiencies and exploitations inherent in global capitalism, particularly how it has leaned heavily on the gendered, racialised working classes across the globe.⁴⁸

One might argue that at the heart of these exploitations are the remnants of a colonial past, glaring through the lens of contemporary capitalism. The very systems that govern the contemporary world, while technologically advanced and globalised, still harbour the residues of age-old inequities. Moreover, the pandemic has redefined the understanding of the state's role, compelling one to re-evaluate its position not merely as a facilitator but as an active player within the capitalist system. While affluent countries rediscovered the potency of fiscal interventions, countries of the Global South grappled with constraints, further widening the chasm between the Global North and South. The stark inequality became palpably evident in the vaccine distribution crisis, with wealthy nations

⁴⁶ Ndege, *Health, state and society in Kenya: Faces of contact and change*

⁴⁷ Stevano S, Tobias F, Dafermos Y et al, 'COVID19- and crises of capitalism: Intensifying inequalities and global responses,' 2(42) *Canadian Journal of Development Studies / Revue canadienne d'études du développement*, 2021, 1-17.

⁴⁸ Stevano et al, 'COVID19- and crises of capitalism: Intensifying inequalities and global responses,' 8-5.

monopolising vaccine stocks, thereby exposing the darker underbelly of global capitalism.⁴⁹ But what underlies this disjunction? Is it mere coincidence or the symptom of a larger, more insidious malaise rooted in the global financial architecture?

The catchphrases for COVID-19 mitigation—‘stay home, socially distance, and wash hands’—underscore this discrepancy. For those cushioned by affluence, it seems a small price to pay. But for countless individuals entrenched in poverty, this mantra becomes an ironic taunt. How does one socially distance in overcrowded slums? How does one incessantly wash hands without access to clean water? This crisis, rather than being the ‘great leveller’, has intensified the chasm between the haves and the have-nots. The COVID-19 pandemic, as the UN succinctly noted, accentuated the systemic neglect of those living on the fringes of prosperity.⁵⁰ It is here that the underpinnings of the global financial architecture come under scrutiny. The post-colonial world order, undergirded by structures established by the Global North, often perpetuates economic hegemonies and continues the legacies of extraction and exploitation.⁵¹ These structures, whether through debt mechanisms, trade policies, or intellectual property regimes, often prioritise capital over humanity. They are not merely neutral by-products of economic evolution but, in many ways, are emblematic of an architecture that has its foundations in racist ideologies and Eurocentric paradigms.

From a financial standpoint, the pandemic starkly highlighted the disparity in available resources for health emergencies. Western countries, with their considerably larger economies, were able to allocate unprecedented funds towards pandemic response. For instance, the United States passed relief packages totalling trillions of US Dollars,⁵² and the European Union established a seven hundred and fifty billion Euros recovery fund.⁵³ In contrast, many African nations,

⁴⁹ Ning C, Wang H, Wu Jing et al, ‘The covid-19 vaccination and vaccine inequity worldwide: An empirical study based on global data’ 19(9) *Int J Environ Res Public Health*, 2022, 5267; Li Z, Lu J and Ly J, ‘The inefficient and unjust global distribution of covid-19 vaccines: From a perspective of critical global justice’, 58 *Inquiry: Journal of Health Care Organisation*, 2021.

⁵⁰ UN, *The parlous state of poverty eradication – report of the Special Rapporteur on extreme poverty and human rights*, UN A/HRC/44/40, 2001.

⁵¹ Latif L, ‘The lure of the welfare state following decolonisation in Kenya,’ in G Bhambra and J McClure (eds) *Imperial Inequalities*, Manchester University Press, 2022.

⁵² Sheth S and Roig J, ‘House passes \$1.9 trillion stimulus package, paving the way for Biden to sign it into law later this week,’ *Insider*, 2021 <https://www.insider.com/house-passes-biden-covid-19-relief-package-stimulus-checks-2021-3> on 21 Jan. 2025.

⁵³ Boffey D and Rankin J, ‘EU leaders seal deal on spending and EUR750bn Covid-19 recovery plans,’ *The Guardian*, 2020 <<https://www.theguardian.com/world/2020/jul/21/eu-leaders-reach-deal-on-750bn-covid-19-recovery-fund>> on 21 January 2025.

already grappling with debt and limited fiscal space, found it challenging to mobilise similar levels of resources. Although international bodies like the IMF and the World Bank have provided emergency financial assistance to several African countries, the quantum often pales in comparison to the self-financed packages of the West.

The financial constraints faced by African nations had direct implications for health disparities. For instance, while Western nations rapidly scaled up their health infrastructure, conducting millions of tests and establishing makeshift hospitals, many African nations struggled to access even basic testing kits in the pandemic's early stages. The disparities became even more pronounced with the rollout of vaccines. Wealthier Western countries pre-ordered billions of doses, ensuring a significant stockpile for their populations.⁵⁴ In contrast, many African countries have been largely reliant on the COVAX initiative, a global effort to ensure equitable access to vaccines. However, as of mid-2022, while many Western countries had achieved substantial vaccination coverage, a significant portion of the African population remained unvaccinated due to supply constraints and logistical challenges. Furthermore, the pandemic's economic fallout has had a disproportionate impact on African nations. With limited financial buffers and a heavy reliance on sectors like tourism and exports, which were severely affected by the COVID-19 pandemic, the economic repercussions for many African nations were profound. In contrast, many Western countries, with more diversified economies and substantial fiscal stimuli, have shown signs of robust economic recovery.

The narrative of global inequities, especially when viewed through the lens of fiscal capacities and health disparities, paints a tale of two worlds. In one, the gleaming hospitals of high-income nations stand tall, bolstered by strong fiscal capacities that give them the edge in times of crisis. The Global North, with its expansive coffers and access to low-interest loans, is not just financially affluent—it is medically privileged. When pandemics strike, they can swiftly channel resources, bolster their medical infrastructure, and launch vast public health campaigns. Yet, travel a little south, and the picture shifts dramatically. The Global South, with its constrained fiscal pockets, grapples with a dual challenge. On the one hand, there is the immediate health crisis, demanding funds, resources, and attention. On the other, there is the looming shadow of long-term economic instability. Their limited borrowing capacities do not just

⁵⁴ UN, *Unequal vaccine distribution self-defeating, WHO chief tells economic and social council's special ministerial meeting*, ECOSOC/7039 (2021). <<https://www.un.org/press/en/2021/ecosoc7039.doc.htm>> on 21 January 2025.

signify economic constraints; they are a glaring emblem of health inequities. In essence, these nations are often forced into an unenviable choice: immediate health response or future economic stability.

C. *Global Health, Digital Health Applications and International Finance*

The global health inequities that have persisted throughout history have found new expression in the realm of digital health, particularly through the development of health apps in the wake of digitalisation and the COVID-19 pandemic. During the pandemic's peak, the disparity in funding allocation for health apps illustrated a divide reminiscent of colonial-era power dynamics. Wealthy nations, leveraging their considerable resources, were able to rapidly develop and implement technologies for tracking and tracing the virus. In contrast, lower-income countries faced significant challenges due to limited financial and infrastructural capacities, highlighting a continuity of the imbalance in global power and resource distribution that has its roots in colonial history. These health apps, vital in the efforts to control the spread of COVID-19, became instruments that inadvertently mirrored the extractive practices of colonialism. The urgency that once propelled the investment in these technologies has subsided, yet a pressing concern emerges: the extensive data amassed by these apps.⁵⁵ The management and use of this data present a risk of perpetuating a new variant of colonialism—'data colonialism'.⁵⁶ This contemporary form of exploitation echoes the extractive nature of traditional colonialism through the accumulation and control of data by entities in high-income countries, often without equitable benefit to, or consent from, the populations of lower-income countries who are the subjects of the data.⁵⁷

Data colonialism has the potential to exacerbate global health disparities by enabling the continuation of unequal power dynamics. HICs could utilise this data to advance their healthcare systems and economic interests, thereby reinforcing their dominant positions. Meanwhile, lower-income nations, already disadvantaged by the digital divide, may experience further marginalisation as they are denied the benefits and insights derived from their data. This situation

⁵⁵ Wongsin U, Wannasri A, and Iqbal U, 'Data Privacy, Regulations and Legal Issues on COVID-19 Tracking Apps: A Scoping Review' 289 *Stud Health Technol Inform*, 2022, 388-391.

⁵⁶ Couldry N and Mejias U, *The Costs of Connection: How Data is Colonising Human Life and Appropriating it for Capitalism*, Stanford University Press, 2019.

⁵⁷ Couldry and Mejias, *The Costs of Connection: How Data is Colonising Human Life and Appropriating it for Capitalism*.

threatens to widen the gap in global health outcomes, with data becoming the new commodity through which inequalities are perpetuated and entrenched. Thus, the forthcoming research that will follow from this paper will critically examine the stewardship of health data and address the mechanisms of data control that continue the legacies of colonialism. By acknowledging and tackling these issues, there is the possibility to redirect the course away from data colonialism and towards a more equitable distribution of the wealth of data. International finance has a pivotal role in this redirection, offering the potential to reshape global health equity. Without the fetters of its current colonial undertones, it can catalyse a shift where investments are made transparently, democratically, and with a deliberate focus on enabling lower-income nations to have sovereign control over their data.

IV. Conclusion

This analysis of the historical contours of health inequities elucidates the colonial underpinnings of contemporary global health financing and governance. Tracing the discriminatory establishment of health systems during colonialism reveals how institutionalised prejudices became entrenched. The transition into today's complex ecosystem of global health actors shows continuity in power imbalances that disadvantage the Global South. The data on health expenditures and outcomes spotlight the ongoing disparities arising from these systemic biases. The COVID-19 response exposed wider fissures between the capabilities of wealthy and poorer nations, precipitated by underlying financial architectures traceable to colonial origins. As technological innovations like digital health apps rise to prominence, retaining the structural status quo risks perpetuating new forms of data exploitation that echo colonial extractivism. Fundamentally reshaping the orientation of global health financing is integral to overcoming persisting inequities. This requires confronting the historical origins of biases, consciously channelling resources equitably, and empowering leadership from marginalised regions to rebalance global health governance. Only by acknowledging and rectifying these systemic flaws can there be a just global health ecosystem.

To build a more just global health ecosystem, concrete policy steps must be taken to realign financing and governance. Firstly, representation and decision-making in multilateral health institutions should be restructured to elevate marginalised voices from the Global South. Leadership selections should diversify beyond historically dominant nations to encompass perspectives from communities bearing the greatest disease burdens. Secondly, health financing

must actively prioritise strengthening national health systems holistically, not just vertical interventions. Fund allocation should be needs-based, channelling greater resources towards countries with the most glaring capacity gaps and health indicators lagging behind global targets. Thirdly, research and innovation must be reoriented towards neglected diseases impacting poorer nations. Equitable access frameworks for new technologies should be instituted to ensure that lifesaving medicines and vaccines reach vulnerable populations concurrently with wealthy countries. Fourthly, local knowledge and cultural contexts should be integrated into policymaking to avoid one-size-fits-all approaches. Finally, equity impact assessments should evaluate all financing and programmes to ensure they progressively reduce disparities. Shifting incentives and mindsets is indispensable for dismantling systemic biases.

Also, the proliferation of digital health technologies like mobile applications warrants careful governance to prevent exacerbating inequalities. Policies must tackle the emergence of data exploitation through data colonialism where countries and companies in the Global North amass and benefit from the health data of populations in the Global South without their consent. Stronger data protections, ownership frameworks, and benefit-sharing agreements are needed to empower low-income nations to control their data sovereignty. Investments should build national capacities for secure data stewardship and advanced analytics to unlock the insights required for strengthening local health systems. Regulatory standards could ensure health apps meet privacy, and equity requirements prior to deployment. Regional cooperation can pool resources for shared data repositories and technology tools tailored to local needs. Ultimately the aim should be catalysing leapfrogging innovations that do not widen digital divides but enable equitable access and health system enhancement. With thoughtful governance, these technologies can disrupt, not reinforce, historic inequities.

The Undelivered Promise: Constitutional Environmental Rights and Judicial Redress in Kenya and South Africa

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Abstract:

The project of constitutionalising environmental rights is nearly complete with over two-thirds of the United Nations member states having enshrined these rights in their constitutions. Despite the widespread adoption, recent studies on environmental protection indicate that the project has not improved in commensurate terms. Environmental law scholars are now engaged in bridging the 'implementation gap'. In an attempt to locate the implementation gap problem, this paper analyses the achievements made under the environmental rights constitutionalisation project. Using Kenya and South Africa as case studies, the author finds that while substantial progress has been made, the conceptualisation of the right to a clean and healthy environment has yet to receive a harmonised meaning. The impact, this paper notes, is the differentiated interpretation and application that greatly undermine environmental protection. As a remedy, the author argues that the adoption of a country's 'fundamental value[s]' as the basis of understanding environmental rights not only provides the widest protection but also allows a harmonised application.

Keywords: Environmental Constitutionalism, Implementation Gap, Environmental Rights, Legal Harmonisation, Environmental Governance

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I. Introduction

In the year 1972, at the United Nations (UN) Conference on the Human Environment, the world linked the exploitation of environmental resources to human rights. What followed was the proliferation of environmental constitutionalism.¹ States resorted to the powerful and promising language of human rights through the constitutionalisation of environmental rights to address development and environmental issues.² The project of constitutionalisation of environmental rights sees constitutions as a powerful tool for achieving environmental protection and equality.³ In constitutional law circles, constitutionalisation and entrenchment of an issue in a state's supreme law gives an issue an identity, communicates its fundamental importance to the inhabitants of a state, and saves it from political debate.⁴ Recognition of an issue as a fundamental right or freedom, which is usually a protected clause incapable of amendment or capable of amendment but with relative difficulty even elevates and cements such right as a fundamental value of the concerned nation. The result of constitutionalisation of a right, its advocates believe, is better outcomes and courts can be used to protect the most vulnerable.⁵ But does it? How soon? What does it take to transform it from textual declaration to tangible outcomes?

¹ The term environmental constitutionalism is used in this paper to mean the protection of the environment through invocation of national or sub-national constitutions. For a historical rise of environmental constitutionalism see May J, and Daly E, *Global Judicial Handbook on Environmental Constitutionalism*, 7; United Nations Environment Programme eds., 3rd ed, 2019; Weis L, 'Environmental Constitutionalism: Aspiration or Transformation?' 16(3) *International Journal of Corpus Linguistics*, 2018, 836-870; and Boyd D, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, 1st ed, Law and Society Series, 2011, 56.

² Though differing in form, nature and content, United Nations Environmental Programme (UNEP) noted that as 2019, this "environmental revolution" provisions had been captured in three quarters of the United Nations members' national constitutions. Partly due to this wide recognition, the United Nations Human Rights Council in its forty eighth session in 2021 adopted a right to a healthy environment as a human right.

³ Hailbronner M, 'Transformative Constitutionalism: Not Only in The Global South, 65(3) *The American Journal of Comparative Law*, 2017, 527-565; Kibet E, and Fombad C, 'Transformative constitutionalism and the adjudication of constitutional rights in Africa', 17(2) *African Human Rights Law Journal* 2017, 340-366; Weis L, 'Environmental Constitutionalism: Aspiration or Transformation?', 837.

⁴ Sunstein C, 'Constitutionalism and Secession', 58, *University of Chicago Law Review* (1991) 633-670; Barber N, 'Why Entrench?' 14(2) *International Journal of Constitutional Law* 2016, 325-350.

⁵ Gunnarsson M, 'Constitutionalisation of the Right to Health: A Pathway to Improved Health Outcomes?' *McGill Journal of Law and Health*, 2019—<<https://mjlh.mcgill.ca/2019/03/26/constitutionalization-of-the-right-to-health-a-pathway-to-improved-health-outcomes/>> on 20 April 2022.

The exploitation of natural resources combined with industrial innovations witnessed massive economic growth in the Industrial Revolution.⁶ However, the resulting environmental crisis in the form of environmental pollution threatens human existence.⁷ The accruing environmental profits are unevenly distributed along, *inter alia*, racial, global south and north, and indigenous communities. Ironically, those who least benefit(ed) from environmental exploitation disproportionately bore, and continue to bear, the resulting burdens. Does the inclusion of environmental rights in national constitutions boost the environmental justice struggle for equal distribution of environmental burdens and opportunities?⁸ Justiciability of rights is recognised as a powerful tool for enforcing rights. Given the widespread justiciability of environmental rights, has it led to any tangible outcomes for the environmental justice movement? If yes, what progress has been made, if not, what is derailing the promise of constitutional environmental rights to environmental justice?

This paper seeks to answer the above questions. Relying on the jurisprudence from the Kenyan and the South African courts, the author argues that although the constitutionalisation of environmental rights has contributed to some progress in the quest to achieve environmental justice, courts have, however, shied away from giving substantive environmental rights a normative interpretation. The result, this paper argues, is incoherent and limited approaches to this right, greatly disfavoured the already overburdened environmental justice seekers. As a remedy, this paper proposes the adoption of an ‘inviolable or fundamental value’ approach to providing normative content of the right to environment.⁹ This paper further argues that approaching the issue this way is a positive step to exploiting the full potential of a constitutional environmental right in addressing complex intersectional issues faced by environmental justice seekers.

This paper contains six parts. Part one discusses the taxonomy of environmental constitutionalism with examples in each category. The idea is to demonstrate the variance in phraseology and conceptualisation across Kenya and South Africa. Part two discusses the manifestation of environmental injustice in

⁶ Barbier EB, ‘Natural Resource-Based Economic Development in History’ 6(3) *World Economics*, 2005, 103-152.

⁷ Boyd, *The Environmental Rights Revolution*, 57.

⁸ Ruiters G, ‘Race, Place, and Environmental Rights: A Radical Critique of Environmental Justice Discourse’ in McDonald DA (ed), *Environmental Justice in South Africa*, (1ed), Ohio University Press, USA, 2002, 245.

⁹ The concept of inviolable or fundamental value is used here to mean a foundational constitutional value guaranteed for every person in the constitution of a country and one that provides the broadest protection of a human being. The issue is explored in the last sections of the paper.

Kenya and South Africa. Part three turns to the rationale and textual content of the Kenyan and South African constitutional environmental rights provisions. Part four identifies the environmental justice judicial gains resulting from the constitutionalisation of environmental rights and notable limitations. Part five discusses the judiciary's laxity in defining this right and the resulting important limitations to addressing environmental justice concerns. Part six explores the proposed 'inviolable or fundamental value' approach to providing normative content of the right to environment.

II. Taxonomy of Environmental Rights Constitutionalism

Although the constitutionalisation of environmental rights gained global attention in 1972 and the process began soon after, little focus was given to its scope and nature.¹⁰ As a result, states adopted varying approaches in their constitutions.¹¹ This divergence, it is argued, stemmed from attempts to address key questions: should environmental rights be recognised implicitly or explicitly? Where and how should they be incorporated? And what constitutes the most effective implementation framework? And which is the 'best' implementation framework?¹² The difference, it is also argued, results from the fact that the right to a clean environment appears in different fashions, phraseology, and standards—given that a constitution reflects the cultural, historical, social, and political contexts of a state.¹³ In the following section, this paper examines the world's general categorisations.

A. *Substantive Environmental Rights*

Substantive environmental rights in constitutions refer to the core entitlements defined by their normative content, distinguishing them from procedural or facilitative rights, which serve to reinforce and operationalise these substantive guarantees.¹⁴ Because of their substantiveness, they tend to be general, with drafters avoiding explicit definitions to avoid restrictive interpretation thus allowing judicial officers the flexibility required in different circumstances. James

¹⁰ May J and Daly E, *Global Judicial Handbook on Environmental Constitutionalism*, 16.

¹¹ Alfano N, *Environmental Constitutionalism in the European Union: A Comparative Analysis of Environmental Legislation in Italy, France and Germany*, MPIR Diss., LUIS University, 2021.

¹² May JR, 'The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes' 42(3) *Cardozo Law Review*, 2020, 983-1036.

¹³ Alfano N, *Environmental Constitutionalism in the European Union*, 154.

¹⁴ Alfano N, *Environmental Constitutionalism in the European Union*, 100.

May and Erin Daly observe that substantive rights are self-executing even in the absence of procedural rights and are less vulnerable to amendment. These features make them very common.¹⁵ Currently, David Boyd notes, there are ninety-nine constitutions containing some form of substantive right to the environment.¹⁶ Also, with the recognition of the right to a clean, healthy, and sustainable environment by the UN General Assembly, more adoption by member states is expected.¹⁷

Substantive environmental rights take different manifestations. They vary from expressing a right to some quality or standard of the environment for instance right to an ‘adequate’, ‘clean’, ‘healthy’, ‘sound’, and ‘sustainable’ environment among others. Such rights presuppose fundamental access to natural resources.¹⁸ A few examples in specific countries may suffice, for example, Chile (‘All persons...have the right to live in an environment free of contamination’),¹⁹ Kenya (‘Every person has the right to a clean and healthy environment’),²⁰ Columbia (‘Every individual has the right to enjoy a healthy environment’),²¹ Spain (‘Everyone has the right to enjoy an environment suitable for the development of the person’),²² Russia (‘Everyone shall have the right to a favourable environment’),²³ and Venezuela (‘Every person has a right to individually and collectively enjoy a life and a safe, healthy and ecologically balanced environment’).²⁴ Environmental justice movements are likely to get more benefits in jurisdictions with this category of rights.

B. Procedural and Substantive Environmental Rights

As noted in the previous section, procedural environmental rights also known as access rights are generally taken to be facilitative to the enjoyment of substantive environmental rights. Cognisant of the importance of people’s involvement in the management of a state’s affairs including environmental matters as espoused in Principle 10 of the Rio Declaration, it is common to have

¹⁵ May & Daly, *Global Environmental Constitutionalism*, 1st ed, Cambridge University Press, 2014, 64.

¹⁶ Boyd, *The Environmental Rights Revolution*, 13.

¹⁷ United Nations General Assembly, Resolution No. A/RES/76/300.

¹⁸ Muigua K and Kariuki F, ‘Towards Environmental Justice in Kenya’ 1 *Journal of CMSD*, 2017, 1-57.

¹⁹ Article 19(8) *Constitution of Chile*, (1980).

²⁰ Article 42, *Constitution of Kenya* (2010).

²¹ Article 79, *Constitution of Colombia*(1991).

²² Section 45, *Constitution of Spain* (1978).

²³ Article 42, *Constitution of the Russian Federation* (1993).

²⁴ Article 127, *Constitution of Venezuela* (2009).

rights of access to information, public participation or consultation, and access to justice enshrined in national constitutions.²⁵ Of course, the mere presence of procedural rights is no guarantee of better environmental decisions. Their effectiveness depends on the weight given to the consultations in the case of public participation.²⁶ In countries that genuinely value public input, decision-making tends to be more robust.²⁷ The right of access to justice is important in seeking remedies for substantive rights and the other two procedural rights—access to information and public participation.

Analogous to substantive rights, the scope and content of procedural rights vary from one state to another. The rights may appear with direct reference to the substantive environmental rights or, where substantive environmental rights are not recognised, as general rights but which are then used in environmental contexts, such as permitting. For example, Rwanda (‘freedom of access to information is recognised and guaranteed by the state’),²⁸ Tanzania (‘every person has the right to seek, receive . . . Information’),²⁹ and Kenya (every citizen has a right to access information held by the state, and right to information held by another person and required for protection or exercise of any right or fundamental freedom³⁰ and the right of access to justice).³¹ Cognisant of their value in enforcing substantive rights, courts have increasingly implied procedural rights as part and parcel of the right to a healthy environment, even in the absence of their direct reference to a right to the environment (especially the right to public participation and access to information).³²

C. *Rights of Nature*

So far, the manifestation of environmental rights has been from an anthropocentric view. According to this view, human beings are owners and beneficiaries of the natural environment, entitled to exploit this natural

²⁵ Muigua K, ‘Reflections on ADR and Environmental Justice in Kenya’—<<http://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-ADR-and-Environmental-Justice-in-Kenya.pdf>> on 20 April 2022.

²⁶ van Bekhoven J, ‘Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact’ 11 *NTU Law Review*, 2016, 219.

²⁷ du Plessis A, ‘Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights’ 11(2) *Potchefstroom Electronic Law Journal*, 2008, 1-34.

²⁸ Article 38, *Constitution of Rwanda* (2003).

²⁹ Article 18, *Constitution of the United Republic of Tanzania* (2005).

³⁰ Article 35, *Constitution of Kenya* (2010).

³¹ Article 38, *Constitution of Kenya* (2010).

³² May & Daly, *Global Judicial Handbook on Environmental Constitutionalism*, 18.

environment to serve their needs.³³ Protection of the environment, therefore, is dictated by the values that human beings derive from a clean environment.³⁴ Likewise, the protection of the environment is solely for its relevance to fulfil human needs.³⁵ As Alexandre Kiss and Dinah Shelton note, ‘the environment is only protected as a consequence of, and to the extent needed to protect human well-being’.³⁶ This is the most widespread view of environmental rights in national constitutions.³⁷

To counter the anthropocentric view of nature, scholars, especially those in nature studies led by Christopher Stone in his book ‘Should Trees have Standing’ saw the overemphasis on human value in the natural ecosystem as an exaggeration.³⁸ To them, nature has its own intrinsic value, as a full ecosystem containing other natural beings, independent of the needs of a human being. Stone argued that nature should be protected for its own good rather than for human ends.³⁹ These works had a notable influence in states that have Indigenous communities and countries rich in biodiversity mostly in Latin America.⁴⁰ Such states therefore guarantee environmental rights to nature in its own right. Examples include *Ecuador* (‘Pachamama’, or Mother Earth to exist and to ‘maintain and regenerate its cycles, structure, functions and evolutionary processes’).⁴¹ In the year 2021 the Ecuador high court in *El Pleno De La Corte Constitucional Del Ecuador, En Ejercicio De Sus Atribuciones Constitucionales Y Legales, Expide La Siguiente* halted mining concessions on the basis of rights of nature to

³³ Abba PW, Constitutionalising Environmental Rights for Sustainable Environmental Protection in Nigeria’s Niger Delta Region, PhD Law Dissertation, University of Exeter, 2019; Macpherson E, ‘The (Human) Rights of Nature: A Comparative Study of Emerging Legal Rights for Rivers and Lakes in the United States of America and Mexico’ 31 *Duke Environmental Law & Policy Forum*, 2020, 327-377.

³⁴ Emmenegger S and Tschentscher A, ‘Taking Nature’s Rights Seriously: The Long Way to Biocentrism in Environmental Law’ 6(3) *Georgetown International Environmental Law Review*, 1994, 545-742.

³⁵ Borràs S, ‘New Transitions from Human Rights to the Environment to the Rights of Nature’ 5(1) *Transnational Environmental Law Journal*, 2016, 113-143.

³⁶ Kiss C and Shelton D, *International Environmental Law*, 1st ed, Transnational Publishers, 2004, 23.

³⁷ Maccone C, ‘Should Environmental Protection be Through Anthropocentric Rights?’ 41 *Pace Environmental Law Review*, 2023, 78.

³⁸ Stone C, *Should Trees Have Standing: Toward Legal Rights for Natural Objects*, 35th ed, W. Kaufmann, 1974.

³⁹ Stone C, *Should Trees Have Standing: Toward Legal Rights for Natural Objects*, 35th ed, W. Kaufmann, 1974, 14.

⁴⁰ Harden-Davies H et al, ‘Rights of Nature: Perspectives for Global Ocean Stewardship’ 122 *Marine Policy*, 2020, 3-11.

⁴¹ Article 71, *Constitution of the Republic Ecuador* (2008).

be protected.⁴² Similar decisions, especially in respect of rivers, have appeared in Uganda, Columbia, and Bangladesh, among others.⁴³

The utility of the eco-centric view of environmental rights to the environmental justice movement is beyond this work. However, it suffices here to say that these rights do away with locus standi hurdles because the rights are possessed by nature, and human beings as custodians, can enforce them.⁴⁴ Secondly, since the primary focus is preserving the integrity of the environment, the standard for addressing pollution is no longer solely based on its impact on human life, health, or survival. Instead, a lower threshold is adopted—one that prioritises safeguarding the integrity of nature itself.⁴⁵ Third, as humans are no longer the central focus, factors such as race, income level, land tenure systems, and gender—among other variables in environmental justice cases—would be diminished or eliminated. The full impact of these newly recognised environmental rights in national constitutions remains to be seen.

Research on the outcomes of environmental constitutionalism, to the best of the author's knowledge, tends to lump all environmental rights, regardless of their nature or phraseology, together.⁴⁶ The analysis of the effectiveness of environmental rights, which this paper proposes as an area of further research, should focus on phraseology and definitional content of a right as an essential aspect to determine how to generally phrase this right. This would enable constitutions to adopt phrasing that yields the most beneficial impact.

As noted in this study, substantive environmental rights are the most prevalent among world constitutions. This paper, therefore, uses Kenya and South Africa, which have both procedural and substantive rights as contained in these countries' constitutions, to assess the utility of this right to environmental justice movement.

⁴² El Pleno De La Corte Constitucional Del Ecuador, En Ejercicio De Sus Atribuciones Constitucionales Y Legales, Expide La Siguiente, Caso No. 784-13-EP.

⁴³ The Cyrus R. Vance Center for International Justice et al, 'Rights of Rivers: A Global Survey of the Rapidly Developing Rights of Nature Jurisprudence Pertaining to Rivers'—<<https://3waryu-2g9363hdvii1ci666p-wpengine.netdna-ssl.com/wp-content/uploads/sites/86/2020/09/Right-of-Rivers-Report-V3-Digital-compressed.pdf>> on 20 April 2022.

⁴⁴ Harden-Davies H, Humphries F, Maloney M, Wright G, Gjerde K and Vierros M, 'Rights of Nature: Perspectives for Global Ocean Stewardship' 122 *Marine Policy*, 2020, p.104059.

⁴⁵ Harden-Davies H, et al 'Rights of Nature: Perspectives for Global Ocean Stewardship', 104059.

⁴⁶ Umukoro BE and Ituru O, 'Conceptual Challenges to the Recognition and Enforcement of the Right to Clean, Safe and Healthy Environment' 2 *Journal of Environmental Law & Policy*, 2022, 1.

III. Manifestation of Environmental Injustice

A. *Environmental Injustice in South Africa*

Pre-apartheid South African environmental policy was an explicit tool of racial oppression.⁴⁷ Nonetheless, it must be understood that the policy was not an isolated phenomenon; it was just a small segment of what an ‘exclusively white minority hegemony’ perpetrated in economic and political space through legal legislation and policy.⁴⁸ Environmental decisions, thus, did not involve blacks.

Under the apartheid regime, black South Africans were forcibly evicted from ancestral land to create game parks and moved to ‘reserves’ and ‘homelands’ without adequate water, food, or housing.⁴⁹ On residences, blacks and people of colour were confined to hostile environments lacking in amenities and green spaces.⁵⁰ Billions of dollars were spent preserving the wildlife (which appealed to the affluent, learned large white minority) at the expense of necessities for black South Africans. More disturbing, was the unwritten rules in practice where blacks were not welcome to visit national parks and were portrayed as ‘homogenously in the role of poachers and whites in the role of conservationist’.⁵¹ In soil conservation discourses, membership to the National Veld Trust, a non-governmental organisation (NGO) promoting soil conversation, was open to ‘South African persons of European descent’, while government conservation efforts favoured the white farmer, and additionally, the Division of Soil Conservation and Extension, a state department, was only open to white youth.⁵²

In the context of urbanisation, housing policies displaced Black populations to overcrowded rural areas characterised by inadequate basic amenities and widespread poverty.⁵³ In education, the segregated system under the ‘Bantu Education policy’ enforced poor educational standards, deliberately fostering illiteracy, particularly in environmental matters.⁵⁴ On environmental pollution, blacks had no say in the location of sewage plans, industries, and land refills,

⁴⁷ McDonald, *Environmental Justice*, 65.

⁴⁸ Carruthers J, *The Kruger National Park: A Social and Political History*, 1st ed, University of Natal, 1995, 34.

⁴⁹ Khan F, ‘*Environmental Justice*’, 87.

⁵⁰ Khan F, ‘*Environmental Justice*’, 90.

⁵¹ Khan F, ‘*Environmental Justice*’, 86.

⁵² Khan F, ‘*Environmental Justice*’, 87.

⁵³ Timberlake L, *Africa in Crisis: The Causes and Cures of Environmental Bankruptcy*, 1st ed, Routledge, 2013, 34.

⁵⁴ Adriaan N. Pelzer, *Verwoerd Speaks: Speeches 7 APB (1948-1966)* (1966).

predominantly among their neighbourhoods.⁵⁵ Under the Reservation of Separate Amenities, only white people could reserve public spaces.⁵⁶ The cumulative effect of the discriminatory laws and policies was to alienate black South Africans from sharing environmental benefits while bearing the brunt of the environmental exploitation burden.

The explicit manifestation of environmental racism galvanised the environmental justice movement with a more holistic outlook than in some countries.⁵⁷ The movement is currently composed of trade unions, churches, academics, NGOs, and civic organisations.⁵⁸ The South African Environmental Justice Networking Forum, established by these organisations, emerged as a prominent entity in advocating for the integration of environmental justice concerns in negotiations constitution.⁵⁹ It is in this context that environmental rights were included in the South African Constitution.

The Constitution of South Africa is largely a response to its infamous colonial and apartheid history permeating through its economic, social, legal, and political systems.⁶⁰ Such a conclusion is supported by phrases such as the constitution ‘belongs to all who live in it, united in our diversity’,⁶¹ and the non-derogable nature of the right to non-discrimination based on race, among others.⁶² The South African constitutional court has also, in unequivocal terms, held that the Constitution was aimed at preventing the recurrence of unjust practices, including apartheid.⁶³

⁵⁵ Khan F, ‘Environmental Justice’, 90.

⁵⁶ Khan F, ‘Environmental Justice’, 90.

⁵⁷ Ruiters G, ‘Race, Place, and Environmental Rights’, 78.

⁵⁸ See for example the Environmental Justice Networking Forum’s definition of environmental justice in its 1997 quarterly release:

“Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life—economic quality, health care, housing, human rights, environmental protection, and democracy. In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others. This includes workers and communities exposed to dangerous chemical pollution, and rural communities without redwood, grazing and water. In recognizing that environmental damage has the greatest impact upon poor people, EJNF seeks to ensure the right of those most affected to participate at all levels of environmental decision-making. (EJNF 1997)”

⁵⁹ Murcott M, ‘The Role of Environmental Justice in Socio-Economic Rights Litigation’ 132(4) South African Law Journal, 2015, 875-908

⁶⁰ Omond R, ‘South Africa’s Post-Apartheid Constitution’ 9(2) Third World Quarterly, 1987, 622-637.

⁶¹ Preamble, *Constitution of the Republic of South Africa* (1996).

⁶² Article 37, *Constitution of the Republic of South Africa* (1996).

⁶³ O’Regan K, ‘Justice & Memory: South Africa’s Constitutional Court’ 143(3) *Daedalus*, 2014, 168-178.

Make no mistake—while some progress has been made, the legacy of historical racism remains deeply entrenched. Today, the majority of Black South Africans, despite their numerical dominance, continue to live on degraded land, often in proximity to heavily polluted areas, industrial sites, incinerators, and waste dumps, with limited access to clean air, safe water, and essential services.⁶⁴ The gradual onset of toxic exposure is increasingly impacting the health and well-being of black South Africans, as evidenced by the detrimental effects of flooding, air pollution, industrial waste, and the mining sector.⁶⁵ The effects of environmental pollution on black women have accelerated the women's environmental defenders. The youth keen on inheriting an environmentally equal South Africa is shaping environmental justice through demonstration and litigation.⁶⁶ Are environmental rights easing the process of reversing the dark past and creating a better future?

B. *Environmental Injustice in Kenya*

Environmental injustice manifestation in Kenya is somewhat similar to the South African experience except that its principal cause is colonialism.⁶⁷ Colonial legislation racially segregated Africans from owning land in highlands and other productive areas. They were moved to native reserves, small enclosed overpopulated areas close to white farmlands to supply cheap labour.⁶⁸ Conditions in these areas lacked basic amenities such as clean water, food, and shelter. Overcrowding placed immense strain on the land, further accelerating environmental degradation. Africans depended on nature to survive. The Maasai, for example, are nomadic and depend on unrestricted access to ancestral lands for grazing their livestock. The dispossession of land from such communities stripped them of their means of livelihood. Conservation of wildlife also excluded Africans from accessing and benefiting from the natural environment.⁶⁹

⁶⁴ Darmofal D, 'Environmental Racism in South Africa: A Sustainable Green Solution'—<https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1026&context=environ_theses> accessed on 20 April 2022.

Cock J, 'How the Environmental Justice Movement is Gathering Momentum in South Africa' *The Conversation*, 2015, 1-34.

⁶⁵ Cock J, 'How the Environmental Justice Movement is Gathering Momentum in South Africa', 12.

⁶⁶ Aziz G, 'Environmental Justice as an Act of Love: A Reflection on the Agency of the Youth on the Cape Flats' 77(2) *HTS Theological Studies*, 2021, 1-6.

⁶⁷ Muigua K, 'Towards Environmental Justice in Kenya', 13.

⁶⁸ Kanyinga K, 'The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya' 27(3) *Journal of Contemporary African Studies*, 2009, 325-344.

⁶⁹ Ndethiu MK, 'Environmental Justice in Kenya: A Critical Analysis', Unpublished LLM Dissertation, University of South Africa, 2018.

This was enforced through laws that established protected areas, such as forests, where human settlement and resource exploitation were strictly prohibited.⁷⁰

Post-colonial Kenya did not change the dynamics of colonial environmental injustices despite independence. In the year 1965, Kenya adopted a development policy which provided that development would first be carried out in 'high potential areas' with the rationale that resources from these regions would be used to develop the 'least potential areas'.⁷¹ Unfortunately, the high potential areas were developed and resources in the least developed areas were extracted and used to further develop the 'high potential areas'.⁷² In urban areas, settlement dictates environmental standards in major cities. The affluent city residence has piped water, clean rivers, and a good ambience for human habitation.⁷³ In stark contrast, the poor urban majority reside in overcrowded, dilapidated conditions, relying on makeshift sanitation systems like 'flying toilets', with inadequate drainage and exposure to industrial pollution. Industries discharge untreated waste into river sections near low-income communities, while affluent areas upstream remain largely unaffected by such environmental hazards.⁷⁴

Land rights have had a significant impact on the distribution of environmental burdens.⁷⁵ Sixty per cent of land in Kenya is held communally while thirty per cent is privately owned, and the residual ten per cent is public land.⁷⁶ Colonialism introduced private and public land ownership tenure systems.⁷⁷ Traditionally, land was communally owned, granting every member of the community both the right to access its resources and the responsibility to protect them.⁷⁸ Resource utilisation was traditionally organised along communal lines, ensuring shared access and collective management. However, colonialism promoted private property as a superior land tenure system, fundamentally altering ownership structures. As a result, land ownership documents became—and continue to be—the primary

⁷⁰ Kameri-Mbote P, 'The Land Question in Kenya: Legal and Ethical Dimensions' in *Governance: Institutions and the Human Condition*, 2009, 219-246.

⁷¹ Government of Kenya, *African Socialism and its Application to Planning in Kenya*, Sessional Paper No. 10 of 1965. High potential areas were those

⁷² Mwangangi L, 'Reflections on Sessional Paper No. 10, 1965: A Government Policy Paper that Widened the Economic, Social and Political Divide in Kenya' 26 *Yesterday and Today*, 2021, 160-163.

⁷³ Ndethiu MK, *Environmental Justice in Kenya*, 56.

⁷⁴ Ndethiu MK, *Environmental Justice in Kenya*, 56.

⁷⁵ Kameri-Mbote P, 'Women, Land Rights and The Environment: The Kenyan Experience' 49(3) *Development*, 2006, 43-48.

⁷⁶ Wily AL, 'The Community Land Act in Kenya: Opportunities and Challenges for Communities' 7(1) *Land*, 2018, 1-25.

⁷⁷ Kameri-Mbote P, *Women, Land Rights and The Environment*, 230.

⁷⁸ Kameri-Mbote P, *Women, Land Rights and The Environment*, 234.

determinant of access to essential resources such as water, electricity, and other basic needs.⁷⁹ The state also enjoyed unchecked power in the allocation of natural resource extraction permits, deforestation, extreme pollution, displacement for development, and pollution of the marine environment.⁸⁰

Due to inadequate resources, many communities rely on rivers as their primary water source. For example, the Sabaki River, which flows over 400 kilometres from the Kenyan capital to the coast, contains dangerously high levels of toxic pollutants, including lead, copper, cyanide, and ammonia.⁸¹ Interestingly, these deposits are discharged into the river as water leaves the Kenyan capital and no significant pollution was noted in the upper area inhabited by the affluent. As a result, coastal communities that rely on the river for their livelihoods bear the brunt of the contamination, with women and children suffering the most severe consequences. How do environmental rights assist in reversing these inequities?

IV. Environmental Constitutionalism in Kenya and South Africa

A. *Environmental Rights in Kenya*

Agitation for the constitutionalisation of environmental rights in Kenya has a long history. The previous constitutional order presided over a regime characterised by unchecked resource extraction and unregulated pollution, with little regard for sustainability or ecological balance.⁸² The most affected people were the homeless, low-income persons, indigenous communities, women, and persons living in the arid semi-arid areas.⁸³ The adoption of the current constitution was people-centred, and people's views largely informed its provisions. In the preparatory documents of the current constitution, the question of constitutionalisation of environmental rights was reasonably addressed with the majority of the people stating that, 'environmental protection

⁷⁹ Kameri-Mbote P, *Women, Land Rights and The Environment*, 230; Ndethiu MK, *Environmental Justice in Kenya*, 69.

⁸⁰ Kameri-Mbote P, *Women, Land Rights and The Environment*, 230; Ndethiu MK, *Environmental Justice in Kenya*, 69

⁸¹ *Odando IL & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties)* (2021) eKLR.

⁸² Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, Government of Kenya, 2005.

⁸³ Kenya in 1965 developed an economic model where development was concentrated in "high potential areas" wherein the resources would be used to develop the "least potential areas". Unfortunately, the high potential areas were developed and resources in least developed areas were extracted and used to develop even further the high potential areas.

should be enshrined in the Constitution’, ‘Indigenous forests and endangered species, should be protected’, and ‘benefits and burdens of environmental utilisation should be evenly distributed and where possible burdens eliminated’.⁸⁴

The Constitution contains environmental provisions in the preamble as a constitutional principle of national value and governance as well as a procedural, substantive, and environmental right. In the preamble, the Constitution provides that the people of Kenya are ‘respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations’. Public participation, equality and sustainable development are national values and principles contained in Article 10 of the Constitution.⁸⁵ These values and principles bind all state organs, state officers, public officers and all persons when they interpret, apply, enact or implement the constitution, legislation or policy decisions.

In terms of procedural and substantive rights, Article 35 serves as an access right, guaranteeing the public’s right to information. It provides that, ‘every citizen has the right of access to information held by the state and information held by another person and required for the exercise or protection of any right or fundamental freedom’, ‘every person has a right to unimpeded access to justice’ and ‘institute legal proceedings alleging actual or threatened infringement of a right’.⁸⁶ As a substantive right, article 42 provides that ‘every person has the right to “a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations”’.

B. *Environmental Rights in South Africa*

The South African Constitution provides that every person has the right to ‘an environment that is not harmful to their health or well-being’.⁸⁷ Moreover, every person is guaranteed the right to ‘have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures’. Under section 152 of the South African Constitution, it is the

⁸⁴ Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, Government of Kenya, 2005.

⁸⁵ The utility of a national values and principles was recognised by the Kenyan Supreme Court in *the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR wherein it stated that national values and principles are important anchors of interpretive frameworks of the Constitution and are underlying the nationhood. Kenyan constitutional courts have struck down dozens of legislations for not adhering to the national values and principles.

⁸⁶ Article 48, *Constitution of Kenya* (2010).

⁸⁷ Section 24, *Constitution of South Africa* (1994).

objective of the local governments to promote a safe and healthy environment. For accountability, section 184 requires state organs to submit information to the South African Human Rights Commission on the state and measures taken towards the realisation of environmental rights. Section 32 also provides for the right to access information from the state or any person for purposes of enforcing a fundamental right, the right to access courts and public consultation.

Kenya and South Africa appear to have adopted substantive and procedural environmental rights. However, there is a notable difference in their phraseology with South Africa adopting a stronger language of anthropocentric view. Kenya appears to have a moderate anthropocentric view capable of incorporating weak eco-centrism. The next section addresses some of the gains and limitations.

V. Merits of Environmental Constitutionalism

A. *Legal standing*

To date, the *Maathai v. Kenya Times Media Trust Limited*,⁸⁸ a constitutional decision relating to legal standing, is a poignant reminder of the challenges faced by the environmental justice movement prior to the incorporation of environmental rights into the Kenyan Constitution. In this case, Professor Wangari Maathai, the 2004 Nobel Prize laureate, filed a constitutional petition seeking to halt the construction of the then ruling party's sixty-storey headquarters on Uhuru Park—a free recreational park in Nairobi City's Central Business District. Regular patrons of the park typically consist of two types of people: individuals from low-income backgrounds—unable to afford lunch at restaurants—seeking fresh air and a place to relax during their lunch breaks; and individuals seeking a central meeting point for the majority of human rights advocacy movements.

In striking out the petition, the court held that the petitioner, Professor Wangari Maathai, did not have personal injury to demonstrate *locus*. On her argument that the public had not been consulted in interfering with the green space, the court held that '...of course, many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this is a special case. Her personal views are immaterial'. Having lost in the court, the applicant organised mass protests the applicant mobilised mass protests, drawing international attention and prompting intervention, ultimately leading to the project's suspension. The attempt to take over the park came under scrutiny

⁸⁸ *Maathai v Kenya Times Media Trust Ltd* (1989) eKLR.

again in 2021 when the government proposed using a significant portion of it for the construction of an overpass and this was met by demonstrations that led the government to thwart the plan.⁸⁹ A few months later, the government sought to ‘renovate’ the park but did not conduct an environmental impact assessment nor conduct public participation. Aggrieved, the case of *Communist Party of Kenya v Nairobi Metropolitan Services & 3 others National Environment Management Authority & another (Interested Parties)*⁹⁰ was filed in court. The Environment and Land Court (ELC) issued a preliminary injunction against the renovation and later invalidated the decision to renovate until an environmental impact assessment and public participation were conducted. Unlike previous cases, the issue of locus standi did not arise, with the court emphasising that it would be absurd for anyone to argue a lack of standing in an environmental rights suit.

The situation in South Africa pre-adoption of environmental rights in 1994 was akin to Kenya’s. For instance, in *Von Moltke v Costa Areoso (Pty) Limited*,⁹¹ a petition was filed against the construction of Sanday Bay on the basis that it constituted a public nuisance and would cause irreparable damage to indigenous vegetation and dunes which had cultural significance to the local community. In dismissing the petition on (lack of) locus standi, the court held that the applicant, despite having a petition backed by four thousand signatures and a protest, did not prove ‘special damage’ to him as required in public nuisance cases. Currently, legal standi in human rights and environmental rights in South Africa is generally liberalised and the issue of legal standi is rarely an objection to such proceedings.⁹²

An interesting question that arose in this research is whether Kenya and South Africa have independent constitutional human rights institutions. Kenya has Kenya National Human Rights Commission while in South Africa, there is the South African Human Rights Commission. Notably, these institutions are at the heart of the issues and seem yet to concentrate on civil and political rights and social and economic rights while paying little attention to environmental rights. Research into this question should be explored.

⁸⁹ Kimiyu H, “Kenya: Government Now Says Uhuru Park to Remain Untouched by New Expressway” 20 April 2022 — <<https://allafrica.com/stories/201910310360.html>>.

⁹⁰ *Communist Party of Kenya v Nairobi Metropolitan Services & 3 others National Environment Management Authority & another (Interested Parties)* (2022) eKLR. This case may be contrasted with Maathai case, each decided in a different constitutional dispensation.

⁹¹ *Von Moltke v. Costa Areoso (Pty) Ltd*, (1975) South Africa.

⁹² Amechi P, ‘Strengthening Environmental Public Interest Litigation Through Citizen Suits in Nigeria: Learning from the South African Environmental Jurisprudential Development’, 23(3) *African Journal of Constitutional Law*, 2015, 383-404.

B. Cost and Financial Responsibility

A large pool of empirical studies on environmental justice has identified cost award rules as the most dominant barrier to environmental justice litigation.⁹³ The old-time principle that ‘costs shall follow the event’ presents uncertainty and risks on already heavily burdened environmental justice litigants.⁹⁴ The thought of well-meaning local communities or NGOs acting in the public interest of being liable for costs for a deep-pocketed state or corporation is deterrent enough to environmental justice claims.⁹⁵ It is, thus important that the rules relating to costs be reconceptualised to encourage environmental injustice and environmental protection causes by already overburdened claimants or those seeking to enforce on their behalf.

In South Africa and Kenya, there is no constitutional or statutory settled legal provision eliminating or reducing costs risks. What is notable, however, is that courts in their discretion in constitutional environmental rights have formulated general rules against awarding costs to the detriment of persons asserting infringement or threatened infringement of their constitutional rights. In Kenya, for instance, in *Harun Mwau and Others v Attorney General and Other*,⁹⁶ the high court held that a party that litigates a public interest issue, such as an environmental right, should not be liable for costs. It was also held that costs should not be ordered against a party that sues a state but loses and ‘there is no reason why a state should pay a successful litigant’. Environmental rights, being constitutional rights, follow a similar trend.⁹⁷

In its landmark ruling, the court recognised that cost orders could have a ‘chilling effect’ on parties seeking to assert constitutional rights. It held that, as

⁹³ Hatten C et al, ‘The environment and the law: Does our legal system deliver access to justice? A review’ 6 *Environmental Law Review*, 2004, 240-272; Brooke LJ, ‘Environmental justice: The cost barrier’ *David Hall Memorial Lecture*, 18 *Journal of Environmental Law*, 2006, 341-400; Humby T, ‘The Biowatch case: Major advance in South African law of costs and access to environmental justice: *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) Constitutional Court of South Africa’ (2009) ZACC.

⁹⁴ Chakrabarti S et al, *Whose Cost the Public Interest*, 20 April 2022 <<https://adminlaw.org.uk/wp-content/uploads/Litigating-the-Public-Interest.pdf>>.

⁹⁵ It is not unusual for a corporation “affording” to pollute the environment to hire a battery of lawyers to defend it. Thus, the cost ordered against a claimant would impose untold suffering to a litigant. See Humby T, *The Biowatch Case: Major Advance in South African Law of Costs and Access to Environmental Justice: Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources and others* (2009) Constitutional Court of South Africa, (2009) ZACC.

⁹⁶ *Harun Mwau and Others v. Attorney General and Other Nairobi* (2012) eKLR

⁹⁷ Odote C, *Public Interest Litigation and Climate Change—An Example from Kenya: In Climate Change: International Law and Global Governance*, Nomos Verlagsgesellschaft mbH & Co. KG, 2013, 805-830.

a general principle, unless a case is *'frivolous, vexatious, or manifestly inappropriate'*, a party that succeeds in constitutional litigation against the state should be awarded costs. Conversely, if unsuccessful, each party should bear its costs. This principle has since been applied in environmental rights petitions, reinforcing access to justice for environmental litigants.

While significant progress has been made on the issue of costs, challenges persist. NGOs that challenge government decisions are often targeted through the closure of their accounts, severely hindering their ability to operate. This financial suppression impacts their capacity to meet essential expenses, including the preparation and filing of cases in court.⁹⁸ This challenge is particularly pronounced in environmental justice cases, which often involve multiple stakeholders, diverse perspectives, and extensive data collection. Gathering and organising evidence requires significant resources, especially when working with communities that may lack proper record-keeping systems or the means to travel. As a result, facilitating their participation becomes essential to ensuring comprehensive and effective litigation. Would it be plausible to provide state-funded legal aid to environmental justice? Should filing petitions in court be free or greatly reduced? Should fines and money collected from environmental justice causes be used to fund constitutional petitions? Should independent human rights commissions like the Kenya National Commission on Human Rights take up more environmental injustice cases? Should they assist in data and evidence collection for free, given that they are state-funded to reduce costs? These looming questions remain unanswered.

J. Remedial Discretion

Important decisions in environmental injustice cases invariably involve processes such as permitting, public participation, and mitigation. As a result, it is uncommon for procedural environmental rights petitions to challenge state actions through judicial review. Traditionally, judicial review has relied on common law discretionary remedies such as certiorari, mandamus, and prohibition. However, these remedies grant courts a restricted discretionary scope, which may not always align with the needs of environmental justice—such as ordering a clean-up exercise or other remedial actions essential for ecological restoration.

In Kenya, the Constitution grants the ELC broad discretion to tailor remedies that appropriately address the specific circumstances of environmental

⁹⁸ — <<https://allafrica.com/stories/201504161614.html>> accessed on 20th February 2025.

rights claims.⁹⁹ Discussing the wide powers of the court in fundamental freedom and rights claims, the Kenyan Supreme Court held in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others Initiative for Strategic Litigation in Africa (Amicus Curiae)*¹⁰⁰ that courts are free to fashion appropriate reliefs, even in interim nature in appropriate cases to redress and protect a constitutional right. A court, the Supreme Court justices held, is free to issue injunctions, mandamus, prohibitions, structural interdicts, supervisory orders or ‘any other order’, provided such orders are specific, appropriate, clear, and effective remedies. Courtesy of these powers, ELCs have issued clean-up orders, closure of dumpsites around Nairobi city Eastlands occupied by poor and homeless people suffering from the cumulative effect of landfills, generous compensations, contempt of court remedies, fines, attachment orders, joinder of parties, construction of washrooms along major highways for road users, relocation of dumpsites, renovation of parks, non-acquisition of indigenous lands for construction, among others.

Courts in South Africa have demonstrated their authority by issuing ‘unconventional remedies’ in fundamental rights cases, including environmental injustice claims. Section 38 of the South African Constitution empowers courts to grant ‘appropriate relief’ in the enforcement of fundamental rights and freedoms. In a recent landmark case, *Trustees of the Groundwork Trust v Acting Director-General: Department of Water and Sanitation and Another*,¹⁰¹ the court, in upholding its powers to issue appropriate remedies, stated that the phrase ‘any order’ is ‘as wide as it sounds’, serving as an injunction to do ‘practical justice, as best and as humbly as the circumstances demand’. It also quoted *Fose vs Minister of Safety and Security*, where another South African court held that ‘Particularly in a country where so few have the means to enforce their rights through the courts...the courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if need be, to achieve this goal’.¹⁰² Noting that the state had repeatedly failed to initiate and prepare regulations on air pollution in the Highveld Plan, the court proceeded to issue a deadline within which the said regulations should be prepared and published.

⁹⁹ Article 23, *Constitution of Kenya* (2010).

¹⁰⁰ *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (2021) eKLR.

¹⁰¹ *Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation and Another* (2020) ZAWT.

¹⁰² *Fose v Minister of Safety and Security* (1997) South Africa.

As was noted, environmental justice claims in Kenya and South Africa present themselves in many ways beyond race and income.¹⁰³ To address the myriad circumstances, it is important that courts have the flexibility to fashion remedies in environmental rights claims appropriately in order to serve justice. Merely requiring the state to formulate regulations is insufficient; imposing a clear timeline creates accountability and compels the state to implement corrective measures promptly.

The implementation of court orders relating to social and economic rights, including environmental rights, in South Africa and Kenya has not been a smooth ride.¹⁰⁴ While lack of constitutionalism and rule of law may contribute to this, courts in fashioning the remedy might also be facilitating the undesirable pattern thereby greatly undermining their legitimacy. Of course, a litigant seeks the most generous remedy, but courts should be cautious of the likelihood of implantability in fashioning the remedy. Incremental generosity may be desirable.

K. *Liberal Interpretative Powers*

In constitutional democracies, constitutions are supreme, whether they explicitly provide so or not.¹⁰⁵ Their supremacy is attributed to their existence stemming from a higher-making power, the people, in whom the sovereign power is reposed; a power higher than the constitutions or any of their creatures.¹⁰⁶ A constitutional interpretation requires going beyond a statutory interpretation.¹⁰⁷ It must be broadly, purposefully, and liberally interpreted, in an unrestrictive manner for it carries the values and aspirations of the people. In addition to this broad view of constitutions, it is unusual for constitutions or judicial officers in their constitutional interpretation to provide an additional layer of protection of fundamental rights and freedoms. To counter majoritarian rule, fundamental rights and freedoms are jealously protected to guarantee the

¹⁰³ An analysis of the petitioners demonstrates that the petitioners vary from professional organisations, community-based organisations, children, women among others. Each of these groups present different perspective

¹⁰⁴ Arwa, J.O, Litigating socio-economic rights in domestic courts: The Kenyan experience. *Law, Democracy & Development*, 17(si-1) 2013, 419-443.

¹⁰⁵ William B, *State Constitutions and the Protection of Individual Rights* 90 Harv. L. Rev, 1976, 489-540. Heun W, *Supremacy of the Constitution, Separation of Powers, and Judicial Review in Nineteenth Century German Constitutionalism* 2)16) Ratio Juris, 2003, 195-205. Moseneke D, *Striking a Balance Between the Will of the People and the Supremacy of the Constitution* 129(1) S.A.J, 2012, 9-22.

¹⁰⁶ Njogu v. Attorney-General (2000) HCK. Alexander L, *What are Constitutions, and what should (and can) they do?*" 1)28) Social Philosophy and Policy, 2011, 1-24.

¹⁰⁷ Timothy M Njoya & 6 others v Attorney General & 3 others [2004] KEHC 2645 (KLR).

enjoyment of those rights to the greatest extent, consistent with the nature of the right or fundamental freedom.¹⁰⁸ ‘Restrictions on rights are strictly construed’.¹⁰⁹ Therefore, the importance of the inclusion of environmental rights as part of constitutional rights cannot be understated.

The liberal interpretative approach to environmental rights is evident when contrasting *Maathai v. Kenya Times Media Trust Limited* with post-2010 cases. In the *Wangari Maathai* case, the court took a narrow and restrictive stance on public participation in environmental conservation, stating that ‘...of course, many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this is a special case. Her personal views are immaterial.’ Such a dismissive approach to public participation has no place in Kenya’s post-2010 constitutional framework, which recognises public engagement as a fundamental pillar of environmental governance and decision-making.

For example, courts have upheld **public participation** as a **procedural environmental justice right**, halting major projects with potential environmental harm. In *Mui Coal Basin Local Community & 15 Others v. Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR*, the court stopped the construction of a coal power plant in a marginalised rural community in Kenya. Similarly, in *Save Lamu & 5 Others v. National Environmental Management Authority (NEMA) & Another [2019] eKLR*, the court intervened in a case involving poor communities with communal land tenure systems, blocking the planned renovation of Uhuru Park. Additionally, in *Mohamed Ali Baadi & Others v. Attorney General & 11 Others [2018] eKLR*, the court halted the construction of a regional port in Lamu following claims of **threatened environmental damage**, including the destruction of mangrove forests, industrial effluent discharge, and adverse impacts on fish species and marine life. These cases illustrate the courts’ growing commitment to enforcing procedural environmental rights and safeguarding ecological integrity.

The interpretation of the South African Constitution is no different. In deciding a landmark decision delivered in 2020, *Trustees of Groundwork Trust*,¹¹⁰ claiming the infringement of the right to a safe and healthy environment through air pollution in Highveld Priority Area, the court interpreted Section 24(a) and

¹⁰⁸ Magliocca G, *The Heart of The Constitution: How the Bill of Rights Became the Bill of Rights*, Oxford University eds, 1ed, 2018. *Baitsokoli & Anor v. Maseru City Council and Others* (2005) High Court of Lesotho.

¹⁰⁹ *Ndyanabo v. Attorney-General* (2001), East African Court of Justice. Article 20 and 24, *Constitution of Kenya* (2010).

¹¹⁰ *Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation and Another* (2020) ZAWT.

24(b) of the South African Constitution quite liberally. The most obvious liberal interpretation is the extent to which the court was willing to rationalise why section 24(a) on the right to a safe and healthy environment and section 24(b) on the realisation of this right ‘through reasonable legislative and other measures’ were distinct rights. It was held that section 24(b) was ‘a right to a safe environment here and now’ and that section 24(a) ‘was added with the clear purpose of enhancing the scope and content of the environmental rights, beyond merely protecting human beings against harmful conditions’. As such, section 24(b) was ‘an addition to, not deriving from, the unqualified section 24(a) right’. This interpretation was the most appropriate in addressing the frequent delays in addressing the widespread environmental justice claims in South Africa, and in the instant case, uncontrolled air pollution in the Highveld Priority Area.

Flowing from above, it is quite clear that environmental rights have boosted the environmental justice movement in accessing courts and seeking remedies. Despite the liberal interpretative mandate, courts are yet to breathe life as to the scope, content, and nature of the right to an environment. The next section explores this laxity.

VI. The Undelivered Promise

A. Normative Scope and Content of Environmental Rights

As was noted in the formative sections of this paper, national constitutions adopt the right to a clean environment with a modifier. The common modifiers range from ‘healthy’, ‘clean and healthy’, ‘sound’, ‘sustainable’, ‘favourable’, ‘conducive’, and ‘a balanced and healthful ecology’. However, Courts have yet to comprehensively articulate a coherent normative meaning, nature, and scope of this right.¹¹¹ While courts in Kenya and South Africa have delivered numerous decisions on environmental rights, they primarily rely on the specific textual phrasing of the right in each case.

The challenge is not unique to Kenya and South Africa. Philippines’ Supreme Court as far back as 1993, stated in *Minors Oposa vs Factoran* that:

¹¹¹ To arrive at this conclusion, the author went through the decisions of the superior courts of Kenya as contained in their decisions available at the official Kenyan Judiciary website <http://kenylaw.org>. Under the National Law Reporting Council Act, all decisions of the superior courts must be published on this website. In the case of South Africa, Du A. Plessis, *South Africa’s Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?* 27(2) S.A.J.H.R., 2011, 279-307.

'it is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to 'a balanced and healthful ecology'. The list of particular claims which can be subsumed under this rubric appears to be entirely open-ended'.

The definition of the term environment is also not obvious and is dependent on the statutory or constitutional definition of a country.¹¹² This definitional challenge represents an especially significant obstacle to the effective utilisation of environmental rights in combating climate change and achieving climate justice at the international level due to the differing standards employed by various nations. The normative content of environmental rights also depends on the priority that each country places on environmental rights and on their commitment to ventilating the rights.

It is relatively easy for a court to arrive at a determination that the right to a clean and healthy environment has been infringed where the state has failed to carry out an obvious obligation such as enacting a law or regulation. But how and what yardstick does a court use to determine whether the construction of a road threatens the right to the environment and results in environmental injustice? Even if a statute were to prescribe the air quality regulations, would a court be able to review the sufficiency of such a statute? Does it use health as a yardstick? Human dignity? What is the acceptable level of pollution and is it acceptable for health purposes for human dignity or right to life? Or for spiritual or cultural reasons? The attractiveness of terming this as a 'policy decision' has probably encouraged courts to shy away from defining it.

The absence of a **normative determination** of the content of the right to a healthy environment—or the existence of **inconsistent standards** for defining its scope—significantly limits its potential. In the Kenyan context, the case of *Elizabeth Kurer and Detlef Heir (Suing on their behalf and on behalf of aggrieved residents of Watamu within Kilifi County) v. County Government of Kilifi & 4 Others* illustrates this challenge. The petitioners, residents of an impoverished neighbourhood experiencing a surge in commercial activity, complained that excessive noise from a newly established restaurant was harming their health and comfort. Despite multiple residents corroborating reports of discomfort and hearing issues, the court dismissed the application, reasoning that the **scientific noise measurements presented were not officially approved by the relevant state agency** to establish harm to human health.

¹¹² Ole P, 'Environmental Law and Constitutional and Public Law' in J. E. Vinuales, E. Lees (eds.), *The Oxford Handbook of Comparative Environmental Law*, E Lees eds., 1ed, 2019.

While the court was correct in requiring standardised scientific evidence, its insistence on **human health as the sole determinant** of a violation **narrowed the scope** of the right to a ‘**clean and healthy**’ environment. The widespread discomfort experienced by residents should have been sufficient to warrant injunctive relief, or at the very least, compel the measurement of noise levels using the approved methodology.

The interpretative approach adopted in the *Kurer* case appears to contradict another ELC decision in *Kiluma Limited & another v Commissioner of Lands & 3 others*.¹¹³ In this case, the court held that the right to a clean and healthy environment is a prerequisite to a ‘life worth living’. The court in this case appears to have interpreted the right more broadly to mean a right to enjoyment of life. However, the court did not state more than this. Would ‘worth living’ mean respect for the environment for ‘spiritual or cultural reasons’? If health was to be used as the yardstick this would not cover these aspects, yet it is environmentally unjust to evict the *Ogiek* people, the Indigenous forest dwellers from Mau Forest, denying them a source of livelihood, cultural and spiritual rights, in the name of protecting the rivers flowing from the forest. A broad interpretation of this right would necessitate a balancing approach, ensuring that environmental protection is not assessed solely through economic or health-based lenses. This is particularly crucial in countries with indigenous communities, where the environment is not just a source of livelihood but also holds deep spiritual and cultural significance.

In yet another decision, *Adrian Kamotho Njenga v Council of Governors & 3 others*,¹¹⁴ concerning a petition to the state authorities to construct washrooms along major highways, the same ELC held that the right clean and healthy environment protects the physical and mental state of an individual. This decision appears to adopt an even wider scope of this right but still within the human health approach. However, given these three decisions were issued by the same court but by different judicial officers, a coherent normative content of this right is required. Adopting a common broad yardstick might be useful.

In South Africa, Section 24(a) of the South African Constitution provides that everyone has the right to an environment that is not harmful to their health or well-being. Similar to the Kenyan Constitution, every South African judicial decision involving environmental protection quotes Section 24(a), but shies away from decisively presenting the normative content of this right.¹¹⁵ In *HTF*

¹¹³ *Kiluma Limited & another v Commissioner of Lands & 3 others* [2015] KEHC 2003 (KLR).

¹¹⁴ *Adrian Kamotho Njenga v Council of Governors & 3 others* [2020] eKLR.

¹¹⁵ Du A Plessis, ‘South Africa’s constitutional environmental right (generously) interpreted: What is in it for poverty?’ 27 *South African Journal on Human Rights*, 2011, 279-293.

Developers (Pty) Limited vs Minister of Environment Affairs and Tourism and Others,¹¹⁶ the court had an opportunity to clarify the normative requirement of Section 24(a), but refrained from indulging in the same, remarking that the term ‘well-being’ is ‘manifestly incapable of precise definition...’. Yet, it admitted that a definition is ‘critically important in that it defines for the environmental authorities the constitutional objectives of their risks’. However, the more recent case of *Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation and Another*,¹¹⁷ acknowledged (without further elaboration) that the right to a healthy environment in South Africa has ‘...two separate descriptive modifiers namely “health” or “well-being” and the right goes beyond health and shows that the drafters of the Constitution were not only concerned with disease outcomes by seeking to protect a person’s “well-being”’. Despite this acknowledgement, the court did not provide a substantive interpretation of the normative content of the ‘well-being’ aspect, leaving its precise legal implications undefined.

Despite the courts’ hesitation in interpreting the normative content of the substantive right to environment, notable progress has been made. In *Earth Life Africa Johannesburg vs Minister of Environmental Affairs*,¹¹⁸ the petitioners sought a review of an authorisation for a coal power plant on the grounds that climate change was not considered. The High Court agreed with the petitioner that despite the lack of an express statutory or constitutional provision requiring consideration of climate change, Section 24(a) of the South African Constitution contains a sustainable development consideration, and therefore, the obligation to mitigate the effects of climate change is self-arising. Though a procedural right litigation, it is an important judgment in connecting sustainable development, climate change, and future generations in the right to the environment. However, the court did not provide a normative meaning of the substantive right to environment. This paper argues, in the next section, that adopting a ‘founding value or right’ approach might assist the courts in finally providing a yardstick to assess environmental issues.

The implications of adopting an environmental rights interpretative approach that lacks comprehensiveness in addressing the environmental concerns of environmental justice seekers are significant. The normative content of a right influences the existence, extent, and nature of violations. For instance, a perspective on the right to a healthy environment that emphasises human health

¹¹⁶ *HTF Developers (Pty) Limited vs Minister of Environment Affairs and Tourism and Others* (2006) South Africa.

¹¹⁷ *Trustees of the Groundwork Trust v Acting Director - General: Department of Water and Sanitation and Another* (WT06/11/2015) [2020] ZAWT 1 (21 July 2020).

¹¹⁸ *Earth life Africa Johannesburg vs Minister of Environmental Affairs* (2017) ZAGPPHC.

may only recognise an infringement in terms of harm to health. This approach evidently neglects other detrimental effects of infringements, such as reductions in economic productivity, the potential for pollution to cause school-aged children to miss classes, relocation expenses, declining soil productivity, material damage to clothing and housing, and the mortality of animals—critical aspects to human sustenance. For example, if pollution is considered to comply with established air or water quality standards for human consumption, an infringement may not be acknowledged even if it adversely impacts animals and crops that are intrinsically connected to human life. Furthermore, the spiritual and cultural well-being associated with indigenous communities may not be adequately considered.

A second implication of a limited approach is that on finding a violation, remedies, especially compensation, are calculated to the extent of the violation found. In the example given above, damages would be limited to the proven effects on human health, and most generously, to the loss of life caused by environmental pollution. This limitation is evident in what is regarded as one of Kenya's most laudable environmental justice cases decided by the ELC: *KM & 9 Others v. Attorney General & 7 Others*. The petitioners were residents of Owino Uhuru Village, an informal settlement in Kenya's coastal county of Mombasa. They alleged that the respondents violated their right to a clean and healthy environment by setting up a lead acid batteries recycling factory that ran for decades near the neighbourhood, claiming that it produced toxic waste that seeped into the slum and caused health complications and loss of lives. Evidence was produced on the prevalence of diseases associated with lead among the slum dwellers and the consequent loss of lives. The court, in finding the violation of the right to a clean and healthy environment proceeded to award approximately twelve million US Dollars for personal injury and health and an additional six million US Dollars for soil cleanup. However, in awarding the damages, the court made no mention of the food productivity effect, house collusion, death or the effect on domestic animals that are a source of livelihood for the people, as well as the impact on the trees that attract tourists to the Kenyan coast.

The third implication, which is related to the preceding one, is that a limited approach to the right to health affects the scope and formulation of the remedies. If a human health approach is taken, remedies will reflect an infringement addressing human health, for instance, hospital and medical checkups, stoppage of pollution, and damages. Remedies related to the social and economic aspects occasioned by the 'loss of productivity', 'collusion of iron sheets and laundry' and 'loss of investments' in an area that could probably extend to other areas not considered. Such remedies would include the construction of schools and roads,

the provision of housing, and the provision of water to such households. Such, as noted in the manifestation of environmental justice in Kenya and South Africa are direct impacts of environmental exploitation.

B. *Towards a 'Founding Value or Right'*

As noted in this paper, constitutions reflect the cultural, historical, social, and political contexts of a state. The judicial interpretation of a right to a certain quality or standard of environment will obviously reflect the state context. However, as has been noted by the UN Special Rapporteur on Human Rights and the Environment, environmental rights serve as a vital enabler for the enjoyment of life and other fundamental rights. How would the right to a clean environment illuminate and be interpreted to encompass the fulfilment of an enjoyable right for all, notwithstanding their class, ethnicity, or economic status? Which approach would give the broadest protection of the intrinsic value to humanity? How does a coherent understanding of the right to the environment alleviate differentiated interpretations and applications highlighted above?

In this paper, a founding value or right is taken to mean the fundamental value or purpose that is founded on other human rights and whose violations awaken 'social consciousness'. While it has been argued in human rights discourses that human rights are interdependent,¹¹⁹ it is submitted, that some rights touch on the very existence of a human being. It may be explicit or implicit and only discoverable from a purposive reading of a constitutional text, its history, and architecture. It may also be identified where a constitution declares a right inviolable or non-derogable. Fundamentally, this right serves as the foundation for all other rights, anchoring human dignity and worth. It is an intrinsic entitlement carried by every individual—whether imprisoned, free, or unwell.

The determination of a foundational value or right within a state is contingent upon the state. The idea of this paper is aimed at encapsulating a right or value that is fundamental and universal, without regard to an individual's race, ethnicity, class, or social status. For illustrative purposes and the advantages that may ensue, this paper utilises the right to life as a focal point. Nevertheless, a comparable argument could equally be presented concerning the right to human dignity, well-being, and other fundamental rights.

¹¹⁹ Nickel J, *Rethinking indivisibility: Towards a theory of supporting relations between human rights*, 30 Hum. Rts. Q. 984-1001 (2008).

The right to life is internationally recognised as the ‘necessary condition of the enjoyment of all other human rights’,¹²⁰ and the ‘supreme right of the human being’.¹²¹ It is also an anchor to the indivisibility or interrelatedness of human rights. It encompasses a substantive principle (to have life respected) and a procedural principle (not to be deprived of life arbitrarily). The substantive principle necessitates the provision of adequate means for the sustenance of life.¹²² Under this modern understanding of life beyond liberalism, states and every person have an obligation to take positive actions to guarantee the right to life.¹²³ The right to life extends beyond mere existence to encompass spiritual, cultural, economic, and political dimensions, as well as the pursuit of happiness. Fully realising this right requires active participation in society, equality in treatment, access to physical and mental well-being, and economic support, ensuring that individuals can live with dignity and fulfilment.

Thus, unlike the health-based definition of environmental rights, a standard approach would consider the economic, social, and political impacts, as well as the effect on human existence and the Earth’s ability to sustain life. Under this approach, factors such as air quality, therefore, would be assessed not only by human health standards but also by their impact on all elements that sustain human well-being, including crops, animals, trees, and the Earth itself—all of which are essential to the pursuit of human life. Given the widely recognised duty of the present generation to future generations, a ‘right to life’ approach to environmental rights would necessitate safeguarding the world for unborn children and preserving all means essential for their future existence and well-being.

The objective of this paper is not to identify the foundational values or rights pertinent to a nation or the world at large; rather, it aims to illustrate that universally recognised rights, such as the right to life, dignity, and happiness, represent exemplars of the broadest protection. One might venture to argue

¹²⁰ United Nations University, *The Fundamental Right to Life at the Basis of the Ratio Legis of International Human Rights Law and Environmental Law*, 21st April 2022 <<https://archive.unu.edu/unupress/unup-books/uu25ee/uu25ee0p.htm>>.

¹²¹ United Nations University, *The Fundamental Right to Life at the Basis of the Ratio Legis of International Human Rights Law and Environmental Law*, 21st April 2022 <<https://archive.unu.edu/unupress/unup-books/uu25ee/uu25ee0p.htm>>.

¹²² United Nations University, *The Fundamental Right to Life at the Basis of the Ratio Legis of International Human Rights Law and Environmental Law*, 21st April 2022 <<https://archive.unu.edu/unupress/unup-books/uu25ee/uu25ee0p.htm>>.

¹²³ United Nations University, *The Fundamental Right to Life at the Basis of the Ratio Legis of International Human Rights Law and Environmental Law*, 21st April 2022 <<https://archive.unu.edu/unupress/unup-books/uu25ee/uu25ee0p.htm>>.

that identifying a founding value or right is impossible. However, such a claim would be both lazy and unfounded, as judiciaries, in exercising their interpretative mandate, have often identified and reinforced foundational values or rights through jurisprudence. The suggested approach in this paper is also not radical, as it utilises the existing and accepted regime to breathe life and give substantive meaning, to the right to the environment. When used as a benchmark, human dignity, for instance, would broaden the scope of the right and allow a comprehensive interpretation beyond health, for instance, enabling a more holistic and inclusive approach to remedies that considers all facets of life.

This paper is cautious of suggesting a simple, straightforward approach because even within the international community, there is no agreement on the subject. For instance, in finding an operational meaning for human dignity, countries are free, to a large extent, to determine its application. Neither an international approach to be adopted by all countries is suggested, nor a regional approach, unless, of course, the right is envisioned in a regional treaty requiring mandatory compliance with decisions of the regional court, such as the European Union. The approach that this paper suggests, offers the broadest interpretative protection to the right to the environment—each according to the country and context. Nonetheless, with the recognition of this right under the UN, its normative content should be urgently developed to ensure its full and uniform enjoyment. Establishing a founding value or right could facilitate a greater alignment of obligations, policies, and practices in upholding the right to a clean and healthy environment.

VII. Conclusion

The constitutionalisation of the rights to the environment is now widespread across nations. As has been demonstrated, the environmental justice movement has made reaps from the constitutionalisation of environmental rights. However, its full potential is yet to be realised and more litigation, particularly those on environmental rights claims strategically aimed at inviting a constitutional interpretation of substantive normative content of the right to environment, should be actively pursued. This paper argues that a founding value or right would be a prolific interpretative approach offering the widest normative scope of this right. This way, environmental rights would offer a more nuanced tool to counter environmental injustice.

An intriguing question that emerged from this research is the role of independent constitutional human rights institutions in Kenya and South

Africa concerning environmental rights. Kenya has the Kenya National Human Rights Commission, while South Africa has the South African Human Rights Commission. Notably, these institutions, despite being central to human rights advocacy, appear to focus primarily on civil, political, and socio-economic rights, with limited attention to environmental rights. This gap warrants further research to explore their potential role in advancing environmental justice.

'Alternative Justice Systems' in Kenya: The Taskforce's Conceptual Minefield

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Abstract

This paper critiques several fundamental concepts conceived and introduced into the discourse on Alternative Justice Systems (AJS) in Kenya by the Judiciary's 'Taskforce on AJS'. To attain this objective, the authors highlight the lack of clarity on the concepts of Access to Justice (A2J), AJS, mechanisms and methods, customs and norms, law and legal systems, and repugnancy as used by the Taskforce. This paper provides clarity on the concept of A2J as 'socio-economic justice', AJS as a 'justice system' within the general legal system and serves only as an alternative to a dispute resolution mechanism, 'mechanisms' as a broader framework which contains 'methods', customs and norms which are not analogous with, and may or may not be part of, the 'law and legal system', and the 'repugnancy clause', which is innocuous and has no content until applied within a specific space-time. Within the discussion on AJS, the authors also clarify the distinctions among the concepts of 'legal system', 'justice system' and the 'judiciary'; 'state or formal' and 'non-state or informal' institutions and processes; 'judicial' and 'non-judicial' institutions and processes, and 'traditional', 'community', 'customary', 'African' or 'indigenous' systems. The paper concludes that the Taskforce's report applies these concepts in a manner that is confusing or conflated, hence, leading to a conceptual minefield.

Keywords: Access to Justice, Alternative Justice Systems, Concepts, Legal Systems, Repugnancy

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I. Introduction

By a Gazette Notice¹ under the Judicial Service Act (2011),² Chief Justice of Kenya, Hon. Justice Willy Mutunga, as he then was, appointed the ‘multi-stakeholder’ ‘Taskforce on Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems)’³ (hereafter ‘the Taskforce’). The appointment was based on Article 159 of the Constitution of Kenya, 2010, which ‘provides for the use of alternative forms of dispute resolution mechanisms, *including traditional dispute resolution mechanisms*’.⁴ The overall objective of the Taskforce was ‘to formulate an appropriate judicial policy on Alternative Justice Systems, to consider the methodology and viability of mainstreaming Alternative Justice Systems, and to suggest concrete ways of doing so’.⁵ The Taskforce completed its work in 2020 when it transmitted a report to the then Chief Justice of Kenya, Hon. Justice David Maraga.⁶

In its report, the taskforce defined and, in some instances, attempted to distinguish several fundamental concepts regarding access to justice. The taskforce, along with the subsequent National Steering Committee for the Implementation of the Alternative Justice System Policy (hereafter ‘NaSCI-AJS’⁷), leaves a substantial amount of confusion and or reflects unfamiliarity with the extensive information (factual or analytical) and ongoing debates on the concept of ‘access to justice’ that have emerged over the past thirty years both within and without Kenya.⁸

¹ No. 1339, Vol. CXVIII—No. 21, NAIROBI, 4 March, 2016, 838.

² Act No. 1 of 2011.

³ The 19-member Taskforce was composed of Hon. Justice Joel Ngugi (Prof.), Judiciary/JTI—(Chairperson); Hon. Justice Joseph Serگون, Judiciary; Hon. Clara Otieno-Omondi, Judiciary/JTI; Hon. Florence Macharia, Judiciary; Hon. Peter Mulwa, Judiciary/RMC; Hon. Joan Irura, Judiciary; Masha Baraza (Dr), Judiciary/ODCJ; Steve Ouma Akoth (Dr), Pamoja Trust—(Vice-Chairperson); Katto Wambua, ODPP; Tom Chavangi, National Land Commission; Sheikh Ahmed Set, National Council of Elders; Commissioner Jedidah Wakonyo, KNHR; James Aggrey Adoli, Director, Community Policing; Morris Kimuli, LSK; Linet Njeri (Ms), Strathmore Law School; Anita Nyanjong (Ms), ICJ-Kenya; a representative from FIDA-Kenya; a representative from Legal Resources Foundation (LRF); Maina SN Njema. The Taskforce was given an initial period ending on 30 September 2016.

⁴ No. 1339, Vol. CXVIII, 838 (emphasis ours).

⁵ No. 1339, Vol. CXVIII, 838.

⁶ See ‘Letter of transmittal’ dated 17 August 2020, attached to the policy. See, Judiciary of Kenya, *Alternative justice systems baseline policy: Traditional, informal and other mechanisms used to access justice in Kenya*, August 2020.

⁷ The formation of the NaSCI-AJS was proposed in the Taskforce’s report. It was established in December 2020 by the Chief Justice, and gazetted, almost a year later, on November 8, 2021, by the next - and current - Chief Justice, Hon. Justice Martha Koome.

⁸ There is a huge body of literature on A2J and ‘AJS’ (not necessarily as perceived by the Taskforce

In this analysis, the authors focus on five composite terms because of their centrality to the critical arguments and recommendations made by the Taskforce and NaSCI-AJS. These are 'access to justice' (which we refer to hereafter as 'A2J'); 'AJS'; 'mechanisms and methods'; 'customs and norms' and 'law and legal systems', and 'repugnancy'. The next five sections of this work are geared towards achieving this objective and the last section is a conclusion.

II. Access to Justice

The Constitution of Kenya (2010) ('the Constitution'), by virtue of Article 48, requires the state to 'ensure access to justice for all persons'. The Taskforce's concept of Access to Justice (A2J) is as follows:

"Access to justice" would then have meaning from an outcome perspective as well as operation perspective. As a question of *outcome*, the taskforce understand access to justice as *realization and preservation of human dignity* as expressed in Article 28(2)¹⁰ of CoK Constitution (*sic*). In other words, justice is said to have (*sic*) done when dignity is realized, advanced and preserved. As a *process*, access to justice *ought to encompass how people navigate and are treated in the many relations and transactions (with dignity and legal consequences) that comprise everyday life*.¹¹

and NaSCI-AJS, which they hardly make any reference to). We list a selected few: Cappelletti M and Garth B (eds), *Access to justice: A world survey*, vol. 1, Sijthoff and Noordhoff, Alphen aan den Rijn, Milan, 1978, and *Access to justice: Emerging issues and perspectives*, vol. 2, Sijthoff and Noordhoff, Alphen aan den Rijn, Milan, 1979; MacDonald RA, 'Access to justice and law reform' 10 *Windsor Yearbook of Access to Justice*, 1990, 287, and 'Access to justice in Canada today: Scope, scale, ambitions' in Bass J, Bogart WA and Zemans F (eds), *Access to justice for a new century: The way forward*, Law Society of Upper Canada/Irwin Law, Toronto, 2005, 19; Mosher JE, 'Lessons in access to justice: Racialized youths and Ontario's safe schools' 46 *Osgoode Hall Law Journal*, 2008, 807-851; Hughes P, 'Law commissions and access to justice: What justice should we be talking about?' 46 *Osgoode Hall Law Journal*, 2008, 773-805; Galanter M, 'Why the "haves" come out ahead: Speculations on the limits of legal change' 9 (1) *Law & Society Review*, 1974, 95-160; Golub S, *Beyond rule of law orthodoxy: The legal empowerment alternative*, Carnegie Endowment for International Peace, New York, 2003; Rhode D, *Access to justice*, Oxford University Press, New York, 2004; UNGA, *Legal empowerment of the poor and eradication of poverty: Report of the Secretary-General*, UN A/64/133, 13 July 2009; Stephens M, 'The Commission on Legal Empowerment of the Poor: An opportunity missed' 1 *Hague Journal on the Rule of Law*, 2009, 132-157; UNDP, *Envisioning empowerment: A portfolio of initiatives for achieving inclusion and development*, UNDP, New York, 2009; Commission for Legal Empowerment of the Poor, *Making the law work for everyone*, UNDP, New York, 2008; and Manuel M and Manuel C, *Achieving equal access to justice for all by 2030 - Lessons from global funds*, Overseas Development Institute, 2018 – <<https://www.odi.org/sites/odi.org.uk/files/resource-documents/12307.pdf>> on 12 September 2020.

⁹ The term is also abbreviated as 'AtoJ'.

¹⁰ The version of the Constitution we are aware of, Article 28, which refers to 'Human dignity', does not have sub-Articles and – unless there is an amendment we have not noticed – provides as follows: 'Every person has inherent dignity and the right to have that dignity respected and protected'.

¹¹ Judiciary of Kenya, *Alternative justice systems baseline policy*, 6 (emphasis ours).

The authors would struggle to convey a ‘concept’ of A2J arising from this rendition, except to the extent that it revolves around the *process* of attaining, and the *outcome* of, *human dignity*.¹² Significantly, assuming the authors are correct in this interpretation, ‘dignity’ as expressed in Article 28 of the Constitution is a single and ‘very thin’ right referring to being, individually or personally, *recognised* and *treated with respect*. This right is buried among the many ‘human rights’ in Chapter Four of the Constitution.

At this level, the authors can expand the second part of the definition (*‘how people navigate and are treated ... [in] everyday life’*) to mean ‘social justice’, which appears to be the Taskforce’s intended vision, though not clearly articulated. Even then, the *parameters* and *components* of social justice would still be unclear. Society in general (and ‘*everyday life*’ in particular), is so complex that deeper analysis is required to clarify A2J as ‘social justice’. *Beyond* the vindication of rights and pursuit of duties through dispute resolution mechanisms,¹³ by social justice, are we referring to justice in our respective *primary* relationship with ‘nature’,¹⁴ or to the other *primary* relationships of ‘production’ of the energy we ‘consume’ in order to exist¹⁵ and of the production of new members of our species to ensure continuity and avoid extinction;¹⁶ or to the *secondary* politico-legal relationships¹⁷ or socio-cultural or moral relationships, or to mundane relationships based on aesthetics? In other words, are we referring to *specific elements* of social organisation or the *entire, complex, but integral* formation?

A2J is *not exclusively* a Kenyan idea. Though referred to by a variety of names, it has been, and is being, debated widely in a variety of contexts and forms. Indeed, some A2J ‘programmes’ being undertaken in Kenya, including the Judiciary’s AJS initiative, for example, are supported by ‘partners’ who have identified ‘alternative methods of dispute resolution’ as potential solutions to challenges in the delivery of ‘legal services’ to the citizens, and the achievement of A2J.¹⁸ Historically, at least from the 1970s, the concept of A2J has developed

¹² Peripherally, when one uses the word ‘ought to’, it suggests not what is, but what should be – an ideal. It is not clear what the Taskforce is contrasting this with, that is, what the ‘what is’ is.

¹³ What we refer to as ‘adjudicatory justice’.

¹⁴ ‘Environmental justice’.

¹⁵ ‘Economic justice’.

¹⁶ ‘Reproductive justice’.

¹⁷ ‘Political justice’.

¹⁸ For example, the Taskforce was variously supported by the European Union through the United Nations Office on Drugs and Crime; GIZ; The World Bank; the Ford Foundation, the International Development Law Organization (IDLO), and the United Nations Food and Agriculture Organization (FAO), which espouse the idea of ‘legal empowerment of the poor’ as a concept of A2J. The Programme for Legal Empowerment and Aid Delivery in Kenya (PLEAD), which brings together ‘criminal justice institutions in Kenya’, is a programme of the European Union.

from a judiciary and state-centric focus of improving access to judicial and quasi-judicial services, also referred to as 'rule of law (RoL) orthodoxy', through 'social justice',¹⁹ to the 'legal empowerment (LE)' concept. LE, as a broad concept of A2J, has a number of strands, which include 'Micro-justice',²⁰ 'LE',²¹ 'Legal empowerment of the poor (LEP)',²² and 'equal access to justice (EA2J)'.²³

Although the Taskforce's concept settles at the very narrow 'RoL orthodoxy', it is the authors' considered view that a *relevant, realistic*, concept of A2J must encompass the challenges which form the basis of socio-economic *injustice*. It must be wide enough to cover injustices—that is, *lack of access*—arising from our relationship with the environment; our relations of production, and our politico-legal, socio-cultural, moral and aesthetic relations. These are the spaces where *disempowerment* resides. In this context, A2J means access to *socio-economic justice*, and justice in *every* important *facet* of *social relations*. This concept may look unrealistic, or even *idealistic*. If it does, this is only *apparent*. The trajectory of the development of the concept of A2J indicates that it has reached a point where it has a *socio-economic character* and *content*. However, it still lacks a clear, *systemic*, connection between *disempowerment* and capitalism, which is what A2J as *access to socio-economic justice* demands.²⁴ Capitalism constrains (especially)

¹⁹ The concept of A2J which attempts to connect legal issues and disputes to the society in which they arise.

²⁰ The concept which focuses on dispute resolution through the use of local resources.

²¹ The concept which refers to the use of legal services and development activities to increase the ability of disadvantaged social groups to control their lives.

²² The approach which the Commission for Legal Empowerment of the Poor defines as the 'process through which the poor become protected and are enabled to use the law to advance their rights and their interests', in UNDP, *Making the law work for everyone*, 2008, 25.

²³ The approach to A2J which, apart from adopting the concept of LEP, additionally emphasises *fairness* and *inclusiveness*.

²⁴ Some 'legal empowerment' proponents point at 'socio-economic' or 'systemic' barriers to A2J and criticise 'the market' and liberal capitalism. They, however, do not go as far as critiquing capitalism as an *intrinsic* and *fundamental* barrier to A2J, and as far as *calling for its transformation*. Examples are Golub S and McQuay K, 'Legal empowerment: Advancing good governance and poverty reduction' in *Law and policy reform at the Asian Development Bank*, Asian Development Bank, Manila, 2001; Alffram H, *Equal access to justice: A mapping of experiences*, Swedish International Development Agency, 2011 – <https://www.sida.se/contentassets/8d1d0ea3d9464589af9259c07937ce35/equal-access-to-justice-a-mapping-of-experiences_3124.pdf> on 12 September 2020; USAID Center for Development Information and Evaluation, *Linking democracy and development: An idea for the times*, USAID, Washington DC, December 2001; Goetz AM and Jenkins R, *Reinventing accountability: Making democracy work for human development*, Palgrave Macmillan, Basingstoke, UK, 2005; Trubek DM and Santos A (eds), *The new law and economic development: A critical appraisal*, Cambridge University Press, Cambridge, 2006; Palacio A, *Legal empowerment of the poor: An action agenda for the World Bank*, The World Bank, Washington DC, 2006; Cotula L, *Legal empowerment for local resource control: Securing local resource rights within foreign investment projects in Africa*, IIED, London, 2007; and Gauri V and Brinks D (eds), *Courting social*

poor and marginalised people's *equitable access* to the environment, productive property, and the 'market', and to *equitable* politico-legal, socio-cultural, moral and aesthetic relations.²⁵ Thus, we need to identify ways of re-organising socio-economic relationships to attain and sustain access to *socio-economic justice*. This is the stage that current concepts of A2J and attendant reform agenda, including the Taskforce's and NaSCI-AJS' social analysis and *proposed* 'transformation', have not reached.

III. Alternative Justice Systems

While a comprehensive concept of 'Alternative Justice Systems (AJS)' in the Taskforce report seems hard to come by, the authors wish to clarify that this is not the result of a lack of diligence on our part.²⁶ Whereas it is possible to develop a comprehensive concept of AJS from the point of view of the Taskforce, this is made difficult by the conflation, and very eclectic use, of a number of concepts in the report, for example, (i) 'non-state', 'informal', 'traditional', 'community', 'customary', and 'African'; (ii) 'lived realities', 'everyday lives', and 'disputes'; (iii) 'social' and 'legal' systems; (iv) 'mechanisms of justice' and 'justice systems'; and, (v) AJS as a 'justice system' and a 'dispute resolution mechanism'. Based on the foregoing, it seems most prudent to pick out the concept provided on the

justice: Judicial enforcement of social and economic rights in the developing world, Cambridge University Press, Cambridge, 2008.

²⁵ The historical and current body of literature which deals with socio-economic formations begins with the C19 classics of *political economy*. It includes Mill JS, *Principles of political economy*, Longmans, London, 1849 (1936); Smith A, *An inquiry into the nature and causes of the wealth of nations*, PF Collier and Sons, New York, 1902; Ricardo D, *On the principles of political economy and taxation*, Batoche Books, Kitchener, Ontario, 1817; Marxist Internet Archive, 'Marx's comments on Mill's book' – <<http://www.marxists.org/archive/marx/works/1844-mil/index.htm>> on 27 October 2019; Marx K, *Capital*, Vols. I and II, Progress Publishers, Moscow, 1888; Engels F, 'The origin of the family, private property and the state' in Marx/Engels, *Selected works*, Vol. III, Progress Publishers, Moscow, 1884; de Soto H, *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else*, Black Swan, London, 2000; Birch K and Mykhnenko V (eds), *The rise and fall of neoliberalism: The collapse of an economic order?*, Zed Books, New York, 2010; Birch K, 'Neoliberalism: The whys and wherefores ... and future directions' 9 (7) *Sociology Compass*, 2015, 571–584; Reiff MR, *Exploitation and economic justice in the liberal capitalist state*, Oxford University Press, Oxford, 2013; Kocka J, 'Capitalism and its critics: A long-term view' in Bosma U and Hofmeester K (eds), *The lifework of a labor historian: Essays in honor of Marcel van der Linden*, Brill, Leiden, 2018, 71-89; and D'Attoma J, 'Transnational hegemony and the formation of a transnational capitalist class' – <https://www.academia.edu/9795748/Transnational_Hegemony_and_the_Formation_of_a_Transnational_Capitalist_Class> on 3 December 2022.

²⁶ At some point, there is a very definite and clear indication that AJS is viewed as a *dispute resolution mechanism* ('Alternative justice systems baseline policy', 5). This idea appears in many parts of the report. The clarity is, however, lost through the conflation of various terms as discussed below.

website of the NaSCI-AJS, though the authors will make attempts to introduce some distinctions amongst the more essential terms.²⁷

The website defines AJS as:

'the comprehensive *organic, non-state* mechanisms of *laws, norms, customs and social and legal systems* which govern and regulate the *entire spectrum of activities and lives of individuals from birth to death*. They are constituted, applied and enforced by the people themselves in their own communities. They include dispute resolution mechanisms which we call AJS mechanism which *does not usually involve using state courts*. Justice (Prof) Joel Ngugi, Presiding Judge Nakuru Law Courts'.²⁸

²⁷ Many writers, including Kenyan scholars, have commented on these 'systems' and attempted to clarify the differences among various related terms. Examples include Helbling J, Kälin W and Nobirabo P, 'Access to justice, impunity and legal pluralism in Kenya' 47 (3) *The Journal of Legal Pluralism and Unofficial Law*, 2015, 329-349; Hiil, *Justice needs and satisfaction in Kenya: Legal problems in daily life*, 2017 – <https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf> on 12 September 2020; Harper E, *Customary justice: From program design to impact evaluation*, International Development Law Organization, Rome, 2011; Penal Reform International, *Eight years on... a record of Gacaca monitoring in Rwanda*, Penal Reform International, 2010 – <<http://www.penalreform.org/wp-content/uploads/2013/05/WEB-english-gacaca-rwanda-5.pdf>> on 27 December 2020; Human Rights Watch, 'Rwanda: Mixed legacy for community-based genocide courts: Serious miscarriages of justice need national court review' *Human Rights Watch*, 2011 – <<https://www.hrw.org/news/2011/05/31/rwanda-mixed-legacy-community-based-genocide-courts>> on 27 December 2020; International Association for Humanitarian Policy and Conflict Research, *Access to justice & peace-building processes: Traditional and informal justice systems, 2007-2009* – <<http://www.peacebuildinginitiative.org/index.cfm?pageId=1692,296-360>> on 1 July 2022; IDLO, *The Judiciary and International Commission of Justice, Report of the East, Horn and Southern African regional forum on alternative dispute resolution & customary and informal justice*, March 2–3 2020, Safari Park Hotel, Nairobi, Kenya; Muigua K, 'Institutionalising traditional dispute resolution mechanisms and other community justice systems', April 2017 – <<http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf>> on 4 March 2023; Kariuki F, 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology' 3 (1) *Alternative Dispute Resolution*, 2015, 163-183; Kinama E, 'Traditional justice systems as alternative dispute resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' 1 (1) *Strathmore Law Journal*, 2015, 22–40; Serгон JK, *Integrating traditional dispute resolution mechanisms with the formal justice system in Kenya: A case study of the Kipsigis community*, PhD Thesis, University of Nairobi, June 2017 – <http://erepository.uonbi.ac.ke/bitstream/handle/11295/155682/Sergon%20J_Integrating%20Traditional%20Dispute%20Resolution%20Mechanisms%20With%20the%20Formal%20Justice%20System%20in%20Kenya%20a%20Case%20Study%20oP%20the%20Kipsigis%20Community.pdf?sequence=1> on 11 March 2023; Okalo AS, *Mainstreaming alternative justice systems for improved access to justice: Lessons for Kenya*, LL.M Dissertation, University of Nairobi, 2019 – <http://erepository.uonbi.ac.ke/bitstream/handle/11295/108728/Okalo_Mainstreaming%20Alternative%20Justice%20Systems%20for%20Improved%20Access%20to%20Justice-lessons%20for%20Kenya.pdf?sequence=1&isAllowed=y> on 11 March 2023; and Forsyth M, 'A typology of relationships between state and non-state justice systems' 56 *Journal of Legal Pluralism and Unofficial Law*, 2014, 67–112.

²⁸ — <<https://ajskenya.or.ke>> on [enter access date] Justice Ngugi was the Chair of the Taskforce and now the Chair of NaSCI-AJS.

This definition can be contextualised by providing general definitions of the concepts of ‘legal system’, ‘justice system’ and ‘judiciary’. Here, a funnel approach, beginning with the widest term, seems the best path of pursuit. Notably, there may be controversies regarding the definitions. Nevertheless, the authors may adopt working definitions for the current purposes.

A *legal system* is the *entire system*, the organised and dynamic structure, of overarching principles (loosely, ‘philosophy’, ‘approach’ or ‘perspective’); laws and legal principles; institutions; and, practices, which regulate social behaviour in a polity, whether provincial, national, regional, or global. This, inevitably, includes the historical *rise and development* of a legal system into ‘*a tradition*’, and its trajectory of development, since it is *dynamic*. The components of a legal system, therefore, include basic underlying values and principles; laws and the processes of their generation; institutions that generate and implement the laws; processes of implementation; institutions of dispute prevention and resolution; dispute prevention and resolution processes; adjudication-implementing institutions and processes; the behavioural practices that have been built over time; (probably controversially) the citizens’ perceptions and attitudes towards the entire system; and, how all these *are developing*.

An important point to make in passing is that all these components of this organised and dynamic structure that make up the legal system are not isolated from, but are influenced by and, in turn, influence, the other elements of society—the economy, politics, socio-culture, morality and aesthetics—in their dialectical relationships. A point often forgotten in all this is that the legal system is *conceptual* in character and that its *reality* is expressed in interpersonal relationships, the relationships among human beings within the legal system in terms of power, authority, capacity, and jurisdictional roles and practices.²⁹

A *justice system*³⁰ is the *sub-system* of the ‘legal system’ which encompasses the normative and institutional framework, processes and practices in the *implementation or enforcement* of laws, *prevention and arbitration* of disputes and *enforcement* of arbitral decisions. Thus, its components are the police and other security-related institutions; the judicial, quasi-judicial and analogous institutions,

²⁹ See, generally, Stychin CF and Mulcahy L, *Legal methods and systems*, 4ed, Sweet & Maxwell, London, 2010; Ambani J and Mbondenyi MK, *The new constitutional law of Kenya: Principles, government and human rights*, LawAfrica Publishing, Nairobi, 2013; Winters B, *Excellence of the common law compared and contrasted with civil law: In light of history, nature, and scripture*, Mountain Press, 2006; and Rene D and Bri-erley JEC, ‘Major legal systems in the world today’ – <[https://lawfaculty.du.ac.in/files/course_material/Old_Course_Material/I%20Term%20Jurisprudence-I%20\(Legal%20Method\)%20July%202016.pdf](https://lawfaculty.du.ac.in/files/course_material/Old_Course_Material/I%20Term%20Jurisprudence-I%20(Legal%20Method)%20July%202016.pdf)> on 25 September 2022.

³⁰ In some cases referred to as the ‘justice sector’.

and the penal and other ('aftercare') institutions, including their *normative framework, processes and practices*.³¹ Furthermore, in concrete terms, the concept of interpersonal relationships as defined above, finds itself at the fore.

The *judiciary*, a *sub-system* of the 'justice system', comprises the institutions of dispute resolution, that is, the system of courts, tribunals and analogous institutions with the *formal* mandate to deal with disputes arising from alleged breaches of the law. In the form of a *judicial system*, it includes the normative frameworks, processes, and practices of the judiciary.

Considering the above nomenclature, AJS falls within the ambit of 'justice system' and, consequently, means the *alternative* normative and institutional framework, processes, and practices in the implementation or enforcement of law, prevention and arbitration of disputes and enforcement of arbitral decisions. There is, however, a caveat: *to the extent permitted (or not prohibited), recognised, accepted or tolerated (or ignored) by the legal system*. Thus, it is the second part of the definition of AJS on NaSCI-AJS' website that fits within this. The first part is too broad to fit within the concept of a 'legal system' as defined. Excluding the website's fluid and imprecise content,³² it is, probably, closer to the concept of (*alternative*) 'socio-economic system'.

The other terms used by the Taskforce and many commentators in this area, very often interchangeably, are 'state/non-state'; 'formal/informal'; 'non-judicial/judiciary and 'judicial/judiciary'; and, 'traditional', 'community', 'customary', 'African' or 'indigenous'. Granted, the terms are not amenable to precise definitions, and commentators are not in general agreement in that regard, as can be surmised from the literature. Nevertheless, broad definitions may be posed, without getting too much into the intricacies, only to provide contextual clarity.

State or formal justice systems are those which are *established* by the state through its formal regulatory system, while *non-state or informal* ones are those

³¹ See, UNDP, *Programming for justice: Access for all, a practitioner's guide to a human rights-based approach to access to justice*, UNDP, Bangkok, 2005; The World Bank, 'Justice Systems' — <<https://pubdocs.worldbank.org/en/988591611674066944/Justice-System.pdf>> on 11 March 2023, 317, and Hammergren, L, Reiling, D, and Di Giovanni, A, *Justice sector assessments – A handbook*, World Bank, Washington DC, 2007 — <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JSAH-andbookWebEdition_1.pdf> on 11 March 2023.

³² For example, 'laws, norms, customs and social and legal systems which govern and regulate the entire spectrum of activities and lives of individuals from birth to death'. First, 'laws' are part of the 'legal system'. Second, 'lives of individuals' include the 'spectrum of activities'. Third, *no system*, no matter how robust, has ever regulated *all* - 'the entire spectrum of' - 'activities and lives ... from birth to death'!

established by entities (including ‘communities’) outside the state system through non-state *practices and norms*. Even though the latter might be outside the state system, they must still *not* contradict the general regulatory framework (the *legal system*), or they may court ‘illegality’.

The *judiciary*, as defined above, is that part of the justice system that has the *formal* mandate to deal with disputes within a polity. Institutions that do not have this mandate and operate outside the judiciary are *non-judicial*.

The concepts of ‘*traditional*’, ‘*community*’, ‘*customary*’, ‘*African*’ or ‘*Indigenous*’ pose the most intractable challenges, controversies and even confusion in this field of legal and justice systems.³³ In the authors’ view, ‘*traditional*’ stands for *historically long-standing* and or *embedded in a milieu* (or social environment). In the context of Kenya and AJS, it refers to the justice systems of the ‘*African*’ communities arising from their *customs and norms* as they regulated and regulate the social behaviour of those who belong to the community, beginning centuries before the intervention of colonialism. With the rise or introduction of *the state* (in the 19th Century in respect of Kenya, hereafter ‘C19’), some of these customs and norms become recognised or defined as ‘*Customary law*’. It is in this sense that one could say that AJS, in its *traditional* or *customary* form, applies ‘*Customary law*’ in dispute prevention and resolution. However, the customs and norms are not static, due either to internal dynamics or to influences from other cultures (other communities or state-related), especially with the emergence and strengthening of the intervention of the capitalist state and accompanying historical changes of ‘*modernity*’.

Indigenous is not a typical term used in Kenya when referring to legal, justice and judicial systems, including AJS; it is hardly used in literature in this area. It appears that it is more commonly used when one refers to *knowledge* (‘*indigenous knowledge*’), especially with reference to *environmental governance* and *medicinal information*. However, outside the Kenyan context, it has a different connotation.

At the international level, there are two important instruments on indigenous peoples: the United Nations *Declaration on the Rights of Indigenous Peoples*³⁴ and the International Labour Organisations (ILO’s) *Indigenous and Tribal Peoples Convention*,

³³ We have referred to the large body of literature on these concepts, only a small number of which we cite. They form the context and, in some cases, generally relate to the ‘content’ of our concepts. Because we constitute these ‘definitions’ from our *dialectical materialist perspective and understanding* and do not draw any of them directly from the literature, we do not refer to specific writings.

³⁴ Annex to Resolution 61/295, adopted at the 107th Plenary Meeting of the General Assembly, 13 September 2007.

1989.³⁵ The Declaration does not define 'indigenous peoples', but the Convention does.³⁶ In the authors' view, the term 'indigenous' seems to, in this context, apply to situations where 'tribal' or 'ethnic' groups were historically uprooted from their traditional lands by invading colonisers, confined to specific 'reservations' or areas, and largely isolated from both other sections of the national community and national development in their country. Consequently, they largely retained their own identity in the economic, political, socio-cultural, and moral spheres, including regulatory rules and institutions—but with the overarching regulation by the state's legal system. The most typical loci of indigenous peoples are Canada, the Americas,³⁷ and Australasia.³⁸

As the reader can glean from the above discussions, the concepts are quite fluid and overlap quite frequently. However, it is equally trite to state that they have *core* attributes that render them distinguishable from each other. In this context, the use of the term 'AJS' by the Taskforce in a generic manner and the interchangeable use of the other terms, creates confusion and impedes critical analysis.

IV. Mechanisms and Methods

In the AJS discourse, a distinction between *mechanisms* and *methods* ought to be made. In terms of categorisation, mechanisms occupy a comparatively higher position and cover a wider array of concepts than methods. This means that they include perspectives or approaches, principles, laws, institutions, processes, *methods*, and practices involved in a justice system. This is what AJS *mechanisms* generally, and traditional dispute resolution *mechanisms* (TDRMs) specifically, denote. They are, comparatively, more of 'systems' than methods. *Methods* are simply the set of *ideas* used and *steps* taken in the resolution of disputes, generally or in specific cases. Adversarial and inquisitorial adjudication, arbitration, mediation, conciliation, and the various other permutations, are examples of such ideas and ways (methods). Hence, just like AJS generally and TDRMs in particular may share some of the methods, they may both, similarly, share some with *state* justice systems. The 'systems' may even 'borrow' from each other through cross-influence.

³⁵ Convention 169 — <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> on 17 March 2023

³⁶ Article 1, *Indigenous and Tribal Peoples Convention* (1989) C169.

³⁷ United States and South American countries.

³⁸ Australia, New Zealand and neighbouring Pacific Ocean islands. See also Forsyth, 'A typology of relationships between state and non-state justice systems'.

V. 'Customs and Norms' and 'Law and Legal Systems'

Right from the beginning of its historical analysis, the Taskforce makes a crucial anthropological statement that it is 'no simplification to say that each society in *pre-colonial* Kenya had a *legal system*, while some ethnic groups had multiple systems operating side by side.' It goes on to claim that, according to *anthropologists and legal historians*, the *legal systems* were 'informal, flexible, unwritten and un-codified procedures; relied on community participation; characterized by a primary focus on reconciliation and reparation'. This is a conceptual leap from the statement in the preceding paragraph where there is a reference to '*justice systems*'.³⁹

In fact, 'anthropologists and legal historians' make a distinction between *pre-state* 'justice' systems on the one hand, and 'legal' systems on the other. The former is established to have been part of human *society* from its emergence, arising from *organic* social norms and customs on acceptable and reprehensible social behaviour. In these systems, individuals recognised as having wisdom, strength of character, understanding of the society or community, and the capacity to steer society harmoniously gained the role of 'elders'. Indeed, the Taskforce is right that these systems were 'flexible, unwritten and un-codified', though the consequences of being found in breach of the norms and customs were more varied than 'reconciliation and reparation'. They often included disapprobation, denial of certain socio-economic entitlements, banishment and community service. Those who have critically studied the emergence of social formations and their evolutionary and revolutionary development situate *law* and *legal* systems in tandem with that of *the state*. In the context of Kenya, the authors note that, although customs and norms existed, and continue to exist with dynamic changes, these were recognised as 'customary *law*' by the introduction of the colonial *state* in the late C19.

Lewis Morgan was one of the earliest anthropologists to comprehensively study and identify the earlier, *pre-state*, forms of human social existence and *evolution of society*, typically (and everywhere) characterised by low levels of development of productive forces and, thus, production; a largely appropriative but *egalitarian economy*, and *communal forms of socio-cultural organisation*.⁴⁰ John Locke,

³⁹ Judiciary of Kenya, 'Alternative justice systems baseline policy', 1 (emphasis ours).

⁴⁰ Morgan HL, *Ancient society: Researches in the lines of human progress from savagery through barbarism to civilisation*, Charles H. Kerr & Co, Chicago, USA, 1906; Morgan HL, *Systems of consanguinity and affinity in the human family*, Smithsonian Institution, Washington, USA, 1871; and Morgan HL, *Houses and house-life of the American aborigines*, Government Printing Office, Washington, USA, 1881.

whose 'social contract' theory the Taskforce embraces in its argument on the citizen's autonomy,⁴¹ called this the *state of nature*:

'Man lived in a *state of nature* in which man had complete liberty to conduct one's life as one best sees fit. This state of nature was, however, limited by *natural* law. This state of nature was *pre-political* but *not pre-moral*.'⁴²

The Taskforce buttresses this point when paraphrasing Locke:

'Having created a *political society* and *government* through their consent, human beings then gained three things, which they *lacked* in the *state of nature*: *laws, judges to adjudicate laws, and the executive power necessary to enforce these laws*.'⁴³

Building upon the work of Morgan and other C19 evolutionary anthropologists, Engels, a contemporary of Morgan, demonstrated that the rise of a central authority (apparently) standing above the rest of society, heralded the *state*, having eroded and thrown into disarray the existing 'gentile constitution' which was based on rules and institutions developed collectively by the tribes. As he put it:

'This so disturbed the regulated functioning of the organs of the gentile constitution that a remedy was already needed in the Heroic Age. A constitution, attributed to Theseus, was introduced. The main feature of this change was the *institution of a central administration* in Athens, that is to say, some of the affairs that hitherto had been conducted independently by the tribes were declared to be common affairs and transferred to a *general council* sitting in Athens. ...This gave rise to a *system of general Athenian popular law*, which *stood above the legal usages of the tribes and gentes*. It bestowed on the citizens of Athens, as such, *certain rights and additional legal protection even in territory that was not their own tribe*'.⁴⁴

Thus, the conflation of pre-state customs and norms with law and legal systems is *unhistorical*. Of course, the claim is often made that this argument denies 'African' customs and norms the 'higher status' accorded to the 'Western' state and law. However, proponents of this view would struggle to explain the existence of these customs and norms in *pre-state Western societies*. They would also find it difficult to account for the fact that, even today, there exist customs and norms that have not been accorded the force of law, and informal institutions that the law has not recognised, not only in Africa, but elsewhere, including the 'western' ones. If we accept that customs and norms, laws, legal systems, and the state, are *social constructs*, it means that they did *not* arise with human beings and

⁴¹ Judiciary of Kenya, 'Alternative justice systems baseline policy', 34.

⁴² Locke, J, *Two treatises of government*, Yale University Press, London, 2003, as quoted in the AJS policy.

⁴³ 'Alternative justice systems baseline policy', 34 (emphasis ours).

⁴⁴ Engels, *The origin of the family, private property and the state*, 108-109 (emphasis ours).

their societies as part of nature, although they were *partly shaped by* it. Therefore, one must place their emergence in the development of *social organisation*, and under certain precise *social conditions*. The authors theorise that, anthropologically and sociologically, it simply *cannot be* that a generalised *organically consensual* system of customs, norms and institutions arose at the *same time*, in the *same place* and under the *same social conditions* as the *coercive* system of laws, legal systems and the state. This would be a highly unusual (*social*) evolutionary process.

VI. The Concept of ‘Repugnancy’

It does not seem to occur to some commentators on the ‘repugnancy clause’, including the Taskforce, that the clause is itself *innocuous* and has *no content*. It does not tell readers what ‘justice’ and ‘morality’ are. It is left to those who are applying it in discourse or decision-making to determine, at any historical moment, what the content is. That is why the phrase appears in a *variety of historical moments and documents with ease*. The colonial courts may have applied *their view* of the standards of ‘justice and morality’ (inevitably, with a British ‘lens’). Just as much, post-1963, -1967, -1969 and -2010 courts have had, and have, a similar authority and *opportunity* to apply *their ‘Kenyan’, ‘African’ or ‘community’ view*. This assumes that it is possible to identify a *unified standard* in this *variegated land* of *capitalist* Kenya, with regional or community (ethnic), gender, sex, age and, most importantly, class, differences and orientations.

It is notable that, after spending about three pages kicking a non-existent horse and, ultimately declaring the constitutional provision a redundancy, the Taskforce declares that it has invented a new ‘lens’ through which the clause, as used in the 2010 Constitution, must be seen⁴⁵. The constitutional provisions in general, and the Bill of Rights in particular, are just one set of factors, albeit significant, that can be used to *give content* to the clause. One may be reminded that the repugnancy clause is no different from the clause that says that any law which is contrary to the Constitution is null and void.⁴⁶ This clause is equally innocuous. Whether a particular law is, or is not, is *not determined* by the Constitution. Such determination is left to a court authorised to make it, after examining that law in light of the constitutional provisions. Consequently, what the crusaders should be *intellectually* targeting are *not even those who interpret and apply* the two clauses in space-time, but the *interpretations* (the *ideas*), and the *results* they produce.

⁴⁵ Judiciary of Kenya ‘Alternative justice systems baseline policy’, 21.

⁴⁶ Article 2(4), *Constitution of Kenya*, (2010).

The authors wish to add that *all* the laws that operate in Kenya, except the Constitution, are authorised with *conditionalities*. All are subject to the Constitution. Common Law, Equity and Statutes of General Application (SOGA) are subject to written laws and 'apply so far only as the circumstances of Kenya and its inhabitants permit' with necessary qualifications. SOGA are, in addition, subject to the cut-off date of 12 August 1897. Customary Law is applied where two or more parties are subject to or affected by it, applies only in specific personal matters, and is subject to the 'repugnancy clause'. Islamic Law applies only in personal matters where both parties profess the Islamic religion. Islamic criminal law does not apply.⁴⁷ There is *no formal hierarchical relationship* between Customary Law and the English-sourced laws (contrary to the Taskforce's assertion⁴⁸), only between it and the Constitution and other written laws. The two sets of laws apply in different jurisdictional areas even by statute. Besides, the fact that the English-sourced laws are in section 3(1)(c) and Customary Law in a subsequent section 3(2) of the Judicature Act is *no evidence* of such hierarchical relationship. In any case, the Court of Appeal long ago (1987) declared that the two 'great laws' are 'complementary'.⁴⁹

VII. Conclusion

As the authors conclude this analysis, they urge that, no matter how difficult it is to define concepts used, or how controversial, fluid or confusing they are, it is still necessary, and useful, to provide and use a *consistent working definition*, even if *tentative*. In this way, those applying the concepts will avoid creating

⁴⁷ Section 3, *Judicature Act*, (CAP 8) and Articles 159 and 170, Constitution of Kenya, 2010.

⁴⁸ Judiciary of Kenya, 'Alternative justice systems baseline policy', 4. It states thusly: 'Doctrinally, the Judicature Act placed African Customary Law hierarchically as the lowest source of law after the Constitution, Kenyan Statutes, English Statutes of General Application, and Common Law', 4.

⁴⁹ In the case of *Virginia Edith Wamboi Otieno v Joash Ochieng Ongo & another* (1987) eKLR: '*The place of customary law as the personal law of the people of Kenya is complementary to the relevant written laws. The place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complimentary to the written law in its sphere.* Now suppose that exceptionally there is a difference between the customary and the common law in a matter of a personal law. First of all, if there is clear customary law on this kind of matter, the common law will not fit the circumstances of people of Kenya. That is because they would in this instance have their own customary laws. Then suppose by misfortune that in this instance those customs were held to be repugnant to justice and morality, and were thus discarded, there would be the common law to fall back upon, at least in a modified form. *In this way these two great bodies of law, for that is what they truly are, complement each other. They may be different but the way to operate them is to use them as complementary to each other without conflict* as laid down in section 3 of the Judicature Act (cap 8)', 6— <http://kenyalaw.org/caselaw/cases/view/7898> on 18March 2023 (emphasis ours).

confusion, or unnecessary controversy. It is also difficult to make logically precise recommendations or proposals when concepts lack clarity or are conflated. Whereas the Taskforce is done and dusted, so to speak, the majority of its members are members of NaSCI-AJS and will, the authors suppose, continue to be guided by the recommendations within the report. It is, therefore, imperative that going forward, NaSCI-AJS progressively clarifies any of these or any other, concepts it uses to avoid the kind of *conceptual minefield* that the Taskforce's report may have created, which may be difficult for it and others to navigate.

Administration of Justice in Nigeria: Ideological Constraints and Allied Challenges

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Abstract

It is trite that the administration of the justice system in Nigeria is confronted by diverse challenges. Among the relatively better-known challenges are delays in the dispensation of justice by the courts, corrupt practices among judicial and law enforcement officers, disrespect of court judgments by the government, its agencies and other subjects, as well as the high cost of litigation. Perhaps one factor that may not be as apparent as other challenges is the jurisprudential ideology of positivism—inherited through the transportation of the British legal system into the country via the colonial relationship with Britain. The underpinning ideology influences and informs the judgments from the courts, which tend to translate to the dispensation of ‘technical’ or legalistic justice in line with strict constructionist formats. To people traditionally attuned to a concept of justice rooted in the moral perception of fairness or good conscience, the technical nature of the justice emanating from the courts tends to raise questions and concerns as to the justness or equitability of such. Generally, these challenges and the nature of the Nigerian justice system erode the trust and confidence of the populace in the justice system, particularly the poor and less influential class’. Hence, this raises the question of whether Nigerian courts are the last hope of the common man. Against this background, this paper engages the discourse on the ideology, challenges and allied issues relating to the administration of justice in Nigeria.

Keywords: Administration of Justice, Positivism, Courts, Natural School, Equity, Fairness, Adversarial System

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I. Introduction

With human evolution into living as coordinated groups in societies of different structures, law has stood as an essential social control and regulation mechanism. Thus, according to A.O. Obilade, an eminent Nigerian legal scholar, '[e]very society, primitive or civilized, is governed by a body of rules which the members of the society regard as the standard of behaviour'.¹ Without law delineating the boundaries of acceptable and unacceptable conduct, there would be no social and normative guide and people can act according to their whims, with 'might' being 'right'. A reference to the philosophical postulation of Thomas Hobbes presents the likely distressing scenario of a society without laws and regulations in the following words:

"The consequence of this...was that if society broke down and you had to live in what he called 'a state of nature', without laws or anyone with the power to back them up, you, like everyone else, would steal and murder when necessary. At least, you'd have to do that if you wanted to carry on living. In a world of scarce resources, particularly if you were struggling to find food and water to survive, it could actually be rational to kill other people before they killed you. In Hobbes' memorable description, life outside society would be "solitary, poor, nasty, brutish, and short".²

Beyond the mere existence of laws in society lies the more crucial need for their effective and just implementation, ensuring their relevance and impact. In essence, in achieving its underlying goal of social regulation and control, there must be *justice* in the application of laws without partiality or exemption among the people. The Collins Dictionary defines justice as '...fairness in the way that people are treated' and, in a related vein, as 'the quality or fact of being just'.³ The essence of justice is aptly captured in the words of renowned Nigerian Nobel Laureate and scholar Wole Soyinka, who asserts, 'for me, justice is the first condition of humanity'.⁴ Evidently, in the unceasing drive for cohesion and orderliness in society, it is crucial that all parties to a dispute, criminal or civil, must have a sense and satisfaction of justice being manifestly done and, by extension, the society should have the fulfilment of justice being done to it

¹ Obilade, AO, *The Nigerian legal system*, Spectrum Books Ltd, Ibadan 1985, 3

² Yale Books, 'Thomas Hobbes: "solitary, poor, nasty, brutish, and short" — <<https://yalebooksblog.co.uk/2013/04/05/thomas-hobbes-solitary-poor-nasty-brutish-and-short/>> on 8 November 2022.

³ Collins dictionary, 'Definition of "justice" — <https://www.collinsdictionary.com/dictionary/english/justice> on 8 November 2022. See also, Cambridge Dictionary, 'Meaning of justice in English' —<<https://dictionary.cambridge.org/dictionary/english/justice>> accessed on 8 November 2022 which defines justice "fairness in the way people are dealt with".

⁴ Libquotes, 'Wole Soyinka quote' — <https://libquotes.com/wole-soyinka/quote/lbs8x8f>> accessed on 8 November 2022.

as a collective entity. Simply put, justice must be done to *all* in every situation. This can be illustrated in the following words of Justice Oputa of the Nigerian Supreme Court in the case of *Josiah v The State*:⁵

‘...[J]ustice is not a one-way traffic. It is not justice for the appellant only. Justice is not even only a two-way traffic. It is really a three-way traffic – justice for the appellant accused of a heinous crime of murder; justice for the victim, the murdered man, the deceased, ‘whose blood is crying out to heaven for vengeance’ and finally justice for society at large – the society whose social norms and values had been desecrated and broken by the criminal act complained of’.

Despite the legal guarantee of administration of justice in a fair manner, the practice of justice in Nigeria remains a mirage, riddled with many systematic challenges. This had led to despair in the justice system as its seen to selectively serve certain quateres of the society. By examining both systemic and systematic challenges, this paper unveils these challenges and make proposals on how to improve the justice system to realize legal guarantees.

II. Administration of Justice and Associated Issues in Nigeria

At a broad level, the concept of ‘administration of justice’ has been described as ‘the process by which the legal system of a government is executed. *The presumed goal of such administration is to provide justice for all those accessing the legal system*’.⁶ In any legal system, the judiciary occupies a crucial spot on the landscape of the administration of justice. This flows from its preeminent position in the application and interpretation of laws, its constitutionally bestowed role as the ultimate arbiter in the resolution of disputes,⁷ coupled with the trial and sanctioning of transgressors of the law. Administration of justice, vis-à-vis the judiciary, involves a setting that includes the personnel, activity, and structure of the justice system.⁸ The Court’s role in the administration of justice is ‘to ensure equality and fairness, to uphold the law, and to punish those who do wrong.’⁹

Beyond the vital role of the courts in the administration of justice, other stakeholders also have important roles to play in having and sustaining an effective

⁵ (1985) Supreme Court of Nigeria.

⁶ United Nations, (United Nations Human Rights) office of the High Commissioner, —<<https://www.ohchr.org/en/taxonomy/term/729?page=5>> accessed on 15 November 2023.

⁷ Section 6, *Constitution of the Federal Republic of Nigeria*, as amended (1999).

⁸ Futo, R ‘Administration of justice: Definition & overview’ *Study.com* — <<https://study.com/academy/lesson/administration-of-justice-definition-lesson.html>> accessed on 15 January 2023.

⁹ Futo, R ‘Administration of Justice: Definition & overview’ *Study.com* — <<https://study.com/academy/lesson/administration-of-justice-definition-lesson.html>> accessed on 15 January 2023.

and productive administration of the justice system. Principal among the roles of courts is the need for litigants, whatever their powers or positions are, to respect and abide by the judgments of courts as delivered. It is in this respect that recurrent disobedience of orders of courts by governments and others in Nigeria has been an issue of serious concern as one of the factors affecting the administration of justice in the country.¹⁰

Apart from non-compliance with court orders, there are other factors affecting the administration of justice in Nigeria. These factors, collaboratively, constitute potentially discouraging bottlenecks for aggrieved persons desirous of pursuing justice through the courts. Adekoya, a Nigerian professor of law and scholar of Constitutional Law, in a discourse on access to justice, has offered a wide-ranging elucidation of some of these factors,¹¹ which are discussed below.

One of the challenges to the administration of justice in Nigeria, as identified by Adeokoya, is the high cost of accessing courts. Aggrieved and justice-seeking litigants inevitably have to bear filing and process service charges along with other administrative expenses. Furthermore, with Nigeria's adversarial justice system that is lawyer-centred,¹² litigants would have to procure the services of lawyers who are professionally trained to navigate the complex labyrinths of substantive and procedural rules with the related technicalities, as well as the language of the courts. In a country with high poverty rates, where the prescribed workers' minimum monthly wage for government workers is seventy-seven thousand Nigerian Naira, the possibility of affording the high cost of pursuing justice through the courts can be a very daunting and discouraging factor. This can be readily inferred from the fact that professional lawyers' fees and other expenses of litigation can run into hundreds of thousands of Naira in a society where many are financially disadvantaged and engaged in unceasing struggles to meet basic daily necessities. One can also reflect on the likely multiple levels of litigation expenses in situations where a case has to go on appeal through the

¹⁰ Akinlade A, 'Disobedience to judgments and orders of the lower Court: implications for the rule of law in Nigeria', All Nigerian Judges Conference for Lower Court Judges organised by National Judicial Institute, Abuja, Nigeria, 14 November 2022; Chioma U, 'Rethinking the disobedience of court orders In Nigeria', *The Nigeria Lawyer* 19 April 2023 — <https://thenigerialawyer.com/rethinking-the-disobedience-of-court-orders-in-nigeria/#google_vignette> on 25 August 2023; Punch editorial board, 'Disobedience of court threatens democracy' *Punch* 21st February 2023 - <<https://punchng.com/disobedience-of-court-threatens-democracy/>> on 25 August 2023.

¹¹ Adekoya C O, 'Betrayal of the Poor in Accessing Justice in Nigeria: The Judas in our Midst' 103rd Inaugural Lecture, Olabisi Onabanjo University, 13 December, 2022, 23-36.

¹² Adekoya C O, 'Betrayal of the Poor in Accessing Justice in Nigeria: The Judas in our Midst' 24 and 26.

different hierarchies of court up to the Supreme Court, which is the highest and final level of court in Nigeria. In the scenario, the consequence is that many financially handicapped litigant parties may find it difficult to access or pursue justice through Nigerian courts, with a feeling that justice is not for the poor.

Other inhibiting factors to the administration of justice in Nigeria include overburdening volumes of cases with the courts, delays in adjudication and conclusion of cases and location and issue of physical access to courts by litigants.¹³ The location and physical access to courts are apt to increase the costs of litigation. Typically, high courts are located in state capitals, with divisions in other major towns; Court of Appeal divisions are in designated cities, while the Supreme Court sits only in the Federal Capital Territory of Abuja. By and large, getting to these courts for people in rural or other faraway places can occasion relatively huge expenses, constituting an addition to the basic financial requirements for litigation.

Another pervasive factor affecting the administration of justice in Nigeria is corruption. In the specific court sector, basic tasks in litigation such as filing, processing, service, entering of proofs of service, as well as getting cases assigned to courts may not be done speedily or appropriately without the tacit or express demand and giving of gratifications or inducements to court officials. Generally, a litigant or lawyer who fails to ‘play ball’ is likely to encounter frustrations of delay and other untoward experiences in their suit. Beyond the realm of courts, other stakeholders in the justice system, such as the police, have been implicated in corrupt practices. Of more serious concern is the payments of money or other forms of inducement to judicial officers and court officials to influence judgments or other judicial outcomes.¹⁴ Such has been the pervasiveness of judicial corruption in Nigerian courts that it has been a recurrent subject of adverse commentaries on diverse platforms.¹⁵

¹³ Adekoya C O, ‘Betrayal of the Poor in Accessing Justice in Nigeria: The Judas in our Midst’ 29, 30, 33.

¹⁴ Adekoya C O, ‘Betrayal of the Poor in Accessing Justice in Nigeria: The Judas in our Midst’ 35-37.

¹⁵ Aderoju T, ‘The impact of corruption on the rule of law and the effective administration of justice using Nigeria as a case study’ International Bar Association Friday 28 April 2023 — <<https://www.ibanet.org/impact-of-corruption-on-rule-of-law-Nigeria>> on 13 August 2023; Obutte P C, ‘Corruption, administration of justice and the judiciary in Nigeria February 3, 2016) — <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2727319>; Ejekwonyilo A, ‘Supreme Court justice laments corruption, inequity in Nigeria’s judiciary’, Premium Times, 23 May 2022 -<<https://www.premium-timesng.com/news/headlines/531981-supreme-court-justice-laments-corruption-inequity-in-nigerias-judiciary.html?tztc=1>> accessed on 13 August 2023.

The collective impact of the above-noted factors as challenges to the administration of justice is not far-fetched. Central is in discouraging aggrieved persons from seeking to access the courts for the pursuit of justice and, generally, making the Nigerian justice system an unattractive option in the resolution of disputes, particularly for financially disadvantaged persons. Adekoya summed this up in the following words:

[T]he challenge of the inaccessibility of the poor to justice...is an unfortunate reality in Nigeria...The result in people withdrawing from the court instead of people seeking to access the court because those who have had a frustrating experience of the civil justice system or who have someone very close to them, who have gone through similar ordeals, often vow never to seek formal justice with the court'.¹⁶

Akinola Aguda, a renowned Nigerian jurist, has commented along a similar line, stating:

'The whole system of administration of justice is heavily weighted against the vast majority of the people, who are unable to afford the expense of any search after justice. The poor can hardly be expected to enter the temple of justice to worship therein and not even the 'not-too-poor' can hardly be expected to pursue his legal rights to a successful end in the system we run. If however the poor is foolhardy enough to enter the temple of justice, he and his family may regret it for the rest of their lives. For in the process – in the pursuit what he considers to be just – he may become bankrupt and die a pauper. Because, no matter how little a claim may be if one of the parties is a wealthy person or is the State, such a case may traverse eight courts in between 5 and 20 years'.¹⁷

The factors militating against the administration of justice in Nigeria, as discussed above, no doubt, should be of serious concern. Though, while they may not be eradicated, there have been measures to address them. Among others, the requirement by judicial officers to submit quarterly reports on concluded cases is one. It is expected that the need for compliance would propel judges to avoid lethargy in adjudication of disputes before them; in that respect, they would be unreceptive of unwarranted 'delay tactics' by lawyers and strive to undertake trials with dispatch, without compromising due process. The introduction of the front-loading process and case-management mechanism in different Nigerian jurisdictions, encompassing pre-trial conferences and other components, is another device geared towards improving the speed of trial of cases.¹⁸

¹⁶ Adekoya C O, 'Betrayal of the Poor in Accessing Justice in Nigeria: The Judas in our Midst' 46-47.

¹⁷ Aguda A, [as adopted from Adekoya C O, 'Betrayal of the poor in accessing justice in Nigeria: The Judas in our Midst' 38.]

¹⁸ Alli N, 'The Evolving Practice of "Frontloading" in Civil Actions in Nigeria' Afe Babalola University, 27 June, 2013 — <<https://www.abuad.edu.ng/the-evolving-practice-of-frontloading-in-civil-actions-in-nigeria/>> on 13 August 2023); Iguh A, 'The Front Loading Concept: An appraisal of

There are some means of ameliorating the huge financial burdens faced by litigants in Nigeria. One is the *legal aid* scheme.¹⁹ Another is the increasing intervention of civil society groups and activists in taking up the grievances of helpless persons in pursuing their cases through the courts, which can assist financially disadvantaged aggrieved persons to pursue justice through the courts. The aspect of the intervention by civil society groups or activists can be illustrated by the widely reported case of Mrs. Georgina Ahamefule. The litigant, a female worker in a hospital, was aggrieved by her dismissal from her job, based on her HIV-positive status. A civil society group took up her case to court, fighting to a successful conclusion, with the court awarding a substantial sum of 7 million Naira in her favour as damages.²⁰ While the avenues for assisting financially handicapped persons may not be far-reaching or available to all, they remain beacons of hope to aggrieved persons lacking means of pursuing justice.

With disrespect of court orders perpetrated by powerful persons and groups, including the government, it may be difficult to address. Nonetheless, it is hoped that the personal consciences of those holding powers of office and other powerful individuals would continue to spur them to respect court orders and the associated rights of affected persons, as well as the collective interest of the society. At different times, reports emerge of judicial officers being sanctioned for corrupt practices. It can be reasonably expected that such situations would serve as deterrence to others, facilitating a notable reduction of incidents of judicial corruption.

Beyond all the above issues, one other crucial factor affecting Nigeria's administration of justice system is the legalistic dispensation of justice by courts, which tends to confuse people as to whether *real* or *natural* justice has been done in actually assuaging the grievances of affected persons. This issue relates to the jurisprudential structure of the Nigerian justice system; the authors discuss the system and allied issues subsequently.

the future of civil litigation in the High Courts within the application of the new rules.' *Researchgate*, —<https://www.researchgate.net/publication/317042134_the_front_loading_concept_an_appraisal_of_the_future_of_civil_litigation_in_the_high_courts_within_the_application_of_the_new_rules/citation/download> on 13 August 2023.

¹⁹ Banire and Associates, 'Legal aid in the administration of justice in Nigeria' —<https://mabandasociates.com/pool/Legal_Aid_in_the_admin_of_justice_Nigeria.pdf> 13 August 2023.

²⁰ Channels Television, 'Court orders hospital to pay unlawfully dismissed HIV positive staff N7 million' —<<https://www.channelstv.com/2012/10/10/court-orders-hospital-to-pay-unlawfully-dismissed-hiv-positive-staff-n7-million/>> on 13 August 2023.

III. Equitable Versus Legalistic Justice

In pre-colonial Nigerian societies, the resolution of disputes was largely based on reconciliatory, arbitral and mediatory approaches.²¹ Generally, dispute resolution was aimed at achieving a ‘win-win’ outcome based on fair and just adjudication, in which none of the disputants would feel disgruntled, and the public would see that justice had been manifestly done.²² Ascertainment and upholding of *truth* is a fundamental component of dispute resolution in the pre-colonial setting, which imposed a burden on stakeholders to strive for truth and fairness. In pre-colonial societies, governance, social regulation, and control, including dispensation of justice, involved human participators along with supernatural forces, such as deities and ancestral forces, believed to be overseers and monitors of human affairs. Rooted in religious, superstitious, and related beliefs, the fear of incurring the impartial wrath of supernatural forces—seen as arbiters of truth and enforcers of justice—served as a powerful deterrent against anti-social or unethical acts, including the perversion of justice.²³ Two scholars of History, Ajayi and Buhari, capture the foregoing narrative thus,

[‘Truth] is the major significance of conflict resolution. How would the other opponents know that there will be no partiality? Both disputants must be truthful. The mediator, arbitrator, judge must also be truthful, the presence of the ancestral forces is a factor; some may collapse or be forced to say the truth because of the ancestral forces.’²⁴

Ajayi and Buhari also note that ‘[i]ndeed, it is a cardinal principle of justice that the common man must see the whole process of adjudication as being fair to all parties’.²⁵ In this context, *justice*, as perceived through the prism of evaluating common people, is a key parameter in gauging the integrity of the dispensation of justice in specific cases, and the administration of justice at large. In the Nigerian pre-colonial settings, the involvement of dreaded supernatural forces in the justice system, as a component of sociological engineering, presented a scenario in which stakeholders tended to strive for truth and justice. Thus,

²¹ Ajayi A T and Buhari L O, ‘Methods of Conflict Resolution in African Traditional Society’ 8 (2) *African Research Review*, 2014, 138-157; Oyelade O S ‘Conflict Resolution and Human Rights in Traditional African Society’ 45, *Indian Journal of International Law* 2005, 209.

²² Ajayi A T and Buhari L O, ‘Methods of Conflict Resolution in African Traditional Society’, 139.

²³ Odunsi, B ‘Crime detection and the *Psychic Witness* in America: An allegory for re-appraising indigenous African criminology’ in O Onazi (Ed.), *African legal theory and contemporary problems – Critical essays*, Springer, New York, 2012, 265-288.

²⁴ Ajayi A T and Buhari L O, ‘Methods of conflict resolution in African traditional society’, 142.

²⁵ Omoleye B O and Eniola B O, ‘Administration of justice in Nigeria: Analysing the dominant legal ideology’ 10 (1) *Journal of Law and Conflict. Resolution*, 2018, 1.

whatever the outcome of any adjudicatory process, the people were apt to be satisfied that the process had been fair and appropriate.

Generally, beyond the scope of pre-colonial Nigeria, the fundamental principle of justice that ‘the common man must see the whole process of adjudication as being fair to all parties’ has been of long origin and remains fundamental in contemporary times. As highlighted in the very popular and evergreen dictum of Lord Hewart, the then Lord Chief Justice of England, in the case of *Rex v. Sussex Justices*,²⁶ ‘It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.’²⁷

Meaningful and beneficial dispensation of justice, therefore, should not be limited to the mere technical perception of judges, legal professionals or other legalism-minded persons that justice has been done following the *prescribed rules*. Rather, the situation should be that the adjudicatory outcome would readily be seen by the people as being fair to all the parties in terms of the basic human notion of natural justice, equity and good conscience. It is in this respect that the authors examine the prevalence of technical or legalistic rulings in Nigerian courts and their impact on the true essence of justice administration.

IV. Nigeria’s Adversarial Justice System: Legalistic Justice and the Question of ‘Fairness’ in Context

To recap, the largely mediatory and conciliatory approach of the justice system of pre-colonial Nigeria facilitated a perception of *fairness* to which the people could relate. As noted earlier, this could also be attributed to factors including ‘fear of the supernatural’. One other notable factor is that, as a whole, the legal system, including the dispensation of justice, revolved around customary law, made and accepted by the people as binding on them. The reason why customary law has been described as ‘a mirror of accepted usage’.²⁸ Along similar lines, Lord Atkins had noted, ‘...it is the assent of the native community that gives a custom its validity and, therefore, barbarous or mild, it must be shown to be recognised by the native community whose conduct it is supposed to regulate’.²⁹ The general nature of Indigenous customary law and its role in the pursuit of justice has been summed up thus:

²⁶ *Rex v. Sussex Justices* (1924) United Kingdom High Court.

²⁷ Datar A ‘The origins of “Justice must be seen to be done”’, *Landmark judgements*, 2020 — <<https://www.barandbench.com/columns/the-origins-of-justice-must-be-seen-to-be-done>> on 20 May 2023.

²⁸ *Owonyin v Omotosho*, (1961) Federal Supreme Court of Nigeria.

²⁹ *Eshugbayi Eleko v Government of Nigeria* (1931) The United Kingdom.

‘...the organic or living law of an 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 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’.³⁰

British colonisation of Nigeria, among other impacts, led to the introduction of the foreign English legal system and its approach. One consequence of the new order was the subjugation of the indigenous customary law system to the English system revolving around the operation of English statutes, case law, and the received English Law.³¹ As a component of the English legal system, the *adversarial system*³² of litigation and adjudication of disputes came into operation in the courts, overshadowing the non-adversarial approach of the pre-colonial system. Put differently, litigation, adjudication of disputes, and dispensation of justice, through the conventional courts, assumed the outlook of fierce contests in a win-or-lose scenario between parties. Ultimately, the prevailing side would emerge as the victor, ‘taking all’ and the losing side, the vanquished.

As typical of officially regulated contests, Nigeria’s adversarial justice system is set in a legal framework of strict substantive and procedural rules, which direct and regulate the forensic contests between the adversaries. Any party that litigates on a claim in a manner that is non-compliant with the substantive and procedural rules stands to fail in getting redress or justice, notwithstanding the basic truth, merit or moral sanctity of his position in the litigated dispute. By and large, the straitjacketing rules of administration of justice, in such situations, result in legalistic or technical justice, as strictly formatted within the architecture of the procedural rules. Judicial outcomes in such dispensation may not readily align with the perception and mindset of the people as *real* justice in terms of equity, fairness and good conscience. This situation has been a cause of vitriolic attacks on some judgments of the Nigerian judiciary, even at the highest level of the Supreme Court,³³ more so in a society where the judiciary carries a taint

³⁰ *Oyewunmi Ajagunghade II v Ogunesan* (1990) Supreme Court of Nigeria.

³¹ Odunsi B ‘Sources of Nigerian law and the relegation of customary law in perspective’ 1 *Crescent University Law Journal* 2016, 151-167.

³² Adekoya C, ‘Betrayal of the Poor in Accessing Justice in Nigeria: The Judas in our Midst’ 26-27.

³³ Kperogi F A ‘Lawan and Supreme Court of Shameless Judicial Bandits’ —<<https://www.farooqkperogi.com/2023/02/lawan-and-supreme-court-of-shameless.html>> on 21 May 2023; Ezeani A ‘Supreme Court vs. Farooq Kperogi & others’ *The Sun*, 14 February 2023, — <<https://sunnews-online.com/supreme-court-vs-farooq-kperogi-others/>> on 21 May 2021; Premium Times, ‘Ahmad Lawan Judgement: Supreme Court angry over attacks on judges, warns critics’ *Premium Times*, 11 February 2023 — <<https://www.premiumtimesng.com/news/581230-ahmad-lawan-judgement-supreme-court-angry-over-attacks-on-judges-warns-critics.html>> accessed on 21 May 2023.

of corruption with people believing that justice can be obtained by the ‘highest bidder’.³⁴

It can be argued that the displeasure and criticisms of ‘unacceptable’ judicial decisions arise because the critics lack the professional or technical minds of jurists and lawyers in the process of administration of justice.³⁵ The criticisms can also be attributed to the biases of the critics, based on inherent displeasure with decisions that are unfavourable to them.³⁶ Whatever the case is, recurrent condemnations of judicial decisions remain an issue of concern in the administration of justice projects. The courts may be self-convinced of having done justice within the prescribed rules. However, public vituperations indicate that the justice purportedly done had not been seen as manifestly and undoubtedly done in their esteem and evaluation.

Scholarly and allied literature offer instances of Nigerian judicial decisions that appear rather strictly technical and are difficult for the public to perceive as being fair. Some examples are considered in the following section for illustration.

V. Legalistic Judicial Decisions Based on Strict Constructionist Approach

Omoleye and Eniola offer some notable Nigerian cases decided in the mould of strict legalism, attracting the perception of being harsh or inequitable in the outcome. One is the case of *Peoples Democratic Party (PDP) v Congress for Progressive Change (CPC) and 410rs*.³⁷ In contention before the Supreme Court was the provision of section 285(7) of the Constitution of the Federal Republic of Nigeria, 1999 (‘Nigerian Constitution’), which provides: ‘An appeal from the decision of an election petition tribunal or court of Appeal in a matter shall be heard and disposed of within sixty (60) days from the date of delivering the judgment of the tribunal or court of Appeal’.

³⁴ Kperogi F A ‘Lawan and Supreme Court of Shameless Judicial Bandits’ []

³⁵ Enumah A ‘Supreme court replies critics, says its silence must not be taken for weakness or cowardice’ ThisDay, 12 February 2023 — <<https://www.thisdaylive.com/index.php/2023/02/12/supreme-court-replies-critics-says-its-silence-must-not-be-taken-for-weakness-or-cowardice/>> accessed on 22 May 2023: “The Supreme Court yesterday reacted in anger to the attacks on its judges over the recent judgments they delivered, warning that those who had been “venting convoluted anger” were ignorant of the law.”

³⁶ Premium Times, ‘Ahmad Lawan Judgement: Supreme Court angry over attacks on judges, warns critics’, 11 February 2023 — <<https://www.premiumtimesng.com/news/581230-ahmad-lawan-judgement-supreme-court-angry-over-attacks-on-judges-warns-critics.html?tztc=1>> accessed on [date].

³⁷ (2011) Supreme Court of Nigeria.

Arising for resolution, thereby, was whether the sixty-day period in the provision would include court vacation periods, Saturdays and Sundays, in determining whether a matter falling beyond the period became statute-barred or otherwise. Engaging the issue, the appellant's counsel contended that the provision should be liberally construed to exclude vacation periods, Saturdays and Sundays. Rejecting the contention, however, the court held that vacations, public holidays, Saturdays and Sundays could not be excluded in the interpretation of the subsection. The rationale of the court was that if the makers of the Nigerian Constitution intended to exclude the periods, such would have been expressly stated in unambiguous terms. Ultimately, the suit was struck out for being statute-barred.

Omoleye and Eniola, in strong disagreement with the court's approach and decision, poignantly remark:

'A liberal and progressive approach, one which advances the cause of democratic value would have reckoned that vacation period and weekends should not be included in the sixty (60) days' time-frame even when such was not expressly stated in the constitution. It could not have been the intention of the legislature that vacation periods and weekends should be included in the sixty-day frame... The vacation period certainly was not caused by the parties involved in this matter and so the ruling was unjust'.³⁸

Another is the case of *Ifezue v Mbadugha*.³⁹ The matter in issue was the construction of section 258(1) of the 1979 Nigerian Constitution, which provides, 'Every court established under this Constitution shall deliver its judgment not later than three months after the conclusion of evidence and final addresses and furnish all parties to the case or matter with duly authenticated copies of the decision on the date of delivery'.

The Court of Appeal had given judgment beyond the prescribed three-month deadline, which was one of the key issues on which the appeal before the Supreme Court was based. Arising for determination in the case was whether the three-month timeline was mandatory or directory. However, taking a strict constructionist and legalistic approach for a literal interpretation of the provision, the Supreme Court's majority decision was that the prescribed time was mandatory, and on that basis, nullified the Court of Appeal judgment, with a directive of remittance of the case back to Court of Appeal for hearing before a different panel. Notably, Bello, a Justice of the Supreme Court, differed from the majority decision in a dissenting judgment. It was the position of the learned

³⁸ Omoleye B O and Eniola B O, 'Administration of justice in Nigeria: Analysing the dominant legal ideology', 5.

³⁹ (1984) Supreme Court of Nigeria.

Justice that strictly sticking to the provisions of section 258(1) in holding it as mandatory would occasion injustice to the parties. Along the scope of the dissenting judgment, one can note the hardship to be faced by the parties for an act or omission of the lower court for which the parties were not responsible. The parties, in the light of the majority decision, would have to incur more expenses and longer time in having to re-undertake the appeal afresh, among other consequences, and, possibly, back to the same Supreme Court.

Worthy of note also is the well-known case of *Savannah Bank Ltd v Ajilo*.⁴⁰ The case centred on the validity of a deed of assignment executed without the requisite consent under the Nigerian *Land Use Act*, section 22 of which provides:

'It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained...?'

In this case, Savannah Bank, a mortgagee sought to foreclose a property used as collateral by Ajilo, the mortgagor upon default of the loan amount. Ajilo on learning of the foreclosure-initiated proceedings at the high court in Lagos, seeking declaration that the deed of mortgage be invalidated for the reason that no consent had been obtained prior to execution of a deed from the Governor, as required by section 22 of the Land Use Act, rendering the transaction null and void. The high court ruled in Ajilo's favor, a decision that was upheld by the appellate court and the supreme court. This holding was manifestly arrived at on a strict literal interpretation and application of the law. The mortgagor, a beneficiary of a loan and a holder of the statutory right of occupancy invalidated the transaction on technicalities exposing the bank to non-recovery of its loan amount.

The case of *Calabar Central Cooperative and Credit Society Ltd v Ekpó* decided after *Savannah Bank Ltd v Ajilo*, along similar lines, also warrants attention. To illustrate the discourse between legalistic justice and *real* justice, it is pertinent to present abridged facts of *Ekpó's* case.⁴¹ The plaintiff was an employee of the defendant company. Following his arrest over allegations of defrauding his employer of eight hundred thousand Nigerian Naira, he signed a deed transferring his house to the defendant in the form of 'plea-bargaining' to avoid prosecution. Ironically, about eight years later, he sued to declare the property transfer void and invalid on the grounds of the absence of the Governor's

⁴⁰ (1989) Supreme Court of Nigeria.

⁴¹ As adopted from Omoleye B O and Eniola B O, 'Administration of justice in Nigeria: Analysing the dominant legal ideology', 5.

consent, contrary to section 22 of the Land Use Act, as was the case in *Savannah Bank v Ajilo*. Ultimately, the case went on appeal to the Supreme Court, where the court upheld Ekpo's contention regarding the invalidity of the property transfer he made, based on non-compliance with section 22 of the Land Use Act.

The *Ekpo* case had been the subject of strong commentaries. Commenting on the case, Emeka Chianu, a Professor of Law, commented:

"This decision is simply calamitous and retrograde. If it is not speedily reversed it could smother commerce...[E]ither unconsciously or unavowedly, the Supreme Court, in its eagerness to achieve a desirable result on the facts flung itself headlong into a narrow conception of the consent issue..."⁴²

The technical dispensation of justice resulting from a strict judicial constructionist approach has also been evident in other cases that may not have garnered significant media or public attention and reviews. One example is the case of *Olubunmi Iranlade v Alfa Olomowewe & Six Ors*.⁴³ Briefly, the central subject matter of the case was the claim of ownership of a parcel of land by the claimant, Iranlade, an acknowledged illiterate woman. In need of finances for various purposes, she sought a loan of sixty-five thousand Naira from the 3rd Defendant, for which she understood that the disputed land would serve as security for repayment. Contrary to her expectations, the 1st to 3rd defendants misled her into signing a sale and transfer of the land to the 3rd Defendant. Upon realising the fraud and the failure of preliminary measures to rectify the situation, she sued, praying to the court for the nullification of the purported sale/transfer transaction and restoration of her land.

The defendants filed their defence and joined issues with the Claimant, but at some point, as indicated in the court's records, they abandoned the case and withdrew from the court's proceedings. After a protracted delay of approximately twelve years, the court ruled in favour of the claimant on Thursday 23 May 2013 concerning the case filed in 2001.

The Defendants filed an appeal, *Alpha Olomowewe & Ors (Appellants) v Mrs. Olubunmi Irinlade (Respondent)* suit no. CA/IB/348/2013⁴⁴, against the judgement of the High Court at the Court of Appeal, Ibadan Division. After another stretched time of about six years, judgment on the appeal was delivered on Tuesday, 9 July 2019. The central issue raised and canvassed by the appellants was that the High Court failed to issue a *hearing notice* to them before commencing

⁴² Omoleye B O, Eniola B O, 'Administration of justice in Nigeria', 5.

⁴³ (2001) High Court of Ogun State, Nigeria. Unreported.

⁴⁴ (2013) Court of Appeal Nigeria. (Unreported)

the hearing of the case and thereby deprive them of their right to a fair hearing. The Court of Appeal concurred with the appellants and ultimately declared the High Court judgement a nullity and set it aside.

To the appellants and, perhaps, adherents and protagonists of strict judicial legalism, the outcome of the appeal can be described as a ‘smart’ forensic move. That is, despite the lower High Court’s finding and holding that the appellants abandoned its proceedings in which they had filed submissions and participated up to a point—a fact which propelled the court in proceeding with the trial, with reliance on pertinent legal authorities. Due to some reasons, particularly that the fatal default in issuing a hearing notice was not the court’s fault nor under its control, the Court of Appeal’s decision would be considered harsh and unfair. This conclusion resonates with a wide range of people who perceive justice from the spectrum of natural fairness. However harsh and unfortunate the situation may be, it stands as a sombre and stark reality of Nigeria’s adversarial justice system operated in a strict legalistic framework.

VI. Natural Law Theory and Legal Positivism: The Issue of the Dominant Ideology in the Nigerian Justice System

Historically, ideological foundations of legal systems have been discussed in the scope of some jurisprudential propositions or theories postulated by different schools of thought.⁴⁵ Principal among these are *Legal Positivism* and *Natural Law* theories. Generally, the scope and operation of any legal system, including the administration of justice vis-à-vis disposition of judges in the interpretation and application of laws, depend on the operative or predominant jurisprudential ideology in place.

Simply, the drive of legal positivism is to

‘concentrate on the detailed but careful analysis of legal concepts with view to determining their theological nexus and function in a system of law. All ethical considerations must accordingly be excluded from any legal analysis, morals have nothing to do with law and it is no business of the lawyer to concern himself with the end or purpose of law which is peculiarly a function of the legislator’.⁴⁶

In essence, legal positivism focuses on legalism devoid of sentimental, moral, ethical or metaphysical considerations, with a concentration on the bare analysis of law as existing. Furthermore, the strict constructionist approach in

⁴⁵ Elegido J M, *Jurisprudence*, Spectrum Books Limited, Ibadan, Nigeria, 1994, 19-81.

⁴⁶ Omoleye B O, Eniola B O, ‘Administration of justice in Nigeria’, 3.

literal dispassionate interpretation and application of law in judicial adjudication of cases is a feature of legal positivism. Along this axis, as a reflection of the legalistic dispensation of justice in Nigeria, Hon. Justice Belgore M B, a respected Nigerian jurist, notes that: ‘A judge is obliged to enforce the law laid down by the legislature or created by a higher court whether such law is unfair, absurd or even dangerous. It is justice according to law, not necessarily according to justice’.⁴⁷

In justifying its adoption, it has been argued that legal positivism facilitates certainty and predictability of law. On the contrary, it has also been noted that, by its nature, the ideology unduly constrains judges and reduces their capacity for flexibility often needed to achieve the end of social justice.⁴⁸

In comparison, Natural Law, in theoretical configuration, focuses on justice and fairness in the nature and operation of law. While comprising of diverse postulations, the key tenet is about law achieving social justice; this flows from an objective, comprehensive and rational enunciation of its basic ideas geared towards practical reasonableness in ordering human life and community.⁴⁹ In highlighting the essence of Natural Law, the position is that law is not law unless it is just, and in another respect, that an unjust law is a perversion of justice.⁵⁰ In perspective, the Natural Law approach, as a legal system ideology, offers a more veritable disposition for the attainment of fairness and *real* justice, compared with Legal Positivism, which propels courts into applying law ‘whether such law is unfair, absurd or even dangerous’.⁵¹

Substantively, legal positivism is the bedrock of the Nigerian administration of the justice system; this has been reflected in the strict constructionist approach of the courts.⁵² The ideological leaning of Nigerian courts has been particularly highlighted in the following commentary.

‘Classical English Positivism which Nigerian judges and jurists have inherited from colonial masters never gave any serious thought to the question of justice as part of the definition of law or even as a concept to which law should direct its attention. And yet in modern times, people have come to the realization that law in the nature of rules, orders and so on must have justice as its main purpose’.⁵³

⁴⁷ Belgore M B, ‘Constraints in the Administration of Justice’ a paper presented at the Judges conference, Abuja, 1999 – as adopted from Omoleye B O and Eniola B O, ‘Administration of justice in Nigeria: Analysing the dominant legal ideology’ 4.

⁴⁸ Omoleye B O and Eniola B O, ‘Administration of justice in Nigeria’, 3.

⁴⁹ Omoleye B O and Eniola B O, ‘Administration of justice in Nigeria’, 3.

⁵⁰ Omoleye B O and Eniola B O, ‘Administration of justice in Nigeria’, 3.

⁵¹ Belgore M B, ‘Constraints in the Administration of Justice’ []

⁵² Belgore M B, ‘Constraints in the Administration of Justice’ []

⁵³ Akinola T, ‘Poverty, Law and Justice’ in Elias and Jegede M (eds), *Jurisprudence*, MIJ Pub., Lagos, 433.

Based on the strict constructionist approach, it has poignantly been stated of Nigerian judges that, '[w]hen confronted with a choice between applying law *de lege lata* and law *de lege ferenda*, the majority of the judges would opt for the former in accordance with the strict constructionist legal ideology which they have imbibed'.⁵⁴

In summary, colonialism introduced the English legal system and its administration of justice to Nigeria. Unlike the relatively simpler pre-colonial approach, this system imposed a framework characterised by technical legal rules and a strong inclination toward legal positivism as its underlying jurisprudential ideology. This influence is evident in the judicial decisions of Nigerian courts, as reflected in previously examined cases—many of which have fallen short of public expectations of justice and fairness.

Regardless of the guiding ideology of a justice system, judges can—and should—endeavour to uphold substantive justice rather than a purely legalistic approach rooted in the rigid application of laws and rules. Put in another perspective, in relation to the words of Justice Belgore, judges should not deliver justice in the harsh manner of 'justice according to law, not necessarily according to justice'. Similarly, they ought not to summarily enforce 'the law laid down by the legislature or created by a higher court whether such law is unfair, absurd or even dangerous'.⁵⁵ Along this line, there have been notable expositions by eminent Nigerian jurists on the need to strive for real justice even in the framework of the positivist jurisprudential ideology underpinning the Nigerian justice system. In one case, *Oputa JSC*, a renowned Nigerian Justice of the Supreme Court, reflected on the essence of substantive justice, as against technical justice, in positing that a court is not a mechanical or automatic calculator. Rather, it is a court of law dealing with varying situations and applying the same law to these situations to do justice in each situation according to its peculiar surrounding circumstances. In a related vein, the jurist pronounced himself thus:

'The picture of law and its technical rules triumphant, and justice prostrate, may, no doubt, have its judicial admirers but the spirit of justice does not reside in forms and formalities, nor in technicalities; nor in the triumph of the administration of justice to be found in picking one's way between pitfalls and technicalities. Law and its technical rules are to be but a handmaid of justice and legal flexibility'.⁵⁶

⁵⁴ Oyeboade A, *Law and Nation Building: Selected Essays*, Nigeria Center for Political and Administrative Research (CEPAR), Ikeja, Lagos, Nigeria, 2005, 134.

⁵⁵ Belgore M B, 'Constraints in the Administration of Justice' []

⁵⁶ Omoleye B O and Eniola B O, 'Administration of justice in Nigeria', 6.

The operation of the emasculating ideology of legal positivism in the Nigerian legal system should not be a barrier to substantive justice. With the proper mindset, commitment and courage, a judge can avoid being mechanical in an adjudicatory process and strive to achieve real justice and fairness based on the circumstances of each case in the framework of the prescribed rules – even at the risk of a charge of ‘judicial activism’ or ‘judicial radicalism’. This relates to the declaration, attributed to an Austrian Jurist, Eugen Ehrlich, that ‘there is no guarantee of justice except the personality of the judge.’⁵⁷ In this context, it has been written of Lord Denning, a foremost jurist of the English legal system, on which Nigeria’s system is patterned:

‘He looks at law as an instrument of doing justice, doing justice now in the case before him which is founded on what majority of right-thinking people regard as fair solutions to justice and which gives them confidence that those occupying the judgment seat do not live in a different world of ideas from their own and understands their hopes and anxieties. The belief that law is instrument of doing instant justice is the explanation of Lord Denning’s often misunderstood radicalism...He thinks of the result before he considers the legal reasoning on which it was to be founded. If the results to which established legal doctrines leads is obviously unfair and out of touch with what ordinary people would expect to be law, he will examine the principles in order to ascertain whether they really compel an injustice solution and after, this method will enable him to arrive at an answer which is more equitable to modern need’.⁵⁸

The drive for meaningful justice in Nigeria does not lie solely in the formulation and operation of legal rules, propelling strict legalistic justice dispensation. It extends to the personality and disposition of judges as well as the mindset of other stakeholders, including parties to cases. Therefore, the existence of guiding rules or the absence of directives should not be a harbinger of injustice in any form.

VII. Administration of Justice in Nigeria: Matters Arising

Generally, there is a need for general improvement in Nigeria’s justice system. The role of judicial officials as key role-players in the system has been addressed in different dimensions. To briefly recap, for effectiveness, judicial officials need to eschew corruption, bias, unwarranted delays in adjudicatory processes and other unwholesome acts that taint the administration of justice in the country. Likewise, the technical and strict constructionist approach embedded in the positivist ideology of the country’s justice system needs to be modified to imprint

⁵⁷ Omoleye B O, Eniola B O, ‘Administration of justice in Nigeria’, 3.

⁵⁸ Omoleye B O, Eniola B O, ‘Administration of justice in Nigeria’, 6.

a human face in the dispensation of justice, with a drive for fairness rather than mere technical justice. Poignantly, it has been declared that '[t]he approach of strict construction of statutes has increasingly made Nigerian Judiciary detached from and even alienated the people. The institution is fast becoming irrelevant to the social conditions, aspirations and national development requirements'.⁵⁹ The positivist ideology of the Nigerian legal and justice system should not be an excuse for Nigerian judges to dish out judgments that the evaluating public largely finds devoid of fairness and equity. As noted in previous parts of this paper, the feasibility of *real* justice being done in the framework of the ideology has been highlighted with references to the veritable positions of eminent jurists such as Lord Denning, Justice Oputa and Justice Eso, among others, who have had to operate in the framework of the same positivist justice system. Essentially, there is a need for a paradigm shift on the part of judicial officials in Nigeria to ensure that justice should not only be done but should manifestly and undoubtedly seen to have been done.

Beyond judicial officials in the court system, other stakeholders have roles to play in instilling confidence in the justice system. The need to respect and abide by court judgments by the government and all affected by such judgments has also been emphasised. Apart from that, there is a need to avoid invocation of tribal, religious, political, affiliations or other sentiments by sections of the public when transgressors of law are made to face trials for crimes. Resort to such sentiments tends to put unwarranted pressure on the justice system in *prima facie* colouring legitimate trial processes such as witch-hunting, vendettas and the like, which may affect the effective dispensation of justice. The public should generally have an attitude of permitting the machinery of justice to run unencumbered.

The unsatisfactory state of the Nigerian justice system, vis-à-vis the related challenges or deficiencies, has been a source of widespread lack of confidence or distrust in it. Consequently, the pursuit of justice through law enforcement and the court systems has largely been an unattractive option for aggrieved persons, particularly, members of society who lack the financial capacity and influence to fight their causes. In reality, law enforcement agencies and the courts are avenues taken or resorted to when it is strictly inevitable and, ostensibly, with mixed expectations. Frustrations with Nigeria's court system, notably, have spawned scathing questions on the legitimacy of Nigerian courts as the 'last hope of the common man',⁶⁰ with some, derogatorily labelling the courts as the '*lost hope* of

⁵⁹ Omoleye B O, Eniola B O, 'Administration of justice in Nigeria', 6-7.

⁶⁰ Anegebe A, 'Is Nigerian Judiciary Still the Hope of The Common Man?' Global advocacy for Afri-

the common man'.⁶¹ The displeasure with the Nigerian justice system has even resonated beyond the country's frontiers; among others, this has been reflected in reported refusal of travel visas to judges by some countries, based on perceived questionable direct or indirect roles of such judges in controversial decisions.⁶²

Lack of confidence in the Nigerian administration of justice system, naturally, would foster some unpleasant outcomes. One, people who are helpless in pursuing redress through the system are apt to leave their grievances and pains, unaddressed by the human justice structure, to God to 'fight' for them. Nonetheless, such people are apt to have bottled-up discontentment and anger with the whole system of governance and society for their failure to come to their aid as necessary. A byproduct of such scenarios is that unscrupulous persons may intensify their impunity in taking advantage of the weak who cannot fight for themselves. A scholar has forlornly noted in this respect,

[I]mpunity is one of the main factors emboldening violators of rights because they are not brought to account. It is worse when the aggressor wears the victim out by sheer exploiting the machinery of justice against the victim or using the law enforcement machinery to silence him/her. Some even flaunt this machinery to let the victim know that there is absolutely nothing he she can do knowing full well that the poor cannot have access to redress mechanism through the court'.⁶³

In summation, violators of the law, with a feeling of immunity from legal sanctions under the justice system, tend to be further propelled to engage in misdeeds. Unceasing and regular incidents of diverse crimes such as robberies, banditry, ritual killings, land-grabbing, and financial frauds in Nigeria stand as attestation. In another aspect, in fighting back, aggrieved citizens, distrustful of the justice system, are apt to take laws into their hands, resorting to extra-legal acts such as mob lynching of apprehended offenders or other forms of violence in addressing personal disputes instead of opting for the making recourse to the justice system. The prevailing mindset is that resorting to the justice system would be 'a waste of time' as the offenders would likely walk free ultimately.

can affairs, 6 May 2019 — < <https://globaladvocacyafrica.org/is-nigerian-judiciary-still-the-hope-of-the-common-man/> > accessed on 27 November 2022.

⁶¹ Omirhobo M E 'Nigerian judiciary: Lost hope of the common man' *The Guardian* 12 November 2021 — <<https://guardian.ng/opinion/nigerian-judiciary-lost-hope-of-the-common-man/>> accessed on 11 January 2023.

⁶² Wale Odunsi W 'Justices who declared third-runner up winner refused US visas - Donald Duke' *Daily Post* 16 February 2023 — <https://dailypost.ng/2023/02/16/justices-who-declared-third-runner-up-winner-refused-us-visas-donald-duke/> on 26 August 2023; Akinsuyi T 'US Government Denies Visa To Justice Kekere-Ekun' *Independent* 17 February, 2023 -<<https://independent.ng/us-government-denies-visa-to-justice-kekere-ekun/>> accessed on 26 August 2023.

⁶³ Adekoya C O, 'Betrayal of the Poor in Accessing Justice in Nigeria', 49.

VIII. Conclusion

It cannot be said that the Nigerian administration of the justice system is *totally* bad or utterly dysfunctional. Systems of other countries, including developed ones, are not infallible, considering reports of miscarriages of justice at different times.⁶⁴ The pre-colonial justice system, despite its noted values and potentials, had its instances of abuses and injustices. This, for example, can be inferred from two long-existing proverbs of the Nigerian Yoruba group: '*Ori yeye ni mogun, ti aise lo po*' (many that have been beheaded for alleged wrongdoings are innocent)⁶⁵ and '*Oluwa lo m'ejo da*' (Only God, as an omniscient being, can be an infallible adjudicator or judge).⁶⁶

Overall, the central issue is that Nigeria's administration of justice system is beset with some serious challenges which affect its attractiveness as a mechanism of dispute resolution or pursuit of redress among the common people. Thus, there is a pressing need to address the challenges to improve the outlook of the justice system. It is in that vein that a call is made to all participators and stakeholders in Nigeria's administration of justice. Factors, such as costs of litigation and others, which inhibit accessibility to court by financially handicapped people should be pragmatically addressed. Financial limitation should not be a barrier to justice for any aggrieved person or be a cause for any person to suffer injustice. Put differently, justice should not be available to only those who can afford its pursuit to the ultimate end. A recent criminal case serves as a touching illustration. The accused person, following conviction at the lower courts, had to fight up to the apex Nigerian Supreme Court before he could get justice in being found innocent of the criminal allegations against him. Reportedly, the lawyer of the defendant

⁶⁴ U.S. Department of Justice, Office of Justice Programs, 'USA and UK responses to miscarriages of justice' in Adler JR (ed), *Forensic psychology: concepts, debates and practice*, Willan Publishing, Uffculme, United Kingdom, 2004, 39-57.

⁶⁵ The origin of this proverb has been traced to an incident in which a king ordered the execution of seventeen of his servants at the shrine of Ogun, the Yoruba god of iron, on the allegation of stealing his trumpet, a prominent symbol of his royalty. It was later discovered that the loss of the trumpet was the act of his son in conspiracy with two other persons. On this discovery and realisation of miscarriage of justice, the king lamented, presumably, at the scene of the execution, that not all the persons whose heads lay at the execution ground were guilty. See, 'How Yoruba Proverb "Ori Yeye Ni Mogun T'aise Lopo" Became A Proverb' — https://web.facebook.com/218630248872524/posts/how-yoruba-proverb-ori-yeye-ni-mogun-taise-lopo-became-a-proverb-long-time-ago-in/374905813244966/?_rdc=1&_rdr on 17 July 2023; *Yorubaoloji*, "Ori Yeye Ni Mogun T'aise Lopo" - <http://yorubaoloji.blogspot.com/2016/07/ori-yeye-ni-mogun-taise-lopo.html> accessed on 17 July 2023.

⁶⁶ In context, the saying seeks to convey that human adjudication can turn to be erroneous, unfair or unjust based on different factors.

lamented that the defendant was able to get justice ‘because he could afford to reach the apex court; imagine what would have been the plight of the innocent Nigerian who could not afford to get as far as the Supreme Court.’⁶⁷ Inferably, a probable scenario is that a less influential or financially disadvantaged person without the means of the accused in that case would have suffered injustice due to financial limitation in taking the case up to the highest level of the Supreme Court.

Beyond access to court, the courts, as occupiers of crucial junctions in the justice dispensation landscape should deliver judgments not encapsulated in legalism or strict technicalities. The tacit and express knocks that Nigerian judicial officials have received in Nigeria and beyond, based on some judicial decisions, speak to the courts on the imperatives of engaging adjudicatory tasks with a sense of equity and humanity, and not robotic inclinations in the guise of ideological compliance. Also important is the need for all, especially the government and powerful people, to respect judgments given in favour of less powerful people.

Generally, the administration of justice in Nigeria does not have to be a complicated and mystical phenomenon or an item of disillusionment to citizens. Essentially, with good conscience, determination and fair-mindedness on the part of all stakeholders, the administration of justice, particularly through the court system, should be an attractive project which citizens ought to embrace with relish, confidence, and positive expectation. Involved in this expectation is that, even in its regimented adversarial setting together with the underpinning positivism ideology, the sanctity of Nigeria’s justice system and dispensation of justice can still be ensured through conscientious judicial adjudication and resolution of disputes devoid of sacrificing the fundamental essence of justice at the altar of technicalities or strict legalism.

⁶⁷ Edozien L. C, ‘Supreme Court on Nwaoboshi’s case: Reason to reform EFCC’ Guardian, 18 July, 2023 — <<https://guardian.ng/opinion/supreme-court-on-nwaoboshis-case-reason-to-reform-efcc/>> accessed on 27 August 2023.

Flawed Evidence: A Recipe for Wrongful Conviction in Nigeria

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Abstract:

Judicial decisions are made based on the evidence presented before the court. In criminal cases, evidence must be overwhelmingly convincing—beyond a reasonable doubt—to secure a conviction of the defendant. When evidence is obtained through flawed processes or is improperly evaluated by the court, it often results in wrongful conviction. Reliance on coerced confessional statements, faulty eyewitness identifications, jailhouse informants, flawed forensic evidence, and improper judicial evaluation of evidence have been identified as major causes of wrongful conviction in Nigeria. This issue is prevalent in Nigeria, and the courts tend to be somewhat lenient regarding these practices. While learning from foreign jurisdictions, it is suggested that Nigerian courts strictly adhere to the provisions of the law on the admission of confessional statements and rigorously evaluate evidence to prevent miscarriages of justice. This would compel law enforcement agents and prosecutorial authorities to focus on intelligence gathering and the proper use of forensic science in criminal investigations, rather than relying heavily on confessional statements. There is also a need for statutory entrenchment of these recommendations.

Keywords: Wrongful Conviction, Evidence, False Confessional Statement, Identification Parade, Forensic Science, Criminal Justice System

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I. Introduction

A wrongful conviction is one where a Court renders a guilty verdict upon someone who is factually innocent of the criminal indictment; a conviction of a person that was not involved in the commission of the crime. It does not refer to instances where a defendant is found innocent due to a defective legal proceeding, but the persistence of factual innocence. Wrongful conviction in this context, concerns those appellants who are factually innocent rather than those appealing their conviction based on technical irregularities.

Wrongful convictions, arising from procedural and substantive defects, have considerable implications on the defendant, such that even when a person is acquitted and discharged of criminal liability, they could still face consequential civil suit and denting criminal records labelling them as ex-convict.¹ A defendant requires exoneration, which is granted only in limited instances, to eliminate the charges and incarceration time.² Wrongful conviction is a worrisome social problem which portends a critical cost implication in terms of human, material and financial resources, public safety, and devastation.

The major causes of wrongful conviction are false, faulty, or inadequate eyewitness' testimony,³ false confession, and employment of flawed techniques by the police. Criminal justice actors like police officers who mostly have initial contact with suspects, usually apply force in extracting confessional statements from the suspect which the courts eventually rely on in reaching a conviction.⁴ The use of force and torture compels suspects to make guilty pleas even though they may be innocent.⁵

In criminal cases, the prosecution must establish their case beyond any reasonable doubt.⁶ Until such a standard of proof is achieved, the defendant continues to enjoy the presumption of innocence. The defendant is entitled to

¹ Morgan BLA, 'Wrongful convictions: Reasons, remedies and case studies' Unpublished MSc Thesis, Appalachian State University, North Carolina, 2014, 1.

² Smith B, Zalman M, and Kiger A, 'How justice system officials view wrongful convictions' 57(5) *Crime and Delinquency*, 2011, 663.

³ Petro J and Petro N, *False justice: Eight myths that convicts the innocent*, Kaplan Publishing, London, 2010, 52.

⁴ Akujobi AT, 'The Nigerian criminal justice system's abuse of confessional statements: A call for judicial policy reforms' 2(2) *University College, Corks Law Journal*, 2022, 149.

⁵ See the following cases decided by the Court of Appeal: *Oniama v. State* (2015) LPELR 24517; *Efifiong v. State* (2009) 1 NWLR (Pt. 1122) 325; *Abamba v. State* (1992) 5 NWLR (Pt. 242) 450. See also Petro and Petro, *False justice*.

⁶ Section 36 (5) Constitution of the Federal Republic of Nigeria 1999 (as amended).

the benefit of doubt in his favour and a duty only to disprove the case of the prosecution or prove any defence otherwise available to him.⁷ Judicial decisions are reached based on evidence as proof in establishing the guilt of a defendant. Where evidence is wrongly obtained, interpreted, or applied, it is likely to lead to wrongful conviction of the defendant and miscarriage of justice.

Wrongful convictions violate the most fundamental principles of justice—that persons should not be punished for crimes they did not commit.⁸ It is a flaw in the administration of the criminal justice system, which can be used as a window to survey and examine all sorts of imperfections in the criminal justice system. These are lapses that arise in the criminal justice process, especially during trials. In some instances, a wrongful conviction could remain unrevised for several years; at times, persisting even after the convict dies in custody. This only further points to the need for corrective reform of the justice administration, especially in Nigeria.

There are instances where it is discovered that a defendant was wrongfully convicted of a crime and upon appeal of the decision of the trial court. It turns out to be more hurtful when an accused has partly served some years in prison as a result of a wrong conviction. This discovery could become obvious when new evidence arises, perhaps, through forensics or the application of technology. It may also emanate from testimony obtained from an eyewitness to a crime that was for certain reasons, not considered during an investigation; where a new supporting piece of evidence exonerating the victim comes to the limelight; or, where the emergence of material evidence or legal technicalities that were not considered during the trial.⁹

Miscarriages of justice, through wrongful conviction, have been recognised as ‘a normal and expected consequence of imperfect procedures of investigation, prosecution and court trials and they ordinarily conceived as exceptional and unacceptable event’.¹⁰ Even though some judges have expressed scepticism

⁷ Hanson MD, ‘The philosophy of criminal law: How fair so far with victims of crime in Nigeria’ 1(1) *Juris Insight*, 2014, 34. Ocheme, however, adds that unlike the prosecutor, the standard of proof required of the defendant is on the balance of probability. See also: PA Ocheme, *The Nigerian criminal law*, Liberty Publications, Kaduna, 2008, 57.

⁸ Section 7, *Criminal Code Act*, (Nigeria), creates the category of persons regarded as parties to offence. Section 7, *Administration of Criminal Justice Act* (Nigeria) prohibits arrest of a person in lieu of a crime suspect.

⁹ Shobola A and Ajeigbe T, ‘Inmates incarceration and family support as precursors of prison recidivism in Nigeria’ 11(34) *European Scientific Journal*, 2015, 1857.

¹⁰ Noble R and Schiff D, *Understanding miscarriages of justice*, 1st ed, Oxford University Press, Oxford, 2000, 78.

about the occurrence of wrongful conviction in the criminal justice process,¹¹ the rate of DNA exoneration in countries like the United States of America (USA) and the United Kingdom (UK), coupled with the number of successful criminal appeals in Nigeria have certainly proved this belief to be false. This has altered the way people perceive the accuracy of the criminal justice system.¹² In reaction to this, many networks of lawyers, journalists, and other key advocates of justice have emerged towards preventing and advocating against wrongful convictions. Some of these groups include: The Legal Defence and Assistance Project, Centre for Justice Mercy & Reconciliation, and Innocent Project, among others.

This study shall therefore examine the evidence-related causes of wrongful conviction in Nigeria. It is structured into three main sections: the first provides an introduction, the second examines key evidential causes of wrongful convictions in Nigeria, and the final section presents recommendations for Nigeria and concludes the paper.

II. Causes of Wrongful Conviction

Although every justice system aims to provide fair and just judgments, however, more often than not, human nature takes its course, either due to hidden evidence or the unethical practices of law enforcement agencies like the police and prosecutors. Consequently, innocent persons are framed, tried, and convicted of offences they did not commit. A wrongful conviction can be caused by many factors, including mistaken eyewitness testimonies, mistaken identification of a suspect resulting from a defective identification parade, false confessions by the suspect, and forensic errors arising from a lack of functional forensic laboratories or incompetent scientific methods experts.

A. *Inaccurate Eyewitness Testimony*

Inaccurate eyewitness testimony is one of the factors responsible for the instances of wrongful convictions. One of the challenges encountered by prosecutors and defence counsels during trial is eyewitness errors, which have continued to plague the criminal justice system. For example, of the one hundred and eighty cases where exoneration is recorded in the USA, faulty eyewitness

¹¹ See the pronouncement of Judge Learned Hand in the case of *US v Garrison* (1923).

¹² Johnson TL, 'Eye witness testimony, false confession and human performance technology: An examination of wrongful conviction' Unpublished PhD Thesis, University of Toledo, Ohio, 2013, 107.

testimony was a recurring decimal in over seventy-five per cent.¹³ While statistical records may not be readily available to demonstrate the impact of faulty eyewitness testimony on wrongful conviction in the Nigerian context, the Nigerian Supreme Court gave judicial cognition to this point in the case of *People of Lagos State v Umaru*,¹⁴ where it quoted and relied on Kingmill Moor J. thus:

‘It is necessary that in all cases where the judgement depends substantially on the accuracy of an identification, their attention should be called in general terms to the fact, a number of instances, such identification has shown to be erroneous, the possibilities of mistake in the case before it and the necessity of caution. Nor do we think such warning should be limited to cases where the identification is that of only one witness. Experience has shown that errors can occur where two or more witnesses have made positive identification’.¹⁵

Eyewitness testimony holds a position of infamy for the wrongful conviction of innocent persons due to the frailty of human memories. Memory involves a cognitive procedure. Post-event facts supplied by persons like the police, prosecutors or media can change an eyewitness’ account of the events of a crime. For instance, posing a leading question such as, ‘is the perpetrator of a diminutive stature or considerable height?’ has the potential to modify the witness’s recollection; once a memory is altered, it becomes exceedingly challenging to accurately recall the details of the crime or its circumstances perpetrator.¹⁶ It can increase eyewitness confidence to give inaccurate information which can lead to wrongful conviction.

The duration of the criminal process is another factor that affects the accuracy of eyewitness testimony. This problem is prevalent in the Nigerian Justice System where the wheel of justice grinds slowly. Most criminal matters get protracted in court for years due to factors such as administrative bottlenecks, and protracted court adjournments, among other reasons.¹⁷ Where this is the case, the witnesses in the case may have died, relocated or due to human mental frailty, may not accurately recall the crime incident when they are eventually called to testify.¹⁸ This would affect the lucidity and veracity of their testimony. In the

¹³ Wise AR, Sartori G, Magnussen S and Safer MA, ‘An examination of the causes and solution to eyewitness error’ 5 *Frontiers in Psychiatry Review* 2014, 1.

¹⁴ (2014) 6 All FWLR (Pt. 737) 685-686.

¹⁵ See the case of *People (Attorney-General) v Casey* (No. 2) (1963) 1 IR 30, 33.

¹⁶ *ibid.*

¹⁷ Osamor R, ‘Administration of criminal justice and plea bargain in Nigeria: Motions without movement’ 6(2) *African Journal of Law and Human Right*, 2022, 122.

¹⁸ See, *Aposi v The State* [1971] NMLR 315, 316, where the Court is quoted as saying: “it is desirable that in a case like this (offence committed 26th September, 1965, trial began 4th December, 1967, and concluded 17th July, 1968) that neither the prosecution nor the judgment should be unduly delayed, in view of the mental agony of the accused person for his life and the fact that impressions get blurred with time”.

worst-case scenario, it could lead to a wrongful conviction if such evidence is relied upon.

Attempts have been made to deal with protracted criminal trials by successive governments in Nigeria. The latest effort to expedite the criminal justice process was the enactment of the Administration of Criminal Justice Act (ACJA) in 2015. The legislation contains provisions that require criminal matters to be determined within a reasonable time.¹⁹ Hence, criminal trials should be conducted on a day-to-day basis or not exceeding five adjournments of not more than fourteen days intervals in between each adjournment.²⁰ However, the implementation of the provisions of such law has not been successful due to the congestion of courts with cases.

B. *Misconducted Identification Parade*

In *Archibong v The State*, the Supreme Court of Nigeria defined identification as:

‘A whole series of facts and circumstance for which a witness or witnesses associate an accused person with the commission of the offences charged. It may consist of or include evidence in the form of fingerprints, hand writing, voice, identification parade, photographs identity or the recollection of the features of the culprit by a witness who saw him in the act of commission of a crime or a combination of two or more of these’.²¹

An identification parade is a procedure that involves the lining up of some persons by the police to determine if the complainant or witness can recognise the criminal suspect(s). It is the most reliable way of identifying suspects under common law. Elsewhere, it was referred to as ‘evidence showing that the person charged with the offence is the same as the person who was seen committing the crime’.²² An identification parade is an extra-judicial exercise coordinated by the police when the proper identity of the perpetrator of a crime cannot be ascertained by the victim or eyewitness to the crime. However, the victim or eyewitness must be sure to have had a reasonable opportunity to observe the suspect at the time of the commission of the offence, such that the suspect could be recognised or have a fair recollection of how he looks if the eyewitness is allowed to see him. Identification parades are essential if the victim of the crime or the

¹⁹ Section 36 (4) Constitution of the Federal Republic of Nigeria (1999) (as amended).

²⁰ See also, Section 396 (3-5) Administration of Criminal Justice Act 2015.

²¹ (2006) 14 NWLR (Pt. 1000) 349.

²² *Olagesin v The State* (2013) All FWLR (Pt. 670) 1382.

eyewitness to the crime must not have previously known the suspect's identity. It is mostly carried out where mass arrests have been made.²³

There is currently no legislative framework regulating the conduct of identification parades in Nigeria. Disappointingly, the ACJA 2015 did not provide rules relating to the proper conduct of the identification parade. What forms the *corpus juris* on identification parade is contained in the Nigerian Police Training Manual for Basic and Advanced Studies.²⁴ Over the years, the courts have also been compelled to develop rules to fill this void in our statute books.

Identification parades are necessitated under specific circumstances. These circumstances include instances in which the victim or witness lacked prior knowledge or interaction with the offender, and the criminal incident constituted their initial encounter; the duration of that encounter was exceedingly brief; and due to the constraints of time and circumstance, the victim or witness was unable to adequately observe the features of the assailant. An identification parade is deemed unnecessary when the defendant admits to perpetrating the offence, when the defendant is apprehended during the act, or when the defendant is already well-known to the victim's eyewitness.

The established protocol for conducting an identification parade is crucial and must be adhered to. Consequently, it is necessary to provide evidence detailing how it was executed. The victim or witness who identified the suspect is also required to testify regarding this matter. An identification parade that is not properly conducted raises doubts in the perception of the court. In suitable cases, the defendant should be pronounced accordingly acquitted.²⁵

The problem with identification parades is that it appears like searching for something that was not lost in the first place. Equally problematic is the inability of the witness to pick the actual person due to faint recollection or close resemblance of paraded participants. In a desperate move to pin criminal responsibility on someone, the witness may innocently or maliciously pick the wrong person.

²³ See, *Bashya v The State* (1998) 4 SCNJ 202.

²⁴ Police College Enugu, *Nigerian police training manual for basic and advanced studies*, Ferdinco Printing Press, Enugu, 1976.

²⁵ See, *Aliyu Wakala v The State* (1991) 8 NWLR (Pt. 211) 552. In *Ikarua v The State* (2013) All FWLR (Pt. 671) 1479, the court held that: "where the quality of identification evidence is poor, the court should return a verdict of not guilty unless there is other evidence to support the correctness of identification. The evidence of identification can be poor even though it is given by a number of witnesses. The witnesses may only have had the opportunity of a glance or a longer observation made in a difficult condition". See also, *Afolabi v The State* (2013) All FWLR (Pt. 702) 1703, where the court counselled for caution and careful examination of identification evidence.

The Court of Appeal gave judicial concern to this issue, in the case of *Aichenabor v The State*, and stated thus:

'A person who is the victim of an unlawful act would want the culprit or culprits to be arrested, to be brought to justice to be answerable for his/her wrong deed/deeds. The courts, (particularly as it relates to evidence of identification) have recognized that a victim of a crime in the search or pursuit that the perpetrator(s) of the crime against him is punished, might be genuinely mistaken in his identification of the said suspect or might out rightly decide to accuse someone or persons of known bad characters, just as the law enforcement agencies might also want to capitalise on the crime committed, to have known or perceived miscreants put behind bars. It is against this background of the human error to which it can be put that the courts, while realizing the primary or pre-eminence of identification evidence in proof of the commission of a crime by an accused person, have consistently counseled for caution or some restraint in convicting on same where it is wholly or substantially the evidence relied upon by the prosecutor'.²⁶

In *Ndidi v The State*,²⁷ the Supreme Court counselled that to avoid wrongful conviction arising from mistaken identity, the court must take cognisance of the following:

- i. What conditions was the eyewitness when they saw the accused or defendant?
- ii. What was the length of time the witness saw the suspect or defendant?
- iii. How was the lighting condition?
- iv. Was there an opportunity for close observation?
- v. Were there previous relations between both parties?

In the USA, the practice dictates that the counsel for the defendant must be present and allowed to participate in the identification procedure. In appropriate cases involving the application of irregular procedures, the defence counsel may file a motion in court to prevent the prosecution from presenting a suggestive identification at trial. Bearing this in mind, the prosecuting authority is obligated to follow the correct procedure. This is one of the safeguards established to check eyewitness errors, identify them, and analyse their accuracy. Legal practitioners and judges are required to develop additional effective safeguards in this context regard.²⁸

²⁶ (2015) All FWLR (Pt. 763) 2005.

²⁷ (2005) 17 NWLR (Pt. 953) 17.

²⁸ Wise RA and Safer MA, 'A method for analysing the accuracy of eyewitness testimony' 48 *Court Review*, 2012, 22.

C. *False Confessional Statement*

This is another avenue for erroneous conviction of an innocent person when not properly done according to law. A false confession is a statement made by a suspect which is averse to his person. Black's Law Dictionary explains confession to be a statement recognising all facts essential for the conviction of a crime.²⁹ Section 28 of the Evidence Act (2011) of Nigeria defines confession as 'an admission made at any time by a person accused of a crime inferring that he committed that crime'.³⁰ While confession is any statement admitting or accepting all facts necessary for conviction of an offence, it would still not satisfy all the elements of the offence and the requirement of the law unless the suspect takes responsibility for such an act.

There are two types of confessions: judicial and extra-judicial confession. Judicial confession is a plea of guilt freely made on arraignment, or in due course of the trial, by a defendant of sound mind.³¹ This confession is made in court before a magistrate, a judge, or other criminal tribunal admitting the commission of a crime. An example of this kind of confession is in instances where a defendant makes a guilty plea to a criminal charge upon the same being read over to him in the language of his understanding in the courtroom; or where the defendant admits commission of the offence upon examination-in-chief, cross-examination, or re-examination.

Extra-judicial confession is a confession made elsewhere, other than before a magistrate or judge during a court proceeding. These are the confessions made outside court, especially during investigations by law enforcement agents or any other person.³² Confession can be oral or in written form and is usually obtained while the defendant is in police custody. Extra-judicial confession can lead to voluntary and involuntary false confessions.

A voluntary false confession is a self-incriminating statement by a suspect free from the exertion of external pressure, without any psychological cause or tangible benefit from the police or any other security agents. The main component

²⁹ Garner BA, *Blacks' Law Dictionary*, 8thedn West Publishing Co., Minnesota, 2004, 889.

³⁰ It can either be written or oral. See the case of *State v Sule* [2009] All FWLR (Pt. 481) 809.

³¹ This form of judicial confession is not available for persons arraigned for capital offences. Whereas guilty is pleaded in this circumstance, the law requires the court to record a not-guilty plea for the defendant and the prosecution would still be required to prove the defendant's guilt beyond reasonable doubt.

³² Nnabugwu, TI 'Confessions in Nigeria Evidence Act' 2011 — <<http://titusnnabugwu.blogspot.com/2012/06/confessions-in-nigeria-evidence-act.html>> accessed on 7 August, 2023.

of such a confession is the fact that it is made deliberately.³³ Several studies of erroneous conviction in the UK and USA have shown that about twenty to thirty per cent of cases appraised involved false confession; and false confession when relied upon as evidence during criminal proceedings, usually leads to the conviction of the innocent.³⁴ An Amnesty International report spanning ten years recorded over five hundred instances of Nigerian security forces' employment of torture to extract confessional statements from suspects.³⁵

It is always very difficult to understand why individuals would admit criminal responsibility for offences they did not commit. However, there are a few possible explanations for this. First, voluntary false confession can be made to protect someone else, especially a confession made by a juvenile. Juveniles sometimes act according to a moral code that regards loyalty as one of its highest values. This can be attributed to the immature moral reasoning of adolescents to protect their peers.³⁶ Children are sometimes put in incredibly tense situations and do not understand the consequences of a false confession. Even adults can make a voluntary false confession to protect family, friends or spouses. Some people take responsibility for offences committed by others. Women may take responsibility for offences committed by their children or partners thinking that their absence would be less harmful to the survival of the family than the absence of their son or husband who are the breadwinners of the family. However, the consequence is that such confessions often lead to years in prison or the execution of innocent individuals.

Second, persons may incorrectly think that they committed the crime and thereby make a voluntary confessional statement. This may be a result of mental delusion, psychological imbalance, or illiteracy. This is common among mentally challenged persons who, due to their state of mind, may be unable to distinguish truth from dream. It is their delusional idea to assume criminal responsibility for an offence they knew nothing about and thereby get convicted easily. Such persons may admit to offences to prevent investigation or charges for more serious offences.

³³ Aebi FM and Campistol C, 'Voluntary' false confessions as a source of wrongful convictions, the case of Spain' in Ronald H and Martin K (eds), *Wrongful convictions and miscarriage of justice: Causes and remedies in North American and European criminal justice*, Routledge Publishing, London, 2013, 194.

³⁴ Leo RA 'False confessions: Causes, consequences and implication' 37(3) *Journal of the American Academy of Psychiatric and the Law*, 2009, 332.

³⁵ Amnesty International, *Welcome to hell fire: Torture and other ill-treatment in Nigeria*, 2014, 12.

³⁶ Beyer M, 'Immaturity, culpability and competency in juvenile: A study of 17 cases' 15(2) *Criminal Justice Magazine*, 2000, 26.

The third possibility is to use admission as a plea bargaining chip to gain a reduced sentence or to avoid harsher punishment, especially for offences with the death penalty.³⁷ Fourth is to attract attention; some people might falsely confess to having done notorious criminal acts just because of the attention they could get from such a confession or conviction. For example, in 1947 about sixty people were said to have admitted criminal responsibility for the murder of Elizabeth Short, referred to as Black Dahila in Los Angeles.³⁸ Lastly, ignorance and poverty level may induce some individuals to voluntarily give a false confession to a crime thinking that the monetary reward attached to such crime will come to them and their family.

An involuntary or coerced false confession obtained by the police could lead to errors which contribute to wrongful conviction. A false confession is a result of pressure exerted on suspects during interrogation; suspects admit culpability for an offence to escape police pressure and brutality. This happens when police erroneously regard an innocent person to be guilty. When this happens, the interview and interrogation are thereafter directed by the presumption of guilt, rather than of innocence as required by law. Prominent among the causes of wrongful conviction are confessional statements police extract from the defendant by oppression. The suspect falsely confesses to the offence despite personally believing in their innocence, hoping that the truth will eventually emerge and lead to their exoneration.

In Nigeria, it is not uncommon for police to use torture and ill-treatment on suspects detained in police cells. There are reported cases of police shooting suspects on the foot, beating and hanging them from the ceiling for long periods to extract information and confessions. Other forms of torture include flogging suspects with whips, beating them with batons and machetes, issuing death threats, inserting sharp objects into suspects' genitals, inflicting burns on suspects with cigarette lights, giving them psychological and mental torture by starvation, among other illegal and inhumane tactics.³⁹

Convictions based on false confessions undermine the integrity of the criminal justice system, inflicting unnecessary injustice. They lead to unwarranted incarceration, the denial of liberty before trial, significant financial burdens in

³⁷ Beyer M, 'Immaturity, culpability and competency in juvenile', 473.

³⁸ Leo RA and Ofshe JR, 'The consequences of false confessions: deprivation of liberty and miscarriage of justice in the age of psychological interrogation' 88(2) *Journal of Criminal Law & Criminology*, 1998, 429.

³⁹ Okeshola FB, 'Human rights abuse by Nigerian police in four selected states and the Federal Capital Territory, Abuja' 13(2) *British Journal of Arts and Social Sciences*, 2013, 244.

defending one's innocence, irreversible damage to careers and reputations, and profound emotional distress for loved ones.⁴⁰ When confessions are involuntarily obtained, there is a grave danger that the defendant has falsely implicated himself.⁴¹

False confessions likely lead to the denial of liberty and conviction of innocent persons. The court places much reliance on such statements that it outweighs other evidence that could establish the innocence of a defendant. The courts have often held in a plethora of cases that a confessional statement is the most credible evidence to ground a conviction.⁴² The utility of confessional statements in criminal trials, especially the ones prosecuted by the police, cannot be overemphasised. There is hardly any criminal trial prosecuted by the Nigerian Police without reliance on confessional statements extracted from the defendant. Most times, the requirement of the law is not complied with.

In Nigeria, there are several legal safeguards and procedures for obtaining admissible confessional statements. Prominent among them is the provision of the Constitution which prohibits torture and other kinds of inhuman or humiliating treatment. This is contained in Section 34(1) of the Constitution which guarantees the right of everyone to receive respect towards the dignity of his status as a human being; and by that fact, must not be put in danger of torture, inhuman, or demeaning treatment. Article 17(2) (b) African Charter on Human Rights supports the position that human dignity must be maintained and enhanced. The court is obliged under Section 29 (2)(a) Evidence Act, 2011 not to admit any evidence obtained by oppression of the maker. The definition of 'oppression' under subsection (5) encompasses torture, inhuman or degrading treatment, acts and the threat of violence whether it amounts to torture or otherwise.

The King's Bench of England developed certain requirements for obtaining confessional statements from suspects in police custody. These were regarded as Judges' Rules of 1964. They are administrative rules not necessarily rules of law.⁴³ Part of the requirements of the Judges' Rule is that a suspect must be brought before a superior police officer when obtaining a confessional statement. The suspect must also be cautioned by the police or any law enforcement agent

⁴⁰ Leo RA and Ofshe JR, 'The consequences of false confessions', 494.

⁴¹ Ibraheem OT, 'The relevance of confessions in criminal proceedings' 3(21) *International Journal of Humanities and Social Science*, 2013, 291.

⁴² See the case of *Ajayi v State* (2014) All FWLR (Pt. 756) 418, where the court stated that: "there cannot be evidence that is stronger than an accused own direct, positive and unequivocal confessional statement, which alone is sufficient to ground conviction".

⁴³ Aguda TA, *Law of evidence*, 4th ed, Spectrum Law Publishing, Ibadan, 1999, 55.

interrogating him that he is at liberty to remain silent as the evidence may be used against him during trial. After the caution, if the suspect still wishes to make a statement, the officer is expected to keep a record of the period and place where the statement commenced and ended, including the identity of the person physically present. In the case of *R. v Ugnuora*,⁴⁴ the court stated that the Judges' Rules are to be followed as far as possible and practicable in Nigeria. Voluntary confessional statements obtained contrary to the Judges' Rules are admissible,⁴⁵ even though the weight the trial judge will attach to it may be affected.

To curtail the incidence of obtaining confessional statements by oppression, the procedure in Lagos State, Nigeria, is that the police officer is expected to make a video recording of obtaining the confessional statement and tendering copies in evidence during a trial. Where there is no video facility, the confessional statement must be in writing and must be made in the presence of a legal practitioner of the maker.⁴⁶ Regrettably, the courts have not been helpful in upholding this requirement of the law—with numerous rulings indicating that non-compliance does not significantly affect the admissibility of a confessional statement.

Leo contended that the damage occasioned by false confessions could be alleviated if the police were mandated to make video or audio recordings of the entire interrogation.⁴⁷ In *Owboruke v COP*⁴⁸ the Supreme Court earnestly endorsed the practice of obtaining confessional statements from suspects only when their counsel or a legal practitioner is present. The court is enjoined to consider the weight to attach to such confessional statements if there is no compliance with the Judges' Rules.

However, in a more recent decision of the Supreme Court, *Charles v The State of Lagos*,⁴⁹ it was held that it is a mandatory requirement of law and non-compliance would warrant the rejection of such confessional statements. This is a welcomed development. At least this would prevent the use of inhumane and degrading means to extract confessional statements from suspects. But up till now, the law enforcement agents hardly abide by this recommendation.

Even on occasions where these rules are purportedly applied, law enforcement agents have a way of bypassing these safeguards. The threat or any

⁴⁴ (1943) 9 WACA 73.

⁴⁵ See, *R. v Umo & Ors* (1944) 10 WACA 254; B Osamor, *Criminal procedure laws and litigation practices*, 2nd ed, Dee-Sage Books, Manchester, 2012, 101.

⁴⁶ See, Section 9(3) Administration of Criminal Justice Law Lagos State 2012.

⁴⁷ Leo and Ofshe, *The consequences of false confessions*, 332.

⁴⁸ (2015) 15 NWLR (Pt. 1483) 557-576.

⁴⁹ (2023) 13 NWLR (Pt. 1901) 213.

other acts of oppression that would otherwise make the confession inadmissible would be carried out before switching on the video or audio recorder or before inviting the legal counsel of the accused.⁵⁰

Where a defendant challenges the admissibility of a confessional statement on grounds that it was not made involuntary, the prosecution is required to prove that the confession was obtained voluntarily before its admissibility by the court.⁵¹ On its own accord, the court may require that the prosecution proves that in obtaining the confessional statement, nothing was said or done to make the confession inadmissible.⁵² This is normally done in a proceeding that is referred to as trial within trial.⁵³

A suspect may, in the quest to avoid the torture and pain of an interrogator, confess to the commission of the crime; hoping that he would have the opportunity to explain himself when brought before a judge. This is usually risky because the law is that: where the defendant denies ever making the statement or retracts a confessional statement, the court is required to admit the statement without going into trial within trial.⁵⁴ But the Court would consider the weight to be attached to such a confessional statement. In *Mohammed v The State*,⁵⁵ the court emphasised the need for the trial judge to look for corroborative evidence before acting on the statement.

Pursuant to Section 274 of the 1999 Constitution, Section 116 (1) Kano State High Court Law, and Section 37 (1) (f), (g), and (2) Criminal Procedure Code, the Chief Judge of Kano State made Practice Direction (No. 3) dated 20 July 2009. The Direction purportedly abolished trial within trial in the state. Accordingly, where the voluntariness of a confessional statement is in issue, it is to be admitted, although the court will have to determine the weight to be placed on the statement.⁵⁶ However, in determining the weight to be placed on

⁵⁰ Agaba JA, *Practical approach to criminal litigation in Nigeria*, 3rd ed, Bloom Legal Temple, Abuja, 2015, 52-54.

⁵¹ Section 29 (3), Evidence Act. See, *Okanlawon v State* [2015] 9 SCM 159, 184, where the Court held that for confessional statement of an accused person in a criminal case to be admissible in evidence it must be positive, direct, and unequivocal, such that where there is any discrepancy in such evidence, trial within trial ought to be conducted to ascertain its authenticity.

⁵² Section 29 (4), Evidence Act 2011.

⁵³ See, *Mohammed v The State* [2007] 13 NWLR (Pt. 1050) 186.

⁵⁴ Naughton M, *The innocent and the criminal justice system: A sociological analysis of miscarriages of justice*, Palmgrave Macmillan Books, London, 2007, 72.

⁵⁵ Naughton M, *The innocent and the criminal justice system*, 72.

⁵⁶ Oniekoro FJ, *Practice notes and guides on litigation (civil and criminal trials)*, 3ed, Chenglo Ltd., Enugu, 2012, 613.

the confessional statement the court must satisfy itself with certain questions, such as: is there any evidence without the confession to ascertain its truth? Is the statement corroborated? Are the vital statements in fact true when subjected to some form of truth test? Was the defendant in a position of time and chance to commit the offence? Is there a possibility in the confession? Is the confession compatible with other prevailing and established facts?⁵⁷

Trial within trial is a rule of evidence statutorily provided for in the Evidence Act. Evidential matters fall within item 23 of the Exclusive Legislative List of the Constitution; hence it is only the National Assembly that can exercise legislative competence on such matters. The powers of the Chief Judge of a State or even Chief Justice of the Federation are limited to making procedural rules to enhance Court proceedings and not to limit or contradict any statutory procedure in force, especially those not within the powers of the Chief Judge to make. Moreover, a Practice Direction is inferior to an enactment of the National Assembly in the hierarchy of laws. Hence, this Practice Direction (No. 3) must bow to the Evidence Act especially as it is made *ultra vires*.

D. Jailhouse Informants

‘All wrongful convictions detract from the public’s faith in the fair administration of justice, but the cost is especially high when wrongful convictions result from the testimony of questionable witnesses’.⁵⁸ Jailhouse informants fit into this description. A jailhouse informant is an inmate in prison; usually awaiting trial or already convicted and sentenced. Such persons may claim to have received a confession made by a defendant in prison custody on awaiting trial. The informant then decided to testify in court against the defendant, usually in exchange for some benefits.⁵⁹ They are inmates awaiting trial or pending sentencing, who assert to have heard other inmates with them in prison have voluntarily admitted committing the offence of which they are charged. Such informants then report other prisoners’ confessions to the authorities in the hope of exchanging the testimony for better treatment or clemency in sentencing. Jailhouse informants who give information about the confessions of fellow inmates are frequently used in criminal proceedings as witnesses for the state. Jailhouse confessions are susceptible to fabrication.

⁵⁷ *Mbang v The State* (2012) 6-7 MJSC (Pt. IV) 119; *Galadima v The State* (2012) 12 MJSC (Pt. III) 190.

⁵⁸ The Justice Project, ‘Jailhouse snitch testimony: A policy review’ — <www.thejusticeproject.org> accessed on 5 November, 2023.

⁵⁹ Sherrin C, ‘Jail house informants, part 1: Problem with their use’ 40 *Criminal Law Quarterly*, 1997, 106.

In Nigeria, when jailhouse informants are used to extract information from suspects, their testimony may be considered hearsay and thus susceptible to inadmissibility, as it does not constitute direct evidence of what the informant personally saw, heard, or perceived. As much as such evidence is inadmissible to prove the truth of the fact, it is not hearsay to prove the fact that the suspect actually made such a statement while in a jailhouse.⁶⁰

In the USA, many individuals convicted based on fabricated jailhouse admissions remain imprisoned due to the lack of a legal mechanism to compel informants to recant their earlier testimonies, even when the convictions were based on false evidence. Without such a mechanism, a jailhouse informant will invoke his Fifth Amendment right out of panic for prosecution for perjury due to the previous perjured testimony which may have been based totally on fabricated evidence. The use of jailhouse informants to obtain conviction has been seen as one of the most abused aspects of the criminal justice system.⁶¹

Despite the criticisms against the practice, its use is still widespread. For example, the District Attorney's office in Los Angeles had to rely on informants' testimonies to secure convictions in more than one hundred and twenty cases.⁶² Nonetheless, some jailhouse informants who are always rewarded for their testimonies have been revealed to go a large extent in deceiving and misinforming the prosecutors in the hope of refining their present situation with little or nothing to lose but so much to gain. Crafty and dishonest jailhouse snitches formulate tales and crime details that misguide prosecutors and contribute to a serious miscarriage of justice. They find willing corroborators in the prosecutors. According to a recent report, the Orange County District Attorney's office which knew the credibility of a jailhouse informant to be in serious doubt, continued to rely on the informant's testimony for years in the prosecution of defendants.⁶³

It was reported that reliance on jailhouse informants in prosecuting offences is a leading cause of wrongful convictions in cases of capital offences.⁶⁴ Most of

⁶⁰ *Utteb v State* (1972) 1 SC SCNJ (Pt. 1) 189.

⁶¹ Rohrlich T, 'Review of murder cases is ordered: Jail-house informant casts doubt on convictions based on confessions' *Los Angeles Times*, 29 October 1988 — <<https://www.latimes.com/archives/la-xpm-1988-10-29-mn-329-story.html>> accessed on 9 August, 2023.

⁶² *Time Magazine*, 'A snitch's story', 12 December 1988, 32.

⁶³ Ferner M, 'California prosecutor's office thought serial snitch was a liar, but used him anyway' *Huffpost*, 6 May, 2017 — <https://www.huffpost.com/entry/mark-cleveland-orange-county-informant_n_5934f469e4b0c242ca2554e3> accessed on 9 August, 2023.

⁶⁴ Center on Wrongful Conviction, 'The snitch system: How snitch testimony sent Randy Steidl and other Americans to death row' — <<http://www.law.northwestern.edu/w.cs/documents/snitch-systemBooklet.pdf>> accessed on 5 November, 2023.

the cases which required exoneration by DNA test in the USA revealed that in more than twenty per cent of those cases, jailhouse snitches gave testimonies against the defendants.⁶⁵ Many informants testify against others by giving out implicating evidence against their prison cell inmates in order to either get a favourable plea, lesser charge, lesser sentence, obtain amnesty, *nolle prosequi*, or bargain charge(s). The desperation to get a sentence reduction may incentivise some jailhouse informants to fabricate incriminating evidence against a defendant.

There is always inherent unreliability of jailhouse snitches' testimonies which always gives rise to miscarriage of justice. In one case, a US prosecutor greatly relied on the evidence of a jailhouse informant to get a successful rape conviction of Wilton Dedge even when he was not the actual offender. Dedge was incarcerated for twenty-two years before he regained his freedom and exoneration from the crime. The exercise of precaution could have stopped the injustice meted out to Wilton Dedge.

Nigeria has had its fair share of unreliable jailhouse testimony. In May 2007, it was announced that one Mr Moshood Enifeni, a drug baron, while in prison custody, had told fellow inmates that he assassinated Chief Bola Ige, who was the Attorney General of the Federation. Sunday Ehindero, the Inspector General of Police, interrogated Enifeni and some hood-wearing persons purported to be his cell mates in a publicly aired television programme. The aftermath of the interrogation was the declaration of guilt. However, the family members of Enifeni described the whole scenario as a sham. They stated in a press release that the said illicit drug case was amicably settled by plea bargain in August 2001 after which he was released. As such, there was no way their son could have harboured any resentment for Chief Bola Ige as of December 2001 when the victim was killed.⁶⁶

There have been serious concerns about the problems caused by the jailhouse testimony of the defendant in a criminal case. There are processes which the state can adopt to make sure that the use of corroborating witness testimonies does not dent the objectivity and accuracy of findings in criminal trials. Informants' testimonies should require corroboration to mitigate the inherent risks an incentivised witness testimony portends. Courts should adopt rules requiring a mandatory pre-trial determination of the reliability of a jailhouse snitch's testimony in instances where the prosecution anticipates adopting the

⁶⁵ Innocent Project, 'Informants/snitches' — <<http://innocenceproject.org/understand/snitches-informants.php>> accessed on 5 November, 2023.

⁶⁶ Osinbajo YO, 'The state of criminal justice in University of Benin' Tenth Justice Idigbe Memorial Lecture, Benin, 2009, 13.

same. In the dependability of pre-trial hearings, the court is expected to perform a ‘gatekeeper’ task in ensuring only credible jailhouse snitches’ testimony are admitted. Standards are to be raised by the Court which the testimony must surpass before it is admitted. By so doing, the state can increase the worth of evidence relied upon at criminal trials.⁶⁷ In essence, if informant testimony is to be used as evidence in criminal trials, it should be carefully regulated to make sure that there are no hidden deals and that prior statements are carefully documented. Judges could also assess the reliability of informants before permitting them to testify. Prosecutors can adopt guidelines requiring the careful use of informants and careful documentation of their statements and consideration offered in exchange for their cooperation.⁶⁸

E. Flawed Forensic Evidence

This occurs in situations where forensic experts place reliance on evidence which is either founded on defective or unverified techniques or embellished with misleading assurance and deceitful reports. Evidence shows that the misapplication of forensic science is the second most contributing factor to wrongful conviction as highlighted by the Innocence Project.⁶⁹ The misapplication of forensic science is so rampant that it is cited in more than half per cent of cases in which DNA evidence later exonerated victims. Some forensic evidence has proved to be an unreliable, inaccurate and inefficient way to determine who committed a crime. For example, bite marks and shoeprint comparisons may be highly unreliable.⁷⁰

Some evidence by forensic experts in criminal cases may either be overstated or understated, with the expert withholding evidence or opinion that might support the defendant’s case; or exaggerating or twisting the important evidence pointing to the guilt of the suspect. Unintentional errors and some purposeful misconduct are common with forensic analysis, and when these happen, a person’s life could be significantly and unjustly affected by a wrongful conviction of such a person. The lack of technical ability of law enforcement officers to

⁶⁷ The Justice Project ‘Jailhouse snitch testimony: A policy review’ — <www.thejusticeproject.org> accessed on 5 November, 2023.

⁶⁸ The Justice Project ‘Jailhouse snitch testimony: A policy review’ — <www.thejusticeproject.org> accessed on 5 November, 2023.

⁶⁹ Mahajan S, ‘Flawed forensics: The Innocence Project’s 25th anniversary’ *Columbia Science Review*, 2017, — <<https://columbiasciencereview.com/2017/11/12/flawed-forensics-the-innocence-projects-25th-anniversary/>> accessed on 5 November, 2023.

⁷⁰ Shkolni NK, ‘Forensic science mistakes and wrongful convictions’ — <<https://www.napolilaw.com/article/forensic-science-mistakes-wrongful-convictions/>> accessed on 25 September, 2023.

effectively employ forensic science in criminal investigation and prosecution is instrumental to the flawed outcome of the criminal justice process. This is one of the challenges that have been associated with the Nigerian Police.⁷¹

Although forensic evidence is not popularly used in criminal investigation and trial in Nigeria compared to the United States of America and Europe, there are reported criminal cases which were decided based on forensic evidence in Nigerian Courts.⁷² In the case of *State v. Ejiofor & 5 Ors*,⁷³ the forensic evidence of a handwriting expert was used to ground the conviction of the sixth defendant for theft, and forgery, while the five others were exculpated. Forensic evidence was used to exculpate the defendant of murder in the case of *Nafiu Rabinu v. State*.⁷⁴ There are a couple of other cases that have been decided on the basis of forensic evidence.⁷⁵ This demonstrates the recognition and application of forensics in criminal justice dispensation. It therefore suggests the need to employ necessary precautions to forestall unjust outcomes and wrongful convictions occasioned by flawed forensic application in the criminal justice dispensation in Nigeria.

The application of forensic evidence in criminal cases has solved many crime puzzles. However, when forensic evidence is erroneously evaluated, the result will amount to misleading the court and conviction of an innocent person. A classic example is an American case of murder and rape of Nancy De Priest in Pizza Hut Restaurant in Austin Texas. Chris Ochoa, a co-worker of Richard Danziger, pleaded guilty to the murder while implicating Danziger of the rape in a confessional statement obtained by coercion. The only forensic evidence against Danziger was a hair found in the restaurant which is identical to that of Danziger. The semen sample found at the crime scene was not tested. Both men were sentenced to life imprisonment. Twelve years later, one of Achim Marino's correspondence from prison disclosed that he was the actual perpetrator of the crime. The DNA samples were finally analysed, and they matched with that of Marino.⁷⁶

⁷¹ Otu N and Elechi O, 'The Nigerian Police forensic investigation failures', 9(1) *Journal of Forensic Sciences and Criminal Investigation*, 2018.

⁷² Oniha OM and Oniha BE, 'Forensic evidence: A panacea for exoneration in criminal justice administration in Nigeria' 3 *Crescent University Law Journal*, 2018, 83.

⁷³ 1983 (1) NCR 86.

⁷⁴ 1980 (2) NCR 117.

⁷⁵ See, *Bosah v. State* 1980 (1) NCR 204, *Ugwanyani v. FRN* (2012) LPELR-SC.190/2010; *Shonubi v. People of Lagos* (2015) All FWLR (Pt. 801) 1424.

⁷⁶ Momodu B, *Preparing for the trials in murder and rape cases in Nigeria: What detectives left undone*, Evergreen Overseas Publications, Lagos, 2013, vii.

Even science has its imperfections. The government should address key concerns such as the accreditation of forensic laboratories, carrying out training programmes, the establishment of testing standards, ensuring the independence of scientific testing techniques, and the collection and preservation of long-chain exhibit safekeeping. There should be a rigorous examination of forensic experts by the prosecutors and defence attorneys regarding their testing technique and expert opinion.⁷⁷ Lawyers, courts, prosecutors and police need to maintain close tabs on emerging techniques in forensic science.

F. Improper Evaluation of Evidence by Trial Judges

The judicial power of government is conferred on the courts by Section 6 of the Nigerian Constitution (1999). This section states that judicial powers are bestowed on courts established by law in accordance with the Constitution for the federation and the various states. The courts so created by Section 6(5) (a) to (1) of the Constitution are referred to as courts that can exercise powers of superior courts of record in Nigeria. Apart from the judicial powers of the courts, they also have inherent power to ventilate justice by virtue of Section 6(6) 1999 Constitution.⁷⁸ Justice is in three ways: justice to the victim, the accused, and the society at large. Justice must be done to avoid the conviction of an innocent person. Wrongful conviction entails a long chain of misconduct from various quarters in the criminal justice process. The court is the last authority that sanctions it. Those various misconducts can never amount to wrongful conviction until it has been sanctioned by the court upon pronouncement of the guilt of the defendant. Thus, the court is best positioned to correct the wrongs of other authorities that would have otherwise given rise to wrong convictions.

Most wrongful conviction cases arising from the action or inaction of the court are usually due to improper evaluation of evidence by the trial judge. This may be a function of factors including judicial bias, caseloads, poor presentation of evidence by counsel, and limited resources, among others. Criminal adjudication deals with proofs and proofs are a function of evidence placed before the court and the evaluation thereof. Nigeria operates an adversarial system of adjudication. This requires the judge to assume an officious position to evaluate the evidence and proofs canvassed by parties and reach its decision

⁷⁷ Northwestern 'Center on wrongful conviction, flawed forensic science' — <www.law.northwestern.edu/legalclinic/wrongfulconvictions/> accessed on 8 August, 2023.

⁷⁸ Obutte PC, 'Corruption, administration of justice and the judiciary in Nigeria' Social Science Research Network, 2016 — <<http://ssrn.com/abstract=2727319>> accessed on 3 September, 2023.

thereto. The court ought not to delve into the arena of dispute.⁷⁹ Sometimes this could be a limitation on the part of the court to do substantial justice, especially when there are weaknesses in the case of the defence, which has been noticed by the court *suo motu*.

It is submitted that the court should take advantage of its discretionary powers to point out certain substantial issues even when it is not canvassed before the court by parties. For instance, nothing limits the court to *suo motu* require the prosecution to prove that confessional statements are obtained voluntarily.⁸⁰ The court can also take advantage of powers conferred on it by Section 246 Evidence Act 2011 by eliciting answers from witnesses or the accused to elicit facts to help the court make a decision that will serve the ends of justice. However, the power of the court to ask such questions under the provision is not unlimited. Such power is limited by the implications of the adversarial system and the impartiality and fair hearing principles enshrined in the Constitution.⁸¹

In a criminal trial in Nigeria, the general burden of proof is on the prosecution at a standard of proof beyond reasonable doubt.⁸² The judges must always be conscious of this in their evaluation of evidence. Courts have, however, in recent times, held in plethora of authorities, that proof beyond reasonable doubt cannot be regarded as proof ‘beyond shadow of doubt’.⁸³ It is proposed that this principle must be exercised with great caution by the court. This risks the court effectively assisting the prosecution in fulfilling its heavy burden of proof by overlooking or rationalizing inconsistencies and gaps in the prosecution’s case. The challenge lies in determining where and how courts should draw the line between ‘shadow’ and ‘real’ doubt. Without caution, the consistent application of this approach could gradually erode the standard of proof in criminal cases—from ‘beyond reasonable doubt’ to a mere preponderance of evidence—contrary to legal requirements.

⁷⁹ *Akinfe v The State* (1988) 3 PLR 35.

⁸⁰ See, Sections 29(3), Evidence Act 2011.

⁸¹ See, *Akinfe v The State* (1988) 3 NWLR (Pt. 85) 729, 741.

⁸² Sections 132 and 135, Evidence Act 2011.

⁸³ See, *Usman v The State* (2014) All FWLR (Pt. 713) 1928; *State v John* (2013) All FWLR (Pt. 696) 532; *Usen v The State* (2013) All FWLR (Pt. 689) 1131; *Babarinde v The State* (2013) All FWLR (Pt. 662) 1731; *Oyebode v Gabriel* (2013) All FWLR (Pt. 669) 1162. In *Osetola v The State* (2012) All FWLR (Pt. 647) 1044, the Court is quoted as saying: “By the provision of S. 138 Evidence Act, the standard of proof is required in criminal trial is proof beyond reasonable doubt. The law would fail to protect the community if it admitted to fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice”.

Although judges are supposed to discharge their judicial functions devoid of fear or favour, bias or prejudice, there are other external factors which could, one way or the other, influence the decision of judges. Judges may be influenced by powerful political officeholders; financial, personal and ideological considerations may also be influential.⁸⁴ Judges could be involved in all manner of political manoeuvrings and pressures as they are the product of political orchestration.⁸⁵ The impact could be felt in their judgments and rulings. Judiciary independence in Nigeria is questionable given the lack of autonomy of the judiciary. This may result in partiality, especially with respect to matters which are of interest to the political actors.

Wrong evaluation of evidence sometimes arises from a situation where judges have already formed a preconceived impression or opinion about the defendant or the case. Such impressions are always difficult to alter, erase or convince the court of the innocence of the defendant. In *Al Mustapha v The State*, the Court of Appeal held that the lower court was bent on securing conviction at all costs despite contradictory evidence by the two major witnesses. The court, per Pemu JCA, stated that:

‘No matter the suspicion and its degree, no matter the grievance or grouse, no matter the height of conjecture, no matter the depth of hatred, even the strongest SUSPICION can never found a conviction in law. There is the duty, not discretion of the prosecution to prove its case beyond reasonable doubt’.⁸⁶

Psychological, sociological, religious and even environmental experiences of a judge could also influence or prejudice the mind of the court. They are preconceptions and biases which inevitably lead to the wrong path.⁸⁷ A judge must rise above all these limitations in order to maintain and enhance the confidence of the public, the legal profession which they represent, and the litigants.⁸⁸ The reverse would lead to the erroneous conviction of innocent persons.

III. Conclusion

It is noted that in criminal cases, a prosecutor is expected to prove its case beyond a reasonable doubt. Thus, a prosecutor’s case succeeds or fails depending

⁸⁴ Sherrer H, ‘The complicity of judges in the generation of Wrongful Convictions’ 30 *Kentucky Law Journal*, 2003.

⁸⁵ Sherrer H, ‘The complicity of judges in the generation of Wrongful Convictions’.

⁸⁶ (2013) 17 NWLR (Pt. 1383) 351.

⁸⁷ Clive SS, *Bad Men: Guantanamo Bay and the secret prison*, Orion Publishing Group, London, 2007, 158.

⁸⁸ Onwubiko E, ‘Nigeria broken judicial system’ *The Nigerian Voice*, 10 January, 2017 —<<https://www.thenigerianvoice.com/news/242266/nigerias-broken-judicial-system.html>> accessed on 9 August, 2023.

on the evidence tendered before the court. Whereas the evidence tendered before the court in grounding conviction does not comply with the adjectival laws which are established to preserve the integrity of the criminal justice process, the chances of wrongful conviction occurrence are quite high. This paper therefore identifies the various causes of wrongful conviction in Nigeria. It pays particular attention to those forms of wrongful conviction that are evidence-based. Hence, this study examined how improper handling or wrong application of legal principles on evidence leads to wrongful convictions. When, these lapses are identified, it becomes easy to set measures targeted at addressing the challenges of wrongful conviction.

Wrongful convictions have dire consequences on the innocent victim wrongfully convicted, their family, and the entire society. To the innocent victim, the state has meted out injustice to them; to the innocent victim's family, their breadwinner or kinsman has been denied justice, which has consequential economic and psychological repercussions on dependents; and, to the society, confidence is lost in the entire criminal adjudicatory system. A phenomenon that has far-reaching consequences like this requires concerted measures to stem its tide.

This study notes that wrongful conviction emerges from errors by police or prosecutors during criminal investigation and trial which have resulted in an innocent person becoming a defendant in a criminal trial and finally convicted of such an offence. Gross⁸⁹ referred to wrongful conviction as an accident or unintended error in the criminal justice system. The accidental or unintentional error would become a regular occurrence when the court, where the bulk stops, fails to uncover defects in the criminal justice process. The court falls into the same error when it fails to correct prior errors in a faulty criminal investigation process but relies on evidence arising therefrom to enter a guilty verdict against a defendant. This may call for the need to designate certain courts and judges as 'criminal courts and judges' respectively, where judges who are especially knowledgeable in criminal law and procedure will dispense justice.

One way of dealing with this issue, especially regarding confessional statements, is for the courts to insist that the statements of suspects be video recorded in line with provisions of ACJA, which has been replicated in most states of the federation in Nigeria. This is to stress that one of the key ways to avoid wrongful convictions of innocent persons is to comply strictly with the

⁸⁹ Gross SR and O'Brien B, 'Frequency and predictors of false conviction: Why we know so little, and new data on capital cases' 4(4) *Journal of Empirical Legal Studies*, 2008, 927.

adjectival law applicable in the state.⁹⁰ This position is in sync with the Police Act which provides that a suspect must at all times be humanely treated.⁹¹

The State of Illinois in the USA recently enacted a law requiring that custodial interrogations of murder suspects in murder cases be electronically recorded. Recording statements of defendants ultimately serves the benefit of the police, the defendant, the justice system and the truth-seeking function of the judiciary. Despite the requirement of the law on confessional statements, the courts have been reluctant to give it mandatory interpretation. It is about time the Nigerian court started enforcing this law by rejecting the admissibility of any confessional statement that falls short of this condition. This will compel the police and other law enforcement agents to focus on intelligence gathering, rather than its current practice of placing heavy reliance on forcefully obtained confessional statements in the pretext of criminal investigation.

Mechanisms should be put in place to monitor the use of informants in criminal trials. It is clear that the use of informants in criminal trials raises particular and additional trustworthy concerns. Law enforcement officers should be more circumspect in using informants. Prosecutors should demand further investigation of informants' reports. Defence counsel should diligently investigate informants. The courts, through discovery, motions, expert testimony, etc. should ensure that all issues relating to the trustworthiness of informants are properly presented before the courts.

The legal profession must lift the professional standards of lawyers, including legal officers by applying meaningful sanctions for violation of legal requirements, standards and ethical expectations. The Bar Associations, both at Federal and State levels, must take stronger action to restore confidence in the integrity of all qualified lawyers particularly those who represent the state in Nigeria. The highest level of professionalism and ethical standards of seeking the truth must be constantly reinforced in the culture of every prosecutor's office. The laws relating to the rules of professional conduct must be strictly implemented and regularly reviewed by relevant disciplinary bodies. Under Nigeria's rules of professional ethics, both the defence and the prosecution have vital roles to play to ensure that wrongful convictions are obviated.⁹² Perverting the course of justice or lack of diligent prosecution or defence, resulting in a wrongful conviction, should attract disciplinary action and criminal liability accordingly.

⁹⁰ Section 18 (1) and (6), *Administration of Criminal Justice Law of Oyo State*, 2016; see also Section 60, *Police Act* (No. 2, 2020).

⁹¹ Section 37, *Police Act* (No. 2, 2020).

⁹² Rule 37, Rules of Professional Conduct for lawyers in Nigeria, 2023.

Emergency Procurement in Nigeria: Mitigating the Corruption Risks

Dare Joseph Ayinde*

Abstract

This article unpacks the concept of emergency procurement and why it is highly susceptible to corruption. It examines the grounds upon which procuring entities may carry out emergency procurement as stipulated in the Public Procurement Act of 2007 (the PPA), which is the primary legal framework governing public procurement at the federal level of government in Nigeria. The author suggests that the provisions of the PPA should be amended to allow procuring entities to apply competitive negotiation and framework agreements in the award of emergency procurement where appropriate, in addition to the direct procurement method. Furthermore, the author recommends that in line with the provisions of the PPA, all procuring entities that carry out emergency procurement should be mandated to submit comprehensive reports of their procurements to the Bureau of Public Procurement (the Bureau). Similarly, the Bureau should carry out post-emergency audits on such procurement to ascertain the justification for emergency procurement, and whether due process was followed. The Bureau should also take appropriate punitive action against those culpable, where it finds any evidence of corruption.

Keywords: Emergency Procurement, Public Procurement, Corruption Risks, Procurement Oversight, Nigeria Public Procurement Act, Accountability and Transparency, Procurement Reform

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I. Introduction

The COVID-19 pandemic (the pandemic) brought to the fore the risks associated with emergency procurement,¹ especially in Nigeria.² Allegations arose that some public officials colluded with contractors to facilitate corruption in awarding contracts for the purchase of medical supplies.³ For example, one Federal Medical Centre purportedly inflated the price of face masks by six hundred and eighty per cent, and that of medical gloves by twelve per cent.⁴ Before the outbreak of the pandemic in Nigeria, emergency procurement was one of the main channels through which public officials committed corruption in the award of contracts.⁵ Unscrupulous public officials exploited these so-called ‘emergency contracts’ to bypass due process that such contracts should have been subjected to if they had used the open competitive bidding method—which is the preferred procurement method in Nigeria.⁶ Corruption in emergency contracts undermines the efforts of the government to tackle emergencies,⁷ leads to wastage of public funds,⁸ and undermines public confidence in government interventions during emergencies.⁹

This article examines how to mitigate the risk of corruption in emergency contracts in Nigeria. The article is divided into five parts. The first part is this introduction. The second part examines the nature of emergency procurement

¹ Rossi V, *Mitigating Corruption Risks in Emergency Spending: Lessons Learned from the IMF’s Experience during the COVID-19 Pandemic* International Monetary Fund, 2023, 14.

² See “ICPC to probe MDAs over Covid-19 Intervention Funds”, available at <https://punchng.com/icpc-to-probe-mdas-over-covid-19-intervention-funds/> (accessed on 2 November 2022).

³ See “ICPC to probe MDAs over Covid-19 Intervention Funds”, available at <https://punchng.com/icpc-to-probe-mdas-over-covid-19-intervention-funds/> (accessed on 2 November 2022).

⁴ See “Covid-19 Investigation: How MDAs Spent 4.2m on facemasks & 48.5m on laptops”(Dataphyte, 7 November 2020) *COVID-19 investigation: How MDAs spent ₦4.2m on facemasks & ₦48.5m on laptops* | *Dataphyte* accessed on 3 September 2021.

⁵ The Inter-Governmental Action Group against Money Laundering in West Africa (GIABA), *Money Laundering Related to Fraud in Public Procurement in West Africa: A Case Study of Nigeria*, 2014, 24.

⁶ GIABA ‘*Money Laundering Related to Fraud in Public Procurement in West Africa*’, 24.

⁷ Ezeibe C *et al*, ‘Political distrust and the Spread of Covid-19 in Nigeria’ *Global Public Health*, 2020, 1754; Saharan V, ‘Disaster Management and Corruption: Issues, Interventions and Strategies’ in Huang H *et al* (eds) *Strategic Disaster Risk Management in Asia*, 2015, 194.

⁸ Duri J, *Corruption in times of crisis*, 2021, 3; Mathiba G, ‘Corruption, Public Sector Procurement and Covid-19 in South Africa: Negotiating the New Normal’ *Journal of Public Administration*, 2020, 648.

⁹ Ezeibe *et al*, ‘Political distrust and the Spread of Covid-19 in Nigeria’ *Global Public Health*, 1755. Because of the lack of trust in government, a number of Nigerians believed the confirmed cases of Covid-19 were being exaggerated by government officials as justification for outrageous contracts. See also Dupuy K and Divjak B *Ebola and Corruption: Overcoming critical governance challenges in a crisis situation*, 2015, 2.

and the different schemes through which corruption is perpetrated in this type of procurement. The third part explores the procurement methods that are used in the award of emergency contracts and why they are susceptible to corruption. The fourth part analyses the grounds upon which procuring entities may make use of emergency procurement in the award of contracts. It also examines the anti-corruption measures that the PPA provides in relation to emergency procurement. Furthermore, it identifies the factors responsible for the prevalence of corruption in emergency procurement in Nigeria. The last part concludes the paper and recommends measures that could be taken to mitigate corruption in emergency procurement in Nigeria.

II. Emergency Procurement in Context

Although the PPA, being the main legal framework for procurement at the federal level in Nigeria,¹⁰ contains the phrase ‘emergency procurement’,¹¹ it does not define it.¹² However, the PPA does state the grounds upon which procuring entities may carry out emergency procurement.¹³ Interestingly, the 2011 United Nations Commission on International Trade Law Model Law on Public Procurement (the UNCITRAL Model Law), which is a global standard on public procurement,¹⁴ does not contain the phrase ‘emergency procurement’, unlike the PPA.¹⁵

¹⁰ Nigeria operates a federal system of government, and legislative powers are shared between the federal and the thirty-six state governments. Each level of government (federal and state) has the power to make law on its expenditure, and since procurement is an integral public expenditure, both federal and state governments have exclusive powers to enact their respective procurement laws. The federal government through the National Assembly enacted the Public Procurement Act of 2007 (the PPA), which was amended by the Finance Act of 2020. The PPA is the main legal framework that regulates the procurement of goods at the federal level in Nigeria. See section 15 of the PPA.

¹¹ Section 43 (1), *Public Procurement Act* (2007).

¹² Unlike the PPA, the Tanzanian Public Procurement Act of 2011 defines emergency procurement, and it defines it as “procurement of goods, works or services essentially to meet an emergency situation which cannot be done through normal process”. See section 3 of the Tanzanian Public Procurement Act of 2011.

¹³ Section 43 (1), *Public Procurement Act* (2007).

¹⁴ Arrowsmith S ‘Public Procurement: An Appraisal of the UNCITRAL Model Law as a Global Standard’ *International Comparative Law Quarterly*, 2004, 18.

¹⁵ The PPA is an adaptation of the 1994 UNCITRAL Model Law on Public Procurement Law. See Quinot G *et al* “Emergency Procurement and Responses to Covid-19 in Africa: The Contrasting Cases of South Africa and Nigeria” in Arrowsmith S *et al* (eds) *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, 2021, 703.

Generally, emergency procurement refers to procurement that is made in a time of urgency, that is not a result of the negligence of procuring entities, and procurement that is made during catastrophes.¹⁶ Examples of what could be regarded as an emergency include natural and man-made disasters, disease outbreaks, international and internal armed conflicts, or humanitarian crises.¹⁷ Natural disasters include floods, earthquakes, hurricanes, tsunamis, and volcanic eruptions, amongst others; man-made disasters include incidents such as fire accidents. In recent times, some of the health emergencies that Nigeria has witnessed include the outbreak of the Ebola virus, Lassa fever, Cholera, and the COVID-19 pandemic. Similarly, armed conflicts, such as a civil war or any other form of internal armed conflict between the government and non-state actors, or between non-state actors, or international armed conflict can also be described as an emergency. It is important to note that emergency procurement in relation to internal or international armed conflict is not limited to the procurement of military hardware. It also includes the procurement of goods, works, and services that are not related to combat. For example, contracts for the procurement of goods, works, and services that are needed to meet the needs of persons who are displaced by an armed conflict could also fall under emergency procurement.

A. *Corruption and Emergency Procurement*

Although corruption is generally defined as ‘abuse of entrusted power for private gain’,¹⁸ in the context of procurement, corruption can be defined as the manipulation or circumvention of procurement rules and procedures by public officials and contractors with a view to obtaining illicit gains.¹⁹ Certain rules and guidelines regulate the award of emergency contracts.²⁰ For example, the PPA stipulates the grounds upon which procuring entities can carry out emergency procurement.²¹ The Bureau of Public Procurement (the Bureau), the main regulatory body for public procurement at the federal level, also issued guidelines on the award of emergency contracts in relation to the COVID-19 Pandemic.

¹⁶ Drabkin D & Thai K ‘Emergency Contracting in the US Federal Government’ *Journal of Public Procurement*, 2007, 84 & 99; GIABA ‘*Money Laundering Related to Fraud in Public Procurement in West Africa: A Case Study of Nigeria*’, 23.

¹⁷ Soreide T & Schultz J *Corruption in Emergency Procurement*, 2006, 3.

¹⁸ See <https://www.transparency.org/en/what-is-corruption> (visited on 4 September 2022).

¹⁹ Soreide T & Schultz J *Corruption in Emergency Procurement*, 9.

²⁰ See Bureau of Public Procurement *Guidelines on the conduct of public procurement activities by ministries, departments and Agencies as a result of the COVID-19 pandemic/lockdown* available at BPP-Guideline-on-COVID-19-Procurements-1.pdf accessed on 17 September 2021).

²¹ Section 43, *Public Procurement Act* (2007).

However, to perpetrate corruption, unscrupulous public officials often disregard or manipulate these rules.

The risks of corruption in emergency procurement can be divided into three. First, procuring entities may falsely label contracts as emergency procurements to evade the anti-corruption measures in the open competitive bidding method, which is the default procurement method.²² For example, almost all COVID-19-related emergency contracts awarded by the Federal Ministry of Women Affairs were, in the author's view, not related to COVID-19 or any emergency.²³ Some of the contracts include the construction of a women and youth sports centre in Esa-Oke, Ijebu-Jesa, the purchase installation and maintenance of office equipment, and an adult literacy and girl child education project.²⁴

The case of the *Federal Republic of Nigeria v. Gekpe & 5ors*²⁵ illustrates how public officials abused emergency procurement in Nigeria. In this case, the defendants, who were members of the Tenders Board of the Rural Electricity Agency (the REA), awarded contracts for the procurement of grid extension and solar systems as emergency contracts because of the delay in the approval of the amended national budget by the National Assembly. The budget was approved on 16 November 2008, six weeks to the end of the financial year. By law, all government agencies must return unspent funds to the Treasury at the end of the year. Presumably, because six weeks was not sufficient to conduct open-competitive bidding and because the defendants did not want to return the funds to the Treasury, the defendants inappropriately labelled the contracts as emergency procurement. The Federal High Court overruled the defendants and held, *inter alia*, that the 'REA's justification for adopting this Emergency Procedure was alien to the law'.²⁶ Furthermore, the court noted that the reason the REA awarded the contracts was not because of any imminent catastrophe but because of the 'imminent end of the year'.²⁷

Secondly, a procuring entity may create an 'artificial' emergency through dereliction of duty.²⁸ This may occur when a procuring entity fails to make a

²² See "Transmission Company of Nigeria CEO, Abdulaziz, Enmeshed in Corruption Scandal over Alleged award of Multi-Billion-Naira Contracts to Cronies". Available at <<https://saharareporters.com/2023/11/14/transmission-company-nigeria-ceo-abdulaziz-enmeshed-corruption-scandal-over-alleged>> accessed on 10 December 2023.

²³ See <<http://nocopa.bpp.gov.ng/ContractReportCovid19.aspx>> accessed on 1 November 2022.

²⁴ See <<http://nocopa.bpp.gov.ng/ContractReportCovid19.aspx>> accessed on 1 November 2022.

²⁵ FCT/HC/CR/39/2009.

²⁶ *Federal Republic of Nigeria v. Gekpe & 5ors*, 209.

²⁷ *Federal Republic of Nigeria v. Gekpe & 5ors*, 209.

²⁸ Dorn *et al* (2008) 251; Williams-Elegbe (2018) 137.

proper plan for projects that it wants to execute.²⁹ The essence of contract planning is for a procuring entity to assess its needs and incorporate them into its procurement plan.³⁰ However, ineffective needs assessment may lead to unnecessary emergency procurement.³¹

Finally, in cases of a real emergency, different types of corruption schemes may be perpetrated in the award and execution of such contracts.³² For example, contracts may be awarded to unqualified and incompetent firms,³³ contracts may be overpriced,³⁴ or may poorly be executed.³⁵

One factor that makes emergency procurement highly vulnerable to corruption is the methods through which they are awarded. These methods are often less competitive and less transparent. The next part of this article examines the procurement method that the PPA prescribes for emergency contracts and why it is susceptible to corruption.

III. Special Procurement Methods for Emergency Contracts

The methods through which contracts for the procurement of goods, works, and services are awarded are strategic to preventing corruption in the procurement process. This is because the level of transparency and competition in all procurement methods are not the same.³⁶ In the Nigerian procurement system, the default procurement method is open competitive bidding.³⁷ The PPA defines open competitive bidding as the process by which a procuring entity based on previously defined criteria, effects public procurement by offering to every interested bidder, equal simultaneous information and opportunity to offer

²⁹ De Mariz C *et al* *Public Procurement Reforms in Africa: Challenges in Institutions and Governance*, 2014, 34; GIABA 'Money Laundering Related to Fraud in Public Procurement in West Africa: A Case Study of Nigeria', 24.

³⁰ Section 18, *Public Procurement Act* (2007).

³¹ De Mariz C *et al* *Public Procurement Reforms in Africa: Challenges in Institutions and Governance*, 34.

³² Duri J *Corruption in Times of Crisis*, 5, 6.

³³ See "Rep UnCOVERS 1.6 billion contract fraud at NEMA" available at <https://www.premiumtimesng.com/news/headlines/264743-reps-uncover-n1-6-billion-contracts-fraud-at-nema.html?tc=1> (accessed on 20 October 2023).

³⁴ GIABA 'Money Laundering Related to Fraud in Public Procurement in West Africa: A Case Study of Nigeria' 24.

³⁵ Dorn *et al* (2008) 251; Colesanti (2014) 577.

³⁶ Martini M *Public Procurement law and Corruption*, 2015, 3.

³⁷ Section 16(1)(c) & 24(1), *Public Procurement Act* (2007).

the goods and works needed'.³⁸ The key components of the open competitive bidding method, which makes it less vulnerable to corruption, are transparency and competition. These two concepts are parts of the pillars of a sound procurement system.³⁹ Procuring entities are required to advertise invitations to bid on platforms with national or international coverage,⁴⁰ to bring contract opportunities to every eligible bidder. Furthermore, the participation of many bidders promotes transparency and competition and reduces collusion. Apart from this, the bid opening exercise is held in public,⁴¹ and at least two civil society organisations are usually present to observe the exercise.⁴²

However, procuring entities are allowed to deviate from using the opening competitive bidding method and may use other procurement methods, such as direct procurement, in the limited instances that are outlined in the PPA.⁴³ One such instance is during an emergency.

A. Direct Procurement

Direct procurement, also called single-source procurement or direct contracting,⁴⁴ is a method of procurement in which procuring entities unilaterally select a firm from which they want to procure their needs without any prior competition.⁴⁵ Of all the methods of procurement, this is the least transparent.⁴⁶ Unlike open competitive bidding, in which procuring entities are obligated to advertise invitations to bid for contracts in newspapers and other platforms, such public solicitation is waived in the award of contracts through direct procurement.⁴⁷ Similarly, there is virtually no competition because procuring entities procure the goods, works, or services they need from a particular entity

³⁸ Section 24(2), *Public Procurement Act* (2007).

³⁹ Section 16(1)(d) & (f), *Public Procurement Act* (2007).

⁴⁰ Section 25(2) *Public Procurement Act* (2007); See also Section 68, *Finance Act* (2020).

⁴¹ Section 30 (b), *Public Procurement Act* (2007).

⁴² Section 19(b), *Public Procurement Act* (2007).

⁴³ Section 24(1)(a), *Public Procurement Act* (2007).

⁴⁴ Arrowsmith *et al* *Public procurement regulation: An introduction* Asia Link, 2011, 44; De Mariz (2014) 31.

⁴⁵ Carborn E & Arrowsmith S "Procurement methods in the public procurement systems of Africa" in Quinot G & Arrowsmith S (Eds) *Public Procurement Regulation in Africa*, 2013, 284; Soreide T & Schultz J *Corruption in Emergency Procurement*, 17.

⁴⁶ Colesanti (2014) 578.

⁴⁷ Section 25(2), *Public Procurement Act* (2007); See also Section 68, *Finance Act* (2020); see also Butler L. 'Regulating Single-Source Procurement in Emergency Situations in Light of the COVID-19 Pandemic: Issues in Policy and Practice' in Arrowsmith S *et al* (eds) *Public Procurement Regulation in (a) Crisis? Global Lessons from the Covid-19 Pandemic*, 2021, 164.

without seeking alternatives in terms of price and quality from others.⁴⁸ Hence, this method of procurement is highly susceptible to corruption,⁴⁹ especially inflation of contract prices. Nonetheless, in the selection of the firm from whom it would procure its needs, a procuring entity must ensure such a firm meets the minimum eligibility requirements stipulated in the PPA.⁵⁰ For example, the firm must have the requisite professional and technical qualifications to execute the contract and must have the legal capacity to enter into the procurement agreement.⁵¹

One of the grounds upon which procuring entities can use direct procurement, and which is related to an emergency, is where:

‘there is an urgent need for the goods, works or services and engaging in tender proceedings or any other method of procurement is impractical due to the unforeseeable circumstances giving rise to the urgency which is not the result of dilatory conduct on the part of the procuring entity’.⁵²

Before a procuring entity can use the direct procurement method on this ground, three conditions must be satisfied. First, there must be an urgent need for the goods, works, or services. Second, the procuring entity must establish that it is not feasible for it to use the open-competitive bidding method or any other procurement method, mainly by demonstrating that the circumstances that gave rise to the urgency could not have been anticipated. In furtherance of this, the procuring authority may need to establish that the time it would take to conduct another procurement method, particularly the open competitive bidding method, would undermine its effort to meet its urgent demands.⁵³ Third, such circumstances must not have been caused by the dilatory conduct or negligence of the procuring entity. One fact that can be deduced from this provision is that the use of a direct procurement method on this ground need not be connected to a catastrophe.

⁴⁸ Pyman M *et al* ‘The Extent of Single Sourcing in Defence Procurement and its Relevance as a Corruption Risk: A First Look’ *Defence and Peace Economic*, 2009, 215.

⁴⁹ Wilkinson K ‘More Effective Federal Procurement Response to Disasters Maximizing the Extraordinary Flexibilities of IDIQ Contracting’ *Air Force Law Review*, 2007, 59.

⁵⁰ See generally section 16 of the PPA; see also Butler L ‘Regulating Single-Source Procurement in Emergency Situations in Light of the COVID-19 Pandemic: Issues’ in Policy and Practice in Arrowsmith S *et al* (eds), *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19*, 2021, 175.

⁵¹ Section 16(6)(a) & (b), *Public Procurement Act* (2007).

⁵² Section 42(1)(b), *Public Procurement Act* (2007).

⁵³ Arrowsmith S ‘The Approach to Emergency Procurement in the UNCITRAL Model Law: A Critical Appraisal in the Light of the COVID-19 Pandemic’ in Arrowsmith S *et al* (eds) *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, 2021, 70.

Another ground on which a procuring entity may use direct procurement, which is also related to an emergency, is where ‘owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods’.⁵⁴ However, before a procuring entity can make use of the direct procurement method on this ground, it must establish three things. First, there must be a catastrophic event. Second, there must be an urgent need for what it wants to procure. Third, it must be impracticable to make use of other procurement methods because of the time that would be spent as a result of the procedures involved in these other methods. In other words, the fact that there is a catastrophic event does not automatically mean that all procurement must be deemed to be emergency procurement; the other two conditions must also be satisfied.

B. *Alternative Procurement Methods for Emergency Contracts*

Apart from direct procurement, other procurement methods are used for emergency procurement. These procurement methods include competitive negotiation and framework agreements. They are provided for in the UNCITRAL Model Law⁵⁵ and the procurement laws of some countries, such as Kenya⁵⁶ and Ghana.⁵⁷ However, these procurement methods are absent in the PPA. The next sub-section of this article examines these procurement methods to identify their advantages over direct procurement in the award of emergency contracts.

i. *Competitive Negotiation*

Competitive negotiation is a procurement method in which a procuring entity selects bidders or firms that could meet its needs, negotiates with them, and then selects and awards the contract to the firm that makes the best offer.⁵⁸ One of the grounds upon which a procuring entity may use this procurement method is where there is an urgent need for what it wants to procure and using the open-tendering method or any other method is not feasible due to the urgency.⁵⁹ However, the circumstances that give rise to the urgency must neither

⁵⁴ Section 42(1) (c), *Public Procurement Act* (2007).

⁵⁵ Articles 27, 32 & 51 of the UNCITRAL Model Law. However, a framework agreement is not listed as a procurement method in the Model Law. Rather, the Model Law calls it procurement procedure.

⁵⁶ Section 92 (j) & (i), 114 of the Kenyan *Public Procurement and Assets Disposal Act* (Act No. 33 of 2015).

⁵⁷ Section 34A (I) (d) of the Ghanaian *Public Procurement Act*, 2003. However, this Act does not provide for the use of competitive negotiation.

⁵⁸ Arrowsmith *et al* (2010) 41 & 42.

⁵⁹ Article 30(4) (a) of the UNCITRAL Model Law; Arrowsmith *et al* (2021) 69.

have been foreseeable by the procuring entity nor attributable to its negligence.⁶⁰ A procuring entity may also use this procurement method where the urgency is due to a catastrophe that makes it impossible for it to explore the open tendering method or any competitive procurement method because of the exigency of time.⁶¹

Unlike direct procurement, competitive negotiation involves some form of competition, even though in using this procurement method procuring entities are not required to advertise invitations to bid.⁶² However, procuring entities must negotiate with a reasonable number of firms that can supply the items they need. Therefore, this method is more competitive and transparent than direct procurement.⁶³

Apart from competitive negotiation, another procurement method that may reduce the risk of corruption in an emergency contract is a framework agreement.

ii. *Framework Agreement*

According to Elinor Carborn and Sue Arrowsmith:

‘A framework agreement is simply a list of suppliers able to perform specific contracts which also establishes some or all of the terms on which the contracts in question will be made allowing for orders to be placed swiftly and without repeating all the stages of a competition every time the need for a specific item arises’.⁶⁴

A framework agreement is essentially a procedure through which procuring entities procure goods and services from shortlisted or prospective firms on an ongoing basis without a need to start the procurement process from the beginning.⁶⁵ It is often preceded by procedures that are followed in

⁶⁰ Article 30(4) (a) of the UNCITRAL Model Law; Arrowsmith *et al* (2021) 58.

⁶¹ Article 30(4) (b) of the UNCITRAL Model Law.

⁶² Arrowsmith S ‘The Approach to Emergency Procurement in the UNCITRAL Model Law: A Critical Appraisal in the Light of the Covid-19 Pandemic’ in Arrowsmith S *et al* (eds) *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic*, 2021, 67. However, the UNCITRAL Model states that it involves “a public advance notice of procurement”. See Glossary of Procurement-related terms used in the 2011 UNCITRAL Model Law on Procurement at 4.

⁶³ Arrowsmith S ‘The Approach to Emergency Procurement in the UNCITRAL Model Law: A Critical Appraisal in the Light of the Covid-19 Pandemic’, 78.

⁶⁴ Carborn E & Arrowsmith S ‘Procurement methods in the public procurement systems of Africa’ in Quinot G & Arrowsmith S (Eds) *Public Procurement Regulation in Africa*, 2013, 297.

⁶⁵ Yukins & Nicholas, 2022, 6.

open competitive bidding.⁶⁶ Accordingly, the method promotes competition and transparency and reduces the incidence of price inflation of contracts.⁶⁷ Unlike direct contracting, procuring entities invite interested bidders through the advertisement of framework agreements and select bidders that would be part of the framework agreement based on competition. Thus, some of the risks of corruption that are associated with direct contracting can be mitigated.⁶⁸ One main advantage of framework agreement over other procurement methods which makes it suitable for emergency procurement is that it allows procuring entities to procure items that they need continuously or repeatedly at an agreed price over a period of time.⁶⁹ Whenever a procuring entity needs goods or services that are the objects of the agreement, it just invites any of the bidders on the list to supply the goods or service or may conduct a mini-competition among such prequalified bidders.⁷⁰

A number of goods that are procured during medical or humanitarian emergencies can be anticipated and can be provided for in framework agreements.⁷¹ Medical items such as gloves, personal protective equipment, and in case of a humanitarian crisis, items such as blankets, clothing, and food are often needed.⁷²

Having considered the different procurement methods through which emergency contracts are awarded, the next part of the article examines the grounds upon which a procuring entity may carry out emergency procurement in Nigeria.

IV. Grounds for Emergency Procurement in Nigeria

Sec 43(1) of the PPA provides that:

⁶⁶ World Bank, 2018, 7.

⁶⁷ See Arrowsmith (2021) 59; World Bank *Guidebook for Setting-up and Operating Framework Agreements*, 2021, 2.

⁶⁸ World Bank, 2021, 2.

⁶⁹ Arrowsmith S 'The Approach to Emergency Procurement in the UNCITRAL Model Law: A Critical Appraisal in the Light of the Covid-19 Pandemic' 61; World Bank (2021) 2.

⁷⁰ Eyo A "Framework agreements in public procurement in Africa: Progress and limitation" in Quinot G & Williams-Elegbe (eds) (2015) *Public Procurement in Africa: Development in Uncertain Times*, 2015, 319; Andrecka M "Framework Agreements: Transparency in the Call-off Award Process" *European Procurement & Public Private Partnership Law Review*, 2015, 231.

⁷¹ World Bank *Framework Agreements: An overview of how to design, establish and operate a Framework Agreement in Investment Project Financing*, 2018, 5.

⁷² World Bank *Framework Agreements: An overview of how to design, establish and operate a Framework Agreement in Investment Project Financing*, 6.

‘A procuring entity may for the purpose of this Act, carry out an emergency procurement where:

- (a) the country is either seriously threatened by or actually confronted with a disaster, catastrophe, war, insurrection or Act of God;
- (b) the condition or quality of goods, equipment, building or publicly owned capital goods may seriously deteriorate unless action is urgently and necessarily taken to maintain them in their actual value or usefulness; or
- (c) a public project may be seriously delayed for want of an item of a minor value.⁷³

From the above provision, there are only three grounds under which procuring entities can carry out emergency procurements. The first is where Nigeria is facing a serious risk of or is confronted with a real disaster, catastrophe, war, an insurrection, or Act of God, which could be classified under the phrase ‘disaster and other humanitarian crisis’.⁷⁴ The second is where a public good or infrastructure would be seriously damaged if urgent steps are not taken. The third is where items of minor value may delay the completion of projects. The use of the direct procurement method on the first ground is to prevent or mitigate a catastrophic event,⁷⁵ while the use of the direct procurement method on the second ground could be either based on urgency or prevention of a catastrophe,⁷⁶ and, the use of direct procurement on the third ground is based on urgency.⁷⁷

The next part of this article examines these grounds in more detail.

i. Procurement During Disaster or other Humanitarian Crisis

As stated above, the first ground on which procuring entities can carry out emergency procurement is where Nigeria is seriously threatened with or actually confronted with a disaster, catastrophe, war, insurrection, or Act of God.

⁷³ This is similar to the grounds on which procuring entities can award emergency contract in Uganda. However, it is stated as “emergency situations” in the Ugandan Procurement law. See Section 3, *Public Procurement and Disposal of Public Assets* (Act 1 of 2003) as amended; The Nigeria constitution empowers the President, with the approval of the National Assembly, to issue a Proclamation of a state of emergency following the occurrence or likely occurrence of conflict and health emergencies, such proclamation is not a condition precedent to the award of emergency contract. However, if such a proclamation is issued, any procurement that is to be made in area covered by the proclamation could be deemed to be emergency procurement. See generally Section 305 of the Nigerian Constitution, as amended.

⁷⁴ Section 43(1)(a), *Public Procurement Act* (2007).

⁷⁵ Section 42(1)(c), *Public Procurement Act* (2007).

⁷⁶ Section 42(1)(b) & (c), *Public Procurement Act* (2007).

⁷⁷ Section 42(1)(b), *Public Procurement Act* (2007).

Emergency procurement on this ground can be classified into two. The first is where Nigeria is seriously threatened by a disaster, catastrophe, war, insurrection, or Act of God.⁷⁸ It is important to highlight that the law contemplates not just an ‘ordinary threat’ but rather a serious threat of a disaster—natural or man-made—or an armed conflict, as grounds for emergency procurement. The second is where Nigeria is actually confronted with a disaster or an armed conflict.⁷⁹ This article argues that while procuring entities may not have any difficulty in establishing when Nigeria is confronted with any actual disaster or other similar humanitarian crisis, a determination of whether Nigeria is confronted with a threat of a disaster and other similar humanitarian crises is to a large extent, subjective. To make a determination on this, a procuring entity must assess any seeming threat of disaster or conflict to ascertain that it is both real and serious.

This paper argues that the reason the PPA allows procuring entities to carry out emergency procurements in relation to the threat of disasters or other similar humanitarian crises is to allow them to take proactive steps to mitigate such disasters or crises. Besides, it might be more difficult and more expensive if procuring entities were to wait until a threat of a disaster materialise before they procure goods, works, and services that they might need to remedy such a disaster. For example, while the outbreak of a highly infectious disease in a small village and the infection of a few persons may not qualify as a real disaster, it would no doubt qualify as a threat of disaster. To prevent such a disease from spreading, health authorities such as the Nigeria Centre for Disease Control may have to urgently procure certain medical items. The pandemic is an example of a health disaster, and most of the emergency contracts that were awarded to curtail the spread of the disease in Nigeria were executed on this ground.⁸⁰

ii. Procurement for Maintenance of Public Goods and Facilities that may be Seriously Damaged if Urgent Steps are not Taken

The second ground upon which procuring entities can carry out emergency procurements is where the condition or state of goods, equipment, buildings, or any capital goods owned by the government could be seriously damaged if urgent

⁷⁸ Section 43(1)(a), *Public Procurement Act* (2007).

⁷⁹ Section 43(1)(a), *Public Procurement Act* (2007).

⁸⁰ See ‘Nigeria confirms first case of coronavirus’ (The Guardian Newspaper, 28 February 2020) available at *Nigeria confirms first case of coronavirus — Nigeria — The Guardian Nigeria News – Nigeria and World News* (visited on 15 September 2021). See also <<http://nocopa.bpp.gov.ng/ContractReportCovid19.aspx>> accessed on 10 October 2023.

and necessary steps are not taken to maintain these goods in their current state.⁸¹ Emergency contracts on this basis are meant to salvage public infrastructure from total collapse. Such contracts are timely and strategic interventions meant to save costs that could have been incurred in reconstructing an infrastructure from scratch or re-purchasing goods if they were allowed to completely deteriorate. Besides, if a procuring entity were to conduct open-competitive bidding in relation to the award of a contract for the repair of an infrastructure that is partly damaged, the infrastructure might be damaged beyond measure before the conclusion of the contracting process. As such, procuring entities are allowed to carry out emergency procurement in such instances.

However, before a procuring entity can award an emergency contract on this ground, two conditions must be met. First, there must be evidence that public facilities or goods could be seriously damaged if urgent steps are not taken. Although the PPA does not state the meaning of serious damage, it is argued that ‘serious damage’ means substantial damage. Minor damage to a public facility would not suffice. The second condition is that the purpose of the emergency contract must be to maintain such goods or facilities in their present state so that they are not damaged. A procuring entity cannot carry out an emergency procurement on this ground where the goods or public infrastructure is damaged already. In light of this, a procuring entity cannot award contracts for the ‘repair’ or ‘rehabilitation’ of a road that has already deteriorated to the extent that it has to be reconstructed all over again, as an emergency contract on this ground. Rather, the procuring entity should use the open competitive bidding method.

This is the main ground upon which emergency procurement is abused in Nigeria, especially in relation to procurement not related to catastrophes. The Niger Delta Development Commission (NDDC), a government agency that is notorious for the abuse of emergency procurement, purportedly awarded different contracts at different times, namely: two hundred and one; one thousand fifty-seven; and, one thousand nine hundred and twenty-one emergency contracts in 2017, 2018, and 2019 respectively.⁸² The total value of the so-called emergency contracts is over one-point-two trillion Naira. To circumvent the open competitive bidding method, the NDDC falsely tagged contracts for the construction of new roads or reconstruction of existing ones as emergency road

⁸¹ Section 42(1)(b), *Public Procurement Act* (2007).

⁸² Report on special periodic checks on the activities and programmes of Niger Delta Development Commission (NDDC) for the period of 2008 to 2012 (2015) 24.

rehabilitation project contracts.⁸³ However, in reality, most of these contracts were for the reconstruction of existing roads that were badly damaged.

iii. Procurement of Items of Minor Value that May Delay Completion of Projects

The third ground upon which procuring entities may carry out emergency procurement is where the construction or completion of a government project would be seriously delayed because of an item that is of minor value.⁸⁴ For a procuring entity to carry out an emergency procurement on this ground, three conditions must be met. First, there must be an ongoing construction. Second, the completion of the construction must be at the threat of serious delay. In other words, the procuring entity need not be certain that there would be a delay; a reasonable suspicion that there could be a delay would suffice. However, it is not all types of delay that could be a ground for a procuring entity to rely on an emergency procurement method; only a delay that is deemed serious can lead to emergency procurement. Unfortunately, the PPA does not define a ‘serious delay’. In the author’s view, a ‘serious delay’ is a delay that may affect the completion of a project within the agreed timeframe, specifically in contracts where time is of the essence. In a contract where timelines are not strict, the issue of a ‘serious delay’ may not arise.

Third, the delay must be caused by an item of minor value. In other words, where the delay is caused by items of major value, a procuring entity cannot award an emergency contract on this ground. The PPA defines a ‘minor value’ as a monetary value that is not over monetary thresholds set for any approving authority.⁸⁵ The monetary threshold for each agency refers to ‘means the value limit in Naira set by the Bureau outside of which an approving authority may not award a procurement contract’.⁸⁶ This means that ‘items of minor value’ are items whose monetary values are within the monetary and approval threshold of procuring entities as set by the Secretary to the Government of the Federation.⁸⁷

⁸³ Report on special periodic checks on the activities and programmes of Niger Delta Development Commission (NDDC) for the period of 2008 to 2012 (2015) 24.

⁸⁴ Section 42(1)(b), *Public Procurement Act* (2007).

⁸⁵ Section 60, *Public Procurement Act* (2007).

⁸⁶ Section 60, *Public Procurement Act* (2007); The Bureau of Public Procurement, which is the main regulatory body for public procurement at the federal level in Nigeria. See Section 3, *Public Procurement Act* (2007); This is the “person charged with the overall responsibility for the functioning of a ministry, extra-ministerial department or corporation”. See Section 60, *Public Procurement Act* (2007).

⁸⁷ It is the duty of the National Council on Public Procurement to be approving the monetary threshold for each of the approving authorities. See Section 2(a), *Public Procurement Act* (2007). However, since 2007 that the PPA has come into force, successive government has failed to inaugurate this

In a circular released by the Secretary to the Government of the Federation on 19 January 2022,⁸⁸ the monetary threshold for each approving authority was stated as follows:

Approving Authority	Goods	Works	Non-Consultant/ Consultant Service
Bureau of Public Procurement's Certificate of No objection to contract award	Three hundred million Naira and above	One-point-five billion Naira and above	Three hundred Naira and above
Ministerial Tenders Board	twenty million and above but less than Three hundred million Naira	thirty million and above but less than One-point-five billion Naira	twenty million Naira and above but less than three hundred million Naira
Parastatal Tenders Board	ten million Naira and above but less than a hundred million Naira	twenty million Naira and above but less than five hundred million	ten million Naira and above but less than a hundred million Naira
Accounting Officer/ Permanent Secretary	Less than twenty million Naira	Less than thirty million	Less than twenty million Naira
Accounting Officer/ Director General/ CEO	Less than ten million Naira	Less than twenty million Naira	Less than ten million Naira

Table 1: Monetary threshold for approving authorities.

body. In its absence, the Secretary to the Government of the Federation of each successive administration has been usurping it powers.

⁸⁸ See "Approval for the revision of subsisting service-wide prior review threshold and monetary threshold". Available at <<https://www.bpp.gov.ng/wp-content/uploads/2022/01/Approval-Threshold.pdf>>, accessed on 5 August 2022.

From the above table 1, one can observe that, for example, the monetary approval threshold for a Chief Executive Officer (CEO) or director-general of a procuring entity for a contract for the procurement of goods and non-consultancy service is less than ten million Naira. For a contract for procurement of works, the monetary threshold is less than twenty million Naira. The implication of this is that a CEO of a government agency is authorised to approve the award of a contract that is not more than twenty million, without seeking approval from any other entity. In light of this, the definition of ‘minor value’ as items that are within the monetary threshold of an approving authority means that, in relation to a CEO of a procuring entity, for example, an item of minor value could be any item that is not more than twenty million Naira. If the maximum amount in a contract that a CEO can approve is twenty million Naira, it means that in the execution of such a contract, the CEO could still approve up to twenty million Naira for the procurement of an ‘item of minor value’ that could cause a serious delay to the completion of a contract. This inadvertently increases his monetary threshold beyond the limit stipulated by law.

The definition of items of minor value is too broad and makes it prone to abuse. The use of the phrase, ‘item of minor value’, seems to suggest that the monetary value of such an item should be significantly less than the total cost of the contract.⁸⁹ If what constitutes an ‘item of minor value’ could be equivalent to the maximum monetary threshold of a procuring entity, then, arguably, such an item ought not to be deemed as an item of ‘minor value’.

A. *Safeguards against Corruption in Emergency Procurement in Nigeria*

The drafters of the PPA appear to be cognisant of the fact that emergency procurements are vulnerable to corruption. Accordingly, they provided for a few anti-corruption measures to promote probity and accountability in emergency procurements, within the PPA. First, the PPA provides that all emergency procurements must be carried out in accordance with the principle of accountability, considering the nature of the emergency.⁹⁰ In other words, the fact that the purpose of procurement is to address an urgent situation or a catastrophe is not an excuse for procuring entities to disregard the principle of accountability. Hence, the PPA’s requirement that procuring entities must keep records of their

⁸⁹ A similar provision in the Ugandan *Public Procurement and Disposal of Public Assets Act* (Act 1 of 2003) uses the phrase “minor item”. See Section 3 of the Ugandan *Public Procurement and Disposal of Public Assets Act*.

⁹⁰ Section 43(3), *Public Procurement Act* (2007).

procurement activities is also applicable to emergency procurement.⁹¹ The record must include the ground upon which the procuring entity carried out emergency procurement, the quantity of goods procured, or a description of service or works procured, as well as the total cost of such contracts. Furthermore, the PPA mandates procuring entities to make such records available to the Bureau, any investigator appointed by the Bureau, or the Auditor-General upon request.⁹² Similarly, where donors' funds are used in procurement, upon request, procuring entities must also make the record available to officials of the donor agencies for audit and review.⁹³ This is meant to promote transparency.⁹⁴

Another provision in the PPA that is geared towards the promotion of probity and accountability is the prohibition of conflict of interests in the award of contracts.⁹⁵ This provision equally applies to the award of emergency contracts. The fact that a procuring entity is at liberty to select an entity from whom it would procure its needs does not give it the liberty to disregard the prohibition on conflict of interests.⁹⁶ Accordingly, a procuring entity should not award emergency contracts to any firm in which any of its officials has a vested or controlling interest.⁹⁷ Similarly, the Code of Conduct that guides actors in the procurement process, as stipulated by the Bureau, must be complied with by all players involved in the award and execution of emergency contracts.⁹⁸

The PPA also makes provisions for post-award review of emergency contracts. Specifically, it mandates procuring entities that carried emergency procurement to file comprehensive reports on such procurements with the Bureau as soon as circumstances that necessitated the emergency procurement cease.⁹⁹ However, the PPA is silent on what should be contained in such reports. In the author's view, procuring entities would be expected to state why they carried out the emergency procurement. In addition, the reports would contain details about emergency contracts that have been awarded, such as names of the contractors awarded the contract, and its value, among other vital information.

⁹¹ Section 38(1), *Public Procurement Act* (2007).

⁹² Section 38(5), *Public Procurement Act* (2007).

⁹³ Section 38(5), *Public Procurement Act* (2007).

⁹⁴ Arrowsmith S *et al* *Regulating Public Procurement*: The Netherlands: Kluwer, 2000, 74-75.

⁹⁵ Section 57(10), *Public Procurement Act* (2007).

⁹⁶ Butler (2021) at 175; Duri J *Corruption in times of crisis*, 7.

⁹⁷ Section 57(10) & (11), *Public Procurement Act* (2007); Butler (2021) at 175.

⁹⁸ Section 57(1) – (3), *Public Procurement Act* (2007); see also Duri J *Corruption in times of crisis*, 7.

⁹⁹ Section 43(4), *Public Procurement Act* (2007).

After procuring entities have submitted their reports on emergency procurement, the PPA mandates the Bureau to carry out a verification of the report, and if the Bureau is satisfied with the report, it must issue a ‘Certificate of No Objection’¹⁰⁰ to the procuring entity.¹⁰¹ Procuring entities are mandated to apply to the Bureau for this certificate before they award contracts that are above a certain monetary threshold.¹⁰² However, for emergency procurement, the PPA provides an exception; procuring entities are not required to apply for this certificate before they award emergency contracts. Nonetheless, after cessation of the condition that gave rise to the emergency procurement, and the procuring entities submitting their reports, the Bureau may issue a certificate of no-objection to the award of the contracts.¹⁰³ The issuance of such a certificate to a procuring entity means that the Bureau is satisfied that the emergency procurement complies with the provisions of the PPA.

Before issuing the certificate, the Bureau must verify the report of the emergency procurement submitted by procuring entities. Although the PPA does not state what the Bureau must do in verifying such reports, nonetheless, in the course of the verification, the Bureau is expected to confirm whether there was indeed an emergency to warrant the award of an emergency contract. Similarly, the Bureau is expected to investigate whether public funds were judiciously spent in the award and execution of the emergency contract. The verification of such reports by the Bureau is to check against the abuse of emergency procurement and to unearth any corrupt practices, such as over-invoicing, that might be perpetrated both in the award and execution of emergency contracts. If, in the course of the verification of the report, the Bureau discovers that any form of corruption was perpetrated in the award or execution of the contracts, it may refer the matter to any of the two main anti-corruption bodies in Nigeria (the Economic and Financial Crimes Commission (EFCC) and the Independent

¹⁰⁰ This is a ‘document evidencing and authenticating that due process and the letters of this Act have been followed in the conduct of a procurement proceeding and allowing for the procuring entity to enter into contract or effect payments to contractors or suppliers from the Treasury’. See section 60 of the PPA.

¹⁰¹ Section 43(4), *Public Procurement Act* (2007); *Federal Republic of Nigeria v. Gekpe & 5ors*, 170.

¹⁰² Section 16(1)(b), *Public Procurement Act* (2007). According to the circular issued by the Secretary to the Government of the Federation, procuring entities are only mandated to seek and obtain this certificate in respect of contracts for the procurement of goods and service in which the contract sum is or more than 300 million Naira, and contracts for the procurement of works that cost 1.5 billion Naira or more.

¹⁰³ It appears this will only be applicable if the emergency contract is within the monetary threshold in which the issuance of the certificate is obligatory.

Corrupt Practices Commission (ICPC)),¹⁰⁴ for further investigation and prosecution of erring officials and persons.¹⁰⁵

In addition to these measures, the Bureau has also taken certain steps to reduce the risks of corruption in procurement, including emergency procurement. One such step is the mandatory requirement that all procuring entities must publish details of their contracts, including emergency contracts, on the Open Contracting Portal.¹⁰⁶ The publication of COVID-19-related contracts on this portal by procuring entities is to promote transparency in the award and execution of contracts.¹⁰⁷ However, some government agencies did not publish their contracts on the portal as mandated. For example, according to the auditor-general of the federation, the Nigeria Centre for Disease Control (NCDC) awarded COVID-19-related contracts for procurement of goods and services worth over one billion Naira but did not publish the contracts on the Nigeria Open Contracting Portal.¹⁰⁸

B. High Rate of Corruption in Emergency Procurement in Nigeria

The high incidence of corruption in emergency procurement, which has resulted in the loss of public funds, underlines the fact that there are certain weaknesses in the provisions of the PPA on emergency procurement. Hence, this section of the paper examines the factors that have contributed to the high rate of corruption in emergency procurement in Nigeria, one of which is ineffective regulatory oversight. Effective monitoring and supervision of the award and execution of contracts are critical to preventing and combating corruption in procurement.¹⁰⁹ This is even more important in emergency procurement in light of its high vulnerability to corruption.¹¹⁰ The PPA charged the Bureau with the duty of preventing fraudulent and unfair procurement.¹¹¹ Specifically, as discussed above, in order to ensure accountability in emergency procurement,

¹⁰⁴ These are the Economic and Financial Crimes Commission, and the Independent Corrupt Practice and Other Related Offences Commission. See section 60, *Public Procurement Act* (2007).

¹⁰⁵ Section 53(1), *Public Procurement Act* (2007).

¹⁰⁶ See <<http://nocopo.bpp.gov.ng/ContractReportCovid19.aspx>> accessed on 10 October 2023.

¹⁰⁷ See <<http://nocopo.bpp.gov.ng/ContractReportCovid19.aspx>> accessed on 10 October 2023.

¹⁰⁸ See *The Interim Report: Special Audit of the Federal Government's Response to the Covid-19 Pandemic for the Period- 1st March to 30th June, 2020* at 26.

¹⁰⁹ Soreide T & Schultz J *Corruption in Emergency Procurement*, 32.

¹¹⁰ Rose-Ackerman S 'Corruption and COVID-19' 20 *Eunomia Revista en Cultura de la legalidad*, 2021,19; Saharan V 'Disaster Management and Corruption: Issues, Interventions and Strategies' in Huang H *et al* (eds) *Strategic Disaster Risk Management in Asia*, 196.

¹¹¹ Section 5(n), *Public Procurement Act* (2007).

the PPA mandates the Bureau to carry out verification of reports on emergency procurement that are submitted by procuring entities.

Additionally, the PPA empowers the Bureau to review procurement proceedings and execution of contracts awarded by procuring entities, whether or not the contracts are related to an emergency.¹¹² Where there is *prima facie* evidence of corruption, the Bureau is empowered to refer such cases to any of the main anti-corruption agencies in Nigeria, the EFCC or the ICPC, for investigation.¹¹³ Unfortunately, however, the Bureau does not seem to be effective in monitoring and supervising the activities of procuring entities, especially as it relates to emergency procurement.¹¹⁴

Moreover, by recognising direct procurement as the default method through which procuring entities can procure goods, works, and services that they require in relation to emergency procurement, the PPA partly contributes to the high level of corruption in this type of procurement.¹¹⁵ As discussed in the earlier part of this article, direct procurement is highly susceptible to corruption because it is neither transparent nor competitive. Apart from the direct procurement method, other procurement methods that are used in the award of emergency contracts are competitive negotiation and framework agreement.¹¹⁶ Unfortunately, these alternative procurement methods are not provided for in the PPA.

Another weakness in the provisions of the PPA on emergency procurement is that it does not make provision for civil society organisations and members of the public to monitor the award and execution of emergency contracts. Unlike the open competitive bidding method where the PPA stipulates that at least two civil society organisations must be present at the bid opening ceremony,¹¹⁷ the PPA does not give any role to these other stakeholders in emergency procurement. Hence, there is a need to amend the PPA to allow civil society organisations to monitor the execution of emergency contracts. This would promote transparency and accountability in the award and execution of emergency contracts.

¹¹² Section 53(1), *Public Procurement Act* (2007).

¹¹³ Section 53(1), *Public Procurement Act* (2007).

¹¹⁴ Independent Corrupt Practices and Other Related Offence Commission *Guaranteeing Impactful Projects: Report of Constituency and Executive Projects Tracking Exercise-Phase V, 2023*, 25.

¹¹⁵ Section 42(1) (c), *Public Procurement Act* (2007).

¹¹⁶ See Article 30 (4) (a) & (b), & 32(1) of the UNCITRAL Model Law; Carborn & Arrowsmith (2013) 297; Andrecka M 'Framework Agreements: Transparency in the Call-off Award Process' *European Procurement & Public Private Partnership Law Review*, 2015, 231.

¹¹⁷ Section 19(b) (i)(ii), *Public Procurement Act* (2007); Udeh K & Ahmadu M 'The Regulatory framework for public procurement in Nigeria' in Quinot G & Arrowsmith S (Eds) *Public Procurement Regulation in Africa*, 2013, 145.

Another factor that encourages corruption in procurement, including emergency procurement in Nigeria, is impunity. Even though accountability is one of the pillars of Nigeria's public procurement,¹¹⁸ in practice, proactive steps are not taken to hold public officials and contractors who abuse emergency procurement accountable. The annual reports of the auditor-general of the federation contain numerous instances where several public officials and contractors have abused emergency procurement.¹¹⁹ Yet, Nigeria's anti-corruption agencies rarely take active steps to prosecute persons who are indicted in these reports. Similarly, the Bureau has not imposed notable administrative sanctions, such as exclusion or debarment, on such erring contractors.

V. Recommendations and Conclusion

This article unpacks the concept of emergency procurement and why it is highly susceptible to corruption. It identifies the three grounds upon which procuring entities can carry out emergency procurement in Nigeria. It also identifies the factors responsible for the high incidence of corruption in emergency procurement in Nigeria. In order to mitigate the risks of corruption in emergency procurement in Nigeria, this article makes the following suggestions. First, the National Assembly should amend the provisions of the PPA to include competitive negotiation and framework agreement as part of procurement methods that procuring entities may use in the award of emergency procurement. Additionally, the PPA should stipulate that procuring entities should use direct procurement in the award of emergency contracts only if competitive negotiation and a framework agreement are not applicable. Second, the meaning of 'item of minor value' should be limited to an item that is not more than forty per cent of the monetary threshold of an approving authority. Third, to promote transparency and effective monitoring of emergency contracts, the publication of all relevant information on contracts, including emergency procurement awarded by procuring entities on the open contracting portal, as currently applicable, should be mandatory.

Furthermore, the accounting officer of any procuring entity that fails to publicise on the portal the details of the contracts awarded, particularly emergency contracts, without any justifiable reason, should be punished. Civil society organisations should be allowed and encouraged to monitor the execution of

¹¹⁸ Section 16(1)(d), *Public Procurement Act* (2007).

¹¹⁹ See generally Report on special periodic checks on the activities and programmes of Niger Delta Development Commission (NDDC) for the period of 2008 to 2012 (2015).

emergency contracts. In line with provisions of the PPA, procuring entities that carry emergency procurement should be mandated to submit comprehensive reports of emergency contracts that they awarded upon the cessation of the circumstances that gave rise to the emergency. Furthermore, the Bureau should impose appropriate sanctions on accounting officers of any procuring authorities that fail to submit such reports.

In addition, the Bureau should ensure that Codes of Conduct for persons involved in the procurement process and the prohibition on conflicts of interest are enforced in the award and execution of emergency contracts. Similarly, in line with provisions of the PPA, the Bureau should carry out a detailed review and verification of all emergency procurements that are carried out by procuring entities. Where the Bureau establishes that there was indeed no situation to warrant the use of emergency procurement, officials of the procuring entities that approve such contract should be sanctioned in line with the PPA. Furthermore, public officials and every other culpable person should be investigated and prosecuted if it is established that public funds were misused or embezzled. Lastly, the Bureau should debar firms that are indicted for corruption from participating in public procurement proceedings for a specified duration.

